IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CARL OLSEN, Petitioner, v. IOWA DEPARTMENT OF INSPECTIONS, APPEALS, AND LICENSING, Respondent.	Case No. CVCV066477 ***PETITIONER'S JUDICIAL REVIEW BRIEF***

Petitioner, Carl Olsen, submits the following judicial review brief.

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INTRODUCTION

On September 26, 2023, Carl Olsen petitioned the Iowa Department of Inspections, Appeals, and Licensing (DIAL) (the "department") to initiate rule making for "non-drug" (non-prescription) use of controlled substances under the Iowa Uniform Controlled Substances Act (the "act"), Iowa Code Chapter 124.

On November 7, 2023, the department referred the petition to the Iowa Board of Pharmacy (the "board") for its opinion.[1] The board took no action on the petition.[2]

The department has responsibility for enforcing the law relative to the board, 2023 Iowa Acts, ch. 19, § 1430. The department and the board have responsibility for enforcing regulatory provisions of the act, Iowa Code § 124.201. The department and the board have responsibility for enforcing registration under the act, Iowa Code § 124.302.

Since 1971, non-drug (non-prescription) use of a Schedule I controlled substance has been authorized and registered under the act, Iowa Code § 124.204(8).

Since 2017, non-drug (non-prescription) use of a Schedule I controlled substance has been authorized and exempt from registration under the act, Iowa Code § 124.401(5)(c).[3]

The registration of the non-drug (non-prescription) use of a Schedule I controlled substance by the Native American Church, Iowa Code § 124.204(4)(p), and Iowa Code § 124.204(8), provides the department and the board with the authority to register additional non-drug (non-prescription) use.

Both the state and federal constitutions explicitly forbid grants of privileges or immunities, which, upon the same terms shall not equally belong to all citizens. Iowa Const., art. 1, §§ 3, 6. *Employment Division v. Smith*, 494 U.S. 872 (1990) (exceptions trigger strict scrutiny).

In 2017 the Iowa Department of Public Health began registering cannabis manufacturers and cannabis extract dispensaries for non-drug (non-prescription) use in Iowa. Iowa Code Chapter 124E, is referred to in Iowa Code § 124.401(5)(c). Just like peyote, cannabis and

[1] https://iowamedicalmarijuana.org/pdfs/dial-2023-11-07-agenda.pdf
[2] https://iowamedicalmarijuana.org/pdfs/dial-2023-11-07-minutes.pdf
[3] https://www.legis.iowa.gov/docs/publications/iactc/87.1/CH0162.pdf

cannabis extracts are Schedule I controlled substances. *State v. Middlekauff*, 974 N.W.2d 781 (Iowa 2022).

The federal regulation for the religious use of peyote describes it as "non-drug" because it is not prescribed and has no pharmaceutical use. 21 C.F.R. § 1307.31.

In 2020 the 3% limit on delta-9-THC (the primary psychoactive ingredient in cannabis) was removed and replaced with a limit of 4.5 grams of delta-9-THC per 90 days, although the 4.5 grams limit can be increased on a case-by-case basis. Over 15% of users have THC waivers, as of December 19, 2023 (2023 Annual Report of the Medical Cannabidiol Board, p. 18).[4]

The department's final decision does not address the non-drug (non-prescription) exceptions in Iowa Code § 124.204(8) and Iowa Code § 124.401(5)(c). A decision "on the merits" is required by Iowa Code § 17A.7(1), stating the "reasons for the denial." There were no reasons given for ignoring Iowa Code § 124.204(8) and Iowa Code § 124.401(5)(c).

The Court should reverse the decision of the department because the department's decision fails to address the merits of the petition for rule making. The Court should further remand to the department to create a process for accommodating exceptions if they are consistent with public health and safety. Iowa Const., art. 1, §§ 9, 20.

JURISDICTIONAL STATEMENT

A petition to initiate rule making is authorized by Iowa Code § 17A.7(1). Within sixty days after submission of a petition, the agency shall deny the petition in writing on the merits, stating its reasons for the denial, or initiate rule making proceedings. *Id*.

