IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CARL OLSEN, Petitioner, vs. IOWA DEPARTMENT OF HEALTH AND HUMAN SERVICES, Respondent.	No. ***CVCV065114*** ***FIRST AMENDED BRIEF IN SUPPORT OF PETITION FOR JUDICIAL REVIEW***

COMES NOW Petitioner, Carl Olsen, through counsel, Colin Murphy, and submits the following First Amended Brief in Support of Petition for Judicial Review.

BRIEF POINT I

CHAPTERS 124 AND 124E ARE NEITHER NEUTRAL TOWARD RELIGION NOR GENERALLY APPLICABLE.

Legal Standard. The district court may grant relief from administrative proceedings if the agency's action is "unconstitutional on its face or as applied or based upon a provision of law that is unconstitutional on its face or as applied." Iowa Code § 17A.19(10)(a) (2023); *Gartner v. Iowa Dept. of Public Health*, 830 N.W.2d 335, 344 (Iowa 2013).

Authorities. The government may burden religious exercise only through neutral regulations of general applicability. *See Employment Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872, 879 (1990). A regulation that is not neutral or generally applicable violates the Free Exercise Clause unless the government can prove that it is narrowly tailored to advance a compelling interest of the highest order. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993); *Mitchell County v. Zimmerman*, 810 N.W.2d 1 (Iowa 2012).

A. Chapter 124 is not Neutral Toward Religion.

Iowa has maintained a statutory exception for the religious use of peyote by the

Native American Church since 1967. *See* Iowa Code § 124.204(8) (2023) (noting "[n]othing 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.")

Writing for the majority of a three-judge panel of the Court of Appeals for the District of Columbia Circuit, then Judge Ruth Bader Ginsburg noted that statutory exemption for peyote - authorized for the Native American Church only and for which no other church may qualify - amounts to a "denominational preference" that is not easily reconcilable with the establishment clause. *See Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458, 1461 (D.C. Cir. 1989) (*citing Larson v. Valente*, 456 U.S. 228, 245, 102 S. Ct. 1673, 1683-84, 72 L.Ed.2d 33 (1982)). She called the contention that the Drug Enforcement Administration could turn away all churches save one a "grave constitutional question." *Id.* To be sure, the DEA now accepts applications for the religious use of controlled substances following the decision in *Gonzales v. O Centra Espirita Beneficente Unaio do Vegetal*, 546 U.S. 418, 126 S. Ct. 1211, 163 L.Ed.2d 1017 (2006).[1] Indeed, Petitioner applied for a religious exemption with the DEA.

The denominational preference for peyote in Chapter 124 in favor of the Native American Church demonstrates a lack of neutrality toward religion. The law need not

[1.] The process surrounding the federal religious exemption for any controlled substance, including cannabis, can be found at:
https://www.deadiversion.usdoj.gov/GDP/(DEA-DC-5)(EO-DEA-007)(Version2)RFRA_Guidance_(Final)_11-20-2020.pdf

target a specific religious practice to violate neutrality.

B. Chapter 124 is No Longer Generally Applicable as a Result of the Enactment of Chapter 124E.

A law is generally applicable if it equally burdens religious and non-religious conduct without making exceptions that undermine its purpose. *Lukumi*, 508 U.S. at 533-540, 543-546. Here, the prohibition in Iowa law in Chapter 124 against the possession and use of marijuana extracts is not generally applicable because Chapter 124E contains exceptions that now undermine its dual purposes, *i.e.*, protecting the public health and preventing diversion of controlled substances.

In *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, the Supreme Court struck down a series of city ordinances that prohibited the practice of religious animal sacrifice while allowing other animal killings, including those associated with hunting, fishing, meat production, and pest control. *Lukumi,* 508 U.S. at 536-537. The Court examined the city's interests allegedly supporting the ordinances—preventing cruelty to animals and protecting public health. It found that the ordinances were "underinclusive for these ends" because they "fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than [religious animal sacrifice]." *Id.* at 543. The law was underinclusive not only because it allowed secular conduct similar to the religious conduct that was forbidden, but also because it allowed dissimilar conduct that caused the same harms or undermined the same governmental interests as the religious conduct that was forbidden. Because the garbage bins of restaurants posed the same health risks as were allegedly caused by sacrifice of animals, but the restaurants were not as tightly regulated as sacrifice, the ban on sacrifice required strict scrutiny. *Id.* at 544-45.

