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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CARL OLSEN, Petitioner, v. IOWA DEPARTMENT OF HEALTH AND HUMAN SERVICES, Respondent,	Case No. CVCV065114 **RESPONDENT'S JUDICIAL REVIEW BRIEF**

Respondent, Iowa Department of Health and Human Services (HHS), submits the following judicial review brief.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Is a statute setting a condition precedent to obtaining a medical CBD registration card neutral and generally applicable?

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Iowa Code chapter 124E
Iowa Code § 17A.19(4)(*b*)
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II. May an administrative agency deem a statute unconstitutional?

Authorities

Salsbury Labs. v. Iowa Dep't of Env'tl Quality, 276 N.W.2d 830 (Iowa 1979)
Endress v. Iowa Dep't of Human Servs., 944 N.W.2d 71, 83 (Iowa 2020)
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Bd. of Supervisors v. Iowa Civil Rights Comm'n, 584 N.W.2d 252, 258 (Iowa 1998)
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III. HHS "may" issue a medical CBD registration card when an applicant satisfies several statutory criteria. Does that language mean that HHS may also issue a card if the applicant *doesn't* satisfy the statutory criteria?

Authorities

Iowa Code § 124E.4(1)
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INTRODUCTION

"[P]olitical losers on the [legislative] battlefield can win only minor skirmishes in the bunkers of administrative law." *Alcaraz v. Block*, 746 F.2d 593, 603 (9th Cir. 1984). Here, despite Petitioner Carl Olsen's attempt to invalidate entire chapters of the Iowa Code (Olsen Br. at 1–8), this case is about considerably less than that. At most, it's a minor skirmish.

And HHS should prevail even there. Olsen sought a medical cannabidiol (CBD) registration card from HHS but did not submit a healthcare practitioner's certification as the statute requires. *See* Iowa Code § 124E.4(1)(*c*) (2021) (requiring a healthcare practitioner's certification of a debilitating medical condition); *see also id.* § 124E.2(2) (defining "debilitating medical condition"). Accordingly, HHS denied his application for a card. He now contends that denying him a medical CBD card unconstitutionally restricts his free exercise rights, and that HHS's inability to resolve his constitutional argument was prejudicial by itself. He also contends that denying him a medical CBD card must mean Iowa's entire cannabis (indeed, its entire controlled substance) possession framework must crumble.

That's not how administrative law works. The specific statutory provision under which HHS denied Olsen's application for a CBD registration card—which is the only provision at issue in this case—is neutral and generally applicable. It's just a condition precedent that Olsen didn't meet. And Olsen misunderstands both the mechanics of administrative law and the limits agencies have when handling matters before them. The Court should affirm.

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STATEMENT OF THE CASE

A. Medical CBD Regulatory Framework.

"Cannabidiol is found in the marijuana plant." *State v. Middlekauff*, 974 N.W.2d 781, 800 (Iowa 2022). "In 2014, the Iowa Legislature enacted its first Medical Cannabidiol Act before passing a more comprehensive Medical Cannabidiol Act in 2017." *Id.*; *see* Iowa Code § 124E.1. Under chapter 124E, "[s]pecific forms of medical cannabidiol" are approved by the board of medicine and adopted by HHS[1] through notice-and-comment rulemaking. *Middlekauff*, 974 N.W.2d at 800; *see* Iowa Code § 124E.2(10); Iowa Admin. Code r. 641—154.1.

"Iowans can apply for an Iowa medical cannabidiol card" issued by HHS "after obtaining a written certification from a healthcare practitioner." *Middlekauff*, 974 N.W.2d at 800. HHS "may issue" a medical CBD registration card "to a patient" who meets certain criteria, including the requirement of providing a healthcare practitioner's written certification "that the patient is suffering from a debilitating medical condition." Iowa Code § 124E.4(1)(*c*). The legislature directed HHS to adopt further rules governing the application and renewal process for medical CBD registration cards. *Id.* § 124E.11(2)(*a*).

