18-CV-859

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARVIN WASHINGTON, DEAN BORTELL,
as Parent of Infant ALEXIS BORTELL;
JOSE BELEN; SEBASTIEN COTTE,
as Parent of Infant JAGGER COTTE;
and CANNABIS CULTURAL ASSOCIATION, INC.,
Plaintiffs-Appellants.

— v. —

JEFFERSON BEAUREGARD SESSIONS, III,
in his official capacity as United States Attorney General;
UNITED STATES DEPARTMENT OF JUSTICE;
ROBERT W. PATTERSON, in his
official capacity as the Acting Director of the Drug
Enforcement Administration;
UNITED STATES DRUG ENFORCEMENT
ADMINISTRATION; and the
UNITED STATES OF AMERICA,
Defendants-Appellees.

ON APPEAL FROM THE DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX (VOLUME 2 OF 2) FOR PLAINTIFFS-APPELLANTS

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APPENDIX
TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARVIN WASHINGTON, et al.,

Plaintiffs,

-against-

JEFFERSON BEAUREGARD SESSIONS, III, et al.,

Defendants.

OPINION AND ORDER GRANTING MOTION TO DISMISS

17 Civ. 5625 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

Plaintiffs Marvin Washington, Dean Bortell, Alexis Bortell, Jose Belen, Sebastien Cotte, Jagger Cotte, and the Cannabis Cultural Association, Inc. ("Plaintiffs") filed this action on July 24, 2017. Broadly stated, plaintiffs assert an as-applied constitutional challenge to the Controlled Substances Act ("CSA"), 21 U.S.C. § 801 *et seq.*, which classifies marijuana as a Schedule I drug—the highest level of drug classification. Plaintiffs attempt to demonstrate the CSA's constitutional infirmity in a number of ways, but the graveman of the complaint is that the current scheduling of marijuana violates due process because it lacks a rational basis.

On September 8, 2017, plaintiffs moved the Court for an order to show cause why a temporary restraining order should not issue. The Court denied plaintiffs' motion that same day, and issued a summary order confirming that result on September 11, 2017. *See* Order Denying a Temporary Restraining Order, ECF 26. After initially indicating a willingness to proceed into discovery, the Court reconsidered and entered a briefing schedule advancing defendants' motion to dismiss the complaint, *see* Order, ECF 33, filed October 13, 2017 under Federal Rules 12(b)(1) and 12(b)(6). The Court held oral argument on February 14, 2018. For the reasons discussed in this opinion, the defendants' motion to dismiss the complaint is granted.

Background

In response to President Nixon's "war on drugs," Congress passed the Comprehensive Drug Abuse and Control Act of 1970. *Gonzales v. Raich*, 545 U.S. 1, 10 (2005). "Title II of the Act, codified at 21 U.S.C. § 801 *et seq.*, is the Controlled Substances Act ('CSA'), and it 'repealed most of the earlier antidrug laws in favor of a comprehensive regime to combat the international and interstate traffic in illicit drugs.'" *United States v. Green*, 222 F. Supp. 3d 267, 271 (W.D.N.Y. 2016) (quoting *Raich*, 545 U.S. at 7, 12). Congress made a number of findings associated with the CSA, including that "[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." 21 U.S.C. § 802(2).

"The Act covers a large number of substances, each of which is assigned to one of five schedules; this statutory classification determines the severity of possible criminal penalties as well as the type of controls imposed." *United States v. Kiffer*, 477 F.2d 349, 350 (2d Cir. 1973); *see also* 21 U.S.C. § 812(a). When the CSA was enacted, Congress classified marijuana as a Schedule I drug. "This preliminary classification was based, in part, on the recommendation of the Assistant Secretary of [the Department of Health, Education, and Welfare] that marihuana be retained within schedule I at least until the completion of certain studies now underway." *Raich*, 545 U.S. at 14 (internal quotation marks omitted). In order to fall within Schedule I, Congress determined that a drug must have: (1) "a high potential for abuse," (2) "no currently accepted medical use in treatment in the United States," and (3) "a lack of accepted safety for use of the drug or other substance under medical supervision." 21 U.S.C. § 812(b)(1). The chart below describes the CSA's various schedules and the findings required for each:

	Statutory Factors	Examples
Schedule I	High potential for abuse, no currently accepted medical use in treatment, and a lack of accepted safety for use of the drug under medical supervision. *See* 21 U.S.C. § 812(b)(1).	Heroin, LSD, Marijuana
Schedule II	High potential for abuse, some currently accepted medical use in treatment, and abuse may lead to severe psychological or physical dependence. *See* 21 U.S.C. § 812(b)(2).	Morphine, Codeine, Amphetamine (Adderall ®), Methamphetamine (Desoxyn ®)
Schedule III	Potential for abuse less than substances in Schedules I and II, some currently accepted medical use in treatment, and abuse may lead to moderate or low physical dependence or high psychological dependence. *See* 21 U.S.C. § 812(b)(3).	Tylenol with Codeine ®, Ketamine, Anabolic Steroids
Schedule IV	Potential for abuse less than substances in Schedule III, some currently accepted medical use in treatment, and abuse may lead to limited physical or psychological dependence. *See* 21 U.S.C. § 812(b)(4).	Alprazolam (Xanax ®), Diazepam (Valium ®)
Schedule V	Potential for abuse less than substances in Schedule IV, some currently accepted medical use in treatment, and abuse may lead to limited physical or physical dependence. *See* 21 U.S.C. § 812(b)(5).	Robitussin AC ®

After placing marijuana in Schedule I, "Congress established a process for reclassification, vesting the Attorney General with the power to reclassify a drug 'on the record after opportunity for a hearing.'" *Green*, 222 F. Supp. 3d at 271 (quoting 21 U.S.C. § 811(a)). Before beginning the reclassification process, the Attorney General must seek a scientific and medical evaluation from the Secretary of Health and Human Services ("HHS"), whose findings are binding on the Attorney General. *Id.* § 811(b). In the relevant implementing regulations, the

Attorney General has delegated this reclassification authority to the Drug Enforcement Agency ("DEA"). *See* 28 C.F.R. § 0.100(b).

The CSA also provides an avenue for interested parties to petition the DEA to reclassify drugs, consistent with the medical and scientific data provided by HHS. *See* 21 U.S.C. § 811(a) (providing that the Attorney General may reclassify drugs after an on the record hearing "on the petition of any interested party"); *see also* 21 C.F.R. § 1308.43(a). If a petitioner receives an adverse ruling from the DEA, 21 U.S.C. § 877 provides for judicial review of the DEA's determination in the D.C. Circuit, or another appropriate Circuit:

> All final determinations, findings, and conclusions of the Attorney General under this subchapter shall be final and conclusive decisions of the matters involved, except that any person aggrieved by a final decision of the Attorney General may obtain review of the decision in the United States Court of Appeals for the District of Columbia or for the circuit in which his principal place of business is located upon petition filed with the court and delivered to the Attorney General within thirty days after notice of the decision. Findings of fact by the Attorney General, if supported by substantial evidence, shall be conclusive.

"Despite considerable efforts to reschedule marijuana, it remains a Schedule I drug." *Raich*, 545 U.S. at 15. "As of 2005, the D.C. Circuit Court of Appeals had reviewed petitions to reschedule marijuana on five separate occasions over the course of 30 years, [and upheld] the DEA's determination in each instance." *Green*, 222 F. Supp. 3d at 272. In 2011, the DEA denied a rescheduling petition, *see* Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 76 Fed. Reg. 40,552 (July 8, 2011), and the D.C. Circuit upheld the DEA's determination in *Americans for Safe Access v. Drug Enforcement Administration*, 706 F.3d 438, 449 (D.C. Cir. 2013). The DEA denied another rescheduling petition as recently as 2016. *See*

Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53,767 (Aug. 12, 2016).[1]

Discussion

Defendants filed a motion to dismiss the complaint under Federal Rules 12(b)(1) and (b)(6). In ruling on a motion to dismiss, the court must accept the factual allegations in the complaint as true and draw all reasonable inferences in favor of the nonmoving party. *Gregory v. Daly*, 243 F.3d 687, 691 (2d Cir. 2001), *as amended* (Apr. 20, 2001). In order to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

A. Exhaustion and Plaintiffs' Rational Basis Claim

Properly understood, plaintiffs have raised a collateral challenge to the administrative decision not to reclassify marijuana. As such, plaintiffs' claim premised on the factors found in Section 812 of the CSA is barred because plaintiffs failed to exhaust their administrative remedies. Even if the Court were to reach the merit of plaintiffs' rational basis claim, I hold that plaintiffs have failed to state a claim under Rule 12(b)(6).

The parties first present a threshold question of statutory interpretation, the resolution of which illustrates that plaintiffs' claim is an administrative one, not one premised on the constitution. Plaintiffs contend that, in analyzing the rationality of the CSA, Congress should be bound by the factors set out in 21 U.S.C. § 812(b)(1), which include a finding that a drug has

[1] It appears that one challenge to the DEA's determination was filed in the Tenth Circuit, but the petition was dismissed as untimely. *See* Order, *Krumm v DEA*, 16-9557 (10th Cir. Dec. 15, 2016).

"no currently accepted medical use in treatment in the United States." Alternatively, defendants suggest that the Section 812 factors apply only to *reclassification* determinations by the Attorney General, as set forth in 21 U.S.C. § 811(a). Put differently, the question is whether the statutory factors outlined in Section 812(b)(1) are imputed into the constitutional analysis, thereby binding Congress to particular factors in conducting rational basis review.

A fair reading of the statute reveals that the factors set out in Section 812 apply only to the Attorney General's reclassification proceedings—they do not bind Congress on rational basis review. As explained above, 21 U.S.C. § 811(a) vests the Attorney General with the authority, through his or her designated agent, to reclassify particular drugs if he or she: (1) "finds that such drug or other substance has a potential for abuse, and," (2) "makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of this title." And 21 U.S.C. § 812(b) states that "[t]he findings required for each of the schedules are as follows," and thereafter lists the three relevant factors, including, as relevant here, whether the drug has any currently accepted medical uses. Read in context with Section 811(a), it is clear that the factors listed in 21 U.S.C. § 812(b)(1) were intended to apply only to the executive officials in reclassification proceedings.

More fundamentally, as a constitutional matter I am persuaded by the logic of the opinion of Judge Wolford of the Western District of New York in *United States v. Green*, who analyzed this question as follows:

> It 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. And if that were the central question in this case, Defendants' argument would have merit—but it is not the central question. . . . The issue is not whether it was rational for Congress or the DEA to conclude that there is no currently accepted medical use for marijuana—that would be the issue if a

> claim were brought in a circuit court challenging the DEA's administrative determination. Rather, the constitutional issue for equal protection purposes is, simply, whether there is any conceivable basis to support the placement of marijuana on the most stringent schedule under the CSA.

222 F. Supp. 3d at 275–80.

By framing their claim in terms of the statutory factors outlined in Section 812(b)(1), plaintiffs' lawsuit is best understood as a collateral attack on the various administrative determinations not to reclassify marijuana into a different drug schedule. As such, plaintiffs' claim is barred because plaintiffs failed to exhaust their administrative remedies. The exhaustion rule generally requires "that parties exhaust prescribed administrative remedies before seeking relief from the federal courts." *McCarthy v. Madigan*, 503 U.S. 140, 144–45 (1992); *see also Beharry v. Ashcroft*, 329 F.3d 51, 56 (2d Cir. 2003), *as amended* (July 24, 2003) ("The general rule is that 'a party may not seek federal judicial review of an adverse administrative determination until the party has first sought all possible relief within the agency itself.'" (quoting *Howell v. INS*, 72 F.3d 288, 291 (2d Cir.1995))). "Exhaustion is required because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *McCarthy*, 503 U.S. at 145. However, because federal courts have a "virtually unflagging obligation to exercise the jurisdiction given them," three exceptions to the exhaustion requirement have emerged. *Id.* at 146 (internal quotation marks omitted) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817–18 (1976)). The Supreme Court has explained these exceptions as follows:

> First, requiring resort to the administrative remedy may occasion undue prejudice to subsequent assertion of a court action. Such prejudice may result, for example, from an unreasonable or indefinite timeframe for administrative action. . . . Second, an administrative remedy may be inadequate because of some doubt

> as to whether the agency was empowered to grant effective relief. . . . Third, an administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it.

Id. 145–49 (internal quotation marks omitted) (quoting *Gibson v. Berryhill*, 411 U.S. 564, 575 n.14 (1973)). None of these exceptions applies here.

Plaintiffs first suggest that the relief they seek—a declaration that the CSA is unconstitutional—differs from the relief available in an administrative forum, which is limited to rescheduling based on the criteria in 21 U.S.C. § 812(b)(1). But while framed in different terms, these two remedies are ultimately two sides of the same coin. Although plaintiffs couch their claim in constitutional language, they seek the same relief as would be available in an administrative forum—a change in marijuana's scheduling classification—based on the same factors that guide the DEA's reclassification determination. As a district court in this Circuit recently explained, "[w]hen [this] argument is dissected, it essentially becomes an attack on the scheduling of marijuana based on the criteria set forth in the statute." *Green*, 222 F. Supp. 3d. at 273. The exhaustion requirement therefore bars plaintiffs' claims.

To avoid this result, plaintiffs rely on *United States v. Kiffer*, 477 F.2d 349 (2d Cir. 1973). Plaintiffs do so in error. In *Kiffer*, criminal defendants convicted of marijuana possession challenged the constitutionality of the CSA under the rational basis test. *Kiffer*, 477 F.2d at 350. Responding to this very exhaustion claim, the Second Circuit held that "the administrative route for these appellants would at best provide an uncertain and indefinitely delayed remedy," and declined to require administrative exhaustion. *Id.* at 351–52. But at the time *Kiffer* was decided, the designated executive official had taken the position that he was barred by a treaty from even considering a petition to reclassify marijuana. *Green*, 222 F. Supp. 3d at 273–74 (noting that "it was doubtful whether an administrative remedy actually existed");

see also Kiffer, 477 F.2d at 351–52. The D.C. Circuit later rejected that position. *See Nat'l Org. for Reform of Marijuana Laws (NORML) v. Ingersoll*, 497 F.2d 654 (D.C. Cir. 1974); *see also Nat'l Org. for Reform of Marijuana Laws (NORML) v. DEA*, 559 F.2d 735 (D.C. Cir. 1977).

Kiffer is also distinguishable on a more fundamental ground: The Court held that imposing the exhaustion requirement would also be unduly burdensome to *criminal defendants* challenging their convictions. *See Kiffer*, 477 F.2d at 353 ("Second, even assuming the existence of a viable administrative remedy, application of the exhaustion doctrine to criminal cases is generally not favored because of 'the severe burden' it imposes on defendants." (quoting *McKart v. United States*, 395 U.S. 185, 197 (1969))). Those concerns are less forceful in the civil context, especially given that the DEA no longer takes the position that it is categorically barred by a treaty from considering reclassification petitions.[2]

Even if the Court were to reach the merits of plaintiffs' rational basis claim, I would be bound by precedent to reject it.[3] The Second Circuit has already resolved this question in *United States v. Kiffer*, 477 F.2d at 355–57, which upheld the constitutionality of the CSA. Every other court to consider this issue has held similarly.[4] Even without the benefit of

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[2] Plaintiffs also claim that the administrative review process is futile because the relevant executive officials are biased against their cause and will not faithfully consider the relevant medical evidence. *See* FAC, ECF 23, at ¶¶ 357–70. But this claim is undercut by the statutory scheme, which specifically requires these officials to defer to HHS on scientific and medical questions. *See* 21 U.S.C. § 811(b).

[3] Plaintiffs rely heavily on *United States v. Pickard*, 100 F. Supp. 3d 981, 996 (E.D. Cal. 2015), for the proposition that the CSA is not "insulated from constitutional review by Congressional delegation of authority to an agency to consider an administrative petition." But as explained above, by raising this challenge based on the factors set out in 21 U.S.C. § 812(b)(1), plaintiffs' claim is properly understood as a collateral attack on the administrative determination not to reclassify marijuana. To the extent that plaintiffs attempt to raise a typical rational basis claim based on whether Congress had *any* conceivable basis to classify marijuana in Schedule I, which would not be the subject of an administrative proceeding, such a claim is barred by precedent.

[4] *See, e.g.*, *Sacramento Nonprofit Collective v. Holder*, 552 F. App'x 680, 683 (9th Cir. 2014) (rejecting rational basis challenge to the CSA); *Am. for Safe Access*, 706 F.3d at 449 (upholding the DEA's decision not to reclassify marijuana in a different schedule under the more stringent "substantial evidence" standard); *United States v Oakland Cannabis Buyers' Co-op*, 259 F. App'x 936, 938 (9th Cir. 2007); *United States v. White Plume*, 447 F.3d 1067, 1075 (8th Cir. 2006) (holding that the CSA's enforcement against industrial hemp production was rationally related to a legitimate government purpose); *United States v Greene*, 892 F.2d 453, 455 (6th Cir. 1989); *United*

precedent, it is clear that Congress had a rational basis for classifying marijuana in Schedule I, and executive officials in different administrations have consistently retained its placement there.[5] For instance, the DEA's most recent denial of a petition to reclassify marijuana listed a number of public health and safety justifications for keeping marijuana in Schedule I. *See* Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53,767 (Aug. 12, 2016). The reasons offered by the DEA included marijuana's "various psychoactive effects," *id.* at 53,774, its potential to cause a "decrease in IQ and general neuropsychological performance" for adolescents who consume it, *id.*, and its potential effect on prenatal development, *id.* at 53,775. Even if marijuana has current medical uses, I cannot say that Congress acted irrationally in placing marijuana in Schedule I.

In sum, the Second Circuit has already determined that Congress had a rational basis to classify marijuana as a Schedule I drug, *see United States v. Kiffer*, 477 F.2d at 355–57, and any constitutional rigidity is overcome by granting the Attorney General, through a designated agent, the authority to reclassify a drug according to the evidence before it and based on the criteria outlined in 21 U.S.C. § 812(b)(1). There can be no complaint of constitutional error when such a process is designed to provide a safety valve of this kind.[6] The argument is

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States v Fry, 787 F.2d 903, 905 (4th Cir. 1986); *United States v. Fogarty*, 692 F.2d 542, 547 (8th Cir. 1982); *United States v Middleton*, 690 F.2d 820, 823 (11th Cir. 1982)

[5] Under the rational basis test, "a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). "On rational-basis review, a classification in a statute . . . comes to [the court] bearing a strong presumption of validity . . . and those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'" *Id.* at 314–15 (quoting *Lehnhausen v. Lake Shore Auto Parts Co*, 410 U.S. 356, 364 (1973)).

[6] As the Second Circuit explained in *Kiffer*:

> The provisions of the Act allowing periodic review of the control and classification of allegedly dangerous substances create a sensible mechanism for dealing with a field in which factual claims are conflicting and the state of scientific knowledge is still growing. The question whether a substance belongs in one schedule rather than another clearly calls for fine distinctions, but the

made that Attorney General's refusal, through the DEA, to quickly resolve reclassification petitions creates sloth. But that sloth, if presented in the appropriate case, can be overcome through a mandamus proceeding in the appropriate Court of Appeals. Judicial economy is not served through a collateral proceeding of this kind that seeks to undercut the regulatory machinery on the Executive Branch and the process of judicial review in the Court of Appeals.

