No. 24-4085

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JENNIFER N. MURPHEY,

Plaintiff-Appellant,

v.

THE UNITED STATES OF AMERICA; MERRICK B. GARLAND, UNITED STATES ATTORNEY GENERAL, UNITED STATES DEPARTMENT OF JUSTICE; ANNE MILGRAM, ADMINISTRATOR OF THE UNITED STATES DRUG ENFORCEMENT ADMINISTRATION; XAVIER BECERRA, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROBERT M. CALIFF, COMMISSIONER OF FOOD AND DRUGS, UNITED STATES FOOD AND DRUG ADMINISTRATION; AND KRIS MAYES, ATTORNEY GENERAL OF THE STATE OF ARIZONA,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona
No. 2:22-CV-01224-JJT
Hon. John J. Tuchi

APPELLANT'S OPENING BRIEF

Jennifer N. Murphey
Soul to Soul Services, LLC
1846 E. Innovation Park Dr., Ste. 100
Oro Valley, AZ 85755

pro se

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INTRODUCTION

From inception, "preventing and combating drug abuse" has been at the forefront of the Controlled Substances Act, 1961 Single Convention on Narcotic Drugs, and the 1971 Convention on Psychotropic Substances. However, what exactly is "drug abuse"? The government and the World Health Organization (WHO) define "drug abuse" as our individual *thoughts, feelings* and *desires* before, during, and after consuming a substance. Thus, for the past 54 years, millions of people have been imprisoned, branded as criminals and essentially thrown away by society all in the name of "preventing and combating drug abuse" – i.e. preventing and combating intimate thoughts and feelings the government does not want. The government even crafted a clever phrase and a movement full of misinformation to recruit society to advance this harmful agenda for them – "The War on Drugs."

For over 54 years, in the name of this so-called war, the government has gone to extreme lengths to probe into our minds to predict our thoughts and feelings, all for the purpose of investigating which substances could lead to thoughts and feelings they deem undesirable. How does the government predict these thoughts and feelings and predict which substances might cause these if consumed? They assign government employees to browse chat rooms on the internet, they look at individual behaviors and hobbies, they conduct studies to extract and document potential cognitive processes, they ponder how much one

thinks about using drugs and consider how people react to normal adverse life events. Numerous government and WHO records include documentation of these methods and of the specific thoughts and feelings they do not want us to entertain, such as non-conformist thoughts, thoughts that help us gain insight into ourselves, expansion of consciousness, and even simply feeling joy. Then, if the government speculates that a substance might produce internal cognitive and emotional processes contradictory to their agenda, they will conclude the substance has a "high potential for abuse" and criminalize it accordingly; thus, making the simple harmless act of merely holding that substance in one's hand a criminal offense.

Interestingly, these invasive government methods seem to disappear, like magic, when the substance under evaluation comes from a pharmaceutical company. The pharmaceutical companies fund 75% of the Food and Drug Administration's (FDA) drug division, and it is the FDA to whom the DEA delegates drug scheduling evaluations. Hundreds of studies about the harm of pharmaceuticals, including millions of deaths, high addiction rates and fatal withdrawals, magically disappear from the government's universe when evaluating them or comparing them to new drugs that are pending FDA approval. For these substances, which likely bring the government trillions of dollars, the government's concern for drug-abuse-like thoughts, feelings and desires, likewise disappear. Then, as if straight from the 2002 film EQUILIBRIUM, the mass

marketing and drugging of the population with toxic, highly addictive drugs that are known to numb the mind and emotions of the user ensues. For these products, the act of simple possession is criminalized not for the thoughts they might produce when consumed, but because that product does not bear the government's label and one did not go through the government to attain that product.

This so-called "war" is a war on people, families, spirits, consciousnesses, critical thinking, emotions, and the human experience to choose what one thinks and feels. These are private sacred realms the government has no lawful authority to enter, investigate and then use against us to imprison us by the millions. Fortunately, the makers of our Constitution foresaw these types of government evils and strictly prohibit the infringement of our Freedom of Thought and deprivations of our freedoms of imprisonment, privacy and personal choice without due process of law.

As extensively alleged and supported by substantial evidence in my First Amendment Complaint, the government violates these sacred realms and constitutional protections with stark frequency and consistency to the unprecedented harm of millions of good humans. Accordingly, the district court's Order dismissing these claims should be reversed.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this action under 28

U.S.C. §§ 1331 and 1367, and 5 U.S.C. § 702. The district court also had jurisdiction under 28 U.S.C. § 1343(a)(3) and 28 U.S.C. § 1346. The district court entered a final order on March 28, 2024 granting the Defendants' Motions to Dismiss the First Amended Complaint. ER-4. The district court granted a 30-day extension to June 26, 2024 to file a notice of appeal. ER-197. I timely filed a notice of appeal, pursuant to Fed. R. App. P. 4(a)(1)(B), on June 26, 2024. ER-196. This Court has jurisdiction under 28 U.S.C. § 1291.

STATUTORY, CONSTITUTIONAL AND REGULATORY AUTHORITIES

All relevant statutory, constitutional, and regulatory authorities appear in the Addendum to this brief.

ISSUES PRESENTED

1. Whether the district court erred when it denied me standing to challenge two international treaties, where both treaties were explicitly implemented by Congress in the Controlled Substances Act, carry the full force of domestic law, and thus, give rise to rights legally enforceable in our domestic courts.

2. Whether the district court erred when it dismissed my Freedom of Thought claims by incorrectly applying standards reserved for Freedom of Expression claims.

3. Whether the district court erred when it dismissed my procedural due process claims, where I alleged deprivation of multiple cognizable liberty interests and numerous facts demonstrating highly inadequate and unfair procedures used by the Defendants to schedule substances and create criminal penalties.

4. Whether the district court erred in dismissing my APA claims when I sufficiently alleged that the continuously amended Schedules of Controlled Substances are final agency actions, are arbitrary, capricious, an abuse of discretion, and not in accordance with law, and I am currently subject to the DEA's continuous enforcement thereof.

STATEMENT OF THE CASE

A. The Laws, Regulations and International Treaties Challenged

1. Controlled Substances Act Framework and Scheduling Process

The Controlled Substances Act (CSA), 21 U.S.C. § 801 *et seq.*, and its regulations, 21 C.F.R. §§ 1300.01, *et seq*. (the Regulations), provide the primary framework governing the scheduling, manufacture, distribution, and dispensing of certain substances and drugs.

The CSA places substances into one of five schedules, the personal possession of which is then criminalized accordingly, allegedly based on their potential for abuse or dependence, their accepted medical use, and their accepted safety for use under medical supervision. The CSA sets forth required findings for

each schedule. 21 U.S.C. § 812(b).

The United States Attorney General is charged with making the findings required for any scheduling decisions, including adding substances to the schedules and re- or de-scheduling substances, by considering the eight factors enumerated in § 811(c). 21 U.S.C. § 811(a). Prior to controlling a substance, the Secretary of Health and Human Services (HHS) must evaluate the substance and make a scheduling recommendation based on those eight factors and submit its evaluation and recommendation to the DEA, who is then bound by the Secretary's recommendations with regard to scientific and medical matters. 21 U.S.C. § 811(b). The Secretary delegates the substance evaluation process to the Food and Drug Administration (FDA). ER-146. The FDA further delegates a large portion of the drug evaluation process to pharmaceutical companies when the drug under evaluation is the subject of a New Drug Application (NDA). ER-157–158; 21 U.S.C. § 811(f); and ER-75–79. In addition to the information from HHS, FDA and the pharmaceutical companies, the DEA uses a four-prong analysis it created to determine whether a particular drug or substance has a potential for abuse. ER-149.

