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

CARL ERIC OLSEN, Plaintiff, vs. ALBERTO R. GONZALES, et al., Defendants.	No. 4:07-cv-0023-JAJ **ORDER**

I. INTRODUCTION

This matter comes before the court pursuant to Attorney General of Iowa Thomas Miller's February 7, 2007 Motion to Dismiss (docket 8) and Attorney of Polk County John Sarcone and Sheriff of Polk County Dennis Anderson's March 19, 2007 Joinder (docket 15) (hereinafter "State Defendants" where applicable) and Attorney General of the United States Alberto Gonzales and Administrator of the United States Drug Enforcement Administration Karen Tandy's (hereinafter "Federal Defendants") April 10, 2007 Motion to Dismiss (docket 21).

Plaintiff Carl Eric Olsen's (hereinafter "Olsen) January 16, 2007 Complaint raises the following claims against State and Federal Defendants ("Defendants" collectively): (Count I) Violation of the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA); (Count II) Violation of the First Amendment; (Count III) Violation of the Equal Protection Clause; (Count IV) Violation of the Ex Post Facto Clause; (Count V[1]) Improper Application of the Controlled Substances to Cannabis; (Count VI) Violation of the Fourth Amendment; (Count VII) Violation of the Fifth Amendment; (Count VIII) Violation of the Administrative Procedure Act; (Count IX) Violation of International Law and Treaties; and (Count X) Request for Declaratory Judgment. Defendant Miller filed his Motion to Dismiss on February 7, 2007 (docket 8). Olsen filed his Response on February 23, 2007 (docket 9). Defendants Sarcone and Anderson joined Defendant Miller's Motion and brief in support on March 19, 2007 (docket 15). Federal Defendants filed their Motion to Dismiss on April 10, 2007 (docket 21). Olsen filed his Response on May 2, 2007 (docket 30).Federal Defendants filed their Reply on May 25, 2007 (docket 38). Olsen filed a Motion for Leave to File

[1] The court re-numbered the last five claims as Olsen labeled two claims as claim four.

Surreply and Motion For Leave to File Overlength Brief on June 4, 2007 (docket 40). The court denied both of Olsen's Motions regarding his proposed Surreply on June 5, 2007 (docket 41). Olsen filed a Motion for Summary Judgment on July 3, 2007 (docket 46).

Olsen asserts that the RFRA and RLUIPA amend the Federal Controlled Substances Act and the Iowa Controlled Substances Act. As such, Olsen urges this court to find that Defendants' interpretations of the Federal CSA and the Iowa CSA are unlawful and unconstitutional as applied to him. Specifically, Olsen seeks an order determining that "Cannabis is not a controlled substance under the Federal CSA or the Iowa CSA" and "an order enjoining Defendants from applying the Federal CSA and the Iowa CSA [to him] for his sacramental use of cannabis." For the reasons listed below, the court dismisses Olsen's claims against all Defendants.

II. CONCLUSIONS OF LAW

Defendants base their motions upon Fed. R. Civ. P. 12(b)(6) (failure to state a claim upon which relief can be granted). Federal Defendants further assert that this court should dismiss Olsen's complaint for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The court first addresses the issue of subject matter jurisdiction. See Brotherhood of Maintenance of Way Employees Div. of Intern. Broth. of Teamsters v. Union Pacific R. Co., 2007 WL 541826, 9 (N.D. Iowa 2007) (court notes that challenges to subject matter jurisdiction must be addressed prior to other challenges) (citations omitted).

A. Fed. R. Civ. P. 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) provides a party may move to dismiss in a pre-answer motion due to "lack of jurisdiction over the subject matter." Id. Here,

Federal Defendants raise the issue "in the form of a Rule 12(b)(1) pre-answer motion, [and] the question may be resolved either on the face of the pleadings or upon factual determinations made in consideration of matters outside of the pleadings." Id. Federal Defendants assert that Olsen has failed to demonstrate that his claims are ripe for review because he is not currently facing an impending threat of prosecution. The court addresses the issue as to all Defendants, as "subject matter jurisdiction goes to the court's power to hear the case." See Brotherhood of Maintenance of Way Employees Div. of Intern. Broth. of Teamsters v. Union Pacific R. Co., 475 F.Supp.2d 819, 831 (N.D. Iowa 2007) (court acknowledges the question of subject matter jurisdiction may be raised by any party or the court at any time).

