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September 10, 2019

### *Via ECF*

Catherine O'Hagan Wolfe, Clerk of Court  
United States Court of Appeals  
for the Second Circuit  
Thurgood Marshall U.S. Courthouse  
40 Foley Square  
New York, New York 10007

Re: *Washington, et al. v. Barr, et al.*, Docket No. 18-859-cv (2d. Cir.)

Dear Madam Clerk:

We represent plaintiffs Marvin Washington, Dean Bortell (as parent of infant Alexis Bortell), Jose Belen, Sebastien Cotte (as parent of infant Jagger Cotte), and the Cannabis Cultural Association (collectively, "Plaintiffs") in the above-referenced action (the "Action") against defendants William Barr (in his capacity as U.S. Attorney General), the U.S. Department of Justice, Uttam Dhillon (in his capacity as Acting Administrator of the U.S. Drug Enforcement Administration), the U.S. Drug Enforcement Administration ("DEA"), and the United States of America (collectively, "Defendants"). We submit this letter in response to the Court's request for an update with respect to the status of a certain petition which this Court authorized Plaintiffs to file, by December 31, 2019, with the DEA ("DEA Petition"), relative to the mis-classification of cannabis under the Controlled Substances Act ("CSA").

As discussed below, Plaintiffs have not yet filed the DEA Petition because, in the course of its preparation, we learned that the DEA, through which the Attorney General typically decides whether to re-schedule and de-schedule substances under the CSA, has already taken the position that cannabis cannot be *de-scheduled*; rather, according to the DEA, the Attorney General can only *re-schedule* cannabis and only under *Schedule II* of the CSA. Such an outcome would: (i) be inconsistent with prevailing medical evidence; and, more importantly (ii) comprise relief -- re-classification under Schedule II -- that Plaintiffs have never requested and do not seek. Accordingly, it is Plaintiffs' intention to file a motion for an extension of time within which to file the DEA Petition to December 31, 2020, and to commence a new action against the DEA and Attorney General for declaratory relief, confirming that the DEA is mistaken with respect to the Attorney General's powers under the CSA. As reflected below, this would allow Plaintiffs to obtain the relief that, according to the Court, would be equivalent to what Plaintiffs' requested in the Action. As further reflected below, re-classification of cannabis under Schedule II would actually constitute a substantial step backward in the fight to legalize and de-stigmatize medical cannabis.



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### **Background**

By the Action, Plaintiffs requested, *inter alia*: (i) a declaratory judgment that the classification of cannabis as a Schedule I drug under the CSA is unconstitutional; and (ii) “a permanent injunction (and associated temporary relief if so required), restraining Defendants from enforcing the CSA as it pertains to Cannabis” (Amended Complaint, Second Circuit Dkt. No. 39, pp. 96-97). Plaintiffs never requested that cannabis be re-classified under the CSA, much less as a Schedule II substance. *See* Memorandum of Law, dated December 1, 2017, SDNY Dkt. Nos. 44-46, p. 106 (“Plaintiffs bring this action challenging the constitutionality of the CSA; they are not asking for the Court to reschedule Cannabis or to compel the DEA to do so”) (emphasis added). Had the constitutional claims recited in the Amended Complaint been accepted and sustained by the District Court and/or this Court, and the injunction granted, cannabis would have been de-scheduled on a *de facto* basis, particularly insofar as unconstitutional acts of Congress are void *ab initio*, and Plaintiffs requested a permanent injunction to restrain enforcement of the CSA as it pertains to cannabis.<sup>1</sup>

Before the District Court and on appeal, we argued that a DEA Petition would be futile because, *inter alia*, “administrative review would not afford Plaintiffs the relief that they seek – a declaratory judgment and injunction, restraining the Federal Government from enforcing the CSA as it pertains to Cannabis” (App. Br. at 5, Second Circuit Dkt. No. 37). We interposed the same argument before the District Court. This Court, nonetheless, ruled that Plaintiffs are required to seek a re-scheduling or de-scheduling of cannabis by filing the DEA Petition. In this regard, the Court explained its rationale as follows:

the gravamen of [Plaintiffs’] argument is that marijuana should not be classified as a Schedule I substance under the CSA. Were a court to agree, the remedy would be to re-schedule or deschedule cannabis. It cannot be seriously argued that this remedy is not available through the administrative process.

*See* Decision, dated May 30, 2019 at 18-19 (“Decision”) (Second Circuit Dkt. No. 101) (emphasis added).

