Iowans for Medical Marijuana
Post Office Box 4091, Des Moines, Iowa 50333 / 515-288-5798 / www.iowamedicalmarijuana.org

Honorable John W. Suthers
Attorney General of Colorado
1525 Sherman Street
7th floor
Denver, CO 80203

Certified Mail Receipt No.
7007 1490 0002 0045 9675

December 12, 2008

Dear Attorney General Suthers:

Colo. Const. Art. XVIII, Section 14 (1)(b), accepts the medical use of marijuana:

> "Medical use" means the acquisition, possession, production, use, or transportation of marijuana or paraphernalia related to the administration of such marijuana to address the symptoms or effects of a patient's debilitating medical condition, which may be authorized only after a diagnosis of the patient's debilitating medical condition by a physician or physicians, as provided by this section.

United States Code, Title 21, § 812(a), requires the United States Drug Enforcement Administration (DEA) to update the list of Schedule I substances annually to make sure that substances in Schedule I have "no currently accepted medical use in treatment in the United States." 21 U.S.C. § 812(b)(1)(B).

Has your state notified the DEA that marijuana no longer meets this required finding for inclusion in Schedule I of the Controlled Substances Act?

Attached is a copy of my motion to enjoin the DEA from the unlawful enforcement of Title 21, Code of Federal Regulations, Section 1308.11(d)(22), which has been filed in the U.S. District Court for the Southern District of Iowa, ***Carl Olsen v. Michael Mukasey, et al.***, No. 4:08-cv-370. Will your state consider joining in this federal civil complaint for declaratory and injunctive relief?

Sincerely,

Carl E. Olsen
Iowans for Medical Marijuana
Advisory Board Member, Patients Out of Time
Post Office Box 4091
Des Moines, Iowa 50333
515-288-5798
carl-olsen@mchsi.com

http://www.iowamedicalmarijuana.org/
http://www.medicalcannabis.com/
Created in 1995, Patients Out of Time is a national nonprofit 501(c)(3) organization dedicated to educating health care professionals, the public and legislators about the efficacy of therapeutic cannabis/marijuana (www.medicalcannabis.com). Your state has recognized the medicinal value of cannabis and allows patients to use it with a physician's recommendation.

Mr. Carl Olsen has studied the law related to the CSA and has noted that with your state (plus 12 other states), there is recognized medical value in cannabis and therefore it must be removed from the Schedule I category. In protecting the public health and welfare of the citizens of your state it is vital that you end this unfounded suffering of thousands of patients who could benefit from this medicine. This is an urgent need that needs your attention and the motion put forth by Mr. Olsen offers a legal solution.

Patients Out of Time will help you in any way.

Sincerely,
Mary Lynn Mathre

Mary Lynn Mathre, RN, MSN, CARN, CLNC
President and Co-founder
Patients Out of Time
1472 Fish Pond Rd.
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On Monday, December 1, 2008, the Supreme Court of the United States denied certiorari in ***City of Garden Grove v. Superior Court of California***, 157 Cal. App. 4th 355, 380-87, 68 Cal. Rptr. 3d 656, 673-78 (Cal. App. 2007, Slip Opinion, pages 26-34), review denied by the California Supreme Court on March 19, 2008 (explaining why the federal Controlled Substances Act does not preempt the state medical marijuana law). The same result was reached in ***County of San Diego v. San Diego NORML***, 165 Cal. App. 4th 798, 81 Cal. Rptr. 3d 461 (2008), rev. denied (California Supreme Court, October 16, 2008). The relationship between the state and federal drug laws is examined in depth in ***Gonzales v. Oregon***, 546 U.S. 243 (2006).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CARL OLSEN, Plaintiff, v. MICHAEL MUKASEY, et al., Defendants.	))))))	No. 4:08-cv-00370

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Comes Now the Plaintiff, pursuant to Federal Rule of Civil Procedure 65, and respectfully moves the court to immediately issue a preliminary injunction enjoining the Defendants from enforcing the unlawful regulation of marijuana in Schedule I of the Controlled Substances Act, 21 C.F.R. § 1308.11(d)(22).

APPLICABLE LEGAL STANDARD

Until recently, the legal standard for preliminary injunction in the Eighth Circuit was controlled by ***Dataphase Systems, Inc. v. C L Systems, Inc.***, 640 F.2d 109, 113 (8th Cir. 1981):

> Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

This month, the United States Supreme Court restated the legal standard in ***Winter v. Natural Resources Defense Council,*** No. 07-1239 (2008 U.S. LEXIS 8343, November 12, 2008), Slip Opinion, at page 10:

> A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. See *Munaf v. Geren*, 553 U. S. __, __ (2008) (slip op., at 12); *Amoco Production Co. v. Gambell*, 480 U. S. 531, 542 (1987); *Weinberger v. Romero-Barcelo*, 456 U. S. 305, 311–312 (1982).