"The ripeness doctrine flows both from the Article III 'cases' and 'controversies' limitations and also from prudential considerations for refusing to exercise jurisdiction." Pub. Water Supply Dist. No. 10 of Cass County, Mo. v. City of Peculiar, Mo., 345 F.3d 570, 572 (8th Cir. 2003) (quoting Nebraska Pub. Power Dist. v. MidAmerican Energy Co., 234 F.3d 1032, 1037 (8th Cir.2000)). The test for ripeness includes two prongs: (1) whether the issue is fit for judicial decision, i.e. whether the case would benefit from further factual development, and (2) hardship to the parties, i.e. whether Olsen "has sustained or is immediately in danger of sustaining some direct injury." Pub. Water Supply Dist. No. 10, 345 F.3d at 573. Here, the issue centers upon the second prong.

A claim must be ripe in a declaratory judgment action, however such an action "can be sustained [even] if no injury has yet occurred." Public Water Supply Dist. No. 8 of Clay County, Mo. v. City of Kearney, Mo. , 401 F.3d 930, 932 8th Cir. 2005) (internal citations omitted). The Eighth Circuit recently stated, "Like the Fourth Circuit, we 'encourage a person aggrieved by laws he considers unconstitutional to seek a declaratory judgment against the arm of the state entrusted with the state's enforcement power, all the

while complying with the challenged law, rather than to deliberately break the law and take his chances in the ensuing suit or prosecution.'" St. Paul Area Chamber of Commerce v. Gaertner, 439 F.3d 481, 488 (8th Cir. 2006) (quoting Mobil Oil Corp. v. Attorney Gen., 940 F.2d 73, 75 (4th Cir.1991)). "[D]ismissal for lack of subject matter jurisdiction is appropriate only in those rare instances when the challenged claim 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.' " Id. (citing Trimble v. Asarco, Inc., 232 F.3d 946, 953 (8th Cir.2000) (quoting Bell v. Hood, 327 U.S. 678, 682-83, 66 S.Ct. 773, 90 L.Ed. 939 (1946)).

The court acknowledges that "[a] document filed pro se is 'to be liberally construed,' and 'a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers,'" Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007) (internal citation omitted). Federal Rule of Civil Procedure 8(a) dictates that a plaintiff must make a short, plain statement of the grounds for this court's subject matter jurisdiction. In the present case, Olsen states that this court has jurisdiction "under 28 U.S.C. § 1331 because the action arises under the laws and Constitution of the United States." Complaint, p. 4. Specifically, Olsen seeks a determination of his rights under the RFRA and RLUIPA, raises numerous constitutional and state law claims, and asserts rights under various international treaties. The court finds that Olsen survives the basic requirements of Rule 8(a).

B. Failure to state a Claim under Fed. R. Civ. P. 12(b)(6)

A plaintiff survives a Rule 12(b)(6) motion by adequately stating a claim[2]; to do so, the plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1965 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level," Id. (citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed.2004).When analyzing the adequacy of a complaint's allegations under Rule 12(b)(6), the court must accept as true all of the complaint's factual allegations and view them in the light most favorable to the plaintiff. Id.; see Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508 n.1 (2002); Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007) ("when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint")(citations omitted)). "The issue is not whether plaintiffs will ultimately prevail, but rather whether they are entitled to offer evidence in support of their claims." U.S. v. Aceto Agr. Chemicals Corp., 872 F.2d 1373, 1376 (8th Cir. 1989) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds, Davis v. Scherer, 468 U.S. 183 (1984)). As

