No. 09-1162

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CARL ERIC OLSEN,
Petitioner,

v.

DRUG ENFORCEMENT ADMINISTRATION,
Respondent.

Petition for Review
from the Drug Enforcement Administration

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. The Petitioner Has Article III Standing.

Respondent Drug Enforcement Administration ("DEA" hereafter) cites three cases on standing: ***Gettman v. DEA***, 290 F.3d 430 (D.C. Cir. 2002); ***Bonds v. Tandy***, 457 F.3d 409 (5th Cir. 2006); ***Lujan v. Defenders of Wildlife***, 504 U.S. 555 (1992). All three cases say a third party does not have Article III standing to redress an injury on behalf of individuals who are not parties to the judicial review proceeding. See, Brief for the Respondent ("DEA's Brief" hereafter), at pages 9-15.

Petitioner Carl Olsen ("Olsen" hereafter) is not a third party. Olsen has suffered an injury in fact (DEA has forbidden Olsen from practicing his religion), which is directly caused by DEA's failure to remove marijuana from Schedule I of the Controlled Substances Act, 21 U.S.C. §§ 801 *et seq*., ("CSA" hereafter), and which will be redressed by a favorable judicial decision removing marijuana from Schedule I[1]. ***Lujan v. Defenders of Wildlife***, 504 U.S. 555, 560-561 (1992).

Olsen's standing has been recognized by the federal courts and nothing has changed that would negate that standing. ***Olsen v. DEA***,

[1] Removing marijuana from Schedule I will leave it federally unregulated, at least until DEA proposes adding it to one of the other 4 schedules, II though V. See, 21 U.S.C. § 811.

878 F.2d 1458, 1461 (D.C. Cir. 1989) ("[W]e recognize that even if the DEA were not empowered or obliged to act, Olsen would be entitled to a judicial audience.").

A. Olsen has suffered an injury in fact.

DEA has previously admitted that Olsen has an injury in fact. ***Olsen v. DEA***, 878 F.2d 1458, 1466 (D.C. Cir. 1989) ("[t]he Administrator accepts that the Ethiopian Zion Coptic Church is a bona fide religion whose sacrament is marijuana.").

On January 16, 2007, Olsen filed a civil complaint against DEA under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq*., in the United States District Court for the Southern District of Iowa, ***Olsen v. Holder***, No. 4:07-cv-00023 (S.D. Iowa). Olsen submitted documents showing that the Ethiopian Zion Coptic Church is centuries old and has regularly used marijuana as its sacrament. See, ***Town v. State ex rel. Reno***, 377 So.2d 648, 649 (Fla. 1979). Olsen complained that no compelling interest exists which would justify prohibiting Olsen from using marijuana as the sacrament of his church. That case is currently pending in the U.S. Supreme Court, ***Olsen v. Holder***, No. 08-777 (U.S. Sup. Ct.), and is scheduled for conference on May 1, 2009.

Both DEA and the federal district court agreed that any complaint Olsen had about scheduling of marijuana should be addressed directly to DEA. Neither the district court nor DEA said Olsen did not have standing to complain about scheduling.

> Olsen asserts that Defendants have criminally prosecuted him in the past and have threatened to criminally prosecute him in the future due to the "erroneous and unlawful determination that Cannabis is a controlled substance under the CSA." Defendants assert that this court lacks jurisdiction to remove marijuana from the CSA and that the "CSA provides "an administrative remedy for any interested party to request that a substance be deleted entirely from the CSA or be transferred to a less restrictive schedule." citing 21 U.S.C. § 811(a). This court agrees and dismisses Count V as to all Defendants.

Olsen v. Holder, No. 4:07-cv-00023 (S.D. Iowa), Unpublished Order, July 16, 2007, Docket No. 49, at page 17.

On September 15, 2008, Olsen filed a civil complaint against DEA for failing to respond to his petition to remove marijuana from Schedule I of the CSA in the United States District Court for the Southern District of Iowa, ***Olsen v. Holder***, No. 4:08-cv-00370 (S.D. Iowa). Olsen submitted a copy of the ruling of the Iowa Supreme Court in ***Iowa v. Olsen***, No. 171/69079 (Iowa, July 18, 1984), in which the Iowa Supreme Court found:

> Olsen is a member and priest of the Ethiopian Zion Coptic Church. Testimony at his trial revealed the bona fide nature of this religious organization and the sacramental use of marijuana within it.

The Iowa Supreme Court's ruling was also reprinted in ***Olsen v. Iowa***, 1986 WL 4045 (S.D. Iowa) (Not Reprinted in F.Supp.). DEA has offered no evidence to rebut this Iowa Supreme Court finding establishing Olsen's standing in ***Olsen v. Holder***, No. 4:08-cv-00370 (S.D. Iowa).

