IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CARL ERIC OLSEN,	)	Case No. 4-07-cv-00023 (JAJ-RAW)
Plaintiff,	)	
v.	)	**MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS**
ALBERTO R. GONZALES, et al.,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF
FEDERAL DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

This action is plaintiff's latest attempt, in a long line of previous legal efforts, to insulate his purported religiously-inspired cultivation, use, and distribution of marijuana from criminal sanctions. Plaintiff alleges that enforcement of the federal Controlled Substances Act, 21 U.S.C. §§ 801 et seq. ("CSA") and the Iowa Controlled Substances Act, Iowa Code § 124 ("Iowa CSA"), against his sacramental marijuana activities would contravene various statutory and constitutional provisions. In particular, plaintiff asserts that application of these drug laws to prohibit his marijuana use would violate the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. ("RFRA"); the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc et seq. ("RLUIPA"); the Free Exercise Clause of the First Amendment; the Equal Protection Clause; the Ex Post Facto Clause; the Fourth Amendment; the Fifth Amendment; the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"); and various treaties and sources of international law.

Plaintiff, however, has failed to establish that his claims are ripe for review, given that he is not currently facing an impending threat of prosecution. Furthermore, plaintiff has, on multiple occasions, previously asserted his claims under the Free Exercise Clause and the Equal Protection Clause with no success, which effectively precludes him from litigating his RFRA claim and his Equal Protection claim here. In any event, as demonstrated below, directly applicable legal precedent indicates that each of plaintiff's claims fails as a matter of law. Accordingly, defendants Alberto Gonzales and Karen Tandy ("Federal Defendants") move to dismiss this action with prejudice.

BACKGROUND

Plaintiff alleges that he is a "sincere adherent of the teachings of the Ethiopian Zion Coptic Church," whose members purport to receive communion through the sacramental use of marijuana. Plaintiff's Original Complaint for Declaratory and Injunctive Relief (dkt. no. 1) (Jan. 16, 2007) ("Complaint") ¶¶ 23-26. According to plaintiff, a central and essential practice of the Ethiopian Zion Coptic Church ("EZCC") is for its members to "assemble for communion, reasoning, and worship through the Sacramental offering of Cannabis during prayer to the living god known to the church as Rastafari." Id. ¶ 26. The EZCC has its roots in Jamaica, and it was incorporated there in 1976. See Complaint, Pl.'s Ex. # 5-F1-F5.

The teachings and practices of the EZCC and its adherents regarding marijuana have been the subject of various litigation matters.[1] For instance, in Town v. State ex rel. Reno, 377 So.2d 648, 649 (Fla. 1979), the Florida Supreme Court upheld an injunction against the use of marijuana on the property of an EZCC member and prohibited the use of that property as a church for the EZCC. Significantly, the court made the following findings regarding EZCC practices:

> . . . the use of cannabis is not restricted to members of the [EZCC]. Instead, it is freely given to children and adults, members and nonmembers. Checks on distribution of cannabis to nonbelievers in the faith are minimal, and no efforts are made to ascertain whether visiting nonmembers are truly interested in learning more about the faith. Nonmembers are not required to undergo any religious training prior to being permitted to share in the use of cannabis. The record and findings also establish that cannabis is continually smoked throughout the waking hours, independent of prayer services or religious rituals. Members partake of cannabis anywhere, not just within the confines of a church facility.

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[1] Courts may take judicial notice of judicial opinions and other public records and may consider them on a motion to dismiss. See Stutzka v. McCarville, 420 F.3d 757, 760 n.2 (8th Cir. 2005); Stahl v. Dep't of Agriculture, 327 F.3d 697, 700 (8th Cir. 2003).

Id.; see also Complaint, Pl.'s Ex. # 4 at 47 (transcript of trial testimony of T. Reilly in plaintiff's criminal prosecution by the State of Iowa indicating that EZCC priests smoke marijuana "continually" and "right through the day").

In addition, vast amounts of marijuana previously have been seized from EZCC church members, including plaintiff. In King Shipping Consum, Inc. v. Commissioner of Internal Revenue, 1989 WL 128559, *5 (U.S. Tax Court 1989), the court indicated that on one occasion 1,150 pounds of marijuana were found with church members and that 14 tons of marijuana were seized from a church member's property. The court determined that the church was a cover for a large commercial drug smuggling operation reasoning that "the size of the drug operation conducted by ZCC negates its contention that its drug-related activities were ONLY in relation to its attempt to acquire a source of marijuana for use as a sacrament in its church services. The record reflects a large-scale operation by ZCC and its members which entailed the illegal distribution of drugs for profit." Id. at *4; see also Zion Coptic Church, Inc. v. United States, 1979 WL 1333, *1 (S.D. Fla. 1979) (noting that thirty-three tons of marijuana were seized from various church members and upholding revocation of church's tax exempt status and imposing tax assessments on church). In addition, fifteen members of the EZCC, including plaintiff, were also convicted in Maine as part of an operation to distribute marijuana in which twenty tons of marijuana were seized. See United States v. Rush, 738 F.2d 497, 501 (1st Cir. 1984).

Plaintiff's own marijuana activities and his efforts to obtain constitutional protection for those activities extend well beyond just his conviction in Rush. Plaintiff was convicted in Iowa state court of possession of marijuana with intent to deliver after sheriffs found 129 pounds of marijuana and $10,915 in cash in plaintiff's trunk. See State v. Olsen, 293 N.W.2d 216, 218

(Iowa 1980). Subsequently, plaintiff was convicted again of possession of marijuana with intent to deliver after police found a pile of cash and plastic bags containing marijuana in the trunk of his car. See State v. Olsen, 315 N.W.2d 1, 3-4 (Iowa 1982). Plaintiff testified that he was a priest in the EZCC and that he smoked marijuana "continually all day, through church services, through everything that we do" as part of the church's sacrament. Id. at 7. Plaintiff thus claimed that his possession of marijuana was protected by the Free Exercise Clause of the First Amendment. Id. The court rejected plaintiff's claim finding that courts have uniformly rejected Free Exercise claims regarding marijuana use and concluding that "a compelling state interest sufficient to override Olsen's free exercise clause argument is demonstrated in this case" Id. at 9.

Following his convictions under Iowa state law, plaintiff's conviction for possession of marijuana with intent to distribute under the federal CSA in connection with his role in the EZCC's large scale operation to distribute marijuana in Maine was affirmed in Rush, 738 F.2d 497 (1st Cir. 1984). The First Circuit rejected Olsen's and his co-defendants' Free Exercise claim finding that unanimous precedent established an overriding governmental interest in regulating marijuana. Id. at 512-13. The court also determined that the CSA's complete prohibition against marijuana was necessary because allowing a religious exception for marijuana would make enforcement of the anti-marijuana laws nearly impossible. Id. at 513. Furthermore, the court decided that Olsen was not entitled, as a matter of Equal Protection, to a religious exemption for marijuana on the same terms as the peyote exemption granted to the Native American Church. Id.