As discussed below, a review of a prior DEA decision denying a petition to re-schedule or de-schedule cannabis confirms that the specific remedies sought by Plaintiffs – the de-scheduling of cannabis and an injunction against enforcement of the CSA as it pertains to that substance – is,

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<sup>1</sup>*Bond v. U.S.*, 564 U.S. 211 (2011); *see also Medical Center Pharmacy v. Mukasey*, 536 F.3d 383 (5th Cir. 2008) (“If that act of amendment is invalid—for instance, because its unconstitutional portions cannot be severed—the act is void *ab initio*, and it is as though Congress had not acted at all”); *U.S. v. Morgan*, 230 F.3d 1067 (8th Cir. 2000) (“Congress exceeded its proper authority in enacting [the law]; the law is [thus] unconstitutional, void *ab initio*”); *Mester Mfg. Co. v. I.N.S.*, 879 F.2d 561 (9th Cir. 1989) (“A law passed in violation of the Constitution is null and void *ab initio*”).



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in fact, not available based upon the DEA's current position on the issue.

### ***Discussion***

In 2016, the DEA denied a petition to initiate rulemaking proceedings to re-schedule cannabis ("Previous DEA Determination"). See 21 CFR Chapter II and Part 1301, Fed. Register, Vol. 156, 53688, Aug. 12, 2016.<sup>2</sup> In the Previous DEA Determination, in a section entitled "Preliminary Note Regarding Treaty Obligations," the DEA advanced the position that, due to United States' obligations under international drug control treaties, cannabis cannot be de-scheduled under the CSA. *Id.* at 53688. According to the DEA, under the Single Convention on Narcotic Drugs, 1961 ("Single Convention"), of which the United States is a party, the United States is "obligated to maintain various control provisions related to the drugs that are covered by the treaty," which includes cannabis. In this regard, the DEA wrote that:

the DEA Administrator is obligated under [the CSA] to control marijuana in the schedule that he deems most appropriate to carry out the U.S. obligations under the Single Convention. It has been established in prior marijuana rescheduling proceedings that placement of marijuana in either schedule I or schedule II of the CSA is "necessary as well as sufficient to satisfy our international obligations" under the Single Convention. *NORML v. DEA*, 559 F.2d 735, 751 (D.C. Cir. 1977). As the United States Court of Appeals for the DC Circuit has stated, "several requirements imposed by the Single Convention would not be met if cannabis and cannabis resin were placed in CSA schedule III, IV, or V." *Id.* Therefore, in accordance with [the CSA], DEA must place marijuana in either schedule I or schedule II.

*Id.* at 53688-89.

Based upon the Previous DEA Determination, the DEA, at least currently, would not entertain a petition to de-schedule cannabis, but rather would consider only whether to re-classify cannabis under Schedule II. And, if cannabis were re-classified to Schedule II, Plaintiffs would be saddled with an outcome that, not only would be inconsistent with their prayer for relief, but worse, would exacerbate their situations. Currently, although illegal under *federal* Law, medical cannabis is available to Plaintiffs and other patients across the United States (in varying degrees) pursuant to 34 state-legal programs. While such programs contain deficiencies and limit cannabis patients in terms of their ability to exercise their constitutional rights, *inter alia*, to travel, free speech and federal benefits and entitlements, such patients can nonetheless, in most instances, travel to an *in-state* dispensary and purchase their medications. And, because the Federal Government has attached funding riders to appropriations legislation annually since 2014, the DEA and Justice Department are prohibited from using federal monies to enforce the CSA as it pertains to cannabis in those states

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<sup>2</sup>The Previous DEA Determination states that "marijuana" refers to "cannabis."



