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COLORADO SUPREME COURT
2 East 14th Avenue, Denver, CO 80203

Court of Appeals Cases 12CA0595 & 12CA1704

Arapahoe County District Court Case 11CV1464
The Honorable Elizabeth Volz

Petitioner:

BRANDON COATS,

v.

Respondent:

DISH NETWORK, LLC.

• COURT USE ONLY •

Case Number

2013SC000394

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BRIEF OF AMICUS CURIAE PATIENT AND CAREGIVER RIGHTS LITIGATION PROJECT

Amicus Curiae Patient and Caregiver Rights Litigation Project hereby submits this Amicus Brief:

TABLE OF CONTENTS

I. ISSUES PRESENTED FOR REVIEW

ISSUE I: Whether the Lawful Activities Statute, C.R.S. section 24-34-402.5, protects employees from discretionary discharge for lawful use of medical marijuana outside the job where the use does not affect job performance.

ISSUE II: Whether the Medical Marijuana Amendment makes the use of medical marijuana "lawful" and confers a right to use medical marijuana to persons lawfully registered with the state.

II. CASES AND AUTHORITIES

Cases

Federal Constitution, Statutes and Regulations

Colorado Constitution and Statutes

Other Authorities

III. STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae Patient and Caregiver Rights Litigation Project ("PCRLP") is a non-profit association of registered medical marijuana patients, primary care-givers, and physicians from Colorado with its purpose the reformation of the medical marijuana laws in Colorado. The PCRLP was the first organization to bring the state-constitutional-right-to-medical-marijuana issue and the attendant issue of federal preemption thereof, one of the issues before the Court in this matter, to this Court in a January 5, 2011 petition seeking original jurisdiction, *In re: Medical Marijuana Legislation*, Colorado Supreme Court (Case No. 2011SA4). The Court deferred original jurisdiction over this issue at that time.

The PCRLP founder, Kathleen Chippi, is a qualifying medical marijuana patient and operated a medical marijuana dispensary in Nederland, Colorado, with a state-issued retail sales tax license for medical marijuana. She was also a primary care-giver for numerous patients but discontinued her services due to the unsettled legal issue regarding preemption of federal criminal laws on the dispensing of medical marijuana to qualifying patients pursuant to the Colorado Constitution. Upon the resolution of the issues raised in this petition, it is Ms. Chippi's intent to reopen her dispensary and continue her caregiver services.

PCRLP member Jason M. Beinor, like the Petitioner herein, was terminated from his employment and was denied state unemployment benefits solely because he used medical marijuana off the job pursuant to his physician's recommendation as a qualifying and registered medical marijuana patient under the State of Colorado's medical marijuana program established under the Colorado Constitution. The Court of Appeals decision in Mr. Beinor's unemployment benefits action established the initial rules of law that are at issue in this appeal by Mr. Coats. Mr. Beinor petitioned this Court for review, however, on May 29, 2012, the Court again deferred taking up at that time the issues now before this Court. *Beinor v. Industrial Claim Appeals Office*, Colorado Supreme Court (Case No. 2011SC676), 2012 WL 1940833 (Colo. 2012). Chief Justice Bender and Justice Marquez specifically noted therein that they would grant certiorari to the issue of: "Whether the medical marijuana provisions of the Colorado Constitution, article XVIII, section 14, ***confer a right to use medical marijuana*** or merely protection from criminal prosecution." (emphasis supplied). *Id*.

IV. REASONS AMICUS BRIEF IS DESIRABLE AND SUMMATION OF THE ARGUMENT

In his Opening Brief, the Petitioner argues that the Medical Marijuana Amendment "establishes that use of MMJ [medical marijuana] is lawful and permitted within Colorado, but it does not currently confer a 'right' to use." Opening Brief, p. 38, also pp. 38-42. In contrast, it is Amicus Curiae's strongly held position that the Colorado Constitution does indeed secure to qualifying medical marijuana patients and derivatively to their care-givers a constitutional right to the medication. As a constitutional right, the protections afforded Amicus Curiae's members and other medical marijuana patients and caregivers, and the restrictions upon those rights by the state, are substantively greater than a merely "decriminalized" or "lawful" activity. For those reasons, Amicus Curiae's participation is necessary to assist the Court in bringing some resolution to important questions of law that directly and significantly affect the rights and lives of hundreds of thousands of Colorado residents and citizens, questions that have remained prominent but unsettled for years.

If the activities of acquisition, possession, growing, manufacture, and distribution of marijuana, and the implementing legislation setting up the state program of registration, licensing. are authorized by the Amendment, it would

appear to come into direct conflict with the prohibitions of the federal Controlled Substances Act ("CSA") expressly prohibiting such activities[1] unless one of the following were to occur or exist: (1) marijuana was removed by an act of Congress as a listed substance under Schedule I of the CSA; (2) marijuana was delisted as a Schedule I substance by the DEA/FDA through the administrative procedure set forth in the CSA; or (3) a court interpreting the CSA ruled that Congress only intended the Schedule I listing in 1970 to include "non-medical" uses of marijuana and that, therefore, recognized "medical uses of marijuana" under a state program and regulation do not fall within the Schedule I listing. The first two do not appear likely to occur anytime soon, leaving in jeopardy the status of medical marijuana programs in Colorado and at least 19 other states and the District of Columbia and leaving in legal limbo the lives and well-being of hundreds of thousands of Coloradans and millions of others who need the physician recommended medication to treat serious and life-threatening medical conditions.

Neither the United States Supreme Court, this Court, nor any other high court has as yet engaged in a proper and full Preemption Doctrine analysis to determine whether the Congress, the drafters of the federal CSA, ever intended to include state recognized medical uses of marijuana in the CSA's Schedule 1 listing of marijuana, or whether the listing was intended to be limited to non-medical uses

[1] 21 U.S.C. §§ 828, 841.

such as recreational uses of marijuana. A proper analysis requires an in-depth examination of the legislative history of the federal CSA to determine the actual intent of Congress. It remains an issue of first impression within Colorado and the United States.

If it can be demonstrated that when Congress promulgated the federal CSA in 1970 it intended to cover *only* non-medical uses of marijuana, then subsequently enacted state recognized medical uses of marijuana would not fall within the scope of the federal CSA, there would be no conflict between the Colorado Constitution and the federal scheme and purpose of the CSA, and, Petitioner Coats as well as all other qualifying patients accessing their needed medication within the Colorado Constitution, would not be in violation of federal law.

V. THE RIGHT TO MEDICATION UNDER THE COLORADO CONSTITUION

On November 7, 2000, the people of Colorado enacted the Medical Marijuana Amendment. The Amendment is found in article XVIII, section 14, titled the "Medical Use of Marijuana Amendment," of the Colorado Constitution.

Subsection (4)(a) states that a "patient may engage in the medical use of marijuana, with no more marijuana than is medically necessary to address a debilitating medical condition." Subsection (1)(d) defines a "patient" as "a person who has a debilitating medical condition." Subsection (1)(a) defines a "debilitating medical condition as:

> (I) Cancer, glaucoma, positive status for human immunodeficiency virus, or acquired immune deficiency syndrome, or treatment for such conditions;
>
> (II) A chronic or debilitating disease or medical condition, or treatment for such conditions, which produces, for a specific patient, one or more of the following, and for which, in the professional opinion of the patient's physician, such condition or conditions reasonably may be alleviated by the medical use of marijuana: cachexia; severe pain; severe nausea; seizures, including those that are characteristic of epilepsy; or persistent muscle spasms, including those that are characteristic of multiple sclerosis; or
>
> (III) Any other medical condition, or treatment for such condition, approved by the state health agency, pursuant to its rule making authority or its approval of any petition submitted by a patient or physician as provided in this section.

