

UNITED STATES DEPARTMENT OF JUSTICE
DRUG ENFORCEMENT ADMINISTRATION
Hearing

IN THE MATTER OF:	:	DEA Docket No.:
	:	1362
Schedules of Controlled	:	
Substances: Proposed	:	Hearing Docket No.:
Rescheduling of Marijuana	:	26-96
	:	

Thursday,
July 2, 2026

700 Army Navy Drive
Arlington, Virginia

The above-entitled matter came on for
hearing, pursuant to notice, at 9:00 a.m. EDT

BEFORE: THE HONORABLE DEREK C. JULIUS,
Chief Administrative Law Judge

1 APPEARANCES:

2 On Behalf of the Government:

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4 JARRETT T. LONICH, ESQ.
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13 On Behalf of the National Drug and Alcohol
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25 On Behalf of Smart Approaches to Marijuana:

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1 On Behalf of the States of Nebraska, Idaho,
2 and Indiana:

3 JOHN M. MCNICHOLS, ESQ.
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7 On Behalf of DUID Victim Voices:

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14 On Behalf of Kenneth Finn, M.D.:

15 JOSEPH A. BINGHAM, ESQ.
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18 DAVID G. EVANS, ESQ.
19 203 Main Street
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21 ALSO PRESENT:

22 GRAYSON E. PHILLIPS, ESQ., Law Clerk
23 DECLAN HURLEY, Torridon Law summer associate
24
25

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2 WITNESS DIRECT CROSS REDIRECT RECROSS

3 Patrice Kelly

By Mr. Evans 1020

4 By Mr. ~~Swan Lonich~~ 1067

5 Mary Jo McGuire

By Mr. Evans 1072 1134

6 By Mr. ~~Swan Lonich~~ 1119

7 EXHIBIT NO.

MARK RECD

8 ~~NDASA + DUID Victim Voices +~~
~~Kenneth Finn's~~

9

1 Omnibus Transportation Employee 1108 1118
 Testing Act of 1991

10 2 Omnibus Transportation Employee 1108 1118
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 December 3rd, 2024

22 15 HHS slides regarding Executive 1108 1118
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1 P-R-O-C-E-E-D-I-N-G-S

2 (9:00 a.m.)

3 JUDGE JULIUS: We are on the record.
4 Today is July 2nd, 2026. This is day 4 in the
5 matter of Schedules of Controlled Substances:
6 Proposed Rescheduling of Marijuana Hearing
7 Docket No. 26-96, DEA Docket No. 1362. I recall
8 as we recessed yesterday, we were running a
9 little bit ahead of schedule as to what was
10 proposed, so our first order of business today
11 was to hear opening statements from NDASA.

12 Before we do that, I do want to take
13 daily roll call just to make sure we have a
14 record of who is present and represented in the
15 courtroom today. Government Counsel, will you
16 please state your appearance for today?

17 MR. SCHWARTZ: Good morning, Your
18 Honor. For the government, James Schwartz,
19 Jarrett Lonich, David Maley, and Mack Swan.

20 JUDGE JULIUS: Thank you, Mr. Schwartz.
21 Good morning, Counsel.

22 MR. EVANS: Good morning.

23 JUDGE JULIUS: For National Drug and
24 Alcohol Screening Association.

25 MR. EVANS: David Evans, Your Honor.

1 JUDGE JULIUS: Very good. Are you also
2 representing Mr. Kenneth Finn today?

3 MR. EVANS: I can, I don't think he's -
4 - is he scheduled to testify today?

5 JUDGE JULIUS: No, no.

6 MR. EVANS: Okay.

7 JUDGE JULIUS: I'm just trying to
8 figure out who's represented in court today.

9 MR. EVANS: I think that as far as
10 Finn's direct, that'll be done by Mr. Kenneally,
11 and the DUID also Mr. Kenneally. If he's not
12 available then I'll step in, but that's the
13 current plan.

14 JUDGE JULIUS: Understood. I'm just
15 going off of the notices of attendance that we
16 received and that we had National Drug and
17 Alcohol Screening Association, DUID Victim
18 Voices, and Kenneth Finn as being represented by
19 a counsel as present today. And you are listed
20 as a counsel of record for all three of those.

21 Are you here, understanding that you'll
22 be conducting your direct examination and your
23 case in chief on behalf of National Drug and
24 Alcohol Screening Association, but are you also
25 here representing those other two entities?

1 MR. EVANS: If need be, I can. I don't
2 know that anything will come up, but right now
3 I'm prepared for National Alcohol and Drug
4 Screening Association.

5 JUDGE JULIUS: Understood, sir, thank
6 you. And the gentleman to --

7 MR. BINGHAM: Joe Bingham filling in
8 for Mr. Kenneally, same clients.

9 JUDGE JULIUS: Excellent, thank you
10 very much, I appreciate the clarity. And for
11 the opposed states?

12 MR. MCNICHOLS: John McNichols and
13 Zachary Horton accompanied by Declan Hurley.

14 JUDGE JULIUS: Good morning, Counsel,
15 and Smart Approaches for Marijuana?

16 MR. MCNICHOLS: Just John McNichols,
17 Your Honor.

18 JUDGE JULIUS: Thank you. And I think
19 that's it. I think that means Dr. Phillip Drum
20 and the Tennessee Bureau of Investigation are
21 not present or represented by counsel today.
22 Anyone on behalf of those entities?

23 MR. SCHWARTZ: I think that's right.

24 MR. EVANS: Yeah.

25 JUDGE JULIUS: Okay, thank you. I just

1 wanted to make the record clear of who is
2 present in the courtroom or at least in the
3 well. All right, any other preliminary matters
4 before we begin with the case in chief for
5 NDASA?

6 MR. SCHWARTZ: Not for us.

7 MR. McNICHOLS: Nothing from the
8 government, Your Honor.

9 JUDGE JULIUS: Thank you. Mr. Evans?

10 MR. EVANS: Your Honor, for some reason
11 my clients have not shown up. I met with them
12 last night, they clearly knew to be here at
13 9:00. I hope maybe they're just a little late,
14 I can start with the opening statement.

15 JUDGE JULIUS: Certainly. I thought I
16 was advised by court staff that your witnesses
17 were in the building. So, I don't know, but
18 certainly you can begin with your opening
19 statement, and then we can track down where they
20 are.

21 MR. EVANS: Okay, all right, very good.
22 Thank you.

23 JUDGE JULIUS: Certainly.

24 MR. EVANS: Good morning, Your Honor,
25 my name is David Evans. I'm representing the

1 National Drug and Alcohol Screening Association
2 I'll refer to as NDASA for the rest of this
3 thing. NDASA is a membership organization of
4 people involved in federal and non-federal
5 employment and other types of drug testing.

6 It includes employers, contractors,
7 consultants, and others involved. NDASA is
8 extremely concerned about the unintended
9 consequences of scheduling marijuana from
10 Schedule I to Schedule III, and their primary
11 concerns are about workplace safety.

12 The federal drug testing affects
13 anywhere from 7 to 9 million employees, and
14 making marijuana Schedule III will prohibit
15 federal drug testing for all those employees.
16 And the reason is that back in the 80s when
17 President Reagan issued his executive order,
18 which was used as the authority for the
19 administrative rules, they cited the executive
20 order.

21 The executive order only permitted
22 mandatory drug testing for Schedule I and
23 Schedule II. So, if this goes down to Schedule
24 III, there's no longer any authority for the
25 testing, and the testing will cease.

1 Laboratories are certified to do this testing by
2 the federal government.

3 We've been informed that they will
4 refuse to do it because of the liability. They
5 no longer have search and seizure protection as
6 a result of that, and I'd like to go into more
7 details. Just a little bit more about the
8 members of NDASA, it includes medical
9 professionals, so medical marijuana is an issue
10 here, recreational is an issue here.

11 Because those medical professionals, if
12 a test is positive, it could be positive because
13 of medical marijuana, it could be positive for
14 recreational marijuana. We also have substance
15 abuse professionals, these are people that if
16 somebody tests positive this is a compassionate
17 program.

18 Somebody tests positive, they can be
19 referred to a substance abuse professional who
20 will evaluate them, recommend a course of
21 treatment, and possibly they can get their jobs
22 back. This program is not intended to be
23 punitive, it's intended to be deterrent, and
24 it's been remarkably successful in that regard.

25 So, we have alcohol and drug collection

1 professionals, major transportation industry
2 employers are members of NDASA, professional
3 associations, large and small business owners,
4 all of whom are on the front lines of protecting
5 the safety of commercial and public
6 transportation in our nation.

7 We reach tens of thousands of employers
8 and millions of American workers nationally,
9 Schedule III affects all of them. Thus, we are
10 deeply interested in maintaining and to prevent
11 the needless accidents caused by those under the
12 influence of marijuana. Now, moving marijuana
13 to Schedule III will end testing for safety-
14 sensitive employees.

15 Now, these are people involved in
16 transportation, it could include a security
17 guard, people with firearms, mechanics on
18 airplanes, everybody involved in the maintenance
19 of all of this, if there is a determination that
20 their role is safety sensitive. So this is a
21 search, drug testing is a search, but it has
22 been narrowed to safety sensitive, which has
23 been permitted under the Supreme Court.

24 There were some cases before the
25 Supreme Court that I was involved in years ago

1 where established the constitutionality of all
2 of this. This program has been in place for
3 three decades, drug testing started after
4 Vietnam, soldiers came back addicted to heroin.

5 If you remember the horrible incident
6 on the aircraft carrier Nimitz that John McClaine
7 was involved in almost got killed, that was due
8 to substance abuse. So the military has been
9 using drug testing to deter that, because these
10 people handle weapons, they handle explosives
11 and so forth. Who is included in this? Airline
12 pilots.

13 Certainly, we don't want an airline
14 pilot driving a plane under the influence of
15 marijuana. My kids are out of school, but it
16 affects school bus drivers, so school bus
17 drivers will no longer be able to be mandatorily
18 tested for marijuana. Subway, train operators,
19 ferry operators, pipeline operators, pipelines
20 are considered transportation.

21 Volatile substances are transferred
22 around the country, oil on pipeline. We have to
23 make sure that there's no slip ups there. And
24 probably the largest number are the commercial
25 truck drivers, people driving these huge semi-

1 trailers around the country. We have to make
2 sure that they're not under the influence of
3 marijuana or anything else.

4 Over the years, marijuana has been the
5 leading drug that's been detected by the drug
6 testing. There's been a rise recently in
7 amphetamines, but it's normally been marijuana
8 number one by far over any other drug. It also
9 affects air traffic controllers, and they would
10 no longer be subject to the deterrence and
11 detection of this.

12 So this could potentially result in
13 catastrophic accidents and loss of life, and it
14 will end abruptly upon the legal rescheduling of
15 marijuana for either recreational or medical
16 marijuana. The NPRM, among all the other things
17 I left out, women, pediatrics, elderly,
18 diversion at the NPRM, this is huge.

19 This could a true national dumpster
20 fire. And we have repeatedly pleaded with the
21 federal government to straighten this out, and
22 so far it's been crickets. Nobody seems very
23 interested in doing anything about it, except
24 perhaps Department of Transportation employees,
25 who I'm sure are very concerned about this.

1 The laws setting this up are in our
2 exhibits, I think it's Exhibit Nos. 1 and 2 that
3 set this up, I'm not going to read all the
4 citations here. Now, the problem is that if
5 it's Schedule III, HHS does not have the
6 authority to test. And why the leaving it out
7 of the NPRM is particularly egregious is because
8 the impetus for this came from HHS.

9 It was a letter from HHS to the head of
10 the DEA saying we're changing things, and at the
11 last minute, as Dr. Chiapperino testified, he
12 had pretty much already completed his
13 investigation, and he was told to do something
14 else. I appreciated his honest testimony at the
15 end about what really happened.

16 If there is another executive order,
17 which we have been begging them for to change
18 the authority for this, it's not been
19 forthcoming. But even if it is authorized to
20 test for Schedule III, there's a huge problem
21 with medical marijuana because the test results,
22 if there's a prescription, have to be verified
23 by somebody called a Medical Review Officer,
24 MRO.

25 These are all physicians who are

1 certified in cannabis medicine and substance
2 abuse medicine. There's an MRO manual that's
3 put out by HHS, and there's several
4 certification agencies where they make these
5 decisions, and they are licensed professionals
6 to begin with, they then become certified.

7 They have to be certified in order to
8 be an MRO. And I would contrast this with the
9 New Hampshire dispensary technicians, who are
10 not required to do anything. So, the government
11 up to this point has treated this issue pretty
12 seriously, and the MRO, if there's a
13 prescription, which will happen under Schedule
14 III, has to verify the prescription.

15 And that can be done by talking to the
16 pharmacist. Now, under the system that's just
17 been proposed by the attorney general, it will
18 no longer be a pharmacist, it will be a
19 marijuana dispensary. So, they will go to the
20 marijuana dispensary and say look, there's this
21 prescription for this that you filled, tell me
22 about it.

23 Okay, now if they get denied that
24 information, which is very likely, the MRO then
25 has to list the positive marijuana result as a

1 positive marijuana result, and that's sent back
2 to the employer for whatever the employer wants
3 to do about it. Now, how do we verify a
4 prescription?

5 There are specific laws on how to do
6 that, we're going to cover that in our
7 testimony. The attorney general has told these
8 dispensaries that they don't have to apply that
9 anymore. So an MRO, who's a medically licensed
10 professional, probably have a DEA license for
11 controlled substances, is being asked to verify
12 a prescription that does not meet the DEA
13 standards and the FDA standards for a
14 prescription.

15 There would be no way to ascertain
16 whether this is valid or not. I want to go into
17 a little bit about how this came up. In the
18 1980s, there were a bunch of catastrophic public
19 safety problems. There was a Conrail train that
20 hit an Amtrak train in 1987, a lot of people
21 were killed.

22 The Transportation Safety Board
23 determined that marijuana was the cause of that,
24 not the correlation, okay? But the cause, it
25 was caused because these guys were high. They

1 blew through three safety things that they
2 should have paid attention to and ran into
3 another train. That's what marijuana does to
4 you, okay?

5 I suppose in addition to helping your
6 sleep hygiene. So since then, there has not
7 been any such accident where marijuana has been
8 determined to be the cause. This also would be
9 a little bit different if there was a good test
10 to determine marijuana intoxication, there just
11 isn't.

12 They're trying to find one, but they
13 can't, and I can go into the science of that,
14 I've written the leading treatise on drug
15 testing law, technology, and practice, but it's
16 going to be -- it's impossible to apply that, or
17 using what are called drug recognition experts,
18 testing is the only way to deter it.

19 So I will end by saying that in my
20 opinion and the opinion of NDASA, the NPRM
21 should be discarded until this issue is
22 effectively addressed. Thank you.

23 JUDGE JULIUS: Thank you very much,
24 Counsel. I believe court staff located your
25 witnesses, I think they're in a counsel room.

1 MR. EVANS: Where's Patrice? She goes
2 first.

3 COURT STAFF: She's in the credenza.

4 MR. EVANS: Would you ask her to come
5 in? She's going first.

6 JUDGE JULIUS: Okay. When you call
7 your witness, we'll have security bring the
8 right one. I think there may have been a
9 misunderstanding of who was going to testify
10 first.

11 MR. EVANS: No, there was no
12 misunderstanding, I think --

13 JUDGE JULIUS: On the court's end, I
14 think that's why --

15 MR. EVANS: It's supposed to be Patrice
16 Kelly, they're going to get her now.

17 JUDGE JULIUS: Okay. No, I think there
18 was a misunderstanding on the court's end,
19 that's why they brought the other witness out
20 first.

21 MR. EVANS: Okay. Well, we decided on
22 Ms. Kelly because she's the expert in the law,
23 and we wanted the court to have a clear
24 understanding of what the law is and the
25 foundation from it and so forth, so she's an

1 expert on that.

2 JUDGE JULIUS: That's fine. I just
3 wanted to -- both of your witnesses are here. I
4 just wanted you to know that.

5 MR. EVANS: Great. Also here is Jo
6 McGuire who is the head of --

7 JUDGE JULIUS: One moment, one moment,
8 sir. My apologies, thank you.

9 MR. EVANS: Yeah. And also here is Jo
10 McGuire, the director of NDASA, and I will later
11 introduce her as a real person.

12 JUDGE JULIUS: Okay.

13 MR. EVANS: Again, in reflection of Dr.
14 ~~Bouchard~~ Burchman yesterday, okay?

15 JUDGE JULIUS: Understood.

16 MR. EVANS: Okay. Patrice, would you?

17 THE WITNESS: Yes, I would. Thank you.

18 MR. EVANS: Okay.

19 JUDGE JULIUS: Yeah, be careful,
20 there's a sort of a hidden bump there for the
21 wires.

22 MR. EVANS: Yeah.

23 JUDGE JULIUS: Good morning, ma'am.
24 Before you're seated, if you could please raise
25 your right hand?

1 MS. KELLY: Yes, sir.

2 JUDGE JULIUS: Do you swear or affirm
3 that everything you say in these proceedings
4 will be the truth, the whole truth, and nothing
5 but the truth?