[1] Chapter 124E initially placed these duties on the Iowa Department of Public Health—but that department is transitioning into a combined agency (with the Department of Human Services) known as HHS. *See* 2022 Iowa Acts ch. 1131, § 51. Because this case is captioned with HHS as the respondent, HHS is appropriately considered the successor to the Department of Public Health wherever applicable.

Under HHS's rules, a person may submit a medical CBD card application that includes required information such as age, residence, identity, and healthcare practitioner certification. *See generally* Iowa Admin. Code r. 641—154.3(1). HHS reviews these applications and issues a medical CBD card "[u]pon the completion, verification, and approval of the patient's application and the receipt of the required fee." *Id.* r. 641—154.3(2).

The verification and approval steps are important. HHS may deny an application for several reasons, including if it can't verify the applicant's identity or if the application contains "illegible, incomplete, falsified, misleading, deceptive, or untrue" information. *Id.* r. 641—154.6(1)–(2). But most relevant here, HHS may deny an application if the applicant "fails to satisfy any of the provisions of Iowa Code chapter 124E." *Id.* r. 641—154.6(3). A healthcare practitioner certification is a required provision of chapter 124E. *See* Iowa Code § 124E.4(1)(*c*).

If HHS denies an application for a medical CBD card, it informs the applicant in writing. Iowa Admin. Code r. 641—154.7(1). Denials are appealable and result in an agency contested case proceeding. *See id.* rs. 641—154.7(3) (providing for CBD card denial appeals to become a contested case), 641—173.26 (providing for a proposed agency decision or final agency decision depending on who hears the evidence in the contested case), 641–173.27 (providing for intra-agency appeals to the department director when applicable). Final agency decisions are then subject to judicial review under Iowa Code chapter 17A. *See* Iowa Code § 17A.19.

B. Olsen's History of Challenging Cannabis Regulations.

Olsen has sought legal authorization for his desired cannabis use for over forty years. In 1982, he "appealed from a conviction for possession of marijuana with intent to deliver," and the Iowa Supreme Court "considered and rejected his free-exercise-of-religion defense." *Olsen v. Mukasey (Olsen III)*, 541 F.3d 827, 830 (8th Cir. 2008); *see State v. Olsen (Olsen I)*, 315 N.W.2d 1, 7–9 (Iowa 1982). In 1982, as now, he contended that marijuana was an integral sacrament used in his religious practice. *See Olsen I*, 315 N.W.2d at 7. In 1984, another court concluded a "broad religious exemption from the marijuana laws" was not required for Olsen or other members of his church. *United States v. Rush*, 738 F.2d 497, 513 (1st Cir. 1984). In 1989, a federal court held "the free exercise clause does not compel . . . an exemption immunizing [Olsen and] his church from prosecution for illegal use of marijuana." *Olsen v. Drug Enforcement Admin. (Olsen II)*, 878 F.2d 1458, 1463 (D.C. Cir. 1989). And in 2008, the United States Court of Appeals for the Eighth Circuit held once again that other exceptions to other drug laws did not require a constitutional exception for Olsen's intended religious marijuana use. *Olsen III*, 541 F.3d at 832.

Of course, cannabidiol and marijuana are not necessarily coterminous. Medical cannabidiol is a pharmaceutical grade cannabinoid that is delivered in a recommended and approved form. Iowa Code § 124E.2(10). Nevertheless, chapter 124E defines "marijuana" to mean any derivative of marijuana, "including but not limited to medical cannabidiol." *Id.* § 124E.2(9); *see also Porter v. Harden*, 891

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N.W.2d 420, 427 (Iowa 2017) ("The legislature is, of course, entitled to act as its own lexicographer. . . ."). And this case is specifically about Olsen's application for a medical cannabidiol registration card.

