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 MINORITY CANNABIS BUSINESS ASSOCIATION AND MINORITIES FOR MEDICAL MARIJUANA, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

WILLIAM BOGOT
JOSEPH COLLINS
Counsel of Record
ALEXANDRA SOBOL
FOX ROTHSCHILD LLP
321 North Clark Street, Suite 1600
Chicago, Illinois 60654
(312) 517-9227
jcollins@foxrothschild.com

Counsel for Amici Curiae

September 4, 2020

298074

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Statutes and Other Authorities

Cited Authorities

INTERESTS OF THE *AMICI CURIAE* [1]

The Minority Cannabis Business Association ("MCBA") is a 501(c)(6) non-profit organization created to serve the needs of minority cannabis entrepreneurs, workers, patients, and consumers alike. Its mission is to create equal access and promote economic empowerment for communities of color through policy considerations and outreach initiatives aimed at achieving equity for those most affected by the "War on Drugs."

Minorities for Medical Marijuana, Inc. ("MFMM") is a 501(c)(3) non-profit organization focused on advocacy and education in support of minorities who have a vested interest in cannabis public policy, business, healthcare access, and social impact. MFMM envisions a forward thinking and progressive approach to social justice and equality in cannabis.

Together, *amici* are committed to dismantling systemic discrimination in the cannabis industry. As part of those efforts, they share an interest in addressing the discriminatory intent underlying the classification of cannabis as a Schedule I drug under the Controlled Substances Act as well as inherent bias within the Drug Enforcement Agency's ("DEA's") administrative review process. Accordingly, *amici* respectfully submit this brief in support of certiorari and urge the Court to grant the Petition for a Writ of Certiorari.

---

1. MCBA and MFMM state that no counsel for a party to this case authored this brief in whole or in part; and no counsel or party, other than *amici* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have received timely notice of *amici*'s intent to file and have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Petitioners filed a complaint in the United States District Court for the Southern District of New York seeking (1) a judicial declaration that the classification of cannabis as a Schedule I drug under the Controlled Substances Act, 21 U.S.C. § 812 *et seq*. ("CSA"), is unconstitutional, and (2) a prayer for injunctive relief against enforcement of the CSA as it pertains to cannabis. (Pet. App. 159a-279a). The district court dismissed the complaint with prejudice for failure to exhaust administrative remedies and, in the alternative, failure to state a claim. (*Id.* at 32a-58a). The United States Court of Appeals for the Second Circuit affirmed in part, agreeing that Petitioners were first required to exhaust administrative remedies. (*Id.* at 3a-29a). Petitioners now seek from this Court a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

In their Petition for a Writ of Certiorari ("Petition"), Petitioners argue that the classification of cannabis as a Schedule I drug under the CSA is so irrational that it violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution. (Pet. 29-31). *Amici* join in this argument, but further submit (as Petitioners argued in the lower courts) that such classification also violates the Due Process Clause because it was based on an invidious discriminatory purpose.[2]

---

2. Petitioners' Memorandum of Law in Opposition to Respondents' Motion to Dismiss ("District Court Brief") at 57-59; Petitioners' Appellate Brief to the Second Circuit Court of Appeals ("Appellate Brief") at 47-50.

Petitioners further argue in their Petition that they were not first required to exhaust administrative remedies prior to filing their complaint because (1) the complaint did not seek an administrative remedy, and (2) administrative review would be futile because the agency—by its own admission—is not empowered to grant the relief sought by Petitioners. (*Id.* at 31-33). *Amici* join in these arguments, but further submit (as Petitioners argued in the lower courts) that administrative review would also be futile because the administrative body has shown itself to be biased.[3]

Given the millions of registered patients who rely upon cannabis to preserve their health and lives, and the discriminatory motives behind the classification of cannabis under the CSA, it is imperative that this Court provide clarity in this area of law.

ARGUMENT

I. The Classification of Cannabis as a Schedule I Drug Under the CSA (21 U.S.C. § 812(B)(1)) Violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution Because the Classification Was Based on an Invidious Discriminatory Purpose.

The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. *Washington v. Davis*, 426 U.S. 229, 239 (1976). "It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups." *Id.* (citing *Bolling v. Sharpe*, 347 U.S. 497, 499

3. District Court Brief at 107-08; Appellate Brief at 27-29.

(1954)). In *Davis*, this Court set forth the "basic equal protection principle" that the governmental action claimed to be discriminatory must ultimately be traced to an invidious discriminatory purpose. 426 U.S. at 240. An invidious discriminatory purpose may often be inferred from "the totality of the relevant facts." *Id*. at 242. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977); *see also U.S. Dep't of Agriculture v. Monroe,* 413 U.S. 528, 534 (1973) (finding a statutory amendment violated the equal protection clause because it "was intended to prevent so called 'hippies' and 'hippie communities' from participating in the food stamp program" and holding that "a desire to harm a politically unpopular group cannot constitute a legitimate governmental interest").

