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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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| Jennifer N. Murphey, individually and on behalf of all others similarly situated,<br><br>Plaintiff,<br><br>v.<br><br>United States of America *et al*.,<br><br>Defendants. | Case No.: 2:22-CV-01224-JJT<br><br>PLAINTIFF'S OPPOSITION TO THE FEDERAL DEFENDANTS' MOTION TO DISMISS<br><br>(Oral Argument Requested) |

## INTRODUCTION

I hereby submit my response in opposition to the Motion to Dismiss submitted by the federal Defendants (Doc. 40).

## ARGUMENT

### I. Plaintiff Has Standing on All Claims

### A. Plaintiff Pled Injury-in-Fact Sufficient for Standing on all Claims

To establish standing, a plaintiff invoking federal jurisdiction must establish "injury in fact, causation, and a likelihood that a favorable decision will redress the plaintiff's alleged injury." *Lopez v. Candaele*, 622 F.3d 1112, 1121 (9th Cir. 2010). As Defendants' Motion is limited to the first element (injury-in-fact), I limit my response accordingly.

To establish an injury-in-fact for a pre-enforcement challenge, a plaintiff need not "first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (internal quote omitted). Rather, a plaintiff must demonstrate that she has "an intention to engage in a

course of conduct arguably affected with a constitutional interest, but proscribed by a statute," and that "there exists a credible threat of prosecution thereunder." *Id.*

To evaluate the credibility of a threat of prosecution, courts consider 1) whether the plaintiff has articulated a concrete plan to violate the law in question; 2) whether authorities have communicated a specific warning or threat to initiate proceedings; and 3) the history of past prosecution or enforcement under the statute. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc).

A plaintiff satisfies the "concrete plan" element where the plaintiff currently violates the law at issue. *See e.g., Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 836 (9th Cir. 2012) (Plaintiffs satisfied the concrete plan element where they "are currently violating and plan to continue to violate the CSA by purchasing and consuming marijuana"); *Valle Del Sol Inc. v. Whiting*, 732 F.3d 1006, 1015 (9th Cir. 2013) (Finding a credible threat of prosecution where the plaintiff provides, and plans to continue to provide, shelter and transportation to unauthorized aliens, actions which fell "within the plain language of [the statute's] prohibitions[.]" (internal quotes omitted). As alleged, I currently engage and intend to continue engaging in conduct unconstitutionally proscribed by the Controlled Substances Act (CSA) and the 1961 Single Convention on Narcotic Drugs and 1971 Convention on Psychotropic Substances (the Conventions). Doc. 22 ¶ 136. Accordingly, I satisfy the "concrete plan" element.

Courts have found, on numerous occasions, that to require a direct specific warning or threat would go against a long line of cases involving pre-enforcement standing. *See Valle Del Sol*, 732 F.3d at 1016 n.5 ("We [have] held that we consider, as *one* of the factors . . . 'whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings.' But we have never held that a specific threat is necessary to demonstrate standing.) (citing *Cal. Pro–Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 (9th Cir. 2003) (Noting years of precedent recognizing the validity of pre-enforcement challenges to statutes infringing upon constitutional rights.")).

Absent a direct threat, a plaintiff can establish a reasonable likelihood of enforcement by alleging "a history of past enforcement against parties similarly situated to the plaintiff". *Lopez* 622 F.3d at 1122. *See also Babbitt* 442 U.S. at 298 (Finding that a plaintiff "does not have to await the consummation of threatened injury to obtain preventive relief."); *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) (Finding that in the absence of non-enforcement, a credible threat of prosecution exists.). As alleged by me, and as undisputed by Defendants, Defendants have a history of past enforcement against parties similarly situated to me. Doc. 22 ¶ 137.

As this is a pre-enforcement challenge to unconstitutional laws and treaties that prohibit the exact conduct that I currently engage in, and Defendants currently and historically enforce the CSA and Conventions against others similarly situated to me for the same conduct, I have established injury-in-fact necessary for standing on all claims. Additionally, as I allege a First Amendment claim, the threshold for standing is lower. *See Lopez*, 622 F.3d at 1116 ("First Amendment cases raise unique standing considerations that tilt dramatically toward a finding of standing.") (internal quotations omitted).

**B. Plaintiff has Standing to Challenge the Conventions**

Defendants argue that I do not have standing to challenge the 1961 Single Convention on Narcotic Drugs, and the 1971 Convention on Psychotropic Substances (the Conventions). Doc. 40 p. 10. However, standing required to challenge international treaties does not differ from the standing elements required to challenge other federal laws, so long as the treaties carry the force of federal law.

