

UNITED STATES DEPARTMENT OF JUSTICE
DRUG ENFORCEMENT ADMINISTRATION

In the Matter of

**Schedules of controlled substances:
Proposed Rescheduling of Marijuana**

DEA Docket No. 1362

Hearing Docket No. 26-96

CHIEF ADMINISTRATIVE LAW JUDGE
DEREK C. JULIUS

**GOVERNMENT’S RESPONSE TO NATIONAL DRUG & ALCOHOL SCREENING, DUID VICTIM
VOICES, AND KENNETH FINN, M.D.’S MOTION SEEKING ADDITIONAL DISCOVERY,
SUPPLEMENTAL BRIEFING, AND TO REOPEN THE PROCEEDINGS**

The United States Department of Justice (DOJ), Drug Enforcement Administration (Government or DEA), by and through the undersigned attorneys, hereby responds to National Drug & Alcohol Screening (NDASA), DUID Victim Voices, and Kenneth Finn, M.D.’s (collectively, the Movants) Joint Motion Seeking Additional Discovery, Supplemental Briefing, and to Reopen the Proceedings. DEA respectfully opposes the Movants’ Motion.

Neither the Administrative Procedure Act (APA) nor the Controlled Substances Act (CSA) provide for record supplementation and general discovery in rulemaking proceedings. Rather, under established law, the parties are entitled only to the disclosure of the documents and summary of the testimony upon which a party intends to rely. The only two exceptions to this blanket proposition are where a party makes a strong showing that: (1) the agency acted in “bad faith;” or (2) the record is so limited that it will frustrate effective judicial review. None of the moving parties have made the requisite showing here. The Movants’ Motion should be denied.

BACKGROUND

On May 21, 2024, DOJ, through the DEA, issued a notice of proposed rulemaking (NPRM) in the *Federal Register* proposing to transfer marijuana and any drug containing a substance within the CSA's definition of marijuana from Schedule I to Schedule III. On August 29, 2024, DEA scheduled a hearing pursuant to the NPRM and published such notice in the *Federal Register* on August 29, 2024. *See Schedules of Controlled Substances: Rescheduling of Marijuana*, 89 Fed. Reg. 70148 (2024).

On April 28, 2026, DOJ withdrew the Notice of Hearing and terminated all proceedings stemming from the August 29, 2024 Notice. *Schedules of Controlled Substances: Rescheduling of Marijuana; Withdrawal*, 91 Fed. Reg. 22,777, 22,778 (Apr. 28, 2026). That same day, then-acting Attorney General Todd Blanche issued a Notice rescheduling the hearing. *Id.* at 22,777. On June 24, 2026, the Government submitted its Prehearing Statement, which contained a list of witnesses, along with their anticipated testimony, including Exhibit One, which was a *Touhy* letter to address the three topics Dr. Dominic Chiapperino would be permitted to testify about outside of the voluminous report the Department of Health and Human Services (HHS) and the Food and Drug Administration (FDA) compiled in support of its scientific and medical evaluation and ultimate rescheduling recommendation. The Movants identified their own witnesses and presented them, along with a significant written record, during the June 29 – July 15, 2026, hearing before Chief Administrative Law Judge Derek C. Julius.

On August 27, 2026, all parties submitted their post-hearing briefs. On September 28, 2026, the Movants submitted a Joint Motion Requesting Leave to File Supplemental Briefing, for Admission of Supplemental Exhibit, and for Stay of Proceedings. The Movants attached a report by the Government Accountability Office (GAO) dated September 23, 2026 (GOA Report or Report) as said supplemental exhibit and requested leave to file additional briefing based on

the Report. On September 29, 2026, Judge Julius issued an order staying the proceedings and ordering the government to respond to Movants' request.

On October 11, 2026, the Movants submitted an additional motion to re-open the proceedings for written discovery, testimony, briefing on the application of these additional materials to the scheduling matter and a stay of the proceedings until the additional materials, testimony, and briefing schedule concludes. Movants submitted five requests for documents and testimony, including a request for the identities of all persons who were involved in the selection, recommendation or drafting of the two-part Currently Accepted Medical Use (CAMU) test, along with all materials that explain why the two-part test was adopted (Req. No. 1); the identities of all persons who drafted the CAMU language in the HHS recommendation and the role various agencies and outside groups played in HHS's recommendation drafting (Req. No. 2); an explanation for why the HHS evaluation submitted in this matter differed from HHS's prior marijuana evaluations (Req. No. 3); criteria FDA used to assess the abuse potential and Schedule III comparisons (Req. No. 4); and the materials GAO reviewed and requested relative to all scheduling matters from any person, entity or group (Req. No. 5). On October 14, 2026, this Tribunal Ordered the Government to provide a response to the Movants' request.

