ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1120

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE SCOTTSDALE RESEARCH INSTITUTE, LLC,

Petitioner.

On Petition for a Writ of Mandamus to
William P. Barr, U.S. Attorney General, Uttam Dhillon, Acting Administrator of the U.S. Drug Enforcement Administration, and the U.S. Drug Enforcement Administration

---

RESPONSE TO MANDAMUS PETITION

JOSEPH H. HUNT
Assistant Attorney General

MARK B. STERN
DANIEL AGUILAR
Attorneys, Appellate Staff
Civil Division, Room 7266
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530
(202) 514-5432

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES*

Cases: **Page(s)**

Statutes:

* Authorities on which we chiefly rely are marked with asterisks.

Regulations:

Other Authorities:

GLOSSARY

The Act	Controlled Substances Act
DEA	U.S. Drug Enforcement Administration
Scottsdale	Scottsdale Research Institute, LLC

STATEMENT OF JURISDICTION

Petitioner "seeks a writ of mandamus directing the Attorney General, [the Drug Enforcement Administration (DEA)], or its Acting Administrator to issue a 'notice of application'" for petitioner's application to grow marijuana "by 90 days from the date of service of this amended petition or fifteen days after the writ issues, whichever is later." Am. Pet. 4. DEA published that notice of application on August 27, 2019. 84 Fed. Reg. 44920, 44923. Accordingly, as explained in the Argument section below, the petition for mandamus is now moot.

STATEMENT OF THE ISSUE

Whether the petition for a writ of mandamus is moot because the agency has granted the petition's request for relief.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY FRAMEWORK

The Controlled Substances Act, 21 U.S.C. §§ 801-971, establishes a comprehensive federal scheme to regulate the manufacture and distribution of controlled substances. The Act divides controlled substances into five schedules, based on their potential for abuse, medical uses, and risk of physical or psychological dependence. *Id.* § 812(a)-(b). Generally speaking, a schedule I substance has no accepted medical use and a high risk for abuse, while schedule II-V substances have accepted medical uses and decreasing risk of abuse and dependence. *Id.* § 812(b).

Congress designated marijuana as a schedule I substance. *See* Pub. L. No. 91-513, title II § 202(c) (sched. I(c)), 84 Stat. 1242, 1249 (1970).[1]

As particularly relevant here, Congress granted the Attorney General authority to register applicants who seek to manufacture controlled substances under schedule I or schedule II of the Act. 21 U.S.C. § 823(a). The Attorney General, in turn, delegated this authority to the Administrator of DEA. 28 C.F.R. § 0.100. The Administrator will register an applicant to manufacture a controlled substance, like marijuana, "if he determines that such registration is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971." 21 U.S.C. § 823(a). In determining the public interest, the Administrator must consider how to maintain "effective controls against diversion" of controlled substances by limiting their "bulk manufacture" to "a number of establishments which can produce an adequate and uninterrupted supply * * * under adequately competitive conditions for legitimate medical, scientific, research, and industrial purposes." *Id.* § 823(a)(1). The Administrator must also consider compliance with state and local laws, the applicant's prior convictions relating to controlled substances, the promotion of technical advances and development of new substances, the applicant's manufacturing experience and

[1] The Controlled Substances Act uses the term "marihuana," but this brief uses the contemporary spelling except in direct quotations.

effective controls against diversion, and "such other factors as may be relevant to and consistent with the public health and safety." *Id.* § 823(a)(2)-(6).

If an applicant seeks to manufacture a schedule I or schedule II controlled substance "for use only in a clinical trial," the Administrator will "issue a notice of application not later than 90 days after the application is accepted for filing." 21 U.S.C. § 823(i)(2). The notice will allow for a comment period, and 90 days after the comment period ends, the Administrator will "register the applicant, or serve an order to show cause upon the applicant in accordance with" section 824(c). *Id.* If the Administrator issues a show cause order, then the Administrator will provide "a statement of the basis for the denial" of the application, will direct the applicant to appear at a hearing, and will notify the applicant "of the opportunity to submit a corrective action plan on or before" the hearing date. *Id.* § 824(c)(2). A hearing under the show cause order is governed by the Administrative Procedure Act. *Id.* § 824(c)(4).

