UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CARL OLSEN, 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. Defendants.	)	Civil File No. 4:08-cv-00370 (RWP/RAW)

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INTRODUCTION

Plaintiff is an Iowa member of the Ethiopian Zion Coptic Church who seeks to use cannabis ("marijuana") as part of his religious sacrament. Plaintiff has asserted that under his church's religious teachings, "marijuana is combined with tobacco and smoked 'continually all day, through church services, through everything we do.'" *Olsen v. Drug Enforcement Admin.*, 279 U.S. App. D.C. 1, 2 (D.C. Cir. 1989) *quoting State v. Olsen*, 315 N.W.2d 1, 7 (Iowa 1982). Olsen and fellow church members have been convicted several times in federal and state courts for various marijuana offenses. Because marijuana is listed as a Schedule I controlled substance under the Controlled Substances Act ("CSA"), courts have consistently held that the government's compelling interest overrides Plaintiff's desired use.

On May 12, 2008, Plaintiff petitioned the Drug Enforcement Administration (DEA) to remove marijuana from Schedule I of the CSA, asserting that marijuana should be rescheduled because it has a "currently accepted medical use." Before DEA had a chance to assess Plaintiff's petition, he also filed this lawsuit, arguing that the listing of marijuana under Schedule I of the CSA is unlawful.

Plaintiff seeks a declaration that marijuana is not a Schedule I controlled substance and an order enjoining federal, state, and local officials from enforcing the CSA against him for the sacramental use of marijuana. He contends that the placement of marijuana under Schedule I of the CSA pursuant to 21 C.F.R. § 1308.11(d)(22) is no longer lawful because the drug now has "accepted medical use in treatment in the United States." Plaintiff further argues that the CSA

gives the states the authority to determine standards for the accepted medical use of drugs, and the DEA's failure to reschedule marijuana violates this mandate.

In addition to the Attorney General and the DEA Administrator, Plaintiff's complaint also names Secretary of State Condoleezza Rice as the official responsible for enforcing the Unites States' obligations under the Single Convention on Narcotics Act and the Convention on Psychotropic Substances. Plaintiff does not, however, assert that he is subject to prosecution under either of these treaties.

Plaintiff's claims suffer from two jurisdictional defects: first, Plaintiff failed to exhaust all administrative remedies before filing his complaint; and second, Plaintiff lacks standing to challenge the Secretary of State's enforcement of the United States's obligations under the Single Convention on Narcotics Drugs and the Convention on Psychotropic Substances.

Plaintiff's claims also fail on the merits because under the CSA, neither the Attorney General nor the DEA are under any obligation to allow states to determine whether a drug has a "currently accepted medical use." The CSA authorizes the Attorney General to transfer a drug between schedules if "the drug or other substance has no currently accepted medical use in treatment in the United States." 21 U.S.C. § 812(b)(1)(B). The CSA provides that, in making rescheduling determinations, the Attorney General should consider eight factors, none of which include a state's determination of whether a drug has an accepted medical use.

In sum, whether on the basis of threshold jurisdictional defects under Federal Rule of Civil Procedure 12(b)(1), or because he has failed to state a claim under Rule 12(b)(6), Plaintiff's lawsuit must be dismissed.

BACKGROUND

Plaintiff has on numerous occasions unsuccessfully filed suit in various state and federal courts, seeking a ruling that his use of marijuana is protected by the First Amendment. In *State v. Olsen*, 315 N.W.2d 1 (Iowa 1982), the Supreme Court of Iowa rejected Plaintiff's free-exercise-of-religion defense to his conviction for possession of marijuana with intent to deliver. In *United States v. Rush*, 738 F.2d 497 (1st Cir. 1984), the First Circuit rejected Plaintiff's free exercise defense to his conviction for participating in an operation to distribute marijuana. In *Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458 (D.C. Cir. 1989), the D.C. Circuit affirmed the DEA's denial of Plaintiff's request for a religious-use exemption from the federal laws proscribing marijuana. And most recently, in *Olsen v. Mukasey*, 541 F.3d 827 (8th Cir. 2008), the Eighth Circuit rejected Plaintiff's appeal of this Court's dismissal of Plaintiff's First Amendment, Religious Freedom Restoration Act (RFRA), and Religious Land Use and Institutionalized Persons Act (RLUIPA) claims against state and federal officials. In rejecting these claims, the court held that "there has not been a change in controlling law" since plaintiff's previous claims had been litigated. *Id*. at 823.

The Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, establishes a comprehensive federal scheme to regulate controlled substances. Under the CSA, it is unlawful to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense" any controlled substance, "[e]xcept as authorized by [21 U.S.C. §§ 801-904]." *Id.* § 841(a)(1). The CSA similarly criminalizes possession of any controlled substance except as authorized by the Act. *Id.* § 844(a).

