No. 20-148

In the Supreme Court of the United States

MARVIN WASHINGTON, ET AL.,
Petitioners,
v.
WILLIAM P. BARR, ATTORNEY GENERAL, ET AL.,
Respondents,

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* INTERNATIONAL CANNABIS BAR ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. DID THE SECOND CIRCUIT ERR IN REQUIRING EXHAUSTION OF ADMINISTRATIVE REMEDIES ONCE IT RECOGNIZED THE HISTORY OF DELAY BY THE DEA AND THE PROSPECT OF IRREPARABLE HARM TO PETITIONERS?

2. IS EXHAUSTION OF THE DEA SCHEDULING PROCESS FUTILE BECAUSE THE DEA REFUSES TO ACKNOWLEDGE THE MEDICAL VALUE OF CANNABIS ESTABLISHED BY THE DEPARTMENT OF HEALTH AND HUMAN SERVICES AND ACCEPTED BY THE U.S. PATENT AND TRADEMARK OFFICE?

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INTERESTS OF THE AMICUS

Founded in 2015, the International Cannabis Bar Association ("INCBA") is a membership organization of over 700 attorneys that advances the interests of its members and thousands of other attorneys across the United States and other jurisdictions. INCBA is the dba of Canbar Association, a nonprofit corporation organized under the California Nonprofit Mutual Benefit Corporation Act and self-certified as a 501(c)(6) organization under the Internal Revenue Code.[1]

INCBA's mission is to improve access to quality legal services for the cannabis industry and to facilitate the practice of law for attorneys serving patients and companies who serve them. INCBA provides premier educational events, maintains an international network of the most experienced legal counsel in cannabis, and advocates for the legal profession.

INCBA's members provide a wide range of legal advice and services to individuals, businesses, and nonprofits interested in state-sanctioned cannabis

[1] No party authored this amicus brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. Counsel for the Petitioners and Respondents received timely notice and have each consented to INCBA filing this brief in support of the Petition for a Writ of Certiorari.

activities. Medical cannabis in one form or another has been legalized by 47 states. It is estimated that three-and-one-half million Americans presently use cannabis for therapeutic purposes.[2] INCBA's members include litigators, transactional attorneys, and regulatory professionals. They practice law in areas that include, among others, securities, finance, corporate, real estate, intellectual property, commercial transactions, banking, antitrust, employment, environmental, immigration, bankruptcy and state receivership, insurance, and tax.

INCBA's members represent patients presently registered in state-authorized medical cannabis programs, seeking registration in such programs, or seeking to authorize such programs in the 17 states that have not yet implemented a robust medical cannabis program. INCBA members advise the businesses licensed to serve medical patients and the adult use market pursuant to state-authorized cannabis programs. INCBA's members advise the many physicians, researchers and their medical and educational institutions who would otherwise study the medical efficacy and safety of cannabis, but for its Schedule I status.

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[2] Americans for Safe Access, State of the State Report, (2020), https://www.safeaccessnow.org/sos; Marijuana Policy Project, *Medical Marijuana Patient Numbers* (May 28, 2020), https://www.mpp.org/issues/medical-marijuana/state-by-state-medical-marijuana-laws/medical-marijuana-patient-numbers/

INCBA members represent the thousands of banks, accountants, insurance companies, and other service providers that serve the state-authorized cannabis industry. INCBA's attorneys advise and assist them in meeting their obligations under federal and state tax laws, state regulatory regimes, sovereign nation rules, and the rules of the many federal agencies that require some form of civil compliance from the cannabis industry, including, among others, the Department of Treasury ("Treasury" or "FinCEN"), the Department of Agriculture, the Food & Drug Administration ("FDA"), the Small Business Administration ("SBA"), and the Patent and Trademark Office ("USPTO").

It is critical to INCBA's members, and to all attorneys advising clients on cannabis issues, that this Court grant certiorari and once and for all decide the constitutionality of the Controlled Substances Act, 21 U.S.C. §§ 811, *et seq*. ("CSA") with respect to cannabis. INCBA's interest in this case arises out of its members' ethical obligations to zealously represent their clients in a shifting legal landscape devoid of clarity.

