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 SUMMARY JUDGMENT**

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INTRODUCTION

Plaintiff has filed various motions in this case in order to receive relief to which he is not entitled. Plaintiff's latest motion seeks summary judgment from the Court in the form of a declaration that, as a matter of law, marijuana has accepted medical use and its listing on Schedule I of the Controlled Substances Act, 21 U.S.C. § 801 *et seq.* ("CSA" or "the Act"), is unlawful. Plaintiff proffers no new arguments for this extraordinary request that contravenes the statutory mandate of the CSA. In fact, Plaintiff's claims present questions of law that are easily resolved in favor of Defendants. Defendants have previously filed a motion to dismiss and opposed Plaintiff's motion for a preliminary injunction. For the same reasons explained in those two briefs, Plaintiff's motion for summary judgment should, likewise, be denied.

STATUTORY BACKGROUND

The CSA establishes a comprehensive federal scheme to regulate controlled substances. It 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. 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. 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. 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 law in the scheduling of controlled substances 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. Plaintiff's motion for a preliminary injunction requested 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. Defendants opposed this motion on December 11, 2008.

On November 23, 2008, Plaintiff filed a motion for summary judgment, which raises the same issue as Plaintiff's motion for a preliminary injunction. Plaintiff's motion for summary judgment requests that the Court: (1) issue "a declaratory order that, as a matter of law, marijuana has "accepted medical use in treatment in the United States" for the purpose of interpreting the statutory language of 21 U.S.C. § 812(b)(1)(B);" and (2) issuing "a declaratory order that, as a matter of law, the regulation listing marijuana in Schedule I of the regulations of the United States Drug Enforcement Administration, 21 C.F.R. 1308.11(d)(22), is unlawful." Pl.'s Mot. for Summ. J. at 1. Rather than setting forth new arguments in support of his motion, Plaintiff incorporates by reference the arguments he has raised in previous briefs. *See id.* at 3.

ARGUMENT

Plaintiff's motion for summary judgment seeks the same relief as his motion for a preliminary injunction – he requests that the Court declare that marijuana does not belong on Schedule I under the CSA or federal regulations.[1] *See* Pl.'s Mot. for Summ. J. at 1. Plaintiff is not entitled to summary judgment for the same reasons he is not entitled to a preliminary injunction, or any relief at all in this case. First, as explained in Defendants' briefs in support of their motion to dismiss and in opposition to Plaintiff's motion for a preliminary injunction, this Court lacks jurisdiction to address Plaintiff's rescheduling claim. Even if it maintained jurisdiction, the Court should not grant Plaintiff's motion on the merits. Plaintiff has repeatedly attempted to challenge the federal drug laws is bound by the doctrines of res judicata and collateral estoppel from challenging them again. In any event, Congress delegated the power of scheduling controlled substances to the Attorney General. Plaintiff should not be allowed to circumvent the statutory criteria and procedures for scheduling controlled substances by receiving a court order in the first instance.

I. 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

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[1] In his summary judgment motion, Plaintiff does not seek relief on his claim involving international treaties, but focuses solely on his claim for rescheduling of marijuana under the CSA. Therefore, Defendants' opposition focuses 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

rescheduling request.

A. 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 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 (1998). 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;[3] (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"); Pl.'s Mot. for Summ. J. at 1-2 (alleging that 13 states have laws allowing for the medical use of

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n.4 ("it is elementary that standing relates to the justiciability of a case and cannot be waived by the parties").

[3] Plaintiff contends that Michigan passed a law permitting the medical use of marijuana on November 8, 2008, bringing the total to 13. Pl.'s Mot. for Summ. J. at 2.

marijuana). 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's 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.").