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[2] The Supreme Court recently clarified the applicable standard under Rule 12(b)(6) in Bell Atlantic Corp. v. Twombly , 127 S.Ct. 1955 (2007). Previously, a court would not dismiss a complaint pursuant to Rule 12(b)(6) according to "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 46 (1957). The Bell Atlantic Court rejected Conley's "no set of facts" standard and instead determined that "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." Bell Atlantic, 127 S.Ct. at 1969. The Supreme Court clarified Conley to stand for the "breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival." Bell Atlantic, 127 S.Ct. at 1969.

noted previously, the court views pro se complaints more liberally, however a pro se plaintiff must still provide more than conclusory allegations. Harris v. Gadd, 2007 WL 1106114, 1 (E.D. Ark. 2007) (citations omitted).

1. Statutory Claims

Olsen states that the RFRA and RLUIPA were passed by Congress "to prevent the government from burdening the free exercise of religion unless it had a compelling government interest in doing so and it accomplished its goal by the least restrictive means." As such, Olsen asserts that Defendants have violated his statutory rights under both statutes because,

> (44) Defendants' interpretations of the Federal and Iowa versions of the CSA substantially burden the Plaintiff's Exercise of his Religion and use of his land.
> (45) Defendants' criminalization of Plaintiff's Sacramental use of Cannabis serves no compelling government interest.
> (46) Even assuming that Defendants' interpretations of the Federal and Iowa versions of the CSA did serve a compelling interest, a complete ban on the Sacramental use of Cannabis by the Plaintiff on his own land is not the least restrictive means of furthering any such interest.

Complaint, p. 16.

Defendant Miller asserts that "neither the RFRA nor the RLUIPA apply under the facts of this case, and, even if they did apply, they would not, as a matter of law, affect the validity of any prohibition of the use, possession or sale of marijuana since such statutory prohibitions are the least restrictive means of addressing a compelling state interest."

a. Count I: RFRA

State Defendants assert that Olsen's RFRA claim fails "because the United States Supreme Court has explicitly held that application of this statute to the states is

unconstitutional." City of Boerne v. Flores, 521U.S. 507 (1997). The court agrees and dismisses this Count as to the State Defendants.

Congress enacted the RFRA in response to the Supreme Court's decision in Employment Division v. Smith, 494 U.S. 872 (1990) in order to restore the "compelling interest" test previously established in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972). [3]

The RFRA provides that

> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.
>
> © Judicial relief
>
> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief

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[3] The Senate Judiciary Committee noted that

> The Religious Freedom Restoration Act of 1993 is intended to restore the compelling interest test previously applicable to free exercise cases by requiring that government actions that substantially burden the exercise of religion be demonstrated to be the least restrictive means of furthering a compelling governmental interest. The committee expects that the courts will look to free exercise cases decided prior to Smith for guidance in determining whether the exercise of religion has been substantially burdened and the [] least restrictive means have been employed in furthering a compelling governmental interest.

S. Rep. No. 103-111 at 8-9 (1993) as reprinted in 1993 U.S.C.C.A.N. 1892,1898.

> against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C.A. § 2000bb-1

Olsen argues that the Supreme Court's decision in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 126 S. Ct. 1211 (2006) supports his bringing of the instant action. The O Centro court affirmed the granting of a preliminary injunction under the RFRA where it determined that "the Government failed to demonstrate… a compelling interest in barring the [plaintiff]'s sacramental use of hoasca." O Centro, 126 S.Ct. at 1225. This court finds Olsen's reasoning unpersuasive. In the initial decision granting the preliminary injunction at issue in O Centro, the district court distinguished its treatment of hoasca from cases involving marijuana.

