No. 21-676

In the Supreme Court of the United States

SUSAN K. MUSTA,

Petitioner,

v.

MENDOTA HEIGHTS DENTAL CENTER AND HARTFORD INSURANCE GROUP,

Respondents.

On Petition for Writ of Certiorari to the Minnesota Supreme Court

BRIEF OF EMPIRE STATE NORML, NEW YORK STATE AFFILIATE OF THE NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS (NORML), NEW YORK CITY CANNABIS INDUSTRY ASSOCIATION (NYCCIA), AND HUDSON VALLEY CANNABIS INDUSTRY ASSOCIATION (HVCIA) AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURES

All parties and amici are listed on the cover. Pursuant to Rule 29.6 of this Court, Empire State NORML, NYCCIA, and HVCIA, are each independent non-profit organizations which have no parent corporations and no publicly-held corporation owns any stock in those entities.

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INTEREST OF AMICI CURIAE[1]

Empire State NORML, New York State affiliate of the National Organization for the Reform of Marijuana Laws (NORML)

Empire State NORML is a not for profit corporation registered in the State of New York, which advocates for public policy changes to allow responsible possession and use of marijuana and safe and regulated markets in the newly legalized state. It further advocates for non-profit and for-profit production and retail sale of cannabis products, transparent, consumer friendly accessibility, and business enterprises which address the harms of the Drug War and restore impacted communities.

New York City Cannabis Industry Association (NYCCIA)

Hudson Valley Cannabis Industry Association (HVCIA)

The New York City Cannabis Industry Association (NYCCIA.org), and its sister entity, the Hudson Valley Cannabis Industry Association (HVCIA.org), are affiliated regional not-for-profit organizations formed under the laws of the State of New York. Each facilitates and fosters dialogue and policy discussions for legacy and newly entering stake holder and drafts proposed rules grounded in fairness and inclusion for the perpetuation of the newly

[1] *Amici* have timely notified counsel for all parties of their intention to file this brief and received consent. No counsel for a party authored this brief in any part, and no person or entity, other than amici and their counsel, made a monetary contribution to fund its preparation and submission.

legalized cannabis market in New York City, the Hudson Valley, and the State of New York.

SUMMARY OF ARGUMENT

A once festering carbuncle in the form of a constitutional supremacy and nullification crisis regarding medical cannabis has erupted into an infectious legal lesion on the corpus of American jurisprudence. This Court should take this opportunity to prevent the further spread of this insidious condition by invocation of the Doctrine of Estoppel. It should find that the Schedule I status of cannabis under the federal Controlled Substances Act is no longer enforceable. Doing so will cure the problem.

This pernicious chafing of state medical marijuana laws bumping up against the Schedule I designation of cannabis under the federal Controlled Substances Act ("CSA"), for the past 25 years, without proper attention and care, is the root cause. Today, 36 states have legalized marijuana in some form. These regulated programs are not only in contravention of the supremacy of the Schedule I status, but in fact, those programs have been indirectly bolstered by the concerted efforts of the three coordinate branches of the federal government to nullify the CSA through a lack of enforcement. Such intentional efforts have consisted of prosecutorial guidance by the Department of Justice, Congressional spending appropriations preventing prosecutions of medical cannabis patients and businesses, and court rulings upholding those decisions and actions of Congress and the Executive Branch.

Due to the continual friction over the last two decades, rulings from state and federal courts are without protocol, prophylaxis to prevent further spread of the constitutional crisis, or enforced precedent which are the cornerstones of American jurisprudence. The juridical ulceration of this supremacy and nullification crisis is evident in the conflicting decisions at issue in the Petition.

The Supreme Courts of Minnesota and Maine held that the Schedule I designation of cannabis under the federal Controlled Substances Act ("CSA"), prohibiting medical use of marijuana, entirely preempts and invalidates the state laws mandating that worker's compensation insurance reimburse injured employees for the cost of their medicine. To the contrary, the Supreme Courts of New Hampshire and New Jersey held that post-purchase patient reimbursement for prior acquisition of that medicine did not require the insurer to violate any federal law and was therefore not preempted. As such, New Hampshire and New Jersey held that the cost of the medicine must be reimbursed.

Both Minnesota and Maine found preemption based upon an inherent 'positive conflict' between their state laws and the CSA Schedule I designation prohibiting the medical use of cannabis. In the 25 years since California first passed its Compassionate Use Act legalizing medical marijuana, no United States Attorney General has exercised his power under 21 U.S.C. §903 to declare such a 'positive conflict' and preempt any state cannabis law, medical or recreational. Arguably, the Supreme Courts of Minnesota and Maine usurped the authority of the

U.S. Attorney General to fill a federal legal void and substantiate their preemption rulings. This overreach only exacerbates the legal carbuncle presented here and should prompt this Court to grant the *Writ* and resolve this supremacy and nullification crisis.

The conflicting decisions of the four Supreme Courts are the natural manifestation of decades of legal uncertainty.

