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 NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS ET AL. AS AMICI CURIAE IN SUPPORT OF PETITIONERS

ANDREW P. SCHRIEVER, ESQ.
CUDDY & FEDER LLP
445 HAMILTON AVENUE
14TH FLOOR
WHITE PLAINS, NY 10601
(914) 761-1300
ASCHRIEVER@CUDDYFEDER.COM

DAVID C. HOLLAND, ESQ.
COUNSEL OF RECORD
201 EAST 28TH STREET
SUITE 2R
NEW YORK, NY 10016
(212) 842-2480
DCH@HOLLANDLITIGATION.COM

SEPTEMBER 14, 2020 *COUNSEL FOR AMICI CURIAE*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES – Continued

Page

STATUTES

JUDICIAL RULES

REGULATIONS

LEGISLATIVE MATERIALS

TABLE OF AUTHORITIES – Continued

Page

GOVERNMENT PUBLICATIONS

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF AMICI CURIAE [1]

National Organization for the Reform of Marijuana Laws (NORML) and Empire State NORML

The mission of NORML, a not for profit corporation, and its New York State affiliate, is to advocate for public policy changes so responsible possession and use of marijuana by adults is no longer subject to criminal penalties. NORML further advocates for a regulated commercial cannabis market so that activities involving the for-profit production and retail sale of cannabis products are safe, transparent, consumer friendly, and subject to state and/or local licensure. NORML advocates for additional legal and regulatory policy changes so those who use marijuana responsibly no longer face social stigma or workplace discrimination, and so those with past criminal records for marijuana-related violations can have their records automatically expunged.

New York City Cannabis Industry Association (NYCCIA) and Hudson Valley Cannabis Industry Association (HVCIA)

The NYCCIA and HVCIA are affiliated regional not for profit organizations which foster dialogue, develop policy, and rules for the self-governance of the anticipated cannabis market in New York City and the Hudson Valley.

---

[1] Pursuant to Supreme Court Rule 37, all parties consent to the filing of this amici curiae brief. No part of this brief was authored by counsel for any party, and no person or entity other than amici curiae and its counsel made a monetary contribution towards the submission of this brief.

New York Cannabis Bar ("Cannabar")

Cannabar was an unincorporated think tank focused on challenging the classification of cannabis under the federal Controlled Substances Act. It was the genesis of the challenge in *Washington v. Barr*.

SUMMARY OF ARGUMENT

A supremacy and nullification crisis has loomed for the past 24 years with regard to the 34 States that implemented some form of cannabis legalization program despite its prohibited Schedule I designation under the federal Controlled Substances Act (hereinafter, "CSA"). This crisis has been fomented by all branches of government. Each have made statements and taken actions to protect and further the state cannabis programs despite federal illegality. States have passed cannabis regulations that defy federal supremacy. Since 2014, Congress began passing spending appropriations amendments handcuffing the Executive branch and federal law enforcement from using federal funds to investigate and prosecute state compliant cannabis patients and providers. As a positive result of this nullification crisis, hundreds of thousands of jobs have been created in state cannabis industries, with billions in revenue generated.[2]

The Second Circuit Court of Appeals did not believe in 2013 that United States Department of

---

[2] https://www.forbes.com/sites/niallmccarthy/2019/03/26/which-states-made-the-most-tax-revenue-from-marijuana-in-2018-infographic/#7547293b7085

Justice prosecutorial guidance memoranda created a *de facto* rescheduling of cannabis or a constitutional crisis. However, in 2019, Attorney General Barr, during his confirmation hearings, directly identified his concerns about it. For him, the guidance memoranda, the spending appropriations amendments which were signed into law by the Executive, and the federal judicial rulings upholding them created a "backdoor nullification" of federal law. Barr testified that while personally opposed to legalizing cannabis, he believed it unfair and vowed not to retroactively prosecute patients and industry participants who in good faith relied upon federal officials' statements and actions that they would not interfere with state legal cannabis programs despite the conflict with federal law.

This nullification crisis rejected by the Second Circuit yet, articulated by Attorney General Barr, must be resolved. Rather than letting future political whims undo the efforts of the three coordinate branches of federal government to protect and promote state cannabis programs, this Court should, as a matter of fairness and Due Process, invoke estoppel against the federal government to prevent injustice through retroactive prosecution of those who detrimentally relied on such statements and violated federal law. Invocation of estoppel would end this constitutional crisis and cede the power to regulate cannabis to the states as the federal government has effectively attempted to do through nullification for more than two decades.

