No. 20-_____

In the Supreme Court of the United States

MARVIN WASHINGTON; DB, AS PARENT OF INFANT AB; JOSE BELEN; SC, AS PARENT OF INFANT JC; AND CANNABIS CULTURAL ASSOCIATION, INC.,

Petitioners,

v.

WILLIAM PELHAM BARR, IN HIS OFFICIAL CAPACITY AS UNITED STATES ATTORNEY GENERAL; UNITED STATES DEPARTMENT OF JUSTICE; TIMOTHY J. SHEA, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF THE DRUG ENFORCEMENT ADMINISTRATION, UNITED STATES DRUG ENFORCEMENT ADMINISTRATION, AND THE UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Three of the Petitioners require daily administration of medical cannabis to live. Despite classifying it a Schedule I drug under the Controlled Substances Act ("CSA"), the federal government, which owns domestic and international medical cannabis patents ("Federal Cannabis Patents"), has, for decades, repeatedly acknowledged that cannabis has safe and effective medical applications in the United States.

THE QUESTIONS PRESENTED ARE:

1. Can Congress, consistent with the Due Process Clause of the Fifth Amendment to the U.S. Constitution, criminalize medical cannabis without exception, even for patients who require its daily administration to live?

2. Given the three requirements for designation as a Schedule I drug under the CSA (21 U.S.C. § 812(b)(1)), is the classification of cannabis so irrational that it violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution?

3. Can Congress, consistent with the Due Process Clause of the Fifth Amendment to the U.S. Constitution, require persons aggrieved by the classification of a substance under the CSA to submit to an administrative review process that cannot, as a matter of law, provide the relief they seek?

CORPORATE DISCLOSURE STATEMENT

All parties are listed on the cover. Pursuant to Rule 29.6 of this Court, Cannabis Cultural Association, Inc. ("CCA"), the only corporate Petitioner herein, represents that it has no parent company; it is a non-profit corporation; and, therefore, no publicly-held corporation owns any stock therein.

LIST OF PROCEEDINGS

United States Court of Appeals for the Second Circuit
Docket No. 18-859

Marvin Washington, Dean Bortell, as Parent of Infant Alexis Bortell, Alexis Bortell, Jose Belen, Sebastien Cotte, as Parent of Infant Jagger Cotte, Jagger Cotte, 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, United States of America, *Defendants-Appellees.*

Date of Final Order: February 3, 2020

United States District Court Southern District of New York

No. 17 Civ. 5625

Marvin Washington, Et Al., *Plaintiffs,* v.
Jefferson Beauregard Sessions, III, Et Al., *Defendants.*

Date of Final Opinion and Order: February 26, 2018

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Justice Dept Press Release: "Justice Department Issues Memo on Marijuana Enforcement" (January 4, 2018) 309a

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Barbuto v. Advantage Sales & Mktg., LLC,
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Bowers v. Hardwick,
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Brown v. City of Jacksonville,
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Brown v. U.S.,
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D.J.C. v. Amazon Com Dedc, LLC,
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England v. Louisiana State Bd. of Examiners,
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Gonzalez v. Raich,
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Hodgkins v. Peterson,
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Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary, 572 U.S. 291 (2014) 27

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Drug Abuse Control Amendment–1970: Hearings Before the Subcomm. on Public Health and Welfare, 91st Cong. 179 (1970) 14, 16

OTHER AUTHORITIES

ABC7 EYEWITNESS NEWS, *Western Illinois, Colorado State Universities to Offer Cannabis-Related Degrees Starting This Fall*, (February 11, 2020), https://abc7chicago.com/cannabis-degree-growing-how-to-grow-marijuana-western-illinois-university/5921746/ 21

ACLU, *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform (last visited June 29, 2020) 16

Allana Akhtar, BUSINESS INSIDER *Jobs in Pot are at an All-Time High, But the Boom is Causing Rifts in the Traditional Workforce*, (Apr. 26, 2019), https://www.businessinsider.com/jobs-in-cannabis-industry-are-growing-2019-4?utm_source=m sn.com&utm_medium=referral&utm_content=msn-slideshow&utm_campaign=bodyurl 34

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Claire Hansen,
U.S. NEWS & WORLD REPORT
Attorney General Barr Calls Current Marijuana Situation 'Intolerable,' Indicates Support for Reform Bill,
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Dan Hyman,
N.Y. TIMES
When the Law Says Using Marijuana Is O.K., but the Boss Disagrees,
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Dennis A. Rendleman,
ABA, *Ethical Issues in Representing Clients in the Cannabis Business: "One Toke Over the Line?,"* (July 2, 2019) 21

Doug Kronaizl,
THE CENTER SQUARE
Two-Thirds of Americans Have Access to Medical Marijuana; One-Fourth Have Access to Recreational Usage,
(Mar. 4, 2020), https://www.thecentersquare.com/national/two-thirds-of-americans-have-access-to-medical-marijuana-one-fourth-have-access-to-recreational/article_f1bb840e-5e52-11ea-8e10-87e05c777253.html 9

Dwight K. Blake,
AMERICAN MARIJUANA
Medical Marijuana Statistics 2019, Usage, Trends and Data,
https://americanmarijuana.org/medical-

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marijuana-statistics/
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E.I. Hillin,
Expelled Students Sue Colleges Over Medical Marijuana Rules,
Medical Marijuana, Inc.
(October 31, 2019),
https://www.medicalmarijuanainc.com/news/expelled-students-sue-colleges-over-medical-marijuana-rules/ 10

Federation of State Medical Boards,
CME Requirements For Medical Marijuana: State-by-State Overview,
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Government of the United States Patent,
1. WO1999053917-Cannabinoids As Antioxidants and Neuroprotectants,
Patentscope, https://patentscope.wipo.int/search/en/detail.jsf?docId=WO1999053917&redirectedID=true
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GW Pharmaceuticals Press Release, https://www.globenewswire.com/news-release/2020/04/06/2012160/0/en/GW-Pharmaceuticals-plc-and-Its-U-S-Subsidiary-Greenwich-Biosciences-Inc-Announce-That-EPIDIOLEX-cannabidiol-Oral-Solution-Has-Been-Descheduled-And-Is-No-Longer-A-Controlled-Substan.html?print=1 19

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Javier Hasse,
FORBES, *U.S. Universities Offering Cannabis-Focused Graduate Programs And Master's Degrees*, (July 17, 2019) 20

MEDICAL MARIJUANA 2020,
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Niall McCarthy,
FORBES, *Which States Made the Most Tax Revenue from Marijuana in 2018? [Infographic]* (Mar. 26, 2019),
https://www.forbes.com/sites/niallmccarthy/2019/03/26/which-states-made-the-most-tax-revenu e-from-marijuana-in-2018-infographic/#7547293b7085. 34

Pamela L. Smithburger,
Evaluation of Medical Marijuana Topics in the PharmD Curriculum: a National Survey of Schools and Colleges of Pharmacy, Currents in Pharmacy Teaching and Learning, at 1 (Jan. 2019),
https://www.sciencedirect.com/science/article/abs/pii/S1877129718301266
(accord) 21

Pat Evans,
MARKET INSIDER,
8 Incredible Facts About the Booming U.S. Marijuana Industry, (May 7, 2019),
https://markets.businessinsider.com/news/

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stocks/weed-us-marijuana-industry-facts-2019-5-1028 177375#the-marijuana-industry-could-soon-be-worth-more-than-the-gdp-of-9-us-states.. 34

Samuel Adams,
7 Old South Leaflets 417 (No. 173)
(B. Franklin 1970)
The Rights of the Colonists: Report of the Committee of Correspondence to the Boston Town Meeting, (1772) 23

State Medical Marijuana Laws,
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Susan Gunelius,
CANNABIZ MEDIA,
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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinions below (App.1a-31a) are published at 925 F.3d 109 (2d Cir. 2019). The District Court's opinion (App.32a-58a) is published at 17 Civ. 5625 (AKH), 2018 WL 1114758 (S.D.N.Y. Feb. 26, 2018).

