

**In the Iowa District Court
in and for
Polk County Iowa**

George McMahon, and Barbara
Douglass, Petitioners

vs.

The Iowa Board of Pharmacy,
Respondent

Docket No. CV7415

Petition for Further Judicial Review of Agency Action

Following Remand from the Iowa District Court
The Hon. Joel D. Novak, presiding

COME NOW George McMahon and Barbara Douglass to respectfully petition the Court to review the “Supplemental Order” and decision of the Iowa Board of Pharmacy made pursuant to this Court’s prior remand with instructions, to wit:

Introduction¹

In Iowa, marijuana is listed as a controlled substance in two schedules of the Iowa Controlled Substances Act (Iowa Code Chapter 124). Schedule I of the act controls substances that have no “accepted medical use” in the United States and which have a “high potential for abuse;” Schedule II controls substances that do “have accepted medical use in treatment in the United States,” notwithstanding their “high potential for abuse.” The Iowa Board of Pharmacy is vested with a legal duty to recommend schedule changes or deletions to the the legislature when a controlled substance no longer meets the criteria for listing in the schedule where it has been listed. *E.g.*, Iowa Code, §§124.203, 124.205.

In prior proceedings before this Court the Petitioners argued that in the United States, it is the states—and not the federal government—that define the bounds of acceptable medical practice and what drugs or substances have accepted medical use. *See, Gonzales v. Oregon*, 546 U.S. 243, 126 S.Ct. 904, 163 L.Ed. 2d 748 (2006)² Consequently, the proper classification of

¹ The Introduction is intended to provide an overview of the litigation and is not part of the formal allegations of this petition.

² Holding federal Controlled Substances Act, did not give Attorney General power to decide standards of medical practice by proscribing use of certain drugs for use in physician assisted suicide

substances and drugs on the basis of their medical utility is entirely a function of decisions about medical practice made by the individual states.

To date, at least 13 states encompassing 1/4 of the U.S. population³ have come to legally recognize that marijuana has accepted medical use in treatment of various medical conditions. Based on the decisions made by those states, marijuana currently does have “accepted medical use in treatment in the United States” and, as Petitioners argue, no longer meets the statutory criteria for listing in Schedule I of the Iowa Controlled Substances Act.

This case is an appeal from a second decision by the Iowa Board of Pharmacy not to recommend removal of marijuana from Schedule I of Iowa’s Controlled Substances Act. Petitioners assert that the Board’s decision is based on erroneous and unstated criteria and/or upon criteria which this Court rejected in its prior (and un-appealed) ruling. Petitioners respectfully submit that the Board of Pharmacy has not complied with this Court’s decision and seek relief.

³ Approximately thirteen states, comprising 23.97% of the United States Population, have statutorily determined that marijuana is acceptable for medical use under medical supervision.

The states are: **Alaska** 670,053, **California** 36,457,549, **Colorado** 4,753,377, **Hawaii** 1,285,498, **Maine** 1,321,574, **Montana** 944,632, **Nevada** 2,495,529, **New Mexico** 1,954,599, **Oregon** 3,700,758, **Rhode Island** 1,067,610, **Vermont** 623,908, **Washington** 6,395,798 **Michigan** 10,045,643. {Based on U.S. Census Bureau Data estimates for 2006.}

Jurisdiction, Parties & Venue

1. This is an action for judicial review as authorized by Iowa Code Section 17A.19 which is part of the Iowa Administrative Procedures Act.
2. The names of the petitioners to this action are George McMahon, and Barbara Douglass.
3. The Petitioners are legal marijuana users whose medical conditions can only be effectively controlled (or controlled without unacceptable side effects) through the use of marijuana and, consequently, each of the Petitioners has an interest in any action by the Pharmacy Board and legislature that removes or reduces the stigma and potential for illegality attached to the medical prescription and use of marijuana by themselves and others.
4. Each of the Petitioners is a citizen and resident of Iowa.
5. The Iowa Board of Pharmacy [*Pharmacy Board*] is the agency named as the Respondent in this action,
6. The Pharmacy Board maintains its principal headquarters in Polk County Iowa.
7. Subject matter jurisdiction and venue of this matter properly lies in Polk County, Iowa by virtue of Iowa Code §17A.19(2).
8. This is a continuation of an appeal from a final order or declaratory ruling by the Iowa Board of Pharmacy examiners, dated October 7th, 2008, indicating that it will not grant the

request of the Petitioners and Carl Olsen to recommend the removal of marijuana from Schedule I of the Iowa Controlled Substances Act AND an appeal of the “Supplemental Order” issued by the Pharmacy Board on July 21st, 2009⁴ in response to this Court’s remand of certain issues to the agency. A true copy of the Board’s “Supplemental Order” is appended hereto, Marked “Petition Exhibit A” and by this reference, is made a part hereof.

9. The ultimate action appealed from is the refusal of the Pharmacy Board to make a recommendation to the Iowa State General Assembly that marijuana be removed from Schedule I of the Iowa Controlled Substances Act.

10. The Petitioners have exhausted their administrative remedies and this is an appeal from a final order of the respondent agency.

Allegations

11. Petitioners herewith reassert and re-incorporate the allegations of their original Petition for Judicial Review filed and served on or about October 17th 2008, and state that this is a continuation of that action.

12. Thirteen states, comprising nearly 25% of the United States Population, have statutorily determined that marijuana is acceptable for medical use under medical supervision. [*See fn. 3, supra*].