C. Olsen's Application for a Medical CBD Registration Card.

Olsen applied for a medical CBD card on November 24, 2021. (Database Printouts, Agency Record [AR] at 93–95; Automated Email Confirmation, AR at 107.) The application did not contain a completed healthcare practitioner certification attesting to a debilitating medical condition. (Blank Healthcare Certification Forms, AR at 90–91; Response to Requests for Admission No. 2, AR at 108.) During the agency proceedings, Olsen acknowledged he in fact does not suffer from any debilitating medical condition within the meaning of Iowa Code section 124E.2(2). (Response to Requests for Admission No. 1, AR at 108.) Although Olsen's application did not include a healthcare practitioner's certification, it did include a personal declaration describing his religious use of cannabis as a member of the Ethiopian Zion Coptic Church and recounting Olsen's decades-long efforts to have marijuana reclassified, to obtain an exemption authorizing him to use it, or both. (Olsen Declaration, AR at 96–101.) Olsen stated he "can't prove cannabis saved [his] life, but it certainly helped." (AR at 96.)

On January 7, 2022, the Department of Public Health notified Olsen that because he did not submit a healthcare practitioner's certification, it could not approve his application for a medical CBD registration card. (1/7/22 Letter, AR at 103.) Olsen sought intra-agency appeal and a contested case. (1/20/22 Appeal

Letter, AR at 3.) An administrative law judge heard evidence, reviewed post-hearing briefs both Olsen and the Department submitted, and issued a Proposed Decision. (Proposed Decision, AR at 161–64.) The administrative law judge found Olsen's omission of a healthcare practitioner's certification meant he did not satisfy "one of the statutory pre-requisites to receiving a registration card" (Proposed Decision at 1–2, AR at 161–62), and accordingly that the Department properly denied his application. (Proposed Decision at 2, 4; AR at 162, 164.) The administrative law judge deferred consideration of Olsen's constitutional arguments because "it is well-settled that an administrative agency lacks authority to decide constitutional issues." (Proposed Decision at 3, AR at 163.)

Olsen sought review by the Department director. (Request for Review by Director, AR at 166–69.) On January 17, 2023, the director affirmed the Proposed Decision and adopted it as the Final Decision. (Director's Final Order at 3–4, AR at 194–95.) This judicial review proceeding is Olsen's appeal from that decision.

STANDARD OF REVIEW

In judicial review proceedings under Iowa Code chapter 17A, the district court acts in an appellate capacity. *Johnston v. Iowa Dep't of Transp.*, 958 N.W.2d 180, 183–84 (Iowa 2021). The petitioner must "particularize the grounds upon which they s[eek] relief." *Kohorst v. Iowa State Commerce Comm'n*, 348 N.W.2d 619, 621 (Iowa 1984).

Olsen's petition raises four grounds for reversal. He contends HHS's agency action denying his application for a medical CBD registration card was

(1) unconstitutional or based on a provision that is unconstitutional, *see* Iowa Code § 17A.19(10)(*a*) (Olsen Br. at 1–8); (2) the product of a decision-making process in which the agency did not consider a relevant and important matter, but should have, *see id.* § 17A.19(10)(*j*) (Olsen Br. at 9–11); (3) not required by law and has a grossly disproportionate negative effect on private rights, *id.* § 17A.19(10)(*k*) (Olsen Br. at 11–13); and (4) otherwise arbitrary, unreasonable, capricious, or an abuse of discretion, *see id.* § 17A.19(10)(*n*) (Olsen Br. at 13–14).

Although delineated as four issues, Olsen's assertions really boil down to three. *See Midwest Auto. III, LLC v. Iowa Dep't of Transp.*, 646 N.W.2d 417, 422 (Iowa 2002) ("The issues raised by Midwest Auto on appeal, although multi-faceted, can be placed into three general categories. . . ."). First, Olsen contends "chapters 124 and 124E" (Olsen Br. at 1) are unconstitutional. Second, he contends HHS erred in deferring rather than resolving his constitutional argument. Third, he contends HHS was not required to deny his petition—even though he did not meet a statutory condition—because of his purported constitutional justification. His fourth argument is that HHS acted arbitrarily because it "failed to consider" (Olsen Br. at 13) his constitutional justification—but that is just another way of stating his second argument.