6 MS. KELLY: Yes, I do.

7 WHEREUPON,

8 PATRICE KELLY

9 was called for examination by Counsel for the
10 Interested Parties, having been first duly
11 sworn, assumed the witness stand, was examined
12 and testified as follows:

13 JUDGE JULIUS: Thank you very much, you
14 may have a seat.

15 THE WITNESS: Thank you.

16 JUDGE JULIUS: And before I turn the
17 mike over to the attorney to ask you questions,
18 I'll just give you a few instructions on the
19 process of testifying.

20 THE WITNESS: Yes, Your Honor.

21 JUDGE JULIUS: Please wait until the
22 full question is asked before you start giving
23 your answer. Maybe pause for a second after the
24 question is finished to see if there's an
25 objection that's lodged, if you hear the word

1 objection, please hold off, I will instruct you
2 if you should answer the question. And if you
3 need it repeated, I can certainly have it
4 repeated for you.

5 THE WITNESS: Okay.

6 JUDGE JULIUS: If at any time you get a
7 question you don't understand, just tell the
8 person you don't understand the question, and
9 we'll get it rephrased in a way that you do
10 understand, okay?

11 THE WITNESS: Thank you, Your Honor,
12 yes.

13 JUDGE JULIUS: Thank you. Whenever
14 you're ready, Mr. Evans.

15 DIRECT EXAMINATION

16 BY MR. EVANS:

17 Q Ms. Kelly, in the pre-hearing
18 statement, you were identified as working for
19 30, let me see if I got that right.

20 A 34 years.

21 Q 34 years in the Office of the Secretary
22 of the U.S. Department of Transportation.
23 Could you tell the court about that?

24 JUDGE JULIUS: Do you have an
25 objection?

1 MR. LONICH: Yes, Your Honor, we would
2 object to this witness on a few bases. First,
3 in the pre-hearing statement, if you notice, the
4 only mention of Ms. Kelly is on page 22
5 regarding her testimony, and it is a single line
6 that is also incorporated within another
7 witness's summary of testimony.

8 So we'd object on proper notice. Also,
9 Mr. Evans just mentioned that she's going to be
10 a legal expert or the expert in law, that's
11 impermissible testimony. If they want to
12 introduce legal documents for Your Honor to
13 consider later on, that's fine. However, we
14 already have a legal expert here, and that's
15 Your Honor.

16 So any analysis, interpretation, or
17 legal conclusions that are made, we object on
18 the basis of that.

19 JUDGE JULIUS: Okay. Do you want to
20 respond to the objection?

21 MR. EVANS: Well, she is here as an
22 expert, and could be a fact witness on the
23 development of the law. She was involved in
24 developing the law, she was involved in writing
25 the law, she worked there for 30 years in the

1 implementation of the law, that is mentioned in
2 our pre-hearing statement.

3 I'm not aware of anything under a
4 federal rule that requires that we give somebody
5 their resume in advance. As the court knows, we
6 had a very short time to prepare everything
7 here. We only had virtually a couple some days,
8 it's not the court's fault, but that's what we
9 were faced with.

10 So, I would ask the court's indulgence
11 if everything wasn't picture perfect, but we
12 also had an issue, originally I was going to
13 testify because I wrote the treatise on drug
14 testing, and then we realized that I had
15 petitioned the court to be able for me to
16 withdraw as counsel so I could be a witness,
17 that was denied.

18 And then we had to get Ms. Kelly, so I
19 would ask the court's indulgence on that. We're
20 interested in fact finding here, she's going to
21 talk about her experience and what she did for
22 the Department of Transportation.

23 JUDGE JULIUS: Understood. So, to the
24 extent that, within your response, I understand
25 you're saying that she could offer some fact

1 evidence, you've also said that she is an expert
2 in the law, are you offering her as an expert on
3 law? Because that would be a different issue.
4 I mean, I'm the one who has to determine the law
5 here, and experts don't give evidence on that.

6 MR. EVANS: Well, it's a little
7 difficult, for example, my statement earlier
8 that Schedule III will end drug testing is sort
9 of an interpretation of the law. It's a fact,
10 but it's an interpretation of the law. She is
11 an attorney, she wrote the rules, I can voir
12 dire her on that, and that can be acceptable.

13 JUDGE JULIUS: So, under the totality
14 of circumstances, I understand the nature of the
15 government's objection. I will allow the
16 witness to testify, I will consider her as a
17 fact witness, and if she wants to give her
18 opinion, she can do that. It won't be as an
19 expert in the law. I don't believe we have any
20 qualifications for her to be an expert in the
21 law, which otherwise is the domain of the court.

22 And then the government can certainly
23 argue whatever weight they think her evidentiary
24 testimony should be given in their closing.

25 MR. EVANS: Well, how about if I

1 withdraw an expert on the law, but an expert on
2 federal drug and alcohol testing for the
3 Department of Transportation?

4 MR. LONICH: Your Honor, if I may?

5 JUDGE JULIUS: Yes, go ahead, Counsel.

6 MR. LONICH: I understand that there
7 was a short turnaround for a lot of these
8 filings, however, their other witness
9 encompasses over 20 pages of summary of
10 testimony, and then we are limited to a single
11 sentence for Ms. Kelly, there was never notice
12 of what she was going to testify to.

13 If you read it in totality, Ms. Kelly
14 will testify as to a legal authority for federal
15 drug testing, period, and NDASA Exhibit Nos. 12,
16 13, 14, and 15. The only notice is that maybe
17 she's introducing those documents or she's
18 pointing you to the authority. There's no
19 facts, there's no analysis, we were never put on
20 notice of what this witness is going to testify
21 to.

22 And I'd also like to point out, just so
23 it's on the record, we received her resume or
24 her CV at 8:58 this morning.

25 JUDGE JULIUS: Has the court been

1 served with the CV or the resume?

2 MR. EVANS: I can give you a copy, Your
3 Honor. If I may approach the bench?

4 JUDGE JULIUS: Yes, if you want to hand
5 that to Mr. Phillips. Thank you, thank you.
6 She was disclosed as a witness, and it does
7 discuss what she may testify about. I'm willing
8 to give counsel some leeway here. I'm not
9 inclined to consider her as an expert witness,
10 but I will hear fact testimony from her.

11 And the government can raise the issues
12 that it wishes to raise in its closing
13 statement, much as the interested parties can
14 with regards to the government's witnesses. So
15 thank you, Counsel.

16 MR. LONICH: Yes, Your Honor. And one
17 more thing, Your Honor. We believe the NDASA's
18 other witness is sitting at counsel table, I
19 don't know if it's appropriate, pursuant to the
20 tribunal's order to have her sit out during this
21 testimony.

22 JUDGE JULIUS: Yeah. Do you plan to
23 call her to testify later today?

24 MR. EVANS: Well, if we have time
25 today, yes.

1 JUDGE JULIUS: Well, then consistent
2 with the preliminary order, she would need to
3 leave and be sequestered from the courtroom.

4 MR. EVANS: She can wait in the counsel
5 room.

6 JUDGE JULIUS: Thank you. Thank you
7 for raising that to the court's attention.
8 Thank you, ma'am.

9 MR. EVANS: Your Honor, just one other
10 comment. There's something that the DEA counsel
11 neglected to mention. In page five of our pre-
12 hearing order, it clearly states that during
13 more than 30 years at DOT, Ms. Kelly has worked
14 closely on writing and providing guidance on
15 DOT's drug and alcohol testing under 49 CFR Part
16 40.

17 Ms. Kelly was the lead author of DOT's
18 Oral Fluid Final Rule, which became effective
19 June 1st, 2003, and she served on assignment to
20 the National Drug and Alcohol Testing
21 Association for years, where she acted as a
22 senior policy executive advisor, is now retired.

23 So it was clear that they had notice that she
24 had worked closely on writing and providing
25 guidance on DOT's drug and alcohol testing.

1 She was the lead author of DOT's Oral
2 Fluid Final Rule, I think that's notice about
3 what she was going to testify about.

4 JUDGE JULIUS: Understood, sir.

5 MR. LONICH: Your Honor, may I be heard
6 on that point?

7 JUDGE JULIUS: I've already ruled --

8 MR. LONICH: Yes, ma'am.

9 JUDGE JULIUS: On the motion, I don't
10 know that further argument is really necessary
11 on this. I think --

12 MR. LONICH: I would just like to note
13 for the record that that is accurate, what he
14 wrote, but that is not encompassed within the
15 summary of testimony. It's under another
16 heading in their filing just identifying the
17 witness.

18 JUDGE JULIUS: Understood, Counsel.
19 But I'm allowing the witness for factual
20 testimony. Please proceed, Mr. Evans.

21 MR. EVANS: Well anyway, I won't
22 comment on that because we're supposed to
23 provide information, and we did it.

24 BY MR. EVANS:

25 Q Okay, Ms. Kelly, do you know how many

1 employees does federal drug testing cover?

2 A The exact number even the Department of
3 Transportation doesn't know, we'd have to
4 estimate it at somewhere around 10 million
5 people who are subject to it. There are more
6 than 7 million tests per year under the U.S.
7 Department of Transportation's program, which
8 actually makes it the largest regulated program
9 in the world, it's larger than the DOD's
10 program.

11 Q And that was the largest regulated
12 program in the world left out of the NPRM?

13 A Yes, sir.

14 Q Okay, now, over the years, what has
15 been the -- when there are drug has been the
16 lead in positive tests?

17 A Marijuana.

18 Q Okay. Now do you have knowledge about
19 President Reagan's Executive Order 12564, Drug-
20 Free Federal Workplace?

21 A Yes, I do.

22 Q Could you tell the court what you know
23 about it?

24 A Yes --

25 MR. SCHWARTZ: Objection, Your Honor.

1 THE WITNESS: That was very important
2 to implementing --

3 JUDGE JULIUS: Hold on, we have an
4 objection.

5 THE WITNESS: Sorry.

6 JUDGE JULIUS: What's the objection?

7 MR. LONICH: To any questions about the
8 executive order, the document speaks for itself.
9 We don't need comment, analysis, or any opinion
10 on it.

11 JUDGE JULIUS: Mr. Evans?

12 MR. EVANS: Well, Your Honor, the
13 executive order was the guide to everybody on
14 what to do, it doesn't require expertise to
15 interpret it. And everybody read it, including
16 non-lawyers, and matter of fact, most of the
17 people who've read it have been non-lawyers. I
18 don't think that this is a matter of expert
19 testimony or expertise.

20 You can read it, you can figure out
21 what it says. It doesn't require anything
22 beyond the ken of a normal juror, which is a
23 requirement for expertise. A normal juror could
24 read this and understand what it said.

25 JUDGE JULIUS: Well, I understand that.

1 Have you submitted that letter as an exhibit
2 that the court can look at if anyone can
3 understand it just on its face?

4 MR. EVANS: I believe we have, yes.

5 JUDGE JULIUS: Okay, and then I don't
6 know what additional service would be gained by
7 having her discuss it if the document speaks for
8 itself.

9 MR. EVANS: Well again, we would like
10 to get it on the record. When you worked at
11 DOT, were you guided by this executive order?

12 THE WITNESS: Yes.

13 MR. EVANS: Okay.

14 MR. LONICH: Excuse me, Your Honor,
15 objection pending.

16 JUDGE JULIUS: Right.

17 MR. LONICH: He needs to withdraw his
18 question, we need a ruling.

19 MR. EVANS: Okay.

20 JUDGE JULIUS: Are you withdrawing that
21 prior question or how are --

22 MR. EVANS: I will, I'll clarify it.
23 When you were working at DOT --

24 MR. LONICH: Your Honor, we have a
25 pending objection, we request that there be a

1 ruling made pertaining to this witness and this
2 line of questioning.

3 JUDGE JULIUS: With regard to the
4 question that was asked, I will sustain it. And
5 I understand that this document appears to be an
6 exhibit that's a proposed submission to this
7 Court.

8 BY MR. EVANS:

9 Q Okay, Ms. Kelly, when you were at DOT,
10 did you take any actions in response to the
11 president's executive order?

12 A Yes.

13 Q What actions did you take?

14 A So, at the U.S. Department of
15 Transportation, that executive order was kind of
16 our lodestar, it was the place we had to go to.
17 Because first, DOT in the late 80s, '88 to '89
18 had made all our final rules based on using HHS
19 as our scientists. And this executive order by
20 President Reagan, 12564, actually told HHS, You
21 will be in charge of the testing.

22 You'll test for illegal drugs those
23 illegal drugs are Schedule I and II, period.
24 And so what HHS did -- I'm sorry, the Department
25 of Health and Human Services, for clarification.

1 What HHS did was they created a program under
2 the Substance Abuse and Mental Health Services
3 Administration, the Division of Workplace
4 Programs, and they certified laboratories.

5 Certification of a laboratory, and
6 we're talking laboratories like the size, and
7 including Quest Laboratories, LabCorp, Abbott,
8 large laboratories as well as small ones. HHS,
9 because of President Reagan's executive order,
10 certifies those labs. It takes 6 to 12 months
11 to initially get certified.

12 Then HHS oversees those laboratories,
13 and HHS requires quarterly proficiency testing.

14 They go in two to four times per year, boots on
15 the ground in those laboratories, to make sure
16 they're doing what they're supposed to be doing.

17 And when my -- these were my predecessors, they
18 were two, three years before I got involved in
19 this area.

20 But they said, hey, we're going to use
21 these HHS labs, and we're going to look to HHS
22 for the drugs for which we test, and we're going
23 to look to HHS for the science because we're
24 transportation policy people. And they were
25 ordered to do this on a very short time line by

1 the administration.

2 So they said, We're going to fall back
3 on HHS as our colleagues, and what then happened
4 was in '91 when Congress passed the Omnibus
5 Transportation Employee Testing Act, Congress
6 said, that's nice, DOT, that you were using HHS.

7 We're going to affirm, and have you move
8 forward with your regulations, but from this
9 point forward, you will always use the
10 Department of Health and Human Services.

11 Their scientific and technical
12 guidelines, you will use them for certified
13 labs. So, all DOT testing, those 7 million
14 tests I mentioned, the initial screening and the
15 confirmation tests must be done at an HHS
16 certified lab.

17 Congress said under OTETA, DOT, you're
18 going to follow HHS for the drugs for which you
19 test. And so those things bound the Department
20 of Transportation. When I go out and do public
21 speaking, I say it's like we were courting HHS
22 before that, there was a courtship, and then
23 there was the shotgun wedding where Congress
24 expressed its clear intent that from that point
25 forward, we would move together with HHS.

1 MR. LONICH: Objection, Your Honor.

2 JUDGE JULIUS: What's the objection?

3 MR. SCHWARTZ: The witness is starting
4 to give opinion about congressional intent and
5 what these orders meant, so I just want to renew
6 the objection.

7 JUDGE JULIUS: That I would sustain.
8 If you just want to have her discuss what she
9 did and why she did it, those types of factual
10 questions.

11 MR. EVANS: Right, just what you
12 personally saw, heard, and what personal actions
13 you took.

14 THE WITNESS: Sure. So, we always knew
15 we had to move forward with HHS. I was very
16 involved in the HHS Federal Drug Testing
17 Advisory Board, as a matter of fact, I was the
18 longest serving member of DTAB, so I was
19 involved behind the scenes too with advising
20 them. HHS has been known as the gold standard
21 because of the thoroughness and the actual
22 detail that they put into every aspect of lab
23 certification.

24 So, at DOT in my role, I worked very
25 closely with HHS, I coordinated with them on all

1 my rulemakings, and I was very involved. First
2 I was involved with the FAA. When I started in
3 this area, I was the first of the FAA attorneys
4 to initiate civil penalties, and to revoke an
5 air carrier certificate under the drug and
6 alcohol rules.

7 I then moved into program management
8 because I saw the value in this program, and I
9 recognized that it was a combination of science,
10 law, transportation policy. And I continued
11 down the path, and got more and more involved
12 with the Office of the Secretary. In the year
13 2000, I was on the team who had authored the
14 current version of 49 CFR Part 40, for which we
15 received the Vice President's Plain Language
16 Award.

17 So it was a big deal, and from that
18 point on, DOT kept me involved in every single
19 one of their rulemakings intricately until I
20 moved into the office in 2007, and then I
21 continued with that. I shaped a lot of these
22 rules as both the deputy of that office in DOT
23 that was called the Office of Drug and Alcohol
24 Policy and Compliance.

25 I shaped a lot of the policy that

1 revolves around this, but worked intricately
2 with HHS. Bounced concepts off them, they
3 bounced concepts off me. So there was very much
4 a strong, effective working relationship between
5 DOT and HHS. Since the DOT's OTETA, since the
6 Omnibus Transportation Employee Testing Act, DOT
7 has continued to prevail on their court cases.

