IN THE SUPREME COURT OF IOWA

CARL OLSEN, Petitioner-Appellant. v. IOWA BOARD OF PHARMACY, Respondent-Appellee.	)))))))))	No. 16-1381

DATE OF FILING OF THE COURT OF APPEALS DECISION

AUGUST 2, 2017

APPLICATION BY APPELLANT FOR FURTHER REVIEW

CARL OLSEN
130 NE Aurora Ave
Des Moines, IA 50313-3654
515-343-9933
carl-olsen@mchsi.com
Appellant, Pro Se

Dated: August 13, 2017

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QUESTION PRESENTED FOR REVIEW

Whether the Board ruled contrary to the letter, as well as the intent, of the law by finding that marijuana has medical use as a matter law and then recommending that it be: (a) removed from its current classification as a substance with medical use; and (b) classified as a substance with no medical use.

STATEMENT SUPPORTING FURTHER REVIEW

1. On January 5, 2015, the Board found that marijuana has medical use as a matter of law. The Board recommended that marijuana be removed from its current classification as a substance with accepted medical use (where it has been classified since 1979[1]), and recommended that marijuana be placed in a classification for substances without any medical use. The Board's finding of medical use required a different recommendation than the one it made. This is an important question of law. Iowa R. App. P. 6.1103(1)(b)(2) (April 2017).

2. On May 30, 2014, Iowa enacted the Medical Cannabidiol Act of 2014[2], which for the first time recognized a medical use for

[1] 1979 Iowa Acts 60, Chapter 9, § 14, S.F. 487, June 1, 1979.
[2] 2014 Iowa Acts 369, Chapter 1125, S.F. 2360, May 30, 2014.

marijuana in Iowa. On January 5, 2015, the Board found that the Medical Cannabidiol Act of 2014 creates a medical use for marijuana in Iowa as a matter of law. The Board recommended removing marijuana from its current classification as a substance with medical use (where it has been classified since 1979[3]), and recommended placing marijuana in a classification for substances without any medical use. There is no logical explanation for the Board's recommendation and it involves an important question of changing legal principles. Iowa R. App. P. 6.1103(1)(b)(3) (April 2017).

3. A recent public opinion poll found that 80% of Iowans believe marijuana has medical use.[4] Because the Board has the responsibility to protect the health and welfare of the people of Iowa and make recommendations on their behalf to the legislature, this case presents an issue of broad public importance that this Court should ultimately determine. Finding that marijuana has medical use and recommending it be classified as having none is a public health disaster. Iowa R. App. P. 6.1103(1)(b)(4) (April 2017).

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[3] See Footnote 1.
[4] https://www.scribd.com/document/339443610/Iowa-Poll-Methodology-document-Medical-Marijuana-2017

INTRODUCTION

The Court of Appeals made substantial errors in summarizing the arguments of the two parties, and erred further by basing an erroneous legal analysis on these erroneous arguments.

First, in its opinion of August 2, 2017 (attached hereto), from which Olsen seeks further review in the Supreme Court, the Court of Appeals erroneously attributes an argument to Olsen that Olsen did not make. Slip. Op., p. 1:

> Carl Olsen appeals from the district court's order on judicial review affirming the Iowa Board of Pharmacy's ruling denying his request to recommend the legislature reclassify marijuana from a Schedule I controlled substance to another scheduled substance.

In the Board's final ruling on January 5, 2015 (attached hereto), the Board acknowledged Olsen did not ask the Board to consider placing marijuana in another schedule. App., p. 27:

> The Petition does not request or suggest what schedule marijuana should be placed in, only that it be removed from Schedule I.

Second, in its opinion on August 2, 2017, the Court of Appeals erroneously attributes an argument to the Board that the Board did not make. Slip. Op., p. 4:

> But the Board found this dual scheduling necessary in light of the legislature's "passage of the Medical

> Cannabidiol Act," which was "an affirmative recognition by the Iowa General Assembly that there is some medical use of marijuana, as it is defined by Iowa Code section 124.201(19)."

