IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CARL OLSEN, Petitioner, v. IOWA DEPARTMENT OF PUBLIC HEALTH, Respondent.	Case No. CVCV062566 **Brief in Support of Respondent's Motion to Dismiss Amended Petition**

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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 now seeks a declaratory judgment that the Iowa Department of Public Health must issue him a medical cannabidiol registration card so that he may use medical cannabidiol for religious purpose rather than medical ones. He claims that failing to do so would violate the Free Exercise clauses of the First Amendment and article 1, section 3, of the Iowa Constitution. But this latest attempt fares no better than his previous.

For starters, this amended petition remains procedurally defective. The Department has already denied Olsen's application for a registration card. And Olsen is currently appealing that denial through the Department's administrative appeals process. Until that process is complete, Olsen has failed to exhaust his administrative remedies. And his challenge to the Department's denial must be brought as a judicial review proceeding under chapter 17A. Both these defects doom Olsen's amended petition and require its dismissal.

Even if the Court could look past these fatal defects, the amended petition still fails to state a claim. Iowa's marijuana and medical cannabidiol laws are neutral and generally applicable. Thus, they do not violate the United States or Iowa constitutions. This case must be dismissed.

FACTUAL BACKGROUND

Olsen belongs the Ethiopian Zion Coptic Church. Am. 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). Those patients apply to the Department to obtain a medical cannabidiol registration card. *See* Iowa Code § 124E.4.

Olsen first filed this suit seeking a declaratory judgment against the State of Iowa that he could 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. *See* Pet. at

4 ¶ 1–4. The State moved to dismiss the suit because the State is protected by sovereign immunity. *See* Motion to Dismiss ¶ 2 (Nov. 23, 2021).

The next day, Olsen applied for a medical cannabidiol registration card from the Department. Am. Pet. ¶ 12. Six weeks later, the Department denied the application and informed Olsen of his right to appeal its decision. *Id.* ¶ 13, Ex. 2. Olsen filed a timely request for an appeal on January 20, 2022. *See id.* ¶ 14 (indicating his intent to appeal); Exhibit A (Olsen Appeal Request). The Department's denial decision will now be reviewed through a contested case proceeding before an independent administrative law judge. *See* Iowa Admin. Code r. 641-154.7; *see also id.* ch. 641-173.

And in response to the motion to dismiss, Olsen filed this amended petition naming the Iowa Department of Public Health instead of the State. *See* Am. Pet. ¶ 2. He also focuses his requested declaratory judgment more narrowly on the Department's issuance of a registration card. He now seeks only a declaration that "[t]he Department shall consider Olsen's religious use of cannabis as a qualifying condition under Iowa Code section 124E.2(2) and, thereafter, respond to Olsen's application for a registration." Am. Pet. at 4 ¶ 1.

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 Iowa Department of Public Health must be dismissed because judicial review under chapter 17A is the exclusive means of challenging the Department's denial of a medical cannabidiol registration card and Olsen has failed to exhaust his administrative remedies.

Judicial review is the exclusive way to challenge agency action unless a statute referencing Iowa Code chapter 17A expressly states otherwise. *See* Iowa Code § 17A.19; *Iowa Farm Bureau Fed'n v. Env't Prot. Comm'n*, 850 N.W.2d 403, 431 (Iowa 2014) ("The IAPA establishes the exclusive means for a person or party adversely affected by agency action to seek judicial review."). Unless a statute expressly states otherwise, there is no exception to the exclusivity of judicial review for certiorari, declaratory judgment, or injunction. *Salsbury Labs. v. Iowa Dep't of Env't Quality*, 276 N.W.2d 830, 835 (Iowa 1979).

Indeed, in the absence of the waiver of sovereign immunity by chapter 17A or some other statute, a state agency—like the Department—is immune from suit the same as the State itself. *See Collins v. State Bd. of Social Welfare*, 81 N.W.2d 4, 6 (Iowa 1957) ("[I]n 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."); *see also Alden v. Maine*, 527 U.S. 706, 713 (1999) ("[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.").

Here, Olsen seeks a declaratory judgment that the Department must grant him a registration card under Iowa's medical cannabidiol program. Am. Pet. at 4 ¶ 1. In fact, he has already applied to the Department for the card.