ARGUMENT

I. Is It Futile to Uphold the Supremacy of the Schedule I Status of Cannabis Under the CSA When Each Branch of Federal Government Has Affirmatively Attempted to Preserve and Protect State Medical Cannabis Programs Which Nullify the Supremacy of That Designation?

A. Supremacy of the Federal Controlled Substances Act

The Supremacy Clause of the United States Constitution promotes national uniformity by precluding state law from interfering with the enforcement of federal law. U.S. Const., art. VI, cl. 2. It gives Congress the power to preempt state law if it is found to be in conflict with federal law. *Hillman v. Maretta*, 569 U.S. 483 (2013). "Where enforcement of . . . state law would handicap efforts to carry out the plans of the United States, the state enactment must . . . give way." *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 103-104 (1940). To avoid a constitutional crisis, where "compliance with both federal and state regulations is a physical impossibility," the "state law is nullified to the extent that it actually conflicts with federal law." *Hillsborough Cnty., Fla. v. Automated Med. Labs.*, 471 U.S. 707, 713 (1985); *See, Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).

The CSA is a series a federal statutes that organizes controlled substances into five schedules based on (1) their potential for abuse, (2) their accepted medical

uses, and (3) their accepted safety for use under medical supervision and potential for psychological or physical dependence. *See* 21 U.S.C. § 812. Cannabis was placed in Schedule I, " . . . the most restrictive of the five schedules, the violation of which may result in criminal penalties." *U.S. v. Canori*, 787 F.3d 181, 183 (2nd Cir. 2013).

The classification of any drug under the CSA is not permanent. Congress may amend it at any time, and the Attorney General is empowered to reschedule it (21 U.S.C. § 811(a)(1)) or de-schedule it entirely upon finding that it lacks the requirements for inclusion. 21 U.S.C. § 811(a)(2). Congress did not intend to completely occupy the field of controlled substance regulation to the exclusion of any state law. State laws may operate provided that the Attorney General does not find a "positive conflict" between it and the CSA such "that the two cannot consistently stand together" requiring complete preemption of the state law. 21 U.S.C. § 903.

B. The Rise of the Nullification Crisis

1. Acts of the Executive Branch

While the Executive Branch, headed by the President, is charged with the duty to "faithfully execute the laws of the United States" U.S. Constitution, Article II, § 3, it has not done so with regard to state cannabis programs. "Dispensing power" occurs when the Executive, rather than "faithfully executing" the law, instead attempts to bypass or suspend legal prohibitions imposed by it." *See*, Robert J. Reinstein, *The Limits of Executive Power*, 59 Am. U. L. Rev. 259, 278-279 (2009). Such dispensing of power has been the

catalyst to the nullification crisis caused by state cannabis programs.

The crisis started in 1996 when the Executive branch failed to preempt California's Proposition 215, the "Compassionate Use Act", which established the country's first medical cannabis program. California Health and Safety Code § 11350, *et. seq*. State sanction of cannabis as a form of medical intervention subverts the Schedule I finding that is has, "no currently accepted medical use in the United States." 21 U.S.C. § 812. Thirty-three states have established medical cannabis programs since 1996[3]. However, Congress and the Executive branch have chosen to stand pat to allow the continued nullification of the Schedule I designation of cannabis rather than preempt those programs.

Since 1996, no Attorney General, the nation's Chief law enforcement officer, has invoked 21 U.S.C. § 903 finding a "positive conflict" between the CSA and state cannabis programs. In 2009, the Justice Department's "Ogden Memorandum" gave guidance to federal prosecutors in districts within medical cannabis states advising them to conserve resources and refrain from pursuing medical patients who were compliant with state cannabis laws.[4] That guidance was enhanced by in 2013 by the "Cole Memorandum" which advised federal prosecutors not to investigate or prosecute

---

[3] https://worldpopulationreview.com/state-rankings/states--with-medical-marijuana

[4] *Memorandum for Selected United States Attorneys–Investigations and Prosecution in States Authorizing the Medical Use of Marijuana*, https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf

compliant medical cannabis operators.[5] While the guidance memoranda did not dispense power to the states, they did exemplify the commitment of the Executive branch to allow state cannabis programs to persist without interference. Due to the proliferation, the industry's commercial needs required guidance for federally regulated banks to facilitate cannabis related transactions. In 2014, the "FinCEN Memorandum" advised banks that, subject to guidance criteria and transparency, they could do so without fear of violating money laundering or other federal criminal statutes.[6]

On January 4, 2018, Attorney General Sessions repealed the Cole Memo stating:

> " . . . today's memo on federal marijuana enforcement simply directs all U.S. Attorneys to use previously established prosecutorial principles that provide them all the necessary tools to disrupt criminal organizations, tackle the growing drug crisis, and thwart violent crime across our country."[7]

Despite Session's recission, in 2019, the Justice Department's Anti-Trust Division approved the merger of multi-state operators making them some of the

---

[5] *Memorandum for All United States Attorneys–Guidance Regarding Marijuana Enforcement*, https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf

[6] *Guidance Subject: BSA Expectations Regarding Marijuana-Related Businesses*, FIN-2014-G001 https://www.FinCEN.gov/resources/statutes-regulations/guidance/bsa-expectations-regarding-marijuana-related-businesses

[7] https://www.justice.gov/opa/pr/justice-department-issues--memo-marijuana-enforcement

largest cannabis related businesses in the United States despite nullifying the supremacy of the CSA.[8]

Sessions sent shock waves through the state cannabis industries. Participants feared that their detrimental reliance upon the actions and pronouncements of federal officials prompting their entrance into state programs despite federal illegality may have imperiled their liberty investments. Those concerns registered with Congressional members whose constituents were impacted. It became a focal point of then Attorney General Nominee, William Barr's confirmation hearings.

Senator Cory Booker inquired about the nominee's thoughts on his predecessor's rescission. Mr. Barr responded: " . . . it was important not to upset the interests and expectations of the businesses and

---

[8] *DOJ Allows MedMen to Buy PharmaCann-Great News for Origin House,* Sep. 11, 2019 https://seekingalpha.com/article/4291015-doj-allows-medmen-to-buy-pharmacann-great-news-for-origin-house

> "CHICAGO-October 30, 2019-(BUSINESS WIRE)–Cresco Labs . . . one of the largest vertically integrated multistate cannabis operators in the United States, today announced the expiration of the waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 . . . in respect to Cresco Labs' pending acquisition of Tryke Companies ("Tryke") (the "Transaction"). The waiting period, during which the Transaction could not be completed, expired without the issuance of a so-called "second request" by the United States Department of Justice Antitrust Division (the "DOJ")."

https://www.newcannabisventures.com/cresco-labs-cannabis-acquisition-clears-department-of-justice-initial-waiting-period-without-second-request/

investors who have entered the legal marijuana industry." He furthered: "I said I'm not going to go after companies that have relied on the Cole memorandum."[9] Mr. Barr was articulating Due Process and fairness concerns in not wanting to retroactively prosecute those who in good faith entered into state medical cannabis industries based upon prior federal statements, actions, and abstinence from enforcing the supremacy of the CSA.

Mr. Barr testified about the undeniable constitutional conflict stating: "However, I think the current situation is untenable and really has to be addressed. It's almost like a backdoor nullification of federal law."[10] Questioned further about the "backdoor nullification" Senator Booker asked: "Do you think it's appropriate to use federal resources to target marijuana businesses that are compliant with state law?" to which Mr. Barr responded "No".[11] He further explained that " . . . to the extent that people are complying with the state law's distribution and production and so forth, we're not going to go after that. But I do feel we can't stay in the current situation." He testified that the nullification was " . . . breeding disrespect for the federal law."[12]

---

9 https://news.yahoo.com/barr-signals-support-ending-marijuana-legalization-212041886.html; *See also*, Kyle Jagger, *Marijuana Moment*, January 15, 2019, https://www.marijuanamoment.net/trump-attorney-general-nominee-pledges-not-to-go-after-legal-marijuana-businesses/

10 *Id.*

11 *Id.*

12 *Id.*

This crisis identified by Attorney General Barr was not recognized six years earlier in *U.S. v. Canori*, 787 F.3d 181 (2nd Cir. 2013). There, the Second Circuit Court of Appeals held that the Ogden and Cole prosecutorial guidance memoranda did not have the force of law and did not cause a "*de facto* rescheduling" of marijuana–thus, no constitutional crisis had been created. *Id.* at 183. But, since 2013, each of the three branches of federal government, despite the separation of powers doctrine, have made statements and taken affirmative actions to assist the other in directly and collaterally protecting and promoting those state regulated cannabis programs.