When established, the CSA specified the initial scheduling of controlled substances and the criteria by which controlled substances could be rescheduled. 21 U.S.C. §§ 811-12. Congress placed marijuana into Schedule I. *See* Pub. L. 91-513, § 202(c), Schedule I (c)(10).

Under the CSA, the Attorney General "may by rule" transfer a drug or substance between schedules if he finds that such drug or substance has a potential for abuse, and makes with respect to such drug or other substance the findings prescribed by subsection (b) of Section 812 for the schedule in which such drug is to be placed. 21 U.S.C. § 811(a)(1). In order for a substance to be placed in Schedule I, the Attorney General must find that (1) the drug or other substance has a high potential for abuse; (2) the drug or other substance 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 or other substance under medical supervision. 21 U.S.C. § 812(b)(1)(A)-(C). To be classified in one of the other schedules (II through V), a drug must have a "currently accepted medical use in treatment in the United States." A drug is placed under Schedule II if (1) it has a high potential for abuse; (2) is currently accepted use in treatment 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).

The CSA provides that, in making any rescheduling determination, the Attorney General shall consider the following eight factors:

(1) The drug's actual or relative potential for abuse;
(2) Scientific evidence of its pharmacological effect, if known;
(3) The state of current scientific knowledge regarding the drug;
(4) Its history and current pattern of abuse;
(5) The scope, duration, and significance of abuse;
(6) What, if any, risk there is to the public health;

> (7) The drug's psychic or physiological dependence liability; and
> (8) Whether the drug is an immediate precursor of a substance already controlled under the CSA.

21 U.S.C. § 811(c). The Attorney General has delegated the authority for making this determination to the Administrator of DEA, who has redelegated it to the Deputy Administrator. *See* 28 C.F.R. §§ 0.100(b) & 0.104, Appendix to Subpart R, sec. 12.

The CSA further provides that, before initiating proceedings to reschedule a drug, the Administrator must gather the necessary data and request from the Secretary of HHS a scientific and medical evaluation and recommendations as to whether the controlled substance should be rescheduled as the petitioner proposes. 21 U.S.C. § 811(b); 21 CFR § 1308.43(d); *Gettman v. DEA*, 290 F.3d 430, 431 (D.C. Cir. 2002). In making such evaluation and recommendations, the Secretary must consider the factors listed in paragraphs (2), (3), (6), (7), and (8) above, and any scientific or medical considerations involved in paragraphs (1), (4), and (5) above. 21 U.S.C. § 811(b). The Secretary has delegated this responsibility to the Assistant Secretary for Health.

The recommendations of the Assistant Secretary are binding on the Administrator with respect to scientific and medical matters. *Id*. If the Administrator determines that the evaluations and recommendations of the Assistant Secretary and ''all other relevant data'' constitute substantial evidence that the drug that is the subject of the petition should be subject to lesser control or removed entirely from the schedules, he shall initiate rulemaking proceedings to reschedule the drug or remove it from the schedules as the evidence dictates. 21 U.S.C. § 811(b); 21 C.F.R. § 1308.43(e).

STANDARD OF REVIEW

Actions are subject to dismissal when the court lacks subject matter jurisdiction over the claims, Fed. R. Civ. P. 12(b)(1), or when a party fails to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6). A motion to dismiss pursuant to Rule 12(b)(1) may challenge the complaint either on its face or on the factual truthfulness of its averments. *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). In reviewing a motion to dismiss pursuant to Rule 12(b)(6), however, the court accepts the facts alleged in the complaint as true and dismisses the action when the allegations in the complaint cannot raise a claim of entitlement to relief. *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1965-66 (2007).

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER PLAINTIFF'S CLAIMS.

A. Because Plaintiff Failed to Exhaust His Administrative Remedies Prior to Filing, this Court Should Dismiss Plaintiff's Complaint.

The Administrative Procedure Act (APA) requires Plaintiff to exhaust all administrative remedies before petitioning the federal courts for relief. 5 U.S.C. § 704. (The APA permits judicial review of agency actions that are either "made reviewable by statute [or] final agency action for which there is no other adequate remedy in a court." *Id.*). Plaintiff filed this complaint, however, without exhausting the DEA administrative process – he brought this action at the same time he filed his rescheduling petition with the DEA.

This Court has held that a DEA petitioner must exhaust administrative remedies before seeking relief in federal court. Just last July, in evaluating a similar lawsuit filed by Plaintiff, this Court held that Plaintiff must first pursue an administrative remedy before petitioning a federal

court to transfer marijuana to a less restrictive schedule. *See* Ex. 1 (Or. [49] of July 16, 2007, *Olsen v. Gonzales*, Civ. No. 07-cv-23 (S.D. Iowa) (JAJ/RAW)). This Court stated:

> Defendants assert that this court lacks jurisdiction to remove marijuana from the CSA and that "the CSA provides 'an administrative remedy for any interested party to request that a substance be deleted entirely from the CSA or be transferred to a less restrictive schedule," citing 21 U.S.C. § 811(a). This Court agrees and dismisses Count V as to all Defendants."

