

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

George McMahon, Bryan Scott, and)	
Barbara Douglass, Petitioners,)	
)	
vs.)	Docket No. CV7415
)	
The Iowa Board of Pharmacy)	
Examiners, Respondent.)	

**MOTION OF INTERVENOR TO JOIN PETITIONERS IN
PETITION FOR JUDICIAL REVIEW OF AGENCY ACTION**

Comes now an intervenor, Carl Olsen, pro se, who respectfully moves the Court pursuant to Iowa Rule of Civil Procedure 1.603(1) for leave to join the petitioners in their Petition for Judicial Review of Agency Action filed pursuant to Iowa Code Section 17A.19. Carl Olsen respectfully informs the Court that he is the original petitioner in the agency action presently before this Court in this petition for judicial review.

Carl Olsen adopts the complaint filed by the petitioners in its entirety and respectfully adds the following allegations:

ACCEPTED MEDICAL USE

1. The Iowa Board of Pharmacy Examiners (“**IBPE**”) has the statutory obligation to recommend to the Iowa Legislature the removal of a substance from schedule I of the Iowa Uniform Controlled Substances Act (“**IUCSA**”) if that substance no longer meets the statutory requirements for inclusion in schedule I. Iowa Code § 124.203:

The board shall recommend to the general assembly that it place in schedule I any substance not already included therein if the board finds that the substance:

1. Has high potential for abuse; and
2. Has no accepted medical use in treatment in the United States; or lacks accepted safety for use in treatment under medical supervision.

If the board finds that any substance included in schedule I does not meet these criteria, it shall recommend that the general assembly place the substance in a different schedule or remove it from the list of controlled substances, as appropriate.

2. In *United States v. Oakland Cannabis Buyers' Cooperative*, 532

U.S. 483, 492 (2001), the Supreme Court of the United States recognized that accepted medical use of a substance requires that the substance be removed from schedule I:

The Attorney General can include a drug in schedule I only if the drug "has no currently accepted medical use in treatment in the United States," "has a high potential for abuse," and has "a lack of accepted safety for use . . . under medical supervision." §§ 812(b)(1)(A)-(C). Under the statute, the Attorney General could not put marijuana into schedule I if marijuana had any accepted medical use.

3. In *NORML v. DEA*, 559 F.2d 735, 748 (D.C. Cir. 1977), the United

States Court of Appeals for the District of Columbia explained the significant factor that distinguishes substances in schedule I from those in schedule II of the Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801-904:

Admittedly, Section 202(b), 21 U.S.C. § 812(b), which sets forth the criteria for placement in each of the five CSA schedules, established medical use as the factor that distinguishes substances in Schedule II from those in Schedule I.

4. The Uniform Controlled Substances Act, 9 U.L.A. 10 (1994), which

Iowa adopted in 1971, was written to mirror the federal CSA.

5. If “any” state “in the United States” accepts the medical use of marijuana, Iowa law requires that marijuana can no longer remain in schedule I of the IUCSA.

6. Since 1996, a total of twelve states have accepted the medical use of marijuana. Iowa law does not give the IBPE the authority to ignore the accepted medical use of marijuana in twelve states “in the United States”. See *Grinspoon v. DEA*, 828 F.2d 881, 886 (1st Cir. 1987) (“[C]ongress did not intend ‘accepted medical use in treatment in the United States’ to require a finding of recognized medical use in every state...”).

WHY THE PETITION WAS FILED

7. In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Supreme Court of the United States recognized that schedule I may not be the appropriate schedule for marijuana.

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.

Gonzales v. Raich, 545 U.S. 1, 28 n.37 (2005).

8. The Supreme Court of the United States also recognized that petitioning the federal administrative agency was a proper method of seeking reclassification of marijuana.

We do note, however, the presence of another avenue of relief. As the Solicitor General confirmed during oral argument, the statute authorizes procedures for the reclassification of Schedule I drugs.

Gonzales v. Raich, 545 U.S. 1, 33 (2005).