ARGUMENT

I. The APA Disfavors Supplementing the Record and Discovery in Administrative Matters

A. Supplementing the Administrative Record

The agency is entitled to a "strong presumption of regularity that it appropriately designated the administrative record." *Swisher Int'l, Inc. v. FDA*, No. 22-cv-954 (CRC), 2023 U.S. Dist. LEXIS 178551, at *9 (D.D.C. Oct. 4, 2023), *quoting Oceana, Inc. v. Ross*, 290 F. Supp. 3d 73, 77 (D.D.C. 2018). A party seeking to add materials to the administrative record must specifically

identify the materials to be supplemented and provide a sufficient reason to support their addition. To supplement the record, the Movants must show that the agency deliberately or negligently excluded documents that may have been adverse to its decision, background information is needed to determine whether the agency considered all the relevant factors, or that the agency failed to explain its administrative action so as to frustrate judicial review. *See Nat. Res. Def. Council, Inc. v. Doremus*, No. 20-cv-1150 (CRC), 2021 U.S. Dist. LEXIS 105921, at *6 (D.D.C. June 7, 2021).

B. Discovery

The APA does not provide for “discovery in the administrative process and the Federal Rules of Civil Procedure for discovery do not apply to administrative proceedings.” *Silverman v. Commodities Futures Trading Comm’n*, 549 F.2d 28, 33 (7th Cir. 1977) (internal citations omitted); *see also N.L.R.B. v. Valley Mold Co.*, 530 F.2d 693, 695 (6th Cir. 1976) (“The [APA] does not confer a right to discovery in federal administrative proceedings.”). Instead, “the extent of discovery that a party engaged in an administrative hearing is entitled to is primarily determined by the particular agency.” *Mister Discount Stockbrokers, Inc. v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985) (*quoting McClelland v. Andrus*, 606 F.2d 1278, 1285 (D.C. Cir. 1979)). “DEA’s regulations do not . . . provide for broad-based discovery. Rather, consistent with the Due Process Clause, they provide only the right to receive in advance of the hearing a summary of the anticipated testimony of the Government’s witnesses and copies of the Government’s proposed exhibits.” *Jones Total Health Care Pharmacy, L.L.C., and SND Health Care, L.L.C.*, 81 Fed. Reg. 79,188, 79,198 (2016), *pet. for rev. denied*, 881 F.3d 823 (11th Cir. 2018). In APA cases, “depositions [and] . . . wide-ranging document production of materials that may potentially lead to admissible evidence-do not apply.” *Bark v. Northrop*, 2 F. Supp. 3d 1147,

1152 (D.Or. 2014) *quoting Comprehensive Community. Dev. Corp. v. Sebelius*, 890 F. Supp. 2d 305, 312 (S.D.N.Y. 2012).

There is a strong presumption against discovery because “[t]he [agency’s] final decision in any hearing must survive review based on the evidence adduced in the hearing.” *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 350 (1st Cir. 2004); *Kravitz v. U.S. Dep’t of Commerce*, 336 F. Supp. 3d 545, 570 (D.Md. 2018), *citing NVE, Inc. v. Dep’t of Health & Human Servs.*, 436 F.3d 182, 195 (3d Cir. 2006); *see also Tafas v. Dudas*, 530 F. Supp. 2d 786, 794 (E.D. Va. 2008) (“Because judicial review of agency action is generally limited to the administrative record, discovery is typically not permitted.”). The party with the burden of proof in such proceedings “will have every incentive to proffer sufficient information to allow the agency to reach a reasoned decision. That same quantum of information should be adequate for a reviewing court to determine whether the agency’s action is supportable.” *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 350 (1st Cir. 2004).

Discovery is available “only upon a showing that the agency engaged in ‘bad faith or improper behavior’ in compiling the record, or in ‘the rare case in which the record is so bare as to frustrate effective judicial review.’” *Swisher*, 2023 U.S. Dist. LEXIS 178551 at *10, *quoting Community for Creative Non-Violence v. Lujan*, 908 F.2d 992, 997-98, (D.C. Cir. 1990). “Mere allegations” of bad faith will not overcome the presumption that government officials have acted properly and in good faith. *Kravitz*, 336 F.Supp. 3d. at 570, *quoting Mullins v. U.S. Dept. of Energy*, 50 F.3d 990, 990 (Fed. Cir. 1995). A party seeking discovery on a “bad faith” theory must make a “strong showing of bad faith or improper behavior before such inquiry may be made.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *see also Voyageurs Nat’l Park Ass’n v. Norton*, 381 F.3d 759, 766 (8th Cir. 2004) (“Inquiry into the

mental processes of administrative decisionmakers is to be avoided unless it is the only way there can be effective judicial review.”)

