UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 18 Civ. 859 Caption [use short title]

Motion for: An order granting an extension of time within which to file a Petiton with the DEA

Set forth below precise, complete statement of relief sought:

Plaintiffs seek an 18-month extension of time within which to file a petition with the Drug Enforcement Administration (DEA) to de-schedule cannabis under the Controlled Substances Act. Plaintiffs maintain that such relief is necessary in order to afford them the opportunity to secure the relief that this Court ruled should be available to them before the DEA.

Washington et al. v. Barr et al.

MOVING PARTY: Plaintiffs OPPOSING PARTY: Defendants

☑ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: OPPOSING ATTORNEY: Joon. H. Kim

[name of attorney, with firm, address, phone number and e-mail]

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Court- Judge/ Agency appealed from: United States District Judge Alvin K. Hellerstein, Southern District of New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1): ☑ Yes ☐ No (explain):

Opposing counsel's position on motion: ☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response: ☑ Yes ☐ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☑ No

Has this relief been previously sought in this court? ☐ Yes ☑ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☑ Yes ☐ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☑ Yes ☐ No If yes, enter date: This case was argued and ultimately decided (5/30/2019)

Signature of Moving Attorney:

/S Michael S. Hiller (MH987 **Date:** 11/27/2019 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

Michael S. Hiller (MH 9871)
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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.,	:	**NOTICE OF MOTION**
Plaintiffs,	:	
- against -	:	18 Civ. 859
WILLIAM BARR, in his official capacity as United States Attorney General; UNITED STATES DEPARTMENT OF JUSTICE; UTTAM DHILLON, in his official capacity as the Acting Administrator of the Drug Enforcement Administration; UNITED STATES DRUG ENFORCEMENT ADMINISTRATION; and the UNITED STATES OF AMERICA,	:	
Defendants.	:	

PLEASE TAKE NOTICE that, upon the annexed Declaration of Michael S. Hiller, dated November 26, 2019, the exhibits annexed thereto, and upon all prior pleadings and proceedings in this action, plaintiffs, through undersigned counsel, will move this Court at the Courthouse located at 40 Foley Square, New York, New York, 10007, on the 12th day of December, for an order granting an extension of time within which to file a petition with the DEA pending the outcome of

the litigation against the DEA for declaratory relief, together with such other relief that this Court deems just and proper.

Dated: New York, New York
November 27, 2019

HILLER, PC
*Attorneys for Plaintiff*s
641 Lexington Avenue
New York, New York 10022
(212) 319-4000

By: /s *Michael S. Hiller*
Michael S. Hiller (MH 9871)

To: To: JOON H. KIM
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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.,	:	**DECLARATION OF MICHAEL S. HILLER**
Plaintiffs,	:	
- against -	:	18 Civ. 859
WILLIAM BARR, in his official capacity as United States Attorney General; UNITED STATES DEPARTMENT OF JUSTICE; UTTAM DHILLON, in his official capacity as the Acting Administrator of the Drug Enforcement Administration; UNITED STATES DRUG ENFORCEMENT ADMINISTRATION; and the UNITED STATES OF AMERICA,	:	
Defendants.	:	

MICHAEL S. HILLER, an attorney admitted to the practice of law before the Courts of the State of New York, as well as the United States District Court for the Southern District of New York, declares as follows under penalty of perjury pursuant to 28 U.S.C. §1746:

1. I am the managing principal of Hiller, PC, *pro bono* counsel for Marvin Washington ("Marvin"), Dean Bortell, as Parent of Infant Alexis Bortell ("Alexis"), Officer Jose Belen ("Officer Belen"), Sebastien Cotte, as Parent of Infant Jagger Cotte ("Jagger"), and the Cannabis Cultural

Association, Inc. ("CCA"), plaintiffs in the above-captioned action (collectively, "Plaintiffs"). I submit this Declaration in Support of Plaintiffs' Motion to Extend the Time within which to Petition the Defendant Drug Enforcement Administration ("DEA") to De-Schedule cannabis.

PRELIMINARY STATEMENT

2. By this action, Plaintiffs seek, *inter alia*, a declaration that the classification of cannabis under the Controlled Substances Act ("CSA") violates the United States Constitution (Amended Complaint, Ex. 1). After the District Court dismissed the Complaint herein (February 26, 2018 Decision, Ex. 2), this Court issued a ruling on May 30, 2019 that Plaintiffs would be afforded the opportunity, by December 31, 2019 (the "Deadline"), to petition the DEA to de-schedule cannabis ("May 30th Decision") (Ex. 3). As reflected in the May 30th Decision, this Court was under the impression that, if the evidence were to demonstrate that cannabis does not meet the criteria necessary to classify it as a Schedule I substance, the DEA would de-schedule cannabis (Ex. 3, May 30th Decision at 12, 18-19, 21). In fact, however, the DEA's clearly-stated position is that, based upon the Single Convention Treaty of 1961, cannabis could never be de-scheduled; rather, it could only be re-classified and only to Schedule II, which, for the reasons set forth below, would be harmful to Plaintiffs' interests. After sending correspondence to this Court on the issue and upon receiving the government's response, we investigated whether the petitioning process somehow could be successful irrespective of the DEA's stated position; however, we determined that the risks of a possible re-classification to Schedule II were too great. Accordingly, we have filed this motion.

3. To resolve the issue, Plaintiffs respectfully request an 18-month extension of time within which to file a petition with the DEA, to allow undersigned counsel to bring a second *pro bono* lawsuit -- this time, seeking a declaration that the DEA has the power to de-schedule cannabis entirely.

STATEMENT OF FACTS

4. Three of the Plaintiffs herein are patients suffering from life-threatening disorders and illnesses and whose lives have been saved by treatment with medical cannabis (A382).[1] Alexis (age 14) suffered from multiple, life-threatening seizures per day for approximately 14 months (A30, 373), when her parents were offered a choice by her doctors – experimental surgery which would have resulted in the removal of a significant portion of her brain, or treatment with cannabis (A286). Her parents chose the latter, and, as a result, Alexis has not had a seizure in more than four years (A287).

5. Jagger was diagnosed with Leigh's Disease before the age of two (A36). When diagnosed before age two, 94% of Leigh's Disease patients die before age four (*Id.*). One week before his fourth birthday, Jagger's condition had deteriorated to the point that his parents moved him into a hospice (A373). To alleviate his excruciating pain, he was treated with cannabis (A37). Today, Jagger is eight years old and living at home with his parents (A373).

6. Officer Belen is an Iraq War Veteran who suffers from post-traumatic stress disorder (A34). His symptoms were so bad that he was regularly placed on suicide watch – a genuine threat, insofar as 22 U.S. veterans commit suicide every day (A35). Since he began treating with cannabis, Officer Belen has not suffered any suicidal ideations.[2]

7. Marvin, a Super Bowl-winning former professional football player, is a businessman

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[1] All references to "A_" refer to pages from the Appendix on Appeal.

[2] As the District Court acknowledged to undersigned counsel prior to dismissal:

> 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? (A382).

interested in the cannabis industry; however, he is not eligible to participate in the Federal Minority Business Enterprise Program because his business would be illegal under the CSA (A29).

8. CCA is a non-profit organization, advocating on behalf of persons of color negatively affected by the CSA (A38). Members of the CCA have been convicted of cannabis-related "crimes" and otherwise subjected to persecution under the CSA, which is racially-motivated and discriminatory (A39). Members of the CCA seek to emerge from the stigma of having been convicted under the CSA, but cannot do so absent a declaration that the classification of cannabis thereunder is unconstitutional (A38-39).

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

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

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

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

11. In 1969, then-President Richard Nixon urged Congress to enact new legislation that would classify drugs under separate schedules according to their medical utility, dangerousness, and addictive potential (A62). Former Attorney General John Mitchell of the Nixon Administration actually *drafted* the CSA. Congress then adopted the CSA at Nixon's insistence on October 27, 1970 -- approximately one month after it was introduced (A62). At the insistence of the Nixon Administration, Congress placed cannabis under Schedule I of the CSA (A62-63).

12. While "[t]here is almost total agreement among competent scientists and physicians that marihuana is not a narcotic drug like heroin or morphine ... [and to] equate its risks ... with the risks inherent in the use of hard narcotics is neither medically or legally defensible[,]"[3] Congress nonetheless listed cannabis under the same schedule as the world's most dangerous narcotics (including heroin and morphine) (A63). The classification of cannabis under Schedule I was intended by Congress to be temporary and subject to further research (A63). This "further research" was assigned to the National Commission on Marihuana and Drug Abuse – a commission established by the CSA for the purpose of studying, *inter alia*, cannabis's pharmacological makeup and its relationship (if any) to the use of other drugs (A63-64).

13. President Nixon thereafter appointed Raymond Shafer to Chair this new commission ("Shafer Commission") (A64). The Shafer Commission, after exhaustive research, concluded that cannabis was not harmful and should be de-scheduled (*i.e.*, removed from the CSA) ("Shafer Commission Findings") (A64-66). The Shafer Commission Findings also recommended that

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

possession of cannabis for personal use be de-criminalized on both the State and Federal levels (A66).

14. Unfortunately, the Nixon Administration rejected the Shafer Commission Findings (A68-69). John Ehrlichman, who served as the Nixon Administration's Domestic Policy Chief and was among the President's closest political advisors, explained why:

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

A66-67; A149-54.

15. Roger Stone, another key member of the Nixon Administration, corroborated Mr. Ehrlichman's account of the bigotry and efforts at political suppression underlying the CSA's enactment, and submitted an affidavit herein so attesting (A400-01).[4] The accounts of Messrs. Stone and Ehrlichman are further corroborated by a diary entry of H.R. Haldeman, another senior member of the Nixon Administration, who wrote:

> [Nixon] emphasized that you have to face the fact that the whole problem is really the blacks. The key is to devise a system that recognizes this while not appearing to [do so].[5]

16. The racial and political animus underlying Nixon's demand for the enactment of the

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[4]Mr. Stone's recent conviction for acts of dishonesty should not affect his credibility with respect to this issue given that his testimony has been corroborated by two independent sources from the Nixon Administration.

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

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

17. The Nixon Administration's efforts to marginalize and oppress racial and political minorities were alarmingly successful (A70). "[B]y 1973, about 300,000 people were arrested under the law [the CSA] – the majority of whom were African American" (A149-54).

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

18. After the Shafer Commission Findings were issued, the Federal Government, beginning in or about 1978 and continuing to this day, has cultivated and distributed medical cannabis to patients throughout the United States pursuant to the Investigational New Drug Program ("IND Program") (A71-72). The FDA excludes drugs from the IND Program when: (1) the FDA believes that the drugs are ineffective; or (2) granting the request for inclusion in the IND Program would expose patients "to an unreasonable and significant additional risk of illness or injury" (21 C.F.R. §312.34(b)(3)). The FDA has never excluded cannabis from the IND Program. And the Federal Government knows that none of the patients who have participated in the IND Program have ever suffered any serious side effects from cannabis (A72-73).

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

19. In the context of a previous administrative review under the CSA, Federal Administrative Law Judge Francis Young, *In the Matter of Marijuana Rescheduling*, DEA Docket

No. 86-22, issued a determination in 1988 in which he concluded, based upon "overwhelming" evidence, that:

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

(A191; A75). Judge Young reached precisely the same conclusion with respect to "spasticity resulting from multiple sclerosis and other causes"(A211;A75). Thus, Judge Young determined that cannabis cannot meet the second of the three requirements for designation under Schedule I -- *i.e.*, that it does not have any accepted medical use.

20. Judge Young, turning to the third of the three requirements for designation under Schedule I, ruled that cannabis is completely safe, concluding in pertinent part:

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

A215-16; A77.

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

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

22. Since 1996, 33 States, plus Puerto Rico, Guam, the U.S. Virgin Islands and Washington, DC (with congressional approval), have legalized cannabis for medical and other uses

(A78-79 and n.2). As of 2016, 62% of Americans lived in a jurisdiction in which cannabis is legal for medical and/or other purposes (A79). Cannabis has also been available *illegally* (*i.e.*, on the "black market") to millions of Americans for the past 100 years (A79).

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

23. In or about 1999, the Federal Government filed with the World Intellectual Property Organization ("WIPO"), a patent application ("WIPO Medical Cannabis Patent") entitled: "CANNABINOIDS AS ANTI-OXIDANTS AND NEUROPROTECTANTS."[6] In its WIPO Medical Cannabis Patent, the Federal Government asserted that cannabis provides medical benefits to patients suffering with an assortment of diseases and conditions, including, *inter alia*, "ischemic, age-related, inflammatory and autoimmune diseases," and "in the treatment of neurodegenerative diseases, such as Alzheimer's Disease, Parkinson's Disease, and HIV Dementia" (*Id*. at Abstract). The Federal Government also specifically asserted in its WIPO Application that cannabis is:

> A method of treating diseases caused by oxidative stress, comprising administering a therapeutically effective amount of a cannabinoid to a subject who has a disease caused by oxidative stress (*Id*. at Claim 1).

24. The Federal Government made identical claims and representations in a separate U.S. Medical Cannabis Patent Application (A227-36; A80-81), citing a series of studies and academic papers supporting its conclusion that cannabis safely provides medical benefits (*Id*.). And a U.S. patent cannot issue in the absence of a representation of utility (35 U.S.C. §101). Thus, the Federal Government maintains in its U.S. and WIPO Medical Cannabis Patents that cannabis *safely provides*

[6]https://patentscope.wipo.int/search/en/detail.jsf?docId=WO1999053917&redirectedID=true (last visited Nov. 27, 2019).

medical benefits to patients while it simultaneously criminalizes cannabis under the CSA based upon the supposed "finding" that *it has no medical application whatsoever and is too dangerous to test* (A81).

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

25. Amidst the trend of State laws legalizing cannabis across the U.S., the Federal Government was confronted with an irreconcilable conflict between State and Federal laws (A81;82). To address this dichotomy, defendant Department of Justice ("DOJ") issued memoranda on October 19, 2009 and August 29, 2013 ("Ogden Memorandum" and "Cole Memorandum," respectively) directing United States Attorneys to de-prioritize prosecution of cannabis-related CSA crimes under circumstances in which possession and medical use is legal under State law (A237-45; *see also* A82-84).[7]

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

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

[7]Ostensibly in response to arguments made in the action, then-Attorney General Jefferson Sessions purported to rescind the Cole Memorandum in 2018; however the de-prioritization of cannabis prosecutions has continued.

27. Continuing the informal policy of rejecting enforcement of the CSA against State-compliant actors, the U.S. Surgeon General (the nation's Chief Medical Officer), on February 4, 2015, appeared on national television and acknowledged the medical efficacy of cannabis to patients (A86). Correspondingly, in 2017, the DEA, in response to a lawsuit claiming that the DEA website contained dishonest representations regarding cannabis in violation of the Information Quality Act (A254-57), suddenly removed the bogus allegations from its website that cannabis is a drug that: (i) serves as a "gateway" to other drugs; (ii) causes "permanent brain damage;" and (iii) leads to psychosis (A86-87).

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

PROCEDURAL HISTORY

29. On the basis of the foregoing, Plaintiffs commenced this action on July 24, 2017, and requested an injunction against enforcement of the CSA as it pertains to cannabis (SDNY Dkt. 1). Plaintiffs never requested that cannabis be re-classified under the CSA, much less to Schedule II. *See* Memorandum of Law, dated December 1, 2017, 17-Civ.-5625, 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.[8]

30. On September 8, 2017, plaintiff Alexis requested a temporary restraining order ("TRO") and preliminary injunction, enjoining enforcement of the CSA so that she could legally meet with members of Congress who had requested her appearance on Capitol Hill to address pending cannabis legislation, including, *inter alia*, the Marijuana Justice Act (A32). Although acknowledging that Plaintiffs had "amply" presented all of the "necessary evidence to attack" the CSA, the lower court denied the TRO (A336). Nonetheless, the lower court reserved decision on whether to grant a preliminary injunction, consolidated the hearing thereon with the trial herein, and announced that, in view of the compelling evidence presented by Plaintiffs, this case would be expedited and given "priority over all other matters ... even over criminal cases" (A341).

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

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

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[8] *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*").

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

32. Plaintiffs appealed the dismissal. In the May 30th Decision, this Court reinstated the Complaint, and ruled that this litigation be held in abeyance pending the filing of a petition with the DEA to de-schedule cannabis. In its May 30th Decision, this Court plainly presupposed that the DEA has the power to de-schedule cannabis or, at a minimum, re-classify to a level that would afford Plaintiffs the relief they seek in this action, thus mooting it (Ex. 3, May 30th Decision at 15). This Court proceeded to explain 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*.

(Ex. 3, May 30th Decision at 18-19).

THE DEA'S POSITION IS THAT CANNABIS CANNOT BE DE-SCHEDULED, BUT AT MOST, MERELY RE-CLASSIFIED AS A SCHEDULE II SUBSTANCE UNDER THE CSA

33. 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.[9] 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

[9]The Previous DEA Determination states that "marijuana" refers to "cannabis."

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. *Id.* at 53767. 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 (emphasis added).

34. 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 the 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 that have implemented medical-cannabis programs.[10] Thus, while far from perfect -- indeed, cannabis patients are required to forfeit their constitutional rights in order to obtain the medication necessary 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.

35. 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.[11] 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 cannabis 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.[12] Currently, pharmaceutical companies charge in excess of $32,000 per annum for regular administrations of Epidiolex.[13] By contrast, the cannabis medication available through state-

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[10] *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).

[11] *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.

[12] 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").

[13] Peter Loftus, *New Marijuana-Based Epilepsy Treatment to Cost $32,500 a Year*, THE WALL STREET JOURNAL (Aug. 8, 2018),

legal programs and upon which plaintiff Alexis 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*. Alexis and other cannabis patients will be able to obtain access to this treatment modality without regulatory interference as long as cannabis is not re-scheduled under the CSA, which would otherwise trigger FDA review. Re-classifying cannabis under another CSA Schedule would act as a barrier to access, and 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 and are seeking a ruling under the Constitution that would effectively *de*-schedule cannabis.[14]

36. The May 30th Decision 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" (Ex. 3, May 30th Decision at 21) (*citing NORML v. DEA*, 559 F.2d 735) (D.C.Cir. 1977). Because the Previous DEA Determination and the DEA's interpretation of the ruling in *NORML v. DEA* are inconsistent with this Court's May 31th

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https://www.wsj.com/articles/new-marijuana-based-epilepsy-treatment-to-cost-32-500-a-year-153376175 8 ("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").

[14]The recent concerns in news reports 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 *regulated* state-legal markets. If cannabis were to be re-classified under Schedule II, patients would be resigned to obtaining their medication from the unregulated black market, which would expose them to dangers that they are currently able to avoid.

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. If we were, however, to file a petition and merely rely upon this Court's May 30th Decision, the DEA would likely persist in its interpretation of the D.C. Circuit's contrary opinion, resulting in re-classification of cannabis under Schedule II, which, for the reasons set forth above, would be a disaster.

DISCUSSION

37. This Court issued a determination based upon the presupposition that filing a petition with the DEA to de-schedule or re-schedule could result in a decision that would benefit Plaintiffs and grant them the relief they seek in this action. However, the DEA's clearly-stated position is that cannabis cannot be de-scheduled or even re-classified below Schedule II under the CSA. At most, the DEA may re-schedule to Schedule II, which, as set forth above, would result in substantial prejudice to Plaintiffs and millions of other cannabis patients across the country. Thus, there is no doubt that, were Plaintiffs to file the petition contemplated by this Court with the DEA, the Plaintiffs, not only would not benefit from the outcome, they would likely be substantially prejudiced by it. Accordingly, Plaintiffs seek to commence an action against the DEA, seeking a declaration from the DEA that cannabis *can* be de-scheduled.

38. A copy of the Proposed Draft Complaint against the DEA is annexed hereto as Exhibit 4. Upon the Court's grant of this motion, undersigned counsel along with co-counsel, all acting *pro bono*, would file the Proposed Draft Complaint and prosecute it aggressively until its

conclusion.

LOCAL RULE 27.1 NOTICE

39. Pursuant to Local Rule 27.1, by email dated November 27, 2019, we notified opposing counsel that Plaintiffs would be filing the instant motion to ascertain opposing counsel's position on the relief requested by the motion and whether opposing counsel intends to file a response to the motion (Notification Email attached as Ex. 5). Opposing counsel notified us that Defendants oppose the relief sought by the motion and intend to file a response thereto.

WHEREFORE, for the reasons stated herein, Plaintiffs respectfully request an order, extending their time within which to file a petition with the DEA pending the outcome of the litigation against the DEA for declaratory relief, together with such other relief that this Court deems just and proper.

Dated: New York, New York
November 27, 2019

/s *Michael S. Hiller* (MH9871)
Michael S. Hiller

Exhibit 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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,	:	**AMENDED COMPLAINT**
- 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 Administration; UNITED STATES DRUG ENFORCEMENT ADMINISTRATION; and the UNITED STATES OF AMERICA,	:	
Defendants.	:	

PLAINTIFFS MARVIN WASHINGTON, DEAN BORTELL, as Parent/Guardian for Infant **ALEXIS BORTELL, JOSE BELEN, SEBASTIEN COTTE,** as Parent/Guardian for Infant **JAGGER COTTE**, and the **CANNABIS CULTURAL ASSOCIATION, INC.** (collectively, "Plaintiffs"), as and for their Amended Complaint against defendants ("Defendants"), allege as follows:

PRELIMINARY STATEMENT

1. This action is brought on behalf of two young children, their fathers, an American military veteran, a retired professional football player and a non-profit membership organization,

all of whom have suffered harm, and who are continuously threatened with additional harm, by reason of the provisions of the Controlled Substances Act ("CSA"). 21 U.S.C. §801, *et. seq.* The CSA has wrongfully and unconstitutionally criminalized the cultivation, distribution, sale, and possession of Cannabis (comprised of Cannabis *Sativa*, Cannabis *Indica*, and Cannabis *Ruderalis*), which, historically, has been harvested to produce, among other things, medicine, industrial hemp, and a substance known as tetrahydrocannabinol ("THC").[1]

2. Although not styled as a class action, this lawsuit stands to benefit tens of millions of Americans who require, but are unable to safely obtain (and in far too many instances, unable to obtain at all, safely or not), Cannabis for the treatment of their illnesses, diseases and medical conditions, the successful treatment of which is dependent upon its curative properties.[2] In addition, this lawsuit, if successful, would aid in the restoration of communities hardest hit and most egregiously stigmatized by the Federal Government's misguided, Crusades-like "War on Drugs."

3. As shown below, despite the relatively recent and inappropriate stigmatization of Cannabis in the United States as a supposed "gateway drug" used primarily used by "hippies" and minorities, there is a long and rich history, dating back thousands of years, of people from virtually every part of the world using Cannabis for medical, industrial, spiritual, and recreational purposes.[3]

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[1]Robert Deitch, HEMP - AMERICAN HISTORY REVISITED: THE PLANT WITH A DIVIDED HISTORY 3 (2003); Editors of the Encyclopedia Britannica, *Cannabis*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/plant/cannabis-plant.

[2]Cannabis, as used in this Complaint, refers to whole-plant Cannabis, with its full spectrum of cannabinoids, including THC, which is separately mis-classified as a Schedule I drug. 21 C.F.R 1308(d)(31).

[3]Deitch, *supra* note 1 at 1; *History of Marijuana as Medicine - 2900 BC to Present*, PROCON.ORG, http://medicalmarijuana.procon.org/view.timeline.php?timelineID=000026 (last updated Jan. 30, 2017) [hereinafter referred to as "PROCON.ORG"]; Lecia Bushak, *A Brief History Of Medical Cannabis: From Ancient Anesthesia To The Modern Dispensary,* MEDICAL DAILY (Jan. 21, 2016),

Indeed, those who have cultivated, encouraged the cultivation of, and/or used Cannabis include, *inter alia*, George Washington, Thomas Jefferson, John Adams, James Madison, James Monroe, John F. Kennedy, Jimmy Carter, Bill Clinton, and Barack Obama – an assortment of the most intelligent and accomplished statesmen in American history.

4. As further shown below, the criminalization of Cannabis – a drug that has never killed anyone – arose out of the enactment of legislation underwritten by illegal racial and ethnic animus, and implemented and enforced at the federal level by those who choose to disregard its scientific properties and benefits, and/or have been motivated by hatred and outright bigotry.[4]

5. The consequences of the Federal Government's misguided War on Drugs have been disastrous. Persons of color are four times as likely as white Americans to be investigated, charged, prosecuted and incarcerated for possession and/or use of Cannabis, even though it is used in approximately equal proportions among the races. In addition, those who are administered medical Cannabis for the treatment of illnesses, disease and other health-related conditions, have been required to forfeit their First, Fifth, Ninth and Fourteenth Amendment Rights, plus their fundamental right to travel.

OVERVIEW OF THE CLAIMS

6. Plaintiffs seek a declaration that the CSA, as it pertains to the classification of

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http://www.medicaldaily.com/brief-history-medical-cannabis-ancient-anesthesia-modern-dispensary-370344 [hereinafter referred to as "MEDICAL DAILY"].

[4]Notably, although a powerful and vocal minority of public officials have continued their irrational opposition to rescheduling or de-scheduling of Cannabis, the overwhelming majority of Americans desire a change. According to an April 20, 2017 Quinnipiac Poll, nearly 94% of Americans support legalization of medical marijuana. And 60% of Americans support full legalization and de-criminalization of Cannabis for all purposes (Exh. 1).

Cannabis as a Schedule I drug, is unconstitutional, because it violates the Due Process Clause of the Fifth Amendment, an assortment of protections guaranteed by the First, Ninth and Tenth Amendments, plus the fundamental Right to Travel, the right to Equal Protection, and right to Substantive Due Process. Further, Plaintiffs seek a declaration that Congress, in enacting the CSA as it pertains to Cannabis, violated the Commerce Clause, extending the breadth of legislative power well beyond the scope contemplated by Article I of the Constitution.[5] The claims are as follows:

7. *First*, as shown below, the CSA as it pertains to Cannabis, violates the Due Process Clause of the Fifth Amendment to the United States Constitution because the CSA is so irrational as a matter of law that it cannot be said to be rationally related to any legitimate government purpose. Cannabis is classified as a Schedule I drug under the CSA, along with such psychotropic drugs as heroin, mescaline and LSD. To have been assigned this Schedule I classification, the Federal Government was required to have determined that Cannabis: (i) has a high potential for abuse; (ii) has absolutely no medical use in treatment; and (iii) cannot be used or tested safely, even under strict medical supervision ("Three Schedule I Requirements"). Significantly, however, as also shown below, the Federal Government does not believe, and upon information and belief, never has believed, that Cannabis meets or ever met the Three Schedule I Requirements.

8. Under Federal Law, it is not enough for a government, in arguing in favor of a statute's constitutionality, merely to *manufacture* a supposedly "legitimate government interest" to which a law is rationally related for the purpose of responding to a lawsuit; the government must also actually believe its own argument. And, as shown below, the Federal Government, at a minimum,

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[5]In interposing this particular claim, Plaintiffs explicitly seek the overturn of the Supreme Court's decision in *Gonzalez v. Raich*, 545 U.S. 1 (2005).

does not, and cannot possibly, believe that there is no acceptable medical use for Cannabis or that it cannot be used or tested safely under medical supervision. In other words, the Federal Government has recognized that Cannabis does not meet (or come close to meeting) two of the Three Schedule I Requirements. *Indeed, the Federal Government has admitted repeatedly in writing, and implemented national policy reflecting, that Cannabis **does**, in fact, have medical uses and can be used and tested safely under medical supervision. On that basis, the Federal Government has exploited Cannabis economically for more than a decade by securing a medical cannabis patent and entering into license agreements with medical licensees*. The Federal Government has also been dispensing medical Cannabis to Americans through a certain Investigational New Drug Program since the late 1970s for the treatment of an assortment of diseases. The notion that the Federal Government genuinely believes that Cannabis has no medical application and is so dangerous that, as with heroin, it cannot be tested even under strict medical supervision, is so absurd that it must be rejected as a matter of law. The Federal Government does not believe in the factual prerequisites underlying its own statute.

9. Because the Federal Government does not believe the factual predicate underlying its own arguments in support of the CSA as it pertains to Cannabis, the CSA is irrational and thus unconstitutional (First Cause of Action).