8 And I attributed a lot of that to the
9 fact that we worked transportation policy with
10 the HHS science, with the other things that we
11 were considering, public comments, and then we
12 came out with the regulations and moved things
13 forward. So, HHS is a very big part of the
14 DOT's program.

15 And we made sure that we moved forward
16 with them in lockstep on the science, but we
17 also knew that's what Congress told us to do. I
18 mean, obviously, that's in your domain to
19 determine that, but we knew what our mantra was.

20 And those were our marching orders, and that's
21 what we did. So, we made sure that we worked
22 that.

23 And then finally, I would say the HHS
24 mandatory guidelines were not only respected by
25 DOT, but the Nuclear Regulatory Commission

1 followed them, they were part of the DTAB with
2 us. And also domestically and internationally
3 in states, and around the world. The Federal
4 Air Surgeon of Nigeria came in and met with me
5 at one point when I was in the Office of Drug
6 and Alcohol Policy and Compliance.

7 And she said I follow Part 40 because
8 this is so important and it's so well done. And
9 that, again, brings it back to HHS was a major
10 driving force with the DOT regulations, and then
11 Congress made that official.

12 BY MR. EVANS:

13 Q Ms. Kelly, you mentioned domestically,
14 do you know, have any states implemented the DOT
15 HHS guidelines for testing for employees in
16 their states?

17 A Yeah, I can't name the states off the
18 top of my head, but I know it's in excess of 20
19 who follow, who require private employers such
20 as these NDASA members, the National Drug and
21 Alcohol Screening Association members. They
22 have to follow their state law, and more than 20
23 states require them to follow DOT and a few more
24 say HHS.

25 MR. LONICH: Objection, Your Honor,

1 same basis. We're getting into what states
2 require by law for people to follow, how they
3 implement these tests. I just believe it's
4 outside the scope, and we also renew our
5 objection that we weren't put on notice of any
6 of these items to be discussed.

7 MR. EVANS: Your Honor, it's a fact
8 issue of how many states. Also, I wanted some
9 clarity from the DOT, DEA about this issue,
10 about the executive order. What exactly was
11 your objection about her testifying about the
12 executive order?

13 MR. LONICH: The order was already
14 ruled on.

15 MR. EVANS: No, because I'm going to
16 bring that up later on. I'm going to bring up
17 another executive order, and I would like to
18 know what their position is on it.

19 MR. LONICH: If and at that time he
20 chooses to do so, we will make an objection if
21 appropriate.

22 MR. EVANS: Okay, well I believe that
23 they said that she didn't have the
24 qualifications to testify.

25 JUDGE JULIUS: Well, what you stated

1 was that the document is plain on its face, that
2 anyone reading it can understand it. I'm not
3 looking for someone to interpret a document that
4 you yourself acknowledge is plain on its face.

5 MR. EVANS: Right, well there has been
6 a subsequent executive order, on December 18th
7 President Trump issued one about going down to
8 Schedule III, so I just want to make sure that -
9 -

10 MR. LONICH: Your Honor, can we confer
11 a moment?

12 MR. EVANS: Yeah.

13 JUDGE JULIUS: Of course.

14 MR. LONICH: Thank you.

15 MR. EVANS: Well, the reason I bring it
16 up is that there was another executive order by
17 President Reagan December 18th, 2025, and that
18 had to do with scheduling. And matter of fact,
19 that was probably the reason that we're here
20 today. And if they're objecting to people
21 reading that order, understanding it, I hope
22 they apply it to that also.

23 BY MR. EVANS:

24 Q Okay, Ms. Kelly, do you know why
25 federal drug testing began?

1 A Yes. Federal drug testing began
2 because of President Reagan's recognition that
3 drug use causes absenteeism, causes illness in
4 the workplace, causes accidents in the
5 workplace, reduces reliability. And so
6 President Reagan said it's time for us to
7 require federal employees to be subject to drug
8 testing. Then --

9 Q Ms. Kelly, what do you mean by reduces
10 reliability, what did you mean by that?

11 A Well, because employees are less able
12 to focus when they're actively using Schedule 1
13 and Schedule 2 drugs, or that was the intent of
14 President Reagan to address drugs for which
15 somebody's cognition, or eye hand coordination,
16 or other aspects are impacted. So, it began
17 with President Reagan saying hey, we've got to
18 pay attention to this.

19 In addition, in the executive branch,
20 we were seeing, as regulators, accidents
21 happening in each of the modes of
22 transportation. And I know the Senate report
23 that goes along with OTETA addresses this. But
24 from the perspective of my work as a federal
25 employee, we were very aware of the train

1 crashes, of the Northwest Airlines pilots who
2 liked the rum and Coke in the cockpit.

3 Of the other accidents that are
4 detailed, and incidents that are detailed in
5 that Senate report, that became part of what
6 guided us in doing this. Then the actual final
7 impetus that pushed this forward through the DOT
8 agencies was the crash of the Amtrak train with
9 the Conrail train in Chase, Maryland in 1987.

10 It was January of '87, the train was
11 loaded with families traveling at the holidays,
12 with college kids, with others. It was an
13 afternoon, a clear, bright afternoon in January.

14 And the Amtrak train came around a turn and
15 crashed into a Conrail train that was sitting
16 there on the tracks.

17 Because the two engineers of the
18 Conrail train missed three signals, and ended up
19 stopping on the tracks. At that point, it was
20 the largest fatality that Amtrak had ever seen.

21 It was tragic, and we all realized we needed to
22 do something about it. And as I said, I'm
23 talking about that from a corporate culture.

24 Because I came onto the department
25 shortly after that, but I knew the attorneys who

1 had written it, those regulations, and they were
2 literally told in each of the modes, you go into
3 a room and you do not come out until you've got
4 an NPRM, or an interim final rule, and that's
5 what the real impetus was, the final straw.

6 That's also when Congress started going
7 on the Omnibus Transportation Employee Testing
8 Act, is they said okay, this is enough, we don't
9 want to see this anymore. And it's a matter of
10 fact, one of the Conrail conductors, Ricky
11 Gates, he testified before Congress and said
12 please implement drug testing.

13 MR. LONICH: Objection, Your Honor,
14 hearsay.

15 MR. EVANS: That's hearsay, you can't
16 say what somebody else said.

17 THE WITNESS: Okay, it's in the public
18 domain. Sorry, I read about that too.

19 MR. EVANS: Still hearsay.

20 THE WITNESS: Okay.

21 MR. EVANS: Go ahead.

22 THE WITNESS: So, we implemented drug
23 testing, and it started with the air carriers,
24 the trucking companies, transit, the rails, the
25 Coast Guard, and the oil and gas folks. So, it

1 started with all of them in late '89, early
2 1990, so the implementation was pretty much done
3 by April 15th of 1990. That was the point where
4 I stepped in as an enforcement attorney shortly
5 after that and carried out the cases for those
6 who were not properly implementing.

7 BY MR EVANS:

8 Q Thank you. Was there an NPRM proposed
9 by the attorney general and DEA in 2024?

10 A Yes.

11 Q Before that was published, were you
12 consulted about it?

13 A No.

14 Q Are you aware whether or not DOT was
15 consulted about it?

16 A Officially, no, because officially on
17 that time, I was on the details of the National
18 Drug and Alcohol Screening Association under an
19 IPA. So officially, no.

20 Q Okay. But do you think -- well, do you
21 have any knowledge that people in the Attorney
22 General's office or DEA were aware of this
23 problem with drug testing at that time?

24 A Throughout the federal government,
25 those of us with security clearances, such as

1 myself at the time, were subject to drug
2 testing. So, we knew that drug testing was
3 going on, and maybe I knew more about it than
4 the average person, but I knew this came through
5 HHS, so yeah, pretty much the public.

6 Well, and it's Federal Register, so
7 it's noticed to all. Yes, we all knew HHS was
8 at the head of all the drug testing.

9 Q Okay. Now, you were working for NDASA
10 at that time?

11 A No, I was working for the Secretary of
12 Transportation on detail to NDASA. So, I was
13 actually a -- so my office, the Office of Drug
14 and Alcohol Policy and Compliance, where I
15 worked until I retired last year, is part of the
16 secretary's staff, which is a little unusual.
17 Actually, the HHS office is down in an agency.

18 We were part of the Speaker 1: Office,
19 so I conferred with secretaries of
20 transportation, my job was to keep them informed
21 on drug and alcohol policy, keep them informed
22 on the actions of HHS, the White House also
23 conferred with me. I became the government's
24 expert in the Omnibus Transportation Employee
25 Testing Act.

1 So they all came to me, said what does
2 this mean? Do we have any flexibility here?
3 What have you, that was essential to my job as
4 the director of ODAPC, but also because I had
5 built that credibility within the government. I
6 used to work with DEA on a regular basis, we did
7 a lot of conferring and cross conferring too.

8 Q Well, my question is this, did anybody
9 from the attorney general's office contact you
10 in your role as a DOT employee detailed to NDASA
11 about the NPRM?

12 A No.

13 Q Okay. So, it was your job on detail at
14 NDASA. Again, could you say what you were
15 supposed to do regarding your superiors at DOT?

16 A Well, I still had conversations with my
17 superiors at DOT, and yes, people at DOT said
18 what does this mean? And so I was actually
19 conferring back with them to explain what that
20 original NPRM meant. But the point was, I was
21 still a DOT employee, which is why I was not on
22 the witness list back then, because I was a
23 federal employee.

24 But I was I don't know what else, I was
25 definitely involved with informing DOT about

1 what that original order meant in June of 2024,
2 or I'm sorry, not order, NPRM.

3 Q Okay. What actions would you have
4 taken had the attorney general or DEA came to
5 you about the NPRM, what would you have done?

6 MR. LONICH: Objection, Your Honor.

7 JUDGE JULIUS: What's the objection?

8 MR. LONICH: The relevance. She
9 testified she wasn't contacted, it's also
10 speculative what she would have done. I just
11 believe it's outside the bounds of this --

12 MR. EVANS: Well, I don't think it's
13 speculative. I think she would have had a very
14 clear idea of what she would have done had she
15 been contacted. Did you have a clear idea?

16 JUDGE JULIUS: Hold on, I need to rule
17 on the objection.

18 MR. EVANS: I'm sorry.

19 MR. LONICH: Your Honor, it is
20 speculative, we don't know what questions they
21 would have asked or what would have been done.
22 She testified just now that she was never
23 contacted.

24 JUDGE JULIUS: I will sustain that
25 objection.

1 BY MR. EVANS:

2 Q Okay. Did anybody from HHS contact you
3 about the NPRM?

4 A Yes.

5 Q Who was that?

6 A Ron Flegel, who was the director of the
7 Division of Workplace Programs and in charge of
8 the National Laboratory Certification Program,
9 and who was responsible for the mandatory
10 guidelines, which outlined the drugs for which
11 we test, it was the science.

12 Q Now, was this before or after the NPRM?

13 A After.

14 Q After?

15 A Yeah.

16 Q Okay, so HHS, and what did you tell Mr.
17 Flegel?

18 A We discussed the fact that Schedule III
19 would put this out of our reach --

20 MR. LONICH: Objection, Your Honor.

21 JUDGE JULIUS: Hold on, there's an
22 objection pending.

23 THE WITNESS: I'm sorry.

24 JUDGE JULIUS: That's okay. What's the
25 objection?

1 MR. LONICH: I believe the response is
2 going to be hearsay based on these discussions
3 that she may or may not have had.

4 MR. EVANS: Could you speak louder,
5 please? I can't hear you.

6 MR. LONICH: Yes, it's a hearsay
7 objection, sir.

8 MR. EVANS: No, I asked what she told
9 him, that's not hearsay.

10 MR. LONICH: That's an out of court
11 statement that is going to be offered, Your
12 Honor, I don't --

13 JUDGE JULIUS: But a statement she made
14 to someone else.

15 MR. EVANS: It's a statement she made,
16 that's not hearsay. Hearsay, when you're trying
17 to authenticate the communication from another
18 person where the person cannot be present to
19 testify, she's here to testify about what she
20 said.

21 MR. LONICH: We still maintain it's a
22 hearsay objection, she's going to testify to out
23 of court conversations.

24 JUDGE JULIUS: Overruled.

25 MR. EVANS: Okay. And by the way, Your

1 Honor, am I reclaiming all the time that we're
2 spending on this?

3 JUDGE JULIUS: You're not charged for
4 discussions on objections.

5 MR. EVANS: Okay, thank you, Your
6 Honor.

7 THE WITNESS: Can I just further
8 clarify?

9 MR. EVANS: Wait, wait, wait.

10 THE WITNESS: Okay.

11 BY MR. EVANS:

12 Q Okay. Do you have anything you'd like
13 to clarify about your previous testimony?

14 A Yes, I do.

15 Q What?

16 A So, I advised Ron Flegel, I advised my
17 colleagues at DOT, I advised my colleagues on my
18 IPA at the National Drug and Alcohol Screening
19 Association that moving marijuana to Schedule
20 III would put it outside our reach. As
21 transportation policy people, as regulators, in
22 every possible way, it would put it out of our
23 reach.

24 Thereby making this the most profound
25 action that had happened in drug and alcohol

1 testing since the Chase, Maryland crash.

2 Q Are you aware of any actions that they
3 took as a result of your communications with
4 them?

5 A Yes, I know that they communicated that
6 to others, but importantly, I was also at that
7 point advising DOT leadership to a certain
8 extent, so I was getting the information
9 through.

10 Q Okay. To your knowledge, did anybody
11 do anything to try to remedy the complaint that
12 you brought up?

13 A There were continuing discussions. I
14 wrote papers and provided them to my colleagues
15 in the government so that they could proceed
16 with them. Whether or not they did, I don't
17 know. But I provided a lot of documentation to
18 explain exactly what the issues were, and how
19 profound the impact was to our programs.

20 Q The NPRM was issued, what was it, May I
21 think?

22 A April 28th.

23 Q April 28th.

24 A Wait a minute, the NPRM was May of
25 2024.

1 Q May of 2024?

2 A Into June, yeah. Late May, early June.

3 Q Okay. So, you were involved in
4 continuing discussions after that, is that
5 correct? Is that what you said?

6 A Yes.

7 Q Okay. Why did you -- did you think
8 that was appropriate to do?

9 A Yeah, because at that point I had a
10 unique position, being on an intergovernmental
11 personnel agreement where I could speak to DOT
12 and I could speak to NDASA, and their
13 membership. And frankly, because this was going
14 to have such a profound impact. Because I had
15 considered myself to be a transportation safety
16 professional for my entire career.

17 Even now, this is what I'm dedicated
18 to, I have a consulting business, I don't get
19 paid for this. This is because I have always
20 cared that deeply about transportation safety.
21 So, because this was going to be so detrimental
22 to safety, and I know one of the victims of the
23 Chase, Maryland crash.

24 I didn't find out that we had that in
25 common until about 10 years ago, known her

1 longer. But I promised to her, and when I go
2 out and I do my public speaking, I tell people
3 that my neighbor, my friend Heidi, she says
4 please keep doing what you're doing. Please
5 don't let another Chase Maryland accident
6 happen.

7 And that has been part of what drives
8 me, and has driven me through my federal career,
9 and now in my retirement.

10 Q Is Heidi a real person?

11 A Yes, she is, she was at a press
12 conference on May 21st.

13 Q Okay. Why did you pursue this after
14 the NPRM was published? I mean, it was done.
15 The DEA's taken the decision, they didn't want
16 to hear anything after that. Why did you do
17 that?

18 A No, respectfully I would disagree with
19 that, because a Notice of Proposed Rulemaking,
20 having been a federal regulatory attorney for
21 much of my -- well actually I was not an
22 attorney, I was policy, but regulator, it was a
23 policy and regulator position.

24 When you issue a notice of proposed
25 rulemaking, an NPRM, you on the federal side are

1 seeking public comment consistent with the
2 Administrative Procedures Act. And I always
3 prided myself on reading every single public
4 comment, and on responding meaningfully to every
5 public comment.

6 As a regulator, I looked for where my
7 blind sides were, and quite often my public
8 commenters would tell me exactly what I missed,
9 and it did cause me to change the regulations
10 that I had proposed, and that my office had
11 proposed, because that's what we're supposed to
12 do under the Administrative Procedures Act, but
13 it's also the right thing to do.

14 When people tell you, you made a big
15 mistake, or this is a blind side that you've
16 missed, then you have a duty, in my opinion, as
17 a regulator for my career, I had a duty to
18 address and rectify that. You know, public
19 comment periods are not elections, you don't go
20 on who likes it more or who likes it less.

