Iowa Department of Inspections and Appeals
Division of Administrative Hearings

CARL OLSEN, Appellant, v. IOWA DEPARTMENT OF PUBLIC HEALTH, Respondent.	)))))))))	DIA Docket No. 22IDPH002 **RESPONDENT'S POST-HEARING BRIEF**

I. SUMMARY OF THE CASE

The Iowa Department of Public Health ("Department") administers the Medical Cannabidiol Act ("Act) contained at Iowa Code chapter 124E, which authorizes patients who suffer from debilitating medical conditions to possess and use medical cannabidiol upon receipt of a medical cannabidiol registration card ("registration card"). The Act requires – as a condition of obtaining a registration card – that an applicant obtain a written certification from a health care practitioner that the applicant suffers from a debilitating medical condition which qualifies for the use of medical cannabidiol. Iowa Code §§ 124E.3, 124E.4.

On November 24, 2021, Appellant Carl Olsen submitted an online application for a registration card to the Department. Department's Exhibit 2. Appellant's application did not contain the required health care practitioner certification form. Department's Exhibits 2 and 5, Testimony of Owen Parker. Appellant admits he does not have a debilitating medical condition as defined by the Act, and that he does not meet the requisite statutory qualifications to use medical cannabidiol for the legally authorized purposes. Department's

Exhibit 5.

In lieu of submitting the health care practitioner certification form, Appellant submitted a personal "Declaration" describing his religious use of cannabis as a member of the Ethiopian Zion Coptic Church. Department's Exhibit 2, Testimony of Owen Parker. Owen Parker, Chief of the Bureau of Medical Cannabidiol within the Department, reviewed Appellant's application. Testimony of Owen Parker. Mr. Parker could not approve the application because it lacked the required health care practitioner certification form. Testimony of Owen Parker. Mr. Parker consulted with his supervisor, Sarah Reisetter, Deputy Director of the Department, who confirmed that he did not have any authority to approve the application. Testimony of Owen Parker. Mr. Parker denied Appellant's application and sent written notification regarding the denial to Appellant on January 7, 2022. Department's Exhibit 3, Testimony of Owen Parker. The denial letter provided information regarding Appellant's right to appeal the denial. Department's Exhibit 3. On January 20, 2022, Mr. Olsen filed a timely appeal. Department's Exhibit 4.

II. APPLICABLE LAW

The Medical Cannabidiol Act, Iowa Code chapter 124E, provides the authority for the Department to issue registration cards to eligible patients and primary caregivers. The Act provides a list of the requirements that must be satisfied before the Department may issue a registration card to a patient, which includes that the applicant must submit a written certification to the Department signed by the patient's health care practitioner that the patient is suffering from a debilitating medical condition. Iowa Code §§ 124E.4(1)(*c*), 124E.3; 641 IAC 154.3(1)"c". The Medical Cannabidiol Act solely authorizes the possession and use of medical cannabidiol for medical purposes: the Act does not

reference any religion or religious use of medical cannabidiol and does not provide a mechanism for individuals to apply for a registration card for religious use.

III. ARGUMENT

A. The Department was required to deny Appellant's application for a registration card based on the undisputed facts and clear statutory requirements.

Based on the undisputed facts, Appellant's application for a registration card was properly denied because he (admittedly) failed to submit a written health care practitioner certification form. Appellant further admits that he does not have a "debilitating medical condition" as defined in Iowa Code section 124E.2(2) and 641 IAC 154.1. Under Iowa law, access to medical cannabidiol is restricted to individuals that have debilitating medical conditions. Based on the clear language of chapter 124E, and accompanying administrative rules, the Department was required to deny Appellant's application for a registration card because Appellant failed to meet the minimum requirements for issuance.

Appellant's brief cites to other contexts in which the Department provides for religious exemptions or waivers as support for his argument that the Department should recognize a religious exemption in this matter. This argument fails for three reasons. First, the examples cited by Appellant involve circumstances in which the Department recognizes a religious exemption to a generally applicable state requirement. In certain circumstances in which the legislature has imposed a mandated activity to protect public health – such as childhood screenings or immunizations – it has chosen to provide exemptions to the required activity if it conflicts with an individual's sincere religious beliefs. In contrast to the other examples provided by Appellant, Iowa's Medical Cannabidiol Act does not impose a requirement or obligation on all Iowans that would potentially educe a similar exemption

process.[1]

Second, in each of the examples cited by Appellant – including dental and vision screening of children, blood lead testing of children, immunization of children, the placement of prophylactic solutions in the eyes of newborns, and specific courses of medical treatment – the ability for the Department to authorize a religious exemption or waiver was expressly established by the legislature. In enacting the Medical Cannabidiol Act, the legislature did not include any provision that would authorize the Department to waive or exempt any of the statutory requirements to allow for the religious use of medical cannabidiol.

