

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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| AMERICANS FOR SAFE ACCESS, et al., | ) |             |
|                                    | ) |             |
| Petitioners,                       | ) |             |
|                                    | ) | No. 11-1265 |
| v.                                 | ) |             |
|                                    | ) |             |
| DRUG ENFORCEMENT ADMINISTRATION,   | ) |             |
|                                    | ) |             |
| Respondent.                        | ) |             |

MOTION TO DISMISS THE INTERVENOR FROM THIS CASE

This matter is before the Court on a petition for review of the Drug Enforcement Administration’s (DEA) denial of a petition to initiate rulemaking proceedings, pursuant to sections 201 and 202 of the Controlled Substances Act (CSA) (21 U.S.C. 811, 812), to transfer cannabis (marijuana) from schedule I to schedule III, IV or V under the Act.<sup>1</sup> Petitioners assert that they are “organizations and seriously ill individuals seeking to reschedule marijuana because they, or their members, are adversely affected by the maintenance of marijuana in Schedule I.” Docketing Statement, Aug. 23, 2011, ECF No. 1325659. Mr. Carl Olsen has entered this case as an intervenor, pursuant to Federal Rules of Appellate Procedure (FRAP) 15(d), Circuit Rule (Cir. R.) 15, and this Court’s Order of September 1, 2011 (ECF No. 1327422). Mr. Olsen claims standing to assert certain State sovereignty claims allegedly bearing on the agency’s decision.

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<sup>1</sup> *Denial of Petition to Initiate Proceedings to Reschedule Marijuana*, Certified Index to the Record (CIR) E; 76 Fed. Reg. 40,552 (July 8, 2011) (also filed by Petitioners in this Court as Underlying decision in case, Aug. 23, 2011, ECF No. 1325662; references hereafter use the Federal Register citation); Petition for Review, Jul. 22, 2011, ECF No. 1320765. Petitioners proceed under 21 U.S.C. 877, providing that “any person aggrieved by a final decision of the Attorney General . . . may obtain review of the decision in the United States Court of Appeals for the District of Columbia” by filing and serving a petition within 30 days after notice of the decision. The DEA Administrator had authority over the underlying matter pursuant to delegation from the Attorney General. 28 C.F.R. 0.100.

For the reasons set forth herein, Respondent respectfully requests that this Court dismiss the intervenor from this case.

Background

Petitioners filed their request for rescheduling with the agency in 2002. CIR A.1; 76 Fed. Reg. at 40,552. The lead Petitioner at the time, the Coalition for Rescheduling Cannabis (CRC), stated that the membership of non-profit organizations and individual citizens comprising the coalition had “various interests” in the scheduling of cannabis, “including but not limited to an interest in legal access to cannabis for therapeutic use based on existing medical conditions.” CIR A.1 at p. 5. In addition to one individual and eleven entities, including Americans for Safe Access, Patients Out of Time (separately identified as Petitioners in this Court), Iowans for Medical Marijuana/Carl Eric Olsen, the Petitioners identified ten “Individual Patients” residing in the states of California, Oregon, and Washington as Co-petitioners before the agency. *Id.* at Attachment 1. The Petitioners sought to establish that marijuana met the criteria for transfer from schedule I of the CSA to schedule III or a less restrictive schedule. CIR A.1 at p. 3; *see* 76 Fed. Reg. at 40,552.

Controlled substances are assigned to one of five “schedules” under the CSA. *See* 21 U.S.C. 812. At the time of enactment, in 1970, Congress placed marijuana in schedule I. 21 U.S.C. 812(c) (Schedule I at (c)(10)). The criteria applicable to schedule I are:

- (A) The drug or other substance has a high potential for abuse.
- (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
- (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

21 U.S.C. 812(b)(1). Under federal law, legal access to schedule I substances is severely restricted relative to substances in other schedules.<sup>2</sup> The criteria applicable to schedule III are:

- (A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.
- (B) The drug or other substance has a currently accepted medical use in treatment in the United States.
- (C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

21 U.S.C. 812(b)(3).<sup>3</sup>

Pursuant to the statutory requirements applicable when the agency considers transferring a substance from one schedule to another, DEA gathered the necessary data, and the then-Administrator requested from the then-Secretary of Health and Human Services (HHS) a scientific and medical evaluation of marijuana and a recommendation as to control. CIR A.9; *see* 21 U.S.C. 811(b), (c); 76 Fed. Reg. at 40,552. Upon receiving a response from HHS, including that agency's recommendation that marijuana remain in schedule I, CIR A.10, *see* 76 Fed. Reg. at 40,552 – 40,566, DEA considered these facts and all other relevant data in light of the eight statutory factors set forth at 21 U.S.C. 811(c) and the schedule I criteria, 76 Fed. Reg. at 40,566 – 40,589. Upon determining that there was “no substantial evidence that marijuana

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<sup>2</sup> Schedule I substances may be dispensed for use only in connection with federally approved research. *See* 21 U.S.C. 823(f). In addition, substances in schedule I and II are subject to production quotas. *See* 21 U.S.C. 826. Moreover, as is common to all controlled substances, manufacturers and distributors must register with DEA to engage in those activities. *See* 21 U.S.C. 823(a), (b).