II. PETITIONER'S APPLICATION TO MANUFACTURE MARIJUANA

Petitioner Scottsdale Research Institute submitted an application to manufacture marijuana on October 1, 2016. Am. Pet. A2-4. DEA asked Scottsdale to answer a series of questions concerning its application, and Scottsdale submitted those answers on January 24, 2017. Am. Pet. A7.

On June 6, 2019, Scottsdale filed a petition for mandamus, seeking to compel DEA "to issue a 'notice of application.'" Pet. 4. Scottsdale argued that, under 21 U.S.C. § 823(i)(2), it was entitled to have DEA publish "a notice regarding its application in the Federal Register to commence the process for determining whether [Scottsdale] should be registered under the Act." Pet. 21. Scottsdale later filed an amended petition that seeks the same relief based on the same arguments. *See* Am. Pet. 4, 21.

III. DEA'S ADMINISTRATIVE ACTIONS

In 2016, DEA issued a policy statement that provided information on how it intended to expand the number of registrations for bulk manufacturers of marijuana, and described in general terms the way it would oversee those additional growers. 81 Fed. Reg. 53846 (Aug. 12, 2016). Since issuing that policy statement, DEA has received 33 pending applications to grow marijuana, marijuana extract, and tetrahydrocannabinols in bulk, with the most recent application filed May 2, 2019.

On August 27, 2019, DEA published a notice of petitioner's application to manufacture marijuana extract. 84 Fed. Reg. 44920, 44923. In the same document, DEA also published notices for 32 other applicants who seek to manufacture marijuana, marijuana extract, and tetrahydrocannabinols. *Id.* at 44922-23. DEA explained that it "anticipates evaluating the applications" and, of those that are legally compliant, "granting the number that the agency determines is necessary to ensure an

adequate and uninterrupted supply of the controlled substances at issue under adequately competitive conditions." *Id.* at 44921.

DEA also explained that, as a result of an inter-agency "policy review process to ensure that the marihuana growers program is consistent with applicable laws and treaties," "adjustments to DEA's policies and practices related to the marihuana growers program may be necessary." 84 Fed. Reg. at 44921. "Accordingly, before DEA completes this evaluation and registration process, DEA intends to propose regulations in the near future that would supersede the 2016 policy statement and govern persons seeking to become registered with DEA to grow marihuana as bulk manufacturers, consistent with applicable law." *Id.* That notice of proposed rulemaking was submitted to the Office of Management and Budget for review on August 22, 2019. Office of Information and Regulatory Affairs, Office of Management and Budget, *Pending EO 12866 Regulatory Review for Proposed Rule re: Controls to Satisfy the Requirements of the Controlled Substances Act Applicable to the Manufacture of Marihuana*, https://go.usa.gov/xVjk2 (accessed August 28, 2019); *see also* Executive Order No. 12866, 58 Fed. Reg. 51735, 51737 § 2(b) (Oct. 4, 1993) (coordinating review of proposed agency rules within the Office of Management and Budget).

SUMMARY OF ARGUMENT

This action is moot because DEA has published a notice of Scottsdale's application, thereby granting the relief requested by the mandamus petition. As the preceding discussion indicates, DEA has sent to the Office of Management and Budget a draft notice of proposed rulemaking that may bear on subsequent action on applications, including Scottsdale's. As relevant here, however, the agency has taken the only action sought in the mandamus petition.

STANDARD OF REVIEW

Whether a case is moot is a question of law the Court determines de novo. *Gul v. Obama*, 652 F.3d 12, 15 (D.C. Cir. 2011). "The burden of establishing mootness rests on the party that raises the issue." *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 459 (D.C. Cir. 1998).

