UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARVIN WASHINGTON, et al.,

Plaintiffs,

-v-

JEFFERSON BEAUREGARD SESSIONS, III, et al.,

Defendants.

17 Civ. 5625 (AKH)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS

JOON H. KIM
Acting United States Attorney for the
Southern District of New York
86 Chambers Street, 3rd Floor
New York, New York 10007
Tel.: (212) 637-2677/2774
E-mail: samuel.dolinger@usdoj.gov
rebecca.tinio@usdoj.gov

SAMUEL DOLINGER
REBECCA S. TINIO
Assistant United States Attorneys
– Of Counsel –

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Joon H. Kim, Acting United States Attorney for the Southern District of New York, on behalf of Defendants the United States of America; Jefferson B. Sessions, III, in his official capacity as Attorney General of the United States; the DOJ;[1] Robert W. Patterson, in his official capacity as the Acting Administrator of the DEA; and the DEA, respectfully submits this reply memorandum of law in further support of Defendants' motion to dismiss this action pursuant to Rules 8, 12(b)(1), and 12(b)(6) of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

This suit should be dismissed. Plaintiffs ignore or unsuccessfully attempt to distinguish the vast array of binding and persuasive precedent that bars or fatally undermines their constitutional claims challenging the regulation of marijuana under the CSA. Further, they incorrectly urge the Court to accept their fundamental *legal* arguments—including the supposed legal irrationality of Congress's policy decisions concerning marijuana and the purported futility of the administrative rescheduling scheme—as "true" under the relevant pleading standards. The Court should reject this premise out of hand: no deference to Plaintiffs' incorrect legal conclusions (or, for that matter, their conclusory and implausible factual contentions) is required. Dismissal is appropriate under Rule 12(b)(6) because the plausibly pleaded factual allegations of the Amended Complaint—even when assumed to be true for the purposes of this motion—do not establish valid claims to legal relief under the relevant legal standards and governing case law. In addition, Plaintiffs impermissibly attempt to plead additional facts and advance new legal theories in opposition to the motion, despite the fact that this is clearly barred and also futile.

[1] Except as otherwise noted, capitalized terms herein are defined in this brief as they were in Defendants' opening brief, Dkt. No. 37.

Plaintiffs repeatedly recite a laundry list of unconvincing factors that, they assert, support their argument that the CSA lacks a rational basis. They argue that because their Amended Complaint is supposedly the largest compilation of these allegations, their case should succeed where all others—including many others citing the very same supposed "evidence"—have failed. But, of course, under the rational basis standard, the Court may not do as Plaintiffs ask and re-weigh from scratch all of the various policy factors and evidence involved in a rationally based legislative choice: this is a task for Congress, not the judicial branch. Furthermore, Plaintiffs' allegations regarding the subjective "beliefs" of various government actors are simply irrelevant on rational basis review.

Plaintiffs also fail to establish any fundamental right to use marijuana, though they appear to rely on such a supposed right as a necessary underpinning to several of their claims. Moreover, Plaintiffs do not advance such a fundamental right by name, but instead attempt to couch it in nebulous terms of "personal autonomy" that other courts have previously rejected in similar cases asserting a fundamental right to access marijuana or other drugs. Nor are Plaintiffs able to find any legal support for their unprecedented claims that the CSA—a facially neutral law regulating a federally banned controlled substance—somehow impinges upon their constitutional right to travel or to petition the legislature for redress.

Furthermore, the claims brought by the Cannabis Cultural Association should be dismissed for lack of standing, as its submission of member affidavits in opposition to the motion to dismiss fails to bolster its conclusory allegations of injury or redressability. Moreover, the Cannabis Association's equal protection claim is unsupported by any allegation of discriminatory intent by the relevant decisionmaker, the 1970 Congress that enacted the CSA, and thus it fails to state a claim. And the Court should reject Plaintiffs' peculiar attempt to have

this Court hold that the Supreme Court's controlling 2005 decision in *Gonzales v. Raich*—which upheld the constitutionality of federal marijuana regulation under the Commerce Clause—is "bad law."

Because the Amended Complaint fails plausibly to state any claim for relief, Defendants' motion to dismiss should be granted under Rule 12(b)(6). Alternatively, the case should be dismissed (1) for failure to exhaust available administrative remedies, because Plaintiffs have not attempted to make use of the administrative rescheduling process that Congress created to permit agency consideration of scientific evidence regarding controlled substances; and also (2) for failure to comply with Rule 8, because Plaintiffs still have not made clear what their claims are, or clearly explicated the legal theories on which they rely.

ARGUMENT

I. The Court Should Reject Plaintiffs' Impermissible Attempt to Further Amend the Amended Complaint Through Their Opposition Papers

As an initial matter, Plaintiffs' attempts to amend their pleadings through their opposition briefing should be barred, and their new factual contentions and legal theories that do not appear in the Amended Complaint should be disregarded. "[I]t is axiomatic that the Complaint cannot be amended by briefs in opposition to a motion to dismiss." *Ace Arts, LLC v. Sony/ATV Music Publ'g, LLC*, 56 F. Supp. 3d 436, 451 (S.D.N.Y. 2014) (internal quotation marks omitted). Despite this clear principle, from the beginning of their brief Plaintiffs repeatedly and inappropriately cite new supposed "evidence" that is not contained in their Amended Complaint. *See, e.g.*, Dkt. No. 44 ("Pl. Opp.") at 2 nn.2-4 (citing, *inter alia*, sources post-dating the Amended Complaint); 7 n.7 & 18 (citing and quoting at length from Stone Affidavit, which does not appear in the Amended Complaint or even on the docket, despite Plaintiffs' misleading citation to Dkt. No. 26); 38 & n.34 (citing previously unasserted "evidence" of international drug

patent from 1999); 39 nn.35-36, 58-59 & n.55, 83-84 & n.72; 87-88 & nn.76-80 (citing numerous pieces of previously unasserted "evidence" for their truth); 107 n.105.

Additionally, Plaintiffs seek to assert new legal theories—for instance, the previously unasserted argument that their Commerce Clause challenge is in fact based on the unrecognized theory of desuetude, *see* Pl. Opp. at 91-95, which can be ascertained nowhere in the Amended Complaint. But it is "[im]proper for plaintiffs to have asserted . . . new legal theories in their opposition brief." *Lombardo v. Dr. Seuss Enterprises, L.P.*, No. 16 Civ. 9974 (AKH), 2017 WL 1378413, at *4 (S.D.N.Y. Apr. 7, 2017) (citing, *inter alia*, *Southwick Clothing LLC v. GFT (USA) Corp.*, No. 99 Civ. 10452 (GBD), 2004 WL 2914093, at *6 (S.D.N.Y. Dec. 15, 2004))).

Plaintiffs chose not to seek to further amend the Amended Complaint in response to Defendants' motion, *see* Fed. R. Civ. P. 15, and instead opposed it.[2] Accordingly, the Court should disregard Plaintiffs' numerous newly asserted factual contentions and reject their attempt to assert novel legal theories in their opposition briefing.

II. The Amended Complaint Fails to State a Claim Under Rule 12(b)(6)

As Defendants' opening brief explains, Plaintiffs fail to state any claim for relief. Now, in an attempt to get around decades of precedent rejecting similar challenges to the federal regulation of marijuana, Plaintiffs cite a mass of irrelevant allegations in their Amended Complaint and then claim that the Court is required to accept their asserted legal conclusions, as well as its numerous conclusory, implausible factual contentions, as "true." Pl. Opp. at 31-35. Clearly, this is not the law. "[O]n a motion to dismiss, courts are not bound to accept as true a

[2] Any request for leave to amend, however, should be denied, given that an amendment of the pleadings would be futile. *See, e.g.*, *Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 119 (2d Cir. 2012) (amendment is futile where the court determines that "proposed amendments would fail to cure prior deficiencies or to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure").

legal conclusion couched as a factual allegation." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks omitted); *accord Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."). Additionally, "[a] complaint must be dismissed if it does not plead 'enough facts to state a claim to relief that is plausible on its face.'" *Brown v. Daikin Am. Inc.*, 756 F.3d 219, 225 (2d Cir. 2014) (quoting *Twombly*, 550 U.S. at 570). Dismissal is appropriate here because "the allegations in [the Amended Complaint], however true, could not raise a claim of entitlement to relief." *Twombly*, 550 U.S. at 558.

A. Plaintiffs' Due Process Challenge Fails

1. Plaintiffs Misstate the Applicable Legal Standard, and Fail to Meet Their Burden to Negate Any Conceivable Rationale for the Statute, Which Is Presumed Constitutional

Plaintiffs' principal claim in this suit is that the CSA, "as it pertains to Cannabis," is "irrational *as a matter of law*." Am. Compl. ¶ 7 (emphasis added). As Defendants' initial memorandum explains, such claims are exceedingly difficult to sustain. Controlling law commands that, on rational basis review, a "*strong presumption of rationality* . . . attaches to a statute," *Beatie v. City of New York*, 123 F.3d 707, 712 (2d Cir. 1997) (emphasis added), and "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," *Heller v. Doe*, 509 U.S. 312, 320 (1993) (brackets and internal quotation marks omitted)); *accord Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012); *see also Wroblewski v. City of Washburn*, 965 F.2d 452, 460 (7th Cir. 1992) (holding that, under the rational basis standard, "[t]o survive a motion to dismiss for failure to state a claim, a plaintiff must allege facts sufficient to overcome the presumption of rationality that applies to government classifications").

Evidently unable to identify any basis to dispute this controlling law, Plaintiffs improperly seek to have the Court nevertheless allow their case to go forward, presumably for discovery, by accepting their fundamental *legal* conclusions as facts supposedly entitled to the presumption of truth under Rule 12(b)(6). *See* Pl. Opp. at 31 (claiming that Plaintiffs' "Irrationality Allegation must be assumed true for purposes of this motion"). But this incorrect assertion is precluded by the Supreme Court's decisions in *Twombly*, 550 U.S. at 555, and *Iqbal*, 556 U.S. at 678. Whether the CSA is constitutionally rational is the ultimate *legal* question at issue here, and Plaintiffs' allegation of a legal conclusion deserves absolutely no weight. *See Wroblewski*, 965 F.2d at 460 (holding that a "complaint's conclusionary assertion that the policy is 'without rational basis' is insufficient to overcome the presumption of rationality" that attaches on rational basis review).

More specifically, Plaintiffs' "Irrationality Allegation"—that "the Federal Government does not and cannot believe . . . that Cannabis satisfies the Three Schedule I Requirements, thus rendering the classification wholly irrational," Pl. Opp. at 31—is a textbook example of the type of legal conclusion that deserves no weight in the Court's consideration of the Amended Complaint. *See, e.g.*, *Iqbal*, 556 U.S. at 680-81 (disregarding allegation that "petitioners 'knew of, condoned, and willfully and maliciously agreed to subject [Respondent]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest'" as "bare assertions" that are "conclusory and not entitled to be assumed true" (second alteration in *Iqbal*)). Moreover, Plaintiffs fail to explain how their bare conclusion regarding the "beliefs" of the "Federal Government"—left entirely undefined—could negate "every conceivable basis" for the CSA, whether or not such reasons

were articulated by or "actually motivated the legislature." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993); *see also infra* Section II.A.3.(c).[3]

Given the strong presumption of rationality, and the governing rule that "any reasonably conceivable state of facts" supporting the law will suffice, *Beach Commc'ns*, 508 U.S. at 313, numerous courts—including the Second Circuit—have made clear that it is appropriate for the Court to decide Plaintiffs' rationality-based challenge on the pleadings and without any need for discovery. *See Connolly v. McCall*, 254 F.3d 36, 42 (2d Cir. 2001) (affirming Rule 12(b)(6) dismissal under rational basis standard as "appropriate . . . on the pleadings and prior to discovery"); *Mixon v. Ohio*, 193 F.3d 389, 400 & n.9 (6th Cir. 1999);[4] *Knapp v. Hanson*, 183 F.3d 786, 789 (8th Cir. 1999) (holding that plaintiffs were "incorrect in their contention that [a claim under rational basis review] cannot be decided on a motion to dismiss," and citing cases); *see also Smith v. Defendant A*, No. 08 Civ. [ ] (DLC), 2009 WL 1514590, at *5 (S.D.N.Y. May 29, 2009) ("The Second Circuit has noted that 'rationality review' is appropriate in reviewing a motion to dismiss on the pleadings where 'it takes but momentary reflection to arrive at a

[3] Plaintiffs compound the peculiarity of their argument by contending that, because Defendants had not countered Plaintiffs' flawed opposition argument in their opening brief—before it was raised by Plaintiffs—Defendants cannot now respond in reply. *See* Pl. Opp. at 32. Plaintiffs misstate the law. "[R]eply papers may properly address new material issues raised in the opposition papers so as to avoid giving unfair advantage to the answering party." *Bayway Ref. Co. v. Oxygenated Mktg. & Trading A.G.*, 215 F.3d 219, 226-27 (2d Cir. 2000) (internal quotation marks omitted).

[4] Plaintiffs provide a misleading summary of *Mixon*. Pl. Opp. at 44. *Mixon* held that no discovery was necessary before dismissing a rational-basis challenge on the pleadings—one of several cases cited in Defendants' opening brief for the proposition that such challenges are often decided at the pleading stage. *See* Def. Br. at 12. Plaintiffs note the irrelevant fact that *Mixon* was decided under Rule 12(c), but that rule's relevant standards (as *Mixon* held) are identical to Rule 12(b)(6). *Mixon*, 193 F.3d at 400. Moreover, while some discovery had apparently taken place before the Rule 12(c) motion was decided, the *Mixon* court explicitly noted that such evidence was disregarded in the decision, and the court below made "determinations of law on all of the issues based on the pleadings filed in the case." *Id.* at 400 n.9.

governmental purpose that is both legitimate beyond dispute and rationally related to the state's classification.'" (quoting *Johnson v. Baker*, 108 F.3d 10, 11-12 (2d Cir. 1997))); *Sullivan v. City of New York*, No. 08 Civ. 7294 (LTS) (MHD), 2011 WL 1239755, at *4 (S.D.N.Y. Mar. 25, 2011) (dismissing on rational basis review because "the Amended Complaint fails to negate any reasonably conceivable state of facts that could provide a rational basis for the challenged classification" (alterations and internal quotation marks omitted)), *aff'd*, 484 F. App'x 628 (2d Cir. 2012) (summary order).

Moreover, "[c]ourts may permissively consider factors outside the pleadings when deciding whether a statute bears a rational relationship to a legitimate state purpose." *Mixon*, 193 F.3d at 400 n.9 (citing *Heller*, 509 U.S. at 319-21). "[U]nder rational basis review, the plaintiff must 'negative every conceivable basis which might support' the challenged law, even if some of those bases have absolutely no foundation in the record." *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 109 (2d Cir. 2008) (quoting *Beach Commc'ns*, 508 U.S. at 315)); *see also Smith*, 2009 WL 1514590, at *5 (a court may "hypothesize[] rational purposes for government action not raised in the pleadings").

2. Plaintiffs Ask the Court to Ignore Uniform Case Law, Including the Binding Law of the Second Circuit, That Precludes Plaintiffs' Due Process Claim

(a) The Law of the Second Circuit Bars Plaintiffs' Claim

That the CSA's classification of marijuana survives rationality review is already the established law of this circuit. *United States v. Canori*, 737 F.3d 181, 183 (2d Cir. 2013) (the Second Circuit has "upheld the constitutionality of Congress's classification of marijuana as a Schedule I drug" (citing *United States v. Kiffer*, 477 F.2d 349, 355-57 (2d Cir. 1973))). Every other court to have considered the question of which government counsel is aware has agreed, and Plaintiffs identify no contrary case law. *See, e.g.*, Dkt. No. 37 ("Def. Br.") at 14-15 (citing

cases from U.S. Courts of Appeals and district courts around the country rejecting marijuana-related challenges to the CSA on rational basis review).