In the Board's final ruling on January 5, 2015, the Board found that dual scheduling was not appropriate for marijuana and recommended that marijuana be removed from schedule 2 and placed in schedule 1. App., p. 31:

> To avoid confusion, the Board recommends the phrase "except as otherwise provided by rules of the board for medicinal purposes" be deleted from Iowa Code section 124.204(4)"m". In addition, the Board recommends that either the entirety of Iowa Code section 124.206(7)"a" be deleted, or, at a minimum, the phrase "pursuant to rules of the board" be deleted from Iowa Code section 124.206(7)"a".

Olsen did not overlook an argument the Board did not make. The Board did not recommend dual scheduling. Slip. Op., p. 3:

> Olsen hones in on "accepted medical use." In his view, because marijuana has accepted medical use in treatment in the United States, it should not be listed in Schedule I and the Board should have recommended its removal from that Schedule. His argument, while appealing at first blush, overlooks a significant portion of the Board's decision.

STATEMENT OF THE FACTS

The Iowa Medical Cannabidiol Act of 2014 ("2014 Act" hereafter), 2014 Iowa Acts 369, Chapter 1125 (S.F. 2360) § 3, Iowa Code 124D.2(1) (2014), defines cannabidiol as a substance found in marijuana:

> "Cannabidiol" means a nonpsychoactive cannabinoid found in the plant Cannabis sativa L. or Cannabis indica or any other preparation thereof that is essentially free from plant material, and has a tetrahydrocannabinol level of no more than three percent.

There are no federally approved cannabidiol preparations. Cannabidiol has always been in schedule 1 and remains so today.[5]

The 2014 Act requires that cannabidiol be obtained from an "out-of-state" source.[6] See Iowa Code § 124D.6(1)(b) (2014).

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[5] Federal Register, Vol.81, No. 240, Wednesday, December 14, 2016, pp. 90194-90196 ("marijuana extracts"). Cannabidiol is an extract: https://www.deadiversion.usdoj.gov/schedules/marijuana/m_extract_7350.html (last accessed on August 4, 2017).

[6] The Medical Cannabidiol Act of 2017 authorizes the cultivation of marijuana in Iowa to make cannabidiol. Authorizing the use of a schedule 1 substance from an unknown "out-of-state" source is not safe and the 2017 Act begins to resolve the issue. Olsen's 2014 petition informed the Board that marijuana is required for making cannabidiol and that Iowa must act to protect the welfare of its citizens who will now be relying on this plant as the source of their medicine. See 2017 Iowa Acts 451, Chapter 162, H.F. 524, Iowa Code 124E (2017).

Federal penalties for possession of medical cannabidiol are quite severe.[7]

ARGUMENT

A. Marijuana has accepted medical use as a matter of law

Cannabidiol is found in marijuana. Schedule 1 is an obstacle to marijuana's medical use. The statutory requirement for inclusion in schedule 1 makes it unlawful to both recognize marijuana's medical use and simultaneously retain it in schedule 1. Iowa Code § 124.203 (2015).

Because cannabidiol is defined in the 2014 Act as a substance contained in marijuana, marijuana has "accepted medical use." Olsen requested that the Board recommend removal of marijuana from schedule 1 because the 2014 Act gives marijuana an accepted medical use in the state of Iowa.

The Board agreed with Olsen that marijuana does have medical use because of the 2014 Act as a matter of law. App., p. 29 ("there is some medical use for marijuana"), while at the same time

[7] A fine of $1,000 fine and up to one year in prison for the first offense; A fine of $2,500 fine and up to two years in prison for a second offense; and a fine of $5,000 fine and up to three years in prison for a third and subsequent offense. 21 U.S.C. § 844(a) (2017).

recommending marijuana be removed from schedule 2 (substances with medical use) and placed in schedule 1 (substances with no medical use).

The Board agreed with Olsen that marijuana has medical use in Iowa as a matter of law, because of the Medical Cannabidiol Act of 2014.

Marijuana has been in schedule 2 (a schedule that recognizes marijuana's medical use) since 1979.[8] The Board's recommendation to remove marijuana from schedule 2 in response to a state law recognizing marijuana's medical use can't be reconciled with Iowa's controlled substances act.