De novo review is appropriate for the constitutional challenge. *See NextEra Energy Res. LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 44 (Iowa 2012). But "a statute will not be declared unconstitutional unless it clearly, palpably and without doubt infringes the constitution." *Hope Evangelical Lutheran Church v. Iowa Dep't of*

Revenue & Fin., 463 N.W.2d 76, 79 (Iowa 1990). And "the Free Exercise Clause does not guarantee the government's absolute noninterference with religion." *Mitchell Cty. v. Zimmerman*, 810 N.W.2d 1, 7 (Iowa 2012).

For the other challenges, the applicable standard of review is set forth in the plain language of chapter 17A. The Court may grant relief from agency action if "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. Iowa Code § 17A.19(10)(*j*). To obtain relief on this ground, Olsen must show that, (1) the agency did not consider a matter; (2) the matter it purportedly did not consider was relevant and important; and (3) a rational decision maker in similar circumstances would have considered it.

Further, Olsen's third challenge relies on the notion that relief is available if agency action is "[n]ot 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." *Id.* § 17A.19(10)(*k*) (emphasis added). "An agency's action may be reversed under section 17A.19(10)(*k*) only if the action is not required by law." *Zieckler v. Ampride*, 743 N.W.2d 530, 533 (Iowa 2007).

Ultimately, of course, Olsen bears "[t]he burden of demonstrating the required prejudice and the invalidity of agency action." Iowa Code § 17A.19(8)(*a*).

ARGUMENT

The proper scope of Olsen's challenge is significantly narrower than his brief attempts to make it. Olsen pled in his petition that the agency action he is appealing is "the January 17, 2023 decision denying his application for a medical cannabidiol registration card under Iowa Code chapter 124E." (Petition ¶ 1.) *See* Iowa Code § 17A.19(4)(*b*) (requiring judicial review petitions to state the "particular agency action appealed from"). That initial denial, affirmed on intra-agency appeal, indicated solely that Olsen's application was unsuccessful because Olsen did not satisfy Iowa Code section 124E.4(1)(*c*). (1/7/22 Letter, AR at 103; Proposed Decision at 2, AR at 162.) So *that* provision—section 124E.4(1)(*c*)—must be the "provision of law" that Olsen asserts "is unconstitutional on its face or as applied," Iowa Code § 17A.19(10)(*a*), because *that's the only provision* HHS applied in this case.

Olsen's brief, however, attempts to chop down a much larger swath of Iowa law. It contends two entire chapters of the Code—124 and 124E—are unconstitutional. But HHS didn't base its denial of Olsen's application on any provision of chapter 124—only on *one* provision in chapter 124E. So this case isn't, and can't be, about anything broader.

With that underbrush cleared, the path becomes much more defined. Agencies, which themselves are creatures of statute, do not have authority to do what Olsen asks and deem a statute unconstitutional either facially or as applied to him—so HHS did not err in declining to discuss his constitutional argument. *See* *Salsbury Labs. v. Iowa Dep't of Env'tl Quality*, 276 N.W.2d 830, 836 (Iowa 1979)

("Agencies cannot decide issues of statutory validity."). And HHS's discretionary ability to issue a medical CBD registration card when an applicant meets statutory criteria (through the word "may") necessarily implies that it *shall not* issue a card when an applicant doesn't meet the criteria.

The Court should affirm HHS's decision.

I. Conditioning receipt of a medical CBD registration card on providing a healthcare practitioner's certification is a neutral and generally applicable condition precedent to obtaining a government benefit, so the statute doesn't violate the Free Exercise Clause.

