IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CARL OLSEN, Petitioner, v. STATE OF IOWA, Respondent.	Case No. CVCV062566 **Brief in Support of Respondent's Motion to Dismiss**

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INTRODUCTION

Throughout the last several decades, Petitioner Carl Olsen has made many attempts to secure legal access to marijuana for his religious use. *See Olsen v. Drug Enforcement Admin.*, 332 F. App'x 359 (8th Cir. 2009); *Olsen v. Mukasey*, 541 F.3d 827 (8th Cir. 2008); *Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458 (D.C. Cir. 1989); *United States v. Olsen*, 823 F.2d 542 (1st Cir. 1987);

Olsen v. State of Iowa, 808 F.2d 652 (8th Cir. 1986); *Olsen v. Drug Enforcement Admin.*, 776 F.2d 267 (11th Cir. 1985); *United States v. Rush*, 738 F.2d 497 (1st Cir. 1984); *Olsen v. Holder*, 610 F.Supp.2d 985 (S.D. Iowa 2009); *Olsen v. United States*, Civil No. 07-34-B-W, 2007 WL 1100457 (D. Maine April 10, 2007); *Olsen v. State of Iowa*, Civ. No. 83-301-E, 1986 WL 4045 (S.D. Iowa March 19, 1986); *State v. Olsen*, 315 N.W.2d 1 (Iowa 1982); *State v. Olsen*, 293 N.W.2d 216 (Iowa 1980). In each instance, the court has rejected Olsen's assertion that he should be allowed to use marijuana as part of the practice of his religion despite laws that make marijuana illegal.

Olsen's latest attempt in this Petition fares no better than his previous. For starters, he brings this declaratory judgment action against the State of Iowa. But the State is protected by sovereign immunity. This dooms Olsen's Petition and requires its dismissal.

Even if the Court could look past this fatal defect, his Petition fails to state a claim. Iowa's marijuana and medical cannabidiol laws are neutral and generally applicable. Thus, they do not violate the First Amendment or article 1, section 3, of the Iowa Constitution. This Petition must be dismissed.

FACTUAL BACKGROUND

Olsen belongs the Ethiopian Zion Coptic Church. Pet. ¶ 9. His sincerely held religious beliefs include "[t]he sacramental, non-drug use of cannabis in bona fide religious worship." *Id.* ¶ 10. He stopped using cannabis as a sacrament a couple decades ago, but now wishes "to resume his religious practice in a manner consistent with the secular use of cannabis extracts" permitted under Iowa's medical cannabidiol laws. *Id.* ¶ 11.

Marijuana has been a Schedule I controlled substance in Iowa since 1971. *Cassady v. Wheeler*, 224 N.W.2d 649, 652 (Iowa 1974). In 2014, the Iowa legislature enacted the Medical Cannabidiol Act, which created Iowa's medical

cannabidiol program administered by the Iowa Department of Public Health. The Act is currently codified in chapter 124E. Medical cannabidiol is defined as "any pharmaceutical grade cannabinoid found in the plant Cannabis sativa L. or Cannabis indica or any other preparation thereof that is delivered in a form recommended by the medical cannabidiol board, approved by the board of medicine, and adopted by the department pursuant to rule." Iowa Code § 124E.2(10). The Act authorizes patients with specific debilitating medical conditions to legally access medical cannabidiol through the Department's highly regulated program even though it would otherwise be a Schedule I controlled substance. *See* Iowa Code §§ 124.101(20), 124.204(4)(m), 124E.2(9).

Olsen filed this suit to seek a declaratory judgment against the State of Iowa that he can purchase, possess, and use medical cannabidiol through the Department's medical cannabidiol program for bona fide religious purposes and to raise the same affirmative defenses that are available to patients and their primary caregivers under chapters 124 and 124E. Pet. ¶ 5.