In *Employment Division v. Smith*, the Court distinguished *Sherbert v. Verner*, 374 U.S. 398 (1963), and similar cases involving persons who lost their jobs because of their religious practice and then applied for unemployment compensation. Those unemployment compensation laws had "individualized exemptions" that allowed some people to collect unemployment benefits even when their inability to find work was caused by their own personal choices. There could not be many acceptable reasons for refusing work but still collecting unemployment compensation, but the law allowed "at least some 'personal reasons.'" *Smith*, 494 U.S. at 884 (quoting *Sherbert*). The reason the Court did not apply strict scrutiny in *Smith* is because there was no compelling reason to extend the *Sherbert* test to a state criminal law (Oregon's controlled substances act) involving across-the-board prohibitions, *i.e.*, no individual exemptions.

In *Lukumi*, the Court repeated *Smith*'s statement about the importance of "individual exemptions" in triggering strict scrutiny. But in *Lukumi*, the Court also relied on categorical exceptions, such as the exceptions for hunting, fishing, and pest control. "[C]ategories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Lukumi*, 508 U.S. at 542. In *Lukumi*, few killings of animals were prohibited except for religious sacrifices, but the Court stated explicitly that the rule was not limited to that situation. The Court said that "these ordinances fall well below the minimum standard necessary to protect First Amendment rights." *Id.* at 543.

Because the law was underinclusive and burdened Free Exercise, the Court applied strict scrutiny to the ordinances. It found that the city's interests "could be achieved by narrower ordinances that burdened religion to a far lesser degree" and found that, under its strict scrutiny analysis, "[t]he absence of narrow tailoring suffices to establish the

invalidity of the ordinances." *Id.* at 546. "It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* at 547 (internal quotations omitted).

Two Third Circuit cases, authored by then-Judge Samuel Alito, further illustrate the *Smith/Lukumi* general-applicability analysis. In *Fraternal Order of Police Newark Lodge v. City of Newark*, 170 F.3d 359 (3rd Cir. 1999), the court considered a police policy that prohibited officers from wearing beards but offered exemptions to two categories: (1) officers who had medical reasons for wearing a beard; and (2) officers who were undercover. *Id.* at 360. Two Muslim officers requested an exemption from the policy for religious reasons but were denied. The City's reason for the policy was to promote uniform appearance among its officers. *Id.* at 366. The exception for undercover officers did not harm the purpose of the policy—as undercover officers are, by nature, out of uniform—and accordingly would not have resulted in imposition of heightened scrutiny. However, the exemption for medical reasons did undermine that policy—it applied to uniformed officers who would be recognized as officers and rendered their appearance non-uniform to the extent of their beards. *Id.* The court in *Newark* emphasized that the rule and its exception implied a value judgment that religious needs were less important than medical needs, and that it was this implicit value judgment that the Free Exercise Clause prohibits. *Id.* at 364-65 (quoting *Lukumi*, 508 U.S. at 537-38). Thus, the policy as it was applied to the Muslim officers was subject to heightened scrutiny under the Free Exercise Clause and found to be unconstitutional. *Id.*

In *Blackhawk v. Pennsylvania*, 381 F.3d 202 (3d Cir. 2004), a Lakota Indian kept two bears on his property to conduct religious ceremonies in keeping with his tribe's traditions. *Id.* at 204. A state law prohibited privately keeping wildlife without paying a fee for a permit. The purported state interest in the law was to discourage "the keeping of wild animals in captivity" and to generate revenue. *Id.* at 211. Nonetheless, zoos and nationally recognized circuses were exempt from the fee requirement. *Id.* As a result, the court found the law not generally applicable under *Smith* and *Lukumi*, because the zoo and circus exemptions "work against the Commonwealth's asserted goal of discouraging the keeping of wild animals in captivity" and its interest in generating revenue. *Id.* Thus, Pennsylvania's decision not to grant an exemption for religious reasons was subject to strict scrutiny and declared to be unconstitutional as a violation of the Free Exercise Clause.