Plaintiffs contend that the principle of *stare decisis* does not apply, either to Second Circuit case law or to any of the numerous other cases rejecting their positions. Pl. Opp. at 37. But in support of this argument, they cite only out-of-circuit cases where no binding decision of a U.S. Court of Appeals or the Supreme Court controlled the decision of the court. *See, e.g.*, *Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1183 (10th Cir. 2009) (declining to follow nonbinding district court and state-court cases); *see also Gately v. Massachusetts*, 2 F.3d 1221, 1227 (1st Cir. 1993) ("We have found no case . . . that supports [a party's] contention that a weak or ineffective presentation in a prior case deprives the ruling of precedential effect." (internal quotation marks omitted)).[5]

Here, by contrast, this Court is bound to follow Second Circuit precedent on this issue, "unless and until it is overruled by the Court *en banc* or by the Supreme Court." *Baraket v. Holder*, 632 F.3d 56, 59 (2d Cir. 2011) (internal quotation marks omitted); *see also United States v. Mitlo*, 714 F.2d 294, 298 (3d Cir. 1983) ("[P]recedents set by higher courts are conclusive on courts lower in the judicial hierarchy and leave to the latter no scope for independent judgment or discretion." (internal quotation marks omitted)). Plaintiffs do not argue that any decision by the Second Circuit sitting *en banc* or the Supreme Court provides any basis for deviating from this established precedent. Accordingly, their attempt to avoid controlling Second Circuit law—which forecloses their central legal argument—should be rejected.

[5] In *Gately*, the First Circuit relied, *inter alia*, on the fact that the "legal landscape ha[d] been altered in critical respects": the legal standard underlying an earlier precedent had been called into question by intervening Supreme Court decisions. *See Gately*, 2 F.3d at 1228.

(b) Plaintiffs Fail to Undermine a Vast Array of Precedent Barring Their Due Process Challenge to the CSA's Classification of Marijuana

Plaintiffs argue that the multitude of cases that stand in direct opposition to their irrationality claim—including the controlling Second Circuit precedent upholding the constitutional rationality of the CSA as applied to marijuana, *Kiffer*, 477 F.2d at 355-57—is inapplicable because of its age. They contend that *stare decisis* does not bind the Court because certain "facts and circumstances" have changed. Pl. Opp. at 37-39. But even were the lower courts permitted to deviate from binding circuit law every time a party made such an assertion—and they are not—Plaintiffs have not presented a reason that plausibly would lead even the Second Circuit, sitting *en banc*, to reconsider *Kiffer*. As the Supreme Court has warned, courts should not "depart from the doctrine of *stare decisis* without some compelling justification," given the doctrine's "fundamental importance to the rule of law" and its "promot[ion of] stability, predictability, and respect for judicial authority." *Hilton v. S.C. Pub. Railways Comm'n*, 502 U.S. 197, 202 (1991); *see also Dickerson v. United States*, 530 U.S. 428, 443 (2000) ("[E]ven in constitutional cases, the doctrine [of *stare decisis*] carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'"). Plaintiffs present no such justification here.

Moreover, Plaintiffs' argument simply ignores the numerous recent decisions that reaffirm earlier decisions maintaining that marijuana's classification is constitutionally rational, rejecting similar arguments that earlier precedents are "outdated," Pl. Opp. at 37. Just last year, in 2016, the Ninth Circuit rejected the very same argument, holding that "while it may be true that marijuana's legal status continues to evolve, as does its standing in the medical and scientific communities," any such "developments *do not come close to demonstrating* that changes since 1978" could materially undermine the court's earlier precedent holding that the CSA is

constitutionally valid. *United States v. Christie*, 825 F.3d 1048, 1066 (9th Cir. 2016) (emphasis added). In 2007, the Ninth Circuit had previously rejected the same argument, holding that "new information" concerning marijuana developed since 1978 had not undermined the central holding of its earlier precedent. *United States v. Oakland Cannabis Buyers' Co-op*, 259 F. App'x 936, 938 (9th Cir. 2007) (mem.). Plaintiffs fail even to mention these cases, much less distinguish them. Rather, their view appears to be that judges must permit the "re-litigat[ion of] scheduling decisions in each and every drug case" that comes before a federal court, *United States v. Taylor*, No. 14 Cr. 67, 2014 WL 12676320, at *4 (W.D. Mich. Sept. 8, 2014)—and apparently in *seriatim* civil challenges, as well. But such a rule would defeat the purposes of *stare decisis*, and contravene the clear rule barring lower courts from disregarding controlling higher-court precedent.

Plaintiffs also fail to acknowledge the multitude of more recently decided cases—even as recent as last month—that reaffirm the uniform precedent already in place precluding Plaintiffs' challenge and rejecting the argument that meaningful "new" facts have emerged. *See, e.g.*, *United States v. Bally*, No. 17-20135, 2017 WL 5625896, at *6-7 (E.D. Mich. Nov. 22, 2017) (reaffirming that there is no "convincing basis to revisit settled case law" concerning the rational basis for CSA's regulation of marijuana, and rejecting defendant's argument that congressional appropriations riders changed the analysis (internal quotation marks omitted)); *United States v. Inzer*, No. 14 Cr. 437, 2015 WL 3404672, at *3 (M.D. Fla. May 26, 2015) (rejecting "exhibits regarding marijuana's medical efficacy and the medical and public opinions related to its use" as "irrelevant," and relying on Eleventh Circuit precedent from 1982); *United States v. Wilde*, 74 F. Supp. 3d 1092, 1098-99 (N.D. Cal. 2014) (rejecting "voluminous exhibits purporting to demonstrate the safety and medical efficacy of marijuana" as "irrelevant" on rational basis

review, and reaffirming that there was a "reasonably conceivable state of facts" supporting marijuana's classification under the CSA, citing numerous cases from the 1970s through 2014); *Taylor*, 2014 WL 12676320, at *4 (rejecting argument that "prior case law is not controlling because new evidence and proffered expert testimony demonstrates that the continued scheduling of marijuana lacks a rational basis"); *United States v. Heying*, No. 14 Cr. 30, 2014 WL 5286153, at *9-10 (D. Minn. Aug. 15, 2014) (rejecting claim that "additional scientific evidence," "not considered by the courts" in earlier cases, "is now available and demands the conclusion that marijuana's continued treatment as a Schedule I substance lacks a rational basis," and affirming CSA's rational basis because "extensive evidence proffered" to the Court failed to "negate every conceivable basis for the treatment of marijuana as a Schedule I controlled substance"), *report and rec. adopted*, 2014 WL 5286155 (D. Minn. Oct. 15, 2014); *United States v. McFarland*, No. 12 Cr. 40082, 2012 WL 5864008, at *1 & n.2 (D.S.D. Nov. 19, 2012) (rejecting argument that binding Eighth Circuit precedent was "outdated because it was decided in 1982," and noting 2006 circuit reaffirmance of rationality of CSA); *United States v. Washington*, 887 F. Supp. 2d 1077, 1102-03 (D. Mont. 2012) (rejecting argument that "additional studies and changes in state law have called into question the rationality of Congress' policy" in classifying marijuana under the CSA, and holding that "there remains sufficient debate regarding the public benefits and potential for harmful consequences of marijuana use to find a rational basis to uphold the continued classification of marijuana as a schedule I controlled substance"); *see also United States v. White Plume*, 447 F.3d 1067, 1076 (8th Cir. 2006) (reaffirming Eighth Circuit's 1982 holding that "categorizing marijuana . . . as a Schedule I substance passes muster under the rational basis test"); *United States v. Smith*, 46 F. App'x 247, 250 (6th Cir. 2002) (unpublished) (reaffirming the validity of 1989 and 1990 Sixth Circuit cases

and holding that "courts have held that the classification of marijuana as a controlled substance was a rational decision by Congress, and we will not disturb that decision," given that "the judiciary may not sit as a super legislature to review legislative policy determinations which do not affect fundamental rights and which involve numerous and controversial medical, scientific, and social issues"); *cf. Storm-Eggink v. Gottfried*, 409 F. App'x 426, 427 (2d Cir. 2011) (summary order) (holding that suit alleging constitutional right to marijuana was "frivolous," citing *Kiffer* and several 1980s cases from other circuits).[6]

Indeed, arguments that are analytically equivalent to Plaintiffs' here have been made and rejected for decades. In a series of failed challenges since the 1970s, parties have argued that "new" science or facts had established marijuana's medical benefits and/or safety, rendering the CSA's classification impermissible. All of those challenges were also rejected. *See, e.g.*, *United States v. Greene*, 892 F.2d 453, 455-56 (6th Cir. 1989) (rejecting rational-basis challenge based on "medical evidence . . . and various articles dealing with [marijuana's] therapeutic use"); *United States v. Wables*, 731 F.2d 440, 450 (7th Cir. 1984) (rejecting argument that Schedule I classification is improper based on claim that "accepted medical use of marijuana in the treatment of both glaucoma and cancer prevents marijuana from meeting the 'no currently accepted medical use' standard set forth for Schedule I substances"); *United States v. Middleton*,

[6] Plaintiffs' argument is not assisted by their citation to a recent New Jersey state appellate court decision regarding New Jersey's state law regulation of marijuana. *See Kadonsky v. Lee*, 172 A.3d 1090, 1096 (N.J. Super. Ct. App. Div. 2017). The court in *Kadonsky* held only that marijuana's claimed medical use could appropriately be considered in an administrative rescheduling proceeding stemming from a petition to reschedule marijuana under the applicable state controlled substances law—in particular, in light of a conflicting state law. *Id.* at 1092, 1096. Here, by contrast, Plaintiffs are attempting to *avoid* the type of rescheduling proceeding permitted under the CSA that, the *Kadonsky* court held, constituted an appropriate forum to consider proposed evidence regarding medical use of marijuana. *See id.* at 1096-97; *see also infra* Section III.

690 F.2d 820, 823 (11th Cir. 1982) (rejecting rational-basis challenge despite proffered "expert testimony that marijuana does not satisfy any of the Schedule I requirements" and testimony concerning use of marijuana to treat glaucoma); *Nat'l Org. for Reform of Marijuana Laws v. Bell*, 488 F. Supp. 123, 136 (D.D.C. 1980) (rejecting argument that "the scientific evidence available today" rendered irrational the "classification of marijuana as a controlled substance"); *United States v. LaFroscia*, 354 F. Supp. 1338, 1340 (S.D.N.Y. 1973) (rejecting argument that "recent findings . . . indicated that marihuana does not possess the requisite qualities required for inclusion as a controlled substance under Section 811 of the Act"), *aff'd*, 485 F.2d 457 (2d Cir. 1973); *State v. Hanson*, 364 N.W.2d 786, 790 (Minn. 1985) (rejecting rational-basis challenge based on argument "that the medical profession now recognizes that marijuana has medicinal value"); *State v. Rao*, 370 A.2d 1310, 1314 (Conn. 1976) (holding that a court cannot invalidate a legislative enactment based on "a judicial determination of a debatable medical issue").

Nor can Plaintiffs escape controlling precedent by contending that a significant body of marijuana-related constitutional case law developed in criminal cases—including the Second Circuit's holding in *Kiffer*, recently endorsed in *Canori*—is inapplicable. Plaintiffs' argument appears to be that, in those cases, the courts would have "presumed to be false" the *legal* assertions of the CSA's unconstitutionality. *See* Pl. Opp. at 6, 42-43. Plaintiffs cite no applicable precedent in support of this plainly incorrect contention. Plaintiffs once again confuse the pleading standards (this time, the pleading standards applicable to a challenge to a criminal indictment) with the substantive *legal* question of whether there is a rational basis for a congressional enactment, which is no different in the criminal and civil contexts.[7] *See, e.g.*,

[7] The standard Plaintiffs cite—that the facts *in an indictment* are accepted as true on a motion to dismiss for insufficiency in criminal cases, *see* Pl. Opp. at 42 n.38—has no relevance here. Plaintiffs do not point to any reliance on this standard in any of the cited criminal cases rejecting

United States v. Lucas, 745 F.3d 626, 630 (2d Cir. 2014) (citing Supreme Court decision in *FCC v. Beach Communications*, 508 U.S. at 313-14, for applicable rational basis standard in criminal case); *United States v. Thomas*, 628 F.3d 64, 70-71 (2d Cir. 2010) (same). Because binding Second Circuit law—applying the appropriately deferential rational basis standard under Supreme Court precedent—holds that the scheduling of marijuana is constitutionally rational, the Court need go no further to reject Plaintiffs' challenge. *See Kiffer*, 477 F.2d at 352-53 (CSA as applied to marijuana was "presumed valid" and did not "lack[] any reasoned justification" under standards set out in *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 485-88 (1955), and *United States v. Carolene Products Co.*, 304 U.S. 144, 152-54 (1938)).[8]

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rational-basis challenges to the CSA, nor do Plaintiffs explain how the facts alleged in a marijuana-related criminal indictment—accepted as true—would have any bearing on the rationality of Congress's legislative policy choice in enacting the CSA.

[8] Plaintiffs ignore or unsuccessfully attempt to distinguish the large body of federal civil cases that also uniformly rejects their arguments regarding the constitutionality of the CSA as applied to marijuana. *See, e.g.*, *Sacramento Nonprofit Collective v. Holder*, 552 F. App'x 680, 683 (9th Cir. 2014) (affirming dismissal of three consolidated civil marijuana lawsuits brought in different district courts); *Oakland Cannabis Buyers' Co-op*, 259 F. App'x at 938; *White Plume*, 447 F.3d at 1074-75.

Plaintiffs attach a chart of certain cases cited in Defendants' brief, apparently under the misimpression that if their Amended Complaint includes any factual allegation that has not repeatedly been rejected in prior suits, they can escape the application of precedent. This is incorrect. Rational basis review does not call for the Court to consider "evidence or empirical data" relevant to Congress's policy determinations, *Heller*, 509 U.S. at 320, much less to determine constitutionality based on Plaintiffs' supposed combination of a larger number of allegations concerning such "evidence" in this suit. Any value of the chart is further decreased by the fact that it misstates the record of the cases it tries to overcome by stating that Plaintiffs' supposed "evidence" was not cited in numerous failed challenges to the scheduling of marijuana, where in fact it was. For a few examples concerning one of Plaintiffs' allegations alone, *see, e.g.*, Petitioners' brief on appeal, *Americans for Safe Access v. DEA*, No. 11-1265, 2012 WL 1951334, at *3 (D.C. Cir. filed May 29, 2012) (citing government "patent for the medical use of cannabinoids"); Plaintiffs' brief in opposition to motion to dismiss, *Sacramento Nonprofit Collective v. Holder*, No. 11-2939, 2012 WL 1580711 (E.D. Cal. filed Feb. 10, 2012) (citing U.S. patent); Complaint ¶ 40, *Storm-Eggink v. Gottfried*, No. 10 Civ. 183 (N.D.N.Y. filed Feb 17, 2010) (citing U.S. patents). Plaintiffs also omit other relevant cases where more of their claimed "evidence" was cited, but similar claims were nevertheless rejected. *See, e.g.*, Brief in support of dismissal of indictment, *United States v. Christie*, No. 10 Cr. 384 (D. Haw. filed Dec.