Finally, Subsection (b) defines "medical use" as "*the* ***acquisition, possession,***

production, *use, or* ***transportation*** *of marijuana* or paraphernalia related to the administration of such marijuana *to address the symptoms or effects of a patient's debilitating medical condition*, which may be authorized only after a diagnosis of the patient's debilitating medical condition by a physician or physicians, as provided by this section." (emphasis supplied).

The Court has requested the parties to address the issue whether the Amendment makes the use of medical marijuana "lawful" and confers a right to use medical marijuana to persons lawfully registered with the state. This question was first considered by the Court of Appeals in *Beinor v. Indus. Claim Appeals Office*, 262 P.3d 970 (Colo.App. 2011). The Court of Appeals split on the issue of whether the Amendment to the Colorado Constitution merely "decriminalizes" medical marijuana or "*legalizes* the use" of the medicine and secures a constitutional right thereto. *See, e.g.*, R.A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 Vand. L. Rev. 1421, 1441-2 (2009) ("Mikos"), for a discussion of the essential distinction between criminalization and legalization in regards to medical marijuana.

The *Beinor* majority adopted a very narrow interpretation of the scope of the authority set forth in the Constitution apparently to avoid what it implicitly viewed would be a conflict with federal controlled substance laws

if the Constitution secured affirmative rights in qualifying patients to marijuana as medication. *Beinor*, 262 P.3d at 973-74 (citing the CSA Schedule I listing of marijuana[2] dicta of the United States Supreme Court in *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 491, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001), and declarations of federal drug agencies). The majority ruled that the Amendment was merely a very limited "decriminalization" of marijuana under state law as to medical use by qualifying patients for qualifying medical conditions rather than a grant of any right to the medication. *Beinor*, 262 P.3d at 976. The majority cited to *Zaner v. City of Brighton*, 899 P.2d 263, 267 (Colo.App. 1994), *aff'd*, 917 P.2d 280 (Colo. 1966), in giving "great weight" to the General Assembly's declaration of the purpose of the Amendment in its implementing legislation, C.R.S. § 18-18-406.3(b), as "creat[ing] limited exceptions to the criminal laws of this state for patients, primary care givers, and physicians concerning the medical use of marijuana to alleviate an appropriately diagnosed debilitating medical condition …." *Id*.

In contrast, dissenting Judge Richard L. Gabriel applied settled rules of constitutional construction looking first to "the intent of the electorate that adopted it," rather than to an arguably reticent General Assembly. *Beinor*, 262 P.3d at 978.

[2] 21 U.S.C. § 812(c) (1999).

A subsequent Court of Appeals panel noted in regards to this Amendment, that "[p]rinciples of statutory construction apply to interpreting a constitutional amendment." *People v. Fioco*, ____ P.3d ____, 2014 WL 975204, *3 (Colo.App. 2014); *see also. Independence Inst. v. Coffman*, 209 P.3d 1130, 1136 (Colo.App. 2008), *cert. den.* (2009) (citizen-initiated measures). As Judge Gabriel stated:

> …We look to the words used, reading them in context and according them their plain and ordinary meaning. *Id.* If the language is clear and unambiguous, we must enforce it as written. *Davidson v. Sandstrom*, 83 P.3d 648, 654 (Colo.2004).
>
> "Language in an amendment is ambiguous if it is 'reasonably susceptible to more than one interpretation.' " *Id.* (quoting *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo.1996)). If the language of a citizen-initiated measure is ambiguous, "a court may ascertain the intent of the voters by considering other relevant materials such as the ballot title and submission clause and the biennial 'Bluebook,' which is the analysis of ballot proposals prepared by the legislature." *In re Submission of Interrogatories on House Bill 99–1325*, 979 P.2d 549, 554 (Colo.1999). "We consider the object to be accomplished and the mischief to be prevented by the provision." *Harwood [v. Senate Majority Fund, LLC]*, 141 P.3d [962, 964 (Colo.App. 2006)].

Beinor, 262 P.3d at 978-79; *also*, *Fioco*, 2014 WL 975204, *3.

Construing the provisions of the Medical Marijuana Amendment, *as a whole*, the decriminalization of medical marijuana found in Section 14(2) is clearly only a small part of the whole measure intended to facilitate the access of qualifying patients to the medicine through the implementation of a state program, including registration, licensing, and record-keeping. Colo. Const., article XVIII,

section 14(2). Numerous provisions both before, within, and after that section create the policy and structure necessary to facilitate the qualifying patient's "access" to, and "use" of, the medicine. *See*, *e.g.*, Colorado Constitution, article XVIII, sections 14(1)(b), 14(2)(a)(II), 14(2)(c)(I) and (II), 14(4)(a) and (b). Section 14(4)(a), for example, provides that "[a] patient may engage "…in the *medical use* of marijuana." As defined by the Constitution, "medical use" refers to the "*acquisition, possession, production, use, or transportation of marijuana* or paraphernalia related to the administration of such marijuana to address the symptoms or effects of a patient's debilitating medical condition …." Colo. Const., art. XVIII, sec. 14(1)(b) (emphasis supplied).

The intent of the voters is clear from the plain, ordinary, meaning of the words in context. Section 14(4)(a) of the Amendment provides that "[a] patient's medical use of marijuana, within [certain listed] limits, *is lawful* …." (emphasis supplied). The People of the State are not merely decriminalizing the medical use of marijuana, but declaring the beneficial nature of marijuana as medicine and establishing the parameters of a constitutional right of access to and use of the medicine in certain persons. A "right" is "something that is due to a person by just claim, legal guarantee, or moral principle ...." Black's Law Dictionary, 1347 (8th ed. 2004). Under the Colorado Constitution, if a citizen or resident of Colorado suffers from a qualifying debilitating condition that under a doctor's

recommendation would benefit from the use of marijuana as medication, that person has a constitutional right or claim to the medication guaranteed by the Constitution. "Courts should not engage in a narrow or technical construction of the initiated amendment if doing so would contravene the intent of the electorate." *Davidson*, 83 P.3d at 654.

The Bluebook prepared by the Colorado Legislative Council provides additional evidence of the intent of the electorate:

> allows patients diagnosed with a serious or chronic illness and their care-givers to legally possess marijuana for medical purposes. [This] proposal does not affect federal criminal laws, but amends the Colorado Constitution to *legalize the medical use of marijuana for patients who have registered with the state .... Patients on the registry are allowed to legally* ***acquire***, ***possess,*** *use,* ***grow****, and* ***transport*** *marijuana* and marijuana paraphernalia ....

Legis. Council of the Colo. Gen. Ass., Res. Pub. No. 475-6, "An Analysis of the 2000 Statewide Ballot Proposals and Recommendations on Retention of Judges" (2000) (the "Bluebook"), 1. The Amendment title, as it appeared on the ballot, read, "An amendment to the Colorado Constitution ***authorizing*** the medical use of marijuana for persons suffering from debilitating medical conditions …." *Id*. at 35 (emphasis supplied). The term "authorize" means "to give *a right* or authority to act …" Black's Law Dictionary, 133 (6th ed.1990).

