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)

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiff is a repeat litigant who has on numerous occasions unsuccessfully attempted to challenge the United States' laws regarding marijuana. *See, e.g., Olsen v. Mukasey*, 541 F.3d 827 (8th Cir. 2008) (rejecting Plaintiff's claims to legalize marijuana use under the First Amendment, Religious Freedom Restoration Act, and Religious Land Use and Institutionalized Persons Act)*; Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458 (D.C. Cir. 1989) (rejecting Plaintiff's request for religious-use exemption from federal laws proscribing marijuana); *Olsen v. Drug Enforcement Admin*., 776 F.2d 267 (11th Cir. 1985) (same). Plaintiff's current lawsuit again challenges the federal laws regarding marijuana, seeking an order to compel the government to remove marijuana from Schedule I of the Controlled Substances Act, 21 U.S.C. § 801 *et seq*. Defendants have already moved to dismiss Plaintiff's meritless lawsuit; the Court should not grant Plaintiff's equally meritless motion for a preliminary injunction.

Plaintiff cannot come close to meeting the stringent criteria required to for the entry of a preliminary injunction. As illustrated by Defendants' motion to dismiss, Plaintiff cannot succeed on the merits of his claim. In fact, he cannot even meet the jurisdictional requirements for bringing his claim in this Court, as he lacks standing and has not exhausted the required administrative process for filing suit. Nor can Plaintiff's assertion of irreparable injury – a violation of his First Amendment rights – pass muster, as numerous courts have already held that Plaintiff has *no* First Amendment right to marijuana. The balance of equities and the public interest lie squarely with the federal government following the laws that Congress set out in the Controlled Substances Act, in which the Attorney General can move a controlled substance from one Schedule to another based only on specified criteria as set forth in the statute.

STATUTORY BACKGROUND

The Controlled Substances Act, 21 U.S.C. § 801 *et seq.* ("CSA" or "the Act"), establishes a comprehensive federal scheme to regulate controlled substances. The CSA criminalizes possession, manufacture, or distribution of any controlled substance except as authorized by the Act. 21 U.S.C. §§ 841(a)(1), 844(a). The CSA classifies controlled substances according to their inclusion in one of five schedules. The listing of a drug or other substance in one of the five schedules depends on whether (and to what extent) it has a currently accepted medial use, its relative potential for abuse, and the degree of psychological or physical dependence to which its use may lead. 21 U.S.C. § 812(b). Congress placed marijuana in Schedule I, which is the most restrictive category. *See* 21 U.S.C. § 812; Pub. L. 91-513, § 202(c), Schedule I (c)(10). However, all substances listed in the CSA, regardless of which schedule they are on, are regulated. The CSA establishes a "closed' system of drug distribution for all substances. H.R. Rep. No. 91-1444 at 6 (1970), reprinted in 1970 U.S.C.C.A.N. 4566, 4571. *See also United States v. Moore*, 423 U.S. 122, 141 (1975) (The Act "authorizes transactions within the legitimate distribution chain and makes all others illegal.") (internal quotations and citation omitted).

Under the CSA, the Attorney General "may by rule" transfer a substance between schedules following the criteria set forth in 21 U.S.C. §§ 811 and 812. In making any determination to reschedule a controlled substance, the Attorney General is to consider the following eight factors:

(1) Its 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 or other substance;
(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 Drug Enforcement Administration ("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 C.F.R. § 1308.43(d); *Gettman v. Drug Enforcement Admin.*, 290 F.3d 430, 432 (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 CSA provides that rules to reschedule controlled substances "shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures" of the Administrative Procedure Act. 21 U.S.C. § 811(a).

FACTUAL BACKGROUND

On September 15, 2008, Plaintiff filed the instant action. Plaintiff alleges that he is a member of the Ethiopian Zion Coptic Church and that marijuana is the sacrament of this church. *See* Compl. at 4, 13-14; Mot. for Prelim. Inj. at 4. He alleges that his "right to freedom of

religion has been irreparably injured" by DEA's failure to reclassify marijuana under the CSA. Compl. at 4-5; Mot. for Prelim. Inj. at 5 ("The irreparable harm the Plaintiff suffers is the direct result of the Defendants' unlawful determination that marijuana, which has 'accepted medical use in treatment in the United States,' must remain in Schedule I of the CSA. . ."). Plaintiff alleges that, because some states have legalized marijuana for medical use, the federal government must reclassify marijuana within the CSA by removing it from Schedule I. Compl. at 3-4, 9-10, 21; Mot. for Prelim. Inj. at 2. Plaintiff further asserts that the Defendants are without authority to allow marijuana to remain on schedules of international treaties. Compl. at 21. Plaintiff requests that the Court direct the government to initiate proceedings to determine the proper schedule for marijuana under the CSA and international treaties. *Id.* ¶ 57.

