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

George McMahon, Bryan Scott, and Barbara Douglass, Petitioners	)	
and	)	
Carl Olsen, Intervenor	)	Docket No. CV 7415
vs.	)	
The Iowa Board of Pharmacy, Respondent	)	

INTERVENOR'S REPLY BRIEF

Submitted by

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BACKGROUND

1. USE OF MARIJUANA IS NOT ILLEGAL IN IOWA PER SE

The use of controlled substances in the State of Iowa is not unlawful per se. Controlled substances are regulated under the Iowa Controlled Substances Act ("ICSA"). Iowa Code, Chapter 124.

http://www.state.ia.us/ibpe/pdf/IC124.pdf

Persons registered under the ICSA may lawfully "possess, manufacture, distribute, dispense, or conduct research with" controlled substances. Iowa Code §§ 124.302(1) & (2).

Persons exempt from registration under the ICSA may also lawfully possess controlled substances: (1) Agents or Employees of a registered supplier; and (2) Common Carriers. Iowa Code §§ 124.302(3)(a) & (b).

End users are authorized to possess controlled substances without a registration when they are using controlled substances pursuant to a valid doctor's prescription, Iowa Code § 124.302(3)(c).

Two of the petitioners in this case, George McMahon and Barbara Douglass, who both reside in Iowa, have been receiving and using marijuana lawfully in the State of Iowa for approximately 20 years.

The marijuana supplied to these two Iowa residents is supplied by the federal government. See, ***Conant v. Walters***, 309 F.3d 629, 648 (9th Cir. 2002) (KOZINSKI, Circuit Judge, concurring), ***cert denied***, ***Walters v. Conant***, 540 U.S. 946 (2003). The use of marijuana by George McMahon and Barbara Douglass is lawful under the ICSA and Respondent has been aware of their use of marijuana in Iowa during this time (approximately 20 years).

2. THE INTERVENOR'S INTEREST (STANDING)

In October of 1990, Intervenor Carl Olsen attended a rally at the Iowa Capitol where he met Petitioner George McMahon. ***Backers rally at Capitol for legal marijuana***, Des Moines Sunday Register, October 7, 1990, page 6B. See Exhibit #1. Mr. Olsen and Mr. McMahon agreed to start working together under the name Iowans for Medical Marijuana, an unincorporated association in the State of Iowa, for the purpose of seeking legal protection for patients needing marijuana in Iowa. ***Drug eases his pain, but brings arrest: MS sufferer loses drug that eased his pain***, Des Moines Sunday Register, October 7, 1990, page 1B. See Exhibit #1. ***Some Iowans who are ill can't get drug***, Des Moines Register, March 22, 1992, page 1B. See Exhibit #2.

Petitioner Barbara Douglass soon joined Petitioner George McMahon and Intervenor Carl Olsen and together they began to hold annual rallies at the Iowa Capitol to gain support for legislation in the Iowa Legislature to provide medical marijuana to those who need it. ***Iowans protest with marijuana at Iowa Capitol***, Des Moines Sunday Register, August 2, 1992, page 1B. See Exhibit #3.

On February 17, 1993, the Intervenor received a letter from the Iowa Legislative Service Bureau asking the Intervenor to review the final draft of legislation to legalize the medical use of marijuana in the State of Iowa to be introduced in the Iowa Legislature. See Exhibit #4.

On Tuesday, March 23, 1993, Iowa Senate File 361, to legalize the medical use of marijuana in the State of Iowa, was amended and passed by a vote of 50-0 in the Iowa Senate. See Exhibit #5. ***Iowa Senate approves use of marijuana as medicine***, Des Moines Register, Wednesday, March 24, 1993. See Exhibit #6.

Senate File 361 was never brought to the floor of the Iowa House because the Speaker of the Iowa House said he had concerns over "adequate safeguards to prevent unauthorized persons from gaining

access" to medical marijuana. See Exhibit #7 (Letter from the Speaker, September 3, 1993).

