

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

George McMahon, Bryan Scott, and	)	
Barbara Douglass, Petitioners	)	
	)	
and	)	Docket No. CV 7415
	)	
Carl Olsen, Intervenor	)	
	)	
<i>vs.</i>	)	MOTION FOR REVIEW
	)	OF JULY 21, 2009
The Iowa Board of Pharmacy,	)	BOARD OF PHARMACY
Respondent	)	SUPPLEMENTAL ORDER

Carl Olsen (“Olsen” hereafter), the Petitioner before the Iowa Board of Pharmacy (“Board” hereafter) and the Intervenor in this case, respectfully moves this Court for judicial review of the Board’s Supplement Order dated July 21, 2009 (attached hereto as Exhibit #1).

**PROCEDURAL HISTORY**

In May of 2008, Olsen petitioned the Board to remove marijuana from Iowa Code § 124.204, Schedule I, because it no longer meets the legal requirement of having no accepted medical use in treatment in the United States. *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 the event the Board wanted to be absolutely sure that marijuana is safe for use under medical supervision, 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.

Olsen did not supply any evidence regarding marijuana's potential for abuse, because marijuana is already listed in both Schedule I and Schedule II in Iowa. See, Iowa Code §§ 124.203(1) and 124.205(1); *and see*, Iowa Code §§ 124.204(4)(m) and 124.206(7)(a). Removing marijuana from Schedule I would not leave it uncontrolled, since it is listed in both schedules I and II and the abuse potential is the same for those two schedules.

On October 7, 2008, the Board rejected Olsen's petition for failure to address the first scheduling criteria, whether marijuana has a high

potential for abuse. On April 21, 2009, this court rejected the Board of Pharmacy's ruling and remanded to the agency because marijuana's potential for abuse was not relevant to Olsen's petition. The abuse potential is identical in both Schedule I and Schedule II and is not determinative as to which of those two schedules is appropriate for marijuana.

The Board adopted its Supplemental Order on July 21, 2009 ("Supplemental Order" hereafter) to address this court's ruling of April 21, 2009. The Board correctly identified the issue that it must address, "[W]hether the evidence presented by the Petitioner is sufficient to support a finding that marijuana has accepted medical use in the United States and does not lack accepted safety for use in treatment under medical supervision."

### **THE BOARD'S FINDINGS**

The Board found that Olsen is not a credible witness because of his past use of marijuana in 1978, 1979, and 1980, ignoring the fact that in 1984 the Iowa Supreme Court ultimately found Olsen's religious use of marijuana bona fide. *See State of Iowa v. Carl Eric Olsen*, No. 171/69079 (Iowa, July 18, 1984), at page 2.

The Board then found that “accepted medical use in the United States” means accepted medical use in all 50 states, not just 12 states. *See Supplemental Order*, at page 7-8;

After having found that marijuana lacks “accepted medical use in the United States” the Board failed to find lack of accepted medical use creates an affirmative duty to recommend the Iowa Legislature remove marijuana from Schedule II. *See Iowa Code § 124.205*.

The Board found that it must apply the eight criteria listed in Iowa Code § 124.201(1) to Olsen’s petition to remove marijuana from Schedule I, regardless of the fact that marijuana is scheduled in both Schedule I and Schedule II, regardless of the fact that Olsen’s petition did not request that marijuana be removed from Schedule II or moved to any other particular schedule, and regardless of the fact that removing marijuana from Schedule I would not leave it unscheduled (it would still remain in Schedule II).

The Board again found that Olsen provided “no evidence in the administrative record to support a finding that marijuana does not have a high potential for abuse”. *See Supplemental Order*, at page 12. In making this finding, the Board completely disregarded this Court’s

April 21, 2009, Ruling in McMahon v. Iowa Board of Pharmacy, Case No. CV7415, finding abuse potential was not relevant to Olsen's petition.

## **ARGUMENT**

As this court has previously held, the only difference between Schedule I and Schedule II is whether a substance has accepted medical use in treatment in the United States and is safe for use under medical supervision. Thirteen state laws allow personal cultivation and distribution of marijuana for medical purposes under a doctor's supervision, which is conclusive proof that marijuana has both accepted medical use in treatment in the United States and that marijuana is safe for use under medical supervision.

