

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CARL OLSEN,
Petitioner

-against-

DRUG ENFORCEMENT ADMINISTRATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

1. Did the Drug Enforcement Administration improperly reject Petitioner's petition to have marijuana rescheduled from Schedule I to Schedule II of the Controlled Substances Act of 1970, and whether that rejection was arbitrary and capricious and contrary to law?

2. Did the Drug Enforcement Administration violate Petitioner's rights under the First Amendment to the United States Constitution to petition the government for a redress of grievances, and thus his Fifth Amendment right to due process, by summarily dismissing his petition to have marijuana rescheduled from Schedule I to Schedule II of the Controlled Substances Act of 1970 without a proper hearing?

3. Did the Drug Enforcement Administration violate Petitioner's Fifth Amendment procedural due process rights by summarily dismissing his petition to have marijuana rescheduled from Schedule I to Schedule II of the Controlled Substances Act of 1970 without a proper hearing?

4. Did the Drug Enforcement Administration violate Petitioner's right to privacy, interfering with sensitive medical decisions without proper constitutional justification, by summarily dismissing his petition to have marijuana rescheduled from Schedule I to Schedule II of the Controlled Substances Act of 1970 without a proper hearing?

5. Did the Drug Enforcement Administration violate Petitioner's right to equal protection of the laws, invalidly treating legal medical Marinol patients differently from illegally smoked marijuana patients without a rational basis, by summarily dismissing his petition to have marijuana rescheduled from Schedule I to Schedule II of the Controlled Substances Act of 1970 without a proper hearing?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the District of Columbia are those in the caption.

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Petitioner herein respectfully prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the District of Columbia entered on October 3, 1996.

OPINIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia is unreported, (94-1605 D.C. Cir. October 3, 1996). (1a) The final order of the Drug Enforcement Administration is also unreported, (93-1109 D.C. Cir. May, 16, 1994). (2a)

BASIS FOR JURISDICTION

The final order of the court of appeals was entered on October 3, 1996. The court of appeals had jurisdiction over this matter pursuant to 21 U.S.C. § 877. This Court has jurisdiction to review the judgement of the court of appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Pursuant to Rule 14(f) of the Supreme Court Rules, the citation of relevant constitutional, statutory, and regulatory provisions involved are listed here, while the pertinent text is set out in the appendix to this petition at pages 8-23.

First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution

5 U.S.C. 706

21 U.S.C. 811

21 U.S.C. 812

21 U.S.C. 877

21 C.F.R. 1307.03

21 C.F.R. 1308.11

21 C.F.R. 1308.12

21 C.F.R. 1308.44

28 C.F.R. 0.100(b)

28 C.F.R. 0.104

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

In 1970 Congress passed the Controlled Substances Act, 21 U.S.C. 801 et seq. ("C.S.A."). The C.S.A. classifies various substances into five schedules. 21 U.S.C. 812. Restrictions upon use and access to a particular drug vary based upon the drug's schedule status in the C.S.A. *Id.* Drugs in Schedule I are subject to more severe restrictions than drugs in the other schedules. See Alliance for Cannabis Therapeutics (hereinafter "A.C.T.") v. Drug Enforcement Administration (hereinafter "D.E.A."), 930 F.2d 936, 937(D.C. Cir. 1991). Congress placed marijuana in schedule I of the C.S.A. 21 U.S.C. 812(c), schedule I(c)(10).

Although Congress made the initial scheduling decisions, the C.S.A. specifically permits the Attorney General to add a substance to a schedule, transfer a substance from one schedule to another or remove a substance from the schedules entirely. 21 U.S.C. 811(a)(1).¹

The Attorney General may only add or transfer a substance to a different schedule if she "finds that such drug or other substance has a potential for abuse" and makes findings that the drug or substance meets the requirements for the new schedule. See 21 U.S.C. 811 (1)(a)and (b). Section 812(b) of Article 21 of the United States Code sets out the

¹Under the C.S.A., a drug or substance may not be placed in schedule I absent findings that:

- (A) The drug or other substance has a high potential for abuse;
- (B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions;
- (C) Abuse of the drug or other substances may lead to severe psychological or physical dependence. 21 U.S.C. 812(b)(2)(A)-(C).

findings required to place a substance in a particular schedule. 21 U.S.C. 812(b). The Attorney General has delegated the authority to reschedule controlled substances to the Administrator of the D.E.A. 28 C.F.R. 0.100(b). The Drug Enforcement Administrator (hereinafter "Administrator") has further delegated this authority to the Deputy Administrator of the D.E.A. 28 C.F.R. 0.104.

The C.S.A. provides that any interested party may petition to have a substance added to, removed or transferred between the controlled substance schedules. 21 U.S.C. 811 (a)(2). Any rules promulgated under this subsection are subject to the rule making procedures of the administrative Procedures Act found in Title 5. 21 U.S.C. 811(a)(2); 5 U.S.C. 5(subchapter II). Pursuant to Title 5, a reclassification rule promulgated under 811(a)(1) must be made on the record after opportunity for hearing. National Organization For the Reform of Marijuana Laws(hereinafter "NORML") v. D.E.A., 559 F.2d 735,738 n9(1977).The administrator of the D.E.A. is obligated to respond to all petitions for the issuance, amendment or repeal of rules pursuant to 21 U.S.C. 811 and by 21 C.F.R. 1308.44 (C) which provides that within a reasonable time after the receipt of a petition, the administrator shall notify the petitioner of his acceptance or nonacceptance of the petition, and if not accepted reasons therefore. This obligation pertains whether or not the object of the petition falls within the scope of 21 U.S.C. 811. 21 C.F.R. 1308.44(C).

Section 811(b) of Article 21 of the United States Code, titled Evaluation of Drugs and Other Substances, clearly states that the Attorney General must, after gathering all the necessary data, request from the Secretary a scientific and medical evaluation, and his recommendations, as to whether such drug or other substance should be so controlled. 21 U.S.C. 811 (b). These recommendations are binding upon the Attorney General. Id. The clear mandate of the statute and case precedent make it clear that the D.E.A. is not authorized to make scientific and medical findings regarding the scheduling of substances without advice from the Secretary of HEW(now H.H.S.) or their delegatee, FDA. NORML, 559 F.2d at 738. For example, the D.E.A. must defer to H.H.S. for scientific and medical findings regarding the structure of a drug. 21 U.S.C. 811(b)

The D.E.A.'s stubborn refusal to exercise its authority to reschedule marijuana has resulted in an arduous legal history of orders

and remands. See Alliance for Cannabis Therapeutics(hereinafter “A.C.T.”) v. D.E.A., 15 F.3d. 1131 (D.C. Cir. 1994); A.C.T., 930 F.2d at 937; NORML v. D.E.A.,559 F.2d 735 (D.C. Cir. 1977); NORML v. Ingersoll, 497 F.2d 654 (D.C. Cir. 1974).

