

BEFORE THE IOWA MEDICAL CANNABIDIOL BOARD

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Petition by Carl Olsen  
for a Recommendation by the  
Board to the Iowa Department  
of Public Health (IDPH)

PETITION FOR  
RECOMMENDATION

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**Implementation of HF 2589, Sec. 31 (2020):**

On April 23, 2021, pursuant to 2020 Iowa Acts Chapter 1116, Section 31 (HF 2589), the Iowa Department of Public Health (“department” hereafter) sent four letters to federal administrative agencies requesting federal funding guarantees for state authorized activities which it seems to assume are in violation of federal drug law.

- A. Medicare and Medicaid
- B. Food and Drug Administration
- C. Department of Education
- D. Drug Enforcement Administration (“DEA” hereafter)

The four letters are attached hereto as Exhibits A, B, C, and D.

On September 4, 2020, the department determined that the only way to guarantee federal funding is a federal exemption from the Drug Enforcement Administration. Page 7 from the department’s presentation to this board on September 4, 2020, is attached hereto as Exhibit E.

## **Federal Exemption:**

Federal exemption would guarantee federal protection of state authorized use of cannabis. Federal exemption, like the exemption for peyote in 21 C.F.R. § 1307.31, would reconcile state and federal drug law where the two would otherwise be in positive conflict with each other.

## **Legislative Intent:**

Iowa Code Chapter 124E does not imply any intent to violate federal drug law or to authorize violation of federal drug law. Similarly, 541 Iowa Administrative Code Chapter 154 (Medical Cannabidiol Program) does not imply any intent to violate federal drug law or to authorize violation of federal drug law. Compare this to our bordering state of Illinois:

**Growing, distributing or possessing cannabis in any capacity, except through a federally approved research program, is a violation of federal law;**

77 Ill. Adm. Code 946.230(d)(4)<sup>1</sup>

Kudos to the department for not putting something damning like that into our Iowa Administrative Code!

In the absence of any explicit intent by the Iowa legislature to create a positive conflict with federal drug law, it must be assumed the legislature intended Iowa Code Chapter 124E to be consistent with federal drug law.

## **Legal Analysis:**

Iowa Code Chapter 124E is consistent with federal law (21 U.S.C. § 903<sup>2</sup>) and the Uniform Controlled Substances Act<sup>3</sup> because it creates an

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<sup>1</sup> <https://www.ilga.gov/commission/jcar/admincode/077/077009460Bo2300R.html>

<sup>2</sup> <https://www.govinfo.gov/content/pkg/USCODE-2019-title21/pdf/USCODE-2019-title21-chap13-subchapI-partF-sec903.pdf>

<sup>3</sup> Uniform Controlled Substances Act, "SECTION 204. SCHEDULE I. Unless specifically excepted by state or federal law or state or federal regulation or more

exemption like the exemption for peyote. Iowa Code § 124.204(8) is the state peyote exemption; 21 C.F.R. § 1307.31 (2020) is the federal peyote exemption. Copies of the state and federal exemptions for peyote are attached hereto as Exhibits F and G.

Peyote, like cannabis, is both a state and federal Schedule I controlled substance. Peyote and cannabis are equally situated substances for equal protection analysis.

The history of the federal peyote exemption shows it was created by federal regulation in 1966 because of a state supreme court decision in 1964. Congressional Record, July 8, 1965<sup>4</sup>; Federal Register, March 19, 1966<sup>5</sup>; 21 C.F.R. § 166.3(c)(3) (1968)<sup>6</sup>; U.S. House Hearings, February 3, 1970<sup>7</sup>. This is important because it shows agency deference to state law.