Shortly thereafter, in Olsen v. DEA, 776 F.2d 267 (11th Cir. 1985), plaintiff filed his own

civil action seeking to compel the DEA to amend the federal rules governing controlled substances to permit the religious use of marijuana. The court of appeals held that the rule sought by plaintiff fell outside the scope of the relevant statute and affirmed the dismissal of plaintiff's action. Id. at 268. Plaintiff then filed a petition for declaratory judgment in this Court, asserting that the Iowa criminal statutes regarding controlled substances violated the Equal Protection Clause by affording a religious exception for the Native American Church's use of peyote but not one for his religious use of marijuana. See Olsen v. State of Iowa, 1986 WL 4045, *1 (S.D. Iowa 1986). This Court determined that the Iowa Supreme Court previously rejected plaintiff's Equal Protection claim and thus concluded that it was barred by collateral estoppel. Id. at *2.[2]

Next, plaintiff filed a federal habeas corpus petition in this Court challenging his first Iowa state court conviction on First Amendment and Equal Protection grounds. See Olsen v. State of Iowa, 649 F. Supp. 14 (S.D. Iowa 1986). The Court summarily dismissed plaintiff's habeas petition finding that his Free Exercise and Equal Protection challenges had been asserted and rejected on numerous prior occasions by the Iowa Supreme Court and the First Circuit Court of Appeals in Rush. Id. at 15. Subsequently, the Eighth Circuit Court of Appeals affirmed this Court's dismissal of plaintiff's habeas petition. See Olsen v. State of Iowa, 808 F.2d 652 (8th Cir. 1986). The Eighth Circuit joined all of the other courts that had considered plaintiff's claims and rejected plaintiff's challenges under the Free Exercise Clause and the Equal

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[2] This Court also determined that plaintiff's claim under the Free Exercise Clause of the First Amendment was barred by collateral estoppel in light of the Iowa Supreme Court's previous rejection of plaintiff's same claim in State v. Olsen, 315 N.W.2d 1, 7-9 (Iowa 1982). Id. at *3.

Protection Clause. Id.

Finally, plaintiff sought a religious-use exemption from the federal laws proscribing marijuana, but the District of Columbia Circuit Court of Appeals affirmed the denial of plaintiff's request in Olsen v. DEA, 878 F.2d 1458 (D.C. Cir. 1989). The D.C. Circuit noted that, as a member of the EZCC, plaintiff smoked marijuana "continually all day, through church services, through everything we do." Id. at 1458 (quoting State v. Olsen, 315 N.W.2d 1, 7 (Iowa 1982)). The court indicated that plaintiff's Free Exercise claim had been raised and rejected previously by several courts, and the court agreed that the government has a compelling interest in prohibiting marijuana use and a religious exception for plaintiff was not warranted. See id. at 1461-62. The court also rejected plaintiff's Equal Protection claim, finding that the demand and abuse rate for marijuana was much greater than that for peyote and that the EZCC endorsed continual widespread use of marijuana, whereas the Native American Church's use of peyote was limited to a "precisely circumscribed ritual." Id. at 1463-64.

Plaintiff has now filed this present action in which he repeats his Free Exercise Clause and Equal Protection Clause challenges to both the Iowa and federal versions of the CSA, asserting that these laws unconstitutionally prohibit plaintiff's sacramental use of marijuana. Complaint ¶¶ 49-59. As mentioned, plaintiff also alleges that these laws violate the Religious Freedom Restoration Act ("RFRA"), the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), the Ex Post Facto Clause, the Fourth and Fifth Amendments, the APA, and various treaties and principles of international law. Plaintiff seeks declaratory and injunctive relief, including inter alia, a judgment declaring that the application of the Iowa and federal versions of the CSA to prohibit plaintiff's sacramental use of marijuana would violate the various provisions

enumerated above; a judgment declaring that the Iowa and federal versions of the CSA do not apply to marijuana generally; as well as an injunction preventing the enforcement of the Iowa and federal versions of the CSA against plaintiff "anywhere within the jurisdiction of the federal courts of the United States" for his sacramental use of marijuana, "including its possession, consumption, distribution and importation for this purpose." See Complaint, Prayer for Relief ¶¶ 1-2, 5.

ARGUMENT

I. PLAINTIFF'S CLAIMS ARE NOT RIPE FOR REVIEW

Although a declaratory judgment action can be maintained even if the plaintiff has not yet suffered an actual injury, "the plaintiff must face an injury that is 'certainly impending'" to make the claim ripe for review. Public Water Supply Dist. No. 8 of Clay County, Missouri v. City of Kearney, Missouri, 401 F.3d 930, 932 (8th Cir. 2005) (quoting Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923)). While plaintiff, in the past, has been prosecuted for his various marijuana activities, he has not established that he currently faces "certainly impending" federal prosecution or other harm from the Federal Defendants in connection with his expressed desire to smoke marijuana as part of his practice of religion. In fact, plaintiff alleges that he has suspended his religious usage of marijuana as a result of his subjective fear of a future criminal prosecution.[3] See Complaint ¶¶ 34-36. Accordingly, plaintiff has not demonstrated that he is

[3] While plaintiff may claim that his abstention from engaging in his purported sacramental use of marijuana is an injury that he is currently suffering, this "injury" is self-inflicted and not a sufficient basis to create a justiciable case or controversy. In other words, because this injury is self-inflicted and based merely on plaintiff's subjective fears, it is not fairly traceable to any actions of the Federal Defendants, and plaintiff therefore lacks standing to maintain this action. See County of Mille Lacs v. Benjamin, 361 F.3d 460, 463 (8th Cir. 2004) (indicating that standing under the Declaratory Judgment Act is governed under the same

currently confronted with a "certainly impending" injury sufficient to render his case ripe for review. See, e.g., Clinton v. Acequia, Inc., 94 F.3d 568, 572 (9th Cir. 1996) (explaining that "a case is not ripe where the existence of the dispute itself hangs on future contingencies that may or may not occur.").

Even if the Court determines that plaintiff's claims are ripe for review, however, as demonstrated below, each of his claims fails as a matter of law and this case should be dismissed with prejudice.

II. PLAINTIFF'S CLAIM UNDER THE RELIGIOUS FREEDOM RESTORATION ACT IS PRECLUDED BY PRINCIPLES OF COLLATERAL ESTOPPEL AND OTHERWISE FAILS AS A MATTER OF LAW

A. Collateral Estoppel Bars Plaintiff's RFRA Claim

Under the doctrine of collateral estoppel, also called "issue preclusion," a judgment in a prior suit precludes re-litigation of an issue when: "(1) the issue sought to be precluded is identical to the issue previously decided; (2) the prior action resulted in a final adjudication on the merits; (3) the party sought to be estopped was either a party or in privity with a party to the prior action; and (4) the party sought to be estopped was given a full and fair opportunity to be heard on the issue in the prior action." Manion v. Nagin, 392 F.3d 294, 300 (8th Cir. 2004); see also Montana v. United States, 440 U.S. 147, 153 (1979).

Under the Religious Freedom Restoration Act ("RFRA"), the federal government may not implement a policy that substantially burdens a person's exercise of religion unless it can demonstrate that the policy furthers a compelling governmental interest and is the least

standards as Article III and requires a plaintiff to demonstrate he has suffered an injury in fact, that "is fairly traceable to the actions of the defendant," and the injury will likely be redressed by a favorable decision).

restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1. Although RFRA was enacted after plaintiff lodged his prior repeated claims that his right to use marijuana religiously was protected by the Free Exercise Clause of the First Amendment, RFRA employs the same compelling interest test that was used by the courts that previously denied plaintiff's First Amendment claims. See 42 U.S.C. § 2000bb(a)-(b) (indicating that RFRA was enacted in response to the Supreme Court's decision in Employment Division v. Smith, 494 U.S. 872 (1990), which eliminated use of the compelling interest test to justify burdens on religion imposed by neutral laws of general applicability, and was designed to restore the compelling interest test as set forth in prior federal court rulings in First Amendment Free Exercise cases that preceded the Smith decision); City of Boerne v. P.F. Flores, 521 U.S. 507, 515 (1997) (providing similar explanation of RFRA's history and purpose); Christians v. Crystal Evangelical Free Church, 141 F.3d 854, 864 (8th Cir. 1998) (Bogue, J. dissenting) (same).