On May 16, 1994, the Intervenor received a Final Order from the U.S. Drug Enforcement Administration on the merits of his 1992 petition to reschedule marijuana. See Exhibit #8. The Intervenor advanced the theory that marijuana had as much medical use as opium poppy, poppy straw, and coca leaf. A product containing pharmaceutically pure THC (the principle psychoactive ingredient in marijuana) was transferred to Schedule II of the Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801 *et seq*., in 1986, 51 Fed. Reg. 17476 (Tuesday, May 13, 1986), and again to Schedule III of the CSA in 1999, 64 Fed. Reg. 35928 (Friday, July 2, 1999). Opium poppy, poppy straw, and coca leaf are all in Schedule II of the CSA and the ICSA. 21 U.S.C. §§ 812, Schedule II(a)(2) and (3); Iowa Code §§ 124.206(2)(c) and (d). ***Olsen v. DEA***, 99 F.3d 448 (D.C. Cir. 1996), ***cert. denied***, 519 U.S. 1118 (1997) ("petitioner's rescheduling request was not supported by grounds sufficient to justify the initiation of rescheduling proceedings").

On June 2, 1995, the Intervenor received a letter regarding a planned rally by Iowans for Medical Marijuana at the Iowa Capitol to

support medical marijuana legislation in the Iowa Legislature from the Iowa Department of General Services, stating:

> Capitol Police will be informed that two participants, George McMahon and Barbara Douglas are authorized to use marijuana by the federal government as well as the Iowa Board of Pharmacy Examiners.

See Exhibit #9.

On January 25, 1995, the Intervenor received a letter from the Iowa Senator Elaine Szymoniak asking the Intervenor to assist in preparing legislation to legalize the medical use of marijuana in the State of Iowa to be introduced in the Iowa Legislature. See Exhibit #10.

On February 15, 1995, the legislation, S.J.R. 10, supporting the use of marijuana for medical purposes in the State of Iowa, failed to pass in the Iowa Senate Human Resources Committee by a vote of 2-7. See Exhibit #11.

On August 16, 1996, the Intervenor received a letter regarding a planned rally by Iowans for Medical Marijuana at the Iowa Capitol to support medical marijuana legislation in the Iowa Legislature from the Iowa Department of General Services, stating:

> Capitol Police has been informed that two participants, George McMahon and Barbara Douglas, have legal prescriptions for marijuana and are approved to use

> marijuana by the federal government as well as the Iowa Board of Pharmacy Examiners.

See Exhibit #12.

On August 28, 1996, the Waterloo – Cedar Falls Courier reported that Allen Helmers had been invited to the rally at the Iowa Capitol. ***Looking for relief: Man faces prison term for using marijuana to ease pain***, Waterloo – Cedar Falls Courier, August 29, 1996, page A1. See Exhibit #13.

On October 7, 1996, the Waterloo – Cedar Falls Courier quoted the Intervenor, "'In any war we have to take care of the sick and wounded first', Olsen said of attempts at the national and state level to decriminalize the use of marijuana". ***Des Moines rally supports Waterloo man in trouble for medical use of marijuana***, Waterloo – Cedar Falls Courier, Monday, October 7, 1996, page 3. See Exhibit #14.

On August 13, 1997, Iowa District Court Judge Jon Fister issued an Order allowing Allen Helmers to use marijuana while on probation from a felony marijuana conviction because the Iowa Board of Pharmacy had not recommended to the Iowa Legislature that marijuana be removed from Schedule II of the ICSA. See Exhibit #15.

On Tuesday, October 21, 1997, the Ames Tribune published an editorial praising Judge Fister for his common-sense approach in the Helmers case. ***Medical Marijuana Laws Need to be Fixed***, Ames Tribune, Tuesday, October 21, 1997. See Exhibit #16.

3. IOWA'S CLASSIFICATION SCHEME

The ICSA contains five schedules. The Iowa Legislature requires the Respondent to review those five schedules annually and to make recommendations for controlled substances to be added, removed, or transferred between the schedules. Iowa Code § 124.201.

The Respondent is required by the ICSA to notify the Iowa Legislature if any substance listed in Schedule I no longer meets the requirements for inclusion in that schedule if that substance has become accepted for medical use in treatment in the United States. If a substance listed in Schedule I does become accepted for medical use in treatment in the United States, the Respondent has a duty to recommend it be transferred to another schedule or be removed from the ICSA entirely. Iowa Code § 124.203. The reverse is also true. The Respondent is required to notify the Iowa Legislature if any substance in any of the other four schedules, Schedule II through Schedule V, no

longer has any accepted medical use in treatment in the United States and should be transferred to Schedule I or removed from the ICSA entirely. Iowa Code §§ 124.205, 124.207, 124.209, and 124.211.

The Respondent is required to consider federal scheduling pursuant to the federal Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801 *et seq*., but is not required to agree with federal scheduling or to recommend that federal scheduling be adopted by the Iowa Legislature. The Respondent has a duty to make an independent finding. Iowa Code § 124.201(4).