IOWA DRUG LAW FROM 1971 TO 1990

9. In *State of Iowa v. Lloyd Dean Bonjour*, 694 N.W.2d 551 (Iowa 2005), Justice Wiggins, in his dissenting opinion, outlined the history of Iowa's statutory evolution regarding the medical use of marijuana:

In 1971, the legislature repealed the Uniform Narcotic Drug Act and enacted the Uniform Controlled Substances Act. Unif. Controlled Substances Act, prefatory note, 9 U.L.A. 10 (1994). While Iowa's enactment of the Uniform Controlled Substances Act is a substantial adoption of the major provisions of the uniform act, Iowa's act contains some provisions not contained in the uniform act. *Id.* One such provision at variance with the uniform act occurred by amendment in 1979.

Iowa's act, as originally enacted, classified marijuana as a Schedule I controlled substance without exception. Iowa Code § 204.204(4)(j) (1973). A Schedule I substance "has no accepted medical use in treatment in the United States; or lacks accepted safety for use in treatment under medical supervision." *Id.* § 204.203(2). The original enactment was consistent with the uniform act. In 1979, the legislature amended Iowa's act classifying marijuana as a Schedule I substance "except as otherwise provided by the rules of the board of pharmacy examiners for medical purposes." *Id.* § 204.204(4)(j) (1981). In the same amendment, the legislature added a new provision to the list of Schedule I substances providing, "this section does not apply to marijuana . . . when utilized for medical purposes pursuant to rules of the state board of pharmacy examiners." *Id.* § 204.204(6).

In the session laws adopting the 1979 amendments, the legislature also provided funding for the board of pharmacy examiners to establish "a research program for the medicinal use of marijuana." 1979 Iowa Acts ch. 9, § 3. In 1979, the board of pharmacy examiners adopted rules establishing a research program investigating the medical use of marijuana. Iowa Admin. Code r. 620--12.1 (1979). The rules clearly recognized the legislature did not preclude the medical use of marijuana in Iowa's Controlled Substances Act by stating: "Nothing in these rules will preclude the use of any available dosage forms of marijuana or tetrahydrocannabinols." *Id.* The rules defined "marijuana" as the legislature defined it in Iowa's Controlled Substances Act. *Id.* r. 620--12.2(3).

In 1987, the board of pharmacy examiners rescinded its rules establishing a research program into the medical use of marijuana because the legislature amended Iowa's Controlled Substances Act classifying marijuana as a Schedule II substance. ² Feb. 25, 1987 Iowa Admin. Bull. at 1444 (ARC 7383). The provision amending the Code classifying marijuana as a Schedule II substance provided in relevant part: "marijuana is deemed to be a Schedule II substance when used for medicinal purposes pursuant to rules of the board of pharmacy examiners." Iowa Code § 204.206(7) (1987). A Schedule II substance "has currently accepted medical use in treatment in the United States, or currently accepted medical use with severe restrictions." Id. § 204.205(2). Millions of people use Schedule II substances each day to relieve their symptoms. Other Schedule II substances include pain medications with codeine (Tylenol with codeine), oxycodone-based pain medications (Percocet), fentanyl-based pain medications (Duragesic), and amphetamines (Adderall and Dexedrine).

² By statute, the board of pharmacy examiners has the duty to recommend revisions to the schedules of controlled substances. Iowa Code §§ 204.201(1); 204.205 (1987).

In 1990, the legislature amended this section of the Code one more time. The legislature continued to classify marijuana as a Schedule II substance, when used for medical purposes pursuant to rules of the board of pharmacy examiners. Id. § 204.206(7) (1991). It provided:

Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances [is a Schedule II substance]:

a. Marijuana when used for medicinal purposes pursuant to rules of the board of pharmacy examiners.

....

c. Nabilone. ³

Id. The 1990 amendment continues to be the law today. See Iowa Code § 124.206(7) (2003).