[4] https://www.legis.iowa.gov/docs/publications/DF/1441905.pdf#page=19

The petitioner filed a petition for rule making with the Iowa Department of Inspections, Appeals, and Licensing on September 26, 2023. The department denied the petition on November 7, 2023, and notified the petitioner by email on November 15, 2023.

In cases involving a petition for judicial review of agency action other than the decision in a contested case, the petition may be filed at any time petitioner is aggrieved or adversely affected by that action. Iowa Code § 17A.19(3).

The petition for judicial review was filed with this court on December 12, 2023, and served on the department on December 13, 2023.

STATEMENT OF THE CASE

A. Non-drug Exception for Peyote

The manufacture or distribution of peyote was first prohibited by federal law in the Drug Abuse Control Act Amendments of 1965 (1965 Amendments). Congress considered adding a statutory exception for the religious use of peyote, noting that some states had excepted the religious use of peyote from their criminal statutes believing it was protected by the First Amendment to the United States Constitution. *See* Congressional Record - House, July 8, 1965, at page 15977.[5]

The U.S. Department of Health, Education, and Welfare (HEW), recommended replacing the proposed statutory exception with a federal regulation. *See* Federal Register, Vol. 31, No. 54, Saturday, March 19, 1966, at page 4679.[6] The exception was added to the Code of Federal Regulations. *See* 21 C.F.R. § 166.3(c)(3) (1968)).[7] The federal regulation was carried over into the federal Controlled Substances Act of 1970. *See* Hearings on Drug Abuse Control

[5] https://files.iowamedicalmarijuana.org/imm/federal/111CongRec15977.pdf
[6] https://files.iowamedicalmarijuana.org/imm/federal/31FedReg4679-1996.pdf
[7] https://files.iowamedicalmarijuana.org/imm/federal/21CFR166-1968.pdf

Amendments, 91st Cong., 2d Sess., ser. 91 - 45, pt. 1, pp. 117-118 (1970).[8] *See* 21 C.F.R. § 1307.31.[9]

In 1967, an identical exception for the non-drug use of peyote was added by statute in Iowa. *See* 1967 Acts, ch. 189, § 2(12)[10]; Iowa Code § 204A.2(12) (1968). The Final Report of the Drug Abuse Study Committee to the Sixty-Fourth General Assembly of the State of Iowa (1971)[11] recommended that Iowa classify all controlled substance by statute rather than by regulation.

> As recommended by the Drug Abuse Study Committee, the Uniform Act has been adapted in a manner which the Committee believes will better meet Iowa's particular needs and circumstances. Decisions on specific changes in the schedules of controlled substances will be made by the General Assembly acting on the basis of recommendations from the Board of Pharmacy Examiners, not by the Board itself through administrative action as the Uniform Act originally provided.

Id., at page 1.

The Iowa statutory exception for the religious use of peyote was carried over into the Iowa Uniform Controlled Substances Act in 1971.

> COMMENT. Section 204 is identical with the corresponding section of the Uniform Act, except for the authorization for use of peyote in the religious ceremonies of the Native American Church which is carried over into this bill from present section 204A.2(12) of the Code.

Id., Appendix II, at pages 16-17. *See* Iowa Code § 124.204(4)(p) and Iowa Code § 124.204(8).

In 1981 a U.S. Department of Justice, Office of Legal Counsel, opinion[12] said the peyote exception "is strictly an interpretative rule . . ." 5 Op. Off. Legal Counsel 403, 404 (1981).[13]

[8] https://files.iowamedicalmarijuana.org/imm/federal/1970-Serial-No-91-45-117.pdf
[9] https://www.govinfo.gov/content/pkg/CFR-2023-title21-vol9/xml/CFR-2023-title21-vol9-sec1307-31.xml
[10] https://files.iowamedicalmarijuana.org/imm/states/1967_Iowa_189.pdf
[11] https://www.legis.iowa.gov/docs/publications/IP/255497.pdf
[12] https://www.justice.gov/olc/opinion/peyote-exemption-native-american-church
[13] https://www.justice.gov/d9/olc/opinions/1981/12/31/op-olc-v005-p0403_0.pdf#page=2

The opinion said the peyote exception cannot have a religious purpose and must have a secular purpose because the government cannot favor religion over non-religion.