3. The Factual Allegations of the Amended Complaint Fail to State a Due Process Claim Under Rational Basis Review

Even if their claims were not conclusively barred by controlling precedent, which they are, Plaintiffs would still fail to state a due process claim. Congress's placement of marijuana on schedule I of the CSA easily satisfies the rational basis test—as it is rationally related to any number of legitimate government interests relating to controlled substances, including prevention of harm to minors and other public health and safety concerns. *See* Def. Br. at 16-17; *see also* 21 U.S.C. § 801(2) (congressional finding that "controlled substances have a substantial and detrimental effect on the health and general welfare of the American people"); Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, Div. F, 112 Stat. 2681 (Oct. 21, 1998) (congressional findings concerning increasing use of marijuana by children and the potential link between marijuana use and other illegal drug use); *Kiffer*, 477 F.2d at 353-54, 356; *United States v. Green*, 222 F. Supp. 3d 267, 279 (W.D.N.Y. 2016) (citing, among other rationales supporting marijuana scheduling, "psychoactive effects that can lead to behavioral impairment," a "decrease in IQ and general neuropsychological performance for those who commence using it as adolescents," and potential "adverse impacts on children . . . subjected to prenatal marijuana exposure" (citing Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53,767 (Aug. 12, 2016)) (internal quotation marks omitted); *Wilde*, 74 F. Supp. 3d at 1099; *cf. Americans for Safe Access v. DEA*, 706 F.3d 438, 449-52 (D.C. Cir. 2013) (upholding marijuana rescheduling denial as "supported by substantial

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3, 2012) (citing U.S. patent, hearings before ALJ Francis Young, Shafer Commission report, IND program); *United States v. Pickard*, 100 F. Supp. 3d 981, 1007 (E.D. Cal. 2015) (rejecting constitutional challenge and concluding that, *inter alia*, former "Surgeon General's statements to a media outlet" cited by Plaintiffs here could not rule out "disagreements among well-informed experts as to marijuana's medical use"); *NORML v. Bell*, 488 F. Supp. at 128 (rejecting challenge relying on Shafer Commission report).

evidence"). It is "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision": because "there are plausible reasons for Congress' action, [the Court's] inquiry is at an end." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980).[9]

Furthermore, numerous courts have stated that the goal of combatting drug abuse amply supplies the necessary "legitimate" government interest supporting the CSA's regulation of controlled substances. *See Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 668, 674 (1989) (drug trafficking is "one of the greatest problems affecting the health and welfare of our population" and "drug abuse is one of the most serious problems confronting our society today"); *see also Christie*, 825 F.3d at 1057 (governmental interest in preventing diversion of marijuana is "contained within its 'compelling interest in protecting the physical and psychological well-being of minors'" (quoting *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)); *United States v. Israel*, 317 F.3d 768, 771 (7th Cir. 2003) ("Whether the government has a compelling interest in preventing drug abuse can hardly be disputed." (citing 21 U.S.C. § 801(2)); *Middleton*, 690 F.2d at 825 (recognizing "compelling" interest in "protect[ing] the public from the obvious danger of drugs and drug traffic," including marijuana).

As shown in Defendants' opening brief, Plaintiffs' rational-basis challenge boils down to an attempt to have the Court entirely re-weigh Congress's policy choices concerning marijuana. But "[w]hen Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to

[9] In support of their challenge to the CSA's rational basis, Plaintiffs repeat their argument that alcohol and tobacco should be regulated similarly to marijuana. Pl. Opp. at 48. This argument fails. "[The Supreme] Court has made clear that a legislature need not strike at all evils at the same time or in the same way." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (internal quotation marks omitted); *see also United States v. Fry*, 787 F.2d 903, 905 (4th Cir. 1986) (rejecting argument premised on alcohol and tobacco regulation in challenge to marijuana classification).

rewrite legislation, even assuming, *arguendo*, that judges with more direct exposure to the problem might make wiser choices." *Marshall v. United States*, 414 U.S. 417, 427 (1974). The Second Circuit in *Kiffer* agreed in terms that fully apply here:

> Any court asked to undertake review of the multifarious political, economic and social considerations that usually underlie legislative prohibitory policy should do so with caution and restraint. In this case, the challenged legislation incorporates conclusions or assumptions concerning an array of medical, psychological and moral issues of considerable controversy in contemporary America. Indeed, as a recent perceptive study suggests, "Marijuana, in fact, has become the symbol of a host of major conflicts in our society, each of which exacerbates any attempt at a rational solution to the problem." This should serve as a reminder that in most instances the resolution of such sensitive issues is best left to the other branches of government.

Kiffer, 477 F.2d at 352 (citation omitted). The Court should follow *Kiffer* and refuse Plaintiffs' invitation to conduct impermissible judicial policymaking—particularly in light of the numerous clear and easily ascertainable rationales for the law. *See* Def. Br. at 14-17.

(a) Plaintiffs' Proposed Framework Is Incorrect

Plaintiffs assert that the Court must re-weigh Congress's policy determinations regarding marijuana under each of the "Schedule I" factors to determine whether the CSA places it in the appropriate schedule. Pl. Opp. at 44-46. But this is not the correct question under rational basis review. A court in this circuit correctly rejected Plaintiffs' proposed approach just last year:

> The issue is not whether it was rational for Congress or the DEA to conclude that there is no currently accepted medical use for marijuana—that would be the issue if a claim were brought in a circuit court challenging the DEA's administrative determination. Rather, the constitutional issue for equal protection purposes is, simply, whether there is any conceivable basis to support the placement of marijuana on the most stringent schedule under the CSA.

Green, 222 F. Supp. 3d at 278-79. And, the court held, "[e]ven if there is a legitimate medical purpose associated with marijuana, under the rational basis standard of review, there are numerous conceivable public health and safety grounds that could justify Congress's and the DEA's continued regulation of marijuana as a Schedule I controlled substance." *Id.* at 279. The

Green court concluded that "[u]nder no reasonable view of the facts could it be concluded that it is irrational for Congress to continue to regulate marijuana in the manner which it has, and for the DEA to continue to adhere to a Schedule I classification for marijuana." *Id.*[10]

Other courts have followed the approach modeled in *Green*. *See, e.g.*, *Wilde*, 74 F. Supp. 3d at 1098-99 (rejecting proffered "evidence" of medical efficacy and concluding with "little difficulty" that "under some 'reasonably conceivable state of facts,' marijuana's classification in Schedule I of the CSA is rationally related to a legitimate government interest," including to prevent "harm to[] minors"); *Taylor*, 2014 WL 12676320, at *4 (affirming that there "unquestionably" was a rational basis for marijuana scheduling; "the most [the challengers] have demonstrated is that there is medical authority today that could support re-scheduling or de-scheduling marijuana. But that's not the question.").

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[10] Plaintiffs' analysis of *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483 (2001), is unhelpful. *See* Pl. Opp. at 45-46. While Plaintiffs are correct that the Supreme Court was responding to an argument made by the Cannabis Buyers' Cooperative (which was the Respondent, not the Appellant, in the case), the Court rejected the Cooperative's argument that there were "two tiers of schedule I narcotics"—that is, the Court concluded that the CSA did not provide for differing statutory regulation of drugs depending whether they were scheduled by Congress or the Attorney General. *Oakland Cannabis Buyers' Co-op.*, 532 U.S. at 492-93. This argument is not at issue here.

As noted in Defendants' opening brief, the CSA reflects Congress's determination "that marijuana has no medical benefits worthy of an exception (outside the confines of a Government-approved research project)." *Oakland Cannabis Buyers' Co-op.*, 532 U.S. at 491. Unlike Congress, however, the Attorney General must follow a statutory process under 21 U.S.C. § 811 in order to schedule or reschedule drugs. That process requires statutorily prescribed "findings," after "gathering the necessary data," and requesting HHS's "scientific and medical evaluation" and "recommendations," and a final determination under statutorily prescribed factors. 21 U.S.C. § 811(a)-(c). Plaintiffs cannot and do not claim that Congress was required to follow this process to place marijuana in Schedule I, but they seek nonetheless to "subject" Congress's "legislative choice" in scheduling marijuana "to courtroom factfinding," *Heller*, 509 U.S. at 320—though that is plainly barred under applicable rational basis review. Because there is clearly a "conceivable basis to support the placement of marijuana on the most stringent schedule under the CSA," no evaluation of evidence is necessary (or appropriate) for the Court to reject Plaintiffs' claims on rational basis review. *Green*, 222 F. Supp. 3d at 279.

Thus, Plaintiffs' hodgepodge of alleged statements and actions (*see* Pl. Opp. at 33-34) fails plausibly to set out—as is Plaintiffs' burden—that *no* "reasonably conceivable state of facts"—or even "rational speculation unsupported by evidence or empirical data"—"could provide a rational basis" for the CSA's regulation of marijuana. *Heller*, 509 U.S. at 320. Further, Plaintiffs ignore that the relevant standard requires them to "do more than show that the legislature's *stated* assumptions are irrational—[they] must discredit any conceivable basis which could be advanced to support the challenged provision, regardless of whether that basis has a foundation in the record, or actually motivated the legislature." *Beatie*, 123 F.3d at 713 (citing *Heller*, 509 U.S. at 320-21; *Beach Commc'ns*, 508 U.S. at 315); *see also Hettinga v. United States*, 677 F.3d 471, 479 (D.C. Cir. 2012) (affirming Rule 12(b)(6) dismissal on rational basis review because "the government provided an explanation that is not only rational on its face, but also has been consistently recognized by the courts as legitimate"). Plaintiffs simply cannot meet this standard, particularly in the face of the statute's presumption of rationality and constitutionality. *See Beatie*, 123 F.3d at 712; *Green*, 222 F. Supp. 3d at 278-79; *Wilde*, 74 F. Supp. 3d at 1098-99.

(b) Plaintiffs' Argument Has Been Rejected Even in Cases Adopting Their Erroneous Framework

Even were the Court to accept the incorrect framework that Plaintiffs advance, Plaintiffs' due process challenge fails. To begin with, Plaintiffs' challenge using the framework of Schedule I is not, in truth, a constitutional argument: accepting Plaintiffs' terms would constitutionalize their "attack on the scheduling of marijuana based on the criteria set forth in the statute"—"a standard not set forth in the Constitution, but rather one derived from the language of the CSA." *Green*, 222 F. Supp. 3d at 273. But even under Plaintiffs' erroneous standard, and even assuming *arguendo* that some medical use of marijuana were recognized by certain medical

providers, or even certain state legislatures, Plaintiffs' due process challenge would still fail. As the Eighth Circuit correctly held, "even assuming, arguendo, that marijuana has some currently accepted medical uses, the Schedule I classification may nevertheless be rational in view of countervailing factors such as the current pattern, scope, and significance of marijuana abuse and the risk it poses to public health." *United States v. Fogarty*, 692 F.2d 542, 548 (8th Cir. 1982).

A number of other courts have agreed, including the court in *Green*, which held that "[e]ven if there is a legitimate medical purpose associated with marijuana," there was a clear rational basis for the law due to the "numerous conceivable public health and safety grounds that could justify Congress's and the DEA's continued regulation of marijuana as a Schedule I controlled substance." *Green*, 222 F. Supp. 3d at 279. Among other rationales, as set out above, the *Green* court cited marijuana's "psychoactive effects," a decrease in IQ and "general neuropsychological performance" by those who begin using marijuana as adolescents, and the fact that marijuana use "can cause recurrent problems related to family, school, and work, including repeated absences at work and neglect of family obligations." *Id.* (citing 2016 Rescheduling Denial, 81 Fed. Reg. at 53,774-53,784).

Even in a proceeding in 2015 where a district court accepted substantive evidence to independently assess whether there was a rational basis under each element of the CSA's scheduling factors—in a case upon which Plaintiffs rely, Pl. Opp. at 46 & n.44—Plaintiffs' argument failed. In *United States v. Pickard*, over the government's objection, the court held a hearing and considered testimony from multiple experts, as well as individuals who testified that they used marijuana for medical purposes. 100 F. Supp. 3d 981, 999-1002 (E.D. Cal. 2015). Even if it were proper to have held an evidentiary hearing in the circumstances of the proceeding

before the *Pickard* court,[11] the consideration of evidence by that court simply reinforced the conclusion that the CSA's regulation of marijuana easily met the rational basis standard.

The *Pickard* court concluded, after consideration of the record, that "[t]o ask [the] question" of "whether Congress acted rationally in classifying marijuana as a Schedule I substance" was "to answer it." *Id.* at 1006. The Court reviewed conflicting record evidence and expert testimony regarding marijuana's potential for abuse, lack of a currently accepted medical use, and safety for use under medical supervision. *Id.* at 1006-08. Because the record did "not demonstrate there is only one supportable point of view about marijuana's safe[ty], medical value or abuse potential," the court rejected the equal protection challenge to the CSA's classification of marijuana. *Id.* at 1006. The court explicitly stated that "positive anecdotal reports from persons who have found relief from marijuana used for medical purposes" did not undermine its conclusion that there were "principled difference" between "credible experts" on the relevant scientific questions. *Id.* at 1008. Thus, the court found, "continuing questions about marijuana and its effects make the classification rational." *Id.* (internal quotation marks omitted). In sum, "the facts relating to the three criteria as applied to marijuana, on which Congress initially relied in 1970, have not been rendered obsolete however much they may be changed and changing." *Id.* at 1006.

Of course, as explained above, the court in *Pickard* had no need to consider this evidence, as no evidence is required to demonstrate a "reasonably conceivable state of facts that could provide a rational basis" for the law, *Beach Commc'ns, Inc.*, 508 U.S. at 313—which has been

[11] The *Pickard* court appears to have misapplied the applicable rational basis standard by holding such an evidentiary hearing. "[A] legislative choice is not subject to courtroom fact-finding, and may be based on rational speculation unsupported by evidence or empirical data." *Beach Commc'ns*, 508 U.S. at 315. Moreover, the government "has no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller*, 509 U.S. at 320.

reaffirmed on countless occasions in the cases cited above.[12] Nothing Plaintiffs advance here suggests that, even if they obtained their requested evidentiary review, the result would be any different from that in *Pickard*, as there clearly are multiple views and multiple considerations that may support differing views as to the appropriate legal status of marijuana. As the Second Circuit stated in *Kiffer*, the consideration of such arguable issues is "best left to the other branches of government." *Kiffer*, 477 F.2d at 352.

While Plaintiffs ask the Court to accept as true their *legal* conclusion that marijuana has a "currently accepted medical use," Am. Compl. ¶¶ 376-77, this misconstrues the law and, at any rate, would not support their claims, even if Plaintiffs were to present additional "evidence" on this point. Whether marijuana has a "currently accepted medical use" for purposes of 21 U.S.C. § 812(b)(1)(B), the principal portion of the Schedule I factors that they challenge as to marijuana, is a determination made by the DEA pursuant to the CSA's statutory factors, under regulations promulgated to interpret this legal requirement. To determine whether marijuana has a "currently accepted medical use," the DEA applies a five-part test:

> (1) The drug's chemistry must be known and reproducible;
> (2) There must be adequate safety studies;
> (3) There must be adequate and well-controlled studies proving efficacy;
> (4) The drug must be accepted by qualified experts; and
> (5) The scientific evidence must be widely available.

[12] Needless to say, it would also be plainly unworkable to hold evidentiary hearings and demand evidence in every case in which a party wishes to contest the rationality of a legislative judgment. *See Taylor*, 2014 WL 12676320, at *4; *see also Heller*, 509 U.S. at 320. Moreover, as detailed below, there is a clear alternative route by which individuals may challenge drug scheduling through the administrative process put in place under the CSA, which permits the compilation of a full record by agencies with expertise in the relevant scientific and medical questions, followed by review of the agency determination in the courts of appeals. *See infra* Section III; *see also* 21 U.S.C. §§ 811, 877.

Americans for Safe Access, 706 F.3d at 449. This test has been "expressly approved" by the D.C. Circuit. *Id.* (citing *All. for Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1135 (D.C. Cir. 1994)). Thus, Plaintiffs' allegations concerning claimed medical uses of marijuana are of no moment. Plaintiffs cannot require the Court to accept their allegation of a *legal conclusion*—whether marijuana has a "currently accepted medical use" under 21 U.S.C. § 812(b)(1) and established DEA rescheduling regulations—as a fact. *See Iqbal*, 556 U.S. at 678.

Moreover, in *Americans for Safe Access*, 706 F.3d at 449-52, the D.C. Circuit upheld the DEA's denial of a petition seeking the rescheduling of marijuana in 2013. As part of that determination, the D.C. Circuit rejected, on the merits, the petitioners' claim "that the DEA acted arbitrarily and capriciously when it concluded that marijuana lacks a 'currently accepted medical use' and has a 'high potential for abuse.'" *Id.* at 442. In doing so, it considered a developed administrative record, comprising scientific evidence compiled by the agency charged by Congress with rescheduling under the CSA. Applying the legal standard set out above, the D.C. Circuit concluded that there was "substantial evidence" supporting the DEA's finding that at least one of the five factors[13] for a "currently accepted medical use" had *not* been met. *Americans for Safe Access*, 706 F.3d at 452.[14] Thus, a claim that marijuana has a "currently accepted medical use" for purposes of the CSA was recently rejected by the D.C. Circuit under more searching review than the deferential rational basis standard applicable to this claim.