On November 17, 2008, Defendants filed a motion to dismiss for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1) and for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Defendants argued that Plaintiff lacked jurisdiction to bring his rescheduling claim because he had not exhausted administrative requirements prior to filing suit. *See* Br. in Supp. of Defs.' Mot to Dismiss at 6-9. Defendants further argued that Plaintiff's claims against the Secretary of State were non-justiciable, as he was under no threat of prosecution under international treaties. *See id.* at 9-10. Defendants also argued that Plaintiff's claims should be dismissed on the merits, because the neither the Attorney General nor the DEA is required to defer to state determinations of whether marijuana is properly scheduled under the CSA. *Id.* at 11-16. Nor is the Secretary of State required to remove marijuana from the schedule of the Single Convention on Narcotic Drugs or the Convention on Psychotropic Substances. *Id.* at 23-24. Additionally, Defendants argued that Plaintiff's claims were barred by the doctrines of res judicata and collateral estoppel.

Id. at 16-21.

On November 24, 2008, Plaintiff filed a motion for a preliminary injunction, requesting that the Court "immediately issue a preliminary injunction enjoining the Defendants from enforcing the unlawful regulation of marijuana in Schedule I of the Controlled Substances Act." Pl.'s Mot. for Prelim. Inj. at 1.

ARGUMENT

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 376 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 374. *See also Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (listing four factors for preliminary injunction). Although "in each case all of the factors must be considered to determine whether on balance, they weigh towards granting the injunction," *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 503 (8th Cir. 1987), the movant in all events "is required to show the threat of irreparable harm," *Baker Elec. Co-op., Inc. v. Chaske*, 28 F.3d 1466, 1472 (8th Cir. 1994), the absence of which "is, by itself, a sufficient ground upon which to deny a preliminary injunction." *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987).

I. PLAINTIFF CANNOT DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS OF HIS RESCHEDULING CLAIM

Plaintiff's claim that the government should reschedule marijuana under the CSA suffers

from both jurisdictional defects as well as defects on the merits.[1] As more fully explained in Defendants' motion to dismiss, Plaintiff does not have standing to bring his claim before this Court. Even if Plaintiff had the requisite standing, his claim that the federal government must consider states' actions in classifying substances under the CSA – rather than the CSA's own delineated factors for classification – fails as a matter of law. Because Plaintiff does not have a likelihood of success on the merits of his claim, his motion for a preliminary injunction should be denied.

A. The Court Lacks Jurisdiction Over Plaintiff's Rescheduling Claim

The Court lacks jurisdiction over Plaintiff's rescheduling claim for two distinct reasons. First, Plaintiff's claim is not redressable by this Court and therefore, he does not have standing to maintain this claim.[2] Second, Plaintiff has failed to exhaust administrative remedies for his rescheduling request.

1. Plaintiff Lacks Standing Because His Rescheduling Claim is Not Redressable

"Article III of the U.S. Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.'" *Allen v. Wright*, 468 U.S. 737, 750 (1984). The doctrine of "standing is an essential and unchanging part of the case-or-controversy requirement of Article

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[1] Plaintiff's motion for a preliminary injunction does not address his claim regarding international treaties. Instead, it focuses solely on his claims regarding the scheduling of marijuana under the CSA. Therefore, Defendants' arguments will focus solely on Plaintiff's rescheduling claim.

[2] Defendants did not initially raise argument in their motion to dismiss. However, this argument is jurisdictional and has not been waived. *Sierra Club v. Robertson*, 28 F.3d 753, 757 n.4 ("it is elementary that standing relates to the justiciability of a case and cannot be waived by the parties").

III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "The party invoking federal jurisdiction bears the burden of establishing its existence." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 104 (19998). Thus, at the pleadings stage, "[i]t is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke . . . the exercise of the court's remedial powers." *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546 n.8 (1986). To establish standing, a plaintiff must show: (1) a distinct and palpable injury, actual or threatened; (2) that the injury is fairly traceable to the defendant's conduct; and (3) that it is "'likely,' as opposed to merely 'speculative' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 560-61 (citation omitted).