There are "public policy battles still swirling around the use of marijuana, hemp, tetrahydrocannabinol ("THC"), cannabidiol . . . , and related compounds." *State v. SASS Grp.*, 885 S.E.2d 761, 764 (Ga. 2023). That public policy arena—not this Court—is the proper place for much of what Olsen argues. For example, he contends Iowa Code chapter 124—which more generally prohibits possession and use of marijuana—is now unconstitutional or should be discarded given that the legislature passed chapter 124E. (Olsen Br. at 3.)

But *this proceeding* isn't about marijuana possession in general. Nor does it arise from a criminal prosecution for possession. Indeed, this proceeding didn't establish that Olsen cannot possess marijuana or related compounds; that was already established. Instead, this specific case is much narrower; it is about the denial of Olsen's specific application for a specific government benefit—a medical CBD registration card. That is the "particular agency action appealed from," Iowa Code § 17A.19(4)(*b*), and that fact necessarily limits what is properly at stake.

And in that regard, denying "benefits by a uniformly applicable statute neutral on its face is of a wholly different, less intrusive nature than affirmative compulsion or prohibition, by threat of penal sanctions, for conduct that has religious implications." *Bowen v. Roy*, 476 U.S. 693, 704 (1986) (plurality op.). That is a key difference between this case and all the caselaw Olsen relies on; in no sense does *this decision* "affirmatively compel [Olsen], by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that [he finds] objectionable for religious reasons." *Id.* at 703. Instead, it merely declines to afford him the ability to obtain and use medical CBD. The laws that *do* compel Olsen to refrain from religiously motivated conduct—namely, consuming cannabis—are not at issue in and weren't applied in this proceeding. The distinction is crucial. And understanding it reveals why the Court should reject Olsen's first ground for relief.

"[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). A three-part test (that separates neutrality into both facial neutrality and operational neutrality) governs the analysis. *See Mitchell Cty.*, 810 N.W.2d at 9–11. Enforcing neutral and generally applicable laws despite some impact on religion establishes the line between affording "an individual protection from certain forms of government compulsion" and affording that individual "a right to dictate the conduct of the Government's internal procedures." *Bowen*, 476 U.S. at 700.

Here, Olsen's attempt to obtain a medical CBD registration card—and his constitutional challenge to the statutory provision that prevents him from doing so—is merely an attempt to dictate the conduct of HHS's internal procedures. *See id.* Denying his application, standing alone, does not compel Olsen to do anything. Indeed, he was not *required* to seek a medical CBD registration card in the first place. *Cf. Korean Buddhist Dae Won Sa Temple v. Sullivan*, 953 P.2d 1315, 1346 (Haw. 1998) (concluding a Buddhist temple did not demonstrate a height restriction for buildings discriminated against religion, in part because "the Temple need not have chosen to purchase land and build within the R-5-zoned . . . district"). Rather, Olsen "seek[s] benefits from the Government" and "assert[s] that, because of certain religious beliefs, [he] should be excused from compliance with a condition that is binding on all other persons who seek the same benefits." *Bowen*, 476 U.S. at 703. But that type of religious objection "is far removed from the historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause." *Id.* The statute requiring a healthcare practitioner's certification is both neutral and generally applicable, satisfying the Free Exercise Clause and dooming Olsen's claim.

When a statute's "language is devoid of any religious references," the law is facially neutral. *Mitchell Cty.*, 810 N.W.2d at 10. Section 124E.4(1)(*c*) is devoid of any religious references. Accordingly, it is facially neutral.

