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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CARL OLSEN, Petitioner, vs. IOWA DEPARTMENT OF PUBLIC HEALTH, Respondent.	No. ***CVCV062566*** ***BRIEF IN SUPPORT OF RESISTANCE TO MOTION TO DISMISS AMENDED PETITION***

COMES NOW Petitioner Carl Olsen, through counsel, Colin Murphy, and submits the following Brief in Support of the Motion to Dismiss Amended Petition.

SOVEREIGN IMMUNITY IS NOT A BAR TO A DECLARATORY ACTION.

It is important to note what this case is not about. Petitioner is not suing the Iowa Department of Public Health or the State of Iowa for damages. So, the State Tort Claims Act is not implicated. Nor has Petitioner been aggrieved or adversely affected by a final administrative decision so as to trigger judicial review under the Iowa Administrative Procedures Act. Rather, he seeks a declaratory judgment that at the time his application for a medical cannabidiol card is adjudicated, the agency should be required to consider his religious use of marijuana at least on par with qualifying health conditions that entitle patients to use marijuana extracts for secular purposes.

Although sovereign immunity will generally foreclose litigation for damages, Iowa courts have recognized exceptions in equitable actions. *See Wasker, Dorr, Wimmer & Marcouiller, P.C. v. Bear*, 2006 WL 3017875 *2 (Iowa App. Oct. 25, 2006) (declaratory judgment against a tribal council and individual members); *Charles Gabus Ford, Inc., Iowa State Highway Comm'n*, 224 N.W.2d 639 (Iowa 1974) (mandamus).

The district court should conclude that Petitioner's equitable claim for a declaratory judgment here is not barred by sovereign immunity.

THE PETITION STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED BECAUSE CHAPTERS 124 AND 124E ARE NEITHER NEUTRAL NOR GENERALLY APPLICABLE.

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. *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. <u>Chapter 124 is not Neutral Toward Religion.</u>

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) (2021) (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 only for the Native American Church, 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

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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]

The denominational preference for peyote in Chapter 124 demonstrates a lack of neutrality toward religion. The law need not target a religious practice to violate neutrality.

B. <u>Chapters 124 is No Longer Generally Applicable as a Result of the Enactment of Chapter 124E</u>.

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 undermine its purpose.

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

[1]. https://www.deadiversion.usdoj.gov/GDP/(DEA-DC-5)%20Guidance%20Regarding%20Petitions%20for%20Religious%20Exemptions.pdf

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. The 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. This shows that even very narrow secular exceptions make a law that burdens religion less than generally applicable, and thus trigger strict scrutiny.

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

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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 (3d 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

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to the extent of their beards. *Id.* The court in *Newark* emphasized that the rule and its exception implied a value judgment that medical needs were less important than religious 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. The provide affirmative defenses to the prosecution for possession and drug tax stamp violations.

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These exclusions undermine the State's purpose of preventing drug abuse and promoting the 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 schedule I in Iowa Code § 124.203) but 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 provides a secular exception to the possession and use of marijuana, which makes it not generally applicable. As a result, it must pass strict scrutiny before it can be applied in a manner to burden the Petitioner's religious beliefs and practices.

The State cannot make a value judgment that maintaining a federally illegal medical marijuana program is more important than Petitioner's religious practice. The Department may not understand or fully appreciate the essential sacramental role that cannabis plays in the Ethiopian Zion Coptic Church, but it must treat the resulting 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 State 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 in itself is strong evidence that there is not suddenly a compelling need to restrict another religion from similarly using a controlled substance.

Even if the State had a compelling interest, the outright prohibition for a religious use is not narrowly tailored to serve that interest. Petitioner access to marijuana extracts would be limited to the number of grams per month that are available to qualified patients.

And even if the rational basis test was used instead of strict scrutiny, it would still be unconstitutional to deprive Petitioner access to marijuana extracts. Medical cannabidiol has been available now since December 1, 2018. There are more than 7,200 patient cardholders as of the last publicly available data (October 2021). The undersigned is unaware of a single overdose or diversion to date, 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 is going to upset that dynamic. The government can allow this small religious group of one to continue to freely exercise its religious traditions without suffering any harm.