³ Nabilone is a synthetic derivative of the chemicals found in marijuana.

Id. at 515-516.

10. Neither the IBPE nor the Iowa Legislature has considered the scheduling of marijuana since 1990.

THE EVENTS THAT REQUIRE RESCHEDULING

11. Because twelve states have accepted the medical use of marijuana since 1996, and because Iowa has not considered the reclassification of marijuana since 1990, marijuana no longer meets the statutory requirement for inclusion in schedule I of the IUCSA. Therefore, the IBPE must recommend that the Iowa Legislature remove marijuana from schedule I of the IUCSA.

12. In *Gonzales v. Raich*, 545 U.S. 1, 6 n.4 (2005), the Supreme Court of the United States recognized that the state of California accepted the medical use of marijuana in 1996.

"The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows: "(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief. "(B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction. "(C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana." § 11362.5(b)(1) (West Supp. 2005).

THE 1987 ACT OF THE IOWA LEGISLATURE

13. The IBPE is not bound by the 1987 act of the Iowa Legislature placing marijuana in both schedule I and schedule II of the IUCSA, because it occurred

prior to 1996 when California became the first state to accept medical use of marijuana. See *Gonzales v. Raich*, 545 U.S. 1, at 5 (“[A]t the end of the century, California became the first State to authorize limited use of the drug for medicinal purposes.”).

14. In *Grinspoon v. DEA*, 828 F.2d 881, 890 (1st Cir. 1987), the United States Court of Appeals for the First Circuit acknowledged the statutory duty of the administrative agency to follow the statutory requirements for including a substance in a particular schedule, regardless of what the legislature might do:

[I]n 1984, Congress legislatively placed the drug methaqualone in Schedule I. Despite its reputation as a widely abused substance, methaqualone was universally acknowledged to have an accepted medical use The statutory findings required for agency scheduling decisions clearly state that the agency may not, in the absence of Congressional action, subject drugs with a currently accepted medical use in the United States to Schedule I controls.

Congress clearly stated that the administrative agency does not have the discretion to ignore the statutory requirements for inclusion of a substance in schedule I. The same is true for the IBPE.

15. The 1987 act of the Iowa Legislature placing marijuana in both schedule I and schedule II of the IUCSA is no longer binding on the IBPE because the Iowa Legislature has not examined this issue since 1990 and the requirements for a substance to be included in schedule I are no longer true for marijuana.

16. Because the Iowa Legislature does not have the authority to determine accepted medical practice in other states “in the United States”, and because the Iowa Legislature has not considered this issue since 1990, six years before the first

state in the United States accepted the medical use of marijuana, therefore the IBPE must now make a recommendation that the Iowa Legislature remove marijuana from schedule I of the IUCSA.

**ILLEGAL ENFORCEMENT
OF UNLAWFUL FEDERAL REGULATIONS
DOES NOT RELIEVE THE BOARD OF PHARMACY
FROM ITS OBLIGATION UNDER STATE LAW**

17. Removing marijuana from schedule I of the IUCSA will not result in the unfortunate situation of persons engaging in activities permitted under state law being prosecuted for that same activity under federal law. *See IBPE's Order*, at page 2.

18. While it is true that the United States Drug Enforcement Administration (DEA) has failed to remove marijuana from schedule I of the federal Controlled Substances Act (CSA), it is also true that the DEA is clearly in violation of federal law. The Petitioner has filed a civil action in the United States District Court for the Southern District of Iowa to enjoin the DEA from further enforcement of its unlawful scheduling of marijuana in schedule I of the CSA. *See Olsen v. Mukasey, et al.*, No. 4:08-cv-370 (attached as Exhibit #1).

19. The IBPE cannot escape its statutory obligation under state law simply because a federal agency has failed to comply with its statutory obligation under federal law. The unfortunate situation here is not created by state law, but, rather, by the failure of the DEA to obey federal law.

