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 A TEMPORARY RESTRAINING ORDER

The Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801-904, recognizes the authority of the states to determine "accepted medical use in treatment in the United States," as that term is used in 21 U.S.C. § 812(b). ***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.

The Drug Enforcement Administration ("DEA") only has the limited authority to determine whether a substance has "accepted medical use in treatment in the United States" if a state has not already determined that a substance does have "accepted medical use."

The Defendants mischaracterize the Plaintiff's claim as a request for an administrative "hearing" (21 C.F.R. § 1300.01(13)(iii)) or "proceeding" (21 C.F.R. § 1300.01(36)). Congress made the determination that a substance cannot be in

Schedule I of the CSA if that substance has any accepted medical use in the United States. Congress has defined limits of the Defendants' administrative authority. The Plaintiff is not asking the Defendants to hold an administrative hearing or proceeding to determine whether the Defendants will obey the law. The Defendants don't have the authority to decide whether they will obey the law. There's nothing for the Defendants to decide other than whether to uphold their oaths of office and obey the laws of the United States or to be criminals.

On January 26, 2009, Defendants filed their Opposition to Plaintiff's Motion for a Temporary Restraining Order ("Opposition" hereafter, Docket #27). Once again, the Defendants claim the Plaintiff has exhausted an administrative remedy because of a letter the Plaintiff received from the Drug Enforcement Administration ("DEA") on January 5, 2009 ("**DEA Letter**" hereafter) (Docket #22, Attachment #1). The **DEA Letter** was not the culmination of an administrative hearing or proceeding. The **DEA Letter** simply denies the DEA has any statutory duty to consider state laws accepting the medical use of controlled substances in maintaining the listing of substances in Schedule I of the CSA, 21 C.F.R. § 1308.11; 21 U.S.C. § 812(a) (the Defendants have a duty to update and republish the list of controlled substances annually).

On January 22, 2009, the Plaintiff's Petition for Review of the **DEA Letter** pursuant to 21 U.S.C. § 877 was filed in the United States Court of Appeals for the Eighth Circuit, ***Carl Olsen v. Drug Enforcement Admin.***, No. 09-1162 (See Exhibit #1). The Plaintiff is going to inform the U.S. Court of Appeals that the proper forum for this case is in the United States District Court for the Southern District of Iowa

because there is no legitimate DEA ruling to review. The DEA has not issued any final ruling it has the authority to make. The DEA's only obligation is to obey federal law and remove marijuana from Schedule I, immediately.

The United States Supreme Court recently made this absolutely clear in ***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.

Grinspoon v. DEA, 828 F.2d 881, 886 (1st Cir. 1987) ("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"). ***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"). ***Conant v. Walters***, 309 F.3d 629, 639 (9th Cir. 2002) ("*Linder v. United States*, 268 U.S. 5, 18, 69 L. Ed. 819, 45 S. Ct. 446 (1925) ('direct control of medical practice in the states is beyond the power of the federal government')").

Clearly, the Plaintiff does not have an administrative remedy and never had an administrative remedy. The statutory language of the CSA does not give the DEA any authority to decide that an "accepted medical use" in a state is not an accepted medical use in that state. The DEA must acknowledge valid state laws accepting the medical use of marijuana as evidence of accepted medical use of marijuana in the

United States as that term is used in 21 U.S.C. § 812(b). The Defendants cannot find an administrative process for circumventing the CSA. The sole purpose of the CSA is to prevent recreational use of drugs and keep doctors from acting as drug pushers. ***Garden Grove v. Kha***, 157 Cal. App. 4th 355, 390, 68 Cal. Rptr. 3d 656, 681 (2007):

> For example, in *U.S. v. Feingold* (9th Cir. 2006) 454 F.3d 1001, 1008, the court held that 21 United States Code section 841(a)(1) could only be applied to a doctor if, in distributing a controlled substance, he intended "to act as a pusher rather than a medical professional." (Relying on *United States v. Moore* (1975) 423 U.S. 122 [46 L. Ed. 2d 333, 96 S. Ct. 335].)

