Iowa District Court
Polk County, Iowa

CARL OLSEN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	Docket No. CV 51068
IOWA BOARD OF PHARMACY	)	
	)	
Respondent.	)	

MEMORANDUM IN SUPPORT OF PETITION FOR JUDICIAL REVIEW

Federal Preemption

Federal preemption is an issue that is frequently brought up in any discussion of state medical marijuana laws.

California enacted a medical marijuana law in 1996. Since that time, the federal government has never made the argument that California did not have a constitutional right to enact such a law. Since that time, forty states, the District of Columbia, the Territory of Guam, and the Commonwealth of Puerto Rico, have enacted medical marijuana laws, and the federal government has never made the argument that any of these laws are unconstitutional. The issue has been litigated. This is by no means an exhaustive list, but here are two judicial rulings that were submitted to the Board on December 1, 2014 (see Exhibit #23, at p. 10): *Garden*

Grove v. Superior Court, 157 Cal.App.4th 355, 385, 68 Cal.Rptr.3d 656, 677 (2007), *cert. denied*, 555 U.S. 1044, 129 S. Ct. 623, 172 L. Ed. 2d 607 (2008); *San Diego County v. San Diego NORML*, 165 Cal.App.4th 798, 809, 81 Cal.Rptr.3d 461, 468 (2008), *cert. denied*, 556 U.S. 1235, 129 S. Ct. 2380, 173 L. Ed. 2d 1293 (2009).

The United States Supreme Court has found that the anti-preemption clause, 21 U.S.C. § 903, in the federal Controlled Substances Act, 21 U.S.C. §§ 801-971, coupled with the explicit enumeration of national standard for medical treatment in the United States, show that Congress did not intend to determine what states can define as accepted medical use of controlled substances and that the federal act simply targets abuse (unauthorized use) (see Exhibit #23, at p. 7). *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) ("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, 271-272 (2006):

> 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.

The federal controlled substance schedules are administrative rules and not statutes (unlike here in Iowa where the schedules are statutory). The schedules in 21 U.S.C. §§ 812(b)(1)-(5) are the "initial schedules" and the official schedules are the ones listed in 21 C.F.R. §§ 1308(11)-(15). Therefore, federal Schedule 1 is just an ordinary administrative rule. The Attorney General has the authority to remove marijuana from federal Schedule 1 by administrative rule without any action from Congress. 21 U.S.C. § 811(a)(2). So, essentially, the Attorney General is unlawfully maintaining a rule that declares illegitimate the medical use of marijuana in forty states and three federal jurisdictions that have accepted it.

If this were a situation where the Attorney General was trying to make a rule placing marijuana in Schedule 1, it would be an impossible task. However, maintaining marijuana in Schedule 1 is simple for the Attorney General; just do nothing and wait for someone else to say something about it. I'm here to say something about it.

What the Iowa Code says about Federal Scheduling

At the hearing on November 19, 2014, James Miller said the Iowa Board of Pharmacy is bound by the scheduling decisions of the federal government (see Exhibit #22, at p. 1). While federal scheduling decisions might be rubber stamped by the Board more often than not, there is no requirement that they be accepted. Mr. Miller's statement is not a legally valid interpretation of Iowa law. If a federal scheduling decision makes sense, there is no reason why Iowa should not adopt it.

The Iowa Code only mentions federal scheduling once in the scheduling requirements (see Exhibit #23, at p. 6). The only instance where the Iowa legislature requires the board to consider federal scheduling is when the federal government adds a new substance to the federal schedules that has never been previously scheduled. Iowa Code § 124.201(4) (2014). And, when the federal government does add a new substance to the federal schedules, the board is not

legally bound to make that same recommendation to the Iowa legislature. Iowa Code § 124.201(4) (2014); 657 IAC 10.37(3).

Because marijuana is not a new substance being added to Schedule 1 by the federal government, the Board is not bound in any way by federal scheduling. Iowa's scheduling of marijuana has been inconsistent with federal scheduling since 1979. Iowa Code § 124.204(4)(m) (2014); Iowa Code § 124.204(4)(u) (2014); Iowa Code § 124.204(7); Iowa Code § 124.206(7)(a) (2014). Another inconsistency is the scheduling of naturally extracted THC, which is in Iowa Schedule 3 since 2008, but has always been in federal Schedule 1. Iowa Code § 124.208(9)(b).

Mr. Miller gave the example of hydrocodone products (see Exhibit #22, at p. 1). Mr. Miller stated that when the federal government transferred hydrocodone products from federal Schedule 3 to federal Schedule 2, the state was legally bound to do the same. Mr. Miller's statement is not a legally valid interpretation of law. Iowa Code § 124.201(4) (2014); 657 IAC 10.37(3) ("The board may object to the designation of any new substance as a controlled substance within 30 days following publication in the Federal Register of a final order so designating the substance under federal law.").