Despite these statutory requirements, the evaluation and scheduling process used by Defendants largely consists of comparing the substance or drug under evaluation to already scheduled substances. ER-159–160. Defendants will consider

the factors and four prongs to make assumptions about the substance under evaluation in accordance to the findings previously made about the comparator substances, rather than complete an independent individualized evaluation. ER-159–160. Defendants will use this method of comparison regardless of how long ago the comparator substances were scheduled and without regard to information about the comparator substances discovered since their initial scheduling to ensure the comparators currently meet the findings required of their assigned schedule.[1] If the Defendants find that the substance under evaluation produces similar pharmacological affects as the previously scheduled comparator substances, Defendants will conclude it should be scheduled the same and, thus, schedule it accordingly. ER-150–152.

Under 21 U.S.C. § 811(b) and 21 C.F.R. § 1308.43(e), once the evaluations are complete and if the Attorney General determines that there is substantial evidence of potential for abuse, he is required to initiate rulemaking proceedings to

[1] Provided as examples in my First Amended Complaint, I compared the scheduling evaluations of five non-pharmaceutical tryptamines with the evaluation of a pharmaceutical hypnotic, named daridorexant. Defendants compared the five tryptamines to certain hallucinogens that were placed in Schedule I over 50 years ago and whose scheduling has not been reviewed since that time to ensure that placement is lawful. Defendants compared daridorexant to the hypnotic zolpidem (Ambien), which was placed in Schedule IV over 30 years ago and whose scheduling has not been reviewed since that time to ensure that placement is lawful, i.e. whether it still meets the required findings for placement in Schedule IV. ER-150–157.

schedule the evaluated substance or drug and criminalize personal possession accordingly. Once the rulemaking process is complete, the schedules listed in 21 C.F.R. §§ 1308.11 – .15 are amended to include the schedule addition, removal, or change. The DEA enforces the criminal penalties provided in the CSA, including criminalizing simple possession, according to the continuously changing schedules in the Regulations. *See* 21 U.S.C. § 841(a). The DEA is required to update and republish the schedules on a semi-annual basis to ensure each scheduled substance or drug continues to meet the required findings of its assigned schedule. 21 U.S.C. § 812(a), (b).

2. The Conventions Framework and Scheduling Process

The United States is a party to the 1961 United Nations Single Convention on Narcotic Drugs ("Single Convention")[2] and the 1971 United Nations Convention on Psychotropic Substances ("Psychotropic Convention")[3], (together "the Conventions"), both of which are international treaties requiring placement of certain substances into one of four schedules and setting forth minimum controls for each schedule and other related procedures. As a party to these Conventions,

[2] Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961, Mar. 25, 1972, 976 U.N.T.S. 105, https://www.unodc.org/pdf/convention_1961_en.pdf, [hereinafter Single Convention].

[3] Convention on Psychotropic Substances, Feb. 21, 1971, 1019 U.N.T.S. 175, https://www.unodc.org/pdf/convention_1971_en.pdf, [hereinafter Psychotropic Convention].

the United States is required to fulfill certain obligations such as scheduling and placing specific controls on certain substances. Single Convention, art. 4; Psychotropic Convention, art. 2. The Conventions also require parties to enact criminal penalties prohibiting the possession and use of scheduled substances, except as authorized. Single Convention, art. 33, 36; Psychotropic Convention, art. 5, 7, 22.

Congress implemented both the Conventions through the Controlled Substances Act. 21 U.S.C. § 811(d)(1). Both the CSA and the Regulations set forth unique scheduling procedures for substances controlled under the Conventions. 21 U.S.C. § 811(d)(1); 21 C.F.R. § 1308.46. Specifically, the CSA and Regulations provide that if control of a substance is required by the United Sates pursuant to the Conventions, the DEA is required to issue a rule controlling and criminalizing possession of that substance accordingly, without making the required findings, considering the scheduling factors, and following the rulemaking procedures under §811(a), and without securing an evaluation and recommendation from HHS. *Id*.

Under Article 3 of the Single Convention and Article 2 of the Psychotropic Convention, if a party has information about a substance which, in its opinion may justify an amendment to the schedules, the party shall provide such information to the Secretary-General of the United Nations, who then forwards only the

information he deems relevant to the World Health Organization (WHO) for assessment, to other parties and the Commission on Narcotic Drugs (Commission).

Under the Psychotropic Convention, if WHO makes the following findings, (1) a substance has the capacity to produce dependency and central nervous system stimulation or depression or similar abuse and similar ill effects as an already scheduled substance; and (2) there is sufficient evidence that the substance is being or is likely to be abused so as to constitute a public health and social problem warranting international control, it is required to submit an assessment and recommendation to the Commission who is bound by WHO's assessment as to scientific and medical matters. Psychotropic Convention, art. 2. The Commission then makes a scheduling decision, by which all parties to the Convention are bound. Should a party disagree with the decision about a substance, that party is still obligated, at a minimum, to apply to the controlled substance the controls of the schedule above it. *Id*. at art. 2(7).

Under the Single Convention, WHO is only required to consider whether a substance is "liable to abuse" and whether is produces "similar ill effects" as currently scheduled substances. Single Convention, art. 3. Similar to the Psychotropic Convention, WHO submits its recommendation to the Commission, who makes the ultimate decision with regard to amending the schedules. *Id*. However, under the Single Convention, the Commission's decision is not governed

by any standards or requirements – only that it make a decision in accordance with WHO's recommendation. *Id*.

Although the Commission's decisions are subject to review, upon a party's request only, by the International Narcotics Control Board for decisions under the Single Convention and by the Economic and Social Council of the United Nations for decisions under the Psychotropic Convention, neither of the Conventions set forth any standards of review by which either of these entities must abide. Single Convention, art. 3(8); Psychotropic Convention, art. 2(7).

The Conventions also lack any mechanisms to ensure the schedules continually reflect current information. The only occasion by which a currently-scheduled substance is reviewed is through the non-mandatory subjective process described above, i.e. when a party, WHO, or the Commission has information they feel justifies a change.

The Conventions are devoid of anything defining their four schedules, including any required findings, descriptions, standards, or anything else that would provide guidance as to or justify which schedule a substance should be or was placed, thereby providing the Commission, or reviewing entities, full scheduling discretion. The only element differentiating the schedules are the various controls required for each schedule.

3. Purpose of the CSA and Conventions is to Prevent Drug Abuse

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. The CSA was codified in the United States Code with the title of "Drug Abuse Prevention and Control". 21 U.S.C. ch. 13. Similarly, the Conventions each expressed a purpose to "prevent and combat" drug abuse or addiction. *See* Single Convention, preamble; Psychotropic Convention, preamble.

4. Drug Abuse Potential: Definitions

The majority of the evaluation and scheduling process performed by the government is dedicated to considering the potential for abuse of a drug or substance using 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 . . .. ER-43–44, 68, 75–79, 178–179.

Thus, the definition of "drug abuse", which the government assesses and seeks to prevent through criminal legislation, is the contents of one's mind prior to and during consumption of a substance, and "psychological dependence" includes the contents of one's mind after consumption. *See also* ER-80–98, 179–181. Accordingly, most of the evaluation process is dedicated to probing into and assessing the psychological, cognitive and emotional processes of individuals that the use of a particular substance might produce within them. The conduct of personal possession of a substance is then criminalized according to a substance's likelihood of producing certain personal, intimate cognitive and emotional processes if consumed, and pursuant to the governments stated purpose of preventing those personal internal processes it deems undesirable.

The only substances or drugs that are considered for control under the CSA and the Conventions are ones that affect the central nervous system (CNS) and have a potential for abuse. 21 U.S.C. §811 (a), (f); Psychotropic Convention, art. 2(4). Non-CNS drugs – drugs that do not have the potential to affect our cognitive, psychological, or emotional processes – are not considered for control and subsequent criminalization for their use or possession.

