UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARVIN WASHINGTON, et al.,

Plaintiffs-Appellants,

-v-

WILLIAM P. BARR, in his official capacity as United States Attorney General, et al.,

Defendants-Appellees.

18-859

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR AN EXTENSION OF TIME TO FILE A PETITION WITH THE DRUG ENFORCEMENT ADMINISTRATION

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Defendants-appellees (the "government") respectfully submit this memorandum of law in opposition to plaintiffs' motion to extend the time in which they may file a petition to reschedule or deschedule marijuana under the Controlled Substances Act ("CSA") while this Court maintains jurisdiction.

PRELIMINARY STATEMENT

This Court provided plaintiffs a six-month window in which to petition the Drug Enforcement Administration ("DEA") to reschedule or deschedule marijuana. Now, within days of the end of the six-month period (and after missing two self-imposed deadlines), plaintiffs have requested to extend this Court's retention of jurisdiction by an additional year and a half before they even file a petition with the DEA. And they do so for the misguided reason that they want an opportunity to file a separate district-court action, seeking an advisory opinion addressing a legal question that the DEA might encounter in response to their still-putative petition.

This Court should deny plaintiffs' motion for several independent reasons. First, plaintiffs' request for further delay belies their repeated claims of urgency, both below and in this Court, which were the principal basis for this Court's determination to maintain jurisdiction over the appeal in the first place. Second, after contending in their complaint below that marijuana should be removed from Schedule I because of its alleged medical uses, plaintiffs' extension request hinges

on a new claim—*i.e.*, that they can only get effective relief if marijuana is descheduled entirely. Thus, the basis for plaintiffs' request is not properly before the Court and falls outside the parameters of the Court's opinion. Last, plaintiffs' proposed course of action—to seek an advisory opinion from a district court regarding a legal issue that the DEA may encounter in response to a putative administrative petition to reschedule marijuana—would be both unnecessary and futile: the DEA can consider such an argument in the first instance, and plaintiffs' proposed new action would be barred both by the administrative exhaustion doctrine, and for lack of Article III jurisdiction to issue an advisory opinion.

Accordingly, the Court should deny plaintiffs' motion and issue its mandate affirming the dismissal of the action.

BACKGROUND

Plaintiffs filed this suit in July 2017 (Appendix for Plaintiffs-Appellants ("PA") 6), and filed the operative amended complaint in September 2017 (PA 9, 18). Plaintiffs' complaint principally attacked the scheduling of marijuana on Schedule I of the CSA based on supposed new evidence of its medical uses. (PA 21-22, 71-89).

As plaintiffs' complaint acknowledged (PA 90-96), the CSA permits the Attorney General to reschedule or deschedule drugs under the CSA, in accordance with a set of scheduling requirements outlined in the statute. 21 U.S.C. § 811. The

Attorney General has delegated scheduling authority to the DEA. 28 C.F.R. § 0.100(b). In making a scheduling determination, the DEA must request a "scientific and medical evaluation" and a scheduling recommendation from the Secretary of Health and Human Services, whose recommendations are "binding" as to "scientific and medical matters." 21 U.S.C. § 811(b). Interested parties may petition the DEA to initiate proceedings to reschedule or deschedule drugs. 21 U.S.C. § 811(a); 21 C.F.R. § 1308.43(a); *see Americans for Safe Access v. DEA*, 706 F.3d 438, 439-41 (D.C. Cir. 2013). A person aggrieved by a final determination of the DEA may seek review in the federal courts of appeals. 21 U.S.C. § 877.

The district court granted defendants' motion to dismiss this action in February 2018. (PA 260). Among other grounds for dismissal, the district court held that plaintiffs "have raised a collateral challenge to the administrative decision not to reclassify marijuana," which was barred by their failure to seek administrative rescheduling by the DEA. (PA 264-66). The district court also rejected plaintiffs' argument that any exception to the administrative exhaustion doctrine excused that failure. (PA 266-70).

In an opinion dated May 30, 2019, this Court agreed that plaintiffs were required to exhaust available administrative remedies with the DEA. (Dkt. No. 101 ("Maj. Op.") at 8-17). Moreover, the Court concluded that "none of the recognized

exceptions to the doctrine" applied. (Maj. Op. at 17-20). However, based on plaintiffs' allegations of the urgency of their situation—given the potentially "catastrophic health consequences" alleged—a majority of the Court determined that plaintiffs had "plausibly raise[d] the specter of delay" in the administrative process. (Maj. Op. at 23-24). Thus, the majority "exercise[d] [its] discretion to keep jurisdiction of the case in this panel, to take whatever action may become appropriate if Plaintiffs seek administrative review and the DEA fails to act promptly." (Maj. Op. at 25). But the majority warned that it did not "intend to retain jurisdiction indefinitely," and noted that "[u]nless the Plaintiffs seek agency review and so inform us within six months"—that is, by November 30, 2019—"we will affirm the District Court's judgment dismissing this case." (Maj. Op. at 26).[1]

