UNITED STATES DEPARTMENT OF JUSTICE

Drug Enforcement Administration

In the Matter of **Schedules of Controlled Substances: Proposed Rescheduling of Marijuana**	**DEA Docket No. 1362** **Hearing Docket No. 24-44**

ORDER DENYING MOTION TO STAY HEARING PROCEEDINGS

On December 4, 2024, Doctors for Drug Policy Reform and Bryon Adinoff (collectively, D4DPR), an entity that is not a party to these proceedings, filed a motion seeking an indefinite stay of proceedings (Motion to Stay or MTS) so that it can pursue relief in the United States Court of Appeals for the District of Columbia (the Circuit Court). *See* Attachment 1 (M. Zorn, Petitioner); MTS at 1.

By way of procedural background, these are formal hearing proceedings being conducted in connection with a notice of proposed rulemaking (NPRM) issued by the United States Department of Justice (the Department) on May 21, 2024. *Schedules of Controlled Substances: Rescheduling of Marijuana*, 89 Fed. Reg. 44597, 44597 (2024). The NPRM proposes the transfer marijuana from Schedule I of the Controlled Substances Act (CSA) to Schedule III. *Id.* Following the publication of the NPRM in the Federal Register by the Department, in accordance with the Attorney General's direction therein, the DEA Administrator determined that in-person hearing proceedings would be appropriate and issued a General Notice of Hearing (GNoH) which, *inter alia*, set an early December commencement date. *Schedules of Controlled Substances: Rescheduling of Marijuana*, 89 Fed. Reg. 70148, 70148-49 (2024). Subsequently, based on correspondence filed with the Agency (but not furnished to this tribunal) the Administrator designated a subset of twenty-five (25) individuals and organizations (evidently culled from a larger group of requestors) to participate in the hearing (Designated Participants or DPs). The DPs were evidently each notified of their participation status by a separate email either before or simultaneous with the GNoH (also not furnished to the tribunal) MTS at 4. D4DPR was apparently not among those receiving invitations from the Administrator to participate in the hearing. *Id.*

Simultaneously with the Administrator's identification of the twenty-five (25) DPs, I was designated by the Administrator[1] to preside over the hearing proceedings, but was not involved in or apprised of the process utilized to render her DP selection. In an order dated November 19, 2024 (the Standing Order), based on submissions by the DPs, I made determinations regarding standing and inclusion in these proceedings by applying the statutory and regulatory guideposts supplied by Congress and the CSA and its implementing regulations. In the Standing Order, the overwhelming majority of DPs maintained their status as hearing participants, but standing assessments were reached regarding a future discretionary decision as to the potential weight to be assigned in the recommended decision. Standing Ord. at 7.

On November 13, 2024, D4DPR, a filed a motion with this tribunal bearing the caption "Non-Party D4DPR's Motion to Intervene and Request for Final Appealable Determination" (Motion to Intervene or MTI) seeking a written final order memorializing the decision that caused its lack of its own invitational email from the Administrator, as well as an order from this tribunal authorizing its inclusion among the DPs notwithstanding her decision. MTI at 4-5.

In an order (MTI Denial Order or MTIDO), dated November 21, 2024, this tribunal denied D4DPR's Motion to Intervene based on a lack of jurisdiction to review, modify, or reverse the Administrator's inclusion/exclusion decisions. MTIDO at 2-3. The MTIDO also explained that, notwithstanding D4DPR's expressed frustration with the lack of a written denial by the Administrator explaining her action (addressed, *infra*), that organization's lengthy recitation of how this formal rulemaking process would benefit from its input, the value of the organization or its potential witnesses does not circumscribe the entire universe of permissible considerations available to the Administrator.[2] *City of San Antonio v. Civil Aeronautics Board*, 374 F.2d 326, 329 (D.C. Cir. 1967) ("No principle [of] administrative law is more firmly established than that of agency control of its own calendar."). The Agency is endowed with the right to place reasonable limits on the number of participants in a given Administrative Procedure Act (APA) hearing. *Id.* As discussed, *supra*, this tribunal does not possess the requests by, or even the number of, persons who sought hearing participation. However large or small that number is, it would be illogical to expect any agency to blithely admit all comers from

[1] 21 C.F.R. § 1316.52.

