IN THE SUPREME COURT OF IOWA

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

APPEAL FROM THE IOWA DISTRICT COURT

FOR POLK COUNTY

HONORABLE BRAD MCCALL, JUDGE

APPELLANT'S REPLY BRIEF

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CERTIFICATE OF FILING

On November 27, 2016, I certify that I did electronically file through the Iowa Court System Appellant's Reply Brief

/s/ Carl Olsen

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The Petitioner disagrees with the Statement of the Issue Presented for Review at page 1 of the Respondent's brief. The Statement of the Issue Presented for Review at page 1 of the Petitioner's opening brief is accurate, for the following reasons.

The first paragraph of Iowa Code § 17A.19 (2015) says "any person" can appeal from "any action" of an administrative agency. Therefore, the Petitioner can appeal from recommendations the Petitioner did not ask the Board to make.

The Board made several recommendations on January 5, 2015, which the Petitioner did not ask the Board to make, all of them related to the recommendation the Petitioner did request the Board to make.

The ruling of the Iowa Court of Appeals earlier this year says the Board is entitled to make no recommendation if the recommendation requested is the same as the recommendation it made in 2010. This appeal is based on recommendations the Board made in 2015, which are different than the recommendation the Board made in 2010. See, *Olsen v. Iowa Board of Pharmacy*, No. 14-2164 (Iowa Court of Appeals, May 11, 2016), App. 562.

STATEMENT OF THE CASE

Iowa Code § 17A.19 (2015) does not constrain an appeal to a petitioner's request. Any person can appeal from any action of the Board. The Petitioner is

appealing from recommendations the Petitioner did not ask the Board to make. The recommendations the Petitioner is appealing from are related to the recommendation the Petitioner requested.

FACTUAL AND PROCEDURAL HISTORY

On page 4 of the Respondent's brief, the Respondent informs the Court that a public hearing that was held by a subcommittee of the Board on November 17, 2014, Exhibit #18, App. 223, and Exhibit #19, App. 313. The Respondent fails to mention that this hearing was held by a subcommittee of the Board. The Respondent fails to mention that on November 19, 2014, the subcommittee recommended granting the Petitioner's request, Exhibit #20, App. 374, and Exhibit #22, App. 393. The subcommittee's recommendation was the same as the recommendation the Board made in 2010, and this is an important fact that should not have been omitted.

In reversing the subcommittee's recommendation on January 5, 2015, the Board did not cite any evidence in the record of the public hearing on November 17, 2014, as a reason for reversing the subcommittee's recommendation. Exhibit #1, Addendum A, App. 27.

On pages 5 and 6 of the Respondent's brief, the Respondent uses the terms scheduling and legalization interchangeably, as if they were the same. Scheduling

a substance does not legalize the substance. Scheduling simply recognizes medical use where it already exists.

Because the Board relies on federal scheduling, federal court decisions interpreting the statutory language are applicable. Accepted medical use can be "anywhere" in the United States. *Grinspoon v. DEA*, 828 F.2d 881, 886 (1st Cir. 1987) ("[C]ongress 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").

On page 6 of the Respondent's brief, the Respondent says the Board recommended the rescheduling of other derivatives. The Board suggested that other derivatives could be rescheduled after individual analysis. The Board did not identify any other derivatives. The Board did not analyze cannabidiol [hereinafter CBD].

The Iowa legislature legalized CBD in 2014. Iowa Code Chapter 124D (2015); 2014 Acts, Chapter 1125. The Board recommended rescheduling CBD because the Iowa legislature legalized CBD, Exhibit #1, Addendum A, p. 3; App. 29 ("[t]he passage of the Medical Cannabidiol Act is an affirmative recognition by the Iowa General Assembly that there is some medical use for marijuana …").

The Iowa legislature defined CBD as, "a nonpsychoactive cannabinoid found in the plant Cannabis sativa L. or Cannabis indica or any other preparation

thereof that is essentially free from plant material, and has a tetrahydrocannabinol level of no more than three percent." Iowa Code § 124D.2(1) (2015). As long as the CBD doesn't have plant material or more than three percent tetrahydrocannabinol [hereinafter THC], a CBD preparation is accepted for medical use in Iowa.

The Petitioner is in agreement with the Board that analysis is not required when state law says CBD is medicine.

