No. 20-148

IN THE
Supreme Court of United States

MARVIN WASHINGTON, ET AL.,

Petitioners,

v.

WILLIAM PELHAM BARR, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* ATHLETES FOR CARE, AFTER THE IMPACT FUND, CANNA RESEARCH FOUNDATION, NFL SISTERS IN SERVICE, INC., AND ISIAH INTERNATIONAL, LLC IN SUPPORT OF PETITIONERS

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Athletes for CARE ("AFC") is a non-profit organization founded by former professional athletes who are united in using their influence to advocate for research, education, and compassion in addressing vital health issues for the next generation of athletes, including the availability of medical cannabis.[2]

After The Impact Fund ("ATI") is a non-profit organization that helps military veterans and retired professional athletes receive customized treatment for unseen traumatic injuries from the field, including anxiety, depression, post-traumatic stress disorder, addition, and thoughts of suicide.[3]

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae, or its counsel, made a monetary contribution intended to fund its preparation or submission. All parties were provided proper notice and have consented to the filing of this amicus brief.

[2] The Board of Directors of AFC consists of Scott Berman, Eben Britton (former NFL player), Riley Cote (former NHL player), Marques Harris (former NFL player), Leah Heise, Bob Hoban, Nate Jackson (former NFL player), Gary Kaminsky, Ryan Kingsbury, Chris Leavy, Frank Manganella, Derrick Morgan (former NFL player), Matthew Nordgren (former NFL player), Emily Paxhia, and Lindy Snider.

[3] The Board of Directors of ATI consists of Matt Birk (former NFL player), Matt Davis, Dr. Jason Cormier, Branden Minuth (former Navy SEAL), Shannon Shryne, Jamie Baker (former NHL player), and Kevin Lee.

Canna Research Foundation ("CRF") is a non-profit organization focused on comprehensive and evidence-based epidemiological research of medical cannabis with the ultimate goal of providing better pain relief and improved quality of life for patients in need.[4]

NFL Sisters in Service, Inc. ("the Sisters") is a non-profit organization comprised of the spouses, daughters, and mothers of current and former NFL players who advocate on behalf of those players and their families. In particular, the Sisters have assisted dozens of players and their loved ones with disability-related issues arising from their time in the NFL, including but not limited to chronic traumatic encephalopathy ("CTE") and amyotrophic lateral sclerosis ("ALS").[5]

ISIAH International, LLC ("ITI") is a holding company founded and wholly owned by former Detroit Pistons NBA Hall of Famer Isiah Thomas that has interests in various companies, including two in the medical cannabis and hemp industries.

AFC, ATI, CRF, the Sisters, and ITI (together, "Amici") all have a strong interest in advocating for the legalization and decriminalization of cannabis for medical use because many of their members and others similarly situated have depended on medical cannabis to treat various conditions and provide pain

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[4] The Board of Directors of CRF consists of Dr. Joanna Zeiger (former professional triathlete), Dr. Robert S. Zeiger, Dr. William S. Silvers, and Will Murray.

[5] The Board of Directors of the Sisters consists of Stephanie Anderson, Karyn Williams, Tierra Royal, Shahida Walker, and Sabrina Pegross.

management when other prescription medications or treatment methods have been unsuccessful or resulted in unbearable side effects. In some situations, medical cannabis has even saved the lives of athletes affiliated with Amici.

Moreover, the Federal Government's prohibition of cannabis for medical use has forced professional sporting leagues to impose their own, often draconian, drug policies. As a result, a large number of former professional athletes suffered, and many more currently suffer, in silence and, in several instances, had their careers shortened because they were unable to access medical cannabis.

Accordingly, Amici submit this brief in support of granting the petition for a writ of certiorari currently pending before the Court.

SUMMARY OF ARGUMENT

More than three million people in the United States require medical cannabis on a regular basis to manage chronic conditions, reduce debilitating pain, and—in some instances—to survive from one day to the next. For these individuals, this case presents an issue of the utmost importance.

