IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CARL OLSEN, in propria persona, Plaintiff, v. MICHAEL MUKASEY, Attorney General of the United States, MICHELE LEONHART, Acting Administrator, United States Drug Enforcement Administration, and CONDOLEEZZA RICE, United States Secretary of State, all in their official capacities, Defendants.	*	No. 4-08-CV-370 **MEMORANDUM OF LAW IN SUPPORT OF ORIGINAL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

JURISDICTION

This complaint is based on the complaint in ***Oregon v. Ashcroft***, 192 F.Supp.2d 1077 (D. Ore. 2002), *petitions for review granted and injunction previously entered by the district court continued in full force and effect*, ***Oregon v. Ashcroft***, 368 F.3d 1118 (9th Cir. 2004), *affirmed*, ***Gonzales v. Oregon***, 546 U.S. 243 (2006).

Although the U.S. Court of Appeals for the 9th Circuit in ***Oregon v. Ashcroft***, 368 F.3d 1118 (9th Cir. 2004), held that review of a final interpretive rule should be filed in the U.S. Court of Appeals, pursuant to 21 U.S.C. § 877, the Court of

Appeals did uphold the injunction issued by the U.S. District Court in ***Oregon v. Ashcroft***, 192 F.Supp.2d 1077 (D. Ore. 2002).

This case is different from ***Oregon v. Ashcroft***, because the Drug Enforcement Administration (**"DEA"** hereafter) has failed, for twelve years, to initiate action to reschedule marijuana. Rescheduling of marijuana is required by the Controlled Substances Act, 21 U.S.C. §§ 801-904 (**"CSA"** hereafter). The DEA is aggressively enforcing an unlawful regulation, which has resulted in numerous innocent people going to prison and the Plaintiff being denied the fundamental right to freedom of religion.

Where an administrative agency has failed to initiate proceedings required by federal statute, and no administrative record has been created, review is proper in federal district court. ***Monson v. DEA***, 522 F.Supp.2d 1188, 1194-1195 (D.N.D. 2007):

> The DEA contends that this Court lacks subject matter jurisdiction because the Controlled Substances Act confers exclusive jurisdiction on the United States Court of Appeals to review any "final decision" of that agency. See 21 U.S.C. § 877. However, the plaintiffs are not challenging a "final decision" of the DEA, such as the denial of a license application or promulgation of a rule. Rather, the plaintiffs are seeking a declaration that the Controlled Substances Act does not apply to their planned cultivation of industrial hemp pursuant to North Dakota state law and, as a result, that they cannot be prosecuted under the Act. Thus, no "final decision" of the DEA is at issue and the Court finds that 21 U.S.C. § 877 does

not bar the plaintiffs from seeking relief in this Court.

21 U.S.C. § 877 provides as follows:

> All final determinations, findings, and conclusions of the Attorney General under this subchapter shall be final and conclusive decisions of the matters involved, except that any person aggrieved by a final decision of the Attorney General may obtain review of the decision in the United States Court of Appeals for the District of Columbia or for the circuit in which his principal place of business is located upon petition filed with the court and delivered to the Attorney General within thirty days after notice of the decision. Findings of fact by the Attorney General, if supported by substantial evidence, shall be conclusive.

21 U.S.C. § 877 cannot preclude a district court from assuming jurisdiction over an action against the DEA where there is no "final decision" of that agency to be reviewed. In *PDK Labs Inc. v. Reno*, 134 F. Supp.2d 24, 29 (D.D.C. 2001), the district court held that it could assume jurisdiction over a challenge to a DEA interpretative letter which did "not constitute a final determination, finding or conclusion within the meaning of [21 U.S.C. §] § 877." In *Novelty, Inc. v. Tandy*, 2006 U.S. Dist. LEXIS 57270 (S.D. Ind. 2006), an unreported case, the district court held that it had jurisdiction over a challenge to the DEA's practice of sending letters directing sellers of certain chemicals to take certain actions with respect to transportation and storage. The court held that "the most persuasive view is that § 877 does not apply where there has been no formal finding, conclusion or determination based on a record that provides a meaningful basis for judicial review." *Id*. at *3. *See also Wedgewood Village Pharmacy, Inc. v. Ashcroft*, 293 F. Supp.2d 462, 468 n. 2 (D.N.J. 2003) (stating that 21 U.S.C. § 877 did not deprive the district court of jurisdiction where there was no actual factual determination by the agency).