> The Establishment Clause generally prohibits the government from granting certain preferences to religions or religious adherents which are not available to secular organizations or nonreligious individuals. *E.g.*, *Everson v. Board of Education*, 330 U.S. 1 (1947).

Id., at 410. "It is well accepted that the Establishment Clause prohibits a government from 'prefer[ring] one religion over another.' *Everson*, 330 U.S. at 15." *Id*., at 419.

"[T]he critical feature of interpretive rules is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 97 (2015), quoting *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) ("Interpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.'").

Iowa Code § 124.204(8), is an interpretation of the controlled substances act. That interpretation cannot eliminate basic civil rights, the first article, from the Iowa Constitution. A process must exist to evaluate exceptions for non-drug (non-prescription) use of controlled substances based on "public health and safety." Iowa Const., art. 1, §§ 1 ("equality"), 3 ("religious neutrality"), 6 ("uniformity"), 9 ("due process"), and 20 ("redress"). The department has the implicit authority to create that process.

B. Non-drug Exception for Cannabis

In 2014 the legislature created an exception for the non-drug (non-prescription) use of cannabis extracts from "out-of-state." *See* 2014 Iowa Acts, ch. 1125, § 7(1)(b).[14] Cannabis extracts, just like peyote, are Schedule I controlled substances. *See* Iowa Code §§ 124.203 and

[14] https://www.legis.iowa.gov/docs/publications/iactc/85.2/CH1125.pdf

124.204; 21 C.F.R. §§ 1308.11(d) (23) ("Marihuana"), (24) ("Mescaline"), (26) ("Peyote"), (31) ("Tetrahydrocannabinols"), (58) ("Marihuana Extract").

Whether anyone ever actually obtained cannabis extracts from "out-of-state" is unknown. Iowa Code Chapter 124D did not require anyone to announce when and where they would be violating federal drug law. The Iowa Department of Public Health could have applied for a federal exception for this distinct class of users, like the specific class of peyote users, but didn't. *See* 21 C.F.R. § 1307.31; Iowa Code § 124.204(8).

In 2017 the legislature expanded this exception by authorizing commercial cultivation, Iowa Code § 124E.6, and commercial distribution, Iowa Code § 124E.8. The legislature did not change the classification of cannabis or cannabis extracts, leaving them classified as having no accepted medical use anywhere in the United States, including Iowa.

Chapter 124E, just like Iowa Code § 124.204(8), is completely outside the context of pharmaceutical drugs and access by prescription only. Chapter 124E is a "non-drug" (non-prescription) use of cannabis just as 21 C.F.R. § 1307.31 is a "non-drug" (non-prescription) use of peyote.

The Iowa Supreme Court recently recognized that cannabis and cannabis extracts have no accepted medical use in the context of the controlled substances act. *See State v. Middlekauff*, 974 N.W.2d 781, 800 (Iowa 2022) ("We conclude that marijuana cannot be validly prescribed or ordered for medical treatment under Iowa Code section 124.401(5).")

Chapter 124E created an initial list of debilitating medical conditions that entitle privileged users to immunity. *See* Iowa Code § 124E.2(2); Iowa Code § 124.401(5)(c). The legislature created an explicit right to petition for redress under Chapter 124E. The list can be

updated by administrative rule, Iowa Admin. Code r. 641 - 154.65. Anyone can petition for addition or removal of medical conditions or medical treatments.

