

**In the Iowa District Court
in and for
Polk County Iowa**

George McMahon, Bryan Scott, and
Barbara Douglass, Petitioners

vs.

The Iowa Board of Pharmacy
Examiners, Respondent

Docket No. CV 7415

FILED
POLK COUNTY IA
08 OCT 17 AM 11:14
CLERK DISTRICT COURT

Petition for Judicial Review of Agency Action

Come now the petitioners, George McMahon, Bryan Scott, and Barbara Douglass, who respectfully petition the Court to review the order and decision of the Iowa Board of Pharmacy Examiners not to make a recommendation to the Iowa General Assembly for the removal of marijuana from Schedule I of the Iowa Controlled Substances Act, to wit:

Introduction¹

In Iowa, marijuana is listed as a controlled substance in two schedules of the Iowa Controlled Substances Act (Iowa Code Chapter 124). Schedule I of the act controls substances that have no “accepted medical use” in the United States and which have a “high potential for abuse;” Schedule II controls substances that do “have accepted medical use in treatment in the United States,” notwithstanding their potential for abuse. Paradoxically, marijuana appears on both lists despite the fact that they are, logically, mutually exclusive. *Compare, Iowa Code, §§124.204(m) & (u); Iowa Code, §124,206(7)(a).* The Iowa Board of Pharmacy is vested with a legal duty to recommend schedule changes or deletions to the the legislature when a controlled substance no longer meets the criteria for listing in the schedule where it has been listed. *E.g., Iowa Code, §§124.203, 124.205.*

In the United States, it is the states—and not the federal government—that define the bounds of acceptable medical practice and what drugs or substances have accepted medical use. *See, Gonzales v. Oregon, 546 U.S. 243, 126 S.Ct. 904, 163 L.Ed. 2d 748 (2006)*² Consequently, the proper classification of substances and drugs on the basis of their medical utility is entirely a function of decisions about medical practice made by the individual states. To date, at least 12

¹ The Introduction is intended to provide an overview of the litigation and is not part of the formal allegations of this petition.

² Holding federal Controlled Substances Act, did not give Attorney General power to decide standards of medical practice by proscribing use of certain drugs for use in physician assisted suicide

states³ have come to legally recognize that marijuana has accepted medical use in treatment of various medical conditions.

Based on the decisions made by those states, marijuana currently does have “accepted medical use in treatment in the United States” and no longer meets the statutory criteria for listing in Schedule I of the Iowa Controlled Substances Act. This case is an appeal from a decision by the Iowa Board of Pharmacy Examiners not to recommend removal of marijuana from Schedule I of Iowa’s Controlled Substances Act in spite of the foregoing considerations.

Jurisdiction, Parties & Venue

1. This is an action for judicial review as authorized by Iowa Code Section 17A.19 which is part of the Iowa Administrative Procedures Act.
2. The names of the petitioners to this action are George McMahon, Brian Scott, and Barbara Douglass.
3. The Petitioners are legal marijuana users and/or persons whose medical conditions can only be effectively controlled (or controlled without unacceptable side effects) through the use of marijuana and, consequently, each of the Petitioners has an interest in any action by the

³ Approximately twelve states, comprising 20.6% of the United States Population, have statutorily determined that marijuana is acceptable for medical use under medical supervision.

The states are: **Alaska** 670,053, **California** 36,457,549, **Colorado** 4,753,377, **Hawaii** 1,285,498, **Maine** 1,321,574, **Montana** 944,632, **Nevada** 2,495,529, **New Mexico** 1,954,599, **Oregon** 3,700,758, **Rhode Island** 1,067,610, **Vermont** 623,908, **Washington** 6,395,798. {Based on U.S. Census Bureau Data estimates for 2006.}

Pharmacy Board and legislature that removes or reduces the stigma and potential for illegality attached to the medical prescription and use of marijuana by themselves and others.

4. Each of the Petitioners is a citizen and resident of Iowa.
5. The Iowa Board of Pharmacy Examiners [*Pharmacy Board*] is the agency named as the Respondent in this action,
6. The Pharmacy Board maintains its principal headquarters in Polk County Iowa.
7. Subject matter jurisdiction and venue of this matter properly lies in Polk County, Iowa by virtue of Iowa Code §17A.19(2).
8. This is an appeal from a final order or declaratory ruling by the Iowa Board of Pharmacy examiners, dated October 7th, 2008, indicating that it will not grant the request of the Petitioners and Carl Olsen to recommend the removal of marijuana from Schedule I of the Iowa Controlled Substances Act. A true copy of the order is appended hereto, Marked "Petition Exhibit A" and by this reference, is made a part hereof.
9. The action appealed from is the refusal of the Pharmacy Board to make a recommendation to the Iowa State General Assembly that marijuana be removed from Schedule I of the Iowa Controlled Substances Act.
10. The Petitioners have exhausted their administrative remedies and this is an appeal from a final order of the respondent agency.

Allegations

11. Section 124.203 requires the respondent Pharmacy Board to make recommendations to the Iowa general assembly concerning the placement in, or removal of, substances from Schedule I of the Iowa Controlled Substances Act.

