

No. 11-1265

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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AMERICANS FOR SAFE ACCESS, *et al.*,

Petitioners,

v.

Drug Enforcement Administration,

Respondent.

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ADDENDUM TO INTERVENOR'S OPENING BRIEF  
Circuit Rule 28(a)(7) Standing

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Carl Olsen  
130 E. Aurora Ave.  
Des Moines, IA 50313-3654  
515-288-5798 home phone  
515-343-9933 cell phone  
carl-olsen@mchsi.com

Pro se

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## CERTIFICATE OF SERVICE

I hereby certify that two copies of the intervenor's addendum were served via first-class mail upon the following parties:

Joseph David Elford  
Americans for Safe Access  
1322 Webster Street  
Suite 402  
Oakland, CA 94612

Lena D. Watkins  
U.S. Department of Justice  
Room 11100  
1400 New York Avenue, NW  
Washington, DC 20005

DATED: February 6, 2012

Respectfully Submitted,

/s/ Carl Olsen

---

Carl Olsen  
130 E. Aurora Ave.  
Des Moines, IA 50313-3654  
515-288-5798 home phone  
515-343-9933 cell phone

**Iowans for Medical Marijuana**

Post Office Box 4091  
Des Moines, Iowa 50333

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August 14, 2010

David C. Holland, Esq  
The Law Offices of David C Holland PC  
419 Park Avenue South  
New York City 10016  
212-980-6881 fax

Dear Mr. Holland,

Iowans for Medical Marijuana must respectfully withdraw from the Coalition for Rescheduling Cannabis.

After the ruling in **Gonzales v. Oregon**, 546 U.S. 243 (2006), Iowans for Medical Marijuana determined that state rescheduling is a prerequisite to federal rescheduling, based on the scheduling criteria in Iowa Code §124.201(1) & §124.203(1) (2009), which is derived from the Uniform Controlled Substances Act, 9 ULA 42 §201(b) & 9 ULA 53 §203(a) (1994), which, in turn, is derived from the Controlled Substances Act, 21 U.S.C. §811(c) & 21 U.S.C. §812(b)(1).

The holding in **Gonzales v. Oregon**, 546 U.S. 243 (2006), combined with the policy statements of the Obama Administration, make it clear that the federal regulatory scheme for controlled substances (implemented by federal regulations) is driven by state policies on controlled substance (implemented by state laws).

Executive Order 13132 of August 4, 1999 ("Federalism"), Federal Register, Vol. 64, No. 153, Tuesday, August 10, 1999, page 43255.

Presidential Memorandum of January 20, 2009 ("Memorandum for the Heads of Executive Departments and Agencies"), Federal Register, Vol. 74, No. 15, Monday, January 26, 2009, page 4435.

Presidential Memorandum of January 30, 2009 ("Regulatory Review"), Federal Register, Vol. 74, No. 21, Tuesday, February 3, 2009, page 5977.

Presidential Memorandum of May 20, 2009 ("Preemption"), Federal Register, Vol. 74, No. 98, Friday, May 22, 2009, page 24693.

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515-288-5798

Carl.Olsen@IowaMedicalMarijuana.ORG

<http://www.iowamedicalmarijuana.org>

The ruling in *Gonzales v. Oregon*, at page 258, is unequivocally clear:

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.

Federal scheduling of controlled substances is a rule making process, 21 C.F.R. 1308.43(d) (April 1, 2010):

The Administrator shall, before initiating proceedings for the issuance, amendment, or repeal of any rule either to control a drug or other substance, or to transfer a drug or other substance from one schedule to another, or to remove a drug or other substance entirely from the schedules, and after gathering the necessary data, request from the Secretary a scientific and medical evaluation and the Secretary's recommendations as to whether such drug or other substance should be so controlled, transferred, or removed as a controlled substance. The recommendations of the Secretary to the Administrator shall be binding on the Administrator as to such scientific and medical matters, and if the Secretary recommends that a drug or other substance not be controlled, the Administrator shall not control that drug or other substance.

In 2008, Iowans for Medical Marijuana filed a petition to reclassify marijuana in Iowa by removing it from Schedule I of the Iowa Uniform Controlled Substances Act, Iowa Code 124.204(4)(m). On February 17, 2010, the Iowa Board of Pharmacy found that marijuana no longer meets the statutory criteria for inclusion in Schedule I of the Iowa Uniform Controlled Substances Act and recommended the Iowa Legislature remove it from that classification:

[http://www.iowa.gov/ibpe/pdf/2010\\_02\\_17minutes.pdf](http://www.iowa.gov/ibpe/pdf/2010_02_17minutes.pdf)

Since 1996, a total of 14 states and the District of Columbia have enacted medical marijuana legislation, and yet not one of those states has reviewed the classification of marijuana under the Uniform Controlled Substances Act or applied for federal reclassification of marijuana. All of the coalition members have either failed to seek state reclassification of marijuana under their own state's Uniform Controlled Substances Act and/or file civil actions in state courts complaining of the failure of their own states to apply for federal rescheduling. Because of this failure on the part of the coalition members there is a conflict of interest between Iowans for Medical Marijuana and the other coalition members which requires Iowans for Medical Marijuana to withdraw and separate itself from the coalition.

Please remove our name and contact information from the Coalition website:

[http://www.drugscience.org/coalition\\_members.html](http://www.drugscience.org/coalition_members.html)

We sincerely wish you all the best in your endeavors.

Sincerely,



Cc: The Coalition for Rescheduling Cannabis:

American Alliance for Medical Cannabis  
22860 Lanark Street  
West Hills, CA 91304

Americans for Safe Access  
1322 Webster St. #402  
Oakland, CA 94612

California NORML  
2215-R Market St. #278  
San Francisco, CA 94114

Drug Policy Forum of Texas  
1425 Blalock Road, Suite 109  
Houston TX 77055

Jon Gettman  
11312 Dutchman's Creek Rd.  
Lovettsville, VA 20180

High Times  
419 Park Ave. South, 16th Floor  
New York, NY 10003

Los Angeles Cannabis Resource Center (LACRC)  
1296 North Fairfax Av.  
West Hollywood, CA 90046

National Organization for the Reform of Marijuana Laws (NORML)  
1001 Connecticut Ave. NW Suite 710  
Washington, DC 20036

New Mexicans for Compassionate Use  
2905 Camino Del Bosque  
Santa Fe, NM 87507

Oakland Cannabis Buyers Cooperative (OCBC)  
P.O. Box 70401  
Oakland, CA 94612-0401

Patients Out of Time  
1472 Fish Pond Road  
Howardsville, VA 24562

Lloyd K. Jessen, R.Ph., J.D.  
Executive Secretary/Director  
Iowa Board of Pharmacy  
400 SW Eighth Street, Suite E  
Des Moines, Iowa 50309-4688

Christine A. Sannerud, Ph.D.  
Chief, Drug & Chemical Evaluation Section (ODE)  
Drug Enforcement Administration  
Attn: Office of Diversion Control/OD  
8701 Morrisette Drive, Springfield, VA 22152

State of Iowa  
**Board of Pharmacy**

RiverPoint Business Park  
400 S.W. Eighth Street, Suite E, Des Moines, Iowa 50309-4688  
<http://www.state.ia.us/ibpe>

Telephone: (515) 281-5944 Facsimile: (515) 281-4609

**BOARD MEMBERS**

EDWARD L. MAIER, R. Ph.  
Mapleton

SUSAN M. FREY, R. Ph.  
Villisca

MARGARET WHITWORTH  
Cedar Rapids

VERNON H. BENJAMIN, R. Ph., Argyle  
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Guthrie Center

ANN DIEHL  
Osceola

MARK M. ANLIKER, R. Ph.  
Emmetsburg

## MINUTES

### February 17, 2010

The Iowa Board of Pharmacy met on February 17, 2010, in the conference room at 400 SW Eighth Street, Des Moines, Iowa at 9:00 a.m. Chairperson Benjamin called the meeting to order at 9:02 a.m.

MEMBERS PRESENT

Vernon H. Benjamin, Chairperson  
Susan M. Frey, Vice-Chair  
Mark M. Anliker  
Annabelle Diehl  
Edward L. Maier  
Peggy M. Whitworth

STAFF PRESENT

Lloyd Jessen, Executive Director  
Scott Galenbeck, Esq., Assistant Attorney  
General  
Therese Witkowski, Executive Officer  
Debbie Jorgenson, Administrative Assistant  
Becky Hall, Secretary

MEMBERS ABSENT

DeeAnn Wedemeyer Oleson

Compliance Officers Present:

Bernie Berntsen  
Jim Wolfe

I. Medical Marijuana.

After the Board held four public meetings and reviewed a substantial amount of medical marijuana material, the Board met to deliberate the possible reclassification of marijuana from Schedule I of the Iowa Controlled Substances Act (Act) into Schedule II of the Act.