The DEA argues that if the challenged decision is not 'final,' the plaintiffs may not bring an action in any

> court. This case does not involve a DEA "decision" of any kind. Instead, the plaintiffs seek a declaratory judgment that the DEA cannot criminally prosecute them for cultivating industrial hemp under their state-issued licenses. The Administrative Procedure Act and the Declaratory Judgment Act, 28 U.S.C. § 2201, confer authority on this Court to afford that remedy. The Court has jurisdiction over the plaintiffs' claims for relief.

GONZALES v. RAICH (2005)

"In 1996, California voters passed Proposition 215, now codified as the Compassionate Use Act of 1996. The proposition was designed to ensure that 'seriously ill' residents of the State have access to marijuana for medical purposes, and to encourage Federal and State Governments to take steps towards ensuring the safe and affordable distribution of the drug to patients in need." ***Gonzales v. Raich***, 545 U.S. 1, 5-6 (2005) (***"Raich"*** hereafter).

RAICH DID NOT CONTEST THE SCHEDULING OF MARIJUANA

The question decided in ***Raich*** was "whether the power vested in Congress by Article I, § 8, of the Constitution '[t]o make all Laws which shall be necessary and proper for carrying into Execution' its authority to 'regulate Commerce with foreign Nations, and among the several States' includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.'" ***Raich***, 545 U.S. at 5.

Ms. Raich did not contest the scheduling of marijuana in Schedule I of the CSA. Because Ms. Raich challenged the power

of Congress to regulate marijuana under the Commerce Clause, instead of the improper scheduling of marijuana, the U.S. Supreme Court was left with no choice but to uphold the power of Congress to regulate marijuana. However, at the same time, the Supreme Court, sue sponte, mentioned that the evidence in the case called into question the scheduling of marijuana even though no one had raised the issue. "We acknowledge that evidence proffered by respondents in this case regarding the effective medical uses for marijuana, if found credible after trial, would cast serious doubt on the accuracy of the findings that require marijuana to be listed in Schedule I." ***Raich***, 545 U.S. at 28.

There is no doubt that federal law applies to California. The injury that Ms. Raich suffered was not the result of Congress' regulation of marijuana, but the failure of the DEA to remove marijuana from Schedule I of the CSA in 1996 when marijuana no longer fit the requirements for inclusion in Schedule I.

The U.S. Supreme Court noted that efforts to reschedule marijuana through administrative procedures established by the CSA had been unsuccessful, but all of those efforts were prior to the enactment of a valid California state medical marijuana law in 1996:

> Starting in 1972, the National Organization for the Reform of Marijuana Laws (NORML) began its campaign to reclassify marijuana. Grinspoon & Bakalar 13-17. After some fleeting success in 1988 when an Administrative Law Judge (ALJ) declared that the DEA would be acting in an "unreasonable, arbitrary, and capricious" manner if it continued to deny marijuana access to seriously ill patients, and concluded that it should be reclassified as a Schedule III substance, *Grinspoon v. DEA*, 828 F.2d 881, 883-884 (CA1 1987), the campaign has proved unsuccessful. The DEA Administrator did not endorse the ALJ's findings, 54 Fed. Reg. 53767 (1989), and since that time has routinely denied petitions to reschedule the drug, most recently in 2001. 66 Fed. Reg. 20038 (2001). The Court of Appeals for the District of Columbia Circuit has reviewed the petition to reschedule marijuana on five separate occasions over the course of 30 years, ultimately upholding the Administrator's final order. See *Alliance for Cannabis Therapeutics v. DEA*, 304 U.S. App. D.C. 400, 15 F.3d 1131, 1133 (1994).

Raich, 545 U.S. at 15 n.23.

It is worth noting that in 1988 the ALJ recommended Schedule II, not Schedule III. The petitioners requested Schedule II and that is what the ALJ recommended. When the U.S. Supreme Court makes an error like this, it proves the statement is only dicta and proves ***Raich*** was not about scheduling.

The ***Grinspoon*** decision occurred in 1987 – prior to the ALJ's ruling in 1988, not after it. So, even if ***Grinspoon*** had been a decision on federal marijuana scheduling, the U.S. Court of Appeals for the First Circuit had no access to the 1988 ALJ's recommendation to reschedule marijuana when it considered ***Grinspoon*** in 1987. Again, this was only dicta and proves ***Raich*** was not about scheduling.