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THE ANALYSIS IS THE SAME IF THE COURT EVALUATES THE ISSUE UNDER THE IOWA CONSTITUTION.

The same arguments hold true if the district court looks at this issue from perspective of state constitutional grounds.

The Free Exercise clause of the Iowa Constitution. Article 1, section 3 provides that the state "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry." The Iowa Supreme Court has not yet interpreted this provision. The first question is whether Iowa will follow the United States Supreme Court analysis in *Employment Division v. Smith*, 494 U.S. 872 (1990) or instead join with the great majority of state supreme courts in rejecting that decision when considering free exercise issues in the context of state constitutional provisions.

A. <u>Iowa Should Properly Balance the Right to the Free Exercise of Religion with Society's Interests.</u>

The threshold question is whether the Iowa Constitution protects against all laws that burden the free exercise of religion, or only against some subset of laws. In 1990, in a bitterly disputed 5-4 decision,[2] the Supreme Court held that the federal Free Exercise Clause provides significant protection only from laws that are not neutral or are not generally applicable. *See generally Smith*. Of course, this decision was not an interpretation of the Iowa Constitution, and there is no reason to believe the Iowa

2. The briefs are described in Justice Souter's concurring opinion in *Lukumi*. 508 U.S. at 571-72. They are also available on Westlaw, with links to the briefs at the end of the Court's opinion. No one asked the Court to do what it did in *Smith*, and no one knew to argue against it or had any opportunity to do so.

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Supreme Court would automatically follow it.

By its terms, the Iowa Constitution says that "no law" shall prohibit the free exercise of religion. The clause is not limited to certain subsets of laws. It does not say that the state shall make no law prohibiting the free exercise of religion except for laws that are neutral and generally applicable. The sacramental use of cannabis by the Ethiopian Zion Coptic Church is undoubtedly an exercise of religion. Chapters 124 and 124E undoubtedly prohibits that practice. Textually, Iowa's free exercise clause applies to the ban on the religious use of cannabis.

Prior to *Smith*, federal courts required a compelling government interest to justify a law that burdened the exercise of religion. But if Iowa were to adopt the federal *Smith* rule, a generally applicable law would be valid, however frivolous the government's interest and however great the interference with religious liberty. For example, if a law against consumption of alcohol by minors is neutral and generally applicable, then under *Smith*, the state could deprive minors of the sacrament of Holy Communion in the Catholic Church that uses real wine for communion, and *a fortiori* the state could suppress First Communion, traditionally celebrated at about age seven. A dry county could then entirely exclude the central religious ritual of these churches.

This requirement in federal cases has been rejected by most state courts that considered it. Ten state courts have expressly rejected it as an interpretation of their own

constitutions;[3] six others have rendered decisions inconsistent with it.[4] Only two state supreme courts have followed *Smith* in reasoned opinions.[5] Three others accepted it without analysis.[6] The *Smith* opinion has also been subjected to intense criticism by dissenting justices[7] and by scholars.[8]

The Supreme Courts of Minnesota and Wisconsin have each protected the Amish communities in their state under the state constitution, rejecting the federal rule in *Smith*. *State v. Hershberger,* 462 N.W.2d 393 (Minn. 1990); *State v. Miller*, 549 N.W.2d 235 (Wis. 1996). The Minnesota court said that the compelling interest test would "strike a balance under the Minnesota constitution between freedom of conscience and the state's public