JURISDICTION

The Second Circuit entered judgment on February 3, 2020. This Court's 60-day extension moved the deadline for this petition to July 2, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Constitutional and Statutory provisions are reproduced in the appendix at App.59a.

- U.S. Const. amend I
- U.S. Const amend V
- 21 U.S.C. § 811

- 21 U.S.C. § 812
- 21 U.S.C. § 841(b)(1)(A)(vii)
- 21 U.S.C. § 841(b)(1)(B)(vii)
- 21 U.S.C. § 844

PRELIMINARY STATEMENT

This case presents three issues, one of which has twice been left open by this Court, and two of which involve Circuit splits. The first issue—twice left open by this Court—is whether it is constitutional for Congress to criminalize medical cannabis, even for patients who require its daily administration to live. Petitioners AB, JC, and Army Specialist Jose Belen are three such patients; as recognized by the District Court herein, they are "living proof of the medical appropriateness of marijuana" (App.143a). The District Court thereafter reinforced this point, asking rhetorically:

> How could anyone say that your clients' lives have not been saved by marijuana? . . . You can't, right? (App.143a-144a).

Notwithstanding the District Court's comments, cannabis has been classified alongside heroin and other life-threatening drugs as a Schedule I substance under the CSA, rendering its cultivation, sale, possession or use a federal crime.[1] Petitioners AB, JC, and Specialist Belen seek the opportunity to prove that the federal government's criminalization of cannabis

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[1] *See* 21 U.S.C. §§ 841, 844.

("Criminalization of Cannabis") violates their fundamental constitutional right to treat with the medication that keeps them alive. Instead, the District Court dismissed this action (App.57a-58a), and the Second Circuit affirmed, ruling that Petitioners' prayer for relief—a declaration that the classification of cannabis is unconstitutional and a corresponding injunction against enforcement—is really a mere request to de-schedule cannabis (App.3a-29a). The Second Circuit proceeded to hold that Petitioners, before proceeding with litigation, were required first to file a de-scheduling petition with the Respondent Drug Enforcement Administration ("DEA"), explaining: "It cannot be seriously argued that [de-scheduling] is not available through the administrative process" (App.16a).

Leaving aside that claims seeking redress for constitutional injury cannot be resolved by the DEA, the Second Circuit's ruling directly conflicts with the D.C. Circuit's decision in *N.O.R.M.L. v. Drug Enforcement Admin.*, in which the Court ruled, as a matter of law, that the "DEA must place marijuana in either schedule I or schedule II."[2] DEA has expressly followed the D.C. Circuit's ruling in *N.O.R.M.L.* and has adopted it as its formal position on the issue.[3] Thus, Petitioners, who seek redress for violations of their constitutional rights, have been relegated to an administrative review process to obtain relief they do not seek from an agency that acknowledges its lack of jurisdiction to grant it. Regardless, the Second

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[2] 559 F.2d 735, 751 (D.C. Cir. 1977).

[3] *Denial of Petition to Initiate Proceedings to Reschedule Marijuana*, CFR Chapter II and Part 1301, Fed. Register, Vol. 156, 53688, 53688-89 (Aug. 12, 2016).

Circuit decision herein and the D.C. Circuit's decision in *N.O.R.M.L.* constitute a clear Circuit split, warranting this Court's intervention.

In dismissing this action, the Second Circuit prevented Petitioners from prosecuting their claim that the Criminalization of Cannabis deprives them of their fundamental right under the Due Process Clause to treat with a safe, effective and available medication that preserves their health and lives. Such a right, though not explicitly recognized by this Court, is implicit in several of its most noteworthy decisions which form the backbone of its Due Process Clause jurisprudence. Consistent with this Court's decisions, the Fifth Circuit has recognized that the Due Process Clause guarantees the rights of patients to obtain access to safe and effective medical treatment free from governmental interference;[4] however, in the ruling affirmed by the Second Circuit herein, the District Court ruled that "no such fundamental right exists" (App.53a)—another Circuit split.

Lastly, the lower courts' dismissal deprived Petitioners of the opportunity to prove that the classification of cannabis under the CSA is unconstitutionally irrational. In particular, Congress criminalized cannabis based upon legislative "findings" that, *inter alia*, there supposedly is no safe and accepted medical use for cannabis in the U.S., even under medical

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[4] *See, e.g.*, *England v. Louisiana State Bd. of Examiners*, 259 F.2d 626, 627 (5th Cir. 1958), *cert. denied* 359 U.S. 1012 (1959). By making this argument, Petitioners do not contend that the federal government is constitutionally obliged to fund or provide health care—only that patients have a fundamental right to control their health care decisions.

supervision.[5] However, as demonstrated below, the federal government has repeatedly taken action, both legislatively and administratively, to recognize that cannabis is both safe and medically effective in the treatment of disease, thereby fully controverting the congressional "findings" underlying the Criminalization of Cannabis and creating an internal conflict under federal law ("Internal Federal Conflict").

Further confusing the issue is the federal government's acceptance, and active encouragement, of medical-cannabis programs in 33 States, four U.S. Territories and the District of Columbia (collectively, "38 State-Legal Cannabis Programs" or "38 State-Legal Cannabis Jurisdictions"). Fourteen of those 38 State-Legal Cannabis Jurisdictions also allow for "adult" or "recreational" use, meaning that cannabis has been completely de-criminalized and/or is regulated similarly to alcohol ("14 Adult-Use Jurisdictions" or "14 Adult-Use Programs").

Meanwhile, to support the State-compliant cannabis industry, Congress has added funding riders to annual appropriations legislation every year since 2014, expressly prohibiting Respondents DEA and Justice Department from using any congressional monies to investigate or prosecute State-compliant medical cannabis activity in the 38 State-Legal Cannabis Jurisdictions ("Funding Riders") (App.100a-106a). The notion that the federal government, under the CSA, has criminalized cannabis because it supposedly has no medical applications in the U.S. and cannot be safely administered even under medical supervision, while at the same time barring Respondents from

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[5] *See* 21 U.S.C. § 812(b)(1).

enforcing that same statute in 38 State-Legal Cannabis (Medical) Jurisdictions, and sanctioning the 14 Adult-Use Programs (collectively, "Federal Acceptance"), is utterly irrational. Nonetheless, aside from its irrationality, the federal government's confounding approach to cannabis has created a separate conflict (in addition to the Internal Federal Conflict)—specifically, the conflict between the federal government's simultaneous Criminalization of Cannabis and the Federal Acceptance of the 38 State-Legal Cannabis Programs ("Federal-State Conflict").

As shown below, the irreconcilable Internal Federal and Federal-State Conflicts have created an incomprehensible hodgepodge of laws, rules and regulations that leaves cannabis patients, their physicians, cannabis businesses ("Cannabis Businesses") and those businesses that support them (*e.g.*, law and accounting firms, payroll companies, security firms) utterly confused as to what is legal and what is not—a situation that Attorney General Barr described in 2019 congressional testimony as "intolerable."[6]

The consequences of the lower courts' errors, and the confusion associated with the various conflicts under federal and state law are profound, given what is at stake for Petitioners and those similarly situated. AB's circumstances are representative.

