

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CARL OLSEN,)	
)	
Petitioner,)	CASE NO. CV 8682
)	
vs.)	
)	MOTION TO DISMISS
STATE OF IOWA)	
)	
Respondent.)	

Pursuant to Iowa R. Civil P. 1.421(f) and 1.431, the State of Iowa (hereinafter, "State") moves to dismiss Petitioner's "Petition for Declaratory Judgment" for the reason it fails to state a claim upon which relief can be granted. The State's motion is based upon the following:

A. BACKGROUND

1. Petitioner seeks a declaratory judgment that marijuana has an accepted medical use as *a matter of law*.
2. Declaratory judgment is available under Iowa R. Civil P. 1.1101 to "declare rights, status and other legal relations . . ." *Fox, et al. v. Polk County Board of Supervisors*, 569 N.W.2d 503, 507 (Iowa 1997) ("declaratory judgment is an action in which a court declares the rights, duties, status or other legal relationships of the parties"). To justify a declaratory judgment, there must be a substantial, immediate and real controversy between parties having adverse legal interests. *Erickson v. Christensen v. Van Dorn*, 261 N.W.2d 171, 172 (Iowa 1978).

3. A court may refuse to render a declaratory judgment where the judgment would not serve to terminate a controversy. Iowa R. Civil P. 1.1105. A justiciable controversy must exist; a court will not decide an abstract question simply because a litigant desires a decision on a point of law or fact. *Bechtel v. City of Des Moines*, 225 N.W.2d 326 (Iowa 1975).

4. Petitioner contends that 16 states have legalized medical use of marijuana and, thus, marijuana has an “accepted medical use in treatment in the United States” as a matter of law. (Petition, p. 3)

5. Petitioner further contends that because marijuana has an “accepted medical use in treatment in the United States,” it no longer meets the criteria for schedule I substances found at Iowa Code § 124.203(1)(b) (2011). Petitioner deems the Iowa legislature's inclusion of marijuana in schedule I to be incorrect.

6. Thus, Petitioner seeks an order declaring the legislature's inclusion of marijuana in controlled substance schedule I – specifically, at Iowa Code § 124.204(4)(m) (2011) – to no longer be valid. (Petition, p. 17)

B. ARGUMENT

1. *Efficacy of Marijuana As Medicine Is Not a Matter of Law*. Petitioner begins his argument with the assertion that 16 states have adopted legislation authorizing some use of marijuana for medical treatment purposes. (Petition, p. 3) Based on this information, he concludes that marijuana has an accepted medical use in the United States, as a matter of law.

Petitioner cites no authority directly in support of his position. Petitioner does not address the fact that, although 16 states have authorized some use of marijuana for medical purposes, 34 states have not. Lawful use of marijuana for medical treatment is limited to a minority of states. Even where medical marijuana use is permitted by state law, persons engaged in manufacturing, distributing or possessing marijuana may face prosecution under federal law. *See* 21 U.S.C. § 812(c); *Gonzales v. Raich*, 545 U.S. 1, 13-15 (2005) (upholding constitutionality of the Controlled Substance Act, which criminalizes manufacture, distribution or possession of marijuana). Where 34 states and the federal government still regard manufacture, distribution and possession of marijuana to be a crime, marijuana cannot be said to have an accepted medical use in the United States, as a matter of law.

Petitioner's argument relies in part on the fact that the Iowa Board of Pharmacy (hereinafter, "Board") *recommended* to the Iowa legislature that marijuana be re-scheduled – i.e., be moved from controlled substance schedule I (unavailable for use as a medication) to schedule II (available as a medication by prescription). Petitioner quotes the Board resolution containing its recommendation, but acknowledges that the resolution was nothing more than a recommendation (Petition, p. 6) made pursuant to the Board's statutory responsibilities. *See* Iowa Code § 124.203 (2011). Petitioner also acknowledges that the Iowa legislature took no action regarding the Board's recommendation.

(Petition, p. 12)

The Board's recommendation did not serve to establish that marijuana has an accepted medical use for treatment in the United States, as a matter of law. Instead, the Board's recommendation had no legal impact, as evidenced by the legislature's choice to ignore the recommendation. The Iowa Code grants no authority to the Board to establish the contents of the controlled substance schedules, nor does the Iowa Code require that the Board's recommendations must be followed. *See Iowa Code § 124.201(2) (2011)* ("After considering the [listed] factors, the board shall make a recommendation to the general assembly, specifying the change which should be made in existing schedules . . ."); *Iowa Code § 124.203 (2011)*.