Plaintiff cannot demonstrate the redressability requirement of standing. He seeks to have the government reclassify or remove marijuana from Schedule I under the CSA based on the fact that certain states have laws allowing the medical use of marijuana. *See* Compl.¶¶ 53 ("The DEA is not authorized to regulate marijuana in Schedule I of the CSA and the regulation of marijuana in Schedule I is not in accordance with law because: (1) twelve states have accepted the medical use of marijuana; (2) Congress gave the states the authority to make that decision; and (3) marijuana no longer meets the requirements for inclusion in Schedule I of the CSA"); 57 ("The Defendants must initiate proceedings to determine the proper schedule for marijuana in the CSA, if any."). First, it is pure speculation that if the government were to reevaluate the scheduling of marijuana under the CSA, it would classify it in a different manner. Standing cannot be based on speculative hopes that action will be taken in a certain manner. *Lujan*, 504 U.S. at 561; *Reproductive Health Servs. v. Nixon*, 428 F.3d 1139, 1147 (8th Cir. 2005). More important, even if the government were to classify marijuana in a different Schedule under the

CSA, this action would not redress Plaintiff's alleged injury. Plaintiff seeks to use marijuana for *religious* purposes, *see* Compl. ¶¶ 23-29, not for *medical* purposes. Even if the government were to place marijuana in a different schedule under the CSA for medical reasons, as Plaintiff requests, marijuana would remain a regulated drug that would be illegal to use except as provided in the statute. *See Moore*, 423 U.S. at 141 (The Act "authorizes transactions within 'the legitimate distribution chain' and makes all other illegal."), quoting H.R. Rep. No. 91-1444, p. 3. Schedule II, III, IV, or V substances are still regulated to ensure that they are not being diverted "into other than legitimate medical, scientific and industrial channels." 21 U.S.C. § 823. Additionally, all controlled substances need to be distributed in compliance with applicable state and local laws. *Id.* Plaintiff's desire to use marijuana for religious purposes would not be affected by any change of scheduling in the CSA. Because the requested relief (reclassification of marijuana to account for state determinations of medical use) would not redress Plaintiff' alleged injury (use of marijuana for religious purposes), he has not met the redressability requirements to maintain his lawsuit. *See Steel Company*, 523 U.S. at 107 ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.").

2. Plaintiff Failed to Exhaust Administrative Remedies

The CSA provides an administrative process to be followed for the rescheduling of controlled substances under the Act. *See* 21 U.S.C. § 811(a). Plaintiff wants marijuana to be rescheduled under the CSA, and he has administratively petitioned the DEA to do so. *See* Compl. at 5. He alleges that he has done so as a "formality;" he does not allege that the agency has rendered a decision regarding his petition, and this lawsuit does not challenge any final

agency action with respect to this petition. *Id.* Instead, Plaintiff seeks immediate relief regardless of the outcome of his administrative petition with the DEA. This Court has already dismissed one of Plaintiff's previous cases seeking the rescheduling of marijuana for failing to exhaust administrative remedies. *See Olsen v. Gonzales*, No. 07-cv-23 (S.D. Iowa) July 16, 2007 Order at 17 (attached as Ex. 1), *aff'd sub nom. Olsen v. Mukasey*, 541 F.3d 827 (8th Cir. 2008). Plaintiff still has not exhausted his administrative remedies, and therefore this Court still lacks jurisdiction over his claim to reschedule marijuana. *See id.*; *Sharps v. U.S. Forest Service*, 28 F.3d 851, 853-54 (8th Cir. 1994) ("Courts have long required a litigant seeking review of agency action to exhaust available administrative remedies prior to seeking judicial review."); *Doe v. Gonzalez* [sic], No. 06-966, 2006 WL 1805685 at *15 (D.D.C. 2006) (requiring administrative exhaustion in CSA case because "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"), *aff'd sub nom. Doe v. Drug Enforcement Admin.*, 484 F.3d 561 (D.C. Cir. 2007).[3]

[3] Additionally, Congress has vested the Court of Appeals with exclusive jurisdiction over final agency action under the CSA. 21 U.S.C. § 877. As one court has recognized, if administrative remedies are not exhausted and there is no final agency action, no court has jurisdiction to review agency action under the CSA; if administrative remedies have been exhausted, the Court of Appeals has sole jurisdiction of CSA claims. *Doe*, 2006 WL 1805685 at * 23. *See also Oregon v. Ashcroft*, 368 F.3d 1118, 1120 & n.1 (9th Cir. 2004) (finding court of appeals had exclusive jurisdiction over challenge to interpretive rule issued by Attorney General under the CSA), *aff'd sub nom. Gonzales v. Oregon*, 546 U.S. 243 (2006).

