

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

George McMahon, Bryan Scott, and	)	
Barbara Douglass, Petitioners	)	
	)	
and	)	
	)	
Carl Olsen, Intervenor	)	Docket No. CV 7415
	)	
<i>vs.</i>	)	
	)	
The Iowa Board of Pharmacy,	)	
Respondent	)	

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**INTERVENOR'S REPLY BRIEF**

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Submitted by

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## **I. AGENCY PROCEEDINGS**

On May 12, 2008, Carl Olsen (“Olsen” hereafter) petitioned the Iowa Board of Pharmacy (“Board” hereafter) to recommend removal of marijuana from Schedule I of Iowa Uniform Controlled Substances Act, Iowa Code § 124.204(4)(m). Olsen claimed that marijuana no longer meets the statutory requirement for inclusion in Schedule I set forth in Iowa Code § 124.203(2):

Has no accepted medical use in treatment in the United States; or lacks accepted safety for use in treatment under medical supervision.

Although the petition asked the Board to recommend transferring marijuana to another schedule, during oral argument Olsen included the option of recommending complete removal of marijuana from the Iowa Uniform Controlled Substances Act. See, Stipulated Record, Tab D, at page 2.

## **II. FACTUAL BACKGROUND**

Marijuana is specifically identified in the Iowa Code as both a Schedule I and a Schedule II controlled substance. Iowa Code § 124.204(4)(m) (“Marijuana, except as otherwise provided by rules of the board of pharmacy examiners for medicinal purposes”) and Iowa Code §

124.206(7)(a) (“Marijuana when used for medicinal purposes pursuant to rules of the board of pharmacy examiners”).

The Iowa Legislature placed marijuana in Schedule I in 1971. The Iowa Legislature recognized marijuana’s medical use in 1979. The Iowa Legislature created the dual scheduling in both Schedule I and Schedule II in 1987. As of 2005, neither the Board nor the Iowa Legislature had examined the scheduling of marijuana since 1990. See, generally, *State of Iowa v. Lloyd Dean Bonjour*, 694 N.W.2d 511, 515-518 (Iowa 2005) (Wiggins, J., dissenting).

The Board does not dispute that since 1996, lawmakers in 13 states “in the United States” have accepted the medical use of marijuana by defining “medical use” of marijuana in their state statutes and/or constitutions.

### **III. ADMINISTRATIVE RECORD**

Because Olsen is not an attorney, Olsen did not anticipate the Board would claim the portions of the record missing from the Stipulated Record never existed. See *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (a pro se complaint is held to less stringent standards than formal pleadings drafted by lawyers). Olsen has filed two motions to

correct the record by enlarging the record with the exhibit and the memorandum of law that were filed with the Board along with the petition to remove marijuana from Schedule I.

Although Olsen's claim does not rely on scientific or medical evidence to support his claim for removal of marijuana from Schedule I, Olsen did submit the findings of the administrative law judge In The Matter of Marijuana Rescheduling, DEA Docket No. 86-22, Sept. 6, 1988, which adequately addresses the Iowa scheduling criteria in Iowa Code § 124.201(1), by showing marijuana has no potential for abuse and has accepted safety for use under medical supervision. Also the fact that 13 states allow cultivation of marijuana by medical users for personal medical use establishes the fact that marijuana has no potential for abuse as required by Iowa Code § 124.203(1). Also, the Drug Enforcement Administration has conceded that anything that has accepted medical use is also safe for use under medical supervision:

The scheduling criteria of the Controlled Substances Act appear to treat the lack of medical use and lack of safety as separate considerations. Prior rulings of this Agency purported to treat safety as a distinct factor. 53 FR 5156 (February 22, 1988). In retrospect, this is inconsistent with scientific reality. Safety cannot be treated as a separate analytical question.

DEA Docket No. 86-22, 57 Fed. Reg. 10,499, 10,504 (March 26, 1992).

In other words, Olsen presented adequate evidence to support his claim.