The purpose of the measure is expressly stated in the Bluebook. It "*amends*

*the Colorado Constitution to **legalize** the medical use of marijuana for patients*". The decriminalization of medical marijuana is hardly mentioned. It is almost an afterthought intended rather to prevent State interference with the ready access of the medicine to qualifying patients. "Legalize" means "[t]o make lawful; to authorize or justify by legal sanction." Black's Law Dictionary 977 (9th ed. 2009); *accord* Webster's Third New International Dictionary 1290 (2002) (defining "legalize" to mean "to make legal: give legal validity or sanction to"). The Amendment not only "legalizes" the use, including the acquisition (distribution), possession, production (growing and manufacture), and transport of medical marijuana, but does so within a state program strictly regulating the activity through agency rules, registration of patients and caregivers, licensing of growers, manufacturers, and distributors. A state issued "license" is not mere decriminalization. A "license" "transfers to the grantee *the right* to do whatever it purports to authorize." *Federal Land Bank v. Board of County Commissioners*, 368 U.S. 146, 154 n. 23, 82 S.Ct. 282, 288 n. 23, 7 L.Ed.2d 199 (1961) (emphasis supplied).

Judge Gabriel concluded that qualifying patients under the Amendment have "a constitutional right to possess and use medical marijuana pursuant to the limitations contained in the medical marijuana amendment. I recognize that such an interpretation could potentially implicate Supremacy Clause issues, given

prevailing federal law. In my view, the same issues could apply to the majority's interpretation because the medical marijuana amendment creates a regulatory scheme that potentially conflicts with federal law." *Beinor*, 262 P.3d at 981. In the decision of the Court of Appeals below, dissenting Judge John R. Webb endorsed Judge Gabriel's conclusion. *Coats v. Dish Network, LLC*, 303 P.3d 147, 157-58 (Colo.App. 2013) (also citing *People v. Watkins*, 282 P.3d 500, 503 (Colo.App. 2012)).

Under the Amendment, qualifying medical marijuana patients are clearly secured a constitutional right to obtain, possess, and use this medication recommended by his or her physician. This right is consistent with other provisions of Colorado law. C.R.S. § 15-18.5-101(1) (emphasis supplied) provides in relevant part:

> (1) The general assembly hereby finds, determines, and declares that:
>
> (a) All adult persons *have a* ***fundamental right****t to make their own medical treatment and health care benefit decisions, including decisions regarding medical treatment ....*

The fundamental right to make decisions regarding medical treatment has long been recognized in other situations as well. *E.g., In the Interest of S.P.B.*, 651 P.2d 1213 (Colo. 1982) (ruling that a woman has a fundamental right to decide in conjunction with her physician whether to terminate her pregnancy).

The General Assembly and the people of the State may extend constitutional protections to Colorado residents that are even more extensive than that secured under federal law. *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1054 (Colo. 2002); *People v. Dist. Ct.*, 439 P.2d 741, 745 (Colo. 1968). Indeed, fundamental constitution rights may be created under the Colorado Constitution that do not even exist under the federal Constitution. *In the Matter of Title, Ballot Title and Submission Clause for Proposed Initiative*, 46 P.3d 438, 448 (Colo. 2002) (rights of initiative and referendum); *Margolis v. Dist. Ct.*, 638 P.2d 297, 302-3 (Colo. 1981).

Qualifying patients possess the fundamental right under state law to make decisions regarding their lawful medical treatment, including the use of physician recommended medical marijuana for qualifying debilitating medical conditions.[3]

[3] So significant is this right that a patient's access to often life-saving medication has been viewed as a "human right" under international law. Alicia E. Yamin, *Not Just a Tragedy: Access to Medications as a Right Under International Law*, 21 Boston University International Law Journal 325 (2003). The "inalienable" human rights to life, liberty, and the pursuit of happiness which the Medical Marijuana Amendment also secures for suffering patients in Colorado are recognized in the founding documents of our nation and state. Declaration of Independence; US Constitution, articles V and XIV; Colorado Constitution, article II, sections 1, 3, and 25; *Gideon v. Wainwright*, 372 U.S. 335, 343, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Edwards v. People*, 129 P.3d 977, 988 (Colo. 2006); *see also, Kogul v. Sonheim*, 372 P.2d 731, 736 (Colo. 1962) (J. Frantz, dissenting); *Liber v. Flor*, 353 P.2d 590, 593 (Colo. 1960) (J. Hall, dissenting) ("This case affords a felicitous occasion for discarding a harsh rule and giving, at the same time, due recognition to one of the most sacred and precious of all admitted natural rights: the right to

VI. THE FEDERAL CONTROLLED SUBSTANCES ACT DOES NOT REGULATE MEDICAL MARIJANA USED PURSUANT TO STATE LAW

This case, as well as the decisions in *Beinor* and *Watkins*, turn on this issue of whether the "lawful" medical use of marijuana under the Colorado Constitution is unlawful under federal law. Surprisingly, no court as yet, state or federal and including this Court and the United States Supreme Court, has made a full analysis of the history of the federal Controlled Substances Act to determine whether the medical use of marijuana under a state program was intended by Congress when the Act was promulgated in 1970 to even be covered by the Act. *See*, Garvey, Todd, "Medical Marijuana: The Supremacy Clause, Federalism, and the Interplay Between State and Federal Laws," Congressional Research Service Report for Congress, No. R42398 (November 9, 2012) ("CRS Report),[4] at 12. For this rule of law, the Court of Appeals below cites to *Gonzales v. Raich*, 545 U.S. 1, 29, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005) and *Ross v. RagingWire Telecommunications,*

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life. A *right* to life, a *duty* to respect and honor that right: this is the ultimate, fundamental principle of a republican form of government in which the dignity of man is acknowledged and protected."). *See also, People v. Sinclair*, 194 N.W.2d 878, 896 (Mich. 1972) (J. Kavanagh, concurring) (finding that Michigan's marijuana laws were "an impermissible intrusion on the fundamental rights to liberty and the pursuant of happiness ….").

[4] https://www.fas.org/sgp/crs/misc/R42398.pdf

Inc., 174 P.2d 200, 204 (Cal. 2008).

Although the U.S. Supreme Court in *Raich*, did hold that the production and consumption of medical marijuana under state programs are within Congress's power to regulate the activity under the Commerce Clause, it did not reach the issue of whether Congress had in fact done so through the federal Controlled Substances Act ("CSA"). *City of Garden Grove v. Superior Court*, 157 Cal.App.4th 355, 382 (Cal. App. 2008); *see also*, *discussion*, Mikos, 62 Vand. L. Rev. at 1441-2 (2009). While discussing the Commerce Clause issue, the Court did opine in *dicta* that the CSA "designates marijuana as contraband for *any* purpose." *Raich*, 545 U.S. at 27, 125 S.Ct. 2195.

Ross cites back to the *Raich dicta* and another commonly cited U.S. Supreme Court opinion, *Oakland Cannabis Buyers*, 532 U.S. at 491. *Oakland Cannabis Buyers* was a "medical necessity" case, not a preemption decision, and while examining some of the language of the CSA in *dicta* made no preemption doctrine analysis and did not discuss history of the CSA or the intent of Congress. The Court of Appeals in *Watkins* also cites to *Raich* and the same provisions of the CSA, and fails to investigate the intent of Congress to discern whether Congress intended the use of medical marijuana under a state program to be included under the federal CSA's marijuana listing. *Watkins*, 282 P.3d at 503.

