UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

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

PLAINTIFF'S SECOND AMENDED REPLY TO DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

INTRODUCTION

On January 13, 2009, Defendants filed a Supplemental Brief (Docket #27) claiming the Plaintiff has now exhausted administrative remedies because the Plaintiff received a letter ("**DEA Letter**" hereafter) (Docket #22, Attachment #1) on January 5, 2009, from the Drug Enforcement Administration ("DEA") rejecting his petition notifying the DEA of its failure to obey federal law. In May of 2008, the Plaintiff notified the DEA that it must remove marijuana from Schedule I of the Controlled Substances Act ("CSA") because marijuana no longer meets the statutory findings required by Congress for inclusion in Schedule I (Docket #1, Attachment #4, Exhibit #12). The "**DEA Letter**" does not say there has been any "FINAL ORDER" on the Plaintiff's petition. The "**DEA Letter**" simply interprets the statutory language of 21 U.S.C. § 812(b)(1)(B) to mean that Congress did not intend a role for the States in determining the meaning of "accepted medical use in treatment in the United States"

as that term is used in the plain language of the statute. This Court is more qualified to authoritatively interpret the language of the CSA than the DEA.

PETITION FOR REVIEW IN THE UNITED STATES COURT OF APPEALS

On Friday, January, 16, 2009, the Plaintiff filed a Petition for Review in the United States Court of Appeals for the Eighth Circuit, pursuant to 21 U.S.C. § 877, from the "**DEA Letter**" of December 19, 2008 (Docket #28, Attachment #1).

FACTUAL BACKGROUND

The Plaintiff is not an attorney and request a liberal interpretation of all pleadings under ***Haines v. Kerner***, 404 U.S. 519 (1972).

Before initiating this civil complaint for injunctive and declaratory relief, the Plaintiff considered how to go about notifying the DEA that the DEA was in violation of federal law. The Plaintiff was unable to find any examples other than marijuana where a Schedule I substance had later been accepted for medical use by any state in the United States. Plaintiff's claim that the DEA failed to remove marijuana from Schedule I, 21 C.F.R. § 1308.11, based on the "accepted medical use" of marijuana beginning in 1996 when California enacted the first state law accepting the medical use of marijuana appears to be a matter of first impression in the federal courts. The Plaintiff decided that a petition to the DEA would give the DEA the opportunity to correct its error, as well as giving the DEA notice that further legal action would be taken if it did not correct the error immediately.

Because the DEA's error has been ongoing for 13 years, the Plaintiff only waited for about 30 days and then, on August 5, 2008, the Plaintiff sent the DEA a

notice to cease and desist the enforcement of the unlawful regulation, 21 C.F.R. § 1308.11(d)(22), maintaining marijuana in Schedule I of the CSA (Docket #1, Attachment # 5, Exhibit # 17). The notice to cease and desist clearly told the DEA that an injunction would be sought in a federal district court within 30 days if the DEA did not comply with the notice.

The DEA now characterizes the petition and notice to cease and desist as a petition to initiate a scheduling proceeding. This interpretation was clearly not the intent of the petition and the notice to cease and desist. 21 C.F.R. § 1300.01(36) defines "proceeding" as follows:

> The term proceeding means all actions taken for the issuance, amendment, or repeal of any rule issued pursuant to section 201 of the Act (21 U.S.C. 811), commencing with the publication by the Administrator of the proposed rule, amended rule, or repeal in the FEDERAL REGISTER.

Clearly, it was not the intent of the Plaintiff that the DEA initiate a scheduling proceeding. The Plaintiff demanded the immediate obedience of the DEA to its statutory obligation of recognizing that marijuana is no longer legally scheduled in Schedule I and to cease and desist from unlawful enforcement where there is no valid law. The grounds for the Plaintiff's petition to the DEA were not based on any regulatory findings the DEA might make in a proceeding, but on the statutory findings required by Congress for inclusion of a drug in Schedule I that are set out in the plain language of the statute as interpreted by the U.S. Supreme Court in ***Gonzales v. Oregon***, 546 U.S. 243, 258 (2006):

> 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.

Perhaps the Plaintiff should have filed a civil complaint in this Court first, instead of giving the agency the opportunity to correct its own error, but the Plaintiff is not a trained attorney and did the best he could to let the DEA know what he expected them to do and what the consequences would be if the DEA failed to act.

