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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

Confronted with the finding that Cannabis has saved the lives of 12-year-old Alexis and 7-year old Jagger, Defendants argue that the Schedule I classification of Medical Marijuana is rational because, "conceivably," its prohibition could protect minors from alleged harm (Gov't.Br.25).[1] Defendants' position is rendered particularly absurd, given that, after we filed the Opening Brief, the FDA approved a Cannabis drug for treatment of children.[2] Meanwhile, as recognized by the lower court, enforcement of the CSA against the minor Plaintiffs herein -- children who need Cannabis to live -- would almost certainly kill them. Defendants' position on this Appeal is sadly representative of the pervasive irrationality of the classification of Cannabis that has plagued America for decades.

Worse, the threats to Plaintiffs' lives do not, according to Defendants, implicate the Constitution, insofar as opposing counsel contends that the Fifth Amendment does not include a right to preserve one's health and life. Defendants base this argument upon their misinterpretation of *Missouri v. Cruzan*, which, according to opposing counsel, grants individuals the right to refuse life-sustaining treatment in

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[1]Unless otherwise indicated, Plaintiff-Appellants rely upon the abbreviations and other capitalized terms defined in Appellants' Opening Brief ("Opening Brief").

[2]https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm611046.htm. Unfortunately, the conditions Plaintiffs suffer with do not respond to this particular strain of Cannabis.

order to *end* their lives, but not the right to continue that treatment in order to *preserve* their lives. As part of their argument, Defendants contend that Plaintiffs are seeking to create a *new* substantive due process right which, supposedly, no court has ever recognized -- an argument made possible only by opposing counsel's complete disregard of the decisions, cited in the Opening Brief, which confirm that the constitutional right to preserve one's health and life has been recognized for decades.

As recited in the Complaint, regulation of Cannabis is a relatively recent phenomenon rooted in racism. Defendants attempt to dismiss that history, asserting that discrimination matters only if practiced by Congress -- even where, as here, the mis-classification of Cannabis was arranged by members of the Executive Branch to suppress civil rights and discriminate against persons of color. It is time for the Courts to announce publicly, what its personnel has likely, for decades, acknowledged privately – that the designation of Cannabis under the CSA is irrational, discriminatory, and otherwise unconstitutional.

ARGUMENT

POINT I. DEFENDANTS MERELY CONFIRM THE LOWER COURT'S ERROR ON ADMINISTRATIVE EXHAUSTION

On Appeal, we demonstrated that the lower court's mis-application of the mandatory exhaustion doctrine constitutes an error of law, requiring reversal (Opening-Br.22-26). We further demonstrated that, whether mandatory or

discretionary, the doctrine of administrative exhaustion cannot reasonably be applied to the facts of this case (*Id.*26-32).

In opposition, Defendants assert that the lower court actually did not apply the doctrine of *mandatory* administrative exhaustion -- a remarkable position, given that the District Court used the word "require" or some variation thereof six times in reference to the purported *obligation* of Plaintiffs to administratively exhaust remedies (A266-67). Regardless, now that it is uncontested that administrative exhaustion under the CSA is discretionary, this Court can address whether it was appropriate for the District Court to impose upon Plaintiffs, a lengthy and futile administrative review process that could never generate the outcome they need -- a declaration that the classification of Cannabis under the CSA is unconstitutional.

A. Defendants' Insistence Upon Administrative Review Fails to Consider the Substantial Delay Associated Therewith and the Immediacy of Plaintiffs' Medical Needs

On Appeal, we showed that Alexis, Jagger and Officer Belen ("Jose") require daily administrations of Cannabis to live (Opening-Br.1, 7, 30-31). Defendants simply ignore this fact, and instead cavalierly remark that references to prejudicial delay associated with administrative review under the CSA are "speculative" (Government Br.17-18). Defendants also argue that a mandamus proceeding could resolve any prejudice associated with delays in administrative review. Defendants are wrong.

First, given that Alexis, Jagger and Jose require daily administrations of Cannabis to live, a delay of even a single day could be catastrophic. Thus, *any* delay would threaten Plaintiffs with irreparable harm. Meanwhile, this Court has long ruled that just the *possibility* of mere "medical setbacks" is sufficient to dispense with administrative exhaustion. *City of New York v. Heckler*, 742 F.2d 729, 737 (2d Cir.1984), *aff'd sub nom. Bowen v. City of New York*, 476 U.S. 467 (1986) (internal quotations and citations omitted); *see also Abbey v. Sullivan*, 978 F.2d 37, 46 (2d Cir.1992) ("if the delay attending exhaustion would subject claimants to deteriorating health ... then waiver may be appropriate"). Given that delays associated with administrative exhaustion would threaten Plaintiffs, not merely with medical setbacks but with death, this irreparable harm requires that administrative review be excused.[3]

Second, Defendants' assertion that delays associated with administrative review under the CSA are "speculative" is controverted by the record. The Complaint herein detailed every administrative review requested under the CSA since its enactment and calculated the Government's average delay in rendering a

[3]The decision in *Krumm v. Holder*, 2009 WL 1563381 (D.N.M. May 27, 2009), cited by Defendants (Br.18), is not to the contrary. The petitioner in *Krumm* claimed that delays in administrative review would prejudice him because he suffered from "inflammation in his knee," and that he desired to avoid such "dangerous" drugs as "Ibuprofen." Id.at *12. The Court in *Krumm* properly concluded that "[s]uch conclusory assertions do not constitute" a basis upon which to "bypass" administrative review. Id. By contrast here, the lower court accepted as true that Cannabis is responsible for keeping Alexis, Jagger and Jose alive (A270,382). Thus, the showing absent in *Krumm* was undeniably present below, requiring denial of the motion to dismiss.

determination – nine (9) years (A90-94). Delay in administrative review is not speculative.