The Board characterized 12 state laws defining "medical use" of marijuana as legalization of "some marijuana use" in those states. *See* Supplemental Order, at page 7. Olsen cited the exact chapter and section of each state law defining "medical use" of marijuana. Some use is medical use in this case and there is no evidence to suggest any other use but medical has been legalized.

The eight criteria listed in Iowa Code § 124.201(1) are not relevant to Olsen's petition because Olsen did not ask the Board to remove marijuana from Schedule II. *See*, Iowa Code § 124.203(1), and Iowa Code § 124.205(1). The Board is certainly free to consider those eight criteria before it makes a recommendation on whether marijuana should have accepted medical use in Iowa, but it cannot escape the plain language of the statute nor say Olsen did not provide sufficient evidence to support a conclusion that marijuana has accepted medical use in other states. The eight criteria in Iowa Code § 124.201(1) are simply used to determine which of the 5 schedules a substance belongs in. Olsen did not err by leaving out any evidence directed toward marijuana's lack of a potential for abuse because Olsen did not request marijuana be removed from Schedule II. If the Board feels there is evidence that marijuana should be removed from both Schedule I and Schedule II, it can take whatever steps are necessary to make findings and make that recommendation to the Iowa Legislature. Olsen was not obligated to amend his petition, or file another petition, requesting that marijuana be removed from both Schedule I and Schedule II, nor was

Olsen obligated to petition the Board to recommend marijuana be accepted for medical use in Iowa.

The Board's finding that accepted medical use in the United States means accepted medical use in all 50 states is an unreasonable interpretation of the statute.

As determined by the U.S. Supreme Court in *Gonzales v. Oregon*, 546 U.S. 243 (2006), accepted medical use in just one state is sufficient, as a matter of law, to establish accepted medical use in the United States under federal law. *See also Grinspoon v. DEA*, 828 F.2d 881, 885-886 (1st Cir. 1987); *and see Conant v. Walters*, 309 F.3d 629, 639 (9th Cir. 2002), *cert. denied, Walters v. Conant*, 540 U.S. 946 (2003):

Our decision is consistent with principles of federalism that have left states as the primary regulators of professional conduct. *See Whalen v. Roe*, 429 U.S. 589, 603 n. 30, 51 L. Ed. 2d 64, 97 S. Ct. 869 (1977) (recognizing states' broad police powers to regulate the administration of drugs by health professionals); *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"). We must "show[] respect for the sovereign States that comprise our Federal Union. That respect imposes a duty on federal courts, whenever possible, to avoid or minimize conflict between federal and state law, particularly in situations in which the citizens of a State have chosen to serve as a laboratory in the trial of novel

social and economic experiments without risk to the rest of the country.” *Oakland Cannabis*, 532 U.S. at 501 (Stevens, J., concurring) (internal quotation marks omitted).

Although the U.S. Supreme Court, in *Gonzales v. Oregon*, was interpreting federal drug law, and not state law, the Board has not produced any evidence that the Iowa drug law should be interpreted any differently. If one state says marijuana has accepted medical use, then marijuana has accepted medical use in the United States.

The Board is no longer citing *Gonzales v. Raich*, 545 U.S. 1 (2005), as it did in its Order of October 7, 2008, in Iowa Board of Pharmacy Case No. 2008-105, but it is worth noting here that Raich never made a challenge to federal scheduling. If Raich had made the claim that marijuana was improperly scheduled because it has accepted medical use in the United States, the outcome of that case would likely have been different. Olsen has filed such a claim with the DEA and the case is currently pending in the U.S. Court of Appeals for the 8<sup>th</sup> Circuit, Olsen v. DEA, No. 09-1162.

Attached to this motion as Exhibit #2 are documents that Olsen attempted to enter into the administrative record at the Board’s June 1, 2009, public meeting. These documents show that federal policy has

changed and the federal government is now accepting state medical marijuana laws. At the end of paragraph 3 in his Memorandum for the Heads of Executive Departments and Agencies of May 20, 2009, President Obama cites the same language cited by Justice Stevens in his concurring opinion in *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 502 (2001), cited in *Conant v. Walters*, 309 F.3d 629, 639 (9th Cir. 2002).