C. Non-drug Use of Cannabis by Petitioner

Prior to the evolution of the "non-drug" (non-prescription) compassionate use of cannabis, the petitioner attempted to compare the religious use of cannabis by the Ethiopian Zion Coptic Church to the religious use of peyote by the Native American Church. *See Olsen v. DEA*, 878 F.2d 1458 (D.C. Cir. 1989). The petitioner proposed two exceptions: (1) an unrestricted exception; and (2) a restrictive exception.

Neither of the petitioner's two proposals exactly matched the peyote exception. Unlimited use was too much. *Id*., at 1460 ("an outrageous quantity"). The narrow exception proposed by the petitioner relied on obtaining access to federal government research cannabis. *Id*., at 1462 ("burdensome and constant official supervision and management").

> Under the Establishment Clause, government aid or preference to religion is constitutional only if it satisfies each part of a three-prong test: (1) it must have a secular purpose; (2) it must have a primary effect which neither aids nor inhibits religion; and (3) its application must not result in *excessive entanglement* of government with religion.

5 Op. Off. Legal Counsel 403, 415-416 (1981) (emphasis added, citations omitted).[15]

Private businesses were registered by federal regulations to supply peyote to the Native American Church, as well as here in in Iowa. There were no private businesses registered to supply cannabis to the petitioner's church in 1989.

Facts have changed significantly since 1989. While persons supplying peyote for "non-drug" (non-prescription) use have been registered in Iowa continuously since 1967, since 2017

[15] https://www.justice.gov/d9/olc/opinions/1981/12/31/op-olc-v005-p0403_0.pdf#page=13

Iowa has registered commercial cannabis suppliers for "non-drug" (non-prescription) use. The analysis of "equal" protection is dramatically different today.

Chapter 124E does not rely on government research cannabis. Cannabis is now being grown commercially by private businesses in Iowa. Commercial businesses have an interest in expanding their market.

There are only two controlled substances that have ever been approved for "non-drug" (non-prescription) use in Iowa, peyote and now cannabis. Both commercial peyote suppliers and commercial cannabis suppliers are registered in Iowa. Exception can and do exist consistent with both "public health and safety."

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v Burns*, 427 U.S. 347, 373 (1976).

> "If a fundamental right is implicated, we apply strict scrutiny analysis, which requires a determination of 'whether the government action infringing the fundamental right is narrowly tailored to serve a compelling government interest.'" *Id*. (quoting *State v. Hernandez-Lopez*, 639 N.W.2d 226, 238 (Iowa 2002)).

State v. Seering, 701 N.E.2d 655, 662 (Iowa 2005).

Iowa Const., art. 1, § 9, provides in part, that "No person shall be deprived of life, liberty, or property, without due process of law." The petitioner is aggrieved because the petitioner is being deprived of religious liberty without due process of law. Iowa Const., art. 1, § 20 ("petition for a redress of grievances").

STANDARD OF REVIEW

"[I]owa Code section 17A.19(10)(a) explicitly allows constitutional arguments to be raised." *Marek v. Johnson*, 958 NW 2d 172, 179 (Iowa 2021). "An agency that acts unconstitutionally is disregarding the controlling law and therefore acting arbitrarily." *Ibid*.

> "Agency action is considered arbitrary or capricious when the decision was made 'without regard to the law or facts.'" (quoting *Doe v. Iowa Bd. of Med. Exam'rs*, 733 N.W.2d 705, 707 (Iowa 2007)).

Irland v. Iowa Bd. of Med., 939 N.W.2d 85, 89 (Iowa 2020).

See also Bonilla v. Iowa Bd. of Parole, 930 N.W.2d 751, 773 (Iowa 2019) (discussing and applying the doctrine of constitutional avoidance).

> When comparing the statute and regulatory framework with constitutional requirements, we ordinarily strive to reach an interpretation that passes constitutional muster. *State v. Iowa Dist. Ct.*, 843 N.W.2d 76, 85 (Iowa 2014) ("The doctrine of constitutional avoidance suggests the proper course in the construction of a statute may be to steer clear of 'constitutional shoals' when possible."); *Simmons v. State Pub. Def.*, 791 N.W.2d 69, 74 (Iowa 2010) ("If fairly possible, a statute will be construed to avoid doubt as to constitutionality.").