Plaintiff's RFRA claim fails because several courts in plaintiff's previous cases found that there was a compelling governmental interest in prohibiting plaintiff's religious use of marijuana and that the CSA's complete ban against marijuana was the least restrictive means of furthering that interest. See supra Background Section. The decisions in United States v. Rush, 738 F.2d 497 (1st Cir. 1984), and Olsen v. DEA, 878 F.2d 1458 (D.C. Cir. 1989), in particular, provide overwhelming justification for precluding plaintiff's re-litigation of the compelling interest and least restrictive means issues with respect to the federal CSA under plaintiff's current RFRA claim.

As mentioned previously, in Rush, plaintiff was one of fifteen co-defendants all of whom claimed to be members of the EZCC and who raised First Amendment Free Exercise challenges

to their convictions for possession of marijuana with intent to distribute under the federal CSA. See Rush, 738 F.2d at 500, 512. The First Circuit Court of Appeals noted that "[e]very federal court that has considered the matter . . . has accepted the congressional determination that marijuana in fact poses a real threat to individual health and social welfare" and concluded that there was "an overriding governmental interest in regulating marijuana." Id. at 512-13. Furthermore, the court determined that the CSA's ban against marijuana was the least restrictive means of furthering the government's compelling interest because allowing for a religious exception as requested by plaintiff would make enforcement of the CSA extremely difficult. Id. at 513.

In addition, in Olsen v. DEA, 878 F.2d 1458, 1461-62 (D.C. Cir. 1989), the D.C. Circuit Court of Appeals concluded that there was a compelling governmental interest in prohibiting plaintiff's religious use of marijuana. The court further determined that the CSA's complete prohibition against marijuana was the least restrictive means of furthering that interest because Olsen's religious usage of marijuana in particular could not be accommodated without "unduly burdening or disrupting enforcement of the federal marijuana laws." Id. at 1462-63. In reaching this conclusion, the D.C. Circuit focused on Olsen's particular religious use of marijuana as a member of the EZCC and even considered his own specific proposal for very restrictive use of marijuana. See id. at 1460, 1462. The court, nevertheless, concluded that Olsen's proposal for his confined use of marijuana would not be self-enforcing because the EZCC endorses "marijuana use every day throughout the day." Id. at 1462. The court found that Olsen's proposed exception for himself would result in "a large monitoring burden in light of evidence that in years past, the church's '[c]hecks on distribution of cannabis to nonbelievers in the faith

[were] minimal,' there was 'easy access to cannabis for a child who had absolutely no interest in learning the religion,' and '[m]embers [partook] of cannabis anywhere, not just within the confines of a church facility.'" Id. (quoting Town v. State ex rel. Reno, 377 So.2d 648, 649, 651 (Fla. 1979). The court thus concluded that granting Olsen an exemption for his religious use of marijuana would require "burdensome and constant official supervision and management" and thereby determined that the uniform application of the CSA with respect to marijuana was the least restrictive means of furthering the government's compelling interest in controlling the use of marijuana. Id. at 1462-63.[4]

As demonstrated, in both Rush and Olsen the issues of whether the government has a compelling interest in prohibiting plaintiff's religious use of marijuana and whether the CSA's prohibition is the least restrictive means of furthering that interest (1) are identical to the issues presented in plaintiff's current RFRA claim; (2) the Rush and Olsen cases resulted in final

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[4] The D.C. Circuit's findings in Olsen, moreover, clearly satisfy the Supreme Court's indication in Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 126 S. Ct. 1211, 1220 (2006), that the compelling interest test requires an individualized determination that the government's compelling interest would be frustrated if the "particular claimant's" own specific religious practice were to be permitted. As explained, the D.C. Circuit analyzed Olsen's particular practice of using marijuana as a member of the EZCC as well as his own specific proposal for more circumscribed use of marijuana. Olsen, 878 F.2d at 1462-63 (explaining, for example, that "[t]he pivotal issue, therefore, is whether marijuana usage *by Olsen and other members of his church* can be accommodated without undue interference with the government's interest in controlling the drug" and concluding that "DEA cannot accommodate *Olsen's religious use of marijuana* without unduly burdening or disrupting enforcement of the federal marijuana laws.") (emphasis added). Furthermore, the Court in O Centro acknowledged that uniform application of a particular government program may be warranted if the government can demonstrate that granting the particular requested religious accommodation would "seriously compromise its ability to administer the program." O Centro, 126 S. Ct. at 1223. As mentioned, the Olsen court made such a finding by concluding that granting Olsen an exemption for his religious use of marijuana would require "burdensome and constant official supervision and management." Olsen, 878 F.2d at 1462.

adjudications on the merits adverse to plaintiff; (3) plaintiff was a party in both of those cases; and (4) plaintiff was given a full and fair opportunity to be heard on those issues in those prior cases. See Manion v. Nagin, 392 F.3d 294, 300 (8th Cir. 2004). Accordingly, Olsen is precluded from re-litigating those issues now and his RFRA claim must be dismissed.

B. Plaintiff's RFRA Claim Fails as a Matter of Law

Even if the Court were to find that collateral estoppel does not strictly apply to plaintiff's RFRA claim, that claim fails as a matter of law because the plaintiff's previous cases as well as many others indicate that there is a compelling government interest in regulating marijuana and the CSA's complete ban on marijuana use is the least restrictive means of promoting that interest.[5]

1. The Government has a Compelling Interest in Prohibiting Plaintiff's Use of Marijuana

Protecting the public from threats to health, safety, and welfare has consistently been recognized as a compelling governmental interest. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) (finding that religiously based activities may be subject to regulation under the government's "undoubted power to promote health, safety, and general welfare."). The Supreme

[5] Plaintiff's prior convictions involving *distribution* of marijuana as well as his and other EZCC members' possession of vast quantities of marijuana call into question both the legitimacy of the EZCC's "religious" nature and the sincerity of plaintiff's beliefs, see supra Background Section, and thus present considerable obstacles to plaintiff's ability to establish a prima facie case under RFRA. See, e.g., Guam v. Guerrero, 290 F.3d 1210, 1222 (9th Cir. 2002) (indicating that a prima facie case under RFRA requires a plaintiff to establish, by a preponderance of the evidence, that the governmental action being challenged (1) substantially burdens (2) a religious belief (not merely a philosophy or a way of life) that the plaintiff (3) sincerely holds); United States v. Meyers, 95 F.3d 1475, 1482 (10th Cir. 1996) (same). For the purposes of this motion only, however, Federal Defendants do not challenge the legitimacy of plaintiff's religion or the sincerity of his beliefs.

Court has acknowledged that the use of and trafficking in controlled substances "creates social harms of the first magnitude," City of Indianapolis v. Edmond, 531 U.S. 32, 42 (2000), and that drug abuse is "one of the most serious problems confronting our society today." Treasury Employees v. Von Raab, 489 U.S. 656, 674 (1989).