I emphasize that this decision is not on the merits of plaintiffs' claim. Plaintiffs' amended complaint, which I must accept as true for the purpose of this motion, claims that the use of medical marijuana has, quite literally, saved their lives. One plaintiff in this case, Alexis Bortell, suffers from intractable epilepsy, a severe seizure disorder that once caused her to experience multiple seizures every day. After years of searching for viable treatment options, Alexis began using medical marijuana. Since then, she has gone nearly three years without a single seizure. Jagger Cotte, another plaintiff in the case, suffers from a rare, congenital disease known as Leigh's disease, which kills approximately 95% of those afflicted before they reach the age of four. After turning to medical marijuana, Jagger's life has been extended by two years and his pain has become manageable. I highlight plaintiffs' experience to emphasize that this decision should not be understood as a factual finding that marijuana lacks any medical use in the United States, for the authority to make that determination is vested in the administrative process. In light of the decision of the Second Circuit, *see United States v. Kiffer*, 477 F.2d at 355–57, and the several decisions of the D.C. Circuit, *see, e.g.*, *Am. for Safe Access*, 706 F.3d at 449, I am required to dismiss plaintiffs' rational basis claim.

> statutory procedure at least offers the means for producing a thorough factual record upon which to base an informed judgment.

Kiffer, 477 F.2d at 357.

B. Standing and Plaintiffs' Equal Protection Claim

The Cannabis Cultural Association, Inc. ("CCA"), a nonprofit entity dedicated to advancing the business footprint of marginalized groups in the cannabis industry, alleges that the CSA violates the Equal Protection Clause because it was passed with racial animus. *See* FAC, ECF 23, ¶¶ 406–21. Defendants claim that the CCA lacks standing to maintain this claim and, alternatively, that the CCA has failed to state an Equal Protection claim. I hold that the CCA lacks standing to maintain its Equal Protection claim because plaintiffs have failed to demonstrate that a favorable decision is likely to redress plaintiffs' alleged injuries.

To satisfy the "irreducible constitutional minimum of standing," a "plaintiff must have (1) 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." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016) (internal quotation marks omitted) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). Specifically, "[t]o establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560). "The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements." *Id.* at 1547.

Plaintiffs do not claim that the CCA has standing to sue on its own behalf, but rather is suing on behalf of its members. In general,

> an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay, 868 F.3d 104, 123 (2d Cir. 2017) (internal quotation marks omitted) (quoting *Hunt v. Washington Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

In opposing this motion, plaintiffs submitted three affidavits from members of the CCA: Kordell Nesbitt, Leo Bridgewater, and Thomas Motley. *See* Declaration of Michael S. Hiller, ECF 43, Ex. 12–14. Kordell Nesbitt, the first affiant, is an African American male and a member of the CCA. *See* Declaration of Michael S. Hiller, ECF 43, Ex. 12, ¶¶ 1. Mr. Nesbitt was charged in 2013 with participating in a marijuana conspiracy, and he pled guilty in 2014. *See id.* at ¶¶ 2–3. He claims that he continues to face collateral consequences as a result of his conviction, including difficulty finding employment. *See id.* at ¶¶ 7–9. Leo Bridgewater, the second affiant, is a veteran of the U.S. Army who previously served as a telecommunications specialist. *See* Declaration of Michael S. Hiller, ECF 43, Ex. 13, ¶¶ 1–2. Mr. Bridgewater began using medical cannabis in 2015 and claims that, as a result, he cannot renew the government security clearance necessary to work as a private military contractor. *See id.* at ¶¶ 7–9.[7] Finally, Thomas Motley, like Mr. Nesbitt, is an African-American male who was indicted and pled guilty to violating federal law by participating in a conspiracy to distribute and cultivate marijuana. *See* Declaration of Michael S. Hiller, ECF 43, Ex. 14, ¶¶ 1–3. Mr. Motley also states that although he would like to participate in a minority-owned business loan or grant, he believes that his prior felony conviction would make him ineligible to do so. *See id.* at ¶¶ 5–6.

Although the affidavits demonstrate that members of the CCA have suffered an injury-in-fact,[8] the pleadings fail to demonstrate that "it is likely that a favorable ruling will

[7] Although Mr. Nesbitt and Mr. Motley claim that they are African-American, Mr. Bridgewater's affidavit does not disclose his ethnicity. This technicality does not affect the Court's reasoning.

[8] Defendants are correct that *City of Los Angeles v Lyons*, 461 U.S. 95, 105 (1983) forecloses plaintiffs' claims that they have standing based on a fear of future arrest. *See* Plaintiffs' Memorandum of Law in Opposition, ECF 44, at

redress" those injuries. *Massachusetts v. E.P.A.*, 549 U.S. 497, 517 (2007). Plaintiffs' FAC seeks "a permanent injunction . . . restraining Defendants from enforcing the CSA as it pertains to Cannabis." FAC, ECF 23, at 97. But plaintiffs have not shown that, were they to receive a favorable ruling that marijuana cannot be treated as a Schedule I drug, their prior convictions would be undone.[9] Nor have plaintiffs shown, for instance, that those within the government in charge of security clearance determinations would no longer include marijuana in a urine test if plaintiffs are successful in having marijuana reclassified to a different drug schedule. Although one could imagine how plaintiffs might connect these dots, plaintiffs bear the burden of pleading each element of standing, and their various submissions have failed to do so. *Spokeo*, 136 S. Ct. at 1547.

Alternatively, even if plaintiffs had standing, I hold that plaintiffs fail to state a claim under Rule 12(b)(6). To survive a motion to dismiss an Equal Protection claim, plaintiffs must plausibly plead that "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979); *see also Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that a law violates the equal protection clause if passed with discriminatory purpose). If a plaintiff plausibly pleads such a claim, a law is then subject to strict constitutional scrutiny, which holds that "such classifications are

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56. However, each of the individuals who submitted an affidavit suffers from a forward-looking injury-in-fact that is concrete, particularized, and imminent. For instance, Mr. Nesbitt claims, with documentation from a potential employer, that his prior conviction has harmed his ability to obtain future employment. As described above, other affiants have similar claims that are sufficient to demonstrate an injury-in-fact.

[9] The Supreme Court recently held for the first time that a guilty plea, standing alone, does not bar a criminal defendant from challenging the constitutionality of the statute of his conviction on direct appeal *Class v. United States*, No. 16-424, 2018 WL 987347, at *8 (U.S. Feb. 21, 2018). But the challenge here is even more attenuated, for plaintiffs are not challenging their underlying convictions, either on direct appeal or in habeas proceedings. Plaintiffs have presented no basis, even a speculative one, explaining how a favorable decision in this case would redress their alleged injuries.

constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

Plaintiffs' racial animus claim is based on a patchwork of statements by former Nixon Administration officials, many of which were made after the passage of the CSA. *See* FAC, ECF 23, at ¶¶ 235–52. Even taking these allegations as true, plaintiffs have failed to demonstrate that the relevant decisionmaker—Congress—passed the CSA and placed marijuana in Schedule I in order to intentionally discriminate against African Americans. *See Feeney*, 442 U.S. at 279 (recognizing that the relevant "decisionmaker" in the case was the "state legislature"); *United States v. Then*, 56 F.3d 464, 466 (2d Cir. 1995) (considering, in the context of the sentencing disparity between powder cocaine and crack cocaine, whether "Congress" acted "with discriminatory intent in adopting the sentencing ratio at issue"). Plaintiffs have cited no authority for the proposition that various statements by Executive Branch officials, such as those at issue here, which are untethered from the Congressional process, can support an Equal Protection claim premised on racial animus. Therefore, even if plaintiffs could demonstrate standing, I would still hold that plaintiffs failed to state a claim.

C. Remaining Constitutional Claims

Plaintiffs advance a number of additional constitutional challenges to the placement of marijuana in Schedule I under the CSA, independent of plaintiffs' rational basis challenge based on medical evidence, largely in order to subject the CSA to heightened constitutional scrutiny. Because plaintiffs have failed to state a claim under any constitutional theory, all of plaintiffs' remaining claims are also dismissed.

Plaintiffs first claim that the CSA's regulation of marijuana violates the Commerce Clause. There is no need to belabor this point. The Supreme Court has held, in no

uncertain terms, that "intrastate manufacture and possession of marijuana for medical purposes," even if legal under state law, does not exceed Congress's authority under the Commerce Clause. *Raich*, 545 U.S. at 15. I am bound to apply this precedent and plaintiffs' claim under the Commerce Clause is therefore dismissed.[10]

Plaintiffs also appear to assert a fundamental right to use medical marijuana, which is then used to prop up plaintiffs' remaining causes of action. Plaintiffs frame their claim as "the right of Plaintiffs to exercise personal autonomy and to preserve their health and lives." *See* Plaintiffs' Memorandum of Law in Opposition, ECF 44, at 68. No such fundamental right exists. Every court to consider the specific, carefully framed right at issue here has held that there is no substantive due process right to use medical marijuana. The Ninth Circuit, on remand from the Supreme Court's decision in *Raich I*, analyzed this question in detail, holding that "federal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering." *Raich v. Gonzales*, 500 F.3d 850, 866 (9th Cir. 2007). Other courts have reached the same conclusion. *See, e.g.*, *United States v. Washington*, 887 F. Supp. 2d 1077, 1102 (D. Mont. 2012), *adhered to on reconsideration*, No. CR 11-61-M-DLC, 2012 WL 4602838 (D. Mont. Oct. 2, 2012) (rejecting a fundamental right to use medical marijuana and applying rational basis review); *Elansari v. United States*, No. CV 3:15-1461, 2016 WL 4386145, at *3 (M.D. Pa. Aug. 17, 2016) (noting "that 'no court to date has held that citizens have a constitutionally fundamental right to use

[10] Apart from simply attempting to relitigate the issues firmly decided in *Raich*, plaintiffs argue that "the classification of cannabis as a Schedule I drug under the CSA is void under the doctrine of *desuetude*." Plaintiffs' Memorandum of Law in Opposition, ECF 44, at 92. Plaintiffs' argument borders on frivolous. "Desuetude is the 'obscure doctrine by which a legislative enactment is judicially abrogated following a long period of nonenforcement.'" *United States v. Morrison*, 596 F. Supp. 2d 661, 702 (E.D.N.Y. 2009) (quoting Note, *Desuetude*, 119 Harv. L. Rev. 2209, 2209 (2006)). First of all, this civil law doctrine is not applicable in federal courts. *See D C. v. John R Thompson Co.*, 346 U.S. 100, 113-14 (1953) ("The failure of the executive branch to enforce a law does not result in its modification or repeal."). And even if this doctrine were viable, plaintiffs have not shown that the federal government has entirely abandoned application of the CSA as applied to marijuana.

medical marijuana'" (quoting *United States v. Wilde*, 74 F. Supp. 3d 1092, 1095 (N.D. Ca. 2014))).[11] Accordingly, plaintiffs' substantive Due Process claim is dismissed.

Plaintiffs also raise an ill-defined right to travel claim. The thrust of this claim appears to be that because plaintiffs are more likely to be arrested for possession of medical marijuana if they travel by airplane or enter federal buildings (where they might be subject to search), the CSA unconstitutionally infringes on their right to travel. *Saenz v. Roe*, 526 U.S. 489, 500 (1999) (defining one element of the right to travel as "protect[ing] the right of a citizen of one State to enter and to leave another State"). This claim fails for substantially the same reasons already discussed above, for no fundamental right to use medical marijuana exists.

As a general matter, the right to travel has been understood primarily as a restriction on state-created obstructions to interstate travel, not as a bar on federal regulatory schemes. *See, e.g.*, *Minnesota Senior Fed'n, Metro. Region v. United States*, 273 F.3d 805, 810 (8th Cir. 2001) (noting that "the Court's other modern cases . . . have applied the federal constitutional right to travel to *state* legislation that had a negative impact on travel between the various states," rather than to a "*federal* statutory regime because it allegedly deters interstate travel"). The CSA is facially neutral as to travel—it does not impose any bar on plaintiffs' movement from state to state. *See Five Borough Bicycle Club v. City of New York*, 483 F. Supp. 2d 351, 362 (S.D.N.Y. 2007), *aff'd*, 308 F. App'x 511 (2d Cir. 2009) ("A statute implicates the constitutional right to travel when it actually deters such travel, or when impedance of travel is its primary objective, or when it uses any classification which serves to penalize the exercise of

[11] Plaintiffs largely rely on *Cruzan v Director, Missouri Department of Health*, 497 U.S. 261, 278 (1990) for the proposition that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment." But *Cruzan* speaks only to one's right to *refuse* medical treatment, not a positive right to obtain any particular medical treatment.

that right" (internal quotation marks omitted) (quoting *Soto–Lopez v. N.Y.C. Civil Serv. Comm'n*, 755 F.2d 266, 278 (2d Cir. 1985))).

Instead, the CSA makes possession and distribution of certain controlled substances, including marijuana, illegal, *regardless* of one's movement between states. Properly understood, plaintiffs' complaint is simply that they are deterred from travel because they fear that they are more likely to be arrested for marijuana possession at airport security checkpoints. Such an interpretation of the right to travel, if adopted, would invalidate any number of bans on controlled substances or firearms simply because the enforcement of these facially neutral laws might have some conceivable, tangential impact on travel. Plaintiffs have identified no authority for such an expansive interpretation of the right to travel, and the Court has not found any. A suggestion has been made that the CSA presents plaintiffs with a Hobson's choice between their fundamental right to use medical marijuana and a right to travel. But as explained above, no such fundamental right to use medical marijuana exists. Plaintiffs' right to travel claim is therefore dismissed.

For substantially the same reasons, plaintiffs' First Amendment claim also fails. The core of plaintiffs' claim stems from the fact that Alexis Bortell has previously been invited to speak with members of Congress in Washington, D.C. about ongoing efforts to decriminalize medical marijuana, but cannot do so because she cannot fly on an airplane or enter federal buildings without risking arrest and prosecution for marijuana possession under the CSA. But the First Amendment protects freedom of speech, first and foremost. To be sure, the Supreme Court has extended constitutional protection to certain kinds of expressive conduct, but only such conduct that is "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Spence v. Washington*, 418 U.S. 405, 409 (1974); *see*

also United States v. O'Brien, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."). Accordingly, the First Amendment's protections have been extended "only to conduct that is inherently expressive," *see Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006), such as burning the American flag, *see Texas v. Johnson*, 491 U.S. 397, 406 (1989), or conducting a sit-in to protest racial segregation, *see Brown v. Louisiana*, 383 U.S. 131 (1966).

The CSA is not targeted at speech, nor does it directly implicate speech in any way. Laws of this kind, which are directed as "commerce or conduct," are not implicated by the First Amendment simply because they impose "incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011); *see also id.* ("[R]estritions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct."). As the Supreme Court has explained, "every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities," but such laws do not automatically warrant First Amendment protection. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 (1986). Put differently, "the First Amendment is not implicated by the enforcement of" laws, like the CSA, which are "directed at imposing sanctions on nonexpressive activity." *Id.* at 707. Were plaintiffs correct, any law regulating possession of illegal substances, firearms, or any number of other things would be subject to First Amendment scrutiny simply because those who possess such items risk arrest by carrying them onto federal property. And as explained above, because there is no fundamental right to use medical marijuana, plaintiffs do not face a Hobson's choice with respect to the exercise of their constitutional rights.

For the reasons stated herein, defendants' motion to dismiss the complaint is granted. Plaintiffs have already amended their complaint once, and I find that further amendments would be futile. *Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993). The clerk is instructed to terminate the motion (ECF 36), mark the case as closed, and tax costs as appropriate.

SO ORDERED.

Dated: February 26, 2018
New York, New York

ALVIN K. HELLERSTEIN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

MARVIN WASHINGTON, et al.,

Plaintiffs,

-against-

JEFFERSON BEAUREGARD SESSIONS, III, et al.,

Defendants.

----------X

17 **CIVIL** 5625 (AKH)

JUDGMENT

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Opinion and Order dated February 26, 2018, defendants' motion to dismiss the complaint is granted. Plaintiffs have already amended their complaint once, and the court finds that further amendments would be futile. Ruffolo v. Oppenheimer & Co., 987 F.2d 129, 131 (2d Cir. 1993); accordingly, the case is closed.

Dated: New York, New York
February 26, 2018

RUBY J. KRAJICK

Clerk of Court

BY: Kmango

Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

MARVIN WASHINGTON,

Plaintiff,

v.

JEFFERSON BEAUREGARD SESSIONS, III, *et al.*,

Defendants.

----------x

New York, N.Y.

17 Civ. 5625 (AKH)

September 8, 2017
12:10 p.m.

Before:

HON. ALVIN K. HELLERSTEIN,

District Judge

APPEARANCES

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(Case called)

MR. HILLER: Michael Hiller from the law firm of Hiller, P.C., 600 Madison Avenue, New York, New York, 10022 on behalf of plaintiffs. Good morning, your Honor.

THE COURT: Introduce your colleagues.

MR. HILLER: To my right is Fatima Afia, also from the same firm; Lauren Rudnick, my partner from the same firm.

MR. BONDY: Good morning, your Honor. Joseph A. Bondy, B-O-N-D-Y, 1841 Broadway, New York, New York, 10023. Good morning.

THE COURT: Good morning.

MR. HOLLAND: Good morning, your Honor. David Holland, 155 East 29th Street, Suite 910.

MR. HILLER: And my associate has asked me to disclose to the Court that her admission is still pending but she has been approved for admission to the bar.

THE COURT: Very well. You may sit at counsel table.

MR. HOLLAND: Thank you.

MR. DOLINGER: Good afternoon, your Honor. Samuel Dolinger, Assistant United States attorney for the defendants. With me at counsel table is David Jones from our office.

THE COURT: Gentlemen, thank you.

This is a TRO. Why don't you make your motion, Mr. Hiller.

MR. HILLER: Thank you. May I use the lectern?

THE COURT: Please.

MR. HILLER: Thank you.

THE COURT: Mr. Hiller, proceed.

MR. HILLER: Thank you, your Honor. This is plaintiff's order to show cause for a temporary restraining order and preliminary injunction.

THE COURT: Let me interrupt and note for the record that I saw the parties informally in the robing room, and we suspended the proceedings so that they could be recorded by Ms. Utter and a record be made.

So, you are going to be repeating things you already told me. I want you to know I understand that and accept that.

MR. HILLER: Thank you very much, your Honor.

THE COURT: You need to do it.

MR. HILLER: So, this is plaintiff's order to show cause for a temporary restraining order and preliminary injunction to suspend enforcement of the Controlled Substances Act as it pertains to cannabis and as it pertains to one plaintiff, Alexis Bortell. With the Court's indulgence, we prefer to focus on the TRO relief today and would defer consideration of the preliminary injunction to a later date, at the Court's direction.

As for the TRO, we simply ask that the federal courts -- the federal government --

THE COURT: Can you tell me that again?

MR. HILLER: I said with the Court's indulgence, we will focus on the TRO relief today and defer consideration of the larger preliminary injunction to a later hearing date, at the Court's direction.

THE COURT: I did that because the papers came in this morning and I have had no time to review them.

MR. HILLER: I understand, your Honor. I just wanted to make a record that I wasn't going to be arguing the full preliminary injunction today.

As for the TRO, we suggest that the federal government be temporarily restrained from enforcing the CSA -- the Controlled Substances Act -- as it pertains to cannabis and as it pertains to Alexis Bortell, so that she can travel back and forth to Washington, D.C. for four days to participate in certain lobbying days that have been scheduled by the National Organization for the Reform of Marijuana Laws, also known as NORML, which invited her specifically to participate in these lobbying days which were scheduled with members of Congress. Without this relief, Alexis Bortell cannot travel because she needs her medical cannabis in order to prevent the recurrence of seizures which, as explained by her physician, would end her life. So, in a sense, she wants to travel to Washington and she wants to take her medical cannabis with her so she can lobby the government and meet with members of NORML, as well as members of Congress.

I should emphasize to the Court that one member of Congress has already sent correspondence to Ms. Bortell's parents and to Ms. Bortell inviting them to meet with him because, as he said, and I am quoting now, the Congressman believes that it is important that members of Congress be afforded the opportunity to meet with you and to hear your story and receive your perspective.

