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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 26.1, and to enable the Judges of this Court to evaluate possible disqualification or recusal, undersigned counsel hereby certifies that Plaintiff Cannabis Cultural Association, Inc. ("CCA") is a not-for-profit organization, incorporated in New York State, with public charity status under Internal Revenue Code 501(c)(3). The CCA has no parent corporation and no publicly held corporation owns 10% or more of its stock.

RULE 7.1 STATEMENT

Pursuant to Federal Rule of Civil Procedure 7.1, and to enable the Judges of this Court to evaluate possible disqualification or recusal, undersigned counsel for the Plaintiffs-Appellants hereby certifies that, except for the CCA, Plaintiffs are individuals. None of the Plaintiffs have any corporate parents, subsidiaries, or affiliates.

JURISDICTIONAL STATEMENT

On July 24, 2017, the Plaintiffs commenced this action in the United States District Court for the Southern District of New York, against the government Defendants. This Court has subject matter jurisdiction pursuant to 28 U.S.C. 1291, as the District Court granted the Defendants' Motion to Dismiss on February 26, 2018. (A-280). A timely Notice of Appeal was filed on March 28, 2018 and an Amended Notice of Appeal on March 29, 2018 (A1).

INTRODUCTION

This brief is submitted on behalf of Petitioners-Appellants, a coalition comprised of individuals and a non-profit organization deprived of their rights under the U.S. Constitution ("Plaintiffs" or the "Coalition"). By this Appeal, the Coalition seeks reversal of the lower court's decision and judgment ("Decision"), dismissing Plaintiffs' Amended Complaint ("Complaint") with prejudice.

Two of the Plaintiffs -- Alexis Bortell ("Alexis") and Jagger Cotte ("Jagger") need to treat with Cannabis daily in order to keep themselves alive (A105,106,112). As the court below acknowledged, Plaintiffs "are living proof of the medical appropriateness of marijuana" (A382). Unfortunately, under the Controlled Substances Act ("CSA"), treatment with Cannabis by Alexis and Jagger, two young children, is a felony (21 U.S.C. §812), thereby resigning them to lives of constant trepidation that their parents may be arrested and prosecuted under the CSA (A24-38,42,96,105).

The Coalition instituted this action, interposing seven claims that the classification of Cannabis as a Schedule I drug under the CSA violates Plaintiffs' rights under the U.S. Constitution, including, *inter alia*, the rights of Alexis and Jagger to preserve their health and lives through treatment with the *only* medication that keeps them alive (A105-6;A112-13). The Complaint also includes as-applied constitutional claims that the classification of Cannabis under the CSA, *inter alia*, is

irrational and violates principles of substantive due process, equal protection, and Plaintiffs' rights to free speech and travel.

In response, the lower court, departing from the Second Circuit's decision in *U.S. v. Kiffer* 477 F.2d 349 (2d Cir. 1973), ruled that Plaintiffs, before instituting legal action to challenge the constitutionality of the CSA, were required first to exhaust administrative remedies available thereunder. Administrative review under the CSA averages nine (9) years to complete and, for the last 40+ years, has resulted in the rejection of every application to remove the classification of Cannabis from Schedule I (A90-94), including just 11 months before institution of this lawsuit (*In re Krumm*, 81 Fed. Reg. 53,767 (Aug. 12, 2016)).

For the reasons set forth below, the Decision below should be reversed and the Complaint reinstated.

SUMMARY OF ARGUMENT

Cannabis is classified under the CSA as a Schedule I drug (A21). To have been classified under Schedule I, three specific findings must first have been made that Cannabis:

(i) has a high potential for abuse;

(ii) has no currently accepted medical use in treatment in the United States; and

(iii) cannot be tested, even under strict medical supervision.

("Three Schedule I Requirements"). 21 U.S.C. §812(b)(1). As the lower court

observed, the latter two findings *cannot* be met, commenting that:

> [i]t is difficult to conclude that marijuana is not currently being used for medical purposes. It is. *There would be no rational basis to conclude otherwise* (A383).

The lower court thereafter recited each of the Three Schedule I Requirements, and acknowledged that "[y]ou [Plaintiffs] win on two" (A390) -- an acknowledgment based upon common experience, insofar as, *inter alia*:

- 30 States, with approval from the Federal Government, currently maintain Medical Cannabis programs (A23-24);
- since 2002, the U.S. Government has owned two patents on Medical Cannabis, explicitly representing that it constitutes a safe and effective treatment for an assortment of diseases ("U.S. Medical Cannabis Patents") (A80;228);[1] and
- since 1978, the U.S. Government has been growing and distributing Medical Cannabis to patients all over the Country pursuant to the Investigational New Drug Program ("IND Program") (A71).

Thus, Cannabis is classified as a Schedule I drug, which requires advance "findings" that it has *no accepted medical purpose in the United States* and *is too dangerous to test (even under strict medical supervision)*, and yet, the lower court properly acknowledged there is no rational basis to conclude that it actually meets these two Schedule I Requirements, ostensibly because the Federal Government owns two Medical Cannabis Patents and cultivates and distributes Cannabis to patients on

[1] patentscope.wipo.int/search/en/detail.jsf?docId=WO1999053917&redirectedID=true.

a monthly basis throughout the Country. Nevertheless, the lower court dismissed the Complaint with prejudice. The Decision is the product of multiple errors of law.

First, the lower court erred, as a matter of law, in ruling that Plaintiffs were required to exhaust administrative remedies before instituting this action. The mandatory administrative exhaustion doctrine does not apply in the absence of clear, express intent by Congress to impose such a requirement. And here, neither the text of the CSA nor the case law construing it reveals any congressional intent to impose mandatory administrative exhaustion upon those aggrieved by the CSA's provisions. Accordingly, at a minimum, Plaintiffs are entitled to remand, with a directive that the lower court exercise its discretion to determine whether requiring administrative exhaustion would be appropriate.

Second, the lower court should have exercised its discretion and permitted this litigation to proceed because: (i) administrative exhaustion is not required where constitutional rights are being violated, as is alleged here; (ii) the institutional 9-year delay associated with the review process would defeat, not only Plaintiffs' constitutional rights, but worse, would effective kill two members of the Coalition; and the lower court's proposed "solution" to the delay -- institution of a *mandamus* proceeding -- constitutes no solution at all, since a precondition to filing such a proceeding is the very delay that Plaintiffs cannot endure; (iii) an administrative appeal would be futile because all of the decision-makers that would be involved in

deciding a rescheduling petition expressed their opposition to re-classifying Cannabis shortly before institution of this lawsuit; and most importantly, (iv) administrative review would not afford Plaintiffs the relief that they seek – a declaratory judgment and injunction, restraining the Federal Government from enforcing the CSA as it pertains to Cannabis.

Third, the lower court erred in dismissing Plaintiffs' substantive due process claim and ruling that the CSA is rationally related to a legitimate governmental interest. Specifically, as the lower court repeatedly acknowledged, Cannabis does not meet all Three Schedule I Requirements; indeed, it would be irrational to conclude otherwise. The lower court nonetheless ruled that the failure to meet the Three Schedule I Requirements is irrelevant because they supposedly do not apply to classifications made by Congress. That ruling is unsupported by any citation to authority, conflicts with the language of the CSA, and controverts well-established case law including the Supreme Court decision in *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483 (2001).

Fourth, the lower court's ruling that the Constitution does not guarantee the right to preserve one's health and life against intrusions by the Federal Government constitutes clear error of law, representing a rank departure from controlling authority. Indeed, the very text of the Fifth Amendment, which expressly proscribes the Federal Government's deprivation of a person's life without due process, renders

the Decision on this point (offered by the lower court without citation to any authority) a genuine head-scratcher.

Fifth, the lower court erred in dismissing the Coalition's equal protection argument. With respect to standing, the lower court's conclusion that Plaintiffs did not "connect the dots" between the relief Plaintiffs seek -- a declaration that the CSA is unconstitutional -- and the benefits that would thereby be conferred upon members of the Coalition is simply unsupported by the record. In addition, contrary to the lower court's ruling, legislation drafted and then signed into law by the executive branch *is* susceptible to an equal protection claim despite the absence of allegations of animus against Congress. As shown below, the CSA was conceived, authored and then pushed through Congress by the Nixon Administration for the express purpose of suppressing political and civil rights of war protestors and persons of color (A70). And, regrettably, it worked; persons of color are four times more likely to prosecuted for Cannabis-related crimes under the CSA than white Americans, even though Cannabis is used in equal proportions by both racial groups (A20). To suggest that a law passed under such circumstances could avoid constitutional scrutiny would insulate the executive branch from the consequences of rank unconstitutional and discriminatory behavior.

Sixth, the lower court erred in ruling that the CSA does not infringe upon Plaintiffs' rights to travel and engage in in-person advocacy. The members of the

Coalition who require daily administration of Medical Cannabis to preserve their health and lives must keep it with them at all times. Thus, they cannot travel between States, onto federal lands (including to Washington, DC) or by means of federally-regulated transport (air travel, trains, etc.) without risking arrest. Because they cannot travel with their Medical Cannabis, Plaintiffs cannot exercise their constitutionally-guaranteed rights to travel and engage in-person advocacy of their representatives in Washington, DC -- a particularly frustrating consequence given that at least one member of the Coalition (Alexis) was invited to testify before Congress, but could not attend because she could not safely leave her life-preserving Cannabis behind (A32).

Americans cannot be required to relinquish one right (self-preservation) in order to exercise others (rights to travel and engage in in-person advocacy). When confronted with this argument on Plaintiffs' request for a temporary restraining order, the lower court responded, "It is a good argument" (A324); nonetheless, on the motion to dismiss, the lower court reversed course and rejected it, ruling that the CSA, constituting a law of general application, did not restrict Plaintiffs' Cannabis treatments, but rather merely increased the likelihood that Plaintiffs would be arrested in the event that they were to travel onto federal lands (A269,270). The lower court's argument presupposes that laws of general application can never constitute an infringement upon constitutional rights which, respectfully, reflects an error of law.