Motion (Maier/Anliker) the Iowa Board of Pharmacy recommends that the legislature reclassify marijuana from Schedule I of the Iowa Controlled Substance Act (Act) into Schedule II of the Act with the further recommendation that the legislature convene a task force or study committee comprised of various disciplines including but not limited to the following: a representative of a seriously ill patient; a representative of law enforcement; a representative of the Iowa Attorney General; a representative of an HIV organization or a physician caring for an AIDS patient; a

substance abuse treatment representative; a person living with a serious illness; a hospice or palliative care representative; a representative of the Iowa Board of Nursing; a representative of the Iowa Board of Medicine; and a representative of the Iowa Board of Pharmacy, for the purpose of making recommendations back to the legislature regarding the administration of a medical marijuana program. Roll call vote. Yes: Anliker, Benjamin, Diehl, Frey, Maier, Whitworth; No: None; Abstain: None; Absent: Oleson. Passed: 6-0-0-1.

Motion (Maier/Frey) to adjourn the meeting. Passed: 6-0-0-1. Absent: Oleson. Meeting adjourned at 12:47 p.m. on February 17, 2010.

Becky Hall

Becky Hall  
Recording Secretary

Lloyd K. Jessen

Lloyd K. Jessen  
Executive Director

Vernon H. Benjamin

Vernon H. Benjamin  
Board Chair

APPROVED THIS 9<sup>th</sup> DAY OF March, 2010.

**2009 IOWA CODE CHAPTER 124  
IOWA CONTROLLED SUBSTANCES ACT**

*(Updated to include 2009 Iowa Acts amendments)*

*See §205.11 – 205.13 for additional provisions relating to administration and enforcement*

*See also chapter 124A, imitation controlled substances*

*This chapter not enacted as a part of this title; transferred  
from chapter 204 in Code 1993*

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## DIVISION I -- DEFINITIONS

### IC 124.101 Definitions.

As used in this chapter:

1. “*Administer*” means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a patient or research subject by:
  - a. A practitioner, or in the practitioner’s presence, by the practitioner’s authorized agent; or
  - b. The patient or research subject at the direction and in the presence of the practitioner.
2. “*Agent*” means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or dispenser. It does not include a common or contract carrier, public warehouse, or employee of the carrier or warehouse.
3. “*Board*” means the board of pharmacy.
4. “*Bureau*” means the bureau of narcotics and dangerous drugs, United States department of justice, or its successor agency.
5. “*Controlled substance*” means a drug, substance, or immediate precursor in schedules I through V of division II of this chapter.
6. “*Counterfeit substance*” means a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person who in fact manufactured, distributed, or dispensed the substance.
7. “*Deliver*” or “*delivery*” means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.
8. “*Department*” means the department of public safety of the state of Iowa.
9. “*Dispense*” means to deliver a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, packaging, labeling, or compounding necessary to prepare the substance for that delivery.
10. “*Dispenser*” means a practitioner who dispenses.
11. “*Distribute*” means to deliver other than by administering or dispensing a controlled substance.
12. “*Distributor*” means a person who distributes.
13. “*Drug*” means:
  - a. Substances recognized as drugs in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them;
  - b. Substances intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals;
  - c. Substances, other than food, intended to affect the structure or any function of the human body or animals; and
  - d. Substances intended for use as a component of any article specified in paragraphs “a”, “b”, or “c” of this subsection. It does not include devices or their components, parts, or accessories.
14. “*Electronic prescription*” means a prescription which is transmitted by a computer device in a secure manner, including computer-to-computer transmission and computer-to-facsimile transmission.
15. “*Facsimile prescription*” means a prescription which is transmitted by a device which sends an exact image to the receiver.
16. “*Immediate precursor*” means a substance which the board has found to be and by rule designates as being the principal compound commonly used or produced primarily for use, and which is an immediate chemical intermediary used or likely to be used in the manufacture of a

controlled substance, the control of which is necessary to prevent, curtail, or limit manufacture.

17. “*Isomer*” means the optical isomer, except as used in section 124.204, subsection 4, and section 124.206, subsection 2, paragraph “d”. As used in section 124.204, subsection 4, “*isomer*” means the optical, positional, or geometric isomer. As used in section 124.206, subsection 2, paragraph “d”, “*isomer*” means the optical or geometric isomer.

18. “*Manufacture*” means the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container, except that this term does not include the preparation, compounding, packaging, or labeling of a controlled substance:

a. By a practitioner as an incident to administering or dispensing of a controlled substance in the course of the practitioner’s professional practice, or

b. By a practitioner, or by an authorized agent under the practitioner’s supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale.

19. “*Marijuana*” means all parts of the plants of the genus *Cannabis*, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin, including tetrahydrocannabinols. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil or cake or the sterilized seed of the plant which is incapable of germination.

20. “*Narcotic drug*” means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

a. Opium, opiates, derivatives of opium and opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation. Such term does not include the isoquinoline alkaloids of opium.

b. Poppy straw and concentrate of poppy straw.

c. Opium poppy.

d. Any compound, mixture, or preparation which contains any quantity of any of the substances referred to in paragraphs “a” through “c”.

21. “*Office*” means the governor’s office of drug control policy, as referred to in section 80E.1.

22. “*Opiate*” means any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. It does not include, unless specifically designated as controlled under section 124.201, the dextrorotatory isomer of 3-methoxy-n-methylmorphinan and its salts (dextromethorphan). It does include its racemic and levorotatory forms.

23. “*Opium poppy*” means the plant of the species *Papaver somniferum* L., except its seeds.

24. “*Person*” means individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other legal entity.

25. “*Poppy straw*” means all parts, except the seeds, of the opium poppy, after mowing.

26. “*Practitioner*” means either:

a. A physician, dentist, podiatric physician, veterinarian, scientific investigator or other person licensed, registered or otherwise permitted to distribute, dispense, conduct research with respect to or to administer a controlled substance in the course of professional practice or research in this state.

b. A pharmacy, hospital or other institution licensed, registered, or otherwise permitted to

distribute, dispense, conduct research with respect to or to administer a controlled substance in the course of professional practice or research in this state.

27. “*Production*” includes the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.

28. “*Simulated controlled substance*” means a substance which is not a controlled substance but which is expressly represented to be a controlled substance, or a substance which is not a controlled substance but which is impliedly represented to be a controlled substance and which because of its nature, packaging, or appearance would lead a reasonable person to believe it to be a controlled substance.

29. “*State*,” when applied to a part of the United States, includes any state, district, commonwealth, territory, insular possession, and any area subject to the legal authority of the United States of America.

30. “*Ultimate user*” means a person who lawfully possesses a controlled substance for the person’s own use or for the use of a member of the person’s household or for administering to an animal owned by the person or by a member of the person’s household.

*§204.101; 82 Acts, ch. 1147, §1; 84 Acts, ch. 1013, §1-3; 91 Acts, ch. 8, §1; C93, §124.101; 94 Acts, ch. 1009, §1; 95 Acts, ch. 108, §1; 99 Acts, ch 89, §1, 2; 2001 Acts, ch 24, §28; 2004 Acts, ch. 1036, §1; 2007 Acts, ch. 8, §1; 2007 Acts, ch. 10, §8; 2009 Acts, ch. 25, §1; 2009 Acts, ch. 133, §194*

#### **IC 124.101A Administration of controlled substances – delegation.**

Nothing contained in this chapter shall be construed to prevent a physician, dentist, podiatric physician, or veterinarian from delegating the administration of controlled substances under this chapter to a nurse, intern, or other qualified individual or, as to veterinarians, to an orderly or assistant, under the veterinarian’s direction and supervision; all pursuant to rules adopted by the board.

*2009 Acts, ch. 133, §195*

### **DIVISION II -- STANDARDS AND SCHEDULES**

#### **IC 124.201 Duty to recommend changes in schedules.**

1. The board shall administer the regulatory provisions of this chapter. Annually, within thirty days after the convening of each regular session of the general assembly, the board shall recommend to the general assembly any deletions from, or revisions in the schedules of substances, enumerated in sections 124.204, 124.206, 124.208, 124.210 or 124.212, which it deems necessary or advisable. In making a recommendation to the general assembly regarding a substance, the board shall consider the following:

- a. The actual or relative potential for abuse;
- b. The scientific evidence of its pharmacological effect, if known;
- c. State of current scientific knowledge regarding the substance;
- d. The history and current pattern of abuse;
- e. The scope, duration, and significance of abuse;
- f. The risk to the public health;
- g. The potential of the substance to produce psychic or physiological dependence liability; and
- h. Whether the substance is an immediate precursor of a substance already controlled under this

division.

2. After considering the above factors, the board shall make a recommendation to the general assembly, specifying the change which should be made in existing schedules, if it finds that the potential for abuse or lack thereof of the substance is not properly reflected by the existing schedules.

