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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, *Plaintiff*, vs. REAL PROPERTY AND IMPROVEMENTS LOCATED AT 2106 RINGWOOD AVENUE, SAN JOSE, CALIFORNIA, *Defendant*.	**Case No. CV 12-03566 MEJ** **BRIEF OF AMICUS CURIAE CARL OLSEN** Judge: The Honorable Maria-Elena James Date Action filed: July 9, 2012
UNITED STATES OF AMERICA, *Plaintiff*, vs. REAL PROPERTY AND IMPROVEMENTS LOCATED AT 1840 EMBARCADERO, OAKLAND, CALIFORNIA, *Defendant*.	**Case No. CV 12-03567 MEJ** **BRIEF OF AMICUS CURIAE CARL OLSEN** Judge: The Honorable Maria-Elena James Date Action filed: July 9, 2012

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CARL OLSEN'S INTEREST

Carl Olsen is interested in these cases because marihuana (the cannabis plant)[1] is his sacrament. *See*, *Olsen v. DEA*, 878 F.2d 1458, 1459 (D.C. Cir. 1989) ("Olsen is a member and priest of the Ethiopian Zion Coptic Church"). *And see*, *Town v. State ex rel. Reno*, 377 So.2d 648, 649 (Fla. 1979):

> (1) the Ethiopian Zion Coptic Church represents a religion within the first amendment to the Constitution of the United States; (2) the "use of cannabis is an essential portion of the religious practice";
>
> * * *
>
> the Ethiopian Zion Coptic Church is not a new church or religion but the record reflects it is centuries old and has regularly used cannabis as its sacrament.

The current classification of cannabis under the Controlled Substances Act, 21 U.S.C. §§ 801-904 (CSA) is unlawful because the condition, 21 U.S.C. § 812(b)(1)(B), that Congress placed on Schedule I ("no currently accepted medical use in treatment in the United States ") is no longer true for cannabis. Marijuana has been accepted for medical use in treatment in the United States. A total of 20 states and the District of Columbia have accepted the medical use of marijuana in treatment since 1996 when California became the first state to accept it[2].

Beacuse of Mr. Olsen's religious interest in cannabis, the U.S. Court of Appeals for the District of Columbia Circuit granted him leave to intervene in the petition for judicial review of marijuana's classification in Schedule I of the CSA. *See*, *Americans for Safe Access v. DEA*, 706 F.3d 438, 441 (D.C. Cir. 2013) ("On September 1, 2011, Carl Olsen intervened on behalf of Petitioners. He asserts a religious interest in the use of marijuana.").

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1 21 U.S.C. § 802(16) (2013). *See*, *United States v. Walton*, 514 F.2d 201, 202 (D.C. Cir. 1975) ("21 U.S.C. § 802(15) (1970) does define marijuana as Cannabis sativa L. but this fact, we think, is not sufficient to support Walton's contention that Congress meant to outlaw the distribution of only one species of marijuana").

2 Alaska (Ballot Measure 8)(1998); Arizona, (Proposition 203)(2010); California (Proposition 215)(1996); Colorado (Ballot Amendment 20)(2000); Connecticut (HB 5389)(2012); District of Columbia (Amendment Act B18-622)(2010); Delaware (SB17)(2011); Hawaii (SB 862) (2000); Illinois (HB1)(2013); Maine (Ballot Question 2)(1999); Massachusetts (Ballot Question 3)(2012); Michigan (Proposal 1)(2008); Montana (Initiative 148)(2004); Nevada (Ballot Question 9)(2000); New Hampshire (HB 573)(2013); New Jersey (SB 119)(2010); New Mexico (SB 523)(2007); Oregon (Ballot Measure 67)(1998); Rhode Island (SB 0710)(2006); Vermont (SB 76, HB 645)(2004); Washington (Initiative 692)(1998). Source: http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881.

However, the decision in *Americans for Safe Access v. DEA* did not address Mr. Olsen's question of whether cannabis is unlawfully classified because of its accepted medical use in treatment in the states that have accepted it. Mr. Olsen's petition for writ of certiorari in *Americans for Safe Access v. DEA* was denied on November 18, 2013. *Carl Olsen v. DEA*, U.S. Supreme Court Docket No. 13-848. So, the question Mr. Olsen raises here was not resolved in that case.

