UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

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

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MISCELLANEOUS

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PLAINTIFF'S REPLY TO DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

The Defendants have mischaracterized the basis of this complaint, misinterpreted relevant law, and wrongly asserted ***collateral estoppel*** and ***res judicata***.

This Court has jurisdiction to determine whether, as a matter of law, an administrative agency is acting within the express terms of its statutory mandate. 21 U.S.C. §812(b)(1)(B). This Court, rather than an administrative agency, has jurisdiction to interpret applicable federal law.

The Defendants have abrogated their duty to act in accordance with the law, and as a result the Plaintiff suffers irreparable harm to his fundamental right to establishment and free exercise of his religion. The prior cases cited by the Defendants in which the Plaintiff was a party were all requests for a religious exemption from federal law, supported both by the First Amendment and by statutory law, the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb et seq. None of those cases requested a declaratory ruling that, as a matter of law,

marijuana has "accepted medical use in treatment in the United States" as that phrase is used in 21 U.S.C. § 812(b)(1)(B). None of those cases asked for a declaratory ruling that, as a matter of law, the listing of marijuana in 21 C.F.R. 1308.11(d)(22) is a legal nullity because it no longer fits the statutory definition set by Congress as a requirement for inclusion in Schedule I of the Controlled Substances Act ("**CSA**" hereafter), 21 U.S.C. §§ 801-904.

This case is not about whether the Plaintiff should be exempt from the **CSA** because of his religious beliefs. The Defendants are attempting to mislead this Court into construing the Plaintiff's standing to complain (injury to fundamental, First Amendment rights) as an attempt to re-litigate the question of a religious exemption. A plaintiff does not have to be religious to complain about a federal agency that is in violation of federal statutory law. A plaintiff does have to show an actual injury, and this Plaintiff is able to show irreparable injury to First Amendment rights. Because the Plaintiff suffers an irreparable injury to his First Amendment rights, the Plaintiff is not required to exhaust administrative remedies.

The question presented here is whether the **CSA** gives the United States Drug Enforcement Administration ("**DEA**" hereafter) the authority to decide whether marijuana has currently accepted medical use in treatment in the United States where 13 States in the United States have enacted laws accepting the medical use of marijuana.

Both statutory and case law on this issue conclusively show that Congress gave the States the authority to determine accepted medical use and the **DEA** only has the limited authority to regulate it.

BACKGROUND

The Defendants have misinterpreted 21 U.S.C. § 811(c) ("factors with respect to each drug or other substance proposed to be controlled or removed from the schedules"). The factors set forth in 21 U.S.C. § 811(c) do not override the findings required by 21 U.S.C. § 812(b) ("findings required for each of the schedules"). Nothing with accepted medical use can be included in Schedule I. The Defendants are limited to determining which of the 4 remaining schedules, Schedule II through Schedule V, marijuana belongs in, or to removing marijuana from the schedules entirely. The Defendants cannot ignore the plain language of the statutory findings required for Schedule I by 21 U.S.C. § 812(b)(1)(B) in applying the factors contained in 21 U.S.C. § 811(c).

ARGUMENT

I. THIS COURT HAS JURISDICTION TO HEAR THE PLAINTIFF'S CLAIM.

A. The Plaintiff is not Required to Exhaust Administrative Remedies: for Two Reasons.

First, "[W]here the disagreement is largely a matter of law, an extensive administrative record may not be necessary for effective judicial review." ***Doe v. DEA***, 484 F.3d 561, 567 (D.C. Cir. 2007).

Second, where irreparable injury to First Amendment rights is involved, "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).

> In a line of cases beginning with *Abbott Labs. v. Gardner*, 387 U.S. 136, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967), for example, the Supreme Court has held that the Administrative Procedure Act authorizes a pre-enforcement challenge to agency regulations if the issue is "fit" for prompt judicial decision and if failure to review would cause significant hardship to the parties. See *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581-82, 87 L. Ed. 2d 409, 105 S. Ct. 3325 (1985); *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 72 n.12, 101 S. Ct. 295, 66 L. Ed. 2d 268 (1980). Fitness for judicial decision means, most often, that the issue is legal rather than factual. Sufficient hardship is usually found if the regulation imposes costly, self-executing compliance burdens or if it chills protected First Amendment activity. See *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 69-71, 125 L. Ed. 2d 38, 113 S. Ct. 2485 (1993) (O'Connor, J., concurring); *Chamber of Commerce v. FEC*, 314 U.S. App. D.C. 436, 69 F.3d 600, 603-04 (D.C. Cir. 1995).

