

No. 11-1265

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICANS FOR SAFE ACCESS, *et al.*,

Petitioners,

v.

Drug Enforcement Administration,

Respondent.

INTERVENOR'S OPENING BRIEF

Carl Olsen
130 E. Aurora Ave.
Des Moines, IA 50313-3654
515-288-5798 home phone
515-343-9933 cell phone
carl-olsen@mchsi.com

Pro se

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici. Except for Carl Olsen, all parties, intervenors, and amici before the Drug Enforcement Administration and in this court are listed in the Brief for the Petitioners.

Ruling Under Review. The ruling at issue in this court is the Drug Enforcement Administration’s “Denial of Petition To Initiate Proceedings To Reschedule Marijuana,” reported at 76 Fed. Reg. 40552 (July 8, 2011). Electronic Case Filing (“ECF”) Document #1325662. Administrative Record (“AR”) (E).

Related Cases. The Drug Enforcement Administration’s ruling under review in this court was preceded by an original action to compel a response from the Drug Enforcement Administration. See In re: Coalition to Reschedule Cannabis, No. 11-5121 (D.C. Cir. 2011).

GLOSSARY

AR – Administrative Record

CRC – Coalition for Rescheduling Cannabis

CSA – Controlled Substances Act

DEA – Drug Enforcement Administration

DHHS – Department of Health and Human Services

ECF – Electronic Case Filing

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JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the final ruling of the Drug Enforcement Administration pursuant to 21 U.S.C. § 877. On October 9, 2002, Carl Olsen and the Petitioners referenced in the Brief for the Petitioners petitioned the Drug Enforcement Administration ("DEA") to initiate rulemaking proceedings to reschedule marijuana pursuant to 21 U.S.C. § 811(a). AR (A1). After the DEA denied the petition by letter dated June 21, 2011, as published at 76 Fed. Reg. 40552 (July 8, 2011), Petitioners timely filed a Petition for Review in this Court on July 21, 2011, pursuant to 21 U.S.C. § 877. Carl Olsen timely filed a motion to intervene in this Court on August 11, 2011, pursuant to Fed. R. App. P. 15(d) and Circuit Rule 15(b). ECF Document #1324610. Carl Olsen's motion to intervene was granted by this Court on September 1, 2011. ECF Document #1327422. Venue is proper in this Court under 21 U.S.C. § 877.

SUMMARY OF ARGUMENT

Petitioners' Opening Brief focuses on marijuana's medical efficacy as grounds to petition this Court to remand our 2002 petition to the DEA for further findings of fact due to the inappropriate length of the DEA's response to our petition for rescheduling cannabis. DEA received our petition for rescheduling in October of 2002 and did not rule on it until July of 2011. A lot of new evidence of

marijuana's medical efficacy has been revealed during that time. A total of 8 states had accepted the medical use of marijuana in October of 2002 when our petition was originally filed. As of February of 2012, a total of 16 states and the District of Columbia have now accepted the medical use of marijuana.

Shortly after the decision in Gonzales v. Oregon, 546 U.S. 243 (2006), Intervenor, Carl Olsen ("Mr. Olsen"), notified the Petitioners that state officials in states that have accepted the medical use of marijuana must join our petition to give it the force of law (demanding DEA recognize states' rights to determine what is or is not accepted for medical use in their state), rather than simply a request for the DEA to determine whether marijuana has medical efficacy. The Petitioners informed Mr. Olsen that bringing in new evidence would further delay our petition. On August 14, 2010, Mr. Olsen notified the Petitioners that he was no longer confident that our petition was being adequately represented by the Petitioners and that Mr. Olsen would represent the issue of states' rights independently from the group. See Addendum, pp. 1-5.

In May of 2008 Mr. Olsen initiated a petition in Iowa to have marijuana removed from Schedule I of Iowa's Controlled Substances Act. The Iowa Board of Pharmacy ruled unanimously in February of 2010 that marijuana no longer meets the statutory criteria for inclusion in Schedule I based on marijuana's medical efficacy. See Addendum, pp. 5-6. Iowa's scheduling criteria are identical

to federal scheduling criteria. See Addendum, pp. 7-12. Compare Iowa Code § 124.201(1) with 21 U.S.C. § 811(c).