LEGAL STANDARD FOR MOTION TO DISMISS

Rule 1.421 of the Iowa Rules of Civil Procedure authorizes a pre-answer motion to dismiss for "[f]ailure to state a claim upon which any relief may be granted." Iowa R. Civ. P. 1.421(1)(f). Motions to dismiss test "the legal sufficiency of the challenged pleading." *Southard v. Visa U.S.A., Inc.*, 734 N.W.2d 192, 194 (Iowa 2007). A motion to dismiss "accept[s] as true the petition's well-pleaded factual allegations, but not its legal conclusions." *Shumate v. Drake Univ.*, 846 N.W.2d 503, 507 (Iowa 2014). A motion to dismiss must be granted "when the petition's allegations, taken as true, fail to state a claim upon which relief may be granted." *Id.*

ARGUMENT

I. This suit against the State of Iowa must be dismissed because it is barred by sovereign immunity.

Olsen named a sole defendant in his Petition—the State of Iowa. Pet. ¶ 2. This dooms his case because sovereign immunity bars suits against the State brought under either the state or federal constitution absent the State's consent.

"[T]he States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments." *Alden v. Maine*, 527 U.S. 706, 713 (1999). The United States Supreme Court has thus held that this sovereign immunity protects states from suit under the U.S. Constitution or federal law—even in state court—absent valid abrogation by congressional statute or waiver by the state. *Id.* at 754–55; *see also Lee v. State*, 815 N.W.2d 731, 737–39 (Iowa 2012). Likewise, the Iowa Supreme Court has repeatedly recognized "that in the absence of specific consent by the State, it or its agencies may not be sued in an action to obtain money from the State, or to interfere with its sovereignty or the administration of its affairs." *Collins v. State Bd. of Social Welfare*, 81 N.W.2d 4, 6 (Iowa 1957); *see also Hoover v. Iowa State Highway Cmm'n*, 222 N.W. 428, 440 (Iowa 1928) (describing "the general and well-recognized rule that the state cannot be sued without its consent").

Olsen doesn't sue under any federal statute, so he cannot contend that the State's sovereign immunity has been validly abrogated by Congress to permit it. And he doesn't sue under any Iowa statute that has waived sovereign immunity, such as the Iowa Administrative Procedure Act or the Iowa Tort Claims Act. *See* Iowa Code chs. 17A, 669. And the State is not consenting to

this suit—it seeks to dismiss it here because it has not waived its sovereign immunity.

True, declaratory or prospective injunctive relief may be available against state officials to remedy violations of the federal of state constitutions. *See Lee v. State*, 844 N.W.2d 668, 677 (Iowa 2014) (holding that relief against state officials under *Ex parte Young*, 209 U.S. 123 (1909), can be sought in state court); *Collins*, 81 N.W.2d at 6 (holding that state officials were not immune to declaratory judgment suit based on state and federal constitution because "no judgment against the State is sought"); *Hoover*, 222 N.W. 438 (permitting suit against officials). But Olsen hasn't sued any individual state officials. He sued only the State. Pet. ¶ 2. And *this* he cannot do. His Petition must be dismissed.

II. Even if brought against a proper party, Olsen's suit fails to state a claim because Iowa's marijuana and medical cannabidiol laws are neutral and generally applicable.

Setting aside the State's immunity from suit, the Petition should still be dismissed for failure to state a claim. Dismissal at this stage is appropriate because the Court can accept the facts set forth in the Petition as true and still legally conclude that Olsen's claims must fail. The Court can assume at this stage that Olsen's religion is protected by the Free Exercise Clause and that his religious beliefs are sincere and the use of marijuana sacrament central to his religion.

The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1876 (2021). The Free Exercise Clause, however, "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the

law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S.252, 263 (1982) (Stevens, J., concurring)). The analysis of a free exercise claim begins with a determination of whether or not the challenged law is a neutral law of general applicability governed by *Smith*.

The Iowa Supreme Court has followed a three-step framework for analyzing whether a law is a neutral law of general applicability. *See Mitchell Cnty. v. Zimmerman*, 810 N.W.2d 1, 9–11 (Iowa 2012). First, a court considers whether the law is facially neutral. *Id.* at 9. If a law is facially neutral, a court next considers whether the law is operationally neutral. *Id.* at 10. If a law is operationally neutral, a court finally considers whether the law is generally applicable. *Id.* at 11.

If a court finds the challenged law satisfies all three of these tests, then *Smith* governs and the free exercise claim must fail. *Id.* at 8–9. If a court finds the challenged law fails any of these three tests, then the court must analyze whether the challenged law can pass constitutional muster under a strict scrutiny analysis. *Id.* A law can survive strict scrutiny if it advances interests of the highest order and is narrowly tailored to achieve those interests. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

As set forth below, Olsen fails to state a claim because the pertinent laws are neutral laws of general applicability. The Free Exercise Clause does not prohibit a state from enforcing a regulatory law that is both neutral and generally applicable. *Mitchell Cnty.*, 810 N.W.2d at 8.