C. Application to Rulemaking

The record supplementation and discovery principles noted above apply equally in the rulemaking context. As a general matter, the same provisions of the APA and the DEA regulations that govern enforcement adjudications also govern rulemaking proceedings. *See* 5 U.S.C. § 556(a) (provisions applying to hearings “required by” 5 U.S.C. § 553 (rulemaking) and 5 U.S.C. § 554 (adjudications)); 21 C.F.R. § 1308.41 (DEA rulemaking hearings “shall be governed,” in part, by the general DEA hearing regulations at 21 C.F.R. §§ 1316.41-67). Any right to (or procedure for) discovery and record supplementation in these proceedings would be found in either the APA hearing provisions or the DEA hearing regulations. And, as discussed above, there are no such provisions.

II. The Movants Are Not Entitled to Supplement the Record

Movants requested to supplement the Administrative Record with the GAO Report but did not identify a basis allowable under the APA. The Government neither agreed nor objected to the introduction of the Report, noting that the Report was clear on its face and required no further briefing. Now the Movants argue that the Report’s addition to the administrative record, to which this Court has not ruled, necessitates significant discovery (written and testimonial) and supports further delay of this rescheduling process. To supplement the administrative record in an APA matter, the Movants must concretely identify the record to be added and cannot rely on broad categories of materials that are “likely” to exist. *Lee Mem’l Hosp. v. Burwell*, 109 F. Supp. 3d 40, 47 (D.D.C. 2015). The only document specifically identified by Movants to supplement the record is the GAO Report. Notably, neither the Report nor Movants identify other records with any specificity to supplement the Record. The Report identifies the *absence* of policy and

procedure records, not the presence of those materials. Because DEA's final decision is based on the review of the evidence adduced at the hearing, and Movants have not identified any materials to supplement the record except for the GAO Report, Movants' record supplementation request is limited to the Report. *See Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 350 (1st Cir. 2004).

III. Movants Are Not Entitled to Discovery

While Movants reference their discovery requests as "limited" and "narrowly tailored," these requests are neither limited nor narrow. Instead, Movants seek broad categories of materials and testimony related to issues the parties addressed repeatedly at the hearing (Request Nos. 1 -4) and an additional request for GAO's materials for all scheduling matters in the prior six years from every entity GAO sought said information from, and the content of every GAO request for information (Request No. 5).¹ Dr. Chiapperino testified about the two-part CAMU test and when it was developed (Tr. 42-45, 411-413, 493), how it differed from other CAMU tests used (Tr. 53-64, 137-138, 159-162, 164-167, 251, 257, 371-385, 393-394, 405-11, 427-438, 464, 528-530), and the direction he received on its use (Tr. 412-413), which is responsive to Request No. 1. Dr. Chiapperino also identified the groups that participated in the scientific and medical evaluation and scheduling recommendation and the process for information exchange between agencies (Tr. 40-43, 444-445, 488-495), which is responsive to Request No. 2. Further, Dr. Chiapperino testified about what ailments and population groups were included in the clinical studies, surveys and other materials FDA assessed and why (Tr. 104-106, 125-126, 181, 251, 357, 360-361, 468, 478, 499, 508, 516, 528), along with the criteria FDA used to assess abuse potential (Tr. 51, 73-

¹ The Government is uncertain whether it can require GAO to produce their investigation file in the current rescheduling process and assumes for the purpose of this response alone that it has the authority to demand GAO's investigative materials that are not in DEA's possession, custody, or control.

80, 291-292, 519-523) and the comparator substances used (Tr. 74-80, 204, 244-245, 273, 282-292, 353-356, 387-393, 528, 532-535). This information is sought in Request Nos. 3 and 4.

Dr. Chiapperino did not specifically identify each and every person who was involved in the selection, recommendation, direction, drafting, and approval of the two-part CAMU test (Request No. 1). Likewise, he did not identify each and every person involved in the preparation and revision of the CAMU language used in the HHS recommendation or whether other agencies participated in HHS's drafting (Request No. 2). The Movants had full opportunity to cross-examine Dr. Chiapperino about the particulars of Request Nos. 1 and 2 and explore any avenues they believed to be fruitful. The Movants' request to reopen this line of inquiry – after they had the opportunity to do so – would give them a “second bite at the apple” to which they are not entitled.

Movants' last Request, Request No. 5, seeks GAO's investigative file relative to its recent Drug Scheduling Report. Given the GAO Report's clear findings, explanation about how it performed its review, and various appendixes and citations, the Government is uncertain what Movants believe is missing from the Report that require discovery to complete the administrative record.²

Movants argue that their disagreement with the Government's interpretation creates a material issue of fact that this Court must resolve by allowing Movants to engage in broad, general written discovery, witness depositions, and further briefing to the Tribunal during a stay implemented until they have concluded their discovery process. This is an obvious fishing expedition based on a Report that is clear on its face. The Report did not find any concerns with

² The Government assumes for the purpose of this response that the GAO investigation materials can be subpoenaed and that GAO would produce fulsome, unredacted materials.

the materials that make up the Movants' discovery requests, *e.g.*, the scientific or medical assessment the Government used in the marijuana rescheduling process, the Office of Legal Counsel memo regarding the two-part CAMU test nor FDA and DEA's reliance on the same, the manner in which HHS's recommendation was written in support of its rescheduling recommendation and the agencies involved in that assessment or production, the population groups and ailments reviewed by FDA in its scientific and medical review, the definition of "potential for abuse" identified in the NPRM and used in the rescheduling review, or the comparator drugs FDA used in its scientific and medical review. Movants' reliance on this Report as the basis for their general discovery requests is misplaced. The parties' disagreement about the Report's findings and its impact on FDA's scheduling recommendation do not create a material issue of fact.

