18-859

To Be Argued By:
SAMUEL DOLINGER

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 18-859

MARVIN WASHINGTON, DEAN BORTELL, as Parent/Guardian for Infant Alexis Bortell, ALEXIS BORTELL, JOSE BELEN, SEBASTIEN COTTE, as Parent/Guardian for Infant Jagger Cotte, JAGGER COTTE, CANNABIS CULTURAL ASSOCIATION INC.,

Plaintiffs-Appellants,

—v.—

JEFFERSON B. SESSIONS III, in his official capacity as United States Attorney General, UNITED STATES DEPARTMENT OF JUSTICE, UTTAM DHILLON, in his official capacity as Acting Administrator of the Drug Enforcement Administration, UNITED STATES DRUG ENFORCEMENT ADMINISTRATION, UNITED STATES OF AMERICA,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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TABLE OF CONTENTS

PAGE

Preliminary Statement 2

Jurisdictional Statement 3

Issues Presented for Review 3

Statement of the Case 4

A. Procedural History 4

B. The Complaint 5

C. Statutory Framework 6

Summary of the Argument 10

ARGUMENT 11

Standard of Review 11

POINT I—Plaintiffs Failed to Exhaust an Available Administrative Remedy 12

POINT II—The CSA Is a Rational Enactment 21

POINT III—There Is No Fundamental Right to Use Marijuana 29

POINT IV—Plaintiffs' Commerce Clause Claim Is Squarely Foreclosed by Supreme Court Precedent 34

POINT V—The Cannabis Cultural Association Lacks Standing 35

PAGE

POINT VI—The Cannabis Association's Equal Protection Challenge Fails to State a Claim 40

POINT VII—Plaintiffs Fail to State a Constitutional Right to Travel Claim 42

POINT VIII—Plaintiffs' First Amendment Challenge Fails to State a Claim 45

CONCLUSION 49

PAGE

TABLE OF AUTHORITIES

Cases:

Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach, 495 F.3d 695 (D.C. Cir. 2007). 33, 34

Ajlani v. Chertoff, 545 F.3d 229 (2d Cir. 2008) 11

Alliance for Envtl. Renewal, Inc. v. Pyramid Crossgates Co., 436 F.3d 82 (2d Cir. 2006) 38

Alternative Cmty. Health Care Cooperative, Inc. v. Holder, No. 11 Civ. 2585, 2012 WL 707154 (S.D. Cal. Mar. 5, 2012) 15

Americans for Safe Access v. DEA, 706 F.3d 438 (D.C. Cir. 2013). . . . . *passim*

Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986). 46, 47, 48

Ashcroft v. Iqbal, 556 U.S. 662 (2009). 40, 41

Batagiannis v. West Lafayette Community School Corp., 454 F.3d 738 (7th Cir. 2006) 19

Beatie v. City of New York, 123 F.3d 707 (2d Cir. 1997) 23

PAGE

Blouin v. Spitzer,
356 F.3d 348 (2d Cir. 2004) 32, 33

Carnohan v. United States,
616 F.2d 1120 (9th Cir. 1980) 34

Chavez v. Martinez,
538 U.S. 760 (2003). 29

City of Los Angeles v. Lyons,
461 U.S. 95 (1983). 36, 38, 39

Clapper v. Amnesty Int'l USA,
568 U.S. 398 (2013). 36

Collins v. City of Harker Heights,
503 U.S. 115 (1992). 30

Cruzan v. Director of Missouri Dep't of Health,
497 U.S. 261 (1990). 32

Elgin v. Dep't of Treasury,
567 U.S. 1 (2012). 17

FCC v. Beach Commc'ns, Inc.,
508 U.S. 307 (1993). 23, 26

Gonzales v. Oregon,
546 U.S. 243 (2006). 6

Gonzales v. Raich,
545 U.S. 1 (2005). . . . . *passim*

Hancock Indus. v. Schaeffer,
811 F.2d 225 (3d Cir. 1987) 23, 28

Heckler v. Ringer,
466 U.S. 602 (1984). 18

PAGE

Holloman v. Greater Cleveland Reg'l Transit Auth., 930 F.2d 918 (6th Cir. 1991) 32

Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977). 36

In re J.P. Linahan, Inc., 138 F.2d 650 (2d Cir. 1943) 19

Int'l Franchise Ass'n, Inc. v. City of Seattle, 803 F.3d 389 (9th Cir. 2015) 47

James v. City of Costa Mesa, 700 F.3d 394 (9th Cir. 2012) 31

Kennedy v. Empire Blue Cross & Blue Shield, 989 F.2d 588 (2d Cir. 1993) 16

Krumm v. Holder, No. 08 Civ. 1056, 2009 WL 1563381 (D.N.M. May 27, 2009) 15, 18, 19

Kuromiya v. United States, 37 F. Supp. 2d 717 (E.D. Pa. 1999) 32

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Left Field Media LLC v. City of Chicago, 822 F.3d 988 (7th Cir. 2016) 46

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). 36, 37, 40

PAGE

Marcavage v. City of New York,
689 F.3d 98 (2d Cir. 2012) 48

Marshall v. United States,
414 U.S. 417 (1974). 21

Mastrovincenzo v. City of New York,
435 F.3d 78 (2d Cir. 2006) 47

McCarthy v. Madigan,
503 U.S. 140 (1992). 13, 14

Members of City Council v.
Taxpayers for Vincent,
466 U.S. 789 (1984). 47

Millea v. Metro-North R. Co.,
658 F.3d 154 (2d Cir. 2011) 37, 39

Minnesota Senior Fed'n v. United States,
273 F.3d 805 (8th Cir. 2001) 43

Minnesota v. Clover Leaf Creamery Co.,
449 U.S. 456 (1981). 26

Molinari v. Bloomberg,
564 F.3d 587 (2d Cir. 2009) 22

Nat'l Treasury Employees Union v. von Raab,
489 U.S. 656 (1989). 25

Nicosia v. Amazon.com, Inc.,
834 F.3d 220 (2d Cir. 2016) 36

Norton v. Sam's Club,
145 F.3d 114 (2d Cir. 1998) 35, 48

PAGE

N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York,
883 F.3d 45 (2d Cir. 2018) 44

Pearson v. McCaffrey,
139 F. Supp. 2d 113 (D.D.C. 2001) 32

Personnel Adm'r of Mass. v. Feeney,
442 U.S. 256 (1979). 41

Planned Parenthood of Southeastern Pennsylvania v. Casey,
505 U.S. 833 (1992). 33

Pollack v. Duff,
793 F.3d 34 (D.C. Cir. 2015). 45

Portela-Gonzalez v. Sec'y of Navy,
109 F.3d 74 (1st Cir. 1997). 16

Porter v. Nussle,
534 U.S. 516 (2002). 13

Progressive Credit Union v. City of New York,
889 F.3d 40 (2d Cir. 2018) 23

Raich v. Gonzales,
500 F.3d 850 (9th Cir. 2007) 29, 30, 31, 34

Rana v. Islam,
887 F.3d 118 (2d Cir. 2018) 18

Reiter v. Cooper,
507 U.S. 258 (1993). 13

Roccisano v. Menifee,
293 F.3d 51 (2d Cir. 2002) 38

PAGE

Rutherford v. United States,
616 F.2d 455 (10th Cir. 1980) 34

Sacramento Nonprofit Collective v. Holder,
855 F. Supp. 2d 1100 (E.D. Cal. 2012) 27

Saenz v. Roe,
526 U.S. 489 (1999). 43

Schirmer v. Nagode,
621 F.3d 581 (7th Cir. 2010) 39

Seeley v. Washington,
940 P.2d 604 (Wash. 1997). 34

Sensational Smiles, LLC v. Mullen,
793 F.3d 281 (2d Cir. 2015) 22

Shenandoah v. U.S. Dep't of Interior,
159 F.3d 708 (2d Cir. 1998) 14

Siena Corp. v. Mayor & City Council of Rockville,
873 F.3d 456 (4th Cir. 2017) 28