21 You go on what people differentiate for
22 you, what they tell you you've got accurately
23 and what you've missed. So, I felt the duty on
24 this was to sound the alarms, as it were a Paul
25 Revere of sorts, to go out and tell industry,

1 because I was on this detail, and tell NDASA,
2 and to tell my federal colleagues hey, this is
3 really important, we all need to know this.

4 And then that's what NDASA put into
5 their comments to this docket. NDASA filed two
6 sets of comments, Part 1 of 2, and I know that's
7 in the record here, Part 1 of 2 was specifically
8 on this exact issue of Schedule III putting this
9 outside the reach of federal drug testing, both
10 for HHS and the employees such as air traffic
11 controllers.

12 Because again, as a transportation
13 person, they're pretty important in the system.

14 And I have done more than 250 public
15 presentations, trainings, what have you, I have
16 yet to find a person who tells me I would love
17 for my airline pilot, my air traffic controller,
18 or my kids school bus driver to be using
19 marijuana.

20 Thank you for deterring that use. And
21 so again, that was part of the picture I felt
22 that we had the duty to raise it to the DEA. So
23 through my federal contacts, I know that they
24 were using their own channels, or I trust that
25 they were using their own channels.

1 Working with NDASA, I was helping to
2 write those documents so that we could provide
3 the DEA with clear information, because they did
4 have a blind spot.

5 Q Now, you say that NDASA submitted
6 comments, what year was that?

7 A 2024. So, first comment was part one
8 of two, which I said focused on this issue, and
9 proposed an executive order, a draft executive
10 order. That was submitted in June of 2024.
11 Subsequently, they applied to be in the hearing,
12 which I believe they also submitted in June of
13 2024, and then finally came Part 2 of 2 on the
14 comments where other issues were addressed.

15 Not part of this Schedule III taking
16 things out of testing. And that one, they
17 submitted, I think, in July.

18 Q Do you know if other entities or
19 individuals also submitted public comment in
20 response to the NPRM?

21 A Yes, many, many, many, but in fairness
22 to the DEA, the DEA was dealing with almost
23 40000 comments, so they were drinking from a
24 fire hose, that is extraordinary.

25 Q I'm sorry. Do you know if the DEA made

1 a selection for people to participate in the
2 hearing out of those 40000?

3 A More than 3500 applied to actually
4 speak at the hearing, and NDASA was chosen, and
5 it was determined that they had standing. And
6 then we also had to address standing again
7 because Judge Mulrooney had asked that -- that
8 be addressed again. So we emphasized who the
9 NDASA members were, and why this was impacting
10 them financially and otherwise, and from a
11 safety standpoint.

12 Q Okay, so just so that I'm clear on
13 this, who made the initial decision that NDASA
14 had standing?

15 A Judge Mulrooney -- no, I'm sorry, it
16 was the DEA administrator, because it was not
17 Part 1 of 2 of the comments, I believe it was
18 the DEA administrator, because then she
19 forwarded it over to Judge Mulrooney, and to
20 your office, Your Honor.

21 Q And did Judge Mulrooney engage in a
22 standing analysis again?

23 A Yes, there were written documents.

24 Q Okay. And do you know why on the
25 record, why did Judge Mulroney revisit standing?

1 It was in his order, do you know why?

2 MR. LONICH: Objection, Your Honor, as
3 to relevance. Discussing a different proceeding
4 that's not permitted.

5 MR. EVANS: Well, I think it's relevant
6 to this hearing, Your Honor, because there were
7 organizations, including my organization,
8 Cannabis Industry Victims Educating Litigators,
9 that were given standing by Judge Mulrooney.
10 And all of that was wiped out by the DEA, and
11 then the second time around, CIVEL was denied
12 standing, as were other organizations.

13 So, that gets to the fairness of this
14 process, we were given standing by judicial
15 order. And I just want to put it on the record,
16 we were given standing by a judicial order, the
17 DEA wiped it out, wiped the slate clean, and
18 started all over again and only selected seven.

19 Originally, the DEA had selected 25.

20 And so one of our complaints in federal
21 court right now before the D.C. Court of Appeals
22 is that we were not given administrative due
23 process, and that we were damaged by that. So,
24 I just want to get it on the record that, what
25 your understanding was about that.

1 JUDGE JULIUS: Well, that sounds like
2 something you would litigate before the D.C.
3 Circuit, not here. I don't understand how she's
4 going to testify about other organizations or --

5 MR. EVANS: Well, you're right, you're
6 right. But I just -- okay, to your knowledge --

7 JUDGE JULIUS: Hold on.

8 MR. EVANS: Yeah.

9 JUDGE JULIUS: I need to rule on the --

10 MR. EVANS: Sorry.

11 JUDGE JULIUS: So, are you withdrawing
12 that question and moving on?

13 MR. EVANS: I'll withdraw the question,
14 Your Honor.

15 JUDGE JULIUS: Okay, thank you,
16 Counsel.

17 BY MR. EVANS:

18 Q Okay, I think you've covered that.
19 Does the Department of Transportation, on its
20 own, without any other law, have authority to
21 conduct drug testing?

22 A No. And let me, and if I may, just
23 clarify that. The Department of Transportation
24 did cull their general safety authority to put
25 together those 1988 and '89 rules, but then

1 Congress came in and changed everything for us.
2 So we followed OTETA after that because
3 Congress was very clear in what they wanted us
4 to do.

5 So, we knew at that point we couldn't
6 use our general safety authority because
7 Congress had cut that away.

8 Q Okay, I'm going to ask you some
9 questions. The testing you mentioned covered
10 safety sensitive employees?

11 A Yes.

12 Q Okay. Are airline pilots included in
13 that definition?

14 A Yes, they are.

15 Q Are aircraft maintenance personnel
16 included?

17 A Absolutely.

18 Q Are flight attendants included?

19 A Yes, they are.

20 Q Truck drivers?

21 A Yes.

22 Q School bus drivers?

23 A Yes.

24 Q Railroad engineers?

25 A Yeah.

1 Q Maintenance of way employees?

2 A Yes.

3 Q What is a maintenance of way employee?

4 MR. LONICH: Objection, Your Honor.

5 THE WITNESS: They're the folks who
6 work on the tracks.

7 JUDGE JULIUS: Hold on, I have an
8 objection pending.

9 THE WITNESS: I'm sorry.

10 MR. LONICH: It's a little leading.

11 MR. EVANS: What, asking -- I don't have
12 any other way to ask it.

13 THE WITNESS: I can give you the list.

14 MR. EVANS: All right, give me the
15 whole list.

16 JUDGE JULIUS: Sustained, but new
17 question.

18 MR. EVANS: Okay, and what was leading
19 about it, that I used the word truck driver?

20 JUDGE JULIUS: If you'd like for her to
21 list, you were going to ask a question, go ahead
22 and ask that question.

23 BY MR. EVANS:

24 Q Okay. Can you list who is included in
25 safety sensitive employees?

1 A Yes, I can. It's airline pilots, it's
2 flight attendants, it's aircraft maintenance
3 folks, there are other people, there are seven
4 categories or eight categories under the FAA's
5 regulation. So we had FAA, we had FMCSA, the
6 Federal Motor Carrier Safety Administration,
7 they've got the truck drivers, they've got the
8 school bus drivers.

9 They've got the folks who carry
10 passengers in vehicles that hold 14 or more
11 people. We've got, after FMCSA, we've got the
12 Federal Railroad Administration, obviously,
13 they're the locomotive engineers, as well as the
14 maintenance of way, because we found that a lot
15 of people were getting killed working on the
16 tracks because they were high on marijuana.

17 So, maintenance of way was subsequently
18 added to the FRA group. We have Federal Transit
19 Administration, so the folks who run the Metro.

20 Actually, also the folks who carry the guns in
21 the Metro Police throughout the United States of
22 America. The people who run the public buses,
23 they're all under Federal Transit.

24 We've got the Pipelines and Hazardous
25 Materials Safety Administration, those are the

1 folks with the oil and gas pipelines. The
2 liquid natural gas, we see what happens when
3 they make mistakes with those, whole blocks of
4 houses blow up, so we considered that to be very
5 important.

6 And oil and gas transportation, that is
7 something that's covered by the Department of
8 Transportation, a lot of people don't know that.

9 And then the United States Coast Guard was part
10 of us at DOT until after 9/11, as you know, and
11 then they were moved into Homeland Security, but
12 Coast Guard stayed with DOT through a memorandum
13 of understanding, and continue to follow.

14 So for Coast Guard, it's the mariners,
15 think of the people who run the ferry boats, and
16 others. So it's really important in all of
17 those categories that those people who touch our
18 lives, who are key in transportation safety and
19 have a direct impact on the safety and safe
20 operations, are subject to testing.

21 There are a lot of people who are not
22 subject to testing, and some of them might be
23 contrary to our common sense, but nonetheless,
24 DOT has clearly, the DOT agencies have clearly
25 defined who's subject to testing, and that has

1 stood up before the federal courts. So, and you
2 know, transportation is so important to all of
3 our lives.

4 When you think about, and especially
5 with the 4th of July weekend, we think about
6 life, liberty, the pursuit of happiness, where
7 would we be if we couldn't trust our public
8 transportation systems? And that was one of the
9 things that drives me and my colleagues, my
10 former colleagues who are at DOT.

11 I've been retired a year, and it still
12 feels like a we situation, because now that I'm
13 outside, as I said, safety's still my mantra.

14 Q You mentioned Coast Guard. Could you
15 elaborate more on what Coast Guard employees are
16 covered?

17 A Well, it would be the Coast Guard
18 mariners, so those who are involved in
19 commercial operations. Those would be freight,
20 those would be the folks who hit Key Bridge in
21 Baltimore. Those would be people with the Exxon
22 Valdez, it's those individuals, whether you're
23 talking about small boats or large ones.

24 Also the D.C. DUKWs, and the DUKWs that
25 you have in the other cities across the US that

1 are the amphibious vehicles that go on land and
2 sea. So, those folks are also covered by the
3 Coast Guard, because those vehicles traverse
4 from land onto sea.

5 Q Have you become aware in any way that
6 the Coast Guard is involved with the DEA?

7 A I have no knowledge of that. Well, I
8 mean on the interdiction side. I'm sorry, that
9 was part of my work as the director of the
10 Office of Drug and Alcohol Policy and
11 Compliance. I worked closely with the Office of
12 National Drug Control Policy, and with DEA, and
13 with other agencies because we dealt with
14 prevention and interdiction. So, yes.

15 Q My question is, were the Coast Guard
16 employees who were involved in interdiction
17 subject to testing?

18 A It depends on their job, if they have a
19 security clearance, they would be. Other than
20 that, each agency is allowed to come up with
21 their own testing designated positions, just
22 like the DOT agencies were allowed to come up
23 with those safety sensitive positions and the
24 types of commercial employers we were going to
25 cover.

1 Well obviously, you don't have the
2 types of commercial when you're talking about
3 internal government, but yes, each of our
4 agencies were allowed to pick their own testing
5 designations, and those testing designation
6 positions were subject to testing. I also
7 worked a lot with those internal programs.

8 Because a lot of times they were not
9 getting all of the information or assimilating
10 it, so I was asked to be on some working groups
11 with them too, to kind of keep everybody in the
12 loop. I believed that we would have better
13 safety policies across the government if we
14 communicated.

15 Q Ms. Kelly, I don't think I have
16 anything else to ask you. Is there anything
17 that I left out that you would like to share?

18 MR. LONICH: Objection, Your Honor.

19 MR. EVANS: No?

20 MR. SCHWARTZ: Calls for a narrative.

21 THE WITNESS: No, sir.

22 MR. EVANS: Okay, I'm --

23 JUDGE JULIUS: Sustained, but we got
24 the answer, and there wasn't anything --

25 MR. EVANS: Right. Your Honor, we're

1 done.

2 JUDGE JULIUS: Okay.

3 MR. EVANS: Ms. Kelly, thank you very
4 much, thank you for your years of service, and
5 your dedication to public safety.

6 THE WITNESS: Thank you.

7 MR. EVANS: And I hope that in the end,
8 that all of your efforts will be rewarded with
9 some sensibility on the part of the DEA. Thank
10 you.

11 JUDGE JULIUS: So what I would suggest
12 at this point, we're a little ahead of schedule,
13 is to take our 15 minute break a little early,
14 and then give government an opportunity for
15 cross examination.

16 MR. SCHWARTZ: Your Honor, if it
17 pleases the Court, I anticipate the cross to be
18 very quick. I don't think it's going to impact
19 any break or anything.

20 JUDGE JULIUS: Okay, let's proceed that
21 way, then. I think our schedule is, since we
22 were so far ahead yesterday, our schedule's a
23 little bit out the window today. So, go ahead,
24 Counselor.

25 MR. LONICH: Ma'am, good morning, how

1 are you?

2 THE WITNESS: Good morning, I'm well,
3 thanks. How are you?

4 CROSS EXAMINATION

5 BY MR. LONICH:

6 Q I just have two really quick questions.

7 Based on your testimony today, you would agree
8 that this drug testing is a serious issue that
9 needs to be addressed by employers, correct?

10 THE WITNESS: Can you clarify what you
11 mean by employers?

12 MR. LONICH: A lot of your testimony
13 today focused on workplace and transportation
14 safety, is that accurate?

15 THE WITNESS: Yes.

16 BY MR. LONICH:

17 Q And then the drug testing that you
18 mention focuses on employment drug testing,
19 correct?

20 A Yes.

21 Q So these issues that you discuss,
22 that's on the employment side, is that fair to
23 say?

24 A The federal employment side, yes, and
25 through HHS. So yeah, HHS really drives the

1 DOT, the federal testing, and the non-federal
2 testing.

3 Q Okay, so it's public and private
4 testing on employer's side?

5 A That HHS drives, yes.

6 MR. LONICH: Okay, thank you. That's
7 it, Your Honor. No further questions.

8 JUDGE JULIUS: Any redirect, Mr. Evans?

9 MR. EVANS: No, Your Honor. I'm very
10 satisfied with her testimony.

11 JUDGE JULIUS: Very good. Thank you
12 very much, ma'am.

13 THE WITNESS: Thank you, Your Honor.

14 JUDGE JULIUS: Any potential that she would be
15 recalled for any reason?

16 MR. EVANS: It's possible, depending on
17 what they come up with.

18 JUDGE JULIUS: Okay.

19 MR. EVANS: She's going to be here, she
20 planned on -- he lives in the area, so we were
21 planning on finishing up on Monday. So she'll
22 be here, my other witness will be here for the
23 weekend also, so we'll be around.

24 JUDGE JULIUS: Does government want to
25 be heard on something?

1 MR. LONICH: No, Your Honor. I was
2 just --

3 JUDGE JULIUS: Okay, I just saw you
4 standing, I just wanted to make sure.

5 MR. LONICH: I'll sit down.

6 JUDGE JULIUS: Okay, so I'll go ahead
7 and just say, please don't discuss your
8 testimony with anyone until a decision is made
9 about whether you will be recalled or not, just
10 to make sure that there's no concern about any
11 impact on any further testimony you may provide
12 to this tribunal.

13 THE WITNESS: Yes, Your Honor, I
14 understand. Thank you, sir.

15 JUDGE JULIUS: Thank you very much,
16 you're free to leave the witness stand, and
17 leave the courtroom.

18 THE WITNESS: Thank you.

19 JUDGE JULIUS: And because you may be
20 recalled, I would ask that you not sit in the
21 courtroom during further testimony so that it
22 would not impact any future testimony you may
23 provide to this tribunal.

24 THE WITNESS: Yes, sir, thank you.

25 JUDGE JULIUS: Thank you for your

1 testimony.

2 THE WITNESS: Thank you.

3 MR. EVANS: No, actually, she can sit
4 outside right here.

5 JUDGE JULIUS: Yes. Let's go ahead and
6 take our break at this point. Let's take a 15
7 minute break, and then I'll allow Mr. Evans, you
8 can call your second witness, and we'll proceed
9 that way. Let's come back at 10:26. That'll be
10 15 minutes exactly. Thank you, everyone. We'll
11 be in recess.

12 (Whereupon, the above-entitled matter
13 went off the record at 10:11 a.m. and resumed at
14 10:27 a.m.)

15 MR. EVANS: I am, Your Honor. I call
16 Jo McGuire -- Mary Jo McGuire.

17 JUDGE JULIUS: Excellent. Good morning,
18 ma'am.

19 MS. MCGUIRE: Good morning.

20 WHEREUPON,

21 MARY JO MCGUIRE,
22 having been first duly sworn, testified as
23 follows:

24 JUDGE JULIUS: And before you're seated,
25 please raise your right hand. Do you swear or

1 affirm that everything you say in these
2 proceedings will be the truth, the whole truth,
3 and nothing but the truth?

4 MS. McGUIRE: Yes.

5 JUDGE JULIUS: Thank you so much. You
6 may put your hand down and be seated. I'll give
7 you just a few instructions about the process of
8 testifying, just for clarity of the record.
9 Please wait until the entire question is asked
10 before you begin your answer. Maybe pause a
11 second before beginning your answer to see if
12 the question draws an objection. If you hear
13 the word objection, just sit tight. I'll have
14 to rule on it, and then I'll instruct whether
15 you should answer or not.