INCBA's members, and indeed all lawyers advising patients and companies on cannabis laws, must navigate the tensions between federal and state laws. States, one after another, have enacted laws authorizing the cultivation, sale, and possession of cannabis. These states seek to replace illicit, black market activity with legal, regulated markets that ensure patient safety, transparency, taxation, and community reinvestment.

The complex maze of federal, state, county, and municipal laws make cannabis the most scrutinized agricultural commodity in the world. INCBA members must navigate all cannabis laws while representing their clients and also maintaining their oaths to uphold the Constitution, laws of the United States, and professional ethics obligations to clients.

As explained below, Congress prohibits the Drug Enforcement Agency ("DEA") from enforcing the CSA directly against the state-licensed cannabis industry. However, the DEA and other federal agencies regularly invoke the Schedule I status of cannabis to discourage hospitals and universities from researching cannabis upon pain of losing federal funding, to preclude veterans from consuming cannabis if they wish to receive benefits from the Department of Veterans Affairs, and to preclude the SBA from assisting businesses that serve the cannabis industry. For example, many companies discovered they were ineligible for Paycheck Protection Program ("PPP") relief because they worked in or with the cannabis industry. Concurrently, many states have deemed cannabis businesses "essential" so they can continue to serve patients during the COVID pandemic.

Since 2014, Congress has expressly prohibited the DEA and the Department of Justice ("DOJ") from using appropriated funds to block states from implementing laws that authorize the use, distribution, possession, or cultivation of medical marijuana. ("Funding Riders," also commonly referred

to as the "Joyce-Blumenauer Amendment").[3] *See United States v. McIntosh*, 833 F.3d 1163, 1178 (9th Cir 2016) (prohibiting prosecution of individuals engaged in activity authorized by state marijuana laws).

The Funding Riders were enacted on the heels of the DOJ's 2013 "Cole Memorandum" that recognized state legalization of cannabis and outlined eight key priorities for enforcement of the CSA against cannabis-related conduct. Shortly after, the Treasury Department authorized banks to serve the cannabis industry through a memorandum issued by FinCEN, conditioned on banks ensuring compliance with the Cole Memorandum. Though the Cole Memorandum was later rescinded by the Attorney General in 2018, the FinCEN Memorandum remains in effect to this day.

As a result of these federal developments, vibrant state-level cannabis economies have flourished and attracted billions of dollars in investment. However, the state cannabis regulatory regimes include comprehensive regulation that *is incongruent with any existing schedule in the CSA*. Regardless of whether or how the DEA *reschedules*

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[3] See Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, §538, 128 Stat. 2130, 2217 (2014); Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, §542, 129 Stat. 2242, 2332-33 (2015); Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, §537 (2017); Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, §538, 132 Stat. 445 (2018).

cannabis, it would necessarily interfere with implementation of state-level regulation in direct contravention of the Funding Riders and the Tenth Amendment of the United States Constitution.

The CSA also interferes with the rational and consistent implementation of federal laws in both federal courts and agencies. The Executive Office for U.S. Trustees maintains that individuals and companies deriving income from state-authorized cannabis activities may not have access to the nation's bankruptcy courts because of the Schedule I status of cannabis. C. White, Why Marijuana Assets May Not Be Administered in Bankruptcy, https://www.justice.gov/ust/file/abi_201712.pdf/download. Yet, these same litigants have access to and may be summoned into federal courts notwithstanding the CSA and the Schedule I status of cannabis. Choice of law principles under the Erie Doctrine could require that federal courts enforce cannabis-related contracts according to state law, the substance of which remains federally illegal. The Schedule I status of cannabis also means that attorney-client privilege could be pierced under the crime-fraud exception to federal evidentiary rules.

Most incongruously, while the DEA has refused to reschedule cannabis based on an asserted lack of scientific evidence, the USPTO acknowledges the science behind the medical benefits of cannabis and grants patent protection for cannabis strains, products, and methods of production. USPTO has issued a patent to the Department of Health and Human Services without regard to the CSA. But the

Trademark Department of the USPTO continues to refuse to issue trademark protection to certain categories of goods and services based on the differentiation between industrial hemp under the 2018 Farm Bill and marijuana under the CSA.