Justice Thomas recently alluded to the ongoing crisis involving the issue of the deductibility of cannabis expenses under IRS Code 280(e) stating:

> "Sixteen years ago, this Court held that Congress' power to regulate interstate commerce authorized it "to prohibit the local cultivation and use of marijuana." *Gonzales v. Raich*, 545 U. S. 1, 5 (2005). The reason, the Court explained, was that Congress had "enacted comprehensive legislation to regulate the interstate market in a fungible commodity" and that "exemption[s]" for local use could undermine this "comprehensive" regime. *Id.*, at 22–29. The Court stressed that Congress had decided "to prohibit entirely the possession or use of [marijuana]" and had "designate[d] marijuana as contraband for any purpose." Id., at 24–27 (first emphasis added). Prohibiting any intrastate use was thus, according to the Court, "'necessary and proper'" to avoid a "gaping hole" in Congress'

"closed regulatory system." *Id.*, at 13, 22 (citing U. S. Const., Art. I, §8).

Whatever the merits of *Raich* when it was decided, federal policies of the past 16 years have greatly undermined its reasoning. Once comprehensive, the Federal Government's current approach is a half-in, half-out regime that simultaneously tolerates and forbids local use of marijuana. This contradictory and unstable state of affairs strains basic principles of federalism and conceals traps for the unwary.

…[T]hough federal law still flatly forbids the intrastate possession, cultivation, or distribution of marijuana, Controlled Substances Act, … the Government, post-*Raich*, has sent mixed signals on its views. In 2009 and 2013, the Department of Justice issued memorandums outlining a policy against intruding on state legalization schemes or prosecuting certain individuals who comply with state law. *[Fn omitted]*. In 2009, Congress enabled Washington D. C.'s government to decriminalize medical marijuana under local ordinance. *[Fn omitted]*. Moreover, in every fiscal year since 2015, Congress has prohibited the Department of Justice from "spending funds to prevent states' implementation of their own medical marijuana laws."

> *United States v. McIntosh*, 833 F.3d 1163, 1168, 1175–1177 (9th Cir., 2016) (interpreting the rider to prevent expenditures on the prosecution of individuals who comply with state law). *[Fn omitted].* That policy has broad ramifications given that 36 States allow medicinal marijuana use and 18 of those States also allow recreational use. *[Fn. Omitted].*
>
> Given all these developments, one can certainly understand why an ordinary person might think that the Federal Government has retreated from its once-absolute ban on marijuana. See, e.g., Halper, Congress Quietly Ends Federal Government's Ban on Medical Marijuana, L. A. Times, Dec. 16, 2014."
>
> *Standing Akimbo, L.L.C., v. United States*, cert. denied, 594 U.S. __, 141 S.Ct. 2236, 2236-37 (2021).

This irrational "half-in, half-out" approach to federal cannabis regulation is reminiscent of Abraham Lincoln's statement: "It must become all one thing, or the other" … "A house divided cannot stand."[2] Federal laws and policies designed to nullify the supremacy of federal law in order to assist promotion of state cannabis programs cannot further stand. This infectious lesion across the national legal landscape

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[2] "A House Divided" speech by Abraham Lincoln, given in Springfield, Illinois, June 16, 1858, https://www.nps.gov/liho/learn/historyculture/housedivided.htm

must be eradicated by invocation of the Doctrine of Estoppel to prevent further enforcement of the Schedule I designation of cannabis.

Doing so will eliminate the constitutional crisis and prevent further constitutional peril attributable to the erratic and unequal enforcement of the CSA with regard to cannabis.

ARGUMENT[3]

POINT I. Upholding the supremacy of the designation of cannabis under the CSA is futile when the coordinate branches of government have affirmatively promoted and protected state medical cannabis programs

SUPREMACY OF THE CONTROLLED SUBSTANCES ACT AND 21 U.S.C §903

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*,

[3] These arguments were previously presented by the amici parties in the matter of *Washington v. Barr*, 141 U.S. 555 (Mem), __ S.Ct. __, 208 L.Ed.2d 176 (2020), cert. denied.

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).

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 and the it CSA such "that the two cannot consistently stand together" requiring complete preemption of the state law. 21 U.S.C. §903.

THE RISE OF THE NULLIFICATION CRISIS

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 cannabis. "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).

The nullification 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 recognition 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-six states have established medical cannabis programs since 1996. Since then, 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

[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] In 2019, the Justice Department's Anti-Trust Division approved the merger of multi-state operators making them some of the largest cannabis related businesses in the United States despite nullifying the supremacy of the CSA.[7]

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[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] "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

Preemption and fundamental fairness became a stated concern of then Attorney General Nominee, William Barr, during his confirmation hearings.

Speaking from the perspective of detrimental reliance on federal guidance and issues of fundamental fairness, Mr. Barr stated: "…it was important not to upset the interests and expectations of the businesses and 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."[8] Mr. Barr articulated 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.