16 MS. McGUIRE: Okay.

17 JUDGE JULIUS: And if at any time you
18 get a question you do not understand, please
19 tell the person who asked you that you don't
20 understand their question, and we'll have it
21 rephrased. Okay?

22 MS. McGUIRE: Thank you.

23 JUDGE JULIUS: Thank you.

24 `Mr. Evans, the witness is yours.

25 DIRECT EXAMINATION

1 MR. EVANS: Ms. McGuire, by whom are
2 you employed?

3 THE WITNESS: The National Drug and
4 Alcohol Screening Association.

5 BY MR. EVANS:

6 Q And could you describe what your title
7 is?

8 A I'm the executive director.

9 Q And what are your duties there?

10 A My primary duties are to be a liaison
11 between the U.S. Department of Transportation
12 and those on the ground that are conducting
13 workplace transportation safety drug testing
14 programs. So, we have a variety of educational
15 and training programs, certification programs,
16 accreditation. I also am responsible for
17 creating the community of folks in the industry
18 to keep them apprised of changes, of updates, of
19 proper protocols. I have weekly meetings with
20 all of the different service agents in our
21 industry, open town hall forums, et cetera.

22 I also run an annual conference for the
23 industry that provides training, education and
24 certification and keeps them, again, apprised of
25 things that are current and what are drugs that

1 are trending. Are there any changes to drug
2 metabolites that we're testing for, et cetera?

3 Q Okay. And who are the members of your
4 organization?

5 A The members are pretty much anybody who
6 touches a drug testing program, so the medical
7 review officers, the substance abuse
8 professionals, the labs, the toxicologists, the
9 people on the ground that are collecting the
10 specimens. But we also have a significant
11 number of employers and what we refer to as
12 designated employer representatives, which would
13 be those who are running a company's drug
14 testing program. A lot of those are safety
15 managers that wear multiple hats, HR
16 departments, et cetera. So we're really anybody
17 that is involved, including other associations.

18 Q Okay. Are there any national
19 organizations that are members of your --

20 A Yes, absolutely. We have --

21 Q Could you give me some examples,
22 please?

23 A Yes. We have, for instance, the
24 American Medical Association of Medical Review
25 Officers. We have the Association of Short Line

1 Railroads. We have airlines, you know, the
2 American Trucking Associations. We have a
3 variety of other associations that are on a
4 national level.

5 I also want to point out we have a lot
6 of state municipalities, like public utilities
7 entities. Some of those are regional: the
8 northwest, southwest regions. So it's pretty
9 significant, those that are running huge safety
10 programs across the country.

11 MR. EVANS: I'd like her qualified as a
12 fact witness to testify about her organization
13 and the activities of its members.

14 JUDGE JULIUS: Any objection?

15 MR. LONICH: No objection, Your Honor.

16 JUDGE JULIUS: Very good.

17 MR. EVANS: Do you know what the DO,
18 drug testing, means?

19 THE WITNESS: Yes, I do.

20 BY MR. EVANS:

21 Q What is it?

22 A The DOT.

23 Q Excuse me, DOT drug testing.

24 A DOT drug testing program. Thank you.

25 This is a safety program that was put into place

1 primarily in 1991, post the Chase Maryland
2 Conrail crash that is meant to deter and detect
3 employees from abusing substances or coming to
4 work under the influence of substances. The
5 point is to create a safe working environment,
6 not just for the employee themselves and their
7 coworkers, but also for the public, primarily
8 for DOT, public transportation, and the
9 traveling public. So, it is a safety program.
10 It's a deterrence program, and one of the things
11 that I think is the most significant about the
12 DOT testing program -- it creates a pathway for
13 employees to return to work in a safe manner
14 after evaluation by a substance abuse
15 professional and then a follow-up program that
16 can help them keep their job.

17 Q Okay, now why not just fire people who
18 test positive?

19 A You know, there's a tremendous cost to
20 employee turnover and replacement, and these
21 people are valuable. They're valuable human
22 beings, they've been trained. They're experts.
23 They have something to contribute. So
24 initially, even in the layout of the DOT testing
25 program, it's stated repeatedly that the goal is

1 to get people back to work.

2 There are companies that do terminate.

3 Zero tolerance has reigned in the United States
4 for a very long time. Sometimes a position is
5 so safety sensitive that the company just says,
6 you know, zero tolerance, they're fired. But
7 the goal here is to be able to return them to
8 work. So, one of the things that I think is the
9 most valuable about the DOT testing program is
10 that even if a company -- so for instance, an
11 airline says, we have zero tolerance, this
12 person is fired. They're out. Well, that
13 doesn't mean that person with that certificate
14 cannot reapply at another job at, with another
15 company, as long as they get their evaluation by
16 their substance abuse professional and to do
17 their follow-up testing program. We want them
18 to be able to come back into the workforce and
19 to contribute and also, that's a cornerstone
20 piece of recovery, is being able to maintain
21 your work. So, no matter which mode of
22 transportation it is, the goal would be to keep
23 them at work.

24 Q Have you seen people recover from
25 marijuana addiction?

1 A We submitted into evidence a report
2 from the American Substance Abuse Professionals
3 Association, and we've seen a tremendous amount
4 of success through that substance abuse
5 professional program for people being able to
6 return back to work is well over 50 percent for
7 the DOT drug testing program alone.

8 Q Okay. So why were these people
9 referred to treatment? Was it because they were
10 detected?

11 A Yes. They had what we would refer to
12 as a violation, so there was a violation in the
13 drug testing program. The DOT rules and
14 regulations state that they must then be
15 evaluated by a substance abuse professional.
16 Once they have that evaluation, the substance
17 abuse professional sets up a follow-up and
18 return to duty testing program for them.

19 Q Do you have personal knowledge of harms
20 to employers caused by employees using
21 marijuana?

22 A Yes, we do. As a matter of fact, we
23 see employers, whether in the DOT or the non-DOT
24 sector, that see increased absence, high
25 turnover rates, people who are less productive

1 on the job, accidents, injuries, even fatalities
2 that occur. So these are things that are very
3 well documented. One of the frustrations that
4 we hear in our industry repeatedly is finding
5 people who can pass a pre-employment test to
6 even come into the job, and that's DOT or non-
7 DOT.

8 There are studies that are ongoing
9 right now to determine should pre-employment
10 testing continue for marijuana just because it
11 is difficult to find qualified workers these
12 days.

13 Q Okay. Have you seen any personal
14 observations about employees being harmed by
15 marijuana?

16 A We have. You know one of the things
17 that's very rewarding about this job is when we
18 have employees that come to us and say, because
19 of my drug test violation, I was able to
20 recognize that I had a problem. I was able to
21 come back to work safely. I was able to regain,
22 my lifestyle, essentially. So, this is
23 something that really kind of made the choice
24 for me in pursuing this career, early days, was
25 I saw many employees come in, and I had a case

1 where a young man, the first time he had his
2 negative test result, he cried, and he asked if
3 he could hug me because he was so excited that
4 he finally had a negative drug test, and he
5 wanted to call his mom. He asked me for a copy
6 of his results because he wanted to show his mom
7 that he had had a negative drug test. So, you
8 know, we see employees all -- and I just want to
9 put that positive perspective on this because I
10 love it when people come to us and say, thank
11 you, thank you, thank you. They're the ones
12 that tell the stories of how their lives were
13 impacted by their substance use, but we do see,
14 mostly the harms that I see most of the time in
15 the workplace are people just dropping out of
16 the workforce which is a real shame, because
17 that impacts their lives all the way down to the
18 details of everything that they do.

19 Q Do you know anybody in your personal
20 life who's been impacted by marijuana?

21 A I do.

22 Q Could you --

23 MR. ~~SWAN~~ ~~SCHWARTZ~~: Objection, Your Honor.
24 Relevance.

25 JUDGE JULIUS: The basis?

1 MR. EVANS: Relevance. Your Honor,
2 she's a real person. She's testifying about the
3 harms of marijuana. I think that she can
4 provide evidence about what she's personally
5 seen and experienced in her own dumpster fire,
6 and I think it's relevant --

7 MR. ~~SWAN SCHWARTZ~~: But --

8 MR. EVANS: Because it deals with her
9 knowledge about this. She's got some real
10 personal first-hand knowledge.

11 JUDGE JULIUS: Did you have more to
12 say, Counselor?

13 MR. ~~SWAN SCHWARTZ~~: Yes, Your Honor.
14 Her specific background as the executive director
15 of the organization deals specifically with the
16 people and the individuals who are getting
17 tested and the individuals she interacts with on
18 a professional level. The idea that she can
19 come in and talk about what's going on in her
20 personal life and the personal people she knows,
21 that's just outside of the realms of this court,
22 and I don't think it's relevant, Your Honor.

23 MR. EVANS: Your Honor, I think it's
24 relevant. It's direct, real person testimony
25 about what she has personally seen. She has --

1 there cannot be any more better testimony about
2 the harms of marijuana other than what she has
3 experienced, and it has motivated her work.

4 JUDGE JULIUS: Thank you both, Counsel.

5 I will overrule the objection, and argue it can
6 go to weight. Go ahead and answer the question,
7 or if you need it repeated, just let us know.

8 THE WITNESS: So, I do have a son who
9 chose in high school to start using marijuana
10 for social anxiety, and he felt like this was --

11 MR. ~~SWAN SCHWARTZ~~: Objection, Your
12 Honor. Now she's -- that's hearsay.

13 MR. EVANS: Okay. I just want on the
14 record that the DEA, again, doesn't want to hear
15 testimony of a mother whose child was damaged by
16 marijuana. Is that the position you're taking?

17 JUDGE JULIUS: Well, please don't talk
18 to each other.

19 MR. EVANS: Okay.

20 JUDGE JULIUS: I want to understand.
21 Explain your hearsay objection.

22 MR. ~~SWAN SCHWARTZ~~: Your Honor, it's
23 hearsay. If you allowed her to testify about
24 the personal experience of people she's come
25 into contact with regarding the use of

1 marijuana, she's going to start testifying about
2 her son's experience with marijuana. She did
3 not experience her son smoking marijuana, her
4 son did. So somehow, some way, she had to get
5 the knowledge of what he was feeling. He
6 communicated that to her, and now she's trying
7 to offer it as evidence in this court. That's a
8 out-of-court statement offered for the truth of
9 the matter asserted. That's hearsay, Your
10 Honor.

11 MR. EVANS: Your Honor, she made no
12 out-of-court statement about any communication
13 from her son. Hearsay testimony does not apply
14 to observations.

15 JUDGE JULIUS: I agree. As to what's
16 been asked and at this point and what she said,
17 I'm going to overrule the objection because
18 she's discussing a situation, not statements
19 that were made to her that she cannot observe.
20 So go ahead, Mr. Evans.

21 MR. EVANS: Thank you.

22 THE WITNESS: So, my son began using in
23 his late teen years, and he had several
24 psychotic breaks. He ended up in and out of
25 treatment programs. Eventually, he left our

1 home and chose to live on the street for a
2 period of time. After several years of living
3 on the street and traveling up and down the West
4 Coast, he asked if he could come home. He
5 called me and said, I want to come home and
6 straighten things out. He wanted to get a job.

7 He wanted to get back to work and become
8 productive. It was very challenging to find
9 someone who would hire him after a gap of
10 unemployment, but a warehouse that needed a
11 forklift operator told him if he could pass a
12 drug test, he could be trained as a forklift
13 operator.

14 He waited the time until he could pass
15 a drug test, which he did. He became a forklift
16 operator. He worked there for several years.
17 He started his education. He rectified some
18 problems that he had had in court as a young
19 man. He had a family, and during that time that
20 he was subjected to mandatory drug testing, he
21 was productive. He got his associate's degree,
22 and I really saw his life turn around. That job
23 ended when he moved, and he got into an
24 environment where there was no mandatory drug
25 testing. Of course, he started socially using

1 with coworkers, and very rapidly his life
2 devolved, I mean just in a shockingly rapid
3 manner. Marijuana was his drug of choice.

4 Unfortunately, because he had come back
5 to Colorado where we have extremely high-potency
6 marijuana, which he hadn't been used to. You
7 know, prior to legalization, he was consuming
8 the highest potencies of derivatives that are on
9 the market, and it led to more psychosis. Right
10 now he is serving a 10-year prison sentence for
11 armed robbery. I go visit him every other
12 weekend, and he is now once again sober in the
13 prison system and grateful that he's actually
14 able to get the rehabilitation that he needs
15 there. But for me, as a professional looking at
16 the environment and what he was able to
17 accomplish in a mandatory drug test program in
18 the workplace, and then when he moved away from
19 that mandatory drug testing program, I really
20 saw the stark difference personally as well as
21 professionally.

22 BY MR. EVANS:

23 Q Thank you very much for your courage,
24 and you have my admiration for dealing with this
25 and still being able to function as a human

1 being. Your Honor, we could fill this building
2 with mothers like this. Ms. McGuire, could you
3 describe are you familiar with the term HHS
4 mandatory guidelines?

5 A Yes, I am.

6 Q Could you please tell the Court what
7 that is?

8 A Yes. The HHS mandatory guidelines are
9 the drug testing protocols for federal
10 employees. So, those would be the guidelines
11 that oversee people in security and safety-
12 sensitive positions for the federal government,
13 whether that's air traffic controllers who don't
14 fall under FAA and United States Department of
15 Transportation testing, they actually fall under
16 the HHS guidelines. But you also have, you
17 know, a variety of other professions, Alcohol
18 and Tobacco and Firearms, et cetera. So, anyone
19 that is considered essential, carries a firearm,
20 safety, security -- over 200 agencies and
21 thousands of employees fall under that testing
22 program for HHS.

23 Q Thank you. Now, are you familiar with
24 the term medical review officer?

25 A Yes, I am.

1 Q And could you tell the Court what a
2 medical review officer is?

3 A Yes, we refer to a medical review
4 officer as an MRO, and the MROs must be a
5 medical physician. They have been put into the
6 program as a safeguard. We kind of call them
7 the gatekeepers of the program because once
8 someone has a test result that is not negative,
9 it goes it goes to the laboratory, and the
10 medical review officer gets the report with the
11 quantification numbers and what the cutoff
12 levels were, et cetera.

13 It is the medical review officer's job
14 to verify and validate whether or not the
15 employee has a legitimate medical prescription
16 for the substance that they tested positive for.

17 So, they are to contact the employee to get a
18 copy of the prescription, and then they must
19 validate that. Whether they call the pharmacy
20 or the prescribing physician, they then
21 determine can that employee operate safely while
22 consuming that product. This qualifies for
23 opiates. It qualifies for anything that can be
24 a valid prescription.

25 One of the things that I think is most

1 important to know is that that is the way in
2 which an employer does not violate HIPAA
3 protections. It's put onto the medical review
4 officer to handle that valid prescription
5 information. So, an example would be if someone
6 is taking oxycodone or Vicodin post-surgery and
7 then they test positive, the medical review
8 officer would get a copy of that prescription,
9 find out from the employee, why were you taking
10 this substance? Well, I just had dental
11 surgery, or, you know, whatever happened. Then
12 the medical review officer could then validate
13 and say, okay, well, maybe this person is safe
14 to work in this position or maybe that's not
15 something they should be consuming in the
16 position that they hold. So, how can we have a
17 better solution, or how can we reassign to non-
18 safety-sensitive duty until the time they're
19 finished with their prescription or whatever
20 have you? This applies for many things,
21 including Adderall. So, you have someone with
22 ADD, and they take Adderall, a truck driver.
23 The medical review officer could determine, oh,
24 well, they have a prescription for this, so
25 they're safe to operate while they use their

1 Adderall.

2 One of the primary goals here is to
3 make sure that people aren't using a legal
4 substance illicitly. So that would be -- you
5 know, we see all the time truck drivers who are
6 taking Adderall, and it's their child's
7 prescription, and they don't realize that that's
8 illicit drug use. It's common regionally and in
9 families and generationally. You know, like,
10 well, my wife had Vicodin, so I can take Vicodin
11 because my back hurts. So a lot of this is
12 about that medical review officer educating the
13 employee, that's not valid use of that
14 prescription. Sorry, this is a violation. Then
15 they work it out through the substance abuse
16 professional for some education, and we want
17 them to be able to return to work and help them
18 understand that's not viable use. That's why we
19 call them the gatekeepers is because they're
20 really trying to help the employee understand
21 what keeps them working and working safely.

22 Q Okay. Let's say, well, under the
23 current -- well, what is your knowledge of any
24 changes that have occurred that might affect
25 MROs?