The explanation given by the Board during the final hearing on Olsen's petition on January 5, 2017, that opium is in schedule 1 and marijuana should be in the same classification as opium was erroneous. App., pp. 56-57, 88-89, 97, 113-115, 145, 409, 440-441, 450-451, 453, 457-458, 469-470. Opium has never been in schedule 1. Opium has been in schedule 2 for the past 47 years.[9]

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[8] See Footnote 1.
[9] Iowa Code § 124.206(2)(c) (2015).

If opium sets the standard for plants with medical use (because those plants are not classified as schedule 1 controlled substances), and it absolutely does, then by the Board's own logic, the Board should have recommended that marijuana be classified as other plants used to make medicines are classified, schedule 2 or lower, or not included in a schedule (Olsen did not ask for a specific schedule).

B. The origin and meaning of "accepted medical use"

The phrase "accepted medical use" is not defined in the Iowa Code, nor is it defined in the U.S. Code. The Board is vested with the authority to interpret that phrase as long as the Board's interpretation is both lawful, Iowa Code § 17A.19(b) (2015), and reasonable, Iowa Code §§ 17A.19(l) and 17A.19(m) (2015).

The origin of the phrase "accepted medical use" comes from the Uniform Controlled Substances Act ("UCSA" hereafter), 9 U.L.A. Part 2, § 203(a)(2)[10], which in turn comes from the federal Controlled Substances Act ("CSA" hereafter), 21 U.S.C. § 812(b)(1)(B).

Iowa has adopted the UCSA. The intent is found in Iowa Code § 124.601. The UCSA is referred to by name in Iowa Code § 124.602

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10 http://www.uniformlaws.org/shared/docs/controlled%20substances/UCSA_final%20_94%20with%2095amends.pdf

(This chapter may be cited as the "*Uniform Controlled Substances Act*".)

The meaning of the phrase "accepted medical use" in the UCSA comes from the CSA. The Uniform Law Commission explains this in the comments on page 16:

> The Act follows the federal Controlled Substances Act and lists all of the controlled substances in five schedules that are identical with the federal law. Throughout the Act "listed" is used to refer to the controlled substances listed in the Act, while "included" is used to refer to substances controlled under authority of the Act but not necessarily "listed" in the Act. The Act is not intended to prevent a State from adding or removing substances from the schedules, or from reclassifying substances from one schedule to another, provided the procedures specified in this section are followed.

Between 1987 and 1994, federal courts and the U.S. Department of Justice Drug Enforcement Administration ("DEA" hereafter) began to explain what the phrase "accepted medical use" means. Federalism was not relevant to accepted medical use of marijuana between 1987 and 1994, because state laws accepting the medical use of marijuana did not exist when these explanations were written. States began enacting medical marijuana laws in 1996.

A federal court ruling in 1987 explained that "accepted medical use" can be intrastate without approval for interstate marketing.

> 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.

Grinspoon v. DEA, 828 F.2d 881, 886 (1st Cir. 1987).

> Unlike the CSA scheduling restrictions, the FDCA interstate marketing provisions do not apply to drugs manufactured and marketed wholly intrastate. Compare 21 U.S.C. § 801(5) with 21 U.S.C. § 321 (b), 331, 355(a). Thus, it is possible that a substance may have both an accepted medical use and safety for use under medical supervision, even though no one has deemed it necessary to seek approval for interstate marketing.

Grinspoon v. DEA, 828 F.2d 881, 887 (1st Cir. 1987).

After the *Grinspoon* decision, the federal courts and the DEA began to address the specific question of how the DEA determines whether marijuana has "accepted medical use" (in the absence of any state law accepting marijuana for medical use).

This discussion between the federal courts and the DEA took place in 1987 and 1994, two years before any state had accepted the medical use of marijuana. There was no constitutional issue of federalism at that time, because no state had accepted the medical use of marijuana prior to 1996.

> The difficulty we find in petitioners' argument is that neither the statute nor its legislative history precisely defines the term "currently accepted medical use"; therefore, we are obliged to defer to the Administrator's interpretation of that phrase if reasonable.

Alliance for Cannabis Therapeutics v. DEA, 930 F.2d 936, 939 (D.C. Cir. 1991); and see, *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131 (D.C. Cir. 1994).

In 1992, the DEA acknowledged that Congress did not authorize the Attorney General to decide whether states can or should accept the medical use of marijuana. The DEA explained it can only acknowledge the decision "others" have made.