Plaintiffs' Amended Complaint and briefing makes clear that they are impermissibly requesting that the Court "judge the wisdom, fairness, or logic of legislative choices." *Beach*

[13] While the *Safe Access* petitioners challenged all five factors, the D.C. Circuit "need[ed] only look at one factor" to resolve the claim in the DEA's favor. *Americans for Safe Access*, 706 F.3d at 450.

[14] A similar rescheduling petition was denied in 2016. *See* 2016 Rescheduling Denial, 81 Fed. Reg. 53,767 (Aug. 12, 2016).

Commc'ns, 508 U.S. at 313. But because the courts may not "sit as a 'superlegislature' to second-guess . . . policy choices," *Ewing v. California*, 538 U.S. 11, 28 (2003), and there are numerous plausible reasons for Congress's legislative decision, Plaintiffs' due process claim should be dismissed. Because Plaintiffs cannot meet their burden of "negat[ing] every conceivable basis which might support" the law, their claim must be rejected. *Heller*, 509 U.S. at 320; *see also, e.g., Hancock Indus. v. Schaeffer*, 811 F.2d 225, 238 (3d Cir. 1987) ("[I]t is not enough for one challenging a statute [under rational basis review] to introduce evidence tending to support a conclusion contrary to that reached by the legislature.").

(c) Plaintiffs' Allegations Regarding Subjective, Supposedly Governmental "Beliefs" Are Irrelevant as a Matter of Law on Rational Basis Review

Plaintiffs point to an amalgam of allegations that, they assert, show that the "Federal Government *knows* that Cannabis constitutes a safe and therapeutic treatment for disease." Pl. Opp. at 6 (double emphasis in original). But Plaintiffs' various factual allegations—even accepted as true—concerning a hodgepodge of actions by various government actors, *see id.* at 5-6, simply do not demonstrate that there is no "reasonably conceivable state of facts" under which Congress's classification of marijuana was and continues to be rational. *Heller*, 509 U.S. at 320. Nor have they alleged that any of these disparate allegations plausibly support an inference that any relevant decisionmaker had a "belief" that could materially affect the regulation of marijuana under the CSA. Plaintiffs studiously ignore the fact that "in our constitutional order it's Congress that passes the laws, Congress that saw fit to enact 21 U.S.C. § 841, and Congress that in § 841 made the distribution of marijuana a federal crime." *Feinberg v. Comm'r*, 808 F.3d 813, 816 (10th Cir. 2015) (discussing DOJ prosecutorial discretion memoranda). The various alleged actions Plaintiffs cite do not undermine the congressional policy determination in enacting the CSA.

Plaintiffs ask the Court to accept and rely on their allegation that the "Federal Government"—a term that appears to be intentionally vague and undefined—"does not *genuinely believe* that Cannabis meets the Three Schedule I requirements." Pl. Opp. at 21 (emphasis added); *see also, e.g.*, Am. Compl. ¶ 256. But Plaintiffs' focus is misdirected: their allegations concerning the subjective state of mind of various government actors are simply irrelevant. Their claims shed no light on whether *Congress* may have had a legitimate reason to place marijuana into Schedule I of the CSA. The question on rational basis review, "whether a classification advances any legitimate government 'purpose,' 'interest,' or 'end' . . . requires courts to consider only whether any state of facts reasonably may be conceived to justify[] the classification," and not "the actual thoughts of government officials." *Grossbaum v. Indianapolis-Marion Cty. Bldg. Auth.*, 100 F.3d 1287, 1292 n.3 (7th Cir. 1996) (internal quotation marks omitted). Plaintiffs' assortment of allegations, intended to support a conclusion about the "beliefs" of the "Federal Government," is immaterial under the appropriate analysis.

The rational basis inquiry does not "involve[] the court in a determination of historic fact and, accordingly, the court has no occasion to inquire into the subjective motives of the decisionmakers." *Hancock Indus.*, 811 F.2d at 237; *see also, e.g., Siena Corp. v. Mayor & City Council of Rockville*, 873 F.3d 456, 465 (4th Cir. 2017) (rational basis "analysis looks not to the subjective motivations of . . . officials," but instead "simply whether the governmental end is legitimate and whether the means chosen to further that end are rationally related to it"); *Front Royal & Warren Cty. Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 290 (4th Cir. 1998) (rejecting rational-basis challenge "[r]egardless of the actual motivation for the decision [in question]," where "the [relevant] officials reasonably could have believed that the decision was rationally related to a legitimate governmental interest"); *Barket, Levy & Fine, Inc. v. St.*

Louis Thermal Energy Corp., 21 F.3d 237, 241 (8th Cir. 1994) ("Under rational basis review, . . . we will not inquire into the subjective motives of the decisionmakers." (internal quotation marks omitted)); *Besinga v. United States*, 14 F.3d 1356, 1362 (9th Cir. 1994) ("Under the rational basis standard of review, it is not [the court's] place to second-guess Congress' motivations."); *Women Involved in Farm Econ. v. U.S. Dep't of Agric.*, 876 F.2d 994, 1005 (D.C. Cir. 1989) (holding that, under rational basis review, "there is no necessity . . . for a separate inquiry into the legislature's *actual* motivation, for the legislature's subjective motivation does not undermine a classification's validity provided legitimate motivations are conceivable.").

B. Plaintiffs' Claimed Fundamental Right to "Personal Autonomy" Through the Use of Marijuana Does Not Exist

Next, the Court should reject Plaintiffs' suggestion that there is any fundamental right to use marijuana. In the face of the uniform precedent in opposition, *see* Def. Br. at 22-27, Plaintiffs purport to abandon, as they must, any claim based on a supposed due process right to use marijuana in particular, *see* Pl. Opp. at 8 (conceding that Plaintiffs do not claim a "constitutional right to treat with medical Cannabis"). However, Plaintiffs simply attempt to disguise a purported right to use marijuana, by advancing a generic "right[] to personal autonomy and to preserve their health and lives." *Id.*[15] But the intentional omission of the actual centerpiece of Plaintiffs' claim—marijuana use—does not improve their claim of a fundamental right. This exact tactic—cloaking a claim of a fundamental right to use marijuana in vague, broad language—has been rejected by other courts in cases challenging marijuana laws.[16]

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[15] In their briefing, Plaintiffs confusingly appear to say that they do not assert a violation of a substantive due process right to use marijuana as medication, but only refer to such a right collaterally to support other claims. *See, e.g.*, Pl. Opp. at 8, 10, 66. Regardless, they fail to assert any recognized fundamental right, and cite no law that would support such a proposition.

[16] Additionally, despite their repeated (but conclusory) references to the Ninth Amendment in the Amended Complaint, *see, e.g.*, Am. Compl. ¶¶ 5, 6, 467, 470, Plaintiffs fail to defend any Ninth

First, as Defendants' brief noted, numerous previous attempts to assert a fundamental right to use marijuana have been rejected by the courts. *See* Def. Br. at 23-27 (citing case law from four courts of appeals and numerous district courts rejecting claims of such a fundamental right). Second, Plaintiffs fail to ground their supposed claim of a constitutional "right to personal autonomy"—omitting mention of marijuana—in the relevant substantive due process case law, and do not even address the Ninth Circuit's explicit rejection of the exact claim they advance in *Raich v. Gonzales*, 500 F.3d 850, 864 (9th Cir. 2007) [hereinafter *Raich II*].

As noted in Defendants' opening brief, the definition of a fundamental right requires "a careful description of the asserted fundamental liberty interest." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks omitted). The Court must look both to "the scope of the challenged regulation and the nature of Plaintiffs' allegations" to determine the breadth of the asserted right. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1085 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016). The right at issue must be framed in a "precise" way. *Glucksberg*, 521 U.S. at 723.

Plaintiffs ignore the command of the Supreme Court, describing their proposed right only in nebulous terms of generalized "personal autonomy." *See* Pl. Opp. at 67-69. But as Defendants set out specifically in their opening brief, a similar tack has been considered and rejected by multiple courts, most notably by the Ninth Circuit in *Raich II*. There, the court rejected the plaintiff's description of the asserted right to "make life-shaping medical decisions that are necessary to preserve the integrity of her body, avoid intolerable physical pain, and

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Amendment claim in their briefing, and any such claim should be deemed abandoned. *See, e.g.*, *McLeod v. Verizon New York, Inc.*, 995 F. Supp. 2d 134, 143 (E.D.N.Y. 2014) ("[C]ourts in this circuit have held that a plaintiff's failure to respond to contentions raised in a motion to dismiss claims constitute an abandonment of those claims." (internal alterations and quotation marks omitted)).

preserve her life." *Raich II*, 500 F.3d at 864 (alteration and internal quotation marks omitted). The Ninth Circuit concluded that the plaintiff's version did not "narrowly and accurately" reflect the proposed right, given that it was missing "its centerpiece:" the purported "right to use *marijuana* to preserve bodily integrity, avoid pain, and preserve her life." *Id.* *Raich II* further narrowed the proposed right to be one to use medical marijuana "on a physician's advice," and also "when all other prescribed medications and remedies have failed." *Id.* Even in this significantly refined and narrowed form, the *Raich II* court concluded that no such fundamental right exists. *Id.* at 864-66.

The Court should reject Plaintiffs' vague, overbroad statement of their proposed right, which mirrors previous unsuccessful proposals. The courts have repeatedly rejected similar attempts to disguise purported constitutional marijuana rights in more nebulous assertions. *See, e.g.*, *Boyd v. Santa Cruz Cty.*, No. 15 Civ. 405, 2016 WL 3092101, at *3 (N.D. Cal. June 2, 2016) (rejecting claimed "fundamental right to medicine of his choosing" when in fact plaintiff sought to establish "fundamental right to use of or access to medical marijuana," which did not exist); *Cty. of Santa Cruz v. Gonzales*, No. 03 Civ. 1802, 2007 WL 2502351, at *5 (N.D. Cal. Aug. 30, 2007) (rejecting claimed "general right to protect [one's] life and bodily integrity," when in fact plaintiffs asserted right to use medical marijuana); *United States v. Cannabis Cultivator's Club*, No. 98 Civ. 85 (CRB), 1999 WL 111893, at *2 (N.D. Cal. Feb. 25, 1999) (rejecting purported "fundamental right to be free from governmental interdiction of their personal . . . medical choice," when in fact intervenors sought declaration of a right to obtain marijuana); *cf. NORML v. Bell*, 488 F. Supp. at 133 (rejecting attempt to "bootstrap the . . . right of privacy in the home into a fundamental right that protects all activities taking place therein," including use of marijuana).

Plaintiffs make no attempt to distinguish—nor even to address—either the Ninth Circuit's holding in *Raich II* or the numerous additional holdings cited here and in Defendants' opening brief. Nor do they conduct a credible analysis of the right at issue under the Supreme Court's fundamental rights jurisprudence. Instead, they attempt to rely on *Cruzan v. Director of Mo. Dep't of Health*, 497 U.S. 261, 281 (1990), in which the Supreme Court found a "right to reject life-sustaining medical treatment." *Blouin v. Spitzer*, 356 F.3d 348, 359 (2d Cir. 2004). But Plaintiffs cite no case establishing as a corollary a *positive* right to *receive* particular medication or particular medical treatment of the Plaintiff's choice.

Indeed, *Cruzan* "has been narrowly confined," and "[t]he Supreme Court has taken pains to avoid expanding *Cruzan* beyond the context of the right of a competent person to *refuse* lifesaving medical treatment." *Blouin*, 356 F.3d at 360 (emphasis added). In *Glucksberg*, for instance, the Supreme Court rejected the reading of *Cruzan* as constitutionalizing a "general tradition of self-sovereignty," and instead focused the inquiry on whether the Constitution recognized "a right to commit suicide with another's assistance," which the Court concluded did not exist. *See Glucksberg*, 521 U.S. at 724. The fact "[t]hat many of the rights and liberties protected by the Due Process Clause sound in personal autonomy," the Court held, "does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected." *Id.* at 727 (distinguishing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)); *see generally id.* at 724-36.

In sum, the Supreme Court "has never recognized an unqualified constitutional right to any medical treatment that a patient desires." *Wilson v. Holder*, 7 F. Supp. 3d 1104, 1123 n.7 (D. Nev. 2014), *aff'd sub nom. Wilson v. Lynch*, 835 F.3d 1083 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 1396 (2017). Instead, "courts have rejected arguments that the Constitution provides an

affirmative right of access to particular medical treatments reasonably prohibited by the Government." *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 710 & n.18 (D.C. Cir. 2007) (*en banc*) (collecting cases). Plaintiffs simply ignore the cases in which courts have rejected a purported right of access to such unapproved or banned drugs. *See, e.g.*, *Carnohan v. United States*, 616 F.2d 1120, 1122 (9th Cir. 1980) (rejecting purported constitutional right to access a particular unapproved drug to treat cancer); *Rutherford v. United States*, 616 F.2d 455, 457 (10th Cir. 1980) (same); *Smith v. Shalala*, 954 F. Supp. 1, 3-4 (D.D.C. 1996) (same); *Seeley v. Washington*, 940 P.2d 604, 613 (Wash. 1997) (rejecting purported constitutional right to be prescribed marijuana by a physician); *see also Mitchell v. Clayton*, 995 F.2d 772, 775 (7th Cir. 1993).

Thus, however vaguely Plaintiffs define their substantive due process claim, it should be dismissed because "federal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering." *Raich II*, 500 F.3d at 866.

C. Plaintiffs Have Failed to Cure the Cannabis Association's Lack of Standing, and in Any Event, Their Conclusory Equal Protection Claim Fails

In opposition to the motion to dismiss, Plaintiffs attempt to revive their claims on behalf of the Cannabis Cultural Association, about which little detail was provided in the Amended Complaint. Plaintiffs' newly introduced affidavits fail to establish that the Association has standing to assert an equal protection claim. Moreover, because Plaintiffs' equal protection claim—brought only by the Cannabis Association—is conclusory and fails to state a plausible claim for relief, it should be dismissed under Rule 12(b)(6), even if the Association had established standing to assert it.

1. The Cannabis Association Fails to Establish Standing

Initially, Plaintiffs have failed to establish that the Cannabis Association has standing to assert any claim, for an equal protection violation or otherwise. "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

To establish standing, a party must demonstrate "(1) *injury-in-fact*, which is a 'concrete and particularized' harm to a 'legally protected interest'; (2) *causation* in the form of a 'fairly traceable' connection between the asserted injury-in-fact and the alleged actions of the defendant; and (3) *redressability*, or a non-speculative likelihood that the injury can be remedied by the requested relief." *W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100, 106 (2d Cir. 2008) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). The alleged injury in fact must be both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (citations and internal quotation marks omitted). To seek injunctive relief—the sole relief the Cannabis Association seeks here—a party must "establish a 'real or immediate threat' of injury." *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 239 (2d Cir. 2016) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 111-12 (1983)). "Although past injuries may provide a basis for standing to seek money damages, they do not confer standing to seek injunctive relief unless the plaintiff can demonstrate that she is likely to be harmed again in the future in a similar way." *Id.*

The Cannabis Association cannot establish associational standing because it cannot show that its "members would otherwise have standing to sue in their own right." *Disability*

Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living, 675 F.3d 149, 157 (2d Cir. 2012) (quoting *Hunt*, 432 U.S. at 343).[17] In opposition to the motion to dismiss, the Cannabis Association, for the first time, identifies three of its members and presents affidavits concerning their claimed interest in this litigation. Dismissal is still required, however, because these member affidavits fail to establish that any of them would have standing "in their own right" to assert an equal protection claim, and thus the Association also lacks standing.