In *Beinor*, the Court of Appeals also cites back to the same *dicta* in *Oakland*

Cannabis Buyers and the CSA, as well as a DEA regulation and some correspondence from a federal agency, but again fails to engage in a preemption doctrine analysis. Federal agency declarations by the U.S. Attorney and others on medical marijuana use under state law are also cited by the parties to the Court in this matter. Executive branch opinions on medical marijuana and their interpretations of the CSA are not law. As the CSA did not delegate authority to the U.S. Attorney General or the FDA Administrator to interpret the provisions of the Act, their letters and opinions on the criteria of the Act coverage are not entitled to any *Chevron* deference. *Grinspoon v. Drug Enforcement Admin.*, 828 F.2d 881, 885 n. 5 (1st Cir. 1987); *also*, *Gonzales v. Oregon*, 546 U.S. 243, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006); *see also*, *In re Rent-Rite Super Kegs West Ltd.*, 484 B.R. 799, 805 (Bk.Colo. 2012).

The real importance of the Attorney General's letters and opinions regarding the state medical marijuana ("MMJ") programs lies in his reserved "right" to arrest and criminally prosecute under federal law at his sole discretion those engaged in activities "lawful," licensed, and regulated under by state agencies under state law. *See, e.g.*, *County of Santa Cruz v. Ashcroft*, 314 F.Supp.2d 1000 (N.D.Cal. 2004); *also, In re Rent-Rite*, 484 B.R. at 805. As seen in this matter, *Beinor, Watkins,* and any other of the innumerable business, banking, contracting, licensing, permitting, domestic relations, and education situations that require obeisance with *all* laws,

this dark cloud looms over the lives of the millions of MMJ patients throughout Colorado and now most of the United States already suffering, like Mr. Coats here, from serious debilitating, even life-threatening, medical conditions. It hangs over their care-givers and even their attorneys. *See*, CBA Formal Opinion No. 124, 41 Colorado Lawyer 28 (July, 2012)[5].

[5] What has been observed in *Beinor, Watkins,* and *Coats* is just the tip of the iceberg. Under the rule followed by the Court of Appeals that federal CSA criminalization of marijuana covers the lawful use and possession of medical marijuana under state law, the following occupations, occupational licenses, permits, and state benefits are denied to Colorado residents and citizens lawfully receiving marijuana as medication pursuant to their physician's recommendation under the Colorado Constitution for qualifying medical conditions as their possession and consumption of their medication would be the use of a non-prescribed "controlled substance":

OCCUPATION / PROFESSION	**COLORADO STATUTE / CASES**
Accountant	C.R.S. 12-2-123(1)(p)
(accounting entity)	C.R.S. 12-2-124(2)
Barber / Cosmetologist / Esthetician Hairstylist / Manicurist	C.R.S. 12-8-132(1)(d)
Boxer / Kickboxer / Second / Inspector Promoter / Judge / Referee	C.R.S. 12-10-107.1(1)(d)
Pharmacist / Pharmaceutical Manufacturer	C.R.S. 12-22-125(1)(e)
Cases: *Brown v. Idaho St. Bd. of Pharmacy*, 746 P.2d 1006 (Idaho App. 1987)	
Professional Engineer	C.R.S. 12-25-108(1)(i)
Professional Land Surveyor	C.R.S. 12-25-208(1)(i)
Architect	C.R.S. 12-25-308(1)(i)
Acupuncturist	C.R.S. 12-29.5-106(1)(m)
Athletic Trainer	C.R.S. 12-29.7-109(2)(c)
Podiatrist	C.R.S. 12-32-107(3)(f)
Cases: *Rush v. Dept. of Prof. Reg., Bd.*, 448 So.2d 26 (1st Dist. Fla. 1984)	

Chiropractor	C.R.S. 12-33-117(1)(d)
Dentist / Dental Assistant / Dental Hygienist	C.R.S. 12-35-129(1)(c), (e)
Massage Therapist	C.R.S. 12-35.5-111(1)(f)
Physician / Physician's Assistant	C.R.S. 12-36-117(1)(i), (x)
Cases: *Weissbach v. Bd. of Med. Exam'rs*, 116 Cal.Rptr. 479 (Cal. App. 1974)	
Midwife	C.R.S. 12-37-107(1)(d)
Nurse	C.R.S. 12-38-117(1)(i)
Nurse Aide	C.R.S. 12-38.1-111(1)(i)
Nursing Home Administrator	C.R.S. 12-39-111(1)(g)
Optometrist	C.R.S. 12-40-108(1)(d)
	C.R.S. 12-40-118(1)(e)
Occupational Therapist	C.R.S. 12-40.5-110(2)(c)
Physical Therapist	C.R.S. 12-41-115(1)(l)
Respiratory Therapist	C.R.S. 12-41.5-109(2)(h)
Psychiatric Technician	C.R.S. 12-42-(1)(i)
Psychologist / Counselors / Social Worker	C.R.S. 12-43-222(1)(e)
Marriage and Family Therapist / Psychotherapists	
Surgical Assistant / Surgical Technologist	C.R.S. 12-43.2-105(2)(c)
Landscape Architect	C.R.S. 12-45-114(2)(h)
Outfitter	C.R.S. 12-55.5-106(1)(g)
Plumber	C.R.S. 12-58-110(1)(l)
Veterinarian	C.R.S. 12-64-111(1)(v)
Cases: *Manners v. Bd. of Vet. Med.*, 694 P.2d 1298 (Idaho 1985)	
Taxi Driver	PUC Rule 6105(f)(III)A)

Teacher Cases: *Chicago Bd. of Educ. v. Payne*, 430 N.E.2d 310 (Ill.App. 1981)
Bogart v. Unified Sch. Dist., 432 F.Supp. 895 (D.Kan. 1977)

Attorney Cases: *People v. Davis*, 768 P.2d 1227 (Colo. 1989);
People v. Larsen, 808 P.2d 1265 (Colo. 1991);
People v. Cantor, 753 P.2d 238 (Colo. 1988);
CRPC Rule 1.2; CBA Ethics Formal Opinions 124, 125.

BENEFITS / RIGHTS	**COLORADO STATUTE / CASES**

Employment ("cause" alone for termination)
Cases: *Coats v. Dish Network, LLC*, 303 P.3d 147 (Colo.App. 2013);
Beinor v. Indus. Claims Appeals Off., 262 P.3d 970 (Colo.App. 2011),

Unbelievably, it further places in jeopardy of criminal prosecution those within Colorado agencies and other state governments who administer, "conspire" and "abet," the growing, manufacture, and distribution of medical marijuana. *See*, CRS Report[6], 14-15 ("the U.S. Attorneys for the Eastern and Western Districts of Washington State have expressly noted that state officials could be subject to prosecution under federal law for carrying out aspects of a state medical marijuana program that violates the CSA."). According to the Colorado Department of Revenue,[7] the State of Colorado realized some $22,000,000 in taxes from almost $1 billion in sales of the medication during the 2012, 2013, and first half of the 2014 fiscal years. Even the taxation of medical marijuana sales is constitutionally

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cert. den.
Unemployment Compensation (disqualified) C.R.S. § 8-73-108(5)(e)(IX.5)
Case: *Beinor v. Indus. Claims Appeals Off.*, (Colo.App. 2011)
Worker's Compensation Benefits C.R.S. 8-42-112.5
(may be reduced by 50%
if contributed to injury)
Aid to the Needy Disabled (denied eligibility) C.R.S. 26-2-111(4)(e)(II)
(re controlled substance addiction)
Employment Assistance C.R.S. 26-2-706.6(7)
(submit to substance abuse program)
Child Care Center (denial of license) C.R.S. 26-6-108(2)(c)
No Use As Condition of Parole / Probation
Case: *People v. Watkins*, 282 P.2d 500 (Colo.App. 2012), cert. den.
Public Education (ban) C.R.S. 25-1.5-106(12)(b)(IV)

[6] https://www.fas.org/sgp/crs/misc/R42398.pdf. The CRS Report contains an excellent preemption doctrine analysis, but once again falls short by failing to examine the history of the CSA to determine the Congressional intent in placing marijuana under Schedule I.