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3. *See Larson v. Cooper*, 90 P.3d 125, 131 & n.31 (Alaska 2004); *City Chapel Evangelical Free Inc. v. City of South Bend*, 744 N.E.2d 443, 445-51 (Ind. 2001); *Fortin v. Roman Catholic Bishop*, 871 A.2d 1208, 1227-28 (Me. 2005); *Rasheed v. Comm'r of Corrections*, 845 N.E.2d 296, 208 (Mass. 2006) (citing *Attorney Gen. v. Desilets*, 636 N.E.2d 233, 235-41 (Mass. 1994)); *McCready v. Hoffius*, 586 N.W.2d 723, 729 (Mich. 1998), *vacated on other grounds*, 593 N.W.2d 545 (Mich. 1999); *Odenthal v. Minn. Conference of Seventh-day Adventists*, 649 N.W.2d 426, 441-41 (Minn. 2002) (citing *State v. Hershberger*, 462 N.W.2d 393, 397-99 (Minn. 1990)); *Catholic Charities v. Serio*, 859 N.E.2d 459, 465-68 (N.Y. 2006); *Humphrey v. Lane*, 728 N.E.2d 1039, 1043-45 (Ohio 2000); *City of Woodlinville v. Northshore United Church of Christ*, 211 P.3d 406, 410 (Wash. 2009), citing *First Covenant Church v. City of Seattle*, 840 P.2d 174 (1992); *Coulee Catholic Schs. v. Labor & Indus Review Comm'n*, 768 N.W.2d 868, 884-87 (Wis. 2009) (citing *State v. Miller*, 549 N.W.2d 235, 238-42 (Wis. 1996)).

4. *State v. Evans*, 796 P.2d 178, 180 (Kan. Ct. App. 1990); *Kentucky State Bd. for Elem. & Secondary Educ. v. Rudasill*, 589 S.W.2d 877 (Ky. 1979); *In re Brown*, 478 So.2d 1033, 1037-39 & n.5 (Miss. 1985); *St. John's Lutheran Church v. State Comp. Ins. Fund*, 830 P.2d 1271, 1276-77 (Mont. 1992); *In re Browning*, 476 S.E.2d 465, 467 (N.C. Ct. App. 1996); *State ex rel. Swann v. Pack*, 527 S.W.2d 99, 107, 111 (Tenn. 1975).

5. *In re Anaya*, 725 N.W.2d 10, 17-20 (Neb. 2008); *Smith v. Employment Div.*, 721 P.2d 445, 446-49 (Or. 1986), *vacated on other grounds*, 485 U.S. 660 (1988).

6. *Archdiocese of Washington v. Moersen*, 925 A.2d 659, 661 (Md. 2007); *Appeal of Smith*, 652 A.2d 154, 160-61 (N.H. 1994); *State v. Hall*, 2009 WL 3320261 (Vt. 2009).

7. *Lukumi*, 508 U.S. at 559-77 (Souter, J., concurring in part); *Smith*, 494 U.S. 872, 892-903 (O'Connor, J., concurring in judgment); id. at 907-09 (Blackmun, J., dissenting).

8. *See, e.g.,* James D. Gordon III, *Free Exercise on the Mountaintop*, 79 Cal. L. Rev. 91 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109 (1990).

safety interest." *Hershberger*, 462 N.W.2d at 398. The Wisconsin court adopted this reasoning, too, as its own. *See Miller*, 549 N.W.2d at 240. Each case involved regulation of the Amish buggies in the interest of public safety. The mere assertion of an interest in highway safety did not excuse the state from proving that its interest was compelling and that the burden on religion was necessary to achieve the interest. By contrast, the new federal test does not "strike a balance" between constitutional and regulatory interests because the test of general applicability has little relationship to the weight of either interest.

The Supreme Court of Washington criticized the consequences of the new federal rule:

> The majority's analysis in *Smith* II . . . places free exercise in a subordinate, instead of preferred, position. . . . *Smith* II accepts the fact that its rule places minority religions at a disadvantage. Our court, conversely, has rejected the idea that a political majority may control a minority's right of free exercise through the political process.

First Covenant Church v. City of Seattle, 840 P.2d 174, 187 (Wash. 1992). The Washington court's reference is to the following sentence in the *Smith* opinion: "[L]eaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in." *Smith*, 494 U.S. at 890. In plain language, the religious observances of small religions will sometimes be outlawed with insufficient reason, or even with no good reason at all. This is the precise evil that free exercise clauses are supposed to avoid.

