IN THE IOWA COURT OF APPEALS

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| CARL OLSEN,<br><br>Petitioner-Appellant.<br><br>v.<br><br>IOWA BOARD OF PHARMACY,<br><br>Respondent-Appellee. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | No. 16-1381 |

APPEAL FROM THE IOWA DISTRICT COURT

FOR POLK COUNTY

HONORABLE BRAD MCCALL, JUDGE

# PETITION FOR REHEARING BY APPELLANT

# AND SUGGESTION FOR REHEARING EN BANC

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## INTRODUCTION

Petitioner-Appellant ask this Court to rehear this case en banc for three reasons.

First, in its final ruling on January 5, 2015, the Board clearly recognized Olsen did not ask the Board to consider placing marijuana in another schedule. App., p. 27:

> The Petition does not request or suggest what schedule marijuana should be placed in, only that it be removed from Schedule I.

In its opinion on August 2, 2017 (attached hereto), from which Olsen seeks a rehearing, the panel incorrectly attributes an argument to Olsen that Olsen never made. Slip. Op., p. 1:

> Carl Olsen appeals from the district court's order on judicial review affirming the Iowa Board of Pharmacy's ruling denying his request to recommend the legislature reclassify marijuana from a Schedule I controlled substance to another scheduled substance.

Second, in its final ruling on January 5, 2015, the Board recommended that marijuana be removed from schedule 2. App., p. 31:

> To avoid confusion, the Board recommends the phrase "except as otherwise provided by rules of the board for medicinal purposes" be deleted from Iowa Code section 124.204(4)"m". In addition, the Board recommends that either the entirety of Iowa Code section 124.206(7)"a" be deleted, or, at a minimum, the phrase "pursuant to rules

> of the board" be deleted from Iowa Code section 124.206(7)"a".

In its opinion on August 2, 2017, the panel incorrectly attributes its own argument to the Board, stating that the Board recommended leaving marijuana classified in two schedules, schedule 1 and schedule 2. Slip. Op., p. 4:

> But the Board found this dual scheduling necessary in light of the legislature's "passage of the Medical Cannabidiol Act," which was "an affirmative recognition by the Iowa General Assembly that there is some medical use of marijuana, as it is defined by Iowa Code section 124.201(19)."

Third, after misquoting both Olsen and the Board, the panel says Olsen overlooked an argument which the Board never made, and faults Olsen for focusing on the phrase "accepted medical use." Slip. Op., p. 3:

> Olsen hones in on "accepted medical use." In his view, because marijuana has accepted medical use in treatment in the United States, it should not be listed in Schedule I and the Board should have recommended its removal from that Schedule. His argument, while appealing at first blush, overlooks a significant portion of the Board's decision.

Olsen did not overlook the argument the panel says the Board made because the Board never made that argument. The Board did not recommend dual scheduling.

## STATEMENT OF THE FACTS

Iowa enacted the Iowa Medical Cannabidiol Act of 2014 ("2014 Act" hereafter), 2014 Iowa Acts 369, Chapter 1125 (S.F. 2360) § 3, Iowa Code 124D.2(1) (2014), which defined cannabidiol as:

> "Cannabidiol" means 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.

There are no federally approved cannabidiol products in schedule 2, 3, 4, or 5. Medical cannabidiol preparations have always been in schedule 1 and remain so today.[1]

The 2014 Act required that cannabidiol be obtained from an "out-of-state" source.[2] See Iowa Code § 124D.6(1)(b) (2014).

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[1] Federal Register, Vol.81, No. 240, Wednesday, December 14, 2016, pp. 90194-90196. https://www.deadiversion.usdoj.gov/schedules/marijuana/m_extract_7350.html (last accessed on August 4, 2017).

[2] The Medical Cannabidiol Act of 2017 authorizes the cultivation of marijuana in Iowa to make cannabidiol. Authorizing the use of a schedule 1 substance from an unknown source is not safe and the 2017 Act makes it safer. Olsen's 2014 petition informed the Board that marijuana is required to make cannabidiol and that Iowa must protect Iowa citizens who will rely on this plant which is misclassified as having no accepted medical use in treatment in the United States. Iowa has accepted marijuana's medical use by authorizing its use to make medicine from it. See 2017 Iowa Acts 451, Chapter 162 (H.F. 524), Iowa Code 124E (2017).

