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 SUMMARY JUDGMENT

The Plaintiff has already filed a Reply to the Defendant's Opposition to the Plaintiff's Motion for Preliminary Injunction and incorporates that reply in this reply.

On page 2 of their Opposition to the Plaintiff's Motion for Summary Judgment ("Opposition" hereafter) the Defendants cite ***Gettman v. Drug Enforcement Administration***, 290 F.3d 430 (D.C. Cir. 2002) ("***Gettman***" hereafter), to support their claim that it is the Administrator of the Drug Enforcement Administration (DEA) and the Secretary of Health and Human Services (HHS) that determine whether a substance has accepted medical use.

Because this Plaintiff's complaint is based on state laws accepting the medical use of marijuana, ***Gettman*** is not controlling. The DEA Administrator explained why ***Gettman*** is not controlling here:

> You do not assert in your petition that marijuana has a currently accepted medical use in treatment in the United States or that marijuana has an accepted safety for use under medical supervision.

66 Fed. Reg. 20038 (April 18, 2001). Mr. Gettman filed his petition with DEA in 1995. In 1995, there actually were no states that had currently accepted medical use of marijuana. Obviously, Mr. Gettman could not assert a fact that had not yet come into existence. There is absolutely no doubt that DEA and HHS have the statutory authority to determine whether a substance has accepted medical use in the United States in the total absence of any state law accepting the medical use of that substance. New drugs would never see the light of day if DEA and HHS were not allowed to approve them. The Defendants are setting up a straw man and then knocking that straw man down. The Plaintiff is not arguing that DEA and HHS have no authority to determine whether "new" drugs have accepted medical use.

As to standing, the stigma attached to marijuana because of the unlawful retention of marijuana in Schedule I after it no longer meets the statutorily required finding for inclusion in that schedule works irreparable injury on the Plaintiff's establishment and exercise of religion. Furthermore, it is the mission of the Plaintiff's religion to provide healing for the sick. The Defendants have injured the Plaintiff and the Plaintiff is entitled to redress.

It is also far from clear that marijuana would be properly scheduled in any schedule of the Controlled Substances Act if the Defendants seek to reschedule it. The U.S. Supreme Court pointed this 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)."

Because the Defendants have no expertise in statutory construction and the only dispute between the parties is the statutory interpretation of "accepted medical use in treatment in the United States", there is no requirement that the Plaintiff exhaust an administrative remedy. The Defendants have take a final position on the matter and this controversy is now properly before this Court.

Finally, the Defendants ignore the interpretation of the statute given in ***Gonzales v. Oregon***, 546 U.S. 243 (2006), that the states, not the federal government, determine accepted medical use.

Defendants claim the Plaintiff has no injury because the courts have refused to apply 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, 42 U.S.C. §§ 2000bb *et seq*. and the First Amendment, to his sacramental use of marijuana. None of those courts said the Plaintiff did not suffer a cognizable injury. They said the scheduling of marijuana in Schedule I was sufficient to override the Plaintiff's religious freedom. Here, where that injury is the direct result of the Defendants' failure to obey a federal statute, that injury is redressable.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 17, 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