A. The Court's analysis should focus on the law prohibiting the religious conduct.

A threshold question is which law should be analyzed using the tests set forth above. The law that prohibits Olsen from engaging in the sacramental

use of marijuana is Iowa Code section 124.204(4)(m), which places marijuana in Schedule I of the Iowa Controlled Substances Act. Iowa Code section 124.401 establishes criminal penalties for the unlawful possession of marijuana.

Pursuant to Iowa Code chapter 124E, the legislature has authorized Iowans with specific debilitating medical conditions to legally access medical cannabidiol. Medical cannabidiol falls under the definition of marijuana in Iowa Code section 124.101(20), and is therefore a Schedule I controlled substance. A patient must be issued a medical cannabidiol registration card by the Iowa Department of Public Health to be eligible to purchase medical cannabidiol. Iowa Code § 124E.4. Medical cannabidiol can only purchased from a medical cannabidiol dispensary licensed by the Department. Iowa Code § 124E.9. To be eligible for a medical cannabidiol card, a patient must have one of the debilitating medical conditions listed in statute and a licensed health care practitioner who has a relationship with the patient must provide written certification identifying the patient's debilitating medical condition. Iowa Code §§ 124E.2, 124E.3. With a valid medical cannabidiol registration card, a patient is authorized to purchase a limited quantity of medical cannabidiol from a licensed dispensary. Iowa Code § 124E.9(14). A patient may only exceed the quantity limits set forth in Iowa Code section 124E.9(14) if the patient's health care practitioner certifies that the patient is terminally ill or that the maximum amount of medical cannabidiol authorized by law is insufficient to treat the patient's debilitating medication condition. Iowa Code § 124E.9(15).

Because medical cannabidiol remains a Schedule I controlled substance, Iowa Code section 124E.12 provides an affirmative defense to criminal prosecution for the charge of unlawful possession of marijuana to a patient in possession of medical cannabidiol with a valid medical cannabidiol registration card. In addition, Iowa Code section 124.401(5) provides that "[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."

The laws cited herein are the pertinent laws for the Court to analyze in evaluating neutrality and general applicability.

B. The pertinent laws are both facially and operationally neutral.

"The most basic requirement of neutrality is 'that a law not discriminate on its face.'" *Mitchell Cnty.*, 810 N.W.2d at 9 (quoting *Lukumi*, 508 U.S. at 533)). "'A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* The laws governing marijuana in Iowa are indisputably facially neutral—they do not reference religion in any way.

To determine operational neutrality, a court must "look beyond the language" to determine whether there is a religious practice being targeted for discriminatory treatment. *Id.* at 10. In all of Olsen's prior cases, there has never been an allegation that laws placing marijuana in Schedule I were passed to target the religious practices of the members of the Ethiopian Zion Coptic Church. This stands in sharp contrast to the ordinances at issue in *Lukumi*, wherein the City of Hialeah passed ordinances to prohibit religious animal sacrifice by members of the Santeria church. 508 U.S. at 527–28. Although the ordinances themselves did not explicitly reference religion or the Santeria church, the record overwhelming established that the city council members passed the ordinances specifically to prevent religious animal sacrifice by church members. The Supreme Court held that a facially neutral

law is not neutral if the objective of the law is to infringe on certain practices due to religious motivation. *Id.* at 533.

Given that Iowa—along with the federal government and the remaining 49 states—enacted laws classifying marijuana as a Schedule I controlled substance to prevent drug abuse and promote the public health—and not to hinder the religious practices of the Ethiopian Zion Coptic Church—there can be no dispute that the laws are operationally neutral.

C. The pertinent laws are generally applicable.

> A law fails the general applicability requirement if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated.

Mitchell Cnty. at 13 (quoting *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3rd Cir. 2004)). "[F]ederal courts have generally found laws to be neutral and generally applicable when the exceptions, even if multiple, are consistent with the law's asserted general purpose." *Id.* at 13.