2. Acts of Congress

Because of supremacy, Congress through the "commerce clause" can preempt all state cannabis programs and criminalize the conduct of patients and market participants. *See*, *Gonzales v. Raich*, 545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). In 2014, however, Congress took a different tack passing the "Rohrbacher-Farr Amendment" to the Commerce, Justice, Science, and Related Agencies Appropriations Act, 2015 (H.R. 4660). The Amendment prohibited the federal law enforcement from using federal funds to investigate and prosecute state compliant medical cannabis operators and patients. That Amendment was signed into law by President Obama on December 16, 2014. It was extended as the "Rohrbacher-Blumenauer Amendment" by means of Consolidated Appropriations Act of 2016 (a/k/a the 2016 Omnibus Spending Bill, Pub. L. 114-113), signed into law on December 18, 2015. Further extensions have been in the Consolidated Appropriations Act 2018 (a/k/a the 2018 Omnibus Spending Bill, Pub. L. 115-141) signed by President

Trump on March 23, 2018, and extended again by him to November 21, 2019 (H.R. 4378). On December 20, 2019, President Trump signed the "Consolidated Appropriations Act, 2020" (H.R. 1158), which is in effect today.

According to Marijuana Moment, as of September 9, 2020, there are more than 1,544 bills pending before state and federal legislatures to promote, protect, and/or establish legalized cannabis programs.[13] Pending before various committees of Congress are:

a. The Marijuana Opportunity Reinvestment and Expungement Act (MORE Act of 2019–H.R. 3884)–Due for full House vote in September, 2020[14]

b. The Strengthening the Tenth Amendment Through Entrusting States Act (STATES Act, H.R. 2093 of 2019);

c. The Secure and Fair Enforcement Act (SAFE Act of 2019–H.R. 1468)

Given the discourse taking place in Congress to protect and promote state cannabis programs through spending appropriations restrictions and bills to strengthen state's rights over them, it is quixotic why Congress chooses to proceed only half-way in efforts to legalize cannabis rather than simply deschedule it. That is why invocation of the doctrine of estoppel is needed to end the nullification crisis and to protect those who relied on the guidance of federal

---

13 https://www.marijuanamoment.net/bills/

14 https://www.leafly.com/news/politics/marijuana-legalization-more-act-news

officials and agencies and engaged in the cannabis space despite federal illegality.

3. Acts of the Judiciary

With cannabis programs flourishing in the majority of the United States, Courts must grapple with the constitutional crisis across a kaleidoscopic range of contexts.

In the context of criminal law, the Rohrbacher-Farr Amendment's handcuffing of federal law enforcement by prohibiting federal prosecution of state compliant individuals and businesses was upheld in *U.S. v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016). There, the Ninth Circuit Court of Appeals stated:

> "[Department of Justice] is currently prohibited from spending funds from specific appropriations acts for prosecutions of those who complied with state law. But Congress could appropriate funds for such prosecutions tomorrow. Conversely, this temporary lack of funds could become a more permanent lack of funds if Congress continues to include the same rider in future appropriations bills." *U.S. v. McIntosh*, 833 F.3d at 1179.

The *McIntosh* Court's pointing out the potential for shifting political sands regarding federal cannabis tolerance is akin to what Attorney General Barr was alluding to in his confirmation testimony.

The Ninth Circuit reiterated the legitimacy of Congress limiting the ability of the Executive branch to faithfully execute the laws stating that:

" . . . Congress passed the Consolidated and

> Further Continuing Appropriations Act of 2015 ("Appropriations Act of 2015"), which put the kibosh on all expenditures of federal prosecutions for marijuana use, possession, or cultivation if the defendant complied with the state's medical marijuana laws."); *U.S. v. Pisarski*, 965 F.3d 738, 740 (9th Cir. 2020).

Likewise, the Tenth Circuit Court of Appeals has stated that:

> "Despite its legalization in" numerous states and Washington, D.C. "for medical use" and in a number of states "for recreational use, marijuana is still classified as a federal 'controlled substance' under schedule I of the Controlled Substances Act." The United States Department of Justice, however, "has declined to enforce [21 U.S.C.] § 841 when a person or company buys or sells marijuana in accordance with state law."

Sandusky v. Goetz, 944 F.3d 1240, 1242 (10th Cir. 2019), *quoting, Green Sol. Retail, Inc. v. U.S.*, 855 F.3d 1111, 1113-14 (10th Cir. 2017)

In commercial litigation, courts have alluded to the nullification crisis, but declined to address it head. In *Mann v. Gullickson*, the District Court upheld contractual payment obligations of a cannabis business purchaser since the transaction could be accomplished without violating the CSA. 2016 WL 6473215 at *7 (N.D. Cal. Nov. 2, 2016). Likewise, in *Energy Labs, Inc. v. Edwards Engineering, Inc.*, the District Court required defendants to follow through with the purchase of air conditioning units to be specifically

used for a cannabis cultivation because fulfilling that obligation was not a violation of the CSA. 2015 WL 3504974 at *4 (N.D. Ill. 2015). Similarly, in *Ginsburg v. ICC Holdings, LLC*, the District Court upheld Defendant's obligations to pay sums certain due on promissory notes related to the acquisition of a cannabis business because the payments under the notes were not derived from the profits of the cannabis business. 2017 WL 5467688 (N.D. Tex. Nov. 13, 2017).