#### IV. ATTEMPTS TO SUPPLEMENT THE RECORD

Although the issue of Olsen's standing was never questioned by the Board, courts do not assume standing for purposes of reviewing the failure of an agency to take an action required by law. See, *Gettman v. DEA*, 290 F.3d 430 (D.C. Cir. 2002).

To make a facial challenge to a state statute, a petitioner must show a direct injury to fundamental rights. See *State v. Hunter*, 550 N.W.2d 460, 463 (Iowa 1996):

If a statute is constitutional as applied to the defendant, the defendant lacks standing to make a facial challenge unless a recognized exception applies. *Id.* One such exception is a situation in which First Amendment rights are implicated. *Id.*

citing, *State v. Price*, 237 N.W.2d 813, 816 (Iowa) (defendant not allowed to make a facial challenge to statute), *appeal dismissed*, 426 U.S. 916, 96 S. Ct. 2619, 49 L. Ed. 2d 370 (1976). It is not enough to simply allege a violation of First Amendment rights. There must be

evidence in the record to support the claim. See *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997):

In the case at bar, we do not find that the statute making possession of psilocybe mushrooms illegal reaches a substantial amount of protected conduct. Atley asserts on appeal that the First Amendment guarantee of freedom of religion protects his use and possession of psilocybin, because he contends it is used as part of a religious ceremony. Although such an argument may implicate an exception to the general rule of standing and serve as grounds to facially challenge a statute, we find his assertion to be meritless and without support in the record.

Olsen's First Amendment claim is not meritless and is extremely well documented. Indeed, the Iowa Supreme Court has recognized Olsen's claim. See, *State v. Olsen*, No. 171/69079 (Iowa Supreme Court, July 18, 1984), Slip Opinion at page 2, attached to Olsen's Amendment to Motion to Intervene filed with this Court on November 29, 2008, attached as Exhibit #1. The Iowa Supreme Court specifically found:

Olsen is a member and priest of the Ethiopian Zion Coptic Church. Testimony at his trial revealed the bona fide nature of this religious organization and the sacramental use of marijuana within it.

The Florida Supreme Court has recognized the bona fide nature of the Ethiopian Zion Coptic Church. “[T]he Ethiopian Zion Coptic Church represents a religion within the first amendment to the Constitution of the United States.” *Town v. State, ex rel. Reno*, 377 So. 2d 648, 649 (Fla. 1979), *cert. denied*, 449 U.S. 803 (1980), *reh. denied*, 449 U.S. 1004 (1980). “The ‘use of cannabis is an essential portion of the religious practice’ of the Ethiopian Zion Coptic Church.” *Id.*, at 649. “[T]he Ethiopian Zion Coptic Church is not a new church or religion but the record reflects it is centuries old and has regularly used cannabis as its sacrament.” *Id.*, at 649

The Iowa Supreme Court recognized Olsen has established a fundamental right to use marijuana as a religious sacrament, but held that the Board had established an overriding compelling interest in preventing Olsen from practicing his religion. See, *State v. Olsen*, 315 N.W.2d 1, 8 (Iowa 1982):

The state board of pharmacy examiners, the agency which administers the regulatory provisions of chapter 204, by its recommendations to the legislature has determined that marijuana has a “potential for abuse.” See § 204.401(1), (2), The Code.

Because Olsen has established his religious claim, Olsen has standing to complain of the injury inflicted on his First Amendment rights by the failure of the Board to recommend that the outdated scheduling of marijuana now be amended.

Olsen is currently complaining that state and federal agencies have never had the authority to override Olsen's religious freedom. See, *Olsen v. Holder*, No. 08-777, United States Supreme Court (filed December 18, 2008). The United States Supreme Court has given Attorney General Holder until April 1, 2009, to respond to the petition.

## V. ORDER OF THE BOARD

The October 7, 2008, Order of the Board relies on federal law as an excuse for disregarding Iowa's statutory scheduling criteria, citing *Gonzales v. Raich*, 545 U.S. 1 (2005), for the proposition that federal supremacy requires the state of Iowa to keep marijuana in Schedule I of Iowa's Uniform Controlled Substances Act ("IUCSA" hereafter).

