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September 14, 2017

Via ECF and Facsimile*: *(212) 805-7942
Hon. Alvin K. Hellerstein
United States District Courthouse
500 Pearl Street, Room 1050
New York, New York 10007

Re: *Washington, et. al. v. Sessions, et. al., 17-cv-05625 (AKH)*

Dear Judge Hellerstein:

This joint letter is submitted to the Court by counsel for the parties, pursuant to Your Honor's directive issued during the hearing held on Friday, September 8, 2017 ("September 8th Hearing").

I. SUBMISSION ON BEHALF OF PLAINTIFFS' *PRO BONO* COUNSEL

The purpose of plaintiffs' submission is to address two issues: (i) defendants' un-noticed motion for, and letterbrief in support of, their request for "reconsideration" ("Un-Noticed Motion and Letterbrief") and (ii) development of a discovery schedule and outline. As demonstrated below, defendants' Un-Noticed Motion and Letterbrief violate multiple of Your Honor's Individual Rules of Practice ("Individual Rules") and, equally as important, contains a series of serious and material misrepresentations of fact.

Regarding discovery, as discussed below, the proposed schedule and outline referenced herein is consistent with the Court's directives issued during the September 8th Hearing, and, if complied with, would allow for expedited adjudication of the claims raised in the Amended Complaint on a full record within six months. Conversely, defendants have persisted in their assertions that the Court never ordered them to submit to discovery -- an allegation they have made *in writing* (discussed *infra*), and further, that they should not be subject to discovery anyway because, according to opposing counsel, the Amended Complaint principally consists of a rational-review challenge to the Controlled Substances Act ("CSA"). In fact, as discussed briefly below, the Court *did* order defendants to submit to discovery. And, as the Court recognized during the hearing, the rational-review challenge to the CSA comprises only one of plaintiffs' multiple claims, with the others consisting of, *inter alia*, as-applied challenges under the First, Fifth, Ninth and Fourteenth Amendments, all involving the deprivation of fundamental rights, which trigger strict scrutiny analysis.

Defendants' Un-Noticed Motion and Letterbrief, as well as the discovery issues, are

addressed in turn below.

Defendants' Un-Noticed Motion and LetterBrief

As Your Honor will recall, at the September 8th Hearing, the Court directed the parties to submit a "joint letter" addressing discovery in anticipation of the expedited Rule 65 hearing and trial in this matter. After conferring with defendants' counsel in the courtroom hallway, we informed the Court that they informed us that they intended to object to any such discovery schedule and outline. Thereafter, defendants' counsel repeated their statement of position on the record that they believe discovery is inappropriate, and that the Court's time would be better utilized by considering a motion to dismiss. The Court disagreed and directed the parties to submit a joint discovery schedule and outline, at which point, opposing counsel stated that he wanted to proceed with the motion to dismiss anyway. In response, the Court clearly stated, "motion denied." The Court then directed that the parties submit the discovery letter jointly on Monday, September 11th, but that if additional time were required, we should notify the Court, and a reasonable extension would likely be granted.

As reflected in our correspondence to the Court, dated September 11, 2017, my mother underwent surgery on Monday and was hospitalized (until noon Wednesday). In my absence, my office contacted defendants' counsel first thing in the morning on September 11th and requested consent to an extension consistent with the Court's remarks during the September 8th Hearing. In response, defendants' counsel reiterated that he objected to <u>any</u> discovery, and desired to file the above-referenced motion for reconsideration. For the following reasons, defendants' Un-Noticed Motion and Letterbrief violate Your Honor's Individual Rules of Chambers, requiring its rejection without further comment.

First, under Rule 2(E) of Your Honor's Individual Rules, the Court requires submission of <u>*joint*</u> letters rather than "separate and successive letters." Instead of complying with Rule 2(E), defendants' counsel submitted his own letter. Prior to his submission, I spoke with defendants' counsel (from the hospital), and also sent him email correspondence, urging him not to file individually, and instead, requesting that he comply with the Court's directive that the parties submit a joint letter (3:17 pm Email, Exh. 1). Defendants' counsel disregarded our requests and, thereafter, proceeded with his own letter comprising his Un-Noticed Motion and Letterbrief.