3. If the board designates a substance as an immediate precursor, substances which are precursors

of the controlled precursor shall not be subject to control solely because they are precursors of the controlled precursor. Such designations shall be made pursuant to the procedures of chapter 17A.

4. If any new substance is designated as a controlled substance under federal law and notice of the designation is given to the board, the board shall similarly designate as controlled the new substance under this chapter after the expiration of thirty days from publication in the Federal Register of a final order designating a new substance as a controlled substance, unless within that thirty-day period the board objects to the new designation. In that case the board shall publish the reasons for objection and afford all interested parties an opportunity to be heard. At the conclusion of the hearing the board shall announce its decision. Upon publication of objection to a new substance being designated as a controlled substance under this chapter by the board, control under this chapter is stayed until the board publishes its decision. If a substance is designated as controlled by the board under this paragraph the control shall be temporary and if within sixty days after the next regular session of the general assembly convenes it has not made the corresponding changes in this chapter, the temporary designation of control of the substance by the board shall be nullified.

*§204.201; C93, §124.201*

#### **IC 124.202 Controlled substances -- listed regardless of name.**

The controlled substances listed in the schedules in sections 124.204, 124.206, 124.208, 124.210 and 124.212 are included by whatever official name, common or usual name, chemical name, or trade name is designated.

*§204.202; C93, §124.202*

#### **IC 124.203 Substances listed in schedule I -- criteria.**

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.

*§204.203; C93, §124.203; 2009 Acts, ch. 41, §34, 263*

#### **IC 124.204 Schedule I -- substances included.**

1. Schedule I shall consist of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section.

2. *Opiates*. Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

- a. Acetylmethadol.
- b. Allylprodine.
- c. Alphacetylmethadol (except levo-alpha-cetylmethadol also known as levo-alpha-acetylmethadol, levomethadyl acetate, or LAAM).
- d. Alphameprodine.
- e. Alphamethadol.
- f. Alpha-Methylfentanyl (N-(1-(alpha-methyl-beta-phenyl) ethyl-4-piperidyl) propionanilide; 1-(1-methyl-2-phenylethyl)-4-(N-propanilido)piperidine).

IN THE SUPREME COURT OF IOWA

---

CARL OLSEN, LADD HUFFMAN, )  
ALAN KOSLOW, and ROBERT )  
MANKE, )  
 )  
Petitioners-Appellants, )  
 ) SUPREME COURT NO. 11-1744  
v. )  
 )  
STATE OF IOWA, )  
 )  
Respondent-Appellee. )

---

APPEAL FROM THE IOWA DISTRICT COURT

FOR POLK COUNTY

HONORABLE BRADLEY M. McCALL, JUDGE

---

APPELLANTS' PROOF BRIEF AND ARGUMENT

AND

REQUEST FOR ORAL ARGUMENT

---

CARL ERIC OLSEN  
130 E. Aurora Ave.  
Des Moines, IA 50313-3654  
515-288-5798 home phone  
515-343-9933 cell phone  
carl-olsen@mchsi.com  
Appellant, Pro Se

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## **STATEMENT OF THE ISSUE**

The issue presented is whether the district court erred by dismissing the petition for declaratory judgment without a hearing on the merits of the petition.

## **ROUTING STATEMENT**

Iowa Rule of Appellate Procedure 6.1101(2) outlines the criteria for determining whether an appeal will be retained by the Iowa Supreme Court or transferred to the Iowa Court of Appeals. Iowa R. App. P. 6.1101(2).

This appeal should be retained by the Iowa Supreme Court because it: (“a”) presents a substantial constitutional question; (“c”) presents a substantial issue of first impression; (“d”) presents a fundamental and urgent issue of broad public importance requiring prompt or ultimate determination by the supreme court; and (“f”) presents a substantial question of enunciating legal principles. Iowa R. App. P. 6.1101(2)(a), (c), (d), and (f).

## STATEMENT OF THE CASE

### **Nature of the Case:**

This is an appeal by Carl Olsen (“Mr. Olsen” hereafter), Ladd Huffman (“Mr. Huffman” hereafter), Alan Koslow (“Dr. Koslow” hereafter), and Robert Manke (“Mr. Manke” hereafter), from a final ruling dismissing their petition for declaratory judgment. The Honorable Judge Bradley M. McCall presided over all relevant proceedings.

### **Course of Proceedings:**

On June 6, 2011, Mr. Olsen filed a Petition for Declaratory Judgment moving the Iowa District Court to declare as a matter of law that marijuana has “accepted medical use in treatment in the United States” because of the fact that 16 states and the District of Columbia now accept marijuana as medicine as a matter of law.

Mr. Olsen moved the district court to declare that the classification of marijuana as a schedule I controlled substance is no longer valid based on the statutory requirement that substances in schedule I do not have “accepted medical use in treatment in the United States.” See Iowa Code § 124.203(1)(b) (2011).

On June 13, June 14, and June 22, 2011, respectively, Mr. Huffman, Dr. Koslow, and Mr. Manke filed motions to join, stating their own

particular facts and adopting Mr. Olsen's Petition for Declaratory Judgment.

See Iowa R. Civil P. 1.232.

On July 11, 2011, the State of Iowa ("State" hereafter) filed a response consenting to the motions to join by Mr. Huffman, Dr. Koslow, and Mr. Manke.

On July 27, 2011, the State filed a motion to dismiss the Petitioners' claim alleging the petition failed to state claim upon which relief could be granted.

On August 8, 2011, Mr. Olsen filed a resistance to the State's motion to dismiss.

On September 23, 2011, Judge McCall held a hearing on the State's motion to dismiss.

On September 26, 2011, Judge McCall granted the motions to join by Mr. Huffman, Dr. Koslow, and Mr. Manke.

On October 12, 2011, Judge McCall granted the State's motion to dismiss.

On October 25, 2011, Mr. Olsen filed a notice of appeal.

**Facts from Carl Olsen's Petition:**

Mr. Olsen presented a single fact.

Marijuana now has accepted medical use in 16 states and the District of Columbia.<sup>1</sup> Since 1996, a total of 16 states have accepted the medical use

<sup>1</sup> Alaska (Ballot Measure 8) (1998), Alaska Stat. § 17.37.070 (2011) (defines "medical use" including "acquisition, possession, cultivation, use or transportation of marijuana"); Arizona, (Proposition 203) (2010), A.R.S. § 36-2801 (2011) (defines "medical use" including "acquisition, possession, cultivation, manufacture, use, administration, delivery, transfer or transportation of marijuana"); California (Proposition 215) (1996), Cal Health & Saf Code § 11362.5 (2011) (defines "use of marijuana for medical purposes" including possession and cultivation for personal use); Colorado (Ballot Amendment 20) (2000), Colo. Const. Art. XVIII, Section 14 (2011) (defines "medical use" including "acquisition, possession, production, use, or transportation of marijuana"); Delaware (SB17, HB 17-4) (2011), 16 Del. C. § 4902A (2011) (defines "medical use" including "acquisition, administration, delivery, possession, transportation, transfer, transportation, or use of marijuana"); District of Columbia (Amendment Act B18-622) (2010), D.C. Code § 7-1671.01 (2011) (defines "medical marijuana" including "marijuana cultivated, manufactured, possessed, distributed, dispensed, obtained, or administered"); Hawaii (SB 862, HB 13-12) (2000), HRS § 329-121 (2011) (defines "medical use" including "acquisition, possession, cultivation, use, distribution, or transportation of marijuana"); Maine (Ballot Question 2) (1999), 22 M.R.S. § 2422 (2011) (defines "medical use" including "acquisition, possession, cultivation, manufacture, use, delivery, transfer or transportation of marijuana"); Michigan (Proposal 1) (2008), MCLS § 333.26423 (2011) (defines "medical use" including "acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana"); Montana (Initiative 148)(2004), Mont. Code Anno., § 50-46-301 (2011) (defines "use of marijuana" to alleviate symptoms of debilitating medical conditions including "cultivation, manufacture, delivery, and possession of marijuana"); Nevada (Ballot Question 9) (2000), Nev. Rev. Stat. Ann. § 453A.120 (2011) (defines "medical use" including "possession, delivery, production or use of marijuana"); New Jersey (SB 119, HB 25-13) (2010), N.J. Stat. § 24:6I-3 (2011) (defines "medical use" including "acquisition, possession, transport, or use of marijuana"); New Mexico (SB 523, ,HB 32-3) (2007), N.M. Stat. Ann. § 26-2B-2 (2011) (defines "use of medical cannabis" "for alleviating symptoms caused by debilitating medical conditions and their medical

of marijuana. In addition, in 2010, with the consent of Congress, the medical use of marijuana was accepted in the federal jurisdiction of the District of Columbia.

**Facts from Ladd Huffman's Motion to Join:**

Mr. Huffman presented the following facts.