[2] Contrary to D4DPR's contention in its Motion to Stay (MTS at 5), the MTIDO did not purport to adjudicate the Administrator's determination as "reasonable" or otherwise. MTIDO at 2.

everywhere. Proceedings would theoretically never reach a resolution. This tribunal has neither the authority nor the inclination to review or reverse the Administrator's attendance determinations, but the conclusion that she must have authority to discern who among the vast population of the United States can participate is inescapable. To be sure, thousands upon thousands of individuals and entities across the country could add value to the issues to be decided here, but they cannot all be included, and someone (in this case the Agency) must make that determination.

As discussed, *supra*, D4DPR has petitioned the Circuit Court to review the Administrator's election to dis-include the organization from the group of Designated Participants. MTS at 1; Attachment 1. Interestingly, the Motion to Stay represents that on November 25, 2024, D4DPR was served with a one-page document from the Agency explaining (albeit briefly) the decision to decline to extend an invitation to the hearing proceedings.[3] MTS at 5.

As explained in the MTIDO, the Administrative Procedure Act and the CSA's implementing regulations (the Regulations) are unsupportive of D4DPR's request that I issue an order including what the Agency head excluded. As discussed, in the MTIDO, DEA administrative law judges (ALJs) are designated[4] to handle a case by the Administrator. 21 C.F.R. § 1316.52. The ALJ's "functions ... commence upon his designation and terminate upon the certification of the record to the Administrator." *Id.* Thus, the time the DPs were selected preceded my authority to act on the case. Even more importantly, in the APA, Congress decreed that "[o]n appeal from or review of the [ALJ's recommended decision] the agency has all the powers which it would have in making the [recommended decision] ... except as it may limit the issues on notice or by rule." 5 U.S.C. § 557(b). Appeals flow *from the ALJ to the Administrator*, not the other way around. I have not been designated to review the Administrator's prehearing

[3] This document was also not forwarded to this tribunal by the Agency.

[4] Designation for a case is not synonymous with the appointment of the ALJ. To that end, the APA and the DEA regulations authorize the identification, recognition and inclusion of material facts in the administrative record by the taking of official notice. 5 U.S.C. § 556(e); *Attorney General's Manual on the Administrative Procedure Act* § 7(d) (1947); 21 C.F.R. § 1316.59(e). Official notice is herein taken of the following: (1) the undersigned was initially appointed as an ALJ on November 21, 2001, at and by the Social Security Administration; (2) on March 9, 2009, the undersigned was appointed as an ALJ by the then-DEA Administrator, Michele Leonhart; and (3) on October 25, 2018, under Attorney General Order 4315-2018, then-Attorney General Jefferson B. Sessions ratified and approved the DEA Administrator's prior ALJ appointment of the undersigned. To the extent any DP seeks to challenge the factual predicate of the official notice taken in this matter that party may file an appropriate motion no later than fifteen (15) days from the issuance of this order.

actions on this matter or the manner in which her DP decisions were reached, issued, or not issued.[5] The Administrator exercised her discretion to fix the number of DPs to be included, and to expand that number would effectively overrule her decision and exceed the proper and logical role of the ALJ under the APA and the CSA.[6] Accordingly, no action was (or could be) taken regarding the D4DPR's Motion to Intervene, and for similar reasons, the same is true of this Motion to Stay.[7]

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[5] *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."). As I have discussed in other orders, while the decision to include or exclude a party arguably bears the hallmarks of a final agency action (5 U.S.C. § 702; 21 U.S.C. § 877), the Court of Appeals for the Sixth Circuit is not altogether convinced that anything is really final and reviewable until the whole adjudication has run its course. *Miami-Luken, Inc. v. DEA*, 900 F.3d 738, 743 (6th Cir. 2018) (The court held that a subpoena decision is not rendered final merely because the agency's highest authority issued the decision prior to an ultimate disposition of the case.). Under this view of things, there is nothing particularly troubling about the Administrator issuing her justification letter after the determination so long as it happens before the final (court-reviewable) order.