10. *Second*, as shown below, the CSA as it pertains to Cannabis was enacted and subsequently implemented, not to control the spread of a dangerous drug, but rather to suppress the rights and interests of those whom the Nixon Administration wrongly regarded as hostile to the interests of the United States – African Americans and protesters of the Vietnam War. In particular, members of the Nixon Administration have confirmed that, when the CSA was enacted, President

Nixon regarded those who opposed the Vietnam War as a threat to America's Cold War against Communism. And President Nixon and associates in the Nixon Administration, including and especially, Myles Ambrose (America's First Drug Czar), harbored considerable antipathy towards African Americans.

11. The Nixon Administration recognized that African Americans could not be arrested on racial grounds, and war protesters could not be prosecuted for opposing America's involvement in Vietnam. However, the members of the Nixon Administration decided that Cannabis was the drug of choice for these two groups. Consequently, the Nixon Administration ushered the CSA through Congress and insisted that Cannabis be included on Schedule I so that African Americans and war protesters could be raided, prosecuted and incarcerated without identifying the actual and unconstitutional basis for the government's actions.

12. Unfortunately, the Federal Government has been quite successful in using the CSA to harass, intimidate and incarcerate African Americans in disproportionate numbers over the years, ruining the lives of generations of black men and women and other persons of color. War protesters were similarly subjected to unconstitutional enforcement activity by the Federal Government, resulting in convictions that stained reputations and limited the career options of countless politically active Americans. In so doing, the Federal Government violated (and continues to violate) the First Amendment and the Equal Protection Clause as implied by the Due Process Clause of the Fifth Amendment to the United States Constitution (Second Cause of Action).

13. *Third*, as shown below, the CSA as it pertains to Cannabis violates the constitutional Right to Travel. As of this writing, 29 States plus Washington, DC and U.S. Territories have

legalized the use of Cannabis containing high concentrations of THC for the treatment of scores of illnesses, diseases and conditions. Indeed, more than 62% of Americans currently live in States in which Cannabis with high concentrations of THC may be recommended by physicians for medical treatment.

14. Some patients who live in State-legal medical-Cannabis jurisdictions are, for the moment, able, as a practical matter, to avail themselves of medical Cannabis, notwithstanding the provisions of the CSA, based upon a series of federal initiatives which have created temporary, *de facto* impediments to its enforcement at the federal level. However, those temporary federal initiatives do not have the force of law and, in many instances, explicitly state that they *do not* provide a legal defense to prosecutions under the CSA.

15. Thus, those who cultivate, distribute, sell, recommend and/or use medical Cannabis in conformity with State-legal medical Cannabis programs remain vulnerable to federal enforcement.

16. Worse, those patients who rely upon medical Cannabis, even in State-legal medical-Cannabis jurisdictions, cannot safely travel by airplane; cannot travel onto federal lands or into federal buildings (even if those federal lands and buildings are situated within State-legal medical-Cannabis jurisdictions); cannot enter facilities owned by the Federal Government, including military bases; and cannot travel to or through States in which medical Cannabis has not been legalized, without risk of arrest and prosecution. Consequently, the physicians who recommend medical Cannabis, the businesses that manufacture and distribute medical Cannabis, and the patients who need and use it remain at constant risk that they could be arrested, prosecuted and incarcerated by the Federal Government at any time.

17. In the context of the Right to Travel, medical Cannabis patients in particular are subjected to a Hobson's Choice of: (i) using their medication but relinquishing their Right to Travel; (ii) exercising their Right to Travel while carrying their medication with them, thereby risking seizure, arrest, prosecution, conviction and incarceration; or (iii) exercising their Right to Travel but foregoing physician-recommended medical treatment that maintains their health and lives. Engaging in an open violation of the CSA and subjecting themselves to the risk of arrest does not constitute a viable option for Plaintiffs. The alternative of leaving their life-sustaining and life-saving medication behind would threaten those Plaintiffs treating with medical Cannabis (and for whom it constitutes a life-saving and -sustaining medicine) with the loss of their health and lives which, as demonstrated below, would constitute a deprivation of their fundamental rights to Substantive Due Process (Third Cause of Action).

18. *Fourth*, the CSA as it pertains to medical Cannabis violates the Commerce Clause and the Tenth Amendment to the United States Constitution. While empowered by Article I to regulate interstate and international commerce, Congress does not have the authority to regulate purely intra-state activities which do not have any impact on the national economy. Any use of medical Cannabis that is legalized and regulated entirely within an individual State's borders does not have any appreciable impact on the national economy. And Congress, in enacting the CSA, never believed that the cultivation, distribution and sale of Cannabis, purely at the intra-state level, ever affected or will affect the national economy.

19. Regulation of doctor-patient relationships and the administration of medical advice has been, since ratification of the United States Constitution and subsequent adoption of the Tenth

Amendment, consistently interpreted as falling within the exclusive regulatory jurisdiction of the States (not the Federal Government) under the provisions of the Tenth Amendment. By injecting itself into the exclusive regulatory jurisdiction of the States, Congress exceeded its powers under the Commerce Clause and violated principles of federalism and the Tenth Amendment of the United States Constitution (Fourth Cause of Action).

20. *Fifth*, the Schedule I classification as it pertains to Cannabis constitutes a completely and utterly irrational legislative construct and thus violates the Due Process Clause of the Fifth Amendment. Specifically, under the CSA, Schedule I drugs are classified as so dangerous that they generally cannot be tested safely; however, in order to obtain the evidence necessary to persuade the Federal Government that Cannabis is safe enough to be rescheduled or de-scheduled, it must be tested. By imposing as precondition to re-classification, the testing of a purportedly un-testable drug, Congress created a legislative Gordian Knot -- a statute that functions as a one-way, dead end street.[6]

21. What transforms this poorly-conceived provision into an unconstitutional one is that Cannabis was categorized as a Schedule I drug, not because the evidence presented during the legislative process actually demonstrated that it was dangerous, but rather because certain members of Congress pretextually claimed that the data for classifying Cannabis in the first instance was, at the time, supposedly insufficient. Accordingly, Cannabis was to be tested and then rescheduled, de-scheduled or left under the provisions of Schedule I. In classifying Cannabis as a Schedule I drug in the first instance, however, Congress permanently resigned Cannabis to that designation because

[6]This is not to suggest that no one has ever obtained permission from the Federal Government to test medical Cannabis; but the vetting process renders the approval process substantially impracticable.

in the absence of testing, those seeking to petition to reclassify Cannabis are deprived of the opportunity to collect the very evidence deemed necessary by the Federal Government to reschedule or de-schedule it (Fifth Cause of Action).

22. *Sixth*, the CSA, as applied to Plaintiffs Alexis Bortell ("Alexis") and Jagger Cotte ("Jagger"), deprives them of their rights under the First Amendment to free speech and to petition the Federal Government for a redress of grievances. Specifically, Alexis and Jagger cannot travel to the Capitol in Washington, DC to petition the Federal Government to enact legislation which they regard as beneficial, or to repeal laws which they regard as harmful unless they leave their life-saving and -sustaining Cannabis medication behind – a substantial risk for each of these Plaintiffs. Thus, for example, Alexis and Jagger cannot visit their elected representatives to lobby in favor of repealing the CSA or in favor of the Marijuana Justice Act ("MJA"), which Senator Cory Booker of New Jersey is preparing to introduce during the next legislative session. The availability of other forms of communication from a distance does not, as a matter of law, constitute an effective or appropriate substitute for in-person advocacy under the First Amendment, particularly under the circumstances of this case.

23. Under principles of Substantive Due Process, the right to preserve one's health and life by continuing to treat with life-sustaining and life-saving medication, is deeply-rooted in our Nation's history and traditions, and implicit in the concept of ordered liberty. By requiring Alexis and Jagger to forfeit that fundamental right in order to exercise their First Amendment rights (and vice versa), the CSA imposes an unconstitutional Hobson's Choice upon the aforementioned Plaintiffs and thus violates the Constitution (Sixth Cause of Action).

24. *Lastly*, the Federal Government cannot maintain its position on the existing record

that continued enforcement of the CSA as it pertains to Cannabis is "substantially justified." Accordingly, under the Equal Access to Justice Act (28 U.S.C. §2412), Plaintiffs are entitled to an award of legal fees and costs.

JURISDICTION AND VENUE

25. This Court has subject matter jurisdiction over this controversy under 5 U.S.C. §8912, 28 U.S.C. §§1331,1346(a)(2), 2201 and 2202.

26. Venue is proper under 28 U.S.C. §§1391(e) and 1402(a)(1).

PLAINTIFFS

Marvin Washington

27. Plaintiff Marvin Washington ("Washington") is, and at all relevant times has been, a citizen, resident and domiciliary of the County of Dallas in the State of Texas.

28. Washington is a graduate of the University of Idaho and is a member of the University's Sports Hall of Fame.

29. From 1989 to 1999, Washington played professional football as a defensive lineman for such National Football League franchises as the New York Jets, San Francisco 49ers and Denver Broncos, winning a Super Bowl with the latter.

30. After his retirement from professional football, Washington entered the business world, working for Kannalife, a Long Island company that has been developing Cannabis-based medications to minimize the damage caused by head injuries and to reduce and ultimately eliminate opioid addiction among professional athletes. Washington is currently working with a Swiss company known as Isidiol that has launched, among other things, a line of products infused with

Cannabidiol, also known as CBD, produced in the European Union, outside the confines of the CSA.[7]

31. Washington would like to expand his business to include whole-plant Cannabis (including THC) products, but is concerned that, even in States in which whole-plant Cannabis is legal for medical and/or recreational use, he may be subject to arrest and prosecution.

32. Washington would like to avail himself of the benefits associated with the Federal Minority Business Enterprise program ("MBE") in connection with whole-plant Cannabis products, but he is ineligible for it solely because such activities would be illegal under the CSA. Were Washington to open a whole-plant Cannabis business and apply for participation in the MBE, he would be admitting to the commission of a felony under Federal Law.

33. According to the Federal Government, CBD falls within the ambit of the classification of Cannabis as a Schedule I drug, unless extracted from industrial hemp or a part of the Cannabis plant exempted from the CSA.

34. Washington is concerned that, although CBD products generally have a low concentration or no concentration of THC, his existing business could be subjected to enforcement under the CSA.

35. Washington is African American.

Dean Bortell and Alexis Bortell

36. Plaintiff Dean Bortell is, and at all relevant times has been, a citizen of Texas and Colorado, currently residing in Larkspur, Colorado ("Dean").

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[7] CBD, although part of the Cannabis plant, generally has no psychoactive effect. Nonetheless, it is currently the position of the Federal Government that the cultivation and/or sale of CBD is prohibited under the CSA.

37. Dean is a former member of the Navy, and is a 100% permanently-disabled veteran of foreign wars ("VFW").

38. As a disabled VFW, his children are entitled to receive certain veteran's benefits ("Veterans' Benefits"), including, *inter alia*, health insurance and the right to use the commissary of any nearby military base.

39. Dean is Alexis's father.

40. Alexis is, and at all relevant times has been, a citizen of Texas and Colorado, currently residing in Larkspur, Colorado.

41. Alexis is an 11-year-old girl, who lives with her parents.

42. At the age of seven, Alexis began experiencing seizures, and was eventually diagnosed with a condition known as "intractable epilepsy."

43. Intractable epilepsy is a seizure disorder in which a patient's seizures cannot be safely controlled with FDA approved medical treatments and procedures.

44. By reason of her intractable epilepsy, Alexis often suffered from multiple seizures per day, and spent most of her school-day afternoons in the nurse's office.

45. Alexis, with the assistance of her family and treatment providers, attempted to treat, control and cure her intractable epilepsy for years without success. Nothing she tried worked.

46. After two years of doctor visits, tests, urgent trips to the emergency room, and pill after pill, all with their assortment of negative side effects, her family exhausted traditional pharmaceutical options to stop what Alexis referred to as the "seizure monster." At that point, they turned to the last known option available: whole-plant Cannabis containing high concentrations of THC.

47. Whole-plant Cannabis with high THC content provided Alexis immediate relief from her seizures, but it is not legal in Texas, where she resided at the time. Accordingly, Alexis and her family were forced to move from her home State of Texas to seek life-saving treatment in Colorado. There, Alexis was thrust into a very grown-up world and joined a then-largely unknown community of Cannabis patients known as "Medical Marijuana Refugees."

48. Since being on whole-plant medical Cannabis, Alexis has gone more than two years seizure-free, without taking any other medication to control her seizures.

49. Without her use of whole-plant medical Cannabis, Alexis would likely have no quality of life, and instead be resigned to spending her days at home inside or worse, in a hospital bed, as medical care-givers surround her with offers of palliative care which fail to provide any actual palliative relief. In addition, Alexis would be subjected to traditional forms of treatment which, aside from being ineffectual, threaten her with serious and life-altering side effects, including infertility.

50. Alexis co-authored the book, Let's Talk About Medical Cannabis, which was launched on April 20, 2017. In her book, she shares her and her family's experiences as "Medical Marijuana Refugees" and gives readers a perspective into the Cannabis refugee community.

51. Alexis was also named a PACT National Pediatric Ambassador (2015-16), and received the Texas Liberty Award (along with her sister) in 2016.

52. Alexis's drive to help those around her led to her newest project, "Patches of Hope." She and her sister Avery are growing USDA certified organic garden vegetables on their family farm to donate to hungry people in need, including her beloved Medical Marijuana Refugees. Her story

and advocacy have been featured in documentaries, newspapers, magazines, TV, and on radio stations worldwide.

53. While thrilled with the success she has experienced in treating her intractable epilepsy and eliminating her daily seizures with medical Cannabis, Alexis would like to move back to Texas, where she would be eligible for free college tuition through Texas's State Department of Education. Alexis is not eligible for free state education in Colorado.

54. In addition, Alexis would like to travel to other States and to federal lands (including, for example, national parks and monuments), but cannot safely do so without fear that: (i) her parents, with whom she would travel, might be prosecuted for possession of Cannabis; or worse (ii) her parents might be subjected to proceedings which would imperil their parental rights.

55. Separate and apart from her desire to travel to other States, national parks and monuments, Alexis would like to visit, and has been invited to speak with, members of Congress at the Capitol, *inter alia*, to lobby in favor of repealing the CSA and in favor of the MJA, which would have the effect of de-scheduling Cannabis.

56. However, Alexis cannot make a trip to the Capitol and visit with her elected representatives and other public officials unless she were to leave her medical Cannabis behind, endangering her life.

57. There is no comparable substitute for the opportunity to visit public officials and engage in in-person advocacy.

58. Insofar as Alexis is a minor, she cannot vote; her ability to influence her elected representatives is limited to efforts by her to advocate in support of beneficial legislation and against laws she regards as harmful.

59. Alexis would also like to avail herself of the Veterans Benefits for which she is eligible and which she would otherwise receive were it not for her necessary Cannabis use; however, Alexis cannot enter the neighboring military base, where she would be able to avail herself of such Benefits, including, for example, commissary benefits, unless she were to leave her medication behind, risking her health. And, although currently receiving health insurance (another of the Veterans Benefits to which she is entitled) through her father's veteran's benefit plan, Alexis will almost certainly lose her eligibility within the next three years, as she would be required to enter a United States military base to renew her health insurance card – a trip she cannot safely make without taking her State-legal, but federally-illegal, medication with her. Thus, Alexis and her family are subjected to an unacceptable Hobson's Choice: (A) discontinuing the only medication that has ever eliminated her seizures (thereby resigning herself to living permanently with a dangerous and disabling illness) so that she could return to Texas; or (B) continuing to use her medication but refusing to relinquish her Right to Travel, risking arrest, prosecution and her parents' loss of parental rights; or (C) continuing to use her medication within the State of Colorado but foregoing her rights to: (i) live in Texas; (ii) receive free tuition in Texas; (iii) travel to other States; (iv) use an airplane to travel to any other State; (v) step onto federal lands or into federal buildings; (vi) access military bases; and (vii) receive her father's Veteran's Benefits ("Hobson's Choice").

Jose Belen

60. Plaintiff Jose Belen is a citizen of the State of Florida, with a residence in Seminole County ("Jose").

61. On January 16, 2002, at the age of 19, Jose enlisted in the United States Army.

62. Soon after enlisting in the Army, Jose was deployed to Germany, where he participated in training exercises and awaited further deployment.

63. On March 20, 2003, the United States Military began an invasion of Iraq, under the code-name "Operation Iraqi Freedom."

64. In or around May 2003, Jose and his battalion were deployed to Kuwait.

65. Jose's battalion was then pushed directly into active combat, receiving orders to cross the Iraq-Kuwait border and march on to enter Baghdad.

66. In connection with this mission, Jose then served in Iraq for 14 months, often witnessing brutal armed combat first-hand.

67. During his deployment, Jose came to know many of his fellow soldiers personally, developing strong, emotional bonds.

68. During his deployment, Jose was in grave danger and witnessed the killing of several fellow soldiers, including his best friend and roommate.

69. After he was honorably discharged, Jose moved to Florida.

70. It soon became clear to Jose that he was unable to forget and/or otherwise cope with his memory of the horrors of war that he had lived through in Iraq.

71. Jose developed Post-Traumatic Stress Disorder ("PTSD").

72. PTSD is an ailment which commonly afflicts members of the armed forces who have seen active combat.

73. Because of his PTSD, the Veterans Affairs Administration declared Jose "70% disabled."

74. Jose sought treatment for his PTSD from the medical staff at the Veterans Affairs Administration and other treatment centers.

75. The medical staff at the Veteran Affairs Administration issued Jose prescriptions for different opioid medications.

76. The aforesaid and described prescriptions were ineffective and often further disabling.

77. Jose's PTSD intensified, and became so severe that Jose often contemplated taking his own life.

78. Statistics show that an average of 22 American military veterans commit suicide every day.

79. Upon information and belief, most of these suicides are directly linked to PTSD.

80. Jose subsequently discovered that Cannabis is the only substance which actually reduced his PTSD symptoms.

81. Since he began treating with medical Cannabis, Jose has been able to cope with his PTSD.

82. Jose has disclosed his need for medical Cannabis to his Veterans Administration physicians.

83. Jose's treatment providers at the Veterans Administration informed Jose that they are unable to prescribe medical Cannabis because it is illegal under the CSA.

84. As with Alexis, Jose cannot, while possessing his medical Cannabis: (i) enter a military base; (ii) travel by airplane; (iii) step onto federal lands or into federal buildings; (iv) travel to States where medical Cannabis is illegal and enforced under the CSA; (v) request medical Cannabis from his treating physicians; and/or otherwise (vi) avail himself of the Veterans Benefits for which he is otherwise eligible and to which he is legally entitled. Thus, as with Alexis, Jose is subjected to a similar Hobson's Choice -- his life and health, or the exercise of his constitutional

rights and the risk of arrest.

85. Separate and apart from his desire to receive Veterans Benefits, Jose would like to visit and speak with members of Congress at the Capitol to lobby in favor of, *inter alia*, repealing the CSA and in favor of the MJA, which would have the effect of de-scheduling Cannabis.

86. However, Jose cannot make a trip to the Capitol and visit with his elected representatives and other public officials unless he were to leave his medical Cannabis behind.

87. There is no comparable substitute for the opportunity to visit public officials and engage in in-person advocacy.

Sebastien Cotte and Jagger Cotte

88. Sebastien Cotte is, and at all relevant times has been, a citizen and domiciliary of the State of Georgia, with a residence in Dekalb County ("Sebastien").

89. Jagger Cotte is, and at all relevant times has been, a citizen and domiciliary of the State of Georgia, with a residence in Dekalb County.

90. Sebastien is Jagger's father.

91. Jagger is a six-year old boy who lives with his parents, including his father, Sebastien.

92. Jagger suffers from a rare, congenital disease known as "Leigh's Disease," which disables and then kills approximately 95% of people afflicted with it (if diagnosed before age 2) by the time that they reach the age of four.

93. Consistent with his diagnosis and prognosis, Jagger, beginning at age one, became a hospice patient, unable to communicate, walk, masticate food, and/or otherwise handle any activities of daily living.

94. Worse, Jagger began experiencing near-constant pain, shrieking in agony as he tried to get through each day.

95. As Sebastien and his wife prepared for what they expected would be their son's inevitable demise, they turned to Cannabis with high concentrations of THC, in the hope of reducing his pain and prolonging his life.

96. Since he began treating with medical Cannabis with high concentrations of THC, Jagger has stopped screaming in pain, has been able to interact with his parents, and has prolonged his life by more than two years.

97. Cannabis with a THC concentration of greater than 5% is illegal in the State of Georgia.

98. Because his required dosage for effective treatment of his condition requires a THC content greater than 5%, Jagger cannot obtain his medical Cannabis in State.

99. Worse, Georgia has no regulatory protocol for the cultivation, distribution and sale of Cannabis. Thus, assuming that medical Cannabis with a THC content of 5% were sufficient to treat Jagger's condition -- and it isn't -- obtaining State-legal medical Cannabis in Georgia is impossible, as it is unavailable for purchase in a dispensary or otherwise.

100. At one point, Jagger and his family relocated to Colorado so as to facilitate the administration of his medication; however, maintaining two residences and caring for a dying child full time rendered this prospect economically infeasible. Consequently, the Cotte family returned to Georgia (by car).

101. As with Alexis and Jose, Jagger cannot travel by airplane, enter onto federal lands or into federal buildings, and/or travel to and/or through States in which medical Cannabis, by reason

of the CSA and other legislation, is illegal. Thus, Jagger is resigned to a Hobson's Choice of: (i) relinquishing his constitutional rights because of his treatment with medical Cannabis; or (ii) retaining his constitutional rights but foregoing his medical treatment and subjecting himself to the uncompromisingly painful and ultimately fatal effects of his illness; or (iii) traveling without regard to where Cannabis is legal or illegal and risking his or his father's arrest.

102. Jagger would like to visit with members of Congress at the Capitol and, through his father, lobby in favor of repealing the CSA and in favor of the MJA, which would have the effect of de-scheduling Cannabis.

103. However, Jagger cannot make a trip to the Capitol and visit with his elected representatives and other public officials unless he were to leave his medical Cannabis behind, thereby endangering his life.

104. There is no comparable substitute for the opportunity to visit public officials and engage in in-person advocacy.

105. Insofar as Jagger is a minor, he cannot vote; his ability to influence his elected representatives is limited to efforts by him (through his father) to advocate in support of beneficial legislation and against laws he regards as harmful.

Cannabis Cultural Association, Inc.

106. Cannabis Cultural Association, Inc. ("CCA") is, and at all relevant times has been, a not-for-profit corporation organized and existing under the laws of the State of New York, with a principal headquarters in the City and County of New York.

107. The CCA was founded to provide a voice and forum to assist persons of color to develop a presence in the Cannabis industry – an industry in which they are and, at all relevant times

have been, grossly under-represented except when it comes to being arrested.

108. People of color, especially black males, are up to four times as likely to be arrested in connection with Cannabis than white Americans, and make up nearly 70% of the 2.5 million people in prison for drug crimes (even though use among races is virtually equal).

109. Convictions for violations of the CSA and other statutes criminalizing cultivation, distribution and/or use of Cannabis frequently disqualify individuals from participating in State-legal medical Cannabis businesses. By reason of the foregoing, persons of color, who are disproportionately investigated and prosecuted for drug offenses, have been unfairly and inequitably excluded from the Cannabis industry.

110. Members of the CCA include persons of color who have been arrested, prosecuted, convicted and/or incarcerated for violating the CSA as it pertains to Cannabis.

DEFENDANTS

Sessions

111. Defendant Jefferson Beauregard Sessions, III ("Sessions") is, and since on or about February 8, 2017 has been, the Attorney General of the United States.[8]

112. Before his ascension to Attorney General, Sessions, from 1997 until in or about late 2016, served as a United States Senator on behalf of the people of the State of Alabama.

113. Prior to his installation as a United States Senator, Sessions was a United States Attorney for the Southern District of Alabama.

114. While serving as a United States Attorney, Sessions was nominated to serve as a United States District Court Judge; however, his nomination was withdrawn following a series of

[8]Sessions is sued only in his official capacity as Attorney General.

Senate hearings at which witnesses testified that Sessions had:

- made racially insensitive remarks to African American Assistant U.S. Attorneys;
- spoken favorably of the Ku Klux Klan;
- referred to a white civil rights attorney as "maybe" a "disgrace to his race;"
- repeatedly referred to an African American Assistant U.S. Attorney as "boy" and had instructed the latter to "be careful what you say to white folks;"
- remarked that the NAACP and ACLU were "un-American" and "Communist-inspired," and that they were trying to force civil rights "down the throats of people;" and
- complained that he had wished he could decline all civil rights cases.[9]

115. Sessions was never again nominated to sit on the Federal Bench.

116. Upon information and belief, Sessions is, and at all relevant times since 1997 has been, a citizen of Alabama, and a resident of both Alabama and Washington, DC.

117. Sessions, as Attorney General, is authorized to re-schedule, de-schedule and/or decline to re-schedule or de-schedule any drug classified under the provisions of the CSA. 21 U.S.C. §811.

118. As shown below, Sessions has announced that:

- he was "heartbroken" that former President Obama said that "Cannabis is not as dangerous as alcohol;"
- he believes that Cannabis is "a dangerous drug;"

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[9]Sessions admitted that he had made favorable comments about the Ku Klux Klan, but claimed he was not being serious and later apologized. He claimed not to remember saying that a white civil rights lawyer was "maybe" a "disgrace to his race." As to the comments about the ACLU and NAACP, Sessions claimed to have been referring to the organizations' supposed support for the Sandinistas in Nicaragua. He denied making the other above-referenced statements attributed to him.

- he believes that "good people don't smoke marijuana;" and
- he thought favorably of the Ku Klux Klan, but then changed his view when he learned that its members supposedly smoke "pot."

119. On or about May 1, 2017, Sessions sent correspondence to Congress requesting that funding be provided that could allow the United States Department of Justice ("DOJ") to resume criminal prosecutions of: (i) State-legal medical marijuana patients, (ii) State-legal businesses that provide medical Cannabis to patients, and (iii) physicians who recommend such treatment.[10]

120. On July 19, 2017, Sessions announced his intention to resume civil forfeiture activity, previously discontinued under the Obama Administration, as part of his continued war against those whom Sessions claims are engaged in dangerous, illegal drug activity.[11]

United States Department of Justice

121. Defendant DOJ is, and since in or about 1870 has been, an executive department of the United States, "with the Attorney General as its head."[12]

122. According to the mission statement contained on its website, the DOJ's purpose is:

> [t]o enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.[13]

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[10]As discussed below, Congress had previously enacted legislation that prevents the Attorney General and Department of Justice from using legislative appropriations to prosecute those in State-legal medical Cannabis jurisdictions operating in conformity with State law.

[11]http://www.politico.com/story/2017/07/19/jeff-sessions-drug-war-seizures-240706.

[12]https://www.justice.gov/about.

[13]*Id.*

123. To the extent that the DOJ treats medical Cannabis as a dangerous and illegal substance, Plaintiffs and everyone else who may need to use, or who desire to cultivate and/or sell, medical Cannabis are at risk of investigation and prosecution by the DOJ.

Charles "Chuck" Rosenberg and the DEA

124. Defendant Charles "Chuck" Rosenberg ("Rosenberg") is, and since May 2015 has been, the acting head of the defendant Drug Enforcement Administration ("DEA").[14]

125. Defendant DEA is, and since 1973 has been, a Federal agency charged with the responsibility of investigating and, together with the DOJ, enforcing, the CSA, and any other controlled substances laws and regulations of the United States.

126. Since at least 2002, the DEA's position has been that enforcement of Federal Laws against medical Cannabis is the responsibility of the DEA.

127. On or about November 10, 2015, Rosenberg publicly announced to CBS News that he believes that "medical marijuana" is a "joke."[15]

United States of America

128. The United States of America is named as a defendant because this action challenges the constitutionality of an Act of Congress. 28 U.S.C. §2403(A).

STATEMENT OF FACTS

I. CANNABIS HAS BEEN CULTIVATED AND SAFELY USED THROUGHOUT WORLD HISTORY

10,000 BC until the Birth of Christ

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[14]Rosenberg is sued only in his official capacity as Acting Administrator of the DEA.

[15]http://www.cbsnews.com/news/dea-chief-says-smoking-marijuana-as-medicine-is-a-joke.