The Board acknowledges that under the current definition of marijuana, CBD is marijuana, Exhibit #1, Addendum A, p. 3, App. 29 ("[t]here is some medical use for marijuana, as it is defined by Iowa Code section 124.101(19)").

CBD comes from the resin extracted from the marijuana plant.[1] See Iowa Code § 124.101(19) (2015) ("'Marijuana' means … resin extracted from any part of the plant …"). If the legislature says CBD has medical use, so does marijuana.

If the Board disagrees with the legislature and thinks CBD is not medicine, the Board has the authority to recommend that the Medical Cannabidiol Act be repealed. The Board has the authority to make recommendations other than scheduling recommendations to the legislature. See Iowa Code § 2.16 (2015). Instead of seeking repeal, the Board has recommended rescheduling CBD, but

[1] https://www.projectcbd.org/article/sourcing-cbd-marijuana-industrial-hemp-vagaries-federal-law

inconsistently recommends keeping the plant CBD comes from locked away in schedule 1.

It is important to understand for purposes of this appeal that all of the Board's actions are based on legal arguments, not on the analysis of the eight factors in Iowa Code § 124.201(1) (2015). The Board did not base its use of discretion on the analysis of any scientific or medical evidence.

The Petitioner agrees with the Respondent that all of the recommendations appealed by the Petitioner are recommendations the Board made on January 5, 2015.

ARGUMEMT

I. The Board was not rational, logical, or wholly justified.

A. Scope of Review and Standard of Review

On page 8 of the Respondent's brief, the Respondent says the parties to this appeal do not agree on the scope of review or the standard of review. The scope of review is the recommendations made by the Board on January 5, 2015. The standard of review is whether those actions were rational, logical, and wholly justified.

B. Argument

Marijuana is classified in Iowa as a substance with no accepted medical use in treatment in the United States, except when it has medical use pursuant to rules

of the Board. Iowa Code § 124.204(4)(m) (2015) and Iowa Code § 124.206(7)(a) (2015). This is inconsistent with federal scheduling and has been inconsistent with federal scheduling since 1979. See 21 C.F.R. § 1308.11(23) (2015). There is no other substance in two schedules in Iowa. There are no substances in two federal schedules. Marijuana is unique in this respect.

Marijuana is also unique because dozens of states have accepted it for medical use and not one state has ever considered accepting any other schedule 1 substance for medical use.

The dissenters in *State v. Bonjour*, 694 N.W.2d 511 (Iowa 2005), were of the opinion that:

> The legislature has accepted the fact that marijuana does have legitimate medical uses.

Id. at 516. The Board affirmed that marijuana does have legitimate medical uses in 2010, when it recommended that marijuana be removed from schedule 1 and placed in schedule 2, Exhibit #10, App. 180. The Board again affirmed that marijuana has legitimate medical uses in 2015, Exhibit #1, Addendum A, p. 3, App. 29. Because marijuana is in federal schedule 1, Exhibit #1, Addendum A, p. 3, App. 29, the Board recommended that marijuana be removed from schedule 2 and placed in schedule 1, Exhibit #1, Addendum A, p. 5, App. 31.

An Iowa Poll in early 2014 showed 59% of Iowans think marijuana is medicine.[2] A more recent Iowa Poll from early 2016 shows that 78% of Iowans think marijuana is medicine.[3]

In 2010 the Board recommended that marijuana be removed from schedule 1 and placed in schedule 2. Exhibit #10, App. 179, Exhibit #11, App. 182, Exhibit #12, App. 191. Schedule 2 is inconsistent with federal scheduling of marijuana. See 21 C.F.R. § 1308.11(23) (2015).

In 2015 the Board recommended that marijuana be removed from schedule 2 and placed in schedule 1. Exhibit #1, Addendum A, p. 5, App. 31. Schedule 1 is consistent with federal scheduling of marijuana. See 21 C.F.R. § 1308.11(23) (2015).