Simon v. E. Ky. Welfare Rights Org.,
426 U.S. 26 (1976). 40

Sorrell v. IMS Health Inc.,
564 U.S. 552 (2011). 46

Stormans, Inc. v. Wiesman,
794 F.3d 1064 (9th Cir. 2015) 30

Storm-Eggink v. Gottfried,
409 F. App'x 426 (2d Cir. 2011) 32

Summers v. Earth Island Inst.,
555 U.S. 488 (2009). 36

PAGE

Thomas v. Trump,
No. 17 Civ. 65, 2017 WL 5629642
(W.D.N.C. Feb. 16, 2017) 15

Torraco v. Port Authority of N.Y. & N.J.,
615 F.3d 129 (2d Cir. 2010) 44

Town of Southold v. Town of East Hampton,
477 F.3d 38 (2d Cir. 2007) 43, 44, 45

United States v. Burton,
894 F.2d 188 (6th Cir. 1990) 15

United States v. Canori,
737 F.3d 181 (2d Cir. 2013) 17, 21

United States v. Christie,
825 F.3d 1048 (9th Cir. 2016) 22, 24, 25

United States v. Fogarty,
692 F.2d 542 (8th Cir. 1982) . . . . . *passim*

United States v. Fry,
787 F.2d 903 (4th Cir. 1986) 22, 26

United States v. Green,
222 F. Supp. 3d 267 (W.D.N.Y. 2016) . . . . . *passim*

United States v. Greene,
892 F.2d 453 (6th Cir. 1989) 15, 22

United States v. Heying,
No. 14 Cr. 30, 2014 WL 5286153
(D. Minn. Aug. 15, 2014) 41

United States v. Israel,
317 F.3d 768 (7th Cir. 2003) 25

PAGE

United States v. Johnson,
40 F.3d 436 (D.C. Cir. 1994). 41

United States v. Kiffer,
477 F.2d 349 (2d Cir. 1973) . . . . . *passim*

United States v. Maas,
551 F. Supp. 645 (D.N.J. 1982) 32

United States v. Middleton,
690 F.2d 820 (11th Cir. 1982) 15, 22

United States v. Miroyan,
577 F.2d 489 (9th Cir. 1978) 24

United States v. Moore,
54 F.3d 92 (2d Cir. 1995) 41, 42

United States v. Morgan,
313 U.S. 409 (1941). 19

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391 U.S. 367 (1968). 47

United States v. Oakland Cannabis Buyers' Cooperative,
532 U.S. 483 (2001). 6, 8, 27

United States v. Sanchez-Gomez,
138 S. Ct. 1532 (2018). 39

United States v. Taylor,
No. 14 Cr. 67, 2014 WL 12676320
(W.D. Mich. Sept. 8, 2014) 27

United States v. Wables,
731 F.2d 440 (7th Cir. 1984) 15, 22

PAGE

United States v. White Plume,
447 F.3d 1067 (8th Cir. 2006) 22, 24

United States v. Wilde,
74 F. Supp. 3d 1092 (N.D. Cal. 2014) . . 24, 27, 32

Village of Arlington Heights v. Metropolitan Housing Development Corp.,
429 U.S. 252 (1977). 42

Washington v. Glucksberg,
521 U.S. 702 (1997). 29, 30, 31, 33

Welch v. United States,
No. 16 Civ. 503, 2017 WL 3763857
(W.D. Va. Aug. 30, 2017) 15

Williams v. Town of Greenburgh,
535 F.3d 71 (2d Cir. 2008) 44, 45

Statutes:

5 U.S.C. § 706 18

21 U.S.C. § 801 . . . . . 6, 24

21 U.S.C. § 811 . . . . . *passim*

21 U.S.C. § 812 . . . . . 6, 8, 26

21 U.S.C. § 823 . . . . . 6, 27

21 U.S.C. § 841 6

21 U.S.C. § 844 6

21 U.S.C. § 877 . . . . . 9, 12, 19

PAGE

28 U.S.C. § 1291 3

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28 U.S.C. § 2255 . . . . . 37, 38

Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681 (Oct. 21, 1998) 7, 25

Rules:

Fed. R. App. P. 10 18

Fed. R. App. P. 43 1

Regulations:

21 C.F.R. § 1308.43 9

28 C.F.R. § 0.100 8

Other Authorities:

Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 76 Fed. Reg. 40,552 (July 8, 2011) 9

Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53,767 (Aug. 12, 2016) 9, 20, 25

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 18-859

MARVIN WASHINGTON, DEAN BORTELL, AS PARENT/GUARDIAN FOR INFANT ALEXIS BORTELL, ALEXIS BORTELL, JOSE BELEN, SEBASTIEN COTTE, AS PARENT/GUARDIAN FOR INFANT JAGGER COTTE, JAGGER COTTE, CANNABIS CULTURAL ASSOCIATION INC.,

Plaintiffs-Appellants,

—v.—

JEFFERSON B. SESSIONS III, IN HIS OFFICIAL CAPACITY AS UNITED STATES ATTORNEY GENERAL, UNITED STATES DEPARTMENT OF JUSTICE, UTTAM DHILLON, IN HIS OFFICIAL CAPACITY AS ACTING ADMINISTRATOR OF THE DRUG ENFORCEMENT ADMINISTRATION, UNITED STATES DRUG ENFORCEMENT ADMINISTRATION, UNITED STATES OF AMERICA,

Defendants-Appellees.[1]

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[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Uttam Dhillon was automatically substituted as Acting Administrator of the Drug Enforcement Administration in place of former Acting Administrator Robert W. Patterson.

BRIEF FOR DEFENDANTS-APPELLEES

Preliminary Statement

The Controlled Substances Act ("CSA") generally prohibits the cultivation, distribution, or possession of drugs classified as "Schedule I" substances. Plaintiffs-appellants in this case claim that the inclusion of marijuana on Schedule I is irrational in light of allegedly new evidence, principally regarding its medical use, and that the law violates a variety of constitutional protections, including substantive due process, the Commerce Clause, the First Amendment, and the right to travel.

As the district court correctly ruled, plaintiffs' contentions about the scheduling of marijuana may not be brought to federal court until they have been presented to the responsible agencies. Congress has created, and the courts have recognized, a statutory mechanism under which the agencies can gather and consider scientific and medical evidence, and reschedule drugs if that evidence warrants. Requiring plaintiffs to exhaust that administrative remedy will allow the creation of a complete record, and if plaintiffs are successful will result in the precise result they seek: the end of the regulation of marijuana as a Schedule I drug. As plaintiffs have bypassed that mechanism, however, their action was properly dismissed.

If the Court were to reach the merits, the dismissal should still be affirmed. The CSA, and its inclusion of marijuana on Schedule I, have been consistently upheld against a range of constitutional challenges. While plaintiffs advance certain novel constitutional theories, such as those based on the right to travel or freedom of speech, those claims are no more meritorious than those the courts have already rejected. The district court's judgment should be affirmed.

Jurisdictional Statement

The district court had jurisdiction under 28 U.S.C. § 1331 over plaintiffs' claims arising under the Constitution and the laws of the United States, except for claims of plaintiff Cannabis Cultural Association, which were dismissed for lack of standing. The district court entered final judgment on February 26, 2018 (Appendix for Plaintiffs-Appellants ("PA") 280), and plaintiffs filed a timely amended notice of appeal on March 29, 2018 (PA 1). This Court has jurisdiction under 28 U.S.C. § 1291.

Issues Presented for Review

1. Whether the district court properly dismissed plaintiffs' claim concerning the CSA's scheduling of marijuana for failure to exhaust administrative remedies.

2. Whether the district court correctly ruled that the CSA's scheduling of marijuana was constitutionally rational.

3. Whether the district court correctly held that plaintiffs enjoy no fundamental right to use marijuana as a matter of substantive due process.

4. Whether the district court correctly dismissed plaintiffs' claim that the CSA's regulation of marijuana violates the Commerce Clause.

5. Whether the district court correctly dismissed the Cannabis Cultural Association's claims for lack of standing.

6. Whether the district court correctly dismissed the Cannabis Cultural Association's equal protection claim, in the alternative, for failure to state a claim.

7. Whether the district court correctly held that the CSA's regulation of marijuana does not violate the fundamental right to travel.

8. Whether the district court correctly held that the CSA's regulation of marijuana does not violate the First Amendment.

Statement of the Case

A. Procedural History

Plaintiffs filed this suit on July 24, 2017 (PA 6) and filed the operative amended complaint on September 6, 2017 (PA 9, 18). On September 7, 2017, plaintiff Alexis Bortell sought an order to show cause seeking a temporary restraining order ("TRO"), asserting that immediate relief was necessary to permit her to take a lobbying trip to Washington, D.C., on September 10, 2017. (PA 13-14). After a hearing on September 8, 2017, the district court denied the TRO. (PA 10).

The government moved to dismiss the complaint on October 13, 2017. (PA 258). On February 14, 2018, the district court heard oral argument (PA 343), and on February 26, 2018, the Court issued an opinion and order granting the motion and dismissing the action (PA 260). Judgment was entered the same day. (PA 280). Plaintiffs filed an amended notice of appeal on March 29, 2018. (PA 1).