1 A Under the Schedule III? Clarifying,
2 am I allowed to ask for that clarification?

3 Q Excuse me?

4 A Am I allowed to ask you for --

5 Q Oh, yeah -- yeah.

6 A Clarification?

7 Q For clarification, sure.

8 A Under Schedule III?

9 Q Under Schedule III, yeah. All right.
10 Let's -- well, I'm trying to get this so I don't
11 put words in your mouth. Are you aware of any
12 recent attorney general orders that would affect
13 MROs?

14 MR. ~~SWAN SCHWARTZ~~: Objection, Your Honor.

15 JUDGE JULIUS: And the basis?

16 MR. ~~SWAN SCHWARTZ~~: Your Honor, that is a
17 legal conclusion at that point, and it's already
18 in the Court's order at this time. He's trying
19 to elicit testimony from something that's
20 already in the Court's order.

21 JUDGE JULIUS: Could you repeat what
22 the question was?

23 MR. EVANS: Well, what I'm trying to
24 get at, Your Honor, is that the attorney general
25 issued a final order back in April, whatever,

1 and I realize that this hearing is not about
2 that order. Okay. But unfortunately, okay, it
3 affects the NPRN because it tells the
4 dispensaries and tells doctors that they don't
5 have to abide by federal prescription laws. So
6 the quality of prescriptions is going to go
7 downhill. Okay? I find that outrageous that
8 the attorney general has instructed them to
9 disobey that and come up with their own
10 definition of prescriptions.

11 The problem is the NPRN, if
12 implemented, it is going to put it down under
13 Schedule III, which means that prescriptions
14 will be able to be written for it. But the
15 attorney general has forbidden prescriptions to
16 be written according to federal law. He put
17 that in his order. So, how is an MRO going to
18 verify a prescription for a Schedule III when he
19 knows that the prescription is de facto faulty,
20 and that's a problem. Even if they get
21 authority to test for Schedule 3, the
22 prescription system is now all screwed up. The
23 MRO used to have to go to the pharmacy, now he's
24 going to go to a dispensary.

25 JUDGE JULIUS: Well, okay. I don't

1 want you to be testifying about what's --

2 MR. EVANS: Yeah.

3 JUDGE JULIUS: Going on. I just want
4 to make sure. So, your objection is that this
5 is a question about the attorney general's final
6 order that's already been issued, and it's not
7 the subject of this hearing. And I guess just
8 for clarity, how is your question not about the
9 attorney general's order and relevant to this
10 proceeding?

11 MR. EVANS: Well, the link is the
12 Schedule III designation. Okay? A Schedule III
13 drug has to have a current accepted medical use.
14 Okay? That's what this hearing is about.
15 Okay. If it becomes accepted medical use and
16 becomes an FDA-approved medicine, it can be
17 prescribed. Okay, so the NPRM and the accepted
18 medical use is a step towards that prescription,
19 which is going to really screw up things for the
20 MROs.

21 MR. BINGHAM: Can I confirm, Your
22 Honor?

23 JUDGE JULIUS: Yeah.

24 MR. BINGHAM: I don't remember what the
25 question was again.

1 JUDGE JULIUS: Yes. Thank you,
2 Counsel. If you want to have a word with your
3 co-counsel.

4 MR. BINGHAM: Yeah. Okay.

5 MR. EVANS: Okay. I'll rephrase the
6 question.

7 JUDGE JULIUS: So are you withdrawing
8 the prior question just for clarity?

9 MR. EVANS: Yes.

10 JUDGE JULIUS: Okay.

11 MR. EVANS: I'm rephrasing the question
12 based on advice of learned counsel.

13 JUDGE JULIUS: Thank you. So that
14 resolves the objection. Thank you.

15 MR. EVANS: What is your understanding,
16 your understanding, of the effect of the
17 Attorney General's Order in April that affects
18 current accepted medical use?

19 MR. ~~SWAN~~ SCHWARTZ: Objection, Your Honor.

20 JUDGE JULIUS: And --

21 MR. ~~SWAN~~ SCHWARTZ: The same objection. At
22 this point, it's not relevant. If it's already
23 determined that it's outside the scope of this
24 hearing, any testimony on it is not relevant to
25 this hearing.

1 MR. EVANS: Well.

2 MR. ~~SWAN SCHWARTZ~~: And it's outside -- may
3 I finish?

4 JUDGE JULIUS: Yes, please.

5 MR. ~~SWAN SCHWARTZ~~: And it's outside the
6 judge's order, which is on page two of the
7 preliminary order.

8 JUDGE JULIUS: Mr. Evans, you want to
9 be heard?

10 MR. EVANS: Well, again, Your Honor,
11 unfortunately, the system is all interlocked so
12 that you do one thing here, and it's Whac-A-
13 Mole, and it comes up here. So, we cannot
14 effectively address the effect of scheduling to
15 a Schedule III and accepted medical use unless
16 we look at the consequences. Now, their
17 position is, we don't want to see anything after
18 2024. Okay? But this is something that
19 directly affects the ability of them to do their
20 work if this gets down to a Schedule III.

21 JUDGE JULIUS: So I do agree with the
22 government that -- do you want to say something?

23 MR. ~~SWAN SCHWARTZ~~: No, I was just -- I'm
24 sorry.

25 JUDGE JULIUS: Oh, no.

1 MR. ~~SWAN~~ SCHWARTZ: I should have been
2 standing before. I'm sorry, Your Honor.

3 JUDGE JULIUS: It's okay. I just want
4 to -- to the extent that we're going to get
5 testimony about the effects of the attorney
6 general's order, I will sustain the objection.
7 To the extent that there's questions about the
8 rescheduling of marijuana generally and the
9 things that are not already in Schedule III, I
10 would suggest that might be a more fruitful --

11 MR. EVANS: Would it be --

12 (Simultaneous speaking.)

13 JUDGE JULIUS: Or appropriate line of
14 questioning.

15 MR. EVANS: Question being:

16 JUDGE JULIUS: For purposes of this
17 hearing.

18 MR. EVANS: How would Schedule III
19 affect the work of MROs? Is that an appropriate
20 question?

21 JUDGE JULIUS: I'll let you ask it.

22 MR. EVANS: Okay.

23 JUDGE JULIUS: And we'll see where it
24 goes.

25 MR. EVANS: If this becomes a Schedule

1 III, how would this affect the ability of the
2 MROs to validate prescriptions?

3 THE WITNESS: If the DOT drug testing
4 program continues by some -

5 MR. ~~SWAN SCHWARTZ~~: Objection, Your
6 Honor. This now calls to speculation.

7 JUDGE JULIUS: Do you have a response
8 to the speculation objection?

9 MR. EVANS: In other words, if the
10 federal drug testing program continues, that's
11 speculation? If we do nothing, it's going to
12 continue. I mean, it's got its own life. So, I
13 think it's kind of ridiculous. She's not
14 speculating on anything. It's like, is the sun
15 going to rise tomorrow? Coming up with a
16 statement, yeah, the sun's going to rise
17 tomorrow. We know it's going to rise tomorrow.

18 So, if nothing is done, so what we're trying to
19 ascertain -- well, let me just say this. Under
20 the current drug testing system, Your Honor -

21 JUDGE JULIUS: Sir, are you withdrawing
22 the prior question?

23 MR. EVANS: I'll withdraw it.

24 JUDGE JULIUS: Okay. Thank you.

25 MR. EVANS: Under the current DOT drug

1 testing system, if this gets moved to a Schedule
2 III, which is the subject of this -- we're all
3 speculating on that right now -- what effect
4 will that have on the ability of MROs to
5 validate prescriptions?

6 THE WITNESS: A medical review officer
7 will need to contact, in the absence of a
8 pharmacy, not going through a pharmacy program,
9 a dispensary. So, contacting a dispensary to
10 determine who dispensed this. They will also
11 need to contact the prescribing physician to
12 find out is this a valid prescription, and does
13 this person have a valid medical need, and are
14 they using it in a manner that allows them to
15 operate safely? One of the concerns is that
16 many of the state laws have privacy rules in
17 place.

18 MR. ~~SWAN~~ SCHWARTZ: Objection, Your Honor.

19 JUDGE JULIUS: Basis?

20 MR. ~~SWAN~~ SCHWARTZ: She's offering evidence
21 that's going to discuss state laws. She's not a
22 legal expert, the Court is.

23 MR. EVANS: Oh, Your Honor, anybody
24 could read a state law. She's the head of the
25 Alcohol and Drug Testing Association. She has

1 to know what the state laws are. Come on.

2 JUDGE JULIUS: I understand the
3 objection. If we can get a basis of her
4 foundation for --

5 MR. EVANS: Sure.

6 JUDGE JULIUS: Then we'll explore it
7 further --

8 MR. EVANS: Are you, in the course of
9 your work --

10 JUDGE JULIUS: So, sustained.

11 MR. EVANS: Yeah. In the course of
12 your work --

13 JUDGE JULIUS: Essentially, lack of
14 foundation, which is not really what your
15 objection was, but that's essentially what it
16 is.

17 MR. ~~SWAN LONICH~~: I understand.

18 JUDGE JULIUS: So if --

19 MR. EVANS: Ms. McGuire.

20 JUDGE JULIUS: If you want to explore
21 her knowledge of state laws, I would allow that.

22 MR. EVANS: Yeah. Ms. McGuire, in the
23 course of your work in NDASA, do you have to
24 obtain knowledge of state laws?

25 THE WITNESS: It's essential when we

1 advise our membership on writing drug test
2 policies -- and I've lectured on this hundreds
3 of times across the country, and I'm an expert
4 in workplace drug test policy, so I do policy;
5 I conduct policy workshops in multiple states
6 across the country -- that employees understand
7 and employers understand that workplace drug
8 testing policies must fit state law
9 requirements.

10 Under DOT testing programs, the federal
11 rule is, of course, the authority. But for the
12 entire rest of the population of the country,
13 non-DOT testing, the state law is what you must
14 pay attention to. So, I was appointed to my
15 governor's commission to help implement the
16 regulations for Amendment 64 in the state of
17 Colorado. I served on that commission to
18 represent civil law and employers' rights to a
19 safe and drug-free workplace, and I've been a
20 policy advisor on probably, I don't know, dozens
21 of states that have implemented legal marijuana
22 to help ensure that employers' rights and safety
23 were protected.

24 BY MR. EVANS:

25 Q Ms. McGuire, have you trained MROs?

1 A I have been a part of MRO training,
2 yes, I have.

3 Q Okay, do the MROs look at the safety
4 implications of a prescription?

5 A They must.

6 Q What do they look at when they look at
7 the prescription?

8 A They look at the dosing standards.
9 They look at, you know, they're looking at
10 anything in that drug that would create a
11 barrier to safety.

12 Q Okay. Do they look at the actual
13 medical condition that a person gets the
14 marijuana for or the prescription for?

15 A A medical review officer is not going
16 to cross the bounds of a medical condition.
17 They're only looking at is this medication
18 obtained through a valid prescription, and can
19 the individual operate safely while using that
20 prescription?

21 Q Okay. All right. Have any medical --
22 and I'm not going to ask for what they said.
23 It's in your document and I don't want you to
24 get involved in a hearsay situation, but it is
25 in the statement. Have any organizations that

1 are concerned about MROs in this come to support
2 your position?

3 A Yes. The American Association of
4 Occupational Medicine Professionals, AAOMP, they
5 submitted a letter stating that they have deep
6 concerns about how a medical review officer will
7 verify a valid prescription when there's not a
8 pathway for them to validate this. What I mean
9 by that is medical marijuana patients are often
10 protected, so that information is not made
11 public. Many of them come with their
12 recommendations to the medical review officers,
13 and I can say this because medical review
14 officers are used in the DOT and the non-DOT
15 world. So, they do have experience with this
16 already. People will come with their
17 recommendation card for medical marijuana, and
18 it doesn't have a prescribing physician's name
19 on it. They don't know the dispensary where
20 they got it from. Some of them applied online.

21 They're not sure how to validate that. So, how
22 will a medical review officer validate and
23 verify the legal prescription in order to
24 determine if this individual can work safely?

25 Q Are there any trucking organizations

1 that are supporting you?

2 A American Trucking Associations has
3 brought forth their concerns.

4 Q Okay. And is the letter from the
5 American Trucking Associations identified as
6 Exhibit 3 in your exhibits?

7 A Yes, it is.

8 Q And then is the letter from -- what was
9 the other one? Oh, ACOEM -- identified as
10 Exhibit 10?

11 A Yes.

12 Q And then who are the American Substance
13 Abuse Professionals?

14 A That is a national organization for --
15 a member of NDASA -- for those who are substance
16 abuse professionals that evaluate individuals
17 who have had a drug test violation.

18 Q Okay. The exhibits that you have given
19 to the Court, are these true copies of the
20 exhibits?

21 A Yes, sir.

22 Q And have you reviewed each and every
23 exhibit?

24 A I have.

25 Q Okay. And did you personally recommend

1 each and every one of these exhibits?

2 A Absolutely, yes, I did.

3 MR. EVANS: Okay. I'd like to move
4 these exhibits -- be placed into evidence.

5 JUDGE JULIUS: Which numbers are you
6 speaking about?

7 MR. EVANS: Excuse me?

8 JUDGE JULIUS: Which numbered exhibits?

9 MR. EVANS: Oh, it would be Exhibits 1
10 to 15.

11 JUDGE JULIUS: 1, 2, and 15?

12 MR. EVANS: No, 1 to 15.

13 JUDGE JULIUS: 1 through 15.

14 MR. EVANS: Right. Yeah.

15 JUDGE JULIUS: Understood.

16 MR. EVANS: In the booklet that we
17 gave to the court.

18 JUDGE JULIUS: Understood. Any --

19 MR. EVANS: I just want to make sure
20 that the Court -- and have you provided a copy
21 of the Omnibus Transportation Employee Testing
22 Act?

23 THE WITNESS: Yes.

24 BY MR. EVANS:

25 Q And did you --

1 JUDGE JULIUS: Hold on, sir. You've
2 moved for their admission.

3 MR. EVANS: Okay.

4 JUDGE JULIUS: We haven't addressed
5 that yet.

6 MR. EVANS: Okay.

7 JUDGE JULIUS: Is there any objection to
8 --

9 MR. ~~SWAN~~ SCHWARTZ: We would object, Your
10 Honor. She identified 3 exhibits that he gave a
11 litany of. There's 15 that he's trying to move.
12 There hasn't been a foundation laid for the
13 admission of those exhibits, Your Honor.

14 MR. EVANS: I'll go through each one.

15 JUDGE JULIUS: Okay. Well --

16 MR. EVANS: Okay. So --

17 JUDGE JULIUS: They're not admitted
18 yet, but --

19 MR. EVANS: Yeah.

20 JUDGE JULIUS: Once you -- okay.

21 MR. EVANS: In your Exhibit 1, which is
22 the Omnibus Transportation Employee Testing Act
23 of 1991, did you make a copy of that?

24 THE WITNESS: Yes, I did.

25 BY MR. EVANS:

1 Q And did you put it in your exhibits?

2 A Yes, sir.

3 Q Okay. Exhibit 2, the Omnibus
4 Transportation Employee Testing Act of 1991 --

5 A Yes.

6 Q Did you make a copy of that?

7 A Yes, sir.

8 Q Did you place it as Exhibit 2?

9 A Yes, sir.

10 Q Okay. The Executive Order 12564 of
11 President Reagan is Exhibit 3. Did you make a
12 copy of that?

13 A Yes, sir.

14 Q Did you place it in your exhibits?

15 A Yes, sir.

16 Q Did you do a presentation called
17 Marijuana and Your Workplace Safety Policies:
18 What Every Employer Needs to Know?

19 A Yes, sir.

20 Q Okay. Did you create that on your own?

21 A Yes, I did.

22 Q Did you make a copy of it?

23 A Yes, I did.

24 Q Did you place it as Exhibit 4?

25 A Yes, sir.

1 Q Okay and Exhibit 5, it's an NDASA
2 conference presentation. Did you make a copy of
3 that?

4 A I did.

5 Q Did you place it as Exhibit 5?

6 A Yes, sir.

7 Q Okay and Exhibit 6 is the Quest
8 Diagnostic Drug Testing Index of 2024. Did you
9 make a copy of that?

10 A I did.

11 Q Did you place it in the index --

12 A Yes, sir.

13 Q In the temporary -- okay. A letter
14 from the American Substance Abuse Professionals,
15 Exhibit 7. Is that a true copy of that?

16 A Yes.

17 Q And you put it in your exhibits?

18 A Yes, sir.

19 Q Okay. The pre-hearing statement that
20 is a detailed legal critique of the DOJ April
21 11, 2024, Office of Legal Counsel opinion. Did
22 you make a true copy of that?

23 A Yes, I did.

24 Q Okay. And did you place it as Exhibit
25 8?

1 A Yes.

2 Q Okay. The declaration of Luli
3 Akinfiresoye that was in Exhibit 4 of the DEA in
4 the last hearing, did you make a true copy of
5 that?