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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/

[8] https://news.yahoo.com/barr-signals-support-ending-marijuana-legalization-212041886.html; See also, Kyle Jagger, Marijuana Moment, 1/15/2019 https://www.marijuanamoment.net/trump-attorney-general-nominee-pledges-not-to-go-after-legal-marijuana-businesses/

Mr. Barr testified: "However, I think the current situation is untenable and really has to be addressed. It's almost like a backdoor nullification of federal law."[9] 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".[10] 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."[11] It is this disrespect for the law that has turned state cannabis programs chafing against the supremacy clause into a full blown infectious lesion which has been remedied in diametrically opposed ways by the Supreme Courts of Minnesota, Maine, New Hampshire, and New Jersey.

Acts of Congress

Congress through the "commerce clause" can preempt all state cannabis programs and criminalize the conduct of patients and market participants. *Gonzales v. Raich*, 545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). In 2014, 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 federal law enforcement from

[9] Id.
[10] Id.
[11] Id.

using federal funds to investigate and prosecute state compliant medical cannabis operators and patients. 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 still in effect.

Pending before various committees of Congress are:

a. the Cannabis Administration and Opportunity Act (CAOA Act of 2021);

b. the Marijuana Opportunity Reinvestment and Expungement Act

(MORE Act of 2019 – H.R. 3884);

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)

Congress is clearly trying to do indirectly that which it can do directly, namely, promote state cannabis programs in contravention of the CSA. It is quixotic why Congress chooses to proceed only half-way in efforts to legalize cannabis rather than simply

de-schedule it. The result is a legal quagmire as evidenced by the split decisions of the four Supreme Courts at issue in the Petition. 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 officials and agencies and engaged in the cannabis industry despite federal illegality.

Acts of the Judiciary

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 Ninth Circuit reiterated the legitimacy of Congressional nullification by limiting the ability of the Executive branch to faithfully execute the laws stating:

> "…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)

Unlike the Supreme Courts of Minnesota, Maine, New Hampshire and New Jersey, addressing the legality of state mandates directing worker's compensation insurance reimbursement for medical cannabis patients, courts in other commercial contexts have broached the preemption issue, but declined to address it.

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). However, is declining to enforce a contract on public policy the same as the Supreme Courts of Minnesota and Maine inherently finding a 'positive conflict' between federal and state law when no Attorney General declared as such under his power pursuant to 21 U.S.C. §903?

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. Rather, the final aria must be sung by this Court with the invocation of the doctrine of

estoppel. Doing so will eliminate the Zeno's paradox of being 'half-in, half-out' issue cited by Justice Thomas and will further avert the backdoor nullification and unfairness concerns.

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.

POINT II. Estoppel is Warranted and Necessary to Cure This Legally Untenable Condition

THE NEED TO INVOKE ESTOPPEL

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). It 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, it 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.

As recently stated by Justice Thomas:

> "Whatever the merits of *Raich* when it was decided, federal policies of the past 16 years have greatly undermined its reasoning. Once comprehensive, the Federal Government's current approach is a half-in, half-out regime that simultaneously tolerates and forbids local use of marijuana. This contradictory and unstable state of affairs strains basic principles of federalism and conceals traps for the unwary."

Standing Akimbo, LLC v. U.S., 141 U.S. at 2236-37.

With the legalization of medical and adult use cannabis in some 36 states, it is hard to describe the situation as being just "half-in" and "half-out". The vast majority of states have found cannabis to be an effective medicine and passed legislation to that effect in direct contravention of the CSA. It seems fundamentally unfair to place the onus on State Supreme Courts to have to make determinations about the applicability of federal preemption and determine the existence of a "positive conflict" when the U.S. Attorney Generals have refused to do for the past 25 years. The outcome from this festering wound is evident in the split decisions of the four Supreme Courts which are at issue here. Invocation of the Doctrine of Estoppel is necessary and precedent exists for it.

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 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 was and is nonetheless anathema to the CSA being a clear abdication of his duties noted by the Court of Claims in the *Montilla* case above. It is unclear where Attorney General Garland presently stands on the preemption issue after two and half decades of nullification. Invocation of estoppel can prevent him from taking action that would effectively impair Due Process and result in fundamental unfairness to the States and citizens that have engaged in the legal cannabis industry since 1996.

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. 10/2/2012). 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 nullifying 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:

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

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

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

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

It is unfortunate that the Supreme Courts of Minnesota and Maine have felt constrained by a constitutional supremacy clause to invalidate the worker's compensation insurance mandate when no branch of federal government is otherwise willing to abide by it.

There is no prejudice to the worker's compensation insurance companies which are contractually obligated to reimburse their insureds for medicine that is properly administered in compliance with a state statute.

CONCLUSION

The festering supremacy and nullification legal carbuncle continues to infect the corpus of American jurisprudence with regard to the Schedule I designation of cannabis. It must be eradicated to end this constitutional crisis. The need for supremacy of rational federal laws, Due Process, and notions of fairness all should compel this Court to invoke the

Doctrine of Estoppel to cure this problem once and for all.

Respectfully submitted,

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