B. The Complaint

According to the operative amended complaint, plaintiffs are four individuals and a nonprofit corporation who have varying interests in the use of marijuana. Plaintiff Marvin Washington is a former professional football player who seeks to sell certain marijuana-based products. (PA 28-29). Plaintiffs Alexis Bortell and Jagger Cotte are children who suffer from medical conditions that they treat by using medical marijuana. (PA 29-33, 36-38). Plaintiff Jose Belen is an army veteran who uses medical marijuana to treat posttraumatic stress disorder. (PA 33-36). Last, the Cannabis Cultural Association, Inc. ("Cannabis Association" or "Association") is alleged to be a nonprofit corporation "founded . . . to assist persons of color to develop a presence in the Cannabis industry," whose "[m]embers . . . include persons of color who have been arrested, prosecuted, convicted and/or incarcerated for violating the CSA as it pertains to Cannabis." (PA 38-39). Plaintiffs assert that their desire to sell or use cannabis conflicts with federal law, and they seek a declaration that the CSA is unconstitutional under a variety of constitutional provisions. (PA 18-22).

C. Statutory Framework

Plaintiffs seek to invalidate Congress's placement of marijuana on Schedule I of the drugs regulated by the CSA. *See* 21 U.S.C. § 812(c) (Schedule I consists of drugs including marijuana "unless and until amended" pursuant to 21 U.S.C. § 811). "Enacted in 1970 with the main objectives of combating drug abuse and controlling the legitimate and illegitimate traffic in controlled substances, the CSA creates a comprehensive, closed regulatory regime criminalizing the unauthorized manufacture, distribution, dispensing, and possession of substances classified in any of the Act's five schedules." *Gonzales v. Oregon*, 546 U.S. 243, 250 (2006); *see* 21 U.S.C. § 801(2) (statement of CSA's purpose).

"In enacting the CSA, Congress classified marijuana as a Schedule I drug." *Gonzales v. Raich* (*Raich I*), 545 U.S. 1, 14 (2005). "By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule," Congress made the manufacture, distribution, or possession of marijuana illegal, with the "sole exception being use of the drug as part of a Food and Drug Administration preapproved research study." *Id.* (citing 21 U.S.C. §§ 823(f), 841(a)(1), 844(a)); *see* 21 U.S.C. § 841(a)(1) (providing that it is unlawful to "manufacture, distribute, or dispense . . . a controlled substance"). That classification reflects Congress's determination at the time "that marijuana has no medical benefits worthy of an exception (outside the confines of a Government-approved research project)." *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 491 (2001).

In 1998, Congress expressed its continuing approval of the CSA's classification of marijuana in the CSA when it enacted appropriations legislation that included a statement entitled "Not Legalizing Marijuana for Medicinal Use." Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, Div. F, 112 Stat. 2681 (Oct. 21, 1998). In this enactment, Congress stated that it "continues to support the existing Federal legal process for determining the safety and efficacy of drugs and opposes efforts to circumvent this process by legalizing marijuana, and other Schedule I drugs, for medicinal use without valid scientific evidence and the approval of the Food and Drug Administration." *Id.* § 11. The law recited Congress's understandings that, among other things, the use of marijuana had "dramatically increased" among children in recent years, and that youths who use marijuana were as much as "85 times more likely to use cocaine than those who abstain from marijuana." *Id.*

Although Congress itself included marijuana on Schedule I in enacting the CSA, the statute also "provides for the periodic updating of schedules and delegates authority to the Attorney General, after consultation with the Secretary of Health and Human Services, to add, remove, or transfer substances to, from, or between schedules." *Raich I*, 545 U.S. at 14-15 (citing 21 U.S.C. § 811). Under the relevant provision,

> the Attorney General may by rule—
>
> (1) add to such a schedule or transfer between such schedules any drug or other substance if he—

> (A) finds that such drug or other substance has a potential for abuse, and
>
> (B) makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of this title for the schedule in which such drug is to be placed; or
>
> (2) remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule.

21 U.S.C. § 811(a). The Attorney General can place a drug on Schedule I "only if the drug 'has no currently accepted medical use in treatment in the United States,' 'has a high potential for abuse,' and has 'a lack of accepted safety for use under medical supervision.'" *Oakland Cannabis*, 532 U.S. at 492 (ellipsis omitted; quoting 21 U.S.C. § 812(b)(1)(A)-(C)).

The Attorney General has delegated rescheduling authority to the Administrator of the Drug Enforcement Administration ("DEA"). 28 C.F.R. § 0.100(b). In making a scheduling decision, the DEA must request a "scientific and medical evaluation" and a scheduling recommendation from the Secretary of Health and Human Services ("HHS"). 21 U.S.C. § 811(b); *Americans for Safe Access v. DEA*, 706 F.3d 438, 441 (D.C. Cir. 2013). HHS's recommendations are "binding" as to "scientific and medical matters." 21 U.S.C. § 811(b).

Interested parties may seek to initiate proceedings to reschedule or de-schedule drugs by submitting a petition to the Administrator. 21 U.S.C. § 811(a); 21 C.F.R. § 1308.43(a); *see Americans for Safe Access*, 706 F.3d at 439-41. An interested person who receives an adverse determination from the DEA may seek review in the federal courts of appeals. 21 U.S.C. § 877.

A number of petitions to reclassify marijuana under § 811 have been made and denied based on the DEA's findings. In 2011, the DEA denied a marijuana rescheduling petition, *see* Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 76 Fed. Reg. 40,552, 40,579-85 (July 8, 2011), and the D.C. Circuit upheld the DEA's denial on a petition for review, *see Americans for Safe Access*, 706 F.3d at 449-52. The DEA denied another petition to reschedule marijuana in 2016. *See* Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53,767 (Aug. 12, 2016).[2]

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[2] A party attempted to seek review of this denial in the Tenth Circuit, but the petition for review was dismissed on jurisdictional grounds. *See* Order, *Krumm v. DEA*, No. 16-9557 (10th Cir. Dec. 15, 2016). Five months later, the same individual filed a new petition with the DEA to reschedule marijuana, which the DEA summarily denied. Review of that denial is currently pending before the D.C. Circuit. *Krumm v. DEA*, No. 18-1058 (D.C. Cir. docketed Feb. 15, 2018).

Summary of the Argument

This case is the latest in a long string of legal challenges to the regulation of marijuana under the CSA, all of which have failed. As plaintiffs' claims are contrary to uniform precedent, this action too was properly dismissed.

First, plaintiffs' challenge to the inclusion of marijuana on Schedule I was properly dismissed because they failed to exhaust an available administrative remedy. Congress has provided an express mechanism for rescheduling drugs, one that requires the gathering and assessment of scientific and medical data. The responsible government agencies must therefore be given the opportunity to consider that evidence before an action proceeds in court. And if plaintiffs are successful in the administrative process, they will obtain relief—the rescheduling of marijuana—that will resolve their claims in this action. Moreover, requiring administrative exhaustion will facilitate judicial review by creating a complete scientific and medical record. Thus, the district court correctly dismissed the action for plaintiffs' failure to present their claims to the federal agencies under the proper statutory mechanism. *See infra* Point I.

On the merits, this Court has already held that the classification of marijuana as a Schedule I drug is rational as a constitutional matter—and other federal courts of appeals have agreed, even in light of allegations of new medical uses similar to those advanced here. *See infra* Point II. Nor is there a fundamental right to use marijuana, either standing alone or ancillary to the alleged constitutional liberty interests in

personal autonomy or access to purported medical treatments that plaintiffs advance, which are inconsistent with Supreme Court precedent. *See infra* Point III. Plaintiffs' Commerce Clause claim is squarely barred by Supreme Court precedent. *See infra* Point IV. The Cannabis Cultural Association lacks standing, as it failed to show that its members have standing to sue, *see infra* Point V, and its equal protection claim fails on the merits, as it incorrectly imputes discriminatory intent to Congress based on scattered statements by people outside Congress, *see infra* Point VI. The district court also properly rejected plaintiffs' ill-defined claims under the constitutional right to travel, which does not protect a right to travel with marijuana, *see infra* Point VII, and under the First Amendment, as the CSA is a regulation of conduct, not expression, whose alleged incidental and minimal effects on speech are not sufficient to subject it to scrutiny under the First Amendment, *see infra* Point VIII.

ARGUMENT

Standard of Review

This Court "review[s] a judgment of dismissal *de novo*, whether the judgment is based on a lack of subject matter jurisdiction or the failure to state a claim on which relief can be granted." *Ajlani v. Chertoff*, 545 F.3d 229, 233 (2d Cir. 2008).

