

**IN THE IOWA DISTRICT COURT  
IN AND FOR  
POLK COUNTY, IOWA**

George McMahon, Bryan Scott, and	)	
Barbara Douglass, Petitioners	)	CASE NO. CV 7415
	)	
and	)	
	)	
Carl Olsen, Intervenor	)	RESPONSE TO
	)	RESISTANCE TO
<i>vs.</i>	)	“MOTION FOR REVIEW”
	)	AND
The Iowa Board of Pharmacy,	)	MOTION TO STRIKE
Respondent	)	

Carl Olsen (“Olsen” hereafter), the Petitioner before the Iowa Board of Pharmacy (“Board” hereafter) and the Intervenor in this case, respectfully responds to the Board’s Resistance and Motion to Strike, and respectfully moves this Court for leave to amend his Motion for Review to include a prayer for relief.

**PRAYER FOR RELIEF**

The relief Olsen seeks is an Order from this Court declaring, as a matter of law, that marijuana no longer meets the statutory

requirement for inclusion in Schedule I of the Iowa Uniform Controlled Substances Act.

Olsen is not an attorney. Olsen may not have chosen the right title for his motion for review. Olsen prays this Court will understand the nature of the relief he is seeking.

### **EFFORTS TO SUPPLEMENT THE RECORD**

Olsen's efforts to supplement the record do not bring up any issues that were not raised in Olsen's original petition. Olsen's efforts to supplement the record consisted of three things:

1. Documents showing a change in federal medical marijuana policy that occurred after the Board's Order of October 2008 responding to comments made by the Board at its public hearing on July 29, 2008 and mentioned by the Board in its Order of October 7, 2008.
2. Documents responding to the Board's Supplemental Order of July 21, 2009, challenging Olsen's standing by saying Olsen lacks credibility, all of which are official documents that this Court can take judicial notice of.

3. Documents showing that no one was allowed to speak or present additional evidence at the Board's June 1, 2009, or July 21, 2009, public meetings.

### OLSEN'S STANDING

The misclassification of marijuana in Iowa works an injury to Olsen's right to practice his religion. This due process violation gives Olsen standing to complain of the injury. Olsen has been fighting for his right to practice his religion in the courts for over 30 years, and all the courts have pointed to the classification of marijuana as a compelling governmental interest sufficient to override Olsen's right to practice his religion. *See, Olsen v. Mukasey*, 541 F.3d 827 (8<sup>th</sup> Cir. 2008), *cert. denied, Olsen v. Holder*, No. 08-777 (U.S., May 4, 2009).

In 1984, the Iowa Supreme Court specifically found that an independent finding of compelling state interest was not required to deny Olsen his right to practice his religion. *See, State v. Olsen*, No. 171/69079, (Iowa Supreme Court, July 18, 1984); *See also, Employment Division v. Smith*, 494 U.S. 872, 888 (1990), citing, *Olsen v. DEA*, 878 F.2d 1458, 1467 (D.C. Cir. 1989) ("the federal

appellate courts have found that the government has a compelling interest in controlling marijuana use”).

The compelling interest test requires an individualized finding of compelling interest. Every law is presumed to have been enacted because of some compelling interest. Simply finding that a law was enacted for some compelling interest is not the “compelling interest test.” The “compelling interest test” requires an inquiry more focused than the state’s categorical approach. ***Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal***, 546 U.S. 418, 430-31 (2006) (“the compelling interest test is satisfied through application of the challenged law ‘to the person’ – the particular claimant whose sincere exercise of religion is being substantially burdened”). Olsen has never received the “compelling interest test” and this is clearly explained by the U.S. Supreme Court in ***Employment Division v. Smith***, 494 U.S. 872 (1990) (if the state has created a system of individualized exceptions, the “compelling interest test” must be applied). *See also*, ***Church of Lukumi Babalu Aye v. City of Hialeah***, 508 U.S. 520 (1993) (where the state allows exceptions the “compelling interest test” must be applied).

The courts have made it abundantly clear that unless Olsen can challenge the statutory classification of marijuana, Olsen will not receive the compelling interest test and has no judicial remedy. Congress attempted to remedy this situation by enacting the Religious Freedom Restoration Act (RFRA) in 1993, but the U.S. Supreme Court ruled RFRA was unconstitutional as applied to the states in 1997. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

In *State v. Olsen*, 315 N.W.2d 1, 8 (Iowa 1982), the Iowa Supreme Court identified the Board as the party responsible for depriving Olsen of his right to practice his religion, because the Board is responsible for making scheduling recommendations to the Iowa Legislature. Olsen is now attacking the validity of that classification because the fact that a dozen or more states in the United States have accepted the medical use of marijuana renders marijuana's current classification in Schedule I invalid and the Board has done nothing to correct the misclassification.