SUCCESS ON THE MERITS

Thirteen States "in the United States" have accepted the "medical use" of marijuana. Federal law requires that anything which has "accepted medical use in treatment in the United States" be removed from Schedule I of the Controlled Substances Act (CSA). See 21 U.S.C. § 812(b)(1)(B); and see ***United States v. Oakland Cannabis Buyers' Cooperative***, 532 U.S. 483 (2001).

> The statute divides drugs into five schedules, depending in part on whether the particular drug has a currently accepted medical use. The Act then imposes restrictions on the manufacture and distribution of the substance according to the schedule in which it has been placed. Schedule I is the most restrictive schedule. 5 The Attorney General can include a drug in schedule I only if the drug "has no currently accepted medical use in treatment in the United States," "has a high potential for abuse," and has "a lack of accepted safety for use . . . under medical supervision." §§ 812(b)(1)(A)-(C). Under the statute, the Attorney General could not put marijuana into schedule I if marijuana had any accepted medical use.

United States v. Oakland Cannabis Buyers' Cooperative, at 491-492. The Plaintiff's interpretation of the CSA is further reinforced by the recent interpretation of the CSA in ***Gonzales v. Oregon***, 546 U.S. 243, 251 (2006) ("[The Attorney General] is not authorized to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law."). Previous case law is in accord. See ***NORML v. DEA***, 559 F.2d 735 (D.C. Cir. 1977).

> After outlining the latitude within which various parts of the marihuana plant could be rescheduled, the Acting Administrator proceeded to determine how to exercise his discretion to reschedule. He examined a letter of April 14, 1975 from Dr. Theodore Cooper, Acting Assistant Secretary for Health. The letter, which was introduced at oral argument before ALJ Parker, states that there "is currently no accepted medical use of marihuana in the United States" and that there "is no approved New Drug Application" for marihuana on file with the [*743] Food and Drug Administration of HEW.[41] Relying on this letter, the Acting Administrator concluded that marihuana could not be removed from CSA Schedule I. He stated that Schedule I "is the only schedule reserved for drugs without a currently accepted medical use in treatment in the United States." Id. at 44167. Because the letter from Dr. Cooper established that marihuana has no medical use, "no matter the weight of the scientific or medical evidence which petitioners might adduce, the Attorney General could not remove marihuana from Schedule I." Id.
>
> [41] The letter, reproduced at 40 FED. REG. 44165 (1975), reads in full:
>
> APRIL 14, 1975
>
> JERRY N. JENSON.
> *Acting Deputy Administrator, Drug Enforcement Administration, Department of Justice, 1405 I Street NW., Washington, D.C. 20537.*
>
> DEAR MR. JENSON: At your request, we have prepared the following statement giving our position on the medical uses of Cannabis sativa L. (marihuana).
>
> There is currently no accepted medical use of marihuana in the United States. There is no approved New Drug Application for Cannabis sativa L. (Marihuana) or tetrahydrocannabinol, the active principle in marihuana. There are Investigational New Drug Applications on file to determine possible therapeutic uses and potential toxic effects of the substance.
>
> We have included for your information a copy of the most recent report on these studies and a copy of the FDA policy regarding clinical studies with marihuana.
>
> Sincerely yours,
>
> THEODORE COOPER, M.D.,
> *Acting Assistant Secretary for Health.*

The Defendants' interpretation of the CSA, that the Secretary of Health and Human Services, and not the States, determines whether the States can accept the medical use of marijuana is absurd and unsupported by the plain language of the

statute and case law both before and after the enactment of State laws accepting the medical use of marijuana. For a more detailed explanation, see the Plaintiff's Memorandum of Law attached to his Original Complaint (Docket #1, Attachment #1), and the Plaintiff's Reply to the Defendants' Motion to Dismiss (Docket #8).

IRREPARABLE HARM IN THE ABSENCE OF PRELIMINARY RELIEF

The Defendants agree on Page 1 of their Brief in Support of their Motion to Dismiss that the Plaintiff is a member of the Ethiopian Zion Coptic Church and that the use of marijuana is part of his religion. Indeed, the Defendants have previously conceded, "[T]he Ethiopian Zion Coptic Church is a bona fide religion whose sacrament is marijuana." ***Olsen v. DEA***, 878 F.2d 1458, 1462 (D.C. Cir. 1989). In 1984, the Iowa Supreme Court held, "Olsen is a member and priest of the Ethiopian Zion Coptic Church. Testimony at his trial revealed the bona fide nature of this religious organization and the sacramental use of marijuana within it." ***State of Iowa v. Carl Eric Olsen***, No. 171/69079, July 18, 1984, Slip Opinion, at page 2, reprinted in Carl ***Eric Olsen v. State of Iowa***, Civ. No. 83-301-E, 1986 WL 4045 (S.D. Iowa 1986) ("Plaintiff is a priest of the Ethiopian Zion Coptic Church. This religion uses marijuana as in integral part of its religious doctrine.") (attached as Exhibit #11 to Plaintiff's Original Complaint, Docket #1, Attachment #3).