20. In *Gonzales v. Oregon*, 546 U.S. 243 (2006), the Supreme Court of the United States acknowledged:

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

Gonzales v. Oregon, 546 U.S. 243, at 251.

The Attorney General has rulemaking power to fulfill his duties under the CSA. The specific respects in which he is authorized to make rules, however, instruct us that he is not authorized to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law.

Gonzales v. Oregon, 546 U.S. 243, at 258.

As for the federal law factor, though it does require the Attorney General to decide "[c]ompliance" with the law, it does not suggest that he may decide what the law says. Were it otherwise, the Attorney General could authoritatively interpret "State" and "local laws," which are also included in 21 U.S.C. § 823(f), despite the obvious constitutional problems in his doing so.

Gonzales v. Oregon, 546 U.S. 243, at 264.

The statute and our case law amply support the conclusion that Congress regulates medical practice insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood. Beyond this, however, the statute manifests no intent to regulate the practice of medicine generally. The silence is understandable given the structure and limitations 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.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985)).

The structure and operation of the CSA presume and rely upon a functioning medical profession regulated under the States' police powers. The Attorney General can register a physician to dispense controlled substances "if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices." 21 U.S.C. § 823(f). When considering whether to revoke a physician's registration, the Attorney General looks not just to violations of federal drug laws; but he "shall" also consider "[t]he recommendation of the appropriate State licensing board or

professional disciplinary authority" and the registrant's compliance with state and local drug laws. *Ibid.* The very definition of a "practitioner" eligible to prescribe includes physicians "licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices" to dispense controlled substances. § 802(21). Further cautioning against the conclusion that the CSA effectively displaces the States' general regulation of medical practice is the Act's pre-emption provision, which indicates that, absent a positive conflict, none of the Act's provisions should 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." § 903.

Gonzales v. Oregon, 546 U.S. 243, at 269-271. *See San Diego v. NORML*, 165 Cal. App. 4th 798, 81 Cal. Rptr. 3d 461 (2008) (the court found that issuing identification cards to medical marijuana users in California does not create a "positive conflict" between California law and the federal CSA). "[T]he CSA's preemption clause showed Congress 'explicitly contemplates a role for the States in regulating controlled substances' (*Gonzales v. Oregon*, at p. 251), including permitting the states latitude to continue their historic role of regulating medical practices." *Id.* 165 Cal. App. 4th, at 821, 81 Cal. Rptr. 3d, at 477.

Even though regulation of health and safety is "primarily, and historically, a matter of local concern," *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985), there is no question that the Federal Government can set uniform national standards in these areas. See *Raich, supra*, at 9, 125 S. Ct. 2195, 162 L. Ed. 2d 1. In connection to the CSA, however, we find only one area in which Congress set general, uniform standards of medical practice. Title I of the Comprehensive Drug Abuse Prevention and Control Act of 1970, of which the CSA was Title II, provides that

"[The Secretary], after consultation with the Attorney General and with national organizations representative of persons with knowledge and experience in the treatment of narcotic addicts,

shall determine the appropriate methods of professional practice in the medical treatment of the narcotic addiction of various classes of narcotic addicts, and shall report thereon from time to time to the Congress." § 4, 84 Stat. 1241, codified at 42 U.S.C. § 290bb-2a.

This provision strengthens the understanding of the CSA as a statute combating recreational drug abuse, and also indicates that when Congress wants to regulate medical practice in the given scheme, it does so by explicit language in the statute.

Gonzales v. Oregon, 546 U.S. 243, at 271-272.

The Government, in the end, maintains that the prescription requirement delegates to a single Executive officer the power to effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality. The text and structure of the CSA show that Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it.

Gonzales v. Oregon, 546 U.S. 243, at 275.

POTENTIAL FOR ABUSE

21. High potential for abuse is identical in both schedule I and schedule II of the IUCSA. Schedule II includes the exact same language as schedule I, "The substance has high potential for abuse." Iowa Code § 124.205(1). The only difference between schedule I and schedule II is whether a substance has accepted medical use in treatment in the United States.