6 A Yes, sir.

7 Q Did you place it in Exhibit 9?

8 A Yes.

9 Q The letter from ACEOM, concerns
10 regarding DOJ DEA notice of proposed rule
11 making?

12 A Yes.

13 Q Did you make a copy of that?

14 A I did.

15 Q Did you place it as Exhibit 10?

16 A Yes.

17 Q Exhibit 11 is the NDASA conference
18 presentation, May 2024. Did you have any role
19 in creating that?

20 A I did not.

21 Q You did not? Okay. Did you make a
22 true copy of it?

23 A Yes.

24 Q Okay. And is that as Exhibit 11?

25 A Yes.

1 Q Okay. And then Exhibit 12 is NDASA's
2 comments page, part 1 and 2, response to the
3 NPRM on rescheduling. Did you create that?

4 A I did.

5 Q Did you put a true copy of it in the
6 exhibit as Exhibit 12?

7 A Yes, sir.

8 Q Okay. And then the letter from the
9 American Trucking Association, did you put that
10 in, a true copy, in Exhibit 13?

11 A Yes, I did.

12 Q And on Exhibit 14, specific slides from
13 the regulatory program updates and mandatory
14 guideline updates presented on December 3rd,
15 2024, did you make a copy of that?

16 A I did.

17 Q And did you place it as Exhibit 14?

18 A Yes, sir.

19 Q Okay, Exhibit 15, HHS slides regarding
20 Executive Order 12564. Did you make a copy of
21 that?

22 A I did.

23 Q Did you place it in your exhibits?

24 A Yes, sir.

25 Q Okay. You know, I urge that they be

1 admitted as evidence.

2 (Whereupon, the documents referred to
3 were marked as NDASA's Exhibit Nos. 1 through
4 15, for identification.)

5 JUDGE JULIUS: Any objections to
6 admission of 1 through 15 from NDASA?

7 MR. ~~SWAN SCHWARTZ~~: Yes, Your Honor.
8 We would object to Exhibit 8, Exhibit 9, and we
9 have no objection for Exhibit 12, but we will
10 note it is already part of the record.

11 JUDGE JULIUS: Okay. So Exhibit 8 is
12 the ~~civil~~ CIVEL pre-hearing statement? Is
13 that correct?

14 MR. ~~SWAN SCHWARTZ~~: Yes.

15 JUDGE JULIUS: And what is the
16 objection to that?

17 MR. ~~SWAN SCHWARTZ~~: Your Honor, that was an
18 interested party in the previous scheduled
19 hearing. They are not an interested party to
20 this particular hearing, so the fact that she
21 may be aware of it -- there is no foundation, it
22 is not relevant to this hearing.

23 JUDGE JULIUS: All right, Mr. Evans,
24 would you like to respond to the objection?

25 MR. EVANS: Well, Your Honor, this

1 Exhibit 8, the pre-hearing statement of the
2 Cannabis Industry Victim Educating Litigators.
3 Are you familiar with that organization?

4 THE WITNESS: Yes, sir. And who heads
5 that organization? Well, I work --

6 MR. ~~SWAN~~ SCHWARTZ: Your Honor, I would
7 object to --

8 JUDGE JULIUS: Additional --

9 MR. EVANS: I'm trying to lay a
10 foundation, verification of the document. This
11 is a critique of the Office of Legal Counsel
12 opinion. Do you know who wrote that?

13 JUDGE JULIUS: Okay, sir, hold on.

14 MR. EVANS: I'm sorry.

15 JUDGE JULIUS: There's been an
16 objection to you asking questions.

17 MR. EVANS: Sorry -- sorry.

18 JUDGE JULIUS: I need you to address
19 the Court and not the witness.

20 MR. EVANS: Right.

21 JUDGE JULIUS: There's been an
22 objection that this is a pre-hearing statement
23 from an organization that is not currently here
24 and she is not involved in that. Do you have a
25 response to the objection at this time?

1 MR. EVANS: Well, I'm trying to figure
2 out exactly why something would be knocked out
3 because it's not an organization that's here.
4 All of our exhibits are from organizations that
5 aren't here.

6 MR. BINGHAM: Your Honor, I don't think
7 we understand what the objection is.

8 MR. EVANS: Yeah.

9 MR. BINGHAM: Is it a relevance
10 objection or a foundation objection?

11 JUDGE JULIUS: Government Counsel?

12 MR. ~~SWAN SCHWARTZ~~: Yes, Your Honor. This
13 is proposed testimony of an interested party
14 that was from the previous scheduled hearing.
15 They are not an interested party for this
16 particular hearing. She does not have the
17 foundation to be able to testify to the 70 pages
18 that counsel is trying to admit at this point.

19 JUDGE JULIUS: So it's a foundation, at
20 least in part, a foundation objection?

21 MR. ~~SWAN SCHWARTZ~~: I'm sorry. Yes,
22 Your Honor. Foundation and its relevance. It's
23 proposed testimony. There's no sworn to it or
24 nothing, Your Honor.

25 JUDGE JULIUS: You'd like to respond to

1 the clarification of the objection?

2 MR. EVANS: Well, the reason this is
3 relevant is that, according to the DEA, the OLC
4 opinion that determined that the legality of the
5 two-part test is now the law of this court. The
6 document here is a critique of that legal
7 opinion. I think it's directly relevant because
8 it deals specifically with the OLC opinion,
9 which has been raised in this hearing, and it's
10 a critique of it. And the Court, I think, would
11 benefit from reading this critique. She has
12 forgotten, but I can testify to this because I
13 wrote it.

14 JUDGE JULIUS: Well.

15 MR. EVANS: So --

16 JUDGE JULIUS: You can't testify as an
17 attorney.

18 MR. EVANS: I understand. I'm just
19 saying that she obtained it from the author.

20 MR. BINGHAM: Your Honor, I'm sorry, I
21 can't tell if they're objecting to the admission
22 of the document or to his question.

23 JUDGE JULIUS: Admission of the
24 document.

25 MR. BINGHAM: Or whether the objection

1 is relevance versus foundation.

2 JUDGE JULIUS: It's an objection to the
3 document, as I understand it.

4 MR. ~~SWAN SCHWARTZ~~: Everything, Your Honor.
5 He just admitted that he wrote the document.

6 JUDGE JULIUS: Right.

7 MR. ~~SWAN SCHWARTZ~~: And if he wrote the
8 document, she is not the person to try to get it
9 admitted through, Your Honor. She cannot
10 establish admissibility or authenticity, Your
11 Honor.

12 MR. EVANS: Your Honor, there's a lot
13 of documents that are here that are not written
14 by her. The only thing she testified is these
15 are true copies from the review of the Court.
16 She has testified that they're true copies. The
17 Court can consider it by the weight and so
18 forth. But the attempt here is to, you know,
19 make the Court aware that there are problems
20 with this OLC opinion.

21 Again, I can't testify about where she
22 got it from, but I represented her at that
23 hearing before. I represented CIVEL at the same
24 time. Had I been representing her at that time,
25 I also would have submitted this. And it's

1 something that I think would be very valuable to
2 the Court. I don't understand why a document
3 can't be admitted because she didn't personally
4 write it. She's testifying that it's a true
5 copy. We lawyers attach exhibits all the time to
6 pleadings that we didn't write. And she has now
7 testified under oath. Normally, when you do
8 that, at least in New Jersey, you submit a list
9 of exhibits you didn't write, you submit an
10 affidavit, which is a sworn statement, because
11 you're not going to be in court to do it. She's
12 under oath. She's had a sworn statement that
13 this is a true copy. Everywhere I've ever
14 practiced law, true copies with an affidavit and
15 a certification are admissible as an exhibit,
16 Your Honor.

17 JUDGE JULIUS: Understood.

18 MR. ~~SWAN~~ SCHWARTZ: I can add more if
19 you would like, Your Honor.

20 JUDGE JULIUS: I mean, I don't want
21 this to turn into a ping pong game. The document
22 is a pre-hearing statement from a party who's not
23 here. There's a lot of argument in there. I
24 will admit the document, but it is going to go to
25 weight as to the contents of that

1 document and the purpose of it and all of that.

2 So, I would admit document 8 with those
3 caveats.

4 (NDASA + ~~DUID Victim Voices + Kenneth~~
5 ~~Finn's~~ Exhibit No. 8 was received into
6 evidence.)

7 MR. EVANS: I think that's very fair,
8 Your Honor.

9 JUDGE JULIUS: And the other document
10 was document 9.

11 MR. EVANS: Yeah.

12 JUDGE JULIUS: Which is the declaration
13 of Luli R. Akinfiresoye. I apologize if I'm
14 mispronouncing that. What is the basis of the
15 objection for this?

16 MR. ~~SWAN SCHWARTZ~~: Your Honor, that is
17 going to be a witness that is going to be called
18 in this matter. Again, she would be trying to
19 admit testimony from another witness, who's
20 actually scheduled to testify in this matter.

21 JUDGE JULIUS: Mr. Evans?

22 MR. EVANS: Well, this testimony of Ms.
23 Akinfiresoye is two parts. There's an affidavit
24 with her testimony, which she swore to.
25 Attached to it, is a DEA science document

1 looking at the science regarding marijuana
2 prepared by the DEA.

3 MR. BINGHAM: Your Honor, may we have a
4 moment?

5 MR. EVANS: Yeah.

6 JUDGE JULIUS: Yes.

7 MR. EVANS: Your Honor, before I
8 respond, it's one of the advantages of counsel
9 who's just out of a law school is they sometimes
10 know more than people who've been practicing 50
11 years. What rule in the federal rules says that
12 we cannot admit this document based on her
13 testimony? Please cite the rule. The Court, in
14 starting this whole thing, said you have to cite
15 the rule. What's the rule?

16 JUDGE JULIUS: So, I would again ask
17 that you please not direct questions.

18 MR. EVANS: Okay. I'm sorry.

19 JUDGE JULIUS: If you would like --

20 MR. EVANS: Your Honor,

21 JUDGE JULIUS: Sorry.

22 MR. EVANS: I would like them to tell
23 us what the rule is. And as far as this, I'll
24 give a little more on this exhibit, Exhibit 9.
25 Her testimony had two parts: There was a sworn

1 affidavit, and then attached was this DEA
2 science document that was undated, unauthored
3 that pretty much ripped apart all of their
4 arguments, which is why they are not submitting
5 her as a witness here. And SAM --

6 MR. ~~SWAN SCHWARTZ~~: Objection, Your
7 Honor. I would ask that a ruling be issued on my
8 objection, Your Honor.

9 MR. EVANS: Yeah.

10 JUDGE JULIUS: The objection.

11 MR. ~~SWAN SCHWARTZ~~: Is his --

12 JUDGE JULIUS: Characterization of
13 this?

14 (Simultaneous speaking.)

15 MR. EVANS: I'll withdraw the
16 characterization.

17 MR. ~~SWAN SCHWARTZ~~: Yes, Your Honor.
18 He's going well beyond this document --

19 JUDGE JULIUS: So I would refrain from
20 characterizing decisions made by an opposing
21 party.

22 MR. EVANS: Right.

23 JUDGE JULIUS: I will note she has not
24 been called by the government in this hearing,
25 but I will not speculate as to why. I don't

1 think it's helpful to do that. So that, I would
2 sustain the characterization, but go ahead and
3 continue, Mr. Evans.

4 MR. EVANS: Well, I --

5 MR. BINGHAM: Your Honor, can we confer
6 briefly?

7 JUDGE JULIUS: Yes.

8 MR. EVANS: Yeah. I'll go along with
9 their motion not to admit it.

10 JUDGE JULIUS: Okay. What I would say
11 is I would be inclined to exclude it anyway. I
12 think she is being called as a witness, and I
13 think there may be another --

14 MR. EVANS: Exactly, Your Honor.

15 JUDGE JULIUS: More appropriate means of
16 --

17 MR. EVANS: There's no sense in
18 overkill.

19 JUDGE JULIUS: Moving forward with that
20 issue. So I will at this time exclude Exhibit 9
21 --

22 MR. EVANS: Okay.

23 JUDGE JULIUS: From NDASA.

24 MR. EVANS: Right.

25 JUDGE JULIUS: And as to 1 through 15

1 minus Exhibit 9, will be admitted. It was just
2 8 and 9 were the only ones objected.

3 (Whereupon, the above-referred to
4 document marked as NDASA + ~~DUID Victim Voices +~~
5 ~~Kenneth Finn's~~ Exhibit Nos. 1 through 15,
6 excluding 9, were received into evidence.)

7 MR. ~~SWAN~~ SCHWARTZ: Yes, Your Honor,
8 those were the two.

9 JUDGE JULIUS: Okay. So of 1 through
10 15, all but Exhibit 9 from NDASA will be
11 admitted.

12 MR. EVANS: Thank you very much, Your
13 Honor. I think it's a very fair ruling. I have
14 no further questions of Ms. McGuire, and I want
15 to thank you very much for your courage in
16 talking about your personal experience and in
17 fighting against this dreadful plague in our
18 society. I know that you are tireless and
19 indefatigable in that, and I just want to
20 acknowledge that publicly. We're done.

21 JUDGE JULIUS: Thank you, Mr. Evans.
22 Government, are you ready for cross-examination
23 of this witness?

24 MR. LONICH: How much time? Is there a
25 break scheduled yet?

1 JUDGE JULIUS: We're scheduled to break
2 for lunch at noon, which is 43 minutes from now.

3 MR. LONICH: We can go through it, Your
4 Honor.

5 JUDGE JULIUS: Okay. Whenever you're
6 ready, Counselor.

7 CROSS-EXAMINATION

8 MR. ~~SWAN LONICH~~: Thank you. Good morning,
9 ma'am.

10 THE WITNESS: Good morning.

11 BY MR. ~~SWAN LONICH~~:

12 Q Just to be clear, you are not a doctor,
13 correct?

14 A I am not a doctor.

15 Q You're not a pharmacist?

16 A No, I am not.

17 Q You did not study pharmacology?

18 A No.

19 Q Did not go to medical school?

20 A No.

21 Q So, your opinion or your belief that
22 marijuana should not be rescheduled is not
23 founded in medicine?

24 A No.

25 Q Is not founded in pharmacy?

1 A No.

2 Q Is not founded in pharmacology?

3 A No.

4 Q It's founded in your belief that
5 testing deters use?

6 MR. EVANS: Your Honor, I would object
7 to that. She said that she's not a
8 pharmacologist and all this stuff. I mean, it
9 doesn't mean --

10 JUDGE JULIUS: Could you use the
11 microphone, sir? Thank you.

12 MR. EVANS: Yeah. Just because she's
13 not a pharmacist or whatever that list of
14 professionals is, doesn't mean that her opinion
15 is not founded in some medical science. So I
16 wish you'd be more specific about that.

17 JUDGE JULIUS: Counsel --

18 MR. EVANS: For example, did you use
19 any medical information in determining this?

20 JUDGE JULIUS: Counsel, would you like
21 to respond to the objection?

22 MR. ~~SWAN LONICH~~: Your Honor, he could
23 have asked that question on direct. He did not.
24 I can ask her about her credentials to come to
25 court today to testify to this.

1 JUDGE JULIUS: Understood. I'll
2 overrule the objection. You'll have an
3 opportunity for redirect, sir.

4 MR. ~~SWAN LONICH~~: So, to reiterate
5 the question -- I'm sorry. I'm not that tall.
6 So to reiterate the question, your belief that
7 it should not be rescheduled is founded not in
8 pharmacology, correct?

9 THE WITNESS: Correct.

10 BY MR. ~~SWAN LONICH~~:

11 Q It's not founded in medicine?

12 A Correct.

13 Q It's founded in the belief that drug
14 testing deters use, correct?

15 A I'm struggling with that answer.
16 That's not encapsulating my opposition. My
17 opposition at this point in time is that we will
18 not have the ability to -- the labs cannot be
19 approved to test for marijuana. That is a
20 matter of public safety.

21 Q And because the labs will not be able
22 to test for marijuana, that is why you do not
23 want it to be rescheduled to Schedule III,
24 correct?

25 A That's my primary objection, yes.

1 Q Thank you. Now, you testified that you
2 are the executive director of NDSA, correct?

3 A NDASA.

4 Q My apologies. NDASA.

5 A Correct.

6 Q My apologies. You are the leader of
7 that organization?

8 A I am.

9 Q Okay. As the leader, you go to
10 different conferences and programs to make sure
11 that other organizations are aware of your
12 mission, correct?

13 A Correct.

14 Q Okay. One of the ways you make sure
15 other organizations are aware of your mission is
16 by presenting information about workplace
17 testing, correct?

18 A Yes.

19 Q Okay. How workplace testing started?

20 A Yes.

21 Q Why it started?

22 A Yes.

23 Q When it started?

24 A Yes.

25 Q The impacts of drug use at the

1 workplace, correct?