[7] http://www.colorado.gov/cs/Satellite/Revenue-Main/XRM/1251633259746

suspect because it and the mandated record-keeping under the Colorado Medical Marijuana Program implicate the 5th Amendment right against self-incrimination if these patient / caregiver reporting activities required by the Amendment fall under the CSA. *See, United States v. Leary*, 395 U.S. 6, 29, 89 S.Ct. 1532, 1544, 23 L.Ed.2d 57 (1969).

The only thing standing between a jail or prison for masses of ailing patients and others engaging in lawful conduct within the state, and the loss of tens of millions of dollars of state tax revenue, is the largesse of President Obama and his Attorney General, or perhaps a ruling of this Court that Congress never intended to include state recognized and regulated medical uses of marijuana within the CSA. It is imperative for those reasons that this Court make a proper and complete preemption analysis to determine if the federal CSA in fact covers qualifying patients receiving their medication under state MMJ programs.

Last December, the Colorado Court of Appeals conducted a limited preemption doctrine analysis of the state MMJ program and the federal CSA for the first time in *People v. Crouse*, ___ P.3d ___, 2013 WL 6673708, *2-7 (Colo.App. 2013), regarding the CSA's specific exemption of persons engaged in law enforcement activities. However, that analysis stopped short at the law enforcement exemption after finding that it thereby avoided an "obstacle" to the federal CSA. *Id*. *Crouse*, like *Watkins*, also cited the *dicta* in *Raich* for the rule

that the CSA covers the use of marijuana for all purposes, but once again failed to examine the history of the CSA to determine the intent of Congress when it placed marijuana under Schedule I. *Id*. at ¶27.

Article VI of the U.S. Constitution provides that the laws of the United States "shall be the supreme law of the Land; … any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Since *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427, 4 L.Ed. 579 (1819), it has been settled that state law that conflicts with federal law is without effect. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 2617 (199). There can be outright or actual conflict, physical impossibility to comply with both, an implicit federal barrier to state regulation, a federal occupation of the entire field of regulation, or a state law that stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Louisiana Public Service Comm'n v. Fed. Commnications Comm'n*, 476 U.S. 355, 368-69, 106 S.Ct. 1890, 1898-99, 90 L.Ed.2d 369 (1986).[8]

The application of the Supremacy Clause "starts with the assumption that the historic police powers of the States are not to be superseded by Federal Act unless that is the clear and manifest purpose of Congress. Therefore, the purpose of Congress is the ultimate touchstone of pre-emption analysis." *Cipollone*, 505 U.S.

[8] *See*, *City of Garden Grove*, 157 Cal.App.4th 355, for a full preemption doctrine analysis of the California MMJ program, again short of an examination of the history of the placement of marijuana in Schedule 1.

at 516; *see also*, *City of Garden Grove*, 157 Cal.App.4th at 383; *County of San Diego v. San Diego NORML*, 165 Cal.App.4th 798, 818-28 (Cal.App. 2008) (noting that medical practice is a field historically occupied by the states). Although the Constitution gives supremacy to federal laws, the reach of federal authority into what are typically matters reserved to states is strictly constrained by the 10th Amendment. U.S. Constitution, amendment X; *see also*, *United States v. Darby*, 312 U.S. 100, 123-24, 61 S.Ct. 451, 85 L.Ed. 609 (1941); *Conant v. Walters*, 309 F.3d 629, 647 (9th Cir. 2002) (Kozinski, J., concurring) (regarding medical marijuana). "The Framers split the atom of sovereignty. It was the genius of their ideal that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) (Kennedy, J., concurring).

An extremely narrow application of the CSA is even mandated by the express provision of the Act itself:

> Under 21 U.S.C. §903, the CSA shall not "be construed" to "occupy the field" in which the CSA operates "to the exclusion of any [s]tate law on the same subject matter which would otherwise be within" the state's authority. Rather, Section 903 provides that state laws are preempted only when "a positive conflict" exists between a provision of the CSA and a state law "so that the two cannot consistently stand together."

Crouse, 2013 WL 6673708, ¶18.

Mere "use" of marijuana whether for medicinal purposes or not does not violate any federal law. *People v. Tilehkooh*, 113 Cal.App.4th 1433, 1445 (Cal.App. 2003). Furthermore, a party challenging a constitutional amendment must show it to be unconstitutional beyond a reasonable doubt." *Evans v. Romer*, 854 P.2d 1270, 1274 & n. 6 (Colo. 1993).

So what exactly was the "manifest purpose" of Congress when it placed marijuana in CSA Schedule I in 1970? On this question, it should be emphasized that the *dicta* of the U.S. Supreme Court in *Raich* and *Oakland Cannabis Buyrers' Coop,* as well as that in *Beinor, Watkins, Coats,* and *Crouse* carry little or no weight as all but *Crouse* failed to engage in any preemption analysis and all of them failed to examine the history of the CSA to determine the intent of Congress in placing marijuana in Schedule I. *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 737, 127 S.Ct. 2738, 2762, 168 L.Ed.2d 508 (2007) ("we are not bound to follow our dicta in a prior case in which the point at issue was not fully debated."); *Glus v. Brooklyn Eastern Dist. Terminal*, 359 U.S. 231, 235, 79 S.Ct. 760, 763, 3 L.Ed.2d 770 (1959) (language in dicta "is neither binding nor persuasive."); *Radke v. Union Pac. Railroad Co.*, 334 P.2d 1077, 1081 (Colo. 1959) ("The comments by the United States Supreme Court …are merely *obiter dicta* and not binding on this court.").

In interpreting a statute to determine and effectuate its purpose, the Court of course begins by considering the "plain meaning" of the words and phrases according to the rules of grammar and common usage. It is only when the language is ambiguous does the Court resort to other rules of statutory construction. *Yellow Jacket Water Conservancy v. Livingston*, 318 P.3d 454, 457 (Colo. 2013); *also, Sandifer v. U.S. Steel Corp.*, 134 S.Ct. 870, 876, 187 L.Ed.2d 729 (2014). ("ordinary, contemporary, common meaning."). If the statute is reasonably susceptible to different interpretations, the Court examines the legislative goals underlying the provision, the circumstances under which it was adopted, and the consequences of possible alternative constructions to determine the proper interpretation. *Trujillo v. Colo. Div. of Ins.*, ___ P.3d ___, 2014 WL 1096625, ¶12 (2014).

The Controlled Substances Act of 1970

The Controlled Substances Act established "a single system of control for both narcotic and psychotropic drugs for the first time in US history."[9] It created five "schedules" to classify regulated substances in terms of their dangers and benefits:

[9] DEA History (http://www.justice.gov/dea/pubs/history/1970-1975.html).