22. Because the petitioner did not ask the IBPE to recommend marijuana be placed in schedule II, and because the petitioner only asked that the IBPE perform its obligation to remove marijuana from schedule I and place marijuana "in a different schedule or remove it from the list of controlled substances", the IBPE must first remove marijuana from schedule I before it considers whether to place

marijuana “in a different schedule or remove it from the list of controlled substances”.

23. Because the petitioner did not ask the IBPE to place marijuana in schedule II, the issue of whether marijuana actually belongs in schedule II was not presented to the IBPE in the original petition to reschedule marijuana. If this Court orders the IBPE to perform its statutory duty to determine the proper scheduling of marijuana, including possible removal from the schedules entirely, the petitioner will then supply the IBPE with evidence that marijuana lacks a high potential for abuse.

24. For example, the only review of marijuana conducted under the process for reclassification of drugs described by the Supreme Court of the United States in *Gonzales v. Raich*, 545 U.S. 1, 33 (2005), resulted in a finding that: “Marijuana, in its natural form, is one of the safest therapeutically active substances known to man.” In the Matter of Marijuana Rescheduling, DEA Docket No. 86-22, September 6, 1988, at pages 58-59 (See Exhibit 1 attached to petitioners’ original petition to the IBPE to reschedule marijuana).

25. In fact, Congress had doubts about placing marijuana in the CSA and established a Presidential Commission to resolve those doubts. Section 601 of the CSA, Public Law 91-513, October 27, 1970, 84 Stat. 1236, 1280-1281, established a commission known as the Commission on Marihuana and Drug Abuse. The Report of the Commission recommended that marijuana be decriminalized and removed from the international drug control treaty. See *NORML v. DEA*, 559 F.2d 735, 751

n.70 (D.C. Cir. 1977) (“[T]he Commission recommended that ‘the United States take the necessary steps to remove cannabis from the Single Convention on Narcotic Drugs (1961)’...”).

26. The Supreme Court of the United States acknowledged that marijuana has recently been shown to have accepted medical use. *Gonzales v. Raich*, 545 U.S. 1, at 28 N.37:

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. *See, e.g.*, Institute of Medicine, *Marijuana and Medicine: Assessing the Science Base* 179 (J. Joy, S. Watson, & J. Benson eds. 1999) (recognizing that “[s]cientific data indicate the potential therapeutic value of cannabinoid drugs, primarily THC [Tetrahydrocannabinol] for pain relief, control of nausea and vomiting, and appetite stimulation”); see also *Conant v. Walters*, 309 F.3d 629, 640-643 (CA9 2002) (Kozinski, J., concurring) (chronicling medical studies recognizing valid medical uses for marijuana and its derivatives). But the possibility that the drug may be reclassified in the future has no relevance to the question whether Congress now has the power to regulate its production and distribution. Respondents’ submission, if accepted, would place all homegrown medical substances beyond the reach of Congress’ regulatory jurisdiction.

27. Because the IBPE must acknowledge that marijuana can no longer be included in schedule I of the IUCSA, it must determine which schedule, if any, marijuana actually belongs in. At that time, the petitioner will introduce evidence such as the Institute of Medicine report mentioned by the U.S. Supreme Court.

28. The question of whether marijuana would meet the statutory requirements for inclusion in schedule II was simply not presented to the IBPE by the petitioner. Because the matter of marijuana’s medical use is a complex social

issue, the petitioner has broken it down into the smallest component necessary for this stage of the litigation. The petitioner does not agree that marijuana has a high potential for abuse, but that has nothing to do with the issue presented to the IBPE at this state of the litigation. The only issue presented to the IBPE at this stage of the litigation is that marijuana no longer meets the requirements for inclusion in schedule I of the IUCSA. The Petitioner reserves the right to present evidence rebutting the false assumption by the IBPE that marijuana has a “high potential for abuse.”

Dated this 19th day of October, 2008.

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 October 20, 2008 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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