The Petitioners have presented a question of whether marijuana has medical efficacy and have failed to address a question of law, whether marijuana has accepted medical use in the United States. Marijuana has accepted medical use in the United States as a matter of law, not because of its medical efficacy. A total of 16 states and the District of Columbia have accepted the medical use of marijuana based on evidence of marijuana's medical efficacy, but now that has become a matter of law and no longer a question of medical efficacy. The DEA has no statutory authority to question the validity of the decision made by state lawmakers that marijuana does indeed have medical efficacy. Federal scheduling decisions are regulatory, not statutory. Petitioners would have this Court upset the balance of power between the states and the federal government, formally known as "federalism" which this Court must not do. Perhaps the discovery of new evidence of marijuana's medical efficacy since 2002 would be relevant to a determination of whether to put marijuana into another federal schedule, but it is not relevant to the question of whether marijuana has accepted medical use in the United States as a matter of law. Marijuana must be removed from Schedule I as a matter of law.

The DEA's decision is not due any deference by this Court because the DEA does not have any statutory authority to reject the decision which has been made

by state lawmakers. This Court must uphold the laws and the Constitution of the United States, regardless of what the DEA may think about marijuana's medical efficacy.

STANDING

Carl Olsen has been before this Court previously in regard to his religious use of marijuana. Olsen v. DEA, 878 F.2d 1458, 1460 (D.C. Cir. 1989) (“the Ethiopian Zion Coptic Church is a bona fide religion with marijuana as its sacrament”). The use of marijuana is essential to Mr. Olsen's religion. Town v. State, ex rel. Reno, 377 So.2d 648, 649 (Fla. 1979) (“use of cannabis is an essential portion of the religious practice”). Mr. Olsen believes marijuana is his medicine, “for the healing of the nations.” Revelation 22:2 (King James Version of the Bible). Mr. Olsen also believes marijuana is both a preventative medicine as well as healing medicine.

Mr. Olsen suggests this Court adopt the analysis of standing articulated in Cutter v. Wilkinson, 544 U.S. 709, 725 (2005) (“The “truth” of a belief is not open to question’; rather, the question is whether the objector's beliefs are ‘truly held’”) (quoting *United States v. Seeger*, 380 U.S. 163, 185 (1965)) and in Gonzales v. O Centro Espirita Benficiente Uniao do Vegetal, 546 U.S. 418, 430-31

(2006) (“application of the challenged law ‘to the person’ – the particular claimant whose sincere exercise of religion is being substantially burdened”).

It is widely believed by legal scholars that the U.S. Supreme Court changed the legal standard by which religious claims are evaluated in Employment Division v. Smith, 494 U.S. 872 (1990). Mr. Olsen’s case is cited in that case at 494 U.S., on page 888. The new standard articulated by the U.S. Supreme Court is that First Amendment claims will not be given strict scrutiny (sometimes called “the compelling interest test”) if a law which burdens a religious practice is neutral toward religion and generally applicable. Accepted medical use of marijuana is an exception to general applicability in states that accept it. Mitchell County v. Zimmerman, No. 10-1932, Slip op. at 17-18, 2012 Iowa Sup. LEXIS 11 (February 3, 2012) (“the secular medical exemption was considered sufficiently parallel to the requested religious exemption”), citing Fraternal Order of Police Newark Lodge v. City of Newark, 170 F.3d 359, 364-66 (3d Cir. 1999). Many states that accept the medical use of marijuana allow it to be cultivated by the end user or a caregiver, making it sufficiently parallel to religious use by Mr. Olsen. Because the CSA recognizes accepted medical use in the United States, the CSA cannot be used to bar Mr. Olsen from practicing his religion. See Montana v. United States, 440 U.S. 147, 163 (1979) (“Unreflective invocation of collateral estoppel against parties with an ongoing interest in constitutional issues could freeze doctrine in

areas of the law where responsiveness to changing patterns of conduct or social mores is critical”). And see Olsen v. Mukasey, 541 F.3d 827, 831 (8th Cir. 2008) (“Collateral estoppel does not apply if controlling facts or legal principles have changed significantly since Olsen's prior judgments,” citing, *Montana v. United States*, 440 U.S. 147, 155, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979)).