Finally, while the Department does have a general process for requesting waivers, the Department cannot waive a provision of law that is specifically mandated by statute. Iowa Code § 17A.9A(2)(*c*); 641 IAC 178. Because the requirement for a written health care practitioner certification form is mandated by the Act, the Department would lack

[1] It is important to note that while the Iowa legislature has chosen to provide for religious exemptions to certain required screenings and immunizations, it is not constitutionally obligated to do so. For example, the states of California, Connecticut, Maine, Mississippi, New York, and West Virginia do not allow religious exemptions to childhood vaccinations and authorize exemptions only on medical grounds. Courts have consistently held that states are not required to include religious exemptions to generally applicable state requirements. *See, e.g., Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015) (holding state "could constitutionally require that all children be vaccinated in order to attend public school."); *Workman v. Mingo Cty. Bd. of Educ.*, 419 F. App'x 348, 353–54 (4th Cir. 2011) (finding state statute requiring school vaccinations does not unconstitutionally infringe the right to free exercise and that "this conclusion is buttressed by the opinions of numerous federal and state courts that have reached similar conclusions in comparable cases."); *Whitlow v. California*, 203 F. Supp. 3d 1079, 1084 (S.D. Cal. 2016) (holding "the Constitution does not require the provision of a religious exemption to vaccination requirements."); *McCarthy v. Boozman*, 212 F.Supp.2d 945, 948 (W.D. Ark. 2002) (finding it is "well settled that a state is not required to provide a religious exemption from its immunization program. The constitutional right to freely practice one's religion does not provide an exemption for parents seeking to avoid compulsory immunization for their school-aged children.")

authority to approve a request for waiver if Appellant submitted such a request.

B. The agency cannot decide Appellant's constitutional challenges to the Medical Cannabidiol Act.

Appellant argues the presiding officer should rule on his constitutional challenge to Iowa Code chapter 124E. The Department disagrees. While it is necessary for Appellant to raise his constitutional challenge at the agency level in order to preserve it for judicial review, the agency lacks authority to rule on Appellant's constitutional challenge to the statute. *Endress v. Iowa Dep't of Human Servs.*, 944 N.W.2d 71, 83 (Iowa 2020) (stating "It is true DHS's final decision preserved Endress's constitutional arguments for judicial review. This is because DHS lacked authority to decide her constitutional issues. Moreover, Endress is required to raise constitutional issues at the agency level, even though the agency lacks the authority to decide the issues, in order to preserve the constitutional issues for judicial review."). Under the separation of powers doctrine, the judiciary is the branch of government responsible for determining the constitutionality of legislation. *ABC Disposal Sys., Inc. v. Dep't of Natural Res.*, 681 N.W.2d 596, 605 (Iowa 2004) (stating "We will not give any deference to the view of the agency with respect to the constitutionality of a statute or administrative rule, because it is exclusively up to the judiciary to determine the constitutionality of legislation and rules enacted by the other branches of the government."). Therefore, a decision in this appeal need only note Appellant's constitutional argument, but need not rule on the constitutionality of Iowa's Medical Cannabidiol Act.

Appellant's brief references the recent district court ruling in *Olsen v. Iowa Department of Public Health*, which dismissed the case due to Appellant's failure to exhaust administrative remedies. CVCV062566 (Polk Co. District Court, May 3, 2022).

The ruling does not state that the agency can or should rule on his constitutional challenge. Rather, it states "Mr. Olsen's constitution claims could be fully adjudicated and the declaratory relief he seeks obtained through a judicial review proceeding under chapter 17A." *Id.* at 6–7. It then directs him to "seek relief through Chapter 17A proceedings, after his administrative remedies have been exhausted." *Id.* at 7. The requirement for Appellant to complete the administrative process prior to seeking judicial review does not equate to a requirement for the agency to rule on his constitutional challenge.

C. Even if the agency were to rule on Appellant's constitutional challenge, the Act is constitutional.

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). 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.

The specific laws that prohibit Appellant from engaging in the sacramental use of marijuana are Iowa Code section 124.204(4)(*m*), which places marijuana in Schedule I of the Iowa Controlled Substances Act, and Iowa Code section 124.401, which 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; however, 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 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 to analyze in evaluating neutrality and general applicability.

"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.

Appellant argues that Iowa Code chapter 124 is not neutral towards religion because of the statutory exemption for the religious use of peyote. However, this specific argument is barred by the doctrine of *res judicata*. The doctrine of *res judicata* includes both the doctrines of claim preclusion and issue preclusion. *Winnebago Indus., Inc. v. Haverly*, 727 N.W.2d 567, 571–72 (Iowa 2007). Under the doctrine of issue preclusion (also known as collateral estoppel), once a court has decided an issue of law or fact necessary to its judgment, the same issue cannot be re-litigated in a subsequent proceeding. *Id.* at 571. Issue preclusion serves the important dual purposes of protecting parties from "the vexation of relitigating identical issues with identical parties…and to further the interest of judicial economy and efficiency by preventing unnecessary litigation." *Id.* at 572.