Lastly, the CSA constitutes an unconstitutional expansion of congressional

power under the Commerce Clause. To the extent that the decision in *Gonzalez v. Raich*, 545 U.S. 1 (2005) is to the contrary, it should be narrowed or overruled completely. For these and the reasons set forth below, the Coalition is entitled to reversal and reinstatement of the Complaint.

QUESTIONS PRESENTED

I. Is administrative exhaustion mandatory under the CSA?

II. Assuming that administrative exhaustion were discretionary and the lower court erred in ruling to the contrary, should the lower court have dismissed the Complaint and resigned Plaintiffs to a lengthy and futile administrative review?

III. Assuming that the CSA actually were to impose mandatory administrative review, does the record herein warrant application of an exception?

IV. Did Congress, in the CSA, excuse itself from the obligation to meet the Three Schedule I Requirements for designation of a Schedule I drug? Are there different criteria for Schedule I drugs designated by Congress and those classified by the Attorney General?

V. Does the Constitution guarantee the right to preserve one's health and life?

VI. For purposes of analyzing standing, would a ruling that the classification of Cannabis under the CSA is unconstitutional provide any benefit to Plaintiffs?

VII. Is a racially-discriminatory and politically-suppressive statute, authored

and ushered through Congress by the President, insulated from constitutional challenge because the animus underlying the law lies with the executive, rather than the legislative, branch?

VIII. Does the First Amendment guarantee the right of in-person advocacy?

IX. Given that members of the Coalition need to keep Medical Cannabis with them at all times in order to keep themselves alive, is the CSA, as applied, an unconstitutional infringement upon their rights to travel and engage in in-person advocacy? Does the Constitution permit the Federal Government to impose a Hobson's Choice on Americans – *i.e.*, relinquish either: (i) life-saving medication and thus the right to self-preservation or (ii) free speech and travel?

X. Does Congress have the power under the Commerce Clause to regulate purely intra-state cultivation, sale, possession and use of Cannabis, even in the absence of any showing that it has had an impact on interstate commerce?

FACTS THAT SHOULD HAVE BEEN ASSUMED TRUE BELOW

Plaintiffs

Alexis (age 12) suffered from multiple, life-threatening seizures per day for approximately 14 months (A30;373), when her parents were offered a choice by her doctors – experimental surgery which would have resulted in the removal of a significant portion of her brain, or treatment with Cannabis (A286). Her parents chose the latter, and, as a result, Alexis has not had a seizure in more than three years

(A287).

Jagger was diagnosed with Leigh's Disease before the age of two (A36). When diagnosed before age two, Leigh-Disease patients die before age four (*Id.*). One week before his fourth birthday, Jagger's condition had deteriorated to the point that his parents moved him into a hospice (A373). To alleviate his excruciating pain, he was given Cannabis (A37). Today, Jagger is seven years old and living at home with his parents (A373).

Jose Belen ("Officer Belen") is an Iraq War Veteran who suffers from post-traumatic stress disorder (A34). His symptoms were so bad that he was regularly placed on suicide watch – a genuine threat, insofar 22 veterans commit suicide every day (A35). Since he began treating with Cannabis, Officer Belen has not suffered any suicidal ideation whatsoever.

Marvin Washington, a Super Bowl winning defensive lineman, is a businessman interested in the Cannabis industry; however, he is not eligible to participate in the Federal Minority Business Enterprise Program because his business would be illegal under the CSA (A29).

The CCA is a non-profit organization, advocating on behalf of persons of color negatively affected by the CSA (A38). Members of the CCA have been convicted of Cannabis-related "crimes" and otherwise subjected to persecution under the racially-motivated and discriminatory CSA (A39). Members of the CCA seek to

emerge from the stigma of having been convicted under the CSA, but cannot do so absent a declaration that the classification of Cannabis thereunder is unconstitutional (A38-39).

Widespread Use and Acceptance of Cannabis Over the Course of World History

As reflected in the Complaint, Cannabis has been utilized in a multitude of ways by diverse groups and societies all over the world for the last 10,000 years, frequently with a listing of its curative properties in medical treatises independently published in cultures ranging from Ancient Egypt, China, Venetia and Greece, to 16th and 17th Century Britain, to Colonial and Post-Civil War America (A43-56). American colonists who cultivated and/or used hemp in the pre-Revolutionary War era included George Washington, Thomas Jefferson, and Benjamin Franklin (A49).

During the early 19th Century, Cannabis enjoyed widespread acceptance as an effective medicine for the treatment of illness and disease, and was listed in multiple medical treatises, including, *inter alia*, the widely-distributed *United States Pharmacopoeia,* a highly selective listing of America's most widely taken medicines (A52-54). By the latter half of the 19th century, "every pharmaceutical company [in America was] ... busy manufacturing [C]annabis-based patent cures" (A54).

Nixon Urges Passage of the CSA to Suppress the Rights of those Regarded by His Administration as the Political Opposition

In 1969, then-President Nixon urged Congress to enact new legislation that

would classify drugs under separate schedules according to their medical utility, dangerousness, and addictive potential (A62). As shown *infra*, former Attorney General John Mitchell of the Nixon Administration actually *drafted* the CSA. Congress then adopted the CSA at Nixon's insistence on October 27, 1970 -- approximately one month after it was introduced. At the request of the Nixon Administration, Congress placed Cannabis under Schedule I (A62-63).

While "[t]here is almost total agreement among competent scientists and physicians that marihuana is not a narcotic drug like heroin or morphine ... [and to] equate its risks ... with the risks inherent in the use of hard narcotics is neither medically or legally defensible[,]"[2] Congress nonetheless listed Cannabis under the same schedule as the world's most dangerous narcotics (A63). The classification of Cannabis under Schedule I was intended by Congress to be temporary and subject to further research (A63). This "further research" was assigned to the National Commission on Marihuana and Drug Abuse – a commission established by the CSA for the purpose of studying, *inter alia*, Cannabis's pharmacological makeup and its relationship (if any) to the use of other drugs (A63-64).

President Nixon thereafter appointed Raymond Shafer to Chair this new commission ("Shafer Commission") (A64). The Shafer Commission, after exhaustive

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[2] *Drug Abuse Control Amendment–1970: Hearings Before the Subcomm. on Public Health and Welfare*, 91st Cong. 179 (1970).

research, concluded that Cannabis was not harmful and should be de-scheduled ("Shafer Commission Findings") (A64-66).

The Shafer Commission Findings also recommended that possession of Cannabis for personal use be de-criminalized on both the State and Federal levels (A66). Unfortunately, the Nixon Administration rejected the Shafer Commission Findings (A68-69). John Ehrlichman, who served as the Nixon Administration's Domestic Policy Chief and was among the President's closest political advisors, explained why:

> You want to know what this was really all about? The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.

See A66-67;A149-54.

Roger Stone, another key member of the Nixon Administration, corroborated Mr. Ehrlichman's account of the bigotry and efforts at political suppression underlying the CSA's enactment, and submitted an affidavit herein so attesting (A400-401). The accounts of Messrs. Stone and Ehrlichman are further corroborated by a diary entry of H.R. Haldeman, another senior member of the Nixon Administration, who wrote:

> [Nixon] emphasized that you have to face the fact that the whole problem is really the blacks. The key is to devise a system that recognizes this while not appearing to [do so].[3]

The racial and political animus underlying Nixon's support for the CSA and rejection of the Shafer Commission Findings is further revealed by tape recordings of the former President, in which Nixon repeatedly made clear that the real purpose of the Shafer Commission had been to justify the criminalization of Cannabis in order to oppress political and racial minorities (A62-70), ultimately linking support for its de-criminalization to Jews, whom Nixon irrationally claimed were "mostly psychiatrists" (A67-68).

The Nixon Administration's efforts to marginalize and oppress racial and political minorities were alarmingly "successful" (A70). "[B]y 1973, about 300,000 people were arrested under the law [the CSA] – the majority of whom were African American" (A149-154).

The Federal Government Does Not, and Cannot Genuinely Believe, That Cannabis Meets the Three Schedule I Requirements

After the Shafer Commission Findings were issued, the Federal Government, beginning in or about 1978 and continuing to this day, has cultivated and distributed

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[3]http://www.nytimes.com/1994/05/18/us/haldeman-diary-shows-nixon-was-wary-of-blacks-and-jews.html.

Medical Cannabis to patients throughout the U.S. pursuant to the IND Program (A71-72). Significantly, the FDA excludes drugs from the IND Program when: (1) the FDA believes that the drugs are ineffective; or (2) granting the request for inclusion in the IND Program would expose patients "to an unreasonable and significant additional risk of illness or injury" (21 C.F.R. §312.34(b)(3)). The FDA has never excluded Cannabis from the IND Program. And the Federal Government knows that none of the patients who have participated in the IND Program have ever suffered any serious side effects from Cannabis (A72-73).

The Federal Government Did Not Contest the Findings of a Federal Administrative Law Judge Who Determined that Cannabis is Safe, Therapeutic and Effective in Treating Disease

In the context of a previous administrative review under the CSA, Federal Administrative Law Judge Francis Young, *In the Matter of Marijuana Rescheduling*, DEA Docket No. 86-22, issued a determination in which he concluded, based upon "overwhelming" evidence, that:

> marijuana has a currently accepted medical use in treatment in the United States for nausea and vomiting resulting from chemotheraphy treatments in some cancer patients. To conclude otherwise, on this record, would be unreasonable, arbitrary and capricious.

(A191;A75). Judge Young reached precisely the same conclusion with respect to "spasticity resulting from multiple sclerosis and other causes"(A211;A75). Thus, Judge Young determined that Cannabis cannot meet the second of the Three Schedule

I Requirements – *i.e.*, that it does not have any accepted medical use.

Judge Young, turning to the third of the Three Schedule I Requirements, ruled that Cannabis is completely safe, concluding in pertinent part:

> Marijuana, in its natural form, is one of the safest therapeutically active substances known to man. By any measure of rational analysis, marijuana can be safely used within a supervised routine of medical care.

A215-16;A77. Judge Young thereafter recommended that Cannabis be de-scheduled (A223;A77). Unfortunately, Judge Young's findings and recommendations were not binding. And the Drug Enforcement Administration ("DEA"), consistent with every other rescheduling petition ever filed under the CSA, rejected all of them (A77).