POINT I

Plaintiffs Failed to Exhaust an Available Administrative Remedy

Plaintiffs' challenge to the CSA's scheduling of marijuana was appropriately dismissed because they failed to exhaust an available administrative process to seek equivalent relief. In enacting the CSA, as set out above, Congress created a statutory mechanism to permit the rescheduling of controlled substances, based on a developed agency record reflecting current scientific and medical data. Interested individuals may file petitions seeking rescheduling, and review of the agency's determination is available in the courts of appeals. *See* 21 U.S.C. §§ 811, 877. Because plaintiffs failed to take advantage of this mechanism, their claims regarding the scheduling of marijuana may not now be heard in federal court.

Plaintiffs' challenge to the scheduling of marijuana rests largely on alleged new factual and scientific developments. (Brief for Plaintiffs-Appellants ("Br.") 14-20). Such evidence, however, is 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); *see Americans for Safe Access*, 706 F.3d at 449-52. 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 "flexibility and receptivity to the latest scientific information" through the administrative process. *United States v. Kiffer*, 477 F.2d 349, 357 (2d Cir. 1973). Because the administrative process under § 811 could resolve plaintiffs' challenge premised on claimed developments since Congress's scheduling of marijuana in 1970, the district court correctly held that plaintiffs were required to use that process before the scheduling of marijuana could be reviewed in court. (PA 264-68).

"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). The exhaustion requirement "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency," as agency action may moot a judicial controversy. *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992), *superseded by statute on other grounds as stated in Porter v. Nussle*, 534 U.S. 516 (2002). Even when "Congress has not clearly required exhaustion, sound judicial discretion governs" the exhaustion requirement. *McCarthy*, 503 U.S. at 144. In such a case, a court must give "appropriate deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court," which in turn "requires fashioning of exhaustion principles in a manner consistent with

congressional intent and any applicable statutory scheme." *Id.*[3]

This case exemplifies the type of action in which a court properly requires exhaustion—a circumstance where the "'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) (quoting *McCarthy*, 503 U.S. at 145). Indeed, the statute's specific references to the necessity of "gathering the necessary data" and obtaining a "scientific and medical evaluation" before making a scheduling decision, 21 U.S.C. § 811(b), demonstrate Congress's recognition of the specialized knowledge possessed by the agencies and needed for a proper decision. Courts have thus repeatedly recognized that, in light of the fact that "classification entails legislative judgments on a whole host of controversial medical, scientific, and social issues," *United States v. Fogarty*, 692 F.2d 542, 547 (8th Cir. 1982), the "efficient and flexible mechanism" provided by Congress, "and not

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[3] Plaintiffs appear to contend that the district court believed that the CSA mandates exhaustion (Br. 22-25), but they cite no part of the court's decision to support that view. The district court properly applied "the general rule that parties exhaust prescribed administrative remedies," even when not expressly required by statute. *McCarthy*, 503 U.S. at 144-45.

the judiciary, is the appropriate means" to consider reclassification of a drug, *United States v. Greene*, 892 F.2d 453, 456 (6th Cir. 1989); *accord United States v. Burton*, 894 F.2d 188, 192 (6th Cir. 1990); *United States v. Wables*, 731 F.2d 440, 450 (7th Cir. 1984); *United States v. Middleton*, 690 F.2d 820, 823 (11th Cir. 1982) ("The determination of whether new evidence regarding either the medical use of marijuana or the drug's potential for abuse should result in a reclassification of marijuana is a matter for legislative or administrative, not judicial, judgment.").[4]

Exhaustion is required even though plaintiffs present their challenge in constitutional terms. The district court accurately characterized plaintiffs' rationality challenge, framed in terms of the CSA's statutory reclassification factors, as a "collateral attack on the various administrative determinations not to reclassify marijuana into a different drug schedule," and

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[4] *Accord Welch v. United States*, No. 16 Civ. 503, 2017 WL 3763857, at *4 (W.D. Va. Aug. 30, 2017) (requiring exhaustion of marijuana scheduling challenge before judicial review); *Thomas v. Trump*, No. 17 Civ. 65, 2017 WL 5629642, at *1 (W.D.N.C. Feb. 16, 2017) (same), *aff'd*, 691 F. App'x 785 (4th Cir. 2017); *Krumm v. Holder*, No. 08 Civ. 1056, 2009 WL 1563381, at *8-9 (D.N.M. May 27, 2009) (same); *see Alternative Cmty. Health Care Cooperative, Inc. v. Holder*, No. 11 Civ. 2585, 2012 WL 707154, at *6 (S.D. Cal. Mar. 5, 2012), *aff'd sub nom. Sacramento Nonprofit Collective v. Holder*, 552 F. App'x 680 (9th Cir. 2014).

thus correctly determined that the administrative process is the proper avenue for such a challenge. (PA 266); *see United States v. Green*, 222 F. Supp. 3d 267, 273 (W.D.N.Y. 2016) (holding that a parallel constitutional challenge, "[w]hen . . . dissected," was "essentially . . . an attack on the scheduling of marijuana based on the criteria set forth in the statute," not a constitutional standard). The administrative process should thus be used to address that challenge.

While this Court did not require exhaustion in *Kiffer*, that holding is distinguishable for two reasons. The Court held that the "application of the exhaustion doctrine to criminal cases is generally not favored because of the severe burden it imposes on defendants." 477 F.2d at 352. But this is a civil lawsuit, not a criminal case. Second, the *Kiffer* Court was uncertain whether an administrative route to seek marijuana rescheduling was indeed available: at that time, the government maintained that it could not consider a petition to reschedule marijuana under U.S. treaty obligations. *Id.* at 351. The DEA does not now take this position, and has considered a number of marijuana rescheduling petitions since. *See Green*, 222 F. Supp. 3d at 273-74.

Nor have plaintiffs established that the futility exception to the exhaustion doctrine applies here. That exception requires a "clear and positive showing that pursuing available administrative remedies would be futile." *Kennedy v. Empire Blue Cross & Blue Shield*, 989 F.2d 588, 594 (2d Cir. 1993) (quotation marks omitted); *accord Portela-Gonzalez v. Sec'y of Navy*, 109 F.3d 74, 78 (1st Cir. 1997) ("A pessimistic prediction or

a hunch that further administrative proceedings will prove unproductive is not enough to sidetrack the exhaustion rule.").

Plaintiffs cannot make that showing. Initially, there is no merit to plaintiffs' argument that the statutory rescheduling process cannot grant them the ultimate relief they seek. They request a declaration "that the CSA, as it pertains to the classification of Cannabis as a Schedule I drug, is unconstitutional . . . ." (PA 20-21; Br. 31-32). But the DEA plainly has the power to grant plaintiffs the relief they seek—*i.e.*, the removal of marijuana from Schedule I, which rescheduling under 21 U.S.C. § 811 would accomplish. *See United States v. Canori*, 737 F.3d 181, 183 (2d Cir. 2013) ("The scheduling of controlled substances under the CSA is not static."); *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."). Even if the DEA "lacks authority to declare a federal statute unconstitutional," the administrative process can still afford plaintiffs the relief they seek and allow "meaningful review" of their constitutional claims on judicial review, *Elgin v. Dep't of Treasury*, 567 U.S. 1, 16, 21 (2012), and therefore exhaustion is required.

Also unavailing is plaintiffs' speculative assertion that they would be unduly prejudiced due to the time required for the resolution of a rescheduling petition under § 811. Parties frequently "would clearly prefer"

a suit in district court "rather than the often lengthy administrative review process"—but that preference alone does not render administrative proceedings futile. *Heckler v. Ringer*, 466 U.S. 602, 619 (1984); *see Krumm v. Holder*, No. 08 Civ. 1056, 2009 WL 1563381, at *10-11 (D.N.M. May 27, 2009) (dismissing unexhausted marijuana challenge despite assertion that undue delay would result; plaintiff made "no strong showing" that "the administrative process [is] inadequate"). As the district court held (PA 269-70), any undue delay can be remedied, if necessary, through a mandamus petition; similarly, the Administrative Procedure Act permits courts to compel unreasonably delayed agency action. *See* 5 U.S.C. § 706(1). Plaintiffs inaccurately characterize the district court as having ruled that a mandamus proceeding would have to be filed simultaneously with a rescheduling petition (Br. 30), but the district court instead held, correctly, that if a delay occurs an appropriate remedy may be available. Plaintiffs offer no reason to suggest that conclusion was incorrect.