As I will get to in a moment, Alexis Bortell does meet the requirements necessary for the issuance of the relief we have requested. But before I do that, your Honor, I want to tell you briefly about Ms. Bortell because I think it is important for the Court to get the full picture.

She is 11 years old. When she turned 7, she developed a condition called intractable epilepsy. That is an uncontrollable form of epilepsy which results in dozens of seizures per week, often several times a day. Because it is intractable, it simply does not respond to traditional western medications. She had over 35 medications, your Honor, and medical cocktails and other treatments. None of it worked. As a consequence, her physicians gave her parents a choice. She could either have invasive brain surgery resulting in the removal of portions of her brain tissue, or she could try medical cannabis. Medical cannabis had, in fact, had some success over the years so she moved with her family -- she moved with her family to Colorado where she has been taking

medical cannabis for the last 900 days, approximately. Your Honor, even thought she was having multiple seizures per day while the doctors attempted to resolve her condition with traditional western medicine, she has not had a single seizure in the more than 900 days since she began a regimen of medical cannabis. She has been transformed from a sick and debilitated little he girl into a very productive, normal girl who has the ability to live a normal life, seizure free.

What is really unusual about this now 11-year-old girl, and I say this from personal experience -- when I was 11 years old the last thing I was thinking about was going to Congress, I was wondering whether or not the Giants were going to win this Sunday -- but for Alexis Bortell she is not content merely to save herself, she wants to advocate on behalf of everyone else, including herself but of course everyone else, so that they can benefit from the regimen of medical cannabis that has saved her life. She has written a book, she has an active Internet presence, she has got tens if not hundreds of thousands of followers all over the world, she has spoken to state legislature, testified at hearings. She raises money for the hungry and for medical refugees who have moved to Colorado but don't have the funds to support their families because they can't maintain two residences. She wants everyone to know how cannabis has changed her life. In many respects, your Honor, Alexis Bortell is to medical cannabis what Malala is to

literacy. She is literally the poster child for medical cannabis. And so, it is against that background that we now speak to you about the opportunity that this particular girl have the opportunity to meet with representatives on Capitol Hill. As I mentioned earlier, she cannot travel on a federal roads, she can't travel by air, and she can't enter on any federal lands.

Now, it is particularly troubling for her that both of her parents are military veterans. Her father is a 100 percent disabled military veteran and, as a consequence of that, she would be entitled to receive certain veterans' dependent or dependent veterans benefits which she cannot collect because she can't go on to a military base. She needs her medical cannabis with her at all times in the same way that some people need a rescue inhaler as an asthmatic, or epi-pen if they have an anaphylactic allergy. She needs it, and if she doesn't have it she can have these seizures, so she can't go on these federal lands.

So, she was invited by NORML, and as I mentioned earlier, by members of Congress to speak to her, to speak to her at this particular time. And I want to emphasize the timing of this application is especially important. Right now the Marijuana Justice Act is going to be introduced on Capitol Hill. In addition, multiple pieces of legislation addressing de-criminalization or de-scheduling of cannabis are under

consideration right now. We are at the proverbial tipping point, your Honor, where the government of the United States needs to hear from people like Alexis Bortell but, unfortunately, the government can't do so because all of the people who need medical cannabis to survive are also the people who do not qualify to be on federal lands.

So, when we talk about the three requirements I want to speak to the first one which is, of course, irreparable harm. This Court has found itself, irreparable harm is the most important of the three prongs. And I want to emphasize that the particular constitutional rights which we are talking about are free speech, the right to petition the government for redress of grievances, the right to travel, the right to preserve one's life and to continue taking medication, I should say, to preserve one's life, and certain substantive due process rights under the Ninth Amendment and under the Due Process Clause. Let me first address the First Amendment issue, Judge.

I can imagine that someone might claim that Ms. Bortell is not threatened with imminent irreparable harm because she could just speak to someone on the telephone or speak to someone on a video connection. Your Honor, I would respectfully refer the Court to Hodgkins v. Peterson, 355 F.3d 1048, (2d Cir. 2014), in which the Court rules, "There is no Internet connection, no telephone call, no TV coverage that can

compare to in-person advocacy."

The United States Supreme Court, in addressing the government's efforts to dictate how these people express themselves and, in particular, what forms they use, the Court specifically ruled in Riley v. National Federation for the Blind, 487 U.S. 781, "The government, even with the purest motives, may not substitute its judgment as to how people should best express themselves."

Senator Booker recently called out Attorney General Sessions and said I dare him to sit down and meet with the families and look hem in the eyes and continue to pursue the course of action he is taking. The point, your Honor, is in person advocacy there is simply no substitute for it. There is simply no substitute for it. And if you look at the particular circumstances here I would like to add one additional nugget to that and that is this: Members of Congress, when they want to meet with someone like Alexis Bortell, will sit down with her. They are going to want to introduce her to other members of Congress, but if she is on a telephone line that is simply not possible. And even if it were, it wouldn't be an in-person connection. And a video feed can't be carried down the hall. She needs to have the opportunity to meet with one member of Congress after another because they need to hear from her and most importantly she, as an American citizen, as a person of the United States, has the fundamental, constitutional right to

engage in in-person advocacy particularly if members of Congress have requested her presence there. And so, that is a fundamental right. And I should emphasize and should have done so at the outset, any time someone is threatened with the deprivation of a constitutional right as a matter of law, that constitutes irreparable harm. So, I have articulated one particular aspect of this, I now want to turn to the issue of the right to travel.

Ms. Bortell cannot travel. If she were to travel, Ms. Bortell would be subject to arrest, her parents would be subject to the termination of their parental rights, and as a consequence she is restricted in ways that other Americans are not. In addition to that, your Honor, I would respectfully refer your Honor to the Roe vs. Wade and Stenberg v. Carhart cases. In those cases, the Supreme Court ruled that an individual has a right to protect his or her own health and life.

In all of the abortion rights cases the Supreme Court has consistently ruled that under circumstances in which a woman wants to have a third trimester abortion, even after fetal liability, the Courts must afford that woman the opportunity to take medication or to save a life in another way by terminating that pregnancy because the right to preserve one's life is paramount. Here, we are simply asking the Court to recognize the same right, the right of Alexis Bortell to

continue taking medication which, for the last almost three years, has been preserving her health and her life.

And with all due respect --

THE COURT: What is the source of that right?

MR. HILLER: The source of the right, your Honor, is found in both due process laws. The Due Process Clause prevents the government from taking action that deprives someone of life, liberty, or property without due process of law. She is being deprived of the opportunity to preserve her life. She is also being derived the opportunity, under the liberty clause, for the maintenance of her health and to preserve her health.

And I would emphasize to your Honor, if you would look at the Stenberg v. Carhart case which we have cited in our brief, if I may turn to that page briefly, the governing standard requires an exception --

THE COURT: What is the case?

MR. HILLER: Stenberg v. Carhart, 530 U.S. 914 at page 931, decided in 2000.

The governing standard requires an exception where it is necessary in the appropriate medical judgment -- in appropriate medical judgment for the preservation of the life or health of the mother, for this Court has made clear that a state may promote but not endanger a woman's health when it regulates methods of abortion.

The point of the matter is, Judge, that whenever there is a circumstance in which there are competing state versus individual interests, the right of a woman, or in this case the right of a 11-year-old girl to preserve her own life and her own health, trumps whatever the government would like to do here insofar as the Controlled Substances Act is concerned. It would be one thing, your Honor, if Alexis Bortell were a drug dealer, but she's not. She is using medical cannabis to preserve and save her life, and that actually takes me to my point concerning substantive due process with respect to the rationale, or I should say the irrationality of the Controlled Substances Act.

Your Honor, in order to meet the requirements of a controlled substance Schedule I drug the government must establish that there is a high potential for abuse, Judge no, medical application whatsoever, no medical utility whatsoever, and third, that it is so dangerous that it cannot be tested even under strict medical supervision.

Well, your Honor, if you look at Exhibit 9 to our papers you will see that the United States government has a patent on medical cannabis and in that patent, your Honor, the United States government makes a representation that it treats Parkinson's disease, HIV-induced dementia, and Alzheimers disease. It also serves as an effective neuroprotectant and safeguard against diseases that oxidize within the body. This

is the United States government.

Now, your Honor, you cannot have a patent under Section 35 U.S.C. 101 unless you can demonstrate utility. The United States government demonstrated that utility by obtaining a patent by making representations to the United States Patent & Trademark office that medical cannabis works, that it is an effective treatment for disease. They also did this on the international stage before the World Intellectual Property Organization, and they obtained a patent in Canada with the same representations that were made based upon the same standard.

So, on the one hand the government of the United States is saying that cannabis is so dangerous it can't be tested under medical supervision and it has no medical application whatsoever, while at the same time they obtained a medical patent based upon the representation that it does provide medical benefits.

The point I am making, your Honor, and this is one of 11 different instances where the government's position simply cannot be reconciled with its own prior statements that the statute itself is completely and totally irrational. So, I have mentioned the first one, which is the patent in the United States. I mentioned the second one which is the patent that's been obtained on the world stage. The United States government has licensed that patent, your Honor, to third-parties. The

United States government is collecting funds based upon the representation that cannabis has medical efficacy in direct violation of the allegation that is a critical component of the CSA, namely, that there is no medical application.

The United States government also has issued something called the FinCEN guidance. The FinCEN guidance is issued by the Bureau of the Department of Treasury. In the FinCEN guidance the United States government gives advice to banks and other financial institutions as to how to do business with cannabis companies. So, the United States government is saying on the one hand under the CSA that cannabis is so dangerous it doesn't have any application and can't be tested, even under strict medical supervision, and yet the United States government at the same time is advising banks and other third-party lending institutions how to do business with cannabis companies. That simply makes no sense.

The United States government, in 1978, your Honor, began something called the IND Program with respect to cannabis. The IND Program -- I think it is called Interventional New Drug Program -- pursuant to the IND program, your Honor, the United States government gives cannabis to patients for the treatment of disease. They have been doing it for almost over 40 years, Judge. What is interesting about that is a study that was conducted -- not a single one of those persons has a single adverse impact that has affected their

lives. Quite the contrary, they are on less medication than they were on before.

If the United States government is going to take the position that medical cannabis has no efficacy whatsoever, how can they explain why they've been giving this drug -- again, by the way, they're not giving it to a drug company to give to these people, the United States government is giving the drugs to patients through the IND Program. How can they do that if it is so dangerous it can't be tested?

In February of 2015, your Honor, the United States Surgeon General, America's chief health and medical officer announced on CBS News that medical cannabis has medical efficacy for the treatment of disease.

Your Honor, there have been 29 states --

THE COURT: You prove that by the efficacy in this young girl's life. Because of cannabis administered in Colorado which she could not get in Boston she has seen a cessation of her seizures for a period of time. The question is that Congress has declared this substance and the delegated authority, something that should be forbidden. It has not enforced that rule in various states that have made an exception for medical marijuana but every now and then there are noises that it will and presumably it does that because there is an attitude, whether scientifically based or not, that the use of cannabis by people, particularly young people, did

cause addiction and serves as a pathway to more dangerous drugs. I don't know if that is true or not but --

MR. HILLER: Your Honor, I can address that specific issue, if I may.

The Drug Enforcement Administration, for decades, had the very same language.

THE COURT: You don't know what my point was.

MR. HILLER: I'm sorry?

THE COURT: What was my point?

MR. HILLER: Oh. I thought you were saying that the government has made this determination that it is a gateway drug. I'm sorry. I thought you were finished. Forgive me.

THE COURT: Maybe you know the point. Maybe you know the point, then I don't have to articulate it.

Where the government has said it is illegal and where it has also said that there is use and utility but there has never been a determination that it's okay for everybody, what's the power of the Court?

MR. HILLER: What's the power of the Court in the context of, in the context of the framework?

THE COURT: The law that says it is illegal and with actions by the government to show that there is utility. The fact that there is utility doesn't make it less illegal.

MR. HILLER: The fact is that the federal government has acknowledged, in writing, that there is medical utility for

cannabis.

THE COURT: Does not make it less illegal to distribute it.

MR. HILLER: I think that may be true, your Honor, but that doesn't make it -- let's put it this way. The government's acknowledgment in writing that cannabis has medical efficacy does render the statute unconstitutional insofar as --

THE COURT: Why?

MR. HILLER: Because in order for cannabis to be a Schedule I drug there needs to be a finding that it has no medical efficacy, that there is no medical utility or application whatsoever and that it is so dangerous, like heroin and ecstasy, for example, that its mere testing even under strict medical supervision, is too dangerous to try. That, your Honor, is completely incompatible with the admissions that the government has made. And when the government purports to represent to your Honor and Judges like yourself that cannabis is properly scheduled because it is too dangerous to test because there is no medical -- because there is no medical efficacy for it because it meets the Schedule I requirements when in fact it's just the opposite, the federal government has a patent alleging, claiming and representing that it does have medical efficacy, that means that the United States government is taking two positions that are irreconcilable.

THE COURT: If there is medical benefit but there is also danger, can there not be a law forbidding its distribution?

MR. HILLER: The fact pattern that you just proposed would mean that it cannot be a Schedule I drug, that it is irrational as currently scheduled --

THE COURT: Schedule I drug can have no utility whatsoever.

MR. HILLER: No medical utility whatsoever. And the fact of the matter is that the United States government --

THE COURT: Does the government agree with that?

MR. DOLINGER: No, your Honor.

THE COURT: Okay. You will tell me later. I just wanted to know.

MR. DOLINGER: Thank you.

MR. HILLER: We can go through the statute but it is clearly in the statute. I will be interested to hear what opposing counsel has to say.

Your Honor, in addition to the matters I mentioned earlier, the United States Congress has repeatedly added riders to all of its appropriations legislation to prevent the Attorney General, Department of Justice, and the DEA from enforcing the Controlled Substances Act as against medical cannabis patients and medical cannabis businesses that are acting in conformity with state law. What that means is the

United States government is allowing people to use medical cannabis notwithstanding that medical cannabis, according to the Controlled Substances Act, is so dangerous it can't be tested even under strict medical supervision.

There are of course the Ogden and Cole memorandum, which I am sure your Honor is familiar with, in which the United States government has discouraged any prosecutions against people who are using medical cannabis in conformity with state law. And by the way, your Honor, with 29 states and three territories having some form of medical cannabis or cannabis legalized, over 60 percent of the United States right now has legalized cannabis, over 190 million people have access to medical cannabis. It is absurd to suggest, as the government may suggest, that cannabis is so dangerous that it can't be tested safely even under medical supervision but 190 million people could be exposed to it every day.

Lastly, your Honor, I would refer your Honor to the comments made by Congressman Gowdy and Congressman Connolly during their recent hearings with the White House Policy Acting Director. During those hearings Congressman Gowdy said: I don't understand why cannabis is a Schedule I. It certainly isn't treated as inherently dangerous, a dangerous substance for which there is no medical value.

And Gerry Connolly of Virginia said: There was in fact no empirical evidence to justify putting marijuana as a

Schedule I drug 50 years ago.

Mr. Connolly also pointed out that the National Institute for Drug Abuse, which helps set policy in Washington said -- Congressman Connolly said, "nobody thinks NIDA is an objective neutral place to go to look at the good, the bad and the indifferent about marijuana. NIDA doesn't have that kind of credibility.

And Congressman Gowdy responded after that and said it would be helpful at some point to us to have some consistency -- and this is the most important part -- or at least to be able to explain why some drugs are Schedule I and others are not.

Congressman Gowdy closed the hearing by pointing out that it is imperative that we just make some common sense in how cannabis is scheduled.

Members of Congress can't even explain it, Judge. I am pointing out that the statute itself is completely and totally irrational and we are going to deprive an 11-year-old girl, who is a leader of this movement, to prevent her from traveling for four days to Washington, D.C. where she will pose harm to no one, where she will be invited as a guest to the meet with members of Congress. The statute should have some basis in reality, some basis in rationality, and the fact of the matter is this one doesn't. We are talking about the loss of a precious constitutional right.

THE COURT: Does she know that she will be forbidden to go on the airplane?

MR. HILLER: Yes.

THE COURT: How does she know that?

MR. HILLER: Her father told her.

THE COURT: What?

MR. HILLER: Her father told her.

THE COURT: That's not a legal answer.

MR. HILLER: No. You are asking me why --

THE COURT: Does she know that by traveling she will be arrested?

MR. HILLER: No. She doesn't know that -- she can't predict the future but she would know that she is violating the law and she doesn't want to violate the law in order to make an appearance.

THE COURT: She would technically be violating the law in Colorado because federal law is enforced in Colorado.

MR. HILLER: She is complying with Colorado law. When she steps foot on an airplane or on federal lands she is violating federal law.

THE COURT: If she is taking marijuana in Colorado, whether under a doctor's prescription or not, she may be violating federal law because federal law is supreme over state law.

MR. HILLER: Your Honor, you know, if I am attacking a

perspective there is no denying the Controlled Substances Act and the supremacy clause controls.

THE COURT: It is not that she is afraid of violating the law. She wants --

MR. HILLER: She is in Colorado, your Honor, and as someone who lives in Colorado she is protected under that state's laws and she is obviously aware -- the family is aware of the Cole memorandum, the Ogden memorandum, the FinCEN Guidance, and of course the fact that 190 million people are exposed to cannabis every day and the federal government at the moment is precluded, under the Rohrabacher-Farr amendment, from to devoting resources to the prosecution of people like her and her family. So, right now, although it is illegal under the Controlled Substances Act, she is not in legal jeopardy as long as she stays within the confines of Colorado. But, in effect, she has become a prisoner of Colorado. And she can't go everywhere in Colorado because she can't go on her parents' military base and she can't go to any of the four National Parks in Colorado. She's never seen Yosemite, she's never seen any National Park, for that matter.

THE COURT: So you are saying there is a memorandum in the Department of Justice that says that the government will not prosecute a case of distribution of marijuana where there is a license from the state involved and a prescription?

MR. HILLER: Not exactly the way you said it, your

Honor, but if you look at Exhibit 11 is the Cole memorandum, and the Cole memorandum specifically addresses this issue.

THE COURT: Wait a moment. Let me get it.

MR. HILLER: Sure.

THE COURT: Because of this memorandum -- is it still operative?

MR. HILLER: It is.

THE COURT: It is not likely that she will be prosecuted on an airplane.

MR. HILLER: It is not likely she will be prosecuted in Colorado.

THE COURT: Or in an airplane moving from Colorado. Or even anywhere else because Colorado's laws entitle her to full faith and credit.

MR. HILLER: Your Honor, it is my understanding that if she travels on airplanes regulated by the federal government she would be subject to prosecution. But let's assume for the purpose of discussion --

THE COURT: You don't know that.

MR. HILLER: Let's assume for the purpose of discussion that your Honor is a hundred percent right and she is completely safe on an airplane -- I'm not sure I agree but let's assume that's the case -- your Honor, the minute she steps on federal land -- the Cole memorandum is inoperative on federal land. She cannot go to Congress. So, even if she

drove to Washington, D.C. using a circuitous route to only go through state-legal cannabis states, she still would be subject to arrest in Washington, D.C.

Then, your Honor, as long as you are looking at the exhibit book, I would encourage you to look at the next exhibit, Exhibit 12. The very first paragraph to me makes the case more strongly than anything I could say but it really talks about how the United States government is telling banks and financial institutions how to do business with cannabis companies. If cannabis is illegal, then they're committing a crime when they do this. And obviously we are not accusing the government. I am just saying the United States government is encouraging bank and financial institutions to do business with cannabis companies and specifically tells them how to do it.

THE COURT: Why don't I hear Mr. Dolinger.

MR. HILLER: Your Honor, before I close out I do need to make a record on the second and third prongs of the injunctive relief and I will be as brief as I can.

THE COURT: Do that. What is the first factor?