Because "[f]acial neutrality is not determinative," *Church of the Lukumi Babalu Aye*, 508 U.S. at 534, the "next inquiry is whether the [law] is operationally

neutral." *Mitchell Cty.*, 810 N.W.2d at 10. To determine operational neutrality, the Court must determine whether the law impermissibly *targets* a religious practice. *See id.* But Olsen does not contend that chapter 124E is a legislative attempt "to discriminate invidiously" or covertly suppress religious beliefs (including his practice as a member of the Ethiopian Zion Coptic Church). *Bowen*, 476 U.S. at 703. Rather, chapter 124E carries out the legislature's intent to make medical CBD available on a limited basis to those with certified debilitating medical conditions. *Cf. Mitchell Cty.*, 810 N.W.2d at 10 (finding a county ordinance was operationally neutral when it was enacted "not to persecute members of a particular faith, but to protect" a multimillion dollar "investment in newly paved roads"). "[I]nescapably . . . the administration of complex programs requires certain conditions and restrictions," which justifies a "policy decision by a government that it wishes to treat all applicants alike" without regard to their religion. *Bowen*, 476 U.S. at 707. That's the effect section 124E.4(1)(*c*) has. It is operationally neutral.

Notably, section 124E.4(1)(*c*) sharply contrasts with the ordinances at issue in *Church of the Lukumi Babalu Aye*, where the record demonstrated that while a city passed a facially neutral ordinance, it did so specifically to prevent religious animal sacrifice by church members. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 540–41. The Free Exercise Clause prohibits that type of religious "targeting"—but does not prohibit laws that evince no legislative "antagonism . . . towards religion generally or towards any particular religious beliefs." *Bowen*, 476

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U.S. at 708. Section 124E.4(1)(*c*) is only the latter; it carries no legislative antagonism toward religion. It satisfies the requirement of operational neutrality.

The final prong of analysis is general applicability. "[T]he Free Exercise Clause appears to forbid the situation where the government accommodates secular interests while denying accommodation for comparable religious interests." *Mitchell Cty.*, 810 N.W.2d at 11. Here, section 124E.4(1)(*c*) does not accommodate secular exceptions. The statute requires a healthcare practitioner's certification; HHS applies that requirement uniformly. Unlike an ordinance that prohibits animal sacrifice to prevent cruelty to animals but authorizes extermination of pests and euthanasia for excess animals, *see Church of the Lukumi Babalu Aye*, 508 U.S. at 543–44; or an ordinance that seeks to prevent damage to public roads by prohibiting metal tractor tires used by practicing Mennonites, but that nevertheless authorizes school buses to use tire studs and ice grips on those roads, *see Mitchell Cty.*, 810 N.W.2d at 16, section 124E.4(1)(*c*) limits medical CBD registration cards to those with debilitating medical conditions—full stop. The statutory requirement for healthcare practitioner certification neither omits nor under-includes categories of behavior that undermine its purpose. *See Shumaker v. Ohio Dep't of Human Servs.*, 691 N.E.2d 690, 701 (Ohio Ct. App. 1996) ("[T]he rules . . . apply to all benefit recipients and do not selectively impose burdens on conduct motivated by religious belief."). Accordingly, the law is generally applicable.

Bowen is instructive. There, the United States Supreme Court clarified that conditioning receipt of government benefits on satisfying a statutory condition

implicates only "the freedom of individual conduct," not "the freedom of individual belief." *Bowen*, 476 U.S. at 699. And it ultimately held the government could require family aid or food stamp applicants to provide a Social Security number despite a religious objection that using a "Social Security number as an identifier" would "serve to 'rob the spirit' of [a young child] and prevent her from attaining greater spiritual power." *Id.* at 696, 703. "The requirement that applicants provide a Social Security number is facially neutral and applies to all applicants for the benefits involved." *Id.* at 708. The "refusal to grant . . . a special exemption" from that condition "does not violate the Free Exercise Clause." *Id.* at 712.

Several cases from other jurisdictions further confirm that placing a uniform condition on obtaining a governmental benefit—a permit, a license, or some other benefit—does not violate the Free Exercise Clause. *See, e.g.*, *Valov v. Dep't of Motor Vehicles*, 34 Cal. Rptr. 3d 174, 183 (Ct. App. 2005) (holding government can require a photograph to issue a driver's license despite a religious objection to photographs); *Korean Buddhist Dae Won Sa Temple*, 953 P.2d at 1344–47 (holding government can require religious buildings to comply with zoning regulations imposing height restrictions); *Shumaker*, 691 N.E.2d at 692, 697–702 (holding government can require benefit applicants to sign application "under penalty of perjury" despite religious objection that such language constitutes "swearing" prohibited by the Bible).