Minnesota Citizens Concerned for Life v. FEC, 113 F.3d 129, 132 (8th Cir. 1997); ***Elrod v. Burns***, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

B. Single Convention and Convention on Psychotropic Substances.

The Plaintiff admits that International Treaties are not controlling on the question of marijuana's "accepted medical use in treatment in the United States."

II. THE ATTORNEY GENERAL AND DEA ADMINISTRATOR ARE BOUND BY STATE DETERMINATIONS ON THE QUESTION OF "ACCEPTED MEDICAL USE".

A. Section 903 of the Controlled Substances Act Provides the States with Authority to Determine "accepted medical use".

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 issue in ***Gonzales v. Oregon***, 546 U.S. 243 (2006), 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 interpret an existing rule to have continued validity when that rule comes into conflict with the **CSA** because of a federally authorized change in State law. A change in state law accepting the medical use of a drug or substance initially placed in Schedule I of the **CSA** requires that substance to be removed from Schedule I.

"The CSA explicitly contemplates a role for the States in regulating controlled substances, as evidenced by its pre-emption provision." ***Gonzales v. Oregon***, 546 U.S. 243, at 251.

> The Attorney General has rulemaking power to fulfill his duties under the CSA. The specific respects in which he is authorized to make rules, however, instruct us that he 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.

Gonzales v. Oregon, 546 U.S. 243, at 258.

> As for the federal law factor, though it does require the Attorney General to decide "[c]ompliance" with the law, it does not suggest that he may decide what the law says. Were it otherwise, the Attorney General could authoritatively interpret "State" and "local laws," which are also included in 21 U.S.C. § 823(f), despite the obvious constitutional problems in his doing so.

Gonzales v. Oregon, 546 U.S. 243, at 264.

> The statute and our case law amply support the conclusion that Congress regulates medical practice insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood. Beyond this, however, the statute manifests no intent to regulate the practice of medicine generally. The silence is understandable given the structure and limitations of federalism, which allow the States "'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" Medtronic, Inc. v. Lohr, 518 U.S. 470, 475, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) (quoting Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985)).
>
> The structure and operation of the CSA presume and rely upon a functioning medical profession regulated under the States' police powers. The Attorney General can register a physician to dispense controlled substances "if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices." 21 U.S.C. § 823(f). When considering whether to revoke a physician's registration, the Attorney General looks not just to violations of federal drug laws; but he "shall" also consider "[t]he recommendation of the appropriate State licensing board or professional disciplinary authority" and the registrant's compliance with state and local drug laws. Ibid. The very definition of a "practitioner" eligible to prescribe includes physicians "licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices" to dispense controlled substances. § 802(21). Further cautioning against the conclusion that the CSA effectively displaces the States' general regulation of medical practice is the Act's pre-emption provision, which indicates that, absent a positive conflict, none of the Act's provisions should be "construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates . . . to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State." § 903.

Gonzales v. Oregon, 546 U.S. 243, at 269-271.

> Even though regulation of health and safety is "primarily, and historically, a matter of local concern," *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985), there is no question that the Federal Government can set uniform national standards in these areas. See

> *Raich*, *supra*, at 9, 125 S. Ct. 2195, 162 L. Ed. 2d 1. In connection to the CSA, however, we find only one area in which Congress set general, uniform standards of medical practice. Title I of the Comprehensive Drug Abuse Prevention and Control Act of 1970, of which the CSA was Title II, provides that
>
> > "[The Secretary], after consultation with the Attorney General and with national organizations representative of persons with knowledge and experience in the treatment of narcotic addicts, shall determine the appropriate methods of professional practice in the medical treatment of the narcotic addiction of various classes of narcotic addicts, and shall report thereon from time to time to the Congress." § 4, 84 Stat. 1241, codified at 42 U.S.C. § 290bb-2a.
>
> This provision strengthens the understanding of the CSA as a statute combating recreational drug abuse, and also indicates that when Congress wants to regulate medical practice in the given scheme, it does so by explicit language in the statute.

Gonzales v. Oregon, 546 U.S. 243, at 271-272.