> Clearly, the Controlled Substances Act does not authorize the Attorney General, nor by delegation the DEA Administrator, to make the ultimate medical and policy decision as to whether a drug should be used as medicine. Instead, he is limited to determining whether others accept a drug for medical use. Any other construction would have the effect of reading the word "accepted" out of the statutory standard.

Marijuana Scheduling Petition, DEA Docket No. 86-22, 57 Fed. Reg. 10499 (March 26, 1992) 10506. The DEA does not decide whether marijuana has "accepted medical use." "Others" do.

"Others," in the context of accepted medical use of marijuana, means people organized as states, electing legislators, and accepting the medical use of marijuana by enacting state laws defining

marijuana as medicine. When federal law does not define a phrase used in a federal statute and state law defines that same phrase, then the Court must find the state has the authority under the U.S. Constitution to make that decision. This is known as federalism. State medical marijuana laws are proof beyond any doubt that marijuana has accepted medical use in the United States.

> Congress may not simply "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981).

New York v. United States, 505 U.S. 144, 161 (1992).

> 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, 258 (2006).

The decisions of the U.S. Supreme Court, as well as the comments of the Uniform Law Commission in the UCSA, make it clear that Iowa has the authority to accept the medical use of marijuana. A state that accepts the medical use of marijuana must remove marijuana from schedule 1 when accepting marijuana for medical use to maintain consistency with federal law. Saying

marijuana is medicine and classifying it as having no medical use is a recipe for a public health disaster. A state cannot be divided against itself (state officials acting against the health and welfare of the citizens), nor can Iowa afford to send an inconsistent message to the DEA.

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.

New York v. United States, 505 U.S. 144, 181 (1992).

C. Legislators did not intend marijuana to remain illegal

Iowa legislators could not have intended the medical use marijuana to remain a federal crime. Recommending marijuana be placed in schedule 1 defies logic. Federal penalties for production and distribution of marijuana are quite severe.[11]

For the board to imply a legislative intent to expose Iowa patients and caregivers to federal criminal penalties for possessing cannabidiol[12] and forcing those same patients and caregivers to

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[11] Fines ranging from $250,000 to $50,000,000 and possible life in prison. 21 U.S.C. §§ 841(b)(1)(A)-(D) (2017).

[12] See Footnote 7.

acquire cannabidiol from federal criminal enterprises[13] is irrational, illogical, and wholly unjustifiable.

Legislators intended Iowa patients and caregivers to have the greatest protection under law, not the least. The Iowa Board of Pharmacy must act responsibly, according to the change in law. The Board does not have the discretion to violate state law and recommend making federal criminals out of citizens the legislators intended to protect.

Recommending schedule 1 violates state law and it violates the U.S. Constitution, because it violates federalism. Federal law requires the state to act responsibly by removing marijuana from state schedule 1, making it clear that federal schedule 1 does not apply to the accepted intrastate medical use of marijuana.

CONCLUSION

For the reasons stated herein, Petitioner-Appellant respectfully requests that this Court grant further review.

Respectfully submitted,

/s/ Carl Olsen

CARL OLSEN

[13] 21 U.S.C. § 848.

130 NE Aurora Ave
Des Moines, IA 50313-3654
515-343-9933
carl-olsen@mchsi.com

Dated: August 13, 2017

**CERTIFICATE OF COMPLIANCE
WITH TYPEFACE REQUIREMENTS
AND TYPE-VOLUME LIMITATION**

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because this application has been prepared in a proportionally spaced typeface using Georgia in 14-point, and contains 2,870 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

/s/ Carl Olsen

CARL OLSEN
130 NE Aurora Ave
Des Moines, IA 50313-3654
515-343-9933
carl-olsen@mchsi.com

Dated: August 13, 2017

CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2017, the foregoing was served electronically on the following:

LAURA STEFFENSMEIER
Assistant Attorney General
Iowa Department of Justice
Hoover State Office Building, 2nd Fl.
1305 East Walnut Street
Des Moines, Iowa 50319
Telephone: (515) 281-6690
Email: Laura.Steffensmeier@iowa.gov

Dated: August 13, 2017

Respectfully submitted,

/s/ Carl Olsen

_____

CARL OLSEN

IN THE COURT OF APPEALS OF IOWA

No. 16-1381
Filed August 2, 2017

CARL OLSEN,
Plaintiff-Appellant,

vs.