The Board also alleges that without evidence that marijuana lacks a high potential for abuse, it cannot be removed from Schedule I of the IUCSA. The Board apparently ignored the evidence submitted by Olsen

showing the administrative law judge for the DEA found marijuana is one the safest therapeutically active substances known to man.

The fact of the abuse potential finding required for Schedule II of the IUCSA being identical to the abuse potential finding required for Schedule I of the IUCSA renders the Board's reliance on abuse potential moot. Removing marijuana from Schedule I would not be inconsistent with a finding of high potential for abuse because marijuana is already included in Schedule II which has the same required finding regarding potential for abuse.

The argument that federal law requires Schedule I of the IUCSA is rendered moot because Iowa has already deviated from federal scheduling in 1987 by including marijuana in Schedule II of the IUCSA. The fact that Iowa scheduling is inconsistent with federal scheduling demonstrates beyond any reasonable doubt that the Iowa Legislature is fully aware that federal law does not dictate state drug law.

## **VI. STANDARD OF REVIEW**

Because this case turns on the statutory language "in the United States" as found in the scheduling criteria of the IUCSA, the standard of review is one of statutory construction. See, *State v. Atley*, 564

N.W.2d 817, 831 (Iowa 1997) (“ordinary and reasonable use of these words”), citing *State v. Hunter*, 550 N.W.2d 460, 463 (Iowa 1996):

“As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858, 75 L. Ed. 2d 903, 909 (1983).

*State v. Hunter*, 550 N.W.2d 460, 465 (Iowa 1996):

A statutory term provides fair warning if the meaning of the word “is to be fairly ascertainable by reference to similar statutes, prior judicial determinations, reference to the dictionary, or if the questioned words have a common and generally accepted meaning.” *State v. Kueny*, 215 N.W.2d 215, 217 (Iowa 1974).

And, see, *Smith v. United States*, 508 U.S. 223, 228 (1993):

When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning. See *Perrin v. United States*, 444 U.S. 37, 42, 62 L. Ed. 2d 199, 100 S. Ct. 311 (1979) (words not defined in statute should be given ordinary or common meaning). Accord, *post*, at 242 (“In the search for statutory meaning, we give nontechnical words and phrases their ordinary meaning”).

And, see, *United States v. Carpenter*, 422 F.3d 738, 746 (8th Cir. 2005):

A criminal statute is vague if persons of a “common intelligence must necessarily guess at its meaning and differ as to its application.”

Quoting, *United States v. Smith*, 171 F.3d 617, 622-23 (8th Cir. 1999))

(internal quotes omitted). See, *Leedom v. Kyne*, 358 U.S. 184, 188

(1958):

This case, in its posture before us, involves “unlawful action of the Board [which] has inflicted an injury on the [respondent].” Does the law, “apart from the review provisions of the . . . Act,” afford a remedy? We think the answer surely must be yes. This suit is not one to “review,” in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act.

Because Olsen’s argument was purely a legal one, based on the plain language of the statute, Olsen’s claim does not rely on scientific or medical evidence. In determining which, if any, of the other schedules marijuana should be placed in after it is removed from Schedule I, the Board would have to initiate administrative proceedings *sua sponte* (on its own motion). Olsen’s claim does not require any obligation by Olsen to suggest an appropriate schedule for marijuana, because marijuana is already scheduled in another schedule, Schedule II. Olsen does reserve the right to present evidence, if the Board decides to recommend anything beyond removing marijuana from Schedule I.

## **VII. ISSUES PRESENTED**

Olsen believes these are the issue:

1. The Board acted upon an erroneous interpretation of law.
2. The erroneous interpretation of law is not vested in the discretion of the Board.

The Board agrees that these issues are properly before this Court.

