NO. 20-148

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

BRIEF OF THE LAST PRISONER PROJECT AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

ELIYAHU S. SCHEIMAN
PORZIO, BROMBERG & NEWMAN, P.C.
100 SOUTHGATE PARKWAY
MORRISTOWN, NJ 07962
(973) 889-4232
ESSCHEIMAN@PBNLAW.COM

MATTHEW J. DONOHUE
PORZIO, BROMBERG & NEWMAN, P.C.
100 SOUTHGATE PARKWAY
MORRISTOWN, NJ 07962
(973) 810-6240
MJDONOHUE@PBNLAW.COM

GARY WEINSTEIN
COUNSEL OF RECORD
330 WASHINGTON ST.
PMB #368
HOBOKEN, NJ 07030
(551) 208-2447
GPW2@CORNELL.EDU

SEPTEMBER 11, 2020 *COUNSEL FOR AMICUS CURIAE*

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INTEREST OF *AMICUS CURIAE* [1]

Despite meaningful progress by the Federal Government and numerous state governments to decriminalize and/or legalize the use, distribution, and possession of marijuana, individuals are still incarcerated and serve disproportionate sentences for nonviolent offenses simply because of the prejudiced and scientifically baseless classification of marijuana as a Schedule I substance under the Controlled Substances Act ("CSA" or "Act"), 21 U.S.C. § 801 *et seq.*

The Last Prisoner Project (LPP), a 501(c)(3) nonprofit organization, advocates for individuals sentenced for nonviolent marijuana offenses, as well as for those still suffering the collateral consequences of a marijuana offense on their criminal record.

LPP's work is grounded in data-driven studies demonstrating that the criminalization of marijuana has led to racial disparities in the justice system. The over-policing of low-income and minority neighborhoods, and the disproportionate social, economic, and civil disenfranchisement of communities of color are intertwined with a national policy of federal marijuana illegality. The criminalization of marijuana has led to egregious sentences, mass incarceration, and a dis-

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[1] Pursuant to Supreme Court Rule 37.2(a), notice of LPP's intent to file this amicus curiae brief was received by counsel of record for all parties at least 10 days prior to the due date of this brief and all parties consent to the filing of this amicus curiae brief. Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than LPP and its counsel made a monetary contribution specifically for the preparation or submission of this brief.

parate impact on people of color, especially Black Americans. Perversely, many such individuals are incarcerated in the very same states where corporate executives generate impressive profits (and where those states collect significant tax revenues) from legalized commercial marijuana activity. This is patently unfair and must be addressed. Tragically, the recent COVID-19 pandemic has now turned the fight for restorative justice into a matter of life or death for those serving nonviolent marijuana offenses nationwide at a time when cannabis has been declared "essential" in almost every state with a medical or adult-use program. Public safety, health, and life is at stake.

In response, LPP has championed a multifaceted approach to remediating these injustices and disparities. Through policy reform, legislative advocacy, and impactful direct service programs, LPP secures release for nonviolent marijuana offenders from incarceration, and assists those coming out of incarceration in rebuilding their lives through reentry programs and anti-recidivism efforts. LPP also advocates for the descheduling and full legalization of marijuana as a means to redress the ongoing disparities within the justice system, from policing to incarceration, which are exacerbated by the scheduling of marijuana.

Along with release, LPP's direct service and advocacy efforts work towards ensuring that LPP constituents have a "clean-slate" to rebuild their lives. Legalization efforts have also served as a catalyst for innovative justice reform measures such as automatic expungement legislation. In fact, with such advocacy efforts, almost every state that has legalized adult-use has enacted some form of clean-slate or marijuana expungement legislation to rectify this societal wrong.

Descheduling marijuana is critical to ensuring that Americans — and especially Petitioners — are able to obtain safe and effective medical treatment without fear of the devastating consequences of potential criminal or civil sanctions resulting from the federal scheduling of marijuana. When federal agencies ignore and simply "pocket veto" important petitions for life-saving medicine, and when federal agency action is grounded in prejudicial bias, courts may and should directly exercise their supervisory authority to do what Petitioners ask the Court to do here – declare the scheduling of marijuana under the CSA unconstitutional, and remove it from the Act.