Federal penalties for possession of medical cannabidiol are quite severe.[3] Olsen's arguments are both timely and correct.

## ARGUMENT

Cannabidiol cannot be obtained without using marijuana and schedule 1 is an obstacle to that medical use. The requirements for inclusion in schedule 1 make it unlawful to retain marijuana in schedule 1. Iowa Code § 124.203 (2015).

The panel talks about several petitions Olsen filed, but the only petition that has any relevance to this appeal is the one based on the Iowa Medical Cannabidiol Act of 2014 ("2014 Act" hereafter).

Because cannabidiol is defined in the 2014 Act as an extract of marijuana, this results in an "accepted medical use" for marijuana. Olsen requested the Board recommend removal of marijuana from schedule 1 because the 2014 Act gives marijuana an accepted medical use. Olsen has not filed any other petitions using accepted medical use of marijuana in Iowa as an argument. Olsen's previous petitions were based on accepted medical use of marijuana in other states.

[3] A fine of $1,000 fine and up to one year in prison for the first offense; A fine of $2,500 fine and up to two years in prison for a second offense; and a fine of $5,000 fine and up to three years in prison for a third and subsequent offense. 21 U.S.C. § 844(a) (2017).

The Board agreed that marijuana does have some medical use because of the 2014 Act. App., p. 29 ("there is some medical use for marijuana"), while at the same time recommending marijuana be removed from schedule 2 (substances with medical use) and placed in schedule 1 (substances without medical use). The logical inconsistency of placing marijuana in schedule 1 is easy to see, but only if the Court acknowledges what the Board actually said.

The panel incorrectly stated the Board recommended leaving marijuana in two schedules. Under the panel's legal analysis using the argument it substituted for the argument the Board actually made, the panel found it logically consistent with "accepted medical use" to leave marijuana in two schedules, which is not what the Board recommended.

Whether or not it would be logically consistent with "accepted medical use" to leave marijuana in two schedules, that is not what the Board recommended and it cannot stand as the basis for the court's final decision in this case.

Rehearing is necessary in this case to correct these errors and accurately describe what the petitioner asked the Board to do and what the Board actually did.

## CONCLUSION

For the reasons stated above, Petitioner-Appellant respectfully requests that this Court grant en banc review.

Respectfully submitted,

/s/ Carl Olsen

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Dated: August 6, 2017

**CERTIFICATE OF COMPLIANCE**
**WITH TYPEFACE REQUIREMENTS**
**AND TYPE-VOLUME LIMITATION**

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because this application has been prepared in a proportionally spaced typeface using Georgia in 14-point, and contains 1,087 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

/s/ Carl Olsen

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## CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2017, the foregoing was served electronically on the following:

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Dated: August 6, 2017

Respectfully submitted,

/s/ Carl Olsen

Carl Olsen

**IN THE COURT OF APPEALS OF IOWA**

No. 16-1381
Filed August 2, 2017

**CARL OLSEN,**
Plaintiff-Appellant,

**vs.**

**IOWA BOARD OF PHARMACY,**
Defendant-Appellee.

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Appeal from the Iowa District Court for Polk County, Bradley McCall, Judge.

Carl Olsen appeals from the district court's order on judicial review affirming the Iowa Board of Pharmacy's ruling denying his request to recommend the legislature reclassify marijuana from a Schedule I controlled substance to another scheduled substance. **AFFIRMED.**

Carl Olsen, Des Moines, pro se appellant.