Mr. Huffman is permanently disabled. Mr. Huffman has multiple sclerosis. Mr. Huffman received federal authorization to use marijuana in 1991. Mr. Huffman's involvement in three federal court rulings were cited in his motion to join and his testimony from the transcript of a public hearing held by the Iowa Board of Pharmacy was included by reference in his motion. See Kuromiya v. United States, 37 F. Supp. 2d 717, 720-721 (E.D. Pa. 1999); see Kuromiya v. United States, 78 F. Supp. 2d 367 (E.D. Pa. 1999); and see Motion to Dismiss, Ladd Huffman v. Food and Drug Administration, Civil No. 93-0237 NHJ (United States District Court for the treatments"); Oregon (Ballot Measure 67) (1998), ORS § 475.302 (2009) (defines "medical use" including "production, possession, delivery, or administration of marijuana"); Rhode Island (SB 0710, HB 33-1) (2006), R.I. Gen. Laws § 21-28.6-3 (2011) (defines "medical use" including "acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marijuana"); Vermont (SB 76, HB 645) (2004), 18 V.S.A. § 4472 (2011) (defines "use for symptom relief" including "acquisition, possession, cultivation, use, transfer, or transportation of marijuana"); Washington (Initiative 692) (1998), Rev. Code Wash. (ARCW) § 69.51A.010 (2011) (defines "medical use" including "production, possession, or administration of marijuana").

District of Columbia), dated June 17, 1993 [found at:

[http://www.iowamedicalmarijuana.org/pdfs/930237\\_fda\\_declarations.pdf](http://www.iowamedicalmarijuana.org/pdfs/930237_fda_declarations.pdf)];

and finally Mr. Huffman's testimony from the public hearing held by the

Iowa Board of Pharmacy in Mason City on September 2, 2009, can be

found in the transcript of that hearing on pages 22-27 [found at:

[http://www.iowamedicalmarijuana.org/pdfs/mc\\_1\\_10.pdf](http://www.iowamedicalmarijuana.org/pdfs/mc_1_10.pdf)].

**Facts from Alan Koslow's Motion to Join:**

Dr. Koslow presented the following facts.

Dr. Koslow is an Iowa physician who would recommend marijuana to

some of his patients as an alternative to dangerous narcotics. Some of Dr.

Koslow's patients have had to leave Iowa and move to other States where

medical use of marijuana is legal in order to reduce their use of dangerous

narcotics. Dr. Koslow's testimony from the transcript of a public hearing

held by the Iowa Board of Pharmacy was included by reference in his

motion to join. Dr. Koslow's testimony from the public hearing held by the

Iowa Board of Pharmacy in Des Moines on August 19, 2009, can be found

in the transcript of that hearing on pages 84-99 [found at:

[http://www.iowamedicalmarijuana.org/pdfs/dm\\_21\\_30.pdf](http://www.iowamedicalmarijuana.org/pdfs/dm_21_30.pdf)].

**Facts from Robert Manke's Motion to Join:**

Mr. Manke presented the following facts.

Mr. Manke is permanently disabled. Mr. Manke has severe injuries. Mr. Manke is authorized to use marijuana for medicine by the State of Oregon. Mr. Manke's testimony from the transcript of a public hearing held by the Iowa Board of Pharmacy was included by reference in his motion to join. Mr. Manke's testimony from the Des Moines public hearing, August 19, 2009, can be found in the transcript of that hearing on pages 29-36 [found at: [http://www.iowamedicalmarijuana.org/pdfs/ic\\_1\\_10.pdf](http://www.iowamedicalmarijuana.org/pdfs/ic_1_10.pdf)], from the Iowa City Public Hearing, October 7, 2009, in the transcript of that hearing on pages 98-108 [found at: [http://www.iowamedicalmarijuana.org/pdfs/ic\\_21\\_30.pdf](http://www.iowamedicalmarijuana.org/pdfs/ic_21_30.pdf)], and from the Council Bluffs Public Hearing, November 4, 2009, in the transcript of that hearing on page 70 [found at: [http://www.iowamedicalmarijuana.org/pdfs/cb\\_11\\_20.pdf](http://www.iowamedicalmarijuana.org/pdfs/cb_11_20.pdf)] and on pages 173-183 [found at: [http://www.iowamedicalmarijuana.org/pdfs/cb\\_41\\_50.pdf](http://www.iowamedicalmarijuana.org/pdfs/cb_41_50.pdf)].

## ARGUMENT

### **Material Facts have Changed:**

Marijuana is the only substance in Schedule I of the Iowa Uniform Controlled Substances Act that has ever been accepted by any state for

medical use since the legislation was enacted in 1971, making this a “substantial issue of first impression.”

Over the past 15 years since California enacted the first state law accepting the medical use of marijuana in 1996, a total of 16 States have now enacted laws accepting the medical use of marijuana, as well as the District of Columbia (with Congressional approval).

The Iowa Uniform Controlled Substances Act was enacted in 1971 and marijuana was placed in schedule I because it had no currently “accepted medical use in treatment in the United States” at that time. A condition for substances to remain in schedule I was created by our legislature – for a substance to remain in schedule I it must have no currently “accepted medical use in treatment in the United States.”

The classification of marijuana has not been considered by the Iowa legislature since 1990, so the current classification of marijuana does not reflect the change that has occurred “in the United States” over the past 15 years. See State v. Bonjour, 694 N.W.2d 511, 516 (Iowa 2005) (Wiggins, J., dissenting) (“The 1990 amendment continues to be the law today”).

Iowa’s Uniform Controlled Substances Act is based on the federal Controlled Substances Act, 21 U.S.C. §§ 801 et seq., and the concept that states determine “accepted medical use in treatment in the United States” is

a concept known as “federalism,” articulated recently in the context of the federal Controlled Substances Act by the U.S. Supreme Court in Gonzales v. Oregon, 546 U.S. 243, 258 (2006) (“a medical standard for care and treatment of patients that is specifically authorized under state law”). Oregon v. Ashcroft, 368 F.3d 1118, 1124 (9<sup>th</sup> Cir. 2004) (“our concept of federalism, . . . requires that state lawmakers, not the federal government, are ‘the primary regulators of professional [medical] conduct’”). Also see President Clinton's Executive Order 13132 of August 4, 1999 (“Federalism”), Federal Register, Vol. 64, No. 153, Tuesday, August 10, 1999, page 43255; President Obama's Memorandum of May 20, 2009 (“Preemption”), Federal Register, Vol. 74, No. 98, Friday, May 22, 2009, page 24693. And see *Bush: Marijuana Laws Up to States*, by Spencer S. Hsu, Washington Post Staff Writer, Friday, October 22, 1999; Page B7 – <http://www.washingtonpost.com/wp-srv/politics/campaigns/wh2000/stories/bush102299.htm> (last accessed, 11/28/2011). And see Conant v. Walters, 309 F.3d 629, 639 (9<sup>th</sup> Cir. 2002):

Our decision is consistent with principles of federalism that have left states as the primary regulators of professional conduct. See *Whalen v. Roe*, 429 U.S. 589, 603 n. 30, 51 L. Ed. 2d 64, 97 S. Ct. 869 (1977) (recognizing states’ broad police powers to regulate the administration of drugs by health professionals); *Linder v. United States*, 268 U.S. 5, 18, 69 L. Ed. 819, 45 S. Ct. 446 (1925) (“direct control of medical practice in the states is beyond the power of the federal

government”). We must “show[] respect for the sovereign States that comprise our Federal Union. That respect imposes a duty on federal courts, whenever possible, to avoid or minimize conflict between federal and state law, particularly in situations in which the citizens of a State have chosen to serve as a laboratory in the trial of novel social and economic experiments without risk to the rest of the country.” *Oakland Cannabis*, 532 U.S. at 501 (Stevens, J., concurring) (internal quotation marks omitted).

**Petitioners’ Claim:**

Because underlying facts regarding marijuana’s “accepted medical use in treatment in the United States’ have changed since our legislature placed marijuana in schedule I (16 States and the District of Columbia now accept the medical use of marijuana “in the United States”), Petitioners petitioned the district court to find as a matter of law that marijuana now has “accepted medical use in treatment in the United States” as that phrase is used in Iowa Code §§ 124.203(1)(b) (schedule I) , 124.205(1)(b) (schedule II), 124.207(1)(b) (schedule III) , 124.209(1)(b) (schedule IV) , and 124.211(1)(b) (schedule V) , and to declare that marijuana is currently misclassified as a matter of state law.

Judge McCall said our legislature has recognized since 1979 that marijuana might have medical use in Iowa (quoting *State v. Bonjour*, 694 N.W.2d at 513). Ruling pp. 4-5. The phrase “might have” does not have the same meaning as “does have.” It would have been impossible for the Iowa

legislature to say marijuana did have “accepted medical use in treatment in the United States” in 1979, since marijuana didn’t have any accepted medical use in treatment in any state “in the United States” until 1996. Petitioners note that Judge McCall found the 1979 amendment to the Iowa Code did address the injury of the petitioners, thus proving the question was not merely “abstract” or “theoretical” and that there is an actual injury in this case that declaratory judgment will remedy. Ruling p. 5. If there was no injury, the legislature would certainly not have addressed it.