The Federal Government's approach to state-authorized cannabis – which flows directly from the Schedule I status of cannabis under the CSA – adversely impacts INCBA's members and their clients daily. Attorneys are faced with the virtually impossible task of explaining a contradictory body of federal law completely at odds with state laws and the medical reality that cannabis has been shown to aid patients with a wide range of debilitating and life-threatening symptoms. The stakes are not inconsequential. Criminal penalties under the CSA are severe. Schedule I status means that state-licensed cannabis companies and noncannabis businesses that work with them are potentially liable under civil RICO statutes, notwithstanding that DOJ cannot prosecute a criminal RICO case against them. Similarly, attorneys face the possibility of discipline under professional ethics rules, jeopardizing their clients' legal privileges when rendering advice, and forfeiting malpractice coverage for their acts and omissions – all because of because of the constitutionally repugnant CSA.

INCBA members are directly affected by the Schedule I status of cannabis because their clients require legal advice to comply with the myriad and complex rules and regulations governing state-authorized cannabis programs, as well as federal tax,

employee safety, and other federal laws of general applicability to most businesses. But in so advising clients, INCBA attorneys face the ethical dilemma of advising clients who are acting in violation of federal law. *See* American Bar Association, Model Rules of Professional Conduct, Rule 1.2 (d) (prohibiting attorneys from counseling a client to engage in criminal conduct). Consequently, while most INCBA members and their firms are willing to advise these clients, a chilling effect persists. Many other lawyers still decline or limit representation of these individuals and businesses because of the CSA.

SUMMARY OF THE ARGUMENT

The Second Circuit erred in requiring Petitioners to exhaust their administrative remedies by petitioning the DEA to reschedule cannabis before they can obtain judicial review of their constitutional claims.

This Court observed in *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992) that notwithstanding prudential considerations, "federal courts are vested with a 'virtually unflagging obligation' to exercise the jurisdiction given to them." (citations omitted). Thus, courts "must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion." *Id*. Administrative remedies need not be pursued if the litigant's interests in immediate judicial review outweigh the government's interests in efficiency or administrative autonomy.

Petitioners' interests grossly outweigh those of the government. Petitioners are suffering immediate and ongoing irreparable constitutional injuries. The DEA scheduling process cannot provide Petitioners relief from unconstitutional actions. The DEA is a law enforcement agency, not a court for constitutional claims. Consigning Petitioners to the DEA administrative process for reclassification is futile. Since the CSA's enactment in 1970, the *DEA has rejected or denied 10 cannabis reclassification petitions* and taken, on average, nine years to do so. Most recently, in July 2016, the DEA denied rescheduling petitions filed by an individual in 2009 and by the Governors of Washington and Vermont in 2011, *after six and one half years of delay*.

Promptly on the heels of the DEA's 2016 denials, Petitioners brought this constitutional challenge to the CSA and to the DEA's implementation of the CSA. With these denials, the DEA established a classic Catch-22 situation: rescheduling has been denied time and again because the DEA claims there is a lack of research demonstrating the medical efficacy and safety of cannabis. But because of the Schedule I status of cannabis, it is virtually impossible to undertake that research without violating the CSA.

The Second Circuit ignored *McCarthy* and erred in ruling as a prudential matter that Petitioners should nevertheless undertake the same petitioning process that has resulted in 10 denials and rejections already, including two that DEA denied mere months before the instant Complaint was filed.

It is hard to conceive of a more apt example of administrative futility than sending Petitioners back to the DEA for relief it cannot provide. Judicial deference to the DEA is perpetuating injury to the Petitioners and all who are compliant participants in state-authorized programs. The agency has made clear its position, time and again. The People have spoken, and it is time for this Court to consider the constitutional merits.

STATEMENT OF FACTS/HISTORY BELOW[4]

1. PETITIONERS' CLAIMS

The Second Circuit's characterization that Petitioners seek to have DEA reschedule cannabis is clear error. Petitioners' Complaint avoids any request for rescheduling and instead seeks judgment "declaring that the CSA … is unconstitutional … [and] a permanent injunction … restraining Defendants from enforcing the CSA, as it pertains to cannabis" on the grounds that is unconstitutional. Petitioners claim the CSA is unconstitutional with regard to cannabis because it violates the Due Process Clause of the Fifth Amendment, an assortment of protections guaranteed by the First, Ninth and Tenth Amendments, plus the fundamental liberty right to travel, the right to equal protection, and the right to substantive due process. In addition, they seek a declaration that in enacting

[4] INCBA adopts and incorporates Petitioners' Statement of Facts and Appendix.

the CSA as it pertains to cannabis, Congress violated the Commerce Clause.