Second, opposing counsel's Un-Noticed Motion and Letterbrief violate Rule 2(B), which prohibits "letter motions," and Rule 2(A), which prohibits the parties from "letter briefing" in lieu of formal memoranda of law. Opposing counsel's Un-Noticed Motion and Letterbrief provide a textbook rationale for these rules. The Un-Noticed Motion and Letterbrief include references to more than 30 cases and more than 40 citations to court decisions, statutes and rules. In effect, opposing counsel's argument, which reads as if drawn from a "federal government's greatest hits" CD on motions to dismiss, constitutes a full-blown, un-noticed motion and brief, for which he afforded us just two days within which to respond. Respectfully, Mr. Dolinger's Un-Noticed Motion and Letterbrief plainly violate the Individual Rules, which, by their terms, are not advisory, but mandatory. And consistent therewith, we trust that the Un-Noticed Motion and Letterbrief, as reflected in the Individual Rules, "will be returned, unread" (Individual Rule 2(E)). We intend no

additional response to the request contained in the Un-Noticed Motion and Letterbrief unless directed by the Court.

Separate and apart from the impropriety of filing an Un-Noticed Motion and Letterbrief over our objections and while I was clearly indisposed, opposing counsel made a serious misrepresentation to the Court. Specifically, in footnote 2 of his Un-Noticed Motion and Letterbrief, opposing counsel wrote that, due to my mother's surgery, he was unable to reach me, requiring him to proceed with his unilateral submission of the Un-Noticed Motion and Letterbrief on September 11th. In this regard, defendants' counsel wrote:

> We *attempted* to confer with Plaintiffs' counsel concerning this request. *We understand* that one of Plaintiffs' counsel is unavailable due to a family emergency.

See Dkt. No. 26, n. 2 (emphasis added). The clear implication of the language in opposing counsel's footnote is that he was unable to discuss this matter with me because I was unavailable. In fact, however, by the time opposing counsel filed his letter, he had spoken with Ms. Rudick twice, exchanged multiple emails with her, had spoken with me, and received two emails from me. In each of these exchanges, we repeatedly requested that opposing counsel consent to the two-day extension request and refrain from filing any unilateral letter. That opposing counsel would suggest otherwise – that he was unable to discuss this matter with me, anyone else from my firm or any of plaintiffs' co-counsel – is particularly striking, given that, earlier in the day, opposing counsel sent us draft language for footnote 2 of his letter -- the only portion of his letter that he would share with us -- in which he wrote that the parties "have conferred" and that he had agreed to provide us with additional time within which to submit an opposition to his Un-Noticed Motion and Letterbrief (Exh. 2). Yet, after asking us to review his language acknowledging that the parties had conferred, he changed it to imply that he had had no ability to speak with me or any other members of plaintiffs' counsel and thus was unaware of our desire to defer submission of correspondence to the Court until it could be done jointly, consistent with the Court's rules.

In any event, upon my return to the office yesterday afternoon, I made multiple attempts to obtain consent to our proposed discovery schedule and outline from opposing counsel or at least receive a proposed counter-schedule (Hiller Email, 9/13/2017, 12:41 pm: "please send us your proposed counter-schedule – that way, we can really confer on the schedule," Exh. 3; *see also* Hiller Email, 9/13/2017, 3:28 pm: "if we do not receive a copy of your proposed discovery by 5:30 pm, we will file the letter without your submission, and simply refer the Court to the exchange of emails (which we will attach) to reflect our efforts to meet and confer with you," Exh. 4 at p. 2 thereof).

It was only in response to our threat to send this letter unilaterally (along with the emails reflecting our multiple efforts to meet and confer) that opposing counsel finally provided us with a response. In that response, which appears below, opposing counsel claims that *we* refused to meet and confer with *him*. We are sure that the Court has no patience for this nonsense -- and, as *pro bono* counsel, we have no patience for it either -- but we have been "dancing without a dancing partner" over the issue of discovery from the moment opposing counsel rejected our efforts in the courthouse

hallway to set a discovery schedule and outline. Over the past four days, defendants have consistently refused to consent to *any* discovery or propose any discovery schedule and outline. And, as reflected in their insert (below), nothing has changed throughout this process other than defendants' tactics in discovery avoidance.

