No. 20-148

IN THE

Supreme Court of the United States

MARVIN WASHINGTON, *et al.*,

Petitioners,

v.

WILLIAM P. BARR, ATTORNEY GENERAL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* THE NATIONAL CANNABIS INDUSTRY ASSOCIATION (NCIA) AND THE ARCVIEW GROUP IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICI CURIAE*[1]

The National Cannabis Industry Association (NCIA) is the largest cannabis trade association in the United States and the only organization that broadly represents cannabis-related businesses at the national level. Representing well over 1,000 member businesses and tens of thousands of cannabis professionals, NCIA promotes the growth of a responsible and legitimate cannabis industry and works toward a favorable social, economic, and legal environment for that industry.

The Arcview Group is the cannabis industry's oldest and largest investor network. Since 2010, more than 1,000 individual investors have invested $300 million into over one hundred cannabis startups in the United States. Founded with the purpose of leveraging business as a vehicle for political and social change, The Arcview Group is dedicated to destigmatizing the cannabis industry by investing in credible, scalable, and profitable cannabis businesses.

Amici have an interest in the responsible and legal development of a sustainable cannabis industry in the United States, as well as in protecting the constitutional rights of their member constituents, patients and consumers.

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1. All parties have consented to the filing of this brief. *Amici* timely provided notice of intent to file this brief to all parties. NCIA and The Arcview Group state that no counsel for a party to this case authored this brief in whole or in part; and no counsel or party, other than *Amici* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

SUMMARY OF ARGUMENT

Amici join the Petitioners' argument that the lower courts erred in requiring exhaustion of administrative remedies as a prerequisite to the Petitioners' request for a declaration that the classification of cannabis under the Controlled Substances Act[2] (CSA) violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution. *Amici* further submit that requiring exhaustion would result in the Petitioners facing substantial prejudice from an unreasonable and indefinite time frame for administrative action by the Drug Enforcement Administration (DEA), which continues to maintain an irrational and archaic position on the scheduling of cannabis that is out of step with sweeping medical, scientific, legal and social advances. Although the Second Circuit expressed its concern over agency delay, the Court failed to recognize that DEA is not only unwilling but also *incapable* of providing the remedy sought by the Petitioners, making exhaustion futile and inappropriate. As recently as 2016, DEA reiterated its long-standing but flawed position that it cannot legally classify cannabis anywhere but Schedule I of the CSA, or potentially Schedule II. Reclassification of cannabis to Schedule II does not represent a viable remedy for the Petitioners, who have not requested reclassification in any event. It appears that the Second Circuit fails to recognize these critical points. Pursuant to *McCarthy v. Madigan*, 503 U.S. 140 (1992), a reasonable balancing of the individual and institutional interests here should lead only to the rational conclusion that exhaustion is not necessary and that the matter should be allowed to proceed in the district court.

2. 21 U.S.C. § 812 *et. seq.*

ARGUMENT

I. Exhaustion of Administrative Remedies Is Futile Because the Administrative Agency Is Unwilling and Incapable of Providing the Legal Remedy Sought by the Petitioners

This Court's longstanding precedent obligated the lower courts to use sound judicial discretion in determining whether to require exhaustion "by balancing the individual's interest in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion." *McCarthy,* at 140. In making this determination, "[i]ndividual interests have weighed heavily where resort to the administrative remedy would occasion undue prejudice to subsequent assertion of a court action, where there is some doubt as to whether the agency is empowered to grant effective relief, or where the administrative body is shown to be biased or has otherwise predetermined the issue before it." *Id*. at 140-141.

The Court in *McCarthy* held that "federal courts are vested with a 'virtually unflagging obligation' to exercise the jurisdiction given them," notwithstanding substantial institutional interests. *Id.* at 146, citing *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817–818 (1976). In addition, the Court cautioned that "administrative remedies need not be pursued if the litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further." *Id*., citing *West v. Bergland,* 611 F. 2d 710, 715 (CA8 1979), cert. denied, 449 U.S. 821 (1980).