During the past two decades, a majority of States and territories and numerous countries worldwide have legalized the use of cannabis for medical reasons. At the same time, the ever-growing body of scientific literature both in this country and across the globe clearly and indisputably demonstrates that medical cannabis is both effective and safe for many patients where alternative treatment options are either futile, intolerable, or

simply non-existent. Notwithstanding this indisputable reality, the Federal Government continues its decades-long crusade against medical cannabis and refuses to change the classification of cannabis from a Schedule I drug under the Controlled Substances Act ("CSA"), 21 U.S.C. § 801 *et seq.*

Amici urge the Court to grant the petition for a writ of certiorari because the Federal Government's unyielding and tainted approach to medical cannabis, combined with the Second Circuit's refusal to adjudicate the Petitioners' constitutional claims on the merits for allegedly failing to exhaust administrative remedies that have proven to be futile, leaves patients with an untenable choice: face federal prosecution for using medical cannabis in accordance with State, territorial, and local laws and the advice of their physicians, or risk serious health consequences, up to and including death.

The status quo is simply unacceptable and cannot be allowed to continue any longer.

REASONS FOR GRANTING THE PETITION

A. THE FEDERAL GOVERNMENT'S ARBITRARY AND IRRATIONAL CLASSIFICATION OF CANNABIS AS A SCHEDULE I DRUG HAS PREVENTED CURRENT AND FORMER PROFESSIONAL ATHLETES FROM ACCESSING MEDICAL CANNABIS TO TREAT SEVERE, DEBILITATING, AND LIFE-THREATENING CONDITIONS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

In October 1970, as part of its "war on drugs," Congress passed, and the President signed, the CSA into law; which went into effect on May 1, 1971. The CSA established five schedules of controlled substances, ranging from I to V. 21 U.S.C. § 812. Schedule I is the most stringent providing that drugs in this category only may be used in limited research settings. Licensed medical professionals are prohibited from prescribing a Schedule I drug to patients in any and all circumstances.

Before a drug may be placed in Schedule I, the Federal Government must -- on the basis of science and evidence -- determine that the drug (1) "has a high potential for abuse[,]" (2) "has no currently accepted medical use in treatment in the United States[,]" and (3) "[t]here is a lack of accepted safety for use of the drug . . . under medical supervision." 21 U.S.C. § 812(b)(1). The CSA expressly provides that "unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of . . . [m]arihuana . . . [or] [t]etrahydrocannabinols, except

for tetrahydrocannabinols in hemp" must be placed in Schedule I. 21 U.S.C. § 812(c)(10) and (17).[6]

Although there have been numerous petitions submitted over the years to change the scheduling of cannabis, none have succeeded. The Drug Enforcement Administration ("DEA") has either declined to docket the petitions for rescheduling or denied the petitions on the merits after years, and sometimes more than a decade, of delay.[7] Further complicating matters is that the D.C. Circuit, to which all appeals from the DEA flow, has held the United States would not be compliant with its international treaty obligations under the 1961 Single Convention on Narcotic Drugs ("Single Convention") if cannabis "were placed in . . . Schedule III, IV or V." *N.O.R.M.L. v. Drug Enforcement Administration*, 559 F.2d 735, 751 (D.C. Cir. 1977).[8] To that end, the D.C. Circuit has observed that keeping cannabis in Schedule I or moving it to Schedule II (at best) was "necessary as well as sufficient to satisfy our international obligations." *Id.*

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[6] By contrast, some of the most common performing-enhancing substances, such as anabolic steroids, are placed in Schedule III. 21 U.S.C. § 812(e).

[7] *See, e.g.*, Drug Enforcement Administration, *Denial of Petition to Initiate Proceedings to Reschedule Marijuana*, 81 Fed. Reg. 53687, 53687-89 (Aug. 12, 2016).