The Federal Government Permits States to Enact Their Own Medical Cannabis Programs

Since 1996, 30 States, plus Puerto Rico, Guam and Washington, DC (with congressional approval), have legalized Cannabis for medical and other uses (A78-79; 79-n.2). As of 2016, 62% of Americans lived in a jurisdiction in which Cannabis is legal for medical and/or other purposes (A79). Cannabis has also been available *illegally* (*i.e.*, on the "black market") to millions of Americans for approximately 100 years (A79). Despite its widespread availability and use, no credible medical report has ever confirmed a single fatality in the U.S. from the consumption of Cannabis (A79;A213-14). By contrast, according to the following reports (most of which were

issued by agencies of the Federal Government), the following "legal" substances have caused the following number of fatalities in the U.S.:

(a) tobacco – 480,000 deaths/year;[4]

(b) alcohol – 88,000 deaths/year;[5]

(c) pharmaceutical opioid analgesics – 18,893/year;[6]

(d) acetaminophen – 1,500 deaths (2001 to 2010) (A79-80).

The Federal Government Acquires Medical Cannabis Patents, Formally Acknowledging that Cannabis Constitutes a Safe, Effective Treatment for Disease

In or about 1999, the Federal Government filed with the World Intellectual Property Organization ("WIPO"), a patent application ("WIPO Medical Cannabis Patent") entitled: "CANNABINOIDS AS ANTI-OXIDANTS AND NEUROPROTECTANTS."[7] In its WIPO Medical Cannabis Patent, the Federal Government asserted that Cannabis provides medical benefits to patients suffering with an assortment of diseases and conditions, including, *inter alia*, "ischemic, age-related, inflammatory and autoimmune diseases," and "in the treatment of

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[4]https://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/tobacco_related_mortality/index.htm

[5]https://www.niaaa.nih.gov/alcohol-health/overview-alcohol-consumption/alcohol-facts-and-statistics.

[6]https://www.cdc.gov/nchs/data/factsheets/factsheet_drug_poisoning.pdf.

[7]https://patentscope.wipo.int/search/en/detail.jsf?docId=WO1999053917&redirectedID=true.

neurodegenerative diseases, such as Alzheimer's Disease, Parkinson's Disease, and HIV Dementia" (*Id.*). The Federal Government also specifically "claim[ed]" in its WIPO Application that Cannabis is:

> A method of treating diseases caused by oxidative stress, comprising administering a therapeutically effective amount of a cannabinoid to a subject who has a disease cause by oxidative stress (*Id.*).

The Federal Government made identical claims and representations in a separate U.S. Medical Cannabis Patent Application (A227-36;A80-81), citing a series of studies and academic papers supporting its conclusion that Cannabis safely provides medical benefits (*Id.*). And a U.S. patent cannot issue in the absence of a representation of utility (35 U.S.C. §101). Thus, the Federal Government maintains in its U.S. and WIPO Medical Cannabis Patents that Cannabis *safely provides medical benefits to patients* while simultaneously criminalizing Cannabis under the CSA based upon the "finding" that *it has no medical application whatsoever and is too dangerous to test* (A81).

The Federal Government Implements National Policy to Permit State-Legal Medical Cannabis Use

Amidst the trend of State laws legalizing Cannabis across the U.S., the Federal Government was confronted with an irreconcilable conflict between State and Federal laws (A81;82). To address this dichotomy, defendant Department of Justice ("DOJ") issued memoranda on October 19, 2009 and August 29, 2013 ("Ogden Memorandum"

and "Cole Memorandum," respectively) directing U.S. Attorneys to de-prioritize prosecution of Cannabis-related CSA crimes under circumstances in which possession and medical use is legal under State law (A237-245; *see also* A82-84).

Thereafter, on February 14, 2014, the Financial Crimes Enforcement Network ("FinCEN"), a division of the U.S. Department of Treasury, issued a "FinCEN Guidance -- a memorandum advising financial institutions as to how they could transact with Cannabis businesses that openly violate both the CSA and 18 U.S.C. §1956 (laundering of monetary instruments) (A247;A84). In this regard, the FinCEN Guidance states:

> This FinCEN guidance clarifies how financial institutions can provide services to marijuana-related businesses consistent with their [Bank Secrecy Act] obligations, and aligns the information provided by financial institutions in [Bank Secrecy Act] reports with federal and state law enforcement priorities. This FinCEN guidance should enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses (A247;A84-85).

Continuing the informal policy rejecting enforcement of the CSA against State-compliant actors, the U.S. Surgeon General (America's Chief Medical Officer), on February 4, 2015, appeared on national television and acknowledged the medical efficacy of Cannabis to patients (A86). Correspondingly in 2017, defendant DEA, in response to a lawsuit claiming that the DEA website contained dishonest representations regarding Cannabis in violation of the Information Quality Act (A254-57), suddenly removed the bogus allegations from its website that Cannabis

is a drug that: (i) serves as a "gateway" to other drugs; (ii) causes "permanent brain damage;" and (iii) leads to psychosis (A86-87).

And every year, beginning in December 2014, Congress has included riders to omnibus appropriations legislation, expressly prohibiting use of federal funds to prosecute State-legal cultivation, possession, and sale of, and treatment with, Cannabis ("Funding Riders") (A87-89) (collectively, the facts uncovered following enactment of the CSA – *e.g.*, IND Program, U.S. Medical Cannabis Patents, Cole and Ogden Memoranda, FinCEN Guidance, etc., shall be referred to hereinafter the "New Facts").

The lower court ruled that, even assuming all of the New Facts are true, the Complaint fails to state a claim.

PROCEDURAL HISTORY

Plaintiffs commenced this action on July 24, 2017. On September 8, 2017, Alexis requested a temporary restraining order ("TRO") and preliminary injunction, enjoining enforcement of the CSA so that she could legally meet with members of Congress who had requested her appearance on Capitol Hill to address pending legislation, including, *inter alia*, the Marijuana Justice Act (A32). Although acknowledging that Plaintiffs had "amply" presented all of the "necessary evidence to attack" the CSA, the lower court denied the TRO (A336). Nonetheless, the lower court reserved decision on whether to grant a preliminary injunction, consolidated the

hearing thereon with the trial herein, and announced that this case would be expedited and given "priority over all other matters ... even over criminal cases" (A341).

Lastly, during the TRO hearing, the lower court ruled that a Rule 12 motion would "not be appropriate because the issue is really the Constitution, as applied, and that requires a full record" (A336). When defendants' counsel persisted, the lower court responded:

> No. We are going to go into the facts. We are going to develop a record. This case will go up to the Second Circuit, and the Second Circuit is entitled to a full record on the matter (A337).

When defendants' counsel failed to relent, the lower court ultimately answered: "Your motion is denied" (A337). Six months later, the lower court reconsidered and granted dismissal (A260-79).

STANDARD OF REVIEW

The standard of review where the district court has dismissed a complaint under Rule 12 is *de novo*, accepting as true all factual allegations in the complaint and drawing all reasonable inferences in favor of the plaintiff. *Tongue v. Sanofi*, 816 F.3d 199, 209 (2d Cir. 2016). To survive a motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the

defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). As demonstrated below, the lower court's dismissal was predicated upon multiple errors of law, requiring reversal.

ARGUMENT

POINT I

THE LOWER COURT ERRED IN REQUIRING PLAINTIFFS TO SUBMIT TO MANDATORY ADMINISTRATIVE REVIEW

As demonstrated below, the lower court erred in granting dismissal based upon alleged failure to exhaust administrative remedies, given that: (A) administrative exhaustion is not mandatory under the CSA; and, in any event, (B) multiple exceptions to administrative exhaustion apply, thereby warranting the exercise of discretion to permit this action to proceed.

A. ADMINISTRATIVE EXHAUSTION IS NOT MANDATORY UNDER THE CSA

Citing *McCarthy v. Madigan*, 503 U.S. 140 (1992), the lower court ruled that "the exhaustion rule generally requires 'that parties exhaust prescribed administrative remedies" (A266). Then, without further analysis, the lower court decided that the three exceptions to mandatory administrative exhaustion do not apply (*Id.*). However, the Supreme Court in *McCarthy* actually ruled that the doctrine of administrative exhaustion may be mandatory *or discretionary*, depending on evidence

of congressional intent:

> Of "paramount importance" to any exhaustion inquiry is congressional intent. Where Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs.

McCarthy, 503 U.S. at 144 (internal citations omitted); *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 518 (1982) (White, J., concurring in part) ("[E]xhaustion ..., unless Congress directs otherwise, [is] rightfully subject to crafting by judges").

In divining congressional intent to determine whether administrative exhaustion is mandatory or discretionary, the presumption is on the latter. Merely making an administrative procedure available to aggrieved parties does not imply that exhaustion is *mandatory*. *See, e.g., Ethridge v. Alabama,* 847 F.Supp. 903, 907 (M.D. Ala. 1993) (ADA requirement that the DOJ make review procedures available to aggrieved parties did not mandate exhaustion). To the contrary, the imposition of mandatory administrative review must be express and clear from the text of the statute. As explained by this Court in *Bastek v. Federal Crop Ins. Corp.*:

> If Congress has not *explicitly* required exhaustion, judicial exhaustion doctrine provides that courts may, in their discretion, waive administrative exhaustion.

145 F.3d 90, 94, n.4 (2d Cir. 1998) (emphasis added); *accord Trafalgar Capital Assocs. v. Cuomo*, 159 F.3d 21, 36 (1st Cir. 1998) ("When Congress *explicitly* requires that administrative remedies must be pursued before seeking judicial relief,

litigants must obviously follow that mandate. On the other hand, "where Congress has not *clearly required* exhaustion, sound judicial discretion governs") (citation omitted) (emphasis added); *see also Yahweh v. U.S. Parole Comm'n.*, 158 F.Supp.2d 1332, 1341-42 (S.D. Fla. 2001) ("Under *McCarthy*, exhaustion is only mandatory and nondiscretionary where 'Congress *specifically* mandates' it") (*quoting McCarthy supra*) (emphasis added).