AB was diagnosed with intractable epilepsy at age seven. Her parents, after watching her endure more than a year of daily (sometimes hourly) life-threatening seizures, were offered two treatment options—a partial

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[6] Claire Hansen, *Attorney General Barr Calls Current Marijuana Situation 'Intolerable,' Indicates Support for Reform Bill*, U.S. NEWS & WORLD REPORT (Apr. 10, 2019).

lobotomy, which likely would have rendered AB permanently disabled, or treatment with medical cannabis. AB's parents chose medical cannabis; and AB hasn't suffered a single seizure since—over five years ago.[7]

Medical cannabis is the only treatment that keeps AB alive. And she is thriving (without any side effects). Although previously struggling academically (due to recurrent sick days), AB, now 14 years old, made the honor roll and the varsity volleyball team in her middle school last year; has written a widely-published book (App.175a); and even founded an organic garden program (Patches of Hope) to help struggling families (App.175a). Yet, because this truly extraordinary girl must keep her cannabis medication on her person at all times (*see* n.7, *supra*), AB cannot enter onto federal land, including, *inter alia*, any National Parks or Museums, or even the Washington, DC Mall.[8] Thus, in 2017, when AB was invited by Representative J. Luis Correa to meet with him and other members of Congress on Capitol Hill regarding the proposed "Marijuana Justice Act" (App.389a-390a), she could not attend, as bringing her life-sustaining

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[7] AB treats with two types of medical cannabis—one, as a maintenance medication with low THC content, and the other as an emergency medication with a higher THC content, used similarly to an Epi-Pen. On occasion, AB still experiences pre-seizure onsets or "auras;" however, she is able to prevent these "auras" from developing into seizures by taking the higher-THC content medication at the onset of symptoms. Thus, AB's medical cannabis (particularly, her medication with elevated THC content) must be carried with her at all times.

[8] *Rehaif v. U.S.*, 139 S.Ct. 2191, 2211 (2019) ("In a State that chooses to legalize marijuana, possession is wrongful [] if the defendant is on federal property") (citation omitted).

medical cannabis with her could subject her parents to arrest, prosecution, and other collateral consequences (discussed *infra*). Earlier this year, AB, for the same reason, was the only member of her class unable to sign up for a planned class trip to the Capitol.

AB, the daughter of two decorated military veterans, also cannot enter her parents' military base, where she is eligible for, but cannot receive, her family's veteran benefits, including health insurance and educational programs (App.176a-177a).[9] Time and again, AB is regularly deprived of rights, benefits and opportunities that other people have the luxury of taking for granted. Why? Because she suffers from a life-threatening illness, the sole treatment for which has been declared illegal by the federal government.

AB's story is America's story. More than 3,000,000 Americans are registered patients who treat regularly with medical cannabis to maintain their health and lives.[10] Yet, they are all resigned to living in fear

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[9] Her younger sister, who is healthy and does not treat with medical cannabis, enjoys full access to all such programs.

[10] JC's and Specialist Belen's stories are equally compelling and heartbreaking. JC was diagnosed with Leigh's Disease before the age of two. Patients diagnosed with this condition by age two have a life-expectancy of four years. A week before his fourth birthday, JC was moved into a hospice (where he was expected to spend his last days), and, for the first time, placed on medical cannabis for palliative relief. But instead of continuing to deteriorate, JC recovered. He is now nine years old and living at home with his parents (App.181a). Specialist Belen suffered from PTSD after surviving a road-side bomb attack in Iraq that killed most of his platoon. After experiencing debilitating suicidal ideation for years, Specialist Belen began treating with medical cannabis (App.179a). He is now married with children

that their conduct, while State-legal, is unlawful under federal law. Conviction for a CSA felony typically results in, not only incarceration, but also a multitude of "collateral consequences," including the forfeiture of a defendant's civil rights and entitlements, such as, *inter alia*, the rights to vote, sit on juries, adopt a child (a five-year restriction) and/or receive disaster-relief funding.[11]

As reflected below, the State-legal cannabis industry has assumed a national dimension. More than two-thirds of Americans—over 220 million people —have access to medical cannabis in the 38 State-Legal Cannabis Jurisdictions.[12] Of those people, more than 80 million live in the 14 Adult-Use Jurisdictions.[13] As shown below, tens of billions of dollars have been invested in the State-legal cannabis industry, employing hundreds of thousands of people throughout the nation. Cannabis Businesses have been deemed "essential" in over 20 States. Colleges, universities, medical schools and law schools, where students are eligible for federal student loans and

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and runs his own business. Marvin Washington and CCA have constitutional claims (referenced *infra*) unrelated to their right to access lifesaving medication.

11 *U.S. v. Nesbeth*, 188 F.Supp.3d 179, 180-83 (E.D.N.Y. 2016).

12 Doug Kronaizl, *Two-Thirds of Americans Have Access to Medical Marijuana; One-Fourth Have Access to Recreational Usage*, THE CENTER SQUARE (Mar. 4, 2020), https://www.thecentersquare.com/national/two-thirds-of-americans-have-access-to-medical-marijuana-one-fourth-have-access-to-recreational/article_f1bb840e-5e52-11ea-8e10-87e05c777253.html; *State Medical Marijuana Laws*, NCSL (Mar. 10, 2020), https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx.

13 *Id.*

other such grants, now offer cannabis course work and degree programs, while State governments have come to rely upon the billions in the State tax revenue the State-legal cannabis industry generates. Nevertheless, given the Criminalization of Cannabis under the CSA, none of this cannabis activity should be legal; and maybe it isn't. We really don't know, especially given that State-legal cannabis patients continue to be subject to adverse consequences solely due to their acceptance of medical treatment.

Specifically, registered State-legal (and thus fully State-compliant) medical cannabis patients who "fail" mandatory drug tests are still fired from their jobs,[14] expelled from college,[15] and deprived of other rights and entitlements under federal and state law even though treatment with cannabis is entirely legal under state law.[16] And even when patients are able

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[14] Dan Hyman, *When the Law Says Using Marijuana Is O.K., but the Boss Disagrees*, N.Y. TIMES (July 19, 2019). *See also* assorted cases in which State-legal cannabis patients lost their jobs*, e.g., Barbuto v. Advantage Sales & Mktg., LLC*, 477 Mass. 456 (2017); *Noffsinger v. SSC Niantic Operating Co. LLC*, 273 F.Supp.3d 326 (D. Conn. 2017); *D.J.C. v. Amazon Com Dedc, LLC*, 2020 WL 1814775 (D.N.J. Apr. 9, 2020).

[15] E.I. Hillin, *Expelled Students Sue Colleges Over Medical Marijuana Rules*, Medical Marijuana, Inc. (October 31, 2019), https://www.medicalmarijuanainc.com/news/expelled-students-sue-colleges-over-medical-marijuana-rules/.

[16] *See e.g., Brown v. Woods Mullen Shelter/Bos. Pub. Health Comm'n.*, 2017 WL 4287909 (Mass. Super. Aug. 28, 2017) (expulsion from homeless shelter due to state-legal medically prescribed marijuana); *Albuquerque Pub. Sch. v. Sledge*, 2019 WL 3755954 (D.N.M. Aug. 8, 2019) (disabled kindergartner denied access to school due to medical cannabis); *Nation v. Trump*, 2020 WL 3410887 (9th Cir. June 22, 2020) (medical cannabis patient evicted from public housing).

to avoid these indignities, the possibility nonetheless exists that the federal government could end Federal Acceptance and resume prosecution of State-compliant Cannabis Businesses and those who rely upon their products, resigning patients to the dangers of the illicit market. As shown *infra*, this danger is real.