International treaties have the force of domestic law when "Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms." *MedellÍn v. Texas*, 552 U.S. 491, 505 (2008) (internal quotation omitted). *See also Flores v. S. Peru Copper Corp*., 414 F.3d 233, 257 (2d Cir. 2003) ("[A] treaty that is self-executing or that has been executed through an Act of Congress . . . gives rise to rights legally enforceable in our courts.") Here, The Conventions have the force of binding domestic law as they were implemented by the CSA.

*See* 21 U.S.C. § 801a(3) ("In implementing the Convention on Psychotropic Substances . . .."); *United States v. Rodriquez-Camacho*, 468 F.2d 1220, 1222 (9th Cir. 1972) ("The United States is a party to the Single Convention on Narcotic Drugs, binding, inter alia, all signatories to control[.]")

Federal courts considered constitutional challenges to treaties on many occasions. *See e.g., Pfeifer v. U.S. Bureau of Prisons*, 615 F.2d 873 (9th Cir. 1980) (constitutional challenge to the Treaty on the Execution of Penal Sentences, which had implementing legislation.); *Bell v. Clark*, 437 F.2d 200, 203 (4th Cir. 1971) ("Acceptance of the [Treaty's] provisions is compulsory upon all courts of the United States, for the Agreement, having the form and force of a treaty, is given supremacy by Article VI, cl. 2 of the Constitution"); and *Lidas, Inc. v. U.S.*, 238 F.3d 1076, 1078 (9th Cir. 2001) (Considering whether the United States-France Income Tax Treaty was constitutionally void.). Moreover, the United States, as a signatory to the Conventions, agreed that the Conventions would be subject to constitutional limitations. *See* 1971 Convention, art. 21 & 22, and 1961 Single Convention, art. 35, 36 & 38.

As Defendants chose to implement the Conventions through acts of Congress and regularly cite the Conventions in the CSA, scheduling decisions, and prior court cases as being binding on them and as justification for prohibition of possession of certain substances and enforcement of the CSA, the Conventions have the force and effect of a legislative enactment subject to constitutional challenge. The same standing requirements for pre-enforcement claims, as described above, applies and have been sufficiently alleged. Thus, I have standing to challenge the Conventions.

**C. There are No Administrative Exhaustion Requirements for Plaintiff's Claims**

Defendants allege that I must exhaust administrative remedies by petitioning the DEA to seek rescheduling of substances. Doc. 40 p. 11. However, I do not seek rescheduling of any substances and never alleged such. I allege that the schedules within the regulations, are final agency actions based on scheduling processes and decisions which are arbitrary, capricious, an abuse of discretion, not in accordance with law, and

unconstitutional. Doc. 22 ¶¶ 26 & 171. Review of such processes is not within the competence of Defendants to decide and such review would be futile.

First, Defendants cannot grant the relief requested (Doc. 22 ¶ 170 & Prayer for Relief), as administrative relief under the CSA is limited to re- or descheduling of substances. *See McCarthy v. Madigan*, 503 U.S. 140, 147-48 (1992) (Finding an administrative remedy may be inadequate where an agency may be unable to consider the constitutionality of a statute.); and *Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004) (The principle of exhaustion excludes constitutional challenges not within the competence of administrative agencies.). Next, as alleged multiple times with numerous examples in my Complaint (Doc. 22), Defendants and their scheduling processes and decisions are biased. *Washington v. Barr*, 925 F.3d 109, 118 (2d Cir. 2019) ("exhaustion may be unnecessary where it would be futile . . . because agency decisionmakers are biased") (citing *McCarthy* 503 U.S. at 148). Finally, as mentioned, it is not the specific schedule designations of substances that I challenge, rather it is the processes and procedures used by Defendants to make such designations. *See McCarthy* 503 U.S. at 148 ("exhaustion has not been required where the challenge is to the adequacy of the agency procedure itself, such that 'the question of the adequacy of the administrative remedy . . . [is] for all practical purposes identical with the merits of [the plaintiff's] lawsuit.'") (internal quote omitted). Accordingly, exhaustion of administrative remedies is not appropriate or required here.

**D. Plaintiff's APA Claims are Not Barred and Explicitly Reference the Schedules**

Defendants argue both that, because some of the subparts of the regulations are older than six years, my APA challenge is barred by the statute of limitations, and that my challenge is broad and unspecified. (Doc. 40 p. 10-11). These are baseless arguments and were not discussed with me during the parties' meet and conferral as Ordered (Doc. 8). I explicitly mention "the schedules" each time I cite 21 C.F.R. §§ 1300.01, *et seq*., including in Count VIII. The schedules, 21 C.F.R. §§ 1308.11-1308.15, are continually changed. Moreover, other regulations included in § 1300.01 *et seq*. reference the schedules. Also, curiously, Defendants' use the 1997 version of § 1300.01 "Definitions relating to

controlled substances" as a supporting exhibit, but fail to acknowledge the 2021 changes to that subpart. Therefore, my APA challenge is not barred and is not overbroad.