Ibid.

ARGUMENT

Exceptions for religious use and compassionate use of controlled substances in Chapter 124 require an application process for other exceptions to be given equal consideration. To avoid the requirement, the department does not mention the exceptions in Chapter 124.

The department must explain why the existing exceptions do not require a process for evaluating additional exceptions, or initiate rule making proceedings.

I. Was the final decision decided on the merits?

The part of Iowa Code § 17A.7(1) relevant to the denial of a petition for rule making says: "the agency shall deny the petition in writing on the merits, stating its reasons for the denial".

After considering the petition,[16] the Iowa Board of Pharmacy (the "board") voted unanimously to take no action.[17] The final decision said, "the Legislature must take specific action to grant the Board rule making authority related to religious exceptions."

A religious exception, Iowa Code § 124.204(8), already exists in Chapter 124. The exception says that users and suppliers shall, "comply with all applicable requirements of this chapter and rules adopted pursuant thereto." It specifically refers to rule making authority.

Legal authority can be "inferred from the power expressly given." *City of Des Moines v. Iowa Department of Transportation*, 911 N.W.2d 431, 440 (Iowa 2018). Statues can "imply the authority to adopt" rules. *Id*., at 443.

The question presented by the petitioner was whether Iowa Code § 124.204(8) is the rule making authority to regulate religious exceptions.

Under the rules of statutory construction, it is presumed that:

1. Compliance with the Constitutions of the state and of the United States is intended.
2. The entire statute is intended to be effective.
3. A just and reasonable result is intended.
4. A result feasible of execution is intended.
5. Public interest is favored over any private interest.

Iowa Code § 4.4.

Any interpretation of Iowa Code § 124.204(8) must be constitutional, and therefore administrative rules are both inferred and implied. *Bonilla v. Iowa Bd. of Parole*, 930 N.W.2d 751, 773 (Iowa 2019) (discussing and applying the doctrine of constitutional avoidance).

The department has no authority to interpret a statute as favoring a single religious organization to the exclusion of all others.

[16] https://iowamedicalmarijuana.org/pdfs/dial-2023-11-07-agenda.pdf
[17] https://iowamedicalmarijuana.org/pdfs/dial-2023-11-07-minutes.pdf

> The DEA's contention that Congress directed the Administrator automatically to turn away all churches save one opens a grave constitutional question. A statutory exemption authorized for one church alone, and for which no other church may qualify, presents a "denominational preference" not easily reconciled with the establishment clause. *See Larson v. Valente*, 456 U.S. 228, 245, 72 L. Ed. 2d 33, 102 S. Ct. 1673 (1982); *cf. infra* pp. 12-13. We resist an interpretation dissonant with the "cardinal principle" that legislation should be construed, if "fairly possible," to avoid a constitutional confrontation. *See Ashwander v. TVA*, 297 U.S. 288, 348, 80 L. Ed. 688, 56 S. Ct. 466 (1936) (Brandeis, J., concurring).

Olsen v. DEA, 878 F.2d 1458, 1461 (D.C. Cir. 1989).

"[L]egal authority to promulgate the rule is not 'on the merits' when the legal authority to act has not been judicially determined." *Litterer v. Judge*, 644 N.W.2d 357, 361 (Iowa 2002).

II. Does a religious exception in the act imply authority to make rules?

The peyote exception is an interpretation of the federal controlled substances act. It was added by the Iowa legislature in 1967, adopted word for word from a federal regulation created in 1966. Comparing the text, the words used are identical. The federal version said: "The listing of peyote in this subparagraph does not apply to non-drug use in"

> bona fide religious ceremonies of the Native American Church; however, persons supplying the product to the Church are required to register and maintain appropriate records of receipts and disbursements of the article.