Since 1996, when California enacted the first law accepting the medical use of cannabis in the United States, the federal classification of cannabis in the CSA has been unlawful. The unlawful classification of cannabis in Schedule I of the CSA is a serious injury to Mr. Olsen's civil rights guaranteed by the First Amendment to the Constitution of the United States. *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").

JUDICIAL ECONOMY

Leaving the question of marijuana's unlawful classification unresolved is a drain on federal judicial resources. Federal courts are being dragged into endless disputes over federal enforcement policy. Federal courts must ask themselves whether Congress ever intended a nation-wide ban on the medical use of marijuana. One thing is clear: the federal government doesn't have the resources to enforce a nation-wide ban on the medical use of marijuana.

Recent federal policy statements acknoweldge both the lack of resources and the lack of interest in enforcing a nation-wide ban on medical use of marijuana. The first in a series of recent announcements of federal medical marijuana policy came in 2009 with the publication of the so-called "Ogden Memo" ("Memorandum for Selected United States Attorneys, David W. Ogden, Deputy Attorney General, October 19, 2009")[3]. The second announcement of federal medical marijuana policy came in 2011 with the publication of the so-called "Cole Memo" ("Memorandum for United States Attorneys, James M. Cole, Deputy Attorney General, June 29, 2011")[4]. The third announcement of federal policy came in 2013 in response to the legalization

3 http://files.iowamedicalmarijuana.org/petition/Ogden_Memo_2009.pdf
4 http://files.iowamedicalmarijuana.org/petition/Cole_Memo_2011.pdf

of the non-medical use of marijuana in Washington and Colorado ("Memorandum for all United States Attorneys, James M. Cole, Deputy Attorney General, August 29, 2013")[5]. The possibilities for litigation seem endless.

In order to prevent further drain on scarce judicial resources, this Court should sua sponte consider whether the U.S. Department of Justice has the authority to interfere with state laws accepting the medical use of marijuana. There exists in these forfeiture cases a jurisdictional defect because of marijuana's unlawful federal classification as a substance with no accepted medical use in treatment in the United States. The federal government never had the authority to intiate these forfeiture cases because they are premised on the unlawful classification of cannabis in Schedule I of the CSA.

ARGUMENT

I. The initial placement of cannabis in Schedule I

With some reservation Congress initially placed cannabis in Schedule I of the CSA in 1970. Congress expressed doubt about placing cannabis in Schedule I. *See*, *NORML v. Ingersoll*, 497 F.2d 654, 657 (D.C. Cir. 1974):

> The House Report recommending that marihuana be listed in Schedule I notes that this was the recommendation of HEW "at least until the completion of certain studies now under way," and projects that the Presidential Commission's recommendations "will be of aid in determining the appropriate disposition of this question in the future." H.R. Rep. No. 91-1444 (Part 1), 91st Cong., 2d Sess. (1970) at p. 13.

And see, *NORML v. DEA*, 559 F.2d 735, 751 n.70 (D.C. Cir. 1977):

> Indeed, in NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE, SECOND REPORT, DRUG USE IN AMERICA: PROBLEM IN PERSPECTIVE, Vol. I, at 235 (1973), the Commission recommended that "the United States take the necessary steps to remove cannabis from the Single Convention on Narcotic Drugs (1961), since this drug does not pose the same social and public health problems associated with the opiates and coca leaf products."

II. The current placement of cannabis in Schedule I

The current classification of cannabis is maintained by the Drug Enforcement Adminis-

5 http://files.iowamedicalmarijuana.org/petition/Cole_Memo_2013.pdf

tration (DEA) in an administrative regulation in the Code of Federal Regulations, 21 C.F.R. § 1308.11, by administrative rule[6]. DEA currently has marijuana listed in Schedule I, 21 C.F.R. § 1308.11(d)(23).

III. Federal regulations cannot be used to interefere with accepted medical use

When President Obama took office, he announced that federal regulations should not be used to interfere with state law. *See*, Presidential Documents, Memorandum of May 20, 2009, Preemption, Memorandum for the Heads of Executive Departments and Agencies, Federal Register, Vol. 74, No. 98 / Friday, May 22, 2009 / Presidential Documents / 24693[7]:

> The purpose of this memorandum is to state the general policy of my Administration that preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption. Executive departments and agencies should be mindful that in our Federal system, the citizens of the several States have distinctive circumstances and values, and that in many instances it is appropriate for them to apply to themselves rules and principles that reflect these circumstances and values. As Justice Brandeis explained more than 70 years ago, "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

In 2006, the United States Supreme Court recognized that Congress did not authorize the U.S. Department of Justice to preempt state laws defining the accepted medical use of controlled substances. *See*, *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.