[6] Admittedly, had the standing determination been deferred to await the action of the ALJ, matters would have been procedurally different and the Administrator could have exercised her unquestioned authority to review my ruling on the matter. But that is not the way the matter progressed.

[7] Even assuming *arguendo* that the Motion to Stay was evaluated on the merits by this tribunal, it would likely produce a similarly unfruitful result. In its evaluations of motions to stay administrative proceedings, the Agency has adopted the following factors set forth in *Nken v. Holder* (the *Nken* Factors), *to wit*:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the [stay] applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

556 U.S. 418, 434 (2009); *Jennifer L. St. Croix, M.D.*, 86 Fed. Reg. 30494, 30495 (2021). Utilizing the *Nken* Factors here would not likely move the needle in D4DPR's direction for the relief it seeks. Regarding *Nken* Factor One (success on the merits), D4DPR's argument depends on acceptance of the fact that the Administrator's determination was *ultra vires* and/or arbitrary and capricious. MTS at 7-11. There is no indication in the NPRM that the Attorney General intended to contravene existing regulations by a definitive *sub silentio* determination to curtail the Administrator's delegated authority. Such a draconian interpretation cannot be made lightly. The United States District Court case cited by D4DPR (MTS at 7-8) merely upholds the authority of the Attorney General to appoint a special prosecutor and cabin the appointee's authority within the bounds of the appointing instrument. *United States v. Libby*, 429 F.Supp.2d 27, 40-43 (D.D.C. 2006). It would be unreasonable to conclude that the language in the NPRM was drafted as a deliberate pull-back of authority long ago delegated by regulation, and the *Libby* case does not support the broad reading of the Attorney General's intent urged by D4DPR here. Further, even D4DPR's own assessment of its advocacy objective is not within the scope of the NPRM to move marijuana to Schedule III, but rather seeks to move it so some other, less restrictive schedule. MTS at 14-15; MTI at 1. It is thus beyond the scope of NPRM. Neither does *Nken* Factor Two (irreparable injury) provide assistance to D4DPR's cause here. To the extent that D4DPR's alleged harm to itself stems from its inability to present its views to the Agency, it is helpful to remember there was an extensive comment submission period set forth in the NPRM where that could have been done. 89 Fed. Reg. at 44597-98. Irreparable injury, even under the authority cited by D4DPR (MTS at 18-19) in support of the relief it seeks, requires, in no uncertain terms that "the injury must be both certain and great [and] actual and not theoretical." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). To the extent that it complains that the irreparable nature of its harm stems from a decision that was issued after the Administrator has made a final decision, or as the MTS put it, after "the cake has been baked" (MTS at 19), not only did D4DPR have the opportunity to submit comments that must be analyzed and incorporated into the final rule, but the DPs who are participating in the hearing are likely provide no shortage of highly-qualified expert opinions. Further, as discussed, *supra*, at least one court has determined that decisions rendered by an agency head during the

Accordingly, no action can or will be taken on the petition of this non-Designated Participant for a stay of proceedings.[8]