Here, the CSA does not require exhaustion, explicitly or otherwise. Instead, the availability of administrative review under the CSA is written as a mere *authorization* to *allow* the Attorney General to re-classify drugs under different schedules under a variety of circumstances, including "on the petition of any interested party." 21 U.S.C. §811(A)(2)(3). No provision of the CSA purports to impose administrative exhaustion as a jurisdictional predicate to institution of litigation. A statute that merely authorizes an agency to promulgate procedures to consider administrative applications does not constitute an express *requirement* to complete administrative exhaustion. *See, e.g., Florida Home Med. Supply, Inc. v. U.S.*, 131 Fed. Cl. 170, 181 (2017); *accord Rollock Co. v. U.S.*, 115 Fed. Cl. 317, 331 (2014) (similar analysis under the Uniform Relocation Assistance and Real Property Acquisition Policies Act). Regrettably, however, the lower court erroneously *assumed* mandatory exhaustion applied without engaging in any analysis of congressional intent, resigning Plaintiffs to fall within an exception to mandatory

review – a ruling that constitutes clear error of law under *McCarthy* and its progeny.[8]

That administrative review is discretionary under the CSA may explain why this Court in *Kiffer* did not rely upon the mandatory exhaustion doctrine. Instead, this Court, after weighing a series of factors (including the parties' interests), *permitted* the criminal defendant in *Kiffer* to challenge the constitutionality of the CSA. As binding authority in this Circuit, the decision in *Kiffer* requires the same result here.

Lastly, the lower court declined to follow *Kiffer*, remarking that one of the factors weighed therein -- that imposing an administrative exhaustion requirement upon the criminal defendant therein would be unduly burdensome -- did not apply to this case because the burdens associated with instituting an administrative proceeding allegedly "are less forceful in the civil context" (A268). The lower court's ruling on this issue is unsupported by any citation to authority (*Id.*). More importantly, mandatory administrative exhaustion is no less burdensome to Plaintiffs, one of whom is a disabled Iraq War Veteran (Officer Belen); and two of whom are children, whose families were forced to abandon their homes and their parents' jobs to relocate to States in which Medical Cannabis is legal (A37;A47), and who are now desperately trying to continue their access to life-saving medication.

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[8]The Supreme Court ultimately ruled in *McCarthy* that the petitioner therein did *not* have to submit to an administrative review process, not because any of the exceptions applied, but because exhaustion was not expressly mandated by Congress, and the petitioner's individual interest in obtaining prompt access to a federal judicial forum outweighed any countervailing institutional interests favoring exhaustion. *McCarthy*, 503 U.S. at 146.

B. EVEN ASSUMING THAT MANDATORY ADMINISTRATIVE EXHAUSTION WERE REQUIRED UNDER THE CSA, EACH OF THE EXCEPTIONS THERETO APPLIES

Even if administrative exhaustion *were* required (and it is not), the requirement of exhaustion has traditionally been waived in three circumstances: (i) when the challenged agency action presents a violation of statutory or constitutional rights;[9] (ii) when resort to administrative procedures is "clearly shown to be inadequate to prevent irreparable injury;"[10] and (iii) when exhaustion is "futile."[11]

Corollaries to these exceptions, which the lower court incorporated into its analysis, include: (i) where resort to the administrative remedy would cause "undue prejudice to subsequent assertion of a court action" due to, for example, "an unreasonable or indefinite timeframe for administrative action;"[12] (ii) there is doubt

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[9] *First Jersey Securities, Inc. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979).

[10] *Babcock and Wilcox Co. v. Marshall*, 610 F.2d 1128, 1138 (3d Cir. 1979).

[11] *U.S. ex rel. Marrero v. Warden, Lewisburg Penitentiary*, 483 F.2d 656, 659 (3d Cir. 1973), *rev'd on other grounds*, 417 U.S. 653 (1974); *see also Johnson v. U.S.*, 2014 U.S. Dist. LEXIS 123733, at *15 (D.N.J. Sept. 5, 2014) ("the administrative exhaustion requirement may be excused if an attempt to obtain relief would be futile or the purposes of exhaustion would not be served").

[12] *See e.g., Walker v. Southern R. Co.*, 385 U.S. 196, 198 (1966) (possible delay of 10 years in administrative proceedings makes exhaustion unnecessary); *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587, 591-92 (1926) (claimant "is not required indefinitely to await a decision of the rate-making tribunal before applying to a federal court for equitable relief"); *see also Gibson v. Berryhill,* 411 U.S. 564, 575 n.14 (1973) ("[A]dministrative remedies have been deemed inadequate by federal courts, and hence not subject to the exhaustion requirement, ... [m]ost often...because of delay by the agency").

as to "whether the agency was empowered to grant effective relief" such as when the agency "lacks institutional competence" to determine the constitutionality of a statute;"[13] and (iii) the administrative body is shown to be biased or has otherwise predetermined the issue before it[14] (A267). As demonstrated below, *all* of the exceptions, irrespective of how they are articulated, support waiver of administrative exhaustion (whether mandatory or discretionary).

First, administrative review of the classification of Cannabis would be futile. The DEA rejected a rescheduling application less than a year before this lawsuit was filed (Decision at 4-5, *citing Krumm*, 81 Fed. Reg. 53,767 (Aug. 12, 2016)). The DEA hasn't suggested that its classification of Cannabis would ever be subject to change. To the contrary, at the time that the lawsuit was filed, the then-Administrator of the DEA (Philip Rosenberg), with whom re-scheduling petitions would be filed, and who made recommendations to the Attorney General on such issues, had already "decided" that Medical Cannabis is "a joke" (A94-95); he rejected the "notion that

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[13] *See e.g., Gibson,* 411 U.S. at 575 n. 14; *Mathews v. Diaz*, 426 U.S. 67, 76 (1976) ("[T]he only issue before the District Court was the constitutionality of the statute ... this constitutional question is beyond the Secretary's competence"); *see also McCarthy*, 503 U.S. at 148 (*quoting Barry*, 443 U.S. at 63, n.10 and *Gibson*, 411 U.S. at 575) (exhaustion is not required "where the challenge is to the adequacy of the agency procedure itself, such that 'the question of the adequacy of the administrative remedy...[is] for all practical purposes identical with the merits of [the plaintiff's] lawsuit'").

[14] *See Gibson*, 411 U.S. at 575 n. 14 ("[A]dministrative remedies have also been held inadequate, however, where the state administrative body was found to be biased or to have predetermined the issue before it"); *accord R.S. v. Bedford Cent. Sch. Dist.*, 2011 U.S. Dist. LEXIS 41573, at *7-9 (S.D.N.Y. Mar. 17, 2011).

marijuana is also medicinal -- because it's not;" and that suggestion [*i.e.* that Cannabis is medicine] "really bothers" him.[15]

Meanwhile, defendant Sessions made similar statements adversely prejudging the possible reclassification of Cannabis including that: (i) "he thought the KKK 'were [sic] OK until I found out they smoked pot'" and (ii) "Good people don't smoke marijuana" (A95). And it is Sessions who is expressly charged with the responsibility of deciding re-scheduling petitions under the CSA. 21 U.S.C. §811(a)(2)(3). Furthermore, less than three months prior to commencement of this action, defendant Sessions, not only didn't express a willingness to reconsider Cannabis's classification; he actually urged Congress to revoke the Funding Riders so that he could prosecute those treating with State-legal Medical Cannabis (A41). And, if that weren't sufficiently clear, just one week before this lawsuit was filed, defendant Sessions announced his intention to file civil forfeiture proceedings against those who own and operate State-compliant Cannabis businesses -- what Sessions described as "dangerous illegal drug activity")(A41). It would be absurd to require Plaintiffs to file a re-classification petition with the Federal Government when the decision-makers previously rejected another re-classification petition just 11 months earlier, and have consistently expressed opposition to changing the designation of Cannabis.

[15]http://dailycaller.com/2015/11/05/dea-chief-says-medical-marijuana-is-a-joke/

Litigants are not required to resort to a futile administrative review, the outcome of which is already preordained. *See, e.g.*, *Monson v. Drug Enforcement Admin.*, 589 F.3d 952, 959 (8th Cir. 2009) ("The DEA has not advised this Court that it will change its position on the treatment of industrial hemp under the CSA, and Monson and Hauge should not be required to further pursue a futile course of action"). *See also Colton v. Ashcroft*, 299 F.Supp.2d 681, 689-90 (E.D. Ky. 2004) (the futility exception applies where there has been "a prior indication from the agency ... [that] has evidenced a strong position on the issue together with an unwillingness to reconsider") (*citing James v. Dep't. of Health and Human Serv's.*, 824 F.2d 1132, 1139 (D.C. Cir.1987)); *Western International Hotels v. Tahoe Regional Planning Agency*, 387 F. Supp. 429, 434, *vac'd in part, on other grounds*, *sub. nom. Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir. 1977) ("If an administrative body ... has made definite statements opposed to plaintiff's position, it is not required that the plaintiff proceed before the administrative body prior to seeking judicial review").

Second, as reflected above, the decision-makers under the CSA with authority to re-classify Cannabis are all biased in favor of maintaining the current classification, reinforcing the futility of proceeding through an administrative review. Plainly, Defendants will never change the classification of Cannabis through any administrative review.

Third, as reflected in the Complaint, the average delay in deciding a petition to re-classify a drug under the CSA is approximately nine years (A90-94). Meanwhile, two of the five Plaintiffs herein require Cannabis daily to keep themselves alive. The lower court suggested that the delay could be "overcome" through a *mandamus* proceeding filed simultaneously with a de-scheduling petition with the DEA (A270). The lower court's ruling on this issue was clear error. A *writ of mandamus* to compel agency action is an extraordinary remedy,[16] which may only be properly invoked *after* an egregious delay has occurred.[17] As made plain by the Court in *City of Virginia Beach*, "only an *egregious* delay would warrant the extraordinary remedy of mandamus." 42 F.3d at 884-85 (emphasis added). Thus, to institute a *mandamus* proceeding, an aggrieved party must first demonstrate that the reviewing agency has *already* unreasonably delayed its consideration of the petition[18] – a principle of law conceded by defendants below (A359). And that means that Plaintiffs would be required to endure an unreasonable delay *before* filing a *writ of*

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[16] *See e.g.*, *Connecticut Mut. Life Ins. Co.*, 131 U.S. 180, 180 (1880); *Cepeda v. U.S. Citizenship & Immigration Servs.*, 624 Fed.Appx. 52, 52 (2d Cir. 2015).