Id. at 17. Despite this Court's order, Plaintiff again seeks to compel this Court to order the Attorney General to reschedule marijuana. Because Plaintiff has again failed to exhaust his administrative remedy, this Court again lacks jurisdiction over Plaintiff's request.

Other courts have found that requiring exhaustion (1) enhances efficiency by ensuring that disputes actually exist, and (2) increases the precision of the judicial process by ensuring that both parties have clarified and fully articulated their positions. As the D.C. Circuit held in *Ticor Title*, "if an agency proceeding is still at an early stage and the party seeking review has the right to administrative review, a court may decline review for failure to exhaust administrative remedies." *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 735 (D.C. Cir. 1987). "Judicial intervention may not be necessary because the agency can correct any initial errors at subsequent stages of the process; moreover, the agency's position on important issues of fact and law may not be fully crystalized or adopted in final form." *Id*. at 736 (citing E. Gellhorn & B. Boyer, *Administrative Law and Process*, 316-19 (1981)).

In the specific context of petitioning the DEA for exemption from the CSA:

> [C]ompelling [a] Plaintiff to either engage in the administrative process or waive its rights and wait for a "final order" with "the findings of fact and conclusions of law upon which the order is based" might well prove an effective choice for the resolution of this case. For instance, the wait to

> conclude the administrative process here is not exceptionally long, now less than thirty (30) days, and therefore not particularly 'harmful' to Plaintiff's alleged interests; moreover, allowing for the conclusion of the process - even if it does not result in a reversal that could moot this suit - could prove beneficial because the reviewing court would then have the DEA's factual and legal conclusions clearly set forth in an extensive manner that would enable the court to conduct a full APA review under a complete administrative record.

Doe v. Gonzales, 2006 U.S. Dist. LEXIS 44402, at *49-49 (D.D.C. June 29, 2006) *quoting Am. Bioscience, Inc. v. Thompson*, 243 F.3d 579, 582-83 (D.C. Cir. 2001).

Here, the Court should again dismiss Plaintiff's complaint because he filed this action prior to the DEA's issuance of its final decision on his rescheduling petition.[1] This Court should

[1] Even if the DEA had issued a final decision, this Court lacks jurisdiction because the CSA vests exclusive jurisdiction to review final decisions with the Court of Appeals:

> [A]ny 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.

21 U.S.C. § 877. "Section 877 . . . seems to explicitly vest *exclusive* jurisdiction in the courts of appeals over any CSA-based agency determination that could properly be before a federal court." *Doe v. Gonzalez [sic]*, No. 06-966, 2006 WL 1805685, at *22 (D.D.C. June 29, 2006), *aff'd sub nom. Doe v. Drug Enforcement Admin.*, 484 F.3d 561 (D.C. Cir. 2007) (emphasis added). *See also Doe*, 484 F.3d at 568-69 (court of appeals had exclusive jurisdiction over statutory and constitutional challenge to DEA denial of controlled substances import permit); *Oregon v. Ashcroft*, 368 F.3d 1118, 1120 & n.1 (9th Cir. 2004) (court of appeals had exclusive jurisdiction over challenge to interpretive rule issued by Attorney General pursuant to CSA), *aff'd sub nom. Gonzales v. Oregon*, 546 U.S. 243 (2006); *Hemp Indus. Ass'n v. Drug Enforcement Admin.*, 333 F.3d 1082, 1084-85 (9th Cir. 2003) (court of appeals had original jurisdiction over challenge to legislative rule issued by Attorney General pursuant to CSA); *Steckman v. Drug Enforcement Admin.*, No. Civ. A. H-97-1334, 1997 WL 588871, at *1-2 (S.D. Tex. Sept. 16, 1997) (district court lacked jurisdiction over CSA claim because court of appeals had exclusive jurisdiction: "When Congress has prescribed a particular method of review, that procedure is exclusive even if the statutory scheme does not explicitly describe itself as the 'exclusive' method of review.").

therefore allow the DEA to assess Plaintiff's petition before permitting Plaintiff to seek relief in this forum.

B. Because Plaintiff is Under No Threat of Prosecution Under the Single Convention on Narcotic Drugs or the Convention on Psychotrophic Substances, Plaintiff's Claims Against the Secretary of State are Non-Justiciable.