See also, ***San Diego v. NORML***, 165 Cal. App. 4th 798, 826, 81 Cal. Rptr. 3d 461, 482 (2008) ("The purpose of the CSA is to combat recreational drug use, not to regulate a state's medical practices").

The case cited by the Defendants, ***Doe v. Gonzalez*** [sic], No. 06-966, 2006 U.S. Dist. LEXIS 44402, is inapposite to the facts of this case. At footnote 2 of her opinion, Judge Kollar-Kotelly, wrote:

> For reasons that shall soon become evident, the Court is only focusing on the difference between Schedule I and Schedule III controlled substances. As discussed below, the thrust of this suit is based around Plaintiff's contention that the drug/product at issue should be treated like a Schedule III controlled substance, not a Schedule I controlled substance. As such, the only relevant Schedules for this dispute are Schedules I and III.

At footnote 5, ***Doe v. Gonzalez*** [sic], Judge Kollar-Kotelly wrote:

> "Review of nonfinal agency action is available in 'the most exceptional circumstances,'" and the "classic and oft-quoted formulation" of that standard comes from Judge Leventhal in *Ass'n of Nat'l Advertisers, Inc. v. Fed. Trade Comm'n*, 201 U.S. App. D.C. 165, 627 F.2d 1151, 1180 (D.C. Cir. 1981), stating that a federal court may take jurisdictional before final agency action only in a case of "clear right," such as "outright violation of a clear statutory provision" …

In ***Ass'n of Nat'l Advertisers, Inc. v. Fed. Trade Comm'n***, 627 F.2d 1151, 1178 (D.C. Cir. 1981), Judge Leventhal wrote: "In *Leedom v. Kyne*, 358 U.S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210 (1958) the Court was willing to bypass a general jurisdictional barrier when an agency clearly violated an express statutory prohibition." In ***Leedom v. Kyne***, 358 U.S. 184, 188 (1958), the U.S. Supreme Court wrote:

> This case, in its posture before us, involves "unlawful action of the Board [which] has inflicted an injury on the [respondent]." Does the law, "apart from the review provisions of the . . . Act," afford a remedy? We think the answer surely must be yes. This suit is not one to "review," in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act.

The Defendants know there is no administrative record for the United States Court of Appeals to review and they have issued the **DEA Letter** now at this time for the sole purpose of depriving the Plaintiff of the proper forum for declaratory and injunctive relief, the United States District Court.

21 U.S.C. § 877 is intended to fill the same role as an appeal from a district court where a trial on the merits has taken place or there has been an exchange of motions on jurisdictional claims. 21 U.S.C. § 877 assumes some kind of administrative record developed by the agency for the appeal court to review. The failure of the Defendants in this case to obey their statutory obligation to remove marijuana from Schedule I after it has been accepted for medical use by 13 states does not require any kind of record to be developed by the agency.

This Court should not wait for the United States Court of Appeals to tell the DEA it cannot rewrite the CSA. The damage to the Plaintiff's right to establish and

freely exercise his religion by sacramental use of marijuana for spiritual and physical healing due to the unlawful scheduling of marijuana has been occurring for 13 years since California enacted the first state law accepting the medical use of marijuana.

The Defendants would like this Court to dismiss this case so they can continue to arrest and prosecute sick people and doctors complying with valid state laws defining accepted state medical practice, which was never the intent of Congress in enacting the CSA.

The Defendants seek to continue injuring the Plaintiff's rights under the First Amendment to the Constitution of the United States and the Religious Freedom Restoration Act ("RFRA" hereafter), 42 U.S.C. §§ 2000bb *et seq*., which effectively amends the CSA. ***In re Young***, 141 F.3d 853, 861 (8th Cir. 1998) ("[W]e can conceive of no argument to support the contention, that Congress is incapable of amending the legislation that it has passed").

The cases cited by Judge Kollar-Kotelly in ***Doe v. Gonzalez*** [sic], 2006 WL 1805685 (D.D.C.), at page 16, make it particularly clear that the injury to the Plaintiff's rights in this case would provide an exception to the exhaustion requirement even if the agency had any discretion to make a decision in the first place.