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that have implemented medical-cannabis programs. *See* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, §538, 128 Stat. 2130, 2217 (2014); Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, §542, 129 Stat. 2242, 2332-33 (2015); Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, §537 (2017); Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, §538, 132 Stat. 445 (2018). Thus, while far from perfect -- indeed, cannabis patients are required to forfeit their constitutional rights in order to obtain the medication to sustain their health and lives -- the current state of the law permits Plaintiffs some level of access to medical cannabis in state-legal jurisdictions. If, however, cannabis were to be re-classified under *Schedule II*, overly-burdensome regulation would resume under federal law, creating substantial increases in the cost of cultivating, extracting, packaging and distributing cannabis, and resulting in built-in increases in cost.<sup>3</sup> Pharmaceutical companies would be able to exploit their vast and superior resources to navigate the regulatory process, monopolizing the cannabis market, and allowing them to charge exorbitant prices for medication that is currently otherwise available to patients at a fraction of the cost. Indeed, the Court need look no further than the pricing for Epidiolex – a cannabis medication approved by the FDA for the treatment of epilepsy in children and classified as a Schedule V drug under the CSA.<sup>4</sup> Currently, pharmaceutical companies charge in excess of \$32,000 per annum for regular administrations of Epidiolex.<sup>5</sup> By contrast, the cannabis medication upon which Plaintiff Alexis Bortell relies daily to treat her epilepsy and otherwise maintain her health and life is less than \$5,800 per year -- *84% less than the cost of Epidiolex*. Re-classifying cannabis under another CSA Schedule would constitute merely an invitation to big pharmaceutical companies to fleece a new population of patients, many of whom are currently able to obtain their medical cannabis at a fraction of the cost. Thus, Plaintiffs, not only never requested that the Court re-classify cannabis under Schedule II, but further, would resist any such effort in its entirety. Plaintiffs were seeking a ruling under the constitution that would effectively *de*-schedule cannabis.<sup>6</sup>

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<sup>3</sup>*Rescheduling Marijuana in the U.S. Could Backfire*, S. Williams, *Motley Fool.com*, 5/27/2018. <https://www.fool.com/investing/2018/05/27/rescheduling-marijuana-in-the-us-could-backfire.aspx>

<sup>4</sup>21 C.F.R. §1308.15(f). *See also* The United States Department of Justice, FDA-Approved Drug Epidiolex Placed in Schedule V of Controlled Substances Act, Office of Public Affairs (Sept. 27, 2018), <https://www.justice.gov/opa/pr/fda-approved-drug-epidiolex-placed-schedule-v-controlled-substances-act> (“Epidiolex, the newly approved medication by the Food & Drug Administration (FDA), is being placed in schedule V of the Controlled Substances Act”).

<sup>5</sup>Peter Loftus, *New Marijuana-Based Epilepsy Treatment to Cost \$32,500 a Year*, THE WALL STREET JOURNAL (Aug. 8, 2018), <https://www.wsj.com/articles/new-marijuana-based-epilepsy-treatment-to-cost-32-500-a-year-1533761758> (“GW Pharmaceuticals PLC said it plans to charge about \$32,500 per patient annually in the U.S. for its new treatment for rare forms of epilepsy, the first prescription drug derived from the marijuana plant”).

<sup>6</sup>The recent concerns over lung damage caused by “vaping” appear to pertain to black-market products that exist outside any regulatory environment -- a problem which would be cataclysmically *worsened* were cannabis to be rendered unaffordable to those who treat with state-legal cannabis daily in

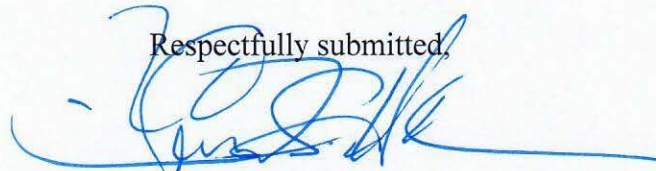


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The Decision herein completely controverts the Previous DEA Determination. In particular, this Court interpreted the DC Circuit's decision in *NORML v. DEA* (upon which the DEA previously relied) as holding that "foreign treaty commitments have not divested the Attorney General of the power to re- or de-schedule marijuana" (Decision at 21) (*citing NORML v. DEA*, 559 F.2d 735). Because the Previous DEA Determination and DEA's interpretation of the ruling in *NORML v. DEA* are inconsistent with this Court's Decision herein, Plaintiffs should be entitled to declaratory relief -- specifically, a ruling that the DEA and Attorney General do, in fact, have the power to de-schedule cannabis. To obtain such a result, however, we need to interpose another *pro bono* action on behalf of Plaintiffs. And because the declaratory judgment action would likely require at least six to nine months to complete, Plaintiffs need an extension of time within which to file their DEA Petition.

Plaintiffs intend to file the motion to extend their time to file the DEA Petition within thirty (30) days. Alternatively, the Court could endorse this correspondence to grant the extension without the necessity of a motion.

Respectfully submitted,



Michael S. Hiller

MSH:me

c: Benjamin H. Torrance, Esq.  
Samuel Dolinger, Esq.  
Joseph Bondy, Esq.