Third, Defendants' reliance upon the mandamus process to address the issue of delay (Gov't.Br.18) ignores the points and caselaw cited in the Opening Brief, confirming that a prerequisite to filing a writ of mandamus is an already-existing "egregious delay" -- generally eight (8) years after the filing of a petition to reschedule (Opening-Br.30-31). Given that a single day without Medical Cannabis would subject Plaintiffs to life-threatening seizures, the gruesome consequences of untreated Leigh's Disease, and suicide caused by PTSD, mandamus relief provides no remedy for Plaintiffs.

Lastly, it is of no moment that Plaintiffs have been able to treat with Cannabis within their home states under the auspices of Defendants' policy of not enforcing the CSA. The uncertainty associated with Defendants' policies on Cannabis, which, as history confirms, are subject to change at any moment, also requires Plaintiffs to live in constant trepidation that they or, in the case of Alexis and Jagger, their parents, may be arrested at any time if Defendants were to change their policy of CSA non-enforcement -- a very real threat, as shown immediately below.

Specifically, on January 4, 2018, defendant-Sessions purported to revoke the Cole Memorandum (A242-45), under the auspices of which, Americans (including Alexis, Jagger and Jose) had treated with Cannabis without fear of reprisal since

2013.[4] Sessions has also urged Congress to reinstate funding for prosecution of medical marijuana patients (A41,¶119), and announced his intention to institute civil forfeiture proceedings against those who distribute and possess Cannabis, including for medical treatment (*Id.*,¶120) ("Sessions' Threats of Enforcement"). Thus, in addition to the loss of their rights to travel and to engage in in-person advocacy (Point V, *infra*), imposing administrative exhaustion upon Plaintiffs has very real consequences for them -- specifically, the constant trepidation that their life-saving medication could be confiscated and that they or their parents will be arrested during nine years of administrative review.

B. Defendants' Bias Against Re-scheduling Cannabis Renders Administrative Review Utterly Futile

On Appeal, we recited a series of statements made by defendants Sessions and Rosenberg of the Justice Department and DEA respectively, confirming that they had pre-judged the issues relating to Cannabis, rendering administrative review futile (Opening-Br.27-28). In response, Defendants argue that the allegations of institutional bias are conclusory, unsupported and irrelevant. Defendants' assertions are controverted by the record.

Sessions, a decision-maker on rescheduling petitions, prejudged any potential administrative review when he said, *inter alia*, that: (i) "the KKK 'were OK until I

[4]https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement; *see also* https://www.cnn.com/2018/01/04/politics/jeff-sessions-cole-memo/index.html.

found out they smoked pot'" and (ii) "Good people don't smoke marijuana" (A95). These excerpts from the record are neither conclusory nor unsupported, but rather constitute detailed statements from the public record. And, contrary to Defendants' ruminations, Sessions' statements do not reflect "strong views about wise public policy" (Gov't.Br.19). Nor are these the words of "men of conscience and intellectual discipline, capable of judging a particular controversy fairly" (*Id.*). These are statements reflective of clear bias, which manifested in Sessions' Threats of Enforcement against Medical-Cannabis patients.

Similarly, statements by defendant-Rosenberg that he had already "decided" that Medical Cannabis is "a joke" (A94-95) and "really bothers" him[5] does not reflect a reasoned disagreement that arose after the "gathering and assessment of scientific and medical data," as alleged by Defendants (Gov't.Br.10). Rosenberg, as with Sessions, prejudged the issues herein based upon personal bias before any hypothetical petition by Plaintiffs could have been filed.

Unable to defend their bias on the merits, Defendants argue that it is irrelevant to administrative review, since the Department of Health and Human Services ("HHS"), which Defendants imply is unbiased and independent, supposedly renders binding determinations on all CSA-related scientific/medical issues. However, history confirms that HHS determination is a mere rubberstamp. Defendants have

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

rejected at least six rescheduling petitions since 1999 based upon HHS's supposed "*findings*...that marijuana...has no accepted medical use in the United States and lacks an acceptable level of safety for use even under medical supervision" (Gov't.Br.20). Yet, HHS applied for and obtained the two U.S. Medical Cannabis Patents -- in 1999 and 2002, respectively -- representing that Cannabis constitutes a safe and effective medical treatment for multiple diseases ("Federal Cannabis Patents") (Opening-Br.17-18).[6] Plainly, HHS, rather than providing the vaunted technical analysis Defendants claim is critical to administrative review, merely lends (and sacrifices) its credibility on scientific matters to rubberstamp Defendants' political decision to mis-classify Cannabis irrespective of medical issues.

Lastly, Defendants completely ignore the caselaw cited in the Opening Brief confirming that, where an agency's recent determinations reflect a clear statement of position, and there is no evidence suggesting a likely change, an aggrieved party is not required to endure a futile pre-litigation administrative review. *Monson v. Drug Enforcement Admin.*, 589 F.3d 952, 959 (8th Cir.2009); *Colton v. Ashcroft*, 299 F.Supp.2d 681, 689-90 (E.D. Ky. 2004); *James v. Dep't. of Health and Human Serv's.*, 824 F.2d 1132, 1139 (D.C. Cir.1987) (among others).