Without describing any alleged violation of law or threat of enforcement, Plaintiff's complaint also names Secretary of State Condoleeza Rice as the official responsible for the enforcement of non-self-executing treaties designed to standardize international drug laws: the Single Convention on Narcotic Drugs and the Convention on Psychotropic Substances. The Single Convention on Narcotic Drugs, March 30, 1961, 18 U.S. T. 1407, is an international treaty that prohibits the production and supply of narcotics, and the Convention on Psychotropic Substances, Feb. 21, 1971, 32 U.S. T. 543, is a treaty that places import and export restrictions on narcotics. While these non-self-executing treaties provide guidelines for defining which substances fall under various schedules, the United States has codified drug scheduling under the CSA, and prosecutes federal cases pursuant to the CSA. The Plaintiff, therefore, does not face the threat of prosecution under either treaty.

Plaintiff nevertheless seeks a declaration that the Secretary of State lacks the authority to allow marijuana to remain under Schedule I of either of these treaties. For the reasons outlined in Section III, Plaintiff has failed to demonstrate that marijuana should not be listed under Schedule I. Even if Plaintiff were to make such a showing, he lacks standing to seek an order removing marijuana from these treaties because he is not under threat of prosecution under either treaty. "[A] lawsuit in federal court is not . . . an arena for public-policy debates." *Mausolf v.*

Babbitt, 85 F.3d 1295, 1301 (8th Cir. 1996). Instead, "Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.'" *Allen v. Wright*, 468 U.S. 737, 750 (1984). To establish standing, a plaintiff must demonstrate that he has suffered an "injury in fact" – "an invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Plaintiff has never been prosecuted under either or these international treaties, and his prior "convictions were based on the Controlled Substances Act, 21 U.S.C. §§ 801-904 (1982)." *Olsen v. Drug Enforcement Admin*., 878 F.2d at 1459. Although these treaties' drug scheduling guidelines are similar to the CSA's structure, the Plaintiff has not been prosecuted and does not even assert the threat of prosecution under either convention. Plaintiff's only other reference to either treaty is his citation to the 1973 Commission on Marihuana and Drug Abuse's recommendation to remove marijuana from the Single Convention on Narcotic Drugs. Because Plaintiff is not threatened with prosecution under either treaty, however, he lacks standing to bring suit against the Secretary of State and his claims are not justiciable.

Finally, in addition to seeking a declaration against the Secretary of State ordering her to reschedule marijuana, Plaintiff's complaint is unclear as to whether he also seeks protection to use marijuana under the Single Convention on Narcotic Drugs and the Convention on Psychotropic Substances. Because neither treaty creates a private cause of action, however, *see, e.g.*, *Olsen v. Gonzales*, 4:07-cv-00023-JAJ (S.D. Iowa 2007), Plaintiff lacks standing to seek such relief in federal court.

II. THE ATTORNEY GENERAL AND DEA ADMINISTATOR ARE NOT REQUIRED TO DEFER TO STATE DETERMINATIONS OF WHETHER MARIJUANA IS PROPERLY SCHEDULED UNDER THE CONTROLLED SUBSTANCES ACT.

This lawsuit is easily dismissed for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). The CSA's statutory scheme disproves plaintiff's contention that Congress has given states the authority to determine whether a drug has a "currently accepted medical use" within the meaning of the CSA. The CSA, in fact, explicitly provides only the Attorney General with the authority to make scheduling determinations, and outlines the criteria by which the Attorney General should make such assessments. Plaintiff's claim that the DEA is usurping decision-making authority that Congress delegated to the states must therefore fail. Finally, Plaintiff's claims are also barred by res judicata and collateral estoppel because a federal court has previously found that Plaintiff's suit to compel rescheduling is outside the scope of the CSA's rescheduling provisions.

A. Section 903 of the Controlled Substances Act Does Not Provide States the Authority to Make Scheduling Determinations.

The CSA does not assign to the states the authority to make findings relevant to CSA scheduling determinations. In arguing that the CSA provides such authority, Plaintiff erroneously, relies, in part, on Section 903, which provides:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903.

As a threshold matter, 21 U.S.C. § 903 merely reaffirms, for purposes of the CSA, what is inherent in the supremacy clause of the United States Constitution: that any state law that actually conflicts with federal law is preempted by federal law and is therefore invalid under the supremacy clause. *See*, *e.g.*, *California Federal Savings and Loan Assoc. v. Guerra*, 479 U.S. 272, 280-281 (1987). As the Supreme Court stated in the context of marijuana possession and cultivation taking place in purported compliance with California law: "The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." *Gonzales v. Raich*, 545 U.S. 1, 29 (2005).

Section 903 provides that, so long as the states do not enact a law relating to controlled substances that creates a positive conflict with the CSA, the states are free to enact laws regulating controlled substances that will operate alongside the CSA. However, Section 903 does not, as Plaintiff seems to contend, stand for the proposition that states' controlled substance laws that conflict with the CSA can override or frustrate the purposes of the CSA.