**E. Plaintiff's APA Claim is Reviewable by this Court**

Defendants argue that 21 U.S.C. § 877 obligates me to assert my APA claim directly to the courts of appeal. Doc. 40 p. 11. However, "district courts have exercised jurisdiction over . . . decisions implementing the CSA, concluding there is a sphere of DEA activity that falls within the APA's 'final agency action,' but outside § 877's 'final determinations, findings, and conclusions.'" *John Doe v. Drug Enfor.*, 484 F.3d 561, 568 (D.C. Cir. 2007). Defendants admit that only "to the extent Plaintiff's complaint can be read to challenge decisions about scheduling particular substances, that claim is foreclosed by 21 U.S.C. § 877." (Doc. 40 p. 11). Because none of my claims challenge the scheduling of specific substances, my APA claim is reviewable by this court.

Federal district courts may exercise federal question jurisdiction over an action alleging a pattern or practice of constitutional violations by an agency. *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 483 (1991). The *McNary* court looked to an exclusive jurisdiction statute similar to § 877 and, permitting district court review, found it applied to "the process of direct review of individual denials . . ., rather than as referring to general collateral challenges to unconstitutional practices and policies used by the agency in processing applications." *Id*. at 492. Similar reasoning was used in *Monson v. Drug Enfor. Admin.*, where the court found that § 877 did not preclude district court review of the plaintiffs' action seeking declaratory relief and stating "there was no final decision of the DEA to be reviewed and the crux of [plaintiffs'] action is a challenge to the applicability of the CSA to their proposed activities and the authority of the DEA under the CSA to regulate those activities in the first instance". 589 F.3d 952, 961 (8th Cir. 2009).

Almost all cases requiring review by the courts of appeal under § 877 involved plaintiffs who were first directly involved with an administrative procedure and were seeking review of a determination or order therefrom. *See e.g. John Doe,* 484 F.3d 561, (applying § 877 to the review of DEA's denial of a permit to import a controlled substance);

*Fry v. DEA*, 353 F.3d 1041, 1042 (9th Cir. 2003) (Applying § 877 to review of DEA's Order to Show Cause on a matter involving a certificate of registration to dispense controlled substances"). In those cases, appellate review was appropriate because there was an established record that could be reviewed. A reading of 21 U.S.C. § 877 in its entirety is informative on this subject:

> All final determinations, findings, and conclusions of the Attorney General under this subchapter shall be final and conclusive decisions of the matters involved, except that any person aggrieved by a final decision of the Attorney General may obtain review of the decision . . . for the circuit in which his principal place of business is located upon petition filed with the court and delivered to the Attorney General within thirty days **after notice of the decision. Findings of fact by the Attorney General, if supported by substantial evidence, shall be conclusive**. (emphasis added)

I do not challenge a specific decision such that findings of fact or any established record thereof could be considered. I allege a pattern of unconstitutional practices and policies that led to the creation of and continuous changes to the schedules in the regulations. Therefore, my APA claim is reviewable by this court under 5 U.S.C. § 704 which permits review of final agency action for which there is no other adequate remedy in a court.

## II. Plaintiff States a Claim for Substantive Due Process Violations

A Plaintiff need only allege the deprivation of a fundamental right to state a claim for Substantive Due Process violations.

The fundamental right alleged is as follows:

> I have a constitutionally protected liberty interest in exercising my personal and mental autonomy by determining and choosing what is best for my own mind, body and spirit . . . [interacting] with and [expanding] my own consciousness. . . . growing plants or fungi of my choosing for personal use in the sanctity of my own home and choosing to consume those substances. The CSA, AZCSA, Conventions, and related criminal provisions unlawfully tread into those sacred and intimate realms of my human existence by criminalizing my private life choices to continue using the natural remedies described above for my personal healing . . .. (Doc. 22 ¶ 132)

At the crux of my asserted right is the fundamental right to make personal private life choices in the privacy of my home. The U.S. Supreme Court consistently recognizes the fundamental rights of humans to engage in private conduct in the privacy of their home

or make choices constitutive of private life, while consistently rejecting the narrow analysis of such right as to allow the court or government to impute its own moral codes.

The Supreme Court in *Lawrence v. Texas* invalidated a law criminalizing sodomy and specifically rejected the framing of the right as a right to homosexual sodomy, stating such framing was a "failure to appreciate the extent of the liberty at stake." 539 U.S. 558, 564-67 (2003). Instead, the Court stated, "We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the [exercise of their liberty]." *Id*. at 564. The Court also stated, "for centuries there have been powerful voices to condemn homosexual conduct as immoral, but this Court's obligation is to define the liberty of all, not to mandate its own moral code." *Id.* at 571.