Given the national investment in cannabis, coupled with the millions of registered patients who rely upon its daily administration to preserve their health and lives, it is imperative that this Court provide clarity in this area of law.

STATEMENT OF FACTS

By this action, Petitioners seek declarations that, *inter alia*, the classification of cannabis under the CSA is unconstitutional under the Fifth Amendment Due Process Clause: (i) as applied to AB, JC, and Specialist Belen (App.257a-264a), and (ii) on its face due to its utter irrationality (App.257a-264a). In connection with this request for relief, Petitioners also seek an order enjoining enforcement of the CSA as it pertains to cannabis (App.264a). The evidence in support of their claims is overwhelming. It begins with the longstanding reliance upon cannabis as a medication, both globally and in the U.S.

Cannabis has been safely utilized in a multitude of ways by diverse societies around the world for the last 10,000 years, frequently with listings of its curative properties noted in medical treatises independently published in cultures ranging from Ancient Egypt, China, Venetia and Greece, to 16th and 17th

Century Britain (App.188a-204a). Indeed, American colonists, including several of our Nation's Founders, cultivated and used cannabis (App.259a).

Thereafter, during the 19th Century, cannabis continued its widespread acceptance in the U.S. as an effective medicine, and was listed in multiple medical treatises, including, *inter alia*, the widely-distributed *United States Pharmacopoeia,* a selective listing of what were America's most widely taken medicines (App.201a). During this period, "every pharmaceutical company [in America was] . . . busy manufacturing cannabis-based patent cures" (App. 202a). This continued into the 20th Century, as cannabis continued its use as a regularly prescribed medication (App.203a).

In 1937, however, the federal government, at the urging of the Federal Narcotics Bureau Chief Harry Anslinger, enacted the Marijuana Tax Act ("MTA"), which effectively crippled the cannabis industry (App. 204a). Historians confirm that Anslinger's interest in cannabis prosecutions was borne out of his two "passions"—racism and a desire to retain his job after the repeal of alcohol Prohibition. Anslinger's bigotry is a matter of public record, including, *inter alia*, by recourse to his public statements:

- "Reefer makes darkies think they're as good as white men."
- "There are 100,000 total marijuana smokers in the U.S., and most are Negroes, Hispanics, Filipinos and entertainers. Their Satanic music, jazz and swing result from marijuana use. This marijuana causes white women to seek

> sexual relations with Negroes, entertainers and any others" (App.208a).

Despite enactment of the MTA, medical boards and organizations rejected its stated underpinnings. For example, in 1944, the New York Academy of Medicine issued the "LaGuardia Report," which concluded that "use of marijuana did not induce violence, insanity or sex crimes, or lead to addiction or other drug use" (App.211a). Nonetheless, despite the lack of evidence that cannabis was dangerous, Anslinger continued his anti-cannabis campaign for decades (App.211a-212a).

In 1969, this Court in *Leary v. U.S.*[17] ruled the MTA unconstitutional; however, as shown below, legalization was short-lived. After *Leary*, then-President Nixon urged Congress to enact legislation classifying medications and other substances under separate schedules according to their medical utility, alleged dangerousness, and addictive potential (App.213a). Congress, at Nixon's insistence, then adopted the CSA just one month after it was introduced. At the request of the Nixon Administration, Congress placed cannabis under Schedule I (App.213a-214a)—this, despite the Subcommittee on Public Health having simultaneously confirmed that:

> [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

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[17] 395 U.S. 6 (1969).

defensible.[18]

The Schedule I classification of cannabis was intended by Congress to be temporary and subject to further research by the National Commission on Marihuana and Drug Abuse—a commission established for the purpose of studying, *inter alia*, cannabis's pharmacological makeup and interactions with other substances (if any) (App.215a). Nixon appointed Raymond Shafer to Chair this new commission in 1972 ("Shafer Commission"). After a lengthy study, the Shafer Commission concluded, *inter alia*, that cannabis was safe and should be de-criminalized for personal use ("Shafer Commission Findings") (App.216a-218a).

The Nixon Administration summarily rejected the Shafer Commission Findings (App.221a-222a). A Nixon Administration alumnus provided an affidavit herein explaining why—specifically that Nixon sought to criminalize cannabis, not out of concern for public health or that drug trafficking posed a threat to Americans, but rather because he associated cannabis with persons of color and the anti-war left—two groups he regarded as hostile to him and his administration (App.420a-426a). In criminalizing cannabis, Nixon believed he had devised a seemingly neutral basis upon which to target protestors and persons of color—his perceived enemies—without raising constitutional concerns (*Id.*). This affidavit corroborates the account by John Ehrlichman, Nixon's Domestic Policy Chief and one of his closest advisors, who similarly acknowledged that the Nixon Administration urged enactment of the CSA to oppress anti-war protestors

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

and persons of color (App.218a-219a).[19] And, if that evidence weren't sufficiently damning, the following entry in the diary maintained by H.R. Haldeman, Nixon's Chief of Staff, leaves no doubt as to the purpose for the Criminalization of Cannabis:

> [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].[20]

"[B]y 1973, about 300,000 people were arrested under [the CSA]—the majority of whom were African American" (App.223a). This pattern of enforcement persists today, insofar as Black Americans are 3.5 times more likely to be prosecuted and incarcerated for cannabis-related activity, even though cannabis is used equally by white and Black people.[21] Thus, the

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19 The full text of Ehrlichman's statement, which corroborates the above-referenced affidavit of fellow alum Roger Stone (App.420a-426a), appears below:

> 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. (App.218a-219a)

20 App.391a-394a.

21 *A Tale of Two Countries: Racially Targeted Arrests in the Era*

CSA, which restricts the constitutional rights of Petitioners to treat with the only medication that keeps them alive, is a relic of the racial bigotry that the country is, right now, still fighting to eliminate.[22]

THE FEDERAL GOVERNMENT'S RECOGNITION THAT CANNABIS IS SAFE AND MEDICALLY EFFECTIVE

To be classified under Schedule I of the CSA, a substance must meet all three of the following requirements—specifically, it must: (i) have "a high potential for abuse;" (ii) have "no currently accepted medical use in treatment in the U.S.;" and (iii) be too dangerous to use, even "under medical supervision" ("Schedule I Requirements"). 21 U.S.C. § 812(B)(1). The undisputed evidence herein overwhelmingly demonstrates that cannabis doesn't meet any of the Schedule I Requirements (much less all of them) and that the federal government has known it since before enactment of the CSA (App.224a-249a and 289a-294a and 313a-382a and 100a-106a and 295a-308a and 383a-389a); *see also Subcomm. on Public Health and Welfare*, 91st Cong. 179 (1970).

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of Marijuana Reform, ACLU, https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform (last visited June 29, 2020).

[22] The claims herein by Petitioner CCA and its membership directly pertain to this issue. CCA is dedicated to, *inter alia*, combating disparate enforcement of the CSA against communities of color, and expunging the criminal records of persons of color who have been systematically targeted by law enforcement under the auspices of the CSA, preventing them from experiencing the same rights and entitlements enjoyed by white Americans (App.183a).