Based on the negative health effects of marijuana and its high potential for abuse, federal courts uniformly have recognized that the government has a compelling interest in prohibiting marijuana cultivation, possession, consumption, and distribution under the CSA. See United States v. Israel, 317 F.3d 768, 771-72 (7th Cir. 2003) (concluding, under RFRA, that Congress has a compelling interest in regulating marijuana because "there is ample medical evidence establishing the fact that the excessive use of marijuana often times leads to the use of stronger drugs such as heroin and crack cocaine" and denying Rastafarian's RFRA claim to use marijuana religiously); United States v. Brown, 72 F.3d 134, *2 (8th Cir. 1995) (unpublished) (indicating that "the government has a compelling state interest in controlling the use of marijuana" and denying RFRA claim); United States v. Greene, 892 F.2d 453, 456-57 (6th Cir. 1989) (indicating that Congress has determined that "marijuana poses a real threat to individual health and social welfare"); United States v. Middleton, 690 F.2d 820, 825 (11th Cir. 1982) (finding that "Congress has determined beyond doubt that it believes marihuana is an evil in American society and a serious threat to its people" and rejecting claimed right of member of the Ethiopian Zion Coptic Church to possess marijuana as part of his religious practice); Loop v. United States, 2006 WL 1851140, * 7 (D. Minn. 2006); Lepp v. Gonzales, 2005 WL 1867723, *10 (N.D. Cal. 2005) (finding that "Congress undoubtedly believes marijuana has a 'substantial and detrimental effect on the health and general welfare of the American people.'") (quoting 21 U.S.C. § 801(2));

United States v. Jefferson, 175 F. Supp. 2d 1123, 1130 (N.D. Ind. 2001) (finding that government has a compelling health and safety interest as well as a compelling interest in uniformly enforcing the drug laws which justified prohibiting Rastafarian's religious use of marijuana).

These judicial findings that the government has a compelling interest in regulating marijuana, moreover, are not weakened by the Supreme Court's decision in Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 126 S. Ct. 1211 (2006). In O Centro, the Court held that the government had failed, at the preliminary injunction stage, to demonstrate a compelling interest in barring a small religious sect's sacramental use of "hoasca" – a tea mixture that contains a schedule I hallucinogenic controlled substance called DMT. See id. at 1225. In deciding that RFRA requires a "more focused inquiry" on the specific practice in question, as opposed to merely relying on the general characteristics of Schedule I substances, the Court stated that "there is no indication that Congress, in classifying DMT, considered the harms posed by the particular use at issue here – the circumscribed, sacramental use of hoasca by the UDV." Id. at 1221.

The facts of the present case, however, involve the plaintiff's proposed cultivation, possession, use, and distribution of marijuana – not hoasca tea. As indicated in many of the cases referenced above, Congress and the courts have considered the harms posed by marijuana specifically. See, e.g., Israel, 317 F.3d at 771-72 (finding a compelling interest in regulating marijuana because "there is ample medical evidence establishing the fact that the excessive use of marijuana often times leads to the use of stronger drugs such as heroin and crack cocaine"); Greene, 892 F.2d at 456-57 (indicating that Congress has determined that "marijuana poses a

real threat to individual health and social welfare"); Middleton, 690 F.2d at 825 (finding that "Congress has determined beyond doubt that it believes marihuana is an evil in American society and a serious threat to its people").

Furthermore, both the Tenth Circuit Court of Appeals and the Supreme Court in the O Centro litigation themselves recognized that marijuana is significantly different from and poses a greater danger than hoasca tea due to the immensity of the demand for marijuana and the extent of the marijuana abuse problem in this country. The Court of Appeals noted that "hoasca and marijuana differ. Marijuana is associated with problems of abuse and control, leading courts to ascertain a particular government interest in its prohibition even for religious uses." O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft, 342 F.3d 1170, 1185 (10th Cir. 2003); see also O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973, 1023 (10th Cir. 2004) (en banc) (explaining that "the fact that hoasca is a relatively uncommon substance used almost exclusively as part of a well-defined religious service makes an exemption for bona fide religious purposes less subject to abuse than if the religion required its constant consumption, or if the drug were a more widely used substance like marijuana or methamphetamine.").[6] The Supreme Court also pointed out "the thinness of any market for hoasca, the relatively small amounts of the substance imported by the church, and the absence of any diversion problem in the past." O Centro, 126 S. Ct. at 1218.

The Court of Appeals also contrasted the tightly controlled and circumscribed sacred use of hoasca espoused by the religious sect in O Centro (the UDV) with the continuous, liberal, and

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[6] The Tenth Circuit's panel decision specifically noted that "[o]ur ruling in the present appeal in no way calls into question cases refusing to grant an exemption to the CSA for marijuana, LSD, heroin, or any other controlled substances." O Centro, 342 F.3d at 1186.

uncontrolled use of marijuana practiced by plaintiff's own church – the EZCC. The court noted that:

> [t]he constant and uncircumscribed use of a drug presents different health risks and risks of diversion than the use of hoasca suggested by UDV. The significance of these differences is underscored by the conviction of the Ethiopian Zion Coptic Church for the importation of twenty tons of marijuana. United States v. Rush, 738 F.2d 497, 501 (1st Cir. 1984). . . . In U.S. v. Brown, 1995 WL 732803, *2, for example, the Eighth Circuit found that the "broad use" of marijuana advocated by the church in question, which included supplying the drug to the sick and distributing it to anyone who wished it . . . made accommodation [under RFRA] impossible. Both the unconstrained character of the proposed use and the popularity of marijuana affected the outcome in these cases.

O Centro, 389 F.3d 973, 1020 (10th Cir. 2004) (en banc); see also id. (explaining that UDV's religious use of hoasca is "tightly circumscribed" and that hoasca is "a drug not in widespread use.").

The O Centro decisions thus tend to reinforce the fact that there is a compelling governmental interest in prohibiting plaintiff's particular marijuana activities. As mentioned previously, as a member of the EZCC, plaintiff's purported religious use of marijuana would not be circumscribed but rather would be extensive and unconfined. See Olsen v. DEA, 878 F.2d 1458, 1462 (D.C. Cir. 1989) (noting that plaintiff smokes marijuana "continually all day, through church services, through everything we do" and that the EZCC does not impose tight restrictions on marijuana use). In addition, the large amounts of marijuana that have been seized from plaintiff and his fellow EZCC members also suggests that plaintiff's marijuana activities would not be narrowly constrained to his religious use and could present a heightened risk of diversion of marijuana to recreational users. See, e.g., United States v. Rush, 738 F.2d 497 (1st Cir. 1984); Proyect v. United States, 101 F.3d 11 (2d Cir. 1996) (indicating that it was "very unlikely that claimant was intending to personally consume 100 marijuana plants seized."). In fact, plaintiff

himself, admits that his religious practices include not only possession and use of marijuana but also cultivation and distribution. See Complaint, Prayer for Relief ¶ 5 (indicating that plaintiff's sacramental use of marijuana includes "possession, consumption, distribution, and importation"); Pl.'s Ex. # 7G at 2 (noting plaintiff's inquiry as to whether the DEA will arrest him if he exercises his "Sacramental right to use, grow, possess, and distribute marijuana"). Prohibiting plaintiff's perpetuation of illegal marijuana distribution qualifies as a compelling governmental interest. See United States v. Jefferson, 175 F. Supp. 2d 1123, 1131-32 (N.D. Ind. 2001) (finding that individual's acquisition of marijuana from third parties contributed to illegal drug distribution that the government had a compelling interest in regulating).