129. Cannabis has been utilized in a multitude of ways by diverse groups of people all over the world for the last 10,000 years.[16]

130. The first documented use of Cannabis took place in the area of modern day Taiwan where hemp cords were identified in pottery found in an ancient village dating back to about 10,000 years ago.[17]

131. In 6,000 B.C., China became the first country known to utilize Cannabis seeds and oil for food and, along with Turkestan, China began cultivating hemp for the purpose of producing textiles in 4,000 B.C.[18]

132. The first documented medical use of Cannabis also occurred in China (in or around 2900 B.C.) when Chinese Emperor Fu Hsi, the father of Chinese civilization, noted that "Ma," the Chinese word for Cannabis, was a "very popular medicine that possessed both yin and yang."[19] Its popularity at that time has been confirmed by the "Pen ts'ao," a Chinese digest of herbal medicines which was first published in or about 2800 B.C.

133. The Pen ts'ao "recommended Cannabis for the treatment of constipation, gout, malaria, rheumatism, and menstrual problems."[20]

134. Hemp in particular was so important in ancient China that the Chinese people referred

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[16]*See* Deitch, *supra* note 1 at 1, 7-8; Leslie Iversen, THE SCIENCE OF MARIJUANA 122 (2000);

[17]Deitch, *supra* note 1 at 7-8; *10,000-year History of Marijuana Use in the World,* ADVANCED HOLISTIC HEALTH, http://www.advancedholistichealth.org/history.html (last visited July 20, 2017) [hereinafter referred to as "ADVANCED HOLISTIC HEALTH"].

[18]ADVANCED HOLISTIC HEALTH, *supra* note 17.

[19]Deitch, *supra* note 1 at 9.

[20]Iversen, *supra* note 16 at 122.

to their country as the "land of mulberry and hemp."[21]

135. The ancient Egyptians began to use Cannabis as medicine in or about 2000 B.C.[22]

136. The ancient Egyptians used Cannabis at that time to treat sore eyes and cataracts, inflammation, hemorrhoids, menstrual bleeding, and Glaucoma.[23] And while the ancient Chinese were the first people known to use Cannabis as medicine, "it was the ancient Egyptians who first identified cancer as an illness and then treated it with Cannabis."[24]

137. Beginning in 2,000 B.C., the use of Cannabis expanded to suit religious and spiritual purposes as well.[25] Around this time, a sacred Hindu text, *Atharvaveda*, first refers to "Bhang," an intoxicant made from the leaves of the female Cannabis plant, as one of the five sacred plants of India.[26]

138. Bhang was used in ancient India medicinally as an anesthetic and anti-phlegmatic.[27]

139. Bhang was used in ancient India religiously as an offering to the god Shiva.[28]

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[21]Deitch, *supra* note 1 at 9.

[22]Claire Rankin, *Marijuana use in ancient Egypt*, NEWS TARGET (Feb. 26, 2016), http://www.newstarget.com/2016-02-26-marijuana-use-in-ancient-egypt.html; *see also In the Matter of Rescheduling Marijuana*, 86-22 at p. 33 (1988) (in a proceeding contested by the DEA, the ALJ observed: "Uncontroverted evidence [o]n this record indicates that marijuana was being used therapeutically by mankind 2000 years before the Birth of Christ" (citation omitted).

[23]Rankin *supra* note 22; *See also* PROCON.ORG, *supra* note 3.

[24]Rankin *supra* note 22.

[25]*See* ADVANCED HOLISTIC HEALTH, *supra* note 17.

[26]*Id.*; Charukesi Ramadurai, *The Intoxicating Drug of an Indian God*, BBC (March 13, 2017), http://www.bbc.com/travel/story/20170307-the-intoxicating-drug-of-an-indian-god.

[27]PROCON.ORG, *supra* note 3.

[28]ADVANCED HOLISTIC HEALTH, *supra* note 17.

140. In approximately 1450 B.C., when the events of the Book of Exodus (30:22-23) are alleged to have occurred, Cannabis was purportedly one of the ingredients contained in the Holy anointing oil passed from God to Moses.[29]

141. According to the analyses of a number of well-respected etymologists, linguists, anthropologists, and botanists, the recipe for the Holy anointing oil contained over six pounds of "kaneh-bosem," a Hebrew term these professionals have identified as meaning Cannabis.[30]

142. The use of Cannabis as a medicinal substance continued to spread throughout Asia and Europe for centuries.

143. *The Venidad*, a Persian text dating back to 700 BC, cited Cannabis as being one of the most significant of 10,000 medicinal plants.[31]

144. By 600 B.C. India began using Cannabis to treat leprosy.[32]

145. In 200 B.C. Greece, Cannabis was utilized as a remedy for earaches, edema, and inflammation.[33]

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[29]*See* PROCON.ORG, *supra* note 3.

[30]*Id. See also* Jane Marcus, *Holy Cannabis: The Bible Tells Us So*, Huffington Post, http://www.huffingtonpost.com/jane-marcus-phd/holy-cannabis-the-bible-t_b_4784309.html (last updated Apr. 16, 2014).

[31]Rob Streisfeld, NMD, *The Role of the EndoCannabinoid System & Cannabinoids Linked to Gut Health*, NYANP 13, http://www.nyanp.org/wp-content/uploads/2015/10/Streisfeld_Cannabis-F-NYANP.pdf (last visited May 10, 2017);PROCON.ORG, *supra* note 3 (*citing* Martin Booth, CANNABIS: A HISTORY (2005)).

[32]PROCON.ORG, *supra* note 3 (*citing* Jonathan Green, CANNABIS (2002)).

[33]US NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE, MARIHUANA, A SIGNAL OF MISUNDERSTANDING, Appendix, Chapter One, Part I (1972).

Cultivation and Use of Cannabis from the Birth of Christ Through the Period of Colonial America

146. An important Roman medical text, *De Materia Medica*, was published in 70 A.D.

147. *De Materia Medica* refers to the Cannabis plant as "produc[ing] a juice" that was "used to treat earache[s] and to suppress sexual longing."[34]

148. By 200 A.D., a Chinese physician, Hua T'o, became the first known surgeon to use Cannabis as an anesthetic during surgeries such as "organ grafts, re-sectioning of intestines, laparotomies (incisions into the loin), and thoracotomies (incisions into the chest)."[35]

149. Ancient civilizations cultivated the Cannabis plant, not merely for medicinal and religious needs, but also to produce industrial hemp for the manufacturing of items such as paper, rope, sails, and linen.

150. China was among the first known civilizations to produce paper from hemp.[36]

151. Between 900 -1200 A.D., the Arab world, Spain, Italy, England, France, and Germany all began replicating China's hemp-paper manufacturing process.[37]

152. The Venetian Republic, the first known Western European nation to industrialize around the production of hemp and the first European country to experience genuine economic progress emerging from the Dark Ages in the late 10th Century A.D., elevated the art of processing

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[34]PROCON.ORG, *supra* note 3 (*citing* Martin Booth, CANNABIS: A HISTORY (2005)).

[35]Ernest L. Abel, THE FIRST TWELVE THOUSAND YEARS 9 (1980), https://cannabis-truth.yolasite.com/resources/Abel.%20marihuana%20the%20first%20twelve%20thousand%20years.pdf; Deitch, *supra* note 1 at 10.

[36]Abel *supra* note 35 at 6-7.

[37]*Id.*

raw hemp into rope, sails and fine linen-like cloth.[38] This reliance upon Cannabis to produce industrial hemp lasted well into the Middle Ages and spread all across Europe.[39]

153. Britain became the "industrial goliath of Western Europe" in large part due to its exploitation of hemp for the manufacture of, among other things, rope and sail-commodities that were essential to its large merchant and naval fleet.[40]

154. In 1533, King Henry VIII imposed a law *mandating* that farmers grow hemp.[41]

155. Three decades after King Henry VIII's law mandating the cultivation of hemp, Queen Elizabeth I increased the mandated quota imposed on farmers growing hemp and increased the penalties for failing to meet the quota.[42]

156. Britain's reliance on Cannabis was not limited to its navy-related needs; Britain's economy had also become largely driven by its production of hemp-based domestic goods such as fabrics and cordage.[43]

157. Britain, during the 16th and 17th Centuries, utilized Cannabis for its medicinal properties as well.[44]

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[38]Deitch, *supra* note 1 at 11.

[39]*Id.*

[40]*Id.* at 11-12.

[41]*Id.* at 12.

[42]*Id.*

[43]*Id.* at 14.

[44]Queen Elizabeth I's doctor prescribed Cannabis to her to relieve her menstrual pain. *History of Cannabis,* BBC NEWS, http://news.bbc.co.uk/2/hi/programmes/panorama/1632726.stm (last visited May 10, 2017).

The Importance of Cannabis to Colonial America

158. By the 17th Century, Britain began colonizing much of the world, including the Americas in particular.

159. Britain's colonization empire was built, in part, upon its cultivation, distribution and use of hemp; however, Britain began to exhaust its geographic agricultural resources to produce adequate amounts of hemp.[45]

160. England's need for hemp was so substantial that, in 1611, after its establishment of the Jamestown Colony in the Americas, England gave direct orders to the colonists to grow hemp for the production of rope, sails, and clothing.[46]

161. In 1619, "[t]he Virginia Company, by decree of King James I ..., ordered every [property-owning] colonist ... to grow 100 [hemp] plants specifically for export."[47]

162. In 1663, the English Parliament passed legislation, granting rights and privileges of natural-born citizens to "any foreigner who settled in England or Wales and established a hemp-related industry within three years," in order to encourage those fleeing persecution in Europe to seek refuge in England.[48]

163. The value of hemp was so well-recognized in the Americas during the colonial period

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[45]Deitch, *supra* note 1 at 12. "The fundamental reason for America's predominately Protestant British heritage is that Britain encouraged its people to colonize America — and they did that primarily because Britain's domestic hemp-based industry, the lifeblood of the economy, desperately needed a stable, reliable, and relatively cheap source of raw hemp." *Id.* at 13.

[46]*Id.* at 14; *Marijuana Timeline*, PBS, http://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html (last visited May 10, 2017) [hereinafter referred to as "PBS"].

[47]Deitch, *supra* note 1 at 16.

[48]*Id.* at 18.

that it was frequently used as a barter medium, and farmers were permitted to pay part of their taxes using the plant in the colonies of Virginia (1682), Maryland (1683), and Pennsylvania (1706).[49]

164. Britain's colonization of the Americas was intended to provide England with raw materials for its own production of goods.[50] However, a combination of America's first textile and shipbuilding industries created a burgeoning domestic market for local hemp, which led the colonists to retain the vast majority of American raw hemp for their own local production of rope, paper, and cloth, rather than for export to England.[51] These growing American industries, based principally upon hemp, helped pave the way for America's economic independence from England.[52]

The Founding Fathers' Cultivation, Distribution and Sale of Cannabis in All its Variations

165. Among the colonists to benefit economically from the commercial uses of hemp in the Americas were the Founding Fathers -- several of whom derived significant portions of their wealth from the production of hemp or hemp-based goods.[53]

166. The men who cultivated and/or used hemp included, *inter alia*, George Washington, Thomas Jefferson, Benjamin Franklin and one of America's richest colonists, Robert "King" Carter.[54]

167. Indeed, "Jefferson received the first United States patent for his invention of a

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[49] *Id.* at 19.

[50] *Id.* at 20.

[51] *Id.*

[52] *Id.*

[53] *Id.* at 19.

[54] *Id.*

machine that would break hemp (that is, start the process of extracting the fibers)."[55]

168. Benjamin Franklin, America's leading paper producer, became wealthy from the cultivation of hemp, since that was what paper was made from at that time.[56]

169. Hemp was so widely utilized in the late 1700s that early drafts of the Declaration of Independence and the United States Constitution were written on it;[57] many of the supplies and uniforms needed for the Revolutionary War were made from it;[58] and the first United States flag was made from hemp cloth.[59]

170. In fact, all official American flags were made of hemp until 1937, when Congress enacted the Marijuana Tax Act, discussed *infra*.[60]

171. Colonial America's use of the Cannabis plant was by no means restricted to industrial uses. "[C]olonial Americans were aware of the medicinal properties of Cannabis. It was one of the few medicines they had, and they used it as commonly as we [in America] use aspirin today."[61]

172. Some of the Founding Fathers also smoked Cannabis (known at that time as "hemp"

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[55] *Id.* Hemp was viewed so favorably by Thomas Jefferson that he was quoted as saying that "[h]emp is of first necessity to the wealth & protection of the country." Robbie Gennett, *On Role Models and their Bongs*, HUFFINGTON POST, http://www.huffingtonpost.com/robbie-gennet/on-role-models-and-their_b_164387.html (last updated May 25, 2011).

[56] *Id.* Until 1883, 75-90% of all the paper the world produced was made with hemp fiber. *Id.* at 21.

[57] Deitch, *supra* note 1 at 35; Gennett, *supra* note 55.

[58] Deitch, *supra* note 1 at 35.

[59] *Id.*

[60] *Id.*

[61] *Id.* at 25.

or "sweet hemp") for both medicinal and recreational purposes.[62]

173. Entries from George Washington's diary reveal that Washington grew hemp at his plantation, Mount Vernon, for approximately 30 years.[63]

174. George Washington specifically grew Cannabis with high THC concentrations – the very substance that today, would subject him to prosecution and incarceration under the CSA.[64]

175. Thomas Jefferson, who was also a hemp farmer, mentioned in his diary that he smoked hemp as a remedy for migraine headaches.[65]

176. James Madison stated that sweet hemp "gave him insight to create a new and democratic nation."[66]

177. The notion that Cannabis negatively impairs a user's mental or physical abilities is rendered ludicrous by the fact that the visionaries of our democratic system of government were known to use (and admitted using) Cannabis on a regular basis.[67]

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[62] *Id.* at 25-26.

[63] *Id.* at 25.

[64] *Id.* Washington's diary entries read: "'Sowed hemp [presumably Indian hemp] at muddy hole by swamp'(May 12-13, 1765);" "Began to separate the male from female plants at do [sic] — rather too late' (August 7, 1765);" and "Pulling up the (male) hemp. Was too late for the blossom hemp by three weeks or a month' (August 29, 1766)" which all indicate that he was growing the Cannabis away from the hemp for fiber and that he was trying to grow female plants, which produce high THC content. *Id.* (*citing* Washington's Diary Notes, Library of Congress (Volume 33, page 270)); *see also* George Andrews and Simon Vinkenoog, THE BOOK OF GRASS: AN ANTHOLOGY OF INDIAN HEMP 34 (1967).

[65] Deitch, at note 1 *supra* at 25.

[66] Julian Sonny, *The Presidents Who Admitted To Smoking Weed*, ELITE DAILY (Feb. 18 2013), http://elitedaily.com/news/politics/presidents-admitted-smoking-weed/.

[67] Deitch, *supra* note 1 at 27. Aside from George Washington and Thomas Jefferson, whose Cannabis use is discussed *supra*, other American Presidents known to have smoked cannabis include: James Madison, James Monroe, Andrew Jackson, Zachary Taylor, Franklin Pierce, Abraham Lincoln, John F. Kennedy, Jimmy Carter, George W. Bush, Bill Clinton, and Barack Obama. *Id.* at 26-27;

Post-Revolutionary War Use of Cannabis for Non-Medical and Medical Purposes

178. At the conclusion of the Revolutionary War in 1781, the value of industrial hemp plummeted.

179. By 1850, hemp dropped to the third most commonly-grown agricultural crop in America – it had been the first until this time – behind only cotton and tobacco.[68]

180. During the mid-19th Century, due to the introduction of more modern sailing ships, hemp became obsolete for military purposes.[69]

181. At or about the time that hemp became obsolete for military purposes, Cannabis was still a mainstream form of medicine in the West and particularly in the United States.

182. Cannabis was formally introduced into Western medicine in the 1830s by William O'Shaughnessy, a doctor working for the British East India Company.[70]

183. After experimenting with Cannabis on both animals and humans for years, Dr. O'Shaughnessy concluded that Cannabis was an "anti-convulsive remedy of the highest value"[71] and that it was highly effective in treating conditions such as rheumatoid arthritis, spasticity, and pain.[72]

184. Shortly after making the aforementioned and described discoveries, Dr.

Gennett *supra* note 55; Sonny *supra* note 66; Chris Conrad, HEMP: LIFELINE TO THE FUTURE 192 (1994).

[68]Deitch *supra* note 1 at 38.

[69]*Id.*

[70]Martin Booth, CANNABIS: A HISTORY 109-10 (2003); Steve DeAngelo, THE CANNABIS MANIFESTO: A NEW PARADIGM FOR WELLNESS 48 (2015).

[71]*Id.*

[72]DeAngelo, *supra* note 70 at 48.

O'Shaughnessy and a London pharmacist created an extract from Cannabis, later termed "Squire's Extract."

185. Dr. O'Shaughnessy put Squire's Extract on the market as an analgesic.[73]

186. After the development of Squire's Extract, Cannabis made its way further into American medicine as "Tilden's Extract."[74]

187. As early as 1840, studies regarding the medical uses of Cannabis appeared in American medical academic publications.[75]

188. By 1850, the widely-distributed *United States Pharmacopoeia,* a highly selective listing of America's most widely taken medicines, listed Cannabis as a treatment for "neuralgia, tetanus, typhus, cholera, rabies, dysentery, alcoholism, and opiate addiction, anthrax, leprosy, incontinence, snake bite, gout, convulsive-inducing conditions, tonsillitis, insanity ... []excessive menstrual bleeding[], and uterine haemorrhaging."[76]

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[73]Booth, *supra* note 70 at 112. Indeed, Squire's Extract and similar medicines became quite popular among physicians who found that the only other pain killer that was equally effective was opium, which unlike Cannabis-based products, they found to be highly addictive and riddled with adverse side effects. *Id.* at 113.

[74]*Id.* at 112-13.

[75]DeAngelo, *supra* note 70 at 50.

[76]Booth, *supra* note 70 at 113-14; Edward M. Brecher, *et al.*, *The Consumers Union Report on Licit and Illicit Drugs*, CONSUMER REPORTS MAGAZINE (1972), http://www.druglibrary.org/schaffer/Library/studies/cu/cu54.html#Anchor-35882; PROCON.ORG, *supra* note 3. Interestingly, "pharmaceutical supplies of Cannabis indica were entirely imported from India (and occasionally Madagascar), in accordance with the *Pharmacopoeia*, which specified that it come from flowering tops of the Indian variety." PROCON.ORG, *supra* note 3. However, by 1913, the U.S. Department of Agriculture Bureau of Plant Industry determined that it had succeeded in growing Cannabis of equal quality to the Indian variety. *Id.* Thus, when World War I disrupted America's receipt of foreign supplies, the United States was able to be self-sufficient in the production of Cannabis. *Id.* "By 1918, some 60,000 pounds were being produced annually, all from pharmaceutical farms east of the Mississippi." *Id.*

189. Thereafter, the *Pharmacopoeia* included Cannabis, later known as "Extractum Cannabis" or "Extract of Hemp," as a treatment for additional ailments and conditions.[77]

190. In 1860, the Ohio State Medical Society's Committee on Cannabis Indica found Cannabis to be medically effective for ailments including stomach cramps, coughs, venereal disease, post-partum depression, epilepsy, and asthma.[78]

191. By the latter half of the 19th century, "every pharmaceutical company [in America was] ... busy manufacturing [C]annabis-based patent cures [including] E.R. Sq uibb & Sons [which] marketed their own Chlorodyne and Corn Collodium; Parke, Davis, [which] turned out Utroval, Casadein and a veterinary [C]annabis colic cure; Eli Lilly [which] produced Dr[.] Brown's Sedative Tablets, Neurosine and the One Day Cough Cure, a mixture of [C]annabis and balsam which was a main competitor for another new cough cure released by the German pharmaceutical firm, Bayer."[79]

192. During the latter half of the 19th Century and the beginning of the 20th Century,

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[77] *Id.*; Brecher *supra* 76.

[78] Booth, *supra* note 70 at 114; DeAngelo, *supra* note 70 at 50. There is even evidence that suggests that none other than Abraham Lincoln smoked "sweet hemp." According to Huffingtonpost.com, Lincoln is reported to have written, while serving as President of the United States:

> Two of my favorite things are sitting on my front porch smoking a pipe,
> and smoking a pipe of sweet hemp and playing my Hohner harmonica.

See http://m.huffpost.com/us/entry/164387. There are those who have disputed the authenticity of the evidence underlying this claim, but it is not without significance that the claim has been reported by reputable media sources.

[79] Booth, *supra* note 70 at 116.

Cannabis was also commonly used to treat asthma in the United States.[80] Specifically, pharmaceutical companies began manufacturing cigarettes containing Cannabis ("Legal Cannabis Cigarettes") for the purpose of treating asthma in both England and the United States.[81]

193. Legal Cannabis Cigarettes were so highly regarded as a remedy for asthma in late 19th Century America that the *Boston Medical and Surgical Journal,* in its 1860 publication, advertised Legal Cannabis Cigarettes, which were manufactured by Grimault & Co., as being able to "promptly" cure or relieve "Asthma, Bronchitis, Loss of Voice, and other infections of the respiratory organs."[82]

194. Legal Cannabis Cigarettes continued to be widely advertised and recommended for the treatment of asthma in the United States until the Marijuana Tax Act of 1937 ("MTA") was enacted.

195. As discussed in greater depth *infra*, the MTA effectively outlawed Cannabis in all of its forms.[83]

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[80] *Viewers' Guide to the Botany of Desire: Based on the book by Michael Pollan,* Chapter 3, p. 7, PBS, https://www-tc.pbs.org/thebotanyofdesire/pdf/Botany_of_Desire_Viewers_Guide.pdf (last visited June 29, 2017).

[81] *Id.* Grimault & Co. manufactured "Indian cigarettes" containing Turkish tobacco and Cannabis, which "were promoted as an asthma and cough treatment which would also dull facial pain and aid insomniacs." *Id.*; *see also* Iversen *supra* note 16 at 130; Rowan Robinson, THE GREAT BOOK OF HEMP: THE COMPLETE GUIDE TO THE ENVIRONMENTAL, COMMERCIAL, AND MEDICINAL USES OF THE WORLD'S MOST EXTRAORDINARY PLANT 47 (1996).

[82] Cupples, Upham & Company, *Medical Journal Advertising Sheet*, 83 B. MED. & SURGICAL J. 260 (1870-1871).

[83] DeAngelo, *supra* note 70 at 52.

196. Nineteenth Century Americans utilized the plant for social purposes as well.[84] A "Cannabis fad" took place in the mid-1800s among intellectuals, and the open use of hashish (*i.e.*, compressed Cannabis containing a very high THC content) continued into the 20th Century.[85]

The Beginning of Marijuana Regulation and Prohibition in America

197. The Food and Drugs Act ("FDA") was enacted in 1906, requiring the labeling of over-the-counter drugs, including, *inter alia*, Cannabis.[86]

198. When the Mexican Revolution resulted in a wave of Mexican immigrants to America's Southern border States in 1910, articles in the *New York Sun, Boston Daily Globe* and other papers decried the "evils of ganjah smoking" and suggested that some immigrants used it "to key themselves up to the point of killing."[87]

199. The vast majority of stories urging the public to fear the effects of "marijuana" appeared in newspapers published by William Randolph Hearst, a man who had financial interests in the lumber and paper industries, and therefore, saw the hemp industry as an obstacle to his path to economic success.[88]

200. As a result of the hysteria created by the aforementioned and described horror stories

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[84]*See* Brecher *et al. supra* note 76, PBS *supra* note 46; The Associated Press, *As pot goes proper, a history of weed*, NY DAILY NEWS (Dec. 6, 2012), http://www.nydailynews.com/news/national/pot-proper-history-weed-article-1.1214613.

[85]Brecher, *et al.*, *supra* note 79; PBS *supra* note 46; The Associated Press *supra* note 84.

[86]PBS *supra* note 46; The Associated Press *supra* note 84; PROCON.ORG *supra* note 3.

[87]*Id.*

[88]PROCON.ORG *supra* note 3 (*citing* Mitchell Earleywine, PhD, UNDERSTANDING MARIJUANA: A NEW LOOK AT THE SCIENTIFIC EVIDENCE (2005). "William Randolph Hearst was an up-and-coming newspaper tycoon, owning twenty-eight newspapers by the mid-1920s ... Hearst then dropped the words Cannabis and hemp from his newspapers and began a propaganda campaign against 'marijuana,' (following in Anslinger's footsteps)." *Id.* (citation omitted).

published by pro-paper entrepreneurs, Cannabis became associated with Mexican immigrants, and because there was tremendous fear and prejudice with respect to these newcomers, Cannabis likewise became vilified across the country.[89]

201. The aforementioned and described xenophobia precipitated anti-Cannabis legislation across America. States across the country began outlawing Cannabis.[90]

202. By 1931, 29 states had outlawed Cannabis.[91]

203. This domino effect was largely triggered by the spread, in the 1890s, of false, racist and bigoted horror stories regarding alleged marijuana-induced violence.[92]

204. The aforementioned and described xenophobia was exacerbated by job losses associated with the Great Depression. During that time, "massive unemployment increased public resentment and fear of Mexican immigrants, escalating public and governmental concern [regarding] the [supposed] problem [associated with] marijuana."[93]

205. Harry J. Anslinger ("Anslinger"), the first U.S. Commissioner of the Federal Bureau

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[89]PBS *supra* note 46. "The prejudices and fears that greeted these peasant immigrants also extended to their traditional means of intoxication: smoking marijuana. Police officers in Texas claimed that marijuana incited violent crimes, aroused a 'lust for blood,' and gave its users 'superhuman strength.' Rumors spread that Mexicans were distributing this 'killer weed' to unsuspecting American schoolchildren .... In New Orleans newspaper articles associated the drug with African-Americans, jazz musicians, prostitutes, and underworld whites. 'The Marijuana Menace,' as sketched by anti-drug campaigners, was personified by inferior races and social deviants." Eric Schlosser, *Reefer Madness*, THE ATLANTIC (Aug. 1994), https://www.theatlantic.com/magazine/archive/1994/08/reefer-madness/303476/

[90]*See* The Associated Press *supra* note 84; PROCON.ORG *supra* note 3.

[91]PBS *supra* note 46.

[92]*See* The Associated Press *supra* note 84.

[93]PBS *supra* note 46.

of Narcotics, initially doubted the seriousness of the so-called "marijuana"[94] problem, but after the repeal of alcohol Prohibition in 1933, he began to push vigorously for the nationwide prohibition of Cannabis, ostensibly to create new work for himself.[95]

206. Anslinger then publicly claimed that the use of "evil weed" led to murder, sex crimes, and mental insanity.[96]

207. Anslinger authored sensational articles falsely associating Cannabis with violence and death, with titles such as "Marijuana: Assassin of Youth."[97]

208. Anslinger also made a series of racist statements pertaining to African Americans and Cannabis, including, *inter alia*:

(a) "Reefer makes darkies think they're as good as white men;"

(b) "Marihuana influences Negroes to look at white people in the eye, step on white men's shadows, and look at a white women [sic] twice;"

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[94]The term "'[M]arijuana' came into popular usage in the U.S. in the early 20th century because anti-cannabis factions wanted to underscore the drug's 'Mexican-ness.' It was meant to play off of anti-immigrant sentiments." Matt Thompson, *The Mysterious History Of 'Marijuana'*, NPR (July 22, 2013), http://www.npr.org/sections/codeswitch/2013/07/14/201981025/the-mysterious-history-of-marijuana.

[95]The Associated Press, *supra* note 84; Schlosser, *supra* note 89. "Harry [Anslinger] was aware of the weakness of his new position. A war on narcotics alone - cocaine and heroin, outlawed in 1914 - wasn't enough . . . they were used only by a tiny minority, and you couldn't keep an entire department alive on such small crumbs. He needed more." Cydney Adams, *The man behind the marijuana ban for all the wrong reasons*, CBS NEWS (Nov. 17, 2016), http://www.cbsnews.com/news/harry-anslinger-the-man-behind-the-marijuana-ban/.

[96] Schlosser, *supra* note 89. Much of his rhetoric was blatantly racist in nature. "He claimed that black people and Latinos were the primary users of marijuana, and it made them forget their place in the fabric of American society. He even went so far as to argue that jazz musicians were creating 'Satanic' music all thanks to the influence of pot . . . [and that] cannabis promotes interracial mixing, interracial relationships." Adams, *supra* note 95.