In addition, the following evidence confirms the federal government's continued recognition of the safe, medical efficacy of cannabis after enactment of the CSA:

- Shafer Commission Findings (App.216a-218a);
- beginning in 1976 and continuing to this day, the federal government has subsidized a cannabis cultivation operation at the University of Mississippi, which then distributes medical cannabis to patients throughout the U.S. pursuant to the Investigational New Drug Program ("IND Program") (App.225a). Under the Code of Federal Regulations, medications cannot be included in the IND Program if they either: (1) are ineffective; or (2) would expose patients "to an unreasonable and significant additional risk of illness or injury" (21 C.F.R. § 312.34(b)(3));
- a peer-reviewed study authorized through the IND Program ("IND Study") confirms that none of the participants who were followed and evaluated suffered any serious side effects or harm from their treatment with cannabis (App.226a, ¶¶275-76), even though the quality of the cannabis was "crude" and "low-grade" (App. 381a); indeed, the cannabis patients benefitted from their treatments, enjoyed improved qualities of life and were able to reduce their reliance on pharmaceutical products (App.381a);
- "HEW's Fifth Annual Report to the U.S. Congress, Marihuana and Health (1975), devotes a chapter to the therapeutic aspects of marihuana, discovered through medical research," which such aspects include treatment of "asthma,"

"epilepsy," and "needed relief for cancer patients undergoing chemotherapy;"[23]

- Federal Administrative Law Judge Francis Young, *In the Matter of Marijuana Rescheduling*, DEA Docket No. 86-22, determined, based upon "overwhelming" evidence, that "[m]arijuana, 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" (App.387a);[24]
- federal government's acceptance of 38 State-Legal Cannabis Programs and 14 Adult-Use Programs, one of which is located in Washington, DC (over which Congress exercises direct oversight) (App.232a-234a);
- enactment of the Funding Riders every year since 2014 (App.100a-106a);
- U.S. Surgeon General Vivek Murthy (America's Chief Medical Officer) announced on national television (2015) that cannabis can safely provide bonafide medical benefits to patients (App.243a);
- in 2018, the Food and Drug Administration ("FDA") approved a cannabis medication (Epidiolex) for the treatment of children with

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[23] *N.O.R.M.L.,* 559 F.2d at 749.

[24] Notwithstanding Judge Young's findings, DEA, consistent with its rulings on every rescheduling petition ever filed with respect to cannabis, rejected them (App.249a-254a).

> rare forms of epilepsy.[25] Although originally classified under Schedule V (which conflicts with the Schedule I classification of cannabis), Epidiolex was completely de-scheduled from the CSA in 2019.[26] Thus, despite congressional "findings" that cannabis has no accepted medical applications in the U.S. and cannot be safely administered even under medical supervision (21 U.S.C. § 812(b)(1)(B)-(C)), the FDA has approved the distribution of cannabis to American children (via Epidiolex) without a prescription.[27]

In addition, the federal government owns the Federal Cannabis Patents, both entitled: "CANNABINOIDS AS ANTI-OXIDANTS AND NEUROPROTECTANTS" (App.289a-294a; App.236a-238a).[28] The Federal Cannabis Patents include assertions that cannabis constitutes an effective medical treatment for an assortment of diseases and conditions, including, *inter alia*, "ischemic, age-related, inflammatory and autoimmune diseases," and "in the treatment of neurodegenerative diseases,

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[25] 21 C.F.R. § 1308.15(f).

[26] GW Pharmaceuticals Press Release, https://www.globenewswire.com/news-release/2020/04/06/2012160/0/en/GW-Pharmaceuticals-plc-and-Its-U-S-Subsidiary-Greenwich-Biosciences-Inc-Announce-That-EPIDIOLEX-cannabidio l-Oral-Solution-Has-Been-Descheduled-And-Is-No-Longer-A-Controlled-Substan.html?print=1.

[27] Unfortunately, Epidiolex doesn't address AB's form of epilepsy.

[28] *See also* Government of the United States Patent, *1. WO1999053917-Cannabinoids as Antioxidants and Neuroprotectants*, Patentscope, https://patentscope.wipo.int/search/en/detail.jsf?docId=WO1999053917&redirectedID=true (last visited June 29, 2020).

such as Alzheimer's Disease, Parkinson's Disease, and HIV Dementia" (*Id.*). Thus, the federal government claims in its Federal Cannabis Patents that cannabis safely provides medical benefits to patients while simultaneously criminalizing cannabis under the CSA based upon "findings" that it has no medical application and is too dangerous to administer, even under medical supervision (App.237a-238a).

Further, the federal government's recognition that cannabis is safe and effective is manifested in domestic economic policy. Specifically, the Treasury Department, since 2014, has formally authorized banks and other federally-regulated lending institutions, by way of a "FinCEN Guidance," to transact with Cannabis Businesses as follows:

> financial institutions can provide services to marijuana-related businesses consistent with their [Bank Secrecy Act] obligations . . . This FinCEN guidance should enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses (App.295a; App.241a).

All of the foregoing has induced national reliance upon the existence of a robust cannabis industry. In addition to the tens of billions in investment capital deployed in the cannabis industry (*infra*), accredited universities and colleges, where students receive federally-backed student loans and other federal aid, offer undergraduate and graduate programs in cannabis and related studies;[29] Cannabis Science is taught at

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[29] *See e.g.*, *Javier Hasse, U.S. Universities Offering Cannabis-Focused Graduate Programs And Master's Degrees*, FORBES (July 17, 2019); *Western Illinois, Colorado State Universities to*

medical schools, including Harvard,[30] and at 62% of pharmacology schools;[31] physicians regularly obtain State certifications to recommend cannabis to patients;[32] and law schools teach Cannabis Law,[33] ostensibly under the auspices of the multitude of State bar opinions that sanction the practice of dispensing legal advice to Cannabis Businesses.[34]

None of this would be possible in the absence of the clear acknowledgment by the federal government, manifested in its legislative and administrative actions, that cannabis, despite its classification under the CSA, is safe, medically effective, widely accepted in the U.S., and thus cannot possibly meet the Schedule I Requirements.

Offer Cannabis-Related Degrees Starting This Fall, ABC7 EYEWITNESS NEWS (February 11, 2020), https://abc7chicago.com/cannabis-degree-growing-how-to-grow-marijuana-western-illinois-university/5921746/; Susan Gunelius, *The Growth of Cannabis College Courses and Degrees*, CANNABIZ MEDIA (Feb. 22, 2019), https://cannabiz.media/the-growth-of-cannabis-college-courses-and-degrees/.

30 *see* n. 29, *supra*.

31 *Id.*; Pamela L. Smithburger, *Evaluation of Medical Marijuana Topics in the PharmD Curriculum: a National Survey of Schools and Colleges of Pharmacy, Currents in Pharmacy Teaching and Learning*, at 1-9 (Jan. 2019), https://www.sciencedirect.com/science/article/abs/pii/S1877129718301266 (accord).

32 *CME Requirements For Medical Marijuana: State-by-State Overview*, Federation of State Medical Boards (Jul. 25, 2019), http://www.fsmb.org/siteassets/advocacy/key-issues/medical-marijuana-cme-requirements.pdf.

33 Gunelius, *Growth of Cannabis College Courses and Degrees* (*see* n. 29, *supra*).

34 Dennis A. Rendleman, *Ethical Issues in Representing Clients in the Cannabis Business: "One Toke Over the Line?,"* ABA (July 2, 2019).

