

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 BRIEF REGARDING THE WEIGHT OF THE GAO REPORT

The United States Department of Justice (DOJ), Drug Enforcement Administration (Government or DEA), by and through the undersigned attorneys, hereby responds to the Court’s invitation to address the weight to be afforded to the September 23, 2026 Report published by the United States Government Accountability Office (GAO) recently admitted into evidence. As explained further below, the Report is not probative to the instant rescheduling analysis and, as a result, should be given no weight by this Tribunal.

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 Controlled Substance Act’s (CSA) definition of marijuana from schedule I to schedule III. 89 Fed. Reg. 44,597 (May 21, 2024). 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 (Aug. 29, 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 29 – July 15, 2026, the Government and seven Opposed Parties, including the Movants¹, presented testimony supporting their respective positions in front of Chief Administrative Law Judge Derek C. Julius. The Government presented multiple exhibits along with testimony from Dr. Dominic Chiapperino detailing the process and analysis that led the Department of Health and Human Services (HHS) to ultimately recommend that marijuana be transferred to schedule III. Smart Approaches to Marijuana (SAM), one of the opposing parties, called Dr. Luli Akinfiresoye, a DEA scientist, who testified about the process and analysis that DEA utilizes in scheduling controlled substances.

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 (Joint Motion for Leave to File Supplemental Briefing). The Movants attached the September 23, 2026 Report by the GAO (GAO Report or Report) as said supplemental exhibit and requested leave to file additional briefing based on the GAO Report. On September 29, 2026, Judge Julius issued an order staying the proceedings and ordering the Government to respond to Movants' request.

On October 9, 2026, the Government filed its opposition to Movants' Joint Motion for Leave to File Supplemental Briefing. On October 12, 2026, the Movants filed two new motions: the first requested leave to respond to the Government's Opposition and the second requested this Tribunal reopen the hearing for limited discovery and testimony. On October 13, 2026, SAM and the States of Idaho, Indiana, and Nebraska filed a joint response regarding supplemental

¹ DUID Victim Voices, Kenneth Finn, M.D., and the National Drug and Alcohol Association (NDASA).

briefing and the admission of the GAO Report. On October 22, 2026, the Court admitted the GAO Report and granted the Movants’ request for supplemental briefing on the GAO Report (Order Granting Motion to Admit GAO Report). Judge Julius’s order noted “the GAO Report speaks for itself regarding its conclusions on the general rescheduling process and documentation about that process.” Order Granting Motion to Admit GAO Rpt, p. 4. The Court sought briefing on the “weight, if any the tribunal should give to the GAO Report” and “if it should be afforded weight, to what extent the GAO Report has an effect on the current rescheduling matter.” *Id.* The Parties may brief these questions and submit reply briefs thereafter. *Id.*

ARGUMENT

This Honorable Court requested the Parties address the weight that should be afforded the GAO Report in the marijuana rescheduling process. Order Granting Motion to Admit GAO Rpt, p. 4. The evidentiary weight of evidence is determined by its probative value. Legal Information Institute, Cornell Law School, *Probative*, <https://www.law.cornell.edu/wex/probative> (last visited Oct. 27, 2026). Probative is “the ability of evidence to persuade a reasonable person about a fact that is in dispute in a case.” *Id.*, see also *Saudi Basic Indus. Corp. v. ExxonMobil Corp.*, 401 F. Supp. 2d 383, 391 (D.N.J., 2005) (“[p]robative is defined as ‘tending to prove or disprove,’” citing *Blacks Law Dictionary* 979 (7th ed. 2000)).

Because the Parties before this court agree that marijuana should be controlled, the Government will address the probative value of the GAO Report against the three factors this Court must consider regarding the placement of marijuana in those schedules. Schedule III requires a finding of whether: (1) marijuana has a potential for abuse less than the drugs or other substances in schedules I and II; (2) [marijuana] has a currently accepted medical use (CAMU) in treatment in the United States, and (3) abuse of the drug or other substance may lead to

moderate or low physical dependence or high psychological dependence. 21 U.S.C. § 812(b)(3). Movants have not demonstrated that the substance of the GAO Report has any probative value on any of the three findings.

