U.S. Department of Justice
Drug Enforcement Administration

Office of the Administrator *Springfield, VA 22152*

APR 27 2021

Carl Olsen
[redacted]
Des Moines, Iowa 50313

Dear Mr. Olsen:

This letter responds to your petition received by the Drug Enforcement Administration (DEA) on November 30, 2020, asking DEA to initiate rule-making proceedings pursuant to the Controlled Substances Act (CSA). You petitioned DEA for an exemption for state-authorized marijuana use pursuant to 21 CFR 1307.03. Specifically, you propose the following rule: "The listing of marihuana as a controlled substance in schedule I does not apply to the state authorized use of marihuana, and persons using marihuana in compliance with state law are exempt from registration."[1] DEA has accepted your petition for filing. However, because state laws authorizing the use of marijuana outside the structures of the CSA are preempted under the Supremacy Clause, your petition is **denied**.

Your current petition incorporates your previous petition, received by DEA on February 4, 2019, and supplemented on August 31, 2020. Your previous petition sought a narrower exemption for "authorized medical use" of marijuana. Your previous petition cited no evidence or clinical studies relating to medical uses of marijuana, nor did it dispute that marijuana has a high potential for abuse and lacks accepted safety for use under medical supervision.

DEA denied that petition via letter dated November 10, 2020, attached and incorporated herein. The denial letter described the five-part test that DEA uses to assess whether marijuana has a currently accepted medical use, explained why marijuana did not meet that five-part test, and concluded that marijuana was properly listed in schedule I. The letter also explained that U.S. obligations under the Single Convention on Narcotic Drugs, 1961, require listing marijuana on either schedule I or II.

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1 The CSA defines "marihuana" as "[a]ll parts of the plant Cannabis Sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin." 21 USC 802(16)(A). Marihuana does not include "hemp," as defined in 7 USC 1639o, or "the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination." 21 USC 802(16)(B). This definition encompasses the various terms used for marijuana or compound of marijuana you used in your petition. This response uses the CSA spelling "marihuana" and the contemporary spelling "marijuana" interchangeably.

Your current petition does not dispute any of the above. Rather, you dispute DEA's conclusion that the requested exemption would violate the CSA and that, consequently, DEA lacks the authority to grant it. You assert that "DEA cannot reject constitutionally enacted state law within the context [of the] federal CSA, when a way to reconcile the two exists" and that "DEA does not have any discretion to create positive conflicts between state and federal drug laws by denying an exception under 21 CFR 1307.03."

In support of this assertion, you cite 21 U.S.C. 903, characterizing that provision as "an explicit presumption against federal preemption". This characterization is incorrect. Section 903 does state that Congress did not intend to occupy the field that the CSA occupies. However, it specifically requires federal preemption when "there is a positive conflict between that provision of this title and that State law so that the two cannot consistently stand together." Taken together, the two parts of this preemption provision permit states to regulate controlled substances in a manner that is not in conflict with the CSA.

Section 903 reiterates what flows directly from the Supremacy Clause of the Constitution. In simplest terms, the Supreme Court has stated: "Consistent with that command [the text of the Supremacy Clause], we have long recognized that state laws that conflict with federal law are 'without effect.'"[2] The Supreme Court has framed the test of whether there is a conflict between a state and federal law as in the form of two questions: "whether the [state] statute requires *or permits*" a violation of the federal statute, "or is *inconsistent with the purposes* of the [federal] statute."[3] Answering either of these questions "yes" mandates a conclusion that the state statute is preempted by the federal statute. Here, both questions are easily answered in the affirmative.

First, State laws that authorize the use of marijuana permit—indeed, provide express state approval of—violations of the CSA. Because marijuana is properly listed as a schedule I controlled substance under the CSA—a fact you concede in your letter—it is illegal to manufacture, distribute, or possess marijuana for human consumption (other than pursuant to the Food and Drug Administration-approved, DEA-registered research).[4] State laws authorizing the use of marijuana (beyond federally approved research) permit violation of these provisions.

Second, state measures permitting use of marijuana frustrate, and are inconsistent with, the purposes of the CSA and stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress under the CSA. The basic structure of the CSA, and the Act's effectiveness, is premised on a "'closed' system of drug distribution" under which all legitimate manufacturers, distributors, and dispensers must obtain a DEA registration specifically authorizing such activity, and are held strictly accountable for all transactions through a system that involves manufacturing quotas, order forms, and recordkeeping.[5] State

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2 *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008) (citation omitted).

3 *See California Federal Savings and Loan Assoc. v. Guerra*, 479 U.S. 272, 283 (1987) (emphasis added).

4 *United States v. Oakland Cannabis Buyers' Cooperative* 532 U.S. 483, 491, 494 & n.7 (2001).

5 *See* 21 U.S.C. 822, 823, 824, 826, 827, 828; H.R. Rep. No. 91-1444 (1970).

laws that authorize possession, dispensing, including via prescription, and distribution of marijuana outside this closed system would, if given effect, undermine the basic structure of the CSA and its effectiveness.

In its opinion in *Raich v. Gonzalez*, the Supreme Court found that Congress's Commerce Clause authority, manifested in the CSA, includes the power to prohibit the local use of marijuana in compliance with state law. 545 U.S. 1, 29 (2005). Your petition attempts to distinguish *Raich* because the opinion did not address the issue of whether the CSA precluded an exemption under 21 CFR 1307.03. But *Raich* makes it clear that the "Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." *Raich*, 545 U.S. at 29. It places no limits on this conclusion. *Raich* does not suggest that the federal government has a duty to minimize conflicts with state laws by granting exemptions. Your petition cites no authority that such a duty exists.

Your petition acknowledges that 21 U.S.C. 811(d) requires the DEA Administrator to list marijuana on either schedule I or II to satisfy the U.S. obligations under the Single Convention on Narcotic Drugs. But your petition asserts that the "domestic law" exception permits DEA to grant the exemption you seek. Whether or not that is true is beside the point because, as explained above, there is no requirement that Congress make exemptions to avoid conflict with state law.

Congress has prescribed how controlled substances listed in schedule I must be regulated. The broad exemption you seek would eliminate the CSA's schedule I regulatory controls and administrative, civil, and criminal sanctions applicable to marijuana in states with statutes permitting marijuana use. A constitutional requirement that DEA grant such an exemption would flip the Supremacy Clause and 21 U.S.C. 903 on their head, making federal regulation of interstate commerce subordinate to the states. Such an outcome is prohibited by the Constitution. For these reasons, your petition is **denied**.

If you have additional information or questions, please contact Mr. Brian Besser, Deputy Assistant Administrator, Diversion Control Division, at (571) 362-8177.

Sincerely,

D. Christopher Evans

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Acting Administrator

Enclosure
cc: Mary J. Roberts
Colin Murphy