In 2015 the Board recommended that CBD (cannabidiol) be removed from schedule 1 and placed in schedule 2, Exhibit #1, Addendum A, p. 3, App. 29. Schedule 2 is inconsistent with federal scheduling of CBD. CBD is a federal schedule 1 controlled substance.[4]

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[2] http://www.desmoinesregister.com/story/news/politics/2014/03/02/59-back-legalizing-medical-marijuana/5958451/

[3] http://www.desmoinesregister.com/story/news/health/2016/03/01/iowa-poll-medical-marijuana-draws-78-percent-support/81126478/

[4] https://www.dea.gov/divisions/hq/2015/hq122315.shtml; and see DEA Registration Form-225, https://www.deadiversion.usdoj.gov/drugreg/reg_apps/225/225_form.pdf

The Board obviously knows it can make recommendations which are inconsistent with federal scheduling. Therefore, simply parroting federal scheduling is not an adequate explanation. The Board must explain the rationale, logic, and justification for the Board's recommendation without relying on federal scheduling as the only explanation.

The Board's 2010 recommendation to remove marijuana from schedule 1 and place it in schedule 2 was based on four months of public hearings and careful analysis of the eight factors in Iowa Code § 124.201(1) (2010), Exhibit #7, App. 172, Exhibit #8, App. 174, Exhibit #9, App. 176.

The Board's 2015 recommendation to remove marijuana from schedule 2 and place it in schedule 1 was based solely on federal scheduling of marijuana without analysis of the eight factors in Iowa Code § 124.201(1) (2015). The Board's recommendation to remove CBD from schedule 1 and place it in schedule 2 was based on state law legalizing the medical use of CBD, again without analysis of the eight factors in Iowa Code § 124.201(1) (2015).

The District Court noted, "Although legalizing the possession of the substance, the Act did not create a method by which Iowa residents can obtain cannabidiol within the state." Ruling, p. 3, n. 15, App. 153. How does one obtain CBD from an out of state source? Iowa Code § 124D.6(b) (2015) ("Cannabidiol … obtained from an out-of-state source…"). CBD is made from is cannabis. Iowa

Code § 124D.2(1) (2015) ("'Cannabidiol' means a nonpsychoactive cannabinoid found in the plant Cannabis …"). Cannabis is in federal schedule 1 and cannabis is in state schedule 1. Schedule 1 says cannabis has no accepted medical use in the United States. It's entirely unclear that CBD is available "out-of-state."

In both its 2010 recommendation and its 2015 recommendations, the Board says marijuana has medical use. Schedule 1 is not consistent with medical use. It is irrational, illogical, and wholly unjustified for the Board to find marijuana has medical use and then recommend that it be removed from schedule 2 and placed in schedule 1.

On page 14 of the Respondent's brief, the Respondent says that marijuana cannot be reclassified because only synthetic drugs have medical use. Merriam-Webster's Dictionary defines "synthetic" as "something resulting from synthesis rather than occurring naturally." This is a bizarre claim. Synthetic drugs were never mentioned in the Board's recommendations on January 5, 2015, Addendum A, App. 27. The Respondent cannot provide rationale, logic, or justification for the Board which the Board itself did not provide.

The CBD approved by our legislature is found in a marijuana plant. Iowa Code § 124D.2(1) (2015). Federally, the only two products containing CBD extract being considered for approval by the FDA are extracts made from

marijuana plants. Epidiolex[5] and Sativex[6], are extracts of marijuana made by GW Pharmaceuticals in Great Britain. Unlike in the United States, the marijuana plants can be grown by GW Pharmaceuticals to make these extracts. Marijuana can only be grown for research in the United States and has been so severely limited that expanded production (for research only) is now being considered.[7]

Tetrahydrocannabinol [hereinafter THC], which is in schedule 3, specifically defines THC as both naturally derived from marijuana or synthetic. Iowa Code § 124.209(9)(b) (2015). Again, because of marijuana's restrictive scheduling, there are no products approved by the FDA containing naturally derived THC. Because the FDA has approved drugs containing THC made from synthetic THC, there has been no demand for naturally derived THC products. Naturally derived CBD products are in demand, because no synthetic version of CBD is available. The FDA has not approved any CBD products, but the two products just previously mentioned, Epidiolex and Sativex, are both made from naturally derived CBD.

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[5] "Epidiolex is GW's lead cannabinoid product candidate and is a proprietary oral solution of pure plant-derived cannabidiol, or CBD." https://www.gwpharm.com/patients-caregivers/patients (last referenced on 11/19/2016)

[6] "Sativex® is an oromucosal spray of a formulated extract of the cannabis sativa plant that contains the principal cannabinoids THC and CBD as well as specific minor cannabinoids and other non-cannabinoid components." https://www.gwpharm.com/products-pipeline/sativex (last referenced on 11/19/2016)

[7] https://www.drugabuse.gov/drugs-abuse/marijuana/nidas-role-in-providing-marijuana-research (revised August 2016).