IOWA BOARD OF PHARMACY,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Bradley McCall, Judge.

Carl Olsen appeals from the district court's order on judicial review affirming the Iowa Board of Pharmacy's ruling denying his request to recommend the legislature reclassify marijuana from a Schedule I controlled substance to another scheduled substance. **AFFIRMED.**

Carl Olsen, Des Moines, pro se appellant.

Thomas J. Miller, Attorney General, and Meghan L. Gavin (until withdrawal), and Laura A. Steffensmeier, Assistant Attorneys General, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

VAITHESWARAN, Presiding Judge.

In 2014, Carl Olsen filed one of several petitions with the Iowa Board of Pharmacy, seeking a recommendation to have the legislature reclassify marijuana from a Schedule I controlled substance to another scheduled substance. *See* Iowa Code §§ 124.204 (2014) (Schedule I substances), .206 (Schedule II substances), .208 (Schedule III substances), .210 (Schedule IV substances), .212 (Schedule V substances); *State v. Bonjour*, 694 N.W.2d 511, 512 (Iowa 2005) (stating Iowa Code chapter 124 "restricts the use of controlled substances and divides them into five schedules"). The Board denied the petition. Olsen sought reconsideration, which the Board also denied.

Olsen petitioned for judicial review. The district court denied the petition, and this appeal followed.

Chapter 124 gives the Board authority to "administer the regulatory provisions of this chapter." Iowa Code § 124.201(1). "Annually, . . . the board shall recommend to the general assembly any deletions from, or revisions in the schedules of substances, enumerated in section 124.204, . . . *which it deems necessary or advisable*." *Id*. (emphasis added). This provision vests the Board with discretion to interpret the schedules. Accordingly, we will reverse the Board's legal interpretation only if it is "irrational, illogical, or wholly unjustifiable." *Id*. § 17A.19(10)(*l*); *Olsen v. Iowa Bd. of Pharmacy*, No. 14-2164, 2016 WL 2745845, at *2 (Iowa Ct. App. May 11, 2016).

The criteria for listing substances in Schedule I are as follows:

> 1. The board shall recommend to the general assembly that the general assembly place a substance in schedule I if the

> substance is not already included therein and the board finds that the substance:
>
> a. Has high potential for abuse; and
>
> b. *Has no accepted medical use in treatment in the United States; or lacks accepted safety for use in treatment under medical supervision.*
>
> 2. If the board finds that any substance included in schedule I does not meet these criteria, the board shall recommend that the general assembly place the substance in a different schedule or remove the substance from the list of controlled substances, as appropriate.

Iowa Code § 124.203 (emphasis added). The criteria for listing substances in Schedule II are as follows:

> 1. The board shall recommend to the general assembly that the general assembly place a substance in schedule II if the substance is not already included therein and the board finds that:
>
> a. The substance has high potential for abuse;
>
> b. *The substance has currently accepted medical use in treatment in the United States, or currently accepted medical use with severe restrictions*; and
>
> c. Abuse of the substance may lead to severe psychic or physical dependence.
>
> 2. If the board finds that any substance included in schedule II does not meet these criteria, the board shall recommend that the general assembly place the substance in a different schedule or remove the substance from the list of controlled substances, as appropriate.

Id. § 124.205 (emphasis added).

Olsen hones in on "accepted medical use." In his view, because marijuana has accepted medical uses in treatment in the United States, it should not be listed in Schedule I and the Board should have recommended its removal from that Schedule. His argument, while appealing at first blush, overlooks a significant portion of the Board's decision.