Our Supreme Court follows a four-factor test to determine if the issue preclusion doctrine applies to bar re-litigation of an issue – namely, the court will review whether:

1) the issue determined in the prior action is identical to the present issue;
2) the issue was raised and litigated in the prior action;
3) the issue was material and relevant to the disposition in the prior action; and

4) the determination made of the issue in the prior action was necessary and essential to that resulting judgment.

Id.

Appellant's argument that Iowa Code chapter 124 is not neutral due to the peyote exemption has been rejected several times, including by the Eighth Circuit in a prior case initiated by Appellant. *Olsen v. Mukasey*, 541 F.3d 827 (8th Cir. 2008). In *Olsen v. Mukasey*, Appellant argued "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." *Id.* at 832. In response to this argument, the Eighth Circuit held "[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 denied by courts in *State v. Olsen*, 315 N.W.2d 1 (Iowa 1982); *U.S. v. Rush*, 738 F.2d 497 (1st Cir. 1984); and *Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458 (D.C. Cir. 1989)). The decision in *Olsen v. Mukasey* clearly satisfies each of the four elements necessary to invoke issue preclusion. Consequently, in light of the above case law and the doctrine of res judicata, Appellant's arguments on this issue are barred and any reviewing body should find that Iowa's Controlled Substances Act is facially neutral towards religion and is constitutional despite the exemption for peyote. *See also McBride v. Shawnee County*, 71 F.Supp.2d 1098 (D. Kansas 1999).

Appellant has not asserted, and would have no basis to assert, that Iowa's Medical Cannabidiol Act is not facially neutral. There are no references to religion or any specific religious practices in Iowa Code chapter 124E. Clearly, Iowa Code chapter 124E is facially

neutral. Based on issue preclusion and a plain reading of chapter 124E, the pertinent laws are all facially neutral.

To determine operational neutrality, a court must "look beyond the language" to determine whether there is a religious practice being targeted for discriminatory treatment. *Mitchell Cnty.*, 810 N.W.2d at 10. Appellant does not allege, and has never alleged in prior cases, 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.

> 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., 810 N.W.2d 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*. 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 1, 8–9 (Iowa 1982). This purpose applies universally to the numerous controlled substances listed in the five schedules set forth in chapter 124.

Appellant 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 does not 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 medical use. This highly regulated access to medical cannabidiol is similar to the familiar concept of patient access to controlled substances through a prescription authorized by a health care practitioner.

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 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. This disparity exists

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" cited by Appellant – 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 (either through a prescription in chapter 124 or a written certification of a debilitating medical condition in chapter 124E) by a patient's health care provider. This medical allowance is categorically unique. It allows health care providers to authorize treatment of medical conditions using controlled substances. Chapter 124E does not authorize use of medical cannabidiol outside of a medical context in which a health care practitioner diagnoses, or affirms a diagnosis for, a patient with a debilitating medical condition and provides the patient with explanatory information about the "therapeutic use of medical cannabidiol and the possible risks, benefits, and side effects of the proposed treatment." Iowa Code § 124E.3. 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 any controlled substance of their choosing, including opioids that have led to the ongoing opioid epidemic, for religious use.

Because the laws making controlled substances, including marijuana, illegal except for medical purposes are neutral and generally applicable, 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*, 494 U.S. at 879–80. Therefore, there is no basis to declare Iowa Code chapter 124 or 124E unconstitutional as Appellant urges.

Even a contrary finding would not necessarily result in a mandate for the Department to issue Appellant a registration card. Based on the record established at the contested case hearing, Appellant has not demonstrated how access to medical cannabidiol – as that term is defined in Iowa Code section 124E.2(10) and 641 IAC 154.1 – would allow him to practice his religion consistent with the beliefs of the Ethiopian Zion Coptic Church. Specifically, Appellant has indicated through testimony at hearing and in prior litigation that his religious use primarily entails smoking marijuana – a practice expressly prohibited by the Act. Iowa Code § 124E.17.

IV. CONCLUSION

The Department's denial of Appellant's application for a registration card should be AFFIRMED.

Respectfully submitted,

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Filed electronically via AEDMS.

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Proof of Service

The undersigned certifies that the foregoing instrument was served upon Attorney for Appellant by delivery in the following manner on the 8th day of July, 2022.

___ U.S. Mail	___FAX
___ Hand Delivery	___Overnight
___ Federal Express	___Other
_X_ Electronically	

Signature: */s/ Laura Steffensmeier*