Here, Defendants admit that petitions to reschedule Cannabis were denied

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[6]*See also* patentscope.wipo.int/search/en/detail.jsf?docId=WO1999053917&redirectedID=true.

twice in the last two years, including a "summary denial" in April 2017, just three months before this lawsuit was filed (Gov't.Br.9, n.2). That history, coupled with Sessions' and Rosenberg's overt to Medical Cannabis, renders irrational the suggestion that administrative review would serve any purpose.

POINT II. DEFENDANTS' ARGUMENTS THAT THE CLASSIFICATION OF CANNABIS IS RATIONAL COMPLETELY LACK MERIT

On Appeal, we demonstrated that, notwithstanding the lower court's ruling on this issue, Congress, in order to classify a drug under Schedule I, is required to find that it meets the Three Schedule I Requirements (Opening-Br.33-37, *citing* 21 U.S.C. §812(b) and *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 492 (2001)). We further showed that Congress could not have rationally concluded that Cannabis meets at least two of the Three Schedule I Requirements and thus its classification thereunder is unconstitutional (Opening-Br.33-40).

In response, Defendants do not contest that classifications by Congress are subject to the Three Schedule I Requirements. Nonetheless, Defendants still oppose Plaintiffs' substantive due process claim, arguing that, because "other courts" have rejected allegedly similar rationality arguments, this Court must do the same. Defendants are wrong.

A. Defendants' Caselaw Is Outdated and Otherwise Inapplicable

Defendants argue that decades-old precedent requires dismissal of this action. However, Defendants ignore the decisions cited in the Opening Brief, confirming that changed circumstances warrant reconsideration of rationality-review determinations. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938); *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924); *Brown v. Hovatter*, 516 F.Supp 2d 547, 559 (D. Md. 2007), *aff'd. in part and rev'd. in part on other grounds*, 561 F.3d 357 (4th Cir.2009); *accord Gately v. Massachusetts*, 2 F.3d 1221, 1226 (1st Cir.1993) (citation omitted); *Jeno's, Inc. v. Comm'r. of Patents & Trademarks*, 1985 U.S. Dist. LEXIS 20097, at * 8 (D. Minn. May 6, 1985). Plainly, this Court is empowered to reject decisions of other courts which rendered determinations decades ago, which cannot be squared with changed circumstances and contemporary understandings.

Here, the decisions upon which Defendants predicate their arguments are mostly criminal cases from the 1970-1990 (Gov't.Br.21-22). Those cases were all decided before disclosure of the New Facts upon which Plaintiffs rely herein (Opening-Br.12-20).[7]

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[7]Defendants also ask this Court to distinguish *U.S. v. Kiffer*, 477 F.2d 349 (2d Cir.1973) because: (i) it was a criminal case and, according to opposing counsel, the burden of administrative review on criminal defendants would be unreasonable; and (ii) there was a level of uncertainty in 1973 as to whether administrative review would be available (Gov't.Br.16). However, the burden of administrative review would be at least as onerous on two sick children and their families, and a disabled military veteran as it would be on an accused – an issue raised in the Opening Brief and never addressed by Defendants in response. Furthermore, while the

Furthermore, the more recent decisions upholding the mis-classification of Cannabis are mostly criminal cases involving different issues and only a limited number, and often none, of the New Facts. *See, e.g., U.S. v. Christie*, 825 F.3d 1048 (9th Cir.2016) (failing to consider the Federal Cannabis Patents (2002), IND Program (1976-2018), the Funding Riders (2014-2018), the 30 State-legal programs (including 10 recreational programs) (1996-2018), the Cole and Ogden Memoranda (2009-13), the FinCEN Guidance (2014)). Moreover, the legal issues raised by the *Christie*-defendant arose from a free-exercise argument, bearing no resemblance to the facts herein.

The only case cited by Defendants which involved a civil litigant who claimed the need to treat with Cannabis to maintain her health and life is *Raich v. Gonzales*, 500 F.3d 850 (9th Cir.2007) ("*Raich II*"); however, the Court therein did not undertake rationality review. Furthermore, the *Raich II* decision reflects that the Court therein was not confronted with any of the New Facts. Thus, the decision in *Raich II* is inapplicable.

B. Defendants Fail to Address the Irreconcilable Contradictions Inherent in the Classification of Cannabis

On Appeal, we showed the contradictions between the Schedule I classification

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availability of administrative review was uncertain in 1973, its utter futility is now clear. Thus, the circumstances herein and today far more forcefully support waiver of administrative review than in *Kiffer*.

of Cannabis and dozens of instances in which Defendants have tolerated, acquiesced and even encouraged treatment with Cannabis (Opening-Br.11-18, 39). Instead of responding to this evidence, Defendants argue that remarks contained in a 1998 legislative appropriation prove that Congress made a finding that Cannabis is dangerous. However, Defendants fail to address the Funding Riders, which reflect that, 16 years later, Congress *reversed* its position and has since de-funded prosecution of all State-legal Medical Cannabis activity (Opening-Br. 20 and 28).