A. Prejudice from Agency Delay

Here, the Petitioners face substantial prejudice from an unreasonable and indefinite time frame for administrative action by DEA. *See Id*. at 147, citing *Gibson v. Berryhill,* 411 U.S. 564, 575, n. 14 (1973) (administrative remedy deemed inadequate "[m]ost often … because of delay by the agency"). The Second Circuit expressly acknowledged this concern in the decision under appeal here:

> Plaintiffs argue that the administrative process will prolong their ordeal intolerably. And their argument is not without force. Plaintiffs document that the average delay in deciding petitions to reclassify drugs under the CSA is approximately 9 years. Such long delays cast doubt on the appropriateness of requiring exhaustion. *Accord Gibson v. Berryhill*, 411 U.S. 564, 575 n.14 (1973). And where, as here, health is involved, delay can be even more problematic. *See Abbey v. Sullivan*, 978 F.2d 37, 46 (2d Cir. 1992) (observing that, "if the delay attending exhaustion would subject claimants to deteriorating health … then waiver [of exhaustion] may be appropriate").

(App.20a.) *See also Walker v. Southern R. Co.,* 385 U.S. 196, 198 (1966) (possible delay of 10 years in administrative proceedings makes exhaustion unnecessary).

In the face of sweeping medical, scientific, legal and social advances on cannabis, DEA has unfalteringly and irrationally remained entrenched in the same archaic

position on cannabis for nearly 50 years. Indeed, the Second Circuit was so concerned over agency foot-dragging that it took the extraordinary step of agreeing to retain jurisdiction "to take whatever action may become appropriate if Plaintiffs seek administrative review and the DEA fails to act promptly." (App.21a.) This half-step is inadequate. Notwithstanding the Second Circuit's concerns over agency delay, the Court fails to recognize that DEA is not only unwilling but also *incapable* of providing the remedy sought by the Petitioners, making exhaustion futile and inappropriate.

B. DEA Is Incapable of Providing the Remedy Sought by the Petitioners

DEA has had multiple opportunities since the early 1970s to determine the proper classification for cannabis under the CSA, including whether it should have any classification under the statute.[3] The evidence nevertheless leads to the inescapable conclusion that the agency has for decades consistently devalued or ignored advances in cannabinoid science. Indeed, the Second Circuit acknowledged that based on our current state of knowledge, "[i]t is possible that the current law, though rational once, is now heading toward irrationality; it may even conceivably be that it has gotten there already." (App.14a.). This is precisely the point. DEA cannot reasonably be expected to determine whether its own entrenched position has become so irrational that it now

3. *See, e.g., NORML v. DEA,* 559 F.2d 735, 751 (D.C. Cir. 1977); *Alliance for Cannabis Therapeutics v. DEA,* 15 F.3d 1131 (D.C. Cir. 1994); Notice of Denial of Petition, 66 Fed. Reg. 20,038 (April 18, 2001); Denial of Petition To Initiate Proceedings To Reschedule Marijuana, 76 Fed. Reg. 40,552 (July 8, 2011); *Ams. for Safe Access v. DEA,* 706 F.3d 438 (D.C. Cir. 2013)

violates the Petitioners' constitutional rights. That is an issue squarely within the domain of the courts, not a federal law enforcement agency. *See*, *e.g.*, *Moore v. East Cleveland,* 431 U.S. 494, 497, n. 5 (An agency may be unable to consider whether to grant relief because it lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute); *Mathews v. Diaz,* 426 U.S. 67, 76 (1976).

Moreover, it would be futile to administratively petition DEA to remove cannabis from scheduled control under the CSA (de-scheduling). As recently as 2016, DEA reaffirmed its long-standing position that marijuana cannot be placed in a schedule less restrictive than Schedule II due to U.S. obligations under international drug control treaties. DEA states:

> It has been established in prior marijuana rescheduling proceedings that placement of marijuana in either schedule I or schedule II of the CSA is "necessary as well as sufficient to satisfy our international obligations" under the Single Convention. *NORML v. DEA,* 559 F.2d 735, 751 (D.C. Cir. 1977). As the United States Court of Appeals for the DC Circuit has stated, "several requirements imposed by the Single Convention would not be met if cannabis and cannabis resin were placed in CSA schedule III, IV, or V." 2 *Id.* Therefore, in accordance with section 811(d)(1), DEA must place marijuana in either schedule I or schedule II.[4]

4. *Denial of Petition to Initiate Proceedings to Reschedule Marijuana*, CFR Chapter II and Part 1301, Fed. Register, Vol. 156, 53688 (Aug. 12, 2016)