"[T]he CSA's preemption clause showed Congress 'explicitly contemplates a role for the States in regulating controlled substances' (*Gonzales v. Oregon*, at p. 251), including permitting the states latitude to continue their historic role of regulating medical practices." ***San Diego v. NORML***, 165 Cal. App. 4th 798, 821, 81 Cal. Rptr. 3d 461, 477 (2008), ***review denied***, Supreme Court of California (October 16, 2008) (finding California's medical marijuana law does not create a "positive conflict" with the **CSA**).

California Federal Savings and Loan Assoc. v. Guerra, 479 U.S. 272, 280-281 (1987), cited by the Defendants in their Brief, is not to the contrary. California's medical marijuana law is entirely consistent with intent and purpose of the **CSA** ("preventing doctors from engaging in illicit drug trafficking"). ***Gonzales v. Oregon***, 546 U.S. 243, at 268.

B. The CSA Requires the Attorney General to Determine whether any States have "accepted" the medical use of marijuana.

"[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***." ***Alliance for Cannabis Therapeutics v. DEA***, 930 F.2d 936, 939 (D.C. Cir. 1991) ("***ACT I***" hereafter) (emphasis added).

In his response to ***ACT I***, In the Matter of Marijuana Rescheduling, DEA Docket No. 86-22, **DEA** Administrator Robert C. Bonner wrote:

> Clearly, the Controlled Substances Act does not authorize the Attorney General, nor by delegation the DEA Administrator, to make the ultimate medical and policy decision as to whether a drug should be used as medicine. ***Instead, he is limited to determining whether others accept a drug for medical use***. Any other construction would have the effect of reading the word "accepted" out of the statutory standard.

57 Fed. Reg. 10499, 10505 (March 26, 1992) (emphasis added).

The DEA Administrator's 5-factor test approved in ***Alliance for Cannabis Therapeutics***, 15 F.3d 1131 (D.C. Cir. 1994) ("***ACT II***" hereafter), is the creation of the administrative agency, not Congress. Congress created the required statutory finding, "accepted medical use in treatment in the United States." If the finding required by Congress is met ("accepted medical use"), then there is no additional administrative interpretation of that finding. See ***Connecticut Nat'l Bank v. Germain***, 503 U.S. 249, 253-254 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." (citations omitted)). "As is apparent, one salient

concept distinguishing the two schedules is whether a drug has 'no currently accepted medical use in treatment in the United States.'" ***ACT II***, at 937-938. See ***United States v. Oakland Cannabis Buyers' Cooperative***, 532 U.S. 483, 491-492 (2001) ("***Oakland***" hereafter) ("The statute divides drugs into five schedules, depending in part on whether the particular drug has a currently accepted medical use").

The decision in ***ACT II***, approving the DEA Administrator's 5-factor test, did not override or replace the required "finding" that anything in Schedule I must have "no accepted medical use in treatment in the United States." 21 U.S.C. § 812(b)(1)(B). See ***Oakland***, at 492 ("Under the statute, the Attorney General could not put marijuana into Schedule I if marijuana had any accepted medical use").

The words "State" and "United States" are used in the CSA according to their common meaning. 21 U.S.C. § 802 defines "State" and "United States" as follows:

> (26) The term "State" means a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.
> . . .
> (28) The term "United States", when used in a geographic sense, means all places and waters, continental or insular, subject to the jurisdiction of the United States.

Thirteen "States" in the "United States" have accepted the medical use of marijuana since 1996. See ***Grinspoon v. DEA***, 828 F.2d 881, 886 (1st Cir. 1987) ("[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 . . ."). The question of the meaning of "accepted medical use in treatment in the United States" in the context of 13 State medical marijuana laws has never been considered by the ***DEA*** or by any

federal court and is now a question of first impression in this Court. However, ***Gonzales v. Oregon***, 546 U.S. 243 (2006), is controlling on this question.

On page 15 of the Defendants' Brief the Defendants quote from ***Gonzales v. Oregon***, 546 U.S. 243 (2006):

> 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.

Id. at 265 (emphasis added).

Gonzales v. Raich, 545 U.S. 1 (2005) ("***Raich***" hereafter) did not contest the Constitutional Due Process violation resulting from the unlawful scheduling of marijuana in Schedule I of the **CSA**:

> Rather, respondents' challenge is actually quite limited; they argue that the CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause.

Raich, 545 U.S., at 15.