5. Drug Abuse Potential: Assessment

The government goes to extraordinary and invasive lengths to predict the personal, intimate, cognitive, psychological and emotional contents of individuals

should they consume the substance under evaluation to assess "drug abuse potential" under both the CSA and Conventions. As alleged in greater detail in the First Amended Complaint (FAC), they browse chat rooms on the internet; they perform animal and human studies to extract and document cognitive, psychological, and emotional affects caused by consumption of substances; they profile individuals to presume motives and thoughts; they look at lifestyles, hobbies, and non-conformist tendencies of individuals; they consider voluntary admissions to treatment centers; and they consider whether a decision to personally consume a substance came from one's own initiative or that of a third party. ER-75–98, 178–181. These so-called findings, consisting of presumptions and predictions of our intimate internal processes, are then documented in the evaluations and are used as determinative by the government to schedule drugs and create criminal legislation.

6. Arizona Controlled Substances Act and Related Criminal Provisions

The Arizona Controlled Substances Act (AZCSA), ARIZ. REV. STAT. § 36-2501 *et seq.*, provides that the controlled substance schedules provided in the federal CSA shall be adopted by rule and such rules shall be amended, as necessary, to reflect any changes to the federal CSA schedules. ARIZ. REV. STAT. § 36-2512 -2516; ER-187. The AZCSA provides no additional or state-specific procedures for reviewing or amending its schedules. Arizona's criminal provisions

with regard to controlled substances, ARIZ. REV. STAT. § 13-3401 *et seq*., also substantially mirror those provided in the CSA. ER-187–189. Although the criminal provisions are encompassed in statutes apart from the AZCSA, they are referenced in the AZCSA and stem from the CSA, Conventions, and the federal laws that were enacted prior to and combined into the current CSA. *Id*. The AZCSA and related criminal provisions, including the definitions of "dangerous drugs" and "narcotic drugs" – possession for both of which are criminalized – are based on the federal processes described above and were enacted and are continuously amended to conform to the CSA and Conventions. ER-187–189.

B. I Filed Suit Challenging the CSA, Conventions, and AZCSA

On January 25, 2023, I filed my First Amended Complaint (FAC) against Defendants alleging, among other claims not subject to this appeal, the federal Defendants, through their execution and enforcement of the CSA and Conventions violate my First Amendment rights of Freedom of Thought, procedural due process rights under the Fifth Amendment, and that the CSA's Regulations violate the Administrative Procedure Act (APA). ER-139, 190–191. I further alleged the State Defendant, through its execution and enforcement of the AZCSA and related criminal provisions in full adherence to the federal counterparts, violate my Freedom of Thought and procedural due process rights under the Fourteenth Amendment and Article 2 of the Arizona State Constitution. ER-190–192.

1. Freedom of Thought Violations

In the FAC, I alleged the Defendants violate my First and Fourteenth Amendment and Arizona State Constitution protections of Freedom of Thought when, pursuant to the CSA, AZCSA, and Conventions, they probe into individual cognitive, psychological and emotional processes to create criminal legislation for the explicit purpose of preventing those personal processes the government deems undesirable and punishing those who might entertain them. ER-178–186. I further alleged that the government violates the law when it criminalizes the conduct of personal possession of certain substances because of what one's thoughts might entail should one consume the product. *Id.* I alleged numerous facts demonstrating the government's unlawful actions and included numerous examples of the government's probing into and reference to personal thoughts, feelings, emotions, and desires in their drug evaluations, scheduling decisions, and creation of criminal legislation for both the CSA and Conventions. *Id.*

2. Procedural Due Process Violations

In the FAC, I alleged the Defendants violate my procedural due process rights through their execution of the CSA and Conventions when they deprive me of multiple liberty rights using inadequate, arbitrary, unlawful and bias procedures. ER-185, 193.

I alleged deprivations of multiple cognizable liberty interests, such as freedom from imprisonment, freedom of personal privacy, choice and exercises of personal autonomy. ER-182–186. I further alleged numerous facts demonstrating the inadequate, arbitrary, unlawful and bias procedures used by the government to deprive me of those freedoms. ER-148–166, 169–178. These include, but are not limited to, the governments explicit disregard and noncompliance of its statutory duties when evaluating and scheduling drugs, the bias application of the required findings and factors when evaluating pharmaceuticals versus non-pharmaceuticals, the failure to evenhandedly consider evidence of harm and other important evidence when evaluating drugs, the use of decades-old information and failure to consider new information in drug evaluations, the financial conflict of interest of the FDA, the lack of procedures, definitions, and processes to ensure fair consistent decision making, and the absence of rationales or nexuses tying drug evaluations to scheduling decisions. *Id.*

3. APA Violations

In the FAC, I alleged that the Regulations implementing the CSA and Conventions, 21 C.F.R. §§ 1300.01, *et seq*., specifically those that house the continuously changing schedules, §§ 1308.11 –.15, are contrary to the Constitution and are arbitrary, capricious, an abuse of discretion, and not in accordance with law, and thus, violate the APA. ER-193. The same facts alleged in the FAC with

regard to Defendants' First Amendment and procedural due process violations through their execution and enforcement of the CSA and Conventions apply to the schedules in the Regulations, which are created and continuously amended pursuant to the CSA and Conventions and are currently enforced by the DEA.

C. Defendants Filed Motions to Dismiss

The federal Defendants filed a Motion to Dismiss, pursuant to Fed. R. Civ. P. 12(b)(1) and (6), moving the court to dismiss all my claims against them for failure to state a claim and to find that I lack standing. ER-99. Likewise, the State Defendant filed a Motion to Dismiss, pursuant to Fed. R. Civ. P. 12(b)(6) on March 28, 2023, moving the court to dismiss all my claims against them for failure to state a claim. ER-129.

1. Federal Defendants' Standing Arguments and My Response

The federal Defendants argued in their Motion that I lacked Article III standing to challenge the CSA, Conventions, and the Regulations. ER-102–109. The Defendants argued that I could not establish an injury-in-fact. Further, the Defendants argued that, even if I could demonstrate an injury-in-fact, I do not have standing to challenge the Conventions because "a private citizen may in theory have standing to challenge a federal statute . . ., but that will not automatically equate to standing to challenge an international treaty." ER-108. The Defendants further noted "it remains up to the United States to domestically implement those

principles through its own federal statutes." *Id*. The State Defendant did not challenge my standing to bring any of my claims.

In my Opposition to their Motion, I argued that international treaties that are implemented through an act of Congress have become enforceable domestic law. ER-57–58. I further demonstrated that the Conventions were, in-fact, implemented by an act of Congress as explicitly provided in both the CSA and Regulations, and thus, carry the force of federal law giving rise to rights legally enforceable in our domestic courts. *Id*. I argued that, as federal law, the same Article III standing requirements apply to the Conventions and are met. *Id*.

2. Defendants' Freedom of Thought Arguments and My Response

The Federal Defendants argued in their Motion that I failed to state a claim under the First Amendment because the CSA and Conventions regulate conduct and not speech, and I failed to allege a restriction on speech. ER-114–116. The State Defendant argued the CSA, Conventions and AZCSA regulate non-expressive conduct and, because I failed to allege that possession of substances is expressive conduct intended to convey a particularized message, I failed to state a claim under the United States and Arizona Constitutions. ER-130–133.