[8] *See also* 21 U.S.C. § 811(d) (establishing procedures for Attorney General, upon recommendation of and/or consultation with Secretary of Health and Human Services, to schedule drugs in order to comply with international obligations under the Single Convention or the Convention on Psychotropic Substances).

The continued failure of the DEA to take appropriate action to reschedule cannabis, and of Congress to mandate that the DEA do so by statute, has for decades deprived countless Americans of access to life-changing, and often life-saving, medical cannabis in violation of their constitutional rights.

The Fifth Amendment of the United States Constitution provides, in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law[.]" The due process clause, along with other important provisions of the Bill of Rights, are based on the English common law dating back to June 15, 1215, when the then-monarch, King John, was forced to sign the Magna Carta by rebellious barons.[9] The following century, the phrase "due process of law" first appeared in an Act of the English Parliament in 1354.[10]

This Court has long recognized the Due Process Clause of the Fifth Amendment imbues individuals with broad protections. For instance, this Court has consistently held that abortion laws are

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[9] The modern English translation of Clause 39 reads as follows: "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land." *The Text of Magna Carta*, Internet History Sourcebooks Project, Fordham University (1995), available at https://sourcebooks.fordham.edu/source/magnacarta.asp (last accessed on August 31, 2020).

[10] Liberty of Subject, 28 Edw. 3 (1354), available at https://www.legislation.gov.uk/aep/Edw3/28/3 (last accessed on August 31, 2020).

unconstitutional if they do not provide an exception for when the pregnant woman's life is at stake.[11] Similarly, the Court has determined that "[i]f the [due process clause's] right of privacy means anything, it is the right of the individual . . . to be free of unwarranted governmental intrusion in matters so fundamentally affecting a person[.]" *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977); *see also Griswold v. Connecticut*, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring) ("The Court stated many years ago that the Due Process Clause protects those liberties that are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'") (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

To that end, the Southern District of Texas, in *Andrews v. Ballard*, while considering a challenge to a Texas law only allowing licensed physicians to perform acupuncture, aptly observed:

> "*[D]ecisions relating to medical treatment . . . are, to an extraordinary degree, intrinsically personal.* It is the individual making the decision, and no one else, who lives with the pain and disease. *It is the individual making the decision, and no one else, who must undergo or forego the treatment. And it is the individual making the decision, and no one else, who, if he or she survives,*

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[11] *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992); *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Whole Woman's Health v. Hellerstedt*, ___, U.S. ___, 136 S. Ct. 2292 (2016); *June Med. Servs. L.L.C. v. Russo*, ___ U.S. ___, 140 S. Ct. 2103 (2020).

> *must live with the results of that decision.* One's health is a uniquely personal possession. The decision of how to treat that possession is of a no less personal nature."

498 F. Supp. 1038, 1047 (S.D. Tex. 1980) (emphases added).

This Court also has applied the protections afforded by the Due Process Clause to those individuals refusing medical treatment. In *Cruzan v. Dir., Mo. Dep't of Health*, the Court noted that "[i]t cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment." 497 U.S. 261, 281 (1990); *see also id.* at 287 (O'Connor, J., concurring) ("[T]he liberty interest in refusing medical treatment flows from decisions involving the State's invasions into the body. . . . Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause.").

It is against this historical backdrop that this Court must evaluate the present federal ban on the use of cannabis in any and all circumstances. Amici contend that the decision to use cannabis for medical reasons is no less important than the decision to use other prescription drugs, such as opioids and contraceptives. It is no less personal than the deeply intimate decision to refuse medical treatment for ethical or other reasons. And, for those individuals who require medical cannabis to have any quality of life or to even survive, the Federal Government's

placement of cannabis in Schedule I relegates them to a lifetime of misery and risk of death.