Following the ruling in Employment Division v. Smith requiring that exceptions to the marijuana laws must be created before a religious exception could be considered by the courts, in 1990, Mr. Olsen co-founded Iowans for Medical Marijuana with two of the 4 existing patients using marijuana legally under the federal government’s Compassionate IND Program in the state of Iowa, George McMahon and Barbara Douglass. The affidavits of George McMahon and Barbara Douglass are attached to the decision in Conant v. Walters, 309 F.3d 629 (9th Cir. 2002). However, “Mere interest as an advocacy group is not enough” to establish standing. Gettman v. DEA, 290 F.3d 430, 433 (D.C. Cir. 2002).

Mr. Olsen has standing in his own right as a person who needs marijuana as medicine for both his physical and spiritual health. 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”). Removing marijuana from Schedule I will remove any federal obstacle to Mr. Olsen’s use of marijuana unless the DEA decides to put marijuana in one of the other four

schedules. The DEA cannot put marijuana into one of the other four schedules without going through a formal administrative process. Although the petitioners have given the DEA the choice of placing marijuana in Schedule III, IV, or V, the DEA cannot just arbitrarily pick another schedule and is not bound by the limits proposed by the Petitioners.

DEA cannot single out Mr. Olsen for disparate treatment. Brady Campaign to Prevent Gun Violence v. Salazar, 612 F.Supp.2d 1, 28 (D.D.C. 2009)

(“Plaintiffs need not show that each plaintiff has standing to assert every claim; rather, ‘if constitutional and prudential standing can be shown for at least one plaintiff, [the court] need not consider the standing of the other plaintiffs to raise that claim”).

On February 17, 2010, Mr. Olsen obtained a unanimous ruling from the Iowa Board of Pharmacy that marijuana no longer meets the statutory requirements for inclusion in Schedule I. See Addendum, pages 5-6. However, the Iowa Legislature has not removed marijuana from Schedule I, proving beyond any doubt that accepted medical use in the United States is a question of law, not medical efficacy. Mr. Olsen is currently asking the Supreme Court of Iowa to find the classification of marijuana in Schedule I unconstitutional, Olsen v. State, No. 11-1744 (Iowa Supreme Court, filed October 25, 2011). See Mr. Olsen’s appeal brief in the Iowa Supreme Court, Addendum, pp. 13-59.

Although medical use of marijuana is not currently accepted in the State of Iowa, the current classification of marijuana in Iowa as a substance with no accepted medical use in the United States violates the Full Faith and Credit Clause of the U.S. Constitution, Art. 4 § 1, and is unconstitutional.

Because Mr. Olsen's standing in this Court is based on state laws in 16 states and the District of Columbia and because Mr. Olsen has standing in his own right as a person who needs marijuana for medicine for both physical and spiritual health, Mr. Olsen has standing to object to the DEA's disregard for the federal structure of our state and national governments. Bond v. United States, 131 S. Ct. 2355, 2366-2367, 180 L. Ed. 2d 269, 282-283, 22 Fla. L. Weekly Fed. S 1156 (June 16, 2011) ("where the litigant is a party to an otherwise justiciable case or controversy, she is not forbidden to object that her injury results from disregard of the federal structure of our Government").

ISSUE PRESENTED FOR REVIEW

Does the DEA have the statutory authority to ignore a statutory mandate ("accepted medical use in the United States") guaranteeing state sovereignty as to which controlled substances a state recognizes as medicine?

STATEMENT OF THE CASE

Pursuant to Circuit Rule 28(4) Mr. Olsen accepts the Petitioners' Statement of the Case.

STATEMENT OF THE FACTS

In addition to the facts stated in the Petitioners' Statement of Facts, Mr. Olsen adds the following:

I. THE CONTROLLED SUBSTANCES ACT

One of the options the Attorney General has is to take a controlled substance entirely "off of the schedules." See Petitioners' Opening Brief, p. 13. The Attorney General is not obligated to put marijuana into one of the other schedules.

The 8 factors that DEA must consider in making a scheduling determination are found under 21 U.S.C. § 811(c). None of those 8 factors contemplate state laws accepting the medical use of marijuana. All of those 8 factors contemplate medical efficacy, not state laws. See Petitioners' Opening Brief, p. 14. Therefore, accepted medical use in the United States is a matter of law, not medical efficacy.

II. PAST RESCHEDULING PETITIONS

The last time this Court considered a final ruling of the DEA on the rescheduling of cannabis was in 1994. Alliance for Cannabis Therapeutics v. DEA, 930 F.2d 936 (D.C. Cir. 1991), and Alliance for Cannabis Therapeutics v.