Opium poppies and coca, both of which are in schedule 2, are not synthetic. Iowa Code § 124.206(2)(c) (2015); Iowa Code § 124.206(2)(d) (2015). And, there are naturally derived extracts of poppy and coca plants in schedule 2 which are not synthetic. Iowa Code § 124.206(1)(a)(13) (2015); Iowa Code § 124.206(d)(1) (2015).

So, accepted medicines extracted from plants, as well as the plants those medicines are extracted come from, are in schedule 2, and not in schedule 1. The Respondent's reasoning is irrational, illogical, and wholly unjustified, because medicines derived from plants are in schedule 2 and the plants these medicines come from are in schedule 2, and not in schedule 1. Schedule 1 might force manufactures to figure out ways to make drugs synthetically, such as THC, simply to avoid schedule 1 restrictions, but this makes no sense. All it does is force production to occur outside of the United States. Keeping plants in schedule 1 to force their development outside of the United States, or to force development of synthetic drugs would add a new interpretation of scheduling that was clearly never the intent of Congress or the Iowa legislature.

On page 14 of the Respondent's brief, the Respondent talks about standardized medications as if they were all synthetic and never derived from plants. The Respondent could make these same arguments to recommend removing all the plants in schedule 2 and moving them to schedule 1. But, of

course, the Respondent is singling out marijuana. Quoting from page 14 of the Respondent's brief, “Such standardization and consistency is nearly impossible with a natural product like marijuana.” How is this not equally true for opium and coca plants?

There is no such thing as a prescription opium plants or a prescription coca plants. Marijuana will never have a prescription label on it. The Respondent refers to marijuana as if rescheduling it would result in marijuana becoming an FDA approved prescription product without explaining why the plants currently in schedule 2 are not FDA approved prescription products, or why those plants don't suffer from the same variations in standardization and consistency as marijuana. This is not rational, logical, or justified.

The Petitioner has never requested the Board to authorize a “wholesale medical marijuana program” as the Respondent suggests on page 15 of its brief. The Petitioner has never requested the Board to authorize the medical use of CBD.

The Petitioner has never argued that marijuana has any more, or any less, medical use than an opium plant or a coca plant. The Petitioner has never argued that the Board should create medical use. The Petitioner simply agrees with the Board. Marijuana does have medical use. It’s not a question of whether marijuana should have medical use.

In the footnote on page 14 of the Respondent's brief, the Respondent truncates the Petitioner's argument to "medical use," instead of using the phrase "accepted medical use in treatment in the United States." Omitting the phrase "in the United States," is not reading the statute as a whole. The Respondent truncates the phrase because it conveniently ignores marijuana's accepted medical use in other states. See *Grinspoon v. DEA*, 828 F.2d 881, 886 (1st Cir. 1987) ("Congress did not intend 'accepted medical use in treatment in the United States' to require a finding of recognized medical use in every state"). If the Respondent is going to rely on federal scheduling, then the Respondent must accept the interpretation of the language made by the federal court in *Grinspoon v. DEA*. The Respondent is selectively reading parts of the act out of context.

On page 15 of the Respondent's brief, the Respondent argues that federal schedule 1 is not being enforced against state medical marijuana programs. But, this argument has no relevance to whether marijuana should be in schedule 1 or another schedule because the schedules are not state medical marijuana programs.

Placing marijuana in another schedule, or completely removing marijuana from all of the schedules, is not a conflict with federal schedule 1. Rescheduling, or even removing marijuana from all of the schedules, does not authorize anyone to use marijuana.

On the other hand, as opposed to scheduling, a state medical marijuana program does expose participants to a direct conflict with federal schedule 1. See *Coats v. Dish Network*, 350 P.3d 849, 850 (Colorado 2015) ("Therefore, an activity such as medical marijuana use that is unlawful under federal law is not a 'lawful' activity under section 24-34-402.5").