Plaintiff clearly did not request the DEA to hold scheduling hearings in order to move marijuana to some other schedule, but simply recognize that marijuana is no longer legally included in Schedule I and to cease and desist the unlawful enforcement where there is no valid law. What the DEA does after it removes marijuana from Schedule I is clearly something the DEA will have to determine. The DEA can initiate a proceeding to schedule marijuana or simply remove marijuana from Schedule I and do nothing. The Petition and notice to cease and desist did not tell the DEA to do anything except remove marijuana from Schedule I.

The DEA has authority to determine "accepted medical use" in the absence of any state law accepting medical use. Congress did not give the DEA the authority to make an accepted medical practice in any state illegal under the CSA. Prior petitions to reschedule marijuana were all filed before state laws were enacted accepting the medical use of marijuana. The last petition to reschedule marijuana mentioned in the "**DEA Letter**" was filed in 1995 (see page 2 of the letter, footnote 1). The first state to enact a law accepting the medical use of marijuana was California in 1996.

ARGUMENT

Plaintiff appreciates that the Defendants now admit the Plaintiff is entitled to judicial review. Plaintiff is entitled to have this Court make a ruling on the interpretation of the statutory language in 21 U.S.C. §812(b)(1)(B) ("accepted medical use in treatment in the United States") absent any conclusive interpretation of that statutory language by the United States Court of Appeals. This Court should not dismiss the Plaintiff's claim prematurely simply because the Plaintiff has filed a Petition for Review of the "**DEA Letter**" in the United States Court of Appeals.

The Defendants cite ***Doe v. DEA***, 484 F.3d 56 (D.C. Cir. 2007), as evidence the Plaintiff must exhaust an administrative remedy. In ***Doe v. DEA***, the DEA refused to permit the importation of a Schedule I substance into the United States. Doe claimed the substance was in Schedule III when it applied for a permit to import the substance. The dispute in ***Doe v. DEA*** was a contest about which schedule the substance was actually in when it was imported. There was no dispute as to whether any state had accepted the medical use of the substance Doe was trying to import. Therefore, the legal question of the interpretation of the statutory language requiring removal of a substance from Schedule I because it has been accepted for medical use by state lawmakers was never an issue in ***Doe v. DEA***.

The case this Court should be looking to for guidance is ***Monson v. DEA***, 522 F.Supp.2d 1188, 1194 (D.N.D. 2007):

> The DEA contends that this Court lacks subject matter jurisdiction because the Controlled Substances Act confers exclusive jurisdiction on the United States Court of Appeals to review any "final decision" of that agency. See 21 U.S.C. § 877. However, the plaintiffs are not challenging a "final decision" of the DEA, such as the denial of a license application or promulgation of a rule. Rather, the plaintiffs are seeking a declaration

> that the Controlled Substances Act does not apply to their planned cultivation of industrial hemp pursuant to North Dakota state law and, as a result, that they cannot be prosecuted under the Act. Thus, no "final decision" of the DEA is at issue and the Court finds that 21 U.S.C. § 877 does not bar the plaintiffs from seeking relief in this Court.

The similarity to this case is that the Plaintiff here is not asking the DEA's permission to initiate a proceeding to remove marijuana from Schedule I as the "DEA Letter" implies. ***Monson v. DEA***, 522 F.Supp.2d 1188, 1194 (D.N.D. 2007) ("They claim that the DEA has misconstrued the Controlled Substances Act by requiring that persons who seek to grow marijuana for industrial purposes obtain DEA registrations."). Similar to the plaintiffs in ***Monson v. DEA***, the Plaintiff here seeks a declaration that the Controlled Substances Act does not apply to the Plaintiff's use of marijuana as a religious sacrament because marijuana is currently misclassified. There is also the underlying issue of the accepted medical use of marijuana (Docket #16, Attachment #1) which is a mission of the Plaintiff's religion. The Plaintiff only has standing to complain about the personal injury to his religious freedom, but, certainly, this question affects a large number of people who are legally using marijuana for medicine under valid state laws and it is a mission of the Plaintiff's religion to protect state-authorized medical users of marijuana. See, ***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), certiorari denied, ***City of Garden Grove v. Superior Court of California***, ___ U.S. ___, 129 S. Ct. 623 (2008) (Docket #13, Attachment #1). 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). And, see, ***State v. Nelson***, 346 Mont. 366, 195 P.3d 826 (Mont. 2008) (similar result).