Dated: December 5, 2024

JOHN MULROONEY

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JOHN J. MULROONEY, II
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the undersigned, on December 5, 2024 caused a copy of the foregoing to be delivered to the following recipients: (1) Julie L. Hamilton, Esq., Counsel for the Government, via email at Julie.L.Hamilton@dea.gov; James J. Schwartz, Esq., Counsel for the Government, via email at james.j.schwartz@dea.gov; Jarrett T. Lonich, Esq., Counsel for the Government, via email at jarrett.t.lonich@dea.gov; and S. Taylor Johnston, Esq., Counsel for the Government, via email at stephen.t.johnston@dea.gov; (2) the DEA Government Mailbox, via email at dea.registration.litigation@dea.gov; (3) Shane Pennington, Esq., Counsel for Village Farms International, via email at spennington@porterwright.com; and Tristan Cavanaugh, Esq., Counsel for Village Farms International, via email at tcavanaugh@porterwright.com; (4) Nikolas S. Komyati, Esq., Counsel for National Cannabis Industry Association, via email at nkomyati@foxrothschild.com; William Bogot, Esq., Counsel for National Cannabis Industry

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pendency of APA proceedings may be interlocutory. *Miami-Luken*, 900 F.3d at 743. Importantly, a review of *Nken* Factors Three (injury to other parties) and Four requires a pragmatic evaluation of the relief actually being sought here. D4DPR seeks an indefinite stay so that the Circuit Court can review the Agency's hearing participation process. The APA hearing date is currently scheduled for January 21, 2025, the date that the Court of Appeals has fixed for D4DPR's initial submissions. Attachment 1 at 2. It is not altogether clear what D4DPR's representations that it "intends to take all reasonable steps to reduce the length of delay, including by seeking expedited review in [the Circuit Court]" really does (or could) mean. MTS at 20. The Circuit Court manages a busy docket. The most that D4DPR could hope for is a fair and timely consideration of its motion to expedite, along with similar motions filed by a multitude of other litigants. If ultimately successful in its litigation before that court, any relief granted in this petitioner's favor will almost undoubtedly involve the reversal of all actions related to the designation of DPs by the Agency and the Department. Under this success metric, the process will need to start again at square one. Invitations for hearing and participation requests will need to be rewritten and republished in the Federal Register with appropriate waiting times and supplemental instructions as to the status of those DPs selected in the Agency's initial efforts. The work of all concerned will be repeated. The Agency will certainly be called upon to review a potentially massive number of new (and old) submissions with detailed statements of position and arguments for standing. And all that will occur *after* the Circuit Court issues its decision on the process. The restarted process will then likely commence with a lengthy APA hearing that potentially will seat even more designated participants. After the *new* process is complete, the Agency will issue a final order that is *then* subject to appeal in the courts. To blithely assert that the stay requested here will have no cognizable impact on the Designated Participants or the members of the public who have long been anticipating an adjudication on these issues, may prove unpersuasive to say the least. Thus, while this order holds that this tribunal is without authority to rule on the Motion for Stay (or any other motion) filed by this non-DP, even if its Motion were to be considered, a thoughtful evaluation of the relief under the *Nken* Factors would likely militate in favor of its denial.

[8] Naturally, any order provided by the Circuit Court will be expeditiously and scrupulously adhered to by this tribunal.