Federal Register, Vol. 31, No. 54, Saturday, March 19, 1966, at page 4679[18], codified at 21 C.F.R. § 166.3(c)(3) (1968).[19] The Iowa version said: "Section three (3) of this Act shall not apply to ... Peyote used in"

> bona fide religious ceremonies of the Native American Church; however, persons supplying the product to the church are required to register and maintain appropriate records of receipts and disbursements of the article.

1967 Iowa Act, ch. 189, § 2(12).[20]

[18] https://files.iowamedicalmarijuana.org/imm/federal/31FedReg4679-1996.pdf
[19] https://files.iowamedicalmarijuana.org/imm/federal/21CFR166-1968.pdf#page=5
[20] https://files.iowamedicalmarijuana.org/imm/states/1967_Iowa_189.pdf#page=2

Both versions required persons supplying the product for "non-drug" (meaning "without a prescription") use to register. The exemptions were carried over into current federal regulations in 1970 and into the Iowa Uniform Controlled Substances Act in 1971. The federal version now reads:

> 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.

21 C.F.R. § 1307.31 (emphasis added).[21] And, the state version now reads:

> Nothing in this chapter shall apply to peyote when used in bona fide religious ceremonies of the Native American Church; however, persons supplying the product to the church shall register, maintain appropriate records of receipts and disbursements of peyote, and otherwise comply with all applicable requirements of this chapter and rules adopted pursuant thereto.

Iowa Code § 124.204(8) (emphasis added).

The Drug Enforcement Administration (DEA) is the federal agency that registers suppliers, 21 U.S.C. § 822, and the Iowa Department of Inspections, Appeals, and Licensing (the "department") through the Iowa Board of Pharmacy (the "board") is the state agency that registers suppliers in Iowa, Iowa Code § 124.303.

Congress created a process for making exceptions. 21 C.F.R. § 1307.03 ("any person may apply for an exception"). Persons supply the product for such an exception may be registered. 21 U.S.C. § 822(d) ("may, by regulation, waive the requirement for registration . . . if . . . consistent with the public health and safety"). Both of these exceptions can be seen in the text of the exception for peyote. 21 C.F.R. § 1307.31 (users are exempt and suppliers must

[21] https://www.govinfo.gov/content/pkg/CFR-2023-title21-vol9/xml/CFR-2023-title21-vol9-sec1307-31.xml

register). Both exceptions can also be seen in Iowa Code § 124.204(8) (users are exempt and suppliers must register).

Iowa Code § 124.204(8) is a federal regulation and there is no other reason for its inclusion in Chapter 124. The interpretation should be consistent with federal interpretation. As explained by the U.S. Department of Justice, Office of Legal Counsel, in 1981: "It is well accepted that the Establishment Clause prohibits a government from 'prefer[ring] one religion over another.' *Everson v. Board of Education*, 330 U.S. 1, 15 (1947)." *Id.*, 5 Op. Off. Legal Counsel 403, 419 (1981).[22]

The Office of Legal Counsel interpretation is consistent with the Iowa Constitution, art. 1, § 3.

The United States Supreme Court has also given the exception for "non-drug" (non-prescription) use of peyote the same interpretation.

> Everything the Government says about the DMT in hoasca – that, as a Schedule I substance, Congress has determined that it "has a high potential for abuse," "has no currently accepted medical use," and has "a lack of accepted safety for use . . . under medical supervision," 21 U.S.C. § 812(b)(1) – applies in equal measure to the mescaline in peyote, yet both the Executive and Congress itself have decreed an exception from the Controlled Substances Act for Native American religious use of peyote. If such use is permitted in the face of the congressional findings in § 812(b)(1) for hundreds of thousands of Native Americans practicing their faith, it is difficult to see how those same findings alone can preclude any consideration of a similar exception for the 130 or so American members of the UDV who want to practice theirs.

Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 433 (2006).

The entire act, Chapter 124, was intended to be consistent with the federal act, 21 U.S.C. §§ 801-971, Iowa Code § 124.601. The legislature intended the department to interpret the

[22] https://www.justice.gov/olc/opinion/peyote-exemption-native-american-church

statute consistent with the state and federal constitutions. Iowa Const., art. 1, §§ 3, 6; Iowa Code § 4.4(1).