The Supreme Judicial Court of Massachusetts rejected *Smith* even though its free exercise clause—"No law shall be passed prohibiting the free exercise of religion"—is virtually identical to the text of the federal Free Exercise Clause. *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994). "Despite the similarity of the two constitutional

provisions, this court should reach its own conclusions on the scope of the protections of art. 46, § 1, and should not necessarily follow the reasoning adopted by the Supreme Court of the United States under the First Amendment." *Id.* at 235.

The new federal rule has been so widely rejected because it simply does not serve the American tradition of religious liberty. It does not serve the purposes either of the constitutional guarantee or of the state's occasional need to override the constitutional guarantee, because it disregards the relative importance of each interest. The Supreme Court of Minnesota explained it very well when it said, "Competing values of such significance require this court to look for an alternative that achieves both values. . . . To infringe upon religious freedoms which this state has traditionally revered, the state must demonstrate that public safety cannot be achieved through reasonable alternative means." *Hershberger*, 462 N.W.2d at 399.

B. Iowa Decisions Concerning the Free Exercise of Religion are Inconsistent with the Federal *Smith* test.

The Supreme Court of Iowa has not formally interpreted the state's Free Exercise Clause. But what the Iowa courts have said about free exercise indicates a willingness to protect the free exercise of religion against all laws, not merely laws that fail a test of neutrality or general applicability.

The leading Iowa decision on free exercise of religion is *State v. Amana Society*, 132 Iowa 304, 109 N.W. 894 (Iowa 1906). There, the state argued that the Amana colonies were incorporated under the not-for-profit corporation act but engaged in for-profit businesses in violation of that charter. The Court said nothing about whether the limitations on not-for-profit corporations were neutral and generally applicable. Rather,

the Court held that the Amana businesses were part of that community's exercise of religion, and thus fully authorized by the not-for-profit charter. This decision was based on statutory interpretation and not directly on the free exercise clause of the Iowa Constitution. But in interpreting the statute, the court was plainly guided by a deep commitment to religious liberty:

> [I]n view of the spirit of tolerance and liberality which has pervaded our institutions from the earliest times, we have not hesitated in giving the statute an interpretation such as is warranted by its language and which shall avoid the persecution of any and protect all in the free exercise of religious faith, regardless of what that faith may be. Under the blessings of free government, every citizen should be permitted to pursue that mode of life which is dictated by his own conscience . . . .

See Amana Society, 109 N.W. at 899. "In this country the conscience is not subject to any human law and the right to its free exercise, so long as this is not inimicable to the peace and good order of society, is guaranteed by the Constitution." *Id.* at 897.

Greater protection by the Iowa Constitution is also evident in a series of unpublished opinions in the Court of Appeals. That court held that parents' right to punish their children in conformance with their religious beliefs can be limited "[i]n cases in which harm to the physical or mental health of the child or to the public safety, peace, order, or welfare is demonstrated . . . ." *In re A.O.*, 2002 WL 1973910, *5 (Iowa App. 2002). The court did not cite *Smith* or any other federal free exercise cases. It held that the state's interest overrode the parent's free exercise rights because it was "compelling." The court plainly assumed that the compelling interest test, and not the new federal law, applied to free exercise review of this generally applicable law. To similar effect is *In Re N.F.*, 2002 WL 31758353, *2 (Iowa App. Dec. 11, 2002), which holds that "a state may intervene to prevent or stop certain conduct that presents a health or safety hazard,

despite individuals' religious beliefs." It too ignores the federal free exercise cases; instead, it cites a compelling interest case from California, *People v. Hodges*, 13 Cal. Rptr. 2d 412, 418-20 (Cal. Ct. App. 1992).