Regarding insurance, the District Court in *Green Earth Wellness Ctr., LLC v. Atain Specialty Ins. Co.*, dismissed an insurer's argument that it had no obligation to pay damage claims related to the insured's cannabis business because the contract was void as a matter of public policy. Rather than focus on assurances given to cannabis related contracts, the Court focused on obligations that were negotiated in the policy stating: "[a]ny judgment issued by this Court will be recompense to Green Earth based on [the carrier's] failure to honor its contractual promises, not an instruction to [the carrier] to 'pay for damages to marijuana plants and products.'" 163 F. Supp. 3d 821, 834 (D. Colo. 2016). The Court stated: "[the carrier] having entered into the Policy of its own will, knowingly and intelligently, is obligated to comply with its terms or pay damages for having breached it." *Id.* at 835.

But, contracts have been voided on public policy grounds because of cannabis being a Schedule I drug under the CSA. The Tenth Circuit observed: "Colorado courts will not enforce a contract that violates public policy'" *McCracken v. Progressive Direct Ins. Co.*, 896 F.3d 1166, 1172 (10th Cir. 2018). The District Court also voided on grounds that: "Contracts for the

sale of marijuana are void as they are against public policy. . . . " *Haeberle v. Lowden*, 2012 WL 7149098 (Colo. Dist. Ct. 2012).

The legal anomalies brought about by the nullification crisis have vexed Bankruptcy courts. One held that a party cannot seek bankruptcy relief "while in continuing violation of federal law" or "where the trustee or court will necessarily be required to possess and administer assets which are illegal under the CSA or constitute proceeds of activity criminalized by the CSA." *In re Way to Grow, Inc.*, 597 B.R. 111, 120 (Bankr. D. Colo. 2018); *See also, In Re Pharmacann LLC,* 123 U.S.P.Q.2d 1122 (T.T.A.B. 2017). As expressed by another Court:

> If the uncertainty of outcomes in marijuana-related bankruptcy cases were an opera, Congress, not the judiciary, would be the fat lady. Whether, and under what circumstances, a federal bankruptcy case may proceed despite connections to the locally "legal" marijuana industry remains on the cutting-edge of federal bankruptcy law. Despite the extensive development of case law, significant gray areas remain. Unfortunately, the courts find themselves in a game of whack-a-mole; each time a case is published, another will arise with a novel issue dressed in a new shade of gray. This is precisely one such case.

In re Malul, 614 B.R. 699 (Bankr. D. Colo. 2020)

Respectfully, Congress is not the "Fat Lady"—Congress has sung with the Executive branch to protect and promote state cannabis programs, and the federal Courts have provided vocal legal support when

possible. With each of those three coordinate branches of government singing in unison to protect state cannabis programs, the legitimacy of the Schedule I status of cannabis under the CSA is no longer a political question. Were it not so, the prevailing political whims of what is federally tolerated today, may become the retroactive and potentially *ex post facto* criminal prosecutions of tomorrow–a political scenario Attorney General Barr will not accede to.

Rather, the final aria must be sung by this Court with the invocation of the doctrine of estoppel. By preventing the federal government from changing its mind and reversing course to retroactively prosecute those who acted in good faith reliance upon official acts and statements will eliminate the backdoor nullification and unfairness concerns testified about by Attorney General Barr.

Congress' repeated spending appropriations restrictions and the impending House vote on the M.O.R.E. Act constitute a self-created Zeno's paradox going only halfway in de-scheduling cannabis which only further exacerbates the ongoing constitutional crisis. Likewise, the Executive Branch's failure to declare a "positive conflict" under 21 U.S.C. § 903 further illustrates Zeno's paradox causing states and their citizens to legitimately rely on their guidance designed to build their legal markets. Attorney General Nominee Barr recognized this, testifying he would not prosecute those who relied in good faith on the actions and statements. Likewise, the federal Judiciary, upholding those spending appropriations restrictions which handcuff the Executive branch, has wrestled to find ways to protect the expectations of the cannabis industry while avoiding running afoul of the supremacy

of the CSA and the Schedule I status of cannabis under it.

