No. _____

In The
Supreme Court of the United States

STATE OF MISSOURI EX REL.
DARRIN LAMASA,

Petitioner,

v.

THE HONORABLE MICHAEL WRIGHT,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Missouri

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Missouri's medical marijuana law (Mo. Const. art. XIV) is preempted by the federal statute.

II. If not, since there is no verdict director for the statutory criteria under section 195.017.1, whether the Due Process Clauses, by and through *Marbury v. Madison*, 5 U.S.137 (1803), may be extended beyond rational basis review.

III. If so, whether Missouri's medical marijuana law or the medical marijuana law of any state where it was legislatively enacted means marijuana, because of the word "no" in the statutory criteria, no longer satisfies the statutory criteria and therefore section 195.017.2(4)(w) is unconstitutional.

PARTIES TO THE PROCEEDING

Respondent:

The Honorable Michael Wright,
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12th Judicial Circuit
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[1] Excluding appendix T, which is a certified copy, each appendix or exhibit is a true and accurate copy. Appendices A through R (with appendices D through R comprising the amended motion to dismiss in the trial court) were filed in the petitions for writ of prohibition in the Missouri Court of Appeals, Eastern District and the Missouri Supreme Court. App. 237a and App. 162e; App. 262a and App. 181e; respectively. In addition, the documents filed in each respective appellate court for appendices A through R have not been included because that would result in two additional copies of the same appendix or exhibit.

[2] The page numbering of the appendices in the booklet and the electronic filing is different and thus cross-references are provided. The page numbering of the appendices in the booklet includes the letter 'a' and the electronic filing includes the letter 'e'. The appendices in the electronic filing have an appendix sticker and the page numbers are handwritten.

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[3] The order denying relief is at 224a and 152e.

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Orders Below

On July 1, 2019, Respondent ("the trial court") denied without explanation petitioner's amended motion to dismiss. App. 224a; App. 152e.[1] On July 19, 2019, the Missouri Court of Appeals, Eastern District denied without explanation petitioner's petition for a writ of prohibition regarding the trial court's July 1, 2019 order summarily denying petitioner's amended motion to dismiss. App. 248a; App. 170e. On September 3, 2019, the Supreme Court of Missouri denied without explanation petitioner's petition for a writ of prohibition regarding said trial court's order of July 1, 2019. App. 277a; App. 194e.

Jurisdiction

Petitioner's amended motion to dismiss claims Missouri's statute codifying marijuana as a Schedule I controlled substance – section 195.017.2(4)(w) – is unconstitutional under the Due Process Clauses. *See* questions presented for review. Petitioner is seeking review of the Supreme Court of Missouri's September 3, 2019 order summarily denying review of the trial court's July 1, 2019 order summarily denying petitioner's amended motion to dismiss. App. 277a; App. 194e. Thus, jurisdiction is based on 28 U.S.C. § 1257(a).

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[1] Citations with "App." refer to Petitioner's appendix and cross-references are provided because the page numbering of the appendices in the booklet and the electronic filing is different.

Constitutional Provisions and Statutes

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law[] . . . ." U.S. Const. amend. XIV.

"That no person shall be deprived of life, liberty or property without due process of law." Mo. Const. art. I, § 10.[2]

"Right to access medical marijuana." Mo. Const. art. XIV.

"The controlled substances listed in this subsection are included in Schedule I[:] . . . Marijuana or marihuana, except industrial hemp[.]" Section 195.017.2(1), RSMo and Section 195.017.2(4)(w), RSMo.

> The department of health and senior services shall place a substance in Schedule I if it finds that the substance: (1) Has high potential for abuse; and (2) Has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision.

Section 195.017.1, RSMo.

> The findings required for each of the schedules are as follows: (1) SCHEDULE I. (A) The drug or other substance has a high potential for abuse. (B) The drug or

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[2] Missouri statutory (i.e., RSMo) and constitutional citations are to the electronic database published by the Missouri Revisor of Statutes, Cum. Supp. 2018, as of November 11, 2019.