Finally, the Iowa Supreme Court has repeatedly demonstrated its willingness to interpret the Iowa Constitution as providing greater protection than the federal counterpart. In *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009), the Court struck down a ban on same-sex marriage under Iowa's equal protection clause. The Court acknowledged the value of federal precedent, but "refuse[d] to follow it blindly." *Id.* at 878 n.6. The Court held that gays and lesbians are a quasi-suspect class and applied heightened scrutiny, *id.* at 889-906, conclusions far beyond anything the United States Supreme Court has suggested. In *Lawrence v. Texas*, 539 U.S. 558 (2003), in striking down a ban on "deviate sexual intercourse," the Court did not rely on equal protection, did not find any form of either a fundamental right or suspect or quasi-suspect class, and did not invoke any form of heightened scrutiny. It said only that the Texas law "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual," *id.* at 578, apparently a form of rational basis review. And it expressly disclaimed any implications of its decision for whether the state "must give formal recognition" to same-sex relationships. *Id. Varnum* is a bold, unanimous, and wholly independent interpretation of the Iowa Constitution, untethered to federal law.

Of course, Iowa has a long history of such decisions. *See Varnum*, 763 N.W.2d at 877 (collecting prominent examples). Other such decisions are more obscure, but equally independent. *See, e.g., In re S.A.J.B.*, 679 N.W.2d 645 (Iowa 2004) (holding, under Iowa equal protection clause, that indigent defendant in suit to terminate parental rights is

entitled to attorney at state expense); *Callender v. Skiles*, 591 N.W.2d 182 (Iowa 1999) (holding that one claiming to be father of a child born to a woman married to another man has a state due process right to a hearing to establish his paternity, rejecting the contrary decision in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989)); *Bierkamp v. Rogers*, 293 N.W.2d 577, 579 (Iowa 1980) (striking down the automobile guest statute as an irrational denial of equal protection under the Iowa Constitution). The court has also emphatically stated its independent authority to interpret the Iowa Constitution in other cases where it interpreted the state and federal constitutions to each support the same result. *See, e.g., In re A.W.*, 741 N.W.2d 793, 806, 812-13 (Iowa 2007).

Fundamental rights under the Iowa Constitution are protected by a requirement of a compelling government interest and narrowly tailored means. *S.A.J.B.*, 679 N.W.2d at 649. The right to free exercise of religion is a fundamental right and should be subject to the same test. There is no reason to think that the Iowa Supreme Court would follow the United States Supreme Court's abrupt revision of free exercise law in *Smith*, blindly or otherwise, and no reason why it should. Iowa law should reflect a proper balance between government police power and religious freedom. That proper balance suggests that before the government acts to burden a person's religious beliefs and practices, it should demonstrate that its interests are sufficiently important to justify burdening a fundamental constitutional right and that its interests cannot be achieved in any other way. *See Hershberger*, 462 N.W.2d at 398 ("the state should be required to demonstrate that public safety cannot be achieved by proposed alternative means.") However, the standard of judicial review is formulated, laws that can be described as "neutral and generally applicable" should not be wholly exempt from it.

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C. <u>Application of the Iowa Free Exercise Clause is Straightforward</u>.

As explained above, Chapter 124 and 124E burden Petitioner's faith in the absence of a compelling governmental interest. That is all the analysis needed, if article I, section 3 of the Iowa Constitution applies to *all* laws. The complex analysis of whether exceptions created by the medical cannabidiol program render it not neutral, or not generally applicable, is unnecessary under the Iowa Constitution.

But if the Iowa Supreme Court follows *Smith* and introduces that exception for generally applicable laws into the Iowa free exercise clause, then the analysis under the Iowa Constitution would be identical to the analysis of the United States Constitution. Either way, a prohibition against Petitioner's possession and use of marijuana extracts violates the free exercise clause of the Iowa Constitution.

<u>CONCLUSION</u>

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 religious group to abandon its sincerely held religious beliefs and practices in order to be members of society, the state should have a compelling reason that cannot be accomplished in some other way.

Because the State acknowledges that Petitioner is protected by the Free Exercise Clauses in both the state and federal constitutions, that Petitioner's religious beliefs are sincere and the use of marijuana as a sacrament is central to his religious beliefs, and because Chapters 124 and 124 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. There is no sufficient governmental interest in

the record before the court to restrict Petitioner from exercising his religious belief while 7,200 other Iowans are permitted to access marijuana extracts for secular purposes.

Defendant respectfully requests the Court enter overruling the Department's Motion to Dismiss.

Respectfully submitted,

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