Defendants also resort to arguing that Cannabis is a "gateway drug," contending that those who treat therewith are more likely to use "harsher" drugs (Gov't.Br.7). However, Defendants were forced to remove all "gateway" references from their websites as inaccurate, and thus in violation of the Information Quality Act (Opening-Br.19-20). Regardless, when claims of unconstitutionality based upon changed circumstances are raised, courts do not revert to allegations of fact that have since been corrected. *Carolene Products Co.*, *supra*.

Defendants also assert that the classification of Cannabis is appropriate because it is "conceivable" that use by minors could harm them (Gov't.Br.25). Yet, a ruling sustaining Defendants' position could kill two children, who, as acknowledged by the lower court, "are living proof of the medical appropriateness of marijuana" (A382) ("How could anyone say that your clients' lives have not been saved by marijuana?")

(*Id.*). And Defendants' suggestion that Cannabis has no accepted medical use and is too dangerous to test on kids is particularly absurd, given that, on June 28, 2018, the FDA approved a Cannabis drug (Epidolex) for the treatment of a rare form of Epilepsy in children![8] Leaving that point aside, if posing hazards to children were a genuine basis for classification under the CSA, Defendants could justify inclusion of even the most benign over-the-counter medications under Schedule I.

The blizzard of contradictions reflected in the chart below makes plain just how utterly absurd defendants' arguments on this Appeal truly are:

[8]https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm611046.htm. Regrettably, Alexis' condition, Intractable Epilepsy, is not alleviated by this particular drug.

Government Against Cannabis	**Government in Favor of Cannabis**
Cannabis is not medicine and is too dangerous to use even under medical supervision	- Cannabis in the IND Program - two Federal Cannabis Patents - tolerance of 30 State-Legal Programs - tolerance of 10 State-Recreational Programs - acceptance of DC's Recreational Program
Schedule-I classification is necessary to prevent harm to kids	- FDA approves a Cannabis Drug for medical treatment of children
Omnibus 1998 Act warning against Cannabis	Funding Riders (2014-present), terminating funding for prosecutions related to State-legal Medical Cannabis
- Sessions' announcement to re-commence civil forfeitures relating to Cannabis activities - Sessions' rescission of the Cole Memorandum (Jan. 2018)	-FinCEN Guidance encouraging banks to transact with Cannabis businesses - President's assurance that the Cole Memorandum will be honored (April 2018)[9] -Surgeon General's announcement that Cannabis is safe and medically effective

[9]https://www.upi.com/Trump-Colorado-senator-make-deal-on-pot-enforcement-policy/7611523716747/

HHS decides that Cannabis supposedly has no medical applications	HHS owns two Federal Cannabis Patents based upon its representation that Cannabis is "therapeutically effective," particularly "in the treatment of neurodegenerative diseases, such as Alzheimer's Disease, Parkinson's Disease, and HIV Dementia."

Thus, Defendants' position is apparently that Cannabis is safe and medically effective except that it's not. And it's this "rationale" which forms the basis for a policy that has led to the "felonization" of hundreds of thousands of people (mostly persons of color for non-violent Cannabis-related felonies), and threatens to endanger the lives of millions of others, including Alexis, Jagger and Jose. Defendants' alternating positions are nonsensical and do not withstand even limited scrutiny.

C. Defendants' Attempt to Dismiss the Disparate Treatment of Cannabis and Other Substances Should Be Rejected

On Appeal, we cited undisputed evidence that, in 10,000 years of use and treatment, Cannabis has never killed anyone, whereas other substances that are not classified under Schedule I kill hundreds of thousands of people a year (Opening-Br.16-17). In response, Defendants, in a footnote, cite caselaw for the proposition that a "legislature need not strike at all evils at the same time or in the same way" (Gov't.Br.26); however, that language has no constitutional significance. Moreover, the record here is clear that, as determined by the Honorable Frances Young, "[b]y

any measure of rational analysis, marijuana can be safely used within a supervised routine of medical care (A215-16;A77). Meanwhile, according to the Centers for Disease Control, tobacco and alcohol, which are unscheduled, account for more than 500,000 deaths per year (Opening-Br.17). Opioids, classified under more permissive schedules below Schedule I, kill approximately 20,000 patients annually (*id.*); and, ironically, studies now confirm that Cannabis, a supposedly "dangerous drug," is used successfully to reduce dependency on supposedly "safer drugs," Opioids.[10] To suggest that the Court should ignore the disparity between Cannabis, which has never killed anyone, and the dangerous substances (tobacco, Opioids, etc.) which remain widely available and have life-threatening consequences is, itself, irrational. Give the Plaintiffs just one deposition of a Government official, and we will prove it.

POINT III. DEFENDANTS MIS-CHARACTERIZE PLAINTIFFS' SUBSTANTIVE DUE PROCESS CLAIM AND THE LAW PERTAINING TO IT

On Appeal, we demonstrated that the Fifth Amendment guarantees Americans the right to preserve their lives and health without unreasonable government interference ("Right to Life") (Opening-Br.40-45). Because classification of Cannabis under Schedule I unduly burdens Plaintiffs' ability to treat their life-threatening conditions with the only proven and safe medicine available, the CSA, as

[10]https://www.washingtonpost.com/news/wonk/wp/2018/04/02/two-new-studies-show-how-marijuana-can-help-fight-the-opioid-epidemic/?noredirect=on&utm_term=.b56b93cafb2c.

it pertains to Cannabis, violates this Right to Life (*Id.*).