12. The Pharmacy Board must recommend removal of a substance from Schedule I if either of the following two criteria are not met:

- a. the substance “has a high potential for abuse;” or
- b. the substance “has no accepted medical use in treatment in the United States...”

13. The full text of the statute establishing this duty reads as follows:

124.203. Substances listed in schedule I--criteria

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.

Iowa Code, §124.203 {*Emphasis Supplied*}

14. Under our federal system of government the decision as to what constitutes “acceptable medical use [*of a substance*] in treatment” is a decision to be made by the states and not the federal government. Gonzales v. Oregon, 546 U.S. 243 (2006).

15. When marijuana was first listed on Schedule I of Iowa's Controlled Substances Act, no state had approved its use for medical treatment.

16. At least 12 states within the U.S., now accept the use of marijuana in medical treatment.

17. Because marijuana no longer meets all the criteria of Iowa Code §124.204 the Board of Pharmacy is under a legal duty to recommend to the Iowa general assembly that marijuana be removed from schedule I and either placed in a different schedule or removed from control altogether. [Iowa Code, § 124.203]

18. On May 12, 2008 Carl Olsen filed a petition with the Pharmacy board requesting that the Board of Pharmacy should proceed with its legal duty to recommend rescheduling of marijuana to the Iowa state legislature.

19. On or about June 23, 2008 petitioners McMahon and Scott filed their Petition and Motion for Intervention seeking a recommendation from the Pharmacy Board to the Iowa General Assembly for removal of marijuana from schedule I of the Iowa Controlled Substances Act based, *inter alia*, on the grounds set forth above (¶'s 10–16).

20. The Pharmacy Board met on July 29th, 2008 at which time it considered and rejected the petitions of Mssrs. Olsen, Scott and McMahon.

21. Subsequently, the Pharmacy Board issued a formal "Order" dated October 7, 2008 denying the relief requested by the Petitioners and Mr. Olsen and providing its reasons therefore. A true copy of the order is appended hereto, and by this reference made a part hereof.

22. The Pharmacy Board's order overlooked the Board's statutory duty to investigate whether substances listed in Schedule I of the Iowa Controlled Substances Act, no longer meet the criteria for inclusion in that schedule.

23. Instead, the Pharmacy Board deferred to the federal government, stating:

Although numerous state laws have legalized medicinal use of marijuana, federal laws authorize prosecution of persons engaging in the same activities which are permitted under state law. Thus, if the Board were to recommend moving marijuana from schedule I to schedule II, that action would create the unfortunate situation described above; specifically, a person in compliance with Iowa law could be prosecuted under the Controlled Substances Act. *See, Gonzales v. Raich*, 545 U.S.1 (2005).

24. Neither the case of *Gonzales v. Raich*, nor the above-quoted reasoning cited by the Pharmacy Board, excuses the Board from its legal duty to make statutorily required determinations and recommendations to the Iowa General Assembly concerning whether and how substances should be scheduled under Iowa's Controlled Substances Act.

25. Insofar as the Pharmacy Board relied upon its perceptions concerning federal law as a reason for not performing its duties under state law, the Board committed clear legal error and abused its discretion.

26. The Pharmacy Board additionally found that consideration of whether Marijuana now has "medicinal value" was unnecessary because "the Board would also need to make a finding that marijuana **lacks a high potential for abuse**. *See* Iowa Code 124.203 (2007)."

27. In making the determination that it was unnecessary to consider the medicinal value of marijuana on the grounds set forth above the Board committed clear legal error: The criteria for listing in Schedule I of Iowa's controlled substances act are stated clearly in the conjunctive and not the disjunctive: both criteria must be met. To read the statute otherwise would destroy the clearly apparent scheme of regulation.

28. The Pharmacy Board abused its discretion by ignoring the clear language of the statute setting forth the criteria required for the listing of substances in Schedule I of the Iowa Controlled Substances Act.

29. Where it has been asserted that at least a dozen states legally recognize the legitimacy of marijuana for use in medical treatment, the question of whether marijuana has "accepted medical use in treatment in the United States" within the meaning of Iowa Code Section 124.203 is a pure question of law which can, and should be, resolved in the first instance by this Court.

30. In its order, the Pharmacy Board conceded that "...numerous state laws have legalized medicinal use of marijuana...."

31. To the extent that the Pharmacy Board chose to consider only the record made by parties seeking the rescheduling of a substance, the Board failed in its duty to affirmatively consider and continually re-evaluate whether substances are correctly classified.

32. The actions and determinations of the Pharmacy Board as recounted herein were:

- a. Beyond the authority delegated to the agency by any provision of law,

- b. Based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency,
- c. Taken without following the prescribed decision-making process,
- d. The product of a decision-making process in which the agency did not consider a relevant and important matter relating to the propriety or desirability of the action in question that a rational decision maker in similar circumstances would have considered prior to taking that action, and
- e. is otherwise, arbitrary and capricious or an abuse of discretion.