Here, Chapter 124E contains exemptions that undermine the purpose of Chapter 124, the state's Uniform Controlled Substance Act. The exemptions permit the possession and use of marijuana extracts. They provide affirmative defenses to the prosecution for possession of marijuana in the form of medical cannabidiol, both misdemeanors and felonies, as well as felony drug tax stamp violations. *See* Iowa Code § 124E.12(4)(a) (2022).

These exemptions undermine the Department's purpose of preventing drug abuse through diversion and promoting public health. Why does the state maintain that marijuana has "no accepted medical use for treatment in the United States; or lacks accepted safety for use in treatment under medical supervision" (one of the criteria for classifying marijuana as a schedule I controlled substance in Iowa Code § 124.203) but

authorizes the Department to establish a medical cannabidiol program that dispenses marijuana extracts to alleviate symptoms associated with certain qualifying conditions based on a health care provider's certification?

The bottom line is that that Iowa's medical cannabidiol law, Chapter 124E, provides a secular exception for the possession and use of marijuana but makes no allowance for religious use. This makes the law underinclusive and not generally applicable. As a result, it must pass strict scrutiny before it can be applied in a manner to burden Appellant's religious beliefs and practices.

The Department must treat religious practice as favorably as it treats the secular reasons for allowing the possession and use of marijuana extracts by Iowa patients. That is the lesson of *Smith*, *Lukumi*, and *Newark*. For these reasons, the law is not generally applicable and can be upheld only if it is narrowly tailored to further a compelling interest. *See Smith*, 494 U.S. at 879.

C. There is no Narrowly Tailored Compelling Government Interest Sufficient to Justify a Prohibition Against Religious Use of Marijuana Extracts.

The Department does not have a compelling interest here, and even if it did, denying Petitioner the same legal protections to possess and use marijuana extracts is not narrowly tailored to achieve that interest. "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 46. Such a law "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." *Id.*, quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978), and *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

For several decades, the State has permitted the religious use of another schedule I controlled substance, peyote, by members of the Native American Church. That alone is robust evidence that there is not suddenly a compelling need to restrict one person from similarly using a controlled substance as part of his religious practice.

Even if the Department had a compelling interest, the outright prohibition against religious use is not narrowly tailored to serve that interest. Petitioner's access to marijuana extracts would be limited to the same number of grams per month that are available to qualified patients. Nothing more or less. This is why the prior cases in which Petitioner was involved are no longer persuasive. His position was hindered by the enormity of the marijuana control problem in the United States then existing, which prohibited the possession and use of marijuana across the board to all citizens. However, much has changed. A majority of states now have highly regulated cannabis programs that provide legal access to marijuana flower and extracts.

Medical cannabidiol has been available in Iowa since December 1, 2018. There are now more than 17,500 patient and caregiver cardholders as of November 2022 when the public data was available.[2] The record before the agency demonstrates not one adverse health effect or diversion, which means that the program is succeeding in meeting its twin goals of preventing drug abuse and promoting public health. It strains credulity to believe that one additional cardholder, whose possession and use would be circumscribed by the

[2] The number of active patient and caregiver registration cards as of November 2022. https://hhs.iowa.gov/sites/default/files/idphfiles/2022%20Annual%20Report%20-%20Medical%20Cannabidiol%20Board.pdf

same regulations, is going to upset that dynamic. The Department can certainly allow Petitioner to freely exercise his religious traditions without suffering any harm.

BRIEF POINT II

NO RATIONAL DECISION MAKER WOULD HAVE IGNORED PETITIONER'S CONSTITUTIONAL CLAIM WHEN THAT WAS THE ENTIRE BASIS FOR THE APPLICATION.

Legal Standard. The district court may grant relief from agency action when it "is the product of a decision-making process in which the agency did not consider a relevant and important matter relating to the propriety or desirability of the action in question that a rational decision maker in similar circumstances would have considered prior to taking that action." *See* Iowa Code § 17A.19(10)(j) (2023).