[97]*Id.* In this article, he said: "No one knows, when he places a marijuana cigarette to his lips, whether he will become a philosopher, a joyous reveler in a musical heaven, a mad insensate, a calm philosopher, or a murderer." *The Associated Press*, *supra* note 84.

(c) "Colored students at the University of Minnesota partying with (white) female students, smoking [marijuana] and getting their sympathy with stories of racial persecution. Result: pregnancy;"

(d) "There are 100,000 total marijuana smokers in the US, and most are Negroes, Hispanics, Filipinos and entertainers. Their Satanic music, jazz and swing, result from marijuana usage. This marijuana causes white women to seek sexual relations with Negroes, entertainers and any others;"

(e) "Marijuana is the most violence causing drug in the history of mankind. Most marijuana smokers are Negroes, Hispanics, Filipinos and entertainers;" and

(f) "The primary reason to outlaw marijuana is its effect on the degenerate races."[98]

209. The hysteria that followed was captured in propaganda films such as "Reefer Madness," which purported to show young adults turning to violence and becoming insane after smoking marijuana.[99]

210. This Cannabis-related propaganda ultimately resulted in the passage of the MTA.[100]

211. The MTA effectively outlawed Cannabis by requiring physicians and pharmacists to register and report use of the plant, as well as pay an excise tax for authorized medical and industrial uses.[101]

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[98] *AZQuotes*. Harry J. Anslinger Quotes. http://www.azquotes.com/author/23159-Harry_J_Anslinger

[99] *Id.*; PBS, *supra* note 46.

[100] PBS, *supra* note 46; Thompson, *supra* note 94.

[101] PBS, *supra* note 46. "The Federal law ... maintained the right to use marijuana for medicinal purposes but required physicians and pharmacists who prescribed or dispensed marijuana to register with federal authorities and pay an annual tax or license fee ... After the passage of the Act, prescriptions of marijuana declined ..." PROCON.ORG *supra* note 3 (*citing* Rosalie Liccardo Pacula, PhD, *State Medical Marijuana Laws: Understanding the Laws and Their Limitations*, JOURNAL OF PUBLIC HEALTH POLICY (2002).

212. The MTA was passed even though members of Congress neither understood the chemical properties of Cannabis, nor had they even read the bill itself.[102]

213. Worse, Congress enacted the MTA despite failing to garner support from the medical community for the notion that marijuana was a dangerous substance.[103]

214. During Congressional hearings regarding the proposed MTA, Dr. William Woodward testified:

> There is nothing in the medicinal use of Cannabis that has any relation to Cannabis addiction. I use the word "Cannabis" in preference to the word "marihuana," because Cannabis is the correct term for describing the plant and its products. The term "marihuana" is a mongrel word that has crept into this country over the Mexican border and has no general meaning, except as it relates to the use of Cannabis preparations for smoking ... To say, however, as has been proposed here, that the use of the drug should be prevented by a prohibitive tax, loses sight of the fact that future investigation may show that there are substantial medical uses for Cannabis.[104]

215. Despite enactment of the MTA, the United States Department of Agriculture ("DOA") and the New York Academy of Medicine ("NYAM") both recognized the beneficial uses

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[102]The following exchange between members of Congress several days after the MTA's passage provides some insight into this ignorance: "Bertrand Snell of New York, confessed, "I do not know anything about the bill." The Democratic majority leader, Sam Rayburn of Texas, educated him. "It has something to do with something that is called marihuana," Rayburn said. "I believe it is a narcotic of some kind." Jacob Sullum, *Marijuana Prohibition Is Unscientific, Unconstitutional And Unjust*, FORBES (May 14, 2015), https://www.forbes.com/sites/jacobsullum/2015/05/14/marijuana-prohibition-is-unscientific-unconstitutional-and-unjust/#3d9bbddf6cf0

[103]"[T]here was little scientific evidence that supported Anslinger's claims. He contacted 30 scientists...and 29 told him cannabis was not a dangerous drug. But it was the theory of the single [so-called] ['expert'] who agreed with him that he presented to the public — cannabis was an evil that should be banned — and the press ran with this sensationalized version." Adams, *supra* note 95.

[104]William C. Woodward, MD, Statement to the U.S. House of Representatives Committee on Ways and Means (May 4, 1937).

of Cannabis.[105]

216. In 1942, after America lost its access to Asian fiber supplies during World War II, the DOA released a film entitled "Hemp For Victory" (Exh. 2), which encouraged farmers to grow hemp, praising its uses for production of parachutes and rope to support the war effort.[106]

217. In 1944, NYAM issued the "LaGuardia Report," concluding that, "use of marijuana did not induce violence, insanity or sex crimes, or lead to addiction or other drug use."[107]

218. Despite the lack of evidence that Cannabis is or ever was dangerous, and notwithstanding the DOA's insistence that American farmers continue growing hemp for war supplies, Anslinger continued his anti-Cannabis campaign throughout the 1940s and 1950s.[108]

219. As heroin addiction in America grew worse during the 1950s, Congress responded by increasing penalties on Cannabis-related offenses,[109] in large measure because of Anslinger's bogus claim that "marijuana" was a "gateway drug" that would eventually lead its users to heroin.[110]

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[105]The Associated Press, *supra* note 84.

[106]*Id.*; Gennett *supra* note 55.

[107] The LaGuardia Report found that: "The practice of smoking marihuana does not lead to addiction in the medical sense of the word ... The use of marihuana does not lead to morphine or heroin or cocaine addiction and no effort is made to create a market for these narcotics by stimulating the practice of marihuana smoking... Marihuana is not the determining factor in the commission of major crimes... The publicity concerning the catastrophic effects of marihuana smoking in New York City is unfounded." PROCON.ORG *supra* note 3 (*citing* LaGuardia Committee Report on Marihuana, THE MARIHUANA PROBLEM IN THE CITY OF NEW YORK (1944)).

[108]The Associated Press, *supra* note 84.

[109]Congress included "marijuana" in the Narcotics Control Act of 1956, providing stricter mandatory sentences for marijuana-related offenses. PROCON.ORG *supra* note 3; PBS *supra* note 46. Under the statute, "[a] first-offense marijuana possession carrie[d] a minimum sentence of 2-10 years with a fine of up to $20,000." PROCON.ORG *supra* note 3; PBS *supra* note 34.

[110]The Associated Press, *supra* note 84.

220. The 1960's saw a cultural shift in the way Americans viewed Cannabis. "Use of the drug became widespread among members of the white upper middle class."[111]

221. Reports requested by Presidents Kennedy and Johnson concluded that Cannabis was not a "gateway drug" nor did its use induce violence.[112]

222. In 1969, the United States Supreme Court, in *Leary v. United States*, 395 U.S. 6 (1969) struck down the MTA, ruling that it unconstitutionally violated the Fifth Amendment right against self-incrimination.[113]

II. HOW THE NIXON ADMINISTRATION'S BIGOTRY AND HOSTILITY TOWARD WAR PROTESTERS CONTRIBUTED TO ENACTMENT OF THE CSA

Enactment of the CSA and the Mis-Classification of Cannabis as a Schedule I Drug

223. After the Supreme Court decision in *Leary*, the Nixon Administration urged Congress to enact legislation that would classify drugs under separate schedules according to their medical utility, dangerousness, and addictive potential.[114] Congress heeded the President's request by passing the CSA on October 27, 1970.[115]

224. At the request of the Nixon Administration and upon the *temporary* recommendation

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[111] *Id.*; PBS, *supra* note 46.

[112] PBS, *supra* note 46.

[113] *Leary v. United States*, 395 U.S. 6 (1969); Yasmin Tayag, *Timothy Leary's Arrest For Marijuana Possession Still Matters 50 Years Later*, INVERSE (Mar. 13, 2016), https://www.inverse.com/article/12782-timothy-leary-s-arrest-for-marijuana-possession-still-matters-50-years-later.

[114] Kevin A. Sabe, *The "Local" Matters: A Brief History of the Tension Between Federal Drug Laws and State and Local Policy*, J. GLOBAL DRUG POL'Y. & PRAC. 4 (2006-2010), http://www.globaldrugpolicy.org/Issues/Vol%201%20Issue%204/The%20Local%20Matters.pdf.

[115] *The Controlled Substances Act*, Pub. L. No. 91-513, 84 Stat. 1242, https://www.gpo.gov/fdsys/pkg/STATUTE-84/pdf/STATUTE-84-Pg1236.pdf.

of the Department of Health, Education, and Welfare ("HEW"),[116] Congress placed "Marihuana"[117] under Schedule I, thereby "subject[ing Cannabis] to the most stringent controls under the bill."[118]

225. While "[t]here is almost total agreement among competent scientists and physicians that marihuana is not a narcotic drug like heroin or morphine ... [and to] equate its risks ... with the risks inherent in the use of hard narcotics is neither medically or legally defensible[,]"[119] Congress nonetheless listed Cannabis under the same schedule as opiates and opium derivatives.[120]

226. The placement of Cannabis under Schedule I was intended by Congress to be temporary and subject to further research.[121]

227. The aforementioned and described "further research" was to be conducted by the National Commission on Marihuana and Drug Abuse -- a commission established by the CSA for the purpose of studying, *inter alia*, Cannabis's pharmacological makeup and the relationship (if any)

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[116]It should be noted that HEW recommended that Cannabis remain under Schedule I only "until the completion of certain studies now underway to resolve this issue." H.R. Rep. 91-1444 at 2111 (1970). However, despite HEW's temporary recommendation, President Nixon and his Administration subsequently ignored the CSA-required report (discussed *infra*) which (i) explored the pharmacological effects of Cannabis and (ii) recommended decriminalization of the personal use and possession of Cannabis.

[117]Under the CSA, "The term 'marihuana' means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin." Pub. L. No. 91-513, 84 Stat. 1244.

[118]H.R. Rep. 91-1444 at 2063 (1970).

[119]*Drug Abuse Control Amendment - 1970: Hearings Before the Subcomm. on Public Health and Welfare*, 91 Cong. 179 (1970) (Statement of Dr. Stanley F. Yolles).

[120]Pub. L. No. 91-513, 84 Stat. 1248-49.

[121]*See* H.R. Rep. 91-1444 at 2111 (1970); COMMON SENSE FOR DRUG POLICY, NIXON TAPES SHOW ROOTS OF MARIJUANA PROHIBITION: MISINFORMATION, CULTURE WARS AND PREJUDICE 1 (2002) [hereinafter "CSDP"].

of its use to the use of other drugs (Shafer Commission, defined hereafter).[122]

228. Upon completion of its research, the Shafer Commission was required under the CSA to submit a comprehensive report to the President and to Congress within one year after it received funding to conduct its research.[123]

229. The aforementioned and described report was to consist of the Shafer Commission's findings as well as its recommendations and proposals for legislation and administrative actions with respect to Cannabis.[124]

230. President Nixon thereafter appointed Raymond Shafer (the former "law and order" Governor of Pennsylvania) to Chair the National Commission on Marihuana and Drug Abuse which consisted of Shafer and 12 other individuals, including four medical doctors and four members of Congress ("Shafer Commission").[125]

The Shafer Commission, Created Pursuant to the CSA, Recommends De-Scheduling Cannabis for Personal Use

231. The Shafer Commission conducted "more than 50 projects, ranging from a study of the effects of marihuana on man to a field survey of enforcement of the marihuana laws in six metropolitan jurisdictions."[126]

232. Among the Shafer Commission's findings were that:

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[122]Pub. L. No. 91-513, 84 Stat. 1281.

[123]*Id.*

[124]*Id.*

[125]NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING, at iv (1972).

[126]*Id.* at 2.

(a) "No significant physical, biochemical, or mental abnormalities could be attributed solely to ... marihuana smoking."[127]

(b) "No verification is found of a causal relationship between marihuana use and subsequent heroin use."[128]

(c) "[T]he weight of the evidence is that marihuana does not cause violent or aggressive behavior, if anything, marihuana serves to inhibit the expression of such behavior."[129]

(d) "Neither the marihuana user nor the drug itself can be said to constitute a danger to public safety."[130]

(e) "Most users, young and old, demonstrate an average or above-average degree of social functioning, academic achievement, and job performance."[131]

(f) "Marihuana's relative potential for harm to the vast majority of individual users and its actual impact on society does not justify a social policy designed to seek out and firmly punish those who use it."[132]

(g) Despite the media's portrayal of Vietnam War protesters as being violent while high on Cannabis, the vast majority of those protesters were peaceful and the few who were violent were not under the influence of Cannabis.[133]

(h) "The actual and potential harm of use of the drug is not great enough to justify intrusion by the criminal law into private behavior, a step which our society takes only with the greatest reluctance."[134]

(i) "[A]ll policy-makers have a responsibility to consider our constitutional heritage

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[127]Id. at 61.

[128]*Id.* at 88.

[129]*Id.* at 73.

[130]*Id.* at 78.

[131]*Id.* at 96.

[132]*Id.* at 130.

[133]*Id.* at 99-100.

[134]*Id.* at 140.

> when framing public policy ... we are necessarily influenced by the high place traditionally occupied by the value of privacy in our constitutional scheme. Accordingly, we believe that government must show a compelling reason to justify invasion of the home in order to prevent personal use of marihuana. We find little in marihuana's effects or in its social impact to support such a determination."[135]

233. The Shafer Commission recommended that possession of Cannabis for personal use be de-criminalized on both the State and Federal levels.[136]

234. The Nixon Administration rejected the findings and recommendations by the Shafer Commission.

235. The Nixon Administration refused to accept the findings and recommendations by the Shafer Commission because they were not consistent with: (i) the preordained outcome Nixon demanded; and (ii) the Administration's agenda with respect to Cannabis, which was focused on racism and suppression of political and civil rights.

236. John Ehrlichman, who served as the Nixon Administration's Domestic Policy Chief and was one of the President's closest political advisors, confirmed that the enactment and enforcement of the CSA criminalizing Cannabis was 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 night on the evening news. Did we know we were lying about the

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[135] *Id.* at 142.

[136] *Id.* at 151.

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. 3); *see also* Harper's Magazine, D. Baum, *Legalize it All: How to Win the War on Drugs* (April 2016) (Exh. 4) ("Nixon's invention of the war on drugs as a political tool was cynical ...").

237. Thus, the findings and recommendations of the Shafer Commission were irrelevant to Congress and the Nixon Administration, insofar as the purpose of the CSA was never to "protect" people from the supposed "scourge" of Cannabis use, but rather to harass, intimidate, prosecute and ultimately incarcerate those whom members of the Nixon Administration irrationally regarded as enemies.

238. The irrationality of the Nixon Administration's support for enactment of the CSA and rejection of the Shafer Commission's findings and recommendations is further revealed by tape recordings made by the former President of his Oval Office conversations.

239. Although ostensibly established for the purpose of properly educating lawmakers about Cannabis with respect to the issue of scheduling or de-criminalization,[137] the Shafer Commission was resigned by the Nixon Administration to the status of a bureaucratic, kangaroo court.

240. Nixon repeatedly made clear that the real purpose of the Shafer Commission was to justify what he had already decided to do with respect to Cannabis, ultimately linking support for its de-criminalization to Jews, whom Nixon irrationally claimed were mostly psychiatrists:

NIXON: Now, this is one thing I want. I want a Goddamn

[137]H.R. Rep. 91-1444 at 2111 (1970); CSDP, *supra* note 121 at 1.

> strong statement on marijuana. Can I get that out of this sonofabitching, uh Domestic Council?
>
> HALDERMAN: Sure.
>
> NIXON: I mean, one on marijuana that just tears the ass out of them. I see another thing in the news summary this morning about it. You know, it's a funny thing – every one of the bastards that are out for legalizing marijuana is Jewish. What the Christ is the matter with the Jews, Bob? What's the matter with them? I suppose it's because most of them are psychiatrists, you know ...[138]

241. In September 1971, before his Commission's report was issued, Raymond Shafer visited the White House to speak with Nixon about a morale problem he was experiencing on the Commission – specifically, that the members of the Shafer Commission were concerned that it was "put together by a President to merely tow the party line ..."[139]

242. In response, Nixon made absolutely clear that he did not care what the Shafer Commission's conclusions were.[140]

243. During Shafer's meeting with Nixon, the latter proceeded to direct the Shafer Commission to ignore the obvious differences between Cannabis, and heroin and other dangerous, addictive drugs:

> NIXON: I think there's a need to come out with a report that is totally, uh, uh, oblivious to some obvious, uh, differences between marijuana and other drugs, other dangerous drugs, there are differences.[141]

244. When Shafer tried to assure Nixon that the Commission would not go "off half-

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[138]Tape Recording, May 26, 1971 (Conversation 505-4).

[139]Tape Recording, September 9, 1971 (Oval Office Conversation No. 568-4).

[140]*Id.*

[141]*Id.*

cocked," ostensibly promising to conclude that Cannabis should remain a Schedule I drug, along with drugs that actually were (and are) dangerous, Nixon responded tersely, "Keep your Commission in line!"[142]

245. Nixon threatened Shafer with public recriminations, asserting that conclusions contrary to Nixon's demands "would make your Commission just look as bad as hell."[143]

246. Nixon's threats were not limited to Shafer and his Commission. When Nixon became aware that Bertram Brown, then-director of the National Institute of Mental Health, called for de-criminalization of Cannabis, Nixon responded:

> Now, did you see this statement by [Bertram] Brown, the National Institute of Mental Health, this morning? Uh, he should be out. I mean today, today. If he's a presidential appointee, [what we should] do is fire the son of bitch and I mean today! Get the son of a bitch out of here.[144]

247. In that same conversation, Nixon also tied protesters to use of Cannabis:

> ... these, uh, radical demonstrators that were here the last, ... two weeks ago. They're all on drugs. Oh yeah, horrible, it's just a – when, I say "all," virtually all. And uh, uh, just raising hell.[145]

248. The so-called "radical demonstrators" to whom Nixon was referring were those opposed to the Vietnam War, which, at the time, deeply divided the Country.

249. When the Shafer Commission issued its findings and recommendations, which controverted the Nixon Administration's preordained conclusions and agenda against African

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[142] *Id.*

[143] *Id.*

[144] Tape Recording, May 18, 1971 (Oval Office Conversation No. 500-17).

[145] *Id.*

Americans and war protesters, Nixon responded, predictably:

> Um, I met with Mr. Shafer, uh, I've read the report, uh, eh, it is a report that deserves consideration and will receive it. However, as to one aspect of the report I am in disagreement. I was before I read it, and reading it did not change my mind. Uh, I, uh, oppose the legalization of marijuana, and that includes the sale, its possession and its use.[146]

250. If incarceration of antiwar protestors and African Americans constitutes the measure of the War on Drugs' success, the Nixon 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 CSA] – the majority of whom were African American" (Exh. 3).

251. The Nixon 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 members of the Nixon Administration considered hostile to their interests.

252. Those who opposed Nixon's agendas were cast aside, vilified or ignored. The Shafer Commission's conclusions which conflicted with Nixon's plans were treated similarly.

III. THE EVIDENCE CONFIRMS THAT, DESPITE THE LANGUAGE OF THE CSA AND NIXON'S ENFORCEMENT OF IT, THE FEDERAL GOVERNMENT DOES NOT AND HAS NEVER BELIEVED THAT CANNABIS MEETS THE REQUIREMENTS OF A SCHEDULE I DRUG

253. Under the CSA, drugs are classified by five Schedules, with Schedule I drugs identified as the most dangerous to human life, and Schedule V drugs regarded as the most benign.

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[146]March 24, 1972 Press Conference (Oval Office Conversation No. 693-01).

254. Cannabis is classified as a Schedule I drug under the CSA.[147]

255. To meet the requirements of a Schedule I drug under the CSA, the following elements must all be met:

1. the drug has a high potential for abuse;

2. the drug has "no currently accepted medical use in the United States;" and

3. there is a lack of accepted safety for use of the drug even under medical supervision.[148]

(the Three Schedule I Requirements, previously defined).

256. The Federal Government does not genuinely believe that Cannabis meets the Three Schedule I Requirements.

257. The Federal Government cannot genuinely believe that Cannabis meets the Three Schedule I Requirements.

258. Upon information and belief, the Federal Government has never believed that Cannabis meets the Three Schedule I Requirements.

The Federal Government Has Authorized Dispensing Medical Cannabis to Patients for More than 30 Years

259. In or about 1978, the United States began subsidizing a program pursuant to which medical patients were provided with Cannabis, directly or indirectly, by the Federal Government.

260. The aforesaid and described program, which exists to this day, is known as the Investigational New Drug Program ("IND Program").

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[147]21 C.F.R. 1308.11(d)(23) and (31) (wrongly listed as a hallucinogenic drug, along with heroin, mescaline and LSD).

[148]Pub. L. No. 91-513, 84 Stat. 1247.

261. The first patient to receive Cannabis under the auspices of the IND Program was Robert Randall.

262. Upon information and belief, Mr. Randall used medical Cannabis provided under the auspices of the IND Program to treat his Glaucoma.

263. Thereafter, at least 12 other individuals participated in the IND Program and received Cannabis for treatment of an assortment of diseases and conditions.

264. Upon information and belief, the Federal Government, as of the date of this filing, continues to sponsor and/or provide medical Cannabis to patients pursuant to the IND Program.

265. Upon information and belief, the number of patients currently receiving medical Cannabis through the IND Program is eight.

266. Pursuant to the IND Program, the Federal Government has authorized the University of Mississippi to harvest acres and acres of Cannabis.

267. Upon information and belief, the acres of land harvested by University of Mississippi produce 50,000 to 60,000 Cannabis cigarettes *per year*.

268. Upon information and belief, none of the patients who have participated in the IND Program have suffered any serious side effects from their Cannabis treatments.

269. Upon information and belief, none of the patients who have participated in the IND Program have suffered any harm from their Cannabis treatments.

270. Upon information and belief, no Federal Agencies have ever collected any scientific data from the IND Program reflecting serious adverse impacts caused by Cannabis.

271. Upon information and belief, the Federal Government does not have any information suggesting that any of the patients who have participated in the IND Program have ever suffered any

harm or serious side effects from their Cannabis treatments.

272. The Missoula Chronic Clinical Cannabis Use Study evaluated the long-term effects of heavy Cannabis use by four patients in the IND Program ("Missoula Study").

273. The Missoula Study demonstrated clinical effectiveness in these patients in treating Glaucoma, chronic musculoskeletal pain, spasm and nausea, and spasticity of multiple sclerosis.

274. All four patients who were the subject of the Missoula Study were stable with respect to their chronic conditions.

275. Upon information and belief, none of the four patients who were the subject of the Missoula Study suffered any serious side effects from their Cannabis treatments.

276. Upon information and belief, none of the four patients who were the subject of the Missoula Study suffered any harm from their Cannabis treatments.

277. Upon information and belief, the Federal Government does not have any information suggesting that any of the four patients who were the subject of the Missoula Study suffered any harm or serious side effects from their Cannabis treatments.

278. Upon information and belief, all four patients who were the subject of the Missoula Study were taking fewer standard pharmaceuticals than before they began treatment with medical Cannabis.[149]

279. The Missoula Study is one of thousands of studies which have confirmed that Cannabis provides measurable health benefits while resulting in minimal or no negative side effects.

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[149]http://~cannabis-med.org/jcant/russo chronic_use.pdf.

United States Administrative Law Judge, Francis L. Young, Concludes that Cannabis Safely Provides Medical Benefits to Patients with an Assortment of Illnesses Without Serious Side Effects

280. In 1988, Administrative Law Judge Francis Young, *In the Matter of Marijuana Rescheduling*, DEA Docket No. 86-22, issued a determination arising from a petition by the National Organization for the Reform of Marijuana Laws ("NORML") to reschedule Cannabis ("ALJ Decision") (Exh. 5).

281. In determining whether to recommend rescheduling Cannabis under the CSA, Judge Young focused on two issues – (i) whether Cannabis "has a currently accepted medical use in treatment in the United States, or a currently accepted medical use with severe restrictions;" and (ii) "whether there is a lack of accepted safety for use of the marijuana plant, even under medical supervision" (*Id.* at 6).

282. The two issues analyzed by Judge Young focus on the latter two of the Three Schedule I Requirements necessary under the CSA to classify a drug as a "Schedule I" substance (*Id.* at 8; *see also* Pub. L. No. 91-513, 84 Stat. 1247).

283. If a drug has no medically-accepted use and cannot be safely used or tested even under medical supervision, it may qualify as a Schedule I drug; if the drug does not meet either of these Schedule I Requirements, it cannot be classified as a Schedule I drug (*Id.*).

284. In resolving these issues, Judge Young made a series of "findings of fact" (ALJ Decision at 10-26, 35-38, 40-54, 56-64, Exh. 5)

285. The aforesaid and described findings of fact by Judge Young were "uncontroverted" by the parties (ALJ Decision at 10, 54, 56, Exh. 5).

286. One of the aforesaid and described parties to the proceeding over which Judge Young

presided was defendant DEA (ALJ Decision at 10).

287. Judge Young thereafter devoted the next 15 pages of the ALJ Decision to evidence adduced during the hearing process, confirming that Cannabis constitutes a recognized, well-accepted and superior method of treatment of cancer patients suffering from nausea, emesis and wasting (*Id.* at 10-25).

288. As part of his analysis, Judge Young cited to studies, patient histories, State legislative findings and other evidence of the medical efficacy of Cannabis (*Id.* at 10-26).

289. The DEA did not attempt to dispute the facts upon which the aforesaid analysis by Judge Young was based (*Id.* at 26).

290. Judge Young concluded, based upon "overwhelming" evidence, that:

> marijuana has a currently accepted medical use in treatment in the United States for nausea and vomiting resulting from chemotheraphy treatments in some cancer patients. To conclude otherwise, on this record, would be unreasonable, arbitrary and capricious (*Id.* at 34).

291. Judge Young proceeded to analyze the record with respect to the use of medical Cannabis for the treatment of multiple sclerosis, spasticity and hyperparathyroidism (*Id.* at 40-54).

292. After reviewing the extensive record, Judge Young concluded:

> [M]arijuana has a currently accepted medical use in treatment in the United States for spasticity resulting from multiple sclerosis and other causes. It would be unreasonable, arbitrary and capricious to find otherwise (*Id.* at 54).

293. The DEA did not attempt to dispute the facts comprising the "extensive record" upon which Judge Young relied in reaching the aforesaid and described conclusion pertaining to the medical efficacy of Cannabis for the treatment of spasticity resulting from multiple sclerosis and other causes.

294. Judge Young similarly concluded that medical Cannabis provides therapeutic benefits to those suffering from hyperparathyroidism (*Id.* at 54-55).

295. The DEA did not attempt to dispute the facts comprising the "extensive record" upon which Judge Young relied in reaching the aforesaid and described conclusion pertaining to the medical efficacy of Cannabis for the treatment of hyperparathyroidism.

296. After concluding that Cannabis does, in fact, have currently-accepted medical uses, Judge Young turned to the issue of whether it may be used or tested safely under medical supervision -- the third of the Three Schedule I Requirements (*Id.* at 56).

297. After reviewing the uncontroverted evidence, Judge Young ruled in a series of enumerated paragraphs that, not only is Cannabis *not* dangerous; it is extraordinarily safe. In this regard, Judge Young ruled:

> *4. Nearly all medicines have toxic, potentially lethal effects. But marijuana is not such a substance. There is no record in the extensive medical literature describing a proven, documented cannabis-induced fatality.*
>
> *5. This is a remarkable statement. First, the record on marijuana encompasses 5,000 years of human experience. Second, marijuana is now used daily by enormous numbers of people throughout the world. Estimates suggest that from 20 million to 50 million Americans routinely, albeit illegally, smoke marijuana without the benefit of direct medical supervision. Yet, despite this long history of use and the extraordinarily high numbers of social smokers, there are simply no credible medical reports to suggest that consuming marijuana has caused a single death.*
>
> *6. By contrast, aspirin, a commonly-used, over-the-counter medicine, causes hundreds of deaths each year.*

Id. at 56-57 (emphasis added).

298. Judge Young found that, to induce a lethal response to Cannabis, the patient would

be required to consume approximately 1,500 pounds of marijuana within 15 minutes – an amount and time frame which, as a practical matter, are completely unrealistic (*Id.* at 57).

