

May 14, 2021

Drug Enforcement Administration
Attn: Administrator
8701 Morrisette Drive
Springfield, Virginia 22152

Drug Enforcement Administration
Attn: Diversion Control Division/DC
8701 Morrisette Drive
Springfield, VA 22152
ODLP@usdoj.gov

Dear Administrator:

The undersigned, pursuant to 21 C.F.R. § 1321.01 (postal mailing addresses), hereby petition the administrator for an exception pursuant to 21 C.F.R. § 1307.03, and the initiation of proceedings for the issuance of a rule or regulation pursuant to 21 C.F.R. § 1308.43 and section 201 of the Controlled Substances Act.

Attached hereto and constituting a part of this petition are the following:

- (A) Proposed rule or regulation in the form proposed by the petitioners.
- (B) Statement of grounds upon which the petitioners rely for issuance of an exception pursuant to 21 C.F.R. § 1307.03 and issuance of a rule or regulation pursuant to 21 C.F.R. § 1308.43 and section 201 of the Controlled Substances Act.
- (C) Four letters dated April 23, 2021, from the Iowa Department of Public Health to federal administrative agencies, including the Drug Enforcement Administration.
- (D) A statement from the Iowa Department of Public Health on September 4, 2020, explaining the intent of the four letters it wrote on April 23, 2021.
- (E) The letter from D. Christopher Evans, Acting Administrator, dated April 27, 2021.
- (F) The letter from Thomas W. Prevoznik, Deputy Assistant Administrator, Diversion Control Division, dated February 1, 2021.
- (G) The petition submitted by the petitioners on December 16, 2020.
- (H) The letter from Brian Besser, Deputy Assistant Administrator, Diversion Control Division, dated November 10, 2020.
- (I) The petition submitted by the petitioners on January 28, 2019.

All notices to be sent regarding the petition should be addressed as indicated below:

Respectfully,

Carl Olsen Mary Roberts Erin Bollman
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The proposed rule in the form proposed by the petitioners, to be inserted in Title 21 of the Code of Federal Regulations.

§1307.32 State Authority

The listing of marihuana as a controlled substance in Schedule 1 does not apply to the state authorized use of marihuana, and persons using marihuana in compliance with state law are exempt from registration.

STATEMENT OF GROUNDS RELIED ON BY THE PETITIONERS

Attached and made a part hereof are: (1) four letters dated April 23, 2021, from the Iowa Department of Public Health to federal administrative agencies including the Drug Enforcement Administration (“DEA” hereafter); (2) a statement from the Iowa Department of Public Health on September 4, 2020, explaining the intent of the four letters it wrote on April 23, 2021; (3) the letter (“second denial”), dated April 27, 2021, denying the petitioners’ petition (“second petition”), dated December 16, 2020, signed by Acting Administrator, D. Cristopher Evans; (4) the petitioners’ second petition; (5) the letter (“FOIA Response”), dated February 1, 2021, responding to Carl Olsen’s request for a status report on the second petition, signed by Deputy Assistant Administrator, Thomas W. Prevoznik; (6) the letter (“first denial”), dated November 10, 2020, denying the petitioners’ petition (“first petition”), dated January 28, 2019, signed by Deputy Assistant Administrator, Brian Besser; and (7) the petitioners’ first petition.

BRIEF SUMMARY

The petitioners seek an exemption like the one granted for church use of peyote.

21 C.F.R. § 1307.31 Native American Church:¹

The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration. Any person who manufactures peyote for or distributes peyote to the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of law.

The rule proposed by the petitioners’ is based on church use of peyote as a template:

§ 1307.32 State Authority:

The listing of marihuana as a controlled substance in Schedule 1 does not apply to the state authorized use of marihuana, and persons using marihuana in compliance with state law are exempt from registration.

The petitioners: (1) replace the Schedule I controlled substance peyote with the Schedule I controlled substance marijuana; and (2) replace “church” use with “state authorized” use.

ARGUMENT

Your agency rejected our previous petitions on the grounds that a regulation exempting state authorized use of marihuana is foreclosed by the U.S. Supreme Court ruling in *Gonzales v. Raich*, 545 U.S. 1 (2005). An exemption can’t be foreclosed because an exemption already exists for a Schedule I controlled substance, peyote.

¹ <https://www.govinfo.gov/content/pkg/CFR-2020-title21-vol9/xml/CFR-2020-title21-vol9-sec1307-31.xml>

Raich challenged the federal Controlled Substances Act as a violation of her right under the Tenth Amendment to the U.S. Constitution. 545 U.S., at 8. The court found that federal regulation of marijuana is constitutional. The court pointed out that your agency can add to, remove from, and transfer between the schedules. 545 U.S., at 27, n.37. The court suggested Raich take up the matter with your agency, which Raich never did. The court did not mention the peyote exemption, but the fact an exemption exists for peyote proves beyond any doubt that your agency can also grant exemptions for Schedule I controlled substances.