[17] *NRDC, Inc. v. U.S. Envtl. Prot. Agency (In re Pesticide Action Network N. Am.)*, 798 F.3d 809, 813 (9th Cir. 2015) (internal quotations omitted).

[18] *NRDC, Inc.*, 798 F.3d at 813-14; *City of Virginia Beach*, 42 F.3d at 884-85.

mandamus proceeding -- as long as *eight* years (according to the case law).[19] The members of the Coalition who need Cannabis daily in order to sustain their health and lives cannot, within the framework of the Constitution, be subjected to a fruitless, multi-year administrative review, the outcome of which would be the inevitable rejection of their application. *Cannon v. University of Chicago*, 441 U.S. 677, n.41 (1979) ("Because the individual complainants cannot assure themselves that the administrative process will reach a decision on their complaints within a reasonable time, it makes little sense to require exhaustion")(*citing* 3 K. Davis, Administrative Law Treatise § 20.01, p. 57 (1958)); *see also McCarthy*, 503 U.S. at 147 ("Even where the administrative decision-making schedule is otherwise reasonable and definite, *a particular plaintiff may suffer irreparable harm if unable to secure immediate judicial consideration of his claim*") (*citing Bowen v, City of New York*, 476 U.S. 467, 483 (1986) (emphasis added).

Fourth, the doctrine of exhaustion does not apply to claims pertaining to denial of constitutional rights or other issues as to which the agency in question lacks competency. Here, as demonstrated *infra*, the classification of Cannabis as a

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[19] *NRDC, Inc.*, 798 F.3d at 813-14 (noting that a 6-year delay in the EPA's administrative process was *not* sufficiently egregious to justify judicial intervention in the form of *mandamus* relief, but finding an eight (8)-year delay to be unreasonable); *City of Virginia Beach*, 42 F.3d at 885 (holding that an agency's 4½ year delay in issuing a final environmental review was *not* "so egregious as to meet the demanding standard required for [the courts] to interfere with the agency process through a writ of mandamus" notwithstanding the fact that "human health and welfare are at stake").

Schedule I drug violates, *inter alia*, Plaintiffs' constitutional rights under the Due Process and Equal Protection Clauses, and the First Amendment.

The lower court erroneously rejected this argument, ruling that the *effect* of a successful application to de-schedule (*i.e.*, the agency determination) and a declaration that the classification of Cannabis is unconstitutional (*i.e.*, judgment in court) are the same and that, therefore, successful administrative review could grant Plaintiffs the relief they seek. Unsurprisingly, however, the lower court did not cite any authority for this proposition (A288) -- and for good reason; it is *always* going to be the case that a claim for deprivation of constitutional rights by an agency would be alleviated if the agency were to reverse its prior decision. Thus, to accept the lower court's ruling on this issue is to eliminate the constitutional-claim exception to mandatory administrative exhaustion – a ruling no other court has issued to date.

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The lower court presumed that the doctrine of mandatory administrative exhaustion applied despite the absence of any congressional intent requiring it. If the lower court had exercised the discretion it unquestionably possessed, or had properly applied the standard exceptions to mandatory exhaustion, the record herein would have required an order, denying the motion to dismiss, and allowing this case to continue. Plaintiffs are entitled to reversal on this basis alone.

POINT II

THE LOWER COURT ERRED IN RULING THAT PLAINTIFFS' FIRST CAUSE OF ACTION FAILS TO STATE A CLAIM FOR VIOLATION OF SUBSTANTIVE DUE PROCESS

By the Complaint, Plaintiffs alleged that the classification of Cannabis is so utterly irrational that it violates the Constitution (A96-102). In particular, while the right to due process "may not require that Congress's actions reflect 'mathematical exactitude' in fitting means to ends,[20] [] the connection between means and ends *must be grounded on something more than an unreasonable, hypothetical connection that the United States has expressly disclaimed in related proceedings*."[21] As reflected above, the Federal Government has repeatedly acknowledged in public filings that Cannabis is safe and medically effective, thereby rendering any suggestion that it meets the Three Schedule I Requirements irrational.

In its Decision, the lower court, while acknowledging that Cannabis could not possibly meet the Three Schedule I Requirements, ruled that, "[e]ven if marijuana has current medical uses, I cannot say that Congress acted irrationally in placing marijuana in Schedule I" (A290). The grounds offered by the lower court for this ruling were that Cannabis has: (i) "various psychoactive effects; (ii) potential to cause

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[20] *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

[21] *Schaeffler Grp. USA, Inc. v. U.S.*, 786 F.3d 1354, 1368 (Fed. Cir. 2015) (Wallach, J., concurring).

a decrease in IQ and general neuropsychological performance for adolescents who consume it; and (iii) a potential effect on prenatal development (A290). The lower court also ruled that it was required to follow prior decisions sustaining the CSA's constitutionality (A289).

As demonstrated below: (A) the first three reasons offered by the lower court proceed from a false premise that the Three Schedule I Requirements do not apply to Congress; (B) the notion that medications should be classified as Schedule I drugs because they have psychoactive effects or could adversely affect prenatal or adolescent development requires an irrational disregard of the Three Schedule I Requirements; and (C) the lower court's reliance upon prior precedent must be rejected because the instant as-applied constitutional challenge requires a fact-specific assessment based upon the allegations of, and evidence recited in, the Complaint that were unavailable when prior courts considered this issue.

A. THE LOWER COURT ERRED IN RULING THAT THE THREE SCHEDULE I REQUIREMENTS DO NOT APPLY TO CONGRESS

During oral argument below, the lower court, after referring to Plaintiffs as "living proof of the medical appropriateness of marijuana" (A382), asked rhetorically:

> How could anyone say that your clients' lives have not been saved by marijuana? How can anyone say that your clients' pain and suffering has not been alleviated by marijuana? You can't, right? (*Id.*).

The Decision repeats this mantra, ruling that there is "no rational basis" to conclude Cannabis has no medical utility (A265).

Having acknowledged that Cannabis provides life-saving medical benefits to Plaintiffs, the lower court effectively conceded, not only that Cannabis does not meet the Three Schedule I Requirements, but that it would be irrational for anyone to suggest otherwise (*Id.*). Nonetheless, the lower court dismissed the Complaint by holding that the Three Schedule I Requirements "apply only to the Attorney General's reclassification proceedings – they do not bind Congress ..." (A265). Thus, according to the Decision, there are two types of Schedule I drugs -- those designated by Congress which may *not* meet the Three Schedule I Requirements, and those classified by the Attorney General which necessarily do. The Decision does not include citation to any authority for this proposition, which forms the backbone of lower court's analysis. As shown below, the lower court's ruling on this point constitutes clear error.

First, the applicable provision of the CSA pertaining to the Three Schedule I Requirements -- 21 U.S.C. §812(b)(1) -- does not establish one set of criteria for designation of Schedule I drugs by the Attorney General and another set for those classified by Congress. Rather, §812(b)(1) states in pertinent part:

> Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on October 27, 1970, and except in the

> case of an immediate precursor, *a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance* ... (emphasis added).

Thereafter, the CSA simply lists the Three Schedule I Requirements.

As should be evident, nothing in that provision suggests that the Three Schedule I Requirements pertain only to the Attorney General. And the Supreme Court has consistently ruled that, in the context of statutory construction, "[t]he inquiry ceases if the statutory language is unambiguous,"[22] as is the case here. Furthermore, the lower court's ruling (A265) that a different provision of the CSA allows the Attorney General to re-classify drugs depending on his or her findings with respect to the Three Schedule I Requirements (21 U.S.C. §811) does not establish or even imply that Congress was never subjected to the same criteria.

Second, the U.S. Supreme Court in *Oakland Cannabis* expressly rejected the very argument that the lower court herein accepted. Specifically, in *Oakland Cannabis*, the appellee argued that the CSA has two standards for classifying Schedule I drugs – one for the Attorney General and another one for Congress, and that the latter's designation did not require a determination that Cannabis has no medical benefits because the Three Schedule I Requirements do not apply to Congress. The Supreme Court *rejected* that argument, ruling:

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[22] *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002).

> We are not persuaded that this distinction has any significance to our inquiry. Under the [appellee's] logic, drugs that Congress places in schedule I could be distributed when medically necessary whereas drugs that the Attorney General places in schedule I could not. Nothing in the statute, however, suggests that there are two tiers of schedule I narcotics...

Oakland Cannabis, 532 U.S. at 492. Thus, the very distinction upon which the lower court relied was rejected by the Supreme Court. Indeed, other courts have consistently engaged in analyses with regard to whether *Congress* could rationally have concluded that the Three Schedule I Requirements were met before designating Cannabis a Schedule I drug. *See, e.g., U.S. v. Pickard*, 100 F.Supp.3d 981, 1006 (C.D. Ca. 2016) (and collecting cases).

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The notion that Schedule I drugs are subjected to different requirements depending on who made the classification – the Attorney General or members of Congress – does not make sense and enjoys no support whatsoever in the text of the CSA or the case law. And, insofar as the lower court acknowledged the medical benefits of treatment with Cannabis and cited to authority conceding that a contrary conclusion is itself irrational (A265), Plaintiffs are entitled to a reversal and reinstatement of the Complaint on *this* basis alone.

B. DUE TO NEW FACTS AND CHANGED CIRCUMSTANCES, *STARE DECISIS* DOES NOT APPLY TO THIS "AS APPLIED" CHALLENGE

In its Decision, the lower court ruled in *dicta* that, even if mandatory exhaustion were not outcome determinative, Plaintiffs' First Cause of Action -- that the classification of Cannabis is so irrational that it violates substantive due process -- would be subject to dismissal based upon prior precedent (R268). However, the doctrine of *stare decisis* has limited application under circumstances in which the factual predicates for the decision have changed or been determined never to have existed. *Gately v. Massachusetts*, 2 F.3d 1221, 1226 (1st Cir. 1993) ("a decision may properly be overruled if seriously out of keeping with contemporary views or passed by in development of the law or proved to be unworkable") (citation omitted); *Jeno's, Inc. v. Comm'r. of Patents & Trademarks*, 1985 U.S. Dist. LEXIS 20097, at * 8 (D. Minn. May 6, 1985) ("Nor does the doctrine of *stare decisis* apply to the present action…Contrary to the [defendant's] reasoning, there is a strong possibility that plaintiff can show changed circumstances").