Plaintiffs' conclusory and unsupported allegations of institutional or individual bias should be disregarded.[5] They rely principally on the fact that previous petitions to reschedule marijuana have been denied. (Br. 27). But the petitions were denied after the agency

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[5] Plaintiffs attempt to bolster their claims by citing sources outside the record on appeal (Br. 28 n.15), which the Court should disregard. *See* Fed. R. App. P. 10(a); *Rana v. Islam*, 887 F.3d 118, 122 (2d Cir. 2018).

reviewed the evidence and determined it did not support rescheduling according to the statutory and regulatory criteria, and the D.C. Circuit has affirmed a recent petition denial. *Americans for Safe Access*, 706 F.3d at 449-52; *see also Krumm*, 2009 WL 1563381, at *12 ("The Court is not willing to assume . . that because others have been unsuccessful in convincing the DEA to reschedule marijuana, the DEA is biased, or that the DEA does not review the petitions in good faith."). It is not reasonable for plaintiffs to assume the government is biased simply because they disagree with its actions.

Nor have plaintiffs shown any other bias. Their remaining allegations center on supposed comments by DEA and Department of Justice officials concerning the use of marijuana. But "having strong views about wise public policy has never been understood to be the sort of 'bias' " that disqualifies a decisionmaker. *Batagiannis v. West Lafayette Community School Corp.*, 454 F.3d 738, 742 (7th Cir. 2006); *accord United States v. Morgan*, 313 U.S. 409, 421 (1941) (that decisionmaker "not merely held but expressed strong views on matters believed by him to have been in issue, did not unfit him for exercising his duty in subsequent proceedings"; decisionmakers must be "assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances"); *In re J.P. Linahan, Inc.*, 138 F.2d 650, 651-52 (2d Cir. 1943) (Frank, J.). And any allegation of improper bias is reviewable in the court of appeals after the administrative process ends. 21 U.S.C. § 877; *see Batagiannis*, 454 F.3d at 742 ("the

rights of the respondents in these proceedings are protected not by insisting that the commissioners arrive with empty heads but by ensuring an opportunity for judicial review of each decision").

In any event, the officials plaintiffs criticize are not truly the relevant decisionmakers, as HHS's "recommendations are binding on the DEA insofar as they rest on scientific and medical determinations." *Americans for Safe Access*, 706 F.3d at 450 (citing 21 U.S.C. § 811(b)). Consistent with that statutory command, in its most recent rescheduling denial in 2016, the DEA relied on the findings of HHS, which "concluded that marijuana has a high potential for abuse, has no accepted medical use in the United States, and lacks an acceptable level of safety for use even under medical supervision," and thus "recommended that marijuana remain in schedule I." Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. at 53,767. Plaintiffs offer no reason to conclude that the statements they allege by Department of Justice and DEA officials had any influence on HHS's binding determinations, and therefore have failed to show any bias that would make exhaustion futile.

Thus, the Court should affirm the dismissal of plaintiffs' challenge for failure to exhaust available administrative remedies under the CSA.

POINT II

The CSA Is a Rational Enactment

If the Court were to reach the constitutional question, plaintiffs' challenge fails because the CSA's constitutional rationality—including specifically its classification of marijuana—is the established law of this Court. *Canori*, 737 F.3d at 183 (this Court has "upheld the constitutionality of Congress's classification of marijuana as a Schedule I drug" (citing *Kiffer*, 477 F.2d at 355-57)). In *Kiffer*, the Court squarely rejected the argument that "the statutory assignment of marihuana to Schedule I, together with such concededly dangerous narcotic drugs as heroin, is arbitrary and unreasonable in light of the criteria for classification established by the statute and what is known about the effects of these substances." 477 F.2d at 356. In upholding the CSA as applied to marijuana, the Court considered the "body of scientific opinion that marihuana is subject to serious abuse in some cases" and the possibility of long-term negative effects of marijuana, particularly among heavy users, along with the need for a "system of controls . . . to keep marihuana and other harmful substances out of the possession of minors" and the impact of marijuana intoxication on drivers of motor vehicles. *Id.* at 353-54, 356. The Court further recognized that "the challenged legislation incorporates conclusions or assumptions concerning an array of medical, psychological and moral issues of considerable controversy in contemporary America"—matters "best left to the other branches of government." *Id.* at 352; *see Marshall v. United States*, 414 U.S. 417, 427 (1974) ("When 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 rewrite legislation . . . .").

Kiffer controls here. Moreover, every other court of appeals that has considered marijuana's constitutional rationality has agreed. *See United States v. Christie*, 825 F.3d 1048, 1066 (9th Cir. 2016); *United States v. White Plume*, 447 F.3d 1067, 1076 (8th Cir. 2006); *United States v. Greene*, 892 F.2d 453, 455-56 (6th Cir. 1989); *United States v. Fry*, 787 F.2d 903, 905 (4th Cir. 1986); *United States v. Wables*, 731 F.2d 440, 450 (7th Cir. 1984); *United States v. Fogarty*, 692 F.2d 542, 548 (8th Cir. 1982); *United States v. Middleton*, 690 F.2d 820, 822-24 (11th Cir. 1982).

Even were the Court to approach this question *de novo*, the CSA's classification of marijuana easily withstands rational basis scrutiny. Because plaintiffs challenge the CSA, which "neither interferes with a fundamental right nor singles out a suspect classification," they must "demonstrate that there is no rational relationship between the legislation and a legitimate legislative purpose" in order to prevail on their due process challenge. *Molinari v. Bloomberg*, 564 F.3d 587, 606 (2d Cir. 2009) (quotation marks omitted). Under rational basis review, a statutory classification must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 284 (2d Cir. 2015) (quotation marks omitted). Rational basis review provides no "license for

courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). Congress's "legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 315.

"To withstand a motion to dismiss such a claim, a plaintiff must plead sufficient facts that, treated as true, overcome the presumption of rationality that applies to government classifications." *Progressive Credit Union v. City of New York*, 889 F.3d 40, 49-50 (2d Cir. 2018). Moreover, "[a] court is not confined to the particular rational or irrational purposes that may have been raised in the pleadings." *Id.* at 50 (collecting cases); *accord Beatie v. City of New York*, 123 F.3d 707, 713 (2d Cir. 1997) ("[A] plaintiff must do more than show that the legislature's *stated* assumptions are irrational—he 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." (citation omitted)). "[I]t is not the [government] that must carry the burden to establish the public need for the law being challenged; it is up to those who attack the law to demonstrate that there is no rational connection between the challenged ordinance and the promotion of public health safety or welfare." *Beatie*, 123 F.3d at 712; *see also 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.").

Despite the supposedly "new facts" plaintiffs assert (Br. 38-39), the classification of marijuana remains rational. Indeed, in 2016 the Ninth Circuit reaffirmed its precedent holding that marijuana's classification is constitutionally rational, even while recognizing changes in marijuana's "legal status" and its "standing in the medical and scientific communities" since the 1970s. *Christie*, 825 F.3d at 1066 (citing *United States v. Miroyan*, 577 F.2d 489, 495 (9th Cir. 1978)). Similarly, the Eighth Circuit has restated its prior holding that "the ongoing debate about the physical and psychological effects of marijuana and whether it had any medicinal value was a sufficiently rational reason for Congress to include marijuana on Schedule I." *White Plume*, 447 F.3d at 1075 (citing *Fogarty*, 692 F.2d at 547-48, and upholding classification of marijuana as rational).

Numerous district courts have also recently considered the rationality question on its merits, and have recognized that "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." *Green*, 222 F. Supp. 3d at 279. "For instance, Congress could rationally conclude that marijuana should be classified as a Schedule I substance because it might be abused by, or cause harm to, minors." *United States v. Wilde*, 74 F. Supp. 3d 1092, 1099 (N.D. Cal. 2014); *see* 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"). Indeed, "one need only review the DEA's most recent denial of a petition to reschedule to recognize

the continuing public health and safety issues associated with marijuana," including "'behavioral impairment,'" "'decrease in IQ and general neuropsychological performance,'" "adverse impacts on children who were subjected to prenatal marijuana exposure," and "recurrent problems related to family, school, and work, including repeated absences at work and neglect of family obligations." *Green*, 222 F. Supp. 3d at 279 (quoting Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53,767, 53,770-84 (Aug. 12, 2016)). Furthermore, Congress made specific factual findings in its 1998 statement concerning increasing use of marijuana by children and the potential link between marijuana use and other illegal drug use. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, Div. F, 112 Stat. 2681 (Oct. 21, 1998).