## **VIII. ARGUMENT**

Olsen agrees that his request does not fit neatly within the ordinary categories of requests for agency action. Olsen gave notice to the Board that the scheduling of marijuana had become outdated due to accepted medical use of marijuana in treatment in the United States. Olsen did not ask the Board to decide anything, but simply to comply with the law. If there is an administrative remedy, Olsen has now exhausted it. Olsen believes the Board had the authority to rule on his petition and had the obligation to recommend removing marijuana from Schedule I even though the Board had no discretion to deny the request.

If the Board had the authority to rule on the petition, then this Court has the authority to review it. If the Board did not have the authority to rule on the petition, then this Court has the authority to

interpret the statute. Either way, this Court has jurisdiction over this matter.

Because marijuana is in both Schedule I and Schedule II of the IUCSA, and because both schedules have the same language for the first criteria (“has high potential for abuse”), Olsen was not required to address the first scheduling criteria to make his claim. See, Iowa Code §§ 124.203(1) and 124.205(1). Removing marijuana from Schedule I would result in no change to the Schedule II classification of marijuana. See, Iowa Code § 124.206(7)(a). The Board could easily recommend that the Iowa Legislature remove marijuana from Schedule I and do nothing else, which is what Olsen intended when he filed the petition. Olsen does not agree that marijuana meets the criteria for Schedule II, but Olsen did not ask the Board to recommend the Iowa Legislature remove marijuana from Schedule II, add marijuana to Schedule II, or transfer marijuana from Schedule I to Schedule II. Olsen simply said the law must be updated according to the IUCSA criteria for scheduling.

In 1979, the Iowa Legislature determined that marijuana had no accepted medical use in treatment in the United States and placed it in Schedule I. The Iowa Legislature entrusted the Board with the duty of

recommending changes to the schedules when circumstances change.

Circumstances have changed. Since 1996, 13 states have enacted laws accepting the medical use of marijuana.

The Iowa Legislature has carefully chosen the language “in the United States” in the scheduling criteria. The term “in the United States” as used in the scheduling criteria clearly relies on what other states have done. See, Iowa Code § 124.203(2). The Iowa Legislature has further defined the term “State” in the IUCSA to mean “any state, district, commonwealth, territory, insular possession, and any area subject to the legal authority of the United States of America.” Iowa Code § 124.101(28). If the Iowa Legislature had intended the Board to consider only whether marijuana had accepted use in Iowa, the Iowa Legislature would have written the language of the statute to say “no accepted medical use in treatment *in the state of Iowa.*” This is just the plain, ordinary usage of the English language. The Iowa Legislature certainly did not intend to say Iowa determines what laws another state may lawfully enact and publish in its state statutes. By the choice of language the Iowa Legislature used in writing the statute,

it is very clear that the meaning of “in the United States” depends on what other states have done.

There are limitless ways the Iowa Legislature could respond to the acceptance of the medical use of marijuana in 13 states in the United States, but leaving marijuana in Schedule I, as currently defined in the statute, is not one of those options. The Iowa Legislature could determine that marijuana should remain in Schedule I despite its acceptance for medical use by other states, but it would have to amend the statutory language to do so. The Iowa Legislature hasn't considered the scheduling of marijuana since 1990, proving it hasn't considered this option. See, *State v. Bonjour*, 694 N.W.2d at 516. In 1990, marijuana actually had no accepted medical use in treatment by lawmakers in any state in the United States and the Iowa Legislature may have been justified in retaining marijuana in Schedule I at that time and for that reason.

There is nothing in the record to suggest that the Board determined the Iowa Legislature has permanently foreclosed it from recommending removal of marijuana from Schedule I. The Board would

not have accepted the petition if it had determined the Iowa Legislature had not given it the authority to make such a recommendation.

## **IX. PETITIONERS' REQUEST FOR FINDINGS**

The Board rests its decision on an interpretation of the phrase “in the United States” which it interprets to mean 13 states - plus “37 states, and the federal government”. In other words, Respondents argue that accepted medical use in the United States means acceptance in all 50 states and acceptance by the federal government. See, Respondent’s Brief, at page 13.