As explained by the Supreme Court in *United States v. Carolene Products Co.*:

> Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, *and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist*.

304 U.S. 144, 153 (1938) (emphasis added)(*citing Chastleton Corporation v. Sinclair*, 264 U.S. 543 (1924) ("A law depending upon ... [a] certain state of facts to uphold it may cease to operate if the…facts change even though valid when passed")); *accord Brown v. Hovatter*, 516 F. Supp. 2d 547, 559 (D. Md. 2007), *aff'd. in part and rev'd. in part on other grounds*, 561 F.3d 357 (4th Cir. 2009) ("it is now questionable whether the legitimate state interest in preserving economic investments of original owners is rationally furthered by the current statutory scheme").

As reflected in the Complaint, the CSA was enacted, and Cannabis was classified as Schedule I drug, in 1970 (A62). Since then, the New Facts (pp. 11-18, *supra*) have been uncovered, dramatically changing the alleged predicates for the classification of Cannabis – facts, which the lower court seemed to recognize. Clinging to decades-old rulings, mistakenly affirming the "rationality" of classifying Cannabis together with life-threatening substances such as heroin, respectfully, constitutes a misapplication of the doctrine of *stare decisis*.

If the allegations of the Complaint are assumed true (as they must be), then it must be accepted at face value that Cannabis is safe, medically effective, and that the Federal Government has long since known it. When considered with the underlying racial and political *animus* that precipitated enactment of the CSA, and the consequences it has had to date, the suggestion that the courts should blindly adhere to anachronistic decisional law without regard to the New Facts confirming the

CSA's irrationality, is, respectfully, absurd.

POINT III

THE LOWER COURT ERRED IN RULING THAT THE CONSTITUTION DOES NOT GUARANTEE THE RIGHT TO PRESERVE ONE'S OWN HEALTH AND LIFE

With respect to Plaintiffs' claim that the CSA infringes upon their constitutional right "to preserve their health and lives," the lower court ruled that "no such fundamental right exists" (A275). From that false premise, the lower court then recast Plaintiffs' claim as one based upon a supposed right to smoke marijuana -- a suggestion which is unsupported by the record -- and then dismissed Plaintiffs' claim as allegedly being without merit. The lower court committed clear error.

As a preliminary matter, the Fifth Amendment to the Constitution plainly states:

> No person shall be ... deprived of *life*, liberty or property without due process of law.

U.S. Const. amend. V (emphasis added). And that language did not emerge from an abyss, but rather was the product of centuries of common law tradition, recognizing the rights of self-preservation and personal autonomy.[23] Thereafter, American

[23]Dating back to the 1700s, William Blackstone wrote of three "principal or primary articles" historically comprising "the rights of all mankind." First among these was "[t]he right of personal security ... in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, [and] his health." William Blackstone, 1 *Commentaries* *129. Blackstone described the guarantee of "[t]he preservation of a man's health from such practices as may prejudice or annoy it." *Id.* at *134. Indeed, "Anglo-American law starts with the premise of thorough-going self

common law adopted the tradition that has consistently recognized and emphasized the right to preserve one's life and the lives of others under the doctrines of self-defense[24] (even by use of deadly force).

This common law tradition has been ensconced into our Nation's constitutional jurisprudence. For example, in *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and their progeny, the Supreme Court has consistently ruled that, under circumstances in which a statute regulating abortion would require a woman, in her third trimester, to continue her pregnancy, such statute must include an exception to preserve the life and health of the mother. *Stenberg v. Carhart*, 530 U.S. 914, 931 (2000) (collective cases).

Recognition of the fundamental right to preserve one's own health and life is hardly limited to the reproductive context. In the context of permitting chiropractors to practice in Louisiana, the Fifth Circuit observed:

> Under all of the cases, we think it is that the State cannot deny to any individual the right to exercise a reasonable choice in the method of treatment of his ills...

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determination." *Natanson v. Kline*, 186 Kan. 393, 350 P.2d 1093, 1104 (Kan. 1960). Further, after imbuing American colonists with the British tradition of protecting human life, Samuel Adams, 15 years before adoption of our Constitution, referred to "the duty of self preservation" as "the first law of nature." Samuel Adams, *The Rights of the Colonists: Report of the Committee of Correspondence to the Boston Town Meeting*, 7 Old South Leaflets 417 (No. 173) (B. Franklin 1970) (1772).

[24] *Brown v. United States*, 256 U.S. 335, 343-44 (1921); *cf. Montana v. Egelhoff*, 518 U.S. 37, 56 (1996) (plurality opinion).

England v. Louisiana State Bd. of Examiners, 259 F.2d 626, 627 (5th Cir. 1958), *cert. denied.* 359 U.S. 1012 (1959). Similarly, in the context of acupuncture treatments, the Court in *Andrews v. Ballard* ruled:

> it is the inalienable nature of the right to decide to obtain or reject medical treatment which forms the very basis of the requirement, enforced throughout America, that medical practitioners obtain their patients' informed consent prior to administering treatment.

498 F.Supp. 1038, 1048 (S.D. Tex. 1980). The Court in *Andrews* proceeded to observe:

> The root premise is the concept, fundamental in American jurisprudence, that "(e)very human being of adult years and sound mind has a right to determine what shall be done with his own body."

Id. (*quoting Schloendorff v. Society of New York Hosp.*, 105 N.E. 92, 93 (N.Y. 1914) (Cardozo, J.)).

And, not only does the Constitution guarantee the right to *preserve* one's own health and life; it also allows people to *refuse* life-sustaining treatment. *Cruzan v. Missouri*, 497 U.S. 261 (1990). And *that* right also derives from the right to self-autonomy. As explained by the Court in *Cruzan*:

> no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law ...

Id. at 269. And, owing to its fundamental importance to personal liberty, *"the right to self-determination ordinarily outweighs any countervailing state interests."*

Cruzan, 497 U.S. at 273 (emphasis added).

Here, Alexis, Jose and Jagger seek to preserve their health and lives, not by the extraordinary means that the Courts have long since sustained -- *e.g.*, aborting a viable fetus or killing in self defense -- but by merely continuing life-saving treatment that has no adverse side effects and causes no harm to others.[25] Because the Supreme Court has consistently recognized the individual's fundamental right to preserve his or her own health and life, the CSA, which needlessly endangers the lives of Alexis, Jose and Jagger, is unconstitutional.

In its Decision, the lower court addressed only one of the cases cited by the Coalition below regarding this issue – *Cruzan*. Specifically, the lower court ruled that *Cruzan* is supposedly irrelevant because the Court therein was focused on "one's right to *refuse* medical treatment, not a positive right to obtain any particular medical treatment" (A276) (emphasis in original). But such a distinction requires utter disregard of the reasoning underlying the decision in *Cruzan*, which was based upon

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[25]Notably, Plaintiffs do not ask the Court to direct the government to engage in active conduct to make Cannabis or any other drug *available* to them, as was the case in *Abigail Alliance for Better Access to Dev't. Drugs v. Von Eschenbach*, 495 F.3d 695 (D.C. Cir. 2007); rather, they seek merely to, *inter alia* *continue* treating with medication (Medical Cannabis) that the Federal Government has acknowledged in writing is safe and effective (U.S. and WIPO Medical Cannabis Patents, A227-63 and *supra* note 1). The distinction between permitting medical intervention to *end* life (*i.e.*, a change in the *status quo*), and the exercise of governmental restraint to *continue* the *status quo* in order to *preserve* life is one that the Supreme Court has recognized, and in such instances, the Court has consistently ruled in favor of maintaining the *status quo* to preserve life. *Cruzan*, 497 U.S. at 283.

the rights to personal autonomy – the very same issue at stake here. Indeed, the body of the opinion in *Cruzan* begins with an homage to the rights of Americans to control decisions regarding the preservation of their health and lives:

> Before the turn of the century, this Court observed that "*no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law*."

Cruzan, 497 U.S. at 269 (*citing Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891) and *Schloendorff*, 211 N.Y. at 129-30) (emphasis added). Only then did the Court in *Cruzan* address the issue of a person's right to refuse medical treatment, but, in that context, the Court acknowledged that it was a "logical corollary" of the doctrine of informed consent, which derives from a person's right to control his or her own medical decisions. *Cruzan*, 497 U.S. at 270. To suggest that *Cruzan* was decided solely upon the right to refuse medical treatment, without regard to the historical and constitutional underpinnings which made that holding possible, is to disregard the analysis which formed the basis for the Supreme Court's landmark decision therein.

Worse, the upshot of the lower court's analysis is that the right to refuse medical treatment and thus terminate one's life is somehow protected, but that the right to preserve it is not – a notion that simply makes no sense under the Constitution. Just as the Court in *Cruzan* refused to allow parents of a terminal

patient to withdraw life support measures unless clear and convincing evidence of the patient's wishes were established (*Cruzan*, 497 U.S. at 292), so too is the Federal Government here proscribed here from effectively withdrawing life-sustaining Medical Cannabis from Plaintiffs without due process of law.

POINT IV

CCA HAS STANDING AND STATES A CLAIM FOR VIOLATION OF THE EQUAL PROTECTION CLAUSE

It is well-settled that, to have "standing," a "plaintiff must sufficiently allege: (1) that it has suffered an injury in fact; (2) that is fairly traceable to the challenged conduct of the defendant; and (3) that is likely to be redressed by a favorable judicial decision.[26] On standing, defendants below argued only that plaintiffs failed to allege an injury in fact – an argument that the lower court properly rejected. Nonetheless, the lower court dismissed Plaintiffs' equal-protection claim, mistakenly ruling *sua sponte* that a declaration that the classification of Cannabis under the CSA is unconstitutional was unlikely to benefit Plaintiffs (Decision at 12). The lower court also ruled that Plaintiffs' reliance upon the discriminatory acts of Nixon as executive, without alleging the same by Congress as legislators, cannot support an Equal Protection claim (*Id.*). The lower court committed clear error.