The Board cannot simply say that Olsen is not a credible witness because Olsen was arrested, convicted, and imprisoned for possession of marijuana. Olsen's argument that his religion requires the use of

marijuana was found credible by the Iowa Supreme Court in 1984, four years after Olsen was arrested, convicted, and imprisoned for possession of 40,000 pounds of marijuana. *See, State v. Olsen*, No. 171/69079, (Iowa Supreme Court, July 18, 1984); *United States v. Olsen*, 738 F.2d 497 (1st Cir. 1984). Olsen has never been arrested for anything except possession of marijuana, which is completely consistent with Olsen's religious claim.

The Board is really attacking Olsen's standing to bring this action, and Olsen has a right to respond by introducing evidence to support his standing to bring this action. This Court should ignore the Board's suggestion in its Supplemental Order of July 21, 2009, that Olsen cannot rebut the attack on his credibility by introducing evidence to show he has standing. *See, Gettman v. DEA*, 290 F.3d 430, 432 (D.C. Cir. 2002) ("On our own motion, we ordered supplemental briefing on standing, and specifically asked parties to address the issue of injury").

## ARGUMENT

### ***A. Olsen has not made any additional claims for relief.***

The case the Board cites, *Keokuk County v. H.B.*, 593 N.W.2d 118 (Iowa 1999), is inapposite to the facts of this case. Unlike Keokuk County, Olsen has exhausted his administrative remedy, this Court does have subject matter jurisdiction, and Olsen is seeking the appropriate appellate review.

Contrary to the Board's assertion, Olsen has never asked the Board or this Court to make a finding that marijuana has accepted medical use in the State of Iowa. Olsen presented the statutes of 12 other states as evidence to support his claim that marijuana has accepted medical use "in the United States".

This Court may take judicial notice that the Iowa Legislature classified marijuana as having accepted medical use in the United States in 1987. Olsen did not include this fact in his petition because accepted medical use in Iowa does not follow automatically from being placed in Schedule II. Without state legislation authorizing the actual use of marijuana for medical purposes, as has been done in the 12 state statutes Olsen cited, marijuana will not be available for medical use in

Iowa. Coca leaves and opium poppy are both in Schedule II in Iowa, neither is in Schedule I, and neither is available for medical use in Iowa.

In May of 2008, Olsen presented the Board with sufficient evidence to require removal of marijuana from Iowa Code § 124.204, Schedule I. *See*, Iowa Code § 124.203(2), and Iowa Code § 124.204(4)(m). In support of his petition, Olsen cited 12 state laws accepting the cultivation and distribution of marijuana for medical purposes under the supervision of a doctor. In further support of his petition, Olsen supplied a copy of a 1988 DEA administrative law judge's ruling, which held, "Marijuana, in its natural form, is one of the safest therapeutically active substances known to man." See Exhibit #1 attached to Olsen's Petition filed with the Board in May of 2008, In the matter of Marijuana Rescheduling Petition, DEA Docket No. 86-22, Sept. 6, 1988, at pages 58-59. The Board simply rejected Olsen's evidence as being insufficient to support his petition. The Board held that other state laws are not binding on Iowa, and rejected the DEA administrative law judge's findings without explaining why marijuana is no longer extremely safe for use under medical supervision. This

Court can take judicial notice that the Commission on Marijuana and Drug Abuse established by the Controlled Substances Act in 1970 also found that marijuana does not present any threat to public health and safety sufficient to justify criminalizing personal possession and distribution without profit. The DEA administrative law judge is not just “a lawyer” as characterized on page 7 of the Board’s July 21 Supplemental Order. The DEA administrative law judge is the person authorized by the Controlled Substances Act to make findings of fact and conclusions of law regarding the classification of controlled substances.

Contrary to the Board’s argument, Olsen has not presented any additional claims for relief. This Court can simply toss Olsen’s additional exhibits in the trash and Olsen will still have the same claim for relief he had in May of 2008, which is just as valid now as it was then. Olsen’s additional exhibits were simply a response to the failure of the Board to give any logical argument why marijuana must remain in Schedule I now that it has accepted medical use in a dozen or more other states. What other claims does the Board think Olsen is making?