<sup>3</sup> Schedule IV and V substances also have a currently accepted medical use in treatment in the United States. 21 U.S.C. 812(b)(4)(B), (b)(5)(B). Schedule IV substances have “a low potential for abuse relative to [those] in schedule III,” and schedule V substances have “a low potential for abuse relative to [those] in schedule IV.” 21 U.S.C. 812(b)(4)(A), (b)(5)(A). Abuse of schedule IV substances “may lead to limited physical dependence or psychological dependence relative to [those] in schedule III,” and abuse of schedule V substances may lead to limited physical dependence or psychological dependence relative to [those] in schedule IV.” 21 U.S.C. 812(b)(4)(C), (b)(5)(C).

should be removed from schedule I,” the Administrator declined to initiate rulemaking proceedings. 76 Fed. Reg. at 40,552; see 21 U.S.C. 811(a)(1), (b).

Prior to DEA’s decision, Petitioners sought mandamus in this Court to compel agency action on the petition for rescheduling. *In re: Coalition to Reschedule Cannabis*, No. 11-5121 (D.C. Cir.). The intervenor in this case also was granted leave to intervene in those proceedings. Order, July 12, 2011, ECF No. 1318048 (Case 11-5121). That case is still pending in this Court.

### Discussion

This Court should dismiss the intervenor from this case because his claims diverge significantly from those of the Petitioners, were never raised during the administrative proceedings, and are not properly raised in this proceeding.

An intervenor “may join issue only on a matter that has been brought before the court by another party.” *Beethoven.com LLC v. Librarian of Congress*, 394 F.3d 939, 946 (D.C. Cir. 2005) (quoting *Edison Electric Institute v. Environmental Protection Agency*, 391 F.3d 1267, 1274 (D.C. Cir. 2004)); *National Association of Regulatory Utility Commissioners v. Interstate Commerce Commission*, 41 F.3d 721, 730 (D.C. Cir. 1994) (“Even a cursory reading of our case law makes clear that a party who seeks to challenge an aspect of agency action not questioned by any other petitioner must file a separate petition for review”); *Illinois Bell Telephone Co. v. FCC.*, 911 F.2d 776, 786 (D.C. Cir. 1990). In all of these cases, this Court refused to consider the arguments of intervenors raising issues that were not addressed by proper petitioners in the cases.

In as much as Mr. Olsen cannot meet the requirements for standing as a petitioner in this case, he proceeds as an intervenor. He states that he has “withdrawn” from CRC due to “a difference of opinion,” Motion to Intervene in Petition for Judicial Review, p. 4, and that he seeks to address “a defect in the petition which may deprive the petitioners of an essential argument,” *id.* at p.6. Specifically, the intervenor seeks to argue that State law should govern

DEA's determination of whether marijuana has a currently accepted medical use for treatment in the United States and that failure to transfer marijuana from schedule I – where Congress placed it – is an impermissible intrusion on State sovereignty. *Id.* at pp. 6-7. He relies primarily on the Supreme Court's decision in *Gonzales v. Oregon*, 546 U.S. 243 (2006), wherein the Court invalidated a DEA rule that interpreted the CSA as prohibiting the use of controlled substances in connection with physician assisted suicide although the substances were legally available under federal law for medical uses generally. Moreover, the intervenor seeks to advance these issues based on his view that State and local governments would have standing to do so by joining as petitioners in this case, and they have inexcusably failed to do so. Motion at pp. 6-7.

Consistent with the applicable case law, this Court should reject Mr. Olsen's intervention in this case to raise these arguments. He withdrew from the agency proceedings, and neither he nor the other Petitioners advanced these arguments before the agency. He admittedly is not aligned with the Petitioners in this case, and he seeks to advance claims of entities that are not parties to the case. He would not have standing as a petitioner to advance these claims on these facts, *see Vietnam Veterans of America v. Shinseki*, 599 F.3d 654, 662 (D.C. Cir. 2010) (“[O]ne can not have standing in federal court by asserting an injury to someone else.”), and this Court should not allow him to advance them as an intervenor in this case. Respondent's lack of objection to the Motion to Intervene does not preclude the Court from dismissing the intervenor's case. *See, e.g., Nat'l Assn. of Regulatory Utility Commissioners*, 41 F.3d at 730 (“Intervenors . . . simply lack standing to expand the scope of the case to matters not addressed by the petitioners in their request for review[,]” and “were we to take . . . into account [that, in light of that unopposed motion to intervene, the intervenor missed the deadline for mounting an

independent facial challenge], we would fundamentally change our practice.”). On the facts here, this Court should dismiss the intervenor’s case.

Conclusion

Wherefore, for the foregoing reasons, Respondent asks this Court to dismiss the intervenor from this case.

Respectfully submitted,

/s/Lena Watkins  
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September 9, 2011

**ADDENDUM**

Except for Mr. Carl E. Olsen, Intervenor, all parties, intervenors and amici appearing before the agency and this Court are listed in the Petitioner's Certificate as to Parties, Rulings, And Related Cases filed this case on August 23, 2011 (ECF No. 1325658).

**CERTIFICATE OF SERVICE**

I, Lena Watkins, hereby certify that I electronically filed the foregoing Motion to Dismiss the Intervenor From This Case with the Clerk of this Court, by using the appellate CM/ECF system, on September 9, 2011. I certify further that Counsel for the Petitioners and the Intervenor, who is proceeding pro se, are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/Lena Watkins

Lena Watkins

*Senior Trial Attorney*

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