2 A Correct.

3 Q And as the executive director, you know
4 the importance of providing accurate
5 information, correct?

6 A Yes.

7 Q The importance of providing complete
8 information, correct?

9 A Yes.

10 Q Accurate and complete information is
11 important because inaccurate and incomplete
12 information can be misleading, correct?

13 A Correct.

14 Q Okay. And as the executive director
15 testifying in an administrative hearing in a
16 court of law, you do not want to provide
17 misleading information, correct?

18 A Correct.

19 Q Okay. I want to draw your attention to
20 Exhibit 4. Yes, I'm sorry, NDASA's Exhibit 4
21 that was just admitted. Are you there, ma'am?

22 A I can't hear you.

23 Q I'm. Are you there?

24 JUDGE JULIUS: I think the court is
25 still providing her a copy of that.

1 THE WITNESS: Yes, I have the exhibit.
2 MR. ~~SWAN LONICH~~: Okay. Drawing your attention
3 to the first page. That is your name on the
4 document, right?

5 THE WITNESS: Yes, it is.

6 BY MR. ~~SWAN LONICH~~:

7 Q That is your email?

8 A Yes, it is.

9 Q You provided this. You've created this
10 PowerPoint presentation, correct?

11 A Yes.

12 Q Okay, and you provided it to your
13 counsel?

14 A Yes.

15 Q You guys talked about it?

16 A Yes.

17 Q Everything in it is true?

18 A Yes, sir.

19 Q And counsel just admitted it as state's
20 exhibit -- I'm sorry, not state. My apologies.

21 Counsel just admitted it as NDASA Exhibit 4,
22 correct?

23 A Correct.

24 Q Okay.

25 COURT REPORTER: I'm sorry, Your Honor,

1 I didn't get the answer as to whether it was
2 true.

3 JUDGE JULIUS: Okay. Oh, could you
4 repeat your answer to that question, ma'am?

5 THE WITNESS: Yes.

6 JUDGE JULIUS: Thank you.

7 THE WITNESS: Thank you.

8 MR. ~~SWAN LONICH~~: I'm sorry, just for the
9 record, what was the question that --

10 COURT REPORTER: Whether it's true?

11 JUDGE JULIUS: Everything in there was
12 true.

13 MR. ~~SWAN LONICH~~: Okay.

14 JUDGE JULIUS: It's just the mic didn't
15 pick it up.

16 MR. ~~SWAN LONICH~~: Okay. Thank you,
17 drawing your attention to the second page of that
18 document.

19 THE WITNESS: Okay.

20 BY MR. LONICH:

21 Q You created this document, correct?

22 A Yes.

23 Q You carefully selected the information
24 you wanted to include in the exhibit, correct?

25 A Yes.

1 Q Okay. Focusing your attention, title
2 is The Impact of Marijuana Use to the Workplace,
3 correct?

4 A Employee Marijuana Use to the Workplace

5 Q My apologies. Impact of Employee
6 Marijuana Use to the Workplace, correct?

7 A Yes.

8 Q Now, you carefully selected this image
9 and this language to bring to the court's
10 attention, correct?

11 A Yes.

12 Q You tell us that --

13 A Although I want to say that we pulled
14 out particular slides that we mentioned in our
15 exhibit, so I want to make sure that we draw
16 attention to the fact that we mentioned very
17 specific examples for the exhibit.

18 Q And who made that determination?

19 A I did.

20 Q You specifically decided what was going
21 to go into this PowerPoint, correct?

22 A Yes.

23 Q Okay. So going back to page two, you
24 tell us the date of the collision, correct?

25 A Correct.

1 Q The location of the collision, correct?

2 A Correct.

3 Q How many passengers were injured?

4 A Correct.

5 Q How many casualties there were?

6 A Yes, sir.

7 Q You even tell us who was operating the
8 train, correct?

9 A Yes.

10 Q Now, based on this slide, is it safe to
11 assume that Ricky Gates tested positive for
12 marijuana after this collision?

13 A Yes.

14 Q And we have to assume that because the
15 slide does not inform us of that, correct?

16 A Correct.

17 Q Okay. And now you want the Court to
18 assume that Ricky Gates was impaired while
19 engineering the train, correct?

20 A The NTSB determined so.

21 Q You did not include that in this slide,
22 did you?

23 A When I create a presentation, it is a
24 presentation that is to inform, but I don't
25 place every single word that I'm going to say

1 when I relate the story. So, what I do is I put
2 up visuals. Sometimes I put a bullet or two.
3 Sometimes I only use a photo, and then I provide
4 the rest of the information to the audience.
5 I'm not asking them to read a slide. I'm not
6 trying to put a comprehensive story on a slide.
7 I'm simply putting up a reminder of what I am
8 going to express to the audience to help them
9 understand the situation.

10 Q But you do decide what information to
11 include, right?

12 A I do.

13 Q Okay. And you also decide which
14 information not to include, right?

15 A I do.

16 MR. ~~SWAN LONICH~~: Okay. Brief
17 indulgence, Your Honor.

18 JUDGE JULIUS: Of course.

19 MR. EVANS: Your Honor, I would like to
20 have an objection that counsel left out a Fox
21 Baltimore.com News local --

22 MR. ~~SWAN LONICH~~: Objection, Your Honor.

23 JUDGE JULIUS: Okay.

24 MR. ~~SWAN LONICH~~: Counsel's going to have
25 the opportunity to do this on redirect.

1 JUDGE JULIUS: I'll overrule that
2 objection. Thank you, sir.

3 MR. ~~SWAN LONICH~~: I would like to bring
4 to your attention state's -- I'm sorry. I keep
5 saying state's. My apologies, Your Honor.
6 NDASA Exhibit 13.

7 JUDGE JULIUS: And just for the record,
8 the Court provided her a copy of that.

9 MR. ~~SWAN LONICH~~: Thank you, Your Honor.
10 Do you recognize NDASA Exhibit 13?

11 THE WITNESS: Yes, sir.

12 BY MR. ~~SWAN LONICH~~:

13 Q Okay. What is NDASA Exhibit 13?

14 A A letter from the American College of
15 Occupational and Environmental Medicine.

16 Q Okay. I'm sorry. I have a different
17 13.

18 JUDGE JULIUS: Yeah. I'm looking at an
19 American Trucking Association letter.

20 MR. ~~SWAN LONICH~~: I have something even
21 different than that, Your Honor. Just a second,
22 Your Honor. Based on the list that was
23 admitted, I'm referring to the five-page
24 document that includes three PowerPoints.

25 MR. EVANS: What's the exhibit number?

1 MR. ~~SWAN LONICH~~: I have it as 13, with the
2 Bates stamp 13. I'm sorry. I guess --

3 MR. EVANS: Well, that's not what was
4 filed on that.

5 MR. ~~SWAN LONICH~~: I'm sorry. It must be
6 15, my apologies, Your Honor.

7 JUDGE JULIUS: The binder I have does
8 not have any document behind the tab 15.

9 MR. ~~SWAN LONICH~~: Brief indulgence, Your
10 Honor. May I return to the --

11 JUDGE JULIUS: Yes. I'll also state
12 that the copy the Court has does not have a
13 document behind tab 5.

14 MR. EVANS: That's okay. Oh, here was
15 the problem with 5, Your Honor. We couldn't
16 make a copy --

17 JUDGE JULIUS: Can you make sure to
18 speak into the microphone?

19 MR. EVANS: I forgot to mention this to
20 the Court. I'm sorry. Exhibit 5, we could not
21 print that out. It was password protected, but
22 it was filed electronically and I'm sorry, I
23 meant to put a note in there.

24 JUDGE JULIUS: Okay.

25 MR. EVANS: Yeah, we couldn't copy it,

1 but --

2 JUDGE JULIUS: And that was --

3 MR. EVANS: -- on theBox.com, it caught
4 the -- the thing is there.

5 JUDGE JULIUS: Okay.

6 MR. EVANS: I'm sorry.

7 JUDGE JULIUS: But as to tab 15?

8 MR. EVANS: Well, I have it here. This
9 is the one you're -- it's by SAMHSA.

10 JUDGE JULIUS: In the Court's binder, I
11 have a tab for 15, and there's no document
12 behind it.

13 MR. EVANS: I'm sorry, Your Honor.
14 Here's the document.

15 JUDGE JULIUS: If you want to hand that
16 to Mr. Phillips.

17 MR. EVANS: That's the copy of the
18 slide.

19 JUDGE JULIUS: Thank you.

20 MR. EVANS: Again, I apologize, Your
21 Honor. Hard to get all this together in a short
22 period of time. I'm a sole practitioner.

23 JUDGE JULIUS: Understood.

24 MR. EVANS: No paralegals like --

25 JUDGE JULIUS: It appears we may be

1 missing some pages from the complete --

2 MR. ~~SWAN LONICH~~: Your Honor, I can move
3 on, Your Honor.

4 JUDGE JULIUS: Okay. I just want to
5 make sure that our record is complete -- that
6 based on the documents that have been submitted
7 to the Court. So, tab 15 appears to be a slide
8 deck from PowerPoint that may not be complete.
9 We've got SAMHSA, page 2 of 5, 3 of 5, 4 of 5, 5
10 of 5. We don't have the first page.

11 MR. EVANS: Oh, got it here.

12 JUDGE JULIUS: Thank you, sir. Now we
13 have one of five, so we have all five pages of
14 tab 15. Thank you. Please proceed, sir.

15 MR. ~~SWAN LONICH~~: Yes. Thank you, Your
16 Honor. I was going to move on, Your Honor.
17 Ma'am, you specific -- I'm sorry, Mrs. McGuire,
18 you specifically talked about the testing that
19 you that you advocate for. Is that correct?

20 THE WITNESS: Yes, sir.

21 BY MR. ~~SWAN LONICH~~:

22 Q Okay. And those tests screen for
23 Schedule II, correct?

24 A Correct.

25 Q And that is because Schedule II drugs

1 cause impairment, correct?

2 A Correct.

3 Q Like opioids?

4 A Yes, sir.

5 Q Okay, is it safe to say that if
6 marijuana is rescheduled, testing will not be
7 changed, correct?

8 A I don't understand the question.

9 Q Okay. You testified about the job that
10 the MROs would have to do.

11 A Correct.

12 Q Right. Is it safe to say that testing
13 still can occur? It just may be difficult.

14 A Are you referring to the DOT testing
15 program? What are you referring to
16 specifically? I don't understand what you're
17 asking me.

18 Q On direct examination, you gave
19 testimony, you gave a litany of what the MROs
20 would have to do.

21 A Yes.

22 Q If marijuana is rescheduled.

23 A Mm-hmm.

24 Q Okay. Based on that, my question to
25 you is, testing still can be done, correct?

1 A Testing will be able to be performed
2 under a company policy.

3 Q So testing still can be done, correct?

4 A Under a company policy.

5 Q Ma'am, that's not the question I asked.
6 Testing still can be done, correct?

7 A Not for DOT.

8 MR. ~~SWAN LONICH~~: No further questions,
9 Your Honor.

10 JUDGE JULIUS: Okay. Thank you,
11 Counsel. Mr. Evans, redirect whenever you're
12 ready.

13 REDIRECT EXAMINATION

14 MR. EVANS: Ms. McGuire, are you a
15 pharmacist?

16 THE WITNESS: I am not.

17 BY MR. EVANS:

18 Q A medical doctor?

19 A No, sir.

20 Q Are you a toxicologist?

21 A No.

22 Q Are you a laboratory clinician?

23 A I am not.

24 Q Okay. Do you have doctors in your
25 organization?

1 A I do.

2 Q Do you have pharmacists in your
3 organization?

4 A Yes.

5 Q Do you have laboratory people in the
6 organization?

7 A Yes, sir.

8 Q Do you frequently interact with them?

9 A I run the NDASA Council of
10 Laboratories, yes.

11 Q Okay. So in the course of your work,
12 do you obtain information on pharmacology?

13 A Yes.

14 Q On medicine?

15 A Yes.

16 Q On laboratories?

17 A Yes.

18 Q Okay, and as far as rescheduling goes,
19 going down to a Schedule III, what is your
20 testimony about the effect on drug testing that
21 moving marijuana to a Schedule III will have?

22 A The U.S. government has stated
23 repeatedly that the DOT --

24 MR. ~~SWAN LONICH~~: Objection.

25 JUDGE JULIUS: What's the basis?

1 MR. ~~SWAN LONICH~~: Hearsay.

2 JUDGE JULIUS: Any response?

3 MR. EVANS: She's coming from her own
4 experience.

5 MR. ~~SWAN LONICH~~: Yeah, I'm addressing
6 the Court, Your Honor.

7 JUDGE JULIUS: I'm sorry?

8 MR. EVANS: Oh, okay.

9 MR. ~~SWAN LONICH~~: I said, I'm addressing
10 the Court, Your Honor.

11 JUDGE JULIUS: Okay.

12 MR. ~~SWAN LONICH~~: I think he's addressing me.

13 MR. EVANS: Yeah, I'm sorry.

14 JUDGE JULIUS: Response to the
15 objection?

16 MR. EVANS: I asked her what effect it
17 will have. That's based on the facts as she
18 knows it, and it's not hearsay. It's not a
19 communication from a third party out of court.

20 JUDGE JULIUS: Yeah. I tend to agree.
21 I'm going to overrule the hearsay objection.
22 She can provide a lay opinion.

23 MR. EVANS: Okay. Right.

24 THE WITNESS: Our exhibits demonstrate
25 that the DOT testing program that HHS can only

1 approve testing for Schedule I and II drugs.

2 BY MR. EVANS:

3 Q Okay, now what about employers that are
4 not regulated by DOT testing?

5 A Employers --

6 Q That are not controlled or regulated by
7 DOT?

8 A So there's two different avenues here
9 that we need to discuss when it comes to that
10 question. First of all, over 20 states have
11 laws in effect that state that employees --
12 employers, I'm sorry, in that state must follow
13 the DOT testing protocols. So we, in effect,
14 aren't sure how this will affect those state
15 laws. We assume they'll have to follow whatever
16 happens to DOT. So those state laws will have
17 that impact.

18 In those state laws that don't address
19 this, then it's up to the employer
20 determinations on what they do and any other
21 state laws that they have to follow. Currently,
22 medical review officers do determine drug test
23 outcomes and verify and validate prescriptions
24 for DOT and non-DOT. So we already see that
25 impact, but we also see that employers have

1 certain protocols that they follow right now,
2 whether in the DOT program or not, based on
3 those best practices that we've had in DOT for
4 over 30 years.

5 Q So, is it fair to say if DOT
6 disappeared, would some employers still be using
7 the DOT procedures?

8 A I think some would, but a drug test
9 policy, a workplace drug test policy, must be
10 legally defensible. So, there will come a point
11 where they cannot use that as legally
12 defensible, and they will have to just
13 determine, you know, make decisions based on
14 what they feel is best for their company.

15 Q Okay. I have no further questions,
16 Your Honor.

17 JUDGE JULIUS: Okay.

18 MR. EVANS: I thank you very much for
19 coming.

20 THE WITNESS: Thank you.

21 JUDGE JULIUS: Thank you. According to
22 my schedule, the next item up would be for
23 another interested party to begin their case-in-
24 chief, which we said we would not force anyone
25 to go a day before. So you know, unless SAM is

1 ready to begin today, I think we may be done.

2 MR. McNICHOLS: Yeah, I think we're
3 going to call Dr. Akinfiresoye on Monday at
4 9:00, Your Honor, but yeah, she's not here
5 today.

6 JUDGE JULIUS: Okay. Our order said we
7 would not force anyone to go a day before, so
8 perfectly understandable position. We will go
9 ahead and recess at this point.

10 We'll take those documents back, ma'am.

11 Thank you. I would just advise, don't discuss
12 your testimony with anyone unless you hear from
13 your attorney that they don't have any intention
14 to call you for any other purpose.

15 MS. McGUIRE: Okay. Thank you.

16 JUDGE JULIUS: Thank you. All right.
17 We'll be in recess until Monday at 9:00.
18 Everyone be safe. Have a wonderful Independence
19 Day holiday. I think today is probably supposed
20 to be the hottest we've had, so definitely be
21 safe out there. I wish you all a wonderful
22 weekend, and we'll see you back here at 9:00 on
23 Monday. Thank you.

24 (Whereupon, the above-entitled matter
25 went off the record at 11:38 a.m.)

1 C E R T I F I C A T E

2 This is to certify that the foregoing transcript
3 was duly recorded and accurately transcribed
4 under my direction; further, that said
5 transcript is a true and accurate record of the
6 proceedings; and that I am neither counsel for,
7 related to, nor employed by any of the parties
8 to this action in which this matter was taken;
9 and further that I am not a relative nor an
10 employee of any of the parties nor counsel
11 employed by the parties, and I am not
12 financially or otherwise interested in the
13 outcome of the action.

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20 James Cordes
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