UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARVIN WASHINGTON, et al.,

Plaintiffs,

-v-

JEFFERSON BEAUREGARD SESSIONS, III, et al.,

Defendants.

17 Civ. 5625 (AKH)

**DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF BORTELL'S REQUEST FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

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Joon H. Kim, Acting United States Attorney for the Southern District of New York, on behalf of defendants the United States of America; Jefferson B. Sessions, III, in his official capacity as Attorney General of the United States; the United States Department of Justice ("DOJ"); Charles Rosenberg, in his official capacity as the Acting Administrator of the Drug Enforcement Administration ("DEA"); and the DEA (collectively, "Defendants"), respectfully submits this memorandum of law in opposition to the request for a temporary restraining order ("TRO") and preliminary injunction by Plaintiff Alexis Bortell ("Plaintiff" or "Bortell"), a minor appearing through her father, Dean Bortell.

**PRELIMINARY STATEMENT**

Plaintiff, a minor who lives in Colorado, seeks a temporary restraining order that would provisionally suspend the application of the federal Controlled Substances Act ("CSA") to her before the Court has reached a final determination on the merits of her constitutional claims. *See* Affidavit of Alexis Bortell ("Bortell Aff.") ¶¶ 1, 6. Bortell and her doctor affirm that her use of marijuana is medically necessary to prevent seizures. *Id.* ¶¶ 6-7; Affidavit of Dr. Margaret Gedde ("Gedde Aff.") ¶¶ 10-12. Bortell asserts that injunctive relief against enforcement of the CSA is necessary to permit her to travel by air to Washington, D.C., while in possession of medical marijuana, and to enter federal land and buildings. Bortell Aff. ¶¶ 11-14; Plaintiff's Memorandum of Law ("Pl. Br.") at 2. She seeks to do so in order to join a marijuana legalization advocacy group to lobby members of Congress concerning proposed federal marijuana legislation. Bortell Aff. ¶¶ 1, 11-12. Bortell concedes that her possession of marijuana is prohibited under federal law. *Id.* ¶¶ 14-16.

The Court should deny Plaintiff's request for a TRO and preliminary injunction, which are "extraordinary remed[ies] never awarded as of right." *Litwin v. OceanFreight, Inc.*, 865 F. Supp. 2d 385, 391 (S.D.N.Y. 2011) (quoting *Salinger v. Coking*, 607 F.3d 68, 79 (2d Cir. 2010)).

Principally, Plaintiff has failed to demonstrate a likelihood of success—a central requirement for the grant of injunctive relief, particularly in the context of a request to "enjoin application of a governmental regulation." *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007).

Plaintiff's claims seeking a declaration that federal marijuana regulation is unconstitutional are without merit. Indeed, this case is the latest in a series of legal challenges to the regulation of marijuana under the CSA, all of which have failed. Plaintiff's legal arguments present no new ground for relief here. Nor has Plaintiff demonstrated irreparable harm in the absence of injunctive relief, that the balance of the hardships tips in her favor, or that an injunction would be in the public interest. Accordingly, Plaintiff's request for a TRO and preliminary injunction should be denied.

**STATUTORY FRAMEWORK**

"Enacted in 1970 with the main objectives of combating drug abuse and controlling the legitimate and illegitimate traffic in controlled substances, the CSA creates a comprehensive, closed regulatory regime criminalizing the unauthorized manufacture, distribution, dispensing, and possession of substances classified in any of the Act's five schedules." *Gonzales v. Oregon*, 546 U.S. 243, 250 (2006). "In enacting the CSA, Congress classified marijuana as a Schedule I drug." *Gonzales v. Raich*, 545 U.S. 1, 14 (2005) [hereinafter *Raich I*] (citing 21 U.S.C. § 812(c)). "By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study." *Id.* (citing 21 U.S.C. §§ 823(f), 841(a)(1), 844(a)); *see also United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 490-491 (2001).