On page 16 of the Respondent's brief, the Respondent says the 2015 Board is not legally bound by decision of the 2010 Board. The Petitioner does not argue the Board is legally bound by past decisions, but past decisions are evidence and the Board is legally bound to rebut that evidence if it no longer agrees with it. The Petitioner cited the 2010 decision as persuasive precedent, not legally binding precedent. Iowa Code § 17A.19(10)(h) (2015) specifically says action inconsistent with the agency's prior practice or precedents requires the Board to give credible reasons for the inconsistency.

The 2015 Board must either adopt the 2010 Board's decision, or explain why it does not agree with the 2010 Board's decision. Nothing prevents the 2015 Board from overturning a decision of the 2010 Board, but an explanation is required. How do we know if the reversal is rational, logical, or wholly justified without an explanation? The Board hasn't stated any credible reason sufficient to explain the inconsistency.

The same is true for the subcommittee recommendation on November 17, 2014. The 2015 Board must give credible reasons for reversing its own subcommittee's recommendation. The 2010 Board looked at this issue carefully in 2009, and it decided not to follow federal scheduling. The subcommittee looked at this issue again in 2014 and decided not to follow federal scheduling. The 2015 Board did not cite anything from the public hearing in 2014 that justified reversing these two prior decisions. The only argument the Board made is that federal schedule 1 exists and marijuana is in federal schedule 1. It is not a rational, logical, or wholly justified to accept federal scheduling without first agreeing that federal scheduling is accurate. There would be no need for an Iowa Uniform Controlled Substances Act if state scheduling was just a rubber stamp for federal scheduling.

It's worth repeating here what the Board actually said on page 3 of its January 5, 2015, ruling:

> "While the Board believes that marijuana has a high potential for abuse, it also believes that the passage of the Medical Cannabidiol Act is an affirmative recognition by the Iowa General Assembly that there is some medical use for marijuana, as it is defined by Iowa Code section 124.101(19)."

Federal scheduling says marijuana has no medical use. The Board's recognition that marijuana has medical use is inconsistent with federal scheduling. In fact, all state medical marijuana programs put their participants into direct conflict with

federal schedule 1. The Board does not agree with federal scheduling because the Medical Cannabidiol Act, 2014 Acts, Chapter 1125, Iowa Code Chapter 124D (2015), creates some medical use for marijuana in Iowa.

The Respondent consistently uses the truncated phrase "medical use" instead of using the phrase "accepted medical use in treatment in the United States." But "medical use" is a term that is not defined in the federal act. *Grinspoon v. DEA*, 828 F.2d 881, 885 (1st Cir. 1987):

> It is undisputed that Congress has not directly spoken to the question at issue here, namely, the proper means of interpreting the second and third criteria of section 812(b)(1).

Alliance for Cannabis Therapeutics v. DEA, 930 F.2d 936, 939 (D.C. Cir. 1991) ("[N]either the statute nor its legislative history precisely defines the term 'currently accepted medical use' …"). When a term is not defined by Congress and that same term is defined by state law, state law matters.

The principles of federalism require the federal administrative agency that determines scheduling to interpret the language Congress used in a manner consistent with federalism. *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006):

> The Attorney General has rulemaking power to fulfill his duties under the CSA. The specific respects in which he is authorized to make rules, however, instruct us that he is not authorized to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law.

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

> 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.

New York v. United States, 505 U.S. 144, 168 (1992) ("Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.").

In order to follow federal scheduling, the Board would have to show that marijuana has no currently accepted medical use in treatment in the United States, but the Board says marijuana does have a legitimate medical use in Iowa (a state) because of the CBD extract. The Board could argue the legislature was wrong to accept this medical use of marijuana, but it hasn't. The Board instead relies on federal scheduling, which is inconsistent with the accepted medical use the Board accepts in the state of Iowa.

In order to be consistent with federal scheduling, the Board would have to recommend that CBD be placed in schedule 1 and find that it has no accepted medical use in Iowa.

In order to be consistent with its own reasoning, the Board would have to recommend that opium plants and coca plants be placed in schedule 1.