SUMMARY OF ARGUMENT

The District Court erred in requiring Petitioners to bring their claims to the Drug Enforcement Administration (DEA) rather than determine the constitutionality of marijuana scheduling under the CSA. The Second Circuit compounded this error by ignoring the futility exception to the exhaustion doctrine. Exhaustion is required when there is a full and fair opportunity to reasonably petition an administrative body for a decision. It is not required, and makes no sense, however, when an agency's (*i.e.* the DEA) predetermined bias renders the outcome a foregone conclusion. This is especially egregious where, as here, Petitioners are medical marijuana patients with a serious, life-or-death threat to their health.

The Second Circuit affirmed the District Court's denial of Petitioners' challenge to the inclusion of

marijuana on Schedule I of the CSA because Petitioners failed to exhaust their administrative remedies and pursue reclassification through the administrative process defined in the Act. It unduly relied on *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992), *superseded by statute on other grounds as recognized in Porter v. Nussle*, 534 U.S. 516 (2002) to justify requiring the exhaustion of administrative remedies.

The Second Circuit stated that "[t]he District Court's decision to require exhaustion here was . . . correct." But it gave short shrift to the important futility exception to exhaustion, and yet did so despite recognizing that exhaustion is unnecessary where futile because of bias or when an administrative agency has already determined the issue.

The Second Circuit found that Petitioners failed to cite evidence of bias by the relevant decision maker — here the bias of Secretary of Health and Human Services, Alex Azar. Yet there are multiple examples of bias in public statements by Secretary Azar. Those public statements, made after the Second Circuit decision — but prior to its April 17, 2020 Order — could and should be reconsidered by the Circuit Court if this matter were reversed and remanded with guidance concerning the futility exception to exhaustion. Alternatively, this matter could be remanded to the District Court which prematurely closed the record and denied Petitioners an opportunity to demonstrate "plausible allegations of bias on the part of the Secretary" and impacted Petitioners' opportunity to establish "futility on account of bias." *See Washington v. Barr*, 925 F.3d 109, 119 (2d Cir. 2019).

Curiously, recognizing precisely the futility of Petitioners reasonably petitioning the DEA, the Second

Circuit retained jurisdiction, "in view of the unusual circumstances of this case" [referring to the "serious, life-or-death threat to their health"] to ensure "speedy administrative review." *Id.* at 112. This retention of jurisdiction — resulting in a mandate over ten months from its own decision — was because the Court was explicitly "troubled by the . . . DEA's history of dilatory proceedings." *Id.* at 113. The Second Circuit was right to recognize the problems reflected in DEA's history with respect to marijuana, but it erred in the "remedy" that it adopted.

The DEA's troubling history, compounded by Secretary Azar's (*i.e.* the relevant decision maker's) statements, entitled Petitioners to the futility exception to the exhaustion doctrine, and compels this Court's reversal and remand. For the Second Circuit to require exhaustion despite having essentially recognized the futility of such efforts, is a decision that has "so far departed from the acceptable and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Rules of the Supreme Court of the United States, Rule 10(a).

ARGUMENT

I. THE DEA AND SECRETARY AZAR HAVE DEMONSTRATED BIAS AND IMPROPERLY PREDETERMINED THAT MARIJUANA CANNOT BE DESCHEDULED, RENDERING EXHAUSTION FUTILE

The Second Circuit erred in ignoring the futility of administrative exhaustion. The DEA has never

given any petitioner a reasonable and unbiased opportunity to petition to deschedule[2] or reschedule marijuana since the first such petition was filed in 1972 by the National Organization for the Reform of Marijuana Laws to the Bureau of Narcotics and Dangerous Drugs (BNDD) (n/k/a the DEA). The BNDD refused to reschedule marijuana on the basis that the Single Convention prohibited it from taking any action. *See N.O.R.M.L. v. Drug Enforcement Admin.*, 559 F.2d 735 (D.C. Cir. 1977). The DEA echoed this flawed reasoning in 2016 in the last published denial of a petition (dated November 30, 2011) to initiate proceedings to reschedule marijuana in accordance with the CSA. *See* 21 U.S.C. § 811. Relying on factors that include "the reputation of the substance 'on the street,'" the DEA determined that marijuana could not be descheduled, but only potentially rescheduled to Schedule II, because "marijuana has no currently accepted medical use in treatment in the United States" and "lacks accepted safety for use under medical supervision." *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 DEA continues to deny petitions to deschedule or reschedule marijuana based on the 2016 decision despite the fact that as of 2018, over three out of five (*i.e.* 62%) Americans live in a state with medical