"The CSA provides for the periodic updating of schedules and delegates authority to the Attorney General, after consultation with the Secretary of Health and Human Services, to add, remove, or transfer substances to, from, or between schedules." *Raich I*, 545 U.S. at 14-15 (citing 21 U.S.C. § 811). "The Attorney General can include a drug in schedule I only if the drug 'has no currently accepted medical use in treatment in the United States,' 'has a high potential for abuse,' and has 'a lack of accepted safety for use under medical supervision.'" *Oakland Cannabis Buyers' Co-op.*, 532 U.S. at 492 (ellipsis omitted) (citing 21 U.S.C. §§ 812(b)(1)(A)-(C)). However, as the Supreme Court has recognized, "the Attorney General did not place marijuana into schedule I. Congress put it there, and Congress was not required to find that a drug lacks an accepted medical use before including the drug in schedule I." *Id.* "Despite considerable efforts to reschedule marijuana, it remains a Schedule I drug." *Raich I*, 545 U.S. at 15 & n.23.[1]

The Supreme Court has upheld the constitutionality of the CSA "as applied to the intrastate manufacture and possession of marijuana for medical purposes" pursuant to state law, *Raich I*, 545 U.S. at 15, and has also held that there is no "medical necessity exception" for marijuana under the CSA, "even when the patient is 'seriously ill' and lacks alternative avenues for relief." *Oakland Cannabis Buyers' Co-op.*, 532 U.S. at 491, 494 n.7.

[1] In 2013, the D.C. Circuit upheld the DEA's denial of a petition seeking the rescheduling of marijuana, holding that the agency's factual findings in support of its determination "are supported by substantial evidence" and "reasonably support the agency's final decision not to reschedule marijuana." *Americans for Safe Access v. DEA*, 706 F.3d 438, 449-52 (D.C. Cir. 2013).

## ARGUMENT

### I. LEGAL STANDARDS

"It is well established that the standard for an entry of a temporary restraining order is the same as for a preliminary injunction." *AFA Dispensing Group B.V. v. Anheuser-Busch, Inc.*, 740 F. Supp. 2d 465, 471 (S.D.N.Y. 2010). A TRO, like a preliminary injunction, is an "an extraordinary and drastic remedy," which "is never awarded as of right." *Munaf v. Geren* 553 U.S. 674, 689-90 (2008) (internal quotation marks omitted).

Ordinarily, a party seeking a preliminary injunction or a TRO must demonstrate:

> (1) a likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the plaintiff's favor; (2) a likelihood of irreparable injury in the absence of an injunction; (3) that the balance of hardships tips in the plaintiff's favor; and (4) that the public interest would not be disserved by the issuance of an injunction.

*Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 895 (2d Cir. 2015) (internal quotation marks and ellipsis omitted). Here, however, Plaintiff's "burden is . . . increased because the preliminary injunction [she] seek[s] is against the government. . . . [W]here a preliminary injunction is sought against the enforcement of governmental rules, the movant may not invoke the 'fair ground for litigation standard' but must show 'likelihood of success.'" *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 763 (2d Cir. 1999), *aff'd*, 531 U.S. 533 (2001); *accord Grand River Enter. Six Nations*, 481 F.3d at 66. Under this "more rigorous" standard, "plaintiffs must establish a clear or substantial likelihood of success on the merits." *Sussman v. Crawford*, 488 F.3d 136, 140 (2d Cir. 2007) (per curiam) (internal quotation marks omitted).

The movant bears the burden of demonstrating "by a clear showing" that the remedy is necessary and that the prerequisites for issuance of the relief are satisfied. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972

(1997) (per curiam)). "That is because the preliminary injunction is one of the most drastic tools in the arsenal of judicial remedies." *Grand River Enter. Six Nations*, 481 F.3d at 66 (internal quotation marks omitted).

## II. PLAINTIFF CANNOT SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS OF HER CONSTITUTIONAL CLAIMS, WHICH ARE FORECLOSED BY PRECEDENT

Plaintiff's suit is the latest in a long list of cases asserting constitutional challenges to marijuana regulation under the CSA. Those challenges have been uniformly rejected by the federal courts. Indeed, several of Plaintiff's specific claims have been explicitly rejected by the Supreme Court or the Second Circuit; others rely on novel but unsound doctrinal foundations in an attempt to avoid precedent. None of Plaintiff's claims gives rise to the required "clear or substantial likelihood of success on the merits," and thus Plaintiff cannot make the required "clear showing" that she is entitled to injunctive relief. *Sussman*, 488 F.3d at 139-40. Plaintiff's request for a TRO and preliminary injunction should be denied on this basis alone. *See, e.g.*, *Elansari v. United States*, 615 F. App'x 760, 762 (3d Cir. 2015) (mem.) (holding that the plaintiff "cannot show a likelihood on the success of his claim that the marijuana prohibition is unconstitutional"), *cert. denied*, 136 S. Ct. 1521 (2016).