Two of the three affidavits are submitted by African American members of the Cannabis Association who declare that they were prosecuted for taking part in marijuana conspiracies in violation of the CSA. *See* Dkt. No. 43-13 ("Nesbitt Aff.") ¶¶ 2-3; Dkt. No. 43-15 ("Motley Aff.") ¶¶ 2-3. Notably, neither of these affiants asserts that their prosecutions constituted discriminatory enforcement of the CSA, much less provides any factual basis for such a claim or attempts to show that similarly situated comparators were not prosecuted.[18] The Cannabis Association's conclusory statement that "persons of color are four times more likely to be subjected to arrest, prosecution, conviction, and incarceration by reason of their involvement with Cannabis," Pl. Opp. at 54, also provides no cognizable evidence of discriminatory enforcement against the affiants. The Supreme Court has made clear that a claim of selective prosecution based on race requires the claimant to make a "show[ing] that similarly situated individuals of a different race were not prosecuted," *United States v. Armstrong*, 517 U.S. 456, 465 (1996), and the Association has failed to advance any such evidence here, much less

[17] The Association does not claim that it has standing "in its own right." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

[18] The closest Plaintiffs come is in the Motley affidavit, which asserts a speculative "belief" that drug laws are enforced "more stringently" against "people of color," apparently based in large part (if not entirely) on anecdotal evidence. *See* Motley Aff. ¶ 4. Motley makes no claim, however, that similarly situated persons of different races were not prosecuted.

sufficient evidence to meet the "deliberately rigorous standard" applicable to such a claim, *United States v. Alameh*, 341 F.3d 167, 173 (2d Cir. 2003) (internal quotation marks omitted).

Moreover, neither Nesbitt nor Motley attempts to establish any likelihood that they will again be subject to "injury" in "a similar way" in the future, *Lyons*, 461 U.S. at 111, *i.e.*, that they are likely to be subject to a future enforcement of the CSA. "As a general rule, the fact that a person was previously prosecuted for violating a law is insufficient by itself to establish that person's standing to request injunctive relief." *Schirmer v. Nagode*, 621 F.3d 581, 585 (7th Cir. 2010) (citing, *inter alia*, *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 108 (1998)). They do not allege that they continue to engage in marijuana trafficking or other conduct made illegal by the challenged law. Thus, even if these individuals plausibly alleged "past wrongs," those would not "amount to that real and immediate threat of injury necessary to make out a case or controversy." *Lyons*, 461 U.S. at 103. Importantly, "[i]t is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions," that matters for standing purposes. *Id.* at 107 n.8.

Nor do either of these affiants demonstrate that any harm they suffer would be redressed by a decision in the Association's favor on this claim. To meet this prong, a plaintiff must establish that it is "likely and not merely speculative that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit." *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 273 (2008) (internal quotation marks omitted). The negative consequences of CSA convictions that Nesbitt and Motley describe in their affidavits flow from the fact that they pleaded guilty to drug-trafficking charges under the CSA, and (in Nesbitt's case) from a separate, subsequent conviction for a federal fraud offense. *See* Nesbitt Aff. ¶¶ 3-4, 6-9, Motley Aff. ¶¶ 3, 6. They make no claim that a ruling in favor of the Association on its equal protection claim

would undo those harms or redress any of their asserted injuries, which stem from existing convictions that would not be undermined by this suit. Thus, the Nesbitt and Motley affidavits provide no support for the Cannabis Association's claim to standing.

The third affiant, Leo Bridgewater, also cannot establish the Association's standing to bring an equal protection claim. Initially, while Plaintiffs assert that Bridgewater "is African American," Pl. Opp. at 54, they cite a portion of Bridgewater's affidavit that does not so state; indeed, Bridgewater's affidavit is silent as to his race. *See* Dkt. No. 43-14 ("Bridgewater Aff."). Even assuming Plaintiffs' assertion were supported by the record, however, Bridgewater's affidavit shows that his interest in marijuana regulation has no connection with race at all. He states that his "medical use of cannabis pursuant to New Jersey State law" precludes him from "renew[ing] [his] security clearances," which, in turn (he conclusorily asserts), prevents him from working in a particular industry. Bridgewater Aff. ¶ 9. He does not assert that the effect of the CSA that he alleges is connected in any way to race, or that the law would treat a person of any other race in a different way. Thus, Bridgewater also cannot support the Cannabis Association's standing, as he has asserted no injury-in-fact that relates to a purported equal protection violation.[19]

For all these reasons, the Cannabis Association fails to establish standing to bring any claim in this suit and, in particular, its equal protection claim. It has not shown that any of its members "have standing to sue in their own right." *Hunt*, 432 U.S. at 343. The affidavits fail to

[19] Plaintiffs claim, completely unsupported by any statement in the affidavit, that Bridgewater "rightly lives in constant apprehension that, as an African American who treats with medical Cannabis, he may be arrested, prosecuted and convicted of violating the CSA." Pl. Opp. at 55. Even if this argument were supported by any facts, the Supreme Court has rejected a claim to standing on the basis of such speculative fears. "It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions," that matters for standing purposes. *Lyons*, 461 U.S. at 107 n.8.

show a likelihood of future harm sufficient to seek the declaratory relief sought here, *Lyons*, 461 U.S. at 111; fail to show that relief here would redress those injuries, *Lujan*, 504 U.S. at 561; and/or fail to show that they are affected by purportedly discriminatory application of the CSA at all. Thus, the Court should dismiss the equal protection claim—brought only by the Cannabis Association—and dismiss all other claims brought by the Association for lack of standing.

2. The Cannabis Association Fails to State an Equal Protection Claim

The Cannabis Association also fails to state an equal protection claim, even assuming the Association had standing to bring such a claim. The Association tacitly concedes that it has presented no allegation that the 1970 Congress—the body responsible for enacting the CSA—was itself motivated by discriminatory animus in passing the law. Instead, the Cannabis Association advances conclusory allegations and post-enactment statements by various members of the executive branch during the Nixon Administration—who were not the relevant decisionmakers for purposes of enacting the CSA. Plaintiffs would have the Court, unsupported by any precedent, create a new doctrine that collapses the separation of powers between the executive and legislative branches, based on a few vague allegations that fail to establish any discriminatory motive by Congress. If the Court reaches the merits of this claim at all—and it need not do so given the Association's lack of standing—it should dismiss this claim under Rule 12(b)(6).[20]

[20] Plaintiffs appear to misunderstand the relevant standards under the Equal Protection Clause. *See* Pl. Opp. 57-58. Such a claim is subject to heightened scrutiny where there are plausible allegations of "actual discriminatory intent." *United States v. Moore*, 54 F.3d 92, 96 (2d Cir. 1995). Because Plaintiffs have failed to plausibly allege discriminatory purpose, this cause of action—if it states a claim at all—is subject at most to "the deferential 'rational basis' standard." *Id.* As set out at length above, courts—including the Second Circuit—have repeatedly held that the CSA is valid under that standard. *See supra* Section II.A.

To plead a claim of "invidious discrimination in contravention of the . . . Fifth Amendment[], . . . the plaintiff must plead and prove that the defendant [government decisionmaker] acted with discriminatory purpose." *Iqbal*, 556 U.S. at 676 (citing *Washington v. Davis*, 426 U.S. 229, 240 (1976)). Accordingly, the Association would have to demonstrate that the 1970 Congress, which enacted the CSA—not assorted members of the executive branch during the Nixon Administration—"selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). To survive a motion to dismiss, the Association must "plead sufficient factual matter" to show that Congress "adopted and implemented the . . . policies at issue not for a neutral . . . reason," "but for the *purpose* of discriminating on account of race." *Iqbal*, 556 U.S. at 676-77 (emphasis added). This it has failed to do.

As noted in Defendants' opening brief, the Association's equal protection claim is patched together from a few largely conclusory allegations about or statements by former President Richard Nixon and members of his administration. *See* Am. Compl. ¶¶ 10, 236. The Cannabis Association's alleged "evidence" includes such bald statements as "President Nixon and associates in the Nixon Administration, including and especially, Myles Ambrose (America's First Drug Czar), harbored considerable antipathy towards African Americans." *Id.* ¶ 10. Plaintiffs rely on the questionably relevant assertions that Nixon, in a taped recording in 1971 (after the CSA's passage) stated that everyone "out for legalizing marijuana is Jewish" because "most of them are psychiatrists," *id.* ¶ 240, and that in a different recording, Nixon said that "radical demonstrators" were "on drugs," *id.* ¶ 247. Finally, the Amended Complaint alleges that, in 2016, a former Nixon aide stated that the Nixon White House wanted to "associate the

hippies with marijuana and blacks with heroin" and "criminaliz[e] both heavily" to "disrupt those communities." *Id.* ¶ 236.

The Amended Complaint's collection of these miscellaneous and nonprobative statements provides no material support to the Cannabis Association's claim of discriminatory intent by Congress in enacting the statute Plaintiffs challenge here. Indeed, the Amended Complaint presents a paradigm of the sort of "sketchy and unpersuasive bits of information" that have previously been found to have "no relevance to [a court's] inquiry into the motives of *the Congress that passed*" the legislation in question. *United States v. Johnson*, 40 F.3d 436, 440 (D.C. Cir. 1994) (emphasis added). Plaintiffs' conclusory assertions are insufficient as a matter of law. *Iqbal*, 556 U.S. at 687 (a complaint must "plead sufficient facts to state a claim for purposeful and unlawful discrimination"); *see also Feeney*, 442 U.S. at 279 ("'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences.").[21]

The Cannabis Association attempts to bolster its wholly inadequate equal protection claim by attempting—improperly—to patch it up with new factual contentions that were not presented in the Amended Complaint. In their brief, Plaintiffs quote at great length from the Affidavit of Roger Stone. *See* Pl. Opp. at 18. Stone's statement is not contained in the Amended Complaint and does not appear on the docket, despite plaintiffs' misleading citation to Dkt. No.

[21] Ironically highlighting the conclusory nature of this claim, Plaintiffs' opposition brief claims that the "Amended Complaint, including its 474 enumerated paragraphs, 166 footnotes, and 10 exhibits . . . detail[s] with particularity the manner in which assorted members of the Nixon Administration (including Nixon himself, Mr. Haldeman, Mr. Ehrlichman and Myles Ambrose, America's first drug czar) ushered the CSA through Congress in order suppress the political and civil rights of, *inter alia*, African Americans and other persons of color." Pl. Opp. at 59-60. This assertion is simply untrue. The Amended Complaint contains a single, conclusory reference to Ambrose, Am. Compl. ¶ 10; it also contains a single line referencing a single-word response by Haldeman, in a taped conversation, *id.* ¶ 240; and its summary of Ehrlichman's statements in fact ties "blacks" to "heroin," not marijuana, *id.* ¶ 236. Plaintiffs' cited statement by Nixon connects marijuana to Jewish psychiatrists, not African Americans. *Id.* ¶ 240.

26 (the Court's order denying the request for a temporary restraining order). Additionally, they attempt to have the Court rely on a new piece of evidence concerning a statement made by former Nixon aide H.R. Haldeman, which also appears nowhere in the Amended Complaint. *See* Pl. Opp. at 58-59 & n.55. The Court should reject these inappropriate attempts by Plaintiffs to further amend the pleadings through their opposition papers, *see supra* Section I, and disregard the Stone and Haldeman statements entirely.

Even if the Court were to consider this improper new "evidence," however, it does not help the Cannabis Association's claim. It presents more of the same largely conclusory and extraneous assertions concerning, at most, the state of mind of Nixon Administration executive branch members, not those of the relevant decisionmakers—a majority of the 1970 Congress that passed the CSA. The Association presents no reason to deviate from the rule governing the analysis of allegations of discriminatory intent: that is, when attempting to undermine a statute by claiming "actual discriminatory intent," a plaintiff must "allege and demonstrate that *the legislators passed the law with a discriminatory purpose*" to merit strict scrutiny. *United States v. Moore*, 54 F.3d 92, 96 (2d Cir. 1995) (emphasis added); *accord Heying*, 2014 WL 5286153, at *5 ("[W]hen determining whether a particular official action was motivated by discriminatory intent, the court must determine the intent of the *decision-making body that engaged in the challenged official action*." (emphasis added)); *see Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977). The alleged intentions of other actors is irrelevant, as they do not answer the question of whether Congress "adopted a policy 'because of, not merely in spite of, its adverse effects upon an identifiable group,'" in classifying marijuana under the CSA. *Iqbal*, 556 U.S. at 681 (quoting *Feeney*, 442 U.S. at 279) (some internal quotation marks omitted).

The Cannabis Association "do[es] not contend that President Nixon's official act of recommending the inclusion of marijuana in the CSA is the official act that has denied them equal protection of the laws." *Heying*, 2014 WL 5286153, at *5. Instead, they challenge the law itself passed by Congress—making "the appropriate inquiry . . . one regarding the intent of the decision-maker whose actions have been challenged, which is, in this case, Congress." *Id.* Plaintiffs present no persuasive basis to undermine the correct analysis of the *Heying* court, which considered and rejected their implausible theory.

The Supreme Court has noted that "contemporary statements *by members of the decisionmaking body*" may be relevant, *Vill. of Arlington Heights*, 429 U.S. at 268 (emphasis added), but here the Association presents evidence that is neither contemporary nor by members of the relevant decisionmaking body, *i.e.*, the 1970 Congress. First, the Supreme Court has noted that "unless historical evidence" of purposeful discrimination "is reasonably contemporaneous with the challenged decision, it has little probative value." *McCleskey v. Kemp*, 481 U.S. 279, 292 n.20 (1987). Plaintiffs' allegations—generally far removed from the 1970 Congress—carry even less weight, given that many of the statements they cite are dated decades after the CSA's enactment. *See, e.g.*, Pl. Opp. at 18 (citing 2017 Stone Affidavit, which concerns events that took place in the early 1970s); *see also* Am. Compl. ¶ 236 (citing statements by Nixon executive branch member from the mid-1990s). Even the cited "evidence" that is more contemporaneous generally *postdates* the passage of the CSA in 1970, further undermining its value. *See* Am. Compl. ¶¶ 240, 247 & nn.138, 145 (quoting Nixon tape recordings from 1971).

Second, and even more importantly, none of the statements on which the Association relies comes from the relevant decisionmakers. "President Nixon and the identified members of his administration were not members of the decision-making body that enacted the CSA."

Heying, 2014 WL 5286153, at *4; *see Johnson*, 40 F.3d at 440 (concluding that information concerning prior legislative debate had "no relevance to our inquiry into the motives of *the Congress that passed the 1986 Act*" in question (emphasis added)); *see also Moore*, 54 F.3d at 96 (issue is whether "the legislators passed the law with a discriminatory purpose"). Nor do Plaintiffs cite any legislative history that could lend support to their claim. *Cf. Vill. of Arlington Heights*, 429 U.S. at 268 ("The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports."); *Johnson*, 40 F.3d at 440 (rejecting claim of discriminatory purpose by Congress and concluding that certain "scattered pieces of legislative history are quite inadequate to serve to attribute a discriminatory purpose to the Congress").[22]

To the extent Plaintiffs attempt to show discriminatory intent through purportedly disparate impact, their contentions are conclusory, and they fail to state a claim. Plaintiffs allege, for instance, that "[a]ccording to the *New York Daily News*, 'by 1973, about 300,000 people were arrested under the law [the CSA] – the majority of whom were African American.'" Am. Compl. ¶ 250. Plaintiffs also allege that "People of color, especially black males, are up to four

[22] The Cannabis Association seeks to redirect attention to members of the Nixon executive branch by asserting that the Nixon Administration was involved in drafting the law. But accepting the unremarkable premise that presidential administrations are at times involved in promoting legislation for consideration by the legislative branch, there is still nothing in any of the Cannabis Association's allegations that could provide "any basis to impute [Nixon Administration members'] alleged discriminatory intent to Congress." *Heying*, 2014 WL 5286153, at *4; *see also Pickard*, 100 F. Supp. 3d at 1004 (holding that "the court cannot find Congress acted with a discriminatory purpose in designating marijuana as a Schedule I substance under the CSA" and rejecting argument premised on statements by former narcotics commissioner, where challengers "d[id] not assert that Congress relied on those statements when it enacted the CSA" and thus the statements "cannot form the basis for a discriminatory purpose claim" (citing *Vill. of Arlington Heights*, 429 U.S. at 268)). There is no allegation that the alleged statements by executive branch members cited in the Amended Complaint were considered by or available to the 1970 Congress—and indeed, most of them were made after the enactment of the CSA, and thus could not have been considered at the time of passage.

times as likely to be arrested in connection with Cannabis than white Americans, and make up nearly 70% of the 2.5 million people in prison for drug crimes (even though use among races is virtually equal)." *Id.* ¶ 108. Initially, these allegations are exceedingly vague and fail to separate federal and state enforcement of marijuana offenses—a vital distinction, given that Plaintiffs challenge only federal enforcement in this suit. Thus, from the outset, the Court should disregard these allegations regarding racial disparities in marijuana arrests as immaterial to their claims.