Because the Attorney General cannot make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law, it follows that the Attorney General cannot maintain a rule, 21 C.F.R. § 1308.11(d)(23), that has the same effect.

> The structure and operation of the CSA presume and rely upon a functioning medical profession regulated under the States' police powers. The Attorney General can register a physician to dispense controlled substances "if the applicant is au-

6 http://www.ecfr.gov/cgi-bin/text-idx?SID=a6ba1a18873f25e9c5532202fe90b04a&node=21:9.0.1.1.9.0.26&rgn=div7

7 http://files.iowamedicalmarijuana.org/imm/states/74fr24693.pdf

> thorized to dispense . . . controlled substances under the laws of the State in which he practices." 21 U.S.C. § 823(f). When considering whether to revoke a physician's registration, the Attorney General looks not just to violations of federal drug laws; but he "shall" also consider "[t]he recommendation of the appropriate State licensing board or professional disciplinary authority" and the registrant's compliance with state and local drug laws. Ibid. The very definition of a "practitioner" eligible to prescribe includes physicians "licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices" to dispense controlled substances. § 802(21). Further cautioning against the conclusion that the CSA effectively displaces the States' general regulation of medical practice is the Act's pre-emption provision, which indicates that, absent a positive conflict, none of the Act's provisions should be "construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates . . . to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State." § 903..

Id. at 271. Congress only set national standards in one specific area:

> Even though regulation of health and safety is "primarily, and historically, a matter of local concern," *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985), there is no question that the Federal Government can set uniform national standards in these areas. *See Raich, supra*, at 9, 125 S. Ct. 2195, 162 L. Ed. 2d 1. In connection to the CSA, however, we find only one area in which Congress set general, uniform standards of medical practice. Title I of the Comprehensive Drug Abuse Prevention and Control Act of 1970, of which the CSA was Title II, provides that
>
> > "[The Secretary], after consultation with the Attorney General and with national organizations representative of persons with knowledge and experience in the treatment of narcotic addicts, shall determine the appropriate methods of professional practice in the medical treatment of the narcotic addiction of various classes of narcotic addicts, and shall report thereon from time to time to the Congress." § 4, 84 Stat. 1241, codified at 42 U.S.C. § 290bb-2a.
>
> This provision strengthens the understanding of the CSA as a statute combating recreational drug abuse, and also indicates that when Congress wants to regulate medical practice in the given scheme, it does so by explicit language in the statute.

Id. at 271-272.

Other provisions in the CSA define a role for the states. The CSA requires manufacturers and distributors to register with the DEA pursuant to § 823(a)(2), (b)(2), (d)(2) and (e)(2) and requires the Attorney General, in in determining the public interest, to consider: "compliance with applicable State and local law." 21 U.S.C. § 873(a)(6) provides:

> "The Attorney General shall cooperate with local, State, and Federal agencies concerning traffic in controlled substances and in suppressing the abuse of controlled substances. To this end, he is authorized to assist State and local governments in suppressing the diversion of controlled substances from legitimate medical, scientific, and commercial channels by -

> (A) making periodic assessments of the capabilities of State and local governments to adequately control the diversion of controlled substances;
> (B) providing advice and counsel to State and local governments on the methods by which such governments may strengthen their controls against diversion; and
> (C) establishing cooperative investigative efforts to control diversion"

Nothing in the CSA explicitly states that the Attorney General, and thus the DEA, can displace a state's enforcement of its drug laws, but instead, the Attorney General may only assist State efforts.

The definition of "manufacture" under 21 U.S.C. § 802 of the CSA specifically excludes actions performed "by a practitioner" who acts "in conformity with applicable State or local law." 21 U.S.C. § 802(15). The term "practitioner," as defined in the Controlled Substances Act, means:

> a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research.

21 U.S.C. § 802(21). Thus, like the definition of manufacture, the broad definition of practitioner expressly recognizes the role of states in the licensing and registration of practitioners.

In *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006), the Supreme Court declined to adopt a rigid, categorical approach to the prohibition of Schedule I substances. The Supreme Court looked to the language of the CSA, which contains a provision that authorizes the Attorney General to waive the requirement for registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety. *Id.* at 432 (citing 21 U.S.C. § 822(d)). The court explained:

> The fact that the Act itself contemplates that exempting certain people from its requirements would be "consistent with the public health and safety" indicates that congressional findings with respect to Schedule I substances should not carry the determinative weight, for RFRA purposes, that the Government would ascribe to them.