ARGUMENT

THE PETITION IS MOOT BECAUSE DEA HAS PUBLISHED A NOTICE OF PETITIONER'S APPLICATION IN THE FEDERAL REGISTER

Under Article III of the Constitution, federal courts may exercise jurisdiction over a case only if a litigant has "suffered, or [been] threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Lewis v. Continental Bank Corp.,* 494 U.S. 472, 477 (1990). Thus, there is "no case or controversy, and a suit becomes moot, when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Chafin v. Chafin*, 568 U.S.

165, 172 (2013) (quotation marks omitted). Accordingly, this Court has held that a mandamus action becomes moot when "all substantive objectives which could be served by a writ of mandamus have been served." *Gordon v. Gray*, 193 F.2d 367, 367 (D.C. Cir. 1951). In particular, a mandamus action that seeks to compel agency action becomes moot when the agency takes the requested action. *See In re American Fed'n of Gov't Employees, AFL-CIO*, 837 F.2d 503, 505 (D.C. Cir. 1988) (holding that mandamus petition to compel an agency to decide certain "appeals within thirty days is moot" because "all the negotiability appeals listed in the petition have been decided").

The relief requested in Scottsdale's petition is to require DEA to publish a notice of Scottsdale's application to manufacture marijuana. *See* Am. Pet. 4 (petitioner "seeks a writ of mandamus directing the" respondents "to issue a 'notice of application'"); *id.* at 5 (describing the issue presented as whether "this Court [should] issue a writ of mandamus under 28 U.S.C. § 1651(a) to compel the agency to issue the statutorily required notice"); *id.* at 37 (concluding with a request that the "Court issue a writ of mandamus compelling" respondents "to issue a 'notice of application'"). DEA has granted that relief by publishing a notice of Scottsdale's application in the Federal Register. 84 Fed. Reg. 44920, 44923 (Aug. 27, 2019). Because "the court can

grant no meaningful relief" beyond that which DEA has already granted, "the case must be dismissed as moot." *Pulphus v. Ayers*, 909 F.3d 1148, 1152 (D.C. Cir. 2018).[2]

The petition notes that "[t]he agency still maintains discretion to deny or delay the application." Am. Pet. 37. As discussed above, that process may be affected by DEA's forthcoming notice of proposed rulemaking, which may result in changes that could affect DEA's consideration of applicants who seek to manufacture marijuana. *See supra* p.5. As relevant here, however, the only requested action has been taken, and the petition to compel that action is moot.

CONCLUSION

The petition should be dismissed as moot.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

MARK B. STERN
/s/Daniel Aguilar
DANIEL AGUILAR
Attorneys, Appellate Staff
Civil Division, Room 7266
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530
(202) 514-5432

August 2019

[2] The Court has routinely dismissed mandamus actions against government agencies as moot when the respondent agency subsequently grants the requested relief. *See Schirripa v. Sharpless*, 2019 WL 3229439, at *1 (D.C. Cir. June 25, 2019); *Bundy v. Sessions*, 2018 WL 4147462, at *1 (D.C. Cir. July 23, 2018); *Abdussamadi v. Harris*, 2003 WL 880993, at *1 (D.C. Cir. Feb. 25, 2003).

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of the Court's July 29, 2019 Order because it contains 1,722 words, excluding the parts of the brief exempted under Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1), according to the count of Microsoft Word.

/s/ Daniel Aguilar
Daniel Aguilar

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2018, I electronically filed the foregoing response with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Daniel Aguilar
Daniel Aguilar

ADDENDUM

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

Petitioner is Scottsdale Research Institute, LLC. Respondents are William P. Barr, in his official capacity as Attorney General; Uttam Dhillon, in his official capacity as Acting Administrator of the Drug Enforcement Administration (DEA); and DEA. Amicus Iraq and Afghanistan Veterans of America have filed a brief in this matter. There have been no intervenors.

B. Rulings Under Review

Petitioner seeks a writ of mandamus compelling DEA to publish a notice of its application to manufacture a controlled substance under 21 U.S.C. § 823(i)(2).

C. Related Cases

This case has not previously been before this Court or any other court, and there are no related cases pending in this Court or any other court. *See* D.C. Cir. R. 28(a)(1)(C) (defining "any other court" to mean a U.S. Court of Appeals or a court in the District of Columbia).