### A. Second Circuit Precedent Forecloses Plaintiff's Rational Basis Challenge

Plaintiff claims that the CSA, "as it pertains to Cannabis," is "so irrational as a matter of law that it cannot be said to be rationally related to any legitimate government purpose." Dkt. No. 23 ("Am. Compl.") ¶ 7; *see* Pl. Br. at 5. This challenge is foreclosed by Second Circuit precedent. As recently reiterated in *United States v. Canori*, the Second Circuit has "upheld the constitutionality of Congress's classification of marijuana as a Schedule I drug." 737 F.3d 181, 183 (2d Cir. 2013) (citing *United States v. Kiffer*, 477 F.2d 349, 355-57 (2d Cir. 1973)). In *United States v. Kiffer*, the Second Circuit squarely rejected the argument that "the statutory

assignment of marihuana to Schedule I, together with such concededly dangerous narcotic drugs as heroin, is arbitrary and unreasonable in light of the criteria for classification established by the statute and what is known about the effects of these substances." 477 F.2d at 356. Thus, unless and until *Kiffer* is "overruled either by an en banc panel of [this] Court or by the Supreme Court," it remains the binding law of this Circuit. *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 405 (2d Cir. 2014) (internal quotation marks omitted).

Other courts have rejected identical challenges. *See, e.g.*, *United States v. Christie*, 825 F.3d 1048, 1066 (9th Cir. 2016) (rejecting argument that Schedule I classification is "arbitrary and lacking in any rational justification" based on circuit precedent from 1978, and further holding that legal, medical, and scientific developments have not undermined the "central holding" of the 1978 precedent (citing *United States v. Miroyan*, 577 F.2d 489, 495 (9th Cir. 1978)); *United States v. Oakland Cannabis Buyers' Co-op*, 259 F. App'x 936, 938 (9th Cir. 2007) (mem.) ("The district court properly concluded that the placement of marijuana in Schedule I of the Controlled Substances Act satisfies rational basis review."); *United States v. White Plume*, 447 F.3d 1067, 1076 (8th Cir. 2006) ("[C]ategorizing marijuana . . . as a Schedule I substance passes muster under the rational basis test."); *United States v. Fogarty*, 692 F.2d 542, 548 (8th Cir. 1982); *United States v. Middleton*, 690 F.2d 820, 822-24 (11th Cir. 1982); *United States v. Wilde*, 74 F. Supp. 3d 1092, 1098 (N.D. Cal. 2014) (collecting cases); *Nat'l Org. for the Reform of Marijuana Laws v. Bell*, 488 F. Supp. 123, 139-41 (D.D.C. 1980).

Even if the Court were considering this challenge without the benefit of binding precedent on point, the outcome would be the same. Because the law at issue "does not involve a suspect classification or impinge on a fundamental right, it need survive only rational basis scrutiny." *United States v. Thomas*, 628 F.3d 64, 70 (2d Cir. 2010) (quoting *Griffin v.*

*Mann*, 156 F.3d 288, 291 (2d Cir. 1998)). The rational basis standard "confers on the challenged classification 'a strong presumption of validity.'" *Id.* (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993)). Under rational basis review, the government "has no obligation to produce evidence to sustain the rationality of a statutory classification"; instead, "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993) (brackets and internal quotation marks omitted). Moreover, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Commc'ns*, 508 U.S. at 315.