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2 As Petitioners correctly identify, there is a Circuit split as to whether the DEA even has the authority to act in the manner the Second Circuit is directing. *N.O.R.M.L. v. Drug Enforcement Admin.*, 559 F.2d 735 (D.C. Cir. 1977).

marijuana[3], and one-in-five (*i.e.* 21%) Americans reside in a state that has legalized adult-use marijuana. The DEA continues to ignore the legislative findings of the thirty-three (33) states with medical marijuana programs, which all recognize the medicinal value of marijuana, evidenced by modern medical research. *See*, *e.g.*, *N.J.S.A.* 24:6I-2 ("Modern medical research has discovered a beneficial use for cannabis in treating or alleviating the pain or other symptoms associated with certain medical conditions, as found by the National Academy of Sciences' Institute of Medicine[.]"; and *R.I.S.* 21-28.6-2 (finding same). Each year, the DEA continues to receive petitions to deschedule and reschedule cannabis, but summarily rejects them all because of similar flawed reasoning. *See Suzanne Sisley, M.D., et al. v. U.S. Drug Enforcement Administration, et al.*, Dkt. No. 20-71433 (9th Cir., August 18, 2020) (discussing a Petition to Reschedule Marijuana with the DEA on January 3, 2020, which was summarily rejected on January 8, 2020 in a two-page letter stating the reasoning contained in the DEA's 2016 decision remained unchanged).

The Second Circuit improperly concluded that Petitioners must subject themselves to the DEA's administrative procedures because they failed to meet any of the exceptions to the exhaustion doctrine. *See Washington v. Barr*, 925 F.3d 109, 115 (2d Cir. 2019).

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[3] As of 2020, medical marijuana was legalized in the District of Columbia and AK, AZ, AR, CA, CO, CT, DE, FL, HI, IL, LA, ME, MD, MA, MI, MN, MO, MT, NV, NH, NJ, NM, NY, ND, OH, OK, OR, PA, RI, UT, VT, WA, and WV: Population data in the District of Columbia and 33 states: https://data.census.gov/cedsci/table?q=2020%20population%20estimates&tid=ACSDP1Y2018.DP05&t=Counts,%20Estimates,%20and%20Projections

It correctly recognized, but then failed to effectively respond to, the DEA's extremely concerning dilatoriness when examining petitions seeking proceedings to reschedule narcotics. The Second Circuit was troubled by the DEA's "history of dilatory proceedings" — which includes one instance of taking over nine (9) years before responding to a petition — yet paradoxically concluded Petitioners were not sufficiently prejudiced by "unreasonable or indefinite timeframes for administrative action." *Id.* at 121.

Nor did the Second Circuit find that Petitioners qualify for the other *McCarthy* exceptions to exhaustion (*e.g.*, that the agency decisionmakers are biased, that the agency has already determined the issue, or that the administrative process would be incapable of granting adequate relief), each of which also applies. The Second Circuit erred in its analysis.

A. The DEA's Established Bias and Record of Dilatory Review

In its 2016 denial of a November 30, 2011 petition to initiate proceedings to reschedule marijuana, the DEA concluded: "placement of marijuana in either schedule I or schedule II of the CSA is 'necessary as well as sufficient to satisfy our international obligations' under the Single Convention." *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. v. DEA*, 559 F.2d 735, 751 (D.C. Cir. 1977). This statement alone demonstrates bias and predetermination that renders any effort to petition the DEA to deschedule futile given that there has been no formal treaty changes. Further, as Petitioners note, only the judiciary

— not the DEA — can find the CSA's classification of marijuana under Schedule I unconstitutional which renders the administrative process incapable of granting adequate relief.

The DEA's recalcitrance and bias are systemic; it has created Kafkaesque rules for effectively negating any attempt to deschedule or reschedule marijuana. For example, for the DEA to consider rescheduling marijuana, a petitioner must show "marijuana has a currently accepted medical use in treatment in the United States." Under the DEA's 2016 decision, Petitioners can only utilize federal research projects approved by the National Institute on Drug Abuse (NIDA) to support their claims, excluding recourse to almost all of the scientific studies accepted by the majority of state legislatures. *Denial of Petition to Initiate Proceedings to Reschedule Marijuana*, CFR Chapter II and Part 1301, Fed. Register, Vol. 156, 53689, Aug. 12, 2016. NIDA researchers — who must have Schedule I research registrations — may only obtain cannabis from a cultivator registered with the DEA as a Schedule I manufacturer. However, the University of Mississippi has been the sole, limited, DEA registered Schedule I cultivator of marijuana for research purposes since 1968. And it typically produces only 500kg of plant material annually. Because of production restrictions, federally produced marijuana may have been harvested years earlier, stored in a freezer (which may diminish the quality and potency of the medicinal effects[4]) and often has a

