UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

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

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

In their Opposition to the Plaintiff's Motion for Preliminary Injunction ("Opposition" hereafter) the Defendants have alleged the Plaintiff does not state a claim for several reasons: (1) they allege that the Plaintiff does not have standing because the Plaintiff has no fundamental right to use marijuana for religious purposes; (2) they allege the Plaintiff has failed to exhaust administrative remedies; (3) they allege the Plaintiff is barred by prior case law; and (4) they allege that Congress did not authorize the States in the United States to determine whether Schedule I controlled substances have any accepted medical use.

The Defendants have effectively made a final ruling on the Plaintiff's administrative petition. The Plaintiff informed the United States Drug Enforcement Administration (DEA) that marijuana now has "accepted medical use" in the United States. There is no reason to remand this case back to the agency for further administrative action, as the Defendants suggest, when the Defendants have already taken the position that the Plaintiff's administrative petition has no

merit (at page 14 of the Defendants' Opposition, Argument 1, Paragraph B, Subheading 2). Further administrative proceedings would not produce a different result.

The Plaintiff acknowledges that he is not an attorney and that a legal professional may have filed the pleadings in this case with more precision and clarity. Pro se complaints are held to less stringent standards than formal pleadings drafted by lawyers. ***Haines v. Kerner***, 404 U.S. 519, 520, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972) (per curium) (reversing a dismissal of a pro se inmate's complaint, yet intimating no view on the merits of his allegations).

Court decisions prior to 1996, when states began adopting laws accepting the medical use of marijuana, have no collateral estoppel effect on the Plaintiff's current claim, which is based on facts occurring after 1995.

Olsen v. Gonzales (U.S. District Court for the Southern District of Iowa, Case 4:07-cv-00023-JAJ-RAW, Document 49, Filed 07/16/2007, attached as Exhibit #1 to the Defendants' Opposition), ***aff'd sub nom. Olsen v. Mukasey***, 541 F.3d 827 (8th Cir. 2008), did not contain a claim that the DEA had failed to removed marijuana from Schedule I as required by the CSA, because the Plaintiff did not realize there was such a claim at the time the case was filed in January of 2007. The Plaintiff is not an attorney and has no professional legal counsel. ***Olsen v. Gonzales*** claimed an exemption from the CSA based on the interpretation of the Religious Freedom Restoration Act (RFRA) in ***Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal***, 546 U.S. 418 (2006) ("O Centro" hereafter). An

exemption from the application of the Controlled Substances Act (CSA) because of religion has nothing to do with the scheduling of marijuana, other than the fact that marijuana's Schedule I status was used by the Defendants as justification for denying the Plaintiff the ***Sherbert v. Verner***, 374 U.S. 398 (1963), and ***Wisconsin v. Yoder***, 406 U.S. 205 (1972), tests required by the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb *et seq*.

There are existing religious exemptions from the CSA for peyote and hoasca (which contains the Schedule I drug DMT). These exemptions are for Schedule I controlled substances. A religious exemption does not rely on which of the five schedules a substance is place in.

Clearly the Plaintiff was not required to give a detailed scheduling argument in his claim for a religious exemption from the CSA because it had no relevance to the religious claim. The Plaintiff made a general comment that marijuana was misclassified based on lack of compelling interest, which is a specific element of the "compelling interest test" guaranteed by RFRA and ***O Centro***. The Plaintiff alleged that marijuana was not harmful and could not be scheduled based on findings made by the Commission on Marijuana and Drug Abuse in 1972 and findings of the DEA Administrative Law Judge in 1988. The Plaintiff mentioned that 12 States had legalized the cultivation of marijuana by medical patients as proof that marijuana is not dangerous.

In response to the Plaintiff's claims that marijuana was not dangerous and could not be included in the CSA, both the Defendants and the District Court in

Olsen v. Gonzales instructed the Plaintiff to file an administrative petition (see page 17 of Defendants' Exhibit #1). The Plaintiff has filed the administrative petition. The Plaintiff is not barred from seeking judicial relief now that an administrative petition has been filed. The Plaintiff is not required to exhaust administrative remedies before seeking review, because the Defendants claim that state medical marijuana laws do not require them to remove marijuana from Schedule I, which is effectively a final ruling on the merits of the Plaintiff's administrative petition.