In my Oppositions to their Motions, I asserted that Freedom of Thought is protected under the First Amendment rights of Freedom of Speech and that expression of my thoughts is not required for my thoughts to be protected from

government intrusion or being used to create criminal legislation. ER-42–47, 67 – 71. I alleged that it is the government's explicit intention to prevent certain thoughts through criminalizing conduct that might cause thoughts it deems undesirable, and the probing of thoughts and other intimate psychological and emotional processes to create criminal legislation that violates the United States and Arizona Constitutions. *Id.* I alleged numerous facts demonstrating these violations and cited multiple U.S. Supreme Court decisions that held the First Amendment's protections of Freedom of Thought strictly prohibit *any* consideration of or probing into one's thoughts to create criminal legislation or otherwise deny freedoms, privileges, or benefits. *Id.*

3. Defendants' Procedural Due Process Arguments and My Response

In their Motion, the federal Defendants argue that I fail to identify any cognizable liberty interests that have been deprived. ER-112–114. The federal Defendants further argued that I cannot show a "lack of process" as required for procedural due process violations because they follow rulemaking procedures, such as providing notice and opportunity for comment, under the APA, and they provide administrative processes to seek rescheduling of specific substances. ER-113–114. The State Defendant argued in her Motion that my procedural due process claims fail because I failed to allege a cognizable liberty interest. ER-133–135. She did not assert that I failed to allege inadequate procedures.

In my Oppositions to their Motions, I asserted that I alleged in my FAC multiple cognizable liberty interests, such as freedom from imprisonment, freedom of personal privacy, choice and exercises of personal autonomy. ER-51–52, 65–66. I further asserted that none of my claims seek rescheduling of specific substances and thus, there are no administrative remedies for my constitutional claims, and that administrative agencies are not competent arbiters of questions of law, such as whether their own procedures comply with the constitution. ER-66–67. Moreover, I argued that, pursuant to the CSA and Regulations, the Defendants are exempt from following rulemaking procedures when scheduling substances that are subject to control under the Conventions, and provide no administrative procedures to which I may avail myself. ER-67.

4. Federal Defendants' APA argument and My Response

The federal Defendants argued in their Motion that my APA claims are barred "by a failure to exhaust administrative remedies, by the statute of limitations, and/or by 21 U.S.C. § 877, which obligated [me] to assert [my] claim directly to the courts of appeals." ER-109–110. The Defendants failed to assert what administrative remedies are available to me for my specific claims that I allegedly failed to exhaust. Defendants also assert that because 21 C.F.R. § 1300.01 was first promulgated in 1997, my claims are barred by the statute of limitations. Defendants further argue that "[t]o the extent [my] complaint can be

read to challenge decisions about scheduling particular substances, that claim is foreclosed by 21 U.S.C. § 877 . . ..” *Id*.

In my Opposition, I asserted that there are no administrative remedies available for my constitutional and APA claims as administrative agencies are not competent arbiters of questions of law and cannot grant the relief requested. ER-58–61. I further alleged that the statute of limitations does not bar my challenges to the Regulations because the challenged schedules are continuously amended through final agency actions – i.e. rulemaking. ER-59–60. I additionally alleged that the Defendants currently and criminally enforce the Regulations against me. ER-57. Moreover, Defendants rely on the 1997 version of § 1300.01 “Definitions relating to controlled substances” as support of their statute of limitations argument, but fail to acknowledge the 2021 changes to that subpart. ER-59–60.

Finally, I assert that none of my claims involve challenging the schedule placement of specific substances, rather I challenge unconstitutional practices and policies, thus, 21 U.S.C. § 877 does not apply and the district court has federal question jurisdiction over my claims. ER-58–60.

D. The Decision Below

The district court issued an Order on March 28, 2024 dismissing my First Amended Complaint without leave to amend, conferring standing to challenge the

CSA, AZCSA and related criminal provisions, and denying standing to challenge the Conventions. ER-4–22.

1. Standing

The district court held that I met the injury-in-fact requirements for Article III standing. ER-7–11. However, it did not extend that grant of standing to my challenge to the Conventions because it found the Conventions are not self-executing, and thus, "do not serve to impose legal obligations upon Plaintiff that are enforceable in this Court." ER-11–13.

2. Freedom of Thought Claims

The district court applied standards reserved for assessing Freedom of Expression claims to dismiss my Freedom of Thought claims wholesale, finding that I "failed to carry [my] burden of showing how the CSA infringes on [my] ability to convey any particularized message." ER-17–19.

3. Procedural Due Process Claims

The district court contextualized my procedural due process claims as purely legislative and dismissed those claims because I made "no allegations that Congress failed to follow proper legislative procedures in enacting the CSA." ER-16–17.

4. APA claims

The district court dismissed my APA claims because the court was unclear on what final agency action I was challenging and, because the initial regulations implementing the CSA were promulgated in 1997, it found the statute of limitations barred my claims. ER-21–22. The court further stated that my claims alleging constitutional violations of the Regulations are dismissed for the same reasons it already provided above. *Id.*

SUMMARY OF THE ARGUMENT

I. The district court rejected standing for me to challenge the Conventions because they are not self-executing. However, self-execution is just one of two ways an international treaty has the force of domestic law enforceable in our courts. The Conventions were explicitly implemented under the CSA and, thereby, became domestic law and are currently domestically enforced against me. Therefore, I have standing to challenge the Conventions.

II. The district court dismissed my First and Fourteenth Amendment and Arizona State Constitution claims for violations of the First Amendment's protection of Freedom of Thought. The district court incorrectly required I plead my Freedom of Thought claims according to Freedom of Expression standards. As I alleged multiple facts to support a plausible claim for violations of my Freedom of Thought rights, and as similar violations by the government have

been invalidated by the Supreme Court, my claims should not have been dismissed.

III. The district court dismissed my procedural due process claims because admittedly it was unclear on the basis of those claims. However, I alleged in the FAC that the procedures used by the Defendants to deprive me of multiple cognizable liberty rights are fundamentally unfair, biased and inadequate, and I alleged multiple pages of facts in support thereof.

IV. The district court dismissed my APA claims admittedly because it was unclear about my exact challenge and because my claims are time-barred. However, I alleged in the FAC that the Regulations violate the APA because they are arbitrary, capricious, an abuse of discretion, not in accordance with law, are unconstitutional and that the violations are ongoing as Defendants currently enforce the Regulations against me, and included numerous facts in support thereof. Therefore, my APA claims should not have been dismissed.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's dismissal of a complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *See Mendiondo* v. *Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1102 (9th Cir. 2008). In so doing, the Court accepts "all factual allegations in the complaint as true and

construe[s] the pleadings in the light most favorable to the nonmoving party." *Knievel* v. *ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

This Ninth Circuit recognizes the pleading standards as liberal. *Fontana v. Haskin*, 262 F.3d 871, 876-77 (9th Cir. 2001) ("Pleadings need suffice only to put the opposing party on notice of the claim. . . . Specific legal theories need not be pleaded so long as sufficient factual averments show that the claimant may be entitled to some relief.") (internal citations omitted). Moreover, the rules provide, "All pleadings shall be construed as to do substantial justice," Fed. R. Civ. P. 8(f), and "[n]o technical forms of pleading . . . are required." Fed. R. Civ. P. 8(e)(1). A plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The district court is not free to draw an inference in favor of the Defendants. To the contrary, all reasonable inferences must be drawn in favor of the non-moving party. *Id.* at 555.

ARGUMENT

I. I Have Standing to Challenge the Conventions

The district court granted me standing to challenge the CSA, but rejected standing to challenge the 1961 Single Convention on Narcotic Drugs, and the 1971 Convention on Psychotropic Substances (the Conventions) because the Conventions are not self-executing. ER-11–13. However, international treaties have the force of domestic law and, thus, can be domestically challenged when

treaties have been implemented by an act of Congress into domestic law. The district court erred when it failed to consider whether congress enacted statues implementing the Conventions, and instead denied standing to challenge the Conventions solely on the basis that they are not self-executing, which is only one of the two ways a treaty becomes domestic law.