The stories of former and current professional athletes -- at the national and international levels -- who have benefited from medical cannabis are numerous. Amici present the stories of a select few to demonstrate the important and often lifesaving or life-sustaining effect that medical cannabis has had upon them. These athletes all lament the fact that medical cannabis was not available to them during most, if not all, of their professional sporting careers (when many of them needed it the most) because of the Federal Government's complete prohibition of cannabis, which in turn led to their respective sporting associations to adopt and enforce draconian drug policies.

Kaitlyn Verfuerth is a three-time Paralympian affiliated with AFC who represented the United States at the Athens 2004, Beijing 2008, and Rio 2016 Olympic Summer Games in wheelchair tennis. Ms. Verfuerth won gold medals in both the singles and double competitions at the Rio 2007 Parapan American Games. She will represent our country again as part of Team USA in the Tokyo 2020 Paralympics, which have been rescheduled to next summer because of the ongoing COVID-19 pandemic, in the 200 meter kayak and 500 meter canoe events.

Ms. Verfuerth was in a motor vehicle accident at the age of seven which forever changed the course of her life. She suffered a spinal cord injury between the T11 and L1 vertebrae and the resulting paralysis below the impact site has left her unable to walk and in need of a wheelchair to this day. Throughout her childhood and her Paralympian career, Ms. Verfuerth

required the use of prescription medications, including morphine, oxycodone, and hydrocodone among others. At one point, she was on seven prescription medications simultaneously. These drugs did nothing to relieve the phantom pain or actual lower back pain she experienced and, in fact, caused her to experience unpleasant digestive system issues and muscle spasms.

After the Rio 2016 Paralympics, Ms. Verfuerth spoke with her physician and was recommended medical cannabis. She notes that "the car accident all those years ago changed my life, and medical marijuana has changed my life again." Ms. Verfuerth's quality of life has markedly improved: her whole body has "calmed down," her headaches have disappeared, she experiences far fewer and much less intense muscle spasms, and the other serious side effects from the regular use of her prescription medications are a relic of the past. As a result, medical cannabis has allowed Ms. Verfuerth to reduce the number of daily prescription drugs she takes from seven to one.

The beneficial effect of medical cannabis on Ms. Verfuerth's life and health cannot be taken lightly or dismissed as anecdotal evidence. In fact, if she had to choose between competing in the Paralympics and using medical cannabis, she would forgo her professional sporting career. Thankfully, Ms. Verfuerth recently was able to obtain a therapeutic use exemption (TUE) and she will be able to continue using medical cannabis while she trains for, and eventually competes, at her fourth and final Paralympic games. However, the TUE does not protect her from federal prosecution and her inability

to travel with medical marijuana to compete on behalf of her country causes great harm to her physical and emotional well-being.

Some athletes were less fortunate and never able to obtain a TUE during their professional sporting careers. For instance, Darren McCarty, also affiliated with AFC, is a former NHL star who played for the Detroit Red Wings for the majority of his seventeen-year career and won the Stanley Cup four times in 1997, 1998, 2002, and 2008. Due to the league's prohibition on medical cannabis, which was largely based on the Federal Government's placement of cannabis in Schedule I, Mr. McCarty was forced to use various prescription drugs and alcohol to relieve pain and make his injuries more bearable.

In November 2015, Mr. McCarty was informed by his physician that he was on the verge of multiple organ failure and at high risk of death if he did not make significant changes to his lifestyle. After a difficult weeklong detoxification program within his own home, Mr. McCarty stopped drinking and has been sober for nearly five years. He credits medical cannabis with saving his life and helping him quit drinking. "Without cannabis, I would be dead," he explains. Today, Mr. McCarty no longer needs to take any prescription medications and he is as healthy (if not healthier) than he was in the prime of his NHL career.