Prayer for Relief

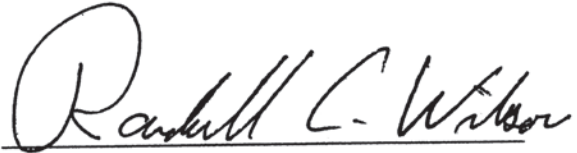
WHEREFORE, the Petitioner's Pray for:

- A. A judgment setting aside the Order and decision of the Iowa Board of Pharmacy Examiners, as challenged herein;
- B. A declaratory ruling establishing that the Board's stated concern with federal law does not preclude or excuse it from complying with its duty to make appropriate recommendations to the Iowa General Assembly concerning the scheduling of marijuana under the Iowa Controlled Substances Act.
- C. A declaratory ruling, establishing that, as a matter of law, marijuana has "accepted medical use in treatment in the United States when used under medical supervision;"
- D. An injunction or writ of mandamus requiring the Iowa Board of Pharmacy to reconsider its refusal to recommend removal of marijuana from Schedule I of the Iowa Controlled Substances Act, Iowa Code Chapter 124 in light of this court's decision and

reasoning, the clear commandments of statute, and an affirmative good faith consideration of the criteria imposed for listing under Iowa Code Section 124.203.

—∞—

Respectfully Submitted:

A handwritten signature in black ink that reads "Randall C. Wilson". The signature is written in a cursive style with a large initial "R".

Randall C. Wilson, Esq. PK 0007857

ACLU OF IOWA FOUNDATION

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Counsel for Petitioners

Affidavit of Service


State of Iowa)
) SS:
County of Polk)

I certify under penalty of perjury that on or before October 17th, 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:

Iowa Board of Pharmacy
400 SW Eighth Street, Suite E
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Des Moines IA 50319

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Des Moines, IA 50313-3654


Randall C. Wilson, Attorney for Petitioners

BEFORE THE IOWA BOARD OF PHARMACY EXAMINERS

Re:)	Case No. 2008-105
Petition from Carl Olsen)	
Requesting Rescheduling of)	ORDER
Marijuana)	

I. JURISDICTION

The Iowa Board of Pharmacy (hereinafter, "Board") has a statutory duty to recommend to the Iowa legislature changes in controlled substances schedules. Iowa Code § 124.201 (2007). The schedules are set out in the Iowa Code from § 124.204 to § 124.212 (2007).

Iowa Code § 124.201(1) (2007) provides eight criteria the Board is to consider in formulating its recommendations for change. As to schedule I controlled substances, the Iowa Code provides additional guidance. Substances not already listed on schedule I may be recommended for inclusion if the Board finds the substance (1) has a high potential for abuse, and (2) has no accepted medical use in the United States, or lacks accepted safety in treatment while medically supervised. Iowa Code § 124.203 (2007). Contrariwise, § 124.203 also provides: "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."

On May 12, 2008, Carl Olsen (hereinafter, "Olsen") filed with the Board a petition which asserts that marijuana, currently listed on schedule I (*See* Iowa Code § 124.204(4)(m) (2007)), is incorrectly classified in the Iowa Code. The substance of Olsen's petition is a request that the Board take action to recommend rescheduling of marijuana. Olsen's petition is supported with citations to the laws of a number of states that authorize the use of Marijuana for medical purposes.

II. ORDER


Marijuana is a schedule I controlled substance except as otherwise provided for in the administrative rules of the Board. Iowa Code § 124.201(4)(m) (2007); Iowa Code § 124.201(7) (2007). The Board has no rules authorizing medicinal use of marijuana.

Olsen contends that marijuana has accepted medical uses in the United States and should be moved to controlled substances schedule II. In support of his contention, Olsen cites the Board to the laws of a number of states (e.g., Alaska, Oregon, Nevada, Vermont) authorizing medical use of marijuana. By Olsen's count, twelve states now authorize medical use of marijuana.

Although numerous state laws have legalized medicinal use of marijuana, federal laws authorize prosecution of persons engaging in the same activities which are permitted under state law. Thus, if the Board were to recommend moving marijuana from schedule I to schedule II, that action would create the unfortunate situation described above; specifically, a person in compliance with Iowa law could be prosecuted under the Controlled Substances Act. *See, Gonzales v. Raich*, 545 U.S.1 (2005).

While neither accepting or rejecting Olsen's assertion that the medicinal value of marijuana is established by legislation adopted in other states, the Board notes that before recommending to the Iowa legislature that marijuana be moved from schedule I to schedule II, the Board would also need to make a finding that marijuana lacks a high potential for abuse. *See* Iowa Code 124.203 (2007). There exists no basis for such a finding in the record before the Board, as Olsen's submission offers no evidence or information on marijuana's potential for abuse. Absent such evidence or information, Olsen's request must be denied.

IT IS SO ORDERED this 7th day of October 2008.


LEMAN OLSON, Chairperson
Iowa Board of Pharmacy Examiners

cc: **Scott Galenbeck,**
Assistant Attorney General