UNITED STATES DEPARTMENT OF JUSTICE

Drug Enforcement Administration

In the Matter of **Schedules of Controlled Substances: Proposed Rescheduling of Marijuana**	**DEA Docket No. 1362** **Hearing Docket No. 24-44**

ORDER DENYING NON-PARTICIPANT
MOTION FOR INCLUSION (Greninger Parties)

These are hearing proceedings instituted in connection with a notice of proposed rulemaking (NPRM) seeking to reschedule marijuana from Schedule I of the Controlled Substances Act (CSA) to Schedule III. *Schedules of Controlled Substances: Rescheduling of Marijuana*, 89 Fed. Reg. 44597, 44597 (2024). On November 18, 2024, Jason Greninger (Greninger) filed a motion (Motion for Inclusion or MFI) on behalf of the Coalition for Patient Rights and Compassion Center, the Community-Based Clinical Cannabis Evaluation and Research Network, Center for Incubation and Findings Research, Integrative Providers Association, and Decriminalize Nature Nevada (collectively, the Greninger Parties). MFI at 1. The Motion for Inclusion seeks an order by this tribunal authorizing the Greninger Parties' collective participation in these hearing proceedings, essentially appealing a decision by the Drug Enforcement Administration (DEA) Administrator declining to include them. *Id.* at 1-4. On November 13, 2024, in response to a "Notice of Appearance" (Greninger Notice of Appearance) Greninger filed on behalf of himself and a much smaller subset of the Greninger Parties, this tribunal issued an order essentially informing Greninger and his (then) parties that, due to his and their apparent omission from those that the Administrator had designated to include in the hearing proceedings (Designated Participants or DPs), this tribunal was precluded from taking any action on the Greninger Notice of Appearance.

The Greninger Parties' Motion for Inclusion seeks an order from this tribunal authorizing their inclusion among the hearing DPs, notwithstanding the fact that they still have not been so designated by the DEA Administrator. *Id.* at 4.

The lion's share of the MFI expends considerable effort into outlining some of the valuable contributions that the Greninger Parties could make toward a correct resolution of the NPRM and why they should be granted standing under the Administrative Procedure Act (APA). The MFI interprets the APA as requiring that "*all interested parties* are entitled to present evidence to ensure a fair and complete evidentiary record." MFI at 3 (emphasis supplied). However, as explained in more detail in the Standing Order issued by this tribunal on November 19, 2024, potential, meaningful input, and even arguable APA standing is not the full extent of the inquiry. *City of San Antonio v. Civil Aeronautics Board*, 374 F.2d 326, 329 (D.C. Cir. 1967) ("No principle [of] administrative law is more firmly established than that of agency control of its own calendar."). When Congress crafted the APA, it qualified its rulemaking participant requirements to extend only "[s]o far as the orderly conduct of public business permits." 5 U.S.C. § 555(b). The country (and the indeed the world) likely has valuable experts and potential interests that could be (and likely are) innumerable, but a hearing of that magnitude would require decades and stadiums to accommodate. The Agency is endowed with the right to place reasonable limits on the number of participants in a given APA hearing. *Id.*; *City of San Antonio*, 374 F.2d at 329. Which is, when reduced to its essence, precisely what the Administrator did in exercising her discretion in determining the number and nature of participants. To be sure, thousands upon thousands of individuals and entities across the country could add value to the issues to be decided here, but they cannot all be included.

Regarding the Administrator's decision not to extend a participation invitation to the Greninger Parties, it is useful to view the current dynamic in the backdrop of the APA and the CSA's implementing regulations. The authority of a DEA Administrative Law Judge (ALJ) and the duration of that authority is strictly circumscribed by the CSA's regulations. 21 C.F.R. § 1316.52. Per those regulations, an ALJ is designated to handle a case by the DEA Administrator.[1] *Id.* The ALJ's "functions … commence upon his designation and terminate upon the certification of the record to the Administrator." *Id.* Thus, at the time the hearing DPs were selected by the Administrator, I had not yet been assigned to the case, and was without authority to act. Even more importantly, Congress decreed that "[o]n appeal from or review of

[1] Actually, in the overwhelming majority of cases, adjudication matters are forwarded to the DEA Office of Administrative Law Judges and then assigned to an ALJ by the DEA Chief Judge. Here, the Administrator made the designation herself, as had been foretold in two previous orders issued in the Federal Register. 89 Fed. Reg. at 44598; *Schedules of Controlled Substances: Rescheduling of Marijuana*, 89 Fed. Reg. 70148, 70148-49 (2024).

the [ALJ's recommended decision], the agency has all the powers which it would have in making the [recommended decision] … except as it may limit the issues on notice or by rule." 5 U.S.C. § 557(b). As has been detailed in previous orders, appeals flow *from the ALJ to the Administrator*, not the other way around. I have not been designated to review, endorse, or disparage the Administrator's prehearing actions on this matter or the manner in which her DP decisions were reached, issued, or not issued.[2] The Administrator exercised her discretion to fix the number of DPs to be included, and to expand that number would effectively overrule her decision and exceed the proper and logical role of the ALJ under the APA and the CSA.[3]

Accordingly, the Greninger Parties' Motion for Inclusion must be, and herein is **DENIED**.

Dated: November 25, 2024

JOHN MULROONEY

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JOHN J. MULROONEY, II
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the undersigned, on November 25, 2024 caused a copy of the foregoing to be delivered to the following recipients: (1) James J. Schwartz, Esq., Counsel for the Government, via email at james.j.schwartz@dea.gov; Jarrett T. Lonich, Esq., Counsel for the Government, via email at jarrett.t.lonich@dea.gov; and S. Taylor Johnston, Esq., Counsel for the Government, via email at stephen.t.johnston@dea.gov; (2) the DEA Government Mailbox, via email at dea.registration.litigation@dea.gov; (3) Shane Pennington, Esq., Counsel for Village Farms International, via email at spennington@porterwright.com; and Tristan Cavanaugh, Esq., Counsel for Village Farms International, via email at tcavanaugh@porterwright.com; (4) Nikolas S. Komyati, Esq., Counsel for National Cannabis Industry Association, via email at nkomyati@foxrothschild.com; William Bogot, Esq., Counsel for National Cannabis Industry Association, via email at wbogot@foxrothschild.com; and Khurshid Khoja, Esq., Counsel for National Cannabis Industry Association, via email at khurshid@greenbridgelaw.com; (5) John

[2] *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."). As I have discussed in other orders, while this decision to include or exclude a party arguably bears the hallmarks of a final, court-reviewable agency action (5 U.S.C. § 702; 21 U.S.C. § 877), at least one Circuit Court is not altogether convinced that anything is really final and reviewable until the whole adjudication has run its course. *Miami-Luken, Inc. v. DEA*, 900 F.3d 738, 743 (6th Cir. 2018) (The court held that a subpoena decision is not rendered final merely because the agency's highest authority issued the decision prior to an ultimate disposition of the case.).

[3] Admittedly, had the standing determination been deferred to await the action of the ALJ, matters would have been procedurally different and the Administrator could have exercised her unquestioned authority to review my ruling on the matter. But that is not the way the matter progressed.

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Quinn Fox
Staff Assistant to the Chief Judge
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