MR. HILLER: The first factor is irreparable harm. And, as I mentioned earlier, it is our position and the cases are consistent on this that the threatened deprivation of a constitutional right constitutes irreparable harm as matter of law. In this instance we have articulated a number of constitutional rights including the rights of free speech, the

right to petition the government for redress of previous --

THE COURT: You made your point.

MR. HILLER: Second is substantial likelihood of success on the merits. Failing that --

THE COURT: You made that point too.

MR. HILLER: Okay. I do want to emphasize one point as part of that that I didn't mention earlier and that's this. I already talked about the fact that in-person advocacy, as a matter of law, is a distinct aspect of a First Amendment right but what I didn't talk about is the tradeoff. If you look at opposing counsel's papers, you will see -- we were served with an 18-page brief shortly before this hearing began -- opposing counsel talks about the fact that she could just leave her cannabis behind and cites papers to make that point. But, your Honor, it is well established in the Simmons case, for example, United States Supreme Court case entitled Simmons, and I can give you the citation in a moment, in which the Supreme Court said you cannot require a person to sacrifice one right in order to exercise another. And here, that's exactly what the U.S. Attorney's office is asking our client to do. He is asking her to either leave her medicine behind in order to travel to Washington and lobby her officials, or she can stay in Colorado and lose the constitutional right to engage in in-person advocacy with respect to an issue that's important to her and which she has been invited to speak about.

THE COURT: What is the third factor?

MR. HILLER: Balancing of equities. Balancing of equities weighing in favor of the injunction, your Honor. I should say balancing of equities determining whether or not it would be -- which party would experience greater harm. In this case, the denial of the application here would deny our client her opportunity to exercise her First Amendment rights, as I mentioned earlier, at this critical point in time when the government is considering the very legislation that could change her life. By contrast, your Honor, there is absolutely no harm whatsoever to the government.

THE COURT: You are appeased, right. I have got all of these points. Let me hear Mr. Dolinger.

MR. DOLINGER: Thank you, your Honor.

MR. HILLER: Thank you, your Honor.

MR. DOLINGER: Your Honor, Samuel Dolinger for the defendants.

To start with the point of likelihood of success on the merits, plaintiff's counsel spent much of his time discussing whether there is a rational basis for the regulation of marijuana under Schedule I of the Controlled Substances Act. There is binding Second Circuit precedent on this point; United States v. Canori, 737 F.3d 181 (2d Cir. 2013) relies on a 1973 Second Circuit case which holds that Congress' scheduling of marijuana in Schedule I was a rational exercise of its power.

THE COURT: You are going too fast. Make your point, please. Take your time.

MR. DOLINGER: Thank you, your Honor.

THE COURT: Start again. What are you telling me?

MR. DOLINGER: Your Honor, there is binding precedent from the Second Circuit recognizing that there is a rational basis for Congress' 1978 determination to schedule marijuana in Schedule I of the Controlled Substances Act.

THE COURT: What about the point that Mr. Hiller made that there are firm examples of federal recognition of the utility of marijuana for medical purposes?

MR. DOLINGER: Your Honor, if you look at the structure of the Controlled Substances Act, Congress passed a law in 1970 and it made an initial determination of where drugs should be scheduled on a total of five schedules. It was Congress that classified marijuana as a Schedule I drug in 1970 and, as a result, the possession, use, etc. of marijuana became a criminal offense.

As the Supreme Court recognized in United States v. Oakland Cannabis Buyers' Cooperative which is 532 U.S., this is page 492, the Attorney General did not place marijuana into Schedule I.

THE COURT: Is this in your brief?

MR. DOLINGER: Yes, it is, at page 3, your Honor.

While the Controlled Substances Act does provide a

method for the updating of schedules --

THE COURT: It would be helpful if you had a table of cases in your brief.

MR. DOLINGER: I'm sorry, your Honor. I had to finish the brief this morning. We got plaintiff's 60-page brief last night at around 10:30.

THE COURT: How about supplementing or submitting a table of contents?

MR. DOLINGER: Certainly, your Honor. I would be glad to do so.

THE COURT: So, which case are you citing? Oakland Cannabis?

MR. DOLINGER: Oakland Cannabis Buyers Club; and the following sentence, your Honor about halfway down the page concerning the fact that Congress was the entity that placed marijuana into Schedule I. And so, while the CSA does provide for this periodic updating of the schedules --

THE COURT: Congress was not required to find that a drug lacks an accepted medical use before including the drug in Schedule I.

MR. DOLINGER: That's right, your Honor.

THE COURT: What if the drug has an accepted medical use and therefore the argument is made that there is no rational basis for the law?

MR. DOLINGER: Your Honor, there is a process whereby

the Attorney General can be petitioned by an individual to seek a change in the scheduling of a drug, a rescheduling into a different schedule. There have been a number of these petitions made as the Supreme Court recognized in Gonzalez v. Raich, which is cited on that same page. Such petitions have been made repeatedly and there is a process for review of the denial of such petitions in the D.C. Second Circuit and so cited again on page 3 of our brief. The D.C. Circuit, in 2013, upheld the denial of such a petition, in 2013, finding that the factual findings in support of its determination not to reschedule the dug were supported by substantial evidence, and those findings reasonably supported the agency's final decision not to reschedule marijuana.

THE COURT: Stop for a moment.

MR. DOLINGER: Yes.

THE COURT: I want to ask a question of Mr. Hiller.

Of course this case is not precedent. Is that binding on me? But the D.C. Circuit, particularly on administrative agency cases, is particularly persuasive. How should I relate it to this case?

MR. HILLER: I will tell you why, your Honor.

You look at your complaint, we have actually put a list of every petition that's ever been filed in connection with the rescheduling of drugs. It takes nine years, on average, for a petition to be considered by the DEA. Very

often, in order to get the DEA or the Attorney General to consider anything, people have to sue, to bring writs of mandamus, to force the government to take action. Nine years is too long.

THE COURT: Why is that relevant?

MR. HILLER: The relevance is that in order for some -- what I am hearing opposing counsel suggest is that there is due process because the petitioning process does provide people with notice and opportunity to be heard. However, if you have to wait nine years to find out whether you can take life saving medication, it ceases to be effective due process.

THE COURT: Well, that doesn't mean every case is nine years, it only means an average is seven or eight years, as you say. But here, the D.C. Circuit held --

MR. HILLER: Which case? I'm sorry. Which case are you talking about?

THE COURT: The one in footnote 1 of page 3 of defendant's brief, Americans for Safe Access v. DEA, 706 F.3d 438. The D.C. Circuit, at page 449 and 442 held that after review of the record, that the agency's factual findings, presumably about marijuana, are supported by substantial evidence; and second, that reasonably support the agency's final decision not to reschedule marijuana.

So, what do I do on a TRO? What do I do with these

findings?

MR. HILLER: Your Honor, that was a litigation to challenge administrative determination. The procedural limitations of such a call are limited to the record that's been placed before the DEA. It is not consistent with the record we have placed before you today and that's a point I really think is important to emphasize. The evidence I have put before you today --

THE COURT: How do I know that? How do I know that? There is no record.

MR. HILLER: I can only tell you -- I mean, I have looked at these cases. I have not seen any case, and opposing counsel is free to disagree with me but I haven't seen any case that has martialed the facts in evidence as we have. I don't see any case talking about the patents, FinCEN.

THE COURT: So, because of the priority of your presentation I should disregard the decision of the District of Columbia Circuit in 2013.

MR. HILLER: Number one, it is based upon different facts; and number two, it is based upon a different procedure. That case was simply seeking to overturn a DEA termination, the standard for which is simply substantial evidence.

THE COURT: And you are telling me to give you an exemption?

MR. HILLER: I am saying to your Honor that the record

here is entirely more substantial than the record that was present for Americans for Safe Access.

THE COURT: Thank you.

Continue

MR. DOLINGER: Your Honor, if I may respond, what counsel is asserting in the complaint here is that the scheduling of marijuana is irrational, and under the rational basis standard there is a strong presumption of validity for the law. The burden is on the plaintiff to show that every conceivable basis which might support it is negated and, furthermore, your Honor, this is at page 7 of our brief, I am citing Beach Communications v. FCC, 508 U.S. at 315; a legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data.

The plaintiffs here are attempting to get the Courts to not only re-review the D.C. Circuit's determinations on an administrative petition which already it is not before the Court but to sit as a sort of super-legislature above Congress and to redetermine its policy judgment as to --

THE COURT: Do you think that the distinction that Mr. Hiller draws is a valid distinction?

MR. DOLINGER: I'm not sure which distinction that is, your Honor, in terms of the evidence presented.

THE COURT: He said his record is much superior.

MR. DOLINGER: Well, your Honor, the issue with -- plaintiff's position is that the DEA -- I'm sorry, the D.C. Circuit case was decided on a substantial evidence standard. A rational basis case, it just requires a single rational basis without any evidence. So, it does seem to me that accepting that case as persuasive authority there must be a rational basis, and that's even beyond the fact, your Honor, that we have Second Circuit precedent which is binding, holding that there is a rational basis for the scheduling.

THE COURT: What case is that?

MR. DOLINGER: That is the case I cited before, your Honor, it is United States v. Canori, C-A-N-O-R-I, and let me get you a cite from the brief.

At page 5 of the brief, your Honor, this is in the paragraph at the bottom, the Second Circuit has "upheld the constitutionality of Congress' classification of marijuana as a Schedule I drug." That is citing a 1973 Second Circuit case, United States v. Kiffer from which a quotation continues on to the next page which rejects the theory that plaintiffs are advancing here.

So, in light of --

THE COURT: So, I put it to Mr. Hiller, how do I deal with these Second Circuit cases in the context of a TRO?

MR. HILLER: Your Honor, the 1973 case occurred before the patents the United States government took out, before the

FinCEN guidance was issued, before the IND program was started, before the U.S. Surgeon General.

THE COURT: So I don't follow it because the facts have changed?

MR. HILLER: Well, your Honor, what I am saying is that if -- let me put it to you this way. Opposing counsel has said that any rational basis will do, any rational connection. Your Honor, that is not the law. The United States government cannot pretextually --

THE COURT: My first point is that as a District Court Judge I have to follow Second Circuit precedent. Shall I hold, in granting your TRO, that Canori and Kiffer are no longer the law?

MR. HILLER: As it pertains to the claims in this case, yes, and that's because the facts have changed.

THE COURT: How long do you think it would take before the Second Circuit reversed me?

MR. HILLER: The facts have changed, Judge. That's the key. In 1973 it was before the United States government announced to the world that medical cannabis is a thing.

THE COURT: You are going to have to make a record of that.

MR. HILLER: Pardon me?

THE COURT: You are going to have to make a record of that. On a TRO I am not able to depart from Second Circuit

precedent.

MR. HILLER: Your Honor, hold on one second, please? I'm sorry.

(counsel conferring)

MR. HILLER: My colleague is making sure I emphasize this point.

THE COURT: You have made the point, it is your basis point.

MR. HILLER: The government has to believe its own argument.

THE COURT: Things have changed.

MR. HILLER: The government no longer believes the argument it made in 1973 that persuaded the Second Circuit to issue the decision upon which opposing counsel is asking you to rely.

THE COURT: The patent examiner is no longer of that belief, perhaps, but that doesn't mean that the Attorney General is no longer of that belief.

MR. HILLER: I think that may very well be true but, your Honor, the standard not what the Attorney General believes.

THE COURT: I take your point. I am giving you a tactical reason why I cannot give you a temporary restraining order, that without a record that powerfully shows that the facts have changed from the Second Circuit precedence, I am

committed to follow Second Circuit precedent.

MR. HILLER: I understand your Honor's point. I would say, though, if you are looking for the powerful evidence to which you just referred, I would respectfully ask that you review exhibits 9, 24, 10, 11, 12, and 13. That is the compelling, overwhelming evidence that the government, notwithstanding able counsel's efforts here today, doesn't believe what he is saying.

THE COURT: 9 is the patent.

MR. HILLER: 9 is the patent.

THE COURT: So that's the opinion of a patent examiner.

MR. HILLER: No, no. I don't mean to interrupt, your Honor, but that's not the opinion of the patent examiner. That's the opinion of the United States government. The United States government, in order to obtain this --

THE COURT: No, it is not. No, it is not. Well, you are saying that because the United States Department of Health and Human Services has made this observation that it is binding on the Attorney General as well.

MR. HILLER: I am saying it is binding on the government.

THE COURT: No, it is not. No, it is not. Estoppel is not running against the government.

MR. HILLER: I am not suggesting estoppel, your Honor.

THE COURT: Yes, you are.

MR. HILLER: I am saying the United States government doesn't believe --

THE COURT: Yes, you are.

MR. HILLER: I can also point to Exhibit 24, and in Exhibit 24, by the way, at beginning of page 30 --

THE COURT: Page 12. 12 is an effort by the Department of the Treasury, which has the certain jurisdiction with regard to financial crimes, to accommodate the law to what's going on advancing in the states. It doesn't necessarily mean that the attorney general is bound to the proposition that Schedule I is an appropriate classification of marijuana at this particular point in time.

MR. HILLER: And I guess, your Honor --

THE COURT: Exhibit 24, again, is the patent.

MR. HILLER: The Exhibits 10 and 11 are from the Justice Department, Judge. But I would respectfully, with all due respect, disagree with the Court that the standard is what the Attorney General, who happens to be sitting in that office, believes. If the United States government is repeatedly taking the position that cannabis provides medical benefits to those who take the drugs, then it is irrational for the federal government at the same time to enforce a law based upon the premise that it doesn't have any medical benefit.

THE COURT: I am not able, Mr. Hiller, in the context

of the TRO, on papers that just came in to me, to issue a TRO. You may be able to make your point in a more persuasive way in the context of a full record and in a hearing on a preliminary injunction, which in this case would be consolidated with a trial itself, but at this point in time I just don't have a record to justify departure from what has been the law up to now.

MR. HILLER: Your Honor, would there be any possibility for the Court to reserve decision on this so that you have the opportunity to review the other exhibits that I haven't had a chance to speak about? I don't want to take all day or your entire calendar talking about each exhibit in our exhibit book but would --

THE COURT: They go to the same point.

Let me put this to you, Mr. Dolinger.

MR. DOLINGER: Yes, your Honor.

Your Honor, if I may direct your attention, I think the analysis in a case from the Western District from the Sierras.

THE COURT: Let me point you. I am looking for the Supreme Court decision that dealt with the way it classified, here.

The Attorney General can conclude a drug in Schedule I, only if the drug has no currently accepted medical use in treatment of the United States, that's a quote I find from the

exhibits in Mr. Hiller's presentation, that a currently accepted medical use of treatment; second, has a high potential for abuse. Well, nothing has been said about that and that's part of it. Third, it has a lack of accepted safety for use under medical supervision. And the points that Mr. Hiller made with regard to the first point are relevant to the third point as well, but there has to be conjunction with all three factors in order to --

MR. DOLINGER: Your Honor, respectfully --

THE COURT: -- for the Attorney General.

MR. DOLINGER: Your Honor, for the Attorney General to place it in that schedule, but as the Supreme Court recognized --

THE COURT: So, what happens if it just has a high potential for abuse but the other two factors don't stack up?

MR. DOLINGER: Then, your Honor, my understanding if that is the finding of the Attorney General, then the Attorney General could not schedule the drug in Schedule I. But as the Supreme Court recognized, it was not the Attorney General who placed marijuana into Schedule I, it was Congress when it first passed the law.

THE COURT: That's why Mr. Hiller is saying there is no rational basis for Congress to have done so.

MR. DOLINGER: Understood, your Honor, but --

THE COURT: Maybe there was at the time, but he is

arguing that the law is unconstitutional as applied because the Attorney General has not seen fit to take into consideration what we have learned about the medical utility of marijuana.

MR. DOLINGER: There are two points to that.

The first is in this same citation from the Supreme Court case, Congress was not required to find that the drugs that it placed in Schedule I meet all of those requirements beforehand. Congress could make whatever determination of which the scheduling, the rescheduling process set out for the future and so there was no necessity. As the Supreme Court recognized in this Oakland Cannabis Buyers' cooperative case that is cited on page 7, Congress was not required to find that a drug lacks an accepted medical use before including it in Schedule I. Again that's 532 U.S. at 492.

So, Congress' determination that marijuana should be included in Schedule I must be upheld under rational basis for review.

THE COURT: Where is that case?

MR. DOLINGER: That is at the middle of page 3 of our brief, your Honor.

THE COURT: Page 7.

MR. DOLINGER: I'm sorry, Your Honor?

THE COURT: You said something on page 7.

MR. DOLINGER: This case, your Honor, is on page 3. I was referring to another case that was decided more recently.

But, the Supreme Court's description of the statutory scheme makes clear that when Congress placed drugs into the drug schedules, this was not subject to the scheduling requirements that are placed upon the Attorney General's later movement of a drug to a different schedule and, once again, that process is subject to a petition and the review of those petitions go to the D.C. Circuit which in 2013 deny the petition and found that there was a substantial basis for the findings that the petition should be denied.

THE COURT: In a word, where you have the decisions of the Supreme Court, consistent decisions of the Second Circuit, and consistent decisions of the D.C. Circuit all holding that there was a rational basis for the law and it will be enforced even though, as the Raich case put it, there can be some medical utility.

MR. DOLINGER: Even though there is ongoing debate about --

THE COURT: Raich I held that there is no medical necessity exception for marijuana under the CSA even when the patient is seriously ill and lacks alternative avenues for relief.

MR. DOLINGER: And, your Honor, I think that also what may be helpful to the Court is there is a list of cases that we have placed on page 6 of the brief starting with United States v. Christie, a Ninth Circuit case from 2016, which not only

rejected the argument that the Schedule I classification of marijuana was arbitrary and lacking rational justification, but also holding that legal, medical, and scientific developments do not undermine the central holding of the 1978 Ninth Circuit precedent that it relied on.

So, that is alternately the precise argument that Mr. Hiller is making here.

THE COURT: So, that's the first factor that I have to consider. With the second factor that he can't succeed, there is no substantial likelihood of success. Talk to me about the first factor, the irreparable harm.

MR. DOLINGER: Irreparable harm, your Honor, here we are here on a request for a temporary restraining order so that the plaintiff can travel to D.C. to attend a meeting with Congress people. That's what he has represented to the Court. And she also represents that she believes that she would be subject to enforcement, a greater enforcement if she boards a plane than she would while sitting in her home state of Colorado. Assuming for the sake of this argument that that is correct, she still has not shown any irreparable harm here. What we are talking about is a meeting that the plaintiff has not asserted cannot happen by other means. She concedes in her papers that she could communicate with these legislators via other methods. She has not asserted that she could not go back to have these same conversations at another point if she

succeeds on the merits of her claims. And --

THE COURT: I think Mr. Hiller's point is that the intensity of the lobbying process requires the martialing of opinions and impressions at particular points and that her physical presence is extremely important and efficacious because it is a chance to meet additional congressmen and would press the congressmen with the utility of the marijuana treatment that has, in effect, saved her life.

MR. DOLINGER: Understood, your Honor.

THE COURT: So, although she 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.

MR. DOLINGER: Well, your Honor --

THE COURT: It is a good argument.

MR. DOLINGER: If you take a look at page 14 of our brief --

THE COURT: I mean, I could be subject to an estoppel because I don't allow -- in conferences, to be here remotely I require them to be present because of the importance of face to face contact.

MR. DOLINGER: Again, your Honor, respectfully, there is simply no constitutional right to this type of face to face

interaction.

THE COURT: We have covered that. That's substantial likelihood of success.

MR. DOLINGER: I'm sorry, your Honor?

THE COURT: We have covered that by the substantial likelihood of success. The question now is irreparable harm.