The purpose of classifying marijuana as a Schedule I controlled substance was to prevent drug abuse and protect the public health. *See* Iowa Code § 124.201 (setting forth the factors to consider in making scheduling recommendations); *State v. Olsen*, 315 N.W.2d at 8-9. This purpose applies universally to the numerous controlled substances listed in the five schedules set forth in chapter 124.

Olsen is specifically requesting a lawful right to purchase, possess, and use medical cannabidiol for religious purposes in accordance with Iowa Code chapter 124E. Admittedly, Iowa Code chapter 124E does provide an exception to the general law that marijuana is illegal. But it doesn't follow that the laws making marijuana illegal are not generally applicable. Iowa's Medical

Cannabidiol Act provides for controlled access to a controlled substance for the purpose of medical treatment. The highly regulated access to medical cannabidiol is akin to the familiar concept of authorized prescriptions for controlled substances.

As previously stated, Iowa's Controlled Substances Act establishes criminal penalties for the possession of a controlled substance. Iowa Code § 124.401. But chapter 124 also makes it lawful for an individual to possess a controlled substance if prescribed or furnished by a licensed health care professional for a legitimate medical purpose. Iowa Code § 124.401(5). For example, the possession of hydrocodone, a Schedule II controlled substance, is illegal for someone who does not have a prescription for it, while the possession of hydrocodone is legal for someone who has a valid prescription. Why? Because a licensed health care professional has determined that a patient under their care has a medical need for hydrocodone. The prescribing of controlled substances occurs in a highly regulated environment, with regulation by the federal Drug Enforcement Administration, the Iowa Board of Pharmacy, and the various licensing boards established under Iowa Code chapter 147 that license health care practitioners with prescriptive authority.

Iowa's Medical Cannabidiol Act—the "exception" at play in this case—is analogous to the allowance in chapter 124 for access to controlled substances via prescription for a medical reason. Neither chapter 124 nor chapter 124E establish a system of government assessment of individual exemptions. Rather, they establish the allowance for medical use of controlled substances as authorized by a patient's health care provider. This medical allowance—or "favored secular conduct"—is categorically unique. It allows health care providers to authorize treatment of medical conditions using controlled substances. Chapter 124E does not authorize use of marijuana outside of a

medical context. Use of a controlled substance for medical treatment does not undermine the goals of the Controlled Substances Act to prevent drug abuse and protect the public health. Society has recognized that tightly controlled access to controlled substances is a cornerstone of medical care. Because of the nature of this excepted category of use, the laws prohibiting the use of marijuana outside of the medical context remain generally applicable and the State can refuse to extend access to medical cannabidiol to individuals with a religious hardship. A contrary finding would allow a person to seek access to a controlled substance of their choosing, such as hydrocodone, for religious use.

Because the laws making marijuana generally illegal, except for medical purposes as set forth in chapter 124E, are neutral and of general applicability, they "need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Lukumi*, 508 U.S. at 531. The Free Exercise Clause does not relieve someone of obligation to comply with a valid and neutral law of general applicability. *Smith* at 879–80. Olsen must thus comply with the provisions of chapter 124 that prohibit him from possessing any controlled substance unless he is authorized to for medical reasons by a treating health care provider and does so in accordance with the provisions regulating medical use that are set forth in chapter 124 for controlled substances in Schedules II-V, and in chapter 124E for medical cannabidiol, respectively.

CONCLUSION

For these reasons, Olsen's Petition for Declaratory Judgment should be dismissed for failure to state a claim under Rule 1.421 of the Iowa Rules of Civil Procedure.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

/s/ Samuel P. Langholz
SAMUEL P. LANGHOLZ

/s/ Laura Steffensmeier
LAURA STEFFENSMEIER
Assistant Attorneys General
Iowa Department of Justice
1305 E. Walnut Street, 2nd Floor
Des Moines, Iowa 50319
Phone: (515) 281-5164
Fax: (515) 281-4209
sam.langholz@ag.iowa.gov
laura.steffensmeier@ag.iowa.gov

ATTORNEYS FOR RESPONDENT

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties of record by delivery in the following manner on November 23, 2021:

☐ U.S. Mail	☐ FAX
☐ Hand Delivery	☐ Overnight Courier
☐ Federal Express	☐ Other
☒ EDMS	

Signature: */s/ Samuel P. Langholz*