A. When Congress Enacted the CSA Implementing the Conventions it Created Enforceable Federal Law

When Congress enacts statutes implementing an international treaty, the treaty carries the force of domestic law and can be challenged in domestic courts, subject to meeting Article III standing requirements. *See MedellÍn v. Texas*, 552 U.S. 491, 505 (2008) (Noting that international treaties have the force of domestic law when Congress has either enacted implementing statutes *or* the treaty is self-executing.) (emphasis added). As both Conventions were explicitly implemented through acts of Congress, the district court erred when it denied me standing to challenge them.

1. Congress enacted the CSA implementing the Conventions.

Here, as previously argued in the court below, both of the Conventions have the force of binding domestic law as they were both explicitly implemented through the CSA. ER-57–58. See the following statutory and regulatory provisions:

> In implementing the Convention on Psychotropic Substances, the Congress intends that, . . . control of psychotropic substances in the United States should be accomplished within the framework of the procedures and criteria for classification of substances provided in the [CSA]. 21 U.S.C. § 801a(3)
>
> The United States is a party to the Single Convention on Narcotic Drugs, 1961, and other international conventions designed to establish effective control over international and domestic traffic in controlled substances. 21 U.S.C. § 801(7)
>
> If control is required by United States obligations under international treaties, conventions, or protocols in effect on October 27, 1970, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings required by subsection (a) of this section or section 812(b) of this title and without regard to the procedures prescribed by subsections (a) and (b) of this section. 21 U.S.C. § 811(d)(1) and *see* 21 C.F.R. § 1308.46.

In addition the explicit implementation of the Conventions in the CSA and Regulations, both the CSA and Regulations cite the Conventions multiple times and set forth unique scheduling procedures specific to the Conventions, and the Defendants cite the Conventions in scheduling decisions and in legal actions as being binding on them and as justification for the prohibition and criminalization of possession of substances implicated under the Conventions. ER-57 –58. Further, the Defendants domestically criminally enforce the Conventions and I am subject to the enforcement thereof. Accordingly, the Conventions have the full force of domestic law subject to constitutional challenge and because the Conventions are

domestically and criminally enforced against me, I have standing to challenge them.

2. Article III standing was already granted to me.

Article III standing requirements apply to actions reviewable in our domestic courts, including challenges to international treaties that have been enacted into domestic law. The district court granted me Article III standing to challenge the CSA, AZCSA and related criminal statutes finding that I demonstrated a credible threat of prosecution under statutes that I allege are unconstitutional. ER-8–11. The credible threat of prosecution the lower court found that I face is the direct result of the Conventions. The threat of prosecution comes from my use and possession of substances that are controlled by Defendants and are specifically implicated under the Conventions. Accordingly, I likewise have standing to challenge the Conventions.

II. I Stated a Plausible Claim for Relief for Violations of the First Amendment's Protection of Freedom of Thought

I sufficiently alleged the Defendants violate my Freedom of Thought as secured by the First Amendment and I alleged numerous facts in support thereof. Therefore, the district court's dismissal of my Freedom of Thought claims should be reversed.

A. Freedom of Thought is Secured by the First Amendment

It is well established that Freedom of Thought, which includes our personal beliefs, intentions, intimate feelings, emotions, desires, and motivation, is a fundamental First Amendment right as secured through Freedom of Speech. *See Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2379 (2018) ("Freedom of speech secures freedom of thought and belief."); *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (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."); *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 . . . consideration . . .."). Because I alleged in my FAC that my First Amendment fundamental right to Freedom of Thought has been abridged by Defendants, the principles thereof govern my First and Fourteenth Amendment and Arizona State Constitution Claims. ER-178–182, 185–186, 190–192.

B. The Government is Prohibited from Probing into or Considering Our Thoughts for the Purpose of Creating Criminal Legislation

The First Amendment's protections of Freedom of Thought strictly prohibit *any* consideration of or probing into one's thoughts to create criminal legislation or otherwise deny freedoms, privileges, or benefits. *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, 7 (1971) (Reversing a bar admission denial where the application probed into the applicant's political beliefs and stating, "[W]hatever justification may be offered, a State may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes.").

As alleged, the explicit purpose of both the CSA and Conventions is to prevent and combat "drug abuse". ER-146, 170. The definition of "drug abuse", under both the CSA and Conventions, is one's thoughts, feelings, and desires before, during, and after consuming a substance. ER-43–44, 68–69, 75–79, 178–

181. The definition of the required scheduling factor "potential for abuse" is defined as the likelihood those personal cognitive and emotional processes will occur within an individual should they consume the substance under evaluation. ER-43–44, 68–69, 75–79, 178–179. Thus, "high potential for abuse," a Schedule I and II required factor, could mean that the consumption of the substance produces a high likelihood that one might feel joy (euphoria) and might frequently think about using that substance.

To fulfill the explicit purpose of combating and preventing drug abuse, the government probes into our private psychological and emotional processes and does so as the dominant method used in all scheduling evaluations and decisions. With each drug evaluation, the government conducts unlawful probing to speculate and predict what a substance or drug might do to our thoughts, consciousness, mood, or emotions or why we might want to use a particular substance. ER-43–46, 68–71, 178–181. Depending on the cognitive, psychological, and emotional effects the government predicts will occur upon consumption, that substance will be scheduled and its personal possession will be criminalized accordingly.

Moreover, drugs that do not have a "potential for abuse" – potential to produce certain thoughts, feelings and desires – are not even considered for control under the CSA or Conventions. ER-43, 46, 68, 70–71, 144, 170. It is only those substances that might affect our thoughts, moods, and emotions that are considered

for control. This means that before a substance or drug is considered for control and potential criminal penalties for its possession, it must pass the initial threshold of having the potential to affect our thoughts, feelings and desires, and thereby, the First Amendment violations begin.

To assess drug abuse potential of each substance, the government, including the World Health Organization in its evaluations under the Conventions, goes to extraordinary and invasive lengths to predict the personal, intimate, cognitive, psychological and emotional contents of one's mind should one consume the substance under evaluation. As alleged in greater detail in the FAC, they browse chat rooms on the internet; they perform animal and human studies to extract and document cognitive, psychological, and emotional affects caused by consumption of substances; they profile individuals to presume motives and thoughts; they look at lifestyles, hobbies, behaviors, and non-conformist tendencies of individuals; they consider voluntary admissions to treatment centers and whether the decision to consume a substance came from one's own thoughts or that of a third party; and they direct pharmaceutical companies to provide predictions of thoughts, mood and emotional effects of drugs. ER-75–98, 178–181. Every step of the scheduling process, under both the CSA and Conventions, involves probing into and predicting potential cognitive and emotional affects and motivations for using substances and drugs. These so-called findings are then documented in the

evaluations and are used as determinative by the government to schedule drugs and create criminal legislation.

It is not simply the probing of our thoughts that make the Defendant's conduct egregious as the government is known to do that in many regards – it is the creation of criminal penalties to prevent and penalize those potential thoughts that remarkably crosses the line into sacred realms of our human existence and violates the Constitution. *See Stanley v. Georgia,* 394 U.S. 557, 564 (1969) ("Th[e] right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society. Moreover, in the context of this case — a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home — that right takes on an added dimension."). The criminal penalties advance the government's explicit desire to control our thoughts, thereby, harming millions of our fellow humans, separating them from their families and society, placing them in cages, and branding them criminals, negatively affecting their chances for success among society, simply because they held in their hand a product, that if consumed, might cause thoughts, feelings, and desires that government does not want. ER-46, 70–71. This scheme is one of the most stark and disgusting instances of First Amendment violations and harm to humans in our history.