Indeed, the list of substances in the ICSA schedules does not duplicate the list of substances in the CSA schedules. The Iowa Code currently lists marijuana in both Schedule I and Schedule II of the ICSA while marijuana is listed only in Schedule I of the federal CSA. Iowa Code §§ 124.204(4)(m) and 124.206(7)(a); 21 C.F.R. § 1308.11(d)(22). It should be noted that federal scheduling is accomplished primarily by regulation, while Iowa scheduling is accomplished completely by legislation.

Indeed, one significant difference between the ICSA and CSA is that under the CSA scheduling decisions have been delegated by

Congress to two administrative agencies, the Drug Enforcement Administration (a law enforcement agency) and the Department of Health and Human Services (a public health agency). 21 U.S.C. § 811; 28 C.F.R. §§ 0.100(b) and 0.104. Under the ICSA, scheduling is done by the Iowa Legislature and the administrative agency, the Iowa Board of Pharmacy (a public health agency), is required to make recommendations for scheduling which the Iowa Legislature then has the option of adopting or rejecting.

If Congress disagrees with an administrative agency scheduling decision or wants to schedule something outside the scope of the administrative agency's authority, it can override the administrative process with direct federal legislation. ***Grinspoon v. DEA***, 828 F.2d 881, 890 (1st Cir. 1987) ("[I]n 1984, Congress legislatively placed the drug methaqualone in Schedule I"); ***Gonzales v. Oregon***, 546 U.S. 243, 273 (2006) ("Anabolic Steroids Act of 1990").

So, although the Iowa and federal legislative structures for dealing with controlled substances are similar in some ways, they are also different in some ways.

4. IOWA'S DUAL SCHEDULING OF MARIJUANA

"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." ***State of Iowa v. Lloyd Dean Bonjour***, 694 N.W.2d 511, 516 (Iowa 2005) (Wiggins, Justice (dissenting)). The Iowa Legislature did not remove marijuana from Schedule I of the ICSA in 1987 and it remains in both Schedule I and Schedule II today.

Even though Iowa's dual scheduling may create the appearance of a state law accepting the medical use of marijuana, in 2005 the Iowa Supreme Court considered Iowa's dual scheduling of marijuana in ***State v. Bonjour***, and the Iowa Supreme Court rejected the interpretation that medical use of marijuana has been accepted by the Iowa Legislature based on the inaction of the Respondent in promulgating any administrative rules to implement the statute. ***State v. Bonjour,*** 694 N.W.2d 511, 513 (Iowa 2005).

5. WHAT OTHER STATES HAVE DONE

Since 1996, a total of 13 states have enacted laws accepting medical use of marijuana, the majority by voter initiative. Each of

these state laws allows a patient or caregiver to cultivate and use marijuana on the advice, and under the supervision of, a physician. ***Conant v. Walters***, 309 F.3d 629 (9th Cir. 2002), ***cert. denied***, ***Walters v. Conant***, 540 U.S. 946 (2003); ***Raich v. Gonzales***, 500 F.3d 850, 866 (9th Cir. 2007) ("… during the last ten years eleven states have legalized the use of medical marijuana …"). Twelve of the state laws are enumerated at pages 1 and 2 of the Intervenor's petition submitted to the Respondent on May 12, 2008. The thirteenth state is Michigan (Ballot Proposal 08-1, approved by the voters of Michigan on Nov. 3, 2008). See text of proposal and election results: http://www.michigan.gov/documents/sos/ED-20_11-08_Props_Poster2_251561_7.pdf (accessed on Jan. 22, 2009); http://miboecfr.nictusa.com/election/results/08GEN/90000001.html (accessed on Jan. 22, 2009).

ARGUMENT

The Respondent cannot simply ignore the inconsistency of a controlled substance being in two mutually exclusive schedules of the ICSA. Whatever side one takes in the political debate over medical use of marijuana, one thing is clear – marijuana either does or does not

have accepted medical use in treatment in the United States. ***Grayned v. City of Rockford***, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."). ***United States v. Santos***, ___ U.S. ___, ___, 128 S. Ct. 2020, 2025, 170 L. Ed. 2d 912, 920 (2008):

> The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. See *United States v. Gradwell*, 243 U.S. 476, 485, 37 S. Ct. 407, 61 L. Ed. 857 (1917); *McBoyle v. United States*, 283 U.S. 25, 27, 51 S. Ct. 340, 75 L. Ed. 816 (1931); *United States v. Bass*, 404 U.S. 336, 347-349, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971). This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

The fact that the Iowa Supreme Court found no medical marijuana necessity defense available in ***State v. Bonjour***, 694 N.W.2d 511 (Iowa 2005), does not save the dual scheduling of marijuana in the ICSA from being void for vagueness because the issue of vagueness was not raised by the defendant in that case. The entire analysis of the Iowa Supreme Court focused on whether an implied exception for medical necessity existed in the language of the statute.