In opposition, Defendants argue that the Right to Life claim fails because, among other things: (i) there is no constitutional right to use Cannabis; and (ii) the Right to Life is purportedly too broad and novel to merit constitutional protection. Defendants' arguments are unavailing.

First, it is well settled that a defendant is not free to rewrite a plaintiff's claims.[11] Here, Defendants improperly recast Plaintiffs' substantive due process claim as one that supposedly asserts a "right to use marijuana" ("Manufactured Right"). Plaintiffs, however, clearly articulated their claims as based upon the Right to Life, *not the Manufactured Right* (A330, reciting that the right at issue is "the right to preserve one's life, *not the right to use cannabis*") (emphasis added). Defendants' attempt to re-frame the Right to Life claim, in complete disregard of the record, should have been rejected by the lower court.

Although the *lower court* had the discretion to interpret Plaintiffs' claim, a substantive due process analysis is a hollow endeavor where a court describes a fundamental right "as the mirror-image of a particular burden (*i.e.*, the right to do the

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[11] *Quezada v. Roy,* 2015 U.S. Dist. LEXIS 140653, at *32 (S.D.N.Y. Oct. 13, 2015) ("As Plaintiff is master of his complaint, I accept his characterization of the pleading and will ignore Defendants'"); *accord Berberyan v. Asset Acceptance, LLC*, 2013 U.S. Dist. LEXIS 38060, at *14 (C.D. Cal. Mar. 18, 2013); *accord Virgilio v. Motorola, Inc.*, 307 F.Supp 2d 504, 513 (S.D.N.Y.2004).

specific thing that a challenged rule prevents)," thereby setting a plaintiff up for failure from the beginning.[12] Thus, by characterizing Right to Life as a right to engage in the specific conduct prohibited by the very statute at issue (*i.e.*, using Cannabis), the lower court failed to "define [Plaintiffs'] interest[s] with sufficient care to ensure that judicial review is not a hollow exercise of deference to conventional wisdom." *Hutchins*, 188 F.3d at 555. The lower court's dismissal of Plaintiffs' substantive due process claim on the basis of its impermissible mis-characterization was, therefore, clear error.

Second, Defendants' allegation that Right to Life is too "vague," "broad," and "novel" to be considered a fundamental right is pure bunk. Defendants premise this argument upon their interpretation of *Washington v. Glucksberg*, 521 U.S. 702 (1997), implying that fundamental rights require "careful descriptions," with narrow and precise language (Gov't.Br.29). However, the *Glucksberg* analysis "applies only when courts consider whether to recognize <u>new</u> fundamental rights." *Bostic v. Schaefer*, 760 F.3d 352, 376 (4th Cir.2014). Here, Plaintiffs do not seek to establish a new right, but merely uphold one that has been recognized for centuries.

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[12] *Hodgkins v. Peterson*, 2004 U.S. Dist. LEXIS 16359, at *23 (S.D. Ind. July 23, 2004) (*citing Hutchins v. Dist. of Columbia*, 338 U.S. App. D.C. 11, 188 F.3d 531, 554 (D.C. Cir.1999) (Rogers, J.) (concurring in part and dissenting in part)); *Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach*, 495 F.3d 695, 716 (D.C. Cir.2007) (Rogers and Ginsberg J.) (dissenting) (arguing that "the description of the right is of crucial importance -- too broad and a right becomes all-encompassing and impossible to evaluate; <u>*too narrow and a right appears trivial*</u>").

As shown in our Opening Brief, the Right to Life is deeply ingrained in our Nation's history, including: (i) common law tradition, dating back to the 1700s, which recognized the rights of self-preservation and personal autonomy (Opening-Br.40-45);[13] (ii) the text of the Constitution which expressly guarantees the Right to Life (Opening-Br.40); and (iii) decades of jurisprudence, clearly recognizing the constitutional right to preserve one's life (Opening-Br.41-42, 44-45 (*citing England v. Louisiana State Bd. of Examiners*, 259 F.2d 626, 627 (5th Cir.1958), *cert. denied.* 359 U.S. 1012 (1959) ("the State cannot deny to any individual the right to exercise a reasonable choice in the method of treatment of his ills")); *accord Andrews v. Ballard,* 498 F.Supp. 1038, 1048 (S.D.Tex. 1980); *Schloendorff v. Society of New York Hosp.*, 105 N.E. 92, 93 (N.Y. 1914) (Cardozo, J.)) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body"); *see also Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and their progeny (confirming that abortion restrictions must include provisos to protect the life and health of the mother).

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[13] *See Abigail Alliance*, 495 F.3d at 717-18 (Rogers and Ginsberg, dissenting) ("Although the concept of self-defense is most often thought of in terms of the response to an assault by another human being, its premise compels the same response in the face of other forms of aggression against life and limb, whether the aggressor be an animal or a diseased cell within one's body...By interposing itself between a terminally-ill patient and her only means of prolonging her life, the [government's] policy runs counter to the common law's historical prohibition on interfering with rescue"). Thus, it is absurd to argue, as Defendants contends, that Right to Life is somehow "novel."

The foregoing makes plain that the Right to Life is neither new nor broadly defined, and has been consistently recognized for generations.[14] Accordingly, the doctrine referenced in *Glucksberg* does not apply.