The Defendant's allege the Plaintiff is merely trying to re-litigate his religious claim which is currently being docketed in the United States Supreme Court. However, the Plaintiff is not trying to re-litigate his religious claim. The Plaintiff is simply reporting the denial of the religious claim as evidence of irreparable injury in support of standing to make the claim in this case.

The Defendants' correctly point out on page 8 of their Opposition, that transferring marijuana to Schedule II through V of the CSA would not automatically require a religious exemption for the sacramental use of marijuana, but ignore the fact that removal of marijuana from the CSA is also a possible consequence of any rescheduling procedure. As the United States Supreme Court pointed out in ***Gonzales v. Raich***, 545 U.S. 1, 27 (2005): "Thus, even if respondents are correct that marijuana does have accepted medical uses and thus should be redesignated as a lesser schedule drug, the CSA would still impose controls beyond what is required by California law (footnote omitted)." The Plaintiff cannot give the

Defendants an easy solution to their dilemma. All the Plaintiff can do is point out the obvious, that marijuana no longer meets the statutory requirement for inclusion in Schedule I of the CSA. Whether this would automatically result in allowing the Plaintiff to use marijuana for religious purposes is beyond the scope of this complaint, which is why this complaint is not an attempt to re-litigate the issue of the Plaintiff's religious use of marijuana.

Thousands of law abiding citizens authorized by their states to use marijuana as medicine are adversely affected by the failure of the Defendants to perform their statutory obligation to keep the nation's drug laws up to date. Potentially, millions of otherwise law abiding users of marijuana could be affected. See ***Morse v. Frederick***, ___ U.S. ___, 127 S. Ct. 2618, 2651, 168 L. Ed. 2d 290, 327-28 (2007) (Justice Stevens, dissenting) ("literally millions of otherwise law-abiding users of marijuana"). The public interest requires that the merits of the claim presented by the Plaintiff be addressed by this Court. The public interest would best be served by allowing the Plaintiff to proceed. The Plaintiff is acting as a "private attorney general" in demanding that a federal agency obey the law set by Congress in the Controlled Substances Act. ***Newman v. Piggie Park Enterprises***, 390 U.S. 400, 402 (1968) ("he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority.").

The Plaintiff believes that his sacrament is for the "healing of the nations" as described in the Book of Revelation, Chapter 22, Verse 2 (Authorized King James Version of the Bible). It is the Plaintiff's religious mission to see that authorized

medical users in the 13 States that have accepted the medical use of marijuana are protected to the fullest extent of the law. The Plaintiff has standing under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb *et seq.,* and the First Amendment to the Constitution of the United States to complain about a regulatory agency that refuses to obey federal law and refuses to allow the States to protect the health and welfare of their citizens by adopting laws accepting the medical use of marijuana. The Plaintiff has the right to seek redress of this grievance because the actions of the Defendants violate the fundamental right of the Plaintiff to promote his religious beliefs through every lawful means. The Plaintiff's Establishment of Religion, Freedom of Speech, and Redress of Grievances are absolute under the First Amendment to the U.S. Constitution.

Attached to this Reply as Exhibit #1 is a civil complaint filed by the American Civil Liberties Union of Iowa in the Iowa District Court in and for Polk County Iowa, ***George McMahon v. Iowa Board of Pharmacy***, No. CV7415. Attached to this Reply as Exhibit #2 are the incorporation papers for Iowans for Medical Marijuana, showing the initial directors of the corporation as Carl Olsen, George McMahon, and Barbara Douglass. The incorporation of Iowans for Medical Marijuana is a direct expression of the Plaintiff's religious beliefs and protected by the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq*., and the First Amendment to the Constitution of the United States.