The Court stated "There are broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases" (*Id*. at 564.), and cited some of the following cases: *Griswold v. Conn.*, 381 U.S. 479, 485 (1965) (Invalidating a law prohibiting the use of contraceptive drugs and describing the protected interest as a right to privacy, especially in the marital relationship – not as the right to possess contraceptives.); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (Adding to *Griswold*, finding that individuals have the same fundamental privacy rights as married couples to such personal private decisions such as whether to take contraceptive drugs.); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (Invalidating a law criminalizing private school attendance, framing the right as "the liberty of parents and guardians to direct the upbringing and education of children under their control"); and *Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 306 (1990) (Recognizing that the consequences of personal decisions do not vitiate rights of medical self-determination and finding that the well-established rule that it is the patient who decides treatment has never been qualified by either the nature or purpose of the treatment.); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (addressing the "Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest.")

The purpose of narrowing an asserted right, narrowing of which the courts take liberty rather than relying on the plaintiff or dismissing a claim for failure to do so, is to minimize the court's risk of placing "the matter outside the arena of public debate and legislative action" when constitutional protection is extended to it. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). However, as indicated by multiple U.S. Supreme Court holdings, the true and correct analysis is to determine whether the specific asserted right (private possession and consumption of natural substances of my personal choosing and determination for my personal wellbeing, growth, benefit or happiness) is constitutive of the established fundamental right to make private life choices – not whether the court deems the specific conduct or substance as moral or acceptable to Defendants, the medical industry, pharmaceutical companies, other corporate institutions, or even society. That private determination and discretion is mine alone.

The fundamental right to make personal private choices in the privacy of one's own home has already been established as deeply rooted in this nation's history and tradition. The question is whether the CSA and Conventions violate those fundamental rights through their prohibition of private conduct. *See Coons v. Lew*, 762 F.3d 891 (9th Cir. 2014) (Considering whether a statute violated the plaintiff's well-established substantive due process rights to medical autonomy and informational privacy and omitting any reference to whether his claims were deeply rooted in this nation's history and tradition.)

Because the Supreme Court has recognized under the broad fundamental right to privacy the rights to engage in sodomy in one's home, to consume contraceptive drugs, to direct the upbringing of one's child, and to medical self-determination, then it follows that I have a fundamental right of privacy to make a personal choice to consume a natural substance in the privacy of my home, to be intimate with my own mind, body and spirit. The government and courts do not get to examine my private recreational choices and decide for me whether those choices serve me or my central nervous system, medically or psychologically, in a way they or others approve and then criminalize those choices they do not approve. *See Stanley* 394 U.S. 557 (rejecting this exact analysis and the

government's argument that private consumption of ideas must be regulated by the government, stating, "The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all.").

Equally notable, most of the recognized fundamental rights described above involve another person: the right of consenting adults to engage in anal sex, the right of parents to direct the upbringing of children, the right to consume contraceptive drugs in respect of the marital relationship. Similarly, the court in *Dobbs v. Jackson Women's Health Org*. rested its decision on the fact that abortion involves "potential life". 142 S. Ct. 2228, 2261 (2022) ("The exercise of the rights at issue in [prior cases] does not destroy a 'potential life,' but an abortion has that effect."). Here, the right I assert is arguably more sacred and deserving of protection as it involves no other. It involves intimacy with my own mind, body, and spirit – a decision that is personal and private in those terms' purest form.

Finally, contrary to Defendants' claim (Doc. 40 p. 13-14), the *Raich v. Gonzales* decision is not controlling here. The court held "federal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering." 500 F.3d 850, 866 (9th Cir. 2007). However, Raich's arguments vastly differ from mine. Raich's arguments, and subsequently the court's analysis, focused on the history of medical use of marijuana at the advice of a physician. Raich did not assert a right to make personal choices constitutive of private life, and therefore, the court did not conduct an analysis thereof. As discussed at length above, it is not for the court or government to decide which substances I may choose to consume in the privacy of my home or the reason therefore, nor to consider, one by one, whether each substance's use is moral or accepted by Defendants, the medical industry, pharmaceutical companies, other institutions, or society. *See Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2374-75 (2018) ("Professionals might have a host of good-faith disagreements . . .. Doctors and nurses might disagree about the ethics of assisted suicide or the benefits of medical marijuana . . .. [A]nd the people lose when the government is the one deciding which ideas should prevail."). Rather, it is my fundamental

right to make the personal private choice for the satisfaction of my own wellbeing and happiness of what enters my body in the privacy of my own home. Accordingly, my asserted right is well within the realm of previously recognized fundamental rights such that I have stated a claim for substantive due process violations.

## III. Plaintiff States a Claim for Procedural Due Process Violations

To sufficiently state a procedural due process claim, a plaintiff must allege (1) a protected liberty interest, and (2) a governmental failure to provide an appropriate level of process. *See Bd. of Regents v. Roth*, 408 U.S. 564, 569–73 (1972).