"[G]overnment regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is

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wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons." *Bowen*, 476 U.S. at 706. This case is about Olsen attempting to secure a governmental benefit. Legislation that criminalizes religiously inspired activity is not at issue in this case, and the provision that *is* at issue is both neutral and generally applicable. The Court should reject Olsen's Free Exercise claim and affirm HHS's conclusion that Olsen did not meet the statutory requirements for a medical CBD registration card.

II. HHS doesn't have legal authority to deem a statute unconstitutional, so it didn't prejudice Olsen for HHS to defer his constitutional argument to the district court.

"Agencies cannot decide issues of statutory validity." *Salsbury Labs.*, 276 N.W.2d at 836. Although judicial review petitioners must raise constitutional arguments at the agency level to preserve error, the agency cannot decide them. *See, e.g.*, *Endress v. Iowa Dep't of Human Servs.*, 944 N.W.2d 71, 83 (Iowa 2020) ("DHS lacked authority to decide . . . constitutional issues."); *McCracken v. Iowa Dep't of Human Servs.*, 595 N.W.2d 779, 785 (Iowa 1999) ("[T]he agency lacks authority to decide constitutional issues."); *Soo Line R.R. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 688 (Iowa 1994) (acknowledging "the agency's lack of authority to decide constitutional questions"). Even the case Olsen relies on recognizes "the agency's lack of authority to make constitutional determinations." *Shell Oil Co. v. Bair*, 417 N.W.2d 425, 430 (Iowa 1987).

While Olsen contends HHS should have considered and resolved his constitutional arguments,[2] he overlooks that HHS *legally couldn't*. HHS could not determine that the statute requiring a healthcare practitioner's certification constitutionally required a religious exemption or substitute for Olsen, "because it is exclusively up to the judiciary to determine the constitutionality of legislation." *ABC Disposal Sys. v. Dep't of Natural Res.*, 681 N.W.2d 596, 605 (Iowa 2004). In turn, it cannot be prejudicial within the meaning of chapter 17A for HHS to recognize the limits of its legal authority and stay within them.

What's more, even if the Court concludes HHS should have discussed Olsen's constitutional argument in greater detail, that *still* doesn't mean Olsen is entitled to reversal and automatic issuance of a medical CBD registration card. (Olsen Br. at 11.) Rather, the remedy would be vacatur and remand for HHS to issue a new decision containing constitutional analysis. *See, e.g.*, *Bd. of Supervisors v. Iowa Civil Rights Comm'n*, 584 N.W.2d 252, 258 (Iowa 1998) (prescribing "remand . . . to the agency for further consideration"); *Gaffney v. Dep't of Emp't Servs.*, 540 N.W.2d 430, 435 (Iowa 1995) (prescribing "remand . . . to the agency for a new ruling, on the record already made"); *Off. of Consumer Advocate v. Iowa State Commerce Comm'n*, 432 N.W.2d 148, 156 (Iowa 1988) ("On judicial review of administrative action, a court has no original authority to declare parties' rights. . . .").

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[2] Olsen asserts "his free exercise, due process and equal protection claims" were the most "relevant and important" parts of considering his application for a medical CBD registration card. (Olsen Br. at 10.) But he pled (Petition ¶ 4) and briefed *only* a free exercise claim in this Court. Therefore, any due process or equal protection claims are no longer in play.

The Court should reject Olsen's second ground for relief.

III. The fact that HHS "may" issue a medical CBD registration card if an applicant meets all the statutory criteria necessarily implies that HHS *can't* issue a card if the applicant doesn't meet the criteria.