MR. DOLINGER: Well, so there is the Supreme Court case law that holds that the Constitution does not grant members of the public a right to be heard by public bodies before making a policy decision. So, to the extent that the plaintiff is arguing that she is irreparably harmed by the denial of such a right, that right does not exist and so it really, I think, collapses the inquiry.

THE COURT: She has a right to petition Congress.

MR. HILLER: That's correct your Honor, and she has --

THE COURT: She has a right to travel. Both of those rights, we are told, are threatened to be curtailed by the fear of arrest and the fear of deprivation, and the legitimate fear of deprivation of a constitutional right can qualify as irreparable damage.

MR. DOLINGER: It can, your Honor.

THE COURT: See, Mr. Hiller? I did hear your argument.

MR. HILLER: Thank you, Judge.

MR. DOLINGER: In this case, your Honor, we do not

have a conflict between two different constitutional rights. The plaintiff concedes in her papers that she is able to travel and she is also able to meet members of Congress, as long as she does not bring with her, her medically prescribed marijuana. The Controlled Substances Act does not regulate travel, it does not regulate the ability to meet with --

THE COURT: Yes, but she is under -- it 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.

MR. DOLINGER: Your Honor, even if that is the case, the Courts have considered whether a medical necessity exception exists in the Controlled Substances Act. The Supreme Court rejected that position. That was also in United States v. Oaklan Cannabis, but --

THE COURT: That's not a substantial likelihood of success.

MR. DOLINGER: I'm sorry, your Honor?

THE COURT: It is not a substantial likelihood of success.

What you are telling me is that the balancing of the equities, because of the improbability of success and the existence of alternative, even though less efficacious methods,

of petitioning Congress in exercising speech, are such as to cause me to deny the TRO at this point. That's really your point.

MR. DOLINGER: Your Honor, we believe there is no irreparable harm here.

The plaintiff is presenting an argument that there is a Hobson's choice, I understand that argument, but for instance if you look at the holding in Raich, the Supreme Court's holding, the Supreme Court upheld in Raich the Congress' determination that marijuana -- excuse me, your Honor -- that Congress, under the commerce power, could regulate even the interstate cultivation and use of marijuana under the Congress' power.

In Raich, the Court noted that one of plaintiff's physicians -- this is in a footnote at the bottom of page 8 -- believed that foregoing cannabis treatments could cause her patient excruciating pain and could very well prove fatal. On remand, the Ninth Circuit considered whether there could be a substantive due process right to use medical marijuana and it determined that there was no such right.

So, even where necessary, according to the plaintiff's physician for medical use, and I can give you a cite to that, your Honor, it is 500 F.3d 850 cited on page 13 of our brief, the Ninth Circuit, the cannabis -- history of marijuana use and regulation in the United States and rejected the claim that the

right to use medical marijuana is fundamental and implicit in the concept of ordered liberty applying the standard from Washington v. Glucksberg, a 1997 Supreme Court case.

More recently, that was a 2007 Ninth Circuit case but there have been several more recent cases that also hold that there is no fundamental right to use medical marijuana. There was an August 30th, 2017 case from the Western District of Virginia that made that holding.

THE COURT: I think I have got your points.

MR. DOLINGER: And so, your Honor, the point that we are trying to make here is we understand the plaintiff's argument that this drug is medically necessary for her but it is not a Hobson's choice, legally speaking. The plaintiff is not being forced to choose between two constitutionally protected activities.

THE COURT: Okay. Thanks.

MR. DOLINGER: Would you -- I'm sorry. May I be heard on the points of the public interest and the balancing of the hardships?

THE COURT: Well, public interest can go both ways. The public interest and enforcing the laws is a clear interest of the United States.

MR. DOLINGER: Yes, your Honor.

THE COURT: And the public interest of allowing individuals, where necessary, the use of marijuana for medical

purposes can also be said to be a strong public interest. And it is a matter of weighing and I think I can do the weighing.

MR. DOLINGER: I think the one point I would add, your Honor, is that under the plaintiff's formulation of the TRO that she brings to the Court, any party, any individual who has such a medical prescription for marijuana in a state where it is regulated and legal under state law could get just this type of order from any Court if they assert a right to travel.

THE COURT: You are arguing not a federal law and not in the way that the law establishes. I catch the point.

MR. DOLINGER: And ultimately --

THE COURT: Let me hear from Mr. Hiller again and then I will rule.

MR. DOLINGER: Thank you, your Honor.

MR. HILLER: I will try to be brief, Judge.

THE COURT: Yes, you will be brief, because it is 20 after 1:00.

MR. HILLER: Mr. Dolinger said in response to one of your questions Congress can make whatever determination it wants on the CSA. I wrote it down when he said it. Congress can't do that.

THE COURT: No, there has to be rational basis for it.

MR. HILLER: There has to be a rational basis but I would take it one step further, your Honor. Since we are talking about fundamental rights, the right to free speech and

the right that you articulated earlier and the right to preserve one's life, not the right to use cannabis, the right to preserve one's life, those are fundamental rights.

THE COURT: She preserves her life by staying in Colorado. You are saying it is a travel issue. It is not a preservation of life because she can stay in colorado to save her life.

MR. HILLER: Then she has to sacrifice her rights to free speech.

THE COURT: Or travel. I got it.

Anything new, Mr. Hiller?

MR. HILLER: Yes. Because it implicates those fundamental rights, either free speech or preserve --

THE COURT: You said that already.

MR. HILLER: That means strict scrutiny should be considered applicable here because it is not just a rational issue anymore if it is impinging upon a fundamental right. And so, I would make that first point.

The second point, your Honor, that I would like to make, is that opposing counsel talked about Raich and medical necessity. I would emphasize, your Honor, we are not articulating medical necessity claims here, we have claims under the Constitution.

The last point I will mention is that to frame the constitutional right here, that is the plaintiff's job, not

opposing counsel's. And we are talking about the fundamental right, we are talking about the right of an individual who has been treating successfully with life saving medication, the right to continue to use that medication. That is the issue that is being sacrificed if she has to stay in Colorado.

THE COURT: Not in this case. You are advocating the change of a law and let's focus on that.

Okay, got it all. Just give me a couple minutes.

(Pause)

THE COURT: Mr. Hiller, when did your client become aware that this was a lobbying day?

MR. HILLER: August 31st, Judge.

THE COURT: That's when she was aware?

MR. HILLER: That's when she was invited to participate.

THE COURT: Who invited her to Congress?

MR. HILLER: The first person to invite her was a member of NORML, the founder of NORML. And then she was invited to speak with Congressman Lou Correa a few days ago and another person, another senator.

(Pause)

THE COURT: The motion for TRO is denied.

There are four factors that have to be shown: The plaintiff will suffer irreparable harm if the temporary restraining order is not granted, that she has a substantial

likelihood of success, that the equities balance out much in her favor, and that the public interest supports a TRO. I can't find those because the law is against me if I were to find them and the record has not been adequately developed to show such a change in the underlying facts as to make a precedence in applicable.

As to irreparable harm, is this a vital moment of such a nature as not to wait before a full hearing and development of the record? I think not.

I understand the importance of time in a lobbying process. It is the same as, in a way, the making of a deal or an argument to a jury. The moment is exceedingly important. The psychology of presenting the case to a person who will command a great deal of sympathy is very important as well. It is also very important to be able to come and speak but opportunities are not unique. Opportunities come and go and the chance of moving Congress at this particular time with this particular bill is speculative. It is much better to have a full record so that the Court can decide intelligently as possible. In the meantime, there are opportunities to present views.

Effectively, there can be use of TV screens so that, in effect, the plaintiff is present with Congressmen who come to see those screens are screens and with those who are not there at the time, those views can be captured on cameras and

be presented over and over again in all different ways.

My case of TDI, now in the Second Circuit, demonstrated the utility of an ability to capture what is on the screen and present it at other people's leisure and that can clearly be done here. So, the idea of having to come at this moment at this time to Congress and the denial of that, if it is a denial, is not irreparable.

I can understand that the fear of arrest will induce a person not to travel if the person legitimately fears that there will be an arrest because of medical marijuana use on an airline, even though pursuant to a valid prescription in the state of origin. It may not be likely but it is a legitimate fear, and the right to travel is an extremely important constitutional right. I can understand that the concern about not being sufficiently efficacious and persuasive because of not being able to be physically present in front of a Congressman is also an encouragement on the right of petition and speech. But, given the importance of the law, the time has been on the books and the overwhelming and consistent weight for precedence in the United States Supreme Court and the Second Circuit and particularly with agency law in the D.C. Circuit, I can't say that the harm would be such as to be irreparable.

It is clear that there has not been proof of a substantial likelihood of success, although the documents

presented by the plaintiffs presented in exhibits are persuasive that there is now a medical use of the marijuana. These are difficult issues requiring scientific proof and opportunity to examine and to cross-examine in a way that allows the Court to see the nuances supporting and invalidating the law and it can't be done on a TRO and it can't be done on a paper record.

With regard to the claim that the plaintiff will suffer irreparable harm, the plaintiff must be examined in terms of how the use of marijuana has prevented seizures and there must be opportunity to cross-examine her position whose affidavit is very important in supporting that.

And so, with other aspects, I cannot find a substantial likelihood of success in overturning the clear precedence against me and not following Supreme Court decisions and Second Circuit decisions on this record that has presented for the TRO. There must be a full record and the parties will have to attend to it. I have told the parties informally and I repeat it now that I will give a hearing to them whenever they are ready.

One minute.

(Pause)

THE COURT: I have covered the first two factors of irreparable harm and substantial likelihood of success.

As to balancing the equities, I am weighing an

intangible and this will go right into the public interest as well and that is the public interest, in enforcing the laws on the books. Although laws can be declared invalid because of conflict with the Constitution, here this is not a case of invalidity on the face of things, it is the invalidity, the invalidity of the body. The argument is that the law which may have had substantial basis for it, rational basis for it, remains, no longer has rational basis because of the advance of medical science and use of marijuana and the slowness of the Attorney General in dealing with this issue in a way that must be applied shows an invalidity as applied to the law. But, in the meantime the public interest exists in enforcing the law. The law is on the books, the law is presumptively valid, it is entitled to be enforced according to the way the public prosecutors bring on cases. That equity is more important than particular concerns of any individual. This does not involve constitutional rights and the like because I have already spoken about those, this is the balancing of the equities at this particular point.

We have an interest in the validity of the Constitution and applicability of the Constitution which is the supreme law, but we have also a public interest in enforcing presumptively valid laws and at this point in time the public interest in the integrity of the laws and enforcement of the laws is more important, in my opinion.

So, for these reasons and because I will entertain these issues in a more intelligent and nuanced way upon a full record, and because I believe that with the cooperation of the parties which I am sure will exist, we can bring this on for a proper hearing at an early time. The motion for TRO is denied.

MR. HILLER: Your Honor, may I just be heard briefly? Not to argue the issue.

THE COURT: Yes, Mr. Hiller.

MR. HILLER: And thank you very much for affording the opportunity to present our arguments. I appreciate the Court's time. I am sure I speak on behalf of everyone here, so thank you.

With respect to a preliminary injunction hearing, during our conversation prior to this hearing there was discussion about engaging in some discovery in advance of that preliminary injunction hearing which would also double as a trial. Your Honor, we have proposed a discovery schedule to the defendants.

THE COURT: The defendant wants to make a point that a Rule 12 motion would be appropriate. It will not be appropriate because the issue is really the Constitution, as applied, and that requires a record.

MR. DOLINGER: Your Honor, if I may?

This is addressed at page 7 of our brief. On rational basis for review, the government is not required to present any

evidence or empirical data, Beach Communications v. FCC, a Supreme Court case, and instead the burden is on the plaintiff to present all of the necessary evidence to attack the legislative arrangement to negative --

THE COURT: The plaintiff has done that amply. There is a need now to cross-examine and examine on all the issues that are relevant and to understand better the context of which things are done.

MR. DOLINGER: May we have the opportunity to brief?

THE COURT: What?

MR. DOLINGER: To send letter briefs to the Court on this issue, your Honor?

THE COURT: 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.

MR. DOLINGER: Respectfully, your Honor, we believe that the only record that is required is the allegations of the complaint which will be accepted as true for purposes of the Rule 12 motion.

THE COURT: Your motion is denied.

MR. DOLINGER: Thank you, your Honor.

MR. HILLER: If I may -- may I confer with opposing counsel, briefly, just on the issue of discovery? Because we talked about it previously and defendants were not willing to

engage in any discovery --

THE COURT: When will you be finished?

MR. HILLER: With conferring?

THE COURT: No. Tell me when you are going to be finished.

MR. HILLER: The proposal we have made is documents, interrogatories and requests for admissions to be served within seven days. Defendants are going to have to inform me of how much time they need to respond to that, but we would be prepared to proceed with depositions 30 days from today.

THE COURT: And how many do you need?

MR. HILLER: We would like -- well, we are going to take the deposition of the parties and then, your Honor, in response to the answers to interrogatories, we are going to ascertain how many additional depositions we will need.

THE COURT: I tell you what you do. You confer with each other this afternoon and you will submit, in writing, jointly, a letter to me on Monday which will outline what you have to do in as much detail as is feasible, and when you conclude doing all of that I will then assign a hearing date. Also, make a recommendation of how many days you need for a hearing.

MR. HILLER: Thank you, Judge.

THE COURT: I don't need -- I don't think we need a very long hearing, I think a half day would be sufficient

because all I need, if there is to be live testimony, is where this credibility factor involved, or some serious question that requires me to hear people in making a judgment. But, I think at that point in time you will have deposed each other, you will be able to present different kinds of views, and we will have just argument.

MR. HILLER: I understand, your Honor.

One last question, and I don't know if this may be premature, but will the Court -- will Alexis Bortell be permitted to come to New York and testify?

THE COURT: Say again.

MR. HILLER: Will Alexis Bortell, plaintiff, be permitted to come to New York to testify in this court? It may be a premature question but it says something.

THE COURT: I think you will have to go there.

MR. HILLER: I'm sorry?

THE COURT: She can come if she wants to but I don't think she wants to.

MR. HILLER: I know she wants to, Judge.

THE COURT: I can't give an exemption.

MR. HILLER: I understand, Judge.

THE COURT: Maybe you can get some informal ruling from the U.S. Attorney's office because it would be better for her to come here and it may be she's interested in the trial also to come here, but I can't give you an exemption. It is

not in my hands.

MR. HILLER: Okay, your Honor. We will make that effort, Judge. Thank you.

MR. DOLINGER: Your Honor, if I may just be heard briefly on this?

The plaintiffs are requesting to --

THE COURT: Hit the podium, I can hear you better.

MR. DOLINGER: Thank you.

Plaintiffs are requesting to take the deposition of the Attorney General of the United States and the administrator of the Drug Enforcement Administration. They have told us that they plan to send interrogatories, document requests, and requests for admission. It seems that the plaintiffs are intending to take the full discovery that they would be seeking on the merits of their claim here and there is no longer any urgency to their request for a preliminary injunction.

THE COURT: Why?

MR. DOLINGER: Because the lobbying days that Ms. Bortell was seeking to come to Washington, D.C. for will pass without her being able to --

THE COURT: Yes, but the need still remains.

MR. DOLINGER: Your Honor, respectfully, we hope to cabin discovery because, for instance, the deposition of these members of the administration has no relevance to --

THE COURT: You are going to make a motion for

protective order, aren't you?

MR. DOLINGER: If your Honor will permit I guess we will, your Honor.

THE COURT: Well, I don't have any choice. It is your decision to make. If you think that some of the witnesses that the plaintiff wants are not appropriate to be witnesses, you will make a motion for protective order.

MR. DOLINGER: Thank you, your Honor.

THE COURT: Or what may be more efficacious, you present your respective views in a letter addressed to me under Rule 2E and I will give you a ruling which will cut down, enormously, on the time.

MR. DOLINGER: We will, your Honor. Thank you.

THE COURT: It may be our ambition to have this done in months will not be able to be satisfied. I will give you time and my prioritized attention so there will no delay in the point of view of the Court. Rule 65 requires me to give this priority over all other matters except like matters and I have no like matters at the time, so you take priority even over criminal cases.

MR. DOLINGER: Thank you, your Honor.

THE COURT: All right.

Anything else? So, you give me a letter on Monday, if you can. If not, you will tell me. If not, you have to call up somebody and say we need another couple days.

MR. HILLER: Thank you, your Honor.

MR. DOLINGER: Thank you.

THE COURT: Thank you, all.

I will be recessed until 2:15.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MARVIN WASHINGTON, et al.,

Plaintiffs,

v. 17 Civ. 5625 (AKH)

JEFFERSON BEAUREGARD SESSIONS, III, et al.,

Oral Argument

Defendants.

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New York, N.Y.
February 14, 2018
11:50 a.m.

Before:

HON. ALVIN K. HELLERSTEIN,

District Judge

APPEARANCES

HILLER, PC
Attorneys for Plaintiffs
BY: MICHAEL S. HILLER
LAUREN A. RUDICK
-and-
JOSEPH A. BONDY
-and-
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SAMUEL DOLINGER
DAVID S. JONES
Assistant United States Attorneys

(Case called)

THE COURT: The next time we hear that command "all rise" it may be that Aaron Judge has hit his first home run.

This is Marvin Washington and others against Jefferson Beauregard Sessions, III in his official capacity as United States Attorney General and other officials and agencies of the government, 17 Civ. 5625.

Who is going to speak for the plaintiff?

MR. HILLER: Your Honor, Michael Hiller of Hiller, PC. I'll be addressing five causes of action. With the Court's permission we would like Lauren Rudick to argue the commerce clause claim and Joseph Bondy to argue --

THE COURT: We are not going to do that. They can get up and answer to my specific questions, but I'll look to you, Mr. Hiller, to do it all.

MR. HILLER: Very well, your Honor.

THE COURT: Why don't you introduce everyone else on your side.

MR. HILLER: Again, Michael Hiller from Hiller, PC; my partner, Lauren Rudick also of Hiller, PC; Joseph Bondy; David Holland. With the Court's permission I would just like to introduce the plaintiffs who are all represented here today.

THE COURT: Sure.

MR. HILLER: The first gentleman on the aisle is Jose Belen. The two gentlemen next to him are Jake Plowden and

Nelson Guerrero from the Cannabis Cultural Association. Marvin Washington. Neil Bridgewater, also of the Cannabis Cultural Association. Dean and Liza Bortell, on behalf of Alexis Bortell. Lastly, Sebastian Cotte on behalf of his son, Jagger Cotte.

THE COURT: Welcome, all.

Defendants.

MR. DOLINGER: Good morning, your Honor, Samuel Dolinger, Assistant United States Attorney, for the government. With me at counsel table is David S. Jones.

THE COURT: Sorry?

MR. DOLINGER: David Jones.

THE COURT: Is Isodore Dolinger, the Bronx congressman, your grandfather?

MR. DOLINGER: He is not. Nor am I related to Magistrate Judge Dolinger.

THE COURT: Just a coincidence.

MR. DOLINGER: I think that's right, your Honor.

THE COURT: Mr. Dolinger, you are up. It's your motion.

MR. DOLINGER: Thank you.

Your Honor, we are here on defendants' motion to dismiss the amended complaint. The plaintiffs assert a variety of constitutional challenges to the federal regulation of marijuana under the Controlled Substances Act. Courts around

the country have considered similar or identical claims and have rejected them.

The Court should do the same here. The briefs in support of our motion are lengthy, and I'm happy to answer any questions the Court has.

THE COURT: I'll have them along the way. Make your argument.

MR. DOLINGER: Thank you, your Honor.

The plaintiffs' principal challenge sounds in due process, and they assert that the regulation of marijuana on schedule 1 of the CSA violates the rational basis test.