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[4] Thomas BF, Pollard GT, *Preparation and Distribution of Cannabis and Cannabis-Derived Dosage Formulations for Investigational and Therapeutic Use in the United States*, Frontiers in Pharmacology, 2016; 7:285.

lower potency than marijuana sold in state-regulated markets.[5] Marijuana available through the federal system also lacks the genetic diversity and variety of products used by consumers in the 33 states and the District of Columbia that have some form of legalized cannabis. The DEA's functional failure to accept other research findings that are sufficient for a supermajority of the states is a systemic bias.

This systemic bias persists despite bipartisan political pressure to loosen restrictions on marijuana research. This is evidenced by the fact that the University of Mississippi has remained the sole Schedule I marijuana cultivator for over half a century. In 2016, the DEA appeared to finally be loosening this draconian restriction, soliciting applications from interested growers. But it has refused to either approve or deny any of those applications, a fact not made public until a lawsuit was filed by an applicant, Scottsdale Research Institute, LLC, in June of 2019. *In re Scottsdale Research Institute, LLC*, Case No. 19-1120 (D.C. Cir., 2019). The D.C. Court ordered the DEA to respond to the 2016 petition by August 28, 2019. The DEA provided notice of all the pending applications one day prior to the deadline, rendering the action moot, while simultaneously declaring that new rules would be imposed to evaluate the applications. *See* 84 Fed. Reg. 44,920 (Aug. 27, 2019). It was unclear initially why new rules were necessary to evaluate applications submitted in 2016, but the truth was revealed in April of 2020. The Department of Justice, through the Office of Legal Counsel, secretly rein-

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[5] Stith SS, Vigil JM, *Federal Barriers to Cannabis Research*. Science, 2016; 352(6290):1182.

terpreted 21 U.S.C. § 823(a) (*i.e.* the relevant statutory provision governing the applications), which resulted in every application effectively being rejected without any of the applicants being notified. *See Licensing Marijuana Cultivation in Compliance with the Single Convention on Narcotic Drugs*, 42 Op. O.L.C. (June 6, 2018). This secret memorandum was only released as part of a settlement after one of the applicants brought claims against the Department of Justice and DEA under the Freedom of Information Act. *See Scottsdale Research Institute*, LLC, 2:20-cv-00605-JJT (D. Ariz.).

Dr. Sisley and the Scottsdale Research Institute also filed a Petition to Reschedule Marijuana with the DEA on January 3, 2020, which was summarily rejected on January 8, 2020 in a two (2) page letter stating that the reasoning contained in the DEA's 2016 decision remained unchanged. *Suzanne Sisley, M.D., et al. v. U.S. Drug Enforcement Administration, et al.*, Dkt. No. 20-71433, Dkt. Entry: 1-6, Page 25 of 203. (9th Cir., May 21, 2020). Dr. Sisley and Scottsdale petitioned the Ninth Circuit to have the DEA perform a comprehensive review of the 2020, 2016, and 1992 DEA decisions on de-scheduling or re-scheduling cannabis. The DEA moved to dismiss the petition because the petitioners failed to utilize the DEA's administrative procedures. The Ninth Circuit denied the DEA's motion despite Scottsdale failing to exhaust the DEA's administrative remedies. *Suzanne Sisley, M.D., et al. v. U.S. Drug Enforcement Administration, et al.*, Dkt. No. 20-71433, Dkt. Entry: 17 (9th Cir., August 18, 2020). The Ninth Circuit panel is now anticipated to hear arguments on the merits at some point after the briefing schedule concludes on November 30, 2020.

Scottsdale exemplifies the DEA's obvious and persistent bias. It refuses to act for years on basic administrative petitions until lawsuits are initiated, then maintains marijuana has "no accepted medical use in treatment" because it refuses to permit federal research to demonstrate its medical efficacy.