REASONS FOR GRANTING THE PETITION

I. THE LOWER COURTS' ERRORS BELOW HAVE CREATED A CIRCUIT SPLIT AS TO WHETHER THERE EXISTS A FUNDAMENTAL CONSTITUTIONAL RIGHT TO TREAT WITH SAFE, EFFECTIVE AND AVAILABLE MEDICATIONS, WARRANTING SUPREME COURT REVIEW

The Fifth Amendment to the U.S. Constitution plainly states: "No person shall be . . . deprived of life, liberty or property without due process of law." U.S. Const. amend. V (emphasis added). This language derives from centuries of common law tradition, recognizing the rights of self-preservation and personal autonomy.[35] To that end, American common law has consistently recognized and emphasized the right to preserve one's life and the lives of others under the doctrines of self-defense and defense of others (even by use of deadly force).[36]

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[35] In the 1700s, William Blackstone wrote of three "principal or primary articles" historically comprising "the rights of all mankind." First among these was "[t]he right of personal security . . . in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health." William Blackstone, 1 *Commentaries* *129. Blackstone described the guarantee of "[t]he preservation of a man's health from such practices as may prejudice or annoy it." *Id.* at *134. Indeed, "Anglo-American law starts with the premise of thorough-going self determination." *Natanson v. Kline*, 186 Kan. 393, 350 P.2d 1093, 1104 (Kan. 1960). Further, after imbuing American colonists with the British tradition of protecting human life, Samuel Adams, 15 years before adoption of our Constitution, referred to "the duty of self preservation" as "the first law of nature." Samuel Adams, *The Rights of the*

This common law precept has been ensconced into our Nation's abortion rights jurisprudence. For example, in *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and their progeny, this Court, regardless of its composition, has consistently ruled that even the most restrictive abortion statute requiring women to continue their pregnancies must include exceptions to preserve women's health and lives. *Stenberg v. Carhart*, 530 U.S. 914, 931 (2000) (collecting cases).

Recognition of the fundamental right to preserve one's own health and life is hardly limited to the reproductive context. In the context of permitting chiropractors to practice in Louisiana, the Fifth Circuit observed that:

> the State cannot deny to any individual the right to exercise a reasonable choice in the method of treatment of his ills . . .

England, 259 F.2d at 627. Similarly, in an action confirming patients' right to obtain acupuncture treatments, the court in *Andrews v. Ballard* observed:

> The root premise is the concept, fundamental in American jurisprudence, that "(e)very human being of adult years and sound mind has a right to determine what shall be done with his own body."

Colonists: Report of the Committee of Correspondence to the Boston Town Meeting, 7 Old South Leaflets 417 (No. 173) (B. Franklin 1970) (1772).

[36] *Brown v. U.S.*, 256 U.S. 335, 343-44 (1921); *cf. Montana v. Egelhoff*, 518 U.S. 37, 56 (1996) (plurality opinion).

498 F.Supp. 1038, 1048 (S.D. Tex. 1980) (*quoting Schloendorff v. Society of New York Hosp.*, 105 N.E. 92, 93 (N.Y. 1914) (Cardozo, J.)).[37]

Further, not only does the Constitution guarantee the right to preserve one's own health and life; it also allows people to refuse life-sustaining treatment. *Cruzan v. Missouri*, 497 U.S. 261 (1990). And that right also derives from the right to medical self-determination. As this Court explained:

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[37] In the context of a denied motion for a preliminary injunction, the Ninth Circuit, in *Raich v. Gonzalez*, 500 F.3d 850 (9th Cir. 2007) ("*Raich II*"), ruled that the plaintiff therein failed to establish a likelihood of success on the merits with respect to her claim that, *inter alia*, by reason of her need for medical cannabis, she was entitled to rely upon the medical necessity defense for affirmative relief from the CSA. To the extent that the *Raich II* decision is at odds with *England supra*, such would constitute yet another dimension to the Circuit split, warranting this Court's review. However, it bears notice that the court in *Raich II* left the door open to further review of similar claims, as our understanding of medical cannabis continues to evolve. In that regard, the *Raich II* court acknowledged that the right to treat with medical cannabis might very well become fundamental "sooner than expected" given that, by that point, 11 States had legalized medical cannabis. *Raich II,* 500 F.3d at 866. In making that observation, the court invoked the "*Lawrence* framework" enunciated in *Lawrence v. Texas*, 539 U.S. 558, 571-73 (2003), in which this Court acknowledged a reduction in the number of States (from 25 to 13) that criminalized same-sex relations following *Bowers v. Hardwick,* 478 U.S. 186 (1986), warranted its reconsideration. Given the number of State-Legal Cannabis Jurisdictions today—38—one more than the number of jurisdictions that permitted same-sex conduct at the time of *Lawrence*—the time is certainly ripe to formally acknowledge that cannabis constitutes a safe and effective medicine for the treatment of disease and is a benign wellness product. Whatever precedential value *Raich II* once had, it has been rendered a jurisprudential anachronism in this context.

> "[N]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law . . . "

Cruzan, 497 U.S. at 269 (*citing Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891) and *quoting Schloendorff*, 211 N.Y. at 129-30)). And, owing to its fundamental importance to personal liberty, "the right to self-determination ordinarily outweighs any countervailing state interests." *Cruzan*, 497 U.S. at 273 (emphasis added).

Here, AB, JC, and Specialist Belen seek to preserve their health and lives, not by the extraordinary means that this Court has long sustained—*e.g.*, aborting a fetus or killing in self-defense—but by merely continuing life-saving treatment that has no adverse side effects and causes no harm to others. Because this Court has consistently recognized the individual's fundamental right to preserve her own health and life, the CSA, which needlessly endangers the lives of AB, JC, and Specialist Belen, is unconstitutional as applied to them.

In its decision below, the District Court addressed only one of the cases cited by Petitioners regarding this issue—*Cruzan,* and then ruled that it is supposedly irrelevant because this Court in *Cruzan* focused only upon "one's right to refuse medical treatment, not a positive right to obtain any particular medical treatment" (App.54a) (emphasis in original). But such a distinction requires utter disregard of the reasoning underlying the decision in *Cruzan*, which was based upon the right to personal autonomy (*Cruzan*, 497 U.S.

at 269)—the very same issue at stake here. Only after recognizing the fundamental right to maintain bodily integrity free from unreasonable governmental interference did this Court in *Cruzan* address the issue of a person's right to refuse medical treatment —a "logical corollary" of the doctrine of informed consent, which derives from a person's right to control her own medical decisions. *Cruzan*, 497 U.S. at 270. For the lower court to have suggested that *Cruzan* was decided solely upon the right to refuse medical treatment, without regard to the historical and constitutional underpinnings which led to that holding, was to disregard the analysis forming the basis for this Court's landmark decision therein.

Worse, the upshot of the District Court's analysis herein is that the right to refuse medical treatment and thus terminate one's life is somehow protected, but that the right to preserve it is not—a notion utterly inconsistent with the Constitution. Just as this Court in *Cruzan* refused to allow parents of a terminally-ill patient to withdraw life-support measures unless clear and convincing evidence of the patient's wishes were established (*Cruzan*, 497 U.S. at 292), so too is the federal government proscribed here from criminalizing life-sustaining medical treatment that patients need to survive.