> other substance has no currently accepted medical use in treatment in the United States. (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

21 U.S.C. § 812(b)(1).

Statement of the Case

On January 5, 2018, the State filed a Complaint against Petitioner. App. 6a; App. 1e. On January 31, 2018, undersigned counsel filed his entry of appearance. App. 9a; App. 2e. On July 31, 2018, the State filed an Information against Petitioner. App. 11a; App. 3e. Petitioner is charged with "the class C felony of trafficking in the second degree[]" based on the possession of a certain amount of marijuana. Apps. 7a and 12a; Apps. 1e and 3e.

On November 6, 2018, the Missouri Constitution was amended with an initiative petition to include medical marijuana that passed as a ballot measure. App. 130a-141a; App. 86e-91e; Mo. Const. art. XIV. In a collaterally persuasive context, Canada recently legalized marijuana. App. 210a; 145e.

On June 17, 2019, Petitioner filed an amended motion to dismiss the charge. App. 19a; App. 9e.[3] On June 17, 2019, Petitioner also

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[3] The citation for the amended motion to dismiss in its entirety is Apps. 13a-216a; Apps. 4e-147e because said motion included two separate motions and several exhibits.

filed an amended motion to stay. App. 217a; App. 148e.

On July 1, 2019, the trial court denied without explanation Petitioner's amended motion to dismiss. App. 224a; App. 152e.

On July 17, 2019, Petitioner filed a petition for writ of prohibition and a motion to stay in the Missouri Court of Appeals, Eastern District. App. 226a; App. 153e. On July 19, 2019, the Eastern District denied without explanation Petitioner's petition. App. 195a; App. 170e.

On July 29, 2019, Petitioner filed a petition for writ of prohibition and a motion to stay in the Supreme Court of Missouri. App. 250a; App. 171e. On September 3, 2019, the Supreme Court of Missouri denied without explanation Petitioner's petition. App. 277a; App. 194e.

Relator's amended motion to dismiss has three major issues: whether Missouri's medical marijuana law (Mo. Const. art. XIV) is preempted by the federal statute; if not, since there is no verdict director for the statutory criteria under section 195.017.1, whether the Due Process Clauses, by and through *Marbury v. Madison*, 5 U.S.137 (1803), may be extended beyond rational basis review; and if so, whether Missouri's medical marijuana law or the medical marijuana law of any state where it was legislatively enacted means marijuana, because of the word "no" in the statutory criteria, no longer satisfies the statutory criteria and there-

fore section 195.017.2(4)(w) is unconstitutional. App. 24a and App. 12e-13e.

The aforementioned three federal questions of law were subsequently presented verbatim to the Missouri Court of Appeals, Eastern District; the Missouri Supreme Court; and now the Supreme Court of the United States. App. 230a and 156e; App. 254a-255a and App. 174e-175e; and *see* questions presented for review ("issues"), *supra*; respectively. In each court thus far (i.e., the trial court, court of appeals, and state supreme court), the merits were not reached. App. 224a and App. 152e; App. 248a and App. 170e; and App. 277a and App. 194e; respectively.

Argument

Introduction

The documented and persuasively larger context within which Petitioner's issues have been presented includes Canada's recent actions vis-à-vis marijuana and the sheer number of states (over half of our states) with legalized medical marijuana. App. 23a; App. 12e; Apps. 142a-146a; Apps. 92e-94e; App. 210a; App. 145e.

In addition, the Controlled Substances Act ("CSA") – the relevant federal law – was enacted by Congress in 1970 and the Missouri General Assembly enacted its version shortly thereafter. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1242 (Oct. 27, 1970) (stating, "[t]his title ["Title II–Control and Enforcement"] may be cited as the 'Controlled Substances Act'."); *State v. Burrow*, 514 S.W.2d 585, 589 (Mo. 1974) (stating,

"[i]n 1971, the Missouri General Assembly adopted its version of the Uniform Controlled Substances Act. Laws of Mo. 1971, p. 237, et seq."). App. 20a; App. 9e-10e.

Compelling Reasons:

I. National issues of first impression.

Since 1970 there have been only two United States Supreme Court opinions involving consequences to legalized medical marijuana: *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S 483 (2001) and *Gonzales v. Raich*, 545 U.S. 1 (2005). Even though Petitioner's issues were not present in said cases, because of the subject matter, said cases are briefly addressed herein. App. 22a; App. 11e.