The Second Circuit did recognize that this case presents at least one unusual and distinguishing feature compared to past challenges to the DEA's classification of cannabis as a Schedule I drug: "among the Plaintiffs are individuals who plausibly allege that the current scheduling of marijuana poses a serious, life-or-death threat to their health." (App.4a).

Though not recognized below, and despite the fact Petitioners pled and argued the point, there is another distinction from past litigation that factors against requiring Petitioners to exhaust their remedies by filing yet another a futile scheduling petition with the DEA: the Petitioners filed their Complaint promptly after the DEA denied two rescheduling petitions, including one filed by the Governors of Washington and Vermont.

2. THE DEA'S HISTORY OF DELAY AND DENYING PRIOR PETITIONS

The DEA's 2016 denials were based on one simple overarching finding: there are few, if any, clinical trials that have studied the efficacy, medical benefits, and safety of cannabis. *See* Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53767 (Aug. 12, 2016).

The DEA's conclusion was unsurprising and indeed, preordained: as explained within, because of the classification of cannabis as a Schedule I drug, it

is virtually impossible for high-quality research to be conducted.

Petitioners pled with specificity the futile and dilatory nature of the DEA's rescheduling proceedings. Amended Complaint, ¶¶ 354-370. Petitions to reschedule cannabis have been filed continuously with the DEA since shortly after the CSA was enacted, each of which the DEA denied after years of delay:

- The first petition, filed in 1971, was denied after 8 years' consideration, in 1979.
- The next petition, filed in 1972, was denied after 20 years of proceedings, in 1992.
- The next petition accepted by DEA, filed in 1995, was denied after 5 1/2 years, in 2001.
- The next petition, filed in 2002, was denied after 8 ¾ years, in 2011.
- The latest two petitions, filed in 2009 and 2011, were denied after 6 ½ years, on the same day in 2016.

(App. 249-54a).

Significantly, the Second Circuit held that the CSA does not mandate that Petitioners exhaust

remedies as a precondition to suit. (App.8a) ("Although the CSA does not expressly mandate the exhaustion of administrative remedies, our precedents indicate that it generally be required as a prudential rule of judicial administration.") The court also expressly recognized the "precarious position of several of the Plaintiffs … and their argument that the administrative process may not move quickly enough to afford them adequate relief." (App.9a). However, it erred in requiring exhaustion and offering to take action only "should the DEA not act with dispatch." *Id.* As a result, the Second Circuit did not reach or express any view on the merits of Petitioners' constitutional claims – "that is, whether marijuana should be listed or not." *Id.*

REASONS FOR GRANTING THE PETITION

I. REQUIRING PETITIONERS TO EXHAUST ADMINISTRATIVE REMEDIES IGNORES THIS COURT'S PRECEDENT IN *MCCARTHY V. MADIGAN*.

In *McCarthy*, this Court recognized that notwithstanding the prudential considerations that often militate in favor of the exhaustion of administrative remedies, the federal courts are not to shirk their "virtually unflagging obligation" to exercise the jurisdiction vested in the judiciary. Nothing in the CSA mandates that Petitioners petition the DEA to reschedule cannabis. On this point, both courts below agreed.

Nevertheless, the Second Circuit's decision ignores the core analysis required by *McCarthy* – whether the individual's interests in securing prompt judicial review of its claims outweigh the institutional interests of the administrative agency. Instead, it improperly focused on its perception of Congressional intent inferred by the rescheduling process set forth in the CSA at 18 U.S.C. § 812. The Second Circuit held that Congress' enactment of the administrative rescheduling process expressed its intent that the courts should defer jurisdiction until the agency was afforded the chance to complete its administrative review.

After fifty years of DEA denials, the courts owe no deference to administrative process when presented with concrete harm to Petitioners' core life and liberty interests. Further, if Congress had intended such deference, it would have expressly stated exhaustion was necessary before judicial relief could be sought. It did not.