***B. Olsen is not required to file another petition for judicial review.***

This Court still has jurisdiction over the original petition for judicial review filed in this case and Olsen's motion to intervene was granted by this Court. On remand, the Board was given specific instructions and this Court now has jurisdiction to review the Board's Supplement Order to see if those instructions were followed. *See, Winnebago Industries v. Smith*, 548 N.W.2d 542 (Iowa 1996) (further review by district court after remand to agency for supplemental ruling); *City of Hampton v. Iowa Civil Rights Com'n*, 554 N.W.2d 532 (Iowa 1996) (further review by district court after remand to agency for supplemental ruling).

The Board has still failed to adequately explain why it can ignore the plain language of the statute and refuse to remove marijuana from Schedule I after it has been accepted for medical use in treatment in the United States. The Board now says accepted medical use in the United States means accepted use in all 50 states, not just a dozen or more states. This Court must now decide whether the Board's interpretation of the statutory language is a lawful interpretation. Because the Board's interpretation would allow Iowa to find marijuana has no

accepted medical use in the United States even if 49 other states say it does, the Board is actually saying “in the United States” means “in Iowa”. The Board’s interpretation of the statutory language is not reasonable and is not consistent with the entire scheme of the Iowa Uniform Controlled Substances Act. ***City of Sioux City v. Iowa Dept. of Revenue & Finance***, 666 N.W.2d 587, 590 (Iowa 2003) (“Generally, statutory words are presumed to be used in their ordinary and commonly understood sense”); ***Cobb v. Employment Appeal Bd.***, 506 N.W.2d 445, 447 (Iowa 1993) (“[W]e accord an agency only limited deference on matters of law, including statutory interpretation”).

The Board fails to acknowledge that removing marijuana from Schedule I would not make it accepted for medical use in Iowa. Indeed, on its own motion, sua sponte, the Board has decided to hold a series of four public hearings over the next four months to decide whether marijuana should have accepted medical use in Iowa. The Board is going to address an issue that Olsen did not present to the Board in his petition, the issue it wants to address.

Separate legislation would be required to make marijuana available for medical use in Iowa. Separate legislation now exists in the

Iowa Senate to make marijuana available for medical use in Iowa, S.F. 293. Separate legislation would also be required to make the Schedule II substances coca leaves and opium poppies available for medical use in Iowa. Simply removing marijuana from Schedule I would not make it available for medical use in Iowa.

Olsen is the prevailing party before this Court. The Board has again failed to follow the plain language of the statute. Olsen is not required to file another petition for judicial review because this Court still has jurisdiction over the original petition in which Olsen is the prevailing party.

***C. Olsen can read and understand the statute in the context it was written.***

On page 3 of the Board's Resistance and Motion to Strike, the Board faults Olsen's evidence as "inadequate to support findings regarding the medical use of marijuana". The Board intentionally omits the additional statutory language "in the United States" that must be included because it was written that way by the Iowa Legislature. Although Iowa is not required to adopt the laws of other states, the Iowa Legislature has the power to make an Iowa law conditional on the

laws of other states by explicitly saying so in the Iowa statute. The Iowa Legislature has clearly instructed the Board of Pharmacy to remove anything from Schedule I once it has accepted medical use in treatment “in the United States”. The Iowa Legislature was not careless in writing the statute. The Board cannot simply omit pieces of the language because it doesn’t like the way it was written.

The Iowa Legislature intended Iowa’s Uniform Controlled Substances Act to be “uniform” with both state and federal laws, as explained by the U.S. Supreme Court in *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (“the structure and limitation of federalism, which allow the States ‘great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.’”); *Conant v. Walter*, 309 F.3d 629, 639 (9<sup>th</sup> Cir. 2002), *affirmed*, *Walters v. Conant*, 540 U.S. 946 (2003); *Linder v. United States*, 268 U.S. 5, 18 (1925) (“direct control of medical practice in the states is beyond the power of the federal government”).

***D. Olsen's argument has not changed.***

Olsen is not making any new arguments. Olsen's profusion of exhibits were simply Olsen's efforts to show the Board the error of its Order of October 7, 2008, and its Supplemental Order of July 21, 2009.

**CONCLUSION**

For the above stated reasons, Olsen respectfully moves this Court to deny the Board's Resistance to "Motion for Review" and Motion to Strike and to grant the relief requested in this Response.

Dated: August 19, 2009

Respectfully submitted:

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## CERTIFICATE OF SERVICE

I certify that on or before August 19<sup>th</sup>, 2009, I served the other parties to this action with notice of this motion by mailing true copies to all parties of record or their attorneys as the case may be at the addresses shown below:

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