No. 11-1265

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICANS FOR SAFE ACCESS, *et al.*

Petitioners

v.

DRUG ENFORCEMENT ADMINISTRATION, *et al.*

Respondents.

PETION FOR REVIEW OF A FINAL ORDER OF THE DRUG ENFORCEMENT ADMINISTRATION

PETITIONERS' SUPPLEMENTAL BRIEF ON STANDING

ORAL ARGUMENT HAS BEEN HELD

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ARGUMENT

I. KRAWITZ HAS DEMONSTRATED AN INJURY-IN-FACT FROM HIS INABILITY TO RECEIVE ALL MEDICAL TREATMENT FROM THE VA

Courts have traditionally held that an actual or threatened denial of government benefits constitutes an injury-in-fact sufficient to confer standing. *See, e.g., T H v. Jones*, 425 F.Supp. 873, 879 (D.C. Utah 1975) (three-judge panel). Here, as is described in detail in Michael Krawitz's ("Krawitz") Supplemental Affidavit, filed herewith, he was denied prescription pain medication for a time and compelled to this day to seek pain treatment outside the VA system because he refused to sign a VA pain contract that would require him to abstain from the use of medical marijuana. *See* Supp. Krawitz Aff. ¶¶7-9; Aff., Exhibit 1, filed May 29, 2012, at 1. As a compromise negotiated by Krawitz's congressman, the VA agreed to allow Krawitz to receive his pain treatment from a non-VA osteopath located in Charlottesville, Virginia, which is located a significant distance from Krawitz's Elliston, Virginia home. Supp. Krawitz Aff. ¶9. Like many others, Krawitz would prefer to receive all of his medical treatment from the VA, since this would provide for the maintenance of all of his medical records in one system and would reduce the amount the amount of time and expense he would have to expend for duplicative evaluation and treatment. Supp. Krawitz Aff. ¶10. Furthermore, Krawitz is unable to receive his pain medications at no cost to him because the VA

will not pay for them unless one of their own doctors issues the prescription, which, for the reasons stated above, they will not do. Supp. Krawitz Aff. ¶9. These constitute injuries-in-fact sufficient to confer standing. *Cf. G. v. Hawaii*, 794 F.Supp.2d 1119, 1149 (D. Hi. 2011) (Medicaid recipients had standing to challenge Medicaid program that caused them lost freedom to choose their own health care providers); *Aiken v. Obledo*, 442 F.Supp. 628, 641 (E.D. Cal. 1977) (delay in receipt of government assistance sufficient to confer standing); *Beeker v. Olszewski*, 415 F.Supp.2d 734, 743-44 (E.D. Mich. 2006) (Medicaid recipients who were forced to fill their prescriptions at other pharmacies or go without their medications because of the denial had standing).

II. KRAWITZ HAS DEMONSTRATED AN INJURY-IN-FACT BY HIS NEED TO SEEK MEDICAL TREATMENT FROM A NON-VA PHYSICIAN IN OREGON

In addition to the non-VA osteopath Krawitz sees in Virginia, he is compelled by VA policy to seek another non-VA physician in the State of Oregon, so he can have his Oregon Medical Marijuana Program ("OMMP"), ORS 475.300-475.346, medical forms completed. *See* Supp. Krawitz Aff. ¶13. This further fractures the medical care he receives. 38 C.F.R. § 17.38(a)(1)(xiv) describes the "medical benefits packages" received by veterans, which includes the completion of medical forms by VA physicians as part of the "basic care" that comprises VHA's medical benefits package. Based on this VHA regulation, in 2008, the

VHA promulgated a Directive on the "Provision of Medical Statements and Completion of Forms by VA Health Care Providers," VHA Directive 2008-071, which "establishes policy requiring VHA health care providers, when requested, to assist veteran patients in completing non-Department of Veterans Affairs (VA) medical forms. . . ." Supp. Krawitz Aff., Exhibit 2. "This regulation requires VHA providers to honor requests by veterans for assistance in completing non-VA forms regarding their current health conditions and functional impairment." *Id.; see also id.* ("It is VHA policy that clinicians must honor all requests by patients for completion of non-VHA medical forms").