### A. Plaintiff Alleged Cognizable Liberty Interests

Liberty interests for procedural due process purposes denotes the freedom "generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men. . . . In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Id.* at 572.

I have alleged multiple cognizable liberty interests. Doc. 22 ¶¶ 132-135. First, it is well-established that liberty interests include the freedoms from imprisonment and prosecution, and that the mere presence of criminal penalties within a law invokes this liberty interest. *See Bd. of Pardons v. Allen*, 482 U.S. 369, 373 n. 3 (1987) ("[F]reedom; liberty from bodily restraint is at the heart of the liberty protected by the Due Process Clause."); *Forbes v. Woods*, 71 F. Supp. 2d 1015, 1018 (D. Ariz. 1999) ("where a statute imposes criminal penalties, the standard of certainty that due process requires is higher.") (internal quotation omitted); *Briggs v. Treatment Assessment Screening Ctr.*, 562 F. Supp. 3d 168, 172 (D. Ariz. 2021) (Recognizing a liberty interest in "freedom from imprisonment or freedom from prosecution and the possibility of a criminal record and imprisonment."). (internal quotations omitted). As the CSA imposes criminal penalties for conduct I engage in, I identified a cognizable liberty interest invoking procedural due process requirements.

I also allege multiple liberty interests in exercising personal private choices, and deprivation thereof. Doc. 22 ¶¶ 130-36. While the private choices I allege include those relating to personal, bodily and medical autonomy, informed consent, private consumption

of substances, and more, courts do not consider the specific choice in question. Rather, they recognize that it is within the constitutional liberty among free men to make a personal private choice in the first place. Courts have long recognized that freedom of choice and privacy are protected liberty interests. *See Lawrence*, 539 U.S. at 562 ("Liberty protects the person from unwarranted government intrusions into a dwelling or other private places."); *Glucksberg*, 521 U.S. at 724 ("[L]iberty protected by the Due Process Clause includes 'basic and intimate exercises of personal autonomy[.]'"); *Cruzan*, 497 U.S. at 341 ("[T]his Court has long recognized that the liberty to make the decisions and choices constitutive of private life is so fundamental to our concept of ordered liberty" and finding a liberty interest in self-determination and choice of medical treatment.); *Harris v. McRae*, 448 U.S. 297, 317 (1980) ("liberty" includes freedom of choice); and *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-86 (1977) (the liberty to make choices regarding contraception is a right of personal privacy.)

The government may interfere with the freedom of choice and privacy only if they provide fundamentally fair procedures. *Keates v. Koile*, 883 F.3d 1228, 1236 (9th Cir. 2018). As I allege cognizable liberty rights, and a deprivation thereof through inadequate procedures, I have stated a procedural due process claim under the Fourteenth Amendment for which relief may be granted.

**B. Plaintiff Alleged Lack of Adequate Process**

Defendants do not argue that I failed to allege inadequate procedures. Rather, their argument rests solely on the reiteration of their previous argument regarding administrative exhaustion and that because there is an administrative process that I may avail myself to (via the notice and comment period for scheduling specific substances or the petition process to seek reclassification of substances) that my procedural due process claims fail. (Doc. 40 pp. 15-16). However, nowhere in this action do I seek reclassification of specific substances.[1] Rather, I allege the CSA and Conventions do not satisfy the procedural due

[1] Defendants cite *United States v. Christie*, 825 F.3d 1048 (9th Cir. 2016). However, this case only addressed the validity of the marijuana classification as Schedule I.

process guarantees of the Fifth Amendment. As discussed above and incorporated by reference herein, administrative agencies are not competent arbiters of such challenges.

Additionally, the Conventions provide no administrative procedures to which I may avail myself. To the contrary, the CSA explicitly states that substance scheduling pursuant to the Conventions are exempt from administrative processes. *See* 21 U.S.C. § 811(d)(1) ("If control is required by United States obligations under international treaties, conventions, or protocols . . . the Attorney General shall issue an order controlling such drug . . . without regard to the [required findings or rulemaking procedures].").

There mere existence of rulemaking procedures for the classification of specific substances does not foreclose my claims regarding the CSA's and Conventions' violations of procedural due process. In fact, the *Christie* opinion cited by Defendants (Doc. 40 p. 16) considered a CSA procedural due process claim without any regard to the existence of rulemaking procedures. 825 F.3d at 1065-66. Further, *Bos. Redev. Auth. v. Nat'l Park Serv.*, cited by Defendants, dealt with a claim by an appellant that it failed to receive notice of a fact that was specifically provided by the appellees through informal agency decision-making, and thus, is of no relevance here. 838 F.3d 42 (1st Cir. 2016). Accordingly, I state a claim for procedural due process violations.