HHS "may issue a medical cannabidiol registration card to a patient" who satisfies five statutory criteria. Iowa Code § 124E.4(1). And by rule, HHS may deny an application for a medical CBD registration card if the applicant—as Olsen undisputedly did here—"fails to satisfy any of the provisions of Iowa Code chapter 124E" or the rules duly promulgated under it. Iowa Admin. Code r. 641—154.6(3). Olsen squarely fits within the denial criteria because he expressly acknowledges he does not suffer from a debilitating medical condition within the meaning of Iowa Code section 124E.2(2).

But Olsen contends the word "may" means HHS had discretion to issue him a registration card anyway. So the argument goes, if HHS had discretion—and the word "may" indicates it did—then it could have used that discretion to issue him a card even though he didn't meet the statutory criteria. (Olsen Br. at 12.)

Agency discretion is not so boundless. If the inclusion of the word "may" means HHS could issue a registration card to a person not meeting the statutory criteria, then the criteria would be ineffectual and superfluous. The Court should "not interpret statutes so they contain surplusage." *Thomas v. Gavin*, 838 N.W.2d 518, 524 (Iowa 2013).

A better understanding of the word "may" in section 124E.4 is that HHS could exercise its discretion to *deny* an application even if the applicant facially

appears to meet all the statutory criteria. *See Lenning v. Iowa Dep't of Transp.*, 368 N.W.2d 98, 101 (Iowa 1985) ("[T]he word 'may' in the first line . . . with the provisions that follow suggests that, if an applicant meets the need criteria which are specified, then, but only then, may the agency exercise its discretion in determining whether a restricted license may be granted."). For example, perhaps the application appears to satisfy all the statutory criteria, but in reviewing it, HHS discovers the information in it "is illegible, incomplete, falsified, misleading, deceptive, or untrue." Iowa Admin. Code r. 641—154.6(1). Or perhaps the application facially contains the patient's name and photo identification, *see* Iowa Code § 124E.4(1)(*d*)(1)–(2), but HHS "is unable to verify" their identity. Iowa Admin. Code r. 641—154.6(2) . In these scenarios, the word "may" in section 124E.4 becomes operational because HHS must retain the ability to deny an application even if the application appears to satisfy the criteria.

Put another way, the word "may" in section 124E.4 is a one-way valve. *Cf. Des Moines Reg'l Transit Auth. v. Young*, 867 N.W.2d 839, 848 (Iowa 2015) (Hecht, J., dissenting) ("Every square is a rectangle, but not every rectangle is a square."). The statute authorizes HHS to deny an application in its discretion, but not to grant one where the statutory criteria aren't met. *See Lenning*, 368 N.W.2d at 101 ("It remains . . . within the discretion of the agency whether a particular applicant whose need has been established shall be granted a temporary restricted license."); *see also Kopecky v. Iowa Racing & Gaming Comm'n*, 891 N.W.2d 439, 443–44 (Iowa 2017) (concluding an agency could only issue a gambling license to a prospective

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casino licensee if the county first passed an affirmative referendum—but was not *required* to issue a license even if the referendum passed and could not issue one if the referendum failed). When an applicant does not meet minimum statutory criteria, an agency can't grant the requested benefit (a license, a registration card, or whatever else). Denial was required under the circumstances. The Court should reject Olsen's third ground for relief. *See Zieckler*, 743 N.W.2d at 533.

CONCLUSION

"[C]laims of religious conviction do not automatically entitle a person to fix unilaterally the conditions and terms of dealings with the Government. Not all burdens on religion are unconstitutional." *Bowen*, 476 U.S. at 701. The statute requiring medical CBD registration card applicants to provide a healthcare practitioner's certification is a permissible, neutral, and generally applicable regulation. Olsen's broader concerns about general prohibitions on marijuana possession and use are not properly part of this proceeding and are policy matters more appropriate for consideration by the legislature. The Court should affirm.

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