The meaning of the phrase “in the United States” was interpreted in *Grinspoon v. DEA*, 828 F.2d 881, 886 (1st Cir. 1987), to mean accepted medical use in “any” state in the United States regardless of approval by the Food and Drug Administration (hereafter “FDA”) for interstate marketing:

The CSA’s definition of “United States” plainly does not require the conclusion asserted by the Administrator simply because section 802(28) defines “United States” as “all places subject to the jurisdiction of the United States.” 21 U.S.C. § 802(28) (emphasis supplied). Congress surely intended the reference to “all places” in section 802(28) to delineate the broad jurisdictional scope of the CSA and to clarify that the CSA regulates conduct occurring any place, as opposed to every place, within the United States. As petitioner aptly notes, a defendant charged with violating the CSA by selling

controlled substances in only two states would not have a defense based on section 802(28) if he contended that his activity had not occurred in “all places” subject to United States jurisdiction. We add, moreover, that the Administrator’s clever argument conveniently omits any reference to the fact that the pertinent phrase in section 812(b)(1)(B) reads “in the United States,” (emphasis supplied). We find this language to be further evidence that the Congress did not intend “accepted medical use in treatment in the United States” to require a finding of recognized medical use in every state or, as the Administrator contends, approval for interstate marketing of the substance.

#### **A. Federal Supremacy**

In rejecting the petition to remove marijuana from Schedule I, the Board relied on federal supremacy, citing *Gonzales v. Raich*, 545 U.S. 1 (2005), for the premise the Controlled Substances Act (“CSA” hereafter), 21 U.S.C. §§ 801 et seq., requires the scheduling of marijuana in Schedule I of the IUCSA. Federal law actually protects persons authorized to use marijuana for medical purposes under state law. Unlawful federal prosecution of state-authorized medical marijuana users, which has been vigorously and unlawfully pursued by the U.S. Department of Justice, is not one of the factors the Board is allowed to consider. See, *Olsen v. DEA*, No. 09-1162, U.S. Court of Appeals for the Eighth Circuit (filed January 21, 2009), and *Olsen v.*

**Holder**, No. 4:08-cv-370, U.S. District Court for the Southern District of Iowa (filed September 15, 2008). Indeed, at a press conference held on February 25, 2009, Attorney General Eric Holder announced that is no longer federal policy to prosecute state-authorized medical marijuana users. “U.S. to yield marijuana jurisdiction to states”, San Francisco Chronicle, Friday, February 27, 2009, Page A-1 (last accessed March 15, 2009, at: <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/02/27/MN2016651R.DTL>), attached as Exhibit #1.

Federal prosecution of medical marijuana users is not found in the scheduling criteria in the Iowa Code from § 124.203 to § 124.211, nor is it found in the 8 scheduling criteria set out in Iowa Code § 124.201(1). The only reference to federal scheduling in the IUCSA is found in Iowa Code § 124.201(4), which gives the Board the authority to override federal scheduling.

The fact that the Iowa Legislature included marijuana in Schedule II in 1987 clearly shows the Iowa Legislature understands that federal supremacy does not require the state to blindly follow federal scheduling. The only thing the state of Iowa cannot do under

federal supremacy is enact a law requiring a person to use marijuana. The state of Iowa can completely repeal any prohibition of marijuana without violating federal law.

Not surprisingly, numerous court decisions have rejected making exceptions to the CSA for individual medical users. Because the CSA specifically contemplates medical use, courts have been unwilling to carve out exceptions for individual medical users.

***Gonzales v. Raich***, 545 U.S. 1 (2005), rejected a claim that application of the federal drug law to purely intrastate, non-commercial, medical use of marijuana exceeds Congress' Commerce Clause powers citing administrative procedures for removing marijuana from Schedule I of the CSA. ***Raich*** did not consider whether marijuana was correctly scheduled in the CSA, because Raich did not contest the scheduling of marijuana in Schedule I of the CSA. The Court specifically mentioned that marijuana may in fact not be correctly scheduled. ***Gonzales v.***

***Raich***, 545 U.S. 1, 28 n.37 (2005):

We acknowledge that evidence proffered by respondents in this case regarding the effective medical uses for marijuana, if found credible after trial, would cast serious doubt on the accuracy of the findings that require marijuana to be listed in Schedule I.