B. Secretary Azar's Demonstrated Bias

Petitioners cited compelling evidence of bias by Attorney General William Barr, but the Second Circuit required demonstration of bias by Secretary Azar. Before the Second Circuit issued its final Order, Secretary Azar publicly commented on Surgeon General VADM Jerome Adams Advisory on "Marijuana Use and the Developing Brain"[6] during an August 29, 2019 speech:

> The President's serious concern with America's health and the risks of addiction is one of the reasons why he [referring to the President] recently donated his second quarter salary to promote the advisory that the Surgeon General is releasing today.
>
> * * *
>
> Especially as the potency of marijuana has risen dramatically over the past several decades, we don't know everything we might want to know about this drug. But we do know a number of things: It is a dangerous drug. For many, it can be addictive.

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6 https://www.hhs.gov/surgeongeneral/reports-and-publications/addiction-and-substance-misuse/advisory-on-marijuana-use-and-developing-brain/index.html

* * *

> We need to be clear: Some states' laws on marijuana may have changed, but the science has not, and federal law has not.
>
> * * *
>
> Worryingly, marijuana use is also linked to risk for and early onset of psychotic disorders, such as schizophrenia, and the association strengthens with more frequent use, stronger THC content, and earlier first use. We are committed to more research on illuminating these risks, because one of the dangers is that we still don't know all of the risks.[7]

Secretary Azar's comments are false, misleading, and showcase the bias of the agency's decision-maker towards marijuana; the same bias that continues to predominate in many local and state law enforcement agencies throughout the United States. Most importantly, aside from the improper signaling of a desired predetermined outcome with a Presidential salary "donation," Secretary Azar's statement on a link between marijuana use and the onset of psychosis or psychotic disorders directly contradicts the DEA's position in its 2016 denial letter:

> At present, the available data do not suggest a causative link between marijuana use and the development of psychosis (Minozzi et al., 2010). Numerous large, longitudinal studies show that subjects who used marijuana do not have a greater incidence of psychotic diag-

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[7] https://www.hhs.gov/about/leadership/secretary/speeches/2019-speeches/remarks-on-surgeon-general-marijuana-advisory.html

> noses compared to those who do not use marijuana (Fergusson et al., 2005; Kuepper et al., 2011; Van Os et al., 2002). Federal Register, Vol. 81, No. 156, pg. 53696 (August 12, 2016).

Secretary Azar's comments reflect either bias or flat-out misunderstanding of accepted scientific literature by the executive with binding authority on the Attorney General on the topic of "scientific and medical evaluations" on substances. *See* 21 U.S.C. § 811(b) (stating that "[t]he recommendations of the Secretary to the Attorney General shall be binding on the Attorney General as to [the] scientific and medical" evaluation of substances considered for scheduling). Petitioners have catalogued the myriad examples where the Federal Government has already recognized the medical efficacy of marijuana, which need not be repeated here but further cements the futility of administrative exhaustion with the DEA.[8]

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[8] *See* Petition, pp. 16-21 ("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"; "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, 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.")

II. THE DEA'S FAILURE TO CONSIDER DESCHEDULING PERPETUATES RACIAL BIAS AND SOCIETAL HARMS BY DRIVING MARIJUANA CRIMINALIZATION AND UNEQUAL ENFORCEMENT

Perhaps the most dangerous aspect concerning marijuana, however, is the mischaracterization of its "criminal element" by local and state law enforcement authorities to incarcerate Black individuals; a factor the DEA relied on and characterized as "the reputation of the substance 'on the street" in its August 12, 2016 *Denial of Petition to Initiate Proceedings to Reschedule Marijuana*, CFR Chapter II and Part 1301, Fed. Register, Vol. 156, 53688.

From 2010 to 2018, more than 6.1 million individuals were arrested for marijuana-related offenses.[9] In 2018, there were almost 700,000 marijuana arrests, which accounted for more than 43% of all drug arrests in the United States. In fact, in 2018, law enforcement made more marijuana-related arrests than all violent crimes combined.[10] Further, it is not clear that marijuana arrests are trending down—they have actually risen in the past few years, with almost 100,000 more arrests in 2018 than 2015. Thus, even if Petitioners can access marijuana under their state's medical or adult-use programs, they continue to be

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[9] E. Edwards, E. Greyak, B. Madubounwu, et al., *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, 2020, 22. https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform

[10] *FBI: Marijuana Arrests Rise for Third Year in a Row, Outpace Arrests for All Violent Crimes*, National Organization for the Reform of Marijuana Laws, October 3, 2019, https://norml.org/news/2019/10/03/fbi-marijuana-arrests-rise-for-third-year-in-a-rowoutpace-arrests-for-all-violent-crimes.

rightfully concerned about the potential ramifications due to marijuana's federal illegality. Just by accessing needed medicine, Petitioners open themselves up to arrest, criminal penalties, civil sanctions, adverse effects on employment opportunities, and more.