Plaintiffs' Proposed Discovery Schedule and Outline

Notwithstanding defendants' counsel's intransigence, we have devised the schedule below which should afford the Court the opportunity to consider this lawsuit on a full record. Before setting forth our proposed discovery schedule and outline, we are constrained to point out that opposing counsel, in their Un-Noticed Motion and Letterbrief, seek to reverse this Court's directive that the parties submit to discovery, by falsely alleging that "Plaintiffs' principal challenge in this matter is their argument that Congress's legislative decision to include marijuana under Schedule I of the CSA is irrational and thus unconstitutional" (Dolinger letter, at 2). As reflected *supra*, the claim that the CSA is irrational and thus unconstitutional on that basis alone comprises just one of the six causes of action set forth in the Amended Complaint. Four of the remaining five causes of action are "as applied" challenges, predicated upon allegations that defendants have deprived plaintiffs of their fundamental constitutional rights, triggering strict scrutiny and requiring discovery (Dkt. No. 23, ¶¶406-434, 450-474).* And the claim that the mis-classification of Cannabis as a Schedule I drug under the CSA is irrational is based upon, *inter alia*, the allegation that the supposed "rationale" offered by defendants is pretextual – an allegation that also requires discovery.

Opposing counsel also asserts that, now that the Court has denied the request for a temporary restraining order, there is no urgency associated with this lawsuit. Opposing counsel is mistaken. Because of her need to continue treatment with her life-saving medicine, Alexis Bortell is currently barred from entering a military base, preventing her from receiving dependent veterans benefits to which she is entitled; she cannot travel onto federal lands; and she cannot travel on federal highways or an airplane. On a daily basis, threatened enforcement of the CSA, as applied to Alexis, denies her of her fundamental constitutional rights, *inter alia*, to travel, to free speech, to petition the government for a redress of grievances, and to preserve her life by continuing the administration of life-saving and sustaining medical treatments. While NORML's lobbying days have passed, one cannot rationally conclude that the claims set forth in the Amended Complaint have somehow been mooted or that time, somehow, ceases to be a factor. As reflected in our Memorandum of Law in Support of a Preliminary Injunction, threatened deprivation of constitutional rights constitutes irreparable harm as a matter of law (Br. at 34-35). That means that every day, defendants cause Alexis irreparable harm. And this harm will continue, denying Alexis the opportunity, *inter alia*, to: (i) travel on school trips, (ii) visit her grandparents in Oklahoma, (iii) meet with and lobby members of Congress who desire to meet with her, (iv) step onto a military base to collect her dependent veterans benefits, and (v) go to national parks and monuments (*Id.* at 35-42).

Lastly, opposing counsel has repeatedly asserted that he would comply with the directive to

*The fifth cause of action seeks recovery of legal fees under the Equal Access to Justice Act.

provide a schedule for discovery "if it is ordered by the Court" (Dolinger Email, 9/13/2017, 8:43 am, Exh. 5). We responded that:

> If it continues to be your position...that no discovery is appropriate and that you will provide it only "***if it is ordered by the Court***," as you assert in your email, then I must remind you that the Court has *already* ordered the parties to exchange discovery. Thus, you are already subject to the discovery obligations you seek to avoid. And we are proceeding accordingly.

See Hiller Email, 9/13/2017 at 3:28 pm, Exh. 4 (emphasis in original).

We propose the following discovery schedule and outline:

On or before 9/25/2017:	Parties to serve First Notice to Produce and Interrogatories;
On or before 10/2/2017:	Parties to serve First Requests for Admission ("RFAs");
On or before 10/3/2017:	Parties to respond with any objections to the First Notice to Produce and Interrogatories;
On or before 10/25/2017:	Parties to produce documents and other materials in response to First Notice to Produce, and Answer First Set of Interrogatories;
On or before 11/3/2017:	Parties to answer First Requests for Admission;
On or before 11/15/2017:	Parties to identify Party and Non-Party Deponents for Deposition;
On or before 11/29/2017:	Parties' Depositions to begin and continue day-to-day until completed (subject to reasonable accommodations among counsel);
On or before 12/31/2017:	Parties to serve any follow-up Discovery Demands (other than follow-up RFAs which may be served up until March 1, 2018, *infra*);
On or before 1/18/2018:	Parties to respond to follow-up Discovery Demands;
On or before 1/25/2018:	Non-Party Depositions to begin;

On or before 2/21/2018:	Completion of Non-Party Depositions and Exchange of Expert Disclosures;
On or before 3/1/2018:	Final RFAs prior to the Rule 65 Hearing and Trial;
On or before 3/8/2018	Responses to Final RFAs to be served.

The above schedule would allow for a Rule 65 Hearing and Trial in March – approximately six months from the September 8th Hearing.