B. The CSA Vests Authority to Make Scheduling Determinations with the Attorney General.

The CSA expressly delegates the task of making scheduling determinations – including whether a substance has any currently accepted medical use – to the Attorney General. 21 U.S.C. § 811(a).

The CSA explicitly provides that in making a scheduling determination, the Attorney General shall consider the following eight factors:

> (1) The drug's actual or relative potential for abuse;
> (2) Scientific evidence of its pharmacological effect, if known;
> (3) The state of current scientific knowledge regarding the drug;

> (4) Its history and current pattern of abuse;
> (5) The scope, duration, and significance of abuse;
> (6) What, if any, risk there is to the public health;
> (7) The drug's psychic or physiological dependence liability; and
> (8) Whether the drug is an immediate precursor of a substance already controlled under the CSA.

21 U.S.C. § 811(c). These factors do not include any requirement that the Attorney General must defer to, let alone consider, changes in state law. The CSA's statutory text evidences that Congress did not envision such a role for state law in establishing or changing the schedules of controlled substances under the CSA.

In order to determine whether a substance has a "currently accepted medical use," the DEA Administrator applies a five-part test:

> 1) The drug's chemistry must be known and reproducible;
> 2) There must be adequate safety studies;
> 3) There must be adequate and well-controlled studies proving efficacy;
> 4) The drug must be accepted by qualified experts; and
> 5) The scientific evidence must be widely available.

Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1137 (D.C. Cir. 1994). This test was approved by the United States Court of Appeals for the D.C. Circuit as a reasonable interpretation of the statutory language. *See id.* at 1134 (affirming the Administrator's Final Order applying these five criteria). Significantly, with respect to Plaintiff's petition, this test also includes no reference to state law.

The CSA also expressly requires the Secretary of HHS to provide a scientific and medical evaluation, as well as scheduling recommendations to inform the Attorney General's findings. 21 U.S.C. § 811(b). Congress's explicit provision of scheduling authority to these two

federal entities precludes Plaintiff's argument that Section 903 delegates this authority to the states.

Next, in arguing that the Attorney General must defer to state determinations of whether particular drugs have medical purposes, Plaintiff mistakenly relies on *Gonzales v. Oregon*, 546 U.S. 243 (2006). Plaintiff argues that O*regon* supports his claim by requiring federal authorities to defer to states' determinations on issues of medical practice. To the contrary, *Oregon* affirms the core federal authority of the Attorney General, in consultation with the Secretary of HHS, as to drug scheduling.

In *Oregon*, the United States Supreme Court considered the Attorney General's interpretive rule prohibiting doctors from prescribing controlled substances for use in physician-assisted suicide under an Oregon state law that permitted the procedure. *Id.* The Court held that the rule was not entitled to deference because it was not issued pursuant to an explicit delegation of rulemaking authority. *Id.* at 258-69. The Court did not find the Attorney General's interpretation persuasive, and invalidated the rule because the CSA "manifests no intent to regulate the practice of medicine generally." *Id.* at 270.

In so holding, however, the Court repeatedly cited by contrast – as a valid and explicit delegation of authority – the Attorney General's authority as to drug scheduling. *See Oregon*, 546 U.S. at 262 ("It would be anomalous for Congress to have painstakingly described the Attorney General's limited authority to . . . schedule a single drug, but to have given him, just by implication, authority to declare an entire class of activity outside the course of professional practice and therefore a criminal violation of the CSA."). The Court observed that, by the text of the CSA itself, Congress had delegated "control" to the Attorney General to add, remove, or

reschedule substances. The Court noted that the term "control" is a term of art in the CSA, meaning to "add a drug or other substance . . . to a schedule . . . whether by transfer from another schedule or otherwise." *Oregon*, 546 U.S. at 260 (quoting 21 U.S.C. § 802(5)). The Court further cited the CSA's detailed scheduling procedures, including the requirement to request a scientific and medical evaluation by the Secretary of HHS. *Id*. at 260. *Oregon* thus confirmed that, in contrast to the invalidated rule, drug scheduling authority and the corresponding scheduling procedures are an appropriate exercise of the federal power granted in the CSA.

The Court also approvingly cited the CSA's explicit allocation of medical judgments in the scheduling context – not, as Plaintiff argues, to states – but rather, to the Secretary of Health and Human Services:

> The CSA allocates decisionmaking powers among statutory actors so that medical judgments, if they are to be decided at the federal level and for the limited objects of the statute, are placed in the hands of the Secretary. In the scheduling context, for example, the Secretary's recommendations on scientific and medical matters bind the Attorney General.

Id. at 265. Whereas the invalidated rule involved an overly broad assertion of authority, the drug scheduling context exemplified the "CSA's consistent delegation of medical judgments to the Secretary and otherwise careful allocation of powers." *Id*. at 272. Thus, far from giving authority to the states, *Oregon* instead confirms the Attorney General's explicit authority, in conjunction with the Secretary's recommendations on scientific and medical matters, as to drug scheduling.