These cases originated from one petition filed with the Bureau of Narcotics and Dangerous Drugs (BNDD), predecessor to the D.E.A.. On May 18, 1972 NORML filed the petition seeking to have marijuana removed from the C.S.A. or in the alternative transferred to schedule II. NORML, 497 F.2d at 655. As a result of BNDD’s refusal to accept the petition for filing, NORML sued. Id at 656. The Court of Appeals ordered the D.E.A. to accept the petition and respond on the merits. Id at 661. Thereafter, D.E.A. Administrator skirted the statutorily mandated recommendation from the secretary of HEW, ignored the findings of Administrative Law Judge Parker and denied the petition in all respects. 40 Fed.Reg. 44164, 44168 (1975); NORML, 559 F.2d at 742-43. The Court of Appeals again remanded the petition back to the D.E.A. with an order to refer the petition to the Secretary of HEW for medical and scientific findings and recommendations for rescheduling. NORML, 559 F.2d at 757.

Forced to follow proper procedure, D.E.A. issued a notice of a hearing on the rescheduling petition in 1986. See 51 Fed. Reg. 22,946 (1986). Administrative Law Judge Young conducted extensive proceedings and found that marijuana enjoyed a current accepted medical use and therefore could be placed in schedule II. A.C.T., 930 F.2d at 938. Rejecting the evidence and disagreeing with Judge Young’s conclusions, the D.E.A. Administrator reaffirmed his prior order stating that marijuana should not be moved from schedule I because the marijuana plant has no currently accepted medical use. See 54 Fed. Reg. 53,767, 53,784 (1989). In making this determination, previous Administrator Lawn listed several criteria used for determining accepted medical use, and declared that marijuana failed to meet them. See 57 Fed. Reg. at 10,507-10,508.

As the issue became more narrowly focused, A.C.T. became the lead petitioner in the case. A.C.T., and other parties seeking rescheduling, advanced the argument that pursuant to 21 U.S.C. 812(b)(2)(B), marijuana has an accepted medical use in the United States and therefore should be rescheduled. See A.C.T., 930 F.2d at 939.

A.C.T. appealed the order for a second time. The Appeals Court remanded the case yet again on the grounds that the criteria the Administrator used to determine currently accepted medical use were impossible to satisfy. See A.C.T., 930 F.2d at 940-941.

Reconsidering the issue yet again, the new Administrator explained that the prior Administrator had not relied on two of the three impermissible criteria and clarified the third criteria. 57 Fed. Reg. 10,507, 10,499 (1992); A.C.T. v. D.E.A., 15 F.3d. 1131 (D.C. Cir. 1994). According to Administrator Bonner, the two criteria not considered were the general availability of the substance and the use of the substance by a substantial segment of medical practitioners. 57 Fed. Reg., at 10,499 (1992). He further argued that the recognition of clinical use in generally accepted pharmacopeia rested on a determination by the previous administrator that marijuana lacked a known, reproducible chemistry. A.C.T., 15 F.3d. at 1135. Thus, a new five part test for determining whether a drug had a currently accepted medical use was created.² 57 Fed. Reg at 10,506. Based on these findings he upheld the decision that marijuana plants should remain in schedule I. Id. The Court of Appeals upheld the Order, finding that the D.E.A. had properly clarified its test for accepted medical use. Id. at 10,499; See also A.C.T., 15 F.3d at 1137.

²Administrator applied a five-part test for determining whether a substance had a currently accepted medical use:

- (1) the drug's chemistry must be known and reproducible;
- (2) there must be adequate safety studies;
- (3) there must be adequate and well-controlled studies proving efficacy;
- (4) the drug must be accepted by a respectable minority of qualified experts; and
- (5) the scientific evidence must be widely available.

57 Fed. Reg. at 10,504-10,507 (1992). After reviewing the evidence in the record, the Administrator found that marijuana could not satisfy a single one of these criteria. Id. at 10,507.

As the issue proceeded through the courts, tangential consideration was given to the difference between synthetic THC and THC found naturally in marijuana. 54 Fed. Reg. at 53,774. In the Final Order on the petition, Administrator Bonner adopted the findings of former Administrator Lawn who stated there is no difference in the pharmacological effect between THC isolated from cannabis and the synthetically produced THC which is now marketed in the United States. Id. Administrator Lawn's conclusion concurred with prior findings made by H.H.S. that the pharmaceutical qualities of synthetic delta-9-THC are the same as those of delta-9-THC itself. Id. Following isolation and characterization of delta-9-THC as the major active component of marijuana by Mechoulam and colleagues, a technique for producing synthetic material was developed. Plasse, T.; Gorter, R.; Krasnow, S.; Lane, M.; Shepard, K.; Wadleigh, R. Recent Clinical Experience with Dronabinol. *Pharmacology Biochemistry & Behavior*, Vol. 40, pp. 695-700; 1991 (Gaoni, Y.; Mechoulam R.; neutral cannabinoids from hashish. *J Am. Chem. Soc.* 93; 217-224; 1971) (Petrzilaka, T.; Haefliger, W.; Sikemier, C. Synthesis of Hashish Components. Part 4. *Helv. Chim. Acta* 52: 1102-1134; 1969). This process was used to create the drug Marinol which is now at the heart of the present controversy. See Id.

By definition, a synthetic drug is the same as its natural occurring twin. (24a). Dronabinol is only one substance, not two. Adding sesame oil and encapsulating the finished recipe in soft gelatin capsules, while having significance to the Food and Drug Administration (hereinafter "F.D.A.") for marketing purposes, does not make Dronabinol into another drug for scheduling purposes. In 1986, Health and Human Services (H.H.S.) recognized that synthetic delta-9-THC is the same as its naturally occurring twin. 51 Fed. Reg. at 17,476.