Plaintiff has no likelihood of success under the applicable standard of review. "The issue is not whether it was rational for Congress or the DEA to conclude that there is no currently accepted medical use for marijuana—that would be the issue if a claim were brought in a circuit court challenging the DEA's administrative determination [on a rescheduling petition]." *United States v. Green*, 222 F. Supp. 3d 267, 278-79 (W.D.N.Y. 2016). Instead, under rational basis review, the issue "is, simply, whether there is any conceivable basis to support the placement of marijuana on the most stringent schedule under the CSA." *Id.* at 279. And, as a court in this Circuit recently concluded:

> [T]here are numerous conceivable public health and safety grounds that could justify Congress's and the DEA's continued regulation of marijuana as a Schedule I controlled substance. Under no reasonable view of the facts could it be concluded that it is irrational for Congress to continue to regulate marijuana in the manner which it has, and for the DEA to continue to adhere to a Schedule I classification for marijuana.

*Id.* (citing DEA petition denial); *see also Americans for Safe Access v. DEA*, 706 F.3d 438, 449-52 (D.C. Cir. 2013) (reviewing evidence on petition for rescheduling and holding that "substantial evidence" supported DEA's findings and that the findings supported DEA's final

decision not to reschedule marijuana); *United States v. Inzer*, No. 14 Cr. 437, 2015 WL 3404672, at *3 & n.5 (M.D. Fla. May 26, 2015) ("In the forty-five years since the CSA was passed, courts have unanimously concluded that Congress could rationally find that marijuana has a high potential for abuse, that it currently has no accepted medical use, and that there is a lack of accepted safety for use of marijuana under medical supervision." (collecting cases)); *United States v. Pickard*, 100 F. Supp. 3d 981, 1009 (E.D. Cal. 2015).

**B. Supreme Court Precedent Forecloses Plaintiff's Commerce Clause Challenge**

Plaintiff also seeks a "declaration that Congress, in enacting the CSA as it pertains to Cannabis, violated the Commerce Clause, extending the breadth of legislative power well beyond the scope contemplated by Article I of the Constitution." Am. Compl. ¶ 6. As Plaintiff concedes, however, *id.* ¶ 6 n.5, this precise claim was considered and rejected by the Supreme Court in *Raich I*, 545 U.S. 1. On a claim by plaintiffs who—like Bortell, *see* Gedde Aff. ¶¶ 11-12 —were under the care of doctors who concluded that "marijuana is the only drug available that provides effective treatment" for their medical conditions, *Raich I*, 545 U.S. at 7,[2] the Supreme Court nonetheless held that the CSA was a valid exercise of Congress's power under the Commerce Clause, *id.* at 23-30. Moreover, in doing so, the Court had "no difficulty concluding that Congress acted rationally" in not creating an exemption to the CSA for the "purported class" of activities that plaintiffs were engaged in—*i.e.*, the "intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law." *Id.* at 26 (internal quotation marks omitted).

[2] Indeed, one physician "believe[d] that forgoing cannabis treatments would certainly cause [the plaintiff] excruciating pain and could very well prove fatal." *Raich I*, 545 U.S. at 7.

Unless and until *Raich* is overruled by the Supreme Court, it remains binding law. *See, e.g., State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents."); *accord Bach v. Pataki*, 408 F.3d 75, 86 (2d Cir. 2005) (the Second Circuit "cannot overrule the Supreme Court," as its precedents in the realm of constitutional interpretation are "the law of the land"), *overruled in part on other grounds by McDonald v. Chicago*, 561 U.S. 742 (2010). Plaintiff therefore cannot show that she is likely to succeed on the merits of a Commerce Clause challenge.

### C. Plaintiff's Right-to-Travel Claim Is Unsupported by Precedent and Is Unlikely to Succeed on the Merits

Plaintiff also alleges that the CSA's regulation of marijuana impinges on her constitutionally protected right to travel. While "[t]he right of interstate travel has repeatedly been recognized as a basic constitutional freedom," *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 254 (1974), Plaintiff cannot show that the CSA affects that right in a legally cognizable way.