Alliance for Cannabis Therapeutics, 15 F.3d 1131 (D.C. Cir. 1994), was finally decided by the U.S. Court of Appeals for the District of Columbia Circuit in 1994, two years before the enactment of the California Compassionate Use Act in 1996.

Particularly instructive is the response from the DEA to Mr. Gettman's petition to reschedule marijuana (which was filed in 1995, a year before California enacted the first medical marijuana law in the United States): "You do not assert in your petition that marijuana has a currently accepted medical use in treatment in the United States or that marijuana has an accepted safety for use under medical supervision." 66 Fed. Reg. 20038 (April 18, 2001). Obviously, if an issue is not raised, a court cannot rule on it. A court could raise the issue sue sponte, but that rarely happens.

So, it is plain to see that ***Raich*** was not about scheduling and the U.S. Supreme Court was not examining the accuracy of marijuana's scheduling in the CSA. The Plaintiff now brings the issue of scheduling before this U.S. District Court.

In May of 2001, the U.S. Supreme Court explained the obligation the government has to be sure that substances in Schedule I have no accepted medical use: "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***, 532 U.S. 483, 492 (2001).

Based on the fact that scheduling has never been addressed by any federal court since California enacted the first state medical marijuana law in the United States in 1996, this Original Complaint for Declaratory and Injunctive Relief raises a question of first impression that was not decided or foreclosed by ***Gonzales v. Raich***, 545 U.S. 1 (2005), or ***United States v. Oakland Cannabis Buyers' Cooperative***, 532 U.S. 483, 492 (2001).

THE CSA DOES NOT PREEMPT STATE MEDICAL MARIJUANA LAWS

When the federal government regulates in an area traditionally regulated by the states, the presumption is that Congress does not intend to preempt state law unless it specifically says so. "Consideration of issues arising under the Supremacy Clause 'starts with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" ***Cipollone v. Liggett Group***, 505 U.S. 504, 516 (1992) (citing, ***Rice v. Santa Fe Elevator Corp.***, 331 U.S. 218, 230 (1947).

The CSA contains no specific language stating that it was the intent of Congress to preempt state laws establishing accepted standards of medical practice. On the contrary, the CSA actually contains language that says Congress did not intend to occupy the field of medicine traditionally regulated by the states. That field, traditionally regulated by the states, includes setting standards for use of drugs in that state. 21 U.S.C. § 903. *See* ***Gonzales v. Oregon***, 546 U.S. 243 (2006).

In rejecting any attempt by the Drug Enforcement Administration (**"DEA"** hereafter) to define accepted state medical practice, the U.S. Supreme Court held: "The Government, in the end, maintains that the prescription requirement delegates to a single Executive officer the power to effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality. The text and structure of the CSA show that Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it." ***Gonzales v. Oregon***, 546 U.S. 243, 275 (2006) (**"*Oregon*"** hereafter).

The issue in ***Oregon*** was whether the DEA could issue an interpretive rule conflicting with the CSA. Just as the DEA cannot issue an interpretive rule conflicting with the CSA, the DEA cannot maintain an existing rule that is now in conflict

with the CSA. A change in state law accepting the medical use of a substance initially placed in Schedule I of the CSA requires rescheduling.

PREVIOUS CASE LAW DEFINING THE ROLE OF THE DEA

Previous case law on the question of marijuana's scheduling has been decided in the context of the absence of any state law accepting the medical use of marijuana. The enactment of state laws accepting marijuana's medical use is a substantial change that now requires re-examination of the question in the context of ***Gonzales v. Oregon***. In the absence of any state law accepting the medical use of marijuana, the DEA must make an independent determination of whether marijuana has any accepted medical use. However, once a state accepts the medical use of marijuana, the DEA no longer has the role of determining accepted medical use. Judge Young pointed this out in his September 6, 1988 recommended ruling, ***In the Matter of Marijuana Rescheduling***, DEA Docket No. 86-22.

At page 32, Judge Young wrote: "The DEA, on the other hand, is charged by 21 U.S.C. § 812(b)(1)(B) and (2)(B) with ascertaining what it is that other people have done with respect to a drug or substance: 'Have they accepted it?;' not 'Should they accept it?'"

