May 25, 2009

Mr. Michael E. Gans
Clerk, United States Court of Appeals
for the Eighth Circuit
Thomas F. Eagleton Court House
Room 24.329
111 S. 10th Street
St. Louis, MO 63102

Re: Carl Olsen v. Drug Enforcement Administration
No. 09-1162

Dear Mr. Gans:

Pursuant to Fed R. App. P. 28(j), Carl Olsen respectfully submits this letter to call the Court's attention to pertinent new authority.

Olsen draws to the Court's attention to the attached White House Memorandum for the Heads of Executive Departments and Agencies (May 20, 2009) ("Memorandum" hereafter), affirming a policy of federalism where, "[T]he citizens of the several States have distinctive circumstances and values, and that in many instances it is appropriate for them to apply the themselves rules and principles that reflect these circumstances and values." And, "[A] single courageous state may, if its citizens chose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

Although the Memorandum creates no enforceable right, the Drug Enforcement Administration ("DEA" hereafter) is required to respond to it and could respond to it before this case is decided. How can the DEA interpret a federal regulation, 21 C.F.R. § 1308.11(d)(22) (claiming that marijuana has no accepted medical use in treatment in the United States), in a way that is intended to preempt state laws accepting the medical use of marijuana?

Thank you for transmitting this letter to the Court.

Respectfully submitted,

Carl E. Olsen

Digitally signed by Carl Olsen
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THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release May 20, 2009

May 20, 2009

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Preemption

From our Nation's founding, the American constitutional order has been a Federal system, ensuring a strong role for both the national Government and the States. The Federal Government's role in promoting the general welfare and guarding individual liberties is critical, but State law and national law often operate concurrently to provide independent safeguards for the public. Throughout our history, State and local governments have frequently protected health, safety, and the environment more aggressively than has the national Government.

An understanding of the important role of State governments in our Federal system is reflected in longstanding practices by executive departments and agencies, which have shown respect for the traditional prerogatives of the States. In recent years, however, notwithstanding Executive Order 13132 of August 4, 1999 (Federalism), executive departments and agencies have sometimes announced that their regulations preempt State law, including State common law, without explicit preemption by the Congress or an otherwise sufficient basis under applicable legal principles.

The purpose of this memorandum is to state the general policy of my Administration that preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption. Executive departments and agencies should be mindful that in our Federal system, the citizens of the several States have distinctive circumstances and values, and that in many instances it is appropriate for them to apply to themselves rules and principles that reflect these circumstances and values. As Justice Brandeis explained more than 70 years ago, "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

To ensure that executive departments and agencies include statements of preemption in regulations only when such statements have a sufficient legal basis:

1. Heads of departments and agencies should not include in regulatory preambles statements that the department or agency intends to preempt State law through the regulation except where preemption provisions are also included in the codified regulation.

2. Heads of departments and agencies should not include preemption provisions in codified regulations except where such provisions would be justified under legal principles governing preemption, including the principles outlined in Executive Order 13132.

3. Heads of departments and agencies should review regulations issued within the past 10 years that

contain statements in regulatory preambles or codified provisions intended by the department or agency to preempt State law, in order to decide whether such statements or provisions are justified under applicable legal principles governing preemption. Where the head of a department or agency determines that a regulatory statement of preemption or codified regulatory provision cannot be so justified, the head of that department or agency should initiate appropriate action, which may include amendment of the relevant regulation.

Executive departments and agencies shall carry out the provisions of this memorandum to the extent permitted by law and consistent with their statutory authorities. Heads of departments and agencies should consult as necessary with the Attorney General and the Office of Management and Budget's Office of Information and Regulatory Affairs to determine how the requirements of this memorandum apply to particular situations.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

The Director of the Office of Management and Budget is authorized and directed to publish this memorandum in the Federal Register.

BARACK OBAMA