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[26] *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (*quoting Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

A. CCA HAS STANDING

Contrary to the lower court's ruling, CCA aptly alleged that a favorable ruling – a declaration that the classification of Cannabis as a Schedule I drug under the CSA violates the Equal Protection Clause of the Constitution -- would redress its members' injuries. For instance, CCA-member Kordell Nesbitt was denied employment as a commercial truck driver, solely because his criminal background check revealed a federal marijuana conviction (a felony) (SA9-13). Similarly, CCA-member Thomas Motley remains on supervised release, resulting from a marijuana conviction (SA7-8). Should the Court ultimately rule in CCA's favor, their convictions would, upon petition, be reversed and vacated under 28 U.S.C. §2255. Vacatur of the convictions of Messrs. Nesbitt and Motley would provide them with an obvious benefit.

Indeed, courts in this Circuit have long recognized the life-long negative repercussions that follow from an (un-vacated) federal felony conviction. For example, in *U.S. v. Nesbeth*, 2016 U.S. Dist. LEXIS 68731 (E.D.N.Y. May 24, 2016), the Court enumerated the myriad collateral consequences faced by a convicted felon which include, among other things: ineligibility for the issuance of any grant, contract, loan, professional license, or commercial license provided by an agency of or appropriated by funds of the United States; denial of admission to federal assisted housing for a "reasonable time;" ineligibility for assistance under any state program funded under Part A of Title IV of the Social Security Act, or for Food Stamp

benefits; a bar on applying for a passport while under a period of supervised release; and the revocation of one's driver's license.

And a felony Cannabis conviction also bars individuals from serving, among other things, as either a grand juror or a petit juror (unless the person's civil rights have been restored, which can only be achieved through a pardon); and permanently bars an individual from possession, sale, shipment, transportation, or receipt of a firearm in interstate and foreign commerce *Id.* The Court further noted that a felony Cannabis conviction may bar individuals from working for a hospice (if the conviction was within three years and the applicant would have contact with patient records), and from enlisting in the Armed Forces of this Country. *Id.* These examples are merely a few of the consequences suffered by every federal Cannabis offender.

It is clear, and CCA was not required to further allege, that a favorable ruling would redress these adverse collateral consequences.

B. THE LOWER COURT COMMITTED CLEAR ERROR BY FAILING TO CONSIDER PLAINTIFFS' EQUAL PROTECTION CLAIM IN THE CONTEXT OF THE NIXON ADMINISTRATION'S RACIAL AND POLITICAL *ANIMUS*

While the executive's original place in the legislative process was to sign or veto legislation (*Buckley v. Valeo*, 424 U.S. 1, 121 (1976)), the President's role has evolved considerably since the Constitution's ratification. Michael A. Fitts, *The Paradox of Power in the Modern State: Why A Unitary, Centralized Presidency May*

Not Exhibit Effective or Legitimate Leadership, 144 U. PA. L. REV. 827, 828 n.2 (1996) (*citing* James L. Sundquist, *the Decline and Resurgence of Congress* at 33 (Brookings Inst. 1981) (internal citation omitted). Today, Presidents have "overmastering-influence over the legislative department," and maintain a "preferred place"[27] and prolific source"[28] in the creation, development, and enactment of national legislation.

Given this exalted role, courts deem any sentiments (which may include animus) of the Executive Branch in proposing legislation, highly probative in determining a statute's purpose. *Kosak v. United States*, 465 U.S. 848, 857 n.13 (1984) (report by Special Assistant to the Attorney General submitted to Congress considered in interpreting FTCA because "it seems to us senseless to ignore entirely the views of its draftsman"); *U.S. v. Story*, 891 F.2d 988, 994 (2d Cir. 1989) ("President Reagan's views are significant here because the Executive Branch participated in the negotiation of the compromise legislation"); *RTC v. Cityfed Fin. Corp.*, 57 F.3d 1231, 1239 (3d Cir. 1995), *vacated sub. nom. Atherton v. FDIC*, 519 U.S. 213 (1997) (relying on statements made by the President in a news conference to determine purpose of legislation). *U.S. v. Strake*, 800 F.3d 570, 586 (D.C. Cir.

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[27]J. Richard Broughton, *The Inaugural Address as Constitutional Statesmanship*, 28 QUINNIPIAC L. REV. 265, 270 (2010).

[28]Vasan Kesa van & J. Gregory Sidak, *The Legislator-in-Chief*, 44 WM. & MARYL. REV. I, 48 & n.196 (2002).

2015) ("When President Reagan proposed the bill that ultimately became the Act, he declared that it would "send a strong and vigorous message to friend and foe alike that the United States will not tolerate terrorist activity against its citizens") (*citing* President's Message to the Congress Transmitting Proposed Legislation to Combat International Terrorism, Pub. Papers, Admin. of Ronald Reagan 3-4 (Apr. 26, 1984) (emphasis added)); *Schuh v. HCA Holdings, Inc.*, 947 F.Supp.2d 882, 889 (M.D. Tenn. 2013) (referencing President Clinton's proposed "Balanced Budget Act"); *Doe v. Salvation Army*, 685 F.3d 564, 572 (6th Cir. 2012) (*citing* President Reagan's submission of the Restoration Act for review by Congress).

Here, Nixon and his Administration were inextricably involved in drafting and enacting the CSA (A23). The CSA was Nixon's brainchild, and he urged Congress to enact it. Richard Nixon, *Special Message to the Congress on Control of Narcotics and Dangerous Drugs* - July 14, 1969, PUB PAPERS 513 (1969); *see also* Comprehensive Drug Abuse Prevention and Control Act of 1970, H.R. Rep. 91-1444, 91st Cong. at 2052 (2d Sess. 1970).

The classification of Cannabis as a Schedule I drug under the CSA also originated with Nixon. *See* Comparison of Bills to Regulate Controlled Dangerous Substances and to Amend the Narcotic and Drug Laws, Staff of H. Comm. Ways and Means (Aug. 8, 1970); *see also* Drug Abuse Control Amendment-I 970: Hearings on H.R. 11701 and H.R. 13743 Before the Subcomm. on Public Health and Welfare of

the H. Comm. on Interstate and Foreign Commerce, 91st Cong. 80 (1970) (statement of John Mitchell, Atty Gen. of the U.S.) ("the administration sent to Congress the proposed 'Controlled Dangerous Substances Act.'"). *This explains why courts have specifically recognized the legislative authority of the President in the context of classifying drugs under the CSA*. *U.S. v. Daniel*, 813 F.2d 661 (5th Cir. 1987); *U.S. v. Womack*, 654 F.2d 1034 (5th Cir. 1981), *cert. denied*, 454 U.S. 1156 (1982); *U.S. v. Gordon*, 580 F.2d 827, 840 (5th Cir), *cert. denied*, 439 U.S. 1051 (1978)).

Given the foregoing, it was an error of law for the lower court to disregard the evidence, confirming the discriminatory motives by members of the Nixon Administration (particularly Nixon himself, and Messers. Ehrlichman and Haldeman) in devising, enacting, and enforcing the CSA. To hold otherwise would insulate the presidency – notwithstanding its lawmaking activities, from discriminatory misconduct, defying the very basis of equal protection. Accordingly, the CCA has raised a viable equal-protection claim upon which relief can be granted; and the lower court Decision dismissing it should be reversed.

POINT V

THE LOWER COURT ERRED IN DISMISSING PLAINTIFFS' RIGHT TO TRAVEL AND FIRST AMENDMENT CLAIMS

The U.S. Constitution provides, in pertinent part:

> Congress shall make no law ... abridging the freedom of speech ... or the right of the people to ... petition the

> Government for a redress of grievances.

U.S. Const. amend. I. Free speech, as a means of communicating freely with one's fellow citizens and with the government on issues of public importance, is "a cornerstone of our American polity."[29] The First Amendment protects speech and the right to petition the government in a variety of ways, including, especially, the right to visit personally with, and engage in advocacy in the presence of public officials.[30] As explained by the Court in *Cyr*, in-person advocacy constitutes a critical component of the rights comprising Free Speech:

> physical participation in ... meetings is a form of local governance, and to the extent that Mr. Cyr cannot be present at these meetings to communicate directly with elected officials, his First Amendment right of free expression is violated.

Cyr, 60 F. Supp. 3d at 547-48.

Remote methods of communication, such as e-mails, letters or telephone calls, do not qualify as comparable substitutes for in-person advocacy. As the Court in *Brown* explained:

> Although the City's directive expressly allows the Plaintiff

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[29] *E. Conn. Citizens Action Grp. v. Powers*, 723 F.2d 1050, 1051 (2d Cir. 1983).

[30] *See, e.g., Cyr v. Addison Rutland Supervisory Union*, 60 F. Supp. 3d 536 (D. Vt. 2017) (school district's ban on attendance at school board meetings deemed a violation of the First Amendment); *Brown v. City of Jacksonville*, 2006 U.S. Dist. LEXIS 8162, at *25 (M.D. Fla. Feb. 17, 2006) (Court enjoined enforcement of rule depriving the plaintiff from attending City Council meetings).

> to "direct [her] communications to the City Council through e-mails or letters, or have her messages to the Council delivered by other persons," such alternative channels do not amount to "ample" alternatives that would be comparable to the same degree as her own passionate deliverance of her messages in person.

2006 U.S. Dist. LEXIS 8162 at *13. Similarly, the Seventh Circuit in *Hodgkins v. Peterson* reassured:

> There is no Internet connection, no telephone call, no television coverage that can compare to attending a political rally in person, ... or standing in front of the seat of state government as a legislative session winds its way into the night.

355 F.3d 1048, 1063 (7th Cir. 2004).

Indeed, even the lower court recognized the unique opportunity in-person advocacy affords:

> THE COURT: So, although [Alexis] could make those arguments remotely using, for example, TV screens and feeds, she has no mobility and it is not easy to get other people to watch those screens, those who are assembled to listen, will listen and watch, but those who need to be persuaded are not likely to be there. That's their argument ...
> THE COURT: It is a good argument ...
>
> THE COURT: I could be subject to an estoppel because ... in conferences ... *I require them [attorneys] to be present because of the importance of face to face contact.*

(A324) (emphasis added).