In any event, as discussed earlier, several courts previously have found compelling governmental interests specifically in prohibiting plaintiff's own religious use of marijuana. See State v. Olsen, 315 N.W.2d 1 (Iowa 1982); United States v. Rush, 738 F.2d 497 (1st Cir. 1984); Olsen v. State of Iowa, 1986 WL 4045 (S.D. Iowa 1996); Olsen v. State of Iowa, 808 F.2d 652 (8th Cir. 1986); Olsen v. DEA, 878 F.2d 1458 (D.C. Cir. 1989). Even if the Court determines that these cases do not have preclusive effect, they are persuasive precedents that support a finding that there is a compelling governmental interest in prohibiting plaintiff's alleged religious use of marijuana in the present case.

2. A Complete Ban on Plaintiff's Use of Marijuana is the Least Restrictive Means to Achieve the Government's Interest

In light of the high demand for marijuana and the pervasive marijuana abuse problem in the United States, uniform enforcement of the CSA's complete prohibition of marijuana is the least restrictive means to achieve the government's compelling interests in protecting the health and safety of its citizens and preventing the diversion of marijuana to recreational users. Courts

consistently have determined that proposals to allow particular individuals or groups a limited right to use marijuana for religious purposes are unworkable because they would make it extremely difficult to otherwise enforce the CSA's regulation of marijuana. See, e.g., Israel, 317 F.3d at 772 (finding that "[a]ny judicial attempt to carve out a religious exemption in this situation would lead to significant administrative problems for the probation office and open the door to a weed-like proliferation of claims for religious exemptions."); Leary v. United States, 383 F.2d 851, 861 (5th Cir. 1967) (explaining that "[i]t would be difficult to imagine the harm which would result if the criminal statutes against marihuana were nullified as to those who claim the right to possess and traffic in this drug for religious purposes. For all practical purposes the anti-marihuana laws would be meaningless, and enforcement impossible.").

Allowing an exemption for plaintiff's proposed religious use of marijuana in particular would be especially troubling. As explained above, plaintiff's religious use of marijuana is not tightly circumscribed, but rather is extremely broad. Plaintiff has indicated that he smokes marijuana continuously, that his religious practice includes not only marijuana use but also marijuana cultivation and distribution, and his church, the EZCC, endorses liberal use of marijuana. See Olsen v. DEA, 878 F.2d 1458, 1462-63 (D.C. Cir. 1989). In similar circumstances, the Eighth Circuit Court of Appeals has determined that such broad use of marijuana cannot be accommodated. United States v. Brown, 72 F.3d 134, *2 (8th Cir. 1995) (unpublished) (explaining that "based on Our Church's broad use [of marijuana], the government could not have tailored the restriction to accommodate Our Church and still protected against the kind of misuses it sought to prevent."). Moreover, as discussed previously, the D.C. Circuit determined that even plaintiff's proposal for more circumscribed use of marijuana could not be

accommodated because it would require "burdensome and constant official supervision and management." Olsen, 878 F.2d at 1462.[7] The court thus found that uniform application of the CSA with respect to plaintiff's marijuana use was the least restrictive means of furthering the government's compelling interest in controlling the use of marijuana. Id. at 1462-63. That conclusion applies equally to plaintiff's current request for a religious exemption, and plaintiff's RFRA claim thus fails.

III. THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT IS INAPPLICABLE TO THE CSA

In addition to RFRA, in Count One of the Complaint, plaintiff also claims that the CSA's prohibition against his purported sacramental use of marijuana violates the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000c. RLUIPA, however, is limited to "laws and regulations concerning institutionalized persons or land use." Murphy v. Missouri Dep't of Corrections, 372 F.3d 979, 987 (8th Cir. 2004). Plaintiff is not an institutionalized person, nor does he claim to be, and the CSA is not a "land use regulation" as defined under the Act. RLUIPA establishes that "[t]he term 'land use regulation' means a zoning or landmarking law, or the application of such law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest." 42 U.S.C. § 2000cc-5(5).

Simply because the CSA prohibits plaintiff from smoking marijuana on his own land (as

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[7] As mentioned, the Supreme Court in O Centro indicated that uniform application of a religiously burdensome law may nevertheless be warranted if the government can demonstrate that granting the particular requested religious accommodation would "seriously compromise its ability to administer the [law]." O Centro, 126 S. Ct. at 1223.

well as anywhere else) does not convert the CSA into a "zoning or landmarking law." Indeed, in Multi Denominational Ministry of Cannabis and Rastafari, Inc. v. Gonzales, 2007 WL 404788, *5-*6 (N.D. Cal. 2007), the court rejected a nearly identical claim challenging the CSA's prohibition against purported religious use of marijuana under RLUIPA, finding that the CSA "does not constitute a zoning or landmarking law." As a result, plaintiff's claim under RLUIPA should be dismissed.

IV. PLAINTIFF'S FIRST AMENDMENT CLAIM FAILS BECAUSE THE CSA IS A NEUTRAL LAW OF GENERAL APPLICABILITY

Under well-established First Amendment jurisprudence, a neutral law of general applicability may be applied to and burden religiously motivated conduct without compelling justification. See Employment Div. Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 883 (1990). Several courts have determined that the CSA is a neutral law of general applicability. See United States v. Meyers, 95 F.3d 1475, 1481 (10th Cir. 1996); O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 282 F. Supp. 2d 1236, 1246 (D.N.M. 2002) (finding the CSA a neutral law of general applicability despite its various exceptions for research and other uses). In Meyers, the Tenth Circuit rejected a "Church of Marijuana" member's First Amendment challenge to the CSA's ban on marijuana, explaining:

> Meyers' challenge to his convictions under the Free Exercise Clause must fail. First, as in *Smith*, Meyers challenges the application of valid and neutral laws of general applicability on the grounds that they prohibit conduct that is required by his religion. Therefore, we hold that Meyers' challenge fails for the same reasons as the respondents challenge in *Smith* failed, i.e., the right to free exercise of religion under the Free Exercise Clause of the First Amendment does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law incidentally affects religious practice. Second, we hold that when, as here, the challenge is to a valid neutral law of general applicability, the law need not be justified by a compelling governmental interest.

Meyers, 95 F.3d at 1481. In sum, when applied to neutral laws of general applicability, such as the CSA, the First Amendment provides even less protection of the plaintiff's marijuana activities than the statutory standards of RFRA. Accordingly, given that the CSA's prohibitions against marijuana have consistently been found to be the least restrictive means of furthering compelling government interests, thereby satisfying the heightened scrutiny statutorily imposed by RFRA, they necessarily pass muster under the lower scrutiny afforded by the First Amendment. As a result, plaintiffs' First Amendment claim fails as a matter of law and must be dismissed. See Multi Denominational Ministry of Cannabis and Rastafari, Inc. v. Gonzales, 2007 WL 404788, *6 (N.D. Cal. 2007) (finding that government's enforcement of CSA against religious organization members who used marijuana in the practice of their religion did not violate the Free Exercise Clause of the First Amendment because the CSA is a neutral and generally applicable law); Loop v. United States, 2006 WL 1851140, *2, *6 (D. Minn. 2006) (concluding that Rastafarian's alleged First Amendment right to possess marijuana and related paraphernalia was not violated because CSA "is a religiously neutral law of general applicability").