The two other recent Supreme Court cases plaintiff cites likewise affirmed the primacy of federal law over state marijuana laws. In *United States v. Oakland Cannabis Buyers'*

Cooperative, 532 U.S. 483 (2001) (*OCBC)*, the Court held that there was no medical necessity exception to the CSA's prohibition on manufacturing and distributing marijuana. Notwithstanding California state law authorizing possession and cultivation of marijuana for claimed "medical" purposes, Congress's clear determination that all schedule I controlled substances, including marijuana, have no currently accepted medical use forecloses any argument as to whether such drugs can be dispensed and prescribed for medical use. *Id*. The Court in *OCBC* was explicit in stating that "for purposes of the [CSA], marijuana has 'no currently accepted medical use' at all. § 812." *Id*. at 491. Similarly, in *Gonzales v. Raich*, 545 U.S. 1 (2005), the Court held that, even in a state that had legalized marijuana activity for claimed medical use, Congress' commerce clause power extended to prohibit purportedly intrastate cultivation and use of marijuana in compliance with the state law. "Limiting the activity to marijuana possession and cultivation 'in accordance with state law' cannot serve to place respondents' activities beyond congressional reach." *Id*. at 29.

C. Res Judicata and Collateral Estoppel Bar Plaintiff's Claims Because They Have Been Previously Rejected By the Court of Appeals.

1. *Res judicata bars Plaintiff's claims.*

The doctrine of res judicata bars Plaintiff's action seeking a rescheduling order. Under res judicata, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). To establish that a claim is barred by res judicata, a party must show: "(1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) both suits involve the same parties (or those in privity with them); and (4) both

suits are based upon the same claims or causes of action." *Yankton Sioux Tribe v. United States HHS*, 533 F.3d 634, 639 (8th Cir. 2008) *quoting Costner v. URS Consultants, Inc.*, 153 F.3d 667, 673 (8th Cir. 1998). "A claim is barred by res judicata if it arises out of the same nucleus of operative facts as the prior claim." *Lane v. Peterson*, 899 F.2d 737, 742 (8th Cir. 1990), *cert. denied*, 498 U.S. 823 (1990).

Res judicata bars this action because a substantial portion of Plaintiff's complaint merely rehashes arguments he has unsuccessfully asserted when previously petitioning DEA to reschedule marijuana. In 1985, the Court of Appeals for the Eleventh Circuit upheld an order of the United States District Court for the Southern District of Florida rejecting Plaintiff's action seeking to compel the DEA to reschedule marijuana to allow its religious use by members of the Ethiopian Zion Coptic Church. *Olsen v. Drug Enforcement Admin*., 776 F.2d 267 (11th Cir. 1985). In that case, Plaintiff also relied on 21 U.S.C. § 811 in arguing that marijuana should be transferred from Schedule I. Holding that Plaintiff's request fell outside the scope of the transfer provision, which requires the DEA to evaluate "the current state of knowledge and understanding of the effects of the substance upon the user and upon society," *id*. at 268, the court affirmed the district's court's dismissal of Plaintiff's action on the ground that Plaintiff "failed to state a cause of action." *Id*.

The Eleventh Circuit's prior ruling satisfies the four prongs necessary to establish res judicata. First, the Eleventh Circuit's ruling constituted a final judgment; second, the suit was based on proper jurisdiction; third, both suits involve the same parties; and fourth, both suits are based on the same claims and arise out of the same nucleus of operative facts. Plaintiff argued in both cases that the Controlled Substances Act improperly places marijuana under Schedule I and

therefore violates his First Amendment right to use marijuana as the sacrament of his church. Plaintiff may argue that this action is based on a new claim and a new set of facts – his contention that the Attorney General must defer to twelve states' determinations regarding the medical use of marijuana. Plaintiff's present suit, however, does not arise from a new set of facts, but merely presents a different legal argument, which is "precisely what is barred by res judicata." *Apotex, Inc. v. FDA*, 393 F.3d 210, 218 (D.C. Cir. 2004) *quoting Drake v. Faa*, 291 F.3d 59, 65 (D.C. Cir. 2002).

Plaintiff's previous rescheduling petition, which fell outside the scope of the transfer provision of the CSA, had also cited a number of studies disputing the health risks posed by marijuana, including (1) Congress's 1970 creation of the Commission on Marihuana and Drug Abuse to resolve its doubts about marijuana's safety; (2) the Commission's 1972 report that found marijuana was not a sufficient threat to public health and safety; and (3) the Commission's 1973 report that recommended the United States remove marijuana from the Single Convention on Narcotic Drugs because it did not pose a sufficient health problem. Just as Plaintiff argued previously that the DEA should reschedule marijuana based on the Commission on Marihuana and Drug Abuse's reports and recommendations, he now argues that the Attorney General and DEA Administrator should defer to state determinations regarding the medical use of marijuana.

