TAKE THE GATEKEEPERS TO COURT: HOW MARIJUANA RESEARCH UNDER A BIASED FEDERAL MONOPOLY OBSTRUCTS THE SCIENCE-BASED PATH TO LEGALIZATION

I. INTRODUCTION

Meet Irvin.[1] At age 10, Irvin was diagnosed with exostosis,[2] a very rare bone disorder that causes severe and debilitating pain from tumors that grow on most long bones in his body.[3] Irvin has made a life for himself as a respected stockbroker, trading tens of thousands of stock market dollars each day for his clients,[4] and he even continues to play softball every Sunday despite medical predictions that he would not make it past his teens.[5] As he puts it, "I am able to do this because I have the right medicine."

access to marijuana as medicine.[8] Irvin is one of only four surviving participants in this program,[9] and unlike the regular medical marijuana patient, he gets his supply directly from the Drug Enforcement Agency ("DEA"),[10] the arm of the executive branch which has functioned as the main obstacle to lifting the federal ban on the drug.[11] The government's discomfort with this aberration in DEA policy is reflected in the observation by drug policy reform advocate Rick Doblin that "[t]he government was never comfortable with this program . . . They are just waiting for all the people in it to die."[12]

Although seemingly absurd at first, this opposite treatment of marijuana makes absolute sense in the context of the modern American administrative state.[13] Agencies like the DEA, CIA, and NSA are given wide latitude in exercising their delegated powers under the highly deferential standard applied to administrative actions established by the seminal case *Chevron v. Natural Resources Defense Council*.[14] Fortunately for legalization advocates like Irvin[15] and Rick Doblin,[16] the very *Chevron* analysis that gives such great latitude to these agencies also contains the power to take it away at the very first sight of arbitrary and capricious behavior.[17] When we observe how the DEA grows, packages, and delivers

there is still a lack of "conclusive" evidence about marijuana's positive

in cases against marijuana advocate groups like those mentioned above.[40] With this deference, the agency wields sole authority to craft a multi-part test used to determine whether a drug has a proven "medical use" under the statute.[41] *Chevron* does not mandate a reviewing court's blind or absolute adherence to an agency's judgments,[42] but marijuana and many other Schedule I substances with support from medical practitioners across the country nevertheless remain illegal under federal law because no advocate group has successfully overcome the following five-part test[43] used by the DEA in determining whether a psychoactive substance has a "currently accepted medical use:"[44]

1) The drug's chemistry is known and reproducible;
2) Adequate safety studies have been conducted;
3) Adequate and well-controlled studies proving efficacy have been conducted;
4) The drug is accepted by qualified experts;
5) The scientific evidence is widely available.

All five parts must be satisfied before the DEA will find that a substance has an accepted medical use.[45]

The requirement of "adequate and well-controlled studies proving efficacy" (hereafter, "efficacy studies") is the main obstacle to the rescheduling movement and has been the most litigated.[46] In 2013, for instance, Americans for Sa00.3 nBT/F1 6. ng move

Court made clear that peer-reviewed studies do not qualify as efficacy studies, reasoning that "'scientists understand that peer review per se

target lawful participants in a state-approved medical marijuana program,[63] U.S. attorneys still tried to prosecute.[64] Although such evidence may be

important aspect of the problem, namely, the inadequate supply of marijuana it would provide for medical research purposes.

B. Alternative Interpretations of the Controlled Substances Act Can Redress the DEA's Arbitrary and Capricious Behavior

In this context, a federal monopoly is arbitrary and capricious when the federal government has entirely failed to consider that placing such a monopoly in the hands of an agency biased against medical use unfairly handicaps research into a Schedule I substance with great potential to help patients, like Irvin,[118] deal with debilitating illnesses. The DEA could take two possible actions to redress its behavior. First, the DEA can do what it has already offered to do in the case of medical marijuana research: break up the monopoly. By giving Dr. Lyle Craker a l(k)11( )270-2(qu11(st)e3( )-86314)-4(o)-8631

C. The CSA's Scheduling Scheme Inhibits Effective Responses to Modern Public Health Issues

A final policy consideration supporting an unbiased regulation of research into substances l

Research Institute, a non-profit organization, has focused its energies on psilocybin applications for cancer-related emotional distress[144] and has produced success stories like that of Patrick Mettes, a TV news director in his mid-fifties whose cancer diagnosis followed soon after his wife observed the whites of his eyes turn the color yellow.[145]

Although Patrick had never taken a hallucinogenic before, his

V. CONCLUSION

Although $297 million is a considerable amount of money to have invested in medical marijuana research,[157] it also represents the high cost we have paid for marijuana to remain a Schedule I substance at a time when nearly half the nation and the District of Columbia provide over a million citizens access to it for medical use.[158] The so-called medicinal research "Catch-22"[159] highlights a serious flaw in American drug regulation: the creation of a categorical system in which illegality is easy to fall into and potentially impossible to escape. A change in the DEA's administration of the phrase "currently accepted medical use" that does away with a biased monopoly would open the doors to