The Constitution also guarantees citizens a fundamental right to interstate

travel.[31] The right to travel encompasses "the right of a citizen of one State to enter and to leave another State," which necessarily entails the right to "cross state borders while en route," "travel freely to and from" the 50 states, and "use highway facilities and other instrumentalities of interstate commerce."[32] This right is an "*unconditional* personal right," which cannot be *indirectly* denied through imposition of a "penalty upon those who exercise a right guaranteed by the Constitution." *Dunn*, 405 U.S. at 341 (internal citations omitted) (emphasis in original).

By their Second, Third, and Sixth Causes of Action, Plaintiffs allege that the CSA violates their rights to interstate travel; to exercise free speech; and to petition the government for grievances (A22-38,66-67,69,103-107,111-113). In particular, Plaintiffs allege that the classification of Cannabis under the CSA effectively bars Plaintiffs, while in possession of life-saving medical Cannabis, from: (i) entering federally-owned lands and/or buildings, including the U.S. Capitol, to engage in protected in-person advocacy, or (ii) traveling by federally-regulated modes of transportation (*Id.*). Plaintiffs maintain that, as applied, the CSA requires them to

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[31] *See e.g., Saenz v. Roe,* 526 U.S. 489, 498 (1999); *Memorial Hospital v. Maricopa County,* 415 U.S. 250, 254 (1974); *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972); *Shapiro v. Thompson,* 394 U.S. 618, 629 (1969), *overruled on other grounds, Edelman v. Jordan*, 415 U.S. 651 (1974); *U.S. v. Guest*, 383 U.S. 745, 757 (1966); *Crandall v. Nevada*, 73 U.S. 35, 48-49 (1868); *Murphy v. Lynn*, 118 F.3d 938, 945 (2d Cir. 1997); *New York State NOW v. Terry*, 886 F.2d 1339, 1360 (2d Cir. 1989).

[32] *Saenz v. Roe*, 526 U.S. at 500 (*citing Edwards v. California*, 314 U.S. 160 (1941) and *U.S. v. Guest*, 383 U.S. 745, 757 (1966)).

sacrifice their rights to travel and free speech in order to exercise their rights to self-preservation, and vice-versa. If, for example, Alexis were to travel to Washington, D.C. to lobby Congress, she would have to leave her life-sustaining medicine behind, sacrificing her right to life. Conversely, she is forced to relinquish her rights to travel and engage in free speech if she wants to exercise her right to self-preservation.

In its Decision, the lower court erroneously dismissed these claims ruling that: (i) the CSA, as a facially neutral statute of general application, does not *ipso facto* violate Plaintiffs' rights to travel, free speech, or petition the government for a redress of grievances; and (ii) the classification of Cannabis under the CSA does not unlawfully force Plaintiffs to make a Hobson's Choice between their fundamental rights because there is "no fundamental right to use medical marijuana" (A276-78). The lower court committed clear error.

The lower court erroneously concluded that, since the CSA does not, on its face, "impose any bar on Plaintiffs' movement from state to state," and because it is "not targeted at speech," the CSA does not unduly burden Plaintiffs' First Amendment rights or their rights to interstate travel (A276-279). In so doing, the lower court misconstrued Plaintiffs' First Amendment and right to travel claims as *facial challenges* to the CSA (*id.*), when, in fact, these claims were pled as *as-applied challenges*, whereby Plaintiffs allege that the classification of Cannabis, as specifically applied to them, unduly burdens their fundamental rights (A22-38,66-

67,69,103-107,111-13).

An as-applied challenge "does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right."[33] The remedy to a successful "facial" challenge is broad invalidation of legislation, whereas the remedy for a successful "as-applied" challenge is enjoinment of a statute's enforcement only as against a particular plaintiff (and, perhaps, others similarly situated) under a specific set of circumstances.[34] And "as-applied" challenges are commonly employed to attack the constitutionality of facially-neutral statutes of general application.[35]

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[33] *U.S. v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010). *See also Green Party v. Aichele,* 89 F. Supp. 3d 723, 737 (E.D. Pa. 2015); *U.S. v. Polouizzi*, 697 F. Supp. 2d 381, 387 (E.D.N.Y. 2010).

[34] *Green Party,* 89 F. Supp. 3d at 737 (internal citations omitted).

[35] *See e.g., Minneapolis Star & Tribune Co. v. Minn. Comm'r. of Revenue*, 460 U.S. 575, 592 (1983) ("We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment"); *Hodgkins*, 355 F.3d at 1064-65 (enjoining enforcement of a general curfew law which prohibited minors from being in public during late hours of the day, because, despite the statute's exemption for a minor's engagement in First Amendment activities, the statute, which threatened arrest, indirectly "chilled" a minor's willingness to exercise their right to free speech); *Vasquez v. Hous. Auth.*, 271 F.3d 198, 206 (5th Cir. 2001) (trespass statute, prohibiting visits to a housing authority by non-residents had the indirect effect of barring political candidates from distributing literature to residents, deemed void as a violation of the free speech protections of the First Amendment); *International Soc. for Krishna Sonsciousness, Inc. v. Barber*, 650 F.2d 430, 443-47, 432-34 (2d Cir. 1981) (holding that New York State's facially-neutral "booth" rule, which prohibited peripatetic solicitation at its State Fair, was unconstitutional as applied to Plaintiffs -- members of the Krishna Consciousness religion -- because it effectively barred them from carrying out a religious ritual, in violation of their right to free exercise under the First Amendment).

Here, Plaintiffs' right to travel and First Amendment claims are not premised on an argument that the CSA is unconstitutional on its face (A22-23,25,27,33,35-38,66-67,69,103-107,111-113). Rather, Plaintiffs alleged that the CSA violates their travel and First Amendment rights in light of the particularized facts at issue herein. *First*, the CSA was enacted by the Nixon Administration for the purpose of suppressing, *inter alia*, the speech and expressive conduct of war protestors in violation of the First Amendment (A22-23,66-67,103-107,111-13). *Second*, the CSA presents a Hobson's Choice for Alexis, Jagger, Jose, and members of the CCA as they are prevented from traveling by federally-regulated modes of transportation and visiting federally-owned lands and/or properties (including to the U.S. Capitol to engage in protected in-person advocacy) while possessing medical Cannabis -- which they need to live -- without risking arrest or prosecution under the CSA, in violation of their rights to travel and free speech (A24,27, 32,33,35-38,106,111-13; Dkt. No. 44 at 72-91).[36]

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[36]As noted *supra*, the lower court also ruled that Plaintiffs are supposedly not faced with a Hobson's Choice because there is no fundamental right to use Cannabis. Respectfully, this analysis is wholly inaccurate; Plaintiffs allege that they have a fundamental right to preserve their health and lives, not one to use Cannabis. *See* Point III, *supra*. Amazingly, when confronted with the Hobson's Choice argument during Plaintiffs' application for a TRO, the lower court admitted:

> [I]t is the Hobson's choice. If she doesn't have the marijuana, I am told -- again, there is no record of this, I haven't had a chance to cross-examine the doctor or the plaintiff -- but I am told that if she doesn't have her marijuana on hand, she can go into a seizure and that would be terrible (A326).

Alexis, in particular, was invited to meet with Congressional representatives to advocate for the legalization of her life-saving medicine (A331). Although Alexis has a "right to petition Congress" (A325), she is prevented from exercising this right while in possession of Cannabis (which, we must emphasize, she must carry on her at all times or risk death) because she fears her parents may be arrested or prosecuted under the CSA - a fear that has understandably "chilled" her exercise of free speech.[37]

Given the foregoing, the lower court's purported rationale for dismissing the right to travel and First Amendment claims is plainly wrong. Although previously acknowledging that Alexis has a right to travel and to petition the government (A325), and that in-person advocacy cannot be replaced by remote channels of communication (A324), the lower court thereafter made an "about-face," and ruled that, because the CSA is facially-neutral, it cannot not "directly implicate" speech or travel (A276-278). The lower court further remarked that "regardless of one's movement between states," the possession of Cannabis remains illegal under the CSA. While this may be true, it does not change the constitutional analysis required here. In *Int'l Soc. for Krishna Sonsciousness, Inc.*, the act of peripatetic solicitation

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The lower court clearly understood that Alexis's Hobson's Choice was not about a right to Cannabis, but about a right to treat her seizures with the only medicine that has proven effective to do so; the court's subsequent change of heart with respect to this argument, without any explanation, is utterly erroneous.

[37] *See Hodgkins*, 355 F.3d at 1064-65.

was made illegal pursuant to a "booth rule," (*i.e.*, participants were limited to interacting with people only at pre-set event booths) regardless of one's religious practices. *See generally* 650 F.2d 430. On its face, this rule did not "target" or "directly implicate" the free exercise of religion. *Id.* Yet, the Second Circuit properly deemed it unconstitutional as applied to the Krishnas, whose faith depended upon peripatetic solicitation.[38] The lower court here was likewise required to consider how a nationwide ban on medical Cannabis has infringed on the rights of those Plaintiffs who simply cannot live without Cannabis, and have thus become prisoners of the States in which Cannabis is legal, unable to travel to any federal land (which comprises a full 28% of the Country) and, unable to engage in in-person advocacy to influence lawmakers in person.[39] The lower court's failure to consider the CSA as it applies to Plaintiffs, constitutes clear error of law, warranting reversal.

POINT VI

THE SUPREME COURT'S DECISION IN *GONZALEZ v. RAICH* SHOULD BE OVERTURNED

For the reasons set forth in Plaintiffs' brief below (Dkt. No. 44), the Supreme Court's decision in *Gonzales v. Raich*, 545 U.S. 1 (2005), is incompatible with even

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[38] *See International Soc. for Krishna Sonsciousness, Inc.*, 650 F.2d at 447.

[39] The lower court ignored <u>all</u> of Plaintiffs' arguments which demonstrated, *inter alia*, that the CSA violates Plaintiffs' First Amendment rights under both the *O'Brien* or *Ward* analyses (A276-278; Dkt. 44 at 72-91).

the outer reaches of the Commerce Clause and should be reversed.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request reversal of the Decision and reinstatement of the Complaint.

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