299. Judge Young thereafter concluded that:

> *In strict medical terms, marijuana is far safer than many foods we commonly consume* (*Id.* at 58) (emphasis added).

300. If these findings were not sufficiently damning to the CSA's mis-classification of Cannabis as a Schedule I drug, Judge Young made it even more clear when he wrote:

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

Id. at 58-59 (emphasis added).

301. Judge Young thereafter recommended that Cannabis be removed from Schedule I of the CSA (*Id.* at 66).

302. The DEA did not accept Judge Young's findings or recommendation.

303. The ALJ's Decision was issued years before 29 States and the District of Columbia legalized Cannabis for medical use; before eight States plus the District of Columbia legalized Cannabis for recreational use; before two U.S. Territories approved the use of whole-plant Cannabis.

States Begin to Legalize Cannabis

304. In 1996, California became the first State to legalize Cannabis for medical use.

305. Oregon, Alaska and Washington (State) followed soon thereafter and also legalized Cannabis for medical use.

306. Today, the following States have legalized Cannabis for medical and/or recreational use:

- California
- Oregon
- Alaska
- Washington (State)
- Maine
- Hawaii
- Colorado
- Nevada
- Montana
- Vermont
- New Mexico
- Michigan
- New Jersey
- Arizona
- Massachusetts
- New York
- Maryland
- Minnesota
- Florida
- Delaware
- Ohio
- Pennsylvania
- Illinois
- North Dakota
- Arkansas
- Connecticut
- New Hampshire
- Rhode Island
- West Virginia

307. In addition to the States, the following territories, protectorates and other areas under United States jurisdiction have legalized Cannabis for medical and/or recreational uses:

- Washington, DC[150]
- Puerto Rico
- Guam

308. The method of legalization of Cannabis by States and other areas within Federal jurisdiction has varied from State constitutional amendment, to legislative enactment, to voters' referenda.

309. Today, more than 62% of Americans live within a jurisdiction in which Cannabis is legal to consume for medical and/or other purposes.

310. California, the world's sixth largest economy, has legalized Cannabis for recreational purposes as well.

311. State-legal Cannabis has been available to millions of Americans for decades.

312. Cannabis has been available illegally (*i.e.*, on the "black market") to millions of Americans for approximately 100 years.

313. Upon information and belief, no credible medical report has confirmed a single fatality in the United States from the consumption of Cannabis.

314. By contrast, the following "legal" substances have caused the following number of

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[150]Although initially barring Washington, DC from implementing a medical Cannabis program in or about 1998, Congress took no action to prevent enactment of a medical legalization program in our Nation's Capitol in 2011. Thus, Washington, DC was able to institute a medical Cannabis program in 2011. Thereafter, in 2014, Washington, DC approved a decriminalization program for Cannabis. Although subjected to a mandatory 30-day review period to be undertaken by Congress under the District of Columbia Home Rule Act, Congress took no action. Thus, although afforded the opportunity to stop implementation of Washington, DC's decriminalization program, Congress decided not to do so.

deaths in the United States on an annual basis:

(a) tobacco -- 480,000 deaths per year;[151]

(b) alcohol – 88,000 deaths per year;[152]

(c) pharmaceutical opioid analgesics – 18,893 per year;[153]

(d) acetaminophen – 1,500 deaths from 2001 to 2010.[154]

The Federal Government Admits and Obtains a Medical Patent Based Upon its Assertion That Cannabis Provides Medical Benefits

315. In or about 1999, the United States Government filed a patent application, entitled:

CANNABINOIDS AS ANTI-OXIDANTS AND NEUROPROTECTANTS

See Exh. 6 ("U.S. Cannabis Patent") (capitalization and underscoring in original).

316. In the U.S. Cannabis Patent application ("U.S. Cannabis Patent Application"), the Federal Government made representations to the United States Patent and Trademark Office ("USPTO") relative to the effects of Cannabis on the human body (*Id.*).

317. In the U.S. Cannabis Patent Application, the Federal Government represented to the USPTO that Cannabis provides medical benefit to, and thus has medical uses for, patients suffering with an assortment of diseases and conditions. In this regard, the Federal Government asserted that:

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

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

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

[154]http://www.huffingtonpost.com/2013/09/24/tylenol-overdose_n_3976991.html. This does not include the 78,000 Americans who are rushed to emergency rooms annually, or the 33,000 hospitalizations in the United States each year, all due to ingestion of acetaminophen. *Id.*

> Cannabinoids have been found to have antioxidant properties, unrelated to NMDA receptor antagonism. This new found property makes cannabinoids useful in the treatment and prophylaxis of wide variety of oxidation associated diseases, such as ischemic, age-related, inflammatory and autoimmune diseases. The cannabinoids are found to have particular application as neuroprotectants, for example, in limiting neurological damage following ischemic insults, such as stroke and trauma, or in the treatment of neurodegenerative diseases, such as Alzheimer's Disease, Parkinson's Disease, and HIV Dementia (*Id.* at Abstract).

318. In support of its U.S. Cannabis Patent Application, the Federal Government cited a series of studies and academic papers, which, the Federal Government represents, support its conclusion that Cannabis does, in fact, provide medical benefits, including conditions which are listed and which are not listed on the U.S. Cannabis Patent Application (*Id.*).

319. The U.S. Cannabis Patent Application directly and unmistakably controverts the Federal Government's continued classification of Cannabis as a Schedule I drug, which, it is emphasized, requires a finding that it lacks any medical use.

320. Simply put – the Federal Government cannot maintain, on its U.S. Cannabis Patent Application, that Cannabis does, in fact, have curative properties that provide medical benefits to patients suffering from an assortment of diseases while also simultaneously "finding" that Cannabis has no medical application whatsoever for purposes of application and enforcement of the CSA.[155]

The Justice Department Issues Guidelines for Prosecution of Medical Cannabis Patients (2009)

321. As State-legal Cannabis legislation and other approvals of medical Cannabis continued to pass throughout the United States, the Federal Government was confronted with a

[155]Because the U.S. Cannabis Patent was granted by the USPTO, the Federal Government is estopped from contesting the assertions contained in its Application.

problem – under the CSA, the cultivation, harvesting, extraction, distribution, sale and/or use of Cannabis was (and is) illegal; however, States were granting their citizens permission to cultivate, distribute, sell, and/or use Cannabis for medical purposes.

322. On or about October 19, 2009, defendant DOJ, while professing the importance of enforcing the CSA as it pertains to Cannabis, acknowledged the existence of State laws authorizing the use of "medical marijuana," and directed that United States Attorneys:

> should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing State laws providing for the medical use of marijuana. For example, prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable State law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana, is unlikely to be an efficient use of limited federal resources.

See October 19, 2009 Memorandum by Deputy Attorney General of the United States, David W. Ogden ("Ogden Memorandum"), Exh. 7.

323. Thus, notwithstanding the provisions of the CSA, prohibiting cultivation, distribution, sale, possession and/or use of Cannabis, as a drug so dangerous that it cannot be tested under strict medical supervision, the DOJ expressly discouraged United States Attorneys from using federal resources to prosecute violations of the CSA by users of Cannabis for medical purposes in State-legal jurisdictions.

The Justice Department Adopts the Cole Memorandum

324. On or about August 29, 2013, defendant DOJ promulgated what has come to be known as the "Cole Memorandum" (Exh. 8).

325. Under the Cole Memorandum, the DOJ, consistent with the Ogden Memorandum,

officially recognized that patients using State-legal medical Cannabis, in accordance with the laws of the States in which they reside, and businesses cultivating and/or selling State-legal Cannabis for medical purposes, are not appropriate targets for federal investigation, prosecution and incarceration (*Id.* at 3).

326. The net effect of the Cole Memorandum was to inform medical-Cannabis businesses operating in accordance with the laws of the States in which such businesses operate, and patients who use medical Cannabis in accordance with the laws of the States in which such patients reside, that they would not be prosecuted, provided that such Cannabis businesses and medical Cannabis patients did not engage in conduct which encroached upon eight (8) specific federal priorities, identified in the Cole Memorandum as follows:

1. Preventing the distribution of marijuana to minors;

2. Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;

3. Preventing the diversion of marijuana from States where it is legal under State law in some form to other States;

4. Preventing State-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;

5. Preventing violence and the use of firearms in the cultivation and distribution of marijuana;

6. Preventing drugged driving and the exacerbation of other adverse public health consequences allegedly associated with marijuana use;

7. Preventing the growing of marijuana on public lands and the supposed attendant public safety and environmental dangers posed by marijuana production on public lands; and

8. Preventing marijuana possession or use on federal property.

See Cole Memorandum, Exh. 8.

The Treasury Department Provides Federal Authorization to Banks to Transact with Cannabis Businesses

327. On February 14, 2014, the Financial Crimes Enforcement Network ("FinCEN") issued a Memorandum providing guidance to clarify Bank Secrecy Act ("BSA") expectations for financial institutions seeking to provide services to marijuana-related businesses ("FinCen Guidance") (Exh. 9 at 1).

328. FinCEN issued the FinCEN Guidance "in light of recent state initiatives to legalize certain marijuana-related activity and related guidance by the DOJ [*i.e.*, the Cole Memorandum] concerning marijuana-related enforcement priorities" (*Id.*).

329. In essence, the FinCEN Guidance was the Treasury Department's own version of the Cole Memorandum, except that the FinCEN Guidance was sent to private actors (banks and other financial institutions), informing them how it is that they can transact with Cannabis businesses – businesses that are technically illegal under the CSA.

330. FinCEN provides guidance and advice to banks and other financial institutions concerning how they can engage in conduct which is illegal under the CSA, as well as under 18 U.S.C. §1956 (laundering of monetary instruments).

331. By the FinCEN Guidance, the Treasury Department provided, *inter alia*, the following instructions on how to transact with Cannabis businesses:

> The Financial Crimes Enforcement Network [] is issuing guidance to clarify Bank Secrecy Act ("BSA") expectations for financial institutions seeking to provide services to marijuana-related businesses. FinCEN is issuing this guidance in light of

> recent state initiatives to legalize certain marijuana-related activity and related guidance by the U.S. Department of Justice ("DOJ") concerning marijuana-related enforcement priorities. *This FinCEN guidance clarifies* ***how financial institutions can provide services to marijuana-related businesses*** *consistent with their BSA obligations, and aligns the information provided by financial institutions in BSA reports with federal and state law enforcement priorities.* ***This FinCEN guidance should enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses***.

See FinCEN Guidance at 1 (Exh. 9) (emphasis added).

332. Under the provisions of the FinCEN Guidance, the Federal Government provided authorization to banks and other financial institutions to transact with Cannabis businesses.

333. Under the provisions of the FinCEN Guidance, the Treasury Department directed that financial institutions, prior to engaging in transactions with medical Cannabis businesses, undertake due diligence to ascertain whether the latter are operating in conformity with the provisions of the Cole Memorandum (*Id.*).

334. The Ogden Memorandum, Cole Memorandum and FinCEN Guidance each state, in form and substance, that the CSA has not been superseded and remains in effect; however, each aforesaid Memorandum/Guidance makes equally clear that the United States Government should not interfere with State-legal medical-Cannabis businesses, and should not otherwise enforce the CSA as against such businesses or the patients who use the products cultivated and dispensed by such businesses, provided that all such businesses and patients act in conformity with the laws of the States in which such businesses operate and in which such patients reside.

335. The 2009 Ogden Memorandum, 2013 Cole Memorandum and 2014 FinCEN Guidance cannot be reconciled with the Federal Government's classification of Cannabis as a

Schedule I drug that is so dangerous that it has no medical purpose and cannot be tested even under strict medical supervision.

The United States Surgeon General Acknowledges Medical Benefits of Cannabis Use/The DEA Removes a Series of False Statements Concerning Cannabis from its Website

336. On or about February 4, 2015, the then-United States Surgeon General, Dr. Vivek Murthy, appeared on CBS This Morning, a nationally-televised daily talk show.

337. While on CBS This Morning, the U.S. Surgeon General publically acknowledged that Cannabis can safely provide bonafide medical benefits to patients ("Surgeon General's Acknowledgment").

338. The DEA, earlier this year, removed from its website: all references to Cannabis as a supposed "gateway drug;" as a drug that causes "permanent brain damage;" and as a drug that leads to psychosis ("DEA's Website Revision").

339. The DEA's Website Revision is consistent with the Surgeon General's Acknowledgment.

340. Prior to the DEA's Website Revision, a petition was filed on behalf of Americans for Safe Access, alleging that the DEA's website contained false information ("ASA Petition") (Exh. 10).

341. The ASA Petition was filed under the Information Quality Act ("IQA") (*Id.*).

342. Under the IQA, Federal Agencies are required to devise guidelines to ensure the "quality, objectivity, utility, and integrity of information" they disseminate.[156]

[156]44 U.S.C. §3516, Statutory and Historical Notes.

343. These requirements are designed to ensure that, *inter alia*, the information contained on the websites maintained by Federal Agencies is accurate.

344. Upon information and belief, it was in response to the ASA Petition, asserting that the information contained on the DEA website was inaccurate, that the DEA effected its Website Revision. In other words, the DEA, rather than litigating the inaccuracy of the information contained on its website, changed that information and effected its Website Revision in recognition that the language asserting that Cannabis is a supposed "gateway drug" that causes psychosis and permanent brain damage was and is false.[157]

Congress Precludes the DOJ from Using Legislative Appropriations to Prosecute State-Legal Cannabis Cultivation, Distribution, Sale and Use

345. In December 2014, Congress enacted a rider to an omnibus appropriations bill, funding the Federal Government through September 30, 2015 ("2014 Funding Rider").

346. Under the 2014 Funding Rider, Congress expressly prohibited the DOJ from using the appropriations provided thereby to prosecute the use, distribution, possession or cultivation of medical Cannabis in States where such activities are legal.

347. The 2014 Funding Rider includes the following language:

> None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, to prevent such States from implementing their own State laws that authorize the use,

[157]The FDA also removed all references to Cannabis as a supposed "gateway drug" on its website.

distribution, possession, or cultivation of medical marijuana.

See Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014).

348. The States referenced in the 2014 Funding Rider are those that, as of the date of the 2014 Funding Rider, had established State-legal medical Cannabis programs.

349. Various short-term measures extended the 2014 Funding Rider through December 22, 2015.

350. On December 18, 2015, Congress enacted a new appropriations act, which appropriated funds through the fiscal year ending September 30, 2016, and included essentially the same rider as the 2014 Funding Rider. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015) (adding Guam and Puerto Rico and changing "prevent such States from implementing their own State laws" to "prevent any of them from implementing their own laws").

351. In 2017, Congress enacted another rider, updating the 2014 Funding Rider to include the States that added medical-Cannabis programs over the preceding three years, and again restricting the use of Congressional appropriations to prosecute only those violations of the CSA in which the defendants cultivate, distribute, and/or sell Cannabis in a manner that violates State-legal medical marijuana programs ("2017 Funding Rider"). In this regard, the 2017 Funding Rider states:

> None of the funds made available in this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska, Arkansas, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma,

> Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, or with respect to the District of Columbia, Guam, or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

See Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, §537 (2017).

IV. SUMMARY OF THE ALLEGATIONS AND EVIDENCE THAT THE FEDERAL GOVERNMENT DOES NOT AND CANNOT BELIEVE THAT CANNABIS MEETS THE THREE SCHEDULE I REQUIREMENTS

352. The net effect of the foregoing allegations and evidence confirms beyond serious question that the Federal Government does not and cannot believe that Cannabis: (i) has no medical use, and (ii) cannot be used or tested even under strict medical supervision. Indeed, it bears emphasis that Cannabis:

- has been widely used as a legal medication for more than 10,000 years, including by the Founding Fathers of this Country;
- was legal until the end of Prohibition threatened to leave Anslinger without any responsibilities;
- was found by the Shafer Commission to be safe enough to decriminalize for personal use;
- has been dispensed by the Federal Government to participants in the IND Program for more than 30 years without evidence of harm to any of the patients;
- was found by ALJ Young to be the safest drug available in the world, based upon evidence that the DEA never attempted to contest;
- has been used continuously as part of State-legal programs for medical purposes throughout the United States, beginning in 1996;
- has been available to millions of Americans on a daily basis for decades without a single fatality – a record that neither coffee nor aspirin can claim;

- is the subject of the successful U.S. Cannabis Patent Application, in which the Federal Government admitted (indeed, bragged) that Cannabis provides safe, medical benefits to patients suffering from an assortment of illnesses, diseases and conditions;

- was identified by the U.S. Surgeon General as having medical benefits -- a conclusion that has been separately reached by doctors, scientists, and academics during the course of conducting thousands of studies and tests;

- cannot be the subject of a federal criminal prosecution under the CSA unless cultivated, distributed, sold or used in violation of State law; and

- is the subject of established federal policy which recognizes the medical benefits of Cannabis.

353. Indeed, the notion that the Federal Government persists in classifying Cannabis as a Schedule I drug, while ignoring the undeniable addictive and lethal chemical properties of nicotine and tar, and alcohol, which kill millions of Americans every year, renders this mis-classification of Cannabis utterly irrational and absurd.

V. THE PETITIONING PROCESS IS ILLUSORY AND FUTILE

Prior Petitions to Re-Schedule and/or De-Schedule Cannabis

354. Under the CSA, members of the public are afforded the supposed opportunity to file petitions to request that medications and drugs be re-scheduled and/or de-scheduled. 21 U.S.C. §811 and 21 C.F.R. §1308.

355. The legal mechanism available to the public to file petitions to change the classification of drugs and medications previously scheduled under the auspices of the CSA is illusory. Petitions filed with the DEA and/or any other Federal agency linger for years, often decades, without any substantive action.

356. The following chart of petitions filed with the DEA, reflects the futility of the petitioning process:

Requested Action	Type of Petitioner(s)	Date Filed	Date Decided	Delay	Outcome
Transfer any injectable liquid containing Pentazocine (opioid derivative) from Schedule V to Schedule III	7 Individuals	10/5/1971	1/10/1979	8 years	Denied
Requested Action	**Type of Petitioner(s)**	**Date Filed**	**Date Decided**	**Delay**	**Outcome**
Remove Cannabis from Schedule I or transfer to Schedule V	NORML, Cannabis Corporation of America (CCA); Alliance for Cannabis Therapeutics (ACT); Individuals	5/18/72	3/26/92	20 years	Denied
Transfer Cannabis from Schedule I to Schedule II	Individual	9/6/92	5/16/94	N/A	DEA declined to accept the filing of the petition

Transfer Marinol from Schedule II to Schedule III	UNIMED Pharmaceuticals Inc. (manufacturer of Marinol)	2/3/95	7/2/99	4 years	Granted

Requested Action	Type of Petitioner(s)	Date Filed	Date Decided	Delay	Outcome
Remove Cannabis from Schedule I	Individual; High Times Magazine	7/10/95	3/20/01	5.5 years	Denied
Remove Cannabis containing 1% or less of THC from Schedule I when used for Industrial Hemp	Individual	3/23/98	12/19/00	2.5 years	Denied
Transfer Hydrocodone combination products (*i.e.*, products mixing Hydrocodone with other drugs) from Schedule III to Schedule II	Physician	Jan. 99	8/22/14	15.5 years	Granted
Transfer Cannabis to Schedule III, IV, or V	The Coalition for Rescheduling Cannabis	10/9/02	6/21/11	8.75 years	Denied
Remove Cannabis from Schedule I	Individual	May 12, 2008	Dec. 19, 2008	N/A	DEA declined to accept the filing of the petition
Transfer Cannabis to any Schedule other than Schedule I	Individual	12/17/09	7/19/16	6.5 years	Denied
Transfer Cannabis to Schedule II	Governors Chafee & Gregoire	11/30/11	7/19/16	5.5 years	Denied

Requested Action	Type of Petitioner(s)	Date Filed	Date Decided	Delay	Outcome
Remove Industrial Hemp plants (*i.e.*, Cannabis sativa L. plants with a THC concentration of not more than three tenths of one percent) from Schedule I	Hemp Industries Association ("HIA") & the Kentucky Hemp Industry Council	6/1/16	Pending	N/A	Pending

The Petition Process for Changes in the Classification of Cannabis is Futile, Rife with Delays, Subject to Systemic and Institutional Bias and Otherwise Constitutes a Hollow Remedy

357. Excluding the petitions which are either still pending or were never decided at all (because they were rejected based upon standing or other grounds), the average delay from filing a petition to reschedule a drug under the CSA to the date of the petition's resolution is approximately nine (9) years.

358. Persons seeking to re-classify a Schedule I drug or medication based upon an urgent medical need, including and especially, Alexis and Jagger, are resigned to waiting until ostensibly the drug would no longer serve any useful purpose, because the illness, disease and/or condition has resolved or the patient has died.

359. The petitioning process is a hollow remedy.

360. Worse than the entrenched, systemic delays imposed by the Federal Government is the institutional bias of government officials which all but assures denial of applications pertaining to Cannabis.

361. As referenced *supra*, in November 2015, defendant Rosenberg of the defendant DEA, which is responsible for responding to petitions to reclassify drugs under the CSA, publically

asserted that medical Cannabis is "a joke" -- essentially pre-judging any petition to re-schedule or de-schedule Cannabis.

362. As reported by Politico, defendant Sessions, "[a]s a U.S. Attorney in Alabama in the 1980s, [] said he thought the KKK 'were [sic] OK until I found out they smoked pot.'"

363. On December 5, 2016, Politico reported that, in April 2016, defendant Sessions disclosed that he believes that: "Good people don't smoke marijuana."

364. As the Attorney General of the United States, defendant Sessions would have the opportunity to reclassify Cannabis; however, as with defendant Rosenberg, defendant Sessions has pre-judged the issue.

365. Upon information and belief, Rosenberg did not review any medical or scientific studies prior to asserting, in or about November 2015, that medical Cannabis is a joke.

366. Upon information and belief, Sessions did not review any medical or scientific studies prior to issuing his statement in the 1980s, in which he said that he thought the KKK "were [sic] OK until I found out they smoked pot."

367. Upon information and belief, Sessions did not review any medical or scientific studies prior to issuing his statement on or about December 5, 2016 that "Good people don't smoke marijuana."

368. Upon information and belief, defendants Sessions and Rosenberg, in condemning medical Cannabis and those who recommend and/or use it, were not speaking from experience or an in-depth medical or scientific understanding of the chemical properties of Cannabis and its impact on the body's metabolic systems and processes; nor were their assertions the product of an analysis concerning whether medical Cannabis has been accepted by the medical community. Rather, the

opinions of defendants Sessions and Rosenberg are based upon political (not scientific) distinctions made by a diminishing minority of vocal public officials who, without conducting any scientific review or analysis, *assume* that any conduct associated with Cannabis is necessarily dangerous and otherwise bad based upon unconstitutional criteria.

369. The unconscionable delays in processing petitions, coupled with the institutional bias at the DOJ and DEA against re-classifying Cannabis, renders the petitioning process illusory and futile. In short, the Federal Government does not provide real "due process" to those aggrieved by the mis-classification of Cannabis under the CSA. This lawsuit is the only mechanism by which patients in need of medical Cannabis can lawfully and without risk of prosecution safely obtain and use it.

370. Even assuming *arguendo* that the petitioning process were not futile – and it is – it would not provide a meaningful remedy for Plaintiffs insofar as the petition process: (i) cannot resolve the substantial constitutional issues which Defendants have repeatedly declined to address in a manner consistent with the provisions of the United States Constitution; and (ii) cannot provide Plaintiffs with a genuine opportunity for adequate relief (specifically, a declaration that the CSA, as it pertains to Cannabis, is unconstitutional), insofar as the relief requested herein is beyond the authority of Defendants DEA, DOJ, Sessions and/or Rosenberg.

FIRST CAUSE OF ACTION
(On behalf of all Plaintiffs)

371. Plaintiffs repeat and reallege each and every allegation of the preceding ¶¶1-370, as if set forth fully herein.

372. Under the Due Process Clause of the Fifth Amendment, no person may be "deprived

of life, liberty or property without due process of law" ("Due Process Clause").

373. Under well-established constitutional jurisprudence, laws which are not rationally related to a legitimate interest of the Federal Government violate the Due Process Clause.

374. The CSA classifies drugs into five scheduled categories – Schedule I, Schedule II, Schedule III, Schedule IV, and Schedule V.[158]

375. Cannabis has been classified as a Schedule I drug, along with, among others, heroin, mescaline, and LSD. As such, under the CSA as it pertains to Cannabis, the cultivation, distribution, prescription, sale, and/or use of Cannabis constitutes a violation of Federal Law, subjecting those accused of such a crime to prosecution and incarceration.

376. The stated basis for enactment and implementation of the CSA as it pertains to Cannabis was that the drug meets the Three Schedule I Requirements, *i.e.*:

1. the drug has a high potential for abuse;
2. the drug has "no currently accepted medical use in the United States;" and
3. there is a lack of accepted safety for use of the drug even under medical supervision.[159]

377. In view of the facts and evidence set forth above and summarized below, the Federal Government does not believe that Cannabis meets the aforementioned Three Schedule I Requirements.

378. Cannabis has been cultivated and used as a medication for thousands of years.

379. Cannabis was cultivated and used as a medication in Colonial America and in post-

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[158]Pub. L. No. 91-513, 84 Stat. 1247.

[159]*Id.*

Colonial America, including by the Framers of our Constitution.

380. Cannabis was cultivated and used throughout the 19th Century, during which it was one of America's three leading crops for cultivation.

381. Cannabis was listed in prominent pharmacological publications throughout the second half of the 19th Century and the beginning of the 20th Century as a medication that treats dozens of diseases and conditions.

382. The Shafer Commission confirmed that Cannabis is not dangerous and should be de-criminalized for personal use.

383. Since in or about 1978, the Federal Government has been continuously dispensing and/or authorizing the dispensing of Cannabis to between at least 8 to 13 patients for the treatment of an assortment of diseases, illnesses and medical conditions.

384. In 1988, ALJ Francis Young, after a review of the uncontroverted medical evidence, concluded that Cannabis provides medical benefits to patients, none of whom have been endangered by it (Exh. 5).

385. Beginning in 1996, States throughout the Country have instituted medical and recreational Cannabis programs without federal intervention.

386. Today, more than 62% of the American public resides in States in which whole-plant Cannabis is legal for medical and/or recreational purposes; thus, millions of Americans have the opportunity to use Cannabis on a daily basis.

387. Upon information and belief, there have never been any documented deaths in the United States due to the consumption of Cannabis.

388. Since 2009, the DOJ has consistently directed its U.S. Attorneys to refrain from

prosecuting patients, physicians and businesses involved in the use, cultivation and/or sale of Cannabis if the same is consistent with State-legal medical-Cannabis programs (Exhs. 8 and 9).

389. Since 2014, the Treasury Department has authorized banking and other financial institutions to engage in transactions with Cannabis businesses that act in conformity with State-legal medical-Cannabis programs (Exh. 9).

390. For the last three years, Congress has de-funded the DEA and DOJ from prosecuting individuals and businesses engaging in conduct that is consistent with State-legal medical-Cannabis programs.

391. In or about 2002, the United States Government repeatedly asserted in its U.S. Cannabis Patent Application that, based upon a series of scientific studies, Cannabis has accepted medical uses for the treatment of brain diseases and disorders (Exh. 6).

392. After obtaining a U.S. Cannabis Patent, the Federal Government executed license agreements to private businesses to engage in medical Cannabis cultivation and extraction.

393. While the Federal Government may conceivably argue that the initial and continued classification of Cannabis as a Schedule I drug is necessary because of its alleged high potential for abuse, supposed lack of medical use, and purported risks of potential harm to those who use it even under medical supervision, the foregoing history confirms that the United States Government does not believe the story it is telling.

394. Based upon the foregoing, the Federal Government, not only does not believe that Cannabis meets the Three Schedule I Requirements of the CSA, but further, upon information and belief, no rational person could reasonably believe that it meets such Requirements.

395. There is no credible evidence that Cannabis has a high potential for abuse.

396. There is no credible evidence that Cannabis lacks any medical benefit; to the contrary, the overwhelming weight of evidence confirms that Cannabis has, for millennia, from Ancient Chinese and Egyptian societies, to our Founding Fathers, to modern-day America, provided substantial medical benefits to the patients who have been treated with medical Cannabis.