Further, contrary to established law, Movants seek discovery while failing to cite to "bad faith" or to an insufficiently "sparse" administrative record. Movants are required to make a "strong showing" of improper behavior before the Tribunal can entertain discovery into an administrative record on a bad faith theory. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). At most, Movants allege that the GAO Report's recommendation that DEA and FDA memorialize the processes requires further discovery to aid the Tribunal because without the written memorialization, "[t]he tribunal has no fixed standard against which to measure" whether the Government's review was adequate. Movants' Motion to Reopen Hearing, p. 2. Movants argument that the lack of a written standard, after the same standard used was addressed throughout the hearing and addressed in voluminous written materials, fails to establish *any* showing of bad faith, let alone a strong showing.

Movants have also not shown that discovery is necessary because the record is “so bare as to frustrate effective judicial review.” *Swisher*, 2023 U.S. Dist. LEXIS 178551 at *10. Dr. Chiapperino testified that he and his team spent ten months performing this review, including four break-out groups that met regularly to perform focused scientific reviews and assessments. (Tr. 42-45). HHS propounded a summary record that included voluminous materials, which summarized numerous studies, survey data, and findings along with citations to the individual studies reviewed because the record would be too difficult to review if all the materials cited were included. (Tr. 203-204). The parties then added to the administrative record during the hearing. The record herein does not “frustrate effective judicial review.” *See Swisher*, 2023 U.S. Dist. LEXIS 178551 at *10. Movants have not met their burden.

Because the GAO Report does not create a material issue of fact sufficient to rebut the presumption against record supplementation or discovery in this administrative matter, and because Movants cannot show bad faith or a sparse record, their request to reopen this hearing to supplement the administrative record and engage in discovery must fail.

CONCLUSION

For the foregoing reasons, the Government requests that the Movants’ Motion be denied in all respects.

Dated: October 20, 2026

Respectfully submitted,

James J. Schwartz

James J. Schwartz

Stacy M. Race

Lisa K. Man

Jarrett T. Lonich

Attorneys | Diversion Section

Drug Enforcement Administration

Office of Chief Counsel

8701 Morrisette Drive

Springfield, VA 22152

James.J.Schwartz@dea.gov

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2026, I electronically submitted the foregoing Government's Response to the DEA Office of Administrative Law Judges via the DEA Judicial Mailbox, at ECF-NPRM@dea.gov, and so caused a copy to be delivered to the following recipients:

- National Drug & Alcohol Screening Association, via email to:
 - M. Jo McGuire at jomcguire@ndasa.com;
 - David Evans, Esq., at thinkon908@aol.com;
 - Patrick D. Kenneally, Esq. at Patrick.Kenneally@burkegroup.law;
 - Connor W. Mighell at connor.mighell@burkegroup.law
- Tennessee Bureau of Investigation, via email to:
 - Reed Smith at reed.smith@ag.tn.gov;
 - Jacob Durst, Esq., at jacob.durst@ag.tn.gov;
- Smart Approaches to Marijuana, via email to:
 - Patrick F. Philbin, Esq., at pphilbin@torridonlaw.com;
 - John M. McNichols, Esq., at jmcnichols@torridonlaw.com;
 - Chase T. Harrington, Esq., at charrington@torridonlaw.com;
- The States of Nebraska, Idaho, Indiana, and Louisiana, via email to:
 - Zachary Pohlman, Esq., at zachary.pohlman@nebraska.gov;
 - Michael Zarian, Esq., at Michael.Zarian@ag.idaho.gov;
 - Blake Lanning, Esq., at Blake.Lanning@atg.in.gov;
 - Zachary Faircloth, Esq., at FairclothZ@ag.louisiana.gov;
- DUID Victim Voices, via email to:

- Ed Wood at Edwood27@icloud.com;
- Patrick D. Kenneally, Esq. at Patrick.Kenneally@burkegroup.law;
- Connor W. Mighell at connor.mighell@burkegroup.law
- Kenneth Finn, M.D., via email to:
 - Patrick D. Kenneally, Esq. at Patrick.Kenneally@burkegroup.law;
 - Connor W. Mighell at connor.mighell@burkegroup.law
- Phillip A. Drum, PharmD, pro se, via email to phillipdrum@comcast.net.