As the Eleventh Circuit ruled in assessing Plaintiff's prior action, however, the relevant basis for determining whether marijuana should be rescheduled is not congressional reports, but the DEA's assessment of the current state of knowledge and understanding of the effects of the substance upon the user and upon society. Once again, Plaintiff has failed to present evidence

relevant to the DEA's rescheduling assessment. As noted earlier, in evaluating whether a substance has an accepted medical use, the DEA Administrator applies a five-part test:

1) The drug's chemistry must be known and reproducible;
2) There must be adequate safety studies;
3) There must be adequate and well-controlled studies proving efficacy;
4) The drug must be accepted by qualified experts; and
5) The scientific evidence must be widely available.

Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1137 (D.C. Cir. 1994). Because states' determinations are not considered by the DEA in evaluating medical use, Plaintiff has again based his claim for rescheduling marijuana on an argument that is not relevant to the DEA's assessment of whether a substance should be rescheduled. At best, Plaintiff therefore merely presents a different theory to argue that criteria other than the DEA's five-part test should be used to reschedule marijuana. This argument, however, has already been rejected by the Court of Appeals. Because both claims arise out the same facts and Plaintiff has once again failed to make an argument relevant to DEA's rescheduling criteria, res judicata bars Plaintiff's claim against the Attorney General and the DEA Administrator.

Res judicata also bars Plaintiff's claim against the Secretary of State regarding the Convention on Psychotropic Drugs. Plaintiff names the Secretary of State in her capacity as enforcer of the United States's obligations under the treaty. He asserts that Defendants must comply with their obligations under these treaties by rescheduling marijuana under their provisions as well.

Res judicata bars this claim because this Court has already rejected Plaintiff's argument in a prior ruling. In *Olsen v. Gonzales*, 4:07-cv-00023-JAJ (S.D. Iowa 2007), this Court rejected Plaintiff's argument that his use of marijuana is protected under the Convention on Psychotropic

Substances, holding that the treaty is not self-executing and does not create a private cause of action. This Court's previous ruling satisfies the four elements for establishing res judicata: (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) both suits involve the same parties; and (4) both suits are based upon the same claims or causes of action. Plaintiff's Convention on Psychotropic Substances claim is therefore barred.

2. *Collateral estoppel also bars Plaintiff's claims*.

Plaintiff's claims are also barred by collateral estoppel. Collateral estoppel, or "issue preclusion[,] . . . bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim." *Taylor*, 128 S. Ct. at 2171 *quoting New Hampshire v. Maine*, 532 U.S. at 748-49. Issue preclusion has five basic elements: (1) the party sought to be precluded in the second suit must have been a party, or in privity with a party, to the original lawsuit; (2) the issue sought to be precluded must be the same as the issue involved in the prior action; (3) the issue sought to be precluded must have been actually litigated in the prior action; (4) the issue sought to be precluded must have been determined by a valid and final judgment; and (5) the determination in the prior action must have been essential to the prior judgment. *Robinette v. Jones*, 476 F.3d 585, 589 (8th Cir. 2007) citing *Anderson v. Genuine Parts Co., Inc.*, 128 F.3d 1267, 1273 (8th Cir. 1997).

For many of the same reasons that res judicata bars Plaintiff's claims, this action is barred by collateral estoppel as well. As the Court held in *Olsen v. Drug Enforcement Admin.*, 776 F.2d 267 (11th Cir. 1985), Plaintiff's petition to remove marijuana from Schedule I fell

outside the scope of the transfer provisions of the CSA because it did not implicate DEA's evaluation of "the current state of knowledge and understanding of the effects of the substance upon the user and upon society." *Id*. at 268.

Plaintiff's present petition similarly fails to implicate the criteria DEA uses to determine whether a drug should be rescheduled, and collateral estoppel therefore bars his claims. First, the party sought to be precluded, Plaintiff Olsen, was the same party that was the same party in the original suit. Second, the issue sought to be precluded is the same as the issue in previous suit. As outlined in the res judicata analysis, *see supra* Sec. II(C)(1), both actions sought to compel the DEA to reschedule marijuana so that Plaintiff could use the substance as religious sacrament. Plaintiff argued than, as he argues here, that the Attorney General and DEA must defer to criteria outside the scope of their statutory authority to schedule drugs under the Controlled Substances Act. Third, this issue was actually litigated in the prior action. Fourth, the Eleventh Circuit reached a final judgment regarding Plaintiff's action. And fifth, the determination of the issue was essential to the prior judgment, as the Eleventh Circuit refused to reschedule marijuana because Plaintiff's request was outside the scope of the CSA's transfer provision and therefore failed to state a cause of action. Because Plaintiff's present action similarly relies on evidence outside the scope of the transfer provision – the determinations of twelve states – his action is barred by collateral estoppel.