More broadly, "the government has a compelling interest in preventing drug abuse." *United States v. Israel*, 317 F.3d 768, 771 (7th Cir. 2003) (citing 21 U.S.C. § 801(2)); *see Nat'l Treasury Employees Union v. von Raab*, 489 U.S. 656, 668, 674 (1989) ("drug abuse is one of the most serious problems confronting our society today"); *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" (quotation marks omitted)). Because all that is necessary is a "reasonably conceivable state of facts that could provide a rational basis for the classification," given these numerous "conceivable" rationales for the CSA's regulation of marijuana, the Court's "inquiry is at an

end." *Beach Commc'ns, Inc.*, 508 U.S. at 313-14 (quotation marks omitted).[6]

Plaintiffs seek to apply an incorrect framework—to have the Court, as a matter of constitutional law, apply the CSA's statutory factors for administrative scheduling by the DEA. *See* 21 U.S.C. § 812(b)(1). The district court correctly rejected this approach (PA 265-66), as have other courts, *e.g.*, *Fogarty*, 692 F.2d at 548 ("[E]ven 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."); *Green*, 222 F. Supp. 3d

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[6] The complaint also alleged that other substances not similarly regulated—including alcohol and tobacco—are more dangerous than marijuana. (PA 79-80). But "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) (quotation marks omitted). This Court has rejected this argument, too. *Kiffer*, 477 F.2d at 355 (rejecting argument that "marihuana is much less harmful than tobacco and alcohol"; even assuming the premise, Congress "is not . . . constitutionally compelled to regulate or prohibit all" harmful substances if it "decides to regulate or prohibit some" such substances); *accord Fry*, 787 F.2d at 905 ("Whatever the harmful effects of alcohol and tobacco, . . . Congress is not required to attempt to eradicate all similar evils.").

at 278-79 (the constitutional issue "is not whether it was rational for Congress or the DEA to conclude that there is no currently accepted medical use for marijuana [but] . . . whether there is any conceivable basis to support the placement of marijuana on the most stringent schedule under the CSA"); *Wilde*, 74 F. Supp. 3d at 1098-99; *United States v. Taylor*, No. 14 Cr. 67, 2014 WL 12676320, at *4 (W.D. Mich. Sept. 8, 2014) (affirming the "unquestionably" 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.").[7]

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[7] To the extent plaintiffs point to certain use of marijuana through a Food and Drug Administration Investigational New Drug program (Br. 14-15), their allegations do not bear on the rationality of the law. Initially, "[t]he CSA expressly allows marijuana use in connection with research projects funded by the federal government," *Sacramento Nonprofit Collective v. Holder*, 855 F. Supp. 2d 1100, 1110 (E.D. Cal. 2012) (citing 21 U.S.C. § 823(f); quotation marks omitted), *aff'd*, 552 F. App'x 680 (9th Cir. 2014), and thus there is no inconsistency in the scheme. *Accord Oakland Cannabis*, 532 U.S. at 490 ("marijuana . . . is available only for Government-approved research projects [under] § 823(f)"). Furthermore, plaintiffs rely on an assortment of allegations that purportedly illustrate the "beliefs" of the "Federal Government," which is left undefined. (Br. 14; PA 71). But the rational basis "analysis looks not to the subjective motivations of . . .

Furthermore, the D.C. Circuit upheld the DEA's denial of a petition seeking the rescheduling of marijuana in 2013, holding that the agency's factual findings in support of its determination under the CSA's statutory factors were "supported by substantial evidence" and "reasonably support the agency's final decision not to reschedule marijuana." *Americans for Safe Access*, 706 F.3d at 449-52. The D.C. Circuit's rejection of the 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,'" upon consideration of a developed administrative record, *id.* at 442, supports the conclusion that the CSA's treatment of marijuana satisfies the rational basis test.

In sum, "[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." *Green*, 222 F. Supp. 3d at 279. Thus, even if the Court reaches the

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officials," but instead "simply whether the governmental end is legitimate and whether the means chosen to further that end are rationally related to it." *Siena Corp. v. Mayor & City Council of Rockville*, 873 F.3d 456, 465 (4th Cir. 2017); *accord Hancock Indus.*, 811 F.2d at 237 (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").

merits of plaintiffs' rationality challenge, the dismissal of this claim should be affirmed.

POINT III

There Is No Fundamental Right to Use Marijuana

Several of plaintiffs' claims appear to rely on a purported substantive due process right to use marijuana. (PA 40, 112). But there is no such constitutional right, either in itself or ancillary to generic rights to "personal autonomy" or "to preserve their health and lives." (Br. 40). The Ninth Circuit has expressly concluded that there is no fundamental right to use medical marijuana, *Raich v. Gonzales* (*Raich II*), 500 F.3d 850, 864 (9th Cir. 2007), and the district court (PA 275) correctly concurred.

"In assessing whether a government regulation impinges on a substantive due process right, the first step is to determine whether the asserted right is 'fundamental.'" *Leebaert v. Harrington*, 332 F.3d 134, 140 (2d Cir. 2003) (footnote and emphasis omitted). Rights or liberty interests are fundamental only if they "are 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Chavez v. Martinez*, 538 U.S. 760, 775 (2003) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). The definition of a fundamental liberty interest requires "a careful description," such that it is framed in a "precise" way. *Glucksberg*, 521 U.S. at 721, 723 (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).

Courts examine claims of fundamental liberty interests narrowly and with caution. The Supreme Court "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). Thus, "[t]he doctrine of judicial self-restraint requires [courts] to exercise the utmost care whenever [they] are asked to break new ground in this field." *Id.* "By extending constitutional protection to an asserted right or liberty interest," a court "place[s] the matter outside the arena of public debate and legislative action." *Glucksberg*, 521 U.S. at 720.

Applying these principles, the *Raich II* court rejected a similarly vague description of a purported fundamental liberty interest in using medical marijuana, framed as the right to "make life-shaping medical decisions that are necessary to preserve the integrity of [the plaintiff's] body, avoid intolerable physical pain, and preserve her life." 500 F.3d at 864 (alteration and quotation marks omitted). The Ninth Circuit concluded that the asserted right did not "narrowly and accurately reflect the right [the plaintiff] seeks to vindicate," as "[c]onspicuously missing from [the] asserted fundamental right is its centerpiece:" the purported "right to use *marijuana* to . . . preserve her life."

Id. (emphasis in original).[8] Plaintiffs' vague and overbroad statement of their proposed right in this case suffers from the same flaw, and the district court properly rejected it. (PA 275).

Nor is there a plausible argument that a right to use marijuana or unapproved drugs for medical purposes is deeply rooted in our nation's history and traditions. The Ninth Circuit in *Raich II* concluded that despite an increase in state-law decriminalization of marijuana, the conclusion could not be "drawn that the right to use medical marijuana is 'fundamental' and 'implicit in the concept of ordered liberty.'" 500 F.3d at 864-66 (quoting *Glucksberg*, 521 U.S. at 720-21); *see James v. City of Costa Mesa*, 700 F.3d 394, 401 (9th Cir. 2012) (reviewing history of federal marijuana regulation and finding "strong and longstanding federal policy against medical marijuana use outside the limits established by federal law itself").[9]

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[8] *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." 500 F.3d at 864. Here, plaintiffs appear to claim a much broader purported substantive due process right, which may sweep as broadly as all marijuana "cultivation, distribution, marketing, sale, prescription[,] and use." (PA 114).