II. THE CURRENT PROCEEDINGS

On July 21, 1992, noting several inconsistencies between the Order and prior findings of fact and law, the petitioner sent a letter to then-Administrator Robert C. Bonner in which he raised several questions about the Administrator's final order. Specifically, petitioner asked why coca and opium poppy plants are scheduled in Schedule II of the C.S.A., since both of these plants are subject to the same variances in chemistry as the marijuana plant and neither are reproducible in standardized dosages. (25a); See 57 Fed. Reg. 10,499.

On August 17, 1992, Administrator Bonner sent the petitioner a response to his letter. In the response, the Administrator rejected the petitioner's attempt to analogize marijuana plants to coca and opium plants. (26a). The Administrator explained that when Congress placed coca leaves and opium plant materials in Schedule II, it was aware that these plants had been recognized historically as the source for a variety of accepted and useful medications. Id. The plants contain medically active alkaloids that can be extracted and used to produce pharmaceutical compounds capable of reproduction in standardized doses. Id. In contrast, the Administrator pointed out that the recent attempts to reschedule marijuana were not grounded on claims that medically useful compounds could be extracted from marijuana, but rather that smoking marijuana itself produced medical benefits. Id. Thus, the Administrator found the scheduling decisions to be reconcilable. Id.

Interpreting the Administrator's statements regarding the scheduling of coca and opium poppy plants as general rules of statutory construction, the petitioner, proceeding pro se, then filed a formal request for the rescheduling of marijuana pursuant to 21 U.S.C. 811 and 21 C.F.R. 1307.03 in the form prescribed by 21 C.F.R. 1308.44(b). The petition was based on the grounds that Dronabinol, delta-9-tetrahydrocannabinol (delta-9-THC), the principle psychoactive substance in the marijuana plant, was rescheduled to schedule II of the C.S.A. in 1986, and, therefore, because marijuana is the source of Dronabinol, it should have been moved into the same schedule as Dronabinol.(27-28a) See Final Order of the Drug Enforcement Administration, May 13, 1986: 51 Fed. Reg. 17,476 (placing Dronabinol in schedule II).

In an order dated May 16, 1992, Deputy Administrator Greene refused to accept the petition for filing on the basis of his finding that Dronabinol is a wholly synthetic substance and is not obtained from marijuana. Despite refusing to accept the petition for filing, the administrator proceeded to reject the issues raised in the petition on their merits. The Deputy Administrator responded to the petition stating only the pharmaceutical product was transferred from schedule I to schedule II, i.e., Dronabinol in sesame oil and encapsulated in a soft gelatin capsule in a U.S. Food and Drug Administration approved drug product. No rescheduling action was taken with regard to (-) delta-9-trans-THC, i.e., Dronabinol, which remains in Schedule I of the C.S.A.. The Deputy

Administrator further explained under the C.S.A., the regulation of chemicals and the plant material are distinct from each other. The classification of delta-9-THC has no bearing on the classification of marijuana. Under the C.S.A., a proposed change in the schedule of either a tetrahydrocannabinol or the plant marijuana requires the Attorney General to proceed independently. See 21 U.S.C. 811.

Petitioner appealed the Deputy Administrator's denial of the petition to the Circuit Court of Appeals for the District of Columbia Circuit. Olsen v. D.E.A., No. 93-1109 (D.C. Cir. Dec. 9, 1993). Familiar with Appellate Court frustration toward the D.E.A. in such matters, the D.E.A. requested a remand for a formal ruling on the petition. Order dated December 9, 1993. See Olsen v. D.E.A., No. 93-1109 (D.C. Cir. Dec. 9, 1993).

Without seeking advice from the Secretary of Health and Human Services, (hereinafter "H.H.S.") Deputy Administrator Stephen H. Greene issued a nine-page Final Order denying the petition. (2-8a) In the Final Order Mr. Greene rejected the petitioner's analogy, finding that marijuana can only be moved from schedule I if there is a finding that marijuana has a "currently accepted medical use in treatment in the United States." (6a) The order acknowledged that (-)delta-9-trans-THC isomer, the principal psychoactive ingredient in marijuana, is also the ingredient in a pharmaceutical product that has proven to be a safe and effective anti-emetic for patients receiving cancer chemotherapy. Id. Even so, only a very specific synthetic Dronabinol product was rescheduled to schedule II --"Dronabinol" (synthetic) in sesame oil and encapsulated in a soft gelatin capsule" in a drug product approved by the Food and Drug Administration (hereinafter "F.D.A."). (5-7a)

According to his interpretation of the statute, Administrator Greene further stated that the regulation of plants and chemicals under the C.S.A. is distinct and that the C.S.A. requires the independent evaluation of each individual controlled substance. Thus he concluded, because marijuana plants have no currently accepted medical use in treatment, the rescheduling of one pharmaceutical product did not require D.E.A. to transfer marijuana plants or any other substance to schedule II. (6-7a)

Pursuant to 21 U.S.C. 877, the petitioner appealed the Final Order to the Circuit Court of Appeals. On October 6, 1996 the court affirmed the D.E.A.'s denial of Mr. Olsen's petition without opinion.(1a)

REASONS FOR GRANTING THE PETITION

I. **Judicial Review of Administrative Process**

Under the Controlled Substances Act, decisions made by the Drug Enforcement Administrator, with regard to scheduling rules made pursuant 21 U.S.C. § 811(a), are subject to review pursuant to 21 U.S.C. § 877 and 5 U.S.C. § 706. While it is true that the court's role in reviewing administrative decisions is limited, the doctrine of deference to agency rulings clearly has limits. NLRB v. Brown, 380 U.S. 278, 291 (1965); Wheatley v. Adlee, 407 F.2d 307, 310 (D.C. Cir. 1968). Courts should only defer to administrative experience where an agency acts within its discretionary powers, under the law. International Brd. Of Elec. Wkrs v. NLRB, 487 F.2d 1143, 1170-71 (D.C. Cir. 1973), aff'd sub nom., Florida Power & Light Co. v. International Brd. Of Elec. Wkrs., 417 U.S. 790 (1974).

However, such discretion must not be given in support of actions taken outside of the law. Id. at 1171. Court must determine what administrative action falls within the law, for no agency is a law unto itself. See Id.; Brown, 380 U.S. at 291 (Courts must be vigilant to ensure that the agency's procedures and underlying standards are in accord with the law).