DEA, 15 F.3d 1131 (D.C. Cir. 1994). The first state to accept the medical use of cannabis was California in 1996.

In the absence of any state law accepting the medical use of marijuana, DEA's rationale for denying rescheduling has been a difference of opinion (lack of consensus) between medical experts regarding marijuana's medical efficacy. AR (E) at 40560, 40562, 40567, 40580, 40581, and 40585, ECF Document #1325662, pp. 10, 12, 17, 30, 31, and 35.

ARGUMENT

I. STANDARD OF REVIEW

If the intent of Congress is clear, “the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

II. FEDERAL PREEMPTION OF STATE LAW AND END USERS

While holding that personal, intrastate medical use of marijuana authorized by state law does not exempt users from the Controlled Substances Act (“CSA”), the U.S. Supreme Court recognized that marijuana could be reclassified. Gonzales v. Raich, 545 U.S. 1, 33 (2005) (“the statute authorizes procedures for the reclassification of Schedule I drugs”). The year following the decision in Gonzales

v. Raich, the U.S. Supreme Court recognized that states have a role in regulating controlled substances under the CSA. Gonzales v. Oregon, 546 U.S. 243, 251 (2006) (“The CSA explicitly contemplates a role for the States in regulating controlled substances, as evidenced by its pre-emption provision”):

"No provision of this subchapter shall 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, unless there is a positive conflict between that provision . . . and that State law so that the two cannot consistently stand together." § 903.

State medical marijuana laws do not create any positive conflict with the CSA because they do not require anyone to use marijuana. Garden Grove v. Kha, 157 Cal.App.4th 355, 68 Cal.Rptr.3d 656 (2007); San Diego v. NORML, 165 Cal.App.4th 798; 81 Cal.Rptr.3d 461 (2008).

However, anyone actually using state authorized medical marijuana is in positive conflict with the CSA as long as marijuana remains in federal Schedule I. This conflict is solely due to an administrative regulation, not the CSA itself. The scheduling of marijuana is an ordinary administrative regulation. 21 C.F.R § 1308.11(d)(23). Nothing in the CSA requires that marijuana remain forever in Schedule I. The Petitioners’ Opening Brief (pp. 9-13) explains in detail the doubt that Congress expressed in 1970 when initially placing marijuana in Schedule I, going so far as to authorize a presidential commission to resolve that doubt.

III. ACCEPTED MEDICAL USE IN THE UNITED STATES

DEA says, “The FDA has not yet approved an NDA for marijuana.” AR (E) at 40562, ECF Document #1325662, p. 12. While FDA approval may be evidence that a controlled substance has medical utility, lack of FDA approval does not prove the opposite. Grinspoon v. DEA, 828 F.2d 881, 887 (1st Cir. 1987) (“it is possible that a substance may have both an accepted medical use and safety for use under medical supervision, even though no one has deemed it necessary to seek approval for interstate marketing”).

DEA argues, “While a number of states have passed voter referenda or legislative actions authorizing the use of marijuana for medical purposes, this does not establish a currently accepted medical use under federal law.” AR (E) at 40567, ECF Document #1325662, p. 17. The DEA may not consider that to be significant, but the people in those states who voted to protect the rights of medical patients thought it was significant. This is the crux of Mr. Olsen’s complaint. DEA cannot simply brush off accepted medical use of marijuana in 16 states and the District of Columbia as having no legal significance to the question of marijuana’s accepted medical use in the United States.

Congress defined the terms “State” and “United States” in the CSA. 21 U.S.C. § 802(26) (“The term ‘State’ means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the

Trust Territory of the Pacific Islands, and the Canal Zone”). 21 U.S.C. § 802(28) (“The term ‘United States’, when used in a geographic sense, means all places and waters, continental or insular, subject to the jurisdiction of the United States”).

The question of who decides what is accepted for medical use by a state has been answered in Gonzales v. Oregon, 546 U.S. 243, 250 (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”). For the same reason 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,” neither can the Attorney General maintain an existing rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law. There’s nothing magical about “making” a rule that isn’t equally true about “maintaining” one.