This Court has twice left open the issue of whether the federal government may be enjoined from enforcing the CSA against patients who require medical cannabis to preserve their health and lives. *See, e.g.*, *Oakland Cannabis Buyers' Co-op*, 532 U.S. at 502-03 (2001) (Stevens, Souter and Ginsberg, JJ., concurring in judgment); *see also Gonzalez v. Raich*, 545 U.S. 1, 33 (2005) ("Respondents also raise a sub-

stantive due process claim and seek to avail themselves of the medical necessity defense. These theories of relief were set forth in their complaint but were not reached by the Court of Appeals. We therefore do not address the question whether judicial relief is available to respondents on these alternative bases"). Given the urgent needs of Petitioners and millions of medical cannabis patients nationwide, coupled with a national imperative that a level of certainty be provided to businesses, medical practitioners, lawyers, accountants, universities, medical schools, law schools, and State governments across America, the issue herein is ripe for determination.

Furthermore, it is inappropriate, as some have suggested, to subject to the legislative process, a patient's right to access safe, effective and available medications. As this Court made clear in *Kimel v. Florida Bd. of Regents*, Congress "has been given the power 'to enforce,' not the power to determine *what constitutes*, a constitutional violation." 528 U.S. 62, 81 (2000) (emphasis in original); *see also City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) ("The power to interpret the Constitution in a case or controversy remains in the Judiciary").

Indeed, it is antithetical to the framework of the Constitution to subject the protections afforded by the Due Process Clause to the vagaries of the legislative and democratic processes; the Fifth Amendment was enacted precisely to protect people from oppressive actions undertaken by legislative majorities and the executive branch. *See Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary*, 572 U.S. 291, 312 (2014) ("The freedom secured by the

Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power").

Here, three Petitioners require lifesaving medical cannabis to live. Because cannabis has been criminalized, AB, JC and Specialist Belen, who must have their medication with them, cannot board an airplane or any other federal mode of transportation, enter onto federal land, or visit the Capitol to lobby their representatives and engage in in-person advocacy—a critical First Amendment right.[38] AB can't participate in class trips or even gain admission to a local high school. Worse, they are resigned to living in constant fear that, at any moment, their medication could be stripped from them, imperiling their health and lives. The notion of subjecting to the whims of the democratic process, Petitioners' right to save their own lives through treatment with a safe, effective and available medication is antithetical to the principles underlying the Fifth Amendment's Due Process Clause. Simply put—under the Constitution, Petitioners have the right to treat with available and effective lifesaving medication whether or not a legislative majority happens to approve of it. *Obergefell v. Hodges*, ___ U.S. ___, 135 S.Ct. 2584, 2606 (2015) ("The dynamic of our constitutional system is

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[38] *Cyr v. Addison Rutland Supervisory Union*, 60 F.Supp.3d 536 (D. Vt. 2017); *Brown v. City of Jacksonville*, 2006 U.S. Dist. LEXIS 8162, at *25 (M.D. Fla. Feb. 17, 2006); *Hodgkins v. Peterson*, 355 F.3d 1048, 1063 (7th Cir. 2004).

that individuals need not await legislative action before asserting a fundamental right").[39]

II. THE IRRATIONAL CLASSIFICATION OF CANNABIS IS UNCONSTITUTIONAL AND HAS CREATED A CHAOTIC SITUATION IN WHICH AMERICANS CANNOT RATIONALLY DISCERN WHAT IS AND IS NOT LEGAL

The CSA requires, and this Court has confirmed, that the Schedule I Requirements for each substance classified under Schedule I apply equally to classifications by both Congress and the Attorney General.[40] Thus, for Congress to classify cannabis under Schedule I, all three Schedule I Requirements must be met. 21 U.S.C. § 812. As shown *supra*, those Schedule I Requirements include that cannabis be found, *inter alia*, to have no safe medical application in the U.S., even under medical supervision (21 U.S.C.

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[39] In *Raich*, Justice Stevens suggested that the democratic process might provide an alternate "avenue" of relief to those suffering with conditions requiring medical cannabis. *Raich*, 545 U.S. at 33. However, *Raich* was decided in 2005, when there existed only 11 State-Legal Cannabis Programs, at which point national recognition with respect to the medical efficacy of cannabis may not yet have been fully established. Today, there are nearly four times as many such Programs. Regardless, the suggestion that patients who desperately need life-saving medication to survive should wait years, while legalization legislation navigates the political obstacle course of electoral politics, special interests, independent expenditure organizations, and political action committees, most of which are financed by institutional interests, is incompatible with the framework of the Constitution and the individual liberties it was designed to protect.

[40] *U.S. v. Oakland Cannabis Buyers' Co-op.,* 532 U.S. 483, 492 (2001) (rejecting the argument that each schedule includes two tiers of drugs classified thereunder—one classified by Congress and the other by the Attorney General).

§ 812(b)(1)(B)-(C)). Yet, as is plain from the record, Congress and the federal government have recognized that cannabis does have medical applications and can be safely administered, with or without medical supervision.

In particular, as shown *supra,* the federal government fully authorized the establishment of 38 State-Legal (Medical) Cannabis Jurisdictions across America; protected State-legal Cannabis Businesses, cannabis treatment providers and their patients from enforcement under the CSA, including through enactment of the Funding Riders; procured Federal Cannabis Patents based upon attestations that cannabis is safe and medically effective; distributed cannabis to patients throughout the U.S. under the auspices of the IND Program; and approved a cannabis drug (Epidiolex) for the treatment of children without a prescription. Clearly, there is an irreconcilable conflict between the classification of cannabis under the CSA and Federal Acceptance—legislative and administrative actions that confirm without qualification that, in direct contradistinction to the Schedule I Requirements, the federal government recognizes that cannabis has current applications in the U.S. and can be administered safely.[41]

While the right to due process "may not require that Congress's actions reflect 'mathematical exactitude' in fitting means to ends, [] the connection between

[41] Petitioner Marvin Washington, a Super Bowl winning defensive tackle and cannabis entrepreneur, is among those most directly affected by the irrationality of the CSA's classification of cannabis; Marvin is subjected to restrictions in his ability to build his business and participate in federal programs that other, similarly-situated businesspersons access daily (App.172a).

means and ends must be grounded on something more than an unreasonable, hypothetical connection that the United States has expressly disclaimed in related proceedings."[42] Here, the classification of cannabis is based upon "findings" that are directly and fully controverted by overwhelming evidence of the federal government's recognition that cannabis is safe and medically effective.

III. The Lower Courts Erred in Ruling That Constitutional Claims Can Be Addressed in the Context of Administrative Review, and in So Doing, Created another Circuit Split

In affirming dismissal of this action, the Second Circuit held, *inter alia*, that "[i]t cannot be seriously argued that [de-scheduling] is not available through the administrative process" (App.16a). The Second Circuit's dismissal was erroneous for three reasons.

First, as set forth *supra*, the DEA has concluded that it cannot de-schedule cannabis, but is limited to merely reclassifying it under Schedule II. *Denial of Petition to Initiate Proceedings to Reschedule Marijuana*, CFR Chapter II and Part 1301, Fed. Register, Vol. 156, 53688, Aug. 12, 2016 (*quoting N.O.R.M.L.* 559 F.2d at 751). The D.C. Circuit in *N.O.R.M.L.* has similarly concluded that, "in accordance with [the CSA], *DEA must place marijuana in either schedule I or schedule II.*" *N.O.R.M.L.*, 559 F.2d at 751 (emphasis added). In view of the rulings by the DEA and D.C. Circuit, filing a petition with the DEA

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42 *Schaeffler Grp. USA, Inc. v. U.S.*, 786 F.3d 1354, 1368 (Fed. Cir. 2015) (Wallach, J., concurring) (*quoting City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)) (emphasis added).

for de-scheduling cannabis would have been a futile endeavor.