An administrative decision must be set aside if it either rests on factual premises which are not based on substantial evidence or if the underlying standards on which the decision is based is not in accord with the law. Wheatley, 407 F.2d at 310. This is especially true where the improper administrative decision is inconsistent with statutory mandate or where it frustrates the Congressional policy underlying a statute. Id. Where an administrator exercises discretion in violation of the law, the court owes no deference to the decision and may set it aside. NORML v. D.E.A., 559 F.2d at 754.

A. **Certiorari should be granted to consider whether the Final Order should be set aside because the decision was made without the procedure required by law.**

The Final Order of Deputy Administrator Green should be held unlawful and set aside because Deputy Administrator Green exceeded the

scope of his authority under Section 201(a) of the C.S.A. when he denied Petitioner Olsen's rescheduling petition without first obtaining a medical and scientific evaluation and recommendation from the Secretary of Health Education and Welfare (hereinafter "H.E.W."). 21 U.S.C. § 811(a); 5 U.S.C. § 706(d); NORML, 559 F.2d at 738. The D.E.A.'s rescheduling power is subject to the limitations proscribed by the Administrative Procedures Act (hereinafter A.P.A.) 21 U.S.C. 811(b); 5 U.S.C. § 706. Under the A.P.A. an agency action taken in excess of proscribed statutory authority can be set aside and held unlawful. 5 U.S.C. § 706.

While a reviewing court should grant some deference to an agency's interpretation of the statute under which it operates, this deference is constrained by an obligation to honor the clear meaning of a statute as revealed by the language, purpose and history of the statute. See, Teamsters v. Daniel, 336 U.S. 551, 556 n.20 (1979); Southeastern Community College v. Davis, 442 U.S. 397, 411 (1979); Brookline v. Gorsuch, 667 F.2d 215, 219 (1st Cir. 1981). 21 U.S.C. § 811(b), clearly requires the Administrator, prior to the commencement of reclassification rule making proceedings under subsection section (a), to request from the Secretary a scientific and medical evaluation, along with the Secretary's recommendations as to whether such drug or other substance should be so controlled or removed as a controlled substance. 21 U.S.C. § 811(b); NORML, 559 F.2d at 754. Pursuant to section 201(b), the Secretary's recommendations shall be binding on the Administrator as to such scientific and medical matters. 21 U.S.C. § 811(b). If the secretary recommends that a drug or other substance not be controlled then the Administrator shall not control the drug or other substance. 21 U.S.C. § 811(b). Both D.E.A. and H.E.W. have interpreted this section to bar the D.E.A. from exceeding the level of control recommended by H.E.W. NORML, 559 F.2d at 738 n.11.

In addition to ignoring the clear language of the statute, D.E.A.'s denial of the petition without seeking the advice of H.E.W. went against established case precedent and Congressional policy. Id. at 745. In previous rescheduling cases, the courts have repeatedly held that D.E.A. is required to seek the input of H.E.W. before making scheduling determinations. Id. 3 In reaching this conclusion, courts have reviewed

3 See e.g., A.C.T. v. D.E.A., 15 F.3d 1131 (1994); A.C.T.et. al. v. D.E.A., 930 F.2d 936 (1991); NORML v. D.E.A., 559 F.2d 735 (1977); NORML v. Ingersoll, 497

the statutory history and record of the C.S.A. and found that Congress strongly disfavored placing too much control into the Attorney General's hands. NORML, 559 F.2d at 744-48. As the Congressional record demonstrates, Congress sought to have the D.E.A. use H.E.W.'s vast scientific and medical resources to make scheduling decisions rather than relying the Administrator's personal opinions. See NORML, 559 F.2d at 746. Statements found in the Senate report made regarding the C.S.A. show the commonly held belief, by members of both houses, that the D.E.A. is simply not qualified to make such important medical and scientific decisions.⁴ See Id. at n.47. Just as in 1977, the failure of the Deputy Administrator to follow the spirit and the letter of the law in handling Mr. Olsen's petition amounts to the destruction of the balance of power created by a deliberate and conscientious exercise of the legislative process. See, Id. at 746; Wheatley, 407 F.2d at 310.

The D.E.A.'s refusal to follow proper rule making procedure is suspect, in consideration of the reclassification of synthetic THC to schedule II. See 51 Fed. Reg. 17476. The D.E.A. does not have authority to impose schedule I controls on a drug which has been approved for medical use by the Food and Drug Administration (hereinafter "F.D.A.") Grinspoon, M.D. v. D.E.A., 828 F.2d 881,890 (1st. Cir. 1987) c.f., 1984 U.S. Cong. & Admin. News 540, 543. The failure of Deputy Administrator Green to seek advice, as required under the C.S.A., from the Secretary of Health and Human Services may be due to the fact that the F.D.A. has granted a new drug application for Marinol, a prescription drug product containing THC. 51 Fed. Reg. 17476. Health and Human services has previously notified D.E.A. that should F.D.A. approve THC for a new drug application, marijuana should be

F.2d 654 (1974). As the history of this controversy clearly demonstrates the D.E.A has repeatedly made medical and scientific determinations without the advice of H.E.W. NORML, 559 F.2d at 741; NORML v. Ingersoll, 497 F.2d 654.

4 As one legislator noted, This title vests the authority for control of the substances enumerated under its provision with the Attorney General. There has been a point of controversy evident among the professionals involved in drug control and drug research on whether or not the Justice Department has the expertise to schedule or reschedule drugs since such decisions require special medical knowledge and training. NORML, 559 F.2d at 746. The Senate report further noted that the provision which requires the D.E.A. to follow H.E.W. advice during scheduling proceedings alleviates this difficulty. S.Rep.No.91-613, H.R.Rep.No.91-1444, 91st Cong., 2d sess., pt. 1, at 5, U.S.Code Cong. & Admin.News 1970, pp. 4566, 4569 (1970).

rescheduled to schedule II. 50 Fed. Reg. 42186. Since the F.D.A. has approved THC for a new drug application, D.E.A. is required to follow the Secretary of Health's recommendation. 21 U.S.C. §811.

B. The court should grant certiorari to consider whether the D.E.A.'s statutory interpretation is inconsistent with the law and whether based upon its misinterpretation, it exceeded its statutory authority.