Moreover, given that the CSA is facially neutral, the Cannabis Association's allegation cannot constitute the type of "clear pattern" that is "unexplainable on grounds other than race." *Vill. of Arlington Heights*, 429 U.S. at 266. The courts of appeals have concluded that far stronger evidence of disparate impact does not indicate discriminatory motive. For instance, the Second Circuit has rejected a claim of discriminatory purpose in Congress's enactment of a "100 to 1 sentencing ratio" between powder and crack cocaine, despite statistical evidence that "approximately 88% of defendants charged with crack cocaine-related crimes are Black." *Moore*, 54 F.3d at 97-98; *accord, e.g.*, *United States v. Clary*, 34 F.3d 709, 711, 713 (8th Cir. 1994) (holding that "[a] belief that racial animus was a motivating factor, based on disproportionate impact, is simply not enough since the Equal Protection Clause is violated only if that impact can be traced to a discriminatory purpose" (internal quotation marks omitted)). Accordingly, the Court should reject the Amended Complaint's weak and nonprobative allegations of a disparate impact, which do not suffice as a matter of law.

In sum, because the Cannabis Association's conclusory assertions plainly fail to "allege and demonstrate that the legislators passed the law with a discriminatory purpose," *Moore*, 54 F.3d at 96, Plaintiffs fail to state an equal protection claim.

D. Plaintiffs' Commerce Clause Challenge Fails

1. Plaintiffs' Commerce Clause Challenge Is Squarely Foreclosed by Supreme Court Precedent

Plaintiffs appear to concede, as they must, that in 2005 the Supreme Court upheld as constitutional under the Commerce Clause the Government's power to regulate even the "intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law." *Gonzales v. Raich*, 545 U.S. 1, 26-27 (2005) [hereinafter *Raich I*] (internal quotation marks omitted). Plaintiffs' nevertheless—and mystifyingly—assert that the "principles articulated" in *Raich I* "simply can no longer be reconciled with governing precedent." Pl. Opp. at 95. This assertion is not supported by citation to any supposed "governing precedent" that could undermine the Supreme Court's explicit and on-point holding from just 2005 in *Raich I*—specifically, any subsequent Supreme Court case that could cast doubt on *Raich I*'s vitality.

Instead, Plaintiffs curiously turn to *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), *see* Pl. Opp. at 96-98—two Commerce Clause cases *predating* the Supreme Court's holding in *Raich I*. But a majority of the Supreme Court in *Raich I* explicitly considered and decisively rejected the argument that *Lopez* and *Morrison* undermine the constitutionality of the CSA as applied to marijuana, the precise contention Plaintiffs make here. *Raich I*, 545 U.S. at 23-33 (holding that "[o]ur opinion in *Lopez* casts no doubt" on the CSA's regulation of marijuana, "[n]or does this Court's holding in *Morrison*"). Plaintiffs' attempt to re-argue *Raich I* on its merits in this Court—which is plainly still bound by the Supreme Court's 2005 holding—is meritless and should be rejected.

Plaintiffs next turn to attacking *Raich I* facially, explicitly urging the Court to "reject *Raich* as bad law." Pl. Opp. at 98 (formatting altered). They go on to assert that the Supreme

Court committed "error" or was "mistaken" in its reasoning in *Raich I* and argue for its overruling, and even argue that the Supreme Court's longstanding decision in *Wickard v. Filburn*, 317 U.S. 111 (1942), should be overruled "to the extent [it] cannot be limited in its application" to a set of circumstances that they deem reasonable. Pl. Opp. at 98-100 & n.89. Plaintiffs argue (circularly) that the "inapplicability (and unconstitutionality) of *Raich* renders it inapplicable" here, and that the Court should refuse to follow it. Pl. Opp. at 101.

But in advancing this argument—that the Court should reject a clear Supreme Court holding—Plaintiffs only highlight the implausibility of their own arguments and invite error by this Court. The lower courts must follow Supreme Court precedent and "leav[e] to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989); *see Hutto v. Davis*, 454 U.S. 370, 375 (1982) ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of [the Supreme] Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."). Because Plaintiffs cannot distinguish *Raich I*, and this Court is obliged to follow it, the Commerce Clause claim must be dismissed.[23]

2. Plaintiffs' Desuetude Argument Fails

Despite the fact that their Commerce Clause claim is squarely precluded by Supreme Court precedent in *Raich I*, Plaintiffs continue to press it. Perhaps recognizing the weakness of their claim, Plaintiffs now advance an argument based on the unrecognized doctrine of

[23] Plaintiffs' opposition fails meaningfully to defend any claim based on the Tenth Amendment, despite Defendants' arguments in favor of dismissal. Def. Br. at 36-37. The Court should deem any such claim abandoned. *See, e.g., Lipton v. Cty. of Orange*, 315 F. Supp. 2d 434, 446 (S.D.N.Y. 2004) ("This Court may, and generally will, deem a claim abandoned when a plaintiff fails to respond to a defendant's arguments that the claim should be dismissed.").

desuetude,[24] a theory (mentioned nowhere in the Amended Complaint) premised on the supposed "non-use" of the Commerce Clause as pertains to the CSA. This theory—which also fails as a matter of law—should be disregarded, as it appeared for the first time in opposition briefing and is therefore not properly before the Court. *See supra* Section I; *Lombardo*, 2017 WL 1378413, at *4.

In any event, Plaintiffs' desuetude argument fails as a matter of law. First, Supreme Court and Second Circuit case law indicates that the supposed desuetude doctrine is not accepted by the federal courts. *See, e.g.*, *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 113-14 (1953) ("The failure of the executive branch to enforce a law does not result in its modification or repeal."). Plaintiffs fail to note that the Second Circuit—on appeal in the same case they cite to support the existence of the doctrine—held that, under federal law, even a government's "decision, for political and practical reasons, to refrain from enforcing" a law "d[oes] not free" an individual "to engage in conduct that the law forb[ids]." *United States v. Morrison*, 686 F.3d 94, 106 (2d Cir. 2012) (citing *John R. Thompson Co.*, 346 U.S. at 113-14); *see also United States v. Winston*, 558 F.2d 105, 108 (2d Cir. 1977). Moreover, the district court case on which Plaintiffs principally rely describes desuetude as an "obscure doctrine" that was accepted, as of 2006, in "only one jurisdiction, the State of West Virginia." *United States v. Morrison*, 596 F. Supp. 2d 661, 702 (E.D.N.Y. 2009), *rev'd and remanded in part*, 686 F.3d 94. That case went on to conclude that the doctrine was unrecognized in the Second Circuit, and then

[24] Black's Law Dictionary defines desuetude as a "civil-law doctrine holding that if a statute or treaty is left unenforced long enough, it ceases to have legal effect even though it has not been repealed." *Desuetude*, Black's Law Dictionary (10th ed. 2014). Black's generally states that the doctrine "has no applicability in common-law systems." *Id.*

rejected its application even assuming *arguendo* that it applied. *Morrison*, 596 F. Supp. 2d at 702-03.

Nor can Plaintiffs credibly contend that the Supreme Court's holding in *Raich I*—little more than a decade old—has "slipped into desuetude," particularly given the Supreme Court's dismissal of the notion that "a [Supreme Court] holding . . . expires if the case setting it forth is not periodically revalidated." *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 413 n.12 (2010). Even if the desuetude doctrine had any force, Plaintiffs cannot plausibly argue that Congress's exercise of its commerce power through the CSA's regulation of marijuana is a "sudden revival of a long forgotten law . . . ." *Cent. Nat. Bank of Mattoon v. U.S. Dep't of Treasury*, 912 F.2d 897, 906 (7th Cir. 1990). It would be preposterous to extend this already-obscure doctrine in an unprecedented manner, that is, to invalidate Congress's exercise of a constitutional power that was upheld in 2005 by the Supreme Court.

Even if any further analysis were necessary, courts have recently rejected a corollary argument to the one Plaintiffs advance here, holding that appropriations riders and other supposed developments since 2005 do not undermine the basis for the Supreme Court's affirmance in *Raich I* of the CSA's constitutionality as applied to marijuana. *See, e.g.*, *United States v. Walsh*, 654 F. App'x 689, 696 (6th Cir. 2016) (unpublished) (considering appropriations riders and concluding that *Raich I* "remains good law"); *Bally*, 2017 WL 5625896, at *6 (considering appropriations riders but concluding that *Raich I* "foreclosed" the challenge); *see also United States v. Johnson*, 228 F. Supp. 3d 57, 62 (D.D.C. 2017) (concluding that "use of medical marijuana is a violation of federal law," even if such use was permitted under D.C. law, and upon consideration of appropriations riders). Thus, even if the Court considers Plaintiffs' desuetude argument, it should be rejected, and their Commerce Clause claim dismissed.

E. Plaintiffs Fail to State a Right-to-Travel Claim

Plaintiffs' opposition presents little defense of their ill-defined right-to-travel claim. *See* Pl. Opp. at 86-91. They provide no coherent explanation of how the CSA affects travel—whether interstate or intrastate—in a legally cognizable way. Instead, Plaintiffs appear to advance an unprecedented version of the right to travel, bounded by no limiting principle: Plaintiffs propose an unrestrained right that would defeat all laws that could be construed even collaterally to affect travel. *See* Pl. Opp. at 87-88. Such a rule, if adopted, could undermine innumerable types of regulation—both state and federal—of banned drugs, toxic substances, weapons, or other contraband. But "the right to travel cannot conceivably imply the right to travel whenever, wherever and however one pleases." *Lutz v. York*, 899 F.2d 255, 269 (3d Cir. 1990). Plaintiffs cite no law, and government counsel knows of none, that could support such a dubious claim.

Plaintiffs do not contest that they have no constitutional right to access the most convenient form of travel, *see Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 54 (2d Cir. 2007); *Miller v. Reed*, 176 F.3d 1202, 1205 (9th Cir. 1999); *Cramer v. Skinner*, 931 F.2d 1020, 1031 (5th Cir. 1991), nor do they allege that the CSA somehow precludes all means of travel. Plaintiffs have no persuasive response to controlling Second Circuit law holding that the constitutional right protects only "*movement between places*," and not "*access* to a particular place." *Williams v. Town of Greenburgh*, 535 F.3d 71, 75 (2d Cir. 2008); *accord Hannemann v. S. Door Cty. Sch. Dist.*, 673 F.3d 746, 757 (7th Cir. 2012). Indeed, the Second Circuit has explicitly rejected the right of access that Plaintiffs advance, holding that it would "distort the right to free travel beyond recognition to construe it as providing a substantive right to . . . gain

admittance to a *specific* government building." *Williams*, 535 F.3d at 76.[25] Simply put, the government is "constitutionally permitted to limit access to facilities without impinging on the right to free movement." *Lowery v. Carter*, No. 07 Civ. 7684 (SCR), 2010 WL 4449370, at *3 (S.D.N.Y. Oct. 21, 2010).

Like plaintiffs in previous, analogous cases, Plaintiffs here "make no attempt to identify the elements of a claim for violation of the right to travel, nor analyze their allegations in light of such elements." *Grider v. City & Cty. of Denver*, No. 10 Civ. 722, 2012 WL 1079466, at *6 (D. Colo. Mar. 30, 2012) (rejecting right-to-travel claim arising from municipal bans on possession of pit bulls). They do not dispute that the CSA does not target travel or penalize travel in particular. *See Torraco v. Port Auth. of N.Y. & N.J.*, 615 F.3d 129, 140 (2d Cir. 2010) (holding that these categories were "clearly inapplicable" as applied to "firearm laws [that] are facially neutral and are not designed primarily to impede travel"). Nor do they dispute that the possession of marijuana is illegal under federal law in substantially all circumstances, even if it is not independently criminalized by certain states' law. *See Canori*, 737 F.3d at 184; *see also* Pl. Opp. at 89-90 (describing CSA as creating "nationwide, categorical ban" and "blanket prohibition" on marijuana). Thus, at the outset, Plaintiffs' constitutional challenge to the CSA appears to be untethered to any possible right to travel: the unlawfulness of marijuana possession under federal law remains constant, whether Plaintiffs travel or not. *See N.Y. State Rifle & Pistol*

[25] In a footnote, Plaintiffs attempt to distinguish the regulations at issue in *Williams*. Pl. Opp. at 88 n.79. In fact, there are two relevant distinctions from *Williams*, but both work against Plaintiffs here. First, the regulation at issue in *Williams* did specifically "limit access" to government buildings, *Williams*, 535 F.3d at 76—unlike the CSA, which bars marijuana possession whether inside or outside federal property. Second, *Williams* rejected the premise that the right to travel protects even a limited right to access a single municipal building, *id.* at 75-76; here, Plaintiffs would expand the right to travel to override federal statutes and regulations applicable to all federal property.

Ass'n v. City of New York, 86 F. Supp. 3d 249, 264 (S.D.N.Y. 2015) (concluding that right to travel was not implicated by rule preventing licensees "from travelling with their firearm").

Nor do Plaintiffs credibly dispute that their claim, in essence, is that they may be deterred from traveling because they are more likely to be subject to *enforcement* of the CSA because of circumstances generated by travel. An allegation that violations of federal law are more likely to be detected or prosecuted while violators are traveling, or in restricted, high-security environments like airports or government buildings—rather than at home—does not give rise to a right-to-travel claim: not "every law that indirectly burdens interstate travel or makes it marginally less likely a person will travel interstate implicates the Constitution." *Pollack v. Duff*, 793 F.3d 34, 47 (D.C. Cir. 2015); *accord Matsuo v. United States*, 586 F.3d 1180, 1183 (9th Cir. 2009). Plaintiffs advance a conception of the right that would apply even to laws that have no connection with travel at all, but no federal right to travel undermines the law in those circumstances, even if such plaintiffs were to assert that the law "actually deters such travel." *Town of Southold*, 477 F.3d at 53.

Moreover, as a general matter, the Supreme Court's "modern" right-to-travel cases "have applied the federal constitutional right to travel to *state* legislation that had a negative impact on travel between the various States"—not to "*federal* statutory regime[s]." *Minn. Senior Fed'n v. United States*, 273 F.3d 805, 810 (8th Cir. 2001) (emphasis in original).[26] Perhaps for this reason, Plaintiffs do not attempt to fit their supposed right into the analytical framework of the Supreme Court's opinion in *Saenz v. Roe*, 526 U.S. 489 (1999): they do not coherently claim that the CSA affects their ability "to enter and to leave another State," to "be treated as a welcome

[26] One of the main sources in which courts have located the right to travel—the Privileges and Immunities Clause of Article IV—applies to the states, not the federal government. *See Pollack*, 793 F.3d at 41.

visitor rather than an unfriendly alien when temporarily present in the second State," or "to be treated like other citizens of that State.'" *Town of Southold*, 477 F.3d at 53 (quoting *Saenz*, 526 U.S. at 500).[27] Regardless of the constitutional source of the right to travel, moreover, Plaintiffs cite no law supporting a theory of the right to travel that could support their claim.

Indeed, Plaintiffs point to no precedent—and government counsel is aware of none—that holds that a "law of general applicability that simply prohibits possession of a certain item" could give rise to a right-to-travel claim. *Grider*, 2012 WL 1079466, at *7 (rejecting right-to-travel challenge to municipal ban on pit bulls). And while they criticize the government's brief for not citing precedents involving a restriction on traveling with a banned controlled substance, Pl. Opp. at 89 n.82, Plaintiffs concede that their right-to-travel claim is "completely unprecedented" in the context of the federal drug laws, *id.* at 91. Moreover, several analogous cases have rejected similar proposed expansions of the right to travel to undermine facially neutral laws regulating possession: courts in New York and Colorado recently rejected purported right-to-travel claims premised on municipal restrictions on possession of firearms and pit bulls. *See* Def. Br. at 39, 43.