*United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001), rejected a claim of medical necessity because the CSA specifically contemplates medical use. As in *Raich*, the plaintiffs in *Oakland* did not contest the scheduling of marijuana in Schedule I of the CSA. The Court noted that the Attorney General could not put marijuana in Schedule I if it has any accepted medical use in the United States. *Oakland*, 532 U.S. 483, 492 (2001).

### **B. Federal Preemption**

Congress carefully crafted the federal drug law to allow states wide latitude when it comes to the medical use of controlled substances. The federal drug law does not require that marijuana forever remain in Schedule I and expresses no value judgment as to whether marijuana should or should not have any accepted medical use in treatment in the United States. In placing marijuana in Schedule I, Congress was not telling the states they could not accept the medical use of marijuana. Congress was simply making an observation that marijuana had no currently accepted medical use in treatment in the United States when the federal drug law was enacted in 1970. See, *City of Garden Grove v. Superior Court*, 157 Cal. App. 4<sup>th</sup> 355, 68 Cal. Rptr. 3d 656 (Cal.

App. 4<sup>th</sup> Dist., 2007), *cert. denied*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 623, 172 L. Ed. 2d 607 (2008). And, see, *Gonzales v. Oregon*, 546 U.S. 243, 251 (2006):

The CSA explicitly contemplates a role for the States in regulating controlled substances, as evidenced by its preemption provision.

“No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates . . . to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision . . . and that State law so that the two cannot consistently stand together.” § 903.

See, also, *San Diego v. NORML*, 165 Cal. App. 4th 798, 826, 81 Cal. Rptr. 3d 461, 482 (2008) (“The purpose of the CSA is to combat recreational drug use, not to regulate a state’s medical practices”). And, see, *Conant v. Walters*, 309 F.3d 629, 639 (9th Cir. 2002) (“*Linder v. United States*, 268 U.S. 5, 18, 69 L. Ed. 819, 45 S. Ct. 446 (1925) (‘direct control of medical practice in the states is beyond the power of the federal government’)”).

### C. Federalism

In its decision in *Oregon v. Ashcroft*, 368 F.3d 1118, 1124 (9th Cir. 2004), the Ninth Circuit noted that in our system of federalism,

[S]tate lawmakers, not the federal government, are “the primary regulators of professional [medical] conduct.” *Conant v. Walters*, 309 F.3d 629, 639 (9th Cir. 2002); see also *Glucksberg*, 521 U.S. at 737 (O'Connor, J., concurring). The Supreme Court has made the constitutional principle clear: “Obviously, direct control of medical practice in the states is beyond the power of the federal government.” *Linder v. United States*, 268 U.S. 5, 18, 69 L. Ed. 819, 45 S. Ct. 446 (1925); see also *Barsky v. Bd. of Regents*, 347 U.S. 442, 449, 98 L. Ed. 829, 74 S. Ct. 650 (1954) (“It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state’s police power.”).

State medical marijuana laws are specifically protected by the CSA.

***Oregon v. Ashcroft***, 368 F.3d 1118, 1124-1125 (9th Cir. 2004):

By criminalizing medical practices specifically authorized under Oregon law, the Ashcroft Directive interferes with Oregon’s authority to regulate medical care within its borders and therefore “alters the ‘usual constitutional balance between the States and the Federal Government.’” ***Gregory v. Ashcroft***, 501 U.S. 452, 461, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985)). Under these circumstances, “it is incumbent on the federal courts to be certain of Congress’ intent” before finding that federal authority supercedes state law. *Gregory*, 501 U.S. at 460 (quotation marks and citation omitted).