This court is not required to defer to agency statutory construction where that construction is inconsistent with the letter of the law. See St. Mary of Nazareth Hospital Center v. Schweiker, 718 F.2d 459 (D.C. Cir. 1983) , on remand, 587 F.Supp. 937 (D.D.C. 1984). Claiming to have authority pursuant to 21 C.F.R. 1308.44(c), Deputy Administrator Green denied the petition based upon his findings that the grounds upon which petitioner relied were not sufficient to justify the initiation of rescheduling proceedings.⁵ (7a) Other courts have previously warned the D.E.A. that the outright rejection of a rescheduling petition is a preemptory action, soundly used only in the clear case of a filing either patently deficient in form or a substantive nullity. NORML, 497 F.2d at 659; Municipal Light Boards v. FPC, 450 F.2d 1341,1345 (D.C. Cir. 1971), cert. denied, 405 U.S. 989 (1972). The court further cautioned that the use of the preemptory challenge should not be used to dispose of a matter on the merits. Municipal Light Boards, 450 F.2d at 1346. In very limited cases, a rejection of a petition on the merits may be taken without invoking formal rule making proceedings when issues of law are decisive and can be decided without taking testimony or hearing the views of others involved. Weinberger v. Hynson, Westcott and Dunning, Inc., 412 U.S. 609,621 (1973); Citizens for Allegan County, Inc. v. FPC, 414 F.2d 1125, 1129 (D.C. Cir. 1969). The Administrator's technical arguments in the Final Order prove that this was not a clear cut case involving decisive issues of law. (2-7a); See Id. Because the petition involved technical scientific and legal questions, the administrator acted without authority in denying the petition on the merits. See 21 U.S.C. §

⁵ As the language of the regulation reads, if accepted for filing a petition may be denied if the Administrator finds the grounds upon which the petitioner relied are not sufficient to justify the initiation of proceedings.

811 (b); NORML, 559 F.2d at 741.

The Administrator also exceeded the scope of his statutory authority when he ignored the evidence presented by Mr. Olsen. 21 U.S.C. § 811(a); Weinberg, 412 U.S. at 620; United States v. Alexander, 673 F.2d 287 (9th Cir. 1982); NORML, 559 F.2d at 741. Due to the evidence that a D.E.A. scheduling decision was possibly in conflict with an H.E.W. recommendation, the D.E.A. was required to consult with and follow H.E.W.'s recommendations regarding the merits of the petition. (2-9a) See also 21 U.S.C. § 811(b); 50 Fed. Reg. 42186; NORML, 497 F.2d at 659. 6 Completely ignoring this evidence, the D.E.A. denied the petition on the grounds that Mr. Olsen presented no new medical, scientific or other information. (5-7a)⁷ The failure to consider this new evidence was beyond the scope of the Administrator's authority. 21 U.S.C. § 811(a).

C. The Court should grant certiorari to consider whether the Administrator's findings were contrary to the law.

The D.E.A.'s finding that the rescheduling of synthetic Dronabinol encapsulated in sesame oil has no bearing on the rescheduling of marijuana contradicts case precedent and therefore is incorrect as a matter of law. See 40 Fed. Reg. 44167,44168 (1974); NORML, 559 F.2d at 742,757. The chemical delta-9-tetrahydrocannabinol (THC) is the principal psychoactive substance in cannabis materials and is the reason the marijuana plant is subject to control under the CSA. 40 Fed. Reg. 44166 (1975); United States v. Walton, 514 F.2d 201, 202-04 (D.C. Cir. 1975). In prior cases, D.E.A. was required to consider the scheduling of "synthetic THC" along with its consideration of rescheduling marijuana. NORML, 559 F.2d at 757. The court found that the D.E.A. was estopped from arguing that NORML was required to file a separate petition to reschedule synthetic THC because D.E.A. did not contend it had been

⁶Despite this clearly stated position, Administrator Green simply ignored the letter.(2-9a) Poignantly, no mention of this letter is ever made in the respondent's brief to the Appeals Court. Id.

⁷ Despite this contention, D.E.A. Deputy Administrator Green proceeded to deny Mr. Olsen's petition by analyzing the scientific and medical issues Mr. Olsen had noted in his petition.

prejudiced when synthetic THC was discussed at rescheduling hearings. Id. Furthermore, the court found that the D.E.A. had failed to argue that the differences between the synthetic THC and natural marijuana were too great to warrant consolidated consideration. Id. Based upon this precedent, the D.E.A. cannot now properly argue that synthetic THC and the THC found in marijuana are not related. See Respondent's Brief (38-40a). This finding should be set aside on the grounds that it contradicts prior case law. 5 U.S.C. §706.

D. The Court should grant certiorari to consider whether the D.E.A.'s denial of the rescheduling petition was made arbitrarily and capriciously.

Under the Administrative Procedures Act, an administrative decision made arbitrarily or capriciously may be set aside. 5 U.S.C. §706(a); Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984). The D.E.A.'s unjustified change of position with respect to synthetic versus natural THC reveals the arbitrary and capricious manner in which Mr. Olsen's petition was denied. 5 U.S.C. §706(a). See Batterton v. Francis, 432 U.S. 416,425 n.9 (1977); Skidmore v. Swift, 323 U.S. 134,140 (1944). Under the arbitrary and capricious standard, the D.E.A. is required to expressly justify any departure from earlier regulatory approaches. See, FORMULA v. Heckler, 779 F.2d 743,760 (D.C. Cir. 1985); 771 F.2d 233,242 (D.C. Cir 1983). Furthermore, the D.E.A. is required to provide a reasoned justification for the departure or the decision will be found arbitrary and capricious. Heckler, 779 F.2d at 760.

Throughout the history of the rescheduling cases the D.E.A. has repeatedly changed position on important issues without justifying such departures. Id.; NORML, 559 F.2d at 746; NORML, 497 F.2d at 659. Previously, D.E.A. Administrator Bonner explained that schedule II drugs were defined as scientifically established chemical compounds capable of reproduction in standardized dosages, one of the factors to be determined in considering whether a substance had a currently accepted medical use. (26a); See also 57 Fed. Reg. 10499,10505. (1992). In response to Mr. Olsen's inquiry based on the aforementioned definition, Administrator Bonner differentiated the schedule II placement of coca and opium from the schedule I placement of the marijuana on the grounds that the coca and opium plants were the basis for useful medications and that neither of the plants were used in their plant form as medicine. (26a)

In both cases, medically useful alkaloids are extracted from the plant materials after which a pharmaceutical compound capable of reproduction in standardized doses are produced. Id. Unlike medications derived from opium and coca plants, he argued, the petition to reschedule marijuana did not involve the scheduling of any medically useful compound to be extracted from the plant material. Id.