Date: October 20, 2026

/s/ James J. Schwartz

James Schwartz

UNITED STATES DEPARTMENT OF JUSTICE

Drug Enforcement Administration

In the Matter of

**Schedules of Controlled Substances:
Proposed Rescheduling of Marijuana**

**DEA Docket No. 1362
Hearing Docket No. 26-96**

ORDER GRANTING LEAVE TO FILE REPLY

The hearing on the merits in the above-captioned matter took place from June 29, 2026, through July 15, 2026. On September 28, 2026, DUID Victim Voices, Kenneth Finn, M.D., and the National Drug and Alcohol Association (NDASA), three Interested Parties (collectively hereinafter the Moving Parties), filed a “Joint Motion for Leave to File Supplemental Briefing, for Admission of Supplemental Exhibit, and for Stay of Proceedings” (Motion to Admit GAO Report). The Motion requests that this tribunal allow the admission of the U.S. Government Accountability Office’s (GAO) report titled “Drug Scheduling: While DEA Decisions Have Aligned with Recent HHS Recommendations, Both Need Comprehensive Policies” (the GAO Report), published on September 23, 2026, into the record as either Finn Exhibit 126 or as an ALJ Exhibit via official notice. The Motion further requests to allow for an additional briefing period on the contents of the GAO Report and how it impacts these proceedings, if at all.

On September 29, 2026, I granted a stay of this matter to allow briefing on the issue of whether the GAO Report should be admitted into the record as evidence. The Government submitted its response in opposition to the Motion to Admit GAO Report (Government’s First Opposition) on October 9, 2026. In its Opposition, the Government opposes the filing of supplemental briefs on the GAO Report, but “defers to this Honorable Court” on its admission into the record. Gov’t First Opp. at 1, 3. On October 13, 2026, Smart Approaches to Marijuana (SAM) and the States of Idaho, Indiana, and Nebraska (the Opposed States) filed a joint response in support of admitting the GAO Report into evidence and allowing a supplemental briefing period on the GAO Report. No other Interested Party filed a response to the Motion to Admit GAO Report.

Subsequently, on October 12, 2026, the Moving Parties filed two new motions. First, a motion for leave to file a reply to the Government's First Opposition (Motion for Leave to Reply). Second, the Moving Parties ask this tribunal to "reopen the hearing for limited discovery and testimony" if the GAO Report is admitted into the record. *See* Motion to Reopen Hearing for Limited Purposes and for Limited Discovery (Motion to Reopen Hearing) at 1. I granted the Motion for Leave to Reply, and I ordered the Government to respond to the Motion to Reopen Hearing. The Government timely filed a response (Government's Second Opposition) opposing the reopening of the hearing for additional testimony and evidence.

The Moving Parties now seek leave to file a reply of no more than five pages to the Government's Second Opposition (Second Motion for Leave to Reply). In the interest of fairness and due process, I will **GRANT** that motion; however, to avoid further delay, it will be on an expedited timeframe. It is **ORDERED** that the Moving Parties may file a reply of no more than five pages to the Government's Second Opposition no later than **October 21, 2026**.

Dated: October 21, 2026

DEREK JULIUS Digitally signed by DEREK
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DEREK C. JULIUS
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the undersigned, on October 21, 2026, caused a copy of the foregoing ORDER GRANTING LEAVE TO FILE REPLY to be delivered to the following parties:

- (1) The Government, via email to
 - i. The DEA Government Mailbox at dea.registration.litigation@dea.gov;
 - ii. James J. Schwartz, Esq., at James.J.Schwartz@dea.gov;
 - iii. Jarrett T. Lonich, Esq., at Jarrett.T.Lonich@dea.gov;
 - iv. Alexis B. Attanasio, Esq., at Alexis.B.Attanasio@dea.gov;
 - v. Kayla L. Kreinheder, Esq., at Kayla.L.Kreinheder@dea.gov;
 - vi. David C. Maley, Esq., at David.C.Maley@dea.gov;
 - vii. Lisa K. Man, Esq., at Lisa.K.Man@dea.gov;
 - viii. Stacy M. Race, Esq., at Stacy.M.Race@dea.gov;
 - ix. Mack J. Swan, Esq., at Mack.J.Swan@dea.gov;
- (2) National Drug & Alcohol Screening Association, via email to
 - i. M. Jo McGuire at jomcguire@ndasa.com;
 - ii. David G. Evans, Esq., at thinkon908@aol.com;
- (3) Tennessee Bureau of Investigation, via email to
 - i. Jacob Durst, Esq., at jacob.durst@ag.tn.gov;
 - ii. Reed N. Smith, Esq., at Reed.Smith@ag.tn.gov;
- (4) Smart Approaches to Marijuana, via email to
 - i. Patrick F. Philbin, Esq., at pphilbin@torridonlaw.com;
 - ii. John M. McNichols, Esq., at jmcnichols@torridonlaw.com;
 - iii. Chase T. Harrington, Esq., at charrington@torridonlaw.com;
- (5) The States of Nebraska, Idaho, and Indiana, via email to
 - i. Zachary Pohlman, Esq., at zachary.pohlman@nebraska.gov;
 - ii. Michael Zarian, Esq., at Michael.Zarian@ag.idaho.gov;
 - iii. Blake Lanning, Esq., at Blake.Lanning@atg.in.gov;
 - iv. John M. McNichols, Esq., at jmcnichols@torridonlaw.com;
 - v. Chase T. Harrington, Esq., at charrington@torridonlaw.com;
 - vi. T. Zachary Horton, Esq., at tzhorton@torridonlaw.com;
- (6) DUID Victim Voices, via email to
 - i. Ed Wood, at edwood27@icloud.com;
 - ii. Patrick D. Kenneally, Esq., at patrick.kenneally@burkegroup.law;
 - iii. Connor W. Mighell, Esq., at connor.mighell@burkegroup.law;
 - iv. David G. Evans, Esq., at thinkon908@aol.com;
 - v. Joseph A. Bingham, Esq., at joe.bingham@burkegroup.law;
- (7) Kenneth Finn, M.D., via email to
 - i. Patrick D. Kenneally, Esq., at patrick.kenneally@burkegroup.law;
 - ii. Connor W. Mighell, Esq., at connor.mighell@burkegroup.law;

- iii. David G. Evans, Esq., at thinkon908@aol.com;
- iv. Joseph A. Bingham, Esq., at joe.bingham@burkegroup.law;
- (8) Phillip A. Drum, PharmD, *pro se*, via email at phillipdrum@comcast.net

KEMBA ARTHUR Digitally signed by KEMBA
ARTHUR
Date: 2026.10.21 09:39:07 -04'00'

Kemba Arthur
Staff Assistant
Office of Administrative Law Judges

**BEFORE THE UNITED STATES DEPARTMENT OF JUSTICE
DRUG ENFORCEMENT ADMINISTRATION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of:

*Schedules of Controlled Substances:
Proposed Rescheduling of Marijuana*

DEA Docket No. 1362
Hearing Docket No. 26-96

**REPLY IN SUPPORT OF MOTION TO REOPEN HEARING
FOR LIMITED PURPOSES AND FOR LIMITED DISCOVERY**

Interested Parties National Drug & Alcohol Screening Association (“NDASA”), DUID Victim Voices, and Kenneth Finn, M.D. (collectively, “Interested Parties”) reply to the Government’s October 20, 2026 response (“Gov’t Oct. 20 Resp.”).

The Government concedes the facts that decide this motion. First, it admits its witness never identified who selected, directed, drafted, or approved the two-part currently accepted medical use (“CAMU”) test, or whether other agencies shaped the CAMU language. Gov’t Oct. 20 Resp. at 8. That two-part test, whose origin is entirely unknown, decided the medical-use finding. FDA was “directed to use” it by someone midway through its evaluation, and its witness admitted marijuana “[w]ould not have passed” the five-part test it replaced. Tr. 412:13–19, 437:13–14. Second, the Government admits the GAO Report documents “the absence of policy and procedure records.” Gov’t Oct. 20 Resp. at 6–7. That absence *is* the finding. FDA has no written criteria for “potential for abuse,” including “abuse potential relative to other substances.” GAO Report at 14. Schedule III requires that comparison. 21 U.S.C. § 812(b)(3)(A). The Government cannot concede that no standard existed and then call the missing standard immaterial. Third, the Government admits that “DEA’s final decision is based on the review of the evidence adduced at the hearing,” Gov’t Oct. 20 Resp. at 7, and “[t]he party with the burden of proof” must “proffer sufficient information to allow the agency to reach a reasoned decision.” *Id.* at 5 (citation omitted). The party with the burden of proof is the Government. *See* 5 U.S.C. § 556(d); 21 C.F.R. § 1316.56.

If discovery were to show that the two-part test had no basis other than ensuring marijuana would pass, that someone outside HHS dictated it to FDA, and that the scientific consensus favored the five-part test for the CAMU determination, it is indisputable that the Government could not carry its burden. The Government shut down that inquiry during the hearing and now asks this tribunal to again foreclose inquiry into clearly relevant and potentially dispositive evidence.

The record lacks facts on a required finding. Reopening this hearing and allowing limited discovery can supply those facts. The tribunal should grant Interested Parties' motion.