Second, the DEA lacks the "institutional competence" to make determinations about the constitutionality of the classification of cannabis.[43] Thus, again, petitioning the DEA for that relief would have been futile.[44]

It is well established that aggrieved parties cannot be required to submit to an administrative review process by an agency that lacks the power to grant the relief requested.[45] Thus, the Second Circuit committed clear error in dismissing this action in favor of requiring Petitioners to proceed with an administrative review process under the CSA that

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[43] *N.O.R.M.L.*, 559 F.2d at 751.

[44] *See e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 76 (1976) ("[T]he only issue before the District Court was the constitutionality of the statute . . . this constitutional question is beyond the Secretary's competence"); *Western International Hotels v. Tahoe Regional Planning Agency*, 387 F.Supp. 429, 434, *vac'd. in part*, *on other grounds sub. nom., Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir. 1977) ("[P]etitioners assert that respondents have been and are depriving them of rights protected by the Fourteenth Amendment. . . . Such claims are entitled to be adjudicated in the federal courts").

[45] *See, e.g., Reiter v. Cooper*, 507 U.S. 258, 268 (1993) ("[administrative exhaustion] doctrine is inapplicable to petitioners' reparations claims, however, because [respondent] has long interpreted its statute as giving it no power to decree reparations relief"); *Ross v. Blake*, 136 S.Ct. 1850, 1859 (2016) ("where the relevant administrative procedure lacks authority to provide any relief, the [petitioner] has 'nothing to exhaust'") (*quoting Booth v. Churner*, 532 U.S. 731, 736 (2001)).

could not, under any circumstances, have resulted in the relief they seek.[46]

Lastly, Petitioners never even requested an administrative remedy, and copiously avoided doing so in their Amended Complaint (App.257a ¶ 370, *see also* 257a-278a). Petitioners have, since inception of this action, sought the only remedy legally available to them—a declaration that the classification of cannabis is unconstitutional and an injunction against enforcement of the CSA as it pertains to cannabis.

[* * * * *]

The Second Circuit herein concluded that Petitioners were required to exhaust administrative remedies under the CSA by filing a petition with the DEA before resorting to litigation (App.16a); however, the D.C. Circuit has ruled that the DEA (which cannot declare laws unconstitutional) cannot deschedule cannabis, but rather can only re-classify it under Schedule II, creating a clear conflict with the Second Circuit on this issue, and leaving Petitioners without a viable remedy.

IV. Clarification Regarding the Legality of Cannabis Is of Vital Concern to This Nation

The State-legal cannabis industry exists in approximately 70% of America's State and Territorial jurisdictions. The revenue associated with cannabis sales, directly and indirectly, was $20-23 billion in *2017*

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[46] Indeed, had Petitioners "succeeded" in reclassifying cannabis under Schedule II, they would have caused themselves and millions of other cannabis patients irreparable injury. And Marvin Washington and other cannabis entrepreneurs throughout the country would likely have been thrown out of business (App.280a-288a).

alone.[47] In terms of future growth, the medical cannabis industry alone (not including adult-use sales) is expected to grow to at least $50 billion in less than 10 years.[48] As for jobs, 200-300,000 people are employed in the State-Legal cannabis industry, with an annual industry-employment growth rate of 76%;[49] and some studies suggest that these figures are overly conservative. According to *Forbes*, the cannabis industry created 300,000 jobs in *2018 alone*.[50] Further, the State governments of the 38 State-Legal Cannabis Jurisdictions benefit from, and rely heavily upon, the tax revenues generated by their robust intrastate cannabis industries. Indeed, both California and Colorado each alone boast State tax revenues

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[47] Pat Evans, *8 Incredible Facts About the Booming U.S. Marijuana Industry*, MARKET INSIDER (May 7, 2019), https://markets.businessinsider.com/news/stocks/weed-us-marijuana-industry-facts-2019-5-1028-177375#the-marijuana-industry-could-soon-be-worth-more-than-the-gdp-of-9-us-states.

[48] Dwight K. Blake, *Medical Marijuana Statistics 2019, Usage, Trends and Data*, AMERICAN MARIJUANA, https://american-marijuana.org/medical-marijuana-statistics/ (last updated Mar. 10, 2020).

[49] Allana Akhtar, *Jobs in Pot are at an All-Time High, But the Boom is Causing Rifts in the Traditional Workforce*, BUSINESS INSIDER (Apr. 26, 2019), https://www.businessinsider.com/jobs-in-cannabis-industry-are-growing-2019-4?utm_source=msn.com&utm_medium=referral&utm_content=msn-slideshow&utm_campaign=bodyurl.

[50] Niall McCarthy, *Which States Made the Most Tax Revenue from Marijuana in 2018? [Infographic]*, FORBES (Mar. 26, 2019), https://www.forbes.com/sites/niallmccarthy/2019/03/26/which-states-made-the-most-tax-revenue-from-marijuana-in-2018-infographic/#7547293b7085.

in excess of $1 billion annually,[51] and that likely doesn't include derivative proceeds from payroll taxes, taxes generated by ancillary businesses (professional service firms, packaging businesses, etc.), tax revenue generated by increased bargaining power from a growing workforce, and other indirect economic effects.

In addition, as set forth *supra*, there is substantial medical-scientific reliance upon the existence of State-Legal Cannabis Programs, not only by millions of patients, but also by medical professionals, and college and post-graduate institutions.

While some may suggest that the existence of robust cannabis industries reflects the absence of a problem, such would ignore the very real possibility that enforcement priorities could change and that adverse action could be taken relative to Petitioners' cannabis treatment in the future. In this connection, in January 2018, just days after submission of Petitioners' opposition to defendants' Motion to Dismiss (which included arguments that the federal government had effectively abandoned enforcement priorities under the CSA), then-Attorney General Sessions purported to reverse federal policy through administrative fiat by rescinding the Cole Memorandum (which, to that point, had de-prioritized cannabis prosecution at the Justice Department since 2013) (App.309a-310a). This precipitated a pitched political battle between the federal government and State-Legal Cannabis

[51] David Jagielski, California's Cannabis Tax Revenues Top $1 Billion, THE MOTLEY FOOL (Mar. 11, 2020), https://www.fool.com/investing/2020/03/11/californias-cannabis-tax-revenues-top-1-billion.aspx.

Jurisdictions, leading one U.S. Senator to place a hold on all Justice Department appointments until a commitment was made by Sessions to resume a hands-off approach towards State-Legal Cannabis Programs (App.311a-312a).

The possible disenfranchisement of those operating under the auspices of, and those benefitting from, the State-legal cannabis industries portends catastrophic nationwide economic impacts, including billions of dollars in losses of investment capital, cash flow, and State tax revenue; and the loss of hundreds of thousands of jobs—jobs in Cannabis Businesses that many States have identified as "essential" during the COVID19 crisis. In addition to the potentially disastrous economic impacts, the health and lives of approximately 3,000,000 (registered) medical-cannabis patients would be moved to the precipice.[52]

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[52] *What Medical Research Says*, MEDICAL MARIJUANA 2020 https://www.medicalmarijuana2020.com/what-medical-research-says (last visited June 29, 2020).

CONCLUSION

The time has come for clarity and coherence in America's jurisprudence in this area. For the foregoing reasons, it is respectfully requested that the Court grant the Petition for Certiorari, and accept jurisdiction of this appeal.

Respectfully submitted,

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[53] Admission pending.