Thomas J. Miller, Attorney General, and Meghan L. Gavin (until withdrawal), and Laura A. Steffensmeier, Assistant Attorneys General, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

**VAITHESWARAN, Presiding Judge.**

In 2014, Carl Olsen filed one of several petitions with the Iowa Board of Pharmacy, seeking a recommendation to have the legislature reclassify marijuana from a Schedule I controlled substance to another scheduled substance. *See* Iowa Code §§ 124.204 (2014) (Schedule I substances), .206 (Schedule II substances), .208 (Schedule III substances), .210 (Schedule IV substances), .212 (Schedule V substances); *State v. Bonjour*, 694 N.W.2d 511, 512 (Iowa 2005) (stating Iowa Code chapter 124 "restricts the use of controlled substances and divides them into five schedules"). The Board denied the petition. Olsen sought reconsideration, which the Board also denied.

Olsen petitioned for judicial review. The district court denied the petition, and this appeal followed.

Chapter 124 gives the Board authority to "administer the regulatory provisions of this chapter." Iowa Code § 124.201(1). "Annually, . . . the board shall recommend to the general assembly any deletions from, or revisions in the schedules of substances, enumerated in section 124.204, . . . *which it deems necessary or advisable*." *Id*. (emphasis added). This provision vests the Board with discretion to interpret the schedules. Accordingly, we will reverse the Board's legal interpretation only if it is "irrational, illogical, or wholly unjustifiable." *Id*. § 17A.19(10)(*l*); *Olsen v. Iowa Bd. of Pharmacy*, No. 14-2164, 2016 WL 2745845, at *2 (Iowa Ct. App. May 11, 2016).

The criteria for listing substances in Schedule I are as follows:

> 1. The board shall recommend to the general assembly that the general assembly place a substance in schedule I if the

> substance is not already included therein and the board finds that the substance:
>
> a. Has high potential for abuse; and
>
> b. *Has no accepted medical use in treatment in the United States; or lacks accepted safety for use in treatment under medical supervision.*
>
> 2. If the board finds that any substance included in schedule I does not meet these criteria, the board shall recommend that the general assembly place the substance in a different schedule or remove the substance from the list of controlled substances, as appropriate.

Iowa Code § 124.203 (emphasis added). The criteria for listing substances in Schedule II are as follows:

> 1. The board shall recommend to the general assembly that the general assembly place a substance in schedule II if the substance is not already included therein and the board finds that:
>
> a. The substance has high potential for abuse;
>
> b. *The substance has currently accepted medical use in treatment in the United States, or currently accepted medical use with severe restrictions*; and
>
> c. Abuse of the substance may lead to severe psychic or physical dependence.
>
> 2. If the board finds that any substance included in schedule II does not meet these criteria, the board shall recommend that the general assembly place the substance in a different schedule or remove the substance from the list of controlled substances, as appropriate.

*Id*. § 124.205 (emphasis added).

Olsen hones in on "accepted medical use." In his view, because marijuana has accepted medical uses in treatment in the United States, it should not be listed in Schedule I and the Board should have recommended its removal from that Schedule. His argument, while appealing at first blush, overlooks a significant portion of the Board's decision.

The Board began by noting marijuana was listed in Schedule I *and* Schedule II. *See id*. §§ 124.204(4)(m) ("Marijuana, except as otherwise provided

by rules of the board for medicinal purposes."), 124.206(7)(a) ("Marijuana when used for medicinal purposes pursuant to rules of the board."). The Board acknowledged, "The dual scheduling [of marijuana under state law] has understandably led to confusion as to the Board's authority to promulgate rules authorizing the legal use of medical marijuana." But the Board found this dual scheduling necessary in light of the legislature's "passage of the Medical Cannabidiol Act," which was "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)." The Board explained that because "[m]any substances can be derived from marijuana" and "some may have a medical use, while others may not," "it would be more accurate to schedule each derivate after an individualized analysis" and simultaneously amend the definition of marijuana to exclude "the derivative [with medical use] from the definition of marijuana, in order to avoid conflict." Meanwhile, the Board stated "Schedule 1 [was] inappropriate for cannabidiol" but declined to "make the broader recommendation" to remove the entire category of marijuana from Schedule I.

The district court characterized the Board's suggested approach as "insightful." We concur in this assessment. We also agree with the district court that the Board's interpretation of law was not irrational, illogical, or wholly unjustified. Accordingly, we affirm the Board's denial of Olsen's petition for agency action.

**AFFIRMED.**