Under rational basis review, a law passed by Congress must only be rationally related to a legitimate government interest. This is the most deferential standard of review. Any conceivable basis will suffice. It need not be a stated basis that Congress made factual findings on or put into a record. A law has a presumption of rationality under this test. In order to state a claim the plaintiffs' complaint must negate every conceivable basis that could support the law, and they haven't done so here.

Among the interests that Congress stated that it was --

THE COURT: What is the relief that plaintiffs seek?

MR. DOLINGER: As I understand it, your Honor, they seek the invalidation of the Controlled Substances Act as

relates to marijuana.

THE COURT: That narrow?

MR. DOLINGER: I'm sorry, your Honor?

THE COURT: Is it that narrow?

MR. DOLINGER: I don't know whether they are seeking a broader invalidation of the Controlled Substances Act. It's my understanding.

THE COURT: That's what you just said. Is it a validation of the act insofar as it places marijuana on schedule 1?

MR. DOLINGER: Yes, your Honor.

THE COURT: That's by act of Congress in 1972?

MR. DOLINGER: 1970, your Honor.

At the time of passage Congress stated that its goals were to protect public health and welfare from drug abuse and drug trafficking. In 1998, your Honor, Congress passed a supplemental statement in which it opposed the legalization of marijuana for medical use, citing the prevalence of its use and abuse by children under the age of 18. This is one of the many bases that Congress and others have cited for marijuana on schedule 1, is the potential of its abuse by children and thereby to protect the health of minors. There are also public safety concerns associated with marijuana use, including --

THE COURT: There is another criteria also that's discussed. That is whether there was any medical use. Was

there any finding on that by Congress in 19 -- when was the amendment, 1998?

MR. DOLINGER: In 1998, there was no amendment, your Honor. It was a statement that was attached to appropriations legislation.

THE COURT: What effect is that?

MR. DOLINGER: It states Congress' intent and findings and its opposition to the legalization of medical marijuana.

THE COURT: It's a statement of general policy. It's nothing more than that. I don't know what kind of legal consequence it has.

MR. DOLINGER: Among other things, your Honor, it's one of many legitimate rational bases that Congress could have --

THE COURT: This is 28 years after the law was passed.

MR. DOLINGER: That's right, your Honor. At the time the law was passed Congress had a rational basis for it as well.

THE COURT: Seems to me the only test that's relevant is what was before the Congress in 1970. The escape valve in the law is a forward-seeking law. It created a schedule, set of schedules that would last, and Congress provided that from time to time there would be review.

MR. DOLINGER: That's right, your Honor.

THE COURT: A later event doesn't necessarily

invalidate the law.

MR. DOLINGER: I think that's especially true in this case, as you are pointing out.

THE COURT: All I think about is that the 1998 law interfered with the due process set up by the law that would be in Attorney General review.

MR. DOLINGER: Your Honor, the congressional purpose in setting up this administrative review process was to permit the Attorney General and his delegates to assess new scientific and medical information on controlled substances.

THE COURT: Doesn't the 1998 pronouncement in the air by Congress, as it were, interfere with that process by the Attorney General or his delegee?

MR. DOLINGER: No, your Honor. Because Congress isn't the ultimate decider here of federal drug policy.

THE COURT: Congress in 1970 passed a law. Congress acts only through laws.

MR. DOLINGER: That's true, your Honor.

THE COURT: If it's not a law, whatever Congress says doesn't have any legal consequence.

MR. DOLINGER: This was, in fact, passed through an appropriations bill that did have the force of law.

THE COURT: Which bill?

MR. DOLINGER: It was the appropriations legislation for 1999. To your point, your Honor.

THE COURT: Mr. Dolinger, don't go fast. You go faster than I can think.

MR. DOLINGER: Sure, your Honor. My apologies.

THE COURT: Let me stop you there. It's part of an appropriations bill appropriating money for the DEA, is that it?

MR. DOLINGER: I believe it was omnibus general appropriations legislation.

THE COURT: What does that have to do with what happened in 1970 or what the Attorney General is supposed to be considering in 1998 or today?

MR. DOLINGER: The relevance of the bill is it expressed Congress' intent some years --

THE COURT: Fine. It gave money. What's the big deal? How much of that went to Schedule 1?

MR. DOLINGER: That, your Honor, I don't have information about.

THE COURT: Mr. Dolinger, that argument is not getting anywhere.

MR. DOLINGER: Understood, your Honor.

THE COURT: Stick with 1970 and the process after that.

MR. DOLINGER: As of 1970, Congress made a list of rationales for the law, principally among which were these public health and safety concerns.

THE COURT: And it created five schedules.

MR. DOLINGER: That's correct.

THE COURT: Teach me the importance of the schedules.

MR. DOLINGER: And placed marijuana on schedule 1. The schedules are arrayed from 1 through 5 in terms of the amount of control that the law places on each substance.

THE COURT: What's the difference among the different schedules?

MR. DOLINGER: The only schedule that's relevant here is schedule 1, which requires that --

THE COURT: My mind goes beyond what's focused and relevant. What do the other schedules do?

MR. DOLINGER: The other schedules also provide for the control of controlled substances that are known to have some currently accepted medical use.

THE COURT: What would be the consequence, for example, if marijuana was shifted from schedule 1 to schedule 2?

MR. DOLINGER: The consequence would be that it could be recognized to have some accepted medical use if it were shifted.

THE COURT: Would it still be criminal?

MR. DOLINGER: There would be criminal penalties attached to the illegal distribution.

THE COURT: Resulting in custody.

MR. DOLINGER: Yes. Among other substances on schedule 2 are certain opiates and amphetamines.

THE COURT: The scourge that's now going on would be a schedule 2 scourge.

MR. DOLINGER: There are drugs on schedule 2 that are part of the current opioid crisis, your Honor. Yes, that's correct.

THE COURT: What happens if marijuana went to schedule 3? What would be the consequence?

MR. DOLINGER: All of these schedules have potential consequences for illegal distribution and use, your Honor.

THE COURT: Even if it were on schedule 5, the most lenient of the schedules, would there be criminal consequences?

MR. DOLINGER: For illicit use, your Honor, and distribution, that is my understanding, but I would respectfully request to get back to the Court on this.

THE COURT: What's the answer to that question, Mr. Hiller?

MR. HILLER: Not necessarily, your Honor. For example, Robitussin is a schedule 5 drug. That's not an illicit drug. There are other drugs which are prescription.

THE COURT: If you periled Robitussin because of the contents of the cough medicine, it could be illegal, right?

MR. HILLER: Yes, it could.

THE COURT: Even though it's an off-the-shelf drug?

MR. HILLER: That's my understanding, Judge.

THE COURT: Off the record.

(Discussion off the record)

THE COURT: Mr. Hiller, even if it was on schedule 5 there would be circumstances where selling, distributing an item on schedule 5 could be criminal.

MR. HILLER: It could be, yes. There are circumstances.

THE COURT: Thank you, Mr. Hiller.

MR. HILLER: Sure.

MR. DOLINGER: As your Honor pointed out, there is a scheduling process that the DEA follows by delegation from the Attorney General to account for developments in science and medicine --

THE COURT: Let's say I'm a doctor specializing or wanting to specialize in the administration of marijuana for certain medical purposes, and we recognize that there are now medical purposes that can be useful to be treated with marijuana, at least to remedy the problem of pain. How would that doctor go about getting a reclassification?

MR. DOLINGER: Any person can submit a petition to the DEA seeking a rescheduling of a drug and can submit evidence that they assert supports the rescheduling. In making the scheduling decision the DEA seeks a recommendation from the Secretary of Health and Human Services.

THE COURT: Is there some kind of a trial?

MR. DOLINGER: There is an agency review process that does result in an agency decision. There is an extensive record.

THE COURT: Is a record created?

MR. DOLINGER: A record is created and is subject to review in the courts of appeal.

THE COURT: Can the petitioner bring evidence?

MR. DOLINGER: Yes. The petitioner can submit evidence.

THE COURT: So the petitioner is free to bring in all kinds of evidence supporting his claim that there should be a liberalization of the scheduling of marijuana?

MR. DOLINGER: That's right, your Honor. And that is the forum in which --

THE COURT: Then there is a process and a final determination by the agency.

MR. DOLINGER: Correct, your Honor.

THE COURT: Or under the Administrative Procedure Act, there is a review by the D.C. Court of Appeals.

MR. DOLINGER: There is actually a specific statutory provision under the Controlled Substances Act that provides for review in any of the courts of appeals. But the D.C. circuit has reviewed these rescheduling decisions several times.

THE COURT: As in any administrative agency cases, the

petitioner is free to ask the Court of Appeals the jurisdiction where he lives to review the final determination of the agency.

MR. DOLINGER: Yes, a petitioner may.

THE COURT: And then there is ultimate review in the Supreme Court.

MR. DOLINGER: Yes, your Honor.

THE COURT: If the agency doesn't do its duty, a writ of mandamus can be taken out in an appropriate Court of Appeals.

MR. DOLINGER: That's true as well.

THE COURT: It's just like any other situation in any agency?

MR. DOLINGER: Yes, your Honor. With the specific statutory guidelines that the agency must follow in rescheduling decisions.

THE COURT: Like all other administrative agencies, there are legal criteria that must be observed?

MR. DOLINGER: Yes, your Honor.

THE COURT: Indeed there have been such proceedings.

MR. DOLINGER: There have been a number of those proceedings.

THE COURT: Was it part of your argument to tell me about it?

MR. DOLINGER: Yes, your Honor.

THE COURT: Now would be a good time.

MR. DOLINGER: This is addressed in our brief and that is one of the grounds on which we have moved to dismiss. There is this possibility of administrative review that the plaintiffs have not sought to take advantage of here.

THE COURT: They tell me it's futile.

MR. DOLINGER: Yes, your Honor.

THE COURT: Meaning that a lot of people have lost.

MR. DOLINGER: That is correct, your Honor.

THE COURT: Then it takes a long time for the agency to work.

MR. DOLINGER: These petitions have been unsuccessful in the past. But the last two decisions in 2011 and 2016 denying the scheduling of marijuana found that there were not sufficient studies of sufficiently high quality to show the efficacy of marijuana.

THE COURT: Those aren't decisions by the D.C. Court of Appeals.

MR. DOLINGER: Those are decisions by the DEA on the rescheduling petitions. One of those cases --

THE COURT: Affirmed by the District of Columbia Court of Appeals.

MR. DOLINGER: Yes. One of them was affirmed. The other, no review was taken. Or if a review was taken, it was dismissed on jurisdictional grounds.

There was a 2013 D.C. Court of Appeals --

THE COURT: The substantive rule of the D.C. Court of Appeals was established in 2013?

MR. DOLINGER: The D.C. circuit did rule in 2013 and upheld the DEA's refusal to reschedule the drug, as supported by substantial evidence.

THE COURT: And the record that came up in 2013 was dated when?

MR. DOLINGER: That was the 2011 denial, your Honor.

THE COURT: In 2011, six, seven years ago, the DEA, after an administrative hearing and evidence and the like, ruled that marijuana should remain schedule 1?

MR. DOLINGER: Correct, your Honor.

THE COURT: And the petitioner didn't like that rule, so he appealed to the D.C. Court of Appeals that the law says he should, and he lost in D.C. Court of Appeals.

MR. DOLINGER: Yes, your Honor.

THE COURT: Although that rule is not binding on me, it's persuasive, isn't it?

MR. DOLINGER: It's very persuasive, your Honor. Because in coming to that determination the D.C. circuit applied a much more rigorous standard of review than your Honor would apply under a rational basis for a view to the law.

THE COURT: What was the standard review?

MR. DOLINGER: It is an APA type standard, your Honor, substantial evidence.

THE COURT: Whether there is substantial evidence, what is the determination of the agency?

MR. DOLINGER: Supports factual findings which reasonably support the legal conclusion.

THE COURT: And the D.C. Court of Appeals found that there was.

MR. DOLINGER: That's correct, your Honor.

THE COURT: As of 2011.

MR. DOLINGER: Yes. In a decision as of 2013.

Among other things, your Honor --

THE COURT: Plaintiff can go back now and say, things have changed since 2011. Here are all these medical uses and here are all these doctors' testimonials about how much it is used and here are my clients, and you have the people who have been helped considerably by it, please change your mind.

MR. DOLINGER: Exactly, your Honor. The administrative review process is the appropriate way to present new evidence to the DEA concerning allegations that there are scientific and medical changes or advancements that could --

THE COURT: What is the doctrine of law that so specifies?

MR. DOLINGER: I'm sorry, your Honor?

THE COURT: What is the doctrine of law that would allow me to dismiss the case, as you want me to do, on the ground that the proper remedy is in the DEA and in the Court of

Appeals?

MR. DOLINGER: It's the doctrine of administrative exhaustion, your Honor. Where there is an available and adequate administrative remedy, a court should not first hear a challenge before that administrative review process has been exhausted. Here, the plaintiffs --

THE COURT: What does available mean? Administrative and available legal remedy?

MR. DOLINGER: It means that the process must provide an opportunity for the relief that the plaintiffs are seeking.

THE COURT: Suppose they just sit on their butts.

MR. DOLINGER: A writ of mandamus, as your Honor stated, can be taken to a Court of Appeals seeking to direct the agency to act if agency action has been unduly delayed.

THE COURT: Plaintiffs say that there was a seven and a half years' delay. Do I remember correctly? How many years, Mr. Hiller?

MR. HILLER: It's nine, your Honor.

THE COURT: Nine years' delay.

MR. DOLINGER: Your Honor, the agency.

THE COURT: Is anyone taking a writ in the D.C. Court of Appeals and say, that's unconscionable?

MR. DOLINGER: I understand there may have been mandamus writs taken in the past in these cases, your Honor. The most two recent rescheduling petitions were pending for a

shorter period than that, for, I believe, five to six years, but the agency process is exhaustive. It results in the compilation of a record that is hundreds of pages long.

As I stated, the DEA takes a recommendation from the secretary of HHS who delegates that responsibility to the Food and Drug Administration, which makes scientific findings that are binding on DEA. That process necessarily takes time and provides for this exhaustive record that is then available to the Court of Appeals for administrative review.

THE COURT: Is there anything now pending before the DEA?

MR. DOLINGER: Not to my understanding, your Honor. There was this petition that was denied in 2016. Any party who is aggrieved by a DEA decision of that type can take the appeal. But, as I stated, no proper appeal was perfected from that 2016 decision.

THE COURT: I think I understand exhaustion. Let's move on to another point, unless I missed something that you want to tell me about.

MR. DOLINGER: No, your Honor. Just that ruling on exhaustion would dispose of all of the claims in this case.

THE COURT: Including the constitutional claims?

MR. DOLINGER: Yes, your Honor. Because what plaintiffs are seeking here is only a challenge to the scheduling of marijuana on schedule 1.

THE COURT: By act of Congress.

MR. DOLINGER: By act of Congress. And if the drug were rescheduled to another schedule, presumably they would be getting all of the relief they are seeking because they do not assert that marijuana cannot be scheduled on any of the other schedules. Actually, the Second Circuit ruled on that point.

THE COURT: In *Kiffer*.

MR. DOLINGER: In *Kiffer*. That's right, your Honor.

THE COURT: What year was *Kiffer*?

MR. DOLINGER: 1973. The case was cited with approval in 2013 in *U.S. v. Canori*, also a Second Circuit case, but held as --

THE COURT: Spell that last name.

MR. DOLINGER: C-a-n-o-r-i. Cited in our brief, your Honor.

THE COURT: Why do you expose the fact that I don't remember it?

MR. DOLINGER: Just for reference, your Honor.

THE COURT: What year was *Canori*?

MR. DOLINGER: 2013.

THE COURT: It was a summary disposition, summary order?

MR. DOLINGER: I know it was an opinion, I believe, by Judge Cabranes.

THE COURT: You have two precedents that say that the

district court in the Southern District of New York and other parts governed by the Second Circuit cannot take up the proposition that the act is unconstitutional.

MR. DOLINGER: *Kiffer* did hold that the scheduling of marijuana as scheduled by Congress in 1970 was constitutionally rational and *Canori* --

THE COURT: It affirmed the conviction for violation of the narcotics laws in the distribution of marijuana, right?

MR. DOLINGER: It did not reopen the question. Yes, your Honor.

THE COURT: And the defense argument was that the law is unconstitutional, right?

MR. DOLINGER: Yes.

THE COURT: And the Court held that it is constitutional?

MR. DOLINGER: Yes.

THE COURT: Is that preclusive?

MR. DOLINGER: Your Honor, these cases remain binding on this court, yes.

THE COURT: Meaning it's preclusive?

MR. DOLINGER: Yes.

THE COURT: Meaning I have no discretion.

MR. DOLINGER: That's the government's position, your Honor.

THE COURT: Meaning if I rule for the plaintiff I

would be reversed.

MR. DOLINGER: Your Honor, that is our position, yes.

THE COURT: More than your position. That's the ruling by the Second Circuit.

MR. DOLINGER: That's right, your Honor. That is the rule of the circuit and of the Supreme Court, that the lower courts do not have the discretion to disobey the binding precedents.

THE COURT: I once failed to follow a Second Circuit precedent. I had found a Supreme Court precedent that although not directly on point, I thought was persuasive. And so I followed the Supreme Court and my case went to the Supreme Court and the Second Circuit was reversed. And in the remand the Second Circuit chastised me for not following Second Circuit precedence. I suppose I could do that now and get chastised again.

Why do you applaud a judge that's going to be chastised?

MR. DOLINGER: Your Honor, it is the rule that even if there were some interceding precedent from the Supreme Court, if it is not directly on point and if it does not reverse that Second Circuit case, the Second Circuit case does remain binding on this Court.

THE COURT: Seems to me that I'm bound by *Kiffer* and *Canori*.

MR. DOLINGER: We agree, your Honor.

THE COURT: What else do you want to tell me that's bad news for the plaintiff?

MR. DOLINGER: Most of the other claims, your Honor, have also been rejected.

First, I'll deal with the commerce clause claim. That one was not rejected only by the Second Circuit, but also by the Supreme Court itself in *Gonzalez v. Raich*.

THE COURT: What's the argument?

MR. DOLINGER: The plaintiffs' argument, as I understand it, is, if there is solely intrastate distribution or use of marijuana, that is not a proper subject for a federal regulation under the commerce clause.

THE COURT: What's the case? Ogden v. something or other established in 1938.

MR. DOLINGER: *Wickard v. Filburn* is the precedent that the Supreme Court ultimately relied on in *Raich* to hold that economic effects of a law can be aggregated --

THE COURT: Where does the distribution in a particular state, since it's quite likely that the drug can come from a different state, or be distributed from a different state, interstate commerce exists and there is jurisdiction on the part of Congress to act. It's like in a Hobbs Act. If someone sells fruits and vegetables in a bodega and is held up, the guy holding him up is subject to enhanced penalties because

he is violating the Hobbs Act. Even though there is an argument that the transaction is purely local, the bodega operates on a particular street corner, their argument doesn't prevail because of interstate.

MR. DOLINGER: That's right, your Honor. The effect on interstate commerce can be minimal.

THE COURT: You are teaching me that the commerce argument is not a valid argument.

MR. DOLINGER: It is foreclosed.

THE COURT: What else would you like to teach me?

I'm sorry that I'm disturbing your set argument. You probably prepared for two days and two nights on a sequence of argument and here the judge is interrupting every minute.

MR. DOLINGER: We welcome your questions, your Honor.

THE COURT: You do not.

MR. DOLINGER: There are implications in the plaintiffs' papers concerning a fundamental right either to use marijuana or to access the medication of one's choice. Those arguments have also been rejected by all of the courts that have considered them.

The applicable test for whether there is a fundamental right comes from a Supreme Court case from the late 1990s, *Washington v. Glucksberg*. It holds that a fundamental right exists only if it is deeply rooted in the nation's history and traditions and is implicit in the concept of overt liberty.