B. Plaintiff is Unable to Succeed on the Merits of His Rescheduling Claim

Even if the Court had jurisdiction over Plaintiff's rescheduling claim, it would fail as a matter of law. As an initial matter, Plaintiff's claim is barred by the doctrines of res judicata and collateral estoppel. Even if it was not, the federal government has acted lawfully in the scheduling of marijuana under the CSA.

1. Res Judicata and Collateral Estoppel Bar Plaintiff's Rescheduling Claim

As more fully explained in Defendants' motion to dismiss, Plaintiff's claims are barred by the doctrines of res judicata and collateral estoppel. Plaintiff has argued for the legalization of marijuana in many lawsuits, most recently in this Court last year. *See, e.g., Olsen v. Mukasey*, 541 F.3d 827 (8th Cir. 2008) (rejecting Plaintiff's claims to legalize marijuana use under the First Amendment, Religious Freedom Restoration Act, and Religious Land Use and Institutionalized Persons Act); *Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458 (D.C. Cir. 1989) (rejecting Plaintiff's claim for religious use of marijuana); *Olsen v. Iowa*, 808 F.2d 652 (8th Cir. 1986) (affirming the denial of Plaintiff's habeas petition raising free exercise and equal protection challenges to his criminal conviction of possession with intent to distribute marijuana); *Olsen v. Drug Enforcement Admin*., 776 F.2d 267 (11th Cir. 1985) (rejecting Plaintiff's claim to amend federal law to allow religious use of marijuana); *United States v. Rush*, 738 F.2d 497, 511-13 (1st Cir. 1984) (rejecting Plaintiff's free exercise claim when he and others were convicted as part of an operation to distribute twenty tons of marijuana).

Res judicata bars Plaintiff's action seeking a rescheduling order because a substantial portion of Plaintiff's complaint merely rehashes arguments he has unsuccessfully asserted in previous cases. "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). Res judicata applies when: "(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 privy with them); and (4) both suits are based on the same claims or causes of action." *Yankton Sioux Tribe v. Dep't of Health and Human Servs.*, 533 F.3d 634, 639 (8th Cir. 2008).

Res judicata bars this action because a substantial portion of Plaintiff's complaint merely rehashes arguments he has unsuccessfully asserted in previous court actions. Plaintiff has already unsuccessfully sued the DEA to compel it to reschedule marijuana in the CSA, just as he has done in this lawsuit. *Compare Olsen*, 776 F.2d at 268 ("Appellants based their petitions to allow for the religious use of marijuana by members of their church upon 21 U.S.C. § 811 which provides that any interested party may petition to have a substance added to the schedules of controlled substances, removed from the schedules of controlled substances, or transferred between those schedules.") *with* Compl. at 4 ("Mr. Olsen's right to freedom of religion has been irreparably injured by the failure of DEA to perform its statutory duty to keep the schedules of controlled substances updated as mandated by Congress."). The Eleventh Circuit rejected Plaintiff's claim for rescheduling. *Olsen*, 776 F.2d at 268. This prior ruling satisfies the requirements for res judicata, as it was a suit of proper jurisdiction resulting in a final decision on the merits, both suits involve the same parties, and the claims – requesting rescheduling of marijuana under the CSA – are the same.

Plaintiff has asserted that res judicata does not apply because, in this lawsuit, he is not seeking a religious exemption for the use of marijuana. Pl.'s Reply to Defs.'Mot to Dismiss

[Doc. No. 8] at 13. This lawsuit, he alleges, is based on the fact that 13 states now allow the medical use of marijuana. *Id.* The fact remains, however, that in both lawsuits, Plaintiff has sought to reschedule marijuana under the CSA in order to use marijuana for religious reasons. As recently as 2007, Plaintiff filed suit in an attempt to de-criminalize marijuana for religious purposes. In that 2007 lawsuit against the Attorney General, Plaintiff could have included his current legal argument that state laws require the Attorney General to reclassify marijuana.[4] *See Allen*, 449 U.S. at 94 (finding res judicata applies to argument that could have been made in previous lawsuits). Just because Plaintiff made the tactical decision not to raise state law arguments in his 2007 lawsuit to support his religious use of marijuana does not entitle him to re-litigate the issue now. *See Lundquist v. Rice Mem. Hosp.*, 238 F.3d 975, 977 (8th Cir. 2001) (Res judicata binds the parties "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.") (internal quotations and citation omitted).