DEA cites a 5 factor test for determining accepted medical use approved by this Court in Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1135 (D.C. Cir. 1994). AR (E) at 40567, ECF Document #1325662, p. 17. DEA does not mention the fact that in 1994 when that 5 factor test was approved by this Court there were no states that had accepted the medical use of marijuana in the

United States. California became the first state to accept the medical use of marijuana in 1996. Since 1996, a total of 16 states and the District of Columbia have now accepted the medical use of marijuana.¹

¹ Alaska (Ballot Measure 8) (1998), Alaska Stat. § 17.37.070 (2011) (defines "medical use" including "acquisition, possession, cultivation, use or transportation of marijuana"); Arizona, (Proposition 203) (2010), A.R.S. § 36-2801 (2011) (defines "medical use" including "acquisition, possession, cultivation, manufacture, use, administration, delivery, transfer or transportation of marijuana"); California (Proposition 215) (1996), Cal Health & Saf Code § 11362.5 (2011) (defines "use of marijuana for medical purposes" including possession and cultivation for personal use); Colorado (Ballot Amendment 20) (2000), Colo. Const. Art. XVIII, Section 14 (2011) (defines "medical use" including "acquisition, possession, production, use, or transportation of marijuana"); Delaware (SB 17, HB 17-4) (2011), 16 Del. C. § 4902A (2011) (defines "medical use" including "acquisition, administration, delivery, possession, transportation, transfer, transportation, or use of marijuana"); District of Columbia (Amendment Act B18-622) (2010), D.C. Code § 7-1671.01 (2011) (defines "medical marijuana" including "marijuana cultivated, manufactured, possessed, distributed, dispensed, obtained, or administered"); Hawaii (SB 862, HB 13-12) (2000), HRS § 329-121 (2011) (defines "medical use" including "acquisition, possession, cultivation, use, distribution, or transportation of marijuana"); Maine (Ballot Question 2) (1999), 22 M.R.S. § 2422 (2011) (defines "medical use" including "acquisition, possession, cultivation, manufacture, use, delivery, transfer or transportation of marijuana"); Michigan (Proposal 1) (2008), MCLS § 333.26423 (2011) (defines "medical use" including "acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana"); Montana (Initiative 148)(2004), Mont. Code Anno., § 50-46-301 (2011) (defines "use of marijuana" to alleviate symptoms of debilitating medical conditions including "cultivation, manufacture, delivery, and possession of marijuana"); Nevada (Ballot Question 9) (2000), Nev. Rev. Stat. Ann. § 453A.120 (2011) (defines "medical use" including "possession, delivery, production or use of marijuana"); New Jersey (SB 119, HB 25-13) (2010), N.J. Stat. § 24:6I-3 (2011) (defines "medical use" including "acquisition, possession, transport, or use of marijuana"); New Mexico (SB 523, HB 32-3) (2007), N.M. Stat. Ann. § 26-2B-2 (2011) (defines "use of medical cannabis" "for alleviating symptoms caused by debilitating medical conditions and their medical treatments"); Oregon (Ballot Measure 67) (1998), ORS § 475.302

The Petitioners are now asking this Court to remand this case to the DEA to determine whether those 16 states have exercised valid medical judgment. See Petitioners' Opening Brief, at page 35 ("the DEA expressly disregarded the medical judgment of sixteen states and the District of Columbia that marijuana has medical use"), and at page 36 ("disregarding the views of states and physicians"). The Petitioners make a grave error. The views of physicians are not entitled equal weight with state laws under the CSA. DEA does not have the statutory authority to analyze each of 16 states laws to discern whether those laws were supported by a valid finding of medical efficacy. State lawmakers found marijuana had medical efficacy and that's all Congress requires of them. Congress never gave the administrative agency the authority to override the decision of state lawmakers by using ordinary administrative regulations.

In the final ruling currently under review in this Court, DEA says, "The drug must be accepted by qualified experts." AR (E) at 40585, ECF Document #1325662, p. 35. In Iowa, for example, under Iowa Code § 124.201, the Iowa

(2009) (defines "medical use" including "production, possession, delivery, or administration of marijuana"); Rhode Island (SB 0710, HB 33-1) (2006), R.I. Gen. Laws § 21-28.6-3 (2011) (defines "medical use" including "acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marijuana"); Vermont (SB 76, HB 645) (2004), 18 V.S.A. § 4472 (2011) (defines "use for symptom relief" including "acquisition, possession, cultivation, use, transfer, or transportation of marijuana"); Washington (Initiative 692) (1998), Rev. Code Wash. (ARCW) § 69.51A.010 (2011) (defines "medical use" including "production, possession, or administration of marijuana").