21 U.S.C. § 812. Schedules of controlled substances.

…

(b) ***Placement on schedules*****;** ***findings required***

Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on October 27, 1970, and except in the case of an immediate precursor, *a drug or other substance* ***may not be placed in any schedule unless the findings required for such schedule are made*** *with respect to such drug or other substance*.

The *findings required* for each of the schedules are as follows:

(1) Schedule I. –

(A) The drug or other substance has a high potential for abuse.
(B) The drug or other substance has ***no currently accepted medical use in treatment in the United States***.
(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

(2) Schedule II. –

(A) The drug or other substance has a high potential for abuse.
(B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.
(C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

(3) Schedule III. –

(A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.
(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

(4) Schedule IV. –

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III.
(B) The drug or other substance has a currently accepted medical use in treatment in the United States.
(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III.

(5) Schedule V. –

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule IV.
(B) The drug or other substance has a currently accepted medical use in treatment in the United States.
(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV.[10]

(emphasis supplied).

While the Act was under consideration, HEW was asked by a House Committee for a recommendation as to where marijuana should be placed. Dr. Roger Egeberg, the Assistant Secretary for Health and Scientific Affairs at that time responded:

[10] 21 U.S.C. § 812(b) (emphasis supplied).

> Dear Mr. Chairman: In a prior communication, comments requested by your committee on the scientific aspects of the drug classification scheme incorporated in H.R. 18583 were provided. This communication is concerned with the proposed classification of marihuana.
>
> It is presently classed in schedule I(C) along with its active constituents, the tetrahydrocannibinols and other psychotropic drugs.
>
> Some question has been raised whether the use of the plant itself produces "severe psychological or physical dependence" as required by a schedule I or even schedule II criterion. Since there is still a considerable void in our knowledge of the plant and effects of the active drug contained in it, our recommendation is that marihuana be retained within schedule I at least until the completion of certain studies now underway to resolve the issue. If those studies make it appropriate for the Attorney General to change the placement of marihuana to a different schedule, he may do so in accordance with the authority provided under section 201 of the bill...[11]

Accordingly, "marijuana" and "tetrahydrocannibinols" were "temporarily" placed under the most severe controls and penalties in Schedule I without the "findings" expressly required by the Act in subsection (b) pending completion of the "certain studies now underway."[12] Those "certain studies" were by the National Commission on Marihuana and Drug Abuse created by Congress in Part F of the

[11] Letter from Dr. Roger Olaf Egeberg to Harley O. Staggers, Chairman of the House Committee on Interstate and Foreign Commerce, August 14, 1970; *see also*, H.R.Rep.No. 91-1444 (Part 1), 91st Cong., 2d Sess. (1970) at p. 13, U.S.Code Cong. & Admin.News 1970, p. 4579.

[12] 21 U.S.C. §812, Schedule I (c)(10) and (17); 21 C.F.R. § 1308.11(d)(23) and (31) (2011); *see also*, *Raich*, 545 U.S. at 14 (noting the "temporary" listing under Schedule I).

Comprehensive Drug Abuse Prevention and Control Act of 1970.[13] In its 1972 report, "Marijuana: A Signal of Misunderstanding," the Commission chaired by former Pennsylvania Governor Raymond Shafer found that while cannabis "had no recognized medical uses *at this time* [it] does not render its users physically dependent, and is not as incapacitating as other substances in the Single Convention."[14] The Commission went on to recommend decriminalization of simple possession and the placement of cannabis into a less restrictive category than Schedule I.[15] The findings of the Shafer Commission are discussed at length

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[13] Pub. L. No. 91-513, 84 Stat. 1236 (Oct. 27, 1970); 21 U.S.C. Part F. Under a contract with the federal government, the National Institute on Drug Abuse (NIDA) since its inception in 1974 has grown and been the sole "legal" source of cannabis for research in the United States. NIDA, "Provision of Marijuana and Other Compounds for Scientific Research – Recommendations of the National Institute on Drug Abuse Advisory Council," NIDA, January, 1998 (http://archives.drugabuse.gov/about/organization/nacda/MarijuanaStatement.html) (website accessed on March 12, 2012)). Under a very limited program approved by the FDA, the NIDA was also authorized to supply cannabis to seven patients under so-called "compassionate use" Investigational New Drug Applications (IND). *Id*. The program was terminated as to new patients in 1992 after the number of application surged in response to the AIDS epidemic. American Medical Association, "Report 10 of the Council on Scientific Affairs," 1997. However, a DEA administrative law judge found in 2007 that "there is currently an inadequate supply of marijuana available for research purposes" and recommended the granting of the application of Lyle E. Cracker, a medical researcher at the University of Massachusetts, to grow marijuana for research purposes. *Craker v. D.E.A.*, 714 F.3d 17, 21 (1st Cir. 2013). However, the ALJ's recommendation was rejected by the DEA Administrator. *Id*. at 22.

[14] National Commission on Marihuana and Drug Abuse, *Marijuana: A Signal of Misunderstanding*, 545 (1972) (emphasis supplied).

[15] *Id*.

in *Ravin v. State*, 537 P.2d 494, 504-09, 512-13 (Alas. 1975), and *State v. Anonymous*, 355 A.2d 729, 331-37, 347 (Sup.Ct.Conn. 1976), both ruling that the Commission finding rendered the placement of marijuana, let alone medical marijuana, under Schedule I as "irrational" and constitutionally suspect. *Id*.

However, even before the Shafer Commission issued its report, President Nixon concerned about appearing "soft on marijuana" refused to implement the expected recommendation of the Commission as it was contrary to his declared "worldwide" war on drugs.[16]

Under the express provisions of the CSA, a temporary scheduling of a substance statutorily expires at the end of one year and may be extended one time for six months while an administrative proceeding is pending to formally place the substance under a CSA schedule after making the required findings.[17] At the very most, a substance may be temporarily scheduled under the CSA for one and one-half years. *Id*. A decision upon the temporary scheduling of cannabis in Schedule

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[16] *See*, Richard Nixon, "The President's News Conference," *The American Presidency Project* (press conference by the President held on May 1, 1971) (http://www.presidency.ucsb.edu/ws/index.php?pid=2995#axzz1pIeFVby3); Richard Nixon, "Remarks About an Intensified Program for Drug Abuse Prevention and Control," *The American Presidency Project* (press conference held by the President on June 1, 1971) (http://www.presidency.ucsb.edu/ws/index.php?pid=3031#axzz1pIeFVby3); declassified tape recordings from the White House Oval office on September 9, 1971 (http://www.csdp.org/research/nixonpot.txt).

[17] 21 U.S.C. §§ 811(h), 811(a)(1); *Touby v. United States*, 500 U.S. 160, 164, 111 S.Ct. 1752, 1755, 114 L.Ed.2d 219 (1991).

I has never been made by the Attorney General as required by the CSA[18], although over 40 years have passed since it was first listed. All of the litigation over the placement of cannabis in Schedule I has not been over the original listing, but rather on attempts to have cannabis re-scheduled. It's a critical distinction since in an initial scheduling proceeding the burden lies upon the Attorney General to demonstrate the proper scheduling of cannabis for *all three* of the Schedule I conjunctive requirements, *see*, *Grinspoon*, 828 F.2d at 887.