397. There is no credible evidence that Cannabis poses a serious risk of harm when used under medical supervision; to the contrary, the overwhelming weight of evidence confirms that, although virtually all medications have some toxic, potentially lethal effects, "marijuana is not such a substance" (ALJ Decision at 56, Exh. 5). And no one in the United States has ever died from using Cannabis (*Id.*).[160]

398. Because Cannabis does not meet the criteria required for classification of a Schedule I drug and is, in fact, safe for use, and because the Federal Government is fully aware of the foregoing but nonetheless insists upon continuing the mis-classification of Cannabis as a Schedule I drug, the CSA and its implementation is irrational, arbitrary, capricious and is not rationally related to any legitimate government interest.

399. The only credible explanation for the enactment of the CSA and its subsequent and continuing enforcement by the Federal Government lies in the politically-repressive, xenophobic and racial animus described by John Ehrlichman and other members of the Nixon Administration – an animus proscribed by the Constitution of the United States.

400. As set forth above, the petitioning process for drug scheduling does not constitute "due process" within the meaning of the Fifth Amendment to the Constitution, insofar as the petition

[160]This allegation does not include reference to those who may have used black-market synthetic Cannabis.

process: (i) is rife with unconstitutional delays that render review impracticable for the Plaintiffs (and most medical Cannabis patients); (ii) is rife with institutional bias, by which a vocal minority of public officials refuse to consider the overwhelming weight of medical evidence establishing that Cannabis provides safe medical benefits; (iii) cannot resolve the substantial constitutional issues which Defendants have repeatedly declined to address in a manner consistent with the provisions of the United States Constitution; and (iv) cannot provide Plaintiffs with a genuine opportunity for adequate relief, insofar as the relief requested requires correcting an Act of Congress which is beyond the authority of Defendants DEA, DOJ, Sessions and/or Rosenberg.

401. Alexis, Jose, and Jagger need medical Cannabis for the treatment of their diseases and conditions, but cannot safely use it without risking their freedom or other rights to which they are legally and constitutionally entitled. Washington desires to open a Cannabis business through the use of the MBE Program, but cannot do so, as he would be ineligible to receive such benefits and would be risking potential incarceration were he to file the required paperwork for MBE benefits. The CCA seeks, on behalf of its membership, termination of disproportionate enforcement of the CSA as it pertains to Cannabis against persons of color. Defendants maintain, notwithstanding the overwhelming weight of the evidence in the record (including statements made by the Federal Government itself that Cannabis has curative properties and is safe), that Cannabis is somehow an addictive, dangerous and lethal drug on par with heroin, mescaline and LSD without any medical benefits whatsoever and thus must remain illegal and continue to be enforced in the manner practiced today.

402. Meanwhile, substances that undeniably provide no medical benefit whatsoever, are highly addictive and cause hundreds of thousands of deaths per year, including for example, tobacco,

remain widely available and un-scheduled under the CSA.

403. An actual case in controversy exists between Plaintiffs and Defendants, by which Plaintiffs need and/or desire to use and/or engage in business transactions involving Cannabis, whereas Defendants falsely and unconstitutionally maintain that possession and use of Cannabis is lethally dangerous and thus must remain illegal.

404. By reason of the foregoing, Plaintiffs are entitled to issuance of an order and judgment: (i) declaring that the CSA, as it pertains to Cannabis, is irrational, arbitrary, capricious and not rationally related to any legitimate governmental interest, and thus unconstitutional; and (ii) permanently enjoining Defendants from enforcing the CSA.

405. Plaintiffs have no remedy at law.

SECOND CAUSE OF ACTION
(On behalf of the CCA Only)

406. Plaintiffs repeat and reallege each and every allegation of the preceding ¶¶1-405, as if set forth fully herein.

407. The United States Supreme Court has consistently held that discrimination may be so unjustifiable as to constitute a violation of the Due Process Clause of the Fifth Amendment.[161]

408. The mis-classification of Cannabis as a Schedule I drug under the CSA was effectuated in an environment tainted by racial discrimination and animus, hostile to the interests of African Americans and other persons of color.

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[161] *Davis v. Passman*, 442 U.S. 228, 234-35 (1979); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n. 2 (1975); *Cruz v. Hauck*, 404 U.S. 59, 62 n. 10 (1971); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

409. The CSA, as it pertains to Cannabis, was implemented in an environment tainted by racial discrimination and animus, hostile to the interests of African Americans and other persons of color.

410. The CSA, as it pertains to Cannabis, has been enforced in a manner reflective of racial discrimination and animus, hostile to the interests of African Americans and other persons of color.

411. Although Cannabis is consumed and used equally by African Americans and White Americans, African Americans are disproportionately the subject of investigations, prosecutions, convictions and incarcerations under the CSA.

412. Upon information and belief, the racial animus underwriting the mis-classification of Cannabis as a Schedule I drug under the CSA continues to this day, resulting in convictions and the incarceration of African Americans and other persons of color in disproportionate numbers.

413. The mis-classification of Cannabis as a Schedule I drug under the CSA was also intended to suppress the First Amendment rights and interests of those protesting the Vietnam War, including such rights as freedom of speech and the right to petition the government for a redress of grievances.

414. Upon information and belief, the Federal Government tactically enforced the CSA against war protesters and persons of color insofar as members of the Nixon Administration irrationally believed such persons to be enemies of America's war on communism.

415. In enacting and disproportionately enforcing the CSA against persons of color, the Federal Government violated, and continues to violate, the Due Process Clause of the Fifth Amendment and the requirements of Equal Protection.

416. In enacting and disproportionately enforcing the CSA against those protesting the

Vietnam War, the Federal Government violated, and continues to violate, the First Amendment, the Due Process Clause of the Fifth Amendment and the requirements of Equal Protection.

417. The Federal Government lacks a compelling interest in the enactment of a statute that discriminates against persons of color, and violates and has violated the First and Fifth Amendment rights of members of the CCA, and their rights to Equal Protection.

418. Upon information and belief, even assuming *arguendo* that the Federal Government were to have a compelling interest in enacting and enforcing the CSA in the manner herein described, the CSA is not narrowly tailored to satisfy and achieve that compelling interest (whatever it might be).

419. An actual case in controversy exists between Plaintiff CCA on the one hand, and Defendants on the other, by which the CCA maintains that the CSA was enacted on the basis of racism and political suppression of the rights guaranteed under the First Amendment, and enforced in a manner that is so discriminatory as to rise to the level of a violation of Due Process and Equal Protection, whereas Defendants irrationally and unconstitutionally maintain that the CSA constitutes a valid exercise of federal power.

420. By reason of the foregoing, the CCA is entitled to issuance of an order and judgment: (i) declaring that the CSA, as it pertains to Cannabis, violates the rights of its members under the First and Fifth Amendments to the United States Constitution and under principles of Equal Protection.

421. CCA has no remedy at law.

THIRD CAUSE OF ACTION
(On behalf of all Plaintiffs except Washington)

422. Plaintiffs repeat and reallege each and every allegation of the preceding ¶¶1-421, as if set forth fully herein.

423. Freedom to travel throughout the United States, including between and among States of the Union, has long been recognized as a basic right under the Constitution.[162]

424. Alexis requires medical Cannabis to preserve and sustain her life, but cannot travel with medical Cannabis without risking prosecution, incarceration, and/or the loss of other liberty rights and interests.

425. Dean cannot travel without his wife, who, as Alexis's caregiver, cannot leave Alexis alone; thus, Dean cannot safely travel either.

426. Jagger requires medical Cannabis to live without excruciating pain and to avoid death, but cannot travel with medical Cannabis without risking prosecution, incarceration, and/or the loss of other liberty rights and interests.

427. Sebastien is required to travel in order to obtain the medical Cannabis Jagger requires to eliminate his pain and continue to live; however, if Sebastien were to travel by plane, or on land across State lines or on a federal highway, he would be threatened with seizure of Jagger's medicine, arrest, prosecution, incarceration, loss of his parental rights and/or other consequences attendant with a conviction for a felony under the CSA.

428. Plaintiffs Alexis and Jagger desire to travel to the Capitol in Washington, DC to meet with their elected representatives and other public officials to advocate in favor of enacting the MJA

[162] *See, e.g., Williams v. Fears*, 179 U.S. 270, 274 (1900).

and repealing the CSA, or otherwise de-scheduling Cannabis; however, they cannot exercise their fundamental right to travel to the Capitol, as such travel would threaten them with seizure of life-saving medicine, arrest, prosecution, incarceration, and other consequences attendant with a conviction for a felony under the CSA. Plaintiff Jose desires to travel without leaving his medication behind, but cannot do so because, under the CSA, any air travel or travel to a State where Cannabis is legal but does not exercise reciprocity (or does not otherwise permit his possession and use within the State) would expose him to seizure of his medicine, arrest, prosecution, incarceration, and other consequences attendant with a conviction for a felony under the CSA.

429. Alexis and Jagger are unconstitutionally required to choose between depriving themselves of their fundamental right to continue treating with life-sustaining and life-saving medications to preserve their lives, and depriving themselves of the opportunity to: (i) travel to other States; (ii) use an airplane to travel to any other State; (iii) step onto federal lands or into federal buildings; (iv) access military bases; and/or (v) receive certain federal benefits. Jose is unconstitutionally required to choose between depriving himself of his fundamental right to continue treating with his life-sustaining medication and depriving himself of the opportunity to: (i) travel to other States; (ii) use an airplane to travel to any other State; (iii) step onto federal lands or into federal buildings; (iv) access military bases; and/or (v) receive certain federal benefits.

430. Certain members of the CCA desire to travel between and among the States with their medical Cannabis, but cannot do so without risk of investigation, prosecution, conviction and incarceration under the CSA, which is disproportionately enforced against persons of color.

431. Defendants maintain that, notwithstanding the overwhelming weight of the evidence in the record (including statements made by the Federal Government itself that Cannabis has curative

properties and is safe), Cannabis is supposedly an addictive, dangerous and lethal drug on a par with heroin, mescaline and LSD, and without any medical benefits whatsoever and thus the CSA must be enforced.

432. An actual case in controversy exists between Plaintiffs Alexis, Dean, Jose, Sebastien, Jagger and the CCA on the one hand, and Defendants on the other, by which such Plaintiffs require the use of Cannabis and desire to travel, whereas Defendants irrationally and unconstitutionally maintain that such conduct is lethally dangerous and thus must remain illegal.

433. By reason of the foregoing, the aforesaid Plaintiffs are entitled to issuance of an order and judgment: (i) declaring that the CSA, as it pertains to Cannabis, violates their constitutional Right to Travel; and (ii) permanently enjoining Defendants from enforcing the CSA.

434. Plaintiffs have no remedy at law.

FOURTH CAUSE OF ACTION
(On behalf of all Plaintiffs)

435. Plaintiffs repeat and reallege each and every allegation of the preceding ¶¶1-434, as if set forth fully herein.

436. The framework of the United States Constitution created a government of limited and enumerated powers.

437. Under Article I, §8, cl. 3 of the United States Constitution, Congress has the limited power:

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.[163]

Hereinafter, the "Commerce Clause."

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[163]U.S. Const. art. I, §8, cl. 3.

438. The Commerce Clause does not include a general power to regulate intra-State commerce.

439. The United States Constitution does not include a federal police power.

440. Under the Tenth Amendment to the United States Constitution:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.[164]

441. Congress is not empowered and/or otherwise authorized to legislate as to matters of intra-State commerce that have no appreciable impact on interstate commerce or commerce with foreign nations and/or with Native American Tribes. Such commerce is reserved to the States and the people who live there.

442. Historically, the regulation of the doctor-patient relationship and decisions pertaining to dispensing medications have been reserved to the States under the Tenth Amendment.

443. The Constitution does not empower Congress to regulate doctor-patient relationships.

444. The CSA, proscribing and criminalizing the use of Cannabis, was not enacted for the purpose of regulating interstate commerce; Congress enacted the CSA based upon a series of irrational and discriminatory motives that cannot be justified or even explained when considered against an incontrovertible record that includes evidence that the United States Government has acknowledged in its U.S. Cannabis Patent Application that Cannabis is an effective treatment for, *inter alia*, Parkinson's Disease and Alzheimer's.

445. By legislating subject matter outside its constitutional delegation of enumerated powers, and encroaching upon the powers expressly reserved to the States, Congress engaged in an

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[164]U.S. Const. amend. X.

unauthorized and thus unconstitutional exercise of power that violates well-recognized principles of federalism.

446. Even assuming *arguendo* that distribution and/or sale of Cannabis that occurs on an entirely intra-state level could be deemed to have an appreciable impact on interstate commerce – and, respectfully, it cannot – individual *use* of Cannabis cannot rationally be claimed to have an effect on the national economy. Thus, it is alleged *in the alternative* that, even assuming that Congress were to have the power to regulate purely intra-state economic activity that has no relationship with interstate commerce, Congress lacks the power to regulate use as a purely intra-state, non-economic activity.

447. An actual case in controversy exists between Plaintiffs and Defendants, by which Defendants maintain that use of Cannabis is lethally dangerous and thus must remain illegal, whereas Plaintiffs maintain that the CSA, as it pertains to Cannabis, constitutes an unconstitutional exercise of power not authorized by the Constitution.

448. By reason of the foregoing, Plaintiffs are entitled to issuance of an order and judgment: (i) declaring that the CSA, as it pertains to Cannabis, constitutes an unauthorized exercise of power by Congress, rendering the CSA, as it pertains to Cannabis, unconstitutional; and (ii) permanently enjoining Defendants from enforcing the CSA.

449. Plaintiffs have no remedy at law.

FIFTH CAUSE OF ACTION
(On behalf of all Plaintiffs)

450. Plaintiffs repeat and reallege each and every allegation of the preceding ¶¶1-449, as if set forth fully herein.

451. Under the provisions of the CSA, de-scheduling or rescheduling a drug such as Cannabis must be supported by medical and/or scientific evidence – such as, for example, the evidence cited in the U.S. Cannabis Patent Application.

452. To acquire and accumulate such medical and/or scientific evidence, studies and tests must be conducted; however, because Cannabis has been classified as a Schedule I drug, it cannot legally be tested unless special permission has been obtained from the Federal Government.[165]

453. Upon information and belief, in the 47 years since the CSA was enacted, the Federal Government has granted only one application to conduct scientific and/or medical testing of Cannabis.

454. The Federal Government has thus created a legislative construct which, by design, is completely dysfunctional. The CSA requires testing and studies to reclassify Cannabis, but prevents such tests and studies from being conducted because Cannabis is supposedly so dangerous that it cannot be tested – except that the stated basis for classifying Cannabis as a Schedule I drug was that Cannabis supposedly had not yet been tested.

455. After creating the Shafer Commission to conduct such tests and studies, the Federal Government, led by the biased and unstable Nixon Administration, promptly rejected its findings.

456. By creating a process that, by its terms, necessarily requires all petitions for de-scheduling or rescheduling to be denied – and, as regards Cannabis, that is exactly what has occurred with respect to every petition – Congress enacted an irrational, arbitrary and capricious law.

457. Simply put – if, by its terms, the CSA created a petition process to allow aggrieved individuals to file futile challenges to the classification of Schedule I drugs, then the procedure

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[165]Pub. L. No. 91-513, 84 Stat. 1255.

serves no lawful purpose and is thus unconstitutionally irrational and violates the Due Process Clause of the Fifth Amendment.

458. An actual case in controversy exists between Plaintiffs and Defendants, by which Plaintiffs need and/or desire to use, prescribe and/or engage in business transactions involving Cannabis, whereas Defendants falsely and unconstitutionally maintain that cultivation, distribution, possession and use of Cannabis is lethally dangerous and thus must remain illegal.

459. By reason of the foregoing, Plaintiffs are entitled to issuance of an order and judgment: (i) declaring that the CSA, as it pertains to Cannabis, constitutes an unauthorized exercise of power by Congress, rendering the CSA, as it pertains to Cannabis, unconstitutional; and (ii) permanently enjoining Defendants from enforcing the CSA as it pertains to Cannabis.

460. Plaintiffs have no remedy at law.

SIXTH CAUSE OF ACTION
(On behalf of all Plaintiffs except Washington and Jose)

461. Plaintiffs repeat and reallege each and every allegation of the preceding ¶¶1-460, as if set forth fully herein.

462. The First Amendment to the Constitution of the United States confirms that:

> Congress shall make no law ... abridging the freedom of speech ... or the right of the people to ... petition the Government for a redress of grievances.

U.S. Const. amend. I.

463. The protections afforded by the First Amendment include, *inter alia*, the right to meet with public officials into advocate in favor or against governmental action.

464. In order for Alexis, Jagger, and certain members of the CCA who treat with medical

Cannabis to meet with public officials at the Capitol, they would be required to leave their medical Cannabis behind – otherwise, under the CSA, their medicine could be seized and they (and/or, in the case of Alexis and Jagger, their parents) could be detained, arrested, prosecuted and/or incarcerated.

465. If Alexis's or Jagger's parents were to be detained, arrested, prosecuted and/or incarcerated, their parental rights could be terminated, depriving Alexis and Jagger of the opportunity to be raised by one or more of their biological parents.

466. The CSA, as applied to Alexis, Jagger, and certain members of the CCA, violates their First Amendment rights to free speech and the opportunity to petition the Government for a redress of grievances by requiring them, as a condition of their entry into the Capitol (or any federal Senate or House office building), to risk their health and their lives in order to engage in in-person advocacy with their elected representatives and other federal public officials.

467. Under the provisions of the Ninth Amendment and Substantive Due Process, Alexis, Jagger, and certain members of the CCA have a fundamental right to continue treating with a medication that, for years, has provided life-saving and -sustaining treatment of their conditions. This fundamental right to life and to preserve one's right to life is deeply rooted in this Nation's history and traditions and is implicit in the concept of ordered liberty.

468. An actual case in controversy exists between Plaintiffs Alexis, Jagger, and certain members of the CCA on the one hand, and Defendants on the other, by which such Plaintiffs need to treat with medical Cannabis while maintaining their constitutional rights to free speech and to petition the federal government for a redress of grievances through in-person advocacy, whereas Defendants unconstitutionally maintain that the CSA must be enforceable on federal lands and in federal buildings, thereby precluding such in-person advocacy. Alternatively, the Federal

Government may maintain that the aforesaid Plaintiffs may travel to Washington, DC to engage in in-person advocacy, but without their life-saving and -sustaining medication – a prospect which threatens each of the aforesaid Plaintiffs with the loss of their lives and health.

469. The Federal Government cannot require persons to sacrifice one fundamental right in order to exercise another.

470. By reason of the foregoing, Plaintiffs are entitled to issuance of an order and judgment: (i) declaring that the CSA, as applied to Alexis, Jagger, and the CCA, constitutes a violation of their First Amendment guarantees of free speech and the right to petition the Federal Government for a redress of grievances, rendering the CSA, as applied to the aforesaid Plaintiffs, unconstitutional; (ii) declaring that the CSA, as applied to Alexis, Jagger, and members of the CCA, constitutes a denial of Substantive Due Process and/or fundamental rights guaranteed by the Ninth Amendment; and (iii) permanently enjoining Defendants from enforcing the CSA as it pertains to Cannabis, as against the aforesaid Plaintiffs.

471. Plaintiffs have no remedy at law.

SEVENTH CAUSE OF ACTION
(On behalf of all Plaintiffs)

472. Plaintiffs repeat and reallege each and every allegation of the preceding ¶¶1-471, as if set forth fully herein.

473. The Federal Government cannot maintain its position on the existing record that continued enforcement of the CSA as it pertains to Cannabis is "substantially justified."

474. By reason of the foregoing, Plaintiffs are entitled to reasonable legal fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. §2412.

WHEREFORE, for the reasons stated, Plaintiffs demand judgment, over and against Defendants, declaring that the CSA as it pertains to the cultivation, distribution, marketing, sale, prescription and use of Cannabis, is unconstitutional under the Due Process Clause of the Fifth Amendment, the Free Speech and Right to Petition Clauses of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment (as implied through the Due Process Clause of the Fifth Amendment), the Right to Travel, Substantive Due Process, fundamental rights secured under the Ninth Amendment, and the Commerce Clause, together with: (i) a permanent injunction (and associated temporary relief if so required), restraining Defendants from enforcing the CSA as it pertains to Cannabis; (ii) reasonable legal fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. §2412; and (iii) any and all other and further relief this Court deems just and proper.

Dated: New York, New York
September 6, 2017

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Exhibit 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARVIN WASHINGTON, et al.,	:	
Plaintiffs,	:	**OPINION AND ORDER GRANTING MOTION TO DISMISS**
-against-	:	
JEFFERSON BEAUREGARD SESSIONS, III, et al.,	:	17 Civ. 5625 (AKH)
Defendants.	:	

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

Exhibit 3

18-859-cv
Washington et al. v. Barr et al.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2018

(Argued: December 12, 2018 Decided: May 29, 2019)

Docket No. 18-859-cv

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. –

WILLIAM PELHAM BARR in his official capacity as United States Attorney General, UNITED STATES DEPARTMENT OF JUSTICE, UTTAM DHILLON in his official capacity as the Acting Administrator of the Drug Enforcement Administration, UNITED STATES DRUG ENFORCEMENT ADMINISTRATION, and UNITED STATES OF AMERICA,
Defendants-Appellees,[1]

Before: JACOBS and CALABRESI, *Circuit Judges*, and RAKOFF, *District Judge*.[2]

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[1] The Clerk of Court is respectfully requested to amend the official caption as set forth above.

[2] Judge Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.

Appeal from the judgment of the United States District Court for the Southern District of New York (Hellerstein, *J.*) dismissing, with prejudice, Plaintiffs' complaint for failure to exhaust administrative remedies and, in the alternative, failure to state a claim. Plaintiffs challenged the inclusion of marijuana on Schedule I of the federal Controlled Substances Act, 21 U.S.C. § 801 *et seq*. But Plaintiffs did not first pursue reclassification through the administrative process defined in the Act. Accordingly, their action is premature. We agree with the District Court's ruling that, since Plaintiffs failed to exhaust their administrative remedies, we should not hear their suit at this time. In view of the unusual circumstances of this case, however, we retain jurisdiction in this panel for the sole purpose of promoting speedy administrative review.

Judge JACOBS dissents in a separate opinion.

Michael S. Hiller, Hiller PC (Lauren A. Rudick, Fatima V. Afia, and Jason E. Zakai, Hiller PC; Joseph A. Bondy, *on the brief*), New York, NY, *for Plaintiffs-Appellants*.

Samuel Dolinger, Assistant United States Attorney (Benjamin H. Torrance, Assistant United States Attorney, *on the brief*), for Geoffrey S. Berman, United States Attorney for the Southern District of New York, New York, NY, *for Defendants-Appellees.*

GUIDO CALABRESI, *Circuit Judge*:

This is the latest in a series of cases that stretch back decades and which have long sought to strike down the federal government's classification of marijuana as a Schedule I drug under the Controlled Substances Act (CSA), 21

U.S.C. § 801 *et seq*. *See, e.g.*, *Krumm v. Drug Enforcement Admin.*, 739 F. App'x 655 (D.C. Cir. 2018) (mem.); *Ams. for Safe Access v. Drug Enforcement Admin.*, 706 F.3d 438 (D.C. Cir. 2013); *Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*, 15 F.3d 1131 (D.C. Cir. 1994) (mem.). The current case is, however, unusual in one significant respect: among the Plaintiffs are individuals who plausibly allege that the current scheduling of marijuana poses a serious, life-or-death threat to their health. We agree with the District Court that Plaintiffs should attempt to exhaust their administrative remedies before seeking relief from us, but we are troubled by the Drug Enforcement Administration (DEA)'s history of dilatory proceedings. Accordingly, while we concur with the District Court's ruling, we do not dismiss the case, but rather hold it in abeyance and retain jurisdiction in this panel to take whatever action might become appropriate if the DEA does not act with adequate dispatch.

STANDARD OF REVIEW

The trial court granted Defendants' motion under Federal Rules of Civil Procedure 12(b)(1) and (6) to dismiss Plaintiffs' case. We therefore review its decision *de novo*, accepting as true all of the complaint's well-pleaded facts. *See*

d'Amico Dry Ltd. v. Primera Maritime (Hellas) Ltd., 886 F.3d 216, 222 (2d Cir. 2018); *Harris v. Mills*, 572 F.3d 66, 71 (2d Cir. 2009).

BACKGROUND

A. Parties

As this case reaches us at the motion to dismiss stage, we must treat the well-pleaded facts alleged in Plaintiffs' complaint as true. According to their pleadings, Plaintiffs are several individuals and a membership organization with an interest in the regulation of marijuana. They assert that the classification of cannabis as a Schedule I substance under the CSA harms them in one or more ways.

Marvin Washington is an African-American businessman working in the medical marijuana space. He would like to expand his business into whole-plant cannabis products and take advantage of the federal Minority Business Enterprise Program, but, he alleges, he is impeded from so doing by the drug's scheduling.

Alexis Bortell and Jagger Cotte are children with dreadful medical problems. Bortell suffers from chronic and intractable seizures; Cotte from Leigh's disease. They allege that they exhausted traditional treatment options

before finding success medicating with cannabis. They claim that marijuana has saved their lives. Because of its Schedule I classification, however, they cannot bring their life-saving medicine with them when they travel onto federal lands or into states where marijuana is illegal. For Bortell, these travel limitations also mean that she cannot take full advantage of the veteran's benefits to which she is entitled through her father. In addition, both Bortell and Cotte live in constant fear that their parents might be subject to arrest and prosecution for their involvement in their children's medical treatment.

Jose Belen is a veteran of the war in Iraq and suffers from post-traumatic stress disorder. After his honorable discharge, he became suicidal and was adjudged 70% disabled. He alleges that he pursued conventional therapies unsuccessfully. In despair, he turned to medical marijuana. This, he claims, has allowed him to manage his symptoms. He further asserts, like Bortell, that marijuana's Schedule I classification restricts his ability to travel and to take full advantage of his veteran's benefits.

The Cannabis Cultural Association, Inc. (CCA) is a not-for-profit organization dedicated to assisting people of color develop a presence in the cannabis industry. CCA is particularly focused on the way past convictions for

possession, cultivation, distribution, and use of marijuana have disproportionately affected people of color and prevented minorities from participating in the new state-legal marijuana industry.

Defendants are the United States, the Attorney General, the Department of Justice, the Acting Administrator of the DEA, and the DEA itself. They are responsible for implementing the CSA and, more particularly, for updating the classification of controlled substances. *See* 21 U.S.C. § 811(a); 28 C.F.R. § 0.100(b).

B. Proceedings below

Plaintiffs initiated the instant suit in the Southern District of New York in July 2017 and filed the amended complaint now at issue on September 6, 2017. Plaintiffs raised numerous arguments for re- or descheduling marijuana, including, as relevant to this appeal, (a) that the classification of marijuana as a Schedule I drug exceeded Congress's powers under the Commerce Clause and was without a rational basis, (b) that the classification was arbitrary and capricious, (c) that marijuana's inclusion in the CSA was racially animated and is an act of viewpoint discrimination, and (d) that the law, as applied to Plaintiffs, violates variously their (or, in CCA's case, its members') First, Fifth, and Ninth

Amendment rights, including, *inter alia*, substantive due process and the fundamental right to travel.

The crux of Plaintiffs' case is that new facts related to the acceptance of medical marijuana treatment regimens and the federal government's own involvement in medical marijuana research require a reexamination of marijuana's scheduling under the CSA. The complaint seeks declaratory relief, as well as an injunction restraining Defendants from enforcing the CSA with respect to cannabis. In reply, Defendants moved to dismiss.

After argument, the District Court granted the government's motion and dismissed Plaintiffs' suit. It further held that amending the complaint would be futile. As a threshold matter, the Court determined that Plaintiffs had failed to exhaust their administrative remedies and that they did not qualify for an exception to the exhaustion rule. On the merits, the Court did not find Plaintiffs' arguments persuasive and deemed their claims to be either foreclosed by precedent or without legal authority. The Court additionally held that CCA failed to establish that it had standing to pursue its claim, since the relief it sought would not redress the injury its members had allegedly suffered. The

District Court entered judgment on February 26, 2018, and this appeal timely followed.