> Second, several courts have held that "federal courts may legitimately decline to require exhaustion" where a plaintiff may suffer irreparable harm if unable to secure immediate judicial consideration of its claim. *Bracco Diagnostics, Inc. v. Shalala*, 963 F.Supp. 20, 30 (D.D.C.1997); see also *Bowen v. City of New York*, 476 U.S. 467, 483, 106 S.Ct. 2022, 90 L.Ed.2d 462 (1986) (disability-benefit claimants "would be irreparably injured were the exhaustion requirement now enforced against them"); *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752, 773, 67 S.Ct.

> 1493, 91 L.Ed. 1796 (1947) ("impending irreparable injury flowing from delay incident to following the prescribed procedure" may contribute to finding that exhaustion is not required).

Doe did not claim its drug/product had been accepted for medical use by any state in the United States. Doe never claimed the DEA didn't have the authority to regulate its drug/product. Doe simply claimed the agency abused its discretion. Doe did not claim that the agency did not have any discretion. The revocation of Doe's license to import the drug/product was within the authority of the DEA to decide and any judicial review had to be in the United States Court of Appeals pursuant to 21 § U.S.C. 877 (after the development of an administrative record). ***Doe v. Gonzalez*** [sic], 2006 WL 1805685 (D.D.C.), at page 17:

> Plaintiff is challenging the DEA's decision that the product it seeks to import is properly classified as a Schedule I-rather than Schedule III-controlled substance.

Indeed, all of the cases cited by Judge Kollar-Kotelly at page 18 of ***Doe v. Gonzalez*** [sic] are DEA decisions regarding registrations issued by the DEA to handle controlled substances. Clearly, those registrations were issued by the DEA and none of those entities, including Doe, claimed the DEA had no authority to issue them in the first place. The sole issue in all of these cases is whether the registrant violated the conditions of the registration and whether the agency had abused its discretion in making those rulings. ***Oregon v. Ashcroft***, 192 F.Supp.2d 1077 (D. Or. 2002), cited by Judge Kollar-Kotelly at page 18 of ***Doe v. Gonzalez*** [sic], was about the DEA threatening to revoke the DEA registrations of doctors for complying with Oregon's Death with Dignity Act.

Clearly, the issue of whether a controlled substance has been removed from Schedule I of the CSA by state lawmakers accepting its medical use is not an issue within the discretion of the administrative agency to decide. ***Oregon v. Ashcroft***, 368 F.3d 1118, 1131 (9th Cir. 2004) ("The Attorney General's unilateral attempt to regulate general medical practices historically entrusted to state lawmakers interferes with the democratic debate … and far exceeds the scope of his authority under federal law"). The CSA does not require deference to administrative opinions when Congress has made it plain what the language of the statute says and what it means. The Plaintiff is not claiming that marijuana belongs in another schedule of the CSA. The Plaintiff is demanding removal of marijuana from Schedule I, because it no longer meets the statutory requirement for inclusion in that schedule.

Nothing in Schedule I of the CSA, other than marijuana, has ever been accepted for medical use by any state since Congress enacted the CSA in 1970. Now that such an event has occurred, this Court must authoritatively interpret the statute as it was written. This Court must declare that marijuana is no longer included in Schedule I and enjoin the Defendants from enforcing Schedule I restrictions on the sacramental use of marijuana by the Plaintiff and on the accepted medical use of marijuana in the states that have accepted it.

This Court should immediately issue a preliminary injunction enjoining the Defendants from the unlawful enforcement of the fraudulent regulation of marijuana at 21 C.F.R. § 1308.11(d)(22) while this matter is pending before this Court.

Attached as Exhibits #2 through #18 is the Plaintiff's Reply Brief in ***McMahon v. Iowa Board of Pharmacy***, No. CV 7415, in the Iowa District Court in and for Polk County, Iowa, which shows the history of the Plaintiff's standing to complain of this injury to the Plaintiff's right to minister to the health and safety of medical patients here in the State of Iowa and nationally. The Plaintiff moves the Court to take judicial notice of the Plaintiff's Reply Brief in ***McMahon v. Iowa Board of Pharmacy***, along with the attached exhibits, pursuant to Federal Rule of Evidence 201.

Dated: January 29, 2009.

/s/ Carl Olsen

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 29th, 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