"The right to travel encompasses at least three different components: '[i]t protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.'" *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 53 (2d Cir. 2007) (quoting *Saenz v. Roe*, 526 U.S. 489, 500 (1999)). The CSA does not affect Plaintiff's ability to travel in any of these ways. Plaintiff asserts that her possession and use of medical marijuana is legal under Colorado state law (*see* Bortell Aff. ¶ 6; Pl. Br. at 1), but "[m]arijuana remains illegal under federal law, even in those states in which medical marijuana has been legalized." *Canori*, 737 F.3d at 184 (citing 21 U.S.C. § 903 (providing for preemption where

"there is a positive conflict" between a provision of the CSA and state law such "that the two cannot consistently stand together")). Accordingly, the CSA does not regulate individuals' ability to travel; rather, it renders marijuana contraband in all circumstances, *see* 21 U.S.C. §§ 812(c), 881(a), without regard to whether it is being transported interstate.[3]

In another formulation, "the Supreme Court has explained [that] a law 'implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right.'" *Town of Southold*, 477 F.3d at 53 (quoting *Atty. Gen. v. Soto-Lopez*, 476 U.S. 898, 903 (1986)). The CSA also does not affect Plaintiff's right to travel in these ways. Impeding travel is not a particular "objective" of the CSA, much less its "primary" objective, nor do its classifications penalize the exercise of the right. The law is facially neutral as to travel. Further, while Plaintiff asserts that the CSA would actually deter her travel in this case, this is of no moment: the fact remains that possession of marijuana remains illegal under the CSA, whether Plaintiff *travels* in possession of marijuana or not.

Thus, the right to travel is not implicated here.[4] *See Town of Southold*, 477 F.3d at 54 ("If every infringement on interstate travel violates the traveler's fundamental constitutional

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[3] A claim that the constitutional right to travel requires admittance to federal property or federal buildings—even when in violation of federal law or regulations—is also unlikely to succeed. As the Second Circuit has held, "it is clear that the right protects *movement between places* and has no bearing on *access* to a particular place." *Williams v. Town of Greenburgh*, 535 F.3d 71, 75 (2d Cir. 2008). "[I]t would distort the right to free travel beyond recognition to construe it as providing a substantive right to cross a *particular* parcel of land, enter a *chosen* dwelling, or gain admittance to a *specific* government building." *Id.* at 76.

[4] Additionally, Plaintiff claims that she needs injunctive relief because she plans to travel by air, Bortell Aff. ¶ 1—a form of travel she apparently believes will subject her to additional federal regulation or scrutiny. Assuming *arguendo* that this is the case, the Second Circuit has held that there is no "constitutional right to the most convenient form of travel." *Town of Southold*, 477 F.3d at 54; *accord, e.g.*, *Miller v. Reed*, 176 F.3d 1202, 1205 (9th Cir. 1999) ("[B]urdens on a single mode of transportation do not implicate the right to interstate travel."); *Cramer v. Skinner*,

rights, any governmental act that limits the ability to travel interstate, such as placing a traffic light before an interstate bridge, would raise a constitutional issue." (quoting *Cramer v. Skinner*, 931 F.2d 1020, 1031 (5th Cir. 1991)); *cf. also Grider v. City & Cty. of Denver*, No. 10 Civ. 722, 2012 WL 1079466, at *7 (D. Colo. Mar. 30, 2012) ("The Court is aware of . . . no precedent suggesting that . . . the right to travel is infringed by a state or municipal law of general applicability that simply prohibits possession of a certain item within the local jurisdiction. To hold otherwise would allow the constitutional right to travel to negate local laws prohibiting, say, possession of firearms or medical marijuana, so long as the traveler could legally possess those items at home.").

The essence of Plaintiff's right-to-travel claim is a repackaging of claims that courts have previously considered and rejected. Plaintiff requests injunctive relief because she seeks to travel with marijuana—which, she claims, is medically necessary. But "medical necessity is not a defense" under the CSA, nor can one be implied through a court's equitable discretion. *Oakland Cannabis Buyers' Co-op.*, 532 U.S. at 494 & n.7, 497-98 ("Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute."). Moreover, as Plaintiff concedes, she is not restricted from traveling as long as she is not in possession of marijuana. Pl. Br. at 54. Because Plaintiff has not demonstrated a fundamental right to possess or use marijuana—and courts have concluded none is recognized, *see infra* Section II.E—her right to travel does not conflict with any other right. Thus, Plaintiff cannot use alleged medical necessity or a fundamental right—both of which have been rejected by the courts—as an end-run around a

931 F.2d 1020, 1031 (5th Cir. 1991). While Plaintiff contends that she also cannot "travel to other States," Am. Compl. ¶ 429, she appears to be claiming that other *states'* laws, not the CSA, stand in her way, which is not material to her claim before the Court.

facially neutral prohibition on the possession of marijuana. Thus, Plaintiff has not shown a likelihood of success on a claim asserting her right to travel.