## IV. Plaintiff States a Claim for First Amendment Violations

As alleged in the FAC, "Defendants use personal thoughts, beliefs, intentions, motivations, and expression to determine how substances should be scheduled and . . . criminalized . . . and chill and deter individual thoughts, beliefs, and expression, in violation of the First Amendment." Doc. 22 ¶ 119. Defendants argue that these asserted rights are not protected by the Constitution. Doc. 40 p. 16-18.

It is well established that freedom of thought, which naturally includes belief, intention and motivation, are fundamental First Amendment rights. *See Lawrence* 539 U.S. at 562 (recognizing the fundamental right to "an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."); *Thomas v. Collins*, 323 U.S. 516, 531 (1945) ("The First Amendment gives freedom of mind the same security as

freedom of conscience."); *Becerra*, 138 S. Ct. at 2379 ("Freedom of speech secures freedom of thought and belief."); *United States v. Alvarez*, 567 U.S. 709, 728 (2012) ("Freedom of . . . thought flows not from the beneficence of the state but from the inalienable rights of the person."); and *Turner Broad. Sys., Inc. v. Fed. Commc'n Comm'n*, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence.").

At every turn, the CSA and Conventions unconstitutionally intrude into the protected intimate realms of individual thought, belief, intentions and consciousness and the intrusions are far from merely incidental. The government overreach into the private realms of our minds is vast, downright frightening, and permeates virtually all aspects of decisions for which controlled substances will carry criminal penalties for their private possession. I alleged numerous facts demonstrating these impermissible intrusions, such as Defendants' definition of "drug abuse", the scheduling factors, inspection of personal anecdotes to presume thoughts, intentions, beliefs, how one feels or desires to feel when consuming a substance, and much more. Doc. 22 ¶¶ 119-127. For example, Defendants use the following definitions:

> *Drug Abuse*: the intentional, non-therapeutic use of a drug product or substance, even once, to achieve a desired psychological or physiological effect. Therefore, *abuse potential* refers to the likelihood that abuse will occur with a particular drug product or substance with CNS activity. Desired psychological effects can include euphoria . . . alterations in cognition, and changes in mood.
>
> *Psychological dependence*: a state in which individuals have impaired control over drug use based on the rewarding properties of the drug . . ..
>
> The presence of a euphoria-like response is a key observation in the clinical assessment of whether a test drug has abuse potential.
>
> *Euphoria-related terms*: Euphoric mood; Elevated mood; Feeling abnormal; . . . Thinking abnormal . . ..[2]

[2] Exhibit 1: excerpts from *Assessment of Abuse Potential of Drugs, Guidance for Industry*. U.S. Department of Health and Human Services, pp. 4 & 21-22 (Jan. 2017) (cited in FAC Doc. 22 ¶¶ 30, 55, 120-21).

Thus, the definition of "drug abuse" includes the contents of one's mind prior to and during consuming a substance, and "psychological dependence" includes the contents of one's mind after consuming a substance. *See also* Doc. 22 ¶¶ 123-124, *and generally* Exhibit 2 (excerpts from *Manual on Drug Dependence*, WHO, 1975) (cited in Doc. 22 ¶ 124), and *Id*. at p. 25. ("In judging . . . psychic dependence . . . it is important to ascertain to what extent he (1) devotes his time to thinking about . . . drug affects[.]"). It is off-limits for Defendants to consider and use to determine criminal penalties one's personal thoughts when consuming a substance; whether one's desire for use conforms to commercially-indicated "therapeutic use"; how a substance affects one's personal cognition or mood; whether one's control over personal use is "impaired"; what is considered "abnormal thinking"; or any other factors that relate to personal cognition and emotions.

It also follows that the CSA and Conventions are content-based laws (contents of one's thoughts), prohibiting expressive conduct (acting on those thoughts by consuming a substance). *See Turner* 512 U.S. at 643 ("As a general rule, laws that, by their terms, distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based."); *Wilson v. Lynch*, 835 F.3d 1083, 1095 (9th Cir. 2016) (Holding that the mere "acquisition of a [marijuana] registry card falls within the scope of conduct protected by the First Amendment"); and *Fulton v. City of Phila*., 141 S. Ct. 1868, 1893 (2021) (concurrence) (Finding that those who "ingest peyote . . . are surely engaging in expressive conduct that falls within the scope of the Free Speech Clause.").

Moreover, the required finding of "currently accepted medical use" under 21 U.S.C. § 812, is determined by considering whether one uses a substance "on their own initiative" versus the advice of a third party who can only prescribe commercial products. Doc. 22 ¶¶ 80 & 123. Here, defendants take traditionally non-medical recreational substances and prohibit the use thereof by applying them to medical standards meant for pharmaceutical drugs. *Merriam-Webster Dictionary* defines the phrase "on one's own initiative" as "at one's own discretion; independently of outside influence or control." Therefore, if the

motivation behind my personal choice comes from my own mind, and not someone else's, that is used in favor of criminalizing the associated conduct.