In the Colorado case, the court located "no precedent suggesting" that the right to travel was "infringed by a . . . law of general applicability that simply prohibits possession of a certain item"—pit bulls—and thus found no "cognizable claim premised on the right to travel." *Grider*, 2012 WL 1079466, at *7. In the New York case, a judge of this Court held that nothing in a New York City firearms licensing rule "impedes, deters, or punishes travel," even if "the rule

[27] While Plaintiffs claim that they cannot "travel to other States," Am. Compl. ¶ 429, they also fail to show that *federal law* creates any such restriction, as opposed to other states' laws regulating marijuana—particularly given that federal law prohibits marijuana possession nationwide. *See Canori*, 737 F.3d at 184. Plaintiffs' failure to show that the CSA affects interstate travel, by itself, is fatal to this claim.

admittedly does not allow for unrestricted travel with a firearm outside New York City." *N.Y. State Rifle & Pistol Ass'n*, 86 F. Supp. 3d at 264. Rather, the court held, the rule "simply prevents [licensees] from travelling with their firearm." *Id.* The same reasoning precludes Plaintiffs' attempt to employ the right to travel in the context of the CSA's generally applicable ban on marijuana possession.

Plaintiffs also contend that their right-to-travel claim is animated by a separate "fundamental right" to use marijuana for medical purposes, Pl. Opp. at 89—but elsewhere they retreat from making a claim to such a fundamental right, which uniform decisional law has concluded does not exist. *See id.* at 8 (conceding Plaintiffs do not advance the claim of a "constitutional right to treat with medical Cannabis"); *see also supra* Section II.B. Moreover, Plaintiffs' circular attempt to circumvent well-settled law through a nebulous claim of a constitutional entitlement to a particular medical treatment has also been rejected by the courts and fails for the reasons set out above in Section II.B.[28]

In sum, Plaintiffs' right-to-travel claim must be rejected. They cannot patch together a cause of action by asserting a "Hobson's Choice" between travel and a nonexistent fundamental right to use marijuana. Nor can they succeed based on their conclusory allegations that the CSA—a generally applicable federal law—somehow affects their right to travel, when in reality their claim is that Plaintiffs' violations of federal law are more likely to be *detected* while traveling. Plaintiffs' allegations support no plausible inference that the CSA intentionally affects travel, and their claims of an indirect effect are unavailing. Accordingly, this claim should be dismissed under Rule 12(b)(6).

[28] Plaintiffs further disclaim any assertion of a medical necessity defense, Pl. Opp. at 89 n.82—as they must, given the Supreme Court's explicit rejection of such a defense, *Oakland Cannabis Buyers' Co-op.*, 532 U.S. at 494 & n.7.

F. The CSA Does Not Affect First Amendment-Protected Expression, and the Right to Petition Does Not Support Plaintiffs' Claim

Plaintiffs' right-to-petition argument parallels their right-to-travel claim: it challenges a law that is facially neutral as to expression, and attempts to invoke a nonexistent fundamental right to use marijuana in order to manufacture an unprecedented and ill-defined claim that the CSA burdens First Amendment-protected expression, though the CSA regulates conduct, not speech. This claim should also be rejected.

Plaintiffs concede (as they must) that the CSA is a "content-neutral" regulation of the possession of controlled substances, and does not "facially target" speech. Pl. Opp. at 72-73 (formatting altered).[29] The CSA makes certain substances, including marijuana, illegal in all circumstances except under the aegis of government-approved research projects. *See Raich I*, 545 U.S. at 24. No connection to expressive activity is apparent on the face of the law.

Arguments like Plaintiffs' are routinely rejected as too attenuated from expression, and as inconsistent with the necessities of governance. "Because 'every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities,' a conduct-regulating statute of general application that imposes an incidental burden on the exercise of free speech rights does not implicate the First Amendment." *Church of Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 209 (2d Cir. 2004) (quoting *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 (1986)). Consistent with this fundamental reality, and because the CSA simply "does not implicate the First Amendment" at all, *id.*, no further First Amendment analysis is necessary

[29] Plaintiffs also appear to concede that the Petition Clause gives them no right to be heard by legislative bodies, including Congress. *See* Pl. Opp. at 81 & n.71; *see also Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 283-84 (1984); *Liverman v. Comm. on the Judiciary, U.S. House of Rep.*, 51 F. App'x 825, 826 (10th Cir. 2002) (unpublished).

for the Court to reject Plaintiffs' claim.[30] *See, e.g.*, *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 409 (9th Cir. 2015) (holding that no First Amendment scrutiny was necessary for law that "was not motivated by a desire to suppress speech, the conduct at issue is not . . . expression, and the ordinance does not have the effect of targeting expressive activity"), *cert. denied*, 136 S. Ct. 1838 (2016); *Wright v. City of St. Petersburg*, 833 F.3d 1291, 1297 (11th Cir. 2016) (holding that no First Amendment scrutiny was necessary because ordinance in question "applies not just to people who are entering a city park to exercise their First Amendment rights but also to every other person who enters city property for any reason—runners, picnic-lunchers, and drug dealers"); *Hutchins v. District of Columbia*, 188 F.3d 531, 548 (D.C. Cir. 1999) (holding that where law "does not itself regulate or proscribe expression," it "would only be subject to scrutiny under the First Amendment if it regulated 'conduct that has an expressive element,' or if it 'imposed a disproportionate burden upon those engaged in protected First Amendment activity'" (quoting *Arcara*, 478 U.S. at 703-04) (brackets omitted)).

Plaintiffs object that the CSA incidentally burdens speech because it prevents certain medical marijuana advocates from carrying medical marijuana while "meet[ing] with elected representatives and other public officials in Congress or congressional office buildings." Pl. Opp. at 75. But Plaintiffs' possession of marijuana is just as illegal under the CSA whether they are expressing themselves or not, and whether on federal property or not. *See Canori*, 737 F.3d at 184; *see also* Pl. Opp. at 89-90 (describing CSA as creating "nationwide, categorical ban" on

[30] Plaintiffs misapprehend *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011), in which the Supreme Court reaffirmed that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *See* Pl. Opp. at 80 n.69. The Supreme Court invalidated the state statute at issue in *Sorrell* because the law "impose[d] a burden based on the content of speech and the identity of the speaker," 564 U.S. at 567—which Plaintiffs do not and cannot claim is true of the CSA.

marijuana). The fact that Plaintiffs allege that they would be at higher risk of *enforcement* of the CSA in certain circumstances—including during a hypothetical visit to congressional offices—simply does not give rise to a First Amendment claim.

The Supreme Court has previously rejected out of hand similar claims of ancillary burdens on speech:

> One liable for a civil damages award has less money to spend on paid political announcements or to contribute to political causes, yet no one would suggest that such liability gives rise to a valid First Amendment claim. Similarly, a thief who is sent to prison might complain that his First Amendment right to speak in public places has been infringed because of the confinement, but we have explicitly rejected a prisoner's claim to a prison environment least restrictive of his desire to speak to outsiders.

Arcara, 478 U.S. at 706 (citation omitted); *see id.* at 708 (O'Connor, J., concurring) (noting the "absurd result" that would come about if "any government action that had some conceivable speech-inhibiting consequences, such as the arrest of a newscaster for a traffic violation," would "require analysis under the First Amendment"). Rather, "regulation of conduct may proceed even if the person who wants to violate the legal rule proposes to express an idea." *Left Field Media LLC v. City of Chicago*, 822 F.3d 988, 990 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 1065 (2017).

Plaintiffs now assert that the Court should consider their right-to-petition claim under *United States v. O'Brien*, 391 U.S. 367 (1968), or as an unreasonable "time, place, and manner" restriction. Pl. Opp. at 73-79. The Court need not perform this analysis, since "*O'Brien* . . . has no relevance to a statute directed at imposing sanctions on nonexpressive activity," *Arcara*, 478 U.S. at 707 (majority opinion), and the CSA simply "does not implicate the First Amendment,"

see Church of Am. Knights, 356 F.3d at 209. However, even if the Court considers them, Plaintiffs' First Amendment theories nonetheless should be swiftly dismissed.[31]

"Under *O'Brien,* an ordinance is valid if (1) it is within the constitutional power of the government; (2) it furthers an important or substantial government interest; (3) the government interest is unrelated to the suppression of free expression; and (4) the restriction is not greater than is essential to the furtherance of the government interest." *White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163, 169 (2d Cir. 2007) (citing *O'Brien*, 391 U.S. at 377). The CSA's regulation of marijuana easily satisfies this standard, even were it necessary for the Court to apply it. First, the CSA's regulation of marijuana has been expressly upheld as constitutional by the Supreme Court under the Commerce Clause in *Raich I*, 545 U.S. 1, and by every court known to government counsel (including the Second Circuit) that has otherwise considered the CSA's constitutionality in like circumstances. *See Canori*, 737 F.3d at 183; *see also supra* Sections II.A.2-3, II.D; Def. Br. at 12-22, 35-36. Second, there is an unquestionable government interest in preventing drug trafficking. *See supra* Section II.A.3; *see also Von Raab*, 489 U.S. at 668 (stating that drug trafficking is "one of the greatest problems affecting the health and welfare of our population"); *Christie*, 825 F.3d at 1057 (government has a "compelling interest in protecting the physical and psychological well-being of minors," advanced in part by

[31] The government notes that its opening brief imprecisely characterized *Vincenty v. Bloomberg*, 476 F.3d 74 (2d Cir. 2007). *See* Def. Br. at 45. While the *Vincenty* court held that a municipal ordinance regulating possession of graffiti implements was a "content-neutral regulation that imposes only an incidental burden on speech," it nonetheless conducted an intermediate scrutiny analysis and held that a preliminary injunction was not an abuse of discretion. 476 F.3d at 84, 89. Because the CSA—unlike the graffiti-related ordinance at issue in *Vincenty*—is "directed at imposing sanctions on nonexpressive activity," *Arcara*, 478 U.S. at 707, no First Amendment analysis is necessary. Along similar lines, the Second Circuit declined to give First Amendment scrutiny to an anti-mask law's potential effect on anonymous speech by Ku Klux Klan members, even if it made "some members of the American Knights less willing to participate in rallies." *Church of Am. Knights*, 356 F.3d at 209.

prevention of diversion of marijuana (internal quotation marks omitted); *Israel*, 317 F.3d at 771; *Middleton*, 690 F.2d at 825. Third, Plaintiffs have advanced no credible claim that the CSA's regulation of marijuana relates to the suppression of their expressive rights or is enforced in a way that relates to the content of any expression. Fourth, the CSA's regulation of Schedule I substances is tailored to the ends of the law, as it "prohibit[s] entirely the possession or use of substances listed in Schedule I, except as a part of a strictly controlled research project," *Raich I*, 545 U.S. at 24—which is calculated to prevent trafficking in marijuana and other Schedule I substances.[32]

Nor can Plaintiffs' vague "as-applied" claim succeed as a challenge to some supposed limitation on the time, place, or manner of expression. "The CSA designates marijuana as contraband for *any* purpose," *Raich I*, 545 U.S. at 27, regardless of whether individuals possess it in a public forum, a nonpublic forum, or otherwise, *see Huminski v. Corsones*, 396 F.3d 53, 89 (2d Cir. 2005), and regardless of the time, place, or manner in which they possess it. Plaintiffs' claim would expand First Amendment analysis boundlessly, to subject all legislation to scrutiny on the grounds that, a party asserted that the regulation affected their right to expression in some implausible way. This is not the law. *See Arcara*, 478 U.S. at 706; *Church of Am. Knights*, 356 F.3d at 209.

[32] To the extent Plaintiffs now attempt to revive their conclusory claim that the CSA was enacted in order to suppress the speech of war protestors, Pl. Opp. at 75, they fail to plausibly assert such a claim for the reasons set out in Defendants' opening brief. *See* Def. Br. at 29 n.11. In short, the cited portions of the Amended Complaint relating to this claim, *see* Am. Compl. ¶¶ 10-12, 249-51, 408-13, are entirely conclusory and lack any factual support, and should thus be disregarded. *Iqbal*, 556 U.S. at 678; *cf. supra* Section II.C.2. Moreover, this puzzling argument cannot be squared with Plaintiffs' own concession that the CSA is "content-neutral." *See* Pl. Opp. at 72 (formatting altered).

Even under such an analysis, moreover, Plaintiffs' First Amendment claim fails. The Amended Complaint reflects a claim that Plaintiffs Bortell, Belen, and Cotte seek to "visit and speak with members of Congress at the Capitol to lobby in favor of . . . repealing the CSA," and to "engage in in-person advocacy." Am. Compl. ¶¶ 85-87; *see also id.* ¶¶ 55-57, 102-04. Plaintiffs concede that "the interior of federally-owned buildings such as the Capitol" constitute nonpublic forums. Pl. Opp. at 78; *see also, e.g.*, *Huminski*, 396 F.3d at 90-91. Thus, even if the CSA regulated expression at all—and it does not, for the reasons set out above—it "need only be reasonable in light of the purpose of the forum." *Gen. Media Commc'ns, Inc. v. Cohen*, 131 F.3d 273, 282 (2d Cir. 1997); *see also Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 808-09 (1985) (such a restriction "need not be the most reasonable or the only reasonable limitation"; no "requirement that the restriction be narrowly tailored or that the Government's interest be compelling").

Plaintiffs cannot establish that it could be unreasonable to neutrally enforce the CSA—a law of general applicability that bars the possession of marijuana nationwide—on Capitol grounds or in other nonpublic federal buildings. The CSA's ban on marijuana possession applies at the Capitol as it does throughout the nation; thus, it is a "reasonable and viewpoint neutral" restriction. *Make the Rd. by Walking, Inc. v. Turner*, 378 F.3d 133, 143 (2d Cir. 2004). And "[t]he First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message." *Cornelius*, 473 U.S. at 809; *see also Church of Am. Knights*, 356 F.3d at 209 (First Amendment protection of expression "does not guarantee ideal conditions for doing so").[33]

[33] Even if any public forum were at issue—and the Amended Complaint does not so allege, given that Plaintiffs claim only that they might be precluded from engaging in in-person advocacy inside the Capitol—the result would be the same. "[E]ven in a public forum the

The cases Plaintiffs cite are not to the contrary. Principally, they involve bans that "singl[ed] out" individuals "for exclusion, thereby permitting all others to engage in similar activity in and around" a particular government facility. *Huminski*, 396 F.3d at 92; *see also Cyr v. Addison Rutland Supervisory Union*, 60 F. Supp. 3d 536, 548 (D. Vt. 2014) (holding that a "categorical ban of a single individual from open school board meetings" was "not narrowly tailored and does not leave open ample alternative channels of communication"); *Brown v. City of Jacksonville*, No. 06 Civ. 122, 2006 WL 385085, at *4 (M.D. Fla. Feb. 17, 2006) (similar). The CSA is not analogous to such restrictions: it is a law of general applicability that regulates *nonexpressive* conduct, namely, the possession of controlled substances.

Last, Plaintiffs raise another variant of their flawed objection that "the Federal Government cannot require a person to sacrifice one fundamental right in order to preserve another." Pl. Opp. at 85. But the courts uniformly agree that no fundamental right is implicated by the use of marijuana, and there is no medical necessity defense recognized under the CSA.

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government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal quotation marks omitted). As Plaintiffs concede, *see* Pl. Opp. at 72, the CSA is content-neutral and does not bar speech; the restriction on possession of Schedule I controlled substances is narrowly tailored to the government's significant interest in barring those substances, *see supra* Section II.A.3; and Plaintiffs concede that they have available to them "other forms of communication from a distance," Am. Compl. ¶ 22, with which they may communicate with legislators. *See Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) (rejecting any "right to communicate one's views at all times and places or in any manner that may be desired"); *Marcavage v. City of New York*, 689 F.3d 98, 107 (2d Cir. 2012) ("The requirement that 'ample alternative channels' exist does not imply that alternative channels must be perfect substitutes for those channels denied to plaintiffs by the regulation at hand." (internal quotation marks omitted)); *accord Connection Distrib. Co. v. Reno*, 154 F.3d 281, 293 (6th Cir. 1998).