Regardless of the past failure of the Respondent to inform the Iowa Legislature of the inconsistency in the dual scheduling of marijuana in Schedule I and Schedule II of the ICSA, a significant change has occurred since 1990. ***State v. Bonjour***, at 516 (WIGGINS, Justice (dissenting).) ("The 1990 amendment continues to be the law today."). 13 states in the United States have now accepted the medical use of marijuana, beginning with the State of California in 1996. The Iowa Legislature defines the word "State" in the ICSA as follows:

> "State," when 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.

Iowa Code § 124.101(28).

Respondent must inform the Iowa Legislature that marijuana no longer meets the requirements for inclusion in Schedule I of the ICSA because it now has accepted medical use in treatment in the United States. The 13 states which have accepted the medical use of marijuana are not required to ask the Respondent if it's okay for them to accept the medical use of marijuana in those states. ***Franchise Tax Board v. Hyatt***, 538 U.S. 488, 494 (2003):

> [T]he Full Faith and Credit Clause does not compel "'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'" *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722, 100 L. Ed. 2d 743, 108 S. Ct. 2117 (1988) (quoting *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501, 83 L. Ed. 940, 59 S. Ct. 629 (1939)).

Respondent claims that removing marijuana from Schedule I would somehow encourage Iowa medical patients to place themselves in jeopardy of being arrested by federal law enforcement authorities. See Stipulated Record, Tab D, Transcript, at pages 3 to 7; and Stipulated Record, Tab E, Order, at page 2. States do not have to ask the federal government for permission to enact laws accepting the medical use of marijuana. It is not the job of the Respondent to enforce federal laws. ***Garden Grove v. Kha***, 157 Cal. App. 4th 355, 385, 68 Cal. Rptr. 3d 656, 676-677 (Cal. App. 4th 2007), ***cert. denied***, ***Grove v. Superior Court of Ca***, ___ U.S. ___, 129 S. Ct. 623 (2008) ("So, what we are left with is a state statutory scheme that limits state prosecution for medical marijuana possession but does not limit enforcement of the federal drug laws. This scenario simply does not implicate federal supremacy concerns"). ***San Diego v. NORML***, 165 Cal. App. 4th 798, 827, 81 Cal. Rptr. 3d 461, 483 (Cal. App. 2008), cert. docketed, ***San***

Bernardino v. California, No. 08-897 (docketed on January 12, 2009) ("Congress does not have the authority to compel the states to direct their law enforcement personnel to enforce federal laws"). ***Conant v. Walters***, 309 F.3d 629, 638 (9th Cir. 2002), ***cert. denied***, ***Walters v. Conant***, 540 U.S. 946 (2003) ("The government seeks to justify its policy by claiming that a doctor's 'recommendation' of marijuana may encourage illegal conduct by the patient, which is not unlike the argument made before, and rejected by, the Supreme Court in a recent First Amendment case. See *Ashcroft v. Free Speech Coalition, Inc.*, 535 U.S. 234, 152 L. Ed. 2d 403, 122 S. Ct. 1389, 1403 (2002)").

Also, opium poppy, poppy straw, and coca leaves, are all in Schedule II of the ICSA, but are still illegal to possess without a valid prescription in Iowa. Iowa Code §§ 124.206(2)(c) & (d). Simply moving marijuana to another schedule of the ICSA or removing marijuana entirely from the ICSA would not force anyone to use marijuana or force doctors to prescribe it. No one would be forced to violate any federal law by any action the Respondent or the Iowa Legislature might take regarding the ICSA.

CONCLUSION

The Iowa Board of Pharmacy must acknowledge that marijuana has "accepted medical use in treatment in the United States" by 13 states in the United States. The Iowa Board of Pharmacy must acknowledge that marijuana cannot be listed in Schedule I of the ICSA which the Iowa Legislature has reserved exclusively for substances which have no accepted medical use in treatment in the United States.

Dated: January 27, 2009.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I certify that on or before January 27th, 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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