For many of the same reasons that res judicata bars Plaintiff's claims, this action is barred by collateral estoppel as well. 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 v. Sturgell*, 128 S. Ct. 2161, 2171 (2008) (internal quotation and citation omitted). The five elements of issue preclusion are: (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

[4] Plaintiff raised a claim that cannabis should be reclassified under the CSA, without reference to state law. *See Olsen v. Gonzales*, No. 4:07-cv-0023, Compl. ¶¶ 62-70 (S.D. Iowa).

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).

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, is the same party in the original suit. Second, the issue sought to be precluded is the same as the issue in previous suit. Both actions sought to compel the DEA to reschedule marijuana so that Plaintiff could use the substance as religious sacrament. Plaintiff argued then, 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 CSA. 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 determination of thirteen states – his action is

barred by collateral estoppel.

2. The Attorney General and DEA Administrator Are Not Required to Defer to State Determinations of Whether Marijuana is Properly Scheduled Under the CSA

Plaintiff cannot demonstrate a likelihood of success on the merits of his claim for rescheduling marijuana because the legal basis upon which his claim rests – that the Attorney General must defer to certain states' determinations of "accepted medical use" in scheduling controlled substances under the CSA – is legally unfounded.

As explained in his motion for a preliminary injunction, Plaintiff's claim is premised on the fact that the CSA places controlled substances in Schedule I if they have no currently accepted medical use. Pl.'s Mot. for Prelim. Inj. at 2, quoting *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 491-92 (2001). Marijuana is currently a Schedule I controlled substance. Plaintiff contends that, because thirteen states have accepted the medical use of marijuana, it cannot remain as a Schedule I substance. *Id.* Plaintiff's claim is based on a fundamental misunderstanding of principles of federalism and the CSA.

The CSA 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 provides eight factors for the Attorney General to consider. *Id.* § 811(c). None of these factors include any requirement that the Attorney General consider changes in state law. Likewise, the determination of whether a substance has a "currently accepted medical use" includes five factors, none of which includes the status of state law. *See Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*, 15 F.3d 1131, 1135 (D.C. Cir. 1994), citing 57 Fed. Reg. 10,499, 10,507 (Mar. 26, 1992). Because the CSA does not require the Attorney General to

consider state law in making scheduling determinations, the fact that some states have allowed for the medical use of marijuana is irrelevant to federal law.

Plaintiff mistakenly relies on *Gonzales v. Oregon*, 546 U.S. 243 (2006), to support his argument that the Attorney General must defer to states' determinations of medical use. Pl.'s Mot. for Prelim. Inj. at 2. (quoting *Gonzales* as stating "[The Attorney General] is not authorized to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law."). *Gonzales v. Oregon* did not address drug classification; instead it centered around a different issue – whether the Attorney General could issue an interpretive rule that physicians could not prescribe Schedule II controlled substances for purposes of assisted suicide pursuant to state law. The Supreme Court concluded that the Attorney General's interpretive rule was invalid because it regulated the practice of medicine, which is not authorized by the CSA. *Gonzales*, 546 U.S. at 270-73. In contrast to the situation in *Gonzales*, the CSA authorizes the Attorney General to make scheduling determinations for controlled substances, and sets forth specific criteria for doing so. The Supreme Court's *Gonzales* decision confirms this. The Court noted that Congress has delegated control to the Attorney General to reschedule controlled substances under the Act and noted that, "[t]o exercise his scheduling power, the Attorney General must follow a detailed set of procedures" outlined in CSA. *Id.* at 260. Plaintiff seeks an order that would by-pass these statutorily-mandated procedures and, instead, follow others. This is legally unsustainable.

While Plaintiff considers "absurd" Defendants' position that CSA's rescheduling procedures – including consideration of a recommendation by the Secretary of the Department of Health and Human Services – control the outcome of a rescheduling determination, rather than

various states' laws, Pl.'s Mot. for Prelim. Inj. at 3, principles of federalism dictate that deference to state law is not necessary. "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).

II. PLAINTIFF HAS NOT DEMONSTRATED IRREPARABLE HARM

As previously stated, to obtain preliminary injunctive relief, Plaintiff must "show the threat of irreparable harm," *Dataphase*, 640 F.2d at 114 n.9, injury so "certain and great and of such imminence that there is a clear and present need for equitable relief." *Iowa Utilities Bd. v. F.C.C.*, 109 F.3d 418, 425 (8th Cir. 1996). "Failure to show irreparable harm is an independently sufficient ground upon which to deny a preliminary injunction." *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003).