DISCUSSION

We resolve this case without reaching most of Plaintiffs' disparate arguments. As the District Court correctly observed, Plaintiffs challenge the current classification of marijuana as a Schedule I substance under the CSA but did not first bring this challenge to the agency that has the authority to reschedule marijuana, the DEA.[3] Although the CSA does not expressly mandate the exhaustion of administrative remedies, our precedents indicate that it is generally to be required as a prudential rule of judicial administration. We agree with the District Court that exhaustion was appropriate here. But in light of the allegedly precarious situation of several of the Plaintiffs, which at this stage of

[3] The CSA places in the Attorney General the power to schedule, reschedule, or deschedule drugs. *See* 21 U.S.C. § 811(a). The Attorney General has promulgated rules delegating this power to the head of the DEA. *See* 28 C.F.R. § 0.100(b). The CSA further requires that, before scheduling, rescheduling, or descheduling a drug, the Attorney General "shall . . . request from the Secretary [of Health and Human Services] a scientific and medical evaluation[of the drug], and [the Secretary's] recommendations, as to whether such drug or other substance should be so controlled or removed," which "shall be binding on the Attorney General as to such scientific and medical matters." 21 U.S.C. § 811(b). The process for reviewing a drug's scheduling can be initiated by the Attorney General, the Secretary of Health and Human Services, or "on the petition of any interested party." *Id.* § 811(a).

the proceedings we must accept as true, and their argument that the administrative process may not move quickly enough to afford them adequate relief, we retain jurisdiction of the case in this panel, for the sole purpose of taking whatever action might become appropriate should the DEA not act with adequate dispatch. We wish to make clear, however, that, in doing so, we express no view whatever on the merits of Plaintiffs' case—that is, on whether marijuana should be listed or not.

A. Exhaustion of administrative remedies is appropriate here.

The administrative state is a topic of much debate these days. *See* Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017). Distinguished jurists and scholars have been critical of its expansion. *See, e.g.*, *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, *J.*, concurring); Philip Hamburger, *Is Administrative Law Unlawful?* (2014). Others understand it as a central part of our modern republic. *See generally* Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (1982); *see also* Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (2012) (tracing the roots of the

administrative state back to the Founding). Regardless of one's point of view, it remains at the moment a key part of our legal regime. The doctrines that regulate the relationship between courts and administrative agencies are thus of particular importance. They attempt to reconcile the advantages of expertise, flexibility, and efficiency with the safeguards of government under law. *See* Daniel R. Ernst, *Tocqueville's Nightmare: The Administrative State Emerges in America, 1900-1940* (2014).

Exhaustion of administrative remedies is one such doctrine. It holds that federal courts should refrain from adjudicating a controversy if the party bringing suit might obtain adequate relief through a proceeding before an administrative agency. *See Woodford v. Ngo*, 548 U.S. 81, 88-89 (2006) ("[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.") (internal quotation marks and citations omitted). The duty to exhaust administrative remedies can spring from legislation or from judicial decision. "Where Congress specifically mandates [it], exhaustion is required." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992), *superseded by statute on other grounds as recognized in Porter v. Nussle*, 534 U.S. 516 (2002). "But [even] where Congress has not clearly required

exhaustion," a court may still impose it as an act of "sound judicial discretion." *Id.*

Before requiring exhaustion as a "rule of judicial administration," *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50 (1938), a court should, however, look to "legislative purpose, which is of paramount importance." *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 501 (1982). Simply put, "a court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with [congressional] intent." *Id.* at 501-02; *see also id.* at 502 n.4 ("Even where the statutory requirement of exhaustion is not explicit, courts are guided by congressional intent in determining whether application of the doctrine would be consistent with the statutory scheme.").

Although the CSA does not mandate exhaustion of administrative remedies, we agree with the court below that exhaustion here is consistent with congressional intent and is therefore appropriate. This judgment flows from our analysis of the text and structure of the Act.

The text of the CSA shows that Congress sought to favor administrative decisionmaking. In several places, the words of the statute either presume or create an administrative process to review the classification of drugs under the

Act's schedules. Thus, 21 U.S.C. § 811(a) instructs the Attorney General to schedule, reschedule, or deschedule drugs under the Act by rules "made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed" by the Administrative Procedure Act, 5 U.S.C. § 551 *et seq*. Similarly, 21 U.S.C. § 811(b) details the procedures the Attorney General should follow when scheduling, rescheduling, or descheduling drugs, including a duty to defer to the Secretary of Health and Human Services on certain medical and scientific matters. And § 811(c) lists several factors the Attorney General must consider before initiating classification. *See generally Ams. for Safe Access*, 706 F.3d at 439-41.

These provisions, among others, establish that Congress intended to implement scheduling decisions under the CSA through an administrative process. Requiring would-be plaintiffs to exhaust that process before turning to the courts is consonant with that intent. Were plaintiffs able to go directly to federal court to pursue reclassification, the language Congress devised to erect an administrative review process would be rendered a nullity. It follows that construing the Act to allow such behavior as a matter of course would violate a

basic canon of statutory interpretation: that, if possible, every provision of a statute must be given effect. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 404 (2000).

The structure of the Act reinforces the language used and hence our conclusion that Congress wanted aggrieved parties to pursue reclassification through agencies, and not, in the first instance, through the federal courts. The CSA relies on an administrative process to operate effectively. When Congress enacted the CSA, it put, by legislative fiat, certain drugs directly into schedules. *See* Controlled Substances Act, Pub. L. No. 91-513, § 202, 84 Stat. 1236, 1247-52 (1970) (codified at 21 U.S.C. § 812); *see also Gonzales v. Raich*, 545 U.S. 1, 14 (2005). But the statute contemplated that these initial lists would be regularly revised and updated by the Attorney General, in consultation with the Secretary of Health and Human Services, and that this would be done according to a specific procedure and set of standards. *See* 21 U.S.C. §§ 811(a)-(c). The Act thus incorporates an administrative process into its structure. Indeed, its logic and design depend on administration and agency actions to realize its aims. Not to require exhaustion in the ordinary case would therefore undermine the text and structure of the CSA.

In addition, requiring exhaustion is eminently sensible here. The Supreme Court has told us that exhaustion furthers two important goals. First, it "protect[s] administrative agency authority." *McCarthy*, 503 U.S. at 145. By "defer[ing] to Congress' delegation . . . to coordinate branches of Government," exhaustion recognizes "that agencies . . . have primary responsibility for the programs that Congress has charged them to administer." *Id*. Second, exhaustion "promotes judicial efficiency" by giving an administrative agency a chance to resolve a dispute, thus either rendering controversies moot or "produc[ing] a useful record for subsequent judicial consideration." *Id*.

Both purposes are advanced by requiring exhaustion in the instant case. The Supreme Court has recognized that protecting agency authority is a particularly compelling aim where "the agency proceedings in question allow the agency to apply its special expertise." *Id.* (citing *McKart v. United States*, 395 U.S. 185, 194 (1969)). That is the situation in the case before us now. At its root, the question raised by Plaintiffs' suit is whether developments in medical research and government practice should lead to the reclassification of marijuana. This is precisely the kind of question that calls for the application of special knowledge. Exhaustion here "protect[s] administrative agency

authority" by leaving this decision in the first instance to the specialists at the DEA and the Department of Health and Human Services. *Id.*

Administrative exhaustion will also promote judicial efficiency in the ways identified by the Supreme Court. It is conceivable that, in response to a petition from Plaintiffs along the lines advanced before us now, the DEA would reschedule marijuana, rendering the current case moot. And if the DEA did not, the administrative process would generate a comprehensive record that would aid in eventual judicial review. The Supreme Court has observed that the creation of such a record can be "especially" beneficial "in a complex or technical factual context," *id.*, which is the context involved in the case at bar. *Accord Shenandoah v. U.S. Dep't of Interior*, 159 F.3d 708, 713 (2d Cir. 1998); *City of New York v. Heckler*, 742 F.2d 729, 737 (2d Cir. 1984).

Moreover, we think that the kinds of arguments Plaintiffs advance make this case well suited to administrative evaluation and inappropriate for federal court determination in the first instance. Plaintiffs do not contend that a decisive event or singular discovery has rendered the previous classification of marijuana under the CSA indefensible. Rather, Plaintiffs claim that a shift over time in our understanding of the uses and dangers of marijuana warrants a change in

marijuana's classification. This argument raises a complex policy question: whether the extant regulatory regime continues to advance the CSA's goals in light of the current state of our knowledge about the drug. It is possible that the current law, though rational once, is now heading towards irrationality; it may even conceivably be that it has gotten there already. Courts are not especially good at dealing with situations of this sort by themselves. In such circumstances, dialogue between courts and other law-defining institutions, like agencies, often works best. *See United States v. Then*, 56 F.3d 464, 468-69 (2d Cir. 1995) (Calabresi, *J.*, concurring).

A sensible response to our evolving understanding about the effects of marijuana might require creating new policies just as much as changing old ones. This kind of constructive governmental work, mixing adjudication and program-design, creating policy through the balancing of competing legitimate interests, is not generally best accomplished by federal courts on their own; it is, however, the stock-in-trade of administration. *See, e.g.*, James M. Landis, *The Administrative Process* (1938). Assuming, of course, that one can get the administrative agency to act.

For the foregoing reasons, requiring exhaustion is appropriate in the instant case. Although not mandated by Congress, it is consistent with congressional intent, as manifested in the CSA's text and structure. And it advances the goals that the Supreme Court has announced the doctrine serves. The District Court's decision to require exhaustion here was therefore correct.

B. None of the recognized exceptions to the doctrine govern this case at this time.

Even where exhaustion is seemingly mandated by statute or decisional law, the requirement is not absolute. The Supreme Court itself has recognized exceptions to the exhaustion requirement under "three broad sets of circumstances." *McCarthy*, 503 U.S. at 146.

First, exhaustion may be unnecessary where it would be futile, either because agency decisionmakers are biased or because the agency has already determined the issue. *Id.* at 148. It does not appear, however, that this futility exception currently applies here. Plaintiffs cite to various public statements by former Attorney General Jefferson Beauregard Sessions III and former Acting Administrator of the DEA Charles Philip Rosenberg to suggest that the administrative process would be biased against them. But Plaintiffs' evidence, even if given the interpretation they suggest, does not qualify them for the

exception, since the public statements relied on do not implicate the relevant decisionmaker. Neither Sessions nor Rosenberg remains part of the review process. Nor, indeed, would they have been the relevant decisionmakers at the time Plaintiffs initiated their suit. On the medical and scientific claims central to Plaintiffs' argument, it is the opinion of the Secretary of Health and Human Services that matters, not the judgment of the Attorney General or the head of the DEA. *See* 21 U.S.C. § 811(b) (stating that "[t]he recommendations of the Secretary to the Attorney General shall be binding on the Attorney General as to [the] scientific and medical" evaluation of substances considered for scheduling). Plaintiffs make no plausible allegations of bias on the part of the Secretary. Futility on account of bias has, therefore, not been adequately alleged.

The Supreme Court has further stated that exhaustion may be unnecessary where the administrative process would be incapable of granting adequate relief. *See McCarthy*, 503 U.S. at 147. That second exception, too, is inapposite at the moment. Although Plaintiffs style their claims in many different ways, the gravamen of their 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- or deschedule cannabis. It cannot be seriously argued that this remedy

is not available through the administrative process. It is precisely the remedy provided under 21 U.S.C. § 801 *et seq*. Plaintiffs are therefore not currently entitled to bypass exhaustion under this second exception either.

Finally, exhaustion may be unnecessary where pursuing agency review would subject plaintiffs to undue prejudice. *McCarthy*, 503 U.S. at 146-47. In particular, "an unreasonable or indefinite timeframe for administrative action" may sufficiently prejudice plaintiffs to justify a federal court in taking a case prior to the complete exhaustion of administrative remedies. *Id.* at 147. Not every delay will be sufficiently severe to justify waiver, however. Although, in most cases, "respondents would clearly prefer an immediate appeal . . . rather than the often lengthy administrative review process," a mere preference for speedy resolution is not enough. *Heckler v. Ringer*, 466 U.S. 602, 619 (1984). "[T]hreatened or impending irreparable injury flowing from delay incident to following the prescribed [administrative] procedure" militates in favor of waiving exhaustion, but only if there is a "strong showing . . . both [of] the inadequacy of the prescribed procedure and of impending harm." *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752, 773-74 (1947).

Despite the apparently dire situation of some of the Plaintiffs, they do not yet meet the requirement for this exception to the exhaustion requirement. In point of fact, the existing classificatory scheme has not prevented Plaintiffs Bortell, Cotte, or Belen from obtaining their allegedly life-saving medication. Nor have Plaintiffs otherwise explained how pursuing agency review would subject them to an additional "irreparable injury flowing from delay incident" to the administrative process itself. *Id.* at 773. Accordingly, despite their concededly difficult position, Plaintiffs are not currently entitled to bypass agency review.

C. *United States v. Kiffer* does not require that we waive exhaustion here at the moment.

The exhaustion requirement under the CSA is, however, prudential, not jurisdictional. It is not mandated by the statute. Rather, it is a judicially-created administrative rule, applied by courts in their discretion.

This explains why this Court has, on at least one previous occasion, considered a challenge to the scheduling of marijuana under the CSA without requiring exhaustion, in *United States v. Kiffer*, 477 F.2d 349 (2d Cir. 1973). That case is readily distinguishable, however, and its holding does not mean that exhaustion should not be required in the current case at this time. The *Kiffer*

Court began by observing that "timely and successful use of th[e] administrative [process] would have obtained for [the] appellants [in that case] the very relief they seek from us—a declaration either that mari[j]uana should not be subject to the [CSA] or that it should be covered only in another schedule." *Id.* at 351. The Court began, then, with the assumption that exhaustion did apply. It waived the normal requirement only because of two factors that do not obtain in the instant case: first, because the "application of the . . . doctrine [of exhaustion] to criminal cases is generally not favored," *id.* at 352, and, second and more significantly, because, at the time *Kiffer* was heard, the federal government had taken the position that it did not have the power to re- or deschedule marijuana at all, as a result of foreign treaty commitments, *id.* at 351. Under those circumstances, where "there [wa]s some doubt whether appellants in fact [had] an administrative remedy," the Court declined to require exhaustion. *Id.* The instant case is different. It is, of course, civil. And, as the D.C. Circuit has since held, foreign treaty commitments have not divested the Attorney General of the power to re- or deschedule marijuana. *See Nat'l Org. for Reform of Marijuana Law (NORML) v. Drug Enforcement Admin.*, 559 F.2d 735 (D.C. Cir. 1977). *Kiffer*'s result is therefore not controlling. In fact, the case's logic reinforces our

conclusion that Plaintiffs should attempt to exhaust their administrative remedies before seeking relief from us. But *Kiffer* also makes clear that, when appropriate, we do have the power to act even if the administrative agency has not.

D. Strong interests compel this Court to retain jurisdiction.

This case reaches us as an appeal from a ruling on a motion to dismiss. Under settled principles of adjudication, we must, therefore, accept the well-pleaded facts in the complaint as true. Taking the facts as alleged, and, accordingly, taking the supposed benefits some Plaintiffs have experienced from marijuana as true as well, we—like the District Court below—are struck by the transformative effects this drug has assertedly had on some Plaintiffs' lives. As a result, we are troubled by the uncertainty under which Plaintiffs must currently live. Plaintiffs claim that marijuana has extended their lives, cured seizures, and made pain manageable. If true, these are no small things. Plaintiffs should not be required to live indefinitely with uncertainty about their access to allegedly life-saving medication or live in fear that pursuing such medical treatment may subject them or their loved ones to devastating consequences.

Plaintiffs argue that the administrative process will prolong their ordeal intolerably. And their argument is not without force. Plaintiffs document that the average delay in deciding petitions to reclassify drugs under the CSA is approximately nine years. Such long delays cast doubt on the appropriateness of requiring exhaustion. *Accord Gibson v. Berryhill*, 411 U.S. 564, 575 n.14 (1973). And where, as here, health is involved, delay can be even more problematic. *See Abbey v. Sullivan*, 978 F.2d 37, 46 (2d Cir. 1992) (observing that, "if the delay attending exhaustion would subject claimants to deteriorating health . . . then waiver [of exhaustion] may be appropriate").

Indeed, on the alleged facts, which, we repeat, we must for now take as true, undue delay by the agency might make applicable each of the three exceptions to exhaustion that the Supreme Court has recognized and which we discussed earlier. Specifically, undue delay, if it in fact results in catastrophic health consequences, could make exhaustion futile. Moreover, the relief the agency might provide could, because of undue delay, become inadequate. And finally, and obviously, Plaintiffs could be unduly prejudiced by such delay.

To be clear, Plaintiffs have not alleged that they will necessarily suffer sufficient harm as a result of the time it would take to pursue the administrative

process to justify an exception to exhaustion now. Plaintiffs do, however, plausibly raise the specter of delay and plausibly suggest that the delay could become problematic. And although agencies, like legislatures, are often the best decisionmakers, this is so only when they actually do decide.

Courts have, moreover, on occasion deemed it proper to encourage prompt decisionmaking. Thus, where agencies have a history of dilatory proceedings, federal courts have sometimes retained jurisdiction of related cases to facilitate swift review. In *Telecommunications Research and Action Center v. F.C.C.*, 750 F.2d 70 (D.C. Cir. 1984), our sister circuit retained jurisdiction of a case in part because of the failure of a federal agency to act with adequate speed. *See* 750 F.2d at 80-81. "Whether or not the[] [agency's] delays would justify mandamus," the court stated, they were significant enough that it should retain jurisdiction to promote a quick resolution. *Id*. at 81; *see also, e.g.*, *In re Pesticide Action Network N. Am.*, 532 F. App'x 649, 652 (9th Cir. 2013) (summary order) (observing that "it is well established that we may retain jurisdiction over [a case]

to ensure that [the agency] acts expediently"); *cf. Then*, 56 F.3d at 468-69 (2d Cir. 1995) (Calabresi, *J.*, concurring).[4]

We think it possible that future action by us may become appropriate here. Plaintiffs have not asked for—and we do not even consider issuing—a writ of mandamus to force the DEA to act. But we exercise our discretion to keep jurisdiction of the case in this panel, to take whatever action may become appropriate if Plaintiffs seek administrative review and the DEA fails to act promptly. And we note that, under the unusual health-related circumstances of this case, what has counted as appropriate speed in the past may not count as appropriate speed here.

In doing this, we specify that we are not retaining jurisdiction to review the actions the agency may take. Jurisdiction over those may well lie solely in another circuit. Nor do we intend to retain jurisdiction indefinitely. Unless the Plaintiffs seek agency review and so inform us within six months, we will affirm the District Court's judgment dismissing this case. (And if only some Plaintiffs

[4] Some courts in other jurisdictions have gone even further in asserting a role for courts to ensure prompt action by lawmakers. *See Vincent v. Pabst Brewing Co.*, 177 N.W.2d 513, 517 (Wis. 1970); Corte Cost., 24 ottobre 2018, n. 207 (It.); *see generally* Guido Calabresi, *A Common Law for the Age of Statutes* (1982), especially *id.* at 35-37. We wish to make clear that we make no such assertion of power in the federal courts generally.

seek agency review, we will dismiss the complaint as to those who do not.) But if Plaintiffs do seek agency review, and the agency fails to act with alacrity, Plaintiffs may return directly to us, under our retained jurisdiction.[5]

To be clear, we repeat that this case remains in our purview only to the extent that the agency does not respond to Plaintiffs with adequate, if deliberate, speed. In other words, we retain jurisdiction exclusively for the purpose of inducing the agency to act promptly.

CONCLUSION

Because Plaintiffs failed to exhaust their administrative remedies and do not at this time qualify for an exception to the exhaustion doctrine, the District Court did not err in requiring Plaintiffs to bring their claims to the relevant agency first. But, in light of the unusual circumstances of this case, we hold the case in abeyance and retain jurisdiction in this panel to take whatever further

[5] Because Plaintiffs' allegations with respect to the catastrophic harm they are facing are not implausible, we must take them as true at this stage of the litigation. Should the agency fail to act, we would, before proceeding further, however, have to look into the allegations more deeply. Accordingly, should the case return to us, it may be appropriate to remand to the District Court for further factfinding. At that time, if Plaintiffs have not at least raised a disputed issue of material fact as to the veracity of their allegations, summary judgment against them would be appropriate.

action might become appropriate should Plaintiffs initiate administrative review and the administrative process fail to operate with adequate dispatch.

DENNIS JACOBS, *Circuit Judge*, dissenting:

The plaintiffs seek a declaration that the classification of marijuana as a Schedule 1 substance is unconstitutional because it does not reflect contemporary learning regarding the drug's medicinal uses. I agree with the District Court that this case must be dismissed for failure to exhaust administrative remedies in the Drug Enforcement Agency ("DEA"). The majority opinion does not actually disagree, though it seems to treat lack of jurisdiction as a prudential speed bump. I dissent from the majority opinion's decision to hold the case in abeyance so that we may turn back to it if, at some future time, we get jurisdiction.

The majority posits that jurisdiction may materialize if the plaintiffs, claiming emergency, do not obtain a prompt decision on their not-yet filed petition to the DEA--but this seems to be no all-fired emergency, given that the plaintiffs are afforded half a year to file a petition on which hang supposed "serious, life-or-death" consequences. Majority Op. 3. For the following reasons, the plaintiffs' claims of emergency are tenuous, and constitute a further argument against retaining jurisdiction that we do not have in order to hurry along an administrative decision on a petition that has not been filed.

- Plaintiffs Dean Bortell and Sebastien Cotte sue on behalf of their severely ill children, who rely on marijuana for treatment. Bortell and Cotte concede that their children get all the treatment they need, including marijuana, and dwell in states that do not outlaw it or that do not enforce any vestigial prohibition; their grounds for claiming urgency are that their children are unable to take that medicine with them if they travel onto federal lands or into states where marijuana is illegal. The parents add that they suffer fear they might be subject to federal prosecution because they are involved in their children's medical treatment. I view these claims as contrived and fanciful. Nobody need fear severe consequences for administering medical marijuana to sick children.

- Jose Belen is a veteran with post-traumatic stress disorder who successfully uses marijuana to manage his symptoms, but complains that his travel is restricted and that he cannot take full advantage of his veterans benefits (presumably for the government to pay for the marijuana).

- Plaintiff Marvin Washington asserts that he is impeded from seeking federal aid to expand his business so that he can sell cannabis products. No emergency here, and likely no standing either.

- Finally, the Cannabis Cultural Association assists people of color who wish to participate in the cannabis industry but who cannot because they jumped the gun, and have been arrested or convicted for cannabis use. I cannot see that this Association has standing to challenge the classification of marijuana under the nation's drug laws, let alone to seek an emergency resolution of that issue.

* * *

As to the Judgment below, which dismissed the claims for failure to exhaust administrative remedies, I agree with the District Court--and with the majority opinion, which agrees that exhaustion is required (at least for now).

I part company with the majority opinion insofar as it holds the case in abeyance with the expectation of taking some measures if the DEA fails to act with "adequate dispatch." Majority Op. 27. Our failure to dismiss the case now is error for several reasons that are easily stated.

First, it is common ground that the case was properly dismissed under 12(b)(1) for failure to exhaust remedies; so neither this Court nor the District Court has jurisdiction to grant a remedy. And we cannot simply decide to wait for jurisdiction that (as we are properly ruling) we do not have. Our job as a circuit court is to issue mandates. We do not fulfill the requirements of the job by holding a case in abeyance on the off chance that we may get jurisdiction to decide it in the future.

Second, the terms of the hold on this case are without content: we may take "whatever further action" if the agency fails to act "promptly" or "with adequate dispatch" or "[with] appropriate speed" or "with alacrity". Majority Op. 25-27. This is of no help--the DEA is unlikely to discern what "adequate

dispatch" or "appropriate speed" may mean for an issue that (as the majority opinion observes) "stretch[es] back decades".[1] Majority Op. 2.

* * *

Given all this, it would be surprising if solid precedent supported this procedural invention. The majority opinion adduces none. The majority thinks that United States v. Kiffer, 477 F.2d 349 (2d Cir. 1973), "makes clear that, when appropriate, we do have the power to act even if the administrative agency has not." Majority Op. 22. But in that case, the Court excused administrative exhaustion only because the defendant had shown that exhaustion would be futile and unduly prejudicial. Id. at 351-352 ("[I]t appears now that the administrative route for [the defendants] would at best provide an uncertain and indefinitely delayed remedy . . . [and impose on them a] severe burden."). Accordingly, Kiffer stands only for the uncontroversial proposition that exhaustion may be excused where it would be futile or unduly prejudicial; it does not condone waiting around until an exception is met. The majority opinion (correctly) concludes that the plaintiffs do not meet the requirements for either exception. The relevance of Kiffer ends there.

The majority opinion relies on Telecommunications Research & Action Center v. F.C.C., 750 F.2d 70 (D.C. Cir. 1984) ("TRAC v. F.C.C."); but that Court decided a mandamus petition (none is before us here). Moreover, the court did not hold the case in abeyance, but retained jurisdiction (that it already had) only to ensure that the agency fulfilled its sua sponte promise to address the issue expeditiously. And the court gave the agency specific direction. Id. at 80-81 (directing the agency to advise the Court of its progress every 60 days).

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[1] The majority opinion also limits its "purview" to a failure of the agency to act with "adequate, if deliberate, speed." Majority Op. 26. The echo of that phrase from Brown v. Board of Education II is unfortunate, however, given that, in the many decades since, school integration is an unfinished project. The phrase seems to be derived from Admiralty law in the days of sail, which likewise offers no useful context. And in Francis Thompson's "Hound of Heaven," "deliberate speed" is the pace by which God pursues us. No help there either.

The majority opinion's "e.g." cite to a single Ninth Circuit summary order does not bespeak a wealth of examples. In that case as well, the court considered a mandamus petition. It decided that a writ of mandamus was not warranted, and *declined* to retain jurisdiction, citing only TRAC v. F.C.C. for the proposition that it *could* have retained jurisdiction if it wanted to. In re Pesticide Action Network N. Am., 532 F. App'x 649, 652 (9th Cir. 2013). (The parenthetical quote from Pesticide classifies itself as "well-established"--often a tell that the point is a novation.) The majority's remaining authority, a concurring opinion by Judge Calabresi, advances the speculative idea that courts may prod government when laws outlive the views of the *bien pensant* community. None of these cases supports the idea that a court is permitted to hold a case in abeyance because the court may on contingency gain jurisdiction to hear it, and can bully the agency in the meantime. As near as I can make it out, the holding of the majority opinion is: a court without jurisdiction should proceed with caution.

* * *

I doubt that the DEA will be hurrying its work on an application that these plaintiffs have not yet filed, seeking administrative action on an old and ramified controversy. Unless the panel opinion precipitates a swift administrative rejection, there is no reason to anticipate a swift ruling that entails the assessment of countervailing risks, the pendency of legislation, and the eliciting of opinions on issues of medicine and public health. So I fully expect to see further proceedings in this appeal. No one can tell what this panel could do then, or (more accurately) would do. In the meantime, the one thing that will not happen is the issuance of the mandate, since I presume the majority will not thus oust this panel and this Court of the ability to take "whatever further action" may be necessary. Majority Op. 26. As and when this case returns to this Court and this panel, I will be an interested and bemused spectator.