13. In its prior order, this Court rejected the Board of Pharmacy position that it must conduct an eight factor analysis for the proper scheduling of marijuana under Iowa Code Section

⁴ The Supplemental Order facially responds to Mr. Olsen’s Petition only. The Petitioner’s attorney orally requested a separate ruling from the Board responding to directly to the Petitioners and was refused on the basis that the “Supplemental Order” covered their action as well.

124.201 before it can advise the Iowa General Assembly that marijuana no longer meets the criteria for listing in Schedule I. [Decision, April 21, 2009, p.4, fn.2]

14. Following remand, however, the Board of Pharmacy again relied upon the 8 factor analysis contained in Iowa Code Section 124.201 [Supplemental Order, pp.11-12]

15. In its “Supplemental Order” the Pharmacy Board explicitly rejected this Court’s interpretation of the statutes, stating: “Even if the Board were to ignore the provisions of Iowa Code §124.201, and focus exclusively on Iowa Code §124.203 – as the District Court appeared to do – there would be no evidence in the administrative record to support a finding by the Board that marijuana does not have a high potential for abuse...”

16. This additional legal conclusion by the Pharmacy Board also runs completely counter to this Court’s prior legal determination that lack of a “high potential of abuse” need not be shown before a substance must be recommended for removal from schedule I. [See, Decision, April 21, 2009, p.3 where this Court stated: “As such, the Board’s statement that it ‘would also need to make a finding that marijuana lacks a high potential for abuse’ before it could recommend to the legislature that marijuana be moved from Schedule I to Schedule II is based on an erroneous interpretation of law”]

17. As a third and final reason for denying the relief sought by Petitioners McMahon and Douglass, the Pharmacy Board alternatively ruled that the fact that twelve (*actually, 13*) states have legally recognized marijuana for medical use is insufficient to establish that “marijuana has an accepted medical use in treatment in the United States and does not lack accepted safety for use in treatment under medical supervision.” [Supplemental Order p. 12]

18. In so doing, the Pharmacy Board ruled for the first time that the fact that marijuana has been legally accepted for medical use in other states, is legally insufficient to establish that marijuana has “accepted medical use in treatment in the United States...”

19. This conclusion by the Pharmacy Board is irrational because it ignores, without any stated rationale, the significance of the fact that thirteen states currently accept marijuana for use in medical treatment.

20. The Pharmacy Board’s determination that marijuana does not have “accepted medical use in treatment in the United States” is not founded on any contrary evidence obtained or advanced by the Board and is not supported by reference to any criteria that the Pharmacy Board does consider to be more relevant or probative of whether or not “marijuana has accepted medical use in treatment in the United States.”

21. Accordingly, the Board’s judgment that marijuana has no “accepted medical use in treatment in the United States” is arbitrary and capricious because it is not based on any other discernible legal standard or body of evidence cited by the Board.

22. The Pharmacy Board has not stated what evidence it would accept to prove that marijuana has accepted medical use in the United States.

23. The Pharmacy Board’s apparent decision that it is free to ignore the fact that marijuana has accepted medical use within the United States vests constitutes an abuse of its fact finding discretion and a misinterpretation of its power and duties under Iowa’s Controlled Substances Act.

24. The Pharmacy Board has twice ruled on Petitioner’s petition in the course of its regular meetings without scheduling a evidentiary hearing, providing notice thereof, or specifying what evidence beyond the fact that marijuana has been legally accepted for medical use in other states. it would require to be presented at such a hearing.

25. Petitioners cannot meet their alleged “burden” when they have not been privy to any of the reasons for the Pharmacy Board’s conclusions that marijuana has no accepted medical use in treatment in the United States, and have never been given notice or the opportunity to present formal evidence at a hearing.

26. The actions and determinations of the Pharmacy Board as recounted herein are:

- a. Beyond the authority delegated to the agency by any provision of law,
- b. Based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency,
- c. Taken without following the prescribed decision-making process,
- d. The product of a decision-making process in which the agency did not consider a relevant and important matter relating to the propriety or desirability of the action in question that a rational decision maker in similar circumstances would have considered prior to taking that action, and
- e. Otherwise, arbitrary and capricious or an abuse of discretion.

27. Upon the undisputed fact that thirteen other states have accepted marijuana for medical use in treatment, this Court should determine, as a matter of law, that marijuana “has accepted medical use in treatment in the United States” and, therefore, no longer meets the legal criteria for listing in Schedule I of Iowa’s Controlled Substances Act.

28. This case should be remanded to the Board of Pharmacy with directions to determine which other schedule or schedules, if any, marijuana should be listed in and to make a timely

recommendation to the legislature that marijuana be removed from Schedule I and rescheduled more appropriately.

Prayer for Relief

WHEREFORE, the Petitioners pray for a reversal of the Pharmacy Board's "Supplemental Order," dated July 21, 2009, and for a remand of this case to the Pharmacy Board with instructions requiring the Board to recommend to the next Iowa General Assembly that marijuana be removed from Schedule I along with such other recommendations for possible listing on other schedules as may be consistent with Iowa's Controlled Substances Act. Petitioners further pray for any additional relief as may be equitable in the premises and that the costs of this proceeding, if any, be assessed against the Respondent Board of Pharmacy.

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Respectfully Submitted:

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Affidavit of Service

State of Iowa)
) SS:
County of Polk)

I certify under penalty of perjury that on or before August 18th, 2009 and in compliance with the notice requirements of Iowa Code Section 17A.19(2), I effected service of notice of this action by-mailing copies of this petition to all parties of record in the underlying case before the Iowa Board of Pharmacy Examiners addressed to the parties or their attorney of record as follows:

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