Regarding Petitioner's third issue, said issue is one of first impression not only as a matter of Missouri law, but as a matter of dual sovereignty for our nation. *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018) (stating, "both the Federal Government and the States wield sovereign powers, and that is why our system of government is said to be one of 'dual sovereignty.'") (internal citation omitted).

Oakland Cannabis

In *Oakland Cannabis*, the Court answered the criminal question of whether "medical necessity is a legally cognizable defense to violations of the Controlled Substances Act." *Oakland Cannabis*, 532 U.S. at 489. App. 22a; App. 11e. The Court held "that medical necessity is not a defense to manufacturing and distributing marijuana." *Id.* at 494 (internal footnote omitted). App. 22a; App. 11e.

Petitioner's first issue – preemption – was never mentioned. *Oakland Cannabis*, 532 U.S 483 (2001). App. 25a; App. 13e-14e.

Petitioner's second issue – the extension of the Due Process Clauses by and through *Marbury v. Madison*, 5 U.S. 137 (1803) in order to reach the minutiae of the statutory criteria – was never mentioned. *Oakland Cannabis*, 532 U.S 483 (2001). Despite the context being different, the merits were not reached in the one isolated reference to due process:

> Finally, the Cooperative contends that we should construe the Controlled Substances Act to include a medical necessity defense in order to avoid what it considers to be difficult constitutional questions. In particular, the Cooperative asserts that, shorn of a medical necessity defense, the statute exceeds Congress' Commerce Clause powers, violates the substantive due process rights of patients, and offends the fundamental liberties of the people under the Fifth, Ninth, and Tenth Amendments. As the Cooperative acknowledges, however, the canon of constitutional avoidance has no application in the absence of statutory ambiguity. Because we have no doubt that the Controlled Substances Act cannot bear a medical necessity defense to

> distributions of marijuana, we do not find guidance in this avoidance principle.

Id. at 494.

Petitioner's third issue (analogizing to California) – the constitutionality of the state statute codifying marijuana as a Schedule I controlled substance – was not present. *Oakland Cannabis*, 532 U.S 483 (2001). Yes, California's medical marijuana law was factually present in the case. *Id.* at 486. As previously mentioned, the issue was whether "medical necessity is a legally cognizable defense to violations of the Controlled Substances Act." *Id.* at 489. Said issue is distinctly different from Petitioner's third issue.

Raich

In *Raich*, the issue was "whether Congress' power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally." *Raich*, 545 U.S. at 9. App. 22a; App. 11e. "In assessing the scope of Congress' authority under the Commerce Clause[] . . . . [w]e need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Id.* at 22 (internal citations omitted). App. 22a-23a; App. 11e-12e.

The Court "held that Congress' authority under the Commerce Clause includes the power to prohibit intrastate cultivation and use of marijuana, even if it is in compliance with

California law." *Kadonsky v. Lee*, 172 A.3d 1090, 1096 (N.J. Super. Ct. App. Div. 2017) (internal citation omitted). App. 23a; App. 12e.

Petitioner's first issue – preemption – was not present. App. 25a; App. 13e. Yes, the Supremacy Clause's truism was mentioned, but the context was the Commerce Clause. *Raich,* 545 U.S. at 29. App. 25a; App. 13e. The issue was not Petitioner's issue, i.e., whether a state's medical marijuana law was preempted. *Raich*, 545 U.S. 1 (2005).

Petitioner's second issue – the extension of the Due Process Clauses by and through *Marbury v. Madison*, 5 U.S. 137 (1803) in order to reach the minutiae of the statutory criteria – was never mentioned. *Raich*, 545 U.S. 1 (2005). Yes, the words "due process" were mentioned, but the merits were not reached and it is not clear what the specific claim involved. *Id.* at 8, 33. An inference is raised that the claim perhaps involved reclassification. *Id.* at 33 (stating, "[w]e do note, however, the presence of another avenue of relief. As the Solicitor General confirmed during oral argument, the statute authorizes procedures for the reclassification of Schedule I drugs."). In any event, Petitioner is not seeking reclassification. App. 23a; App. 12e.