V. PLAINTIFF'S EQUAL PROTECTION CLAIM IS PRECLUDED BY PRINCIPLES OF COLLATERAL ESTOPPEL AND OTHERWISE FAILS AS A MATTER OF LAW

In Count Three, plaintiff alleges that defendants have violated the Equal Protection Clause by not permitting his religious use of marijuana, but allowing Native American Church members to use peyote in their religious ceremonies and allowing the UDV church members in the O Centro case to use hoasca as part of their religious practice. See Complaint ¶¶ 57-59.

Plaintiff's Equal Protection claim based on the Native American Church's peyote exemption,[8] however, is barred by collateral estoppel, and plaintiff is not similarly situated to members of the UDV church.

A. Plaintiff is Precluded From Asserting His Equal Protection Claim Based on the Peyote Exemption for the Native American Church

Plaintiff previously asserted identical Equal Protection claims based on the Native American Church's peyote exemption and lost. As mentioned earlier, in United States v. Rush, 738 F.2d 497, 513 (1st Cir. 1984), the court rejected plaintiff's claim that, as members of the EZCC, he and his co-defendants were entitled, under the Equal Protection Clause, to a religious exemption from the CSA similar to the Native American Church's exemption for peyote use. In denying plaintiff's claim, the court noted that the peyote exemption is rooted in the special obligations of the United States toward the Native American Church and its duty to preserve the integrity of Native American tribal culture. The court explained:

> [T]he peyote exemption is uniquely supported by the legislative history and congressional findings underlying the American Indian Religious Freedom Act, which declares a federal policy of "protect[ing] and preserv[ing] for American Indians their inherent right of freedom to believe, express and exercise the[ir] traditional religions . . ., including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." . . . In light of the *sui generis* legal status of American Indians, and the express policy of the American Indian Religious Freedom Act . . . we think the Ethiopian Zion Coptic Church cannot be deemed similarly situated to the Native American Church for equal protection purposes.

738 F.2d at 513 (internal citations omitted).

Plaintiff's same Equal Protection argument also was raised and rejected in Olsen v. DEA,

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[8] Members of the Native American Church have a limited exemption under the CSA to use the substance peyote for religious purposes. See 42 U.S.C. § 1996a; 21 C.F.R. § 1307.31.

878 F.2d 1458, 1463-65 (D.C. Cir. 1989). In reaching its conclusion, the D.C. Circuit focused on the significant differences between marijuana and peyote:

> [T]he actual abuse and availability of marijuana in the United States is many times more pervasive . . . than that of peyote . . . . The amount of peyote seized and analyzed by the DEA between 1980 and 1987 was 19.4 pounds. The amount of marijuana seized and analyzed by the DEA between 1980 and 1987 was 15,302,468.7 pounds. This overwhelming difference explains why an accommodation can be made for a religious organization which uses peyote in circumscribed ceremonies, and not for a religion which espouses continual use of marijuana.

Olsen, 878 F.2d at 1463. The court also contrasted the difference between the Native American Church's precisely circumscribed peyote ritual, outside of which the use of peyote is considered sacrilegious, and the EZCC's endorsement of widespread use of marijuana, which plaintiff himself explained involved smoking marijuana "continually all day through everything that we do." Id. at 1464.

As demonstrated, all of the issues of plaintiff's current Equal Protection claim based on the Native American Church's peyote exemption are the same as the issues previously decided in Rush and Olsen; the decisions in Rush and Olsen resulted in final adjudications on the merits of plaintiff's Equal Protection claims adverse to plaintiff; plaintiff was a party to the Rush and Olsen cases; and plaintiff was provided a full and fair opportunity to be heard on his Equal Protection claims in Rush and Olsen. See Manion v. Nagin, 392 F.3d 294, 300 (8th Cir. 2004) (listing elements of collateral estoppel). Accordingly, plaintiff's Equal Protection claim based on the Native American Church's peyote exemption is precluded under collateral estoppel principles.[9]

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[9] This Court previously determined that plaintiff's identical Equal Protection challenge to the constitutionality of the Iowa marijuana laws was barred by collateral estoppel based on

In any event, even if the Court determines that plaintiff is not collaterally estopped from asserting his present Equal Protection claim, the decisions in Rush and Olsen are persuasive precedent for dismissing the claim, and other courts have rejected identical Equal Protection claims asserted by other litigants purporting to be religious marijuana users. See McBride v. Shawnee County, Kansas Court Servs., 71 F. Supp. 2d 1098, 1101-02 (D. Kan. 1999) (rejecting Rastafarian Church members' assertion that their religious use of marijuana rendered them similarly situated to Native American Church members for Equal Protection purposes and noting that "peyote and marijuana are not the same drug" and that "[u]nder the doctrine of trust responsibility, the federal government is required to promote tribal self-government and cultural integrity of Native Americans."); United States v. Carlson, 959 F.2d 242, *3 (9th Cir. 1992) (unpublished) (denying Equal Protection claim of member of Yurok Indian Tribe who claimed to use marijuana as a religious practice based on finding that "[m]arijuana distribution in this country is a social problem of considerably more complexity and breadth than that of peyote.").

B. Plaintiff is Not Similarly Situated to Members of the UDV Religion

Plaintiff's other Equal Protection theory based on the O Centro Court's affirmance of a preliminary injunction preventing the enforcement of the CSA against members of the UDV religion for their use of hoasca also lacks merit and should be dismissed.

To reiterate, plaintiff's proposed religious practice here involves marijuana – not hoasca tea. As explained above in section II.B., the lower courts and the Supreme Court in the O Centro litigation emphasized that marijuana and hoasca are significantly different substances and that

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prior rejections of his Equal Protection claim by the Iowa Supreme Court. See Olsen v. State of Iowa, 1986 WL 4045, *2 (S.D. Iowa 1986).

the prevalence of marijuana and large demand for it make it a much greater threat to public health and safety than hoasca. See O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft, 342 F.3d 1170, 1185 (10th Cir. 2003) (noting that "hoasca and marijuana differ. Marijuana is associated with problems of abuse and control, leading courts to ascertain a particular government interest in its prohibition even for religious uses."); O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973, 1023 (10th Cir. 2004) (en banc) (explaining that "the fact that hoasca is a relatively uncommon substance used almost exclusively as part of a well-defined religious service makes an exemption for bona fide religious purposes less subject to abuse than if the religion required its constant consumption, or if the drug were a more widely used substance like marijuana or methamphetamine.").[10]

Furthermore, as discussed previously, the UDV church's sacramental use of hoasca is tightly controlled and limited to a specific religious ceremony whereas plaintiff's use of marijuana, under the teachings of the EZCC, is expansive and unconstrained, which heightens the risk of diversion. See O Centro, 389 F.3d at 1020. Accordingly, the inherent differences between marijuana and hoasca, as well as the differences between the UDV's circumscribed use of hoasca and plaintiff's liberal use of marijuana, establish that plaintiff is not similarly situated to members of the UDV religion and his Equal Protection claim should be dismissed. See Geach v. Chertoff, 444 F.3d 940, 945 (8th Cir. 2006) (indicating that to establish an equal protection violation, a plaintiff must identify a class of persons who are similarly situated to him but who

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[10] The Tenth Circuit panel in O Centro itself recognized that case law clearly establishes that the government has a compelling interest in outlawing even the sincere religious use of marijuana, even though it found such an interest lacking with respect to UDV members' sacramental use of hoasca. O Centro, 342 F.3d at 1185.

are treated dissimilarly).