Despite the previous Administrator's arguments to the contrary, Deputy Administrator Green, in his Final Order, admitted that marijuana is in fact the source of a medically useful compound, Dronabinol. See Final Order (5a). In order to avoid an obvious contradiction, Deputy Administrator Green successfully distracted the court by turning the argument to the issue of whether or not Dronabinol itself was a schedule I drug. (5-6a) He argued that Dronabinol was scheduled in schedule II only when in sesame oil and encapsulated in soft gelatin capsules. Administrator Green found that the rescheduling of synthetic Dronabinol in a pharmaceutical compound had no effect on the scheduling of marijuana. (7a) On this basis, he found the petition failed to raise any issue that justified the initiation of rescheduling proceedings. Id.

The unjustified findings by the Administrator contradict case law and prior D.E.A. conclusions and therefore were arbitrary and capricious. 5 U.S.C. §706(a); Chevron, 467 U.S. at 843-44. The Administrator's finding that the rescheduling of THC in sesame oil had no effect on the rescheduling of marijuana contradicts D.E.A.'s prior finding that H.E.W. recommends moving THC to schedule II should it become the source of an approved new drug application. 50 Fed. Reg. 42186. Furthermore, during prior rescheduling hearings the D.E.A. agreed that synthetic THC, which D.E.A. claims is the main substance in Dronabinol, did not need to be controlled under the C.S.A. 40 Fed. Reg. 44164, 44168 (1975). During further proceedings, the Administrator took special note that synthetic THC was in schedule I. 51 Fed. Reg. 17477. Indicative of D.E.A.'s own confusion in this area, when answering the question whether marijuana has an accepted medical use, the Administrator measured the benefits of synthetic THC use against the negative effects of marijuana use. 57 Fed. Reg. 10500.

Inconsistent application of administrative precedent requires the agency to carefully spell out the basis of its decision when departing from prior norms. See, Sect'y of Agriculture v. United States, 347 U.S. 645,652-53(1954); Food Marketing Institute v. Interstate Commerce

Com., 587 F.2d 1285,1290 (D.C. Cir. 1978). Furthermore, when reviewing an agency decision under 5 U.S.C. §706(2)(A) the court may accord a greater degree of scrutiny where an agency has been inconsistent. Id. In this case the D.E.A. has not provided any reasons for the inconsistency, therefore the decision should be set aside as being arbitrary and capricious. Chevron, 467 U.S. at 843.

II. This Court should grant certiorari to consider if, by denying Mr. Olsen's First Amendment right to petition the government for a redress of grievances, the Deputy Administrator's actions violated the Due Process Clause of the Fifth Amendment.

The Supreme Court has identified many constitutional rights as fundamental, and therefore these rights are entitled to heightened judicial protection. See Eisenstadt v. Baird, 405 U.S. 438 (1972). These include the fundamental guarantees of the Bill of Rights, such as the freedom of association, the right to petition the government for a redress of grievances, and the right to procedural fairness in regards to claims for governmental deprivations of life, liberty or property. Planned Parenthood v. Casey, 11 S.Ct. 2791, 2805, 505 U.S. 833 (1992); Duncan v. Louisiana, 391 U.S. 145, 147-148 (1968); Quill v. Vaco, 80 F.3d 716 (2d Cir. 1996). Through its arbitrary, capricious, and summary denial of Mr. Olsen's rescheduling petition, the D.E.A. has violated his fundamental right to fair process and his First Amendment right to petition the government for redress. McDonald v. Smith, 472 U.S.479, 482 (1985). Furthermore, by denying these rights to Mr. Olsen, who represents the class of interested citizens that Congress sought to include in the schedule decision making process, the D.E.A.'s ruling violates the equal protection guarantees of the Fifth Amendment and the right to personal autonomy. C.f., Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312 (1975); Doe v. United States Civil Serv. Com'n., 483 F.Supp. 539, 562-574 (S.D.N.Y. 1980).

The First Amendment guarantees all citizens the right to petition the government for a redress of grievances. U.S. Const., Amend. I. This right is a fundamental concept of liberty. McDonald, 472 U.S. at 482. When the government, through its action denies a citizen of such a fundamental right, it may do so only if the action is narrowly tailored to serve a compelling government interest. See Reno v. Flores, 507 U.S. 292 (1993); Brown v. Hartlage, 456 U.S. 45, 53-4 (1982); Steelworkers v.

Sadlowski, 457 U.S. 102, 111 (1982); Murgia, 427 U.S. at 312. The burden of proof in such a case is upon the government. Id. Fundamental rights are those explicit or implicitly derived from the constitution itself. See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973).

The outright rejection of Mr. Olsen's rescheduling petition, without considering the evidence presented and without following statutorily mandated procedure denied the petitioner his First Amendment right to petition the government. Steelworkers, 457 U.S. at 111. The actions taken by the D.E.A. were not narrowly tailored and do not serve any compelling government interest. See Id. Administrative economy does not justify a complete refusal of the procedural process mandated by Congress. See Schneider v. State, 308 U.S. 147,164 (1939). The administrator was required to seek medical and scientific advice from the secretary of H.H.S. 21 U.S.C. §811. If, as respondents previously argued, Mr. Olsen's petition was denied on the grounds that it was procedurally defective, the Deputy Administrator should not have made scientific observations in his Final Order denying Mr. Olsen's petition. NORML, 559 F.2d at 757. The D.E.A.'s desire to prevent additional hearings and reconsideration of the rescheduling of marijuana is not a compelling government interest which justifies the D.E.A.'s violation of Mr. Olsen's First Amendment rights. See Id.