While most professional athletes are not scientists and most scientists are not professional athletes, sometimes the unexpected happens. Enter Dr. Joanna Zeiger, the founder of CRF. She is a former professional triathlete who competed between 1988 and 2010, placing fourth in the Sydney 2000

Summer Olympics, and becoming the 2008 Ironman 70.3 World Champion. In addition to her professional sporting career, Dr. Zeiger graduated with a Bachelor of Arts in Psychology from Brown University, and earned a Master's of Science in Genetic Counseling from Northwestern University, and a Ph.D. in Genetic Epidemiology from Johns Hopkins University's School of Hygiene and Public Health.

In 2009, during the Ironman World Championship, Dr. Zeiger was involved in a bicycle accident. While riding through a designated water station during the triathlon, there were volunteers standing along the course handing water to passing cyclists. One of the volunteers failed to let get go of the bottle that Dr. Zeiger was grabbing. Dr. Zeiger flew off her bicycle and sustained severe injuries. She broke her collarbone, suffered several broken ribs and substantial nerve damage that caused a condition called intercostal neuralgia.[12] For years, Dr. Zeiger suffered muscle and diaphragm spasms, appetite loss, severe chronic pain, and trouble with sleeping and breathing. In total, she had nine surgeries to her chest wall.

Around 2014, when cannabis was legalized recreationally in Colorado, Dr. Zeiger tried medical cannabis upon the recommendation of her husband. Since then, her quality of life has improved significantly. She is able to sleep better, her nausea has subsided, her appetite has returned, and she has suffered no major side effects. As a scientist, Dr. Zeiger was initially skeptical of medical cannabis, but

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[12] The intercostal nerves are those that rise from the spinal cord below the ribs.

now strongly supports it in light of the growing body of evidence and her own personal experience. She notes that "[c]annabis doesn't take away your pain completely, but it lessens your suffering greatly." Thanks to medical cannabis, Dr. Zeiger is able to exercise once again and be productive during the day.

And the list of professional athletes benefiting from medical cannabis goes on. Kyle Turley, a former NFL player associated with ATI who suffers from stage 2 progressive dementia, went from twelve prescriptions daily to none with the help of medical cannabis. His vertigo and light sensitivity have disappeared altogether. He believes that his sporting career would have lasted longer and he would have had fewer health issues in retirement if medical cannabis had been available to him and other players during his career.

The Sisters observe that, in addition to CTE, ALS, and dementia, many former NFL players suffer from insomnia, severe and recurring pain, memory loss, paranoia, hallucinations, seizures, chronic headaches, and depression. They contend that players were often required to take addiction-forming opioids so that they could return to the playing field instead of safer alternatives with fewer side effects, such as medical cannabis. In some instances, players who suffered seizures were not allowed to use medical cannabis even though their personal physicians recommended its use to alleviate their conditions.

These testimonials serve as proof that medical cannabis has undoubtedly helped, and in some cases saved, the lives of the professional athletes who have made the decision to use it with the advice of their physicians. And, medical cannabis continues to

improve their quality of life and help them survive. Alone, this anecdotal evidence is highly persuasive. When combined with the ever-expanding body of scientific research and the fact that more than three million Americans (more than the populations of Guam, Wyoming, Vermont, Alaska, and North Dakota combined) use cannabis for health reasons, Amici contend that cannabis's continued designation as a Schedule I drug by the Federal Government is entirely arbitrary and irrational.

The wise words of the Supreme Court of Montana are particularly relevant here:

> Certainly, this right of choice in making personal health care decisions and in exercising personal autonomy is not without limits. In narrowly defined instances the state, by clear and convincing evidence, may demonstrate a compelling interest in and obligation to legislate or regulate to preserve the safety, health[,] and welfare of a particular class of patients or the general public from a medically-acknowledged, *bonafide* [sic] health risk. Subject to this narrow qualification, however, the legislature has neither a legitimate presence nor voice in the patient/health care provider relationship superior to the patient's right of personal autonomy which protects that relationship from infringement by the state.
>
> *Worse, when, as in the case at bar, the legislature thrusts itself into this protected zone of individual privacy*

> *under the guise of protecting the patient's health, but, in reality, does so because of prevailing political ideology and the unrelenting pressure from individuals and organizations promoting their own beliefs and values, then the state's infringement of personal autonomy is not only constitutionally impermissible, it is, as well, intellectually and morally indefensible.*

Armstrong v. State, 989 P.2d 364, 380 (Mont. 1999) (second emphasis added). These observations apply with equal force today.

