IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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

TABLE OF CONTENTS

ARGUMENT

I. Olsen's sovereign immunity argument is misplaced, and he fails to offer any argument against dismissing this suit because of the exclusivity of section 17A or his failure to exhaust.

The Department seeks to dismiss this suit because of two procedural defects: Olsen's failure to exhaust his administrative remedies and his failure to bring this suit under the exclusive means of challenging an agency's action or inaction—chapter 17A. Instead of resisting these arguments, Olsen argues that sovereign immunity doesn't apply because he's not seeking damages. *See* Resist. Br. at 1. But that's wrong because sovereign immunity isn't limited to damages suits.

First, addressing the argument Olsen does make: his request of equitable relief rather than damages doesn't avoid sovereign immunity. A

waiver of sovereign immunity is required not just "to be sued in an action to obtain money from the State" but also "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). *Sovereign* immunity is thus unlike *qualified* immunity, which *is* limited to protection against damages claims against state officials. *See* Iowa Code § 669.14A(1); *Grantham v. Trickey*, 21 F.3d 289, 295 (8th Cir. 1994). Neither is the *Ex Parte Young* exception to sovereign immunity applicable here because Olsen doesn't bring his First Amendment claim against an individual state officer. *See Lee v. State*, 844 N.W.2d 668, 674-78 (Iowa 2014).

But the Department's sovereign immunity claim is really only further support for the statutory bar to this suit in section 17A.19. Chapter 17A is the exclusive means for challenging agency action or inaction. *See* Iowa Code §§ 17A.19, 17A.2(2). And that's exactly what Olsen is doing here. He seeks to get a medical cannabidiol registration card from the Department. The Department's denial of that request is agency action that may only be reviewed under chapter 17A.

If Olsen is somehow arguing that 17A isn't applicable because the Department's decision about his card isn't final yet, that doesn't help him. It's another reason his claim fails. He's failed to exhaust his administrative remedies by not completing the appeal process that he's in the middle of pursuing. That means this case must be dismissed. And if the Department upholds its denial of Olsen's application, he can then file a proper judicial review proceeding under chapter 17A. In *Shell Oil Co. v. Bair*, 417 N.W.2d 425, 429 (Iowa 1987), the Iowa Supreme Court already rejected the argument that exhaustion isn't required just because there's a constitutional issue involved. And Olsen has offered no argument why *Shell Oil* doesn't control.

These procedural defects doom Olsen's suit. It must be dismissed.

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.

The Court shouldn't reach the merits of Olsen's claim at this time. He can properly present his constitutional claims in a judicial review proceeding after the Department has taken final agency action—if he's still aggrieved by that action. And in that proceeding, his claims could be considered on a concrete factual record. But if this Court disagrees and considers the merits, Olsen has offered no meritorious argument to save his free-exercise claims.

In his brief, Olsen cites and quotes *Olsen v. DEA*, 878 F.2d 1458 (D.C. Cir. 1989), a case in which he was unsuccessful in overturning the DEA's denial of a religious-use exemption from federal laws prohibiting marijuana. The *Olsen v. DEA* case is a good illustration of three relevant issues. First, the decision provides citations to a multitude of cases in which courts have already considered and rejected similar free exercise claims, including several cases directly involving Olsen. "Olsen's free exercise claim has been raised, considered, and rejected in the context of criminal proceedings." *Id.* at 1461 (citing *Olsen v. Iowa*, 808 F.2d 652 (8th Cir. 1986); *U.S. v. Rush*, 738 F.2d 497 (1st Cir. 1984); *U.S. v. Middleton*, 690 F.2d 820 (11th Cir. 1982); *State v. Olsen*, 315 N.W.2d 1 (Iowa 1982); *Town v. State ex rel. Reno*, 377 So.2d 648 (Florida 1979)). There have been even more cases decided since *Olsen v. DEA* was decided in 1989. *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. Holder*, 610 F.Supp.2d 985 (S.D. Iowa 2009); *Olsen v. U.S.*, Civil No. 07-34-B-W, 2007 WL 1100457 (D. Maine April 10, 2007).

Olsen is not raising a new or novel claim. In fact, he has previously sought declaratory relief from the Iowa Controlled Substances Act for his sacramental use of marijuana. *See Olsen v. Mukasey*, 541 F.3d 827; *Olsen v.*

State of Iowa, Civ. No. 83-301-E, 1986 WL 4045 (S.D. Iowa 1986). In *Olsen v. Mukasey*, his claims were dismissed by the federal district court for failure to state a claim at the motion to dismiss stage. In *Olsen v. Mukasey*, he argued that "the [Controlled Substances Acts] are not generally applicable because they exempt the use of alcohol and tobacco, certain research and medical uses of marijuana, and the sacramental use of peyote." 541 F.3d at 832. In response to his argument, the Eighth Circuit stated "[g]eneral applicability does not mean absolute universality . . . [e]xceptions do not negate that the CSAs are generally applicable." *Id.* Ultimately, the Eighth Circuit held that Olsen's "free exercise claim—alone or hybrid—is barred by collateral estoppel." *Id.* (Based on the fact that his free exercise claim had been previously considered by courts in *State v. Olsen*, 315 N.W.2d 1; *U.S. v. Rush*, 738 F.2d 497; and *Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458).

Second, the *Olsen v. DEA* opinion provides multiple reasons why peyote is fundamentally distinct from marijuana and explains why the existence of a religious exemption for peyote does not necessarily mean that all other religious exemptions to the Controlled Substances Act are constitutionally mandated. And while the DEA has established a process to receive and review petitions for religious exemption from the Controlled Substances Act, it has yet to grant any exemptions for marijuana.

Third, the court noted that the Ethiopian Zion Coptic Church "teaches that marijuana is properly smoked 'continually all day,' as Olsen himself stated, 'through everything that we do.'" *Olsen*, 878 F.2d at 1464. Under Iowa's medical cannabidiol program, "[a] patient shall not consume medical cannabidiol possessed or used as authorized under this chapter by smoking medical cannabidiol." Iowa Code § 124E.17. If Olsen's Amended Petition survives the pending motion to dismiss, he will need to address how access to

medical cannabidiol would allow him to practice his religion in accordance with the tenants of the Ethiopian Zion Coptic Church.

Olsen asserts that chapter 124E contains exceptions that undermine its purpose. *See* Resist. Br. at 3. But chapter 124E does not contain exceptions to chapter 124 that undermine its purpose. Chapter 124 prohibits Iowans from possessing controlled substances, except when authorized for medical purposes, in order to prevent drug abuse and promote the public health. Chapter 124E—which allows medical cannabidiol for medical purposes—is consistent with the purpose of chapter 124. The decision to authorize a patient to have access to medical cannabidiol—as well as the decision to authorize a patient to have access to other controlled substances—is properly within the scope of practice of medicine. It is the practitioner, and not the Department or the State, that is tasked with evaluating a patient's medical condition. None of the cases cited in Olsen's brief implicate the practice of medicine. None of them involve access to medical treatments that can only be authorized by a licensed practitioner. It would be a fundamental shift for a court to hold that the availability of medical treatments through a doctor-patient relationship necessitates that those same medical treatments be authorized for individuals who seek them for non-medical religious purposes. There is no Constitutional right to receive medical treatments for religious purposes only.

For all 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 March 7, 2022:

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

Signature: */s/ Samuel P. Langholz*