Id. at 432-33. The court also noted that the Government has long recognized an exemption for Indian tribes who use peyote, which contains mescaline, a Schedule I controlled substance. *Id.* at

433. Thus, the Supreme Court concluded that the "well-established peyote exception . . . fatally undermines the Government's . . . contention that the Controlled Substances Act establishes a closed regulatory system that admits no exceptions under RFRA." *Id.* at 434.

IV. Ambiguities in federal law cannot be interepreted to violate state sovereignty

As noted in *Gonzales v. Oregon*, 546 U.S. at 258, the DEA cannot define the meaning of statutory criteria by issuing regulations ("*Chevron* deference, however, is not accorded merely because the statute is ambiguous and an administrative official is involved"). In rejecting the DEA's interpretation of "accepted medical use in treatment in the United States" to require unanimity among medical professionals, states, or the Food and Drug Administration (FDA), the U.S. Court of Appeals in *Grinspoon v. DEA*, 828 F.2d 881, 885 n.5 (1st Cir. 1987), held:

> Contrary to the assertions of the Administrator, this is not a situation in which Congress has expressly vested the Administrator with authority to define general statutory criteria by issuing regulations. Were this such a case, such regulations would be controlling unless they were "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-44. Here, the CSA expressly delegates to the Attorney General only the authority to make "the findings prescribed by subsection (b) of section 812 of this title for the schedule in which [a] drug is to be placed." 21 U.S.C. § 811(a)(1)(B) (emphasis supplied). This explicit delegation of authority to apply prescribed statutory criteria is not equivalent to an explicit delegation of authority to define those criteria.

As the *Grinspoon* court noted, unanimity is not a prerequisite to a finding of accepted medical use in treatment in the United States:

> 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.

Id. 828 F.2d at 886.

While it is true that the DEA Administrator was able to articulate a reasonable interpretation of that phrase ("accepted medical use in treatment in the United States") in *Alliance for Cannabis Therapeutics v DEA*, 930 F.2d 936 (D.C. Cir. 1991), and in *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131 (D.C. Cir. 1994), the absence of any state law accepting the medical use of marijuana in treatment in 1994 and the enactment of 20 state laws accepting the medical use of marijuana after 1994, renders that 1994 interpretation unlawful in light of the obvious conflict that now results between state law and federal Schedule I.

Congress did not authorize the DEA to maintain an outdated regulation that conflicts with state law accepting the medical use of marijuana.

Further evidence that the Attorney General may not use regulations to define "accepted medical use in treatment in the United States" in the statutory criteria is found in 21 U.S.C. 811(d)(1):

> If control is required by United States obligations under international treaties, conventions, or protocols in effect on October 27, 1970, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings required by subsection (a) of this section or section 812(b) of this title and without regard to the procedures prescribed by subsections (a) and (b) of this section.

The United States became a signatory to the Single Convention on Narcotic Drugs in 1967. Article 36(2) of the Single Convention limits the restrictions on access to controlled substances, as follows: "Subject to the constitutional limitations of a Party, its legal system and domestic law, …" Because federalism is at the core of our system of government, the limits imposed on Schedule I by the Single Convention protect state sovereignty to define accepted medical use of controlled substances within their own borders, and the Attorney General should have already removed marijuana from Schedule I without regard to any of the findings required by subsection (a) of section 811.

CONCLUSION

Because the current regulation of cannabis in Schedule I of the CSA is unlawful and the

administrative agency charged with its upkeep has failed in its duty to protect state sovereignty from interference by federal regulations, any attempt by the federal government to forfeit property based on the erroneous classification of cannabis is invalid and deprives the federal courts of jurisdiction to hear the case.

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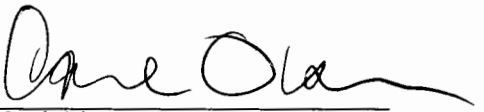
Dated: December 31, 2013 By: 
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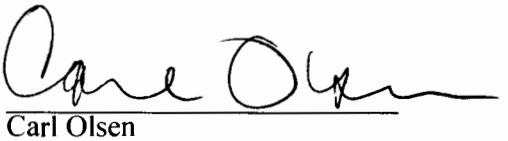
By: 
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