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Iowa Board of Pharmacy
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March 7, 2014

Re: Comments in Support of Petition for Rulemaking For Schedule II Classification of Marijuana for Medicinal Purposes

Dear Members of the Board:

Maria La France first submitted a written request to the Board in December 2013. The request asked that the Board undertake rulemaking to allow marijuana to be listed as a Schedule II substance when used for medicinal purposes pursuant to Iowa Code § 124.206(7)(a), with additional supporting materials provided in January 2014. These written comments supporting the pending La France petition for rulemaking are submitted on behalf of the ACLU of Iowa, which represents thousands of Iowa members who are committed to the protection of civil liberties and fundamental rights. The ACLU of Iowa hopes that these comments will assist the board in making its decision.

I. Board classification of marijuana as a Schedule II substance is authorized by Iowa law.

Current Iowa law authorizes the Board of Pharmacy to create and regulate a medical marijuana program in Iowa. Since 1979, Iowa's Controlled Substances Act has provided that marijuana is designated a Schedule I drug "except as otherwise provided by rules of the board for medicinal purposes." Iowa Code § 124.204(4)(m)(2013). Iowa law provides that marijuana is designated a Schedule II drug "when used for medicinal purposes pursuant to rules of the board." Iowa Code § 124.206(7)(a). In 2005, the Iowa Supreme Court declined to find a common law defense of medical necessity in a marijuana manufacturing case involving a patient in his sixties who had been diagnosed with AIDS and whose treating physician testified that marijuana might have been lifesaving in alleviating the side effects of his prescription medications. *State v. Bonjour*, 694 N.W.2d 511, 511 (Iowa 2005). In coming to that determination, the Court recognized that the board possesses the authority to legalize the use of marijuana for medical purposes:

> The legislature has recognized that marijuana may have medical value. This is apparent from Iowa Code section 124.206(7)(a), which provides marijuana may become a Schedule II substance (which is one that "has currently accepted medical use in treatment in the United States, or currently accepted medical use with severe restrictions," Iowa Code § 124.205(2)). As to marijuana, the "severe restriction" is that its use must be for medicinal purposes "pursuant to rules of the board of pharmacy examiners." Id. § 124.206(7)(a) . . . . These statutes show that our legislature has foreseen the potential medical uses for marijuana but has deferred on the issue until the Board of Pharmacy Examiners has acted.

Id. Iowa law likewise provides for an exception to the ban on possession of marijuana when its possession is "otherwise authorized" by the Controlled Substances Act, which would include action by the Board pursuant to Iowa Code § 124.206(7)(a) to create a medical marijuana program. Iowa Code § 124.401(1) (2013).

Concurrent with the authority of the Board to regulate medicinal use of marijuana as a Schedule II substance, the Board also possesses the authority under Iowa law to recommend to the general assembly that it reclassify marijuana if the board finds that it has accepted medical use in treatment. Iowa Code § 124.203(2)(2013). This option has some potential appeal to the Board in that it defers to the future legislative process to provide the board with more specific guidance in crafting a medical marijuana program. However, such a recommendation is just as likely to further delay the availability of medical cannabis to treatment providers and patients significantly in lieu of Board regulations. Of course, the legislature may again fail to provide further legislative guidance to the Board.

In 2010, the Board held hearings across the state, and after carefully reviewing the testimony and evidence it received, made a formal recommendation to the legislature that marijuana be removed from the list of Schedule I substances in the code. The legislature did not pass medical marijuana legislation, leaving it to the Board to use its existing authority to create such a program. Since that time, the states which regulate medical marijuana in a treatment setting for patients has increased. Currently, 20 states and the District of Columbia have enacted laws legalizing and regulating medical marijuana,[1] and 15 states have pending medical marijuana legislation.[2]

Given the express authority of the Board under Iowa law to create a medical marijuana program through rulemaking, as well as the political uncertainties of further legislation, the ACLU of Iowa urges the Board to begin rulemaking rather than decide only to take the option to make further recommendations to the legislature.

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[1] Jolie Lee and Karl Gelles, *Legalized Medical Marijuana*, USA TODAY, citing Marijuana Policy Project, *available at* http://www.usatoday.com/story/news/nation-now/2014/01/06/marijuana-legal-states-medical-recreational/4343199/ (last visited Mar. 7, 2014).

[2] *15 States with Pending Legislation to Legalize Medical Marijuana (as of Mar. 3, 2014)*, PROCON.ORG, *available at* http://medicalmarijuana.procon.org/view.resource.php?resourceID=002481 (last visited Mar. 7, 2014). This page provides pdfs of the various introduced bills.