Disturbingly, Black people continue to bear the disproportionate brunt of those arrests. The ACLU performed a comprehensive analysis and ranked state and county level arrest ratios by considering counties with populations greater than 30,000, greater than 1% Black population, and more than 50% data coverage, which accounts for 81% of the U.S. population. In 2018, 96.1% of these counties (1,081 counties total) had a rate ratio greater than one, indicating a higher likelihood of arrest for Black people than white people. In other words, in less than 5% of these counties was the rate ratio equal to or lower than one — *i.e.*, white people were as likely as or more likely than Black people to be arrested for marijuana possession. This was the case despite the fact that use of marijuana and recent use by race do not significantly differ between Black and white populations.[11] Therefore, the wide racial disparities in marijuana possession arrest rates cannot be explained by differences in marijuana usage rates between Black and white people.

Yet in states where marijuana has been legalized, there is no influx of "danger" or "crime." Rather, it

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[11] The Substance Abuse and Mental Health Services Administration (SAMHSA), a federal branch of the U.S. Department of Health and Human Services, conducts nationally representative annual surveys of marijuana use over respondents' lifetime, over the past year, and over the past month. SAMSHA, *Results from the 2018 National Survey on Drug Use and Health*, *See* Table 1.26B.

results in significant social equity implications[12], and increased job opportunities[13]. Moreover, state marijuana legalization has not only led to decreased unemployment and increased jobs and economic opportunities, but a radical shift in state prosecution of both marijuana misdemeanors and felonies. States that have bucked the harmful bias reflected in DEA policies and practices by legalizing marijuana have consistently experienced significant reductions in marijuana arrests and significant increases in job creation and tax revenues.[14]

The scheduling, and criminalizing, of marijuana has unreasonably persisted for far too long because of the DEA's failure and unwillingness to perform the basic duties of an administrative agency. Petitioning the DEA to deschedule marijuana is pointless. Petitioners should not have been required to do so to get their day in court.

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[12] Angela Dills, Sietse Goffard and Jeffrey Mironm, *Dose of Reality: The Effect of State Marijuana Legalizations*, CATO Institute, September 16, 2016, https://object.cato.org/sites/cato.org/files/pubs/pdf/pa799.pdf.

[13] *The Economic Impact of Marijuana Legalization in Colorado*, Marijuana Policy Group, October 2016, http://www.mjpolicygroup.com/pubs/MPG%20Impact%20of%20Marijuana%20on%20Colorado-Final.pdf

[14] Angela Dills, Sietse Goffard and Jeffrey Mironm, *Dose of Reality: The Effect of State Marijuana Legalizations*, CATO Institute, September 16, 2016, https://object.cato.org/sites/cato.org/files/pubs/pdf/pa799.pdf.

CONCLUSION

Petitioners were wrongly denied the opportunity to pursue the extent of Secretary Azar's bias and demonstrate the numerous ways that the DEA has created indefinite timelines and biased determinations that should have exempted Petitioners from having to exhaust their administrative remedies. To require administrative exhaustion, in the face of having explicitly recognized its fundamental futility, constitutes a decision that has so far departed from the acceptable and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. For the foregoing reasons, the judgments below should be reversed and remanded.

Respectfully submitted,

ELIYAHU S. SCHEIMAN
PORZIO, BROMBERG & NEWMAN, P.C.
100 SOUTHGATE PARKWAY
MORRISTOWN, NJ 07962
(973) 889-4232
ESSCHEIMAN@PBNLAW.COM

GARY WEINSTEIN
COUNSEL OF RECORD
330 WASHINGTON STREET
PMB #368
HOBOKEN, NJ 07030
(551) 208-2447
GPW2@CORNELL.EDU

MATTHEW J. DONOHUE
PORZIO, BROMBERG & NEWMAN, P.C.
100 SOUTHGATE PARKWAY
MORRISTOWN, NJ 07962
(973) 810-6240
MJDONOHUE@PBNLAW.COM

SEPTEMBER 11, 2020 *COUNSEL FOR AMICUS CURIAE*