> There is a second major distinction between the present case and the cases involving claims that the principles of religious freedom reflected in the Free Exercise Clause and RFRA should be interpreted as permitting the sacramental use of marijuana. This distinction stems from the significant differences in the characteristics of the drugs at issue. Affirming a trial court's denial of a criminal defendants' request to rely in *1254 RFRA as a defense to marijuana charges, the Eighth Circuit stated "that the government has a compelling state interest in controlling the use of marijuana." United States v. Brown, 72 F.3d 134 (8th Cir.1995) (table). As support for this observation, the Brown court cited a number of First Amendment opinions which had emphasized problems associated with marijuana in particular. See, e.g., United States v. Greene, 892 F.2d 453, 456-57 (6th Cir.1989) ("Every federal court that has considered this issue has accepted Congress' determination that marijuana poses a real threat to individual health and social welfare and had upheld criminal penalties for possession and distribution even where such penalties may infringe to some extent on the free exercise of religion."); United States v. Middleton, 690 F.2d 820, 825 (11th Cir.1982), quoting Leary v. United States, 383 F.2d 851, 860-61 (5th Cir.1967) ("It would be difficult to imagine the harm which would result if

> the criminal statutes against marihuana were nullified as to those who claim the right to possess and traffic in this drug for religious purposes.")

O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 282 F.Supp.2d 1236, 1253 -1254 (D.N.M. 2002)

Further, the government has previously met the "compelling interest" test in lawsuits brought by Olsen on the same issue. See United States v. Rush, 738 F.2d 497(C.A. Me. 984); Olsen v. Drug Enforcement Admin., 878 F.2d 1458 (C.A.D.C. 1989). In fact, Olsen's previous unsuccessful lawsuit in United States v. Rush, 738 F.2d 497 (C.A. Me. 984) has been cited as a reason for dismissing "claims which, while constituting a RFRA prima facie case, had already been ruled invalid." O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 342 F.3d 1170, 1179 (10th Cir. 2003) (court notes that "a plaintiff seeking to use marijuana for religious purposes would likely not be able to demonstrate a substantial likelihood of success on the merits because courts have already ruled against sacramental marijuana claims")(citing Rush, 738 F.2d at 512, for the conclusion that "the Government has a compelling interest in banning the possession and distribution of marijuana notwithstanding the burden on religious practice").

Federal Defendants thus properly assert that collateral estoppel, or "issue preclusion," blocks Olsen's claim. In the Eighth Circuit, issue preclusion has five 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).

The court in Rush analyzed the government's interest in controlling marijuana use and distribution as follows:

> Much evidence has been adduced from which it might rationally be inferred that marijuana constitutes a health hazard and a threat to social welfare; on the other hand, proponents of free marijuana use have attempted to demonstrate that it is quite harmless. See Randall v. Wyrick, 441 F.Supp. 312, 315-16 (W.D.Mo.1977); United States v. Kuch, 288 F.Supp. 439, 446 & 448 (D.D.C.1968). In enacting substantial criminal penalties for possession with intent to distribute, Congress has weighed the evidence and reached a conclusion which it is not this court's task to review de novo. Every federal court that has considered the matter, so far as we are aware, has accepted the congressional determination that marijuana in fact poses a real threat to individual health and social welfare, and has upheld the criminal sanctions for possession and distribution of marijuana even where such sanctions infringe on the free exercise of religion. United States v. Middleton, 690 F.2d 820, 825 (11th Cir.1982), cert. denied, 460 U.S. 1051, 103 S.Ct. 1497, 75 L.Ed.2d 929 (1983); United States v. Spears, 443 F.2d 895 (5th Cir.1971), cert. denied, 404 U.S. 1020, 92 S.Ct. 693, 30 L.Ed.2d 669 (1972); Leary v. United States, 383 F.2d 851, 859-61 (5th Cir.1967), rev'd on other grounds, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969); Randall, 441 F.Supp. at 316 & n. 2; Kuch, 288 F.Supp. at 448. Only last year, the Eleventh Circuit rejected identical claims raised by some of the very appellants before us in this case, see Middleton, 690 F.2d 820, and the United States Supreme Court denied review. We decline to second-guess the unanimous *513 precedent establishing an overriding governmental interest in regulating marijuana.