After indicating to the Court that they would file a motion for more time by October 10, 2019 (Dkt. No. 121), and then representing they would file a motion by October 30, 2019 (Dkt. No. 124), plaintiffs filed this motion on November 27, 2019, seeking to extend this Court's abeyance by eighteen months, in order to

[1] Judge Jacobs dissented from the majority's determination to hold the case in abeyance "on the off chance that [the Court] may get jurisdiction to decide it in the future," awaiting "an application that these plaintiffs have not yet filed." (Dkt. No. 102 (Dissenting Op.) at 2, 4). The government respectfully notes that it agrees that the panel majority erred in holding the case in abeyance, substantially for the reasons stated in the dissenting opinion.

permit them to bring an as-yet unfiled case seeking a "declaration that the DEA has the power to de-schedule cannabis entirely." (Dkt. No. 129-2 ("Hiller Decl.") ¶ 3).

ARGUMENT

I. Plaintiffs' Request for Further Delay Undermines Their Claims of Urgency and the Basis for the Court's Assertion of Jurisdiction

Plaintiffs' request that this Court continue to hold the appeal in abeyance for an additional eighteen months before they file a rescheduling petition belies their claim that time is of the essence in this matter. The allegedly exigent circumstances were the principal basis for this Court's decision to maintain jurisdiction in the first place. Because this supposed urgency is contradicted by plaintiffs' proposed undertaking, the Court's continuing jurisdiction is unnecessary and should be terminated.

As the Court held earlier this year, plaintiffs failed to show that exhaustion was futile, "[d]espite the apparently dire situation of some of the Plaintiffs." (Maj. Op. at 20). The Court noted that "the existing classificatory scheme has not prevented [certain plaintiffs] from obtaining their allegedly life-saving medication," and they had not "otherwise explained how pursuing agency review would subject them to an additional irreparable injury flowing from delay incident to the administrative process itself." (Maj. Op. at 20 (quotation marks omitted)). However, the majority took the unusual step of maintaining jurisdiction on the basis of plaintiffs' complaint, which alleged a "delay in deciding petitions to

reclassify drugs under the CSA," and "suggest[ed] that [such] delay could become problematic." (Maj. Op. at 23-24).

Plaintiffs' course of action to date contradicts any claim of harm stemming from purported undue delay, and undercuts the rationale for the Court's continuing jurisdiction. Plaintiffs filed this action almost two and a half years ago without first seeking to exhaust administrative remedies with the DEA. (PA 6). The case was dismissed by the district court more than a year and a half ago, on that ground and others. (PA 260). Now, notwithstanding the six-month period authorized by the Court, which lapsed three days after plaintiffs filed this motion (after missing two self-imposed deadlines[2]), plaintiffs seek to quadruple the time this Court holds the matter in abeyance, waiting for plaintiffs to do what they were required to do in the first place (and can do at any time regardless of what this Court does)—to file a petition with the DEA.

Plaintiffs' course of action stands in marked tension with their allegations below that the petitioning process cannot aid them because of certain plaintiffs' "urgent medical need" to access marijuana-based medical remedies. (PA 94). In

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[2] As noted above, plaintiffs represented to the Court that they would file a motion by October 10, 2019, and then by October 30, 2019. (Dkt. Nos. 121, 124). Moreover, their September 10 letter asserted that they would be seeking an extension to December 31, 2020 (Dkt. No. 121), but their motion seeks to have the Court continue to maintain jurisdiction for eighteen months—well into the year 2021 (Hiller Decl. ¶ 3).

contrast, plaintiffs' motion now avers that the "current state of the law permits [them] some level of access to medical cannabis in state-legal jurisdictions" (Hiller Decl. ¶ 34), and asks that the Court *delay* potential action for another year and a half. Plaintiffs' current position simply cannot be squared with their earlier claims of exigency, which this Court relied on.

This Court has no reason to continue to maintain jurisdiction. It already warned plaintiffs that it would not "retain jurisdiction indefinitely" (Maj. Op. at 25), and plaintiffs have missed their window to invoke this Court's extraordinary step of retaining jurisdiction.[3] Their motion and proposed course of action concede a lack of urgency and are simply incompatible with the notion that this Court's retention of jurisdiction is necessary. Accordingly, the motion should be denied.