The totality of the policies and actions of the three branches comprise a unified chorus trying to protect and promote state regulated cannabis industries. The time has come for this Court to play the role of the "Fat Lady" and close down this nullification saga by invoking the doctrine of estoppel. Doing so will prevent future injustice caused by a return to strict enforcement of the Schedule I designation and denying Petitioners and others the right to medically benefit from its availability and protect the industry providing it to them.

II. IS THIS "BACKDOOR NULLIFICATION" CRISIS THE PROPER SCENARIO FOR THIS COURT TO INVOKE THE DOCTRINE OF ESTOPPEL AGAINST THE FEDERAL GOVERNMENT IN ORDER TO PREVENT DUE PROCESS HARMS AND UNFAIRNESS TO PATIENTS AND INDUSTRY PARTICIPANTS WHO DETRIMENTALLY RELIED ON OFFICIAL ACTS AND STATEMENTS INDUCING THEM TO ENGAGE IN ACTIVITIES OTHERWISE UNLAWFUL UNDER THE FEDERAL LAW?

A. Futility of Administrative Challenges and Need to Invoke Estoppel Against the Federal Government

Previously, this Court has stated: "It is clear from the text of the Act that Congress has made a determination that marijuana has no medical benefits worthy of an exception." *U.S. v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 491, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001). The Court concluded that federal law prohibits the manufacture, distribution

or sale of marijuana for any purpose. *Id.* at 489–90; *See also*, 21 U.S.C. § 841; § 846. In 2005, this Court observed that "[d]espite considerable efforts to reschedule marijuana" through the administrative process, "it remains a Schedule I drug." *Gonzales v. Raich*, 545 U.S. 1, 15 n. 23, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). It opined that "evidence proffered by [defendants] . . . regarding the effective medical uses for marijuana, if found credible after trial, would cast serious doubt on the accuracy of the findings that require marijuana to be listed in Schedule I." 545 U.S. at 27 n. 37, 125 S.Ct. 2195.

Credible evidence does exist about the medical validity of cannabis and it undeniably has been life-saving, particularly for Petitioners AB, and JC. However, despite the proliferation of medical cannabis programs in 34 states since the *Raich* decision was handed down 15 years ago, there has not been any meaningful Drug Enforcement Administration action to evaluate cannabis as a medicine to alter its continued relegation to Schedule I status. *See*, *Krumm v. Drug Enforcement Administration*, 739 Fed. Appx. 655 (D.C. Cir., Sept. 24, 2018), *rehearing en banc denied* January 17, 2019, *cert. denied*, 140 S.Ct. 144, 205 L.Ed.2d 45 (October 17, 2019); *Americans for Safe Access v. Drug Enforcement Administration*, 706 F.3d 438 (D.C. Cir., 2013), *cert. denied*, 571 U.S. 885, 134 S.Ct. 267, 187 L.Ed.2d 151 (2013); *See also*, Petition of *Suzanne Sisley, M.D. et. al., v. U.S. Drug Enforcement Administration*, *et. al.*, Dkt. No. 20-71433 (9th Cir., August 18, 2020). In fact, the DEA has stated that it believes it is constrained from any evaluation

that would move cannabis to anything less than Schedule II.[15]

The Second Circuit's instruction to resort to the petitioning process is at this point an exercise of futility. Requiring Petitioners to exhaust their administrative remedies prior to judicial review only perpetuates their suffering, but also, exacerbates the legal limbo that vexes Petitioners who have urgent medical needs and cannot travel or enter upon federal property until the crisis is resolved by this Court's invocation of estoppel against the federal government. Needless to say, the petitioning process only continues the festering of the nullification crisis.

B. The Precedent for Estoppel

As forecasted by the Court of Claims: " . . . we know of no case where an officer or agent of the government, . . . has estopped the government from enforcing a law passed by Congress. Unless a law has been repealed or declared unconstitutional by the courts, it is a part of the supreme law of the land and no officer or agent can by his actions or conduct waive its provisions or nullify its enforcement." *Montilla v. U.S.*, 457 F.2d 978, 986–87 (Ct. Cl. 1972). Here, the Executive branch through the Cole Memorandum, FinCEN Memorandum, and the spending appropriations restrict federal law enforcement, all serve to nullify the Schedule I status of cannabis under the CSA.