Unless Congress’ authorization is “unmistakably clear,” the Attorney General may not exercise control over an area of law traditionally reserved for state authority, such as regulation of medical care. *Id.* at 460-61 (quoting *Atascadero State Hosp.*, 473 U.S. at 242); see also *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173, 148 L. Ed. 2d 576, 121 S. Ct. 675 (2001) (“This concern

is heightened where an administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.”); *United States v. Bass*, 404 U.S. 336, 349, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971) (“Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.”). In divining congressional intent, it is a “cardinal principle” of statutory interpretation that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, [federal courts shall] construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988).

The Ashcroft Directive is invalid because Congress has provided no indication – much less an “unmistakably clear” indication – that it intended to authorize the Attorney General to regulate the practice of physician assisted suicide. By attempting to regulate physician assisted suicide, the Ashcroft Directive invokes the outer limits of Congress’ power by encroaching on state authority to regulate medical practice. See *Linder*, 268 U.S. at 18; *Conant*, 309 F.3d at 639. Because Congress has not clearly authorized such an intrusion, the Ashcroft Directive violates the clear statement rule. See *Solid Waste Agency*, 531 U.S. at 172-73; *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 208-09, 141 L. Ed. 2d 215, 118 S. Ct. 1952. We need not, and therefore do not, decide whether the Ashcroft Directive actually exceeds Commerce Clause boundaries, but only that it “invokes the outer limits of Congress’ power” without explicit authority from Congress. *Solid Waste Agency*, 531 U.S. at 172 (citing *Edward J. DeBartolo Corp.*, 485 U.S. at 575); see also *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 208-09, 141 L. Ed. 2d 215, 118 S. Ct. 1952 (1998) (“Absent an unmistakably clear expression of intent to alter the usual constitutional balance between the States and the Federal Government, we will

interpret a statute to preserve rather than destroy the States' substantial sovereign powers.”) (quotation marks and citations omitted).

Congress intended to limit that CSA to problems associated with drug abuse and addiction. The preamble to the CSA states its purpose: “to provide increased research into, and prevention of, drug abuse and drug dependence; to provide for treatment and rehabilitation of drug abusers and drug dependent persons; and to strengthen existing law enforcement authority in the field of drug abuse.” Comprehensive Drug Abuse Prevention and Control Act of 1970, P. L. 91-513, 84 Stat. 1236 (1970) (preamble).

And, see, *City of Garden Grove v. Superior Court*, 157 Cal. App. 4th 355, 383, 68 Cal. Rptr. 3d 656, 675 (2007):

Congress enacted the CSA to combat recreational drug abuse and curb drug trafficking. (*Gonzales v. Oregon*, supra, 546 U.S. at p. 271; *Gonzales v. Raich*, supra, 545 U.S. at pp. 10-13.) Its goal was not to regulate the practice of medicine, a task that falls within the traditional powers of the states. (*Gonzales v. Oregon*, supra, 546 U.S. at p. 269.)

And, see, *City of Garden Grove v. Superior Court*, 157 Cal. App. 4th 355, 383-384, 68 Cal. Rptr. 3d 656, 676 (2007):

The [Compassionate Use Act] does not authorize doctors to use their prescription-writing powers “to engage in illicit drug dealing and trafficking as conventionally understood.”

Instead, the act grants doctors the authority to recommend marijuana to their patients for medicinal purposes. No other use is contemplated. As a matter of fact, the CUA provides that it shall not “be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes.” (§ 11362.5, subd. (b)(2).) Similarly, nothing in the MMP “shall authorize the individual to smoke or otherwise consume marijuana unless otherwise authorized by this article, nor shall anything in this section authorize any individual or group to cultivate or distribute marijuana for profit.” (§ 11362.765.)