At page 33, Judge Young (referring to ***Grinspoon***) continued: "In the MDMA third final order DEA is actually making the

decision that doctors have to make, rather than trying to ascertain the decision which doctors have made. Consciously or not, the Agency is undertaking to tell doctors what they should or should not accept. In so doing the Agency is acting beyond the authority granted in the Act."

The U.S. Supreme Court referred to five previous controlled substance scheduling cases, which are summarized below. ***Raich***, 545 U.S. at 15 n.23.

> The National Organization for the Reform of Marijuana Laws ("**NORML**" hereafter) filed a petition to reschedule marijuana with the Department of Justice in May 1972. It was filed within two months after the release of *Marihuana: A Signal of Misunderstanding*, the title given to the *First Report by the National Commission on Marihuana and Drug Abuse*, chaired by Governor Shafer. The Bureau of Narcotics and Dangerous Drugs (**"BNDD"** hereafter) responded by saying that international treaties precluded the rescheduling of marijuana. The U.S. Court of Appeals rejected the interpretation of the BNDD: "The respondent seems to be saying that even though the treaty does not require more control than schedule V provides, he can on his own say-so and without any reason insist on Schedule I. We doubt that this was the intent of Congress."

NORML v. Ingersoll, 497 F.2d 654, 660-661 (D.C. Cir. 1974).

In 1977, The U.S. Court of Appeals rejected the DEA's argument that lack of accepted medical use automatically determines that a substance must be scheduled in Schedule I, but did recognize that accepted medical use precludes placement in Schedule I. "Admittedly, Section 202(b), 21 U.S.C. § 812(b), which sets forth the criteria for placement in each of the five

CSA schedules, established medical use as the factor that distinguishes substances in Schedule II from those in Schedule I." ***NORML v. DEA***, 559 F.2d 735, 748 (D.C. Cir. 1977).

In the absence of any accepted medical use of marijuana, the DEA must make an independent analysis using the factors set forth in 21 U.S.C. § 811(c). "Moreover, DEA's own scheduling practices support the conclusion that substances lacking medical usefulness need not always be placed in Schedule I. At the hearing before ALJ Parker DEA's Chief Counsel, Donald Miller, testified that several substances listed in CSA Schedule II, including poppy straw, have no currently accepted medical use. Tr. at 473-474, 488. He further acknowledged that marihuana could be rescheduled to Schedule II without a currently accepted medical use. Tr. at 487-488. Neither party offered any contrary evidence." ***NORML v. DEA***, 559 F.2d 735, 749 (D.C. Cir. 1977).

The reason the U.S. Supreme Court mentioned ***Grinspoon v. DEA***, 828 F.2d 881 (1st Cir. 1987) (**"*Grinspoon*"** hereafter), in ***Raich*** is because it clarifies the limited role of the DEA in determining "accepted medical use in treatment in the United States." The case was not about marijuana, but was particularly instructive on the operation of the scheduling criteria. "[C]ongress did not intend 'accepted medical use in treatment in

the United States' to require a finding of recognized medical use in every state ..." ***Grinspoon***, 828 F.2d at 886.

"As is apparent, one salient concept distinguishing the two schedules [Schedule I and Schedule II] is whether a drug has 'no currently accepted medical use in treatment in the United States.' ***Alliance for Cannabis Therapeutics v. DEA***, 930 F.2d 936, 937-938 (D.C. Cir. 1991) (***"ACT I"*** hereafter).

"[N]either the statute nor its legislative history precisely defines the term 'currently accepted medical use'; therefore, we are obliged to defer to the Administrator's interpretation of that phrase if reasonable." ***ACT I***, 930 F.2d at 939.

The important distinction here is that accepted medical use is not defined in 21 U.S.C. § 812, it is defined in 21 U.S.C. § 903. If no state accepts the medical use of a drug or other substance, the DEA can determine whether it has accepted medical use despite the lack of accepted medical use in any state. However, when a state accepts the medical use of a drug or other substance, then the DEA is bound by that state's decision.

"A drug is placed in Schedule I if (1) it 'has a high potential for abuse,' (2) it has "no currently accepted medical use in treatment in the United States,' and (3) 'there is a lack of accepted safety for use of the drug ... under medical supervision.' 21 U.S.C. § 812(b)(1) (1988) (emphasis added).