**A. *Violation of Due Process***

The Board wants to answer a question that Olsen did not ask. The question presented to the Board was whether marijuana has accepted medical use in treatment in the United States. The question the Board wants to answer is whether marijuana should have accepted medical use in Iowa. Olsen understands why the Board would want to answer the question of whether marijuana should have accepted medical use in Iowa, because there is a bill pending in the Iowa Legislature, Senate File 293, which would make marijuana legal for medical use in Iowa. The Board cannot simply deny Olsen's petition because it wants to answer a question that Olsen did not ask.

The Board correctly points out that Olsen's claim is not a medical claim. Olsen's claim is based on his belief that marijuana is the blood of Christ referred to in the Bible and used as a sacrament in Holy Communion. Olsen's injury is due to the misclassification of marijuana as a dangerous substance, as well as the refusal of the Board to make it available as medicine. Olsen's sacrament is for the "healing of the nations" and Olsen believes it is a medicine. Revelation 22:2; *State v. Olsen*, 315 N.W.2d 1, 7 (Iowa 1982). Olsen believes spiritual healing is the essential ingredient of physical healing, so Olsen's claim is medical as well as religious.

The question of whether marijuana should be accepted for medical use in Iowa must remain for another day. Removing marijuana from Schedule I would not make it accepted for medical use in Iowa. Removing marijuana from Schedule I would remove the stigma associated with marijuana being misclassified as a dangerous substance with no medical value. For Olsen and other medical users of marijuana, the misclassification of marijuana works a real injury in trying to get legal protection from the state of Iowa and the federal government.

Attached to this motion as Exhibit #3 is a copy of the Written Statement of Carl Olsen that Olsen attempted to file with the Board on July 21, 2009, showing that coca leaves and opium poppy are both in Schedule II and neither of them is accepted for medical use in Iowa, proving that removing marijuana from Schedule I is not the same thing as legalizing it for medical use in Iowa. Contrary to the Board's Conclusion of Law on page 9 of its Supplemental Order, removing marijuana from Schedule I is not the equivalent of legalizing the medical use of marijuana in Iowa. Senate File 293 would legalize the medical use of marijuana, not the classification of marijuana in Schedule II. Coca leaves and opium poppy are not legal for medical use in Iowa, and both are in Schedule II.

Also attached to this motion are Exhibits #4, #5, and #6, which were presented to the Board at its meeting on July 21, 2009, but rejected by the Board for inclusion in the administrative record. Exhibit #4 is Olsen's objection to any action by the Board to consider the medical use of marijuana in Iowa until marijuana is removed from its illegal classification in Schedule I. Exhibits #5 and #6 are statements by medical marijuana patients that the Board refused to

consider before adopting its Supplemental Order showing how our due process rights were violated.

The Board clearly erred by finding Olsen lacks credibility. Olsen's last criminal conviction was in 1982. In 1984, the Iowa Supreme Court held that Olsen's religion is bona fide. The Iowa Supreme Court refused to apply the compelling interest test to Olsen's possession of marijuana, consistent with the ruling in *Employment Division v. Smith*, 494 U.S. 872 (1990), but found Olsen was credible in regard to his religious belief in the use of marijuana. Although Olsen has never agreed that a compelling interest sufficient to override his religious freedom was shown in any case, Olsen does agree that the Iowa Supreme Court said the Board had determined there is compelling state interest in denying Olsen's his Constitutional Rights:

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."

*State v. Olsen*, 315 N.W.2d 1, 8 (Iowa 1982).

The prejudicial effect marijuana's misclassification has on Olsen's religion is a burden that gives Olsen standing to complain and seek redress of his grievance. Attached to this motion as Exhibit #7 is a copy

of the Supplemental Testimony of Carl Olsen that Olsen attempted to submit to the Board on July 13, 2009, showing that Olsen has standing to complain about religious discrimination based on his religious use of marijuana while the state accepts the medical use of marijuana at the Iowa State Capitol Building. *Employment Division v. Smith*, 494 U.S. 872 (1990), explains that when a state allows the secular or religious use of a controlled substance, it triggers a Fourteenth Amendment due process and equal protection claim for religious exercise under the First Amendment to the U.S. Constitution. The state must allow religious use that cannot be any less than any secular or religious use already allowed. *See, Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). Olsen has a right to religious use of marijuana that can be no less than the accepted medical use allowed by both the state of Iowa and the federal government (this is called the least restrictive means test which is used in conjunction with the compelling interest test).