The Second Circuit's decision must be reversed because it ignored *McCarthy*'s command and relegated Petitioners to a lengthy, futile and biased administrative process that is entirely incapable of affording them the relief they seek – a declaration that the CSA is unconstitutional and an injunction prohibiting its enforcement as regards cannabis.

McCarthy held exhaustion is not required in at least three broad sets of circumstances where individual interests weigh heavily against exhaustion. First, exhaustion is not required where to do so would

be futile, as where the agency is biased or has otherwise predetermined the issue. Second is where the agency is unable to grant relief because it lacks the institutional competence to resolve the particular type of issue presented, such as the constitutionality of the statute it is enforcing. The third circumstance is where resort to the administrative remedy would occasion undue prejudice.

Tacitly acknowledging the DEA's historic delays and disinclination to reschedule cannabis, the Second Circuit recognized that "undue delay by the agency might make applicable each of the three exceptions to exhaustion." (App.20a). In light of the DEA's dilatory track record with respect to rescheduling petitions, the court took the extraordinary step of retaining jurisdiction "to take whatever action may become appropriate … if the DEA fails to act promptly" if and when the Petitioners filed their scheduling petition. (App.21a).

However, this was not the result required by *McCarthy*. Petitioners should have been excused from exhausting remedies, and their constitutional claims should have been heard. The law does not require Petitioners to waste countless resources and time mired in a years-long process on yet another petition doomed to fail before having their constitutional claims heard. As the Second Circuit recognized, Petitioners' very life and liberty interests depend on having those claims timely heard and resolved. The appropriate forum is not an administrative agency charged primarily with the enforcement of criminal laws, but rather an Article III court. Petitioners

understandably declined to resign themselves to further administrative futility before the DEA, and now petition this Court for certiorari.

This case falls squarely within each of the three circumstances described by this Court militating against sending the Petitioner back to the agency:

- Exhaustion is futile because the DEA has denied or rejected each of the 10 prior rescheduling petitions, most recently just months prior to filing this Complaint, and the Schedule I status of cannabis prevents this or any Petitioner from gathering the medical and scientific data the DEA and FDA require.

- The DEA's scheduling process is intended on its face to evaluate the medical efficacy and safety of the drug at issue, not to entertain constitutional claims.

- The DEA's rescheduling process is plainly incapable of preventing the current and ongoing irreparable deprivation of Petitioners' constitutional rights.

Futility

Exhaustion is unnecessary if it would be futile, either because agency decisionmakers are biased or because the agency has already determined the issue.

The DEA has determined the issue, no less than 10 times to date. The Second Circuit found this consideration inapplicable because the Attorney General and Director of the DEA named in the Complaint no longer serve in these capacities. Petitioners allege a *decades-long* pattern of bias and animus motivating the enactment of the CSA and the practices of the agency from inception to the present time, not the isolated statements of individual officials at a single point in time.

Petitioners' Complaint detailed the long and unsuccessful history of petitions to reschedule cannabis, as well as the anti-cannabis bias of the DEA, its leaders past and present, and the then-Attorney General.

Since the CSA was enacted in 1970, the DEA has been entertaining rescheduling petitions for the past fifty years on a virtually continuous basis and has rejected each one. Irrespective of the merits of the DEA's decisions, it is plain the DEA is disinclined to change its position, at least in the absence of substantial new research that the DEA itself prohibits researchers from undertaking.

The DEA has erected a classic Catch-22, Kafkaesque state of affairs that forever consigns cannabis to Schedule I status unless this Court steps in and exercises jurisdiction. According to the DEA, cannabis cannot be rescheduled because it has not been adequately researched for the FDA to conclude that it is effective and safe. But cannabis cannot be properly researched to the satisfaction of the DEA and

the FDA because to do so would violate the very law Petitioners and many others have sought to change through the administrative process of petitioning to reschedule cannabis – for the past fifty years – without success.

No medical institution that receives or seeks federal funding is willing to sponsor and undertake the high-quality clinical studies of cannabis the DEA and FDA demand because of the significant risk and catastrophic consequence of losing the many streams of federal funding on which they rely. Hospitals cannot afford to jeopardize the Medicare, Medicaid, and many other streams of federal funds they receive by engaging in clinical research activity that requires them to procure and dispense a Schedule I drug in violation of the CSA.