Iowa could, in theory, leave hydrocodone products in state Schedule 3 after the federal government moves them to federal Schedule 2. Federal Schedule 2

would prevail, because every doctor and every pharmacist that handles hydrocodone has to have both a state and a federal license and agree to comply with both state and federal law. There is no state law that allows the sale of hydrocodone products outside of a pharmacy, so it would be impossible to obtain it legally without getting it from a pharmacy with a prescription from a doctor. It might make sense to move hydrocodone products to state Schedule 2, but it's certainly not required by any federal law. States are unlikely to pass laws allowing the use of hydrocodone as a non-prescription medicine sold in state dispensaries, but forty states have allowed the use of marijuana or marijuana extracts that are not being sold in pharmacies.

At that same hearing on November 19, Mr. Miller identified marijuana as a "drug product" which is not technically accurate in the sense that opium plants and coca plants are not technically "drug products." Plants in Schedule 2 that are used to make "drug products," like opium plants and coca plants are certainly commercial products (like fruits and vegetables) in their raw form, but they are not sold to end users as "drug products." Both opium plants and coca plants are in state and federal Schedule 2 and always have been (see Exhibit #23, at p. 13). Marijuana does not have to be a "drug product" to be removed from Schedule 1. Marijuana can be used to make "drug products," like cannabidiol, the same as opium plants (used to make morphine) and coca plants (used to make cocaine).

It's also worth noting that morphine and cocaine are not approved for end users unless they are in an FDA-approved "drug product." In theory, there could be a state law that allows them to be sold without being approved for marketing by the FDA, but there are no such state laws. Since morphine and cocaine prescriptions can be obtained legally, there's no reason to sell them in a state dispensary. With legal access, there is no reason for state to allow the use of these products outside the doctor/pharmacy model. States that have legalized marijuana or marijuana extracts allow people to dispense it in a separate facility (because they are in violation of federal law due to the inaccurate federal scheduling of marijuana) or they don't even allow it to be dispensed at all (in states like Iowa, you can have it in Iowa but you can't obtain it in Iowa). Manufactures of medical marijuana and marijuana extracts, dispensers, and end users, are all in violation of federal law because marijuana is being unlawfully maintained in federal Schedule 1 by the federal administration despite the fact it has accepted medical use in forty states and three federal jurisdictions. It's a total mess, because of the illegal federal classification.

Duty to Recommend

At that the hearing on January 5, 2015, Mr. Miller suggested that the Board should recommend rescheduling cannabidiol because the legislature had

recognized its medical use (see Exhibit #31, at p. 1). But, the statute governing the operation of the Board says the Board must make recommendations to the legislature. Is this an admission by the Board that state laws do require the removal of marijuana from Schedule 1? Is the Board admitting that state laws prove that marijuana has accepted medical use in the United States? The Board thinks a state law here in Iowa proves that cannabidiol has medical use in the United States because it must have accepted medical use in the United States to be in Schedule 2.

The Iowa statute does not say "in Iowa," it says "in the United States." The only reference to state laws in the statue is Iowa Code § 124.203(1)(b) (2014), Iowa Code § 124.205(1)(b) (2014), Iowa Code § 124.207(1)(b) (2014), Iowa Code § 124.293(1)(b) (2014), and Iowa Code § 124.211(1)(b) (2014). There is federal case law directly on this point. *Grinspoon v. DEA*, 828 F.2d 881, 886 (1st Cir. 1987) ("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.").

If you take away the reference in Iowa Code Chapter 124 to state laws, the Board would have to make recommendations to the legislature based solely on the 8 factors in Iowa Code §§ 124.201(1)(a)-(h) (2014), none of which references any state law. There is inconsistency in the Board's logic.

Mr. Miller also says that recommending scheduling of controlled substances is not within the Board's "purview," and that the Board's sole purview is the regulation of pharmacists and pharmacies in Iowa, but that is another incorrect interpretation of law (see Exhibit #31, at p. 3). There is an entire section on scheduling. Iowa Code §124.201 (2014). And the title of that section is "Duty to Recommend Changes in Schedules."

Scheduling does not make a substance legal

Placing a substance in Schedule 2 does not make it legal for anything. It takes a separate law to make it legal to actually use it. In the case of an FDA approved product, an FDA approved product is legal for an end user who has a valid prescription from a doctor who is licensed to prescribe scheduled substances and obtained from a pharmacy licensed to dispense scheduled substances.

In the case of marijuana and marijuana extracts, some states have laws explaining how those substances can be produced and distributed without a prescription and without obtaining it from a pharmacy.

Most states that have legalized marijuana or marijuana extracts for medical use have not even changed their state schedules. Colorado, for example, has never had marijuana in any schedule. Colorado made marijuana illegal in 1917 and

probably saw no reason to include it in Schedule 1. Schedule 1 would not make marijuana any more illegal than it already was.

During discussion on January 5, 2014, the Board made references to a medical marijuana program, but a medical marijuana program was not requested in the Marijuana Scheduling Petition (see Exhibit #31, at pp. 3 & 4). Moving marijuana to another schedule, or even removing it from all of the schedules, would not create any obligation on the Board to recommend a medical marijuana program in Iowa. It might make sense to make such a recommendation, but such a recommendation is not required.

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 January 4, 2016, 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 addressed to the parties or their attorney of record as follows:

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/s/ Carl Olsen
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