The Board violated Olsen's rights to Due Process and Redress of Grievances by finding Olsen is not credible without allowing Olsen to present any evidence or rebuttal to address the finding. The Board

selected an Iowa Supreme Court ruling from 1982, while ignoring the Iowa Supreme Court ruling from 1984. Olsen is credible and has more standing than a medical patient. The right to medical treatment is not a fundamental right, although medical patients do have a fundamental right to due process. The right to free exercise of religion is a fundamental right in and of itself. *See, Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”); *Braunfeld v. Brown*, 633 U.S. 599, 605 (1961) (“choice to the individual of either abandoning his religious principle or facing criminal prosecution”); *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 302 (1979) (“when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not ‘first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute’”); *MedImmune v. Genentech*, 549 U.S. 118, 128-129 (2007):

Our analysis must begin with the recognition that, where threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced. The plaintiff’s own action (or inaction) in failing to

violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction.

***B. The Plain Meaning of the Statute***

The Board interprets the phrase “in the United States” to mean in all 50 states, not just 12. Iowa Code § 124.101(28) defines the term “State”:

[W]hen applied to a part of the United States, includes any state, district, commonwealth, territory, insular possession, and any area subject to the legal authority of the United States of America.

In *Grinspoon v. DEA*, 828 F.2d 881, 886 (1<sup>st</sup> Cir. 1987), the United States Court of Appeals rejected the argument that “accepted medical use in treatment *in the* United States” (emphasis supplied) means accepted medical use everywhere in the United States.

In *Gonzales v. Oregon*, 546 U.S. 243 (2006), the United States Supreme Court found that “accepted medical use” is defined by the states and not by the federal government. In *Oregon v. Ashcroft*, 368 F.3d 1118, 1124 (9th Cir. 2004), the United States Court of Appeals explained the role of the states in determining accepted medical practice:

The principle that state governments bear the primary responsibility for evaluating physician assisted suicide follows from our concept of federalism, which requires that state 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.”). The Attorney General “may not . . . regulate [the doctor-patient] relationship to advance federal policy.” *Conant*, 309 F.3d at 647 (Kozinski, J., concurring).

The Iowa Legislature’s choice of the words “in the United States” makes it perfectly clear that Iowa’s classification of marijuana depends entirely on whether any of the 50 states have accepted marijuana for medical use, not all 50. The Iowa Legislature could have easily used the words “in Iowa” if it had intended to give the Board the authority to classify marijuana in Schedule I in Iowa independently from what other states have done. The Iowa Legislature could have just as easily used the words “by the DEA” or “by the FDA” if it had intended to let the federal government dictate Iowa scheduling. The Iowa Legislature

could also have easily used the words “by every state in the United States” if it had meant all 50. The Board acknowledges that the states, and not the federal government, determine accepted medical use, but incorrectly interprets “in the United States” to mean all 50 states.

The Board correctly points out that the meaning of “in the United States” must be interpreted within the context of the entire statute as a whole and not a single part, but never explains why 50 states must accept the medical use of a substance for that substance to have accepted medical use in the United States. If, for example, 49 states had accepted the medical use of marijuana, then Iowa could say marijuana has no accepted medical use in treatment in the United States until Iowa says it does. If the Iowa Legislature had intended marijuana’s classification to be changed only when marijuana had accepted medical use in Iowa, it could have used the words “in Iowa” instead of “in the United States”. The Board’s interpretation of the statute is unreasonable.

## CONCLUSION

Olsen is pleased with the Board's recent sua sponte announcement on July 21, 2009, that it will conduct a review of the scientific literature and hold public hearings on marijuana's accepted medical use for the purpose of determining whether the Board should recommend that Iowa legalize the medical use of marijuana in Iowa. *See Exhibit #8.* However, that review should not be tainted by the current illegal classification of marijuana as a substance having no accepted medical use in treatment in the United States.

Olsen's petition was supported by sufficient evidence to justify the removal of marijuana from Schedule I and the Board erred by applying the statutory criteria of Iowa Code § 124.201(1) when the only difference between marijuana's current classification in Schedule I and marijuana's current classification in Schedule II is whether it has accepted medical use in other states. Olsen presented evidence that marijuana does indeed have accepted medical use in other states and that marijuana is extremely safe for use under medical supervision. Olsen was not required to present any additional evidence to prove his case.

Dated: August 4, 2009

Respectfully submitted:

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## CERTIFICATE OF SERVICE

I certify that on or before August 4<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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