Petitioner's third issue (analogizing to California) – the constitutionality of the state statute codifying marijuana as a Schedule I controlled substance – was not present. *Raich*, 545 U.S. 1 (2005). Yes, California's medical marijuana law was factually present in the case. *Id.* at 5. As previously mentioned, the issue was

"whether Congress' power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally." *Raich*, 545 U.S. at 9. App. 22a; App. 11e. Said issue is distinctly different from Petitioner's third issue.

Despite the fact that state legalized medical marijuana was present in the case, additional support for Petitioner's argument that his first issue – preemption – was not present may be found in the *Raich* court's interpretation of marijuana in the CSA: "The CSA designates marijuana as contraband for *any* purpose[.]" *Raich*, 545 U.S. at 27. By extension, state legalized medical marijuana is one such purpose. "Under the Supremacy Clause of the Constitution, state laws cannot permit what federal law prohibits. U.S. Const. art VI, cl. 2." *United States v. McIntosh*, 833 F.3d 1163, 1179 n.5 (9th Cir. 2016). App. 37a; App. 23e.

Therefore, the reasonable inference must be that said statement is not controlling and dictum because otherwise all state legalized medical marijuana laws, absent a federal anti-preemption provision, would have already been preempted in any and all circumstances. App. 39a; App. 25e.

II. Petitioner's criminal felony context is good cause for an exception.

Absent preemption, Defendant's criminal felony context is good cause for an exception to be made to the combined holdings of *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483

(1955); and *Ferguson v. Skrupa*, 372 U.S. 726 (1963) in order to extend the Due Process Clauses beyond rational basis review. App. 42a; App. 28e.

"The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955). App. 42a; 27e.

Federal preemption was not an issue in *Williamson*, *Ferguson*, *Nebbia v. New York*, 291 U.S. 502 (1934); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Olsen v. Nebraska*, 313 U.S. 236 (1941); *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220 (1949); and *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952). App. 47a; App. 31e.

None of the aforementioned cases involved a felony or a misdemeanor drug offense. App. 46a; App. 31e.

Further, making an exception to *Williamson* and *Ferguson* does not implicate *Lochner v. New York*, 198 U.S. 45 (1905). Similarly, none of the following cases involved preemption, a felony, or a misdemeanor drug offense: *Lochner*; *Adair v. United States*, 208 U.S. 161 (1908); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adkins v. Children's Hospital*, 261 U.S.

525 (1923); and *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924). App. 47a-48a; App. 31e-32e.

III. Long past time to interpret one of the universally elementary and least ambiguous words – "no."

Assuming that interpreting the word "no" "out of the statute[]" does not constitute an interpretation of the word "no," no majority opinion has interpreted the word "no." App. 57a; App. 40e; Apps. 147a-194a; Apps. 95e-133e; section 195.017.1(2), RSMo; 21 U.S.C. § 812 (b)(1)(B); and *Morales v. TWA*, 504 U.S. 374, 385 (1992).

"A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979) (internal citation omitted). App. 55a; App. 38e.

"[C]ourts reject interpretations that render statutory language 'mere surplusage' because '[p]resumably, the legislature does not insert superfluous language in a statute[.]'" *Doe v. St. Louis Cmty. Coll.*, 526 S.W.3d 329, 342 (Mo. App. E.D. 2017) (internal citation omitted). App. 55a; App. 38e.

Consequently, Congress' and the Missouri General Assembly's knowing and voluntary decision to use the word "no" in the statutory criteria eliminates any want, need, or requirement for any expert debate about marijuana's medical usefulness. App. 59a; App. 41e-42e; Section 195.017.1(2), RSMo.; 21 U.S.C. § 812(b)(1)(B).

Interestingly, a dissenting opinion in Missouri that predated all legalized medical did not interpret the word "no" "out of the statute." *State v. Mitchell*, 563 S.W.2d 18, 36 (Mo. banc 1978) (Charles Shangler, S.J., dissenting) (stating, "[i]t is altogether inappropriate to say of marihuana that the substance 'has no accepted medical use in treatment'[.]"); *Morales*, 504 U.S. at 385. App. 153a; App. 100e.