III. Does legislative intent to make the act uniform imply a duty to make rules?

What is legislative intent? "This chapter shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it." Iowa Code § 124.601. Construed: "1. interpreted or understood; 2. arrived at by inference or interpretation." Dictionary.com.[23] Uniform Controlled Substances Act (1994), prefatory note at page 1: "uniformity between the laws of the several States and those of the federal government." Uniform Law Commission.[24]

How uniform is uniform? Federal law authorizes petitions to an administrative agency for exceptions. 21 C.F.R. § 1307.03. The statutory authority to make exceptions comes from 21 U.S.C. §§ 821, 822(d), and 871(b). The Iowa Constitution guarantees a fundamental right to "due process" and "to petition for a redress." Iowa Const., art. 1, §§ 9, 20.

Uniform acts are not strictly uniform, but they can't violate fundamental rights. A uniform controlled substances act can vary from the federal act and still be uniform, within constitutional limitations. *Employment Division v. Smith*, 494 U.S. 872 (1990).

> As the plurality pointed out in *Roy*, our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason. *Bowen v. Roy*, *supra*, at 708.

Smith, 494 U.S., at 884.

> All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.

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[23] https://www.dictionary.com/browse/construed

[24] https://www.uniformlaws.org/committees/community-home?CommunityKey=9873a9bf-7335-4be7-855d-b17c9e8ff3dd

Iowa Const., art. 1, § 6. "The general assembly shall make no law respecting an establishment of religion, . . ." Iowa Const., art. 1, § 3.

Religious exceptions are not forbidden by the establishment clause, but they do trigger strict scrutiny.

"The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

The department has the authority to make rules to consider additional exceptions because that is exactly how the federal act works, and there is no other reasonable interpretation of Iowa Code § 124.204(8). The department isn't free to violate the law, just because it has for over five decades.

The DEA failed to interpret federal drug law correctly for five decades but had to comply when the failure was revealed. 42 Op. Off. Legal Counsel 1 (2018).[25] Federal Register: Vol. 85, No. 244, Friday, December 18, 2020, at 82333.[26]

An increased demand for federal research grade cannabis triggered the DEA review, just as recent "non-drug" (non-prescription) use of cannabis in Iowa, Iowa Code § 124.401(5)(c), has now triggered this review.

Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) ("government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise").

[25] https://www.justice.gov/olc/opinion/licensing-marijuana-cultivation-compliance-single-convention-narcotic-drugs
[26] https://www.govinfo.gov/content/pkg/FR-2020-12-18/pdf/2020-27999.pdf

The department is responsible for implementing the act and must avoid an unconstitutional interpretation. *Bonilla v. Iowa Bd. of Parole*, 930 N.W.2d 751, 773 (Iowa 2019) (discussing and applying the doctrine of constitutional avoidance).

Statutory exceptions for "non-drug" use can easily pass constitutional muster as long as they are interpreted as an initial list of statutory exceptions with the adoption of rules for processing additional requests for exceptions. The department has the authority to accept additional request for exceptions, because it is implicit from the existing exceptions in the act and because it is uniform with the federal act to accept requests for exceptions.

IV. Does a secular exception in the act imply a duty to make rules?

Iowa Code § 124.401(5)(c) is a secular exception to Chapter 124. It refers to another chapter, Chapter 124E, that sets up a program for the "non-drug" manufacture, distribution, and use of cannabis and cannabis extracts without a prescription for debilitating medical conditions.

> A person may knowingly or intentionally recommend, possess, use, dispense, deliver, transport, or administer cannabidiol if the recommendation, possession, use, dispensing, delivery, transporting, or administering is in accordance with the provisions of chapter 124E. For purposes of this paragraph, "cannabidiol" means the same as defined in section 124E.2.

The initial list of "debilitating medical conditions" was added by statute: Iowa Code § 124E.2(2). The current list of "debilitating medical conditions" is updated by administrative rule: Iowa Admin. Code r. 641 - 154.1.