B. 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 (Ex. 1 to Defs.' Opp. to Pl.'s Mot. for Prelim. Inj.), *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. Forest Serv.*, 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).[4]

Additionally, in his motion for summary judgment, Plaintiff seeks a determination from the Court – rather than the Attorney General – that marijuana has an accepted medical use and that its maintenance on Schedule I is unlawful. *See* Pl.'s Mot. for Summ. J. at 1. This is clearly improper. Congress conferred upon Attorney General the power to reschedule controlled substances under the CSA, following the procedures of the Administrative Procedure Act. 21 U.S.C. § 811(a). Courts have repeatedly held that this administrative rescheduling process is the exclusive means for challenging Congress's scheduling decisions and that courts lack authority to review such scheduling decisions in the first instance. *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."). Accordingly, this Court is without jurisdiction to consider Plaintiff's request to reschedule marijuana under the CSA.

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[4] 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).

III. PLAINTIFF'S RESCHEDULING CLAIM FAILS ON THE MERITS

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.

A. 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. *Olsen v. Gonzales*, No. 07-cv-23 (S.D. Iowa) July 16, 2007 Order at 17 (Ex. 1 to Defs.' Opp. to Pl.'s Mot. for Prelim. Inj.), *aff'd sub nom. 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).

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.[5] *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

[5] 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.

B. The Federal Government Need Not Defer to State Law in Scheduling Marijuana

The legal basis upon which Plaintiff's claim rests – that the federal government must defer to certain states' determinations of accepted medical use in scheduling controlled substances under the CSA – is legally unfounded. This conclusion is simply in error, as federal law need not defer to state law. *See Gonzales v. Raich*, 545 U.S. 1, 29 (2005) ("The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail."). The Supreme Court has held that the CSA is enforceable, regardless of various state laws regarding marijuana. *See id.* at 9 (declaring that "[t]he CSA is a valid exercise of federal power," when challenged by California residents seeking marijuana for medical use under state law); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001) (finding that, regardless of state law allowing for the medical use of marijuana, "medical necessity is not a defense to manufacturing and distributing marijuana" under federal law).

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.

None of the alleged material facts cited by Plaintiff in his motion for summary judgment change the outcome of the case, as they are each irrelevant to the legal question before the Court. Plaintiff relies of the fact that thirteen states have medical marijuana laws. Pl.'s Material Facts ¶¶ 1, 2. As explained above, state law does not dictate the outcome of this case, as federal law need not defer to state law. Nor does Plaintiff's citation to affidavits from the case of *Conant v. Walters*, 309 F.3d 629, 648-49 (9th Cir. 2002), have any bearing on this case. *Id.* ¶ 3. Plaintiff appears to use these affidavits to demonstrate that the federal government allows for the medical use of marijuana in certain circumstances. The Compassionate Care program described in *Conant* was a research program begun in 1978 to settle a civil lawsuit and provided marijuana to a limited number of participants with glaucoma and other severe illnesses. *See Kuromiya v. United States*, 78 F. Supp. 2d 367, 368 (E.D. Pa. 1999). The federal government terminated the program in 1992 because it was increasingly skeptical about the safety and effectiveness of marijuana as a medical treatment. *Id.* at 369-70. The government merely decided to continue to provide marijuana to the remaining participants because those individuals had relied on the government-supplied marijuana for many years and the government did not want to abruptly end their supply. *Id.* at 372. The existence of this now-discontinued program does not impact how marijuana should currently be scheduled in the CSA. Indeed, the court in *Conant* recognized that the Supreme Court has ruled that federal law does not exempt "from prosecution the dispensing of marijuana in cases of medical necessity." *Conant*, 309 F.3d at 634, citing *Oakland Cannabis Buyers Coop.*, 532 U.S. 483. The remainder of Plaintiff's proffered "material facts" are erroneous conclusions of law. *See* Stmt. of Mat. Facts ¶¶ 4-6. Plaintiff's misrepresentations of

the law do nothing to take away from the fact that marijuana is a Schedule I controlled substance under the CSA and the Attorney General – not the courts – has the power to change scheduling under the CSA following appropriate procedures.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for summary judgment should be denied.

Dated: December 17, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2008, a true and accurate copy of the foregoing document, Defendants' Opposition to Plaintiff's Motion for Summary Judgment 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 17, 2008

/s/ Tamara Ulrich
TAMARA ULRICH