At page 415 of its 1981 legal opinion, the Office of Legal Counsel told the DEA: "... we think it likely that Congress could, consistently with the Free Exercise Clause, prohibit even the religious use of peyote if it chose to do so, ...".<sup>8</sup> This is important, because it shows the peyote exemption is not required by law and it shows the federal agency has deferred to state law. Compare that with *Gonzales v. Raich*, 545 U.S. 1 (2005) (prohibition of cannabis found constitutional). The court mentioned DEA has the authority to reclassify cannabis, 545 U.S. at 27, n. 37. The court did not mention DEA has the authority to create exemptions, but Raich never

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specifically included in another schedule, the following controlled substances are listed in Schedule I:"

<https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=34039f08-ab0d-24fd-d349-b8f58e81b281>; And see 14 C.F.R. § 91.19(b) ("this section does not apply to any carriage of narcotic drugs, marihuana, and depressant or stimulant drugs or substances authorized by or under any Federal or State statute or by any Federal or State agency");

<https://www.govinfo.gov/content/pkg/CFR-2002-title14-vol2/pdf/CFR-2002-title14-vol2-sec91-19.pdf>

<sup>4</sup> <https://files.iowamedicalmarijuana.org/imm/federal/111CongRec15977.pdf>

<sup>5</sup> <https://files.iowamedicalmarijuana.org/imm/federal/31FedReg4679-1996.pdf>

<sup>6</sup> <https://files.iowamedicalmarijuana.org/imm/federal/21CFR166-1968.pdf>

<sup>7</sup> <https://files.iowamedicalmarijuana.org/imm/federal/1970-Serial-No-91-45-117.pdf>

<sup>8</sup> <https://www.justice.gov/olc/opinion/peyote-exemption-native-american-church>

applied for “any” administrative remedy. The court simply told Raich that only DEA could address her concerns.

In 1990 the United States Supreme Court found the use of peyote is not protected by the U.S. Constitution in *Employment Division v. Smith*, 494 U.S. 872 (1990) (prohibition of peyote found constitutional). The court found that the state of Oregon could constitutionally prohibit the use of peyote as long as that prohibition was generally applicable to everyone, again showing great deference to state law.

The peyote exemption exists, first because DEA has the authority to grant exemptions and, second because DEA deemed it important to respect state laws at the time the peyote exemption was created.

It would seem equally important, if not more important, for the DEA to grant an exemption for state authorized use of cannabis.

Denying an exemption creates a positive conflict with federal drug law where none is required. The federal agency has the discretion to grant exemptions. It would be arbitrary and capricious for the same federal agency that granted an exemption for peyote to deny one for state authorized use of cannabis.

In the *Smith* case, the court said the outcome would have been different if Oregon had allowed “some” use of peyote. It was only because Oregon prohibited “all” use of peyote that the court found Oregon’s prohibition of peyote constitutional. Iowa has a peyote exemption (created in 1967 Iowa Acts Chapter 189), and Iowa now has an exemption for cannabis created in 2017 by Iowa Code Chapter 124E.

### **Requested Recommendation:**

Please recommend the department request Iowa’s six federal legislators, Senator Charles Grassley, Senator Joni Ernst, Representative Ashley Hinson, Representative Mariannette Miller-Meeks, Representative Cindy Axne, and Representative Randy Feenstra, to assist Iowa in obtaining the

federal funding guarantees described in Exhibits A, B, C, and D, and 2020 Iowa Acts Chapter 1116, Section 31 (HF 2589).

Hawaii House Concurrent Resolution 132 was adopted by the Hawaii Senate on April 23, 2021, the same day the department sent the letters on April 23, 2021. HCR 132 states, “that certified copies of this Concurrent Resolution be transmitted to the members of Hawaii's ***Congressional Delegation***, Governor, Attorney General, and Director of Health” at page 2 (emphasis added). HCR 132 is attached hereto as Exhibit H.

Hawaii House Resolution 112 was adopted by the Hawaii House of Representatives on March 31, 2021. HR 112 states, “that certified copies of this Resolution be transmitted to the members of Hawaii's ***Congressional Delegation***, Governor, Attorney General, and Director of Health” at page 2 (emphasis added). HR 112 is attached hereto as Exhibit I.

Thank you!

Signed this 7<sup>th</sup> day of May, 2021.

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