Estoppel emanates from Due Process's requirement of fair notice of what conduct is illegal and will

---

15 CFR Chapter II and Part 1301, Fed Register, Vol. 156, 53688-89, Aug. 12, 2016

incur sanctions. *See, Landgraf v. USI Film Productions*, 511 U.S. 244, 265-66 (1994). Entrapment by estoppel is where the defendant reasonably relies on the inducements of government agents with apparent authority to authorize otherwise criminal acts, even if they do not in fact possess such authority. *U.S. v. Giffen*, 473 F.3d 30 (2nd Cir. 2006). This defense stems from the notion that "[o]rdinarily, citizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach." *Raley v. Ohio*, 360 U.S. 423, 487, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959). The defense "is based upon fundamental notions of fairness embodied in the Due Process Clause of the Constitution." *U.S. v. Ormsby*, 252 F.3d 844, 851 (6th Cir. 2001), and focuses on government conduct instead of a defendant's state of mind. *U.S. v. Blood*, 435 F.3d 612, 626 (6th Cir. 2006).

In *Raley*, Due Process required reversal of convictions of those who were mis-advised of their rights during a state investigation. Defendants relied upon assurances of the state investigation commission that they had privilege under state law to refuse to answer, though in fact they did not. This Court reasoned that failing to overturn the convictions "would be to sanction an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him." *Id.*, at 426.

In *Cox v. Louisiana*, this Court overturned disorderly conduct convictions of demonstrators who, after being instructed in front of the Mayor and Chief of Police that while the law prohibited protests "near" a courthouse, defendants could demonstrate 101 feet

away from it. Defendants relied on that official instruction, assembled, and protested. They were thereafter arrested and convicted for violation of the ordinance. 379 U.S. 559, 568-69 (1965). This Court overturned their convictions finding Due Process was violated because Defendants detrimentally relied upon the statements and representations of officials in good faith and their subsequent arrest constituted "an indefensible sort of entrapment by the State." *Id.* at 560. "As a matter of law, Cox establishes that, under some circumstances, demonstrators or others who have been advised by the police that their behavior is lawful may not be punished for that behavior." *Garcia v. Does*, 779 F.3d 84, 96 (2d Cir. 2015) (*en banc*).

The detrimental reliance upon the statements and acts of government officials is at the heart of the indefensible entrapment concerns testified to by Attorney General Barr. So great were his concerns that he vowed not to retroactively or prospectively prosecute state compliant cannabis industry participants. His vow is nonetheless anathema to the CSA being a clear abdication of his duties noted by the Court of Claims in the *Montilla* case above. Invocation of estoppel can solve that problem.

This Court invoked the doctrine against the federal government in overturning the conviction of a business which was deprived of opportunity to prove at trial that it discharged waste into a waterway in compliance with the Army Corps of Engineers "long standing administrative construction" of the environmental statute. *See, U.S. v. Pennsylvania Industrial Chemical Corp. (PICCO)*, 411 U.S. 655, 657 (1973). This Court found Due Process was violated by the denial as defendant was " . . . affirmatively misled by

the responsible administrative agency into believing that the law did not apply in this situation." *Id.* at 674-74. This Court, in holding that defendant "had a right to look to the [agency's] regulations" ruled:

> [The regulations] designed purpose was to guide persons as to the meaning and requirements of the statute. Thus, to the extent that regulations deprived [the defendant] of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution. *Id.* at 674.

This Court has repeatedly questioned whether estoppel can be invoked against the federal government. It has noted that: "We have left the issue open in the past, and do so again today." *Heckler v. Community Health Services*, 467 U.S. 51, 60, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984). It stated: "From our earliest cases, we have recognized that equitable estoppel will not lie against the Government as it lies against private litigants." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 419, 110 S. Ct. 2465, 2469, 110 L.Ed.2d 387 (1990).

But that does not mean it will not lie against the government. Historically, the question has revolved around "affirmative misconduct" on behalf of the federal government. *Id.* at 420-21. In *INS v. Hibi*, this Court stated that: "While the issue of whether 'affirmative misconduct' on the part of the Government might estop it from denying citizenship was left open in *Montana v. Kennedy*, 366 U.S. 308, 314, 315, 81 S.Ct. 1336, 1340, 1341, 6 L.Ed.2d 313 (1961), no

conduct of the sort there adverted to was involved here." 414 U.S. 5, 8, 94 S.Ct. 19, 21, 38 L.Ed.2d 7 (1973) (per curiam). In *Schweiker v. Hansen*, this Court denied an estoppel claim for Social Security benefits but observed it "has never decided what type of conduct by a Government employee will estop the Government from insisting upon compliance with valid regulations governing the distribution of welfare benefits." 450 U.S. 785, 788, 101 S.Ct. 1468, 1470, 67 L.Ed.2d 685 (1981) (per curiam). The estoppel question was averted in *INS v. Miranda*, when this Court stated: "This case does not require us to reach the question we reserved in *Hibi*, whether affirmative misconduct in a particular case would estop the Government from enforcing the immigration laws." 459 U.S. 14, 19, 103 S.Ct. 281, 283, 74 L.Ed.2d 12 (1982) (per curiam). Deferring, the Court stated: "We leave for another day whether an estoppel claim could ever succeed against the Government" *Office of Pers. Mgmt. v. Richmond*, 496 U.S. at 423. The day has come to answer that question.