The Iowa legislature in 1979 could not have possibly addressed the fact of 16 state laws which did not exist until 1996. The legislature was not being inconsistent in placing marijuana in Schedule I in 1971 when the uniform act was adopted, because marijuana actually had no “accepted medical use in treatment in the United States” at that time. What the legislature did in 1971 was to create a condition that anything in schedule I must be removed from schedule I if it later becomes “accepted for medical use in treatment in the United States.” Judge McCall interpreted the 1979 amendment as somehow nullifying the scheduling criteria, which is not a fair reading of the statute.

In fact, if you look at the rules the Iowa Board of Pharmacy adopted in 1979, 620 Iowa Administrative Code Chapter 12 “Medical use of

Marijuana” (October 1, 1979), 620 IAC 12.3(3) (1979) (“Concurrent with federal approval” ), there is nothing in those rules that wasn’t already legal in 1971 pursuant to Iowa Code § 124.303(3) (“Practitioners registered under federal law to conduct research with schedule I substances may conduct research in schedule I substances within this state upon furnishing the board evidence of the federal registration”). Indeed, two Iowans (Barbara M. Douglass, Storm Lake, IA, and George Lee McMahon, Livermore, IA) have been receiving approximately 300 federal marijuana cigarettes per month here in Iowa since 1990 pursuant to Iowa Code § 124.303(3). See Appendix to Conant v. Walters, 309 F.3d 629, 648 (9th Cir. 2002). Petitioners have been unable to find any information that the 1979 program was ever funded.

In 1996, the Executive Director of the Iowa Board of Pharmacy wrote:

I am writing in response to your letter dated June 21, 1996. In regard to Senate File 487, this legislative bill was approved on June 1, 1979. The Board of Pharmacy Examiners adopted 620 Iowa Administrative Code chapter 12 "Medicinal Use of Marijuana" on October 1, 1979. A copy of chapter 12 is enclosed per your request.

Subrule 12.3(5) called for the termination of the research program on June 30, 1981. It appears that the program ended on that date. Because of changes in Iowa Code chapter 204 as amended by 1986 Iowa Acts, chapter 1037, chapter 12 was rescinded in its entirety on January 20, 1987. Apparently, the change in the Iowa Code in 1986 eliminated the need for investigational programs on the medical use of marijuana.

In regard to the advisory group of physicians which was required to be formed seventeen years ago in 1979 pursuant to Senate File 487 and 620 I.A.C. chapter 12, these records are either no longer in existence or are nonretrievable. The current office files contain no information about the advisory group or its activities.

Letter from Lloyd K. Jessen, R.Ph., J.D., to Carl E. Olsen dated July 16, 1996.

The State, as well as Judge McCall, treated the phrase “accepted medical use in treatment in the United States” as if the last four words “in the United States” did not exist, or had no meaning. Ruling p. 4. In other words, the State, as well as Judge McCall, read this phrase as if it said “accepted medical use in treatment in Iowa,” which is not what it says and not what it means. Anderson v. State, 801 N.W.2d 1, 6 (Iowa 2011) (citing Iowa R. App. P. 6.904(3)(m): “In construing statutes, the court searches for the legislative intent as shown by what the legislature said, rather than what it should or might have said”).

If we do not follow the clear language of a statute, or of the Constitution, but by a fallacious theory of construction attempt to impose our own ideas of what is best, even if in so doing we conceive that we are promoting the public welfare and achieving a desirable result, we are indulging in judicial legislation and are invading the province of the Legislative branch of the Government, or of the electorate in amending the basic law. The end does not in such cases justify the means. We must accept [the statute] as the legislature wrote it, and its meaning is definite and beyond fair debate.

Id., at 6-7. What possible relevance does the statement “the legislature has recognized that marijuana may have medical value” have with whether marijuana has “accepted medical use in treatment in the United States?” Ruling p. 4. The first statement is a value judgment. The second is a legal question.

Judge McCall also said the question whether marijuana has “accepted medical use in treatment in the United States” is merely “abstract.” Ruling p. 5. The two permanently disabled co-petitioners, one of whom has a debilitating illness and the other of whom has debilitating injuries, are injured by marijuana’s current misclassification in Iowa. Before dismissing the case, Judge McCall granted these two co-petitioners’ motions to join, so the facts of their injuries were properly before Judge McCall regarding the State’s motion to dismiss.

In particular, Mr. Manke is authorized by the state of Oregon to use marijuana as medicine and that medical use of marijuana is recognized by our law here in Iowa. Leaving marijuana classified as having no “accepted medical use in treatment in the United States” works a serious injury to Mr. Manke and others like him. Our law recognizes the law in other states because it says “in the United States” which means “within the United States.” The law of a sister state, specifically referred to in an Iowa statute,

is a relevant fact. See Berger v. General United Group, 268 N.W.2d 630, 634 (Iowa 1978) (“We have consistently held the law of a sister state, statutory or common, is a question of fact”).

The meaning of term “State” is found in Iowa Code § 124.101(29) (2011). The term (“when applied to a part of the United States, includes any state, district, commonwealth, territory, insular possession, and any area subject to the legal authority of the United States of America”). Gregory v. Ashcroft, 501 U.S. 452, 457-458 (1991):

“‘The people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,’ . . . ‘Without the States in union, there could be no such political body as the United States.’ Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.” *Texas v. White*, 74 U.S. 700, 7 Wall. 700, 725, 19 L. Ed. 227 (1869), quoting *Lane County v. Oregon*, 74 U.S. 71, 7 Wall. 71, 76, 19 L. Ed. 101 (1869).

The Constitution created a Federal Government of limited powers. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const., Amdt. 10. The States thus retain substantial sovereign authority under our constitutional system. As James Madison put it:

“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.” The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961).

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry. See generally McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1491-1511 (1987); Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 3-10 (1988).

Perhaps the principal benefit of the federalist system is a check on abuses of government power. “The ‘constitutionally mandated balance of power’ between the States and the Federal Government was adopted by the Framers to ensure the protection of ‘our fundamental liberties.’” *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985), quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 572, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985) (Powell, J., dissenting).

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

Respondents then pose what appears at first to be a troubling question: How can a federal statute be found an unconstitutional infringement of state sovereignty when state officials consented to the statute’s enactment?

The answer follows from an understanding of the fundamental purpose served by our Government's federal structure. 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, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991) (BLACKMUN, J., dissenting).

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

The constitutional authority of Congress cannot be expanded by the "consent" of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States.

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.

New York v. United States, 505 U.S. 144, 187 (1992):

But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

New York v. United States, 505 U.S. 144, 188 (1992):

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.

**Arguments from the Petition:**

The Iowa Uniform Controlled Substances Act states that its legislative intent is to "make uniform the law of those states which enact it." Iowa Code § 124.601 (2011). See, Uniform Controlled Substances Act §§ 101-401, 9 U.L.A. Part II (1994). See, Iowa Const. art. I, § 6 ("All laws of a general nature shall have a uniform operation").

The scheduling criteria in the Iowa Code are not part of a legislative scheme created exclusively by Iowa legislators. The statutory scheme and the meaning of its terms are taken from the Uniform Controlled Substances Act, which, in turn, is taken from the federal Controlled Substances Act. 21 U.S.C. §§ 801 et seq. The purpose of the Uniform Controlled Substances Act is to "maintain uniformity between the laws of the several States and those of the federal government." Prefatory Note for Uniform Controlled Substances Act (1990). (Pet. p. 11).

While taking no position on whether Iowa should have adopted the uniform act verbatim (exactly as written by the National Conference of

Commissioners), Petitioners do want the court to take particular notice that Iowa's version of the Uniform Controlled Substances Act varies from the Uniform Controlled Substances Act as recommended by the National Conference of Commissioners on Uniform States Laws ([http://www.nccusl.org/Act.aspx?title=Controlled Substances Act](http://www.nccusl.org/Act.aspx?title=Controlled%20Substances%20Act)).

Unlike the model uniform act, which recommends that scheduling determinations be made through formal administrative rulemaking, Iowa's version of the Uniform Controlled Substances Act does not authorize the Iowa Board of Pharmacy to amend the classifications of controlled substances by formal rulemaking. Iowa Code § 124.201 (2011).