In its decision under appeal, the Second Circuit briefly addressed this issue in the context of distinguishing the case of *United States v. Kiffer*, 477 F.2d 349 (2d Cir. 1973). In *Kiffer*, the Second Circuit considered a challenge to the scheduling of marijuana under the CSA without requiring exhaustion. In declining to follow *Kiffer*, the Second Circuit explains:

> [The court in *Kiffer*] waived the normal requirement only because of two factors that do not obtain in the instant case: first, because the "application of the … doctrine [of exhaustion] to criminal cases is generally not favored," *id.* at 352, and, second and more significantly, because, at the time *Kiffer* was heard, the federal government had taken the position that it did not have the power to re- or de-schedule marijuana at all, as a result of foreign treaty commitments, *id.* at 351. Under those circumstances, where "there [was] some doubt whether appellants in fact [had] an administrative remedy," the Court declined to require exhaustion. *Id.* The instant case is different. It is, of course, civil. And, as the D.C. Circuit has since held, foreign treaty commitments have not divested the Attorney General of the power to re- or de-schedule marijuana. *See Nat'l Org. for Reform of Marijuana Law (NORML) v. Drug Enforcement Admin.*, 559 F.2d 735 (D.C. Cir. 1977). *Kiffer's* result is therefore not controlling.

(App.18-19a.)

Despite the Second Circuit's naked assertion that *NORML* long ago put to rest the idea that foreign treaty commitments preclude the de-scheduling of marijuana, DEA continues to stand behind that legal theory in refusing to consider placing marijuana anywhere but Schedule I, or potentially Schedule II. The Second Circuit nevertheless appears to have glossed over this critical point. In its decision under appeal here, the Court writes:

> Although Plaintiffs style their claims in many different ways, the gravamen of their argument is that marijuana should not be classified as a Schedule I substance under the CSA. Were a court to agree, the remedy would be to re- **or de-schedule** cannabis. *It cannot be seriously argued that this remedy is not available through the administrative process.*

(App.16a) (emphasis added).

Yet Petitioners make precisely the argument that the Second Circuit so casually dismisses. Indeed, *Amici* assert that it is unreasonable to believe that the Petitioners would be able to achieve anything other than reclassification to Schedule II – a remedy that has never been sought – by exhausting administrative remedies with DEA.

The Second Circuit apparently believes that the Petitioners' constitutional challenge equates to a request for the de-scheduling of cannabis. Even if true, which *Amici* dispute, is it reasonable to believe that filing yet another petition with DEA would cause the agency to reverse an entrenched legal position that has become irrational over time, and particularly when the agency

has vigorously defended that position since as long ago as 1972 and as recently as 2016? Exhaustion has not been required where the challenge is to the adequacy of the agency procedure itself, such that "the question of the adequacy of the administrative remedy … [is] for all practical purposes identical with the merits of [the plaintiff's] lawsuit." *McCarthy,* 503 U.S. at 148, citing *Barry* v. *Barchi,* 443 U. S. 55, 63, n. 10 (1979) (quoting *Gibson* v. *Berryhill,* 411 U. S. 564, 575). Here, the central legal remedy requested by the Petitioners in this lawsuit is the very thing that the agency procedure cannot give. Exhaustion is futile.

II. DEA's Limited Authority to Reclassify Marijuana as a Schedule II Controlled Substance Could Cripple the Burgeoning Legal Cannabis Industry

The sole administrative remedy that DEA states it can provide – reclassifying marijuana to Schedule II – has not been requested by the Petitioners because the creation of a prescription drug model could have devastating financial implications on the nascent cannabis industry and could be far worse than the troublesome *status quo* under Schedule I. Reclassifying exposes the cannabis industry to costly regulatory hurdles, including expensive and arduous clinical trials, that could result in the destruction of all state medical cannabis and adult-use programs, including state-created social equity licensing programs that address the disparate harms imposed on communities of color from decades of state and local cannabis prohibition. The resulting harmful social costs include removing access to medicine for millions of medicinal marijuana

patients,[5] loss of hundreds of thousands of jobs, the evisceration of billions of dollars in needed tax revenue and the resurgence of the illicit marijuana market. These harmful consequences would be felt directly by individuals such as Petitioners Bortell and Cotte, who in the words of the Second Circuit, are "children with dreadful medical problems" and Petitioner Belen, a veteran of the Iraq war who turned to medical cannabis after conventional therapies were unsuccessful in treating his post-traumatic stress disorder. (App.5a-6a.) In addition to the human cost, there could be very significant economic costs to the industry that serves these Americans—to say nothing of the states that rely on the industry for tax revenue. Reclassification to Schedule II also would put at risk the $2.62 billion in venture capital infused into the marijuana industry in 2019 alone.[6]