Defendants' reliance on *Raich II* and *Abigail Alliance* is also misplaced. In *Raich II*, the Ninth Circuit recast the plaintiff's asserted right therein so narrowly -- the so-called right to use Cannabis -- that it was doomed to be rejected. *See* 500 F. 3d 850, 864 (9th Cir.2007). By improperly framing the right in this manner, the Court in *Raich II* wrongly avoided addressing America's longstanding history of protecting the Right to Life. Id.at 864-865.

Lastly, Defendants' invocation of *Abigail Alliance* is likewise unavailing because Plaintiffs are not asking this Court to direct Defendants to engage in active conduct to make Cannabis or any other drug *available* to them. 495 F.3d 695 (D.C. Cir.2007); rather, Plaintiffs seek merely to *continue* treating with medication (Medical Cannabis) that Defendants have acknowledged in writing is safe and effective (A227-63). The distinction between permitting medical intervention to *end* life (*i.e.*, a change in the *status quo*), and the exercise of governmental restraint to

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[14] *Abigail Alliance*, 495 F.3d at 717 (Rogers and Ginsburg) (dissenting) ("[A] review of this history demonstrates that this Nation has long entrusted in individuals those fundamentally personal medical decisions that lie at the core of personal autonomy, self-determination, and self-defense"). Because a fundamental right to preserve one's health has been repeatedly and consistently recognized in this Country, the lower court's refusal to acknowledge this right constitutes clear error (A275).

continue the *status quo* in order to *preserve* life is one that the Supreme Court has repeatedly recognized, and in such instances, the Court has consistently ruled in favor of maintaining the *status quo* to preserve life. *Cruzan*, 497 U.S. at 283.

Plainly, the lower court's dismissal of Plaintiffs' substantive due process claim should be reversed.

POINT IV THE CCA ESTABLISHED ASSOCIATIONAL STANDING AND STATED A CLAIM FOR VIOLATION OF EQUAL PROTECTION

On Appeal, we showed that CCA established associational standing before the lower court, and that its equal protection claim stated a cause of action (Opening-Br.45-50). In particular, we showed that a felony conviction, independent of incarceration, includes devastating collateral consequences that can ruin the lives of those accused, even if arising from a non-violent offense (Id.46-47). We further established that the CSA was conceived of, drafted and ushered through Congress by members of the Nixon Administration for the express purpose of suppressing civil rights and discriminating against persons of color (Id.47-50). In response, Defendants make two arguments, neither of which has any merit.

A. Defendants' Contention that There is No Connection Between the Claimed Injury and the Relief to be Granted Requires the Court to Disregard Common Experience and Clear Precedent

Defendants contend that a declaration that the classification of Cannabis is

unconstitutional would provide the members of CCA with no benefit, and that allegations to the contrary are based upon "attenuated logic" (Gov't.Br.37). Such an argument is as surprising as it is unpersuasive. CCA Members with federal Cannabis convictions, such as Messrs. Motley and Nesbitt, live under the continual threat of concrete and particularized injuries. Indeed, Mr. Nesbitt had been denied employment as a commercial truck driver simply because of his Cannabis conviction. A favorable decision would enable these CCA members to seek an end to the stigma and collateral consequences of being a drug felon,[15] by moving to vacate their convictions for conduct that would no longer be criminal. Such a circumstance would reverse that "complete miscarriage of justice" that justifies the grant of collateral relief," *Davis v. U.S.*, 417 U.S. 333, 347 (1974) -- whether pursuant to 28 U.S.C. §2255 (*habeas corpus*) or a *coram nobis* proceeding. CCA members, like Leo Bridgewater, who suffer from other injuries-in-fact, would be able to obtain military security clearance or federal employment.

Notwithstanding the foregoing, Defendants assert that there is no benefit to these men to have a declaration that the law pursuant to which they were convicted is unconstitutional. It is entirely unclear how anyone could genuinely believe such an argument. Indeed, even the district court acknowledged that one could imagine

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[15] *See United States v. Nesbeth*, 2016 U.S. Dist. LEXIS 68731 (E.D.N.Y.) (marshaling the myriad statutory and regulatory collateral consequences faced by convicted felons).

how the "dots" of Plaintiffs' equal protection claim and the redressability of Plaintiffs' injuries could be connected (A273); *see also Virginia v. Black*, 538 U.S. 343, 367-68 (2003); *Aiken v. U.S*, 358 F.Supp. 87, 91 (S.D.N.Y. 1972).

The lower court should have viewed allegations of the Complaint in a light most favorable to Plaintiffs, or granted leave to amend their pleadings.[16] The lower court's failure to do so elevated form over substance, resulting in dismissal of a meritorious claim on specious grounds that are inconsistent with common experience and clearly-established caselaw.

B. Defendants' Contention That Only Discrimination By Congress May Be Considered in the Equal Protection Context Plainly Lacks Merit

On Appeal, we established that the modern-day Executive is actively engaged in the legislative process and thus, racial animus by the President and his staff must be considered in the context of equal protection claims (Opening-Br.48-50). In response, Defendants completely ignore this showing and suggest that the evidence of racial animus consists of "a few conclusory allegations about or statements by former President Richard Nixon and members of his administration" (Gov't.Br.41). Defendants' argument is absolutely controverted by the record.

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[16]Defendants' half-hearted contention that CCA waived the allegations underlying standing by supposedly not referencing the connection between its equal protection claim and the extent to which unjust convictions have damaged the lives of its membership is belied by the record (A23,39,103; *see also* Dkt. No. 43, #13-15).