Likewise, colleges and universities cannot afford to sponsor this research and risk losing the billions of dollars in research grants, student financial aid, and other forms of federal financial assistance upon which they rely. Moreover, most research hospitals and research universities are 501(c)(3) nonprofit organizations that cannot afford to jeopardize the tax-exempt status upon which they have erected billion-dollar institutions by allowing researchers to properly evaluate the medical efficacy and safety of cannabis.

Most vexing of all for the Petitioners, (as well as the patients, doctors and researchers who want to engage in this much-needed research), the federal agency requiring this research to reclassify cannabis

is the very same agency that vigorously wields the CSA and threat of enforcement action to prevent that research from being conducted. That threat is real: DOJ actively usurps the Funding Riders through administrative subpoenas and unwarranted antitrust scrutiny of cannabis companies. If research institutions were to engage in the research demanded by the DEA rescheduling process, they would subject themselves to prosecution and/or suspension and debarment from federal programs.

Perhaps the most damning evidence of the futility of sending the Petitioners back to once again endure the Sisyphean task of the DEA rescheduling process is the federal government's own patent application in 1999 entitled "Cannabinoids as Anti-Oxidants and Neuroprotectants." (App.289a). Notwithstanding the DEA's 2016 denials based on the FDA's conclusions that cannabis has no medical use or efficacy, the same Department of Health and Human Services ("HHS") upon which the DEA and Attorney General are required to rely in judging the efficacy of cannabis, applied for and in 2003 received Patent No. 6,630,507 B1 from the USPTO. Despite the Government's own contention to the USPTO in 1999 that cannabis compounds have medical uses for purposes of securing intellectual property rights, the DEA and FDA have been unwilling to concede these same facts for purposes of rescheduling petitions.

The Second Circuit erroneously found exhaustion to be "sensible" because it would protect agency authority, promote judicial efficiency, and allow the agency to apply its expertise, but ignored the

long history of DEA denials, and especially the DEA's most recent petition denials in 2016. The DEA has had fifty years to correct the quite evident flaws of the temporary legislative classification of cannabis. Instead, the DEA has used each opportunity to erect further barriers to relief and to frustrate the very research needed to properly evaluate the legislative classification.

Requiring Petitioners to file yet another rescheduling petition at this juncture constitutes the very essence of futility.

Lack of Remedy/Competence

Second, exhaustion is unnecessary where the administrative process would be incapable of granting adequate relief. The Second Circuit erred in concluding that Petitioners wish to pursue reclassification of cannabis, and thus, they must avail themselves of the DEA's administrative process. That is not the claim Petitioners made, nor the relief Petitioners sought. Petitioners do not claim "developments in medical research and government practice should lead to the reclassification of marijuana." (App.13a). The Second Circuit dismissed the Complaint after rewriting and recharacterizing it, rather than taking the claims as pled by Petitioners.

Any fair reading of Petitioners' Complaint reveals that their claim is not that there have been new medical or scientific developments since the 2016 denials, but that the very enactment of the CSA in the 1970s and the subsequent administration of it by the

DEA are unconstitutional. Petitioners allege the Government has been motivated by anti-drug bias and racial animus. They claim that they have been personally injured and deprived of their rights to federal benefits, to petition their government, and to travel. Petitioners seek to prove that the agency charged with administering the CSA has been biased, and in being so, has abused its wide-ranging administrative powers and fearsome criminal powers to forever consign cannabis to Schedule I status.

These sorts of factual claims, and the constitutional consequences, are not at all suited for determination by the very agency Petitioners accuse of a fifty-year history of bias and animus. In our system of checks and balances, Petitioners' claims are properly heard only by the judiciary.

Petitioners do not seek to reschedule cannabis. Rather, they seek to invalidate the CSA's provisions with regard to cannabis and enjoin its enforcement. As such, no administrative remedy can afford them the relief they seek.

The DEA's scheduling process is designed to evaluate the medical value and safety of cannabis, not the constitutionality of the CSA or of the DEA's actions. Petitioners' constitutional claims are not within the institutional competence of the DEA petitioning process. The DEA and Attorney General's track record is clear: they do not believe the CSA or their actions have been unconstitutional. Indeed, they so argued in the courts below here.