According to the "**DEA Letter**", marijuana has no accepted medical use because it has not been approved by another administrative actor, the Secretary of Health and Human Services (see the letter at pages 3, 4 & 5) according to the agency rules applied when the agency initiates a proceeding for rescheduling of a drug. According to the statute enacted by Congress, marijuana has accepted medical use in treatment in the United States when a state says so because the states have the authority under the CSA to determine the accepted use of drugs in that state. ***Gonzales v. Oregon***, 546 U.S. 243, 264 (2006):

> As for the federal law factor, though it does require the Attorney General to decide "[c]ompliance" with the law, it does not suggest that he may decide what the law says. Were it otherwise, the Attorney General could authoritatively interpret "State" and "local laws," which are also included in 21 U.S.C. § 823(f), despite the obvious constitutional problems in his doing so.

Although the U.S. Supreme Court has rejected a medical necessity exception to the CSA for production and distribution of medical marijuana and upheld the application of the CSA to the states by way of the Commerce Clause, the U.S. Supreme Court has never found that marijuana can remain in Schedule I after it has been accepted for medical use by 13 states in the United States. ***United States v. Oakland Cannabis Buyers' Cooperative***, 532 U.S. 483, 492 (2001) ("Under the statute, the Attorney General could not put marijuana into schedule I if marijuana had any accepted medical use."). ***Gonzales v. Raich***, 545 U.S. 1, 28 n.37 (2005) ("We

acknowledge that evidence proffered by respondents in this case regarding the effective medical uses for marijuana, if found credible after trial, would cast serious doubt on the accuracy of the findings that require marijuana to be listed in Schedule I.").

The DEA cannot put marijuana in schedules II through V without first seeking an opinion from the Secretary of Health and Human Services (see "**DEA Letter**" at pages 3, 4 & 5). Congress did not give the DEA the authority to maintain marijuana in Schedule I if it has any accepted medical use in the United States. ***Grinspoon v. DEA***, 828 F.2d 881, 886 (1st Cir. 1987):

> We add, moreover, that the Administrator's clever argument conveniently omits any reference to the fact that the pertinent phrase in section 812(b)(1)(B) reads "in the United States," (emphasis supplied). We find this language to be further evidence that the Congress did not intend "accepted medical use in treatment in the United States" to require a finding of recognized medical use in every state or, as the Administrator contends, approval for interstate marketing of the substance.

Therefore, because marijuana does not meet the statutorily required findings for inclusion in Schedule I, and because the DEA has failed to move it to another schedule, marijuana is not currently in any schedule.

Because marijuana is not in any schedule of the CSA, the Plaintiff has standing to complain of the injury to his First Amendment right to freedom of religion which has been based on the placement of marijuana in Schedule I. ***Olsen v DEA***, 878 F.2d 1458, 1459 (D.C. Cir. 1989) ("[Olsen's] federal convictions were based on the Controlled Substances Act, 21 U.S.C. §§ 801-904 (1982), which lists marijuana as a "Schedule I" controlled substance ..."). Plaintiff's use of marijuana as a religious

sacrament is entirely legal under federal law but for the unlawful actions of the Defendants in this matter. The threat of enforcement of the unlawful regulation threatens the Plaintiff's establishment and free exercise of religion and constitutes an irreparable injury for purposes of Article III standing. See ***Elrod v. Burns***, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

CONCLUSION

The Plaintiff notes that in ***Oregon v. Ashcroft***, 368 F.3d 1118, 1120 (9th Cir. 2004), the U.S. Court of Appeals for the Ninth Circuit held the U.S. District Court had the authority to transfer the case to the United States Court of Appeals pursuant to 28 U.S.C. § 1631:

> We have original jurisdiction over "final determinations, findings, and conclusions of the Attorney General" made under the CSA. 21 U.S.C. § 877. Because the Attorney General maintains that his interpretive rule is a "final determination" and because the Directive orders sanctions for violations of its provisions, we have original jurisdiction pursuant to § 877. See *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1085 (9th Cir. 2003) (holding that an interpretive rule issued by the Attorney General pursuant to the CSA is a "final determination" for jurisdictional purposes because the rule "imposes obligations and sanctions in the event of violation [of its provisions]"); see also *City of Auburn v. Qwest*, 260 F.3d 1160, 1171-73 (9th Cir. 2001). We consider the matter transferred to us from the district court pursuant to 28 U.S.C. § 1631.

A freshly minted interpretive rule by the Bush Administration reversing a previous interpretation by the Clinton Administration, like the one in ***Oregon v. Ashcroft***, is distinguishable from this case where 13 years of unlawful enforcement of an administrative regulation in violation of a federal statute requires immediate action

by this Court to prevent further injury to the Plaintiff's rights by enjoining the enforcement of the DEA's unlawful regulation.

Dated: January 19, 2009.

/s/ Carl Olsen

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 19th, 2009 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

/s/ Carl Olsen

CARL OLSEN