[9] Numerous other courts have concurred that there is no fundamental right to use marijuana. *See Fogarty*, 692 F.2d at 547 ("no fundamental constitutional right to import, sell, or possess marijuana"); *see*

The district court also correctly rejected plaintiffs' invocation of *Cruzan v. Director of Missouri Dep't of Health*, 497 U.S. 261 (1990). (PA 276). In *Cruzan*, the Supreme Court found a "right to reject life-sustaining medical treatment," *Blouin v. Spitzer*, 356 F.3d 348, 359 (2d Cir. 2004)—not a corollary positive right to receive specific medication or medical treatment of an individual's choice. Since it was decided, *Cruzan* "has been narrowly confined," and "[t]he Supreme Court has taken pains to avoid expanding *Cruzan* beyond the

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also Storm-Eggink v. Gottfried, 409 F. App'x 426, 427 (2d Cir. 2011) (holding that arrest for marijuana possession "did not deprive [the plaintiff] of a constitutional right" and concluding that suit "lacks an arguable legal basis and is thus frivolous"); *Holloman v. Greater Cleveland Reg'l Transit Auth.*, 930 F.2d 918 (6th Cir. 1991) (unpublished table opinion) ("no fundamental right to smoke marijuana"); *Wilde*, 74 F. Supp. 3d at 1095 ("[N]o court to date has held that citizens have a constitutionally fundamental right to use medical marijuana."); *Pearson v. McCaffrey*, 139 F. Supp. 2d 113, 123 (D.D.C. 2001) ("[N]o court has recognized a fundamental right to sell, distribute, or use marijuana."); *Kuromiya v. United States*, 37 F. Supp. 2d 717, 725 (E.D. Pa. 1999) ("[T]here is no constitutional provision by which one can discern a fundamental right to possess, use, grow, or sell marijuana."); *United States v. Maas*, 551 F. Supp. 645, 646 (D.N.J. 1982) ("[T]he court rejects the argument that use of marijuana is a fundamental right protected by the Constitution.").

context of the right of a competent person to refuse life-saving medical treatment." *Blouin*, 356 F.3d at 360. In *Glucksberg*, the Supreme Court rejected the interpretation that *Cruzan* constitutionalized a "general tradition of self-sovereignty." 521 U.S. at 724. The right to refuse treatment recognized in *Cruzan* was grounded in a long legal tradition requiring patients' informed consent to medical treatment and recognizing forced treatment as a battery. *Id.* at 724-25. But the Court refused to extend the protected liberty interest beyond those established bounds, and declined to recognize constitutional protection for "the choice to hasten impending death by consuming lethal medication." *Id.* 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 Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)). *Glucksberg*, which plaintiffs do not cite, defeats their claim to any broad and novel right to choose to consume marijuana or any other purportedly beneficial drug.

Indeed, "courts have rejected arguments that the Constitution provides an affirmative right of access to particular medical treatments reasonably prohibited by the Government." *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 710 & n.18 (D.C. Cir. 2007) (en banc) (collecting cases). Historical evidence does not support the assertion of "a right to procure and use experimental drugs

that is deeply rooted in our Nation's history and traditions." *Id.* at 711. "To the contrary, our Nation's history evidences increasing regulation of drugs as both the ability of government to address these risks has increased and the risks associated with drugs have become apparent." *Id.* Other courts have concurred that there is no constitutional right of access to unapproved or banned drugs, even when sought by individuals with cancer or those who are terminally ill. *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); *Seeley v. Washington*, 940 P.2d 604, 613 (Wash. 1997) (rejecting claimed constitutional right to be prescribed marijuana by a physician).

In sum, there is no fundamental right to use marijuana, including medical marijuana, even when "prescribed by a licensed physician to alleviate excruciating pain and human suffering." *Raich II*, 500 F.3d at 866. The dismissal of plaintiffs' substantive due process claim should be affirmed.

POINT IV

Plaintiffs' Commerce Clause Claim Is Squarely Foreclosed by Supreme Court Precedent

Plaintiffs' Commerce Clause claim fails because it is expressly precluded by Supreme Court precedent. *Raich I*, 545 U.S. at 22. The Court need not reach the merits of this claim, however, as plaintiffs have waived review on appeal. "Issues not sufficiently argued in the briefs are considered waived and normally will not be

addressed on appeal," including attempts to "incorporat[e] by reference an argument presented to the district court." *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998). That is all plaintiffs have done here. (Br. 58-59).

Indeed, as plaintiffs conceded below (PA 21), and implicitly concede on appeal by urging this Court to "reverse[ ]" *Raich I* (Br. 59), this precise claim was considered and rejected by the Supreme Court in *Raich I*, 545 U.S. 1. On a claim by plaintiffs who claimed that "marijuana is the only drug available that provides effective treatment" for their medical conditions, the Supreme Court held that the CSA was a valid exercise of Congress's power under the Commerce Clause. *Id.* at 7, 22-30. In doing so, the Court had "no difficulty concluding that Congress acted rationally" in not creating an exemption to the CSA for 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." *Id.* at 26. The district court's dismissal of plaintiffs' Commerce Clause claim should therefore be affirmed.

POINT V

The Cannabis Cultural Association Lacks Standing

The district court correctly dismissed the claims of plaintiff the Cannabis Cultural Association—the only plaintiff alleging that the CSA violates the constitutional guarantee of equal protection (PA 102)—because it lacks standing.

To establish standing to seek injunctive relief—the sole relief the Cannabis Association seeks—"a plaintiff must show that he is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009); *accord Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 239 (2d Cir. 2016) (party seeking injunctive relief must "establish a 'real or immediate threat' of injury," citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 111-12 (1983)). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The standing inquiry is "especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).

"[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. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). The Cannabis Association—which does not claim that it has standing in its own right—failed to

establish associational standing because it did not establish that its members have standing to sue in their own right.

The Association presented two affidavits of African-American members, Kordell Nesbitt and Thomas Motley, who have been prosecuted for taking part in marijuana conspiracies in violation of the CSA. (Supplemental Appendix for Plaintiffs-Appellants ("SA") 7-10). The sole argument plaintiffs now assert on appeal to support the Association's standing is that if their action is successful, Nesbitt's and Motley's convictions would "be reversed and vacated under 28 U.S.C. § 2255." (Br. 46). But the Association did not advance that argument in the district court, and accordingly it has been waived. *See Millea v. Metro-North R. Co.*, 658 F.3d 154, 163 (2d Cir. 2011).

Regardless, their assertion is highly speculative and therefore fails to establish that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (quotation marks omitted). Nesbitt and Motley do not contend that a favorable decision in this case will redress their injury; instead, they argue that a favorable decision here may permit them to file a separate action in which they may then obtain relief from their convictions. But that attenuated logic is not sufficient for standing. Both Nesbitt and Motley may face any number of hurdles to obtaining § 2255 relief, including time bars or the fact that both waived their rights to

review of their convictions.[10] Moreover, "[a]s a general rule, when collaterally attacking a sentence on the ground that he was convicted in violation of the Constitution or federal law, a federal prisoner must use § 2255." *Roccisano v. Menifee*, 293 F.3d 51, 57 (2d Cir. 2002) (quotation marks omitted). Thus, even if Nesbitt and Motley are entitled to constitutional relief from their convictions, only the court considering a § 2255 motion may grant it. They (and the Association) are therefore unable to obtain redress in this action, and lack standing.[11]

Moreover, neither Nesbitt nor Motley attempts to establish a likelihood that he will again be subject to "injury" in "a similar way" in the future, *Lyons*, 461 U.S. at 111, *i.e.*, that he is likely to be subject to future

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[10] *See* Transcript of Plea at 18:1-10, *United States v. Nesbitt*, No. 13 Cr. 629 (S.D.N.Y.) [Dkt. No. 44]; Transcript of Plea at 17:15-25, *United States v. Motley*, No. 12 Cr. 604 (S.D.N.Y.) [Dkt. No. 80].

[11] Plaintiffs claim that the district court ruled on redressability *sua sponte* (Br. 45), but the government raised redressability below in reply, after the Association submitted the members' affidavits with its opposition to the motion to dismiss. (Dist. Ct. ECF No. 49, at 34-35). Regardless, a district court is required to "establish that it has federal constitutional jurisdiction, including a determination that the plaintiff has Article III standing, before deciding a case on the merits." *Alliance for Envtl. Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 85 (2d Cir. 2006).

prosecution. They do not allege that they continue to engage in marijuana trafficking or other conduct made illegal by the challenged law. "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); *see United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1541 (2018) (Court has "consistently refused to conclude that the case-or-controversy requirement is satisfied by the possibility that a party will be prosecuted for violating valid criminal laws" (quotation marks omitted)). 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. Further, any subjective fear of re-arrest is immaterial; "[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 (emphasis in original).[12]

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[12] In their brief to this Court, plaintiffs do not address the claim of their third affiant, Leo Bridgewater; they have thus waived the argument. *See Millea*, 658 F.3d at 163. Moreover, Bridgewater cannot establish the Association's standing to bring an equal protection claim, as his purported injury is also too attenuated to support standing. Bridgewater avers that his "medical use of cannabis pursuant to New Jersey State law" precludes him from "renew[ing] [his] security clearances," which, in turn, prevents him from working as

For all these reasons, the Cannabis Association lacks standing, and the dismissal of its claims should be affirmed.