Notwithstanding this Directive, on January 31, 2011, the VHA issued Directive 2011-004 regarding "Access to Clinical Programs for Veterans Participating in State-Approved Marijuana Programs." Supp. Krawitz Aff., Exhibit 1. Citing marijuana's placement in Schedule I of the CSA, this Directive instructs VA clinicians that they may not complete forms for participation in State medical marijuana programs – "It is VHA policy to prohibit VA providers from completing forms seeking recommendations or opinions regarding a Veteran's participation in a State marijuana program." *Id.* This Directive, thus, divests Krawitz of the benefit of having a VA physician in Oregon fill out a non-VHA medical form, which compels Krawitz to expend his own resources to be examined and get advice from a non-VA physician in Oregon, since it would be futile for

Krawitz to visit a VA physician in Oregon for this purpose, even though he would otherwise be eligible to do so. Supp. Krawitz Aff. ¶¶11-15. This deprivation of a medical benefit constitutes an injury-in-fact for standing purposes. *See* cases cited *supra; see also Stewart v. Sullivan*, 816 F.Supp. 281, 286 (D.N.J. 1982) (foregoing medical benefits to seek treatment from physician of choice constitutes injury).[1]

III. THE INJURIES SUFFERED BY KRAWITZ ARE CAUSED BY MARIJUANA'S PLACEMENT IN SCHEDULE I AND WOULD BE REDRESSED BY A FAVORABLE DECISION IN THIS CASE

To establish causation for standing purposes in a situation such as this one, a party need only demonstrate that the injury suffered in "fairly traceable" to the challenged conduct or the challenged conduct is a "substantial factor" in bringing about the injurious conduct of the VA. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotations marks omitted); *Tozzi v. U.S. Dep't of Health and Human Servs.*, 271 F.3d 301, 308 (D.C. Cir. 2001) (applying "substantial factor" test to cases where challenged conduct affects conduct of third-parties). The obvious basis for the VHA Directive prohibiting VA clinicians from completing forms for participation in State medical marijuana programs is the designation of marijuana in the CSA as a "Schedule I drug[] having no currently-accepted medical use," which is expressly cited in the Directive. Supp. Krawitz

[1] For reasons related to this Directive, and the placement of marijuana in Schedule I, VA physicians are unwilling to discuss to medical benefits of marijuana with Krawitz, since they would be obligated to state this in their clinical notes. *See* Supp. Krawitz Decl. ¶13. This constitutes another form of constitutional injury.

Decl., Exhibit 1. Except for the tension between marijuana's placement in Schedule I and Oregon's recognition of marijuana as medicine, there is no reason for the VHA to prohibit VA clinicians from completing the "Attending Physician's Statement" required under the Oregon Medical Marijuana Program, since it expressly states that "[t]his is not a prescription for the use of medical marijuana." Supp. Krawitz Aff., Exhibit 3. A change in this VA policy would enable Krawitz to be treated by a VA physician in Oregon who could complete the OMMP form, thereby consolidating his treatment in the VA system.

Relatedly, the designation of marijuana as a Schedule I substance is a substantial factor causing the injury suffered by Krawitz under the VA pain contract, since reclassification of marijuana would almost certainly induce the VHA to modify its pain contract to allow for the medical use of marijuana, since it would then be deemed by statute to have an accepted medical use. Redressibilty is established for standing purposes where the relief sough "will likely alleviate" the particular injury alleged by the party. *See Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664-64 (D.C. Cir. 1996) (en banc). Rescheduling of marijuana will almost certainly alleviate the injuries suffered by Krawitz.

DATED: October 22, 2012

Respectfully Submitted,

/s/ Joseph D. Elford
Joseph D. Elford

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served on October 22, 2012, via ECF/electronic filing upon the United States Attorney General's Office, 950 Pennsylvania, Avenue, N.W., Washington DC, 20530, and Carl E. Olsen, 130 East Aurora Avenue, Des Moines, IA 50313.

DATED: October 22, 2012 Respectfully Submitted,

/s/ Joseph D. Elford
Joseph D. Elford