Courts have consistently held laws that criminalize conduct, or otherwise penalize people, based on personal thoughts, beliefs, and perspectives as violative of the First Amendment. *See e.g.*, *Stanley*, 394 U.S. 557 (Holding that a law criminalizing possession of material the government deemed obscene violated First Amendment rights, including rights to beliefs, thoughts, emotions, and sensations, to be let alone and satisfy one's intellectual and emotional needs in the privacy of his own home.); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) (Invalidating a law criminalizing possession of material in the government-asserted interest of protecting one's mind and stating, "The government 'cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.'") (internal quotes omitted); *Schneider v. Smith*, 390 U.S. 17, 25 (1968) (Invalidating procedures used by the U.S. to judge one's character and habits by probing thoughts and beliefs, not actual past conduct, and stating "The First Amendment's ban against Congress 'abridging' freedom of speech . . . create[s] a preserve where the views of the individual are made inviolate."); *Speiser v. Randall*, 357 U.S. 513, 535-36 (1958) (concurrence) (Finding that a state cannot withhold benefits based on one's personal beliefs and stating: "[W]hat one thinks or believes . . . [has] the full protection of the First Amendment. It is only his actions that government may examine and penalize."); and *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971) (Reversing a bar admission denial where the application probed into the applicant's political beliefs, stating, "The First Amendment . . . prohibits . . . punishing [a person] solely because . . . he holds certain beliefs").

Prevention of "drug abuse" is at crux of CSA and the Conventions[3], and the criminal provisions thereof are premised on the terms "drug abuse" and "potential for abuse", which are defined as one's thoughts and desires before, during, and after consuming a substance. In fact, drugs that do not have "potential for abuse", i.e. potential to produce certain

[3] The stated purpose of the CSA is "to provide increased research into, and prevention of, drug abuse and drug dependence . . . and to strengthen existing law enforcement authority in the field of drug abuse." Pub.L. No. 91-513, 84 Stat. 1236 (1970) (preamble).

thoughts or desires, are not considered for control. Defendants, along with the World Health Organization, took non-medical recreational activities, applied them to a medical framework, and criminalized those private activities solely because of the potential cognitive affects they might induce in Americans, including mere happiness, joy and increased perception, which threatens the government's agenda and control. *See* Exhibit 3 (*Drug Dependence*, Bull. Wld. Hlth. Org. 1965, 32, p. 731) (cited in Doc. 22 ¶ 124) (finding although hallucinogens do not cause physical dependency, they are likely to be used by "non-conformists" to "clarify perception" and gain "psychological insight"); and Exhibit 2 p. 40 (hallucinogens are used by those "who have a more than usual interest in artistic and intellectual pursuits . . . particularly to 'expand the consciousness'"[.]).

Thus, the basis of determining what conduct is criminalized, and what is not, is the contents of one's thoughts and the potential that consuming a substance might produce thoughts the government deems undesirable. These intimate thoughts are presumed through unlawful probing of and bias conclusions about individual cognition. What's next? Prohibition of dancing or consuming chocolate, without physician approval, due to the euphoric effects or effects on the central nervous system of those? Or banning the private possession of books that serve as mere entertainment or might expand the consciousness of the reader, but are devoid of ideological content approved by the government? This type of communistic control over thoughts and perception was emphatically rejected in *Stanley*. 394 U.S. at 565-66. Allowing such control to persist creates a slippery slope towards federal control, under the guise of the power to regulate the medical industry, over anything that might produce thoughts or desires they deem inappropriate. Accordingly, the fundamental right of freedom of thought protected by the First Amendment is infringed, and thus, I stated a claim for First Amendment violations for which relief may be granted.

## V. Plaintiff's Commerce and Necessary and Proper Clause and Tenth Amendment Claims are not Foreclosed

Defendants argue that the Commerce and Necessary and Proper Clause and Tenth Amendment claims (Counts VI & VII) are foreclosed by *Gonzales v. Raich*, 545 U.S. 1

(2005). Doc. 40 p. 18-20. However, *Raich* is not controlling as there is substantial new evidence, accumulated in the 18 years since *Raich*, which proves what may have been a "rational basis" at the time of that decision, is now irrational, and what was speculated as "necessary and proper", actually is not. The court cannot ignore the vast changes of state marijuana legislation and the demonstrated effects it has had on Defendant's enforcement of the CSA and Conventions in the past 18 years – effects that demonstrate ending the prohibition on personal intrastate cultivation and possession actually furthers Defendants' purpose under the CSA and Conventions of suppressing interstate trafficking.