**D. Plaintiff's Conclusory Equal Protection Claim Is Without Merit**

The Amended Complaint also contains conclusory allegations that the CSA, as pertains to marijuana, was enacted in 1970 with discriminatory intent toward Vietnam War protestors and/or members of certain minority groups. Am. Compl. ¶¶ 10-12. Plaintiff has not demonstrated a likelihood of success on these claims.

"Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). By way of evidence, Plaintiff asks the Court to "ascribe a discriminatory intent to Congress based on rather sketchy and unpersuasive bits of information." *United States v. Johnson*, 40 F.3d 436, 440 (D.C. Cir. 1994). The main factual basis for their assertion of a discriminatory motivation for the CSA rests on allegations concerning "the Nixon Administration's bigotry and hostility toward war protestors." Am. Compl. at 45 (formatting altered); *see id.* ¶¶ 223-252 (citing statements by former President Richard Nixon and members of his administration around the time of the passage of the CSA).

As other courts considering similar allegations have concluded, however, "President Nixon and the identified members of his administration were not members of the decision-making body that enacted the CSA," nor does Plaintiff present "any basis to impute the alleged discriminatory intent to Congress." *United States v. Heying*, No. 14 Cr. 30, 2014 WL 5286153, at *4 (D. Minn. Aug. 15, 2014), *report and rec. adopted*, 2014 WL 5286155 (D. Minn. Oct. 15, 2014); *see Johnson*, 40 F.3d at 440 (rejecting attribution of discriminatory intent to 1986 Congress based on "undeniable racism that animated legislative debate leading to the passage of a *1914* statute criminalizing cocaine trafficking generally," long before the enactment of the law

in question (emphasis in original)); *cf. McCleskey v. Kemp*, 481 U.S. 279, 292 n.20 (1987) (holding that "unless historical evidence" of purposeful discrimination "is reasonably contemporaneous with the challenged decision, it has little probative value"). Thus, courts have concluded that "no discriminatory legislative purpose motivated the inclusion of marijuana as a Schedule I controlled substance." *Heying*, 2014 WL 5286153, at *7.[5] For these reasons, Plaintiff has not made a substantial showing of likelihood of success on these claims.

### E. Plaintiff's Substantive Due Process Challenge Is Unlikely to Succeed on the Merits

Plaintiff also makes a brief reference in the Amended Complaint of a substantive due process right to use medical marijuana. This claim, too, has been rejected by the courts that have considered it. The Ninth Circuit in *Raich*—on remand from the Supreme Court's decision upholding the constitutionality of the CSA under the Commerce Clause—rejected just such a substantive due process claim. After canvassing the history of marijuana use and regulation in the United States, the court rejected the claim that "the right to use medical marijuana is 'fundamental' and 'implicit in the concept of ordered liberty.'" *Raich v. Gonzales*, 500 F.3d 850, 866 (9th Cir. 2007) [hereinafter *Raich II*] (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)); *accord, e.g.*, *Welch v. United States*, No. 16 Civ. 503, 2017 WL 3763857, at *3 (W.D. Va. Aug. 30, 2017) (rejecting substantive due process claim and holding that the plaintiff "does not have a federally protected right to possess, use, or distribute marijuana and, thus, he has not demonstrated a violation of his right[] to due process"); *Doe v. Nevada*, No. 69801, 2017 WL

[5] Additionally, the equal protection claim is unlikely to succeed because it is largely conclusory and lacks factual basis. *See* Am. Compl. ¶¶ 409-17; *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); *Guo Hua Ke v. Morton*, No. 10 Civ. 8671 (PGG), 2012 WL 4715211, at *11 (S.D.N.Y. Sept. 30, 2012) ("[V]ague, speculative, and conclusory allegations are not sufficient to state a claim for a violation of equal protection.").