In the late 1980s, DEA Chief Administrative Law Judge Francis L. Young heard testimony over two years from a number of physicians and other experts and patients on the medicinal value of marijuana, found that a "respectable minority" of American physicians accept those uses, and ruled that was sufficient to demonstrate that marijuana had a currently accepted medical use supporting the rescheduling of marijuana from Schedule I.[19]

> … First, the record on cannabis encompasses 5,000 years of human experience. Second, cannabis is now used daily by enormous numbers of people throughout the world. Estimates suggest that 20-million to 50-million Americans routinely, albeit illegally, smoke marijuana without the benefit of direct medical supervision. Yet, despite this long history of use and the extraordinarily high numbers of social smokers, there are simply no credible medical reports to suggest that

[18] *Id*.

[19] *In the Matter of Medical Marijuana Rescheduling Petition*, Docket 86-22 (September 6, 1988), findings 5, 6, and 16, conclusion; *Alliance for Cannabis Therapeutics v. Drug Enforcement Administration*, 930 F.2d 936, 938 (D.C. Cir. 1991) (*ACT I*).

> consuming cannabis has caused a single death.
>
> By contrast aspirin, a commonly used, over-the-counter medicine, causes hundreds of deaths each year.
>
> … Marijuana, in its natural form, is one of the safest therapeutically active substances known to man. By any measure of rational analysis cannabis can be safely used with a supervised routine of medical care.
>
> …The evidence in this record clearly shows that cannabis has been accepted as capable of relieving the distress from great numbers of very ill people, and doing so with safety under medical supervision. It would be unreasonable, arbitrary and capricious for the DEA to continue to stand between those sufferers and the benefits of this substance in light of the evidence in this record.[20]

The US government has also formally acknowledged the medical benefits of marijuana. On April 1999, the United States filed a patent application for the use of cannabinoids, defined broadly to include all cannabinoids including THC and cannabidiol (CBD), to "provide a new class of antioxidant drugs that have particular application as neuroprotectants …"[21] There is no restriction to synthetic cannabinoids.[22] The application asserts the use of the cannabinoids as a therapeutically effective treatment for Alzheimer's disease, Parkinson's disease, human immunodeficiency virus (HIV) dementia, Down's syndrome, and heart

[20] *In the Matter of Medical Marijuana Rescheduling Petition*, *Id*.
[21] US Patent No. 6,630,507, pp. 3, 10-11.
[22] *Id*.

disease.[23] The patent application was approved and a patent for the medical use of cannabinoids was issued to the United States on October 7, 2003.

Currently Accepted Medical Use in Treatment in the United States

By the plain language of the Act, in order to place a substance such as marijuana under Schedule I of the CSA, there has to be a specific "finding, among other findings, that: "The drug or other substance has ***no currently accepted medical use in treatment in the United States***." 21 U.S.C. §812(b)(1)(B). When interpreting a statute, the court must give meaning to every word and avoid surplusage. *DePierre v. United States*, 131 S.Ct. 2225, 2227, 180 L.Ed.2d 114 (2011). The plain, common, meaning of the word "currently" is "occurring or belonging to present." *Brigham Young Univ. v. Pfizer*, 2010 WL 3855347, *3 n. 19 (D.Utah 2010) (citing, Merriam-Webster Dictionary 445 (1998)). When read with the Section 812(b) requirement that there be explicit "findings" *at the time of scheduling*, the term "currently" refers to the time of scheduling. *See, e.g., Owens v. U.S. Dept. of Ag.*, 45 F.Supp.2d 509, 511 n. 3 (W.D.Va. 1998). Thus, by the clear language of the statutory provision itself, there was no accepted medical use of marijuana *at the time* Congress temporarily placed it under Schedule I *in 1970.* Obviously, the finding requirement when construed with this term suggests that an

[23] *Id*., Abstract.

accepted medical use in treatment in the United States of a Schedule I substance may well subsequently develop and disqualify that substance from continued listing under Schedule I. "The statutory findings required for agency scheduling decisions clearly state that the agency may not, in the presence of Congressional action, subject drugs with a currently accepted medical use in the United States to Schedule I controls." *Grinspoon*, 828 F.2d at 890.

The next word, "accepted," raises the question, "accepted by whom." In *Grinspoon*, the court considered the meaning of this term at length. *Grinspoon*, 828 F.2d at 886-88. There, noting that a requirement for FDA approval was not in the legislative history of the Act, the court rejected the FDA's assertion that the term referred to acceptance solely by the agency under the administrative scheduling procedure set forth in the Act. *Id*. Instead, the court adopted the broader plain meaning of the term and ruled that at the time of scheduling "a substance might still possess an accepted medical use or even be considered safe for use under medical supervision" in the absence of FDA approval. *Id*. at 888. Accordingly, for example, the court in *Grinspoon* vacated the FDA Administrator's determination that psychoactive substance, MDMA, should be placed in Schedule I in light of the evidence of medical use accepted outside of FDA approval. *Id*. at 891 ("On remand, the Administrator will not be permitted to treat the absence of FDA interstate marketing approval as conclusive evidence that

MDMA has no currently accepted medical use and lacks accepted safety for use under medical supervision.").

The *Grinspoon* court also considered the plain meaning of the phrase "in the United States." *Grinspoon*, 828 F.2d at 885-86. The court rejected the FDA's assertion that the phrase should be interpreted to mean "all places" subject to the jurisdiction of the United States. *Id*. at 886. The court found 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." *Id*.; *accord*., *John Doe, Inc. v. Drug Enforcement Admin.*, 484 F.3d 561, 571 (D.C.Cir. 2007) (synthetic marijuana / Marinol).

Thus, a proper reading of the statutory requirement, "currently accepted medical use in treatment in the United States," as applied to marijuana describes Congress's intent in 1970 at the time of scheduling to *only* schedule *non-medical uses* of marijuana. Looking at it the other way, Congress in 1970 could not have placed marijuana in Schedules II, III, IV, or V, if it did not at the time have a currently accepted medical use as that is a requirement for placement of a substance into each one of those other Schedules. Simply put, by the plain, clear, language of the CSA itself, Congress could not have intended to have the Schedule I listing cover accepted medical uses of marijuana as treatment in the United States

because it was unable to make that determination at the time, as required by Section 812(b) for scheduling a substance in Schedules II, III, IV, or V[24]. It was for that very purpose that Congress set up the Shafer Commission and "temporarily" placed non-medical marijuana under Schedule I until the Commission could provide the medical and other statutorily required evidence needed for a different classification. *Raich*, 545 U.S. at 14.

The Congressional classification of non-medical marijuana as a Schedule I substance "*implies that matter beyond that reach are not pre-empted*." *Cipollone*, 505 U.S. at 517. By express statutory definition under the CSA itself (Section 812(b)(1)), medical uses of marijuana accepted for treatment in the United States are "beyond" the reach of the 1970 Schedule I classification of non-medical marijuana. *Grinspoon*, 828 F.2d at 890. Because after some 40 years of enforcement of the law against recreational marijuana the wide medical use of

[24] The CSA also implemented the international law obligations of the United States under the Single Convention on Narcotic Drugs of 1961 (ratified by the United States in 1967). *Nat'l Org. for the Reform of Marijuana Laws (NORML) v. Drug Enforcement Admin.*, 559 F.2d 735, 739 (D.C.Cir. 1977). Even after marijuana was place, temporarily, under Schedule I of the CSA, the Second Report of the Shafer Commission recommended that the United States take the necessary steps to remove cannabis from the Single Convention "since this drug does not pose the same social and public health problems associated with opiates and coca leaf products." *NORML*, 559 F.2d at 751 n. 70. The Single Convention does not include detached leaves, stems or seeds in its definition of "cannabis," so a rescheduling of these marijuana products would not offend the treaty. *NORML*, 559 F.2d at 750.

marijuana has only relatively recently spread across the United States, as well as worldwide, the FDA, the DEA, the Attorney General and the Department of Justice, and some judicial officers, have assumed that the Schedule I listing covered "all" uses of marijuana without examining the Act to determine the true intent of Congress at the time, or without even acknowledging the blatant internal contradiction in the plain language of the Act and the current and growing existence of a widespread use of marijuana as medication for seriously ill persons under state license and regulation.