And there was a period of time after the CSA was enacted when our federal government actually stood behind medical marijuana. *Kuromiya v.United States*, 78 F. Supp. 2d 367, 374 (E.D. Pa. 1999) (stating, "[e]ven odder is the government's having provided marijuana to a small group of people over the years in the compassionate use program without having obtained a single useful clinical result as to the utility or safety of marijuana as a medicine to alleviate the symptoms of illness."). App. 74a; App. 53e-54e.

> While there may have been "no accepted medical use in treatment in the United States" for marijuana when the CDSA became effective, any argument suggesting that premise is still valid in the post-CUMMA era strains credulity beyond acceptable boundaries. Medical benefits from the use of marijuana not known in 1971, when the CDSA became effective, or in 1986, when *Tate* was decided, and impediments to its lawful use

> as a result of its Schedule I classification, are abundant and glaringly apparent now.

Kadonsky v. Lee, 172 A.3d 1090, 1096 (N.J. Super. Ct. App. Div. 2017) (internal footnote omitted). App. 74a; App. 54e.

IV. In light of legalized medical marijuana, the CSA's Legislative History needs reconsideration.

Incidentally, the CSA's legislative history provides support for the argument that the word "no" should not be interpreted "out of the statute." *Morales*, 504 U.S. at 385. App. 60a; App. 42e.

"Federal narcotic enforcement officials who regarded marihuana as the 'new' drug danger second to opiates in hazard (no clear scientific basis was ever given for this belief), asked for and received responsibility for its regulation at the Federal level, culminating in the Marihuana Tax Act of 1937." *Controlled Dangerous Substances, Narcotics and Drug Control Laws: Hearings on Legislation to Regulate Controlled Dangerous Substances and Amend Narcotics and Drug Laws Before the H. Comm. on Ways and Means*, 91st Cong., 2d Sess. 273 (1970) (statement of Dr. Roger O. Egeberg, Assistant Secretary for Health and Scientific Affairs, U.S. Department of Health, Education, and Welfare) (hereinafter "*Hearings: Ways and Means*"). App. 196a; App. 134e.

"Until the 12th revision of the United States Pharmacopeia in 1942, marijuana was listed as a chemical with medical usefulness. It

was suddenly deleted, said Dr. Osmond of Princeton, []rather in the way that Stalin rewrote history." 116 Cong. Rec. 2,219 (1970) (Stuart Auerbach, Study Discloses Medical Uses of Synthetic Pot, Wash. Post, Feb. 3, 1970). Apps 60a and 195a; Apps. 42e and 134e.

"The President's Ad Hoc Panel on Drug Abuse (1962) and Dr. Goddard, Commissioner of the Food and Drug Administration, have both declared that marijuana is less harmful than alcohol." *Part 1, Drug Abuse Control Amendments—1970: Hearings on H.R. 11701 and H.R. 13743 Before the Subcomm. On Public Health and Welfare of the H. Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess., Serial No. 91-45, 301 (1970) (statement of Lawrence Speiser, director, Washington (D.C.) Office, American Civil Liberties Union). App. 203a; App. 140e.

> The criteria used in scheduling substances under this bill are improper and inappropriate and lead to illogical results. For example, the wording of the above-quoted criteria results in marihuana being classified in the same schedule as heroin, merely because marihuana is capable of being abused and at the present time has no accepted medical usefulness.

Part 2, Drug Abuse Control Amendments—1970: Hearings on H.R. 11701 and H.R. 13743 Before the Subcomm. On Public Health and Welfare of

the H. Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess., Serial No. 91-46, 850 (1970) (statement of Neil L. Chayet, lecturer in legal medicine at the Boston University School of Law, Boston University School of Medicine, Tufts University School of Medicine, and Tufts University School of Dental Medicine). Apps. 58a and 201a-202a; Apps. 40e and 139e.

> This legislation would constitute a Congressional finding that heroin and marijuana are of equal danger to society, and of equal harm to the individual. As the unanimous testimony at the hearings has demonstrated, however, this simply is not true, and widespread dissemination of this misinformation as part of national policy could have tragic results.

Hearings: Ways and Means, 91st Cong., 2d Sess. 492 (1970) (statement via letter of Peter Barton Hutt, chairman, Comm. on Alcohol and Drug Reform of the American Bar Association's Section on Individual Rights and Responsibilities). Apps. 78a and 207a-208a; Apps. 57e and 143e.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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