3160306, at *2 (Nev. July 25, 2017) ("To date, no court has recognized a fundamental right to use medical marijuana recommended by a physician, and the use of medical marijuana is still prohibited under federal law and the laws of 22 states.").

Plaintiff makes no attempt to distinguish the Ninth Circuit's holding in *Raich II*—indeed, she does not cite it—and presents no persuasive argument that a right to use medical marijuana is, "objectively, deeply rooted in this Nation's history and tradition." *Glucksberg*, 521 U.S. at 721 (internal quotation marks omitted). Thus, because "federal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering," *Raich II*, 500 F.3d at 866, Plaintiff's substantive due process challenge is unlikely to succeed.

### F. Plaintiff's First Amendment Petition Claim Is Unsupported by Precedent and Unlikely to Succeed on the Merits

Plaintiff also asserts a claim under the First Amendment protection of the right to petition the government for a redress of grievances. Am Compl. ¶¶ 462-466. However, the "Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." *Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 283 (1984). As the Supreme Court held:

> Policymaking organs in our system of government have never operated under a constitutional constraint requiring them to afford every interested member of the public an opportunity to present testimony before any policy is adopted. Legislatures throughout the nation, including Congress, frequently enact bills on which no hearings have been held or on which testimony has been received from only a select group. Executive agencies likewise make policy decisions of widespread application without permitting unrestricted public testimony. Public officials at all levels of government daily make policy decisions based only on the advice they decide they need and choose to hear. To recognize a constitutional right to participate directly in government policymaking would work a revolution in existing government practices.

*Id.* at 284; *see also Liverman v. Comm. on the Judiciary, U.S. House of Rep.*, 51 F. App'x 825, 826 (10th Cir. 2002) (unpublished) ("[M]embers of the public enjoy no constitutional right to be heard by members of Congress."); *Marino v. State of New York*, 629 F. Supp. 912, 918 (E.D.N.Y. 1986) ("Even interested members [of the public], with a stake in the outcome of the decision or act, have no right to be heard before a policy is adopted.").[6]

Here, Plaintiff's claim is not simply that she has the right to be heard by a legislative body considering a policy—to which the right does not extend—but furthermore that she must be heard in a *specific place and manner* of her choosing—that is, she wishes to personally be present at the Capitol while in possession of marijuana, in violation of federal law. She does not assert that she is unable to communicate with her representatives in other ways, including by video, telephone, mail, electronic mail, or otherwise; indeed, she concedes that she "could . . . write a letter or telephone individual members of Congress." Pl. Br. at 3. And Plaintiff further concedes that it would even be "possible for members of Congress to meet with Alexis and other medical Cannabis patients . . . off federal property," where she asserts that her possession of marijuana would be permitted under the law of the District of Columbia—permitting Plaintiff

[6] The cases Plaintiff cites are not to the contrary. For instance, in *Cyr v. Addison Rutland Supervisory Union*, the court concluded that a "categorical ban[s] of a single individual" from otherwise "open . . . meetings" did not "leave open ample alternative channels of communication." 60 F. Supp. 3d 536, 548 (D. Vt. 2014). Important to the court's analysis was that the defendants "singl[ed]" plaintiff "out . . . for exclusion, thereby permitting all others to engage in similar activity . . . ." *Id.* at 549 (quoting *Huminski v. Corsones*, 396 F.3d 53, 92 (2d Cir. 2005)). *Brown v. City of Jacksonville* is to similar effect. *See* No. 06 Civ. 122, 2006 WL 385085, at *4 (M.D. Fla. Feb. 17, 2006). There, the court *upheld* council rules against disruption that permitted the plaintiff's exclusion from a city council meeting, and *upheld* the council's decision to remove her from a particular meeting for disruption—and rejected only the council's "directive banning [the plaintiff] from seven future cycles of Council meetings." *Id.* at *3-4. The generally applicable regulations at issue here are not analogous.

even the in-person meeting that she seeks. Pl. Br. at 60. Thus, because Plaintiff has not made a substantial showing that the Petition Clause supports Plaintiff's claim, it is unlikely to succeed.