These restrictions are consistent with the goals of the CSA. Irrespective of Congress’s prohibition against marijuana possession, “[i]t is unreasonable to believe that use of medical marijuana by [qualified users under the CUA] for [the] limited purpose [of medical treatment] will create a significant drug problem” (*Conant v. McCaffrey* (N.D.Cal. 1997) 172 F.R.D. 681, 694, fn. 5, *affd.* *Conant v. Walters*, *supra*, 309 F.3d 629), so as to undermine the stated objectives of the CSA. (Cf. *Gonzales v. Oregon*, *supra*, 546 U.S. at p. 273 [state initiative allowing doctors to prescribe controlled substances for the purpose of facilitating a patient’s suicide is not inconsistent with the CSA’s objective to prevent recreational drug use].)

## X. CONCLUSION

Because the Iowa Legislature clearly bound the Board to look at what other states have done by including the phrase “in the United States” in the scheduling criteria of the IUCSA, it was entirely appropriate for the Petitioners to ask this Court for a declaration that marijuana has accepted medical use in treatment in the United States.

The only evidence required for such a declaration is the existence of state statutes defining the accepted medical use of marijuana. An adequate record was provided to the Board by the citation to 12 state statutes defining the accepted medical use of marijuana.

Dated: March 16, 2009.

Respectfully submitted:

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## CERTIFICATE OF SERVICE

I certify that on or before March 16<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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**EXHIBIT #1**

**SFGate.com**

## U.S. to yield marijuana jurisdiction to states

Bob Egelko, Chronicle Staff Writer

Friday, February 27, 2009



**(02-26) 20:00 PST San Francisco** -- U.S. Attorney General Eric Holder is sending strong signals that President Obama - who as a candidate said states should be allowed to make their own rules on medical marijuana - will end raids on pot dispensaries in California.

Asked at a Washington news conference Wednesday about Drug Enforcement Administration raids in California since Obama took office last month, Holder said the administration has changed its policy.

"What the president said during the campaign, you'll be surprised to know, will be consistent with what we'll be doing here in law enforcement," he said. "What he said during the campaign is now American policy."

Bill Piper, national affairs director of the Drug Policy Alliance, a marijuana advocacy group, said the statement is encouraging.

"I think it definitely signals that Obama is moving in a new direction, that it means what he said on the campaign trail that marijuana should be treated as a health issue rather than a criminal justice issue," he said.

Piper said Obama has also indicated he will drop the federal government's long-standing opposition to health officials' needle-exchange programs for drug users.

During one campaign appearance, Obama recalled that his mother had died of cancer and said he saw no difference between doctor-prescribed morphine and marijuana as pain relievers. He told an interviewer in March that it was "entirely appropriate" for a state to legalize the medical use of marijuana "with the same controls as other drugs prescribed by doctors."

After the federal Drug Enforcement Agency raided a marijuana dispensary at South Lake Tahoe on Jan. 22, two days after Obama's inauguration, and four others in the Los Angeles area on Feb. 2, White House spokesman Nick Schapiro responded to advocacy groups' protests by noting that Obama had not yet appointed his drug policy team.

"The president believes that federal resources should not be used to circumvent state laws" and expects his appointees to follow that policy, Schapiro said.

The federal government has fought state medicinal pot laws since Californians voted in 1996 to repeal criminal penalties for medical use of marijuana.

President Bill Clinton's administration won a Supreme Court case, originating in Oakland, that allowed federal authorities to shut down nonprofit organizations that supplied medical marijuana to their members. Clinton's Justice Department was thwarted by federal courts in an attempt to punish California doctors who recommended marijuana to their patients.

President George W. Bush's administration went further, raiding medical marijuana growers and clinics, prosecuting suppliers under federal drug laws after winning another Supreme Court case and pressuring commercial property owners to evict marijuana dispensaries by threatening legal action.

The Bush administration also blocked a University of Massachusetts researcher's attempt to grow marijuana for studies of its medical properties. Piper, of the Drug Policy Alliance, said he hopes Obama will reverse that position.

"If you removed the obstacles to research," he said, "in 10 to 15 years, marijuana will be available in pharmacies."

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<http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/02/27/MN2016651R.DTL>

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