POINT VI

The Cannabis Association's Equal Protection Challenge Fails to State a Claim

The Cannabis Association also fails to state an equal protection claim, even if the Association had standing to bring such a claim. 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." *Ashcroft v. Iqbal*, 556 U.S. 662, 676-77 (2009) (emphasis added). In the circumstance where a plaintiff seeks to undermine a statute by claiming "actual discriminatory intent," it must "allege and demon-

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a contractor for a private company. (SA 6). But "the 'case or controversy' limitation of Art. III . . . requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court," *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976), and therefore the Association fails to show that it is "likely," and not "merely speculative," that relief in this suit would redress Bridgewater's alleged injury, *Lujan*, 504 U.S. at 561.

strate 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). Accordingly, the Association would have to demonstrate that the 1970 Congress, which enacted the CSA, "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." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

The Cannabis Association fails to do so. Instead, it points only to a few, largely conclusory allegations about or statements by former President Richard Nixon and members of his administration. (PA 22-23, 67-70). There is no allegation that the alleged statements by executive branch members cited in the complaint were considered by or even available to the 1970 Congress—and indeed, most of them were made after the enactment of the CSA. In short, nothing in any of the Cannabis Association's allegations provides "any basis to impute [Nixon Administration members'] alleged discriminatory intent to Congress." *United States v. Heying*, No. 14 Cr. 30, 2014 WL 5286153, at *4 (D. Minn. Aug. 15, 2014) (rejecting equal protection challenge to CSA based on Nixon Administration statements), *report and rec. adopted*, 2014 WL 5286155 (D. Minn. Oct. 15, 2014). Ultimately, the Cannabis Association presents only 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); *see also Iqbal*, 556

U.S. at 681; *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-68 (1977).

The Association's allegations regarding the state of mind of Nixon Administration executive branch members' statements provide no plausible support to its claim of discriminatory intent by Congress in enacting the statute challenged here. *Moore*, 54 F.3d at 96. Accordingly, if the Court were to reach the issue, the dismissal of the Cannabis Association's equal protection claim should be affirmed on the merits.

POINT VII

Plaintiffs Fail to State a Constitutional Right to Travel Claim

All plaintiffs except Washington assert that the CSA's regulation of marijuana inhibits their ability to travel: more specifically, they allege they cannot travel by airplane or "travel onto federal lands or into federal buildings" while in possession of marijuana.[13] (PA 24). The district court correctly dismissed these claims.

The "right to travel" recognized by the Supreme Court "embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a

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[13] Plaintiffs also claim that they cannot "travel to other States" (PA 106), but their grievance there appears to be with states' laws regulating marijuana, not federal law.

welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Saenz v. Roe*, 526 U.S. 489, 500 (1999). Plaintiffs invoke the first of these. (Br. 52-53).

But on its face, the CSA does not affect the right to travel at all. To begin with, the Supreme Court's "modern" right-to-travel cases have generally "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]." *Minnesota Senior Fed'n v. United States*, 273 F.3d 805, 810 (8th Cir. 2001). That is because, outside the context of international travel, "the Court's right-to-travel jurisprudence has focused on a fundamental issue of federalism, the extent to which States may restrict American citizens' right to travel within their nation." *Id.* at 810 n.3. But that concern is not implicated by a federal statute, and plaintiffs cite no cases that hold a federal statute of general application may run afoul of constitutional protection for the right to interstate travel.

In addition, a state law only implicates the right to travel "when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right." *Town of Southold v. Town of East Hampton*, 477 F.3d 38, 53 (2d Cir. 2007) (quotation marks omitted). But the CSA does not target or penalize travel: the possession of marijuana is illegal under federal law in substantially all circumstances. *See*

Torraco v. Port Authority of N.Y. & N.J., 615 F.3d 129, 140 (2d Cir. 2010) (upholding laws that are "facially neutral and are not designed primarily to impede travel"). Nor does the CSA actually deter travel. This Court recently upheld a city licensing scheme that prevented licensees from bringing their firearms outside a specific location, because "[n]othing in the Rule prevents the Plaintiffs from engaging in intrastate or interstate travel as they wish," as it "concerns only their ability to remove the specific handgun licensed to their residences from the premises for which they hold the license." *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 883 F.3d 45, 53-54, 66-67 (2d Cir. 2018). Just as "[t]he Constitution protects the right to travel, not the right to travel armed," *id.*, the Constitution does not protect the right to travel with marijuana. Moreover, a "regulation that limits the possession in one jurisdiction of items that may be more broadly permitted in another" is not a "significant disincentive to travel." *Id.* "[I]f every infringement on interstate travel violates the traveler's fundamental constitutional rights, any governmental act that limits the ability to travel interstate, such as placing a traffic light before an interstate bridge, would raise a constitutional issue." *Id.* (brackets and quotation marks omitted); *accord Town of Southold*, 477 F.3d at 54.

As for plaintiffs' claim concerning access to federal buildings, 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) (emphasis in original). It would "distort the right to free travel beyond recognition to con-

strue it as providing a substantive right to . . . gain admittance to a *specific* government building." *Id.* at 76 (emphasis in original). Plaintiffs' claim that the CSA prevents them from traveling by air also fails, as "travelers do not have a constitutional right to the most convenient form of travel, and minor restrictions on travel simply do not amount to the denial of a fundamental right." *Town of Southold*, 477 F.3d at 54 (quotation marks and alterations omitted).

The real nub of plaintiffs' travel claim—as the district court observed (PA 277)—is their assertion that they are more likely to be subject to enforcement of the CSA because of circumstances generated by travel. But 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, does not give rise to a right-to-travel claim. "A law does not 'actually deter' travel merely because it makes it somewhat less attractive for a person to travel interstate." *Pollack v. Duff*, 793 F.3d 34, 46 (D.C. Cir. 2015).

For all these reasons, the dismissal of plaintiffs' travel claim should be affirmed.

POINT VIII

Plaintiffs' First Amendment Challenge Fails to State a Claim

The district court also correctly dismissed the convoluted First Amendment claim asserted by all plaintiffs except Washington and Belen. Plaintiffs depend on an even more attenuated chain of assertions—that

they can effectively exercise their speech rights only by traveling in person to "visit their elected representatives to lobby in favor of repealing the CSA," but the CSA impedes their travel to the Capitol, as they cannot travel without "life-saving" marijuana medication. (PA 27). This implausible claim gives rise at most to an attenuated and incidental effect, which requires no First Amendment scrutiny.

The CSA does not regulate First Amendment–protected activity at all: it regulates conduct, not expression, and it is neutral as to content. "[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). "[R]egulation 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). "[E]very civil and criminal remedy imposes some conceivable burden on First Amendment protected activities." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 (1986). Thus, "the First Amendment is not implicated by the enforcement of a . . . regulation of general application" that imposes an incidental burden on expression. *Id.* at 707. For instance, "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 [the Supreme Court has] explicitly rejected a prisoner's claim to a prison environment least restrictive of his desire to speak to outsiders." *Id.* at 706. Courts regularly reject similarly attenuated First Amend-

ment claims, which deal with laws that are "not motivated by a desire to suppress speech," where "the conduct at issue is not . . . expression, and the ordinance does not have the effect of targeting expressive activity." *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 409 (9th Cir. 2015). Plaintiffs do not claim here that the CSA directly regulates expression; at most, they claim an attenuated and incidental effect. No First Amendment effect is implicated by the CSA. *Arcara*, 478 U.S. at 706-07.

Additionally, plaintiffs claim only that the CSA prevents them from engaging in one specific form of expression—traveling to Washington, D.C., to lobby the legislature in person to amend the drug laws. (PA 112). But while "a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate," *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984), plaintiffs do not plausibly allege that they are unable to effectively communicate through other channels, *see Mastrovincenzo v. City of New York*, 435 F.3d 78, 101 (2d Cir. 2006) ("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; indeed, were we to interpret the requirement in this way, no alternative channels could ever be deemed 'ample.'").[14]

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[14] Plaintiffs also argued below that (1) the CSA runs afoul of *United States v. O'Brien*, 391 U.S. 367

Accordingly, the Court should affirm the dismissal of plaintiffs' First Amendment claim.

(1968), or (2) the CSA constitutes an unreasonable "time, place, and manner" restriction. Plaintiffs have waived these arguments here, however, by raising them only in a footnote and attempting to incorporate by reference their arguments below. (Br. 58 n.39). *See Norton*, 145 F.3d at 117 (deeming waived arguments contained only in a footnote or incorporated by reference). Moreover, "*O'Brien* . . . has no relevance to a statute directed at imposing sanctions on nonexpressive activity," *Arcara*, 478 U.S. at 707, and the CSA does not restrict the time, place, or manner of any expression: the law "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, and regardless of the time, place, or manner in which they possess it, *cf. Marcavage v. City of New York*, 689 F.3d 98, 104 (2d Cir. 2012).

CONCLUSION

The district court's judgment should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 11,302 words in this brief.

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