Plaintiffs relied upon, *inter alia*, tape recordings of President Nixon, wherein he spoke openly of his racial animus towards African Americans and how he thought criminalizing Cannabis would interfere with their political activities (A67-70); an affidavit from Nixon administration alum Roger Stone, who spoke with Myles Ambrose, the author of Nixon's drug policy, and confirmed that during a conversation at The Exchange in the winter of 1971, Mr. Ambrose reported that the purpose of classifying Cannabis under the CSA was to "get rid of the niggers" and to disrupt political activities (A400); a contemporaneous diary entry from H.R. Haldeman,[17] and an acknowledgment by John Ehrlichman, two of the highest ranking members of the Nixon Administration, confirming Mr. Stone's account and corroborating the statements recorded on the Nixon tapes (A66-67;A149-54). To suggest that this showing constitutes a "few conclusory allegations" is to ignore the record.

Defendants cite several cases for the notion that these statements should not be considered, but all but one pertain to general principles of law concerning other statements, made by different people, in different circumstances. Only one case involved an effort to cite the Nixon Administration's animus relative to the designation of Cannabis under CSA – a Magistrate's report and recommendation

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

from the District of Minnesota;[18] however, the "evidence" proffered therein consisted solely of an affidavit in which a "[Steve] Cohen stated that President Richard Nixon, as well as President Nixon's White House Counsel and Chief of Staff, made statements indicating that discriminatory motives drove the administration's support of the CSA."[19] Merely because the proffered and, in this case, uncorroborated, testimony of a witness was rejected does not mean that all subsequently uncovered evidence of discriminatory intent by the Nixon Administration is insufficient as a matter of law.

Here, there are three witnesses, plus tape-recorded statements of the former President, confirming the racial animus underlying the enactment of the CSA, plus direct evidence confirming that the CSA was drafted and ushered through Congress by his administration. The significant role that modern-day Presidents play in the legislative process requires consideration of racial animus by the Executive Branch. CCA's claim under the Equal Protection Clause should be reinstated.

POINT V. DEFENDANTS DO NOT UNDERMINE PLAINTIFFS' TRAVEL AND SPEECH CLAIMS

In the Opening Brief, Plaintiffs demonstrated that the lower court mis-characterized Plaintiffs' Fundamental Rights claims as facial challenges to the CSA,

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[18] *U.S. v. Heying*,. 2014 WL 52686153 (D. Minn. Aug. 15, 2014).

[19] Id.at *4.

simply because the CSA does not expressly refer to speech or travel (Opening-Br.54-58). Plaintiffs argued that the CSA, although a facially neutral law of general application, is unconstitutional *as applied to Plaintiffs* because it unduly burdens their Fundamental Rights (*Id.*). *See also International Soc. for Krishna Sonsciousness, Inc. v. Barber*, 650 F.2d 430, 443-47 (2d Cir.1981). In opposition, Defendants ignore Plaintiffs' arguments and caselaw, and instead argue that: (i) Plaintiffs' Fundamental Rights are not implicated because "on its face," the mis-classification of Cannabis does not affect them (Gov't..Br.43, 46); (ii) the right to interstate travel purportedly protects citizens as against State legislation, not federal legislation; and (iii) the burden on Plaintiffs' ability to engage in in-person advocacy is minor because there are alternative modes of communication. Defendants are wrong.

First, as set forth in the Opening Brief, "as-applied" challenges are commonly invoked to attack the constitutionality of facially-neutral statutes of general application (Opening-Br.55). Thus, it is of no moment that the CSA does not, on its face, mention travel or speech. It is sufficient that the CSA's potential enforcement prevents Alexis, Jagger, and Officer Belen from, among other things: traveling by air or Amtrak; entering federal property; and advocating in-person with elected representatives in Washington, D.C. (Opening-Br.56-57).

Second, contrary to Defendants' claim, there is no rule that limits application

of the right to travel to State laws; nor can Defendants cite to one. And Defendants' reliance upon *Minn. Senior Fed'n v. United States*, 273 F.3d 805 (8th Cir.2001)is misplaced. Although noting that "modern" right-to-travel cases generally involved State-legislative challenges, the Court's rejected the travel claim not upon this fact, but rather, upon the fact that the pertinent federal program "was not affirmatively *penalizing* her right to travel." Id.(emphasis in original). Because Plaintiffs' rights to travel are certainly being penalized here, as evidenced by the fact that they cannot freely travel without risking their lives or incarceration, *Minn. Senior Fed'n* actually supports Plaintiffs' position.[20]

Finally, Defendants' contention that in-person advocacy is only one of several modes of communication misses what the lower court conceded, there is *no comparable substitute* for in-person advocacy (Opening-Br.51-52;324). Because the mis-classification of Cannabis deprives Plaintiffs from, *inter alia*, lobbying Congress and meeting with elected, it violates their First Amendment Rights (Opening-Br.56-58).

For the foregoing reasons, Defendants' arguments should be rejected and the

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[20]It is also worth noting that no right-to-travel case can be analogous to this case because this case presents an unprecedented state of affairs -- the Federal Government is maintaining broad-sweeping legislation, enacted for the purported purpose of creating a unified legal framework by which to prohibit certain conduct, while simultaneously *encouraging* States, businesses, and individuals to engage in that very conduct, in direct contravention of that very framework.

Lower Court's decision dismissing Plaintiffs' Fundamental Rights claims should be reversed.