Association, via email at wbogot@foxrothschild.com; and Khurshid Khoja, Esq., Counsel for National Cannabis Industry Association, via email at khurshid@greenbridgelaw.com; (5) John Jones and Dante Picazo for Cannabis Bioscience International Holdings, via email at ir@cbih.net; (6) Andrew J. Kline, Esq., Counsel for Hemp for Victory, AKline@perkinscoie.com; and Abdul Kallon, Esq., Counsel for Hemp for Victory, via email at and AKallon@perkinscoie.com; (7) Shanetha Lewis for Veterans Initiative 22, via email at info@veteransinitiative22.com; (8) Kelly Fair, Esq., Counsel for The Commonwealth Project, via email at Kelly.Fair@dentons.com; (9) Rafe Petersen, Esq., Counsel for Ari Kirshenbaum, via email at Rafe.Petersen@hklaw.com; (10) David G. Evans, Esq., Counsel for Cannabis Industry Victims Educating Litigators, Community Anti-Drug Coalitions of America, Phillip Drum, Kenneth Finn, International Academy on the Science and Impacts of Cannabis, and National Drug and Alcohol Screening Association, via email at thinkon908@aol.com; (11) Patrick Philbin, Esq., Counsel for Smart Approaches to Marijuana, via email at pphilbin@torridonlaw.com; and Chase Harrington, Esq., Counsel for Smart Approaches to Marijuana, via email at charrington@torridonlaw.com; (12) Stephanie E. Masker, Esq., Counsel for National Transportation Safety Board, via email at stephanie.masker@ntsb.gov; (13) Eric Hamilton, Esq., Counsel for the State of Nebraska, via email at eric.hamilton@nebraska.gov; and Zachary Viglianco, Esq., for the State of Nebraska, via email at zachary.viglianco@nebraska.gov; (14) Gene Voegtlin for International Association of Chiefs of Police, via email at voegtlin@theiacp.org; (15) Gregory J. Cherundolo for Drug Enforcement Association of Federal Narcotics Agents, via email at executive.director@afna.org; (16) Reed N. Smith, Esq., Counsel for the Tennessee Bureau of Investigation, via email at Reed.Smith@ag.tn.gov; and Jacob Durst, Esq., Counsel for Tennessee Bureau of Investigation, via email at Jacob.Durst@ag.tn.gov; and (17) Matthew Zorn, Esq., Counsel for OCO *et al.*, and Counsel for Doctors for Drug Policy Reform and Bryon Adinoff, via email at mzorn@yettercoleman.com; abrumbaugh@yettercoleman.com.

QUINN FOX

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Quinn Fox
Staff Assistant to the Chief Judge
Office of Administrative Law Judges

Attachment 1

24-1365, Doctors for Drug Policy Reform, et al v. DEA, et al

US Circuit Court of Appeals - D.C. Circuit

This case was retrieved on 12/05/2024

Header

Case Number: 24-1365
Date Filed: 11/27/2024
Date Full Case Retrieved: 12/05/2024
Status: Unknown
Misc: (0) 0: ; Appeal

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Drug Enforcement Administration **Respondent**	
Anne Milgram, in her official capacity as Administrator of the United States Drug Enforcement Administration **Respondent**	

Additional Case

Additional Case Information
Petition for Review - Review
Appeal from: Drug Enforcement Administration
District: DEA Division: 1 CaseNumber: DEA-11/25/24 Letter
Date Decided: 11/25/2024
District: DEA Division: 1 CaseNumber: DEA-10/28/24 Letter
Date Decided: 10/28/2024

Proceedings

24-1365, Doctors for Drug Policy Reform, et al v. DEA, et al

Date	#	Proceeding Text	Details
11/27/2024		PETITION FOR REVIEW CASE docketed. [24-1365]	
11/27/2024		PETITION FOR REVIEW [2087993] of a decision by federal agency filed by Byron Adinoff and Doctors for Drug Policy Reform [Service Date: 11/27/2024] Disclosure Statement: Not Attached. [24-1365]	
12/04/2024		CERTIFIED COPY [2087996] of Petition for Review sent to respondent [24-1365]	
12/04/2024		CLERK'S ORDER [2087997] filed directing party to file initial submissions: PETITIONER docketing statement due 01/03/2025. PETITIONER certificate as to parties due 01/03/2025. PETITIONER statement of issues due 01/03/2025. PETITIONER underlying decision due 01/03/2025. PETITIONER deferred appendix statement due 01/03/2025. PETITIONER procedural motions due 01/03/2025. PETITIONER dispositive motions due 01/21/2025; directing party to file initial submissions: RESPONDENT entry of appearance due 01/03/2025. RESPONDENT procedural motions due 01/03/2025. RESPONDENT certified index to record due 01/21/2025. RESPONDENT dispositive motions due 01/21/2025 [24-1365]	

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