Current federal policy regarding enforcement of the CSA has shown ambivalence where the possession and distribution of marijuana is consistent with well-regulated state law. Congress's position that taxpayer funds may not be used to prosecute state-compliant medical cannabis operators (as codified in successive federal appropriations acts), despite marijuana's Schedule I status, has created

5. As of July 6, 2020, approximately 4,375,822 patients are registered to use medical cannabis across the country. *Medical Marijuana Patient Numbers*, Marijuana Policy Project (July 6, 2020), https://www.mpp.org/issues/medical-marijuana/state-by-state-medical-marijuana-laws/medical-marijuana-patient-numbers/.

6. Javier Hasse, *Even As Overall Deals Declined, VC Investments in Cannabis Nearly Doubled Over 2019*, Forbes (January 28, 2020), https://www.forbes.com/sites/javierhasse/2020/01/28/vc-in-cannabis/#70ba8335a8c9.

a "*de facto*" quasi-legal status for the plant when used for medicinal purposes.[7] Indeed, federal agencies have issued guidance to industries that seek to work with marijuana. The Department of the Treasury, through FinCEN, issued guidelines in 2014 to financial institutions seeking to provide services to marijuana-related businesses by clarifying the financial institutions' obligations under the Bank Secrecy Act[8] and relevant federal anti–money laundering statutes. The stated purpose of those guidelines, which remain in place today, is to "enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses."[9]

Marijuana's "*de facto*" legal status has facilitated the growth for an industry worth an estimated $10.73 billion in early 2020 and that currently supports more than

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7. *See generally Rohrabacher-Farr Amendment,* which prevents the Department of Justice from spending funds to interfere with the implementation of state medical cannabis laws. The Ninth Circuit has interpreted the Rohrabacher-Farr Amendment as prohibiting the Department of Justice from spending funds from relevant appropriations acts for the prosecution of individuals engaged in conduct permitted by state medical cannabis laws and who fully complied with such laws. *See U.S. v McIntosh*, 833 F.3d 1163, 1178 (9th Cir. 2016); *See also*, *Green Earth Wellness Center, LLC v. Atain Specialty Ins. Co.*, 163 F. Supp.3d 821 (D. Colo. 2016) (rendering an insurance policy's "Contraband" exclusion "ambiguous by the difference between the federal government's *de jure* and *de facto* public policies regarding state-regulated medical marijuana.").

8. 31 USC 5312 *et seq.*

9. *FinCEN Guidance on BSA Expectations Regarding Marijuana-Related Businesses* (February 14, 2014), https://www.fincen.gov/sites/default/files/guidance/FIN-2014-G001.pdf.

243,000 full-time jobs, even in states with historically high unemployment rates caused by COVID-19.[10] Sales in Colorado, for example, reached $1.77 billion in 2019 while the market supported more than 34,700 cannabis-related jobs.[11] Florida maintained its more than 15,498 cannabis industry jobs in the first half of 2020 with sales in 2019 that approached $800 million.[12] Arizona's medical cannabis program supports 15,059 jobs and posted an estimated $709 million in total market value in 2019.[13] Oklahoma saw an unprecedented growth rate of 221 percent in 2019, which continues to support in excess of 9,400 jobs in 2020.[14]

States also have reaped significant tax revenue. In 2019, Colorado collected more than $302 million in tax revenue from cannabis-related activity,[15] while California earned $629.3 million in 2019.[16] Washington collected $395.5 million in cannabis tax revenue in 2019, which was

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10. *Cannabis Jobs Report: Legal cannabis now supports 243,700 full-time American Jobs*, LEAFLY (February 7, 2020), https://leafly-cms-production.imgix.net/wp-content/uploads/2020/02/06145710/Leafly-2020-Jobs-Report.pdf.