The issue in ***George McMahon v. Iowa Board of Pharmacy*** is the same as the issue in this case, to wit: "In the United States, it is the states – and not the

federal government – that define the bounds of acceptable medical practice and what drugs or substances have accepted medical use." See page 2 of Exhibit #1 attached to this Reply.

CONCLUSION

Congress did not intend the "initial" classification of substances in the Controlled Substances Act, 21 U.S.C. §§ 801 *et seq*. ("CSA"), to give a regulatory agency the authority to impose accepted standards of medical practice on the states. "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, 258 (2006).

Contrary to the Defendants' claim on page 2 of their Opposition, the regulatory agencies do not have the authority to determine "to what extent" a substance has currently accepted medical use. A substance either has or doesn't have currently accepted medical use. Congress gave the authority to the States to determine accepted medical use. The regulatory agencies only have this authority in the absence of any state law accepting the medical use of a controlled substance. The regulatory agencies obviously need this authority to approve any new pharmaceutical drugs that have not yet been accepted as having any medical use in the United States by any of the States.

21 U.S.C. 812(b)(1)(B) does not say a substance must have accepted medical use in "every" state, nor does it say the DEA can determine whether a substance has accepted medical use in the United States when a substance actually has accepted medical use in the United States. Congress established a regulatory scheme to prevent the abuse of drugs and other substances "initially" listed in the CSA. Congress defined what abuse means. Abuse means distribution outside of "the legitimate distribution chain." See Defendants' Opposition at page 2, citing ***United States v. Moore***, 423 U.S. 122, 141 (1975). State medical marijuana laws are not illegitimate distribution chains. See ***Gonzales v. Oregon***, 546 U.S. 243 (2006). See also ***City of Garden Grove v. Superior Court of California***, 157 Cal. App. 4th 355, 380-87, 68 Cal. Rptr. 3d 656, 673-78 (Cal. App. 2007, Slip Opinion, pages 26-34), review denied by the California Supreme Court on March 19, 2008 (explaining why the federal Controlled Substances Act does not preempt the state medical marijuana law). Similar results were reached in ***County of San Diego v. San Diego NORML***, 165 Cal. App. 4th 798, 81 Cal. Rptr. 3d 461 (2008), rev. denied (California Supreme Court, October 16, 2008).

Congress "initially" placed marijuana in Schedule I of the CSA in 1970 because in 1970 marijuana actually had no currently accepted medical use in treatment in the United States at that time. "Justice Anthony Kennedy told us that 'times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.' Lawrence, 539 U.S. at 579." ***Raich v. Gonzales***, 500 F.3d 850, 866 (9th Cir. 2007), citing *Lawrence v.*

Texas, 539 U.S. 558 (2003). ***Morse v. Frederick***, ___ U.S. ___, 127 S. Ct. 2618, 2651, 168 L. Ed. 2d 290, 327-28 (2007) (Justice Stevens, with whom Justice Souter and Justice Ginsburg join, dissenting):

> Reaching back still further, the current dominant opinion supporting the war on drugs in general, and our anti-marijuana laws in particular, is reminiscent of the opinion that supported the nationwide ban on alcohol consumption when I was a student. While alcoholic beverages are now regarded as ordinary articles of commerce, their use was then condemned with the same moral fervor that now supports the war on drugs. The ensuing change in public opinion occurred much more slowly than the relatively rapid shift in Americans' views on the Vietnam War, and progressed on a state-by-state basis over a period of many years. But just as prohibition in the 1920's and early 1930's was secretly questioned by thousands of otherwise law-abiding patrons of bootleggers and speakeasies, today the actions of literally millions of otherwise law-abiding users of marijuana, and of the majority of voters in each of the several States that tolerate medicinal uses of the product, lead me to wonder whether the fear of disapproval by those in the majority is silencing opponents of the war on drugs. Surely our national experience with alcohol should make us wary of dampening speech suggesting --however inarticulately--that it would be better to tax and regulate marijuana than to persevere in a futile effort to ban its use entirely.

(footnotes omitted).

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 14, 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

TAMARA ULRICH, U.S. Department of Justice, Civil Division

Filed Electronically

CARL OLSEN