Authorities. "Efficient and effective judicial administration is . . . better served by having the entire proceeding first determined by the agency." *Shell Oil v. Bair*, 417 N.W.2d 425, 430 (Iowa 1987) (citations omitted). "[T]he purpose of these rules [regarding error preservation] is to give both the opposing party and the agency an opportunity to address the issue." *Brewbaker v. State Bd. of Regents*, 843 N.W.2d 466, 471 (Iowa App. 2013) (noting constitutional issues can be raised for first time on petitions for rehearing and intra-agency appeals).

Regarding the requirement to consider "relevant and important" matters, *see Cargill Meat Solutions Corp. v. DeLeon*, 2014 WL 1496091 *5 (Iowa App. Apr. 16, 2014) (determining it could not be said that the Iowa Worker's Compensation Commissioner failed to consider "important and relevant" matters in reviewing "all medical opinions" before concluding that the claimant suffered a permanent work-related injury); *Hagen v. Iowa Dental Bd.*, 2013 WL 4769330 *5 (Iowa App. Sept. 5, 2013)(noting "a close reading

of the board's finding of fact reflect its consideration of [three key facts claimed by Hagen]" and disagreeing that these "mitigating circumstances" were either overlooked by the board or critical to the its decision making).

Argument. If we consider "propriety" to be the quality of being correct or proper, then it is understood that Petitioner's constitutional claims are absolutely relevant and important to the correctness of the consideration of his application and the appeal. The initial application sought a religious exemption. R. at 96-101. Respondent's denial made no mention of the religious claims or why they wouldn't be considered. R. at 103. The proposed decision defers the constitutional claims to the district court. R. at 163. And Respondent's final order confirms the constitutional claims will not be resolved. R. at 195.

No issue was more relevant and important to the consideration of Petitioner's claim and appeal than his free exercise, due process and equal protection claims. Considering the fact that the sincerity of Petitioner's religious belief was not and could not be disputed, the only legal issue before the agency was whether Chapters 124 and 124E were neutral laws of general applicability. It matters not that a ruling on this issue receives no deference on appeal. That should not be understood to mean Respondent has no authority to rule on Petitioner's claims.

Judicial efficiency is best served by having the agency fully address the constitutional issues. Otherwise, there would have been no meaningful reason to dismiss Polk No. CVCV062566 because the parties are now back in district court a year later with the issue still undecided, which is exactly what Petitioner predicted would happen.

Without a ruling, the exhaustion of administrative remedies has been nothing more than an exercise in futility.

In any event, because the final order failed to address the constitutional claims, it should be reversed.

BRIEF POINT III

THE DIRECTOR WAS NOT REQUIRED TO DENY PETITIONER'S APPLICATION.

Legal Standard. The action is not required by law and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest from that action that it must necessarily be deemed to lack any foundation in rational agency policy. *See* Iowa Code § 17A.19(10)(k) (2023).

Authorities. An agency's action may be reversed under section 17A.19(10)(k) only if the action is not required by law. *See Zieckler v. Ampride*, 743 N.W.2d 530, 533 (Iowa 2007)(concluding the Iowa Worker's Compensation Commissioner is required to adopt rules to implement a system of benefits, but is not required by law to adopt a rule mandating a dismissal of an intra-agency appeal as sanction for failing within 30 days to reimburse a nonappealing party for the cost of a hearing transcript).

Argument. The final agency action adopted the conclusions from the proposed decision. One conclusion was "[t]he clear and unambiguous language of both the statute and regulations *required* that the Department deny his application." R. at 162 (emphasis in original). However, neither the statute nor the regulations compel the denial of an application lacking the written certification of a debilitating medical condition. In fact, the clear and unambiguous language only makes the issuance of a card *permissive* even

in cases where the application includes the written certification. *See* Iowa Code § 124E.4 (2023) (providing "the department may issue a medical cannabidiol registration card to a patient who . . . submits a written certification . . . ."); Iowa Admin. Code r. 641–154.3(1) (same). "Inherent in the word 'may' is that the agency has discretion." *Endress v. Iowa Dep't of Human Servs.*, 944 N.W.2d 71 (Iowa 2020) (citing *State ex rel. Lankford v. Allbee*, 544 N.W.2d 639, 641 (Iowa 1996)).