The Schedule II criteria are somewhat different: (1) the drug 'has a high potential for abuse,' (2) it 'has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions,' and (3) 'abuse of the drug ... may lead to severe psychological or physical dependence.' 21 U.S.C. § 812(b)(2) (1988) (emphasis added). ***Alliance for Cannabis Therapeutics v. DEA***, 15 F.3d 1131, 1133 (D.C. Cir. 1994) (***"ACT II"*** hereafter). "[T]he Administrator found on December 29, 1989, that marijuana had no currently accepted medical use." ***ACT II***, 15 F.3d at 1134.

Again, 1989 was 7 years prior to the enactment of the first state medical marijuana law in 1996. The administrator had the statutory authority to determine whether marijuana had any accepted medical use in 1989. Now, and since 1996, the DEA no longer has any statutory authority to determine whether marijuana has any accepted medical use, because the states have that authority under 21 U.S.C. § 903, and the states have made that determination.

PLAINTIFF'S STANDING TO COMPLAIN IN DISTRICT COURT

The Plaintiff has been a member of the Ethiopian Zion Coptic Church since the early 1970s. The Plaintiff has been arrested on numerous occasions for possession of marijuana. In all of those criminal prosecutions the evidence proved the Plaintiff never hurt anyone. The sole reason the Plaintiff was

convicted of a crime was because marijuana was assumed to be a threat to public health and safety due to its placement in Schedule I of the CSA. "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). "A petitioner is not required to exhaust administrative remedies in 'a situation in which primary conduct is affected.'" ***Toilet Goods v. Gardner***, 387 U.S. 158, 164 (1967). "Failure to comply with the challenged Regulations could have serious consequences if they are valid." ***Toilet Goods v. Gardner***, 360 F.2d 677, 682 (2nd Cir. 1966). See ***Monson v. DEA***, 522 F.Supp.2d 1188, 1195-1199 (D.N.D. 2007):

> We think that the threat of federal prosecution here is realistic. [Plaintiff] Owen, a farmer as well as a legislator, proposes to grow cannabis sativa plants to produce industrial products if permitted to do so. The DEA has made clear, both by its conduct in New Hampshire and elsewhere, that it views this as unlawful under the federal criminal statutes governing marijuana. . . . Nor, as the medical-use controversy bears out, . . . is there any reason to doubt the government's zeal in suppressing any activity it regards as fostering marijuana use.

Id. at 1196 (citing *New Hampshire Hemp Council v. Marshall*, 203 F.3d 1, 5 (1st Cir 2002)).

CONCLUSIONS OF LAW

It is clear from the legislative history, the language of the statute, and the case law, that the findings required by 21 U.S.C. § 811 can never justify the inclusion of drugs or

substances which have accepted medical use in treatment in the United States in Schedule I of the CSA. Congress explicitly recognized the authority of the states to determine accepted medical use. Congress explicitly expressed its intent not to preempt state laws regarding accepted medical use of drugs or substances. 21 U.S.C. § 903. ***Gonzales v. Oregon***, 546 U.S. 243 (2006).

It is also clear from the legislative history, the language of the statute, and the case law, that a substance that has no accepted medical use in treatment in the United States can still be transferred to a schedule lower than Schedule I if the DEA finds that transferring the substance to a lower schedule would be consistent with the findings required by 21 U.S.C. § 811. ***NORML v. DEA***, 559 F.2d 735 (D.C. Cir. 1977). However, the DEA cannot leave a drug or substance in Schedule I if it has accepted medical use in the United States.

Prior to 1996, in the absence of any state law accepting the medical use of marijuana, it was entirely acceptable for the DEA to apply the requirements of 21 U.S.C. § 811 to marijuana in determining whether it should remain in Schedule I or be transferred to a lower schedule. ***Alliance for Cannabis Therapeutics v. DEA***, 930 F.2d 936 (D.C. Cir. 1991); ***Alliance for Cannabis Therapeutics v. DEA***, 15 F.3d 1131 (D.C. Cir. 1994).

It is now entirely unlawful for the DEA to maintain marijuana in Schedule I because marijuana now has accepted medical use in treatment in the United States. If a substance has accepted medical use in treatment in the United States, it cannot be in Schedule I. ***Grinspoon v. DEA***, 828 F.2d 881 (1st Cir. 1987); ***United States v. Oakland Cannabis Buyers' Cooperative***, 532 U.S. 483 (2001).

Respectfully submitted this 15th day of September, 2008.

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