I. THE RECORD RULE GOVERNS REVIEWING COURTS, NOT AN OPEN ADMINISTRATIVE PROCESS

Every limit the Government invokes comes from judicial review of a closed administrative record. *See* 5 U.S.C. § 706 (“the court shall review the whole record”). But this tribunal is compiling a record, not reviewing one. In a formal hearing, the transcript, exhibits, and papers filed “constitute[] the exclusive record for decision.” *Id.* § 556(e). No recommended decision has issued, and the record has not been certified. 21 C.F.R. §§ 1316.52, 1316.65(c). The Government’s own test asks whether the record would “frustrate effective judicial review.” Gov’t Oct. 20 Resp. at 10. That review will be confined to what this tribunal receives now. *See Walter O. Boswell Mem’l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) (reviewing less than the full record “might allow a party to withhold evidence unfavorable to its case”).

Swisher, *Oceana*, *Doremus*, *Lee Memorial*, and *Community for Creative Non-Violence* each asked what a district court may add to a closed agency record. None involved a § 556 hearing before certification. The Government’s remaining out-of-circuit cases hold only that the Federal Rules do not govern agency hearings, which no one disputes.

II. THE APA AND DEA’S RULES AUTHORIZE WHAT THE MOTION REQUESTS

The Government says any discovery right would appear in the APA or DEA’s hearing rules, and “there are no such provisions.” Gov’t Oct. 20 Resp. at 6. Wrong. The Administrative Procedure

Act allows presiding officers in an administrative hearing to issue subpoenas, take depositions, receive evidence, regulate the hearing, and dispose of procedural requests. 5 U.S.C. § 556(c). Parties at a § 556 hearing may submit rebuttal evidence, conduct cross-examination, and contravene any official notice of material facts. *Id.* § 556(d)–(e).

The Government’s own authority also holds that the extent of discovery “is primarily determined by the particular agency.” Gov’t Oct. 20 Resp. at 4 (quoting *McClelland v. Andrus*, 606 F.2d 1278, 1285 (D.C. Cir. 1979)). Here, the particular agency has spoken. DEA’s rules authorize the presiding officer to issue subpoenas, direct witness testimony, and rule on evidence and procedural matters. *See* 21 C.F.R. § 1316.52. DEA’s rules also permit submission of previously unidentified evidence upon a showing of good cause. *See id.* § 1316.57. *Jones Total Health Care Pharmacy* acknowledged that discovery must be available when its denial would prejudice a party sufficiently to violate due process. *See* 81 Fed. Reg. 79,188, 79,198 (2016). Interested Parties seek identified materials and testimony that bears directly on disputed issues material to rescheduling. Moreover, this tribunal has already treated this request as within its authority to decide, calling it “a new substantive motion.” Order of Oct. 14, 2026, at 2.

III. THE GOVERNMENT LIMITED THE INQUIRY AND CANNOT NOW CITE THOSE LIMITS AS A REASON TO HALT IT

The Government says Interested Parties had a “full opportunity” to cross-examine Dr. Chiapperino and now seek “a second bite at the apple.” Gov’t Oct. 20 Resp. at 8. There was no first bite. The Government declared the two-part test off limits. Tr. 26:12–17, 97:8–17. FDA’s Touhy letter confined Dr. Chiapperino to three topics, ALJ Ex. 44, Attach. 1 at 1–2, and the Government invoked it against process questions, Tr. 107:5–108:1, 196:23–197:2, 1355:6–14. The witness stated that explaining “how the two part test became the documents that we gave to DEA” might breach his letter. Tr. 440:20–24. Section 556(d) guarantees cross-examination “required for a full and true disclosure of the facts.” A witness bound by a Touhy letter cannot disclose what lies outside it.

The Government's string cites show what the two-part test is and when it arrived. Gov't Oct. 20 Resp. at 7–8. They do not show who chose it or why. The Government, as proponent of the proposed rule, bears the burden of proof. 5 U.S.C. § 556(d). The policies the agencies gave GAO, and their comments on the draft Report, sit in the Government's own files and require no detour through GAO. GAO Report at 18–20.

IV. THE GOVERNMENT'S SHIFTING ACCOUNT OF THE REPORT CREATES DISPUTED FACTS

The Government calls the Report “clear on its face” and denies any “material issue of fact.” Gov't Oct. 20 Resp. at 8–9. On October 9 in its response to Interested Parties' prior Motion (“Gov't Oct. 9 Resp.”) the Government read the Report as a mere recommendation to memorialize procedures. *See* Gov't Oct. 9 Resp. at 3–5. Interested Parties covered how this reading creates a dispute of material fact in its Reply to that Response. Notably, the Report says DEA “does not have any policies or procedures regarding how its staff are to conduct evaluations or schedule substances,” and that FDA lacks written criteria for potential for abuse. GAO Report at 2, 12–14. FDA told GAO that gap “presented challenges for determining the relative abuse potential.” *Id.* at 14. Whether that admitted gap shaped the evaluation relevant to this proceeding, including its comparators and its omission of psychosis and prenatal exposure, is an open question of material fact. Tr. 104:17–106:1, 357:10–17. Additionally, how the Government's decision to use the novel two-part test instead of the traditional five-part test affected its recommendation to reschedule marijuana is a material fact requiring scrutiny.