The secular exception, Iowa Code § 124.401(5)(c), triggers strict scrutiny. *Sanchez v. State*, 692 N.W.2d 812, 817 (Iowa 2005) ("If a statute affects a fundamental right . . ., it is subjected to strict scrutiny review.")

> A government policy will fail the general applicability requirement if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," . . .

Kennedy v. Bremerton School District, 142 S. Ct. 2407, 2422 (2022), quoting *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021).

"Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny." *Kennedy*, at 2422.

> A law is not generally applicable if it "invite[s]" the government to consider the particular reasons for a person's conduct by providing "'a mechanism for individualized exemptions.'" *Smith*, 494 U.S. at 884, 110 S.Ct. 1595 (quoting *Bowen v. Roy*, 476 U.S. 693, 708, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986) (opinion of BURGER, C. J., joined by POWELL AND REHNQUIST, JJ.)).
>
> *Smith* went on to hold that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." 494 U.S. at 884, 110 S.Ct. 1595 (quoting *Roy*, 476 U.S. at 708, 106 S.Ct. 2147); *see also Lukumi*, 508 U.S. at 537, 113 S.Ct. 2217 (same).

Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021).

The department's final decision under review here did not address religious discrimination at all, as if Chapter 124 did not contain both religious, 124.204(8), and secular, 124.401(5)(c), exceptions.

Cannabis and cannabis extracts have a high potential for abuse, no currently accepted medical use, and lack accepted safety for use under medical supervision. 21 U.S.C. § 812(b) ; Iowa Code § 124.203(1). Iowa Code § 124.401(5)(c) is an exception to Iowa Code § 124.203(1) and it is a "system of individual exemptions." Manufacturers are licensed, distributors are licensed, and qualified users are registered. Anyone can petition to have medical conditions or forms of administration added. Iowa Code § 124E.5(3)(a); Iowa Admin. Code r. 641 - 154.65.

Chapter 124 is constitutional. Iowa Code § 124.204(8) and Iowa Code § 124.401(5)(c) are constitutional. Exceptions are part of the federal act, as they are in the Iowa act. It is not constitutional to eliminate the due process protected by the federal act from the Iowa act.

The department lacks authority to: (1) decide a statute is unconstitutional and refuse to enforce it; (2) ignore an existing religious exception it currently regulates; and (3) fail to address the merits of the petition for rule making. The department must execute and enforce the law to the best of its ability. The department's duty is to create administrative rules necessary to ensure the constitutional application of the law.

The department has authority to create rules that are "implicit" from Chapter 124 and the Iowa Constitution.

CONCLUSION

The Iowa "constitution is implemented through laws passed by the general assembly." *Burnett v. Smith*, 990 N.W.2d 289, 295 (Iowa 2023), citing *Godfrey v. State*, 898 N.W.2d 844, 883 (Iowa 2017) (Mansfield, J., dissenting).

The general assembly has implemented a religious exception, Iowa Code § 124.204(8) to Chapter 124. Iowa Const., art. 1, § 3.

The general assembly has implemented a secular exception, Iowa Code § 124.401(5)(c) to Chapter 124. Iowa Const., art. 1, § 6.

Authority to create rules is implicit, because the "general assembly shall make no law respecting an establishment of religion," Iowa Const., art. 1, § 3, and because the "general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens" Iowa Const., art. 1, § 6.

The federal act, upon which the state act is based, includes both due process and the right to petition as guaranteed in the Iowa Bill of Rights, Iowa Const., art. 1, §§ 9, 20. The department has legislative authority to make rules consistent with the intent of the general assembly and the Constitution of Iowa. The Court should reverse and remand.

Respectfully submitted.

CARL OLSEN

/s/ Carl Olsen

CARL OLSEN
Pro Se
130 E. Aurora Ave.
Des Moines, IA 50313
Phone: 515-343-9933
Email carl@carl-olsen.com

All parties served view EDM on
February 9, 2024