Am. Pet. ¶ 12. The Department has denied his application. *Id.* ¶ 13, Ex. 2. And Olsen is appealing that decision through the Department's administrative appeals process. *See id.* ¶ 14 (indicating his intent to appeal); Exhibit A (Olsen Appeal Request). The statute authorizing the medical cannabidiol program does not provide another method of judicial review aside from the exclusive review under chapter 17A. *See* Iowa Code ch. 124E. And thus chapter 17A is "the exclusive means by which" Olsen may seek judicial review of the Department's action. Iowa Code § 17A.19.

Requiring Olsen to follow the proper procedures won't prejudice him in any way. In a judicial review proceeding under chapter 17A, a court "shall reverse, modify, or grant other appropriate relief from agency action . . . , if it determines that substantial rights of the person seeking judicial relief have been prejudiced because the agency action is . . . [u]nconstitutional on its face or as applied or is based upon a provision of law that is unconstitutional on its face or as applied." Iowa Code § 17A.19(10)(a). Thus, if Olsen is correct that either constitution requires that he be issued a medical cannabidiol registration card, he could obtain that relief from a judicial review proceeding under chapter 17A. And because that is the exclusive means of seeking review of agency action, this original proceeding seeking a declaratory judgment must be dismissed.

But even a judicial review action under chapter 17A is premature now because Olsen must exhaust administrative remedies before seeking judicial review. "A person or party who has exhausted all adequate administrative remedies and who is aggrieved or adversely affected by any final agency action is entitled to judicial review thereof under this chapter." Iowa Code § 17A.19(1). The doctrine of exhaustion of administrative remedies provides a person may obtain judicial review of agency action only after that action is

officially sanctioned and thereafter reviewed within the agency to the fullest extent provided by law. *North River Ins. Co. v. Iowa Div. of Ins.*, 501 N.W.2d 542, 545 (Iowa 1993); *see also City of Des Moines v. City Dev. Bd.*, 633 N.W.2d 305 (Iowa 2001) (noting that the doctrine of exhaustion of administrative remedies "exists principally to prevent courts from interfering with the administrative process until it has been completed").

The Department's rules provide for a contested case hearing on appealed application denials. *See* Iowa Admin. Code r. 641-154.7; *see also id.* ch. 641-173. Indeed, Olsen has already started that process by appealing his denial and requesting a hearing. *See* Am. Pet. ¶ 14 (indicating his intent to appeal); Exhibit A (Olsen Appeal Request). Olsen must first exhaust his administrative remedies by completing this administrative appeal process before seeking judicial intervention. *See Wells Pharmacy Network, L.L.C. v. Iowa Bd. of Pharmacy*, No. 16-1084, 2017 WL 5178459 (Iowa Ct. App. Nov. 8, 2017); *Blecher v. Iowa Bd. of Educ. Exam'rs*, Nos. 99-479, 99-736, 98-2230, 2000 WL 18849 (Iowa Ct. App. Jan. 12, 2000). In that contested case proceeding, he will have an opportunity to present evidence and to make legal arguments, including constitutional arguments, before an independent administrative law judge. *See* Iowa Admin. Code ch. 641-173; *see also* Iowa Code § 17A.11–17.

In *Shell Oil Co. v. Bair*, the Iowa Supreme Court considered whether agency proceedings may be bypassed by bringing an original action to challenge the constitutionality of a statute. 417 N.W.2d 425 (Iowa 1987). The Court held "where the constitutional issue sought to be raised directly affects a matter pending before an agency, administrative exhaustion should ordinarily precede a judicial inquiry into the statute's validity." *Id.* at 429. That is the situation applicable here. Petitioner's constitutional issue directly affects the grant or denial of a medical cannabidiol registration card, which is

exclusively within the jurisdiction of the Department to issue. The Petition must be dismissed to allow the administrative process to proceed and conclude.

II. Even if the court reach the merits, Olsen's suit fails to state a claim because Iowa's marijuana and medical cannabidiol laws are neutral and generally applicable.

Setting aside the procedural defects, the case 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 amended 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 analysis focuses on the law prohibiting 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 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 First Amended 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
(515) 281-5164

(515) 281-4209 (fax)
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 January 31, 2022:

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

Signature: */s/ Samuel P. Langholz*