POINT VI. PLAINTIFFS PRESERVED THEIR MERITORIOUS COMMERCE CLAUSE CLAIM AND ASKED THAT RAICH I BE OVERRULED

On Appeal, we argued that the CSA, to the extent it prohibits State-legal intrastate Cannabis activity, constitutes an unconstitutional expansion of federal commerce power (Opening-Br.7-9,58-59). Referring to the rulings issued by the lower court, we further demonstrated that, to the extent the Supreme Court decision *Gonzalez v. Raich,* 545 U.S. 1 (2005) ("*Raich I*") compels a different result, it should be overruled or narrowed (Opening-Br.58-59).

In their Brief, Defendants do not address Plaintiffs' argument, and instead contend that: (i) Plaintiffs waived their Commerce Clause claim by incorporating by reference, arguments presented to the lower court; and (ii) *Raich I* Court considered and rejected Plaintiffs' "precise claim." As demonstrated below, Defendants' arguments lack merit.

First, issues of importance are preserved for appeal if they are raised before the trial court and listed in the docketing statement and in a statement of the issues, notwithstanding that such issues may be contained in truncated arguments in the body of a brief. *United Transp. Union v. Dole*, 797 F.2d 823, 828 (10th Cir.1986). Here,

Plaintiffs exceed this standard. Plaintiffs repeatedly emphasized the importance of their commerce claim throughout this Appeal. Plaintiffs initially introduced their commerce claim in their Description of the Case, annexed as Addendum A to their Pre-Argument Statement. Therein, Plaintiffs submitted: "Congress, in enacting the CSA as it pertains to Cannabis, violated the Commerce Clause, extending the breadth of legislative power well beyond the scope contemplated by Article I of the Constitution," reflecting a challenge to the Government's commerce power as violative of the Constitution (*Id.*). Plaintiffs also submitted that the Government's abuse of its commerce power has caused Plaintiffs' damages, particularly Plaintiff-Washington, an African American, who is "prohibited from applying to participate in the Federal Minority Business Enterprise program" in connection with his existing State-legal Cannabis businesses. (*Id.*).

Plaintiffs also submitted two questions related to their commerce claim in their List of Issues Proposed to be Raised on Appeal, annexed as Addendum B to the Pre-Argument Statement.

Correspondingly, in the Opening Brief's Summary of Argument, we reiterated that the regulation of Cannabis, violates the federal commerce power and requested an express overrule of *Raich I* (Br.at 7-8). We thereafter devoted another question presented to the issue, highlighted the matter in its own Point (VI), and referred to the

arguments contained in our opposition to the Government' motion to dismiss (Id.58-59). To suggest that Plaintiffs failed to preserve their Commerce Clause claim is to ignore the record.[21]

Second, the issues raised by Plaintiffs herein, as in *Dole*, address a matter of significant public importance – the unconstitutionality of legislation rooted in racism and political suppression and which has, for generations, resulted in the mass incarceration of persons of color for non-violent drug offenses, while simultaneously threatening to deprive millions of Americans of potentially life-saving medication. Furthermore, the continuing vitality of *Raich I* is in substantial question, in view of the decision in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), in which the Supreme Court limited *Raich I* to the "relatively narrow circumstances in which Congress is attempting to regulate commodities, the intrastate production and consumption of which *necessarily* impact the interstate market."

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[21]Furthermore, even if Plaintiffs' only reference to their Commerce Clause argument were an incorporation by reference statement in the Opening Brief (and it clearly wasn't), the only case cited by the Government, *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir.1998), doesn't *require* a finding that all arguments incorporated by reference are waived, as the Government disingenuously suggests. Indeed, the plaintiff in *Norton* did not actually incorporate arguments by reference at all. Rather, this Court in *Norton* merely noted *in dicta* that it *has*, *in the past*, ruled that arguments incorporated by reference may be inadequately raised for appellate review. In any event, the arguments waived by the appellant in *Norton* were mentioned merely "in passing" in plaintiffs' brief, and the plaintiff "attribute[d] no significance" to them. Id. That is hardly the case here. Here, we presented Plaintiffs' Commerce Clause arguments to this Court six times, in three submissions, presenting the bases upon which the lower court erred, adequately preserving the issues for appeal.

United States v. Lott, 912 F.Supp 2d 146, 154 (D.Vt. 2012) (*citing NFIB*, 567 U.S. at 561-2) (questioning "what remains of *Raich* after *NFIB*") (emphasis added); *see also NFIB*, 567 U.S. at 654 (JJ. Scalia, Kennedy, Thomas, and Alito, dissenting).

Given the New Facts and the Government's clear acquiescence to the development of 30 State-legal programs (which existence on an entirely intra-state level), *Raich I* requires reconsideration.

Lastly, on the merits, it is important to emphasize that the Court in *Raich I* mistakenly aggregated non-economic activity in determining whether such activity substantially affects commerce, and wrongly inserted "rationality" into the standard by which the Plaintiff's activities, taken in the aggregate, substantially affect commerce. The Court's reliance in *Raich I* upon the decision in *Wickard v. Filburn*, 317 U.S. 111 (1942) was misplaced. Such errors alone, warrant that *Raich I* be overturned. And as confirmed in Point II *supra*, this Court is not necessarily bound by *Raich I*, given the disclosure of New Facts which require a different outcome.

CONCLUSION

For the foregoing reasons, the Decision below should be reversed.

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