II. Plaintiffs Impermissibly Seek to Interpose a New Claim for Relief in This Action

Plaintiffs have abandoned their principal legal claim in this litigation—that the Schedule I classification of marijuana is unconstitutionally irrational—and improperly seek to substitute a new claim, that only the across-the-board *descheduling* of marijuana would provide them with relief, based on a different set of considerations than they relied upon in their pleadings. While plaintiffs may

[3] Plaintiffs appear to be under the misconception that their deadline to file a DEA petition under this Court's opinion is December 31, 2019. (Hiller Decl. ¶ 2). But the Court's opinion, issued on May 30, 2019, gave plaintiffs a deadline six months from that date—which fell on November 30, 2019, a date which has passed.

petition the DEA for any relief they see fit to request, they cannot ask this Court to extend its jurisdiction based on a new and different claim, after both the dismissal of their suit below and a decision by this Court based on their original claims.

In their complaint here, plaintiffs focused predominantly on the purported irrationality of marijuana's scheduling in Schedule I, largely because of the supposed "new evidence" of its medical use, which (they claim) precludes it from meeting the statutory requirements to be included on Schedule I in particular. (PA 20-22, 71-90). This Court's opinion recognized that plaintiffs' challenge "sought to strike down the federal government's classification of marijuana *as a Schedule I drug* under the Controlled Substances Act," and that the "crux of Plaintiffs' case is that new facts related to the acceptance of medical marijuana treatment regimens and the federal government's own involvement in medical marijuana research require a reexamination of marijuana's scheduling under the CSA." (Maj. Op. at 2, 7 (emphasis added)); *see also id.* at 4-5 (explaining alleged harms to the plaintiffs arising from placement of marijuana on Schedule I); *id.* at 18 ("the gravamen of [plaintiffs'] argument is that marijuana should not be classified as a Schedule I substance under the CSA").

In their motion, plaintiffs suggest that the underlying action sought "a declaration that the classification of cannabis" as a controlled substance under the CSA *at all* is unconstitutional. (Hiller Decl. ¶ 2). But the complaint asserted no

such claim; rather, as set forth above, it was premised on the assertion that marijuana could not rationally be listed *on Schedule I* because of its purported medical uses. Yet even were the DEA to conclude that marijuana has "a currently accepted medical use in treatment in the United States," such a finding could give rise to a rescheduling to Schedules II through V of the CSA, *see* 21 U.S.C. § 812(b)(2)-(5)—and would not necessitate descheduling.[4]

Plaintiffs now pivot to a claim that *any* federal regulation of marijuana would be unacceptable, complaining of the supposed burdens of federal drug regulation and the asserted increases in "the cost of cultivating, extracting, packaging and distributing cannabis." (Hiller Decl. ¶ 35). Thus, plaintiffs now rely not on a claim of the purported constitutional irrationality of marijuana's placement on Schedule I, but on a claim—untethered to any identifiable legal framework—that because federal regulation of marijuana would be unduly expensive or burdensome, they would prefer to have no federal control over marijuana at all. But numerous common prescription drugs—that is, drugs with accepted medical uses—are listed on Schedules II through V, and plaintiffs offer no reason marijuana should be treated any differently, or that the expense or burden of regulating marijuana as a medically acceptable drug differs from the

[4] The Court recognized the distinction between rescheduling and descheduling in its opinion (Maj. Op. at 15, 18, 21), contrary to plaintiffs' suggestion (Hiller Decl. ¶ 2).

expense or burden of regulating other drugs. Policy decisions regarding how best to regulate in an area like this one are legislative choices properly made by Congress, not the courts. *Long Island Oil Products Co. v. Local 553 Pension Fund*, 775 F.2d 24, 27 (2d Cir. 1985) ("It is not the judiciary's task to balance the economic costs and benefits of a challenged Act, or to measure it against a particular social or economic philosophy.").

Even were plaintiffs' new claim properly before this Court, it would fail. There is no right to access particular medical treatments, even for the gravely ill. *See Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 710 & n.18 (D.C. Cir. 2007) (en banc). Here, plaintiffs make the claim that they are entitled to marijuana as a medical treatment without having to satisfy federal regulatory requirements at all, because of the purported burdens involved—without reference to any constitutional right or other legal framework that could support such a claim.

In sum, plaintiffs cannot abandon their principal claim below—asserting the constitutional irrationality of marijuana's placement on Schedule I—and replace it in this Court with a new, open-ended claim, unsupported by pleadings or legal foundation, asserting an entitlement to medical marijuana without federal regulatory control.

III. Plaintiffs' Proposed Extension Is Both Unnecessary and Futile

Even if plaintiffs could surmount the obstacles set out above, they fail to demonstrate either the need for or likely success of their proposed declaratory judgment action. Indeed, it would be a waste of time to await the filing of plaintiffs' proposed complaint because it is unnecessary and would likely be found to be nonjusticiable.