And we know, as in *Raich*, the use of peyote is not protected by the U.S. Constitution. *Employment Division v. Smith*, 494 U.S. 872 (1990)

The peyote exemption would be precluded by *Smith*, if an exemption for marijuana were precluded by *Raich*.

Your agency prohibits an application for exemption where one is otherwise required by law. *Raich* says an exemption for marijuana is not required by law. *Smith* says an exemption for peyote is not required by law.

21 C.F.R. § 1307.03 Exceptions to regulations:²

Any person may apply for an exception to the application of any provision of this chapter by filing a written request with the Office of Diversion Control, Drug Enforcement Administration, stating the reasons for such exception. See the Table of DEA Mailing Addresses in § 1321.01 of this chapter for the current mailing address. The Administrator may grant an exception in his discretion, but in no case shall he/she be required to grant an exception to any person which is otherwise **required by law** or the regulations cited in this section.

(emphasis added).

Peyote and marijuana are equally situated for equal protection analysis.

When reviewing the peyote exemption for your agency in 1981, the Office of Legal Counsel said: "... 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, ..." ³ The decision in the *Smith* case, nine years later, validates that opinion.

If an exemption for church use of the Schedule I controlled substance peyote is not required by law, then DEA is discriminating against states in favor of churches. A regulation exempting the state authorized use of marijuana would be consistent with your agency's decision-making regarding church use of peyote, rather than intentionally creating positive conflict between state and federal law where conflict isn't required or even desirable. Denying equal protection to state authorized use of marijuana is an abuse of agency discretion. States created the federal government, not churches. DEA has authority to grant exemptions to churches only because states gave DEA that power.

² <https://www.govinfo.gov/content/pkg/CFR-2020-title21-vol9/xml/CFR-2020-title21-vol9-sec1307-03.xml>

³ <https://www.justice.gov/olc/opinion/peyote-exemption-native-american-church>, at page 415.

The history of the federal peyote exemption shows it was based on state court decisions in California and Arizona. Congressional Record, July 8, 1965.⁴

Federal Register, March 19, 1966⁵ (regulatory exemption for church use of peyote); 21 C.F.R. § 166.3(c)(3) (1968)⁶ (codified exemption for church use of peyote).

During U.S. House Hearings, February 3, 1970⁷ (BNDD, the predecessor to DEA, testified, “Under the existing law originally the Congress was going to write in a specific exemption but it was then decided that it would be handled by regulation and we intend to do it the same way under this law.”)

It was the state authorization of church use that resulted in the DEA’s peyote exemption.

A consistent theme emerges throughout showing deference to state authority. It makes sense that your agency has shown deference to state laws in the past, because states are the primary regulators of health and safety under the federal Controlled Substances Act.⁸ It does not make sense that your agency now considers states to be its opponents rather than its partners.

Since the filing of our previous petitions, the state of Iowa has made its own application for federal exemption. Attached are letters Iowa sent to federal administrative agencies on April 23, 2021, including a letter to your agency. Also attached is a document filed with the Iowa Medical Cannabidiol Board on September 4, 2020, explaining that the state believes 21 C.F.R. § 1307.03 to be the only method of obtaining an exemption.

On November 10, 2020, your agency kindly pointed out that 21 C.F.R. § 1308.43 would be the proper method of obtaining an exemption like the one for peyote and accepted our petition as if it was filed under 21 C.F.R. § 1308.43, even though we filed it incorrectly under 21 C.F.R. § 1307.03. We think both the 21 C.F.R. § 1307.03 and 21 C.F.R. § 1308.43 applications are valid because we want both immediate and permanent exemptions. We ask that you interpret our state’s application as filed with the intent that your agency create an exemption like that one that currently exists for peyote and that you notify the state it is exempt upon receipt of the state’s April 23, 2021, letter to your agency.

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

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

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

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

⁸ See *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006), “... the structure and limitations of federalism, which 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.’ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)).”; *Id.*, at 271, “... regulation of health and safety is ‘primarily, and historically, a matter of local concern,’ *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985)”.

CONCLUSION

Please assist Iowa in obtaining a federal exemption for the state authorized use of cannabis.

Thank you!

Carl Olsen
Des Moines, Iowa

Mary J. Roberts
Coralville, Iowa

Erin Bollman
Dallas Center, Iowa

Colin Murphy
Ames, Iowa