"[T]he words of federal officials were enough to convince those who were considering entry into the medical marijuana business that they could engage in that enterprise without fear of criminal consequences." *U.S. v. Washington*, 887 F.Supp.2d 1077, 1084 (D.Mont.), *adhered to on reconsideration*, 2012 WL 4602838 (D. Mont. October 2, 2012). The constitutional nullification crisis of the past 24 years caused by the affirmative misconduct of each of the three coordinate branches of federal government warrants invoking estoppel. This ensures fairness and prevents future constitutional uncertainty to cannabis industry participants who detrimentally relied upon the null-

ifying statements and actions designed to protect and promote state regulated medical cannabis programs. Estoppel is warranted because the issues are quasi-criminal like *Raley* and *Cox* given the unquestionable violation of the CSA caused by official statements and guidance, and quasi-administrative law and interpretation based like *PICCO* given the judicial rulings that attempt to uphold the inherent federal nullification scheme and mergers approved by the Department of Justice.

Estoppel may be asserted where there is: "(1) misleading conduct, which may include not only statements and actions but silence and inaction, leading another to reasonably infer that rights will not be asserted against it; (2) reliance upon this conduct; and (3) due to this reliance, material prejudice if the delayed assertion of such rights is permitted." *U.S. v. Cox*, 906 F.3d 1170, 1191 (10th Cir. 2018), *cert. denied*, 139 S.Ct. 2690, 204 L.Ed.2d 1090 (2019), and *cert. denied sub nom. Kettler v. U.S.*, 139 S.Ct. 2691 (2019)(internal citations omitted).

As for the first prong, each branch of the federal government has made affirmative statements and taken actions designed to induce the growth of the state medical cannabis programs at the expense of violating federal law. This is evidenced by:

1. No Attorney General has found a "positive conflict" and preempted as empowered to do under 21 U.S.C. § 903;

2. FinCEN guidance encouraged banks to enter into the cannabis related commerce by dispelling fears of prosecution for financial crimes;

3. Congress passed multiple spending appropriations amendments to prevent law enforcement from interfering with state compliant medical patients and industry participants;

4. Judicial determinations like *U.S. v. McIntosh* upheld limitations placed by Congress upon the Executive Branch to prevent enforcement of the federal laws.

The net result is that state regulated cannabis industries tolerated by all three branches of federal government have generated billions of dollars in revenue and created some 300,000 jobs.[16]

As for material prejudice, this is precisely what Attorney General Barr alluded to in recognizing the "backdoor nullification" and unfairness of retroactively prosecuting medical patients like Petitioners, AB, JC, and JB, and industry participants like Petitioner, Marvin Washington, and the indirect participants like Petitioner, Cannabis Cultural Association, that relied upon those official statements in deciding to partake in state regulated programs.

CONCLUSION

While Attorney General Barr testified he would not prosecute industry investors and participants who for more than two decades have detrimentally relied upon those official policies and actions, there is

[16] https://www.forbes.com/sites/niallmccarthy/2019/03/26/which-states-made-the-most-tax-revenue-from-marijuana-in-2018-infographic/#7547293b7085

no guarantee that his successors too will refrain from doing so. Whether such prosecutions take place after the expiration of spending appropriations restrictions may in fact constitute an *ex post facto* prosecutions, will be an issue which this Court will address another day.

However, the question may be averted in its entirety by invoking estoppel against the federal government and achieving that which the three coordinate branches of government have fallen short of doing-de-scheduling cannabis from the Schedule I of the federal Controlled Substances Act. The need for supremacy of rational federal laws, Due Process, and notions of fairness all should compel this Court to invoke it to settle the issue once and for all.

Respectfully submitted,

DAVID C. HOLLAND
COUNSEL OF RECORD
201 EAST 28TH STREET, SUITE 2R
NEW YORK, NY 10016
(212) 842-2480
DCH@HOLLANDLITIGATION.COM

ANDREW P. SCHRIEVER
CUDDY & FEDER LLP
445 HAMILTON AVENUE, 14TH FLOOR
WHITE PLAINS, NY 10601
(914) 761-1300
ASCHRIEVER@CUDDYFEDER.COM

COUNSEL FOR AMICI CURIAE

SEPTEMBER 14, 2020