United States v. Rush, 738 F.2d 497, 512 -513 (C.A. Me. 984).

In Olsen, Olsen conceded that the government had a "compelling interest in controlling the distribution and drug-related use of marijuana" and instead challenged the government's means. See Olsen, 878 F.2d at 1462. The court upheld the government's means as follows,

> The pivotal issue, therefore, is whether marijuana usage by Olsen and other members of his church can be accommodated without undue interference with the government's interest in controlling the drug. Three circuits have so far considered pleas for religious exemption from the marijuana laws; each has rejected the argument that accommodation to sacramental use of the drug is feasible and therefore required. Rush, 738 F.2d at 513 (First Circuit); Olsen v. Iowa, 808 F.2d at 653 (Eighth Circuit); Middleton, 690 F.2d at 825 (Eleventh Circuit). We have no reason to doubt that these courts have accurately gauged the Highest Court's pathmarks in this area.

Olsen v. Drug Enforcement Admin., 878 F.2d 1458, 1462 (C.A.D.C. 1989).

The court finds that Olsen was a party in the above-mentioned lawsuits in which the current issue was involved, actually litigated, determined by a valid, final judgment, and the current claims were essential to the prior judgment. As such, this Court agrees that collateral estoppel applies to Olsen's claims under RFRA and dismisses Count I as to the Federal Defendants as well.

b. Count I: RLUIPA

Olsen seeks a determination of his rights under the RLUIPA**,** which protects "Religious Exercise in Land Use and by Institutionalized Persons," as interpreted by the Supreme Court in Cutter v. Wilkinson, 544 U.S. 709, 715, 125 (2005). In Cutter, the Supreme Court's analyzed Section 3 of the RLUIPA, which provides, in part, that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution." Id. 42 U.S.C.A. § 2000cc. Defendants argue that Olsen may not bring a claim under this statute as he is not incarcerated, and the CSA does not affect Olsen's religious use of land. The court agrees and dismisses Olsen's claims brought under the RLUIPA as to all Defendants.

2. Constitutional Claims

Olsen alleges violations regarding his First Amendment free exercise rights, Equal Protection, the Ex Post Facto Clause, the Fourth Amendment, and the Fifth Amendment.

a. Count II: First Amendment

Olsen asserts that the Defendants' interpretation of the statutory and regulatory scheme of the Federal Controlled Substances Act has violated his rights under the Free Exercise Clause of the First Amendment, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." US CONST AMEND I.

State Defendants note that Olsen's free exercise claims "have already been found to have no merit by both the Eighth Circuit Court of Appeals and by the Iowa Supreme Court." Olsen v. State of Iowa, 808 F.2d 652 (8th Cir. 1986); State v. Olsen, 315 N.W.2d 1 (Iowa 1982).

Federal Defendants assert that Olsen's claim alternatively fails as a matter of law because the CSA is a neutral law of general applicability, and thus may burden Olsen's "religiously motivated conduct without compelling justification," citing Employment Div. Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 883 (1990); United States v. Meyers, 95 F.3d 1475, 1481 (10th Cir. 1996); O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 282 F. Supp. 2d 1236, 1246 (D.N.M. 2002).

As noted previously in the section regarding Olsen's RFRA claim in Count 1, the court finds that Olsen is collaterally estopped from bringing the same claim in this court. See Olsen, 878 F.2d at 1461. (court notes that "Olsen free exercise claim has been raised, considered, and rejected in the context of criminal proceedings" citing Olsen v. Iowa, 808 F.2d at 653; Rush, 738 F.2d at 512-13; Middleton, 690 F.2d at 824-26; State v. Olsen,