*Raich* considered the narrow questions of whether personal intrastate cultivation and possession of medical marijuana substantially affects commerce, and whether the prohibition of such was, thereby, violative of the Commerce Clause, and whether prohibiting personal intrastate cultivation and possession of medical marijuana was "necessary and proper" to the CSA's scheme and purpose of suppressing interstate commerce. The only evidence considered by the *Raich* court in holding that personal intrastate cultivation and possession of medical marijuana "could" have a substantial effect on commerce and that the CSA's scheme was "necessary and proper", was a predictive congressional finding made in 1970 (21 U.S.C. § 801(5)) and the government's purely speculative conclusions – maybe because there was no other evidence to consider. *Id.* at 20-22. However, predictive congressional findings are not insulated from judicial review; are considered helpful to the courts but do not end the analysis; and do not automatically withstand the test of time and experience. See *Turner* 512 U.S. at 666 (Finding that Congress' predictive judgments are not insulated from meaningful judicial review.); *Raich* 545 U.S. at 21 (Noting that congressional findings may be considered as part of an analysis, when available); *Minority Television Project, Inc. v. Fed. Commc'ns Comm'n,* 736 F.3d 1192, 1199-1200 (9th Cir. 2013) (Noting that the information before Congress at the time of the legislation was limited, and considering new evidence since the time of enactment to determine whether the predictive findings beared out in order to support the purpose of the enactment.), and *Free Speech Coal., Inc. v. Attorney Gen. of the United States Free*

*Speech Coal.*, Inc., 677 F.3d 519, 546-47 (3d Cir. 2012 )(dissent) ("[A]lthough section 2257 has been on the books for almost 25 years, the record contains no evidence as to . . . the government's experience under the statute, and, therefore, no means of assessing whether the requirements actually have had any deterrent or preventive effect.")

The Supreme Court, exercising independent judgment on the facts, has held that "proof of connection" to interstate commerce is required to find validity of legislation under the Commerce Clause. *See Bond v. United States*, 572 U.S. 844, 859 (2014), and *Turner* 512 U.S. at 666 (1994) ("[T]he deference afforded to legislative findings does not foreclose our independent judgment of the facts bearing on an issue of constitutional law.") (internal quote omitted). Based on the evidence accumulated in the time since *Raich*, it is no longer rational to conclude that the federal prohibition on personal intrastate cultivation and possession of substances could substantially affect commerce or that it undercuts the regulation of the interstate market. Defendants cannot lawfully allege that they have an interest in maintaining the interstate illicit market of substances, and thereby, the existence and profitability of drug traffickers. Rather, their lawful interest can only be in suppressing the illicit interstate market. And as alleged in the Complaint (Doc. 22 ¶ 88), and not denied by Defendants, the increase in state legislation legalizing personal cultivation and possession of marijuana, since *Raich*, has had a direct correlation on the reduction of federal marijuana trafficking arrests. The additional evidence accumulated since *Raich*, which must be considered by the court, proves that ending prohibition of personal cultivation and possession of substances does not, in fact, substantially affect the interstate market in a way that undercuts the regulatory scheme of the CSA. To the contrary, ending such prohibition would drastically reduce the resources expended by the federal government and further its interest in suppressing the illicit interstate market.

*Raich*'s holding that prohibition on personal cultivation and possession is "necessary and proper" is equally no longer valid in light of the 18 years of additional evidence. Congressional action is valid under the Necessary and Proper Clause, only if it carries into the *beneficial execution* of its Commerce power. *See United States v. Comstock*,

560 U.S. 126, 170 n.8 (2010) (citing *McCulloch v. Maryland*, 17 U.S. 316, 418 (1819). As indicated above, ensuring the maintenance and existence of an illicit market of substances or drugs is not within the power granted to Congress and the new evidence proves that prohibition of personal cultivation and possession is not a beneficial exercise of its lawful power to suppress the illicit market.

Finally, the *Raich* court focused on use of marijuana for medical purposes, which is not the issue here. The court stated, "[T]he CSA is a comprehensive regulatory regime specifically designed to regulate which controlled substances can be utilized for medicinal purposes, and in what manner." *Id*. at 27. Defendants may have a power to regulate FDA-approved drugs as those have a defined commercial market – from which defendants profit generously. However, the prohibition and criminalization of non-medical recreational activities, simply because those activities involve substances that could be bought or sold (like virtually any material possessions), is unrelated to the pharmaceutical industry and the analysis in *Raich*, and exceeds Defendants' power.

As both the CSA and Conventions prohibit personal cultivation and possession of substances and additional evidence since *Raich* proves prohibition is not a beneficial exercise of any valid congressional power, and ending prohibition does not undercut any valid regulatory scheme of the CSA or Conventions, these prohibitions violate the Commerce and Necessary and Proper Clauses, and thereby, exceed Defendants' authority under the Tenth Amendment. Accordingly, Counts VI and VII should not be dismissed.

## CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss (Doc. 40) should be denied in its entirety.

Respectfully submitted on May 18, 2023,

By: _____
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*Plaintiff/pro se*