Here, Plaintiff has shown no harm at all, let alone any imminent irreparable harm if an injunction is not granted. Plaintiff alleges that he has a First Amendment right to marijuana as a result of his religious beliefs, and that this "loss of first Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Pl.'s Mot. for Prelim. Inj. at 5, quoting *Elrod v. Burns,* 427 U.S. 347, 373 (1976). Unfortunately for Plaintiff, numerous courts – including this Court – have determined that Plaintiff does *not* have a First Amendment right to marijuana as a result of his religious beliefs. *See, e.g.,* July 16, 20007 Order in *Olsen v. Gonzales*, No. 4:07-cv-0023 (attached as Ex. 1) (denying Plaintiff's First Amendment challenge to the CSA), *aff'd sub nom Olsen v. Mukasey*, 541 F.3d 827 (8th Cir. 2008); *United States v. Rush*, 738 F.2d 497 (1st Cir. 1984) (rejecting Plaintiff's free exercise of religion defense to his conviction for possession of marijuana with intent to deliver); *Olsen v. Drug Enforcement*

Admin., 878 F.2d 1458 (D.C. Cir. 1989) (rejecting Plaintiff's request for a religious-use exemption from the federal laws proscribing marijuana). Because Plaintiff does not have a First Amendment right to marijuana, he cannot demonstrate injury in this case – let alone the imminent, irreparable injury required to receive a preliminary injunction.

III. THE BALANCE OF THE EQUITIES DOES NOT TIP IN PLAINTIFF'S FAVOR

Plaintiff's only argument regarding the balance of the equities is that "[b]ecause the Defendants have failed to do what they were statutorily required to do in 1996 by transferring marijuana out of Schedule I of the CSA pursuant to 21 U.S.C. § 812(a) . . . the balance of the equities tips in the Plaintiff's favor." Pl.'s Mot. for Prelim. Inj. at 6. This argument presupposes Plaintiff's success on the merits of his claim. As Defendants have explained, Plaintiff is unlikely to succeed on the merits of his claim. Contrary to Plaintiff's bare assertion, there is nothing in 21 U.S.C. § 812(c) that requires the Attorney General to transfer marijuana out of Schedule I of the CSA. Therefore, the balance of the equities tips in favor of Defendants, not Plaintiff.

In addition, because Plaintiff has not even exhausted his administrative remedies to seek rescheduling of marijuana with the DEA, the balance of the equities favors Defendants. Waiting for administrative exhaustion allows the government to consider Plaintiff's arguments in the first instance, and gives a reviewing court a better record upon which to make a decision.

IV. A PRELIMINARY INJUNCTION IS NOT THE PUBLIC INTEREST

In support for his public interest argument, Plaintiff asserts that "[t]he public has an interest in the enforcement of laws properly enacted by Congress." Pl.'s Mot. for Prelim. Inj. at 6. Defendants agree. This is precisely why an injunction should not issue. Congress has set forth a means by which to protect the public interest in the CSA. Congress placed marijuana as a

Schedule I controlled substance in the CSA. *See* 21 U.S.C. § 812. Before any changes can be made to this determination, the CSA delineates certain administrative procedures to be followed and specified criteria to be considered. Plaintiff seeks to circumvent these procedures, and instead replace them with a court order enjoining the government's enforcement of the CSA as it pertains to marijuana. This clearly is not in the public interest. *See United States v. Burton*, 894 F.2d 188, 192 (6th Cir. 1990) ("it has repeatedly been determined, and correctly so, that reclassification is clearly a task for the legislature and the attorney general and not a judicial one"); *United States v. Middleton*, 690 F.2d 820, 823 (11th Cir. 1982) ("The determination of whether new evidence regarding either the medical use of marijuana or the drug's potential for abuse should result in a reclassification of marijuana is a matter for legislative or administrative, not judicial, judgment.").

CONCLUSION

For the foregoing reasons, Plaintiff's motion for a preliminary injunction should be denied.

Dated: December 11, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2008, a true and accurate copy of the foregoing document, Defendants' Opposition to Plaintiff's Motion for a Preliminary Injunction 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, Pro Se.

Dated: December 11, 2008

/s/ Tamara Ulrich_____
TAMARA ULRICH