Board of Pharmacy are the “qualified” medical experts, because the law in Iowa qualifies them as the medical experts to determine marijuana’s medical efficacy in Iowa. DEA did not consider the Iowa Board of Pharmacy’s February 17, 2010, unanimous decision that marijuana has medical efficacy in its analysis.

Congress actually approved medical use of marijuana in the District of Columbia and yet DEA asserts that Congress has not approved of medical use of marijuana.² DEA clearly misunderstands its role under the CSA, which is to prevent the unauthorized use, not the legitimate use of controlled substances. Gonzales v. Oregon, 546 U.S. 243, 268 (2006) (“the statutory purposes to combat drug abuse and prevent illicit drug trafficking”). Gonzales v. Raich, 545 U.S. 1, 24 (2005) (“to foster the beneficial use of those medications, to prevent their misuse”).

The legitimate use of marijuana in a state that accepts it for medical use cannot be regulated by the DEA so as to make it illicit under federal law, which is

² On May 4, 2010, the District of Columbia City Council unanimously approved a bill that established a legal medical marijuana program. See Legalization of Marijuana for Medical Treatment Amendment Act of 2010, D.C. Code §§ 7-1671.01 to 7-1671.13 (2010) (“D.C. Act”). Then Mayor Adrian Fenty signed the bill on May 21, 2010 and Congress took no action on the bill during the 30-day “home rule” period. See The District of Columbia Home Rule Act, Pub. L. No. 93-198, 87 Stat. 777, § 602(C)(1) (1973) (providing that any act passed by the D.C. Council and approved by the Mayor shall be transmitted to the Speaker of the House of Representatives and the President of the Senate and shall take effect upon the expiration of the 30-calendar-day period unless there is a joint resolution disapproving such act). Therefore, the D.C. Act became law on July 27, 2010.

exactly what DEA does by maintaining marijuana in federal Schedule I. Oregon v. Ashcroft, 368 F.3d 1118, 1125 (9th Cir. 2004) (“Unless Congress’ authorization is ‘unmistakably clear,’ the Attorney General may not exercise control over an area of law traditionally reserved for state authority, such as regulation of medical care”). Conant v. Walters, 309 F.3d 629, 639 (9th Cir. 2002) (“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’”). See Gregory v. Ashcroft, 501 U.S. 452, 458 (1991):

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry. See generally McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. Chi. L. Rev. 1484, 1491-1511 (1987); Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 3-10 (1988).

Perhaps the principal benefit of the federalist system is a check on abuses of government power. “The ‘constitutionally mandated balance of power’ between the States and the Federal Government was adopted by the Framers to ensure the protection of ‘our fundamental liberties.’” *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985), quoting

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 572, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985) (Powell, J., dissenting).

And see, *New York v. United States*, 505 U.S. 144, 181-182 (1992):

Respondents then pose what appears at first to be a troubling question: How can a federal statute be found an unconstitutional infringement of state sovereignty when state officials consented to the statute's enactment?

The answer follows from an understanding of the fundamental purpose served by our Government's federal structure. The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Coleman v. Thompson*, 501 U.S. 722, 759, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991) (BLACKMUN, J., dissenting).

...

The constitutional authority of Congress cannot be expanded by the "consent" of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States.

State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution. Indeed, the facts of these cases raise the possibility that powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests.

New York v. United States, 505 U.S. 144, 187-188 (1992):

But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

...

States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," The Federalist No. 39, p. 245 (C. Rossiter ed. 1961), reserved explicitly to the States by the Tenth Amendment.

Also see President Clinton's Executive Order 13132 of August 4, 1999 ("Federalism"), Federal Register, Vol. 64, No. 153, Tuesday, August 10, 1999, page 43255; President Obama's Memorandum of May 20, 2009 ("Preemption"), Federal Register, Vol. 74, No. 98, Friday, May 22, 2009, page 24693.