315 N.W.2d at 7-9; Town v. State ex rel. Reno, 377 So.2d at 650-51). The court dismisses Count II as to all Defendants.

b. Count III: Equal Protection Clause

Olsen raises his equal protection claim as follows

> 57. The Plaintiff is similarly situated to Native American Church members in their sacramental use of a substance considered a Schedule I controlled substance under the Federal and Iowa versions of the CSA. Nevertheless, Defendants have refused to accord the same deference to the Plaintiff.
>
> 58. The Plaintiff is similarly situated to UDV Church members in their sacramental use of a substance considered a Schedule I controlled substance under the Federal and Iowa versions of the CSA. Nevertheless, Defendants have refused to accord the same deference to the Plaintiff.
>
> 59. Consequently, the Defendants' decision to allow the members of the Native American Church to use peyote and members of the UDV church to use DMT for religious purposes, while denying the same protection to the Plaintiff, violates the Equal Protection rights of the Plaintiff guaranteed by the Fifth and Fourteenth Amendments to the United States.

Complaint, pp. 17-18.

As noted for Counts I and II, Olsen previously brought this identical claim and is collaterally estopped from re-litigating the same claim. See Olsen, 878 F.2d at 1463. (court notes that "Olsen has urged before that members of his church are similarly situated to the beneficiaries of the exemption prescribed in 21 C.F.R. § 1307.31. See Olsen v. Iowa, 808 F.2d at 653; Rush, 738 F.2d at 513. We join our sister courts in rejecting this plea."). The court grants dismisses Count III as to all Defendants.

c. Count IV: Ex Post Facto Clause

Olsen improperly invokes the Ex Post Facto Clause, which provides that "No Bill of Attainder or ex post facto Law shall be passed." U.S.C.A. Const. Art. I § 9, cl. 3. Olsen states that, "Based upon the erroneous and unlawful determination that Cannabis is a controlled substance under the CSA, Defendants have criminally prosecuted the Plaintiff in the past…and have threatened to criminally prosecute the Plaintiff [in the future]."

> Our test for determining whether a criminal law is *ex post facto* derives from these principles. As was stated in Weaver, to fall within the ex post facto prohibition, two critical elements must be present: first, the law "must be retrospective, that is, it must apply to events occurring before its enactment"; and second, "it must disadvantage the offender affected by it."

Miller v. Florida, 482 U.S. 423, 430 (1987)(emphasis in original) (quoting Weaver v. Graham, 450 U.S. 24, 29 (1981)). Defendants argue that this clause does not apply to Olsen's claims. This court agrees; Olsen fails to establish the first element as the CSA was not applied to him retrospectively. The court dismisses Count IV as to all Defendants.

d. Count VI: Fourth Amendment

Olsen claims that "Defendants cannot substantially burden his right to be secure in his person, house, papers, and effects, without demonstration of the facts of a threat to public health and safety which triggers the application of the Compelling Interest Test to review the facts and application of the law de novo." Complaint, p. 21.

The Fourth Amendment protects

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S.C.A. Const. Amend. IV.

State Defendants note as follows,

> The nature of this allegation is unclear. Apart from general rubric about what the Fourth Amendment protects, little is said to support such a claim. There is no allegation that Olsen was ever the victim, or will ever be the victim, of an illegal search and/or seizure. There is certainly no allegation that any particular defendant ever participated in, or caused, such an event.

Federal Defendants also argue that Olsen fails to raise a viable claim and cannot save his claim by comparing it to the "hybrid" situation presented in Employment Division v. Smith, 494 U.S. at 881-882. Federal Defendants point out that "the hybrid situation mentioned in Smith referred only to a few prior cases were religiously motivated action that also implicated freedom of speech rights or rights of parents to raise their children."

The court agrees that Olsen fails to state a claim for which relief can be granted and dismisses Count VI as to all Defendants.

e. Count VII: Fifth Amendment

Olsen claims Defendants violated his rights under the Fifth Amendment due to their failure provide him with a pre-deprivation notice and hearing prior to seizing his property, i.e. his marijuana, in the past. Defendants state that Olsen's claim is frivolous as he cannot claim a constitutionally protected property interest in marijuana. This court agrees and dismisses Count VII as to all Defendants.