All of the cases that have considered whether there is either a specific right to marijuana under the fundamental rights jurisprudence or, more generally, to access medications of one's choice, if they are not approved under the regulatory regime --

THE COURT: By implication, that's the rule of *Kiffer*.

MR. DOLINGER: Your Honor, *Kiffer* did not specifically address fundamental --

THE COURT: I said by implication.

MR. DOLINGER: That's right, your Honor.

THE COURT: If it were a fundamental right to distribute marijuana, *Kiffer* would not have been --

MR. DOLINGER: That's right, your Honor. And the Court there did hold that there is no fundamental right to distribute marijuana. It did not address whether there is a fundamental right to use. But subsequent cases have addressed that point and have concluded that there isn't.

THE COURT: What else would you like to teach me?

MR. DOLINGER: Your Honor --

THE COURT: I think you have hit on all of the high points.

MR. DOLINGER: Also, if you have further questions. We are happy to rest on our brief.

THE COURT: Anything else in your brief that you want to draw to my attention? Your brief is very long.

MR. DOLINGER: Yes. The briefing is lengthy, your Honor.

THE COURT: I read these at night, so my attention span is very limited, even during the olympics.

MR. DOLINGER: Very briefly, your Honor, there are claims concerning the constitutional right to travel in the First Amendment.

THE COURT: Those are fundamental rights.

MR. DOLINGER: Those are fundamental rights. But the Controlled Substances Act regulates only possession of substances. It does not speak to travel. It does not speak to expression. So under the governing precedence there, too, there is no constitutional claim.

THE COURT: If I wanted to hold up a bodega in New Jersey, I couldn't claim that I'm not allowed to travel to New Jersey. My fundamental right to travel is violated. I wouldn't be able to argue that.

MR. DOLINGER: That's right, your Honor.

THE COURT: If it's legitimately a crime, your right to travel for purposes of having the drug for distribution trumps the fundamental right.

MR. DOLINGER: Correct, your Honor.

THE COURT: However, if you just possessed the marijuana to use it medicinally, without intending to distribute it, it's a federal crime.

MR. DOLINGER: Federal law does prohibit marijuana and makes it contraband for all purposes as a general matter.

THE COURT: But the law is it's possession with intent to distribute.

MR. DOLINGER: Distribution is treated differently than simple possession, your Honor, but both are illegal.

THE COURT: Simple possession is a misdemeanor?

MR. DOLINGER: That, your Honor, I would also have to provide you something further on.

MR. BONDY: Yes, your Honor, it's a misdemeanor.

MR. DOLINGER: Unless the Court has any questions.

THE COURT: I never had in 19 years a case of simple possession. I've had cases of distribution.

MR. DOLINGER: I understand that it is --

THE COURT: If someone is using marijuana or carries it, even for medicinal purposes, that person is exposed to being arrested and tried for a misdemeanor.

MR. DOLINGER: It is regulated by the Controlled Substances Act, yes, your Honor.

THE COURT: It depends on whether that Controlled Substances Act is legal. If it's illegal, the travel is violated. If it's not legal, then you can't travel with it.

MR. DOLINGER: These claims do rely on their being some other infirmity in the law. They cannot stand on their own. That's right.

THE COURT: Thank you.

MR. DOLINGER: Thank you.

THE COURT: Mr. Hiller, you want to make a speech or you want to answer questions?

MR. HILLER: I think I want to start where your Honor asked your questions so I can address them directly, and maybe I'll get into the speech and maybe I won't.

First, with respect to the petitioning process, Mr. Dolinger argues that the petitioning process constitutes a full defense to this action. As far as I know, that argument that Mr. Dolinger has made has been made twice and it's been rejected twice.

The first instance was *Kiffer*, actually was the argument in *Kiffer*, was that the defendant had no right --

THE COURT: That was a criminal case, Mr. Hiller. The Second Circuit couldn't duck that. An exhaustion would not play a role there because they had to rule on the validity of a conviction. What would be the consequence if they didn't rule?

MR. HILLER: That wasn't the reason that they gave, your Honor. What they said was, in order to get to the threshold point of arguing that it's unconstitutional, the government came forward and said, you can't argue that because there is a petitioning process and the judge said no. I am going to allow the argument. So even though it was a criminal case, your Honor, I don't think it's distinguishable on that

basis.

I would also point out that in *U.S. v. Pickard*, which is one of the lead cases cited by the government, the very argument that Mr. Dolinger made was rejected by the court in *U.S. v. Pickard*. If I could put my hand on the case, I could actually direct you to the exact page.

Here we are. The citation is 100 F.Supp. 3rd 981 and it's on page 996. And what the Court said was: A provision conferring jurisdiction to entertain such a constitutional challenge is not required to be included in the CSA itself, nor is the statute insulated from constitutional review by congressional delegation of authority to an agency to consider an administrative petition. The government has not pointed to any clear and convincing evidence that Congress intended to preclude review of constitutional claims regarding the CSA. On that basis, the Court entertained the constitutional claims. I would respectfully submit --

THE COURT: What happened?

MR. DOLINGER: In that.

MR. HILLER: In that particular case, because the defendant bears the burden of proving his affirmative defense by a preponderance of the evidence on a motion to dismiss, he wasn't able to meet that standard.

But I would emphasize to this Court that the standard in this case --

THE COURT: It's also a criminal case, right?

MR. HILLER: It's also a criminal case, your Honor. But it's cited by the defendants. If the defendants are going to take the position that *Pickard* defeats our case --

THE COURT: You are talking too fast. I can't think that fast.

MR. HILLER: Most of the cases upon which the defendants rely in this matter are criminal defense cases and this is one of them.

THE COURT: If I had a criminal case involving distribution and a motion to dismiss were made, I couldn't say that I'm not entertaining that because you have to go through an administrative process that will take years. I have to address it, as *Pickard* did. I don't think there is an option in the criminal case. You have to deal with it directly.

MR. HILLER: There is a three-part test to determine whether or not administrative remedies are futile, your Honor. Even assuming that this Court were not inclined to follow *Pickard* or *Kiffer* on this point, we would respectfully submit that the three-part test favors denial of the defendants' motion with respect to the administrative review process.

THE COURT: What are those three parts?

MR. HILLER: We have to meet just one of them. First, resort to the administrative remedy would cause undue prejudice to a subsequent assertion of a court action due to, for

example, an unreasonable or indefinite time frame for administrative action. The second is, if there is any doubt that the agency is empowered to grant relief, such as, for example, if the agency lacks the institutional --

THE COURT: Can you slow up, please.

MR. HILLER: There is a doubt as to whether the agency was empowered to grant effective relief such as when an agency lacks institutional competence to determine the constitutionality of a statute.

THE COURT: That doesn't apply.

MR. HILLER: Third, the administrative body is shown to be biased or otherwise had predetermined the issue before it.

I would submit, your Honor, at a minimum, the first and the third fall squarely in our corner, and I would say the second one does as well. If I may just focus on the first.

The allegations in the complaint, which, as your Honor is well aware, have to be assumed true for purposes of this motion, are that the petitioning process is a futile one. It takes nine years on average.

THE COURT: Only if the argument is plausible.

MR. HILLER: Yes, your Honor. But I would respectfully submit it's not only plausible --

THE COURT: What is the remedy, if there is an administrative delay?

MR. HILLER: Historically what's happened is that petitioners have filed motions for writs of mandamus to require, for example, the DEA to render a decision.

Mr. Holland, who is a cocounsel of ours, he was one of the attorneys on the Americans for Safe Access case, was required to file a motion for a writ of mandamus to require the DEA just to render a decision. It took six years for the DEA just to render a decision before the administrative process continued.

THE COURT: What happened on his writ?

MR. HILLER: I'm sorry?

THE COURT: What happened on the petition for a mandamus?

MR. HILLER: Eventually what happened, as I understand it, was the DEA responds to the writ of mandamus, actually did issue the decision which then proceeded to go forward.

Your Honor, I represent people who need cannabis to live.

Jagger Cotte was diagnosed with Leigh's disease before he turned the age of two and generally if you are diagnosed before the age of two, you die by the age of four. He was admitted to a hospice before his fourth birthday, administered cannabis to treat his pain, and he is seven now.

I represent Alexis Bortell, who was having multiple seizures a day for 14 months and having repeat hospitalizations

to the point where her doctor said that part of the left side of her brain might have to be removed, and even then they weren't sure it would work.

THE COURT: Is there a process for expedited review by an agency when the pleasures of life and the endurance of life are at stake?

MR. HILLER: No, your Honor.

THE COURT: Can't I go to an agency and say, please, agency, my client's life is threatened?

MR. HILLER: Mr. Holland is gesturing to me and my instinct is that the answer is no.

MR. HOLLAND: With regard to Americans with Safe Access, which was also the coalition rescheduled cannabis, a group of scientists, one of the organizations with them was Patients Out of Time, or POT, who are arguing that very thing, that we are suffering immensely without any further action that is expedited in any way. To my knowledge, there has never been a way to expedite --

THE COURT: What happened?

MR. HOLLAND: Ultimately, it was the mandamus action that brought about the determination from the DEA.

THE COURT: Why can't you do that here?

MR. HOLLAND: I'm sorry?

THE COURT: Why can't you do that here?

MR. HOLLAND: It's not clear that our plaintiffs would

be alive at that time. I would defer to Mr. Hiller to answer that question directly. But Alexis Bortell, on any given day that she doesn't have access to that, your Honor, she could pass away.

THE COURT: She has been doing it. No one has bothered her.

MR. HILLER: Your Honor, the real problem with that process --

THE COURT: She has fears to move from her jurisdiction. Colorado is a safe jurisdiction. She moved to Colorado, I think you alleged, because it was the opportunity to get cannabis at the time when Massachusetts didn't allow it.

MR. HILLER: Texas, yes. Your Honor, my client, it's not --

THE COURT: Let's stay with that for a while. I think that's the critical part of your case.

MR. HILLER: Yes, your Honor.

THE COURT: You are really arguing that basic issues of human life are at stake.

MR. HILLER: Yes, your Honor.

THE COURT: Not just an opportunity for recreational use of marijuana, but the opportunity to enjoy life itself is threatened without marijuana.

MR. HILLER: Yes, your Honor.

THE COURT: That's circumstance. What would happen if

you went to the agency and said, here is my case, I need quick action, I need immediate response? If there was no response, you take out a mandamus to the Court of Appeals.

MR. HILLER: Your Honor, it is my understanding that petitioners have already been placed in that situation and, nonetheless, the decisions don't come.

And the concern that I have, your Honor, quite frankly, is, yes, Alexis Bortell and Jagger Cotte and Jose Belen need their cannabis to live. Alexis Bortell, who has not had a seizure in almost three years, since she started the cannabis, while she is allowed to stay within Colorado, your Honor, I would remind the Court that 28 percent of the United States is federal land. She is excluded between a quarter and a third of American lands from traveling anywhere.

THE COURT: If Congress can legislate, then she can't travel. If it can, she has got to abide by the law.

MR. HILLER: Your Honor, what I would say to that --

THE COURT: It all depends on the legality. I just put to you that a district court is not the appropriate forum to weigh all of the conflicting arguments with regard to items on the schedules. It's not only that there is a medical use, but it has to be weighed. That criteria has to be weighed against other criteria, including the dangers to the community by too-ready availability of the drug. That has been the holdup, I think, in terms of what Congress is feeling.

There is lots of things district judges have to do. When agencies are set up to do the very kind of thing that you want me to do, I think the right thing is to defer to the agency.

MR. HILLER: Your Honor, what I would suggest to your Honor is, and in the greatest deal of respect, is to review the language in *Pickard* that I have referred to you because that language --

THE COURT: It's the same issue as *Kiffer*. *Kiffer* is a case where the Second Circuit took the case, took the argument, and *Pickard* did the same thing, ultimately holding that the argument did not have merit. But they took it.

MR. HILLER: Your Honor, in each instance the courts allowed the defendants to interpose a constitutional challenge and constitutional challenge was deemed not to be precluded by the existence of the petitioning program. The defendants argued there --

THE COURT: The existence of what?

MR. HILLER: Of the petitioning program, of the administrative review process. The very arguments that were made today were made in those two cases. And what the courts --

THE COURT: The court held that because there is a petitioning process, the law is not unconstitutional.

MR. HILLER: No. I'm sorry, your Honor. What the

court did in *Pickard* and *Kiffer* was that when the defense came forward with an affirmative defense, arguing that the statute was unconstitutional, the Federal Government said they are precluded from making any constitutional challenge.

THE COURT: And the Court held not, but then they held against the defendant.

MR. HILLER: The Court held that they were not precluded from raising the constitutional claim, that the threshold issue that the defense is raising now --

THE COURT: Mr. Hiller, let me suggest. I understand you are passionate about your case, and you've got a very strong case and a lot of human interest involved. Unless you discipline yourself to slow down, you lose your effectiveness.

MR. HILLER: Thank you, your Honor. I will do my best.

The threshold argument that the defense made today is the same threshold argument that was rejected in *Pickard*.

THE COURT: I take your point. I take your point. I have it. I really understand it. I may not follow it, but I understand it.

The second part of my question, though, is what I'm focused on. When the district courts and the Second Circuit Court of Appeals focused on the issue, they held that the Constitution was not violated by having marijuana on schedule 1.

MR. HILLER: Yes. That goes to the issue of *stare decisis*, which I am prepared to discuss.

THE COURT: Maybe we should get into that. But I'm thinking that in those cases they held that they had to get onto the question and they gave different reasons than I had. But they got onto the question. They held that the defense was not proved. What did they hold?

MR. HILLER: In *Kiffer*, the claimed constitutional right, as Mr. Dolinger pointed out, was the constitutional right to distribute cannabis, which is clearly not implicated by Alexis Bortell, Jagger Cotte or Jose Belen.

THE COURT: Slow.

MR. HILLER: With respect to *Canori*, *Canori*'s argument was not constitutional. Mr. Dolinger represented to this Court that *Canori* was decided on constitutional grounds but, in fact, the defendant in *Canori* argued that the *Ogden* memorandum had affected a de facto rescheduling of cannabis and, therefore, he could not be charged as having violated a classification of schedule 1.

THE COURT: I don't think he relies on *Canori* for that purpose. I think he relies on *Canori* for favorable citation of *Kiffer*.

Am I right, Mr. Dolinger?

MR. DOLINGER: Yes, your Honor.

MR. HILLER: With respect to *Kiffer*, your Honor --

THE COURT: What about *Pickard*?

MR. HILLER: I'm sorry.

THE COURT: What about *Pickard*? What was the constitutional ruling of *Pickard*.

MR. HILLER: The argument in *Pickard* was different from what we are arguing. The argument in *Pickard* was, the ruling was that the classification was constitutional, but the arguments and claims were different. The arguments we are making here are not the same. And I would emphasize to the Court --

THE COURT: What were the arguments in *Pickard*?

MR. HILLER: In *Pickard*, there are quite a few of them.

THE COURT: Pick out two, the two you have the most difficulty in answering.

MR. HILLER: I'm sorry?

THE COURT: The two that you have most difficulty in answering. I'll read the case again before I issue my decision. You might as well anticipate that I'll focus on the two questions that you have difficulty in answering.

MR. HILLER: The first argument in *Kiffer* and in *Pickard* --

THE COURT: Here is the answer.

MR. HILLER: No, it's not.

The principal claim in *Pickard* was that science had

reached the point where now the scientific community had raised enough questions that cannabis does have a medical application within the meaning of a schedule 1 definition, which is not the same that we are arguing.

THE COURT: It really is.

MR. HILLER: With all due respect, your Honor, it is definitely not. I can assure you that --

THE COURT: Your clients have a medical need for marijuana that it's saving their lives.

MR. HILLER: That's correct.

THE COURT: Isn't that the same argument?

MR. HILLER: Our argument is not that there is this raging scientific debate that has ultimately started to tip in our favor. That is not the argument. Our argument is that the Federal Government knows that cannabis is safe and effective. The reason I would say that --

THE COURT: It doesn't want to act.

MR. HILLER: The Federal Government has a patent right now that was taken out by the Department of Health and Human Services which, according to defendants' brief on page 5, specifically says is binding on the Federal Government.

Now, in that patent application, the United States Government represented that cannabis constitutes a safe and medically effective treatment for Parkinson's disease, HIV-induced dementia, Alzheimer's disease, autoimmune diseases,

and also serves as a neuroprotectant to help people with seizure disorders. And those representations cannot be made in bad faith by law under Section 101 of Title 35 of the United States Code. Any representation made in a patent application must be in good faith based upon the invention's utility. So the United States Government has represented --

THE COURT: Your clients are living proof of the medical appropriateness of marijuana. I don't need a patent to tell me that. I have to take the plausible allegations in your complaint as true. 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?

MR. HILLER: I could not agree with you more, your Honor.

THE COURT: That criteria, does it trump everything else? Suppose the administrative agency would say, yes, yes, Mr. Hiller, you are right. But the dangers I see in marijuana are such, dangers to the community, are such that I feel and I hold that there is no rescheduling. Can it do that?

MR. HILLER: No. Once cannabis does not meet Section 2 of the definition, it cannot be classified as a schedule 1 drug.

Your Honor, in that sense you have made the point for us. There is no real question that cannabis provides safe or

medically effective relief to our clients. And the fact of the matter is, in order for cannabis to be schedule 1 drug, in addition to having to have no medical application whatsoever, it also has to be so dangerous it can't even be tested under strict medical supervision and, yet, the United States Government is allowing over 200 million Americans today to have access to cannabis in 30 states across the country.

In addition to that, your Honor, the government itself has its own investigational new drug program and beginning in 1976 has been distributing cannabis to medical patients all over the country for the treatment of their diseases. If cannabis met the requirements of a schedule 1 drug, the Federal Government, under the FDA's regulations, would not have been permitted to include cannabis as a schedule 1 drug.

THE COURT: Judge Wolford in western New York, *United States v. Green*, I think looked at it in the way that is persuasive to me. She said: It 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. If that were the central question in this case, defendants' argument would have merit, but it is not the central question.

The issue is not whether it is rational for Congress or the DEA to conclude that there is no currently accepted medical use for marijuana. That would be the issue if a claim were brought in a circuit court challenging the DEA's

administrative determination.

Rather, a constitutional issue for equal protection purposes is simply whether there is any conceivable basis to support the placement of marijuana in the most stringent schedule under the act.

This is 222 F.Supp. 3d, 275-280.

MR. HILLER: What page were you at, your Honor?

THE COURT: 275-280.

MR. HILLER: Your Honor, I'm familiar with *Green*. I read it. What I would suggest to the Court is that --

THE COURT: Your argument is that *Kiffer* really overrules *Green* or *Green* is not following *Kiffer* because *Kiffer* holds that the district court should retain the issue, and language does not confine it to a criminal court, to a criminal case.

MR. HILLER: Yes, your Honor. I would also point out --

THE COURT: I have your argument. I know the argument. It's a good argument. I'm not saying it's a win argument. It's a good argument.

MR. HILLER: I appreciate it, your Honor.

THE COURT: I don't know if it's a win argument. That's one of the things I have to decide.

MR. HILLER: May I address one other point on the issue of *stare decisis* before we change the subject?

THE COURT: Of course.

MR. HILLER: I'll try to do it quickly.

THE COURT: Don't do it quickly.

MR. HILLER: I won't say it quickly. I'll just try to do it quickly.

In *United States v. Pickard*, one of the arguments that the Federal Government made is another argument that was made here, specifically that the presence of a prior decision by the Ninth Circuit specifically foreclosed any constitutional challenge because in that case, just like, for example, in *Kiffer*, the Court ruled that the Controlled Substances Act, as it pertains to cannabis' classification as a schedule 1 drug, is constitutional.

So the government argued then, argued today. The name of that case that *Pickard* was referring to was *Miroyan*. And what the Court in *Pickard* ruled was, the decision in *Miroyan* does not foreclose a Court's consideration of future constitutional challenges to the classification of marijuana as a schedule 1 drug. That case does not stand for the proposition that even if defendants proffer credible evidence raising serious questions regarding the constitutional soundness of marijuana's listing on schedule 1, that district courts cannot entertain a constitutional challenge.

Then the Court in *Pickard* specifically relied on the decision in *Gonzalez v. Raich* for the proposition that it had

no choice but to consider the constitutional challenge, notwithstanding defendants' argument.

And what the Court said, and I quote, to read *Miroyan* so broadly as to preclude constitutional challenges to marijuana scheduling under any circumstances would be inconsistent with the Supreme Court's relatively recent observation in *Raich*, specifically that evidence proffered by the defendants regarding the effective medical uses for marijuana, if found credible after trial, would cast serious doubt on the accuracy of the findings that require marijuana to be listed as a schedule 1 drug.

I would also cite for the Court's attention *Jeno v. Commissioner of Patents & Trademarks*, which talks about changes of circumstances warranting a departure from prior decisions. The Court in *Jeno* said: Nor does the doctrine of *stare decisis* apply to the present action. Contrary to the defendants' reasoning, there is a strong possibility that plaintiff can show changed circumstances. *Stare decisis* may not be so mechanically applied so as to ignore changing facts and inequitable results.

And a case that opposing counsel cited, *Gately v. Massachusetts*, held, as *stare decisis* is concerned with rules of law, a decision dependent upon its underlying facts is not necessarily controlling precedent as to a subsequent analysis of the same question on different facts and on a different

record, which is exactly what we are saying here.

Although Mr. Dolinger pointed out in his brief that *Gately* is a First Circuit case, *Gately* also cites a Second Circuit decision, *In Re Tug Helen B. Moran, Inc.*, 607 F.2d 1029 (2d Cir. 1979). This is the Second Circuit. We find no merit in the state's attempt to invoke the doctrine of *stare decisis* since the doctrine is not applicable to determinations of fact.

In view of the fact that *stare decisis* is concerned with rules of law, a decision dependent on the facts is not controlling precedent as to a subsequent determination of the same question on different facts and on a different record.

THE COURT: What is the determination of fact? Who determined it?

MR. HILLER: Your Honor would determine the facts. There is no jury in this case because we are asking for equitable relief.

THE COURT: But issue is not a factual issue. It's a motion to dismiss a complaint as a matter of law.

MR. HILLER: I agree.

THE COURT: The issue that the government raises is that since Congress had a rational basis to have the law in 1970 instead of a procedure for change, the law is constitutional. That's as far as the argument goes.

The question I would pose as a judge hearing it might go a little further. It might say that even though there was a

rational basis for the law when it was promulgated, the inability or unwillingness of the agency to act on changing facts indicates that there is some kind of unconstitutionality. I don't know how to complete that argument. I think that is really your argument.

MR. HILLER: It is, your Honor. It's one of them.

THE COURT: The next question is, you asked for a reclassification. What would happen with a reclassification?

MR. HILLER: We are not asking for reclassification, your Honor. We are simply asking for a declaration that the classification of cannabis as a schedule 1 drug under the CSA is unconstitutional.

THE COURT: That would not give you complete relief. There are other schedules that might go into this. The implication of that argument, it should not be schedule 1; it might be schedule something else.

MR. HILLER: Your Honor, it is my understanding --

THE COURT: The relief you are asking is not to remove marijuana from any and all schedules, because that would fit the argument you are making.

MR. HILLER: Our argument, your Honor, is that once this Court finds that the classification, if the Court were to find that the classification violates the Constitution, it would be the schedule and it would be incumbent upon Congress to pass new legislation to reschedule it to another level.

THE COURT: If I review what your complaint is I have to focus on 1970.

MR. HILLER: Yes.

THE COURT: And I can't focus on 1970 and give you relief. I can only focus on the as-applied attitude that the Attorney General or his delegee has not been keeping current. That's a different argument and I don't know the answer to it.

MR. HILLER: What I would say, your Honor, is that the Court is duty bound to look at 1970, but also look at the changing facts and circumstances that have occurred since 1970.

THE COURT: It's not a basis for a rational basis test for the law passed in 1970.

MR. HILLER: Your Honor, we have cited cases that take a different position on that issue than you have. The cases that we have cited make very clear that changed circumstances can be considered and factored into a rational relation or rational review analysis.

Your Honor, as long as we are talking about 1970, I think it's important not to lose sight of one critical fact about our case, which also must be assumed true for purposes of this motion, and that is, your Honor, that the Controlled Substances Act was enacted not for the purpose of preserving health and lives, but, instead, to suppress political rights of those that Richard Nixon and his administration believed to be hostile to his administration and, also, to oppress African

Americans.

We have four witnesses who have each stated that the Controlled Substances Act, which was passed, your Honor, in 27 days, and written entirely by the Attorney General at the time, John Mitchell, who went to prison afterwards, not related to the --

THE COURT: Mr. Hiller, what's the point? The point is, I'm not involved here in a discussion of the evaluation of the Nixon administration. I'm not here to evaluate the good faith or not of the Attorney General in drafting this law. There are other very important laws that were passed in the twinkling of an eye, including the Securities Exchange Act, the Securities Act of 1933, the law on setting up the courts and the special master after 9/11. Don't argue with me that it came very fast.

Here is the argument I'm interested in. You can't win on these arguments. You may have appeal on those arguments, but you can't win on those arguments.

Schedule 1 requires that a drug must have a high potential for abuse; no currently accepted medical use and treatment in the United States; third, there is a lack of accepted safety for use of the drug or other substance under medical supervision.

You win on two. One, I don't know. If these are three criteria that have to be weighed, a district judge would

have a very hard job in weighing medical use against potential for abuse. I think bias and prejudice would be a danger.

The third criteria, lack of accepted safety for use of the drug or other substance under medical supervision, the opioid epidemic has occurred in a prescription drug. Who was there to say that a requirement of a prescription for marijuana will save the community from the danger of the drug?

My point is this. I don't know if these are conjunctive criteria that all have to be satisfied or disjunctive criteria. But my experience with criteria is that they have to be weighed and evaluated. If as a matter of law I'm wrong on that, I would like you to tell me.

MR. HILLER: Your Honor, as a matter of law, you are wrong on that one, I'm sorry. All three have to be met. I don't think the government is going to tell you differently. I don't believe there is any weighing process --

THE COURT: Are you going to tell me differently, Mr. Dolinger?

MR. DOLINGER: No, your Honor. That is true for the DEA. As your Honor cited, *United States v. Green* holds that that's not the proper analysis for a district court.

THE COURT: I'll hear you in a minute. I think Mr. Hiller is drawing to a close.

MR. HILLER: Absolutely, Judge.

I want to point to two more points, if I may.

The first is, I respect that the Court doesn't want to get involved in the inner machinations of the Nixon administration, but I would respectfully urge the Court to review footnote 45 to our brief on page 47. Because even if the defendants are given the benefit of the doubt and they are entitled to argue their rational and review, even under those circumstances, if there is a basis to infer antipathy or bad faith in the enactment or passage of a statute, then, your Honor, those factors are actually very relevant.

And if it's also true that the rational basis, the so-called rational basis is merely a subterfuge for something more sinister, your Honor, I would respectfully submit that if we could prove those facts, if we could prove that the Nixon administration, or those that were working for it, were involved in a predatory effort to break up protests and infiltrate opposition groups, your Honor, then the Controlled Substances Act doesn't get rationality review.

THE COURT: As a judge I will not get into that. It's a political question. I will not get into it. The law is the law. I'm sworn to enforce the laws. If it's constitutional, I uphold it. Constitutionality will not depend on what may have been in President Nixon's mind at the time or in Attorney General Mitchell's mind at the time, or in all the legislators' minds at the time. This bill passed by votes.

MR. HILLER: It's not my practice --

THE COURT: Passed the house, passed the Senate, signed by the president. It's either constitutional or not and I will follow those arguments.

What's the last point?

MR. HILLER: I think I want to make that my last point.

THE COURT: Thank you very much, Mr. Hiller. You raised provocative questions.

MR. HILLER: Thank you.

THE COURT: Mr. Dolinger, last few words. We will wrap up the argument and I will reserve decision.

MR. DOLINGER: Just a few points very briefly, your Honor.

The first on the question of the administrative remedy, it is true that *Kiffer* looked past the administrative remedy and ruled on the constitutional question. That is because it cited two rationales for that. The first was that it was a criminal case, as your Honor pointed out.

THE COURT: Mr. Hiller told me it was not one of the rationales.

MR. DOLINGER: Your Honor, it was, in fact, one of the rationales that it was a pending criminal case.

THE COURT: Was it explicitly a rationale?

MR. DOLINGER: Yes, your Honor. I can get you a page cite, if that would be helpful.

THE COURT: Here is the wording. I think Mr. Dolinger is right. 477, F.2d at 352.

MR. HILLER: Are we talking about *Canori* or *Kiffer*?

THE COURT: *Kiffer*.

MR. HILLER: Let me just pull it out.

THE COURT: Got it?

MR. HILLER: I don't have it yet, your Honor. I'm sorry.

THE COURT: I'll wait for you.

Page 352.

MR. HILLER: I'm sorry?

THE COURT: Page 352. Right at the top. You see where it says second? Second, even assuming the existence of a viable administrative remedy, application of the exhaustion doctrine in criminal cases is generally not favored because of the severe burden it imposes on defendants.

MR. DOLINGER: Thank you, your Honor.

The other rationale cited by the Second Circuit was the position of the head of the Bureau of Narcotics and Dangerous Drugs, which is the predecessor to the DEA as of 1973, which is that he had a concurrent obligation under a drug regulation treaty that also had the force of statute. That position is no longer --

THE COURT: Give me that again. I missed it.

MR. DOLINGER: The head of the Bureau of Narcotics and

Dangerous Drugs came to the conclusion at the time that rescheduling marijuana was separately prohibited to him as part of the administrative process by a treaty obligation. The DEA does not take that position and has considered a number of petitions to reschedule marijuana since that time.

THE COURT: None of which has succeeded.

MR. DOLINGER: That's right, your Honor.

THE COURT: Let me ask you this. Go back to these three criteria established by 21 U.S.C. Section 812(b)(1). High potential for abuse, no currently accepted medical use, lack of accepted safety for use of the drug under medical supervision.

Let's say that only criterion 2 is no longer applicable, but 1 and 3 are. Does that mean it cannot be on schedule 1?

MR. DOLINGER: If the DEA is considering a rescheduling petition, it is a conjunctive test, so all three factors must be met.

THE COURT: What happens if two out of the three are met? Does it hit another schedule?

MR. DOLINGER: It may be rescheduled at that point into schedule 2.

The DEA did conclude --

THE COURT: If that were the case, plaintiff can win on schedule 1, maybe not here, but in the administrative

process, only to find it comes onto schedule 2 or 3.

MR. DOLINGER: That's right, your Honor.

THE COURT: With lesser penalties but nevertheless criminal penalties.

MR. DOLINGER: And among the factors that the DEA considered in making the determination that it has no currently accepted medical use, this is different from the question of whether there could possibly be any medical utility to the drug. Among other things --

THE COURT: You can't argue that. Given the allegation in the complaint that it saved the life and eliminated epileptic seizures, how can you say that? You have to accept these allegations as true. I can't say they are not plausible.

MR. DOLINGER: We do accept them as true for purposes of the motion. The issue is that the agency must also consider whether there are sufficient studies of the drug and sufficient studies of high enough quality to show its effectiveness such that it can be permitted --

THE COURT: It says no currently accepted medical use and treatment in the United States. Judge Wolford has said, and what I understand to be the case, that there is. It may not be universal, but some statements in their legislative findings have found that there is accepted medical use. You can't say what you are arguing. Your argument doesn't hold.

MR. DOLINGER: Your Honor, I understand --

THE COURT: I think the argument is, Mr. Dolinger, if this were an administrative process I might hold, if I were the agency head, that, no, it's not a schedule 1 drug, but it is a schedule 2 or schedule 3 drug. So nobody has argued the schedules. But I look at them because it's judicial notice. Therefore, we will reschedule it. The relief that's sought by the plaintiff to travel and to petition Congress and the like won't be changed in the slightest by that reclassification. What they are fearing now they can fear later. I think that's the critical issue.

Thank you very much. Thank you both sides. Thank you all for attending and being so patient and laughing at my jokes. I'll take this under advisement.

MR. DOLINGER: Thank you, your Honor.

MR. HILLER: Your Honor, may we afforded the opportunity for supplemental briefing?

THE COURT: No, no supplemental briefs.

MR. HILLER: Thank you, your Honor.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARVIN WASHINGTON; DEAN BORTELL as Parent/Guardian for Infant ALEXIS BORTELL, JOSE BELEN, SEBASTIEN COTTE as Parent/Guardian for Infant JAGGER COTTE, and CANNABIS CULTURAL ASSOCIATION, INC.,	
Plaintiffs,	**AFFIDAVIT OF ROGER STONE**
- against -	17 Civ. 5625
JEFFERSON BEAUREGARD SESSIONS, III, in his official capacity as United States Attorney General; UNITED STATES DEPARTMENT OF JUSTICE; CHARLES "CHUCK" ROSENBERG, in his official capacity as the Acting Director of the Drug Enforcement Agency; UNITED STATES DRUG ENFORCEMENT AGENCY; and the UNITED STATES OF AMERICA,	
Defendants.	

State of New York)
:.ss:
County of New York)

ROGER STONE, having been duly sworn, deposes and says:

1. I am a former member of the Richard Nixon Presidential Administration. I submit this Affidavit in connection with plaintiffs' Order to Show Cause for a Temporary Restraining Order and Preliminary Injunction. As explained below, I have personal knowledge of the rationales and motivations underlying enactment, administration and enforcement of the Controlled Substances Act ("CSA") by the Nixon Administration.

My Background

2. I am, and for more than 40 years have been, a political consultant and operative,

working predominantly with Republican candidates and officials. I began my political career at age 12, working for Barry Goldwater's 1964 Presidential Campaign. Thereafter, while attending George Washington University, I accepted a position with the Committee to Re-Elect President Nixon ("CRP"). My work for CRP provided me with close access to Nixon Administration officials and associates, with whom I interacted regularly.

3. After Richard Nixon was re-elected as President in 1972, I was offered and took a position with his Administration's Office of Economic Opportunity, where I continued to work closely with Nixon Administration officials and associates in the creation and administration of policy.

4. In addition to my tenure with the Nixon Administration, I also worked with and/or for other public officials, candidates and campaigns over the years, including, among others: President Ronald Reagan; Senator and Republican Presidential Candidate Robert Dole; Governor Thomas Keane (New Jersey); Congressman Jack Kemp (New York); Senator Arlen Spector (Pennsylvania); and President Donald J. Trump.

5. I have authored five books: The Man Who Killed Kennedy: The Case Against LBJ (Skyhorse Publishing 2013); Nixon Secrets: The Rise, Fall and Untold Truth About the President, Watergate, and the Pardon (Skyhorse Publishing 2014); The Clinton's War on Women (Skyhorse Publishing 2015); Jeb! and the Bush Crime Family (Skyhorse Publishing 2016); The Making of the President 2016: How Donald Trump Orchestrated a Revolution (Skyhorse Publishing 2017). I also regularly appear as a guest contributor on network and cable news and politically-focused television shows, including, among others, CNN, FoxNews, ABCNews, NBCNews, Meet the Press, Real Time with Bill Maher, and C-Span.

6. In short, I have devoted most of my professional life to politics and public policy, focusing my efforts in support of candidates, causes and policies affiliated with the Republican Party.

The Controlled Substances Act

7. Working with the Nixon Administration afforded me constant contact with Administration officials, both inside and outside the White House. One of the officials with whom I was in regular contact was Myles Ambrose, who, at the time, was involved in President Nixon's "War on Drugs" and eventually became the first "Drug Czar" (Exhibit 23, N.Y. Times Article). I remember that, in the winter of 1971, I met Mr. Ambrose at "The Exchange," then a popular hangout for politicos in Washington, DC. Over drinks, Mr. Ambrose and I began to discuss the President's agenda. Not surprisingly, he spoke most favorably of the President's plan to "win" the War on Drugs. In particular, Mr. Ambrose said to me: "We gotta do this drug stuff. We gotta get rid of the 'niggers.'" He proceeded to explain that those associated with the President associated African Americans and hippies protesting the Vietnam War with marijuana, which the President and Mr. Ambrose believed was the drug of choice for these two groups. I remember this conversation well, because it shocked and offended me.

8. I came to learn, and, as is known to history, those associated with the President felt that war protestors and those with whom they associated were a threat to the Nation in its fight against communism. He also had mixed emotions toward African Americans, whom he may have associated with the anti-war left. No legislation could be focused directly at these two groups, as the Administration recognized that such would draw objections based upon, among other things, constitutional grounds. The alternative strategy developed by the Administration was to use the War on Drugs -- and, in particular, the efforts to criminalize and prosecute possession and use of cannabis

-- to marginalize war protestors and African Americans and "get them off the streets." To convert these viewpoints into policy, the President, members of his Administration, and those whom he entrusted to liaise with Congress dedicated themselves to enacting and administering a legislative agenda directed toward prosecuting, in particular, war protestors and African Americans for use of cannabis.

9. The Administration's efforts were successful in enacting the CSA in 1970. Thereafter, the President named Mr. Ambrose to lead the White House Office of Drug-Abuse Law Enforcement -- a precursor to the Drug Enforcement Agency, which then led the Administration's War on Drugs.[1]

10. Again, all of these efforts, as they pertained to criminalizing cannabis, were directed toward suppressing the rights of African Americans and protestors of the Vietnam War, whom the President believed were threatening to undermine America's sense of collective purpose in the Cold War and the battle against communism. My recollection of these events and conversations is consistent with those of others from the Nixon Administration. For example, John Ehrlichman, who served as the Administration's Domestic Policy Chief and was one of the President's closest political advisors, confirmed that the enactment and enforcement of laws criminalizing cannabis were directed toward political suppression and racial discrimination. In this regard, Mr. Ehrlichman said:

> 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

[1]Ironically, Mr. Ambrose, who was slated to become the first director of the DEA, resigned from the Administration before accepting the post.

> night on the evening news. Did we know we were lying about the drugs? Of course we did.

N.Y. Daily News, A. Edelman, *Nixon Aide: "War on Drugs" was tool to target "black people"* (March 23, 2016) (Exh. 4); *see also* Harper's Magazine, D. Baum, *Legalize it All: How to Win the War on Drugs* (April 2016) (Exh. 5) ("Nixon's invention of the war on drugs as a political tool was cynical ...").

11. If incarceration of the antiwar left and African Americans constitutes the measure of the War on Drugs' success, the Administration's efforts must be characterized as "successful." According to the *New York Daily News*, "by 1973, about 300,000 people were arrested under the law – the majority of whom were African American" (Exh. 4).

12. The Administration's anti-cannabis policies thus were manifested in two distinct, but related, efforts – to usher the CSA through Congress and then to use the law as a tool to incarcerate, harass and undermine those whom the President considered hostile to American interests.

13. While there also may well have been those who genuinely believed that marijuana was a dangerous drug on par with heroin, the individuals responsible for making and administering America's drug policy were, in my experience, not among them. The driving force behind the CSA and its administration was to suppress and discriminate. It represents a regrettable and unfortunate period in American history which, I trust, contemporary society will, at some point, endeavor to correct – perhaps now.

For these reasons, I join the plaintiffs' request for a temporary restraining order and preliminary injunction.

Roger Stone

Sworn before me this 16th day of June, 2017.

Notary Public

MICHAEL S. HILLER
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 02HI6328111
Qualified in Kings County
Commission Expires July 27, 2020