United States v. Oakland Cannabis Buyers' Co-op., 532 U.S. 483, 494 & n.7 (2001); *see supra* Section II.B. Plaintiffs' attempt to manufacture a free expression claim thus should be rejected.

III. In the Alternative, the Amended Complaint Should Be Dismissed Under Rule 12(b)(1) for Failure to Exhaust Available Administrative Remedies

In addition to being subject to dismissal for failure to state a claim, the Amended Complaint also should be dismissed because Plaintiffs have failed to pursue an available forum in which they would be entitled to challenge the inclusion of marijuana as a Schedule I drug. "Where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed." *Reiter v. Cooper*, 507 U.S. 258, 269 (1993); *see also Skubel v. Fuoroli*, 113 F.3d 330, 334 (2d Cir. 1997) ("As a rule, plaintiffs must exhaust administrative remedies before seeking redress in federal court.").

Although they appear to acknowledge that Congress created a statutory mechanism to permit the rescheduling of drugs under the CSA, Plaintiffs argue they should be excused from following that procedure, Pl. Opp. at 103-08, despite the fact that their challenge rests in large part on whether new science and evidence undermine Congress's placement of marijuana on Schedule I. Such evidence is more appropriately considered under the administrative process created by statute, which directs the DEA to "gather[] the necessary data" and "request from [the Department of Health and Human Services] a scientific and medical evaluation." 21 U.S.C. § 811(b). The question of whether a drug belongs in one schedule rather than another "clearly calls for fine distinctions, but the statutory procedure at least offers the means for producing a thorough factual record upon which to base an informed judgment," which reflects Congress's

intent to permit "intended flexibility and receptivity to the latest scientific information" through the administrative process. *Kiffer*, 477 F.2d at 357.[34]

Plaintiffs' challenge presents a paradigm case for when administrative exhaustion should be required: that is, a case where "exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context[,] or where . . . the underlying issues are particularly within the agency's expertise." *Shenandoah v. U.S. Dep't of Interior*, 159 F.3d 708, 713 (2d Cir. 1998) (internal quotation marks omitted); *see also Beharry v. Ashcroft*, 329 F.3d 51, 62 (2d Cir. 2003). Because "[d]rug re-scheduling decisions implicate specialized agency expertise, . . . it is no surprise that Congress would desire to channel challenges to the comprehensive scheduling scheme in the CSA through one specialized agency." *Krumm v. Holder*, No. 08 Civ. 1056, 2009 WL 1563381, at *9 (D.N.M. May 27, 2009). Courts "would . . . greatly undermine the CSA if they could, in the first instance, make or second-guess the scheduling decisions that Congress has charged to the Attorney General, and that the Attorney General has properly delegated to the DEA." *Id.*

The Court should reject Plaintiffs' baseless claim that their request falls within legal exceptions from the exhaustion doctrine. First, there is no merit to Plaintiffs' assertion that they would be unduly prejudiced due to the time required for the resolution of a rescheduling petition under § 811. Parties often "would clearly prefer" a suit in district court "rather than the often lengthy administrative review process"—but that preference alone does not render administrative

[34] As noted in Defendants' opening brief, the court in *Kiffer* did not require exhaustion of remedies under § 811 before considering a constitutional challenge: in 1973, the Director of the Bureau of Narcotics and Dangerous Drugs maintained that he could not consider a petition to reschedule marijuana, so the court concluded that the availability of an administrative remedy was in doubt. *Kiffer*, 477 F.2d at 351. That is no longer the case. *See Green*, 222 F. Supp. 3d at 273-74; *see also* discussion *infra*.

proceedings futile. *Heckler v. Ringer*, 466 U.S. 602, 619 (1984). Plaintiffs' delay argument has also been rejected as to marijuana rescheduling. *See Krumm v. Holder*, 2009 WL 1563381, at *10-11 (dismissing unexhausted marijuana challenge despite assertion that undue delay would result; plaintiff made "no strong showing" that "the administrative process [is] inadequate"). Among other grounds, the court held that any undue delay could be remedied, if necessary, through a suit to compel agency action under the Administrative Procedure Act. *Id.* at *11 (citing 5 U.S.C. § 706(1)).[35]

Further, to the extent that Plaintiffs attempt to rely on the Second Circuit's holding in *Kiffer* for the proposition that the remedy is subject to uncertainty and delay, *see* Pl. Opp. at 105-06 & nn.99 & 102, they do not grapple with the material change in circumstances since *Kiffer*, as set out in Defendants' brief. Specifically, in 1973, "it was doubtful whether an administrative remedy actually existed." *Green*, 222 F. Supp. 3d at 274. In 1973, the position of the Director of the Bureau of Narcotics and Dangerous Drugs was that he *could not* reschedule marijuana. *Kiffer*, 477 F.2d at 351. This has not been the case for decades: Plaintiffs concede that the DEA has considered a number of petitions requesting the removal of marijuana from Schedule I. *See* Am. Compl. at 74-77 (table). Thus, the factual underpinning for *Kiffer*'s decision on this ground has fallen away, and "it is not clear that the Second Circuit would reach the same conclusion today." *Green*, 222 F. Supp. 3d at 273. Plaintiffs do not credibly contend otherwise.[36]

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[35] Additionally, under the statutory provision providing appellate review of scheduling determinations, "any person aggrieved" by the determination "may obtain review" in a court of appeals by filing within 30 days of notice of the decision. 21 U.S.C. § 877. Plaintiffs do not assert that they sought review of the denials of previous rescheduling denials—including a denial in the summer of 2016, *see* Am. Compl. at 76 (table), nor that any obstacle prevented them from doing so.

[36] The court in *Green* expressed doubt about the continued "soundness" of *Kiffer*'s holding on administrative exhaustion given the change of circumstances, but nonetheless declined to rule on

Also unavailing is Plaintiffs' argument that the DEA cannot grant them the relief that they seek—to declare the CSA unconstitutional as applied to marijuana. Pl. Opp. at 106. As relevant here, Plaintiffs' challenge seeks a declaration "that the CSA, as it pertains to the classification of Cannabis *as a Schedule I drug*, is unconstitutional . . . ." Am. Compl. ¶ 6 (emphasis added); *see also, e.g.*, *id.* at ¶¶ 7-8, 20-21, 253-58, 376-77. But Plaintiffs do not and cannot claim that the DEA lacks the power to grant them the relief they seek—*i.e.*, the removal of marijuana from Schedule I, which can plainly be accomplished through a rescheduling proceeding under 21 U.S.C. § 811. *See Canori*, 737 F.3d at 183 ("The scheduling of controlled substances under the CSA is not static."). Indeed, even *Kiffer* dismissed this argument out of hand, despite the court's doubts about the availability of rescheduling in 1973 under the then-existing administrative scheme. *Kiffer*, 477 F.2d at 351 ("[T]imely and successful use of [the § 811] administrative remedy would have obtained for appellants the very relief they seek from us—a declaration either that marihuana should not be subject to the Act or that it should be covered only in another schedule carrying lesser penalties."). Because Plaintiffs could receive the relief they seek from the administrative process, their argument is meritless.[37]

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this ground and went on to consider and reject the defendants' constitutional challenge to the CSA on its merits. *See Green*, 222 F. Supp. 3d at 274-80.

[37] Plaintiffs argue that the cases in which challenges were dismissed on exhaustion grounds involved only requests that a court reschedule marijuana, not suits seeking to invalidate the CSA as unconstitutional. This is incorrect: a number of the cited cases involved putative constitutional challenges. *See, e.g.*, *Welch v. United States*, No. 16 Civ. 503, 2017 WL 3763857, at *1, *3-4 (W.D. Va. Aug. 30, 2017) (rejecting due process challenge, *inter alia*, on exhaustion grounds); *Alternative Cmty. Health Care Co-op., Inc. v. Holder*, No. 11 Civ. 2585, 2012 WL 707154, at *6 (S.D. Cal. Mar. 5, 2012) (rejecting as futile amendment to include constitutional claim of a lack of rational basis for marijuana scheduling, *inter alia*, because the CSA's "comprehensive reclassification scheme" is the "exclusive means of challenging classification decisions" (citations omitted)), *aff'd sub nom. Sacramento Nonprofit Collective v. Holder*, 552 F. App'x 680 (9th Cir. 2014) (mem.).

Any argument based on a supposed bias in the existing rescheduling process likewise fails. This argument appears largely to boil down to the fact that prior marijuana rescheduling petitions have been denied, along with conclusory allegations of hostility to marijuana by certain present or former officials. *See* Am. Compl. ¶¶ 354-56, 360-68. But it would be inappropriate to "second guess the DEA's decision not to reschedule marijuana simply because the DEA has refused to reschedule marijuana in the past." *Krumm*, 2009 WL 1563381, at *12. Moreover, even where parties assert that an administrative process is ineffectual by presenting plausible "evidence of hostility by certain . . . officials," this has been deemed insufficient to allege the futility of the administrative scheme. *Kowalczyk v. Barbarite*, 594 F. App'x 690, 693 (2d Cir. 2014) (summary order).[38]

In the face of Defendants' prior arguments, *see* Def. Br. at 51-53, Plaintiffs appear no longer to rely on many of the Amended Complaint's conclusory allegations in support of their futility argument, *see* Am. Compl. ¶¶ 451-56, and they appear to have abandoned such arguments. Plaintiffs' own contentions preclude their conflicting allegation that marijuana cannot be sufficiently studied, as they themselves allege that "thousands of studies" concerning marijuana have been performed. *Id.* ¶ 279; *see also L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011) (courts need not presume the truth of a plaintiff's allegations when they are "contradicted by more specific allegations or documentary evidence"). Nor do Plaintiffs attempt to counter the D.C. Circuit's observation in *Americans for Safe Access* that marijuana research is permitted under HHS policy, and that "it appears that adequate and well-controlled

[38] The Amended Complaint makes no claim of bias on the part of HHS, whose recommendations are binding on the Attorney General in scientific and medical matters. *See* 21 U.S.C. § 811(b); *Canori*, 737 F.3d at 183. Nor is there a claim of bias on the part of the U.S. Courts of Appeals, which may hear appeals from denials of rescheduling petitions, 21 U.S.C. § 877.

studies are wanting not because they have been foreclosed but because they have not been completed." *Americans for Safe Access*, 706 F.3d at 452.

In sum, because "a scheduling decision is not a legal determination that an Article III court is qualified to make without an administrative record" and requires weighing specialized and "complex policy implications and scientific data," the Court should dismiss this suit in light of the statutorily available administrative remedies. *Krumm*, 2009 WL 1563381, at *10.[39]

IV. The Amended Complaint Should Alternatively Be Dismissed Pursuant to Rule 8, or Substantial Portions Should Be Stricken

Plaintiffs' 99-page, 474-paragraph Amended Complaint is a model of prolixity and confusion. Plaintiffs' 109-page opposition brief provides little clarification—indeed, it makes matters worse, failing to defend some legal theories seemingly referenced in the Amended Complaint while failing to explain the masses of extraneous matter pled therein. Compounding these deficiencies, Plaintiffs improperly attempt to inject new factual contentions and new legal theories into their opposition brief—a tactic that the Court should not tolerate. *See supra* Part I.

Thus, although Defendants have labored to respond to all allegations and claims that Plaintiffs state or hint at, and particularly given the burden that a detailed adjudication would place on the Court, the Amended Complaint is subject to dismissal for the overarching reason that it does not set forth the required "short and plain statement" that "give[s] the defendant fair notice of what the claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (ellipsis and internal quotation marks omitted). Indeed, Plaintiffs hardly attempt to support the relevance of many allegations—containing, *inter alia*, historical information predating the passage of the CSA by hundreds of years, including outside the United States—to their theories

[39] The same considerations also warrant dismissal of the futility-related purported cause of action set out in paragraphs 451-57 of the Amended Complaint.

for legal relief. Even if the Amended Complaint were to survive dismissal—and it should not, for all the reasons set out above—such irrelevant matter should be stricken.

For example, Plaintiffs scarcely defend the inclusion in their pleadings of a compendium of allegations regarding the use of marijuana in other countries "for the last 10,000 years." Pl. Opp. at 12. In a single paragraph of their brief, they sum up a lengthy section of their Amended Complaint containing hundreds of years of such foreign and domestic history. *See id.* (citing Am. Compl. ¶¶ 129-96). In response to Defendants' motion, Plaintiffs do not comprehensibly argue that ancient marijuana history supports any of their legal claims.[40] Such immaterial portions should be stricken from Plaintiffs' pleadings. *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988).

Second, Plaintiffs have still failed to clarify what they believe to be the legal basis for many of their claims. As an example, their Amended Complaint refers repeatedly to the Ninth and Tenth Amendments to the Constitution. *See* Am. Compl. ¶ 6 (claiming that CSA as applied to marijuana violates the First, Fifth, Ninth, and Tenth Amendments, among other supposed rights); *see also id.* ¶¶ 5, 18, 19, 440, 442, 467, 470. But after Defendants were forced to respond to Plaintiffs' apparent legal theories—which are meritless, *see* Def. Br. at 22 n.7, 25-26, 36-37—Plaintiffs apparently abandoned them and all but omitted any reference to such "claims" in their opposition. *See* Pl. Opp. at 96 (sole, conclusory reference to Tenth Amendment in Plaintiffs' brief; no reference to Ninth Amendment). This is exactly what Rule 8 is designed to prevent. Plaintiffs' improper pleading practices have imposed an "unjustified burden on the

[40] Plaintiffs say that somehow these paragraphs "provide[] necessary context to Plaintiffs' Irrationality Allegation," Pl. Opp. at 103 n.95, but do not assert that these allegations would have been relevant to any relevant decisionmaker who enacted or enforced the CSA, much less that any such party was aware of this assortment of historical allegations.

court and the party who must respond" to their Amended Complaint, and both the Court and Defendants have been "forced to select the relevant material from a mass of verbiage." *Salahuddin*, 861 F.2d at 42 (internal quotation marks omitted).[41]

Given that all of Plaintiffs' claims are without merit for the reasons set out in Section II, and because the suit alternatively should be dismissed for failure to exhaust as set out in Section III, the Court need not reach Rule 8. However, because Plaintiffs' opposition briefing only underscores the "confused, ambiguous, vague, or otherwise unintelligible" nature of the Amended Complaint—which fail to give Defendants adequate notice of what the claims are and the evidence that Plaintiffs claim supports them—the Court should, alternatively, grant Defendants' request for relief under Rule 8 to dismiss the Amended Complaint due to its "labyrinthian prolixity" or, in the alternative, strike its substantial "redundant or immaterial" portions. *Salahuddin*, 861 F.2d at 42.

CONCLUSION

The Court should dismiss this action pursuant to Rules 8, 12(b)(1), and 12(b)(6).

[41] Plaintiffs incorrectly claim that the government's Rule 8 argument is in tension with its separate argument that many of Plaintiffs' arguments are implausibly pleaded through repetitive conclusory statements of law. Pl. Opp. at 102. Length or brevity is not the reason Plaintiffs' claims are conclusory; the problem is that the Amended Complaint is a mass of conclusory, repetitive, and largely irrelevant material that, for the most part, provides neither support for the legal theories it advances nor clarity as to what those theories are. As the Second Circuit has noted in another context, "[I]t is simply not true, we want to emphasize, that if a litigant presents an overload of irrelevant or nonprobative facts, somehow the irrelevances will add up to relevant evidence . . . . They do not; zero plus zero is zero." *Tepperwien v. Entergy Nuclear Operations, Inc.*, 663 F.3d 556, 572 (2d Cir. 2011) (internal quotation marks omitted).

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Respectfully submitted,

JOON H. KIM
Acting United States Attorney for the
Southern District of New York
Attorney for the Defendants

By: /s/ Samuel Dolinger
SAMUEL DOLINGER
REBECCA S. TINIO
Assistant United States Attorneys
86 Chambers Street, 3rd Floor
New York, New York 10007
Tel.: (212) 637-2677/2774
E-mail: samuel.dolinger@usdoj.gov
rebecca.tinio@usdoj.gov