Potential for Abuse

Movants argue that the GAO Report’s findings that FDA lacks criteria to determine “potential for abuse,” including abuse potential relative to other substances. Joint Motion for Leave to File Supplemental Briefing, p. 6. The GAO Report noted that the CSA itself does not define “potential for abuse.” Report, p. 14. However, the Government defined “abuse” in the NPRM consistent with the CSA’s legislative history. 89 Fed. Reg. at 44601. The NPRM further notes that “DEA and HHS have typically weighed [certain] factors in determining whether a particular drug or substance has a *potential for abuse*.” *Id.* (emphasis added). HHS’ recommendation (HHS Marijuana Recommendation) also addressed these same abuse factors in writing.² Notably, the HHS recommendation was published in August 2023 and the NPRM was published in May 2024, more than two years before Movants presented their cases to this Tribunal. Movants’ implication that they did not have a “written yardstick” to determine the factors the Government considered in performing its analysis is belied by the evidence in the record. Joint Motion for Leave to File Supplemental Briefing, p. 6.

The Report is not probative to the abuse potential analysis performed by the Government in the marijuana rescheduling hearing because the factors used by the Government were published and publicly available to the parties for more than two years prior to the hearing.

² The “potential for abuse” factors considered were 1) evidence of individuals taking the substance in amounts sufficient to create a hazard to their health or the safety of others or the community, 2) whether there is significant diversion from legitimate drug channels, 3) if individuals are taking the substance on their own initiative or on the advice of a medical practitioner, and 4) if the substance at issue is related to a listed drug such that it is likely that the substance will have the same potential of abuse of the listed drug. 89 Fed. Reg. at 44603; Gov’t Exh. 3, p.7.

While the Movants may not agree with the abuse analysis performed, the factors the Government used to perform that analysis are not in dispute. As such, the Report is not probative to the Government's abuse potential finding.

CAMU

The GAO Report's assessment of CAMU is limited to a historical recitation of the various CAMU tests employed by HHS and DEA. Report pp. 7-8. The Report also addressed the 2024 Office of Legal Counsel (OLC) opinion and noted that OLC "found that DEA may satisfy the United States' international treaty obligations by placing marijuana in schedule III while imposing additional restrictions pursuant to the Controlled Substance Act's regulatory authorities." *Id.* at p. 8. There is simply no substantive commentary (critical or otherwise) about the two-part CAMU test in the GAO Report, which is notable given that Movants focus on the two-part CAMU test in these post-hearing motions. Like the abuse finding, the Report is not probative to the method used by the Government to assess marijuana's CAMU.

Dependence Risk

The GAO Report references dependence risk in the body of the report when noting that "FDA has issued ... a policy document that establishes responsibilities and procedures in the FDA Center for Drug Evaluation and Research for consulting the Controlled Substance Staff regarding the evaluation of drug abuse potential ... [and] dependence risk." Report p. 13. Like abuse potential and CAMU, there is no substantive finding relative to HHS's dependence risk assessment. The GAO Report holds no probative value for the third finding pending before this Court.

The GAO Report is not probative to the rescheduling matter before this Court. *See Saudi Basic Indus. Corp.*, 401 F. Supp. 2d at 391. Specifically, the Report does not present evidence

that “tends to prove or disprove” any of the recommendation factors necessary to HHS’s rescheduling recommendation. *Id.* Because the GAO Report is not probative to the rescheduling recommendation, this Tribunal should give the GAO Report no weight.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the Court give the GAO Report no weight.

Dated: October 29, 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 29, 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 29, 2026

/s/ James J. Schwartz

James Schwartz