While the right to petition does not require that everyone should have a direct voice in all actions taken by our government, this court has recognized that where, as here, a government body has either by its own decision or under statutory command determined to open its decision making process to public view and participation, the right to petition for redress is fundamental. Madison School Dist. v. Wisconsin Employment Comm., 429 U.S. 178, 179 (1976); San Filippo v. Bongiovanni, 30 F.3d 424,442 (3rd. Cir. 1994). Congress has mandated that public participation in the process by which drugs and other substances are controlled and scheduled is of paramount importance. See NORML, 559 F.2d at 757. Congress has expressly stated that interested citizens have a right to petition the D.E.A. for rescheduling of a drug. Id. By denying the petitioner his right to meaningfully present a petition, the D.E.A. has denied him of this fundamentally important First Amendment right. See Madison, 429 U.S. at 179. By depriving Mr. Olsen and others this right, the D.E.A. has violated the critical function of enabling a self governing people to both inform the government and to check abuses of government

power. McDonald, 472 U.S. at 485.

III. This Court should grant certiorari to consider if the denial of Mr. Olsen’s petition, without regard to the statutory process mandated by Congress, denied Mr. Olsen’s right to procedural due process.

The Due Process clause guarantees that where the government deprives a citizen of a fundamental right, the citizen is guaranteed a fair procedure by which they may seek redress. Bongiovanni, 30 F.3d at 442. Where an agency, such as the D.E.A., significantly burdens a citizen’s fundamental rights, it must at least assure accuracy and avoid arbitrariness. Id. Generally, the minimum process due in such a case is notice and the opportunity for hearing. Doe, 483 F.Supp. at 572.

The arbitrary and capricious manner with which the Deputy Administrator denied Mr. Olsen’s petition, denied Mr. Olsen of his constitutional right to procedural due process. See Id. The illogical and unreasonable manner in which Mr. Olsen’s petition was denied deprived him of his right present new evidence. 21 U.S.C. §811(a). The Congressional purpose of the statute under which Mr. Olsen was permitted to petition would be destroyed if the D.E.A. is allowed to summarily dismiss each petition without meaningful consideration of the evidence presented. NORML, 559 F.2d at 757.

Indicative of its history of contempt towards challenges to marijuana regulation, the D.E.A. has been quick to point out that petitioner has “frequently litigated issues related to the legal treatment of marijuana.” See Respondent’s Brief (33a); See e.g., Olsen v. Drug Enforcement Admin., 878 F.2d 1458, 1461-1465 (D.C.Cir. 1989), cert. denied, 495 U.S. 906 (1990); Olsen v. Iowa, 808 F.2d 652, 653 (8th Cir. 1986); United States v. Rush, 738 F.2d 497, 511-513 (1st Cir. 1984), cert. denied, 470 U.S. 1004 (1985); State v. Olsen, 315 N.W.2d 1, 7-9 (Iowa 1982); Olsen v. Drug Enforcement Admin., 776 F.2d 267, 268 (11th Cir. 1985), cert. denied, 475 U.S. 1030 (1986).

Judicial review pursuant to the Administrative Procedures Act encompasses a court’s evaluation of the constitutionality of an agency’s conduct. Doe, 483 F.Supp. at 572. The Congress, in its wisdom, set up a provision whereby any interested party could petition for rescheduling

based upon changed circumstances or new evidence. 21 U.S.C. §811(a). The scheduling of synthetic THC in schedule II and the evidence presented by petitioner, that H.E.W. views marijuana and synthetic THC to be one and the same, is exactly the type of new evidence which the administrator is required to consider. NORML, 559 F.2d at 754. While the D.E.A. may feel that petitioner is committing a wrongful act by exercising his constitutional right to petition the government, he is in fact assisting the government by employing the mechanism Congress expressly provided: rescheduling based upon the careful consideration of new evidence as it arises. Id.

IV. This Court should grant certiorari to consider if the D.E.A.'s denial of Mr. Olsen's petition constitutes an invasion of privacy in that the D.E.A. is interfering with sensitive medical decisions without proper constitutional justification.

The right to make personal medical decisions has been held fundamental to a citizen's liberties under the substantive component of the Due Process Clause of the Fifth Amendment. Casey, 112 S.Ct. at 2805. This clause assures the citizenry that any deprivation of life liberty or property by a government entity will be attended by the appropriate legal processes. Bowers v. Hardwick, 478 U.S. 186, 192 (1986). This Court has found that the Due Process clause of the Fifth Amendment has substantive content, subsuming rights that are, to a great extent, immune from government regulation or proscription. Id. at 191. These cases have recognized implied rights that have little or no textual support in the constitutional language. Id. The rights which qualify for heightened judicial protection include fundamental liberties so implicit in the concept of ordered liberty that neither liberty nor justice would exist if they were sacrificed. Palko v. Connecticut, 302 U.S. 319, 325-24 (1937). Fundamental liberties have also been described as those that are deeply rooted in this nation's history and tradition. Moore v. City of East Cleveland, 431 U.S. 479, 506 (1965)(White, J., concurring). The government may not infringe upon a fundamental liberty unless the infringement is narrowly tailored to serve a compelling government interest. See Reno, 507 U.S. 292.

The right to privacy has been found to encompass personal decisions relating to marriage, family, and education. See Carey v. Population Services Int'l, 431 U.S. 678, 684-85 (1977). While the constitution does not include any explicit mention of the right to privacy,

this right has been judicially recognized. Carey, 431 U.S. at 684. In previous decisions, courts have found that smoking marijuana was not a fundamental right because it did not involve any important values inherent in questions involving marriage, procreation or child rearing. See, NORML v. Bell, 488 F.Supp. 123, 133 (D.D.C. 1980). While smoking marijuana itself may not be a fundamental right, the right to choose appropriate medication involves the right of every human being of sound mind and adult years to determine what should or should not be done with their own body. Casey, 112 S.Ct. at 2807; Whalen v. Roe, 429 U.S. 599,600 (1977); Schloendorff v. Society of New York Hosp., 211 N.Y. 125, 129 (1914). In the context of the medical use of marijuana, privacy rights are implicated.

In our system of a free government, where notions of individual autonomy and free choice are cherished, it is the individual who must have the final say in respect to decisions regarding his medical treatment in order to insure that the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires. Rivers v. Katz, 67 N.Y.2d 485,493(1986). This court has repeatedly recognized that the Constitution places limits on government interference with a person's most basic decisions about bodily integrity. See e.g., Casey, 431 U.S at 684; Roe v. Wade 410 U.S. 113,152 (1973).