DEA made a tactical move on December 19, 2008, by making a final determination on Olsen's demand that DEA remove marijuana from Schedule I while a case on that exact same issue is still pending in the United States District Court in ***Olsen v. Holder***, No. 4:08-cv-00370 (S.D. Iowa). No evidentiary record on the issue of standing at the agency level is before this Court because the DEA Administrator tactfully chose not to hold an evidentiary hearing on the issue.

DEA now seeks to add insult to injury by challenging Olsen's standing before this Court. On petition for review, the Court of Appeals can make its own evidentiary record where the DEA has failed to do so. See, ***Gettman v. DEA***, 290 F.3d 430, 432 (D.C. Cir. 2002) ("On our own motion, we ordered supplemental briefing on standing, and specifically asked parties to address the issue of injury.").

B. DEA has caused Olsen's injury.

Olsen has been convicted for possession of marijuana based on the classification of marijuana as a Schedule I controlled substance. ***Olsen v. DEA***, 878 F.2d 1458, 1459 (D.C. Cir. 1989) ("The 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…").

Thirteen states in the United States have accepted the medical use of marijuana since 1996. The current scheduling of marijuana has not been legally valid since 1996 because marijuana no longer meets the findings required by Congress in 21 U.S.C. § 812(b) for inclusion in Schedule I of the CSA.

C. Removing marijuana will redress Olsen's injury.

DEA cannot simply transfer marijuana to one of the other 4 schedules of the CSA without initiating proceedings and applying the 8-factor test required by 21 U.S.C. § 811(c). DEA is caught in the awkward situation of marijuana no longer meeting the statutory requirements for inclusion in Schedule I of the CSA and being unable to place it in a different schedule without going through administrative

procedures to determine which of the other 4 schedules, if any, is appropriate for marijuana.

Olsen is free to practice his religion without interference from the DEA while marijuana remains unscheduled. The remedy Olsen seeks from this Court will cure Olsen's injury immediately. Olsen is not asking the DEA to reschedule marijuana. Olsen is simply demanding that marijuana be removed from Schedule I because that is what the law says.

II. The Petition Has Merit

A. DEA is Not Entitled to Deference.

DEA's opinion is not entitled to deference because Congress clearly said accepted medical use in treatment in the United States means anywhere in the United States.

> As petitioner aptly notes, a defendant charged with violating the CSA by selling controlled substances in only two states would not have a defense based on section 802(28) if he contended that his activity had not occurred in "all places" subject to United States jurisdiction. 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.

Grinspoon v. DEA, 828 F.2d 881, 886 (1st Cir. 1987).

Beyond the clear language of the statute, the U.S. Supreme Court has consistently ruled that, "direct control of medical practice in the states is beyond the power of the federal government". ***Linder v. United States***, 268 U.S. 5, 18, 69 L. Ed. 819, 45 S. Ct. 446 (1925).

DEA has failed to cite even one case that has considered the impact that state medical marijuana laws enacted since 1996 have on scheduling since its 5-part scheduling test was last approved by the U.S. Court of Appeals for the District of Columbia in 1994. ***Alliance for Cannabis Therapeutics v. DEA***, 930 F.2d 936 (D.C. Cir. 1991); ***Alliance for Cannabis Therapeutics v. DEA***, 15 F.3d 1131 (D.C. Cir. 1994).

In fact, in one of the cases DEA relies on for its position that Olsen lacks standing, ***Gettman v. DEA***, 290 F.3d 430 (D.C. Cir. 2002), DEA actually faulted the petitioner for failing to make the claim that marijuana has any accepted medical use in treatment in the United States:

> In this case, you submitted your petition by letter dated March 10, 1995. After gathering the necessary data, DEA referred the petition to HHS on December 17, 1997, and requested from HHS a scientific and medical evaluation and scheduling recommendation. HHS forwarded its scientific and medical evaluation and scheduling recommendation to DEA on January 17, 2001.
>
> . . .
>
> DEA's denial of your petition is based exclusively on the scientific and medical findings of HHS, with which DEA concurs, that lead to the conclusion that marijuana has a high potential for abuse. Nonetheless, independent of this scientific and medical basis for denying your petition, there is a logical flaw in your proposal that should be noted.
>
> 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. Indeed, the HHS scientific and medical evaluation reaffirms expressly that marijuana has no currently accepted medical use in treatment in the United States and a lack of accepted safety for use under medical supervision.

Drug Enforcement Administration, Notice of Denial of Petition, 66 Fed. Reg. 20038 (Wednesday, April 18, 2001 / Notices). At the time Mr. Gettman filed his petition with the DEA in 1995, there were no states that had accepted the medical use of marijuana. California became the first state to accept the medical use of marijuana in 1996, a year after Mr. Gettman filed his petition.

DEA also fails to cite any cases where any other substance in Schedule I, other than marijuana, has been accepted for medical use by any state in the United States.

DEA simply wants this Court to read the statutory language of 21 U.S.C. § 812(b) to exclude "states" in the United States from the meaning of "*in the* United States" (emphasis added) to produce an absurd result contrary to the ruling of the United States 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.