Twenty states, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia, comprising over one-third of the US, states, population, and territory, have legalized marijuana for medical use through state programs.[25] 16 of those states have enacted MMJ legislation since 2000, essentially since the US Supreme Court decided *Oakland Cannabis Buyers Coop*. Legislation or initiatives to legalize medical marijuana have been introduced in

[25] "20 Legal Medical Marijuana States and DC / Laws, Fees and Possession Limits," *ProCon.org* (http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881).

Congress and every other state, with legislation pending in at least 13 states[26]. In Colorado alone, over 250,000 MMJ patient applications have been received by the Colorado Department of Public Health and the Environment and as of February 28, 2014, over 113,000 patients currently possess registration cards.[27] More than 800 different physicians have signed for current MMJ patients in Colorado. *Id.*

These relatively recent changes in facts strongly challenge the rationality and constitutionality of the federal government's contention that the federal CSA Schedule I listing covers state medical marijuana programs and their patients. *See, e.g., Anonymous*, 355 A.2d at 331-37, 347. "Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, … the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *United States v. Carolene Products Co.*, 304 U.S. 144, 154-55, 58 S.Ct. 778, 784 (1938). Thus, even if, *arguendo*, Congress had intended in 1970, to include marijuana under Schedule I without

[26] "13 States With Pending Legislation to Legalize Medical Marijuana," *ProCon.org* (http://medicalmarijuana.procon.org/view.resource.php?resourceID=002481). Florida, Kansas, Kentucky, Maryland, Minnesota, Missouri, New York, Ohio, Pennsylvania, South Carolina, Tennessee, West Virginia, and Wisconsin.

[27] http://www.colorado.gov/cs/Satellite/CDPHE-CHEIS/CBON/1251593017044.

regard to use, it can no longer be maintained that there currently is no accepted medical use of marijuana in treatment in the United States.

"Similarly we recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition …." *Carolene,* 304 U.S. 154-55. Clearly medical marijuana is "so different" from recreational marijuana "as to be without the reason for the prohibition" contained in Schedule I of the CSA.

"[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail – whether or not those constitutional problems pertain to the litigant before the Court." *Clark v. Martinez*, 543 U.S. 371, 380-81, 125 S.Ct. 716, 724, 160 L.Ed.2d 734 (2005). The "plausible statutory construction" and, the one supported by the plain language and history of the Act, is the one that finds that Congress never intended to include under CSA Schedule I listing the use of marijuana as medication by patients under a state constitutionally established program, license, and regulation.

The Barr Amendment

Subsequent Acts of Congress may also provide evidence of its intent in earlier legislation. *Branch v. Smith*, 538 U.S. 254, 281, 123 S.Ct. 1429, 1445, 155 L.Ed.2d 407 (2003); *Grinspoon*, 828 F.2d at 889-90. In 2002, a medical marijuana citizens' initiative was submitted to the District of Columbia's Board of Elections. *Marijuana Policy Proj. v. United States*, 304 F.3d 82, 84 (D.C. Cir. 2002). In response, US Congressman Bob Barr inserted a rider, the "Barr Amendment" into to annual District of Columbia appropriations bill that specifically prohibited Congressional funds from being "used to enact or carry out" the initiative. *Id*.; Pub.L. No. 107-96, §127(a), 115 Stat. 923 (2001). The District of Columbia is under the direct control and administration of Congress. *Marijuana Policy Proj.*, 304 F.2d at 83; *Cohens v. Virginia*, 19 U.S. 264, 425, 5 L.Ed. 257 (1821). If medical marijuana was already covered by the Schedule I listing, the initiative would have been in violation of the CSA and there would have been no need for the Barr Amendment to halt the initiative from going forward. To hold otherwise would violate the canon against interpreting any statutory provision, the CSA Schedule I listing for marijuana, in a manner that would render another provision, the Barr Amendment, superfluous. *Bilski v. Kappos*, 130 S.Ct. 3218, 3228, 117 L.Ed.2d 792 (2010).

Eleven years later, former Congressman Barr lobbied against his own legislation and contributed to the effort that successfully obtained a Congressional lifting of the ban on medical marijuana in the District of Columbia with the 2010 Congressional appropriations bill. Pub. L. 111-117 (Dec. 16, 2009). This is of great significance, as Congress acted affirmatively in withdrawing the barrier to a medical marijuana program directly under its jurisdiction – something that, if within the scope of the federal CSA, was authorizing criminal conduct in violation of the CSA.

As Justice Scalia has opined in *Branch*:

> The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought to be taken into consideration in construing a subsequent statute, be within reason of a former statute, it shall be taken to be within the meaning of that statute …; and if it can be gathered from a subsequent statute *in pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.

Branch, 538 U.S. at 281 (quoting, *United States v. Freeman*, 3 How. 556, 564-565, 11 L.Ed. 724 (1845)). Construing the CSA Schedule I listing of marijuana, the Barr Amendment, and the Congressional repeal of the Barr Amendment together, *in pari materia*, the only way to resolve these Acts of Congress and to construe the District of Columbia's medical marijuana program as lawful and not in violation of the CSA is to find that Congress did not intend in 1970 to include medical uses of

marijuana under a governmental program to be within the scope of the CSA Schedule 1 listing of marijuana. Here we have *two* subsequent acts of Congress, one in 2001 and another in 2009, as evidence that it never intended to include medical uses of marijuana under CSA Schedule I.

VII. CONCLUSION

This Court has an opportunity here to set things right and protect the lives, health, and occupations of hundreds of thousands of Colorado residents and citizens who are threatened with federal prosecution for engaging in medically necessary activities secured by the Colorado Constitution. No other court, federal or state, has yet engaged in a proper and full interpretation of the state medical marijuana programs and the federal Controlled Substances Act to uncover the true intent of Congress in placing marijuana in CSA Schedule I in 1970. It offers a way out, an interpretation of the CSA that is supported by the history and legislative history of the Act, as well as subsequent acts of Congress, that respects both federal and state constitutions, that protects the well-established, state licensed and tightly regulated, medical marijuana program in Colorado and perhaps in other states, that secures the occupational licenses and governmental benefits that are

otherwise being denied to Colorado residents and citizens, and that does not frustrate or obstruct the purpose of the CSA in controlling drug trafficking.

For these reasons, Amicus Curiae Patient Caregiver Rights Litigation Project requests that the Court find that the Colorado Constitution secures to qualifying patients a constitutional right to their physician-recommended medication, medical marijuana, and that neither the Colorado Constitution, nor the implementation of the Medical Marijuana Amendment by the General Assembly, conflict with or are preempted by the federal Controlled Substances Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the above and foregoing **BRIEF OF AMICUS CURIAE PATIENT AND CAREGIVER RIGHTS LITIGATION PROJECT** by ICCES e-service, this 16th day of April, 2014, addressed to the following:

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