First, plaintiffs have not shown any need to bring a separate declaratory judgment action. Any arguments they make concerning a legal issue that might be raised in an administrative proceeding before the DEA could and should be considered by the DEA in the first instance. Accordingly, their proposed declaratory judgment complaint would, like the complaint in this case, likely be dismissed for failure to exhaust administrative remedies. "The general rule is that a party may not seek federal judicial review of an adverse administrative determination until the party has first sought all possible relief within the agency itself." *Beharry v. Ashcroft*, 329 F.3d 51, 56 (2d Cir. 2003) (quotation marks omitted).

This Court held, in this case, that Congress intended to require parties to exhaust the DEA's administrative process for a rescheduling determination under the CSA, and subsequently to seek review in the courts of appeals. (Maj. Op. at 11-17). But plaintiffs—in contravention of the Court's holding—seek yet again to turn

to a federal district court first, this time to seek an anticipatory ruling on a legal question. (Hiller Decl. ¶¶ 33-36). They fail to explain why they should not be required to proceed to the DEA, which should decide the relevant issues—the interpretation of a treaty assertedly relevant to plaintiffs' putative rescheduling petition—in the first instance. Moreover, if plaintiffs are aggrieved by the result of that process, they may seek judicial review in an appropriate court of appeals under 21 U.S.C. § 877. Plaintiffs make no plausible assertion that "meaningful judicial review" of the issue they raise would be unavailable through the rescheduling process created by Congress. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-13 (1994); *see Elgin v. Department of the Treasury*, 567 U.S. 1, 16-21 (2012).

Indeed, plaintiffs' proposal is an affront to both of the "important goals" of the administrative exhaustion doctrine. (Maj. Op. at 14). First, it would fail to permit the DEA to consider their arguments in the first instance, in appropriate "deference to Congress' delegation of authority to coordinate branches of Government" to oversee particular programs. *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). Second, it would impede the "judicial efficiency" that arises from "giving an administrative agency a chance to resolve a dispute, thus either rendering controversies moot or 'producing a useful record for subsequent judicial

consideration.'" (Maj. Op. at 14 (quoting *McCarthy*, 503 U.S. at 145; brackets omitted)).

Indeed, plaintiffs do not assert that the DEA would not consider their arguments about the interpretation of a relevant treaty. Instead, they only allege that the DEA "would almost certainly refuse to de-schedule" marijuana (Dkt. No. 129-6 ("Proposed Compl.") ¶¶ 28, 64, 82, 88; *see id.* ¶ 36). This conclusory statement falls far short of the "clear and positive showing" needed to demonstrate that the administrative process would be futile. *Kennedy v. Empire Blue Cross & Blue Shield*, 989 F.2d 588, 594 (2d Cir. 1993). Because plaintiffs cannot show a "certainty of an adverse decision," nor that it would be "clearly useless" to follow the process created by statute, *Communications Workers of America v. AT&T Co.*, 40 F.3d 426, 432 (D.C. Cir. 1994) (quotation marks omitted), their proposed new action would likely be dismissed. *See also, e.g.*, *Portela-Gonzalez v. Secretary of the Navy*, 109 F.3d 74, 79 (1st Cir. 1997) ("neither courts nor litigants are allowed to equate pessimism with futility").

A host of other defects would also likely bar consideration of plaintiffs' proposed action on its merits. Indeed, its flaws are apparent on its face: plaintiffs intend to seek an opinion from a district court as to an abstract legal issue that could theoretically be encountered by the DEA in response to an as-yet unfiled rescheduling petition. (Proposed Compl. ¶¶ 96, 100-05). Among other problems,

such an action would violate Article III's prohibition on advisory opinions and would be unripe.

"'The oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.'" *Association of Car Wash Owners Inc. v. City of New York*, 911 F.3d 74, 85 (2d Cir. 2018) (quoting *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (brackets omitted)). Plaintiffs' proposed complaint would give rise to precisely the kind of request for an "advance expression[] of legal judgment" that the federal courts "have consistently refused to give." *United States v. Fruehauf*, 365 U.S. 146, 157 (1961).

Plaintiffs' proposed case is also unripe, as it presents a "mere hypothetical question" about a determination that the DEA may or may not make, if presented with their putative rescheduling petition. *National Organization for Marriage, Inc. v. Walsh*, 714 F.3d 682, 687 (2d Cir. 2013) (quotation marks omitted). The ripeness doctrine prevents the courts from becoming involved in inchoate disputes like this one, which would turn on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580-81 (1985) (quotation marks omitted).

The Court should not continue to maintain jurisdiction here. Plaintiffs' proposed action is both unnecessary, as they may present legal arguments to the DEA in the first instance and seek further review in the courts of appeals; and

futile, because the obvious flaws in plaintiffs' proposed new action would almost certainly result in its dismissal.

CONCLUSION

The Court should deny plaintiffs' motion and, instead, should issue the mandate affirming the district court's judgment dismissing this case.

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New York, New York

Respectfully submitted,

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