> 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. See, e.g., Institute of Medicine, Marijuana and Medicine: Assessing the Science Base 179 (J. Joy, S. Watson, & J. Benson eds. 1999) (recognizing that "[s]cientific data indicate the potential therapeutic value of cannabinoid drugs, primarily THC [Tetrahydrocannabinol] for pain relief, control of nausea and vomiting, and appetite stimulation"); see also *Conant v. Walters*, 309 F.3d 629, 640-643 (CA9 2002) (Kozinski, J., concurring) (chronicling medical studies recognizing valid medical uses for marijuana and its derivatives). But the possibility that the drug may be reclassified in the future has no relevance to the question whether Congress now has the power to regulate its production and distribution. Respondents' submission, if accepted, would place all

> homegrown medical substances beyond the reach of Congress' regulatory jurisdiction.

Raich, 545 U.S., at 28 n.37. ***Raich*** simply held that Congress has the power to regulate marijuana. The injury in ***Raich*** 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 met the statutory requirement for inclusion in Schedule I.

Grinspoon v. DEA, 828 F.2d 881 (1st Cir. 1987) ("***Grinspoon***" hereafter), acknowledged the obligation of the administrative agency to follow the statutory requirements for including a substance in a particular schedule:

> The statutory findings required for agency scheduling decisions clearly state that the agency may not, in the absence of Congressional action, subject drugs with a currently accepted medical use in the United States to Schedule I controls.

Grinspoon, 828 F.2d, at 890.

Congress has stated unequivocally that the DEA does not have authority to put anything in Schedule I that has been "accepted" medical use:

> The House Committee Report concerning the scheduling of methaqualone stated:
>
> > the [DEA] does not have authority to impose Schedule I controls on a drug which has been approved by the [FDA] for medical use. The statutory findings required for agency scheduling decisions clearly state that the agency may not, in the absence of Congressional action, subject drugs with a currently accepted medical use in the United States to Schedule I controls.
>
> H.R. Rep. No. 534, 98th Cong., 2d Sess. 4 (1984), reprinted in 1984 U.S. Code Cong. & Ad. News 540, 543..

Grinspoon, 828 F.2d, at 890.

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, Mr. Gettman could not assert a fact that had not yet come into existence and ***Gettman v. DEA***, 290 F.3d 430 (D.C. Cir. 2002), is not controlling on the question presented here.

Based on the fact that marijuana's unlawful scheduling has never been addressed by the **DEA** or any federal court since California enacted the first state medical marijuana law in the United States in 1996, this 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 (2001).

C. Res Judicata and Collateral Estoppel do not Bar Plaintiff's Claim Because It has never been Previously Considered by any Federal Court.

Mr. Olsen has an irreparable injury to his religious freedom which establishes his standing to complain. Mr. Olsen must show this Court he has standing. The irreparable injury to Mr. Olsen's First Amendment rights establishes that Mr. Olsen has met his burden to establish Article III standing in this Court.

> 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).

On page 17 of the Defendants' Brief in support of their Motion to Dismiss, the Defendants cite ***Olsen v. DEA***, 776 F.2d 267 (11th Cir. 1985), ***cert. denied***, 475 U.S. 1030 (1986). The Eleventh Circuit denied Mr. Olsen's request for a religious exemption from the **CSA**. The Eleventh Circuit held, "The petitions of the plaintiffs for a religious exemption for marijuana use thus fall outside the scope of the statute, and a rule such as they sought could not be made under authority of 21 U.S.C. § 811." ***Olsen v. DEA***, at 268.

In this case, Mr. Olsen is not requesting a religious exemption from the **CSA**.

The operative facts upon which this complaint is based, 13 States accepting medical use of marijuana since 1996, did not exist in 1985 when the Eleventh Circuit issued its decision in ***Olsen v. DEA***. The "accepted medical use" of marijuana falls squarely under authority of 21 U.S.C. § 811 and 21 U.S.C. §812. Contrary to the Defendants' claim on page 18 of their Brief, this case does present a different set of facts.

Olsen v. DEA, 878 F.2d 1458 (D.C. Cir. 1989), cert denied, 495 U.S. 906 (1990), and all of the cases summarized in it were decided prior to 13 State accepting the medical use of marijuana since 1996. None of those cases involved any claim of improper scheduling of marijuana based on new facts which did not exist prior to 1996 (13 State accepting the medical use of marijuana). In all of those

cases a religious exemption was denied based on marijuana's scheduling in Schedule I of the **CSA**.