The Board began by noting marijuana was listed in Schedule I *and* Schedule II. *See id*. §§ 124.204(4)(m) ("Marijuana, except as otherwise provided

by rules of the board for medicinal purposes."), 124.206(7)(a) ("Marijuana when used for medicinal purposes pursuant to rules of the board."). The Board acknowledged, "The dual scheduling [of marijuana under state law] has understandably led to confusion as to the Board's authority to promulgate rules authorizing the legal use of medical marijuana." But the Board found this dual scheduling necessary in light of the legislature's "passage of the Medical Cannabidiol Act," which was "an affirmative recognition by the Iowa General Assembly that there is some medical use for marijuana, as it is defined by Iowa Code section 124.101(19)." The Board explained that because "[m]any substances can be derived from marijuana" and "some may have a medical use, while others may not," "it would be more accurate to schedule each derivate after an individualized analysis" and simultaneously amend the definition of marijuana to exclude "the derivative [with medical use] from the definition of marijuana, in order to avoid conflict." Meanwhile, the Board stated "Schedule 1 [was] inappropriate for cannabidiol" but declined to "make the broader recommendation" to remove the entire category of marijuana from Schedule I.

The district court characterized the Board's suggested approach as "insightful." We concur in this assessment. We also agree with the district court that the Board's interpretation of law was not irrational, illogical, or wholly unjustified. Accordingly, we affirm the Board's denial of Olsen's petition for agency action.

AFFIRMED.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
16-1381	Olsen v. Iowa Board of Pharmacy

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ADDENDUM A

ORDER DENYING PETITION FOR AGENCY ACTION TO RESCHEDULE MARIJUANA

JANUARY 5, 2015

BEFORE THE IOWA BOARD OF PHARMACY

PETITION FOR AGENCY ACTION TO RESCHEDULE MARIJUANA	))))	**ORDER DENYING PETITION**

PROCEDURAL BACKGROUND

On July 7, 2014, Carl Olsen filed a Petition for Agency Action requesting that the Iowa Board of Pharmacy ("Board") recommend to the Iowa General Assembly the removal of marijuana from Schedule I. The Petition does not request or suggest what schedule marijuana should be placed in, only that it be removed from Schedule I.

The Board first considered the Petition at its August 2014 meeting. The Board tabled consideration of the Petition at that time and appointed a committee to further study the request. The committee met on November 17, 2014, and invited public comment on the Petition. Several government agencies, advocacy groups, and private citizens provided both written and oral comments at the November meeting.

On November 19, 2014, the Board met in open session to deliberate the Petition. At that time, the Board voted to table the Petition until the January 2015 meeting. On January 5, 2015, the Board met in open session to deliberate and render a decision on the Petition. The Board voted to deny the Petition.

FACTUAL AND LEGAL BACKGROUND

Marijuana is currently listed in Schedule I under state law. *See* Iowa Code section 124.204(4)"m" (stating "Marijuana, except as otherwise provided by rules of the board for medicinal purposes."). Marijuana is also currently listed in Schedule II under state law. *See* Iowa Code section 124.206(7)"a" (stating "Marijuana when used for medicinal purposes pursuant to rules of the board."). In Iowa, marijuana is defined by Iowa law to include

> all parts of the plants of the genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin, including tetrahydrocannabinols. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil or cake or the sterilized seed of the plant which is incapable of germination.

Iowa Code section 124.101(19). Marijuana is currently listed in Schedule I under federal law. *See* 21 CFR § 1308.11(d)"23".

The Controlled Substances Act places some responsibilities on the Board as it relates to the scheduling of substances. In particular, Iowa Code section 124.203(2) provides:

1. The board shall recommend to the general assembly that the general assembly place a substance in schedule I if the substance is not already included therein and the board finds that the substance:
    a. Has high potential for abuse; and
    b. Has no accepted medicinal use in treatment in the United States, or lacks accepted safety for use in treatment under medical supervision.
2. If the board finds that any substance included in schedule I does not meet these criteria, the board shall recommend that the general assembly place the substance in a different schedule or remove the substance from the list of controlled substances, as appropriate.

In 2014, the Iowa General Assembly passed the Medical Cannabidiol Act. *See* Iowa Code chapter 124D. The Act permits the use of cannabidiol by patients suffering from intractable epilepsy. The Iowa General Assembly granted the authority to administer the provisions of the Act to the Iowa Department of Public Health.

ANALYSIS

Typically, the Board makes recommendations regarding the scheduling of substances to the Iowa General Assembly when the federal Drug Enforcement Agency (1) adds a new substance to a schedule, (2) moves a scheduled substance to a different schedule, or (3) removes a substance from scheduling. Essentially, the Board notifies the Iowa General Assembly of

changes in the federal scheduling of controlled substances and recommends changes in the schedules under state law to be in accordance with federal scheduling.