Exhibit 4

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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

DEAN BORTELL, as Parent of Infant ALEXIS BORTELL; MARVIN WASHINGTON; JOSE BELEN; SEBASTIEN COTTE, as Parent of Infant JAGGER COTTE; and CANNABIS CULTURAL ASSOCIATION, INC.,	:	__ Civ. ___
Plaintiffs,	:	**PROPOSED COMPLAINT**
- against -	:	
UTTAM DHILLON,in his official capacity as the Acting Administrator of the United States Drug Enforcement Administration; UNITED STATES DRUG ENFORCEMENT ADMINISTRATION; and the UNITED STATES OF AMERICA,	:	
Defendants.	:	

PLAINTIFFS DEAN BORTELL, as Parent/Guardian for Infant **ALEXIS BORTELL, MARVIN WASHINGTON, JOSE BELEN, SEBASTIEN COTTE** as Parent/Guardian for Infant **JAGGER COTTE**, and the **CANNABIS CULTURAL ASSOCIATION, INC.** (collectively, "Plaintiffs"), as and for their Complaint against defendants ("Defendants"), allege as follows:

PRELIMINARY STATEMENT

1. By this action, Plaintiffs seek an order, declaring that the defendant United States Drug Enforcement Administration ("DEA") has the power and authority to issue a determination,

de-scheduling cannabis under the Controlled Substances Act ("CSA"). Plaintiffs previously commenced an action in the Southern District of New York, seeking, *inter alia*, a declaration that the classification of cannabis under the CSA as a Schedule I drug was unconstitutional ("Prior Action"); however, on May 30, 2019, the Second Circuit Court of Appeals ruled therein that Plaintiffs were required to exhaust their administrative remedies by filing a de-scheduling petition with the DEA ("May 30th Decision") (Ex. 3). The May 30th Decision plainly contemplated that the DEA would have the power and authority to de-schedule cannabis. While preparing the petition to the DEA, however, Plaintiffs' counsel became aware of a prior (2016) determination by the DEA, in which it concluded that it lacks the power and authority to de-schedule cannabis ("2016 DEA Determination"). Thus, Plaintiffs have been tasked with filing a petition with the DEA to obtain the relief they seek in the Prior Action, despite that the DEA has taken the position that it lacks the power and authority to grant that very same relief.

2. By obtaining an order from this Court declaring that the DEA *does*, in fact, have the power and authority to de-schedule cannabis, Plaintiffs would be positioned to file their petition and cite to controlling case law, demonstrating that the DEA must de-schedule cannabis. And, if this Court were to conclude that the DEA is correct and that it lacks the power and authority to de-schedule cannabis, then the Second Circuit would be able to take appropriate next steps with respect to the Prior Action – specifically, modifying the May 30th Decision, and permitting Plaintiffs to continue to prosecute their claims in the Prior Action.

PLAINTIFFS

Dean Bortell and Alexis Bortell

3. Plaintiff Dean Bortell ("Dean") is, and at all relevant times has been, a citizen of

Texas and Colorado, currently residing in Larkspur, Colorado.

4. Dean is a former member of the Navy, and is a 100% permanently-disabled veteran of foreign wars ("VFW").

5. As a disabled VFW, his children are entitled to receive certain veterans' benefits ("Veterans' Benefits"), including, *inter alia*, health insurance and the right to use the commissary of any military base.

6. Plaintiff Alexis Bortell ("Alexis") is a 14-year-old girl, who lives with her parents.

7. Alexis is, and at all relevant times has been, a citizen of Texas and Colorado, currently residing in Larkspur, Colorado.

8. Dean is Alexis's father.

9. At the age of seven, Alexis began experiencing violent seizures, and was eventually diagnosed with a condition known as "intractable epilepsy."

10. Intractable epilepsy is a seizure disorder in which a patient's seizures cannot be safely controlled with FDA-approved medical treatments and procedures.

11. By reason of her intractable epilepsy, Alexis often suffered from multiple seizures a day, and spent most of her school-day afternoons at home or in the nurse's office.

12. Alexis, with the assistance of her family and treatment providers, attempted to treat, control and cure her intractable epilepsy for years without success. Nothing worked.

13. After two years of doctor visits, tests, urgent trips to the emergency room, and endless amounts of pills, all with their assortment of negative side effects, Alexis and her family realized they had exhausted all traditional and pharmaceutical options to stop what Alexis referred to as her "seizure monster." At that point, the Bortells tried the last known option available: whole-plant

cannabis ("Cannabis") containing high concentrations of THC.

14. Whole-plant Cannabis with high THC content provided Alexis immediate relief from her seizures, but it is not legal in Texas, where she resided at the time. Accordingly, Alexis and her family were forced to move from her home in Texas to seek life-saving treatment in Colorado. There, Alexis, despite being a young child, was thrust into a very grown-up world and joined a then-largely-unknown community of Cannabis patients known as "Medical Marijuana Refugees."

15. Since being on whole-plant medical Cannabis, Alexis has gone more than 6 years without a seizure, without taking any other medication to control her seizures.

16. Without treatment with whole-plant medical Cannabis, Alexis would likely have no quality of life, and instead be resigned to spending her days inside her home or worse, in a hospital bed, as medical caregivers surround her with offers of palliative care which fail to provide any relief whatsoever, including from seizures. In addition, Alexis would be subjected to traditional forms of treatment which, aside from being ineffectual, would threaten her with serious and life-altering side effects, including infertility.

17. Alexis was named a PACT National Pediatric Ambassador (2015-16), and received the Texas Liberty Award (along with her sister) in 2016.

18. At the age of eleven, Alexis co-authored the book, Let's Talk About Medical Cannabis, which was launched on April 20, 2017. In her book, she shares some of her and her family's experiences as "Medical Marijuana Refugees" and gives readers a perspective into the Cannabis refugee community.

19. Alexis's drive to help those around her led to her newest project, "Patches of Hope." Through Patches of Hope, Alexis and her sister Avery are growing USDA-certified organic garden

vegetables on their family farm to donate to hungry people in need, including her beloved Medical Marijuana Refugees. Alexis's story, including her advocacy, has been featured in documentaries, newspapers, magazines, TV, and on radio stations worldwide.

20. While thrilled with the success she has experienced in treating her intractable epilepsy and eliminating her daily seizures with medical Cannabis, Alexis wishes to move back to Texas where her grandparents live, and where she would be eligible for free college tuition through Texas's State Department of Education. Alexis is not eligible for free state education in Colorado.

21. In addition, Alexis would like to travel to other States and to federal lands (including, for example, national parks and monuments), but cannot safely do so without fear that: (i) her parents, with whom she would travel, might be prosecuted for possession of Alexis's medical Cannabis; or worse (ii) her parents might be subjected to proceedings which would imperil their parental rights.

22. Separate and apart from her desire to live in another State and travel to other States, national parks and monuments, Alexis would like to visit, and has been invited to speak with, members of Congress at the U.S. Capitol in Washington, D.C. to, *inter alia*, lobby in favor of repealing the CSA and in favor of the Marijuana Opportunity Reinvestment and Expungement Act ("MORE Act") or Marijuana Justice Act ("MJA"), both of which would have the effect of de-scheduling Cannabis.

23. However, Alexis cannot legally travel to the Capitol and visit with her elected representatives and other public officials unless she were to leave her medical Cannabis behind, which would endanger her life.

24. When lobbying for or against legislation, there is no comparable substitute for visiting

public officials face-to-face and engaging in in-person advocacy.

25. Insofar as Alexis is a minor, she cannot vote; her ability to influence her elected representatives is limited to efforts by her to advocate in support of beneficial legislation and against laws she regards as harmful.

26. In addition, Alexis would also like to avail herself of the Veterans' Benefits for which she is eligible and which she would otherwise receive were it not for her necessary Cannabis treatment; however, Alexis cannot legally enter the United States military base near her house, where she would be able to avail herself of such Benefits, including, for example, commissary benefits, unless she were to leave her medication behind, which would endanger her life. And, although currently receiving health insurance (another of the Veterans' Benefits to which she is entitled) through her father's veteran's benefit plan, Alexis will almost certainly lose her eligibility within the next three years, as she would be required to enter a United States military base to renew her health insurance card – a trip she cannot safely make without taking her State-legal, but federally-illegal, medication with her. Thus, Alexis and her family are subjected to a frightening Hobson's Choice: (a) discontinuing the only medication that has ever eliminated her seizures (thereby endangering her life, or, at best resigning herself to living permanently with a dangerous and disabling illness) so that she could return to Texas; (b) continuing to use her medication but refusing to relinquish her Constitutional right to travel, risking arrest, prosecution and her parents' loss of parental rights; or (c) continuing to use her medication within the State of Colorado but foregoing her rights to: (i) live in Texas; (ii) receive free college tuition in Texas; (iii) travel to other States where her Cannabis medication is illegal; (iv) use an airplane to travel anywhere; (v) step onto federal lands or into federal buildings; (vi) access United States military bases; and (vii) receive her father's Veterans'

Benefits ("Hobson's Choice").

27. Alexis and her co-Plaintiffs previously brought the Prior Action in which the Second Circuit issued the May 30th Decision.

28. Alexis seeks to file a petition with the DEA, in accordance with the May 30th Decision, but has reason to believe that, were she to do so, the DEA would almost certainly refuse to de-schedule cannabis, and would, instead, re-classify it under Schedule II, which would limit, if not completely eliminate, her access to the medication she needs in order to live.

Marvin Washington

29. Plaintiff Marvin Washington ("Marvin") is, and at all relevant times has been, a citizen and resident of the County of Dallas in the State of Texas.

30. Marvin is a graduate of the University of Idaho and is a member of the University's Sports Hall of Fame.

31. From 1989 to 1999, Marvin played professional football as a defensive lineman for the National Football League, including for the New York Jets, San Francisco 49ers and Denver Broncos, winning a Super Bowl with the latter.

32. After his retirement from professional football, Marvin entered the business world, working for Kannalife, a New York company that has been developing Cannabis-based medications to minimize the damage caused by traumatic head injuries and to reduce and ultimately eliminate opioid addiction among professional athletes. Marvin is currently working with a Swiss company known as Isidiol that has launched, among other things, a line of products infused with Cannabidiol,

also known as CBD, produced in the European Union, outside the confines of the CSA.[1]

33. Marvin wishes to expand his business to include whole-plant Cannabis (including THC) products in the United States, but is concerned that, even in States in which whole-plant Cannabis is legal for medical and/or recreational use, he may be subject to arrest and prosecution under Federal law.

34. Marvin wishes to avail himself of the benefits associated with the federal Minority Business Enterprise program ("MBE") in connection with whole-plant Cannabis products, but he is ineligible for this program solely because such activities would be illegal under the CSA. Were Marvin to open a whole-plant Cannabis business and apply for participation in the MBE, he would be admitting to the commission of a felony under Federal Law.

35. Marvin fears that, although CBD products generally have a low concentration or no concentration of THC, his existing business could be subjected to enforcement under the CSA.

36. Marvin seeks to file a petition with the DEA, as per the May 30th Order, but is concerned that, were he to do so, the DEA would almost certainly decline to de-schedule cannabis, and would, instead, re-classify it under Schedule II, which would limit, if not completely eliminate access to the product necessary for his company's operations. And if cannabis were no longer available to Marvin's company, Marvin would stand to lose his entire investment.

Jose Belen

37. Plaintiff Jose Belen ("Officer Belen") is a citizen of the State of Florida, with a

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[1] CBD, although part of the Cannabis plant, generally has no psychoactive effect. Nonetheless, it is currently the position of the Federal Government that the cultivation and/or sale of CBD is prohibited under the CSA. According to the Federal Government, CBD falls within the ambit of the classification of Cannabis as a Schedule I drug, unless extracted from industrial hemp or a part of the Cannabis plant exempted from the CSA.

residence in Seminole County.

38. On January 16, 2002, at the age of 19, Officer Belen enlisted in the United States Army.

39. Soon after enlisting in the Army, Officer Belen was deployed to Germany, where he participated in training exercises and awaited further deployment.

40. On March 20, 2003, the United States Military began an invasion of Iraq, under the code-name "Operation Iraqi Freedom."

41. In or around May 2003, Officer Belen and his battalion were deployed to Kuwait.

42. Officer Belen's battalion then engaged in active combat, receiving orders to cross the Iraq-Kuwait border and march on to enter Baghdad.

43. In connection with this mission, Officer Belen served in Iraq for 14 months, often engaging in and witnessing brutal armed combat.

44. During his deployment, Officer Belen came to know many of his fellow soldiers personally, developing strong, emotional bonds with them.

45. During his deployment, Officer Belen was in grave danger and witnessed the killing of several fellow soldiers, including his best friend and roommate.

46. Soon after Officer Belen was honorably discharged, it became clear to Officer Belen that he was unable to forget and/or otherwise cope with his memories of the horrors of war that he had lived through in Iraq.

47. Officer Belen was diagnosed with Post-Traumatic Stress Disorder ("PTSD").

48. PTSD is an ailment which commonly afflicts members of the armed forces who have seen active combat.

49. Because of his PTSD, the United States Department of Veterans Affairs ("Veterans Affairs") declared Officer Belen "70% disabled."

50. Officer Belen sought treatment for his PTSD from the medical staff at Veterans Affairs and other treatment centers.

51. The medical staff at Veteran Affairs issued Officer Belen prescriptions for different opioid medications.

52. The aforesaid and described prescriptions were ineffective and often further disabling for Officer Belen.

53. Officer Belen's PTSD intensified, and became so severe that Officer Belen often contemplated taking his own life.

54. Statistics show that an average of 22 American military veterans commit suicide *every single day*.

55. Upon information and belief, most of these VFW suicides are directly linked to PTSD.

56. After taking prescribed opioid medications, Officer Belen subsequently discovered that Cannabis is the only substance which actually controls and reduces his PTSD symptoms.

57. Since he began treating with medical Cannabis, Officer Belen has been able to cope with his PTSD.

58. Officer Belen has disclosed his need for medical Cannabis to his Veterans Affairs physicians.

59. Officer Belen's treatment providers at Veterans Affairs informed Officer Belen that they are unable to prescribe medical Cannabis because it is illegal under the CSA.

60. As with Alexis, Officer Belen cannot, while possessing his medical Cannabis, legally:

(i) enter a military base; (ii) travel by airplane; (iii) step onto federal lands or into federal buildings; (iv) travel to States where medical Cannabis is illegal and enforced under the CSA; (v) request medical Cannabis from his treating physicians; and/or otherwise (vi) avail himself of the Veterans Benefits for which he is otherwise eligible and to which he is legally entitled. Thus, as with Alexis, Officer Belen is subjected to a similar Hobson's Choice -- his life and health, or the risk of arrest simply for exercising his constitutional rights as a U.S. citizen.

61. Separate and apart from his desire to receive Veterans Benefits, Officer Belen would like to visit and speak with members of Congress at the U.S. Capitol to lobby in favor of, *inter alia*, repealing the placement of Cannabis on the CSA and in favor of enacting the MJA, which would have the effect of de-scheduling Cannabis.

62. However, Officer Belen cannot legally travel to the U.S. Capitol to visit with his elected representatives and other public officials unless he were to leave his medical Cannabis behind.

63. There is no comparable substitute for the opportunity to visit public officials and engage in in-person advocacy.

64. Officer Belen seeks to file a petition with the DEA, in accordance with the May 30th Decision, but is concerned that, were he to do so, the DEA would almost certainly refuse to de-schedule Cannabis, and would, instead, re-classify it under Schedule II, which would limit, if not completely eliminate, his access to the medication he needs in order to live.

Sebastien Cotte and Jagger Cotte

65. Plaintiff Sebastien Cotte is, and at all relevant times has been, a citizen and domiciliary of the State of Georgia, with a residence in Dekalb County ("Sebastien").

66. Plaintiff Jagger Cotte is, and at all relevant times has been, a citizen and domiciliary

of the State of Georgia, with a residence in Dekalb County.

67. Jagger is an eight-year old boy who lives with his parents, including his father, Sebastien.

68. Jagger suffers from a rare, congenital disease known as "Leigh's Disease," which disables and kills approximately 95% of people afflicted with it (if diagnosed before age 2) by the time that they reach the age of four.

69. Consistent with his diagnosis and prognosis, Jagger, beginning at age one, became a hospice patient, unable to communicate, walk, masticate food, and/or otherwise handle any activities of daily living.

70. Worse, Jagger began experiencing near-constant pain, shrieking in agony as he tried to get through each day and night.

71. As Sebastien and his wife prepared for what they expected would be their son's inevitable demise, they turned to Cannabis with high concentrations of THC, in the hope of reducing his pain and prolonging his life.

72. Since he began treating with medical Cannabis with high concentrations of THC, Jagger has stopped screaming in pain, has been able to interact with his parents, and has prolonged his life by more than two years.

73. Cannabis with a THC concentration of greater than 5% is illegal in the State of Georgia.

74. Because his required dosage for effective treatment of his condition requires a THC content greater than 5%, Jagger cannot obtain his medical Cannabis in his home State.

75. Worse, Georgia has no regulatory protocol for the cultivation, distribution and sale of

Cannabis. Thus, assuming that medical Cannabis with a THC content of less than 5% were sufficient to treat Jagger's condition -- and it isn't -- obtaining State-legal medical Cannabis in Georgia is impossible, as it is unavailable for purchase in a dispensary or otherwise.

76. At one point, Jagger and his family relocated to Colorado as Medical Marijuana Refugees to facilitate the administration of his medication; however, maintaining two residences and caring for a terminally ill child full-time rendered this prospect economically infeasible. Consequently, the Cotte family returned to Georgia (by car).

77. As with Alexis and Officer Belen, Jagger cannot travel by airplane, enter onto federal lands or into federal buildings, and/or travel to and/or through States in which medical Cannabis, by reason of the CSA and other legislation, is illegal. Thus, Jagger is resigned to a similar Hobson's Choice of: (i) relinquishing his constitutional rights because of his treatment with medical Cannabis; or (ii) retaining his constitutional rights but foregoing his medical treatment and subjecting himself to the uncompromisingly painful and ultimately fatal effects of his illness; or (iii) traveling without regard to where Cannabis is legal or illegal and risking his and/or his father's arrest and/or loss of parental rights.

78. Jagger would like to visit with members of Congress at the U.S. Capitol and, through his father, lobby in favor of repealing the placement of Cannabis on CSA and in favor of enacting the MJA, which would have the effect of de-scheduling Cannabis.

79. However, Jagger cannot make a trip to the U.S. Capitol and visit with his elected representatives and other public officials unless he were to leave his medical Cannabis behind, thereby endangering his life.

80. There is no comparable substitute for the opportunity to visit public officials and

engage in in-person advocacy.

81. Insofar as Jagger is a minor, he cannot vote; his ability to influence his elected representatives is limited to efforts by him (through his father) to advocate in support of beneficial legislation and against laws he and his family regard as harmful to him.

82. Jagger seeks to file a petition with the DEA, in accordance with the May 30th Decision, but has reason to believe that, were he to do so, the DEA would almost certainly refuse to de-schedule cannabis, and would, instead, re-classify it under Schedule II, which would limit, if not completely eliminate, his access to the medication he needs in order to live.

Cannabis Cultural Association, Inc.

83. Plaintiff Cannabis Cultural Association, Inc. ("CCA") is, and at all relevant times has been, a not-for-profit corporation organized and existing under the laws of the State of New York, with a principal headquarters in the City and County of New York.

84. The CCA was founded to provide a voice for, and forum to assist, persons of color to develop a presence in the Cannabis industry – an industry in which they are and, at all relevant times have been, grossly under-represented except when it comes to being arrested and incarcerated.

85. People of color, especially black males, are up to four times as likely to be arrested in connection with Cannabis than white Americans, and make up nearly 70% of the 2.5 million people in prison for drug crimes, even though use among races is virtually equal.

86. Convictions for violations of the CSA and other statutes criminalizing cultivation, distribution and/or use of Cannabis frequently disqualify individuals from participating in State-legal medical Cannabis businesses. By reason of the foregoing, persons of color, who are disproportionately investigated and prosecuted for drug offenses, have been unfairly and inequitably

excluded from the Cannabis industry.

87. Members of the CCA include persons of color who have been arrested, prosecuted, convicted and/or incarcerated for violating the CSA as it pertains to Cannabis.

88. The CCA seeks to file a petition with the DEA, in accordance with the May 30th Decision, but has reason to believe that, were the CCA to do so, the DEA would almost certainly refuse to de-schedule cannabis, and would, instead, re-classify it under Schedule II, which would limit, if not completely eliminate, any chance that the membership of the CCA would be eligible for the benefits that de-scheduled cannabis would provide, including: (i) the economic opportunities that would otherwise be unavailable to CCA members; and (ii) the opportunity to seek expungement of their criminal records.

DEFENDANTS

Uttam Dhillon and the DEA

89. Defendant Uttam Dhillon is, and since July 2, 2017, has been, the acting head of the defendant DEA.[2]

90. Defendant DEA is, and since 1973 has been, a Federal agency charged with the responsibility of investigating and, together with the Department of Justice, enforcing, the CSA, and any other controlled substances regarding laws and regulations of the United States.

91. Since at least 2002, the DEA's position has been that enforcement of Federal Laws against medical Cannabis is the responsibility of the DEA.

[2]Dhillon is sued only in his official capacity as Acting Administrator of the DEA.

United States of America

92. The United States of America is named as a defendant because this action challenges the constitutionality of an Act of Congress. 28 U.S.C. §2403(A).

JURISDICTION AND VENUE

93. This Court has subject matter jurisdiction over this controversy pursuant to 5 U.S.C. §8912, and 28 U.S.C. §§1331,1346(a)(2), 2201 and 2202.

94. Venue is proper pursuant to 28 U.S.C. §§1391(e) and 1402(a)(1).

FIRST CAUSE OF ACTION

95. Plaintiffs repeat and reallege each and every allegation contained in the preceding paragraphs 1-94, as if fully set forth herein.

96. By this action, Plaintiffs seek an order, declaring that the DEA has the power and authority to de-schedule cannabis from the CSA. The need for such a declaration is rooted in the outcome of a companion proceeding, styled *Washington et. al. v. Barr, et al.*, 17 Civ. 5625 (S.D.N.Y.) commenced by these same Plaintiffs (Prior Action, previously defined).

97. Plaintiffs commenced the Prior Action to obtain, *inter alia*, a declaration that the classification of cannabis under the CSA is unconstitutional, and an order enjoining its future enforcement (Prior Complaint, Ex. 1). The Prior Complaint was dismissed by a February 26, 2018 Order of the District Court of the Southern District of New York, which ruled that the Prior Action was barred by the doctrine of administrative exhaustion ("Prior Action Dismissal Order"). Specifically, the District Court therein ruled that Plaintiffs were required to file a petition with the DEA to de-schedule or re-schedule Cannabis before instituting any legal action (Prior Action Dismissal Order, Ex. 2).

98. Plaintiffs appealed the Prior Action Dismissal Order to the Second Circuit ("Appeal"), arguing, *inter alia*, that: (i) the DEA could not provide the relief sought in the Prior Complaint; and if the DEA could, (ii) the DEA typically does not issue administrative determinations on de-scheduling petitions for approximately nine (9) years, which would constitute undue and unfair prejudice to Plaintiffs. In response to the Appeal, the Second Circuit, on May 30, 2019, reinstated the Complaint and determined that it would be held in abeyance pending the filing of a petition with the DEA to obtain the relief that Plaintiffs requested in the Prior Complaint (May 30th Decision, previously defined, Ex. 3).

99. The May 30th Decision clearly presupposed that the DEA perceives itself as having the power and authority to de-schedule cannabis; however, in 2016, the DEA denied a petition to initiate rulemaking proceedings to re-schedule cannabis, and in so ruling that, due to United States' obligations under international drug control treaties, cannabis cannot be de-scheduled under the CSA ("Previous DEA Determination"). *See* 21 CFR Chapter II and Part 1301, Fed. Register, Vol. 156, 53688, Aug. 12, 2016.[3] According to the DEA, cannabis cannot be de-classified and at most can only be re-classified under Schedule II. *Id.* For the reasons set forth below, the re-classification of cannabis under Schedule II would severely prejudice several of the Plaintiffs, including especially Alexis, Jagger and Officer Belen.

100. The DEA's construction of the Single Convention on Narcotic Drugs of 1961 ("Single Convention") is erroneous, as the Second Circuit made clear in its May 30th Decision. In particular, the Second Circuit concluded that Plaintiffs could petition the DEA for the relief they seek (*i.e.*, the removal of cannabis from the CSA) because "foreign treaty commitments have not divested the

[3]The Previous DEA Determination states that "marijuana" refers to "cannabis."

Attorney General of the power to re- or *deschedule* marijuana" (Exh. 3 at 21) (emphasis added). In fact, the Single Convention does not impose rigidly-enforced, bright-line rules, but, rather, offers signatory parties a certain level of flexibility in developing drug regulations in accordance with their respective constitutional mandates, legal systems, and domestic laws.[4] Indeed, as the Chief Executives Board for Coordination ("CEB") recently acknowledged during the United Nations second regular session of 2018, the international drug policy conventions:

> allow for sufficient flexibility for countries to design and implement national drug policies *according to their priorities and needs*, consistent with the principle of common and shared responsibility and applicable international law.[5]

Furthermore, the CEB recognized that the complex "world drug problem" requires:

> a comprehensive approach that includes law enforcement efforts ensuring people's security and efforts *promoting health, human rights, including equality and non-discrimination, and sustainable development*.[6]

102. Thus, the DEA has authority to de-schedule cannabis consistent with the treaty obligations of the United States to prevent illicit drug trafficking and drug abuse if doing so: (i) is required by the United States's legal system and Constitution; and (ii) would promote public health and human rights.[7] Here, this is undoubtedly the case insofar as: the classification of cannabis under Schedules I or II of the CSA is unconstitutionally irrational given the current state of science

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[4] *See* United Nations, Single Convention on Narcotic Drugs, 1961, as Amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961, Articles 23, 35, 36, 38, 42, https://www.unodc.org/pdf/convention_1961_en.pdf (emphasis added).

[5] United Nations Systems Chief Executives Board for Coordination, Second regular session of 2018, Annex I at 12 (January 2019), https://www.unsystem.org/CEBPublicFiles/CEB-2018-2-SoD.pdf (emphasis added).

[6] *Id.*

[7] *See supra* notes 4, 5.

pertaining to the medical efficacy and safety of cannabis; at least 62% of Americans live in a state or jurisdiction in which cannabis is legal for medical and/or adult-use, rendering unworkable federal prohibition or a strictly-regulated federal regime; criminalization of cannabis has led to the disproportionate incarceration of persons of color in violation of the Fifth Amendment of the United States Constitution; and millions of Americans need medical cannabis to live. In light of the foregoing, the DEA would be perfectly within its authority to de-schedule cannabis so that States can properly regulate and control the cultivation, manufacture, sale, and possession of cannabis, which in turn would allow the DEA to focus its resources on eliminating the cannabis "black market" operating outside of state-legal jurisdictions -- the very type of illicit drug trafficking that the international drug treaties were intended to combat.

103. The DEA disagrees, and instead maintains that, under the Single Convention of 1961, it lacks the power or the authority to de-schedule cannabis or re-classify it to any level other than Schedule II. *See* 21 CFR Chapter II and Part 1301, Fed. Register, Vol. 156, 53688, Aug. 12, 2016.

104. There is, therefore, a genuine case in controversy between and among the parties, insofar as Plaintiffs maintain that the DEA has the power and authority to de-schedule cannabis, and Defendants have clearly taken the position that the DEA lacks such power and authority. As a result of the May 30th Decision, the outcome of the Prior Action, in which Plaintiffs seek a ruling that would effect the de-scheduling of cannabis, depends entirely upon whether the DEA has the aforesaid power and authority.

105. Because the DEA does, in fact, have the power and authority to issue a determination de-scheduling cannabis, and a genuine case and controversy exists with respect to such issue, with its outcome determinative of material rights and privileges to which Plaintiffs are entitled, Plaintiffs

are entitled to an order, declaring that the DEA has the power and authority to de-schedule cannabis.

WHEREFORE, Plaintiffs demand judgment over and against Defendants, declaring that the DEA does, in fact, have the power and authority to issue a determination de-scheduling cannabis under the CSA, along with attorneys' fees and any and all other and further relief this Court deems just and proper.

Dated: New York, New York
November 27, 2019

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By: /s Michael S. Hiller
Michael S. Hiller (MH 9871)
Lauren A. Rudick (LR 4186)
Fatima Afia (FA 1817)

EXHIBIT 5

From: Scott Woller
To: samuel.dolinger@usdoj.gov; benjamin.torrance@usdoj.gov
Cc: Michael Hiller; Fatima Afia
Subject: Washington v. Barr, 18 Civ. 859
Date: Wednesday, November 27, 2019 2:37:00 PM

Counsel:

Please be advised that Plaintiffs will today be filing in the U.S. Court of Appeals for the Second Circuit a Motion (the "Motion") to Extend the Time within which to Petition the Defendant Drug Enforcement Administration ("DEA") to De-Schedule cannabis, to allow Plaintiffs time to bring a new action seeking a declaration that the DEA has the power to de-schedule cannabis entirely.

Pursuant to Local Rule 27.1, please advise whether Defendants intend to file a response to the Motion and of Defendants' position on the relief requested by the Motion.
Thank you very much.

Regards,

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