IV. RECENT EFFORTS TO SHIFT THE BALANCE OF POWER

On November 30, 2011, state officials in several states that have accepted the medical use of marijuana undermined their own state laws by asking the DEA to decide if marijuana is actually medicine. Voters in those states have already determined that marijuana is medicine (see footnote 1). The governors of Washington and Rhode Island have filed a petition with the DEA asking that marijuana be transferred to Schedule II of the CSA. See

<http://www.governor.wa.gov/news/news->

[view.asp?pressRelease=1809&newsType=1](http://www.governor.wa.gov/news/news-view.asp?pressRelease=1809&newsType=1) and

http://www.governor.wa.gov/priorities/healthcare/petition/combined_document.pdf

f. It has been reported by the press, but unconfirmed by Mr. Olsen that the governors of Vermont and Connecticut have joined the governors of Washington and Rhode Island in their petition. Of critical note, none of these state officials are asserting that marijuana has accepted medical use in the United States as a matter of law. These state officials have unconstitutionally ceded state sovereignty to a federal administrative agency, the DEA.

On December 22, 2011, state officials in Colorado undermined their state's constitution by asking the DEA to decide if marijuana is actually medicine. See http://www.iowamedicalmarijuana.org/States/pdfs/co_1325267714-barbara_brohl_letter.pdf.

And, finally, the governor of Arizona tried to obtain an advisory ruling from the federal court regarding the state's medical marijuana law. Arizona v. United States, No. 2:11-cv-01072-PHX-SRB. See http://www.iowamedicalmarijuana.org/States/pdfs/az-11-cv-01072_071.pdf. In denying the petition for declaratory and injunctive relief, the Honorable Judge Susan R. Bolton, U.S. District Court for the District of Arizona, wrote: "Plaintiffs do not challenge any specific action taken by any Defendant. Plaintiffs also do not describe any actions by state employees that were in violation of the CSA or any threat of prosecution for any reason by federal officials. These issues, as

presented, are not appropriate for judicial review.” Final Order, January 4, 2012, p. 9.

Nor does promissory estoppel, judicial estoppel, or states’ rights prevent the enforcement of the CSA. See Marin Alliance v. Holder, No. 4:11-cv-05349-SBA (N.D. Cal.), Order Denying Plaintiffs’ Motion for a Temporary Restraining Order (2012 U.S. Dist. LEXIS 6425, Nov. 28, 2011), and Montana Caregivers v. United States, No. 9:11-cv-00074-DWM (D. Mont.), Final Order (2011 U.S. Dist. LEXIS 136089, Jan. 20, 2012).

CONCLUSION

There is only one way through the door. The failure of state officials and federal regulators to recognize accepted medical use of marijuana in the United States does not create an injury to them; it creates an injury to the people who elected them to obediently serve the will of the people.

For the foregoing reasons, Mr. Olsen prays this Court to remand this matter to the DEA with instructions to:

1. Remove marijuana from federal Schedule I of the CSA immediately;
2. Notify the state petitioners that proceedings to place marijuana in Schedule II will be initiated immediately by the DEA; and
3. Notify the private petitioners that proceedings to place marijuana in Schedule III, IV, or V, will be initiated immediately by the DEA.

Petitioners such as Mr. Olsen, who believe that marijuana should not be placed in Schedule II, III, IV, or V, can participate in those proceedings and make their concerns known at that time. Mr. Olsen would base his argument at that time on marijuana's exceptional safety record.

DATED: February 6, 2012

Respectfully Submitted,

/s/ Carl Olsen

Carl Olsen, Pro Se
130 E. Aurora Ave.
Des Moines, IA 50313-3654
515-288-5798 home phone
515-343-9933 cell phone
carl-olsen@mchsi.com

CERTIFICATE OF COMPLAINE

I, Carl Olsen, hereby certify pursuant to Fed. R. App. P. 32 and Circuit Rule 32, that the foregoing brief is proportionally spaced, has a typeface of 14 points, and contains 5,281 words.

DATED: February 6, 2012

/s/ Carl Olsen

Carl Olsen

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing were served via first-class mail upon the following parties:

Joseph David Elford
Americans for Safe Access
1322 Webster Street
Suite 402
Oakland, CA 94612

Lena D. Watkins
U.S. Department of Justice
Room 11100
1400 New York Avenue, NW
Washington, DC 20005

DATED: February 6, 2012

Respectfully Submitted,

/s/ Carl Olsen

Carl Olsen
130 E. Aurora Ave.
Des Moines, IA 50313-3654
515-288-5798 home phone
515-343-9933 cell phone
carl-olsen@mchsi.com