VI. THE CONTROLLED SUBSTANCES ACT IS NOT AN EX POST FACTO LAW

Plaintiff's allegation in Count Four that the CSA violates the Ex Post Facto Clause of the Constitution is completely meritless. Article I, section 9, clause 3 of the Constitution provides that "No Bill of Attainder or ex post facto Law shall be passed." This clause forbids the passage of any law which "imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." Weaver v. Graham, 450 U.S. 24, 28 (1981) (internal quotations and citation omitted). Thus, in determining whether a law is impermissibly ex post facto, "the critical question is whether the law changes the legal consequences of acts completed before its effective date." Id. Accordingly, the relevant date to focus on for ex post facto purposes is the date on which the act or offense was committed and whether that date precedes the effective date of the law. See Miller v. Florida, 482 U.S. 423, 426-27 (1987); Lynce v. Mathis, 519 U.S. 433, 441 (1997) (explaining that an ex post facto law applies to events occurring before the law's enactment and disadvantages the offender affected by it, by altering the definition of criminal conduct or increasing the punishment for the crime).

Here, the CSA was in effect well before any of plaintiff's numerous transgressions involving marijuana. Thus, the CSA has not retroactively punished plaintiff for an act that was innocent at the time it was committed, nor has the CSA retroactively increased the punishment for any of the crimes committed by plaintiff. Accordingly, plaintiff's claim that the CSA violates the Ex Post Facto Clause should be dismissed summarily.

VII. THIS COURT LACKS JURISDICTION TO RESCHEDULE MARIJUANA UNDER THE CONTROLLED SUBSTANCES ACT

In the second of two counts labeled as "Count Four" (actual Count Five), plaintiff asserts that marijuana has been improperly classified as a schedule I controlled substance under the CSA and appears to ask the Court to reclassify marijuana to a less restrictive schedule or to remove marijuana altogether from the CSA. See Complaint ¶¶ 62-70. Rescheduling a substance under the CSA, however, is not the province of courts in the first instance, but of Congress or the Attorney General. The CSA provides an administrative remedy by which "any interested party" may petition the Attorney General to initiate a rulemaking proceeding if he or she believes that medical, scientific, or other relevant data warrant deleting a substance from the CSA or transferring it to a less restrictive schedule. See 21 U.S.C. § 811(a).[11] Courts have uniformly held that this administrative rescheduling process is the exclusive means for challenging Congress's scheduling decisions and that courts lack authority to review such scheduling

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[11] Many such administrative requests to reclassify marijuana have been made previously, and plaintiff relies heavily on a DEA Administrative Law Judge's decision in 1988 to recommend that marijuana be reclassified as a schedule II substance. See Complaint, Ex. 1, ¶¶ 12, 64. In Raich v. Gonzales, 545 U.S. 1, 15 (2005), however, the Supreme Court recently recounted previous efforts to reschedule marijuana, as well as the 1988 recommendation of the ALJ. The Court noted, "[s]tarting in 1972, the National Organization for the Reform of Marijuana Laws (NORML) began its campaign to reclassify marijuana. . . . After some fleeting success in 1988 when an Administrative Law Judge (ALJ) declared that the DEA would be acting in an 'unreasonable, arbitrary, and capricious' manner if it continued to deny marijuana access to seriously ill patients . . . the campaign has proved unsuccessful. The DEA Administrator did not endorse the ALJ's findings, 54 Fed. Reg. 53767 (1989), and since that time has routinely denied petitions to reschedule the drug, most recently in 2001. The Court of Appeals for the District of Columbia Circuit has reviewed the petition to reschedule marijuana on five separate occasions over the course of 30 years, ultimately upholding the Administrator's final order. See Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1133 (1994)." Raich, 545 U.S. at 15 n.23. Incidentally, plaintiff was a party to the Alliance lawsuit and is bound by that determination.

decisions in the first instance. See, e.g., United States v. Burton, 894 F.2d 188, 192 (6th Cir. 1990) (explaining that "it has repeatedly been determined, and correctly so, that reclassification is clearly a task for the legislature and the attorney general and not a judicial one."); United States v. Middleton, 690 F.2d 820, 823 (11th Cir. 1982) (finding that "[t]he determination of whether new evidence regarding either the medical use of marijuana or the drug's potential for abuse should result in a reclassification of marijuana is a matter for legislative or administrative, not judicial, judgment."); Lepp v. Gonzales, 2005 WL 1867723, *10 (N.D. Cal. 2005) (same).[12] Accordingly, this Court is without jurisdiction to consider plaintiff's request to reschedule marijuana under the CSA, and this claim should be dismissed.

VIII. PLAINTIFF FAILS TO STATE A COGNIZABLE CLAIM UNDER THE FOURTH AMENDMENT

In Count Five (actual Count Six), plaintiff generally describes the protections afforded by the Fourth Amendment and alludes to a violation of the Fourth Amendment but fails to articulate clearly and specifically how defendants actually have violated his Fourth Amendment rights. See Complaint ¶¶ 71-73. Plaintiff does not point to a particular instance where he allegedly was the victim of an illegal search or seizure, nor does he indicate that he expects to be subject to an illegal search or seizure imminently. Plaintiff thus fails to state a claim on which relief can be granted, and this count should be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

For similar reasons, plaintiff also lacks standing to assert his claim alleging a Fourth

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[12] Only after a rescheduling petition is lodged administratively and a final administrative decision is rendered would judicial review of a rescheduling decision be appropriate, and even then, such review would be conducted in the court of appeals, not in the district courts. See 21 U.S.C. § 877.

Amendment violation. Plaintiff has not demonstrated that he has suffered a concrete and particularized injury that is actual or imminent. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Instead, at most, plaintiff's purported injury regarding a potential illegal search or seizure is merely conjectural or hypothetical, which is not a sufficient basis to establish that there is an actual case or controversy to be decided. As such, plaintiff lacks standing to pursue his cause of action based on the Fourth Amendment, and his claim should be dismissed under Rule 12(b)(1).

In addition, to the extent that plaintiff is claiming that any potential search or seizure based on his marijuana use would be illegal under the Fourth Amendment, such a claim is entirely dependent on the lawfulness of plaintiff's use of marijuana. As demonstrated previously, however, plaintiff's purported religious use of marijuana is not protected under RFRA, the First Amendment, or any other statutory or constitutional provision. Accordingly, a search that would be based on probable cause that plaintiff was in possession of marijuana would not be illegal under the Fourth Amendment, and his claim necessarily fails.[13]

IX. PLAINTIFF DOES NOT HAVE A PROPERTY INTEREST IN MARIJUANA THAT IS PROTECTED BY THE FIFTH AMENDMENT

In Count Six (actual Count Seven), plaintiff asserts that defendants, on certain unspecified prior occasions, seized his marijuana without providing him pre-deprivation notice or a hearing in violation of the Due Process Clause of the Fifth Amendment. Plaintiff's Fifth Amendment claim should be dismissed out of hand because there is no constitutionally protected

[13] Furthermore, to the extent plaintiff intends to allege an Equal Protection claim with his assertion that possession of marijuana should not be subject to greater restrictions than possession of alcohol, tobacco, or peyote, see Complaint ¶ 73, such a claim fails for the same reasons plaintiff's explicit Equal Protection claim in Count Three fails. See supra Section V.