Despite the passage of laws regarding marijuana in several states, it remains a Schedule I controlled substance under federal law. As a matter of policy, the federal government has allowed states, through non-enforcement of federal law, to serve as laboratories of democracy by experimenting with medical marijuana programs. This, however, is a matter of policy and not of law. The federal government may change its policy at any time, thereby nullifying any laws or programs related to marijuana enacted by any state. The Board is hesitant to recommend a change in the state scheduling of a substance that directly conflicts with federal law.

Regardless of federal law, Iowa Code section 124.203 requires that the Board recommend the removal of a substance from Schedule I if the Board finds that either (1) the substance does not have a high potential for abuse, or (2) the substance has some accepted medicinal use in treatment in the United States. While the Board believes that marijuana has a high potential for abuse, it also believes that the passage of the Medical Cannabidiol Act is an affirmative recognition by the Iowa General Assembly that there is some medical use for marijuana, as it is defined by Iowa Code section 124.101(19). As a result of the Medical Cannabidiol Act, Schedule I is inappropriate for cannabidiol.

The Board is not inclined to make the broader recommendation requested by the Petition that marijuana be removed from Schedule I. Many substances can be derived from marijuana—some may have a medical use, while others may not. Therefore, in the Board's opinion, it would be more accurate to schedule each derivate after an individualized analysis. The Board points out that separately scheduling a substance that is a derivative of marijuana, such as cannabidiol, should be accompanied by an amendment to the definition of marijuana in Iowa Code section

124.101(19), explicitly excluding the derivative from the definition of marijuana, in order to avoid conflict.

The Board believes it has an obligation under the Controlled Substances Act to recommend the proper schedule for cannabidiol. Iowa Code section 124.205 establishes the criteria for including a substance in Schedule II. The criteria are: (1) the substance has a high potential for abuse, (2) the substance currently has accepted medical use with severe restrictions in the United States, and (3) abuse of the substance may lead to severe psychic or physical dependence. The Board feels that cannabidiol meets the criteria for Schedule II, and thus recommends to the Iowa General Assembly that cannabidiol, as defined by Iowa Code section 124D.2(1), be placed in Schedule II.

The Board believes that, if the Iowa General Assembly chooses to expand the Medical Cannabidiol Act or implement a medical marijuana program, a coalition of stakeholders should be established to further study the potential medicinal uses of marijuana or its derivatives in Iowa. These stakeholders should include, but not be limited to, the Office of Drug Control Policy, the Iowa Boards of Medicine and Pharmacy, law enforcement agencies, academia, addiction treatment specialists, and patients. It is incumbent that the establishment of a program involving marijuana or its derivatives for medicinal use includes the perspectives of all of these groups. No single entity can determine what conditions marijuana or its derivatives could be used to treat, what safety measures are needed to prevent unlawful use, and the myriad of other concerns raised by a program involving marijuana or its derivatives for medicinal use in Iowa. The Board is particularly concerned about the ability of any program to establish the standardization of dosage and potency necessary to ensure patient safety and effective treatment.

The dual scheduling of marijuana under state law is a holdover from experimental marijuana research programs authorized more than thirty years ago. The dual scheduling has understandably led to confusion as to the Board's authority to promulgate rules authorizing the legal use of medical marijuana. The Board does not believe it was the intention of the Iowa General Assembly for the Board to unilaterally establish and implement a medical marijuana program in Iowa. This is evidenced by the fact that the Department of Public Health was vested with the authority to implement the Medical Cannabidiol Act. To avoid confusion, the Board recommends that the phrase "except as otherwise provided by rules of the board for medicinal purposes" be deleted from Iowa Code section 124.204(4)"m". In addition, the Board recommends that either the entirety of Iowa Code section 124.206(7)"a" be deleted, or, at a minimum, the phrase "pursuant to rules of the board" be deleted from Iowa Code section 124.206(7)"a".

ORDER

For the reasons stated herein, the Petition for Agency Action to Reschedule Marijuana is **DENIED**.

EDWARD MAIER
Chairperson, Iowa Board of Pharmacy