This Court has generally been a zealous defender of individual rights over our Nation's history. It should continue to follow that fine tradition and grant the petition for a writ of certiorari.

B. THE FEDERAL GOVERNMENT'S APPROVAL AND DESCHEDULING OF EPIDIOLEX DEMONSTRATES THAT CANNABIS HAS AN ACCEPTED MEDICAL USE

To make matters worse, the Federal Government is talking out of both sides of its mouth.

In June 2018, the Food and Drug Administration ("FDA") approved Epidiolex for the treatment of two rare epilepsy conditions -- Lennox-Gastaut syndrome and Dravet syndrome -- in children 2 years of age and older.[13] Epidiolex is a cannabidiol

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[13] Food and Drug Administration, *FDA Approves First Drug Comprised of an Active Ingredient Derived from Marijuana*

solution derived from the *Cannabis sativa L.* plant and currently placed in Schedule V, the least restrictive controlled category under the CSA. In April 2020, Epidiolex was descheduled altogether and no longer subject to the CSA's requirements. And, on July 31, 2020, the FDA expanded its approval for Epidiolex to treatment of tuberous sclerosis complex in patients one year of age and older.[14]

This hypocrisy stands in stark contrast to the Federal Government's continued placement of cannabis generally in Schedule I. It defies logic and common sense that cannabis must remain in Schedule I, which requires a finding that it has "no currently accepted medical use in treatment in the United States[,]"[15] but Epidiolex, which is made from the same plant and contains the same active ingredient, has been approved for use in *children* and has been descheduled altogether.

Amici contend that the FDA's approval of Epidiolex fatally undermines the Federal Government's arguments for maintaining cannabis in

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to Treat Rare, Severe Forms of Epilepsy (June 25, 2018), available at https://www.fda.gov/news-events/press-announcements/fda-approves-first-drug-comprised-active-ingredient-derived-marijuana-treat-rare-severe-forms (last accessed on August 31, 2020).

[14] Food and Drug Administration, *FDA Approves New Indication for Drug Containing an Active Ingredient Derived from Cannabis to Treat Seizures in Rare Genetic Disease* (July 31, 2020), available at https://www.fda.gov/news-events/press-announcements/fda-approves-new-indication-drug-containing-active-ingredient-derived-cannabis-treat-seizures-rare (last accessed on August 31, 2020).

[15] 21 U.S.C. § 812(b)(1).

Schedule I. As the Federal Government now admits that cannabis has a "currently accepted medical use in treatment in the United States[,]" it must be removed from Schedule I. But instead of recognizing its hypocrisy, the Federal Government insists on denying millions of Americans who rely on medical cannabis the right to secure their bodies against harm by insisting that proponents of change file yet another formal descheduling petition with the DEA and wait for a decision that -- if past performance is any indicator of future action -- will take approximately a decade. In the meantime, millions will continue to suffer because they live in States or territories that do not permit medical cannabis and are forced to make significant sacrifices in their daily lives -- from not traveling on airplanes, visiting national parks, or petitioning their elected officials in Congress -- to continue using medical cannabis in violation of federal law (notwithstanding the fact that it is legal in the State or territory where they reside). And, the same fate awaits current professional athletes who would benefit from the use of medical cannabis but are denied freedom of choice because the professional sporting leagues have based their drug policies on the Federal Government's irrational, arbitrary, and unconstitutional ban of cannabis in any and all circumstances.

This is not an acceptable state of affairs and the time has come for this Court to intervene.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

September 14, 2020

Respectfully submitted,

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