It is our unalienable human right to think and feel what we please, to explore our consciousness in the privacy of our own mind, and when the government dives into those intimate realms, for the purpose of creating criminal statutes and penalizing people, it has violated the most sacred aspects of our human existence. There is no lawful purpose or rationale the government could provide for probing into our thoughts for the purpose of creating criminal legislation that would be excusable by the courts and not violate the First Amendment. Similar legislation and procedures have historically and consistently been invalidated by our courts. Accordingly, I have stated a plausible claim for relief under the First and Fourteenth Amendments, and Article 2 of the Arizona State Constitution.

C. The Government is Prohibited from Criminalizing Personal Possession of Substances for the Purpose of Controlling or Preventing Thoughts it Deems Undesirable

Laws that criminalize personal possession of a product because the consumption thereof could lead to certain thoughts, emotions or behaviors the government deems immoral or unfavorable violate the First Amendment protections of our Freedom of Thought. The Supreme Court has decided this exact issue when it considered whether criminalizing possession of material the government deemed offensive, in the government's expressed interest of protecting one's mind and preventing thoughts that could lead to criminal activity, violated the First Amendment. *See Stanley v. Georgia*, 394 U.S. 557 (1969).

The Court in *Stanley* found that First Amendment rights included the 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. *Id.* at 564-65. The government in *Stanley* asserted the right to protect the individual's mind from the effects of obscenity, which the Court found was an assertion of the government's right to control the moral content of a person's thoughts and that it cannot "constitutionally premise legislation on the desirability of controlling a person's private thoughts." *Id.* at 565-66. The Court held that the First and Fourteenth Amendments prohibit making mere private possession of material the government finds offensive a crime and the government's power simply does not extend to possession by an individual in the privacy of his own home. *Id.* at 568; *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (Invalidating a law criminalizing possession of material in the government-asserted interest of protecting one's mind.).

The simple act of holding a substance or drug in one's hand – personal possession – is, in and of itself, harmless. As stated above, the only reason provided by the government to criminalize such harmless conduct is because of what the consumption of that product might do to one's personal and private cognitive, phycological or emotional processes. I know of no other law criminalizing personal private conduct like this that has survived judicial review.

Yet, the CSA and Conventions have been allowed to persist for over 54 years causing the imprisonment of millions. As stated, the government's admitted and undeniable reason to criminalize such personal private action is to prevent and combat drug abuse.

The Defendants only argument is that the CSA and Conventions only criminalize conduct, and therefore, do not implicate First Amendment protections. ER-114–115, 131–133. However, the courts would be amiss to allow the Defendants to hide behind such assertions that have harmed millions of people by ignoring First Amendment Freedom of Thought implications and without considering the government's explicitly stated purpose to criminalize such conduct.

As alleged in the FAC, the government's stated purpose within the CSA, Conventions, and related State Law, of combating and preventing drug abuse is to prevent, chill and deter certain intimate thoughts, feelings, and desires it deems unfavorable for us, and it does so through the enforcement of criminal penalties for personal private possession of substances that could lead to those thoughts. ER-178, 186. I alleged numerous facts in the FAC demonstrating this unlawful statutory and regulatory scheme and purpose. Accordingly, I have stated a plausible claim for relief of violations of my Freedom of Thought as secured by the First and Fourteenth Amendments, and Article 2 of the Arizona State Constitution.

D. Expression of Thought is not Required for Our Thoughts to be Protected from Government Intrusion

The district court incorrectly analyzed my First Amendment Freedom of Thought claims under principles reserved for Freedom of Expression claims. ER-17–19. It, therefore, erred when it dismissed my First Amendment claims because I "failed to carry [my] burden of showing how the CSA infringes on [my] ability to convey any particularized message". ER-19. Although I alleged possession and consumption of substances is expression of our thoughts, intentions, desires, and feelings surrounding those substances, such allegation of expression is not required to state a claim of Freedom of Thought violations. ER-44, 69, 178–180, 185–186, 190 –192. It is the unlawful probing by the government into our minds, in and of itself, and then its use of the presumptions of thought made, therefrom, to determine criminal penalties, that violate our fundamental Freedom of Thought. See *Ashcroft*, 535 U.S. at 253 ("[T]he Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct."); and *Speiser*, 357 U.S. at 535-36 ("[W]hat one thinks or believes . . . ha[s] the full protection of the First Amendment. It is only his actions that government may examine and penalize. . . . What a man thinks is of no concern to government.")

As alleged, the main reason personal private possession of certain substances is criminalized is because consumption thereof might lead to certain thoughts, feelings, and desires the government does not want individuals to have. Since the

inception of the CSA and Conventions, all scheduling decisions made by the government include an alarming amount of intrusion into and prediction of what our thoughts, feelings and desires would entail should we consume the substances considered for control. ER-75–98, 178–181. Nothing in the CSA and Conventions include predictions or desired prevention of future expression or criminal conduct resulting from consuming a substance. Nor could they, as criminalizing conduct, such as possession, for the purpose of preventing potential future crime is unlawful. *Stanley,* 394 U.S. at 566-67 ("[T]he [government] may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.").

Therefore, as it is the thoughts themselves the government seeks to prevent through its combat against drug abuse and not the expression thereof, it would be contrary to justice to require that I state a plausible claim of Freedom of Expression to receive First Amendment Protection of my Freedom of Thought. Because I stated a plausible claim for relief under the First Amendment's protections of Freedom of Thought, the district court erred when it dismissed my First Amendment claims through its improper focus and analysis solely on Freedom of Expression standards. Accordingly, the district court's dismissal of my

First and Fourteenth Amendment, and Arizona State Constitution claims should be reversed.

III. I Alleged Violations of My Procedural Due Process Rights

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). The district court dismissed my procedural due process while admitting it was unclear on the basis of my claims, but did not request oral argument to clarify nor did the court draw in my favor reasonable inferences as required under *Twombly*. 550 U.S. at 555-56. ER-16–17. It dismissed my claims by presuming they were purely legislative and ignoring the multiple pages of facts in the FAC showing inadequate procedures and lack of fundamentally fair process.

A. I Alleged Deprivation of 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." *See Bd. of Regents*, 408 U.S. at 572. I alleged multiple cognizable liberty interests in the FAC. ER-184–185. 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."); *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 and Conventions imposes criminal penalties for conduct I engage in, I identified a cognizable liberty interest invoking procedural due process requirements.

I also alleged multiple liberty interests in exercising personal private choices, and the deprivation thereof. ER-184–185. Courts have long recognized that freedom of choice and privacy are protected liberty interests. *See Lawrence v. Texas*, 539 U.S. 558, 562 (2003). ("Liberty protects the person from unwarranted government intrusions into a dwelling or other private places."); *Washington v. Glucksberg*, 521 U.S. 702, 724 (1997) ("[L]iberty protected by the Due Process Clause includes 'basic and intimate exercises of personal autonomy[.]'"); and *Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 341 (1990) ("[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 . . .."). As I alleged cognizable liberty rights, the government must provide adequate procedures before the deprivation thereof.

B. I Alleged Inadequate and Fundamentally Unfair Process

When determining what process is due, it is important to consider the precise liberty at stake. *See Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961) ("[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."). Here, as alleged, when it comes to personal choice, our physical and mental wellbeing and what we are permitted to place or prohibited from placing in our own bodies, it cannot be understated the criticality of full-disclosure, accuracy, thorough unbiased analysis, transparency, prompt consideration of all new, evolving, and relevant information, and the freedom of meaningful choice. ER-143. The scheduling evaluations and decisions under the CSA and Conventions satisfy none of these critical elements in a meaningful manner. Moreover, as alleged, what we are permitted and limited to placing in our own bodies for our own well-being and what we are allowed to feel and think is far too important of a subject matter to place in the hands of a law enforcement agency, such as the DEA, whose function is to prosecute and imprison people. ER-141, 174.