II. Board classification of marijuana as a Schedule II substance is not preempted by federal law.

The federal government has made a policy decision to respect states' medical marijuana laws. The doctrine of "dual sovereignty" permits both the states and federal government to adopt criminal laws regarding marijuana, and each sovereign may enforce those laws within a given state. States are free to pass medical marijuana laws that exempt certain people from criminal liability under state law, and state employees do not break federal law by licensing and regulating activities that are legal under state law. The "structure and limitations of federalism …allow the States " 'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (striking down a federal rule aimed at undermining Oregon's Death with Dignity law). States are free to exercise their regulatory, licensing, and zoning powers to establish the limits of legal conduct under state law. *Gonzales*, 546 U.S. at 270-72. No state employee has ever been arrested or threatened with arrest for licensing or regulating a medical marijuana dispensary.

For patients, the analysis is different, but leads to the same result. While individuals may be exempted from state criminal penalties under the state's medical marijuana law, they are still subject to theoretical arrest and prosecution under federal law. However, the U.S. Department of Justice has determined not to challenge state medical marijuana laws.

In 2009, the U.S. Department of Justice produced the Ogden Memo, setting out the federal government's intent not to prosecute individuals who were complying with the medical marijuana laws of their state. The Memo directs that all federal prosecutors serving in states with medical marijuana laws "should not focus federal resources in [their] States on individuals in clear and unambiguous compliance with state laws providing for the medical use of marijuana."[3] In 2013, the federal government reaffirmed that position, providing that the U.S. Department of Justice will not prosecute people who use marijuana for medical purposes in accord with the laws of their states.[4]

III. Classification of marijuana as a Schedule II substance is supported by medical research and practice.

Medical cannabis has clear accepted medical use, and has been used to provide effective palliative treatment to patients with serious health conditions. Short term controlled trials indicate that cannabis is effective in reducing neuropathic pain and countering loss of appetite and nausea in immunocompromised patients. *See, e.g.*, Eddy, CSR Report for Congress, *Medical Marijuana: Review and Analysis of Federal and State Policies* (May 7, 2007), Order Code

[3] David W. Ogden, Dep. Attorney General, U.S. Dept. of Justice, *Memorandum for Selected United States Attorneys: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana* (Oct. 19, 2009), *available at* http://www.justice.gov/opa/documents/medical-marijuana.pdf.

[4] James M. Cole, Dep. Attorney General, U.S. Dept. of Justice, *Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013), *available at* http://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf.

RL33211, at 8. Additionally, cannabis is considerably more affordable than synthetically produced cannabinoid alternatives.[5]

Additionally, medical cannabis has potential use in the "treatment and prophylaxis of a wide variety of oxidation associated diseases, such as ischemic, age-related, inflammatory and autoimmune diseases. The cannabinoids are found to have particular application as neuroprotectants, for example, in limiting neurological damage following ischemic insults, such as stroke and trauma, or in the treatment of neurodegenerative diseases, such as Alzheimer's disease, Parkinson's disease and HIV dementia."[6]

Finally, the FDA has recently approved clinical trials to study the use of medical cannabis to treat severe epilepsy in children, including the prevention of seizures.[7]

Proposed rulemaking to create a medical marijuana program will allow Iowa physicians to provide enhanced care to their patients where appropriate. The board has the support of the clear majority of Iowans should it choose to exercise its ability to be responsive to the needs of sick Iowa patients. A recent poll found that 59 percent of Iowans would support a medical marijuana program.[8]

The ACLU of Iowa respectfully urges the agency to adopt regulations for a medical marijuana program as requested in the petition submitted by Maria La France.

Sincerely,

Rita Bettis

Rita Bettis
Legal Director

[5] For example, a year supply of Nabilone can cost more than $4,000.

[6] U.S. Patent 6,630,507, Cannabinoids as Antioxidants and Neuroprotectants (Feb. 2, 2001), *available at* http://www.google.com/patents/US6630507.

[7] *See, e.g.,* Susan K. Livio, *FDA-approved medical marijuana clinical trial gets underway next month for kids with epilepsy*, THE STAR LEDGER, *available at* http://www.nj.com/politics/index.ssf/2013/12/fda-approved_medical_marijuana_clinical_trial_gets_underway_next_month_for_kids_with_epilepsy.html. *See also* Seanna Adcox, *SC bill allows cannabis oil for epilepsy treatment*, ASSOCIATED PRESS (Mar. 6, 2014), *available at* http://www.thestate.com/2014/03/06/3309171/sc-bill-allows-cannabis-oil-for.html.

[8] The Register's Editorial: On medical marijuana, it's wrong not to help sick Iowans, DES MOINES REGISTER (Mar. 6, 2014), *available at* http://www.desmoinesregister.com/article/20140307/OPINION03/303070072/The-Register-s-Editorial-On-medical-marijuana-it-s-wrong-to-not-help-sick-Iowans?Opinion.