Because there is no formal administrative remedy for misclassification of controlled substances in Iowa, actual enforcement is only available in a court of law. See Ewurs v. Irving, 343 N.W.2d 273, 276 (Iowa Ct. App. 1983) ("The test in each case is whether or not the legislature has prescribed an exclusive remedy"). Auen v. Alcoholic Beverages Div., 679 N.W.2d 586, 590 (Iowa 2004) (citing *Marion v. Iowa Dep't of Revenue & Fin.*, 643 N.W.2d 205, 207 (Iowa 2002)) ("statute delegating rulemaking power . . . vested the interpretation of . . . the Iowa Code with the agency"); Litterer v. Judge, 644 N.W.2d 357, 362 (Iowa 2002):

The failure of an agency to act based upon the perceived lack of legal authority to act and the failure of an agency to act based

upon the exercise of discretion are different concepts. They may both be reasons for the failure to act, but the lack of authority to act does not implicate the exercise of agency discretion because there can be no discretion to exercise if there is no authority to act. Thus, judicial review of the authority of an agency to act does not undermine agency decision-making, or meddle in the wisdom of agency decision-making. For this reason, we do not believe the denial of rulemaking based upon the lack of legal authority falls within the “on the merits” requirement, unless the agency has no legal authority to act. Yet, this requires a judicial determination. See *Hamilton v. City of Urbandale*, 291 N.W.2d 15, 19 (Iowa 1980) (the interpretation of a statute can only be determined by the judiciary). Courts do not invade the discretion of the agency by examining the legal authority to act, and an agency that has authority to act but fails to exercise that authority based upon a false belief that there is no such authority abuses its discretion.

For a detailed explanation of Iowa’s informal controlled substance scheduling recommendation see the “Ruling on Respondent’s Motion to Dismiss” in Carl Olsen v. Board of Pharmacy, No. CV 8156 (Honorable Judge Robert Hanson, Polk County Iowa District Court, August 23, 2010).

**Federal Case Law:**

The U.S. Court of Appeals for the First Circuit has determined the phrase “accepted medical use in treatment in the United States” does not require a finding of recognized medical use in every state or approval for interstate marketing of a controlled substance. Grinspoon v. DEA, 828 F.2d 881, 886 (1st Cir. 1987).

Scheduling of controlled substances under the federal Controlled Substances Act and as recommended by the Uniform Controlled Substances Act is carried out by formal rulemaking. 21 C.F.R. §§ 1308 et seq. Under the federal Controlled Substances Act, the federal administrative agency 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”. Gonzales v. Oregon, 546 U.S. 243, 258 (2006).

“Direct control of medical practice in the states is beyond the power of the federal government. . . . It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state’s police power.” Oregon v. Ashcroft, 368 F.3d 1118, 1124 (9th Cir. 2004) (citations omitted).

The question of whether the State must acknowledge that marijuana has “accepted medical use in treatment in the United States” falls squarely under the Full Faith and Credit Clause of the United States Constitution as well as the Iowa Court Rules which require the State to take judicial notice of the statutes of other states to determine whether marijuana has any “accepted medical use in treatment in the United States.” U.S. Const. art. IV, § 1; 28 U.S.C. § 1652 (2011); Iowa R. Civ. P. 1.415; Iowa R. Evid. 5.902; Iowa Code § 622.59 (2011).

In 2005, the U.S. Supreme Court upheld the constitutionality of the federal Controlled Substances Act, while at the same time expressing doubt that the federal classification of marijuana is still valid. Gonzales v. Raich, 545 U.S. 1, 28 n.37 (2005):

We acknowledge that evidence proffered by respondents in this case regarding the effective medical uses for marijuana, if found credible after trial, would cast serious doubt on the accuracy of the findings that require marijuana to be listed in Schedule I.

Since that ruling, no one in California has brought an action against the State of California for its failure to apply for federal reclassification on behalf of the citizens of California. This failure of states that have accepted the medical use of marijuana to apply for federal reclassification is inexcusable and treasonous on the part of state officials.<sup>2</sup> The states that have enacted

<sup>2</sup> While I was in the process of writing this brief, on November 30, 2011, two states actually did file for federal reclassification of marijuana, Washington and Rhode Island. However, neither state has removed marijuana from schedule I of their states' controlled substances act.

Also, while I was in the process of writing this brief, on December 7, 2011, the U.S. Court of Appeals for the District of Columbia denied the U.S. Drug Enforcement Administration's motion to dismiss me from the current federal marijuana rescheduling petition, Americans for Safe Access v. DEA, Case No. 11-1265 (D.C. Cir.). In that case, my argument is that states have failed to file for federal reclassification. Of course, now states have actually filed for federal reclassification as of November 30, 2011. My argument is going to be that the petitions these states have filed are defective because they fail to assert that marijuana has accepted medical use in treatment in the United States as a matter of law. See *Gonzales v. Oregon*, 546 U.S. 243 (2006). In

medical marijuana laws cannot simply shrug off this federal responsibility to ensure the safety of their citizens who are using marijuana pursuant to state laws defining marijuana as medicine.

In 2006, the United States Supreme Court interpreted the limits of the administrative rulemaking power given to the U.S. Attorney General by Congress under the federal Controlled Substances Act. 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.

Because the federal schedules are administrative regulations, it follows that they can't be used to make an accepted medical practice illegal in a state that accepts the medical use of marijuana.

Both the courts and the U.S. Drug Enforcement Administration have determined that accepted medical use and safety for use under medical supervision are not separate analytical questions. See Alliance for Cannabis

other words, there's nothing to which the DEA can apply the 8 factors listed in 21 U.S.C. § 811(c), because accepted medical use in treatment in the United States is a matter of law, not medical efficacy. The DEA might use those 8 factors to determine which, if any, of the other schedules to put marijuana in, but that is speculation. Marijuana is not currently prescribed in any state and it's doubtful it ever will be.

Therapeutics v. DEA, 930 F.2d 936, 940 n.4 (D.C. Cir. 1991) (“we do not see that ‘safety’ issue as raising a separate analytical question”). And see DEA Docket No. 86-22, Federal Register, Vol. 57, No. 59, Thursday, March 26, 1992, 10499 at page 10504:

The scheduling criteria of the Controlled Substances Act appear to treat the lack of medical use and lack of safety as separate considerations. Prior rulings of this Agency purported to treat safety as a distinct factor. 53 FR 5156 (February 22, 1988). In retrospect, this is inconsistent with scientific reality. Safety cannot be treated as a separate analytical question.

See Iowa Code § 124.203(1)(b). Because safety is not listed in a separate subsection “c” in Iowa, it’s clearly not a separate analytical question in Iowa. Compare 21 U.S.C. § 812(b)(1)(C) (2011).

**Iowa Case Law:**

In 2005, the Iowa Supreme Court held, “As the law stands now . . . marijuana has no recognized medicinal value.” State v. Bonjour, 694 N.W.2d 511, 514 (Iowa 2005). Again, Petitioners reiterate that whether marijuana has recognized medical value in Iowa is not the same question as whether marijuana has “accepted medical use in treatment in the United States.” Iowa Code § 124.203(1)(b).

The Iowa Supreme Court made an interesting observation in the Bonjour case:

That procedure is to defer to the Board of Pharmacy Examiners, which is far better equipped than this court – and the legislature, for that matter – to make critical decisions regarding the medical effectiveness of marijuana use and the conditions, if any, it may be used to treat.

Id. at 514. Petitioners agree with the Iowa Supreme Court that the Board of Pharmacy Examiners is far better equipped to determine the medical effectiveness of marijuana than the legislature, but the legislature hasn't authorized the Board of Pharmacy to classify controlled substances in Iowa.

Petitioners also agree with the comments made by Honorable Judge Jon Fister in 1997 in State v. Helmers, Case No. FECR047575 (Black Hawk County, August 13, 1997):

What all of this means is that, if the board of pharmacy examiners really concludes marijuana to have no medicinal value, as alleged by the assistant county attorney, the board has an unqualified duty to recommend that the general assembly delete it from Schedule II and revise Schedule I so that it is not excluded even when utilized for medicinal purposes. See Sections 124.203, 124.205, (The Code 1997).

Accepted medical use in Iowa is not really a question of medical efficacy at all because only the Iowa lawmakers can give marijuana any medical use in Iowa. If “accepted medical use in treatment in the United States” were really a question of whether marijuana has medical efficacy here in Iowa, the legislature would have authorized the Iowa Board of Pharmacy to determine whether marijuana should have accepted medical use

in Iowa. The legislature clearly created the condition that marijuana must continue to have no “accepted medical use in treatment in the United States” in order to remain in schedule I as a matter of law, not as a matter of medical efficacy. That condition has now been met by 16 states.

There is no administrative remedy here in Iowa because the administrative agency has no authority to change the classification of marijuana. Because the court can enforce the law as written by the legislature, the remedy is an original action for declaratory judgment in the Iowa courts. Courts can enforce the law here in Iowa.

**There is no administrative remedy:**

Unlike the federal administrative process which provides a formal administrative remedy (a legally binding administrative rulemaking process which results in a final, legally binding determination by the agency of the final scheduling of a controlled substance), Iowa’s administrative process provides no administrative remedy. Fox, et al. v. Polk County Board of Supervisors, 569 N.W.2d 503, 508 (Iowa 1997) (“the test is whether the legislature has prescribed an exclusive remedy”).