In light of the importance and personal intimate nature of these liberty interests, the fundamental fairness and adequacy of the procedures is critical.

Keates v. Koile, 883 F.3d 1228, 1236 (9th Cir. 2018) (Noting that the government may interfere with the freedom of choice and privacy only if they provide fundamentally fair procedures). Further, "where a statute imposes criminal penalties, the standard of certainty that due process requires is higher." *See Forbes v. Woods*, 71 F. Supp. 2d 1015, 1018 (D. Ariz. 1999) (internal quotation omitted).

1. I alleged inadequate process with regard to the CSA.

In the FAC, I alleged numerous facts, with supporting evidence, of the numerous unfair, biased, highly subjective and unevenly applied practices used by the government when evaluating substances to determine schedule placement and criminal penalties, caused, in part, by a lack of definitions and consistent, meaningful procedures. ER-148–166, 174–178. These include, but are not limited to, the government's explicit and deliberate failure to comply with statutory requirements when evaluating and scheduling drugs, the bias application of the required findings and factors when evaluating pharmaceuticals versus non-pharmaceuticals, the failure to evenhandedly consider substantial evidence of harm, medical and scientific studies, and other important evidence when evaluating drugs, the use of decades-old information and failure to consider new information, the financial conflict of interest of the FDA, the lack of procedures, definitions, and processes to ensure fair consistent decision making, and the absence of rationales or nexuses tying drug evaluations to ultimate scheduling decisions. *Id.*

The principles of procedural due process include consideration of whether the deprivation would have occurred had due process been given. *See Nelson v. Colo.*, 137 S. Ct. 1249, 1261 n.2 (2017). As alleged in the FAC, if the factors were defined, tied to the ultimate decisions, and applied consistently, in a non-arbitrary and non-biased manner, and all available important information was given due consideration and equal weight, the schedules would look vastly different than they currently do. ER-157. Meaning, the deprivations of the aforementioned liberty interests likely would not exist if Defendants followed adequate and fair procedures.

In the FAC, I attempted to do a side-by-side comparison of two recent scheduling decisions – one involving a pharmaceutical and one involving a non-pharmaceutical – and such comparison was near impossible due to the extreme differences and subjectivity between the two. ER-150–157. However, I was able to uncover numerous discrepancies, not only in those evaluations, but permeated throughout scheduling evaluations and decisions made since the inception of the CSA and Conventions. The Defendants' scheduling regime that leads to deprivation of such important freedoms is highly offensive to the fundamental principle of justice, and thus, fails to meet even the minimum requirements of adequate process proportionate the liberty rights at stake. Accordingly, I alleged a

plausible claim for relief for procedural due process violations with regard to the CSA

2. I alleged inadequate process with regard to the Conventions.

As alleged in the FAC, the Conventions suffer from the same, and some additional, procedural defects as those described above with regard to the CSA, such as a lack of definitions, meaningful procedures, highly subjective scheduling decisions, failure to consider new information about scheduled drugs, and failure to update the schedules. ER-148–166, 169–178. As further examples of inadequate procedures that I alleged in the FAC, the Conventions provide no procedures, standards, or definitions governing the elements required in WHO's drug assessment or governing the Commission's ultimate decision, nor is Who or the Commission required to consider any specific information or scientific studies. ER-171–173. Similar to the process used under the CSA, WHO's scheduling recommendation process largely consists of comparing the substance or drug under review to a previously scheduled substance. If WHO finds the new drug has "similar ill effects" to an already scheduled substance, it will schedule it the same, regardless of how long ago the comparator substance was scheduled and without regard to information discovered since its initial scheduling. ER-170

The Conventions also lack any mechanisms to ensure the schedules continually reflect current information. ER-171. This is problematic as the only

occasion by which a currently-scheduled substance is reviewed is through the subjective process of when a party, WHO, or the Commission has information they feel justifies a change. ER-169–170. Even then, despite all the information a party might submit regarding a substance or suggested schedule change, the Secretary-General has full discretion to forward only what information he deems relevant to the other parties, the Commission and WHO. *Id.*

Further, the U.S. has failed to set forth any procedures by which I, or anyone, could submit information I believe may justify a change to the schedules. This means that when a U.S. citizen submits a petition to DEA to request a schedule change to the Conventions, the U.S. is not required to submit that information to the Secretary-General for review nor is there anything mandating or governing a review by the U.S. government of this information. To the contrary, the DEA is required under § 811(d)(1) to control substances as mandated by the Conventions without making any findings required by §§ 811(a) or 812(b), without following the rulemaking procedures under §811(a), and without securing an evaluation and recommendation from HHS.

Finally, there is a complete absence of anything defining the Convention's four schedules. ER-172. The only element differentiating the schedules are the various controls required for each schedule. The Conventions' schedules are devoid of any required findings, descriptions, standards, or anything else requiring

justification for schedule placements, thereby providing the Commission, or reviewing entities, full discretion with no accountability.

As alleged in the FAC, the lack of procedures, guidance, consistency, and the amount of discretion that has been given to the United Nations entities to determine what we can legally put into our own bodies in the privacy of our own home has led to numerous arbitrary scheduling decisions and deprivations of multiple liberty interests in violation of due process guarantees, such as placing substances that WHO has admitted are non-addictive, nontoxic, with psychological benefits on Schedule I, while placing deadly drugs known to cause dependency in a matter of days on Schedule II-V. ER-160, 181. Accordingly, I alleged a plausible claim for relief for procedural due process violations with regard to the Conventions.

IV. The Schedules of Controlled Substances are Subject to Judicial Review under the APA

The APA provides that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. § 704. The APA further provides that if the reviewing court finds that an agency action was "arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence," or "contrary to constitutional right" the court shall hold unlawful, reverse or set aside the action. 5 U.S.C. § 706(2)(A), (B).

A. Administrative Regulations are Final Agency Actions Subject to Judicial Review

The Supreme Court has established a two-part test for determining whether an agency action is final. The action must: (1) "mark the consummation of the agency's decisionmaking process [and] must not be of a merely tentative or interlocutory nature"; and (2) "be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). It is well established that the issuance of administrative regulations is final agency action. *See Fed. Trade Comm'n v. Standard Oil Co.*, 449 U.S. 232, 239-40 (1980) (summarizing multiple cases to note that regulations are definitive statements and have the status of enforceable law). The challenged regulations, 21 C.F.R. § 1300.01 *et seq*., house the Schedules of Controlled Substances (§§ 1308.11 –.15), the rulemaking procedures by which scheduling changes, additions, or deletions are made (§ 1308.43), and provide the administrative procedures by which control required under the Conventions is implemented (§ 1308.46). Accordingly, I identified final agency action – the issuance of currently enforced regulations – subject to judicial review.

B. The Regulations are Contrary to Constitutional Rights and are Arbitrary, Capricious, an Abuse of Discretion, and not in Accordance with Law

The APA provides that if the reviewing court finds that an agency action was "arbitrary, capricious, an abuse of discretion, not in accordance with law, or

unsupported by substantial evidence," or "contrary to constitutional right" the court shall hold unlawful, reverse or set aside the action. 5 U.S.C. § 706(2)(A), (B). The district court dismissed my APA claims while admitting it was unclear about my exact challenge, but did not request oral argument to clarify nor did the court draw in my favor reasonable inferences as required under *Twombly*. 550 U.S. at 555-56. ER-21–22. However, I alleged in the FAC that the Regulations violate the APA because they are arbitrary, capricious, an abuse of discretion, not in accordance with law, are unconstitutional and that the violations are ongoing as Defendants currently enforce the Regulations against me, and I included numerous facts in support thereof.