On page 7 of the Defendants' Brief, the Defendants quote from a paragraph on page 17 of the District Court's Final Order in ***Olsen v. Gonzales***, No. 07-cv-23 (S.D. Iowa, July 16, 2007). The title of that paragraph of the District Court's Final Order is "**Count V: Iowa Controlled Substances Act**". The argument Mr. Olsen made in ***Olsen v. Gonzales*** that the Defendants lacked a compelling interest under the First Amendment and the Religious Freedom Restoration Act to prevent his sacramental use of marijuana, is different than the Fifth Amendment Due Process complaint in this case. The arguments presented to the court in ***Olsen v. Gonzales*** were strictly made to focus on the claim that Mr. Olsen's sacramental use of marijuana should be exempt from the **CSA** because the government lacked a compelling interest and could not show that the Mr. Olsen's sacramental use of marijuana could ever be harmful. While it is true that Mr. Olsen asked the Court to declare that marijuana is not properly scheduled, Mr. Olsen expected the Court to find the Defendants had failed to prove their burden of an independent showing of compelling interest. If marijuana is not harmful, then it would not be properly scheduled in any schedule of the CSA. Those facts and that legal argument are different than the one presented here: that marijuana cannot be scheduled in Schedule I of the CSA because it now has "accepted" medical use in treatment in the United States.

In ***Olsen v. Gonzales***, the Defendants told the District Court the Plaintiff should file an administrative action with the **DEA** seeking to have marijuana rescheduled, which is why the Plaintiff has filed this case. The facts and legal argument made in this complaint, that 13 State medical marijuana laws require the **DEA** to remove marijuana from Schedule I of the **CSA**, was not made in that complaint. The Plaintiff has previously explained to this Court why he is not required to exhaust administrative remedies before bringing this action.

D. Plaintiff's Remaining Argument Regarding "Safety for Use under Medical Supervision".

Marijuana's safety for use under medical supervision is controlled by the same factors that determine its "accepted" medical use (which is defined by the States pursuant to 21 U.S.C. § 903). Both the courts and the **DEA** acknowledge this. "Petitioners also quarrel with the Administrator's decision that marijuana lacks 'accepted safety for use.' Since the Administrator based this determination on his decision that no medical uses are possible (and thus any use lacks 'accepted safety'), we do not see that 'safety' issue as raising a separate analytical question." ***ACT I***, at 940 n.4. The **DEA** Administrator agreed with the analysis of the U.S. Court of Appeals. "The scheduling criteria of the Controlled Substances Act appear to treat the lack of medical use and lack of safety as separate considerations. Prior rulings of this Agency purported to treat safety as a distinct factor. 53 FR 5156 (February 22, 1988). In retrospect, this is inconsistent with scientific reality. Safety cannot be treated as a separate analytical question." 57 Fed. Reg. 10499, 10504 (March 26, 1992).

Although "potential for abuse" is identical in both Schedule I and Schedule II, and the only difference between Schedule I and Schedule II is whether a substance has accepted medical use in treatment in the United States, it is worth noting that marijuana has no potential for abuse at all.

Congress had doubts about placing marijuana in the **CSA** and established a Presidential Commission to resolve those doubts. Section 601 of the **CSA**, Public Law 91-513, October 27, 1970, 84 Stat. 1236, 1280-1281, established a Commission on Marihuana and Drug Abuse. The Report of the Commission recommended that marijuana be decriminalized and removed from international drug control. See ***NORML v. DEA***, 559 F.2d 735, 751 n.70 (D.C. Cir. 1977) ("[T]he Commission recommended that 'the United States take the necessary steps to remove cannabis from the Single Convention on Narcotic Drugs (1961)' . . .").

The only review of marijuana conducted under the process in the **CSA** for rescheduling of drugs resulted in a finding that: "Marijuana, in its natural form, is one of the safest therapeutically active substances known to man." In the Matter of Marijuana Rescheduling, DEA Docket No. 86-22, September 6, 1988, at pages 58-59.

SUMMARY

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).

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).

CONCLUSION

WHEREFORE, the Plaintiff moves this Court:

1. Issue a Declaratory Order that, as a matter of law, marijuana has accepted medical use in treatment in the United States within the meaning of 21 U.S.C. § 812(b)(1)(B);

2. Issue a Declaratory Order that, as a matter of law, the listing of marijuana in Schedule I of the CSA, 21 C.F.R. § 1308.11(d)(22), is a legal nullity;

3. Issue an injunction preventing the Defendants from enforcing the fraudulent regulation of marijuana in Schedule I of the CSA;

4. And any other relief the Court finds just and proper under the circumstances.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 22, 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

CARL OLSEN