By foreclosing the rescheduling process, the D.E.A.'s decision amounts to government intrusion in matters involving the most intimate and personal choices a patient may make in a lifetime, choices central to personal dignity and autonomy and which are central to the liberty protected by the Fifth Amendment. U.S. Const. Amend IX; Casey 211 S.Ct. at 2807.

Because fundamental personal liberty interests are involved, they may not be abridged by the government simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper government purpose. Poe v. Ullman, 367 U.S. at 543. Where there is a significant encroachment upon personal liberty, the government may prevail only upon showing a subordinate interest which is compelling. Bates v. City of Little Rock, 361 U.S. 516, 524 (1960). The law must be shown to be necessary and not merely rationally related to the accomplishment of a permissible government policy. McLaughlin, v. State of Florida, 379 U.S. 184,196 (1964) ; See e.g., Schneider, 308 U.S.

at 161. Because the D.E.A. is unable to show any compelling purpose which is served by differentiating between the THC found in a plant and the same exact THC encapsulated in sesame oil and gelatin, the order refusing to reschedule marijuana to schedule II should be struck down because it unnecessarily infringes on medical THC users privacy rights. Casey, 112 S.Ct. at 2805.

V. Equal Protection

The Due Process clause of the Fifth Amendment requires that federal legislation satisfy the same standards of equal protection of the law that are guaranteed by the Fourteenth Amendment. See Buckley v. Valeo, 424 U.S. 1, 93 (1976). Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment. Bolling v. Sharpe, 347 U.S. 497,450 (1954). It has long been recognized that when the government treats two classes of citizens differently under the law, the government must demonstrate that such dissimilar treatment is at least rationally related to a legitimate government purpose. City of Cleburne v. Cleburne Living Ctr., Inc. 473 U.S. 432, 440 (1985); Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985); Plyer v. Doe, 457 U.S. 202, 216 (1982).

A. This Court should grant certiorari to consider if the D.E.A.'s dissimilar treatment of medical THC users violates the guarantees of equal protection.

The arbitrary distinction drawn by D.E.A. between a legal user of synthetic THC and an illegal user of natural THC is not rationally related to any legitimate government purpose. NORML, 488 F.Supp. 134. The distinctions drawn by the D.E.A. with respect to the THC found in schedule I and the same THC found in schedule II must bear some rational relation to controlling psychotropic substances. Hooper, 472 U.S. at 618. The synthetic THC found in schedule II is structurally the same as the THC found naturally in marijuana. See, 51 Fed. Reg. 17,476. The only difference between the THC in schedule I and the THC in schedule II is that the substance in schedule II is encapsulated in gelatin and sesame oil. This distinction should be set aside as violative of the Equal Protection Clause because it is based on reasons totally unrelated to the pursuit of controlling substances. See 51 Fed. Reg. At 17,476; Hooper, 472 U.S. at 619-20; NORML, 488 F.Supp. at 134. McDonald v. Board of Election Commissioners, 394 U.S. 803,809 (1969).

B. This Court should grant certiorari to consider whether or not the D.E.A. could reasonably believe that differentiating between THC encapsulated in gelatin and THC in the plant form will prevent drug abuse, and thus, if that distinction is rational.

This Court has held that where, as here, the legislative facts on which a classification is based could not reasonably be conceived to be true by the governmental decision maker the classification cannot be said to be rationally related to a legitimate government purpose. Vance v. Bradley, 440 U.S. 93, 111 (1979). The D.E.A. cannot reasonably believe distinguishing between a substance coated in gelatin and sesame oil and one that is not, will prevent the abuse of the substance. See 51 Fed. Reg. 17476. Furthermore, both the courts and the D.E.A. have previously found that THC is the only reason the marijuana plant is controlled in schedule I. Walton, 514 F.2d at 204 n.12. As the Appeals Court noted in 1991, one of the very purposes in placing a drug in schedule I is to raise significant barriers to prevent doctors from obtaining the drugs too easily. A.C.T., 930 F.2d at 940. Now that the same substance which D.E.A. sought to prevent doctors from obtaining is a legally prescribable substance, in schedule II, the purpose no longer exists. 21 U.S.C. §811(a). To doggedly refuse to reschedule the marijuana plant to schedule II is a decision not rationally related to controlling THC and does not serve the purpose of drug abuse prevention. See Walton, 514 F.2d at 204.

C. This Court should grant certiorari to consider whether the destruction of the premise on which Congress placed marijuana in schedule I makes the D.E.A.'s refusal to consider rescheduling unconstitutional, in that it is not rationally related to any legitimate government purpose.

Where a decision is predicated upon a particular state of facts, it can also be challenged by showing the Court that those facts are no longer true. See Abie State Bank v. Bryan, 282 U.S. 765 (1931). In a prior decisions, courts have noted that Congress's original placement of marijuana in schedule I was premised upon the fact that H.E.W. recommended it be placed there. Bell, 488 F.Supp. 134. The letter from H.E.W. suggesting that synthetic marijuana, which H.E.W. has placed in schedule II, is no different than the natural THC found in schedule I, coupled with the D.E.A.'s own recognition that both synthetic THC and natural THC are the same substance, should demonstrate to this court that

the facts upon which marijuana was placed in schedule I have ceased to exist. (24a)

As previously noted, a drug must meet five criteria to remain in schedule I. 21 U.S.C. §811(a). The most contested of these criteria is the requirement that the substance does not have an accepted medical use. A.C.T., 930 F.2d at 936. Like the coca and opium plants, the marijuana plant is now recognized as the source of a compound which is utilized as the basis of a useful medication. 51 Fed. Reg. 17476. The THC isomer, which has been judicially recognized as the ingredient which originally caused marijuana to be placed in schedule I, is now the source of a prescription drug. Id. F.D.A. approval of a drug is sufficient to establish the existence of an accepted medical use. A.C.T. v. D.E.A., 930 F.2d 936 (1991); Grinspoon, 828 F.2d at 891-92. Furthermore, the F.D.A.'s study and testing of this substance, in order to give it the status of a new drug application, certainly satisfies the five criteria the D.E.A. must follow in determining accepted medical use. Id. All of these factual changes demonstrate that the D.E.A. based its decision not to reschedule marijuana, or even to hold hearings to consider new evidence, on moot and outdated information. See Bell 488 F.Supp. at 135-136. Therefore, the decision is no longer rational. Id.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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