Interestingly, the Board treated the efficacy of medical marijuana as a question of *fact*. The Board held public hearings and assembled a substantial body of evidence (*See Petition, p. 3-4*) before making its recommendation to the legislature regarding a change to the controlled substance schedules. This approach was consistent with the suggestion in *Gonzales v. Raich* that the efficacy of marijuana as a medicine might be established as a factual matter – after evidence had been presented at trial. *See Gonzales v. Raich, 545 U.S. 1, 27, footnote 37 (2005)*.

Whether marijuana has an “accepted medical use in treatment in the United States” is a question of fact. Petitioner's brief provides no support for his conclusion that the efficacy of medical marijuana is a matter of law.

2. *Declaratory Judgment Order Would Violate Separation of Powers Doctrine.* Petitioner seeks an order declaring that the Iowa general assembly's classification of marijuana as a schedule I controlled substance is "no longer valid." (Petition, p. 17). In other words, Petitioner asks this court to tell the legislature that it is wrong; that the general assembly has made a mistake in the exercise of its legislative authority.

The judiciary may not intervene or attempt to adjudicate a challenge to legislative action when a political question is raised. This principle arises from the separation of powers doctrine. *Des Moines Register and Tribune v. Dwyer*, 542 N.W.2d 491, 495 (Iowa 1996). The separation of powers doctrine is violated when one branch of government purports to use powers that are granted to another branch. *Klouta v. Sixth Judicial District*, 642 N.W.2d 255, 260 (Iowa 2002). In order to avoid violating the separation of powers doctrine, a court may determine that an issue is non-justiciable. *See Des Moines Register and Tribune v. Dwyer*, 542 N.W.2d at 496-500 (Iowa 1996).

Numerous factors indicate the presence of a political question in this proceeding, not the least of which is the fact that a declaratory order would express a lack of respect for the legislative branch of Iowa government. By adopting Iowa Code chapter 124, the general assembly has set out a comprehensive scheme for determining the contents of controlled substance schedules I through V. With regard to each schedule, the Board makes only recommendations. *See* Iowa Code §§ 124.203, 124.205, 124.207, 124.209 and

124.211 (2011). The legislature then exercises discretion over which controlled substances are placed on which schedules. Petitioner acknowledges that Iowa Code chapter 124 is consistent with the Federal Uniform Controlled Substances Act, which states “ultimate authority for determining the appropriate person or agency [to administer the Act] is vested in the enacting State.” (Petition, p. 11)

Issuance of a judicial order deciding that the legislature has incorrectly left marijuana on controlled substance schedule I would constitute a direct rebuke to the general assembly’s exercise of judgment; would indicate that the judiciary disagrees with a legislative choice. These sorts of contradictory and divisive pronouncements by different branches of government are to be avoided. *Des Moines Register and Tribune v. Dwyer*, 542 N.W.2d at 495 (Iowa 1996).

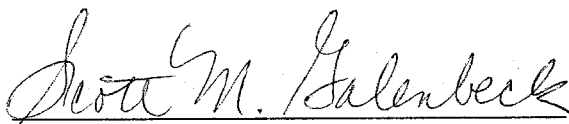
Likewise, courts will not issue a declaratory judgment where there is no actual or justiciable controversy between the parties, and a mere advisory opinion is sought by a petitioner. Iowa R. Civ. P. 1.1105; *Katz Inv. Co. v. Lynch*, 47 N.W.2d 800, 804 (Iowa 1951); *Bechtel v. City of Des Moines*, 225 N.W.2d 326 (Iowa 1975). Here, where the Iowa legislature has exclusive authority to determine the contents of the controlled substance schedules, the issues are non-justiciable.

This court has discretion to “refuse to render a declaratory judgment where it would not, if rendered, terminate the uncertainty or controversy” Iowa R. Civ. P. 1.1105. Because the Iowa legislature is not legally obligated to alter the controlled substance schedules – even if the Board and the Petitioner

disagree with the scheduling – a declaratory judgment by the court would do nothing to resolve a controversy.

WHEREFORE, the State of Iowa respectfully requests that the Olsen's Petition for Declaratory Judgment be dismissed.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties in the above-entitled cause by enclosing the same in an envelope addressed to each such attorney at his respective address as disclosed by the pleadings of record herein, with postage fully paid, and by depositing said envelope in a United States Post Office depository in Des Moines, Iowa, on the 26th day

of July, 2011.

Carl Olsen