D. Plaintiff's Remaining Arguments Regarding Available Medical Evidence are Without Merit and Do Not Compel the Attorney General to Reschedule Marijuana.

Finally, none of Plaintiff's other arguments as to whether marijuana has a currently accepted medical use have merit. First, Plaintiff's cites a portion of the 1970 legislative history

of the CSA relating to appointment of a commission that issued a report on marijuana in 1972 as somehow relevant to the Attorney General's scheduling determination. In the more than 36 years since this report was published, however, numerous individuals and marijuana legalization advocates have unsuccessfully pointed to the 1972 marijuana report in support of efforts to justify CSA violations involving marijuana, to challenge the constitutionality of the federal marijuana laws, or, as with Plaintiff's latest petition, to argue that marijuana should be deemed to have medical efficacy for purposes of the CSA. None of these efforts has ever succeeded for the simple reason that Congress took no action to alter the CSA in any respect as a result of the 1972 report.

Plaintiff also observes that the federal government has supplied marijuana to medical patients through a program of compassionate use. Mem. at 5-6 (citing *Kuromiya v. United States*, 78 F. Supp. 2d 367 (E.D. Pa. 1999). The existence of this exception is not a ground for rescheduling. As the federal district court held in *Kuromiya*, the government's decision to continue the program at all was a "means of balancing" the interests of those who had relied on the drug with the government's desire to avoid distributing marijuana. 78 F. Supp. 2d at 370-71.

Finally, Plaintiff argues that the "DEA's own Administrative Law Judge [ALJ Young] has already determined that marijuana is safe for use under medical supervision." As Plaintiff acknowledges, however, the DEA Administrator unambiguously rejected ALJ Young's determination in *In The Matter of Marijuana Rescheduling*, DEA Docket No. 86-22 (Sept. 6, 1998). The D.C. Circuit later affirmed the DEA's final order (Mar. 26, 1992) in *ACT II* (affirming denial of NORML's petition to reschedule marijuana from Schedule I to Schedule II of the CSA). The Administrator's rejection of ALJ Young's determination did not depend on the

fact that no state had accepted the use of marijuana for medical purposes. Indeed, ALJ Young's opinion had noted the efforts of a number of states to pass such legislation. Furthermore, for the reasons set forth in detail above, the existence of state legislation is not relevant to a scheduling determination.

III. THE SECRETARY OF STATE IS NOT REQUIRED TO REMOVE MARIJUANA FROM THE SCHEDULE OF THE SINGLE CONVENTION ON NARCOTIC DRUGS OR THE CONVENTION ON PSYCHOTROPIC SUBSTANCES.

Plaintiff argues that the Attorney General and the DEA administrator must notify the Secretary of State when they have new information that marijuana should not be considered a Schedule I substance. Because the Attorney General and DEA Administrator have not and are not required to reschedule marijuana, however, the Secretary of State is not obligated to remove marijuana from the schedule of international treaties.

Furthermore, when a treaty mandates a particular level of control, the Attorney General is required to "issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations without regard to scientific or medical findings." 21 U.S.C. § 811d. The Single Convention on Narcotic Drugs classifies marijuana under Schedule IV, the treaty's most strictly controlled category. March 30, 1961, 18 U.S. T. 1407. The Convention on Psychotropic Substances, Feb. 21, 1971, 32 U.S. T. 543, lists marijuana under Schedule I, its most controlled category. Although the treaties exclude medicinal drug use, Article 2(5)(b) of the Single Convention on Narcotic Drugs states that for Schedule IV drugs:

> A Party shall, if in its opinion the prevailing conditions in its country render it the most appropriate means of protecting the public health and welfare, prohibit the production, manufacture, export and import of, trade in, possession or use of any such drug except for amounts which may be necessary for medical and scientific research only, including clinical trials therewith to be conducted under or subject to the direct supervision and control of the Party.

Article 7 of the Convention on Psychotropic Substances contains the same exception. Because the Attorney General has determined that conditions in the United States require marijuana to be listed under Schedule I, he is not required to reschedule the substance or instruct the Secretary of State to reschedule the substances under the Single Convention on Narcotic Drugs or the Convention on Psychotropic Substances.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court dismiss all claims asserted against them under Federal Rule of Civil Procedure 12(b)(1) or 12(b)(6).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2008, a true and accurate copy of the foregoing document, Defendants' Brief in Support of Their Motion to Dismiss, was filed electronically with the Clerk of Court through ECF and that ECF will send a Notice of Electronic Filing to the following:

Carl Olsen

/s/ Christopher D. Hagen
Christopher D. Hagen
Assistant U.S. Attorney