Resolution of the constitutional violations and deprivations alleged in the Complaint, such as the racial animus underlying enactment of the CSA, is more properly the province of the courts than of a law enforcement agency that has derived its funding by prosecution of thousands of individuals for violations of the CSA and the fact many of those convictions would be jeopardized were it to accept Petitioners' constitutional challenges.

Undue Prejudice

Third, exhaustion is unnecessary "where pursuing agency review would subject plaintiffs to undue prejudice. … In particular, 'an unreasonable or indefinite timeframe for administrative action' may sufficiently prejudice plaintiffs to justify a federal court taking a case prior to the exhaustion of administrative remedies." *McCarthy*, 503 U.S. at 146-47. Here, while the Second Circuit was more charitable, allowing that irreparable injury flowing from delay incident to exhausting remedies militates in favor of waiving exhaustion, it erroneously concluded that despite the "apparently dire situation of some of the Plaintiffs," they are not injured because they are able to obtain their "life-saving medication."

The Second Circuit missed the forest for the trees. Petitioners' irreparable injury is not that they cannot receive their medication currently; their present and ongoing injury is the violation of their constitutional rights to travel on federal lands and to petition the government, among others, for injuries that are irremediable except by a judicial declaration

freeing them of the criminal consequences of the Schedule I status of cannabis and enjoining DEA enforcement.

As eloquently detailed by Petitioners in their Petition, medical cannabis patients cannot access certain federally provided healthcare services. They may not administer life-saving medication at home if they live on federal or tribal lands or in federally subsidized housing. Many schools, hospitals and social service institutions that receive federal funds prohibit or strictly limit patients from possessing or using their medically necessary cannabis in institutional settings because of the fear of prosecution or loss of funding for violating the CSA. *See e.g., Brown v. Woods Mullen Shelter/Bos. Pub. Health Comm'n.*, 2017 WL 4287909 (Mass. Super. Aug. 28, 2017) (expulsion from homeless shelter due to state-legal medically prescribed marijuana); *Albuquerque Pub. Sch. v. Sledge*, 2019 WL 3755954 (D.N.M. Aug. 8, 2019) (disabled kindergartner denied access to school due to medical cannabis); *Nation v. Trump*, 2020 WL 3410887 (9th Cir. June 22, 2020) (medical cannabis patient evicted from public housing). Their rights to travel with their medically necessary cannabis onto or across federal property and to petition their federal representatives are severely inhibited by the Schedule I status of cannabis. *Rehaif v. U.S.*, 139 S.Ct. 2191, 2211 (2019) ("In a State that chooses to legalize marijuana, possession is wrongful [] if the defendant is on federal property") (citation omitted). State-licensed companies are subject to civil RICO liability for operating businesses in violation of the CSA, notwithstanding state authorization and the Federal

Riders that prohibit criminal prosecution of the predicate acts under the CSA. *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865 (10th Cir. 2017).

Acknowledging the DEA's long delays, the Second Circuit held that "long delays cast doubt on the appropriateness of requiring exhaustion." (App.20a, *citing Gibson v. Berryhill*, 411 U.S. 564, 575 n.14 (1973)). The Second Circuit held out the prospect that "undue delay by the agency might make applicable each of the three exceptions to exhaustion. [U]ndue delay, if it in fact results in catastrophic health consequences, could make exhaustion futile. Moreover, the relief the agency might provide could, because of undue delay, become inadequate. And finally, and obviously, Plaintiffs could be unduly prejudiced by such delay." *Id*.

The futility of petitioning the DEA is evident in light of its fifty-year history of denials, including the two denials issued immediately preceding the filing of Petitioners' Complaint. The DEA is not competent to resolve Petitioners' constitutional claims, and Petitioners are deprived daily of their core life and liberty interests. The Second Circuit erred in requiring Petitioners to exhaust their remedies before the DEA.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTING POLICIES AND IMPLEMENTATIONS BY THREE FEDERAL DEPARTMENTS.

Certiorari is appropriate because the federal government, through its various departments and agencies, is addressing medical cannabis in inconsistent and contradictory ways. That creates chaos in public policy and in legal implementation. By granting certiorari, the Court can reconcile policy and implementation with the Constitution, and benefit the public.