Iowa’s Board of Pharmacy makes an informal recommendation to the legislature which is not legally binding on the State. Because the legislature has not authorized the Board of Pharmacy to reschedule controlled

substances in Iowa, Petitioners have no administrative remedy to exhaust. See Grains of Iowa v. Iowa Department of Agriculture, 562 N.W.2d 411, 444 (Iowa Ct. App. 1997) (“The exhaustion of remedies requirement is a highly utilitarian principle of administrative law both as an expression of administrative autonomy and a rule of sound judicial administration”).

**The res judicata argument:**

At the September 23, 2011, hearing on the State’s motion to dismiss, the State’s attorney, Scott Galenbeck (“Mr. Galenbeck” hereafter), told the court, “I just realized this yesterday, that we have – that Judge Novak may have already ruled on precisely the issue that is presented.” (Transcript p. 6, lines 17-20).

Mr. Olsen responded, “The ruling from Judge Novak that Scott referred to was a ruling in a petition for judicial review of an agency ruling, and the judge made that ruling in the context of a petition for judicial review.” (Transcript p. 12, lines 11-14). “[W]hen the Supreme Court . . . dismissed the case they never ruled on the merits of that issue, they just said the case was moot.” (Transcript p. 12, lines 19-25). “I don't feel that decision is res judicata because of the context that it was made in.” (Transcript p. 13, lines 8-9). See Grains of Iowa v. Iowa Department of Agriculture, 562 N.W.2d 441, 444 (Iowa Ct. App. 1997):

When reviewing agency action, the district court exercises only appellate jurisdiction and review is for errors at law. *PERB v. Stohr*, 279 N.W.2d 286, 289-90 (Iowa 1979). The “district court has no original authority to declare the rights of parties or the applicability of any statute or rule.” *Id.* Therefore, the district court may review only the challenged agency action and may not issue an original declaratory judgment. *Id.*

Mr. Galenbeck is familiar with the limited context of Judicial Review under Iowa Code § 17A. At the first hearing before Judge Novak, Mr. Galenbeck told the court that Mr. Olsen’s argument could only be addressed in the context of an original action in district court, not in the context of a proceeding for judicial review.

Judge Novak prefaced his ruling with, “As to paragraph C this court rules that it does not believe that it can determine . . .” Judge Novak would not have written the ruling that way if he actually thought he was making a declaratory judgment ruling. Mr. Olsen was not seeking a declaratory judgment ruling from Judge Novak. Mr. Olsen was merely asking Judge Novak to find the agency erred by failing to acknowledge the law. Mr. Olsen was simply saying everyone has to obey the law, including the agency.

Mr. Olsen’s administrative petition sought a recommendation from the board, which is all the law requires from the board. Iowa Code § 124.201 (2011). Mr. Olsen could not possibly get a ruling that is legally

binding on the State from the board, and Judge Novak could not possibly have made a legally binding declaratory judgment on the legality of marijuana's scheduling in that context. Mr. Olsen did not agree with Judge Novak and he filed an appeal with the Iowa Supreme Court, but Mr. Olsen never suggested that Judge Novak could make a ruling outside the limited scope of judicial review. Mr. Olsen simply wanted the Iowa Board of Pharmacy to tell the Iowa legislature that marijuana is misclassified as a matter of Iowa law.

Mr. Olsen's appeal was dismissed as moot when the Iowa Board of Pharmacy ruled unanimously that marijuana is medicine based on science rather than medical marijuana statutes in sister states. George McMahon v. Board of Pharmacy, No. 09-1789 (Iowa Supreme Court, May 14, 2010) ("The board ultimately made the reclassification recommendation sought by the petitioners and the intervenor. This reclassification decision ended any justiciable existing controversy that an appellate decision on this case could affect"). Mr. Olsen agrees with the Iowa Supreme Court. This appeal is not about a petition for judicial review.

Because the Iowa Supreme Court never addressed the argument that marijuana is misclassified as a matter of state law, the issue is properly before the Iowa Supreme Court now.

Judge Novak simply found the administrative agency was not obligated by law to answer a legal question. And, considering the Board of Pharmacy is composed of pharmacists, it's not difficult to understand why they did not want to answer a question of law. The Board of Pharmacy thought the 8 factors in Iowa Code 124.201(1)(a)-(h) (2011) were the only factors they should consider and that the only issue they had to decide was medical efficacy. Mr. Olsen does not agree that "medical efficacy" and "accepted medical use in treatment in the United States" are the same analytical question, but does understand why the Iowa Supreme Court dismissed his appeal as moot.

Obviously, the 16 states and the District of Columbia must have found that marijuana has medical efficacy, but that is a matter of state law here in Iowa. The State admits in footnote 1 of its Response to Petitioner's Supplemental Memorandum in Opposition to Respondent's Motion to Dismiss, filed on Oct. 13, 2011, that, "the Board made no finding regarding whether marijuana has accepted medical use in the United States." If the Board of Pharmacy didn't make any finding whether marijuana has accepted medical use in treatment "in the United States," then Judge Novak's ruling was simply whether or not the board was required to make that finding. It's dishonest for the State to make a res judicata argument.

At the swearing-in ceremony for 11 assistant U.S. attorneys for the District of Columbia held on April 8, 2011, U.S. Attorney General Eric Holder made the following statements: “Your job as assistant U.S. attorneys is not to convict people,” Holder said. “Your job is not to win cases. Your job is to do justice. Your job is in every case, every decision that you make, to do the right thing. Anybody who asks you to do something other than that is to be ignored. Any policy that is at tension with that is to be questioned and brought to my attention. And I mean that.” *Holder Replaces DOJ Internal Ethics Head*, by Nedra Pickler, Associated Press, Huffington Post, April 8, 2009: [http://www.huffingtonpost.com/2009/04/08/holder-replaces-doj-inter\\_n\\_184797.html](http://www.huffingtonpost.com/2009/04/08/holder-replaces-doj-inter_n_184797.html) (last accessed 11/29/2011).

The Board of Pharmacy, on its own initiative, without being petitioned by anyone, did address the 8 factors in Iowa Code 124.201(a)-(h) (2011) and reached the same conclusion that Mr. Olsen asked them to reach, by a different method (medical efficacy). The board found that marijuana does have accepted medical use (based on medical efficacy as a matter of science, without taking any position on whether marijuana has “accepted medical use in treatment in the United States” a matter of law). The Iowa Supreme Court then dismissed Mr. Olsen’s petition as moot because the board made the recommendation that Mr. Olsen asked them to make,

depriving Mr. Olsen of any right in that case to appeal on the issue of whether marijuana has “accepted medical use in treatment in the United States” a matter of state law.

It was unfair of the Iowa Board of Pharmacy to ask sick and injured people to expose their confidential medical information and choice of treatment in a public forum when the board had no authority to help them in any way and the law entitled those patients to have marijuana reclassified without the risk of exposing themselves to law enforcement. I’m still hearing from patients who think I tricked them, but it was not me who tricked them.

**Public statements by the Board of Pharmacy:**

When an administrative agency is given the authority to make legally binding rulings, the Iowa Administrative Procedures Act requires formal rulemaking in the context of a contested case proceeding. Iowa Code § 17A.2(5) (2011). Because the legislature has not authorized the Iowa Board of Pharmacy to schedule controlled substances in Iowa, the process the Iowa Board of Pharmacy follows is an informal process without the due process of formal rulemaking. Iowa Code § 17A.2(2) (2011).

The Iowa Board of Pharmacy has publicly stated that it is impossible for the board to change marijuana’s classification by formal rulemaking. In

a letter to Iowa Senate President Jack Kibbie on June 16, 2010, Iowa Board of Pharmacy Executive Director Lloyd Jessen wrote:

I am writing on behalf of the members of the Iowa Board of Pharmacy to offer some comments on the situation with medical marijuana. This issue has been an onerous one for the Board and its staff. We have spent a significant amount of time on it and had hoped that the legislature would give it the consideration that it deserves, as has been done in 14 other states. The suggestion that the Board can implement a medical marijuana program entirely on its own is simply incorrect. The Board does not currently have the jurisdiction or legal authority to address all the necessary issues by administrative rule. Those issues include complex matters such as the growing and distribution of marijuana, the physician's role in making it available to Iowa patients, qualifying medical conditions, program funding, criminal sanctions for violations of the program, legal protection for those who comply with the program, and a myriad of other related matters. All of these critical issues exceed the Board's statutory jurisdiction. The 1978 law which has been referred to is totally inadequate as a basis for Board action today. The administrative rule that was authorized and promulgated under the 1978 law would be completely inadequate and useless today. It allowed only for the investigational use of marijuana under a federal program which was in effect at that time but is no longer in existence. There seems to be a lot of confusion about the Board's role in all of this. The Board is supportive of a compassionate use program. It is not trying to avoid a responsibility; rather, it is trying to respond in a manner that is lawful and productive. The Board emphasizes, however, that it cannot take the place of our elected officials who must determine what is appropriate for the citizens of Iowa. Please let me know if I can provide you with any additional information or answer any questions you may have. Thank you.