11. *Id.* at 8

12. *Id.*

13. *Id.*

14. *Id.* at 9

15. *Colorado Department of Revenue*, STATE OF COLORADO, (February 2020), https://www.colorado.gov/pacific/sites/default/files/0120_MJTaxCalendarReport_PUBLISH.pdf

16. *California Department of Tax and Fee Administration*, STATE OF CALIFORNIA (June 2020), https://www.cdtfa.ca.gov/dataportal/dataset.htm?url=CannabisTaxRevenues

$170 million more than the state collected for beer, wine and liquor sales combined.[17]

No other industry in the history of this country has been able to survive and grow to this extent in the face of such a legal quagmire. DEA's self-asserted sole administrative remedy of reclassification to Schedule II, however, could result in the destruction of all state cannabis programs and a further resurgence of the unregulated illicit marijuana market. Under the CSA and accompanying regulations, every person who manufactures, distributes, dispenses, imports or exports any controlled substance must register with the DEA[18] for each principal place of business or professional practice where controlled substances are manufactured, distributed or disposed.[19] Every operator in the country would be subject immediately to these requirements if marijuana is reclassified to Schedule II. Because the refilling of prescriptions for Schedule II substances is prohibited,[20] patients would require new prescriptions from their medical provider whenever they run out of their life-saving medicine. These requirements are incompatible with current state medical and adult-use cannabis programs.

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17. *Washington State Liquor and Cannabis Board*, Annual Report Fiscal Year 2019 (June 2019) https://lcb.wa.gov/sites/default/files/publications/annual_report/2019-annual-report-final2.pdf

18. 21 U.S.C. § 822

19. 21 C.F.R. § 1301.12

20. 21 U.S.C § 829(a)

Furthermore, FDA would have jurisdiction to regulate marijuana as a Schedule II drug under the Federal Food Drug & Cosmetic Act (FDCA) and would almost certainly qualify medical cannabis as a "new drug," subjecting it to myriad regulations including the requirement that companies file an investigational new drug application for clinical trials to study the safety and efficacy of any new drug.[21] New drugs may not be introduced legally or delivered for introduction into interstate commerce without prior approval from FDA.[22] This requirement alone could cripple the industry due to its cost, and at a minimum could create a product bottleneck preventing many Americans from accessing these products on which they rely from a regulated and taxed source. In 2018, a study led by a research team from Johns Hopkins Bloomberg School of Public Health found that the median cost for a clinical trial was $19 million, representing less than one percent of the average *total* costs of developing a new drug.[23] This would cause the financial ruin of even the best-capitalized operators, let alone the hundreds of small businesses that won licenses via state-created social equity programs to assist historically disenfranchised communities. Those costs and delays will fall directly on average Americans such as Petitioners.

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21. 21 C.F.R § 312.2

22. 21 U.S.C. § 331(d) and § 355(a)

23. *Cost of Clinical Trials for New Drug FDA Approval Are Fraction of Total Tab*, Johns Hopkins Bloomberg School of Public Health (September 24, 2018), https://www.jhsph.edu/news/news-releases/2018/cost-of-clinical-trials-for-new-drug-FDA-approval-are-fraction-of-total-tab.html.

CONCLUSION

The decision of the lower courts to require the exhaustion of administrative remedies as a prerequisite to the Petitioners' constitutional claim constituted error. DEA continues to defend its irrational position on the scheduling of cannabis and continues to state that de-scheduling cannabis is not an available administrative remedy. Likewise, reclassification of cannabis to Schedule II does not represent a viable remedy for the Petitioners, who have not requested reclassification in any event. In dismissing the Petitioners' constitutional claim, the Second Circuit's casual conclusion that "it cannot be seriously argued" that reclassification or de-scheduling cannabis is not available through the administrative process is not only a gross over-simplification that fails to account for an entrenched and irrational agency mindset, it is simply wrong on the legal merits. Pursuant to this Court's holding in *McCarthy*, a reasonable balancing of the individual and institutional interests is required here and should lead only to the reasonable conclusion that exhaustion is not necessary and that the matter should be allowed to proceed in the district court.

For the foregoing reasons, *Amici* NCIA and The Arcview Group respectfully request that the Court grant the petition for a writ of *certiorari*.

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