The Defendants also point out on Page 3 of their Brief in Support of their Motion to Dismiss that the Plaintiff's request for a religious-use exemption was recently denied by this Court and the denial was affirmed by the Eighth Circuit in ***Olsen v. Mukasey***, 541 F.3d 827 (8th Cir. 2008). A petition for writ of certiorari will

be filed with the U.S. Supreme Court in ***Olsen v. Mukasey*** on or before December 7, 2008.

In ***Olsen v. Mukasey***, the Plaintiff asserts that if the "compelling interest test" of ***Sherbert v. Verner***, 374 U.S. 398 (1963) and ***Wisconsin v. Yoder***, 406 U.S. 205 (1972), now mandated by the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb et seq., were applied to his sacramental use of marijuana, the Defendants would be unable to show actual harm – undermining marijuana's classification as a scheduled substance in the CSA. The Eighth Circuit did not require the Defendants to make such a showing.

The Plaintiff has an irreparable injury to his First Amendment rights. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." ***Elrod v. Burns***, 427 U.S. 347, 373 (1976). The irreparable harm the Plaintiff suffers is the direct result of the Defendants' unlawful determination that marijuana, which has "accepted medical use in treatment in the United States," must remain in Schedule I of the CSA, which by definition cannot contain any substance which actually has "accepted medical use in treatment in the United States."

> When government action or inaction is challenged by a party who is a target or object of that action, as in this case, "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan* 504 U.S. at 561-62. More particularly, when a party brings a pre-enforcement challenge to a statute that both provides for criminal penalties and abridges First Amendment rights, "a credible threat of present or future prosecution itself works an injury that is sufficient to confer standing." *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996).

Minnesota Citizens Concerned for Life v. FEC, 113 F.3d 129, 131 (8th Cir. 1997).

THE BALANCE OF EQUITIES TIPS IN THE PLAINTIFF'S FAVOR

Because the Defendants have failed to do what they were statutorily required to do in 1996 by transferring marijuana out of Schedule I of the CSA pursuant to 21 U.S.C. § 812(a) ("The schedules established by this section shall be . . . updated and republished on an annual basis . . ."), the balance of equities tips in the Plaintiff's favor.

THE PUBLIC INTEREST

The public has an interest in the enforcement of laws properly enacted by Congress. Torturing sick people, putting people in prison, seizing their property, and giving them criminal records to burden the remainder of their lives is not something the Defendants should view as a goal of good government. Marijuana's placement in the CSA, in a category with the most severe penalties, has always been controversial.

As the Ninth Circuit recently observed in ***Raich v. Gonzales***, 500 F.3d 850, 866 (9th Cir. 2007):

> As stated above, Justice Anthony Kennedy told us that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence*, 539 U.S. at 579. For now, federal law is blind to the wisdom of a future day when the right to use medical marijuana to alleviate excruciating pain may be deemed fundamental. Although that day has not yet dawned, considering that during the last ten years eleven states have legalized the use of medical marijuana, that day may be upon us sooner than expected. Until that day arrives, federal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering.[16]

[16] Because we find no fundamental right here, we do not address whether any law that limits that right is narrowly drawn to serve a compelling state interest. See *Flores*, 507 U.S. at 301-02. We note, however, that, a recent Supreme Court case suggests that the Controlled Substances Act is not narrowly drawn when fundamental rights are concerned. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S. Ct. 1211, 1221-23, 163 L. Ed. 2d 1017 (Feb. 21, 2006) (observing that "mere invocation of the general characteristics of Schedule I substances, as set forth in the Controlled Substances Act, cannot carry the day," and that the government had presented no evidence that narrow exceptions to the Schedule I prohibitions would undercut the government's ability to effectively enforce the Controlled Substances Act).

CONCLUSION

Plaintiff asserts that for the foregoing reasons and the arguments in the Plaintiff's Memorandum of Law attached to his Original Complaint (Docket #1, Attachment #1) and in his Reply to the Defendants' Motion to Dismiss (Docket #8) an immediate injunction should issue enjoining the Defendants from the unlawful enforcement of the fraudulent regulation of marijuana contained in 21 C.F.R. § 1308.11(d)(22).

Plaintiff requests an immediate hearing on this motion.

Respectfully submitted:

Carl Eric Olsen, Pro Se
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(515) 288-5798

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 24, 2008 I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

CHRISTOPHER D. HAGEN, Assistant U.S. Attorney

Filed Electronically

/s/ Carl Olsen

CARL OLSEN