DEA interprets its role under the CSA as one of dictating to the states which substances shall have accepted medical use, which is completely contrary to the role assigned to the DEA by Congress to regulate medical practice rather than define it.

> The CSA's definition of "United States" plainly does not require the conclusion asserted by the Administrator simply because section 802(28) defines "United States" as "all places subject to the jurisdiction of the United States." 21 U.S.C. § 802(28) (emphasis supplied). Congress surely intended the reference to "all places" in section 802(28) to delineate the broad jurisdictional scope of the CSA and to clarify that the

> CSA regulates conduct occurring any place, as opposed to every place, within the United States. As petitioner aptly notes, a defendant charged with violating the CSA by selling controlled substances in only two states would not have a defense based on section 802(28) if he contended that his activity had not occurred in "all places" subject to United States jurisdiction. 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.

Grinspoon v. DEA, 828 F.2d 881, 886 (1st Cir. 1987).

> Our decision is consistent with principles of federalism that have left states as the primary regulators of professional conduct. See *Whalen v. Roe*, 429 U.S. 589, 603 n. 30, 51 L. Ed. 2d 64, 97 S. Ct. 869 (1977)(recognizing states' broad police powers to regulate the administration of drugs by health professionals); *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"). We must "show[] respect for the sovereign States that comprise our Federal Union. That respect imposes a duty on federal courts, whenever possible, to avoid or minimize conflict between federal and state law, particularly in situations in which the citizens of a State have chosen to serve as a laboratory in the trial of novel social and economic experiments without risk to the rest of the country." *Oakland Cannabis*, 532 U.S. at 501 (Stevens, J., concurring) (internal quotation marks omitted).

Conant v. Walters, 309 F.3d 629, 639 (9th Cir. 2002).

In fact, the Attorney General has recently come to the conclusion that federal interference with state medical marijuana laws is an untenable position for the federal government. Eric H. Holder, Jr., the new Attorney General of the United States, recently said that the federal government will no longer pursue prosecution against purveyors of marijuana in those states that have legalized the use of marijuana for medical purposes. See http://www.washingtonpost.com/wp-dyn/content/article/2009/04/10/AR2009041001288.html (Attorney General Holder Jr. announced that the federal government would no longer go after groups that supply medical marijuana in the thirteen states where it is legal) and "Holder's pot policy unclear on old state cases, available at http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/04/10/MN5816UOLA.DTL (Attorney General, Holder announced federal agents will target only persons who violate both federal and state law; anyone complying with the medical marijuana law in the 13 other states with such laws would be left alone).

Attorney General Holder is taking a position consistent with the CSA, whether he realizes it or not. The CSA does not authorize the DEA to target anyone complying with state medical marijuana laws.

B. DEA Attempts End Run to Avoid Civil Injunction

DEA's final determination on December 19, 2008, was timed to take place prior to the change in presidential administration. President Obama had announced his intention to change federal policy toward state medical marijuana laws during his campaign for office. DEA was aware that federal policy on state medical marijuana laws was about to change. Immediately after taking office, the Obama Administration ordered a freeze on federal agency decisions until the new administration could review them for compliance with the new administration's policies. See Memo for the Heads of Executive Departments and Agencies, by Rahm Emanuel, Jan. 20, 2009, available at http://ombwatch.org/files/regs/midnightregfreezememo.pdf.

C. Civil Injunction was Olsen's only choice of remedy.

Congress made the determination that anything with accepted medical use in treatment in the United States must be removed from Schedule I. DEA does not have the authority to ignore the statute.

> 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.

Gonzales v. Oregon, 546 U.S. 243, 264 (2006).

The only remedy available to Olsen was to seek a civil injunction in a federal district court to enjoin DEA from violating the law, which Olsen has done on September 15, 2008. See ***Olsen v. Holder***, No. 4:08-cv-00370 (S.D. Iowa). When an agency refuses to obey a law, the only remedy is a civil injunction.

> 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.

Leedom v. Kyne, 358 U.S. 184, 188 (1958).

CONCLUSION

WHEREFORE, Olsen respectfully moves this Court to instruct DEA to immediately remove marijuana from Schedule I of the CSA as required by the CSA.

In the alternative, Olsen moves this Court to transfer this case to the United States District Court for the Southern District of Iowa, in

Olsen v. Holder, No. 4:08-cv-00370 (S.D. Iowa), for further proceedings.

Respectfully submitted,

By: _____

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Reply Brief for Petitioner complies with the type-volume limitation provided in Fed. R. App. P. 32(a)(7)(B)(ii). The foregoing brief contains 3,353 words of Century Schoolbook (14 point) proportional type. The word processing software used to prepare this brief was Microsoft Office Word 2007.

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Carl Olsen

CERTIFICATE OF SERVICE

Service of 2 copies of this brief were mailed by first class mail on the 24th day of April, 2009, to the following parties:

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