1. The federal Defendants engage in unconstitutional rulemaking.

The APA permits courts to review and provides a remedy for alleged unconstitutional rulemaking. *See Sky Ad, Inc. v. McClure*, 951 F.2d 1146, 1148 (9th Cir. 1991), and *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502 (9th Cir. 1988). The Supreme Court in *Bullfrog Films* reviewed a claim under the APA that regulations implementing an international treaty violated the First and Fifth Amendments. *Id.* The court reviewed the regulations for constitutional validity in the same manner they would for any other type of law and found that the regulations violated the First and Fifth Amendments. *Id.* at 514.

As alleged in the FAC and discussed herein the practices and procedures used by the government pursuant to the CSA and Conventions in the creation and criminal enforcement of and continuous changes to the schedules violate the First Amendment's protection of Freedom of Thought and the Fifth Amendment's due process requirements. I further alleged, throughout the FAC, that Defendants use the same unconstitutional practices and procedures for each scheduling decision they make through rulemaking, and thus, the violations are ongoing. ER-148–150, 157–163, 169–181. The Regulations are where the Schedules of Controlled Substances are published by rule as required under the CSA, and thereby, suffer the same constitutional defects as previously alleged. Accordingly, I stated a plausible claim for relief under the APA for constitutional violations.

2. Defendants' administrative actions are arbitrary, capricious, an abuse of discretion, and not in accordance with law.

The APA permits courts to review and provides a remedy for rulemaking, including agency "findings, and conclusions" when they are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "[A]n agency rule would be arbitrary and capricious if the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or product of

agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The CSA grants the DEA, through the Attorney General, discretion to make rules to add, transfer, or remove substances from the schedules, to make findings about substances' or drugs' potential for abuse, and to determine whether substantial evidence of potential abuse exists. 21 U.S.C. § 811(a), (b). The CSA also grants discretion to the DEA to "promulgate and enforce any rules, regulations, and procedures which [it] may deem necessary and appropriate for the efficient execution of [its] functions. . .." 21 U.S.C. § 871(b). I alleged numerous facts in the FAC demonstrating how the Defendants' actions, findings, and conclusions surrounding the scheduling of substances and assessing potential for abuse, are arbitrary and capricious, and abuse of discretion and not in accordance with law. ER-146–166. Although the alleged facts are too numerous to relist here, some examples include the governments explicit disregard and failure to comply with statutory duties under the CSA when evaluating and scheduling drugs, the bias application of the required findings and factors when evaluating pharmaceuticals versus non-pharmaceuticals, the failure to evenhandedly consider evidence of harm and other important evidence when evaluating drugs, the use of decades-old information and failure to consider new information in drug evaluations, the financial conflict of interest of the FDA, the lack of procedures,

definitions, and processes to ensure fair consistent decision making, and the absence of rationales or nexuses tying drug evaluations to scheduling decisions.

Further, as alleged, the scheduling decisions made pursuant to the Conventions are arbitrary and an abuse of discretion. ER-169–178. And as the DEA is required under § 811(d)(1) to control substances as mandated by the Conventions without making any findings required by §§ 811(a) or 812(b), without following the rulemaking procedures under §811(a), rules made by Defendants pursuant to the Conventions are likewise arbitrary and an abuse of discretion.

Because I stated sufficient facts in the FAC alleging that Defendants administrative actions are arbitrary, capricious, an abuse of discretion, and not in accordance with law, I stated a plausible claim for relief under the APA.

C. Principles of Administrative Exhaustion do not Apply as Courts are the Sole Arbiters of Questions of Law

In their Motion to Dismiss, the federal Defendants allege that administrative exhaustion principles apply to my APA claims. Doc. 40 p. 11. However, constitutional or statutory determinations are questions of law subject to *de novo* review and are reserved for Courts, not the agencies, as agencies are not competent arbiters of the legal or constitutional validity of their own regulations. *See* 5 U.S.C. § 706 (". . . the reviewing court shall decide all relevant questions of law . . .."); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 480 (1991); *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.); *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.). Moreover, the APA provides specifically for review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *and see Bowen v. Mass.*, 487 U.S. 879, 901 (1988) ("[T]he doubtful and limited relief available in the Claims Court is not an adequate substitute for review in the District Court."). As alleged in my Opposition to the Federal Defendants' Motion to Dismiss, Defendants are not competent arbiters of questions of law and cannot grant the relief requested. ER-58–59. Accordingly, my claims under the APA are reviewable by the courts.

D. The District Court has Federal Question Jurisdiction to Review My APA Claims

In their Motion to Dismiss, the federal Defendants argue that 21 U.S.C. § 877 obligates me to assert my APA claims directly to the appellate courts. ER-109–110. However, federal district courts may exercise federal question jurisdiction over an action involving constitutional or statutory determinations. *See McNary,* 498 U.S. at 483-84. The *McNary* court looked to an exclusive jurisdiction statute similar to § 877 and, permitting district court review, found that a court of appeals would not have an adequate record as to alleged unconstitutional practices, would lack a district court's factfinding and record-developing capabilities, and the

statutory provision requiring appellate review was meant for single agency determinations, not challenges to unconstitutional practices and policies used by the agency. *Id*. at 492-94. It held the district court had federal question jurisdiction to hear respondents' constitutional and statutory challenges and stated "[w]ere we to hold otherwise . . . meaningful judicial review of their statutory and constitutional claims would be foreclosed." *Id.* at 483-84.

Like the respondents in *McNary*, I do not challenge a single administrative action such that findings of fact or any established record thereof could be considered. I allege unconstitutional administrative practices and policies used by the Defendants when making their ongoing scheduling decisions. Therefore, my APA claim is reviewable by the district 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.

E. My Challenge to the Regulations is Not Time-Barred

"When the continued enforcement of a statute inflicts a continuing or repeated harm, a new claim arises (and a new limitations period commences) with each new injury." *Flynt v. Shimazu*, 940 F.3d 457, 462 (9th Cir. 2019). The Schedules of Controlled Substances are published in the Code of Federal Regulations, are amended regularly with each new addition or removal of substances, are continuously and currently criminally enforced by the DEA, and I

am continuously and currently subject to their criminal enforcement thereof. The CSA and Regulations are inextricably intertwined – the Defendants currently and criminally enforce the CSA based on the Schedules that are codified and amended in the Regulations, not in the CSA. Thus, due to the ongoing violations described herein and the DEA's current and continuing enforcement of the schedules codified in 21 C.F.R. §§ 1308.11 – .15, my challenge to the Regulations is not time-barred.

CONCLUSION

For the foregoing reasons, the judgment of the district court denying standing, in part, and dismissing Counts I–V and VIII should be reversed.

Date: August 13, 2024

/s/ Jennifer N. Murphey
Appellant/pro se

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

Instructions for this form: http://www.ca9.uscourts.gov/forms/form17instructions.pdf

9th Cir. Case Number 24-4085

The undersigned attorney or self-represented party states the following:

[X] I am unaware of any related cases currently pending in this court.

[ ] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

[ ] I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Signature s/ Jennifer N. Murphey **Date** August 13, 2024
*(use "*s/[typed name]*" to sign electronically filed documents)*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number 24-4085

I am the attorney or self-represented party.

This brief contains 12,309 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[X] complies with the word limit of Cir. R. 32-1.

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Signature _s/ Jennifer N. Murphey_____ **Date** _August 13, 2024____
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