Here, the discriminatory purpose of the classification of cannabis is well-documented. In 1969, the Nixon administration formed a commission under the chairmanship of Raymond Shafer, a former Republican Governor of Pennsylvania, as a means to establish the dangers of cannabis as a means to prosecute persons of color and anti-war protesters. (Pet. App. 218a-219a).[4] As learned later through the Nixon tapes, these were two groups Nixon despised. Indeed, John Erlichman, a senior advisor to Nixon, was quoted as 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

4. *See also* District Court Brief at 17; Appellate Brief at 13.

> 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.

(*Id.* at 219a).[5]

Shafer, however, did not support Nixon's agenda. The Shafer Commission concluded that cannabis was not as dangerous as perceived, and even recommended *decriminalization* of cannabis. (*Id.* at 216a-218a).[6] The Nixon Administration, however, summarily rejected the Shafer Commission Findings, and urged Congress to criminalize cannabis under the CSA. (*Id.* at 221a-222a).[7] In fact, former Attorney General John Mitchell of the Nixon Administration actually drafted the CSA.[8] Congress then adopted the CSA at Nixon's insistence on October 27, 1970—approximately one month after it was introduced. At the request of the Nixon Administration, Congress

---

5. *See also* District Court Brief at 17; Appellate Brief at 13.

6. *See also* District Court Brief at 16-17; Appellate Brief at 13-14.

7. *See also* District Court Brief at 17; Appellate Brief at 12-13.

8. *See* Comparison of Bills to Regulate Controlled Dangerous Substances and to Amend the Narcotic and Drug Laws, Staff of H. Comm. Ways and Means (Aug. 8, 1970); *see also* Drug Abuse Control Amendment-I 970: Hearings on H.R. 11701 and H.R. 13743 Before the Subcomm. on Public Health and Welfare of H. Comm. on Interstate and Foreign Commerce, 91st Cong. 80 (1970) (statement of John Mitchell, Atty Gen. of the U.S.) (noting that "the administration sent to Congress the proposed 'Controlled Dangerous Substances Act.'").

placed cannabis under Schedule I, notwithstanding the findings of the Shafer Commission that belied such a classification. (Pet. App. 213a-214a).[9]

As referenced in the Petition, another Nixon Administration alumnus provided an affidavit to Petitioners explaining that Nixon sought to criminalize cannabis pursuant to the CSA not out of concern for public health, but because he associated cannabis with persons of color and the anti-war left—two groups he regarded as hostile to him and his administration. (Pet. 14) (citing Pet. App. 221a-226a). In criminalizing cannabis, Nixon believed he had devised a seemingly neutral basis upon which to target so-called hippies and persons of color—his perceived enemies—without raising constitutional concerns. As stated in the affidavit:

> The driving force behind the CSA and its administration was to suppress and discriminate. It represents a regrettable and unfortunate period in American history which, I trust, contemporary society will, at some point, endeavor to correct—perhaps now.

(Pet. App. 221a-226a).

And finally, as set forth in the Petition, 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.

9. *See also* District Court Brief at 16-20; Appellate Brief at 12.

> The key is to devise a system that recognizes this while not appearing to [do so].

(Pet. 15).[10]

An invidious discriminatory purpose can and should be inferred from the totality of the relevant facts outlined above. The findings of the Shafer Commission demonstrate that there is no plausible basis for classifying cannabis as a Schedule I drug under the CSA. Moreover, the statements and testimony of former Nixon Administration officials establish that the classification was based on an invidious discriminatory purpose. As such, the classification violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

II. Administrative Remedies Would Be Futile Because the Administrative Body Has Shown Itself to Be Biased on Numerous Occasions.

Amici agree with Petitioners that "filing a petition with the DEA for de-scheduling cannabis would have been a futile endeavor." (Pet. 32).[11] Because exhaustion of administrative remedies is not mandated by the CSA, the federal courts must exercise sound judicial discretion in determining whether to require such exhaustion. In exercising its sound judicial discretion, the Court must balance the individual's interest in retaining prompt access to a federal judicial forum against countervailing

10. *See also* District Court Brief at 58-59; Appellate Brief at 14.

11. Petitioners, of course, never sought de-classification or re-classification of cannabis. As stated in their Petition, Petitioners sought a declaration that the classification of cannabis is unconstitutional. (Pet. 33).

institutional interests favoring exhaustion. *McCarthy v. Madigan*, 503 U.S. 140, 141 (1992), *superseded by statute on other grounds as recognized in Porter v. Sussle*, 534 U.S. 516 (2002). However, "[i]ndividual interests have weighed heavily where resort to the administrative remedy would occasion undue prejudice to subsequent assertion of a court action, where there is some doubt as to whether the agency is empowered to grant effective relief, or where the administrative body is shown to be biased or has otherwise predetermined the issue before it." *Id.* at 140, 141.