If the agency has discretion to issue the medical cannabidiol registration card even when the application is accompanied by a written certification, then there is discretion to consider Petitioner's application, which contained the functional equivalent of a written certification regarding his sincerely held religious beliefs regarding the sacramental use of cannabis. Respondent was not required to deny the application.

Having shown that a denial is not required, Petitioner contends that the negative impact on his religious practice is so grossly disproportionate to the benefits accruing to the public interest of denying his application that the agency action must be considered lacking foundation in rational policy. The public is not harmed in the least by adding one more person to the roll of 17,500 other medical cannabidiol registration card holders participating in a highly regulated program. Petitioner is likely the *only* person in Iowa who can assert free exercise, due process and equal protection claims with respect to marijuana extracts under Chapter 124E. But the harm to the Petitioner is significant. That he is forced to seek any government authorization to practice his faith is manifestly anti-American in and of itself. Adding insult to injury, however, is the irony that Petitioner is denied equal access to marijuana extracts for lack of a qualifying medical condition while marijuana remains a controlled substance under both state and federal

schedule I because it has *no accepted medical use* in treatment in the United States or *lacks accepted safety for use in treatment under medical supervision*. Iowa Code § 124.203(1)(b) (2023) (emphasis added); 21 U.S.C. § 812(b)(1) (2023) (same).

It is also important to highlight that fact that the statute requires Respondent to adopt rules to "govern the manner in which the department shall consider applications for new and renewal medical cannabidiol registration cards." *See id*. § 124E.11(2)(a) (2023). Considering the state's long-standing religious exemption for peyote, the federal government's religious exemption for any controlled substance and the statutory authority to promulgate rules for considering these applications, the Department should consider Petitioner's constitutional claims rather than simply deny the application on a technicality.

BRIEF POINT IV

THE DIRECTOR OTHERWISE ACTED ARBITRARILY.

Legal Standard. The district court can reverse agency action that is otherwise unreasonable, arbitrary, capricious or an abuse of discretion. *See* Iowa Code § 17A.19(10)(n) (2023).

Authorities. "The term 'arbitrary' when applied to test the propriety of agency action means the action complained of was without regard to the law or consideration of the facts of the case." *Babka v. Iowa Dep't of Inspections and Appeals*, 967 N.W.2d 344 (Iowa App. 2021) (quoting *Norland v. Iowa Dep't of Job Serv*., 412 N.W.2d 904, 012 (Iowa 1987).

Argument. Respondent failed to consider the fact of Petitioner's bona fide religious belief regarding the sacramental use of cannabis. It also failed to apply these

facts to the law to determine whether Chapter 124 and 124E were underinclusive considering the secular exemption for marijuana extracts in Iowa. This results in arbitrary action by the agency.

CONCLUSION

The compelling interest test does not mean that every religious belief and practice will automatically trump every law that burdens it. What it does mean, however, is that before a law can be enforced in such a manner as to require a person to abandon his sincerely held religious beliefs, the Department should have a compelling reason that cannot be accomplished in some other way.

Petitioner is protected by the Free Exercise Clauses of both the State and federal constitutions. His religious beliefs are sincere and the use of marijuana as a sacrament is central to his religious beliefs. Chapters 124 and 124E are neither neutral nor generally applicable. A prohibition against the religious use of marijuana cannot be allowed unless it is narrowly tailored to serve a compelling governmental interest of the highest order. There is no sufficient governmental interest in the record before the court to restrict Appellant from exercising his religious belief while more than 17,500 other Iowans are permitted to access marijuana extracts for secular purposes.

Petitioner's constitutional claims are dispositive under section 17A.19(10)(a). However, the failure to address the constitutional claims, the needless denial of his application and the overall arbitrary nature of the final order here provide additional grounds for the district court to reverse the agency action and grant Petitioner a medical cannabidiol registration card.

Respectfully submitted,

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