The CSA requires the Attorney General to rely on HHS for medical and scientific determinations in cannabis rescheduling petitions. 18 U.S.C. § 811(b). Based on research at the National Institutes of Health ("NIH"), HHS filed a U.S. Patent Application in 1999 entitled "Cannabinoids as Anti-Oxidants and Neuroprotectants." The federal patent system is grounded in the Constitution (Article I Section 8 clause 8); it is highly credible, objective, and rigorous, and plays a major role in bringing medical innovation forward commercially for the public good. Further, the patent literature is a highly valuable and accessible repository of scientific and technical innovation.

The patent was issued in 2003 by the USPTO, an agency of the Department of Commerce, as U.S. Patent No. 6,630,507. (App.289a). The independent actions of these two cabinet-level Departments directly contradict DEA findings that cannabis has no medical use or efficacy. Both NIH and the USPTO

have a long tradition of careful deliberation and sound managerial practices. NIH is performing its role, driving basic research, and bringing medical innovation forward to the public. The USPTO is performing its role by rationally, objectively, and rigorously examining patent applications and awarding patents for inventions that meet their quality criteria.

The inventors on U.S. Patent 6,630,507 were leading scientists, and one of them (Axelrod) was a Nobel Prize winner. The science behind U.S. Patent 6,630,507 was included in a broad area of research that began in the 1970s, and ultimately yielded the concept that biochemicals such as neurotransmitters, hormones, and drugs typically exert their action by way of binding to specific chemical receptors throughout the body.

In the abstract of U.S. Patent 6,630,507, which clearly describes a science-based medical treatment, HHS represented to USPTO, and USPTO accepted its claim, that cannabinoids found in cannabis have particular application in limiting neurological damage following stroke and trauma and in treating Alzheimer's and Parkinson's diseases and HIV dementia:

> Cannabinoids have been found to have antioxidant properties, unrelated to NMDA receptor antagonism. *This new found property makes cannabinoids useful in the treatment and prophylaxis of wide variety of oxidation associated*

> *diseases, such as ischemic, age-related, inflammatory and autoimmune diseases. The cannabinoids are found to have particular application as neuroprotectants, for example in limiting neurological damage following ischemic insults, such as stroke and trauma, or in the treatment of neurodegenerative diseases, such as Alzheimer's disease, Parkinson's disease and HIV dementia.*

(App.290a) (*emphasis added*).

Some twenty-one years after the filing of the U.S. Patent 6,630,507, the reported data and conclusions remain unchallenged, and indeed have served as an opening for further development of cannabinoid compounds for medical treatments. Cannabinoid research and patenting activity for medical use has been distributed about equally among three areas: (1) receptors and ligands, (2) pharmaceutical composition (including formulation, bioavailability), and (3) disease treatments. Diseases identified as treatment targets include psychological conditions (anxiety, depression), arthritis, asthma, inflammatory diseases, neurological and brain disease, nausea, and epilepsy. The most active entities now involved in development of cannabinoid for medical use are mid-sized pharmaceutical companies.

Based on the work of NIH, HHS has officially asserted the medical utility of cannabis, and the Department of Commerce, through the USPTO, has reviewed and accepted the claims of HHS and select

other applicants who are actively researching and filing patents for medical uses of cannabis. Yet, the DEA perpetually and arbitrarily refuses to recognize the medical utility of cannabis in the rescheduling process. Aside from affirming the futility of the DEA rescheduling process, the conflicting agency approaches underscore the need for this Court to exercise jurisdiction and resolve these conflicts that subject Petitioners to ongoing and severe constitutional harm.

CONCLUSION

This Court should grant certiorari to bring clarity and coherence to this regulatory area in order to relieve Petitioners of constitutional harm. Because classification of cannabis as a Schedule I drug prevents precisely the research needed to satisfy the prerequisites for rescheduling under the CSA, further administrative process is futile. Moreover, because the DEA refuses to accept the conclusions of HHS, NIH and USPTO that cannabis has medical value, conflicts endure at the federal level, causing Petitioners harm. INCBA, on behalf of attorneys who themselves are subject to criminal prosecution, disciplinary proceedings, and significant professional risks for advising compliant participants in the state-legalized cannabis industry, join Petitioners in respectfully requesting that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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