Here, anti-cannabis bias is pervasive throughout the administrative body. At the time Petitioners' lawsuit was filed, the then-Administrator of the DEA, Philip Rosenberg, with whom re-scheduling petitions would be filed, and who made recommendations to the Attorney General on such issues, had already "decided" that medical cannabis is "a joke."[12] The Administrator further rejected the "notion that marijuana is also medicinal—because it's not," and any suggestion that cannabis is medicine "really bothers" him.[13] Similarly, the present U.S. Health and Human Services Secretary, Alex Azar stated during a press conference that "[t]here really is no such thing as medical marijuana."[14]

---

12. Appellate Brief at 27; Paula Reid and Stephanie Condon, *DEA chief says smoking marijuana as medicine "is a joke,"* CBS News (Nov. 4, 2015), https://www.cbsnews.com/news/dea-chief-says-smoking-marijuana-as-medicine-is-a-joke/.

13. *Id.*

14. *Health Secretary: There's 'no such thing as medical marijuana,'* Dayton Daily News (Mar. 5, 2018), https://www.daytondailynews.com/news/local/such-thing-medical-marijuana-health-secretary-says-dayton/La8dTJgu6nF3ojSc1z6yPO/.

Furthermore, then-Attorney General Jeff Sessions, who was expressly charged with the responsibility of deciding re-scheduling petitions under the CSA, 21 U.S.C. §811(a)(2)(3), made several disparaging remarks regarding the use of cannabis, including that "he thought the KKK 'were [sic] OK until I found out they smoked pot'" and "[g]ood people don't smoke marijuana."[15] Moreover, less than three months prior to commencement of Petitioners' action, Sessions sent a letter urging Congress to revoke riders to omnibus appropriations legislation—expressly prohibiting use of federal funds to prosecute State-legal cultivation, possession, sale of, and treatment with cannabis—so that he could prosecute those treating with State-legal medical cannabis.[16] And just one week before this lawsuit was filed, Sessions announced his intention to file civil forfeiture proceedings against those who own and operate State-compliant cannabis businesses—what Sessions described as "dangerous illegal drug activity."[17]

While the Appellate Court seemed to agree that Sessions was biased, it also believed that Sessions' successor, Attorney General William Barr, would prove

---

15. Appellate Brief at 28; James Higdon, *Jeff Sessions' Coming War on Legal Marijuana,* Politico (Dec. 5, 2016), https://www.politico.com/magazine/story/2016/12/jeff-sessions-coming-war-on-legal-marijuana-214501.

16. Christopher Ingraham, *Jeff Sessions personally asked Congress to let him prosecute medical-marijuana providers*, The Washington Post (June 13, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/06/13/jeff-sessions-personally-asked-congress-to-let-him-prosecute-medical-marijuana-providers/.

17. Appellate Brief at 28; Josh Gerstein, *Sessions to step up drug-war seizures,* Politico (July 19, 2017), https://www.politico.com/story/2017/07/19/jeff-sessions-drug-war-seizures-240706.

not to be. (Pet. App. 15a-16a). That hope has proved to be misplaced. In fact, regarding current Attorney General William Barr, a career Department of Justice employee recently testified to Congress that Barr's personal opposition to marijuana led him to direct improper antitrust investigations into multiple cannabis company mergers—accounting for nearly one-third of the division's cases in 2019. According to the whistleblower, Barr's directives "centered not on an antitrust analysis, but because he did not like the nature of their underlying business."[18] According to the whistleblower, the head of the Antitrust Division, Assistant Attorney General Delrahim, responded to internal concerns about these investigations at an all-staff meeting on September 17, 2019. There, Delrahim acknowledged that the investigations were motivated by the fact that "the cannabis industry is unpopular 'on the fifth floor,' a reference to Attorney General Barr's offices in the DOJ headquarters building."[19]

Due to the compelling examples of bias set forth above, Petitioners' individual interests in retaining prompt access to a federal judicial forum weighs heavily against countervailing institutional interests favoring exhaustion of administrative remedies, and would occasion undue prejudice to subsequent assertion of a court action. For this additional reason, Petitioners should be permitted to proceed with their action in the district court.

---

18. *Oversight of the Department of Justice: Political Interference and Threats to Prosecutorial Independence Before the H. Comm. on the Judiciary*, 116th Cong. (2020) (testimony of John W. Elias, chief of staff for the Justice Department's Antitrust Division), https://www.congress.gov/116/meeting/house/110836/witnesses/HHRG-116-JU00-Wstate-EliasJ-20200624-U8.pdf.

19. *Id.*

CONCLUSION

For the foregoing reasons, *amici* MCBA and MFMM respectfully request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

WILLIAM BOGOT
JOSEPH COLLINS
Counsel of Record
ALEXANDRA SOBOL
FOX ROTHSCHILD LLP
321 North Clark Street,
Suite 1600
Chicago, Illinois 60654
(312) 517-9227
jcollins@foxrothschild.com

Counsel for Amici Curiae