As for a briefing schedule, we have no objection to defendants' proposal, *except that* we understood the reference to "briefing" in the September 11th Order to refer to the motion for preliminary injunction, not, as defendants suggest, summary judgment (Dkt. No. 26). Assuming we are correct, defendants are not entitled to submit a reply to plaintiffs' reply.

With respect to defendants' submission below, opposing counsel has devised yet *another* way to attempt avoidance of defendants' obligations under the Federal Rules -- this time, a feigned allegation that we refused to confer on discovery. Fortunately, the written correspondence between counsel confirms the opposite – that opposing counsel repeatedly refused to respond to our requests to confer until we threatened to send copies of email correspondence to the Court, along with our own unilateral letter (Exhs. 3 and 4).

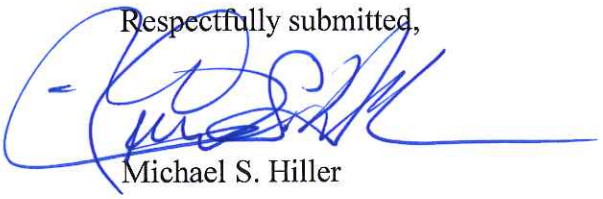
Opposing counsel separately contends that defendants have no idea what subjects as to which we seek disclosure. Respectfully, that is a headscratcher. Through the Complaint, Amended Complaint, and the process of litigating the Order to Show Cause for a TRO, we have already disclosed precisely what this case is about and the proof we need in order to win it. By contrast, defendants have not identified any subject matter as to which they would seek discovery, and they have not even answered the Amended Complaint. Thus, it is the plaintiffs who have not received any notice of defendants' proposed areas of discovery. Once again, defendants are proceeding in this litigation as if it were a one-way street by seeking to impose a requirement upon plaintiffs without complying with it themselves.

Regardless, we patterned our proposed discovery schedule and outline on the draft Case Management Order that is contained in Your Honor's Individual Rules. In my more than 25 years of practice, submission of a Case Management Order based upon the Court's form has been the gold standard. Accordingly, we followed it in this case. If further elaboration concerning the scope of discovery is truly necessary, we are confident that the Court will instruct us to provide it. However, we regard defendants' latest ploy as merely another attempt to avoid participating in the discovery that the Court ordered from the bench, and then memorialized in its September 11, 2017 Order (Dkt. 26).

Lastly, defendants have interposed objections to the shortening of deadlines with respect to interposing objections to interrogatories and document productions, and the waiver of expert

depositions. What opposing counsel appears to have overlooked is that the discovery referenced in the above-schedule was identified in anticipation of a hearing on a motion for a preliminary injunction pertaining to claims arising from the deprivation of plaintiffs' constitutional rights. Each day that passes prior to the hearing results in permanent losses to plaintiffs in their exercise of constitutional rights to which every American is entitled. That urgency warrants shortening the time within which to interpose objections – so that those objections can be resolved by the Court prior to answering deadlines – and also calls for the elimination of expert depositions. The parties will exchange expert reports (assuming that experts are retained). Expert depositions would consume at least an additional month and thus interfere with expeditious resolution of this lawsuit.**

Respectfully submitted,



Michael S. Hiller

II. SUBMISSION ON BEHALF OF DEFENDANTS***

For the reasons set out in their letter dated September 11, 2017, it is Defendants' position that no discovery is appropriate in this matter, particularly before the Court's ruling on a motion to dismiss makes clear what, if any, claims remain, which in turn will determine the applicable legal standard and what, if any, discovery is needed. *See* Dkt. No. 27.

If the Court does not reconsider its order concerning the commencement of discovery, Defendants respectfully request that the Court direct Plaintiffs to confer and propose a discovery plan in compliance with Rule 26. Under Rule 26(f), a proposed discovery plan must contain the parties'

**Opposing counsel also takes pains to emphasize that service of the Complaint was delayed in this matter. As I explained to Mr. Dolinger when he first raised this issue with me last week, service of the Complaint was delayed because plaintiffs intended to amend, and had no desire to invite a motion to dismiss the pleading prior to its amendment. Nor were we interested in inconveniencing the government into preparing a motion that pertained to a pleading that, by the time they filed their motion, would have been replaced. After opposing counsel asserted during that call that the timing and sequencing of the Complaint, Amended Complaint and request for a TRO constituted improper conduct, we included reference to that assertion in my moving Declaration in support of the TRO, and responded to it. Upon reviewing the Declaration, opposing counsel contacted my office, retracted any suggestion that we had acted improperly, and requested that I remove the reference to the issue from my moving Declaration. I agreed, but only on the condition that opposing counsel never raise the issue again. He agreed (precipitating my removal of the reference to this issue from my moving Declaration), and then opposing counsel kept his word for less than a week.