On June 16, 2010, Executive Director Jessen had this to say in an interview with Sarah McCammon on National Public Radio Morning Edition:

SARAH McCAMMON: State lawmakers now say they're no longer planning a legislative study looking into the possible legalization of medical marijuana. House majority leader Kevin McCarthy has said he's determined that existing state law gives the Iowa Board of Pharmacy the authority to set such rules, so there's no need for a committee to study the issue. However, pharmacy board officials don't seem too eager to jump in and legalize medical marijuana in Iowa. The board voted unanimously earlier this year to recommend that the legislature change the way marijuana is classified to pave the way for medicinal use. The board's executive director, Lloyd Jessen, joins me now. Lloyd, now that the legislature seem to be backing off, where does that leave the pharmacy board?

LLOYD JESSEN: Well, the pharmacy board has made its recommendation that the drug should be rescheduled to class II, or schedule II, which is the starting point if you're going to make it available medically. So, that's where the pharmacy board is at.

SARAH McCAMMON: So, will the board go ahead and actually create a policy to allow that to go forward, to allow medical marijuana to go forward at this point?

LLOYD JESSEN: It would involve a lot more than a policy. The board believes that it requires some new law, or some new legislation. And that's because, even though we technically have a law on the books that would allow the board to go ahead and try to do it by rule making, that's not practical. And it's not doable today, because that law is from 1978. And the circumstances that existed when that old law was in place are completely different today. Back in 1978 the federal government was permitting what they called investigational use of medical marijuana, and they actually supplied the medical marijuana. I think as everyone is aware now the federal government discontinued that program long ago. And, federally, medical marijuana is not legal. Also, as people are aware, the Obama Administration and the U.S. Attorney General have given some guidance saying that states that now

have medical marijuana laws won't be disturbed. So, conditions have changed and the issues that are involved here are many more than just a drug or pharmacy related issue. And we have things like the distribution of the marijuana itself. How would that be done? Would patients be allowed to grow it? Would the state grow it and provide it? Or would the state license private vendors? Other issues would be such as: How are the physicians going to prescribe it or recommend it? What medical conditions are going to be treated with medical marijuana? These are all things that go far beyond what the board of pharmacy can do by rulemaking.

SARAH McCAMMON: But given that the head of the majority, the house majority leader Kevin McCarthy has said that in his understanding the laws are on the books that would allow the pharmacy board, your board, to move forward with this...

LLOYD JESSEN: Okay, what didn't you understand that I just said? I said the law is 32 years old. Conditions have changed from 32 years ago. There are issues that we can't handle by administrative rulemaking. That's why it won't work. And I'll be writing Senator McCarthy to tell him that.

SARAH McCAMMON: So does it just come down to a difference of opinion between the board and the legislature?

LLOYD JESSEN: I don't think it comes down to a difference of opinion. It comes down to the legality of it. Rulemaking is not legislation.

SARAH McCAMMON: And what do you intend to ask Mr. McCarthy to do in your letter?

LLOYD JESSEN: Well, I intend to inform him that it's our opinion that we can't do this by rulemaking even though there is an antiquated law on the books. It's not workable.

SARAH McCAMMON: What specific legislative changes would you like to see? I mean you outlined some of the problems, but what do you think the legislature needs to do?

LLOYD JESSEN: The board of pharmacy needs to consider the issue like the other 14 states have done. If you look at what the other 14 states have done, their legislators and their governors have acted on it. Because you need to bring in law enforcement people, you need to bring in the physician group. You need to bring in a lot of people beyond who the board of pharmacy has jurisdiction over. The board of pharmacy is limited in what it can do. It was created to regulate the practice of pharmacy. And this goes far beyond regulating the practice of pharmacy, because medical marijuana probably will not be distributed by pharmacies. It'll be either grown by patients, or it'll be provided by vendors, or it would be provided by the state.

SARAH McCAMMON: Lloyd, thank you for your time.

LLOYD JESSEN: You're welcome.

While the opinion of the Iowa Board of Pharmacy is definitely not binding on the court, it is nevertheless entitled to some deference. Litterer v. Judge, 644 N.W.2d 357, 365 (Iowa 2002) (citing *State v. Vargason*, 607 N.W.2d 691, 695 (Iowa 2000)) (“Although not binding, we give some deference to an administrative agency's interpretation of a statute it administers”).

In its recommendation of February 17, 2010, the Iowa Board of Pharmacy suggested that the Iowa legislature set up a medical marijuana program similar to that of the states which have accepted the medical use of

marijuana. In November of 2010, the Iowa Board of Pharmacy pre-filed legislation, Senate Study Bill 1016, proposing marijuana be removed from Schedule I and placed in Schedule II. Of particular note, the explanation attached to SSB 1016 states that it would allow the medical use of marijuana here in Iowa:

The bill removes marijuana from schedule I and reclassifies it as a schedule II controlled substance. The bill also strikes references to the authority of the board of pharmacy to adopt rules for the use of marijuana or tetrahydrocannabinols for medicinal purposes. A schedule I controlled substance is a highly addictive substance that has no accepted medical use in the United States and a scheduled II controlled substance is a highly addictive substance that has an accepted medical use in the United States.

The reclassification of marijuana from a schedule I controlled substance to a schedule II controlled substance permits a physician to issue a prescription for marijuana.

**Removing marijuana from schedule I:**

Declaratory judgment removing marijuana from schedule I resolves the controversy between the parties because marijuana will no longer be a controlled substance in Iowa and will then become legal in Iowa for medical use immediately. The criminal penalties in Iowa Code § 124.401 (2011) apply to marijuana only if marijuana is classified as a controlled substance.

Hartford Accident & Indemnity Co. v. O'Connor-Regenwether Post No. 3633, 247 Iowa 168, 172, 73 N.W.2d 12, 14 (1955) (“The remedy of a

declaratory judgment will be refused, provided the court has discretion to decline it, only if it will not finally settle the rights of the parties”).

The state of Oregon has given Mr. Manke the right to medical use of marijuana. Iowa law recognizes Mr. Manke’s right in Oregon by requiring that marijuana must have no currently “accepted medical use in treatment in the United States” (within the United States) in order to remain classified in Iowa schedule I.

The Iowa Board of Pharmacy has recommended that marijuana be placed in Iowa schedule II where a doctor could issue Mr. Manke a prescription for marijuana. The Iowa legislature has not acted on that recommendation.

The Iowa Board of Pharmacy says it cannot create any rule that would allow Mr. Manke to use marijuana as long as it remains in Iowa schedule I. Mr. Manke has a legally protected right that can be redressed by declaratory judgment removing marijuana from schedule I as required by law.

## **CONCLUSION**

For the foregoing reasons, Petitioners respectfully move for an order directing the district court to declare that marijuana is no longer classified in schedule I of the Iowa Uniform Controlled Substances Act.

## REQUEST FOR ORAL SUBMISSION

Mr. Olsen requests to be heard in oral argument.

Respectfully submitted,

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Carl Olsen, Pro Se  
130 NE Aurora Ave.  
Des Moines, IA 50313-3654  
515-288-5798 home phone  
515-343-9933 cell phone  
Petitioner-Appellant

## PETITIONERS'-APPELLANTS' COST CERTIFICATE

Mr. Olsen hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$\_\_\_\_\_, and that amount has been paid in full by Mr. Olsen.

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Carl Olsen, Pro Se  
Petitioner-Appellant

## CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 9,422 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the style requirements of Iowa R. App. P. 6.903(1)(d) because the margins are 1 inch top and bottom, 1.24 inches left and right, the text is double spaced, and page numbers are at the bottom.
3. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman style, with 14 point type size.

### **CERTIFICATE OF SERVICE**

I certify that on December 19, 2011, I filed this document by hand delivering 2 copies of it to the Clerk of the Supreme Court, Iowa Judicial Building, 1111 East Court Avenue, Des Moines, Iowa 50319, and by mailing a copy of it to each of the following parties:

Scott Galenbeck  
Assistant Attorney General  
1305 E. Walnut St.  
Des Moines, IA 50319  
Attorney for Respondent-Appellee

Alan Koslow  
2716 Jordan Grove  
West Des Moines, IA 50265-6462  
Petitioner-Appellant

Ladd Huffman  
210 S. 2nd Street  
Calumet, IA 51009  
Petitioner-Appellant

Robert Manke  
1603 10th Street, #27  
Nevada, IA 50201  
Petitioner-Appellant

---

CARL E. OLSEN  
130 E. Aurora Ave.  
Des Moines, IA 50313-3654  
515-288-5798 home phone  
515-343-9933 cell phone  
carl-olsen@mchsi.com  
Petitioner-Appellant, Pro Se