## III. Plaintiff Does Not Meet the Remaining Requirements to Establish Her Entitlement to Injunctive Relief

Plaintiff has also not made a "clear showing," *Winter*, 555 U.S. at 22, that she meets the remaining requirements for injunctive relief, including that she would be irreparably harmed in the absence of an injunction; that the entry of an injunction would serve the public interest; and that the balance of hardships tips in her favor.

First, it is unclear that any harm to Plaintiff would be irreparable. She claims irreparable harm principally on her assertion that she has alleged a violation of a constitutional right (Pl. Br. at 34-35), but for the reasons set out in Section II, Plaintiff has not made a plausible allegation of such a violation. While Plaintiff claims that her use of marijuana is medically necessary and a fundamental right, this proposition has been rejected by the courts, *see* Section II.E—and moreover, Plaintiff asserts that she currently has unrestricted access to medically necessary marijuana where she lives, in Colorado. The remainder of her claim to potential harm is that, if she travels to Washington D.C. by air or enters federal property while in possession of medical marijuana, she may be subject to the enforcement of the CSA. But Plaintiff admits that she can communicate with her elected representatives through other means. Pl. Br. at 3. She also does not assert that she could not appear remotely at an event in Washington, D.C. (*e.g.*, by video), or that her current speaking invitation is a one-time occurrence that could not be repeated at a future date. Thus, Plaintiff has presented insufficient evidence to make a "clear showing" that she would be subject to a cognizable and irreparable harm, even if she is unable to travel pursuant to her request.

Moreover, Plaintiff concedes that she *does* in fact have the ability to "travel to, and advocate on, federal lands and inside federal buildings," as long as she "leave[s] her medical Cannabis behind." Pl. Br. at 54. While she claims that this presents a "Hobson's Choice" between two "fundamental right[s]," *id.*, she points to no law indicating that there is a fundamental right to use medical marijuana. Indeed, as noted above, courts have concluded the opposite—that such a right is not recognized. *See Raich II*, 500 F.3d at 866 (holding that "federal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering"); *Doe*, 2017 WL 3160306, at *2 ("To date, no court has recognized a fundamental right to use medical marijuana recommended by a physician."); *Wilde*, 74 F. Supp. 3d at 1095 ("[N]o court to date has held that citizens have a constitutionally fundamental right to use medical marijuana.").

Second, the entry of a TRO or preliminary injunction would not serve the public interest, and for similar reasons, Plaintiff has not shown that the balance of hardships tips in her favor. As set out above, Plaintiff has not shown a likelihood of success on the merits of her constitutional challenges or that she would be irreparably harmed in the absence of injunctive relief, and thus, she has not shown that she is subject to cognizable hardship.

Furthermore, the government has a "general interest in promoting public health and safety by enforcing the Controlled Substances Act." *Christie*, 825 F.3d at 1057 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 438 (2006)). "In enacting the Controlled Substances Act, Congress stated that '[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.'" *United States v. Israel*, 317 F.3d 768, 771 (7th Cir. 2003) (citing 21 U.S.C. § 801(2)) (internal

citation and brackets omitted). "Congress' inclusion of marijuana as a Schedule I controlled substance makes it clear the belief that [marijuana] is a serious threat to the public health and safety." *Id.*

Plaintiff's argument appears almost unbounded in its breadth as applied to medical marijuana users: under her formulation, any individual who has a prescription for medical marijuana from a doctor is entitled to injunctive relief against the enforcement of the CSA by alleging a vague right to travel, to petition, or to enjoy a fundamental right. The effect of such relief would threaten to undermine the public's interest in the federal regulatory scheme.

While Plaintiff argues that there could be no "harm" to the public "from enforcing an unconstitutional law," Pl. Br. at 58, this circular argument assumes that she will prevail on her constitutional challenges, most of which have already been repeatedly rejected by the courts. Accordingly, Plaintiff has not demonstrated either that the public interest would be served by the entry of an injunction or that the balance of hardships tips in her favor.

## CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's request for a temporary restraining order and preliminary injunction.

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New York, New York

Respectfully submitted,

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