***Except for the insertion of Roman Numeral II, defendants' submission is a verbatim block and copy of the content emailed to our office by opposing counsel on the evening of September 13, 2017.

views on "the subjects on which discovery may be needed," and the parties, in conferring, "must consider the nature and basis of their claims and defenses," Fed. R. Civ. P. 26(f)(2), (3)(B). Moreover, the Court's order directed the parties to "*outline the discovery* that will be necessary in this case, *along with* a proposed discovery and briefing schedule." Dkt. No. 26, at 2 (emphases added).

Despite the Court's order and the Federal Rules, Plaintiffs have refused (despite several requests) to provide Defendants any information concerning the outline of the discovery they plan to seek and how that information is relevant to their claims under the relevant legal standards.* Without this information, Defendants cannot determine whether Plaintiffs' requested discovery is "relevant to any party's claim or defense," and "proportional to the needs of the case," or "whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). Because Plaintiffs have provided no information about the material they believe to be relevant to their claims, and on what legal theory, or what they envision as the permissible scope of discovery, Defendants are unable to provide a considered response.

Moreover, for the reasons set out in Defendants' September 11 letter, Dkt. No. 27, it is not clear to Defendants what, if any, discovery could be relevant in this case. Without information as to what discovery Plaintiffs plan to seek—whether documents, testimony, or otherwise—Defendants cannot assess the reasonableness of Plaintiffs' proposed schedule. Because Plaintiffs refuse to confer, Defendants cannot assess "when discovery should be completed, and whether discovery should be conducted in phases or limited to or focused on particular issues," Fed. R. Civ. P. 26(f)(3)(B), discuss potential claims of privilege, Fed. R. Civ. P. 26(f)(3)(D), propose limitations on discovery, Fed. R. Civ. P. 26(f)(3)(E), or otherwise provide Defendants' views and proposals as required by the Federal Rules.

As to the specifics of Plaintiffs' proposed discovery schedule, Defendant request that all deadlines and means of discovery comply with the Federal Rules of Civil Procedure and the Local Rules of the Southern District of New York. Plaintiffs propose to foreshorten certain deadlines, which Defendants believe is inappropriate given the lack of exigency: Plaintiffs propose an extended and plenary discovery schedule, including multiple rounds of document requests and depositions, and which would extend from now until at least the end of March 2018. Moreover, as stated in Defendants' prior letter, Plaintiffs filed this case in July 2017 but took no action (including even to serve the complaint on the U.S. Attorney's Office) to move the case forward until early September, further undermining any claim of urgency.

Additionally, while Plaintiffs have indicated that they waive expert discovery, Defendants do not make such a waiver and request to add an expert deposition period to any discovery schedule, as Rule 26 provides. *See* Fed. R. Civ. P. 26(b)(4)(A).

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* Plaintiff's counsel takes the position that neither the rules nor the Court's order requiring a discovery "outline" requires disclosure of the subjects of discovery. Instead, he responded, "Frankly, I have no doubt that you are fully aware of what the subjects of discovery will be." Government counsel, however, is unaware of the information Plaintiffs plan to seek in discovery.

Other than a first draft of their proposed discovery schedule, Plaintiffs have refused to provide Defendants with the remainder of their draft letter. Thus, as far as Defendants are aware, Plaintiffs have not "outline[d] the discovery that will be necessary in this case," as the Court's order required, Dkt. No. 26, at 2, nor proposed any "briefing schedule," as the Court also directed. If such proposals are contained in Plaintiffs' letter, Defendants have not seen them, and thus cannot comment on them.

On those points, Defendants respectfully submit that (1) in their view, no discovery is necessary in this case under rational basis review, but Defendants reserve the right to seek any reciprocal discovery if such discovery is permitted by the Court; and (2) any briefing schedule on a preliminary injunction motion shall begin with Plaintiffs' brief, to be filed within 30 days of the close of all discovery; Defendants' opposition and any cross-motion for summary judgment shall be filed within 30 days of Plaintiffs' brief; Plaintiffs' reply/opposition shall be filed within 14 days of Defendants' opposition; and Defendants' reply shall be filed within 14 days of Plaintiffs' opposition.