A recommended decision must state findings “on all the material issues of fact . . . presented on the record.” 5 U.S.C. § 557(c)(3)(A). Without further fact-finding regarding the Government's process (or lack thereof), this tribunal cannot issue a recommended decision that meets this bar.

V. THE RECORD IS BARE ON THE DISPOSITIVE QUESTIONS

The Government’s lead case supports the motion. The Government cites *Overton Park* for a bad-faith requirement. Gov’t Oct. 20 Resp. at 5, 9. But that requirement applies only “where there are administrative findings that were made at the same time as the decision.” *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). Where those findings are missing, “the bare record may not disclose the factors that were considered,” and “the only way there can be effective judicial review” may be “examining the decisionmakers themselves.” *Id.* The Court reversed because the lower courts had ruled on less than the whole record. *Id.* at 419–20.

This record is missing a crucial finding: the written standard FDA used to judge abuse potential. GAO Report at 14. No bad-faith showing is required to fill that gap. Nor do Interested Parties’ requests probe mental processes. They seek facts: who chose the all important, decisive two-part CAMU test, who directed its use, when, and under what criteria. The Government’s summaries, *see* Gov’t Oct. 20 Resp. at 9–10, show what FDA reviewed. They do not show what standard FDA applied when reviewing. The Report identifies the documents that would: the July 17, 2023 “Part 1 Analysis” memorandum, FDA’s eight-factor SOPs, and the FDA–DEA and FDA–NIDA memoranda of understanding. GAO Report at 8, 12–15, 28 n.25. HHS has since committed to write the standard that should have governed this evaluation. *Id.* at 18. The existing administrative record is bare where it counts.

VI. CONCLUSION AND PRAYER FOR RELIEF

Interested Parties request that the Chief Administrative Law Judge grant the Motion to Reopen Hearing for Limited Purposes and for Limited Discovery; authorize limited discovery and testimony on the five identified subjects; admit or officially notice the GAO Report; continue the stay and hold the recommended decision and certification until that process closes; and grant such other relief as justice requires.

Date: October 21, 2026

Respectfully submitted,

/s/ Patrick D. Kenneally
Patrick D. Kenneally
IL Bar #6286573
BURKE LAW GROUP, PLLC
205 N Michigan Avenue, Suite 810
Chicago, Illinois 60601
Telephone: (832) 987-2214
Fax: (832) 793-0045
patrick.kenneally@burkegroup.law

Connor W. Mighell
TX Bar #24110107
BURKE LAW GROUP, PLLC
1000 Main Street, Suite 2300
Houston, Texas 77002
connor.mighell@burkegroup.law

Joseph A. Bingham
DC Bar #1015329
BURKE LAW GROUP, PLLC
2001 L Street NW, Suite 500
Washington, D.C. 20036
joe.bingham@burkegroup.law

**Counsel for DUID Victim Voices and
Kenneth Finn, M.D.**

/s/ David G. Evans
David G. Evans
NJ Bar #019631974
203 Main St. #250
Flemington, NJ 08822
Telephone: (908) 963-0254
thinkon908@aol.com

**Counsel for National Drug & Alcohol
Screening Association**

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2026, I electronically filed the foregoing Reply with the tribunal via email to the DEA Judicial Mailbox at ECF-NPRM@dea.gov and simultaneously served the Reply by email upon the Government and all parties of record as follows:

The Government — dea.registration.litigation@dea.gov, James.J.Schwartz@dea.gov;
Jarrett.T.Lonich@dea.gov; Alexis.B.Attanasio@dea.gov; Kayla.L.Kreinherder@dea.gov;
David.C.Maley@dea.gov; Lisa.K.Man@dea.gov; Stacy.M.Race2@dea.gov;
Mack.J.Swan@dea.gov

National Drug & Alcohol Screening Association — jomcguire@ndasa.com;
thinkon908@aol.com

Tennessee Bureau of Investigation — jacob.durst@ag.tn.gov; reed.smith@ag.tn.gov

Smart Approaches to Marijuana — pphilbin@torridonlaw.com;
jmcnichols@torridonlaw.com; charrington@torridonlaw.com

States of Nebraska, Idaho, and Indiana — zachary.pohlman@nebraska.gov;
Michael.Zarian@ag.idaho.gov; Blake.Lanning@atg.in.gov; pphilbin@torridonlaw.com;
jmcnichols@torridonlaw.com; charrington@torridonlaw.com;
tzhorton@torridonlaw.com

DUID Victim Voices — edwood27@icloud.com

Kenneth Finn, M.D. — kfinn0731@gmail.com

Phillip A. Drum, PharmD — phillipdrum@comcast.net

/s/ Patrick D. Kenneally

Patrick D. Kenneally