Iowa Code § 124.201(4) (2015) makes it clear the Board is not to act as a rubber stamp for federal scheduling decisions. In the sole situation where a new substance is being added to the federal schedules that has never been scheduled before, the Board is to follow federal scheduling unless the Board disagrees. The fact the Board can disagree clearly says the legislature intended the Board to have its own, independent reason for following federal scheduling. Marijuana was placed in federal schedule 1 in 1970 and placed in Iowa schedule 1 in 1971. Since 1971, dozens of states have accepted the medical use of marijuana (starting in 1996) and Congress has been carving out exceptions for it (starting in 2014). See *United States v. McIntosh*, 833 F.3d 1163, 1169-70 (9th Cir. 2016):

> In December 2014, Congress enacted the following rider in an omnibus appropriations bill funding the government through September 30, 2015:
>
> > None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.
>
> Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014). Various short-term measures extended the appropriations and the rider through December 22, 2015. On December 18, 2015, Congress enacted a new

> appropriations act, which appropriates funds through the fiscal year ending September 30, 2016, and includes essentially the same rider in § 542. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015) (adding Guam and Puerto Rico and changing "prevent such States from implementing their own State laws" to "prevent any of them from implementing their own laws").

Iowa is included in this list. And, yet, the Board relies on marijuana's placement in federal schedule 1 without any giving any credible reason for doing so.

On page 17 of the Respondent's brief, the Respondent says the Board considered the 8 factors in Iowa Code § 124.201(1) (2015), but the record is completely devoid of any analysis of those 8 factors. The only reason the Board gave for recommending that CBD be transferred to schedule 2 was that the Iowa legislature had legalized CBD for medical use. The only reason the Board gave for recommending that marijuana be removed from schedule 2 was federal scheduling.

It is certainly easier to rely on federal scheduling than it is to defend state sovereignty.

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (BLACKMUN, J., dissenting). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*,

> 501 U.S. at 458. See The Federalist No. 51, p. 323 (C. Rossiter ed. 1961).

New York v. United States, 505 U.S. 144, 181-182 (1992).

> State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution. Indeed, the facts of these cases raise the possibility that powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests. Most citizens recognize the need for radioactive waste disposal sites, but few want sites near their homes. As a result, while it would be well within the authority of either federal or state officials to choose where the disposal sites will be, it is likely to be in the political interest of each individual official to avoid being held accountable to the voters for the choice of location. If a federal official is faced with the alternatives of choosing a location or directing the States to do it, the official may well prefer the latter, as a means of shifting responsibility for the eventual decision. If a state official is faced with the same set of alternatives – choosing a location or having Congress direct the choice of a location – the state official may also prefer the latter, as it may permit the avoidance of personal responsibility. The interests of public officials thus may not coincide with the Constitution's intergovernmental allocation of authority. Where state officials purport to submit to the direction of Congress in this manner, federalism is hardly being advanced.

Id. at 182-183.

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," The Federalist No. 39, p. 245 (C. Rossiter ed. 1961), reserved explicitly to the States by the Tenth Amendment.

Id. at 188.

The Petitioner presented evidence of other state laws authorizing the medical use of marijuana and extracts of marijuana as proof that marijuana has accepted medical use in treatment in the United States. The Board cannot second guess the legislatures of other states. The Board never addressed this argument.

Finally, the Respondent argues that moving heroin to schedule 2 would legalize heroin's use in Iowa. Just as it took a state law legalizing the use of CBD to make CBD medicine in Iowa, it would take a state law legalizing the use of heroin to make it medicine in Iowa. Rescheduling heroin would not give heroin any medical use. The Respondent does not understand the difference between scheduling and legalization. Not one state is even considering the legalization of heroin for medical use.

CONCLUSION

The Board must explain why the Board agrees with federal scheduling before following federal scheduling. The Board is not legally bound by federal scheduling. Congress has not defined medical use and the Board disagrees with the DEA on whether marijuana has medical use. The state legislature also disagrees with the DEA on whether marijuana has medical use. The Board's finding that CBD and marijuana have medical use is inconsistent with federal scheduling. While the Board has followed federal scheduling decisions in the past, none of those recommendations were controversial because there was no positive

conflict with a state law. The Board has not articulated any rational, logical, or wholly justified explanation for its actions on January 5, 2015. This court should remand all of the actions the Board took on January 5, 2015, back to the Board for further analysis and explanation. The Board should give rational, logical, and wholly justified explanations for its recommendations.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) or (2) because this brief has 4,946 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

This brief complies with the typeface requirements and the type-style requirements of Iowa Rule of Appellate Procedure 6.903(1)(e) and (f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point, Times New Roman font.

Dated: November 27, 2016

Respectfully submitted,

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