property interest in marijuana. Congress has established that "no property right shall exist in . . . [a]ll controlled substances which have been possessed in violation of [the Controlled Substances Act]." 21 U.S.C. § 881(a)(8). In addition, Congress has provided that "[a]ll controlled substances in schedule I or II that are possessed . . . in violation of the [Controlled Substances Act] . . . shall be deemed contraband and seized and summarily forfeited to the United States." 21 U.S.C. § 881(f)(1). Marijuana is a schedule I controlled substance under the CSA, and as demonstrated herein, its use or possession is not protected under RFRA, the First Amendment, or any other statutory or constitutional provision. Marijuana qualifies as per se contraband, thus plaintiff cannot claim to have any property interest in it. See One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965) (indicating that per se contraband consists of "objects the possession of which, without more, constitutes a crime."); United States v. Jeffers, 342 U.S. 48, 53-54 (1951) (finding narcotics seized were contraband and defendant did not have right to have them returned to him); United States v. Mettetal, 2006 WL 1195777, *2 (W.D. Va.) (2006) (concluding that ricin toxin was per se contraband and defendant was not entitled to have it returned to him). Because plaintiff has no property interest in marijuana, any seizure of it did not and would not violate the due process protections of the Fifth Amendment.

X. PLAINTIFF'S CLAIM UNDER THE ADMINISTRATIVE PROCEDURE ACT IS ENTIRELY DERIVATIVE OF HIS OTHER CLAIMS AND SHOULD BE DISMISSED

Plaintiff's Seventh Count (actual Count Eight) tersely alleges that "Federal Defendants' conduct as set forth above" violates the Administrative Procedure Act ("APA"). Complaint ¶ 78. Because plaintiff merely cross-references his previous allegations against the Federal Defendants, this count is completely derivative of plaintiff's other claims. Accordingly, for the

same reasons each of plaintiff's other claims should be dismissed, as discussed herein, plaintiff's APA claim lacks merit and also warrants dismissal.

In addition, insofar as plaintiff alleges that Federal Defendants' conduct violates the APA because it is contrary to plaintiff's statutory rights under RFRA, this claim is not justiciable. Where a statute provides its own, adequate judicial review provisions – as RFRA does – the judicial review provisions of the APA are not available. See, e.g., Bowen v. Massachusetts, 487 U.S. 879, 903 (1988) (stating that "Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action . . . § 704 does not provide additional judicial remedies in situations where Congress has provided special and adequate review procedures.") (internal quotation marks omitted); see also Hayes v. Whitman, 264 F.3d 1017, 1025 (10th Cir. 2001) (indicating that "[b]ecause review of Plaintiffs' claim is available under [another statute], it is not subject to review under the APA."). Accordingly, the Court should also dismiss plaintiff's APA claim because it is predicated, at least in part, on the government's alleged RFRA violation.[14]

XI. PLAINTIFF'S CLAIMS UNDER VARIOUS TREATIES AND INTERNATIONAL LAW ARE NOT VIABLE AND SHOULD BE DISMISSED

In plaintiff's Count Eight (actual Count Nine), plaintiff alleges that application of the CSA to prohibit the sacramental use of marijuana violates the United Nations International Covenant on Civil and Political Rights ("ICCPR"), 138 Cong. Rec. S4781-84 (1992), the Universal Declaration of Human Rights ("UDHR"), GA res. 217A, Dec. 10, 1948, the

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[14] Furthermore, because Congress explicitly has provided that any appeal from DEA final agency action must be taken to the federal circuit courts of appeal, see 21 U.S.C. § 877, this court lacks subject matter jurisdiction over plaintiff's APA challenges to DEA's interpretation of the CSA.

International Religious Freedom Act ("IRFA"), Pub. L. No. 105-292, 112 Stat. 2787 (1998) (codified at 22 U.S.C. §§ 6401-6481), and the 1971 Convention on Psychotropic Substances ("CPS"), 32 U.S.T. 543, 1019 U.N.T.S. 175. Plaintiff's reliance on these provisions, however, is completely misplaced.

As an initial matter, courts have consistently held that the ICCPR is not a self-executing treaty, and as such it does not create any independent, privately enforceable rights that plaintiff can pursue in federal court. See, e.g., U.S. ex rel. Perez v. Warden, FMC Rochester, 286 F.3d 1059, 1063 (8th Cir. 2002) (finding that "the ICCPR does not bind federal courts because the treaty is not self-executing and Congress has yet to enact implementing legislation."); Payne-Barahona v. Gonzales, 474 F.3d 1, 3 (1st Cir. 2007); Martinez-Lopez v. Gonzales, 454 F.3d 500, 502 (5th Cir. 2006) (concluding that the ICCPR was not a valid basis for relief because "it is not a self-executing treaty."); Guaylupo-Moya v. Gonzales, 423 F.3d 121, 133 (2nd Cir. 2005) (explaining that Senate declared that ICCPR is not self-executing and therefore it does not provide a private right of action). Furthermore, the UDHR is not a treaty at all, and is therefore not a source of law enforceable in federal courts. See Guaylupo-Moya, 423 F.3d at 133.

Similarly, the CPS also does not create a private right of action. Its implementing legislation specifically provides that "[t]he Convention is not self-executing, and the obligations of the United States thereunder may only be performed pursuant to appropriate legislation." 21 U.S.C. § 801a(2). As a result, the CPS does not provide a valid basis for plaintiff to pursue the relief he seeks. See Hernandez v. Ciba-Geigy Corp. USA, 200 F.R.D. 285, 294 (S.D. Tex. 2001) (finding that there is no private right of action under the CPS).

In addition, IRFA was enacted to promote religious freedom internationally in foreign

countries; it is not focused on domestic United States policy. See 22 U.S.C. § 6401(b)(1) (affirming the U.S. policy "[t]o condemn violations of religious freedom, and to promote, and to assist other governments in the promotion of, the fundamental right to freedom of religion."); O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 282 F. Supp. 2d 1236, 1251 n.6 (D.N.M. 2002) (indicating that "Congress passed [IRFA] to address threats to religious freedom occurring in countries other than the United States" and rejecting argument that IRFA should influence the interpretation of the CSA). Furthermore, nothing in IRFA suggests that restricting the ingestion of substances that are controlled under valid public health legislation constitutes a violation of religious freedom. In any event, the statute specifically precludes judicial review under its provisions, thus it cannot support plaintiff's requests for relief. See 22 U.S.C. § 6450 (establishing that "[n]o court shall have jurisdiction to review any Presidential determination or agency action under this chapter or any amendment made by this chapter."). As demonstrated, plaintiff's claims under these various treaties and provisions are not sustainable and should be dismissed.[15]

CONCLUSION

For the foregoing reasons, Federal Defendants respectfully request that the Court grant their motion to dismiss and dismiss this action with prejudice.

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[15] In addition, Count Nine (actual Count Ten) of the Complaint merely explains plaintiff's request for a declaratory judgment but does not present any additional cause of action. Accordingly, because plaintiff's other claims fail, his request for a declaratory judgment, and any other relief, should be denied.

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Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

MATTHEW G. WHITAKER
United States Attorney

/s/ Edward H. White
ARTHUR R. GOLDBERG
EDWARD H. WHITE (D.C. Bar No. 468531)
Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W. Room 6110
Washington, D.C. 20530
Tel: (202) 514-5108
Fax: (202) 318-4268
email: ned.white@usdoj.gov

Attorneys for Federal Defendants