3. Other Claims

a. Count V: Iowa Controlled Substances Act

Olsen asserts that Defendants have criminally prosecuted him in the past and have threatened to criminally prosecute him in the future due to the "erroneous and unlawful determination that Cannabis is a controlled substance under the CSA."

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.

b. Count VIII: Administrative Procedure Act

Olsen claims that

> The Federal Defendants' conduct as set forth above constitutes agency action that is: (a) arbitrary and capricious; (b) an abuse of discretion and otherwise not in accordance with6 the law: © contrary to the Plaintiff's constitutional and statutory rights; (d) in excess of statutory jurisdiction and authority; and (e) without observance of procedures required by law. Such action should be set aside and declaratory and injunctive relief provided under the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

Complaint, p. 22.

Federal Defendants argue that "plaintiff merely cross-references his previous allegations…[and thus] this count is completely derivative of plaintiff's other claims." Fed. Def. Brief, p. 30. Olsen agrees, stating that he "feels that he has exhausted reasonable attempts to obtain relief under the APA." Response, p. 28. The court dismisses this count as to all Defendants.

c. Count IX: Treaties and Conventions

Olsen contends that his religious use of cannabis is protected under the United Nations International Covenant on Civil and Political Rights ("ICCPR"), 138 Cong. Rec. S4781-84 (1992), the Universal Declaration of Human Rights("UDHR"), GA res. 217A, Dec. 10, 1948, the International Religious Freedom Act ("IRFA"), Pub. L. No. 105-292, 112 Stat. 2787 (1998) (codified at 22 U.S.C. §§ 6401-6481), and the 1971 Convention on Psychotropic Substances ("CPS"), 32 U.S.T. 543, 1019 U.N.T.S. 175.

State Defendants note that: (1) Plaintiff cites to documents that refer to the United States government, rather than the states; (2) Plaintiff lacks standing to raise any claim as an individual; (3) Under O Centro, international treaties and conventions may "not be read as negating an unambiguous statute such as the Controlled Substances Act"; and (4) None of the international treaties/conventions "specifically prohibits the criminalization of marijuana."

Federal Defendants note that: (1) The ICCPR is not self-executing and thus the Plaintiff has no privately enforceable rights absent implementing legislation by Congress, citing U.S. ex rel. Perez v. Warden, FMC Rochester, 286 F.3d 1059, 1063 (8th Cir. 2002) Payne-Barahona v. Gonzales, 474 F.3d 1, 3 (1st Cir. 2007); Martinez-Lopez v. Gonzales, 454 F.3d 500, 502 (5th Cir. 2006); Guaylupo-Moya v. Gonzales, 423 F.3d 121, 133 (2nd Cir. 2005); (2) The UDHR is not an enforceable source of law in federal courts, citing Guaylupo-Moya, 423 F.3d at 133; (3) The CPS is also not self-executing and thus creates no private cause of action for the Plaintiff absent implementing legislation. Similarly, the CPS also does not create a private right of action. citing Hernandez v. Ciba-Geigy Corp. USA, 200 F.R.D. 285, 294 (S.D. Tex. 2001); and (4) The IFRA applies only internationally and the statute specifically precludes judicial review. 22 U.S.C. § 6450. The court agrees and dismisses Count IX as to all Defendants.

d. Count X: Request for Declaratory Judgment

As noted previously, the court dismisses all claims brought by Olsen against all Defendants, thus Olsen's request for declaratory judgment is denied.

III. CONCLUSION

Upon the foregoing,

IT IS ORDERED that State Defendant Miller's February 7, 2007 Motion to Dismiss (docket 8), State Defendants Sarcone and Anderson's March 19, 2007 Joinder (docket 15), and Federal Defendants April 10, 2007 Motion to Dismiss (docket 21) are GRANTED. Olsen's July 2, 2007 Motion for Summary Judgment is DENIED as moot. (docket 43). The clerk shall enter judgment for all Defendants on all claims.

DATED this 16th day of July, 2007.

JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA