Iowa Department of Inspections and Appeals
Division of Administrative Hearings
Wallace State Office Building
Des Moines, Iowa 50319

CARL OLSEN, Appellant, vs. IOWA DEPARTMENT OF PUBLIC HEALTH, Respondent.	Docket No. ***22IDPH0002*** ***BRIEF IN SUPPORT OF APPEAL OF DENIAL OF MEDICAL CANNABIDIOL REGISTRATION CARD***

COMES NOW Appellant Carl Olsen, through counsel, Colin Murphy, and submits the following Brief in Support of Appeal of Denial of Medical Cannabidiol Registration Card.

BRIEF

FINDINGS OF FACT

Appellant established through his declaration and testimony at hearing that he is a member of the Ethiopian Zion Coptic Church, and his sacrament is marijuana.

This is consistent with prior findings and stipulations in both state and federal courts over the last 43 years that address Appellant's religious beliefs and practices. *See Town v. State ex rel. Reno*, 377 So. 2d 648, 650-52 (Fla. 1979)("[t]he record substantiated the trial court's findings that the [Ethiopian Zion Coptic Church] was a religion within the first amendment, that petitioner sincerely subscribed to the beliefs of the church, and that the use of cannabis was an integral part of the religion") ((noting also this worship has been conducted for centuries before the discovery of America and the adoption of the United States Constitution); *State v. Olsen*, 315 N.W.2d 1, 7-9 (Iowa 1982) ("[w]e assume . . . that the religion practices by Olsen is one which is protected by the free exercise clause and that Olsen's belief in the marijuana sacrament is 'sincere and central' to the religion");

U.S. v. Rush, 738 F.2f 497, 512 (1st Cir. 1984) ("[t]here is no question that marijuana use is an integral part of the religious doctrine and practice of the Ethiopian Zion Coptic Church, and that appellants [including Carl Olsen] are sincere practicing members of that Church"); *Olsen v. State of Iowa*, 1986 WL 4045 *1, 3 (S.D. Iowa Mar. 19, 1986)('[p]laintiff is a priest of the Ethiopian Zion Coptic Church. This religion uses marijuana as an integral part of its religious doctrine") ("Olsen is a member and priest of the Ethiopian Zion Coptic Church. Testimony at this trial revealed the bona fide nature of this religious organization and the sacramental use of marijuana within it")(quoting *State v. Olsen*, No. 171-69079 (Iowa Jul. 18, 1984) attached to the ruling as Exhibit A); *Olsen v. Drug Enforcement Admin*. 878 F.2d 1458, 1462 (D.C. Cir. 1989) ("[t]he [Drug Enforcement Administration], for purposes of this decision . . . accepts that the Ethiopian Zion Coptic Church is a bona fide religion whose sacrament is marijuana"); *U.S. v. Lepp*, 2008 WL 3843282 *11 (N.D. Cal. Aug. 14, 2008)("[p]etitioner Olsen [was] a member and priest of the Ethiopian Zion Coptic Church . . . . Olsen asserts, and the government concedes for purposes of this case, that the church's sacrament is marijuana . . . ."); *Olsen v. Holder*, 610 F. Supp. 2d 985 (S.D. Iowa 2009)("[p]laintiff is a member and priest of the Ethiopian Zion Coptic Church, a recognized religion that employs marijuana as 'an essential portion of [its] religious practice'").

Appellant applied for an Iowa Medical Cannabidiol Registration Card on November 24, 2021 and uploaded a declaration detailing his religious beliefs and request for a religious exemption for the use of marijuana extracts. The declaration was meant to serve as the functional equivalent of the certification by a health care practitioner.

ARGUMENT

THE DEPARTMENT OF INSPECTIONS AND APPEALS HAS JURISDICTION OVER THE ISSUE OF A PERSONAL RELIGIOUS EXEMPTION FOR THE POSSESSION AND USE OF MEDICAL CANNABIDIOL.

Appellant contends the Department of Inspections and Appeals has jurisdiction over the issue he is raising in support of the appeal of the denial of his medical cannabidiol registration card application: whether the denial violates Appellant's constitutional right to the free exercise of his religion as a member of the Ethiopian Zion Coptic Church.

Iowa law requires Appellant to raise constitutional issues before state agencies in order to preserve them for judicial review. *See Garwick v. Iowa Dep't of Transp.*, 611 N.W.2d 286, 288-89 (Iowa 2000); *Soo Line R Co. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 691 (Iowa 1994); *Fisher v. Iowa Bd. of Optometry Examiners*, 478 N.W.2d 609, 612 (Iowa 1991). This is true even though the agency may lack the authority to decide the issue. *Endress v. Iowa Dept. of Human Servs.*, 944 N.W.2d 71, 83 (Iowa 2020).

One of the grounds upon which the district court may grant judicial review is whether an agency action is "unconstitutional on its face or as applied or is based on a provision of law that is unconstitutional on its face or as applied." *See* Iowa Code § 17A.19(10)(a) (2022). Appellant believes this statute provides the Department of Inspections and Appeals with jurisdiction to consider constitutional issues surrounding the application of a "provision of law" like Iowa Code Chapter 124E.

Also, Appellant and the Iowa Department of Public Health (the "**Department**") were previously parties to a matter before the Iowa District Court in Polk County where Appellant sought a declaratory judgment regarding whether the sacramental use of cannabis should be considered a qualifying condition for purposes of the medical

cannabidiol registration card. That case was dismissed on procedural grounds, but the takeaway is that Appellant needed to first fully adjudicate his constitutional claims before the agency because that is his exclusive remedy. *See* Ex. 1 May 3, 2022 Ruling on Motions to Dismiss, Polk County No. CVCV062566. The conclusions of law provide additional justification in support of the jurisdiction to raise and litigate the constitutional issues here.

It is important to also note that Appellant is unable to petition for a waiver from the rule requiring "a written certification to the department signed by the patient's health care practitioner that the patient is suffering from a debilitating medical condition" because the Department has not "established by rule an application, evaluation and issuance procedure permitting waivers" of the application requirements of a registration card. *See* Iowa Code § 17A.9A(1) (2022); *see also* Iowa Admin. Code r. 641 – 154 (no mention of procedure permitting waivers). However, the Department has long maintained processes to review and ostensibly approve similar religious exemptions or waivers in a variety of different contexts, including: (1) specific embalming and disposition of corpses; (2) dental screening of children[1]; (3) vision screening of children; (4) blood lead testing of children[2]; (5) immunization of children[3]; (6) the placement of prophylactic solutions in the eyes of newborns; and (7) specific courses of medical

1. The religious exemption certificate can be found at: https://idph.iowa.gov/Portals/1/Files/OralHealthCenter/Certificate%20of%20Dental%20Screening%20Exemption.rev.9.13.12.pdf
2. The religious exemption certificate can be found at: https://idph.iowa.gov/Portals/1/userfiles/106/ReligiousExemptionCertificate.pdf
3. The religious exemption certificate can be found at: https://iris.iowa.gov/docs/Certificate_of_Immunization_Exemption_Religious.pdf

treatment for any person. *See* Iowa Code §§ 135.11(7), .17(1)(d), .35D(10), .105D(4), .146; *see also* Iowa Code §§ 139A.8(4)(a)(2), .38, .39 (2022).

The Department, as an agency of the State of Iowa, may also be subject to the new Iowa law on waiving COVID-19 vaccination requirements in cases where the jab conflicts with religious tenets and practices. *See* Iowa Code § 94.2(2) (2022) (noting "employer" means "a person, as defined in chapter 4, who employs an individual in this state for wages") ("person" under section 4.1(20) includes "government or governmental subdivision or agency"). This provision took effect on October 28, 2021 and predates Appellant's application of an Iowa medical cannabidiol registration card on November 24, 2021.

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 of the highest order. *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. Chapter 124 is not Neutral Toward Religion.

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 for the Native American Church only 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 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).[4] Indeed, Appellant applied for a religious exemption with the DEA. *See* Ex. 2.

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

[4] The application for the federal religious exemption for any controlled substance, including cannabis, can be found at:
https://www.deadiversion.usdoj.gov/GDP/(DEA-DC-5)%20Guidance%20Regarding%20Petitions%20for%20Religious%20Exemptions.pdf

B. Chapter 124 is No Longer Generally Applicable as a Result of the Enactment of Chapter 124E.

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 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. Those 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 (quoting *Sherbert*). The reason why the Court did not apply strict scrutiny in *Smith* is because there was no compelling reason to extend the *Sherbert* test to a state criminal law (Oregon's controlled substances act) involving across-the-board prohibitions, *i.e.*, no individual exemptions.

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 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 (3rd 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 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. They provide affirmative defenses to the prosecution for possession of marijuana in the form of medical cannabidiol, both misdemeanors and felonies, as well as felony drug tax stamp violations. *See* Iowa Code § 124E.12(4)(a) (2022).

These exemptions undermine the Department's purpose of preventing drug abuse through diversion 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 classifying marijuana as a schedule I controlled substance in Iowa Code § 124.203) but authorize the Department to 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, Chapter 124E, provides a secular exception for the possession and use of marijuana but makes no allowance for religious use. This makes the law underinclusive and not generally applicable. As a result, it must pass strict scrutiny before it can be applied in a manner to burden Appellant's religious beliefs and practices.

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 Department does not have a compelling interest here, and even if it did, denying Appellant 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 alone is robust evidence that there is not suddenly a compelling need to restrict one person from similarly using a controlled substance as part of his religious practice.

Even if the Department had a compelling interest, the outright prohibition against religious use is not narrowly tailored to serve that interest. Appellant's access to marijuana extracts would be limited to the same number of grams per month that are available to qualified patients. Nothing more or less. This is why the prior cases in which Appellant was involved are no longer persuasive. His position was hindered by the enormity of the marijuana control problem in the United States existing at the time. However, much has changed. A majority of states now have highly regulated medical cannabis programs that provide legal access to marijuana.

Medical cannabidiol has been available in Iowa since December 1, 2018. There are more than 10,200 patient and caregiver cardholders as of May 2022.[5] The record before the agency demonstrates not one adverse health effect 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, whose possession and use would be circumscribed by regulations, is going to upset that dynamic. The Department can certainly allow Appellant to freely exercise its religious traditions without suffering any harm.

---

5. The number of active patient and caregiver registration cards as of May 2022. https://idph.iowa.gov/Portals/1/userfiles/234/Files/2022_05%20Monthly%20Website%20Program%20Update.pdf

CONCLUSION

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 person to abandon his sincerely held religious beliefs, the Department should have a compelling reason that cannot be accomplished in some other way.

Appellant is protected by the Free Exercise Clauses of both the State and federal constitutions. His religious beliefs are sincere and the use of marijuana as a sacrament is central to his religious beliefs. Chapters 124 and 124E 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 of the highest order. There is no sufficient governmental interest in the record before the court to restrict Appellant from exercising his religious belief while 10,200 other Iowans are permitted to access marijuana extracts for secular purposes.

Appellant respectfully requests the Department of Inspections and Appeals reverse the Department's denial of his application for a medical cannabidiol registration card.

Respectfully submitted,

By: /s/ Colin Murphy AT0005567
GOURLEY REHKEMPER LINDHOLM, P.L.C.
440 Fairway, Suite 210
West Des Moines, Iowa 50266
T: (515) 226-0500
F: (515) 244-2914
E-mail: ccmurphy@grllaw.com

ATTORNEY FOR APPELLANT

Email to:

The Hon. Carla Hamborg (carla.hamborg@dia.iowa.gov)
Laura Steffensmeier (laura.steffensmeier@ag.iowa.gov)
Heather Adams (heather.adams@ag.iowa.gov)

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CARL OLSEN, Petitioner, vs. **IOWA DEPARTMENT OF PUBLIC HEALTH**, Respondent.	**Case No. CVCV062566** **RULING ON MOTIONS TO DISMISS**

I. INTRODUCTION

Before the court is a Motion to Dismiss filed by the Iowa Department of Public Health on January 31, 2022. The court held a hearing on the record on March 11, 2022, at which Sam Langholtz represented the Iowa Department of Public Health; and Colin Murphy represented the Petitioner, Carl Olsen. After hearing the arguments of counsel and reviewing the court file, including the Motion and Resistance thereto, and submitted briefs, the court now enters the following ruling on the pending Motion.

II. FACTUAL & PROCEDURAL BACKGROUND

According to his Amended Petition filed January 12, 2022, the Petitioner ("Mr. 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

Mr. Olsen filed this initial Petition in this matter on September 24, 2021, seeking a declaratory judgment against the State of Iowa that 1) he has a lawful right to purchase, possess and use for bona fide religious purposes medical cannabidiol obtained from a licensed Iowa dispensary and that such rights are coextensive with any future amendments to chapter 124E; 2) he can raise affirmative defenses under chapters 124, 124E and 453B to any prosecution for possession of marijuana or failure to affix a drug tax stamp; and 3) he has a right to exceed the 4.5 gram per 90 day limit by providing the Iowa Department of Public Health with written certification of his religious use and needs. *See* Pet., page 4. On November 23, 2021, the State moved to dismiss the on sovereign immunity grounds. See Motion to Dismiss ¶ 2 (Nov. 23, 2021).

On November 24, 2021, Mr. Olsen applied for a medical cannabidiol registration card from the Iowa Department of Public Health ("IDPH"). Am. Pet. ¶ 12. IDPH denied the application on January 7, 2022. *Id*. ¶ 13, Ex. 2. Mr. Olsen filed a timely request for an appeal on January 20, 2022. Exhibit A (Olsen Appeal Request). The appeal is pending.

On January 12, 2022, Mr. Olsen filed this amended petition substituting IDPH for the State as Respondent. See Am. Pet. ¶ 2. The amended petition modified the declaratory relief requested as well, to that IDPH shall consider Mr. Olsen's religious use of cannabis as a qualifying condition under Iowa Code section 124E.2(2) and, thereafter, respond to his application for a registration card. Am. Pet. at 4.

IDPH filed the pending Motion to Dismiss on January 31, 2022, seeking dismissal of Mr. Olsen's amended petition because 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; and because Mr. Olsen fails to state a claim because Iowa's marijuana

and medical cannabidiol laws are neutral and generally applicable. Mr. Olsen resists dismissal on all grounds.

III. MOTION TO DISMISS

A. LEGAL STANDARD

In deciding a motion to dismiss, "the petition is assessed in the light most favorable to the plaintiffs, and all doubts and ambiguities are resolved in the plaintiffs' favor." *Southard v. Visa U.S.A. Inc.*, 734 N.W.2d 192, 194 (Iowa 2007). *See also Ritz v. Wapello Cty. Bd. of Supervisors*, 595 N.W.2d 786, 789 (Iowa 1999) ("Allegations in the petition are viewed in a light most favorable to the plaintiff and facts not alleged cannot be relied on to aid a motion to dismiss . . . ."); *Haupt v. Miller*, 514 N.W.2d 905, 911 (Iowa 1994) ("The petition should be construed in the light most favorable to the plaintiff with doubts resolved in that party's favor in ruling on the motion."). Furthermore, a "court considers all well-pleaded facts to be true." *U.S. Bank v. Barbour*, 770 N.W.2d 350, 353 (Iowa 2009). *See also Southard*, 734 N.W.2d at 194 ("Well-pled facts in the pleading assailed are deemed admitted."). Affidavits may be considered alongside the pleadings. *Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 473 (Iowa 2004).

"A motion to dismiss is sustainable only when it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts that could be proved in support of the claims asserted." *Haupt*, 514 N.W.2d at 911. *See also Barbour*, 770 N.W.2d at 353 ("A court should grant a motion to dismiss only if the petition 'on its face shows no right of recovery under any state of facts.'") (quoting *Ritz*, 595 N.W.2d at 789); *Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600, 609 (2012) (reiterating the standard for granting a motion to dismiss described by the court in *Barbour*). Iowa courts recognize that this is a very high bar, and

therefore traditionally disfavor motions to dismiss. *See Cutler v. Klass, Whicher & Mishne*, 473 N.W.2d 178, 181 (Iowa 1991) (remarking that both the filing and sustaining of motions to dismiss "are poor ideas").

B. ANALYSIS

i. Judicial Review under Iowa Code Chapter 17A is the exclusive remedy.

Mr. Olsen wants this court to tell the IDPH, a State agency, to include his religious use of cannabis as a debilitating medical condition under Iowa Code section 124E.2(2), when considering whether it should issue him a medical cannabidiol registration card under section 124E.4(1). He argues that if IDPH does not do so, it would violate his constitutional rights to free exercise of religion under the 1st and 14th amendments to the U.S. Constitution, and Article 1 section 3 of the Iowa Constitution.

Iowa Code Chapter 124E, known as the "Medical Cannabidiol Act", provides a mechanism for a person to apply for and the IDPH to issue a medical cannabidiol registration card, permitting the applicant to use medical cannabis as it is defined and regulated by the statute. Mr. Olsen invoked that mechanism when he applied for a medical cannabidiol registration card from the IDPH on November 24, 2021.

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 ("Except as expressly provided otherwise by another statute referring to this chapter by name, the judicial review provisions of this chapter shall be the exclusive means by which a person or party who is aggrieved or adversely affected by agency action may seek judicial review of such agency action."); *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). Chapter 124E does not provide another method of judicial review aside from the exclusive review under chapter 17A. *See Iowa Code* chapter. 124E. Chapter 17A, therefore, is "the exclusive means by which" Mr. Olsen may seek judicial review of the IDPH's action. *Iowa Code* § 17A.19.

ii. *Exhaustion of Administrative remedies is required*.

Mr. Olsen, in his brief in resistance to IDPH's Motion to Dismiss, argues that he has not "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."

Iowa Code Chapter 124E provides that before one is able to use cannibus in this State, he or she must first apply to the IDPH for a medical cannabidiol registration card, and be issued the same by the IDPH. For the purposes of this suit, anyway, Mr. Olsen is not disputing that he must go through this administrative procedure in order to be able to use cannibus. He simply wants the court, now, to tell the agency to treat his religious use of marijuana the same as a qualifying medical condition when considering his application. It doesn't work that way.

"Exhaustion of adequate administrative remedies is generally required prior to permitting a party to seek relief via judicial review in district court." *IES Utilities Inc. v. Iowa Dep't of Revenue & Fin.*, 545 N.W.2d 536, 539 (Iowa 1996) (*citing Iowa Code* § 17A.19(1); *City of Des Moines v. Des Moines Police Bargaining Unit Ass'n*, 360 N.W.2d 729, 730, 731 (Iowa 1985)).

> The doctrine of exhaustion is not absolute, however. In the following limited situations, we have allowed a litigant to bypass the exhaustion requirement:
>
> (1) plaintiff challenges, by way of *judicial review under Iowa Code section 17A.19*, an agency action as in violation of the rulemaking procedures set forth under the APA, *see Lundy [v. Iowa Department of Human Services, 376 N.W.2d 893, 894 (Iowa 1985)]*;
>
> (2) plaintiff claims an adequate administrative remedy does not exist for the claimed wrong*, see Rowen v. LeMars Mut. Ins. Co.*, 230 N.W.2d 905, 909 (Iowa 1975), or stated otherwise, plaintiff will suffer "irreparable injury of substantial dimension" if not allowed access to district court prior to exhausting all administrative remedies, *see Salsbury Lab.*, 276 N.W.2d at 837; or
>
> (3) plaintiff claims the applicable statute does not expressly or implicitly require that all adequate administrative remedies be exhausted prior to bringing an action in district court, *see Rowen*, 230 N.W.2d at 909.

Id (emphasis in original). None of the limited situations appear here. As to the first exception, Mr. Olsen is not challenging any rulemaking procedure. As to the third exception, Iowa Code chapter 224E does not provide for bringing any action in district court.

As to the second exception, Mr. Olsen does not claim an adequate administrative remedy does not exist for the claimed wrong, or that he will suffer "irreparable injury of substantial dimension" if not allowed access to district court prior to exhausting all administrative remedies. In fact, requiring Mr. Olsen to follow administrative 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). Mr. Olsen's constitution claims could be fully adjudicated and the declaratory relief he seeks obtained through a judicial review proceeding

under chapter 17A. Mr. Olsen must seek relief through Chapter 17A proceedings, after his administrative remedies have been exhausted.

ii. Remaining ground for dismissal. The court, having determined above that dismissal is appropriate as set forth above, will nevertheless address the remaining ground raised in the in the Motion to Dismiss.

IDPH asserts that even if the court reaches the merits, Mr. Olsen's suit fails to state a claim because Iowa's marijuana and medical cannabidiol laws are neutral and generally applicable. When the court is asked to get into the merits of a claim, a motion to dismiss should generally not be granted, and "nearly every case will survive a motion to dismiss under notice pleading." *Weizberg v. City of Des Moines*, 923 N.W.2d 200, 217 (Iowa 2018) (*quoting U.S. Bank v. Barbour*, 770 N.W.2d 350, 353 (Iowa 2009)). If a claim is "at all debatable," the filing or sustaining of a motion to dismiss is ill-advised. *Id*. This case is no exception.

In order to sustain IDPH's motion on this ground, the court would have to make a factual determination that all of the laws operating separately or together to prevent Mr. Olsen from legally using marijuana in Iowa are indisputably, not just facially, but operationally neutral. *Mitchell Cty. v. Zimmerman*, 810 N.W.2d 1, 10 (Iowa 2012) (*citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 113 S.Ct. 2217, 2227, 124 L.Ed.2d 472, 491 (1993) Lukumi, 508 U.S. at 534, 113 S.Ct. at 2227, 124 L.Ed.2d at 491 (1993)). " 'Facial neutrality is not determinative,' we must examine the ordinance for "governmental hostility which is masked, as well as overt." *Id*. Given the pleadings, Mr. Olsen is entitled to attempt to show government hostility in the operation of these laws. Dismissal on the merits at this stage would not be appropriate.

IV. RULING

For the reasons set forth in sections III(B)(i) and III(B)(ii) above,

IT IS THEREFORE ORDERED that Motion to Dismiss Petitioner's Petition filed by the Iowa Department of Public Health is **GRANTED**. The Petition in the above captioned case is dismissed. Costs are assessed to the Petitioner.

State of Iowa Courts

Case Number	**Case Title**
CVCV062566	CARL OLSEN V STATE OF IOWA
Type:	ORDER REGARDING DISMISSAL

So Ordered

Joseph Seidlin, District Court Judge
Fifth Judicial District of Iowa

Electronically signed on 2022-05-03 14:13:09

U. S. Department of Justice
Drug Enforcement Administration
8701 Morrissette Drive
Springfield, Virginia 22152

www.dea.gov

Carl E. Olsen
130 E. Aurora Avenue
Des Moines, Iowa 50313-3654
carl@carl-olsen.com

Dear Mr. Olsen:

With this letter the Drug Enforcement Administration (DEA) hereby acknowledges receipt of your petition, on April 27, 2022, to be exempted from the Controlled Substances Act (CSA) under the Religious Freedom Restoration Act as promulgated under 42 U.S.C. § 2000bb-1(c).

Your petition is currently being reviewed in consideration of the complexity of your petition and DEA's mission to prevent the diversion of controlled substances granted under the authority of the CSA, 21 U.S.C. §§ 801 et. seq.

For information regarding the Diversion Control Division, please visit www.DEAdiversion.usdoj.gov. If you have any additional questions on this issue, please contact the Diversion Control Division Regulatory Section at (571) 362-8137, or via e-mail at DRG@dea.gov.

Sincerely,

Matthew J. Strait
Deputy Assistant Administrator, Regulatory
Diversion Control Division

Drug Enforcement Administration
United States Department of Justice

Carl Olsen
130 E Aurora Ave
Des Moines, Iowa 50313-3654
515-343-9933
carl@carl-olsen.com

Application for Religious Exemption
from the
Controlled Substances Act
pursuant to the
Religious Freedom Restoration Act

April 27, 2022

Assistant Administrator
Diversion Control Division
Drug Enforcement Administration
8701 Morrissette Drive
Springfield, Virginia 22152
ODLP@usdoj.gov

Certified Mail # 7021 2720 0002 2687 0091

Dear Assistant Administrator,

Pursuant to your "Guidance Regarding Petitions for Religious Exemption from the Controlled Substances Act Pursuant to the Religious Freedom Restoration Act (Revised)" EO-DEA007, DEA-DC-5, November 20, 2020, Version 2, attached is my application for a religious exemption.

I would like to receive immediate notification of acceptance or deficiency. I would also be happy to answer any questions you may have and you can reach me at the address, phone number, and email address I have given.

I request a final ruling within 60 days from the date my request is received. I understand the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb et seq., gives me the right to a judicial proceeding to compel a decision if I don't receive one within the time I have requested.

I agree with your guidance document that an appeal from a final decision is governed by 21 U.S.C. § 877.

Carl Olsen
130 E Aurora Ave
Des Moines, Iowa 50313-3654
515-343-9933
carl@carl-olsen.com

Drug Enforcement Administration
United States Department of Justice

Carl Olsen
130 E Aurora Ave
Des Moines, Iowa 50313-3654
515-343-9933
carl@carl-olsen.com

Application for Religious Exemption
from the
Controlled Substances Act
pursuant to the
Religious Freedom Restoration Act
Certified Mail # 7021 2720 0002 2687 0091

To the Assistant Administrator:

Background

I have previously applied to your agency for an exemption like the one for peyote, 21 C.F.R. § 1307.31 (Native American Church), for my church, the Ethiopian Zion Coptic Church. *Olsen v. DEA*, 878 F. 2d 1458 (D.C. Cir., 1989). In 1989 there were a handful of states that had religious exemptions for the use of peyote but there were no states that had any exceptions for the use of marijuana. Nonetheless, I based my request on a memo dated December 22, 1981, from the Office of Legal Counsel, United States Department of Justice, to your agency.

> If such a petition is brought, your agency could: (1) require that the petitioner be a member of a bona fide peyote-using religion in which the actual use of peyote is central to established religious beliefs, practices, dogmas, or rituals; and (2) apply a rebuttable presumption that the exemption is not available, under the foregoing standard, unless the petitioner can allege and establish a significant history of religious use of peyote.

Peyote Exemption for Native American Church, at page 421. My church has a similar history. *Town v. State ex rel. Reno*, 377 So.2d 648, 649 (Fla. 1979) ("the Ethiopian Zion Coptic Church is not a new church or religion but the record reflects it is centuries old and has regularly used cannabis as its sacrament").

Your agency attempted to deny my petition by saying your agency cannot grant religious exemptions.

> The DEA's contention that Congress directed the Administrator automatically to turn away all churches save one opens a grave constitutional question. A statutory exemption authorized for one church alone, and for which no other church may qualify, presents a "denominational preference" not easily reconciled with the establishment clause.

Olsen, at 1461.

After rejecting your claim that your agency cannot grant religious exemptions for marijuana, the court held that my church was not equally situated to the Native American Church because it lacked any limitations to prevent the diversion of the church's sacrament, marijuana.

> Some religions, for example, might not restrict drug use to a limited ceremonial context, as does the Native American Church. *See*, *e. g.*, *Olsen*, 279 U. S. App. D. C., at 7, 878 F. 2d, at 1464 ("[T]he Ethiopian Zion Coptic Church . . . teaches that marijuana is properly smoked 'continually all day'").

Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 918 (1990) (Blackmun, J., dissenting). Again, I point out that in 1989 my church was not authorized to use marijuana by any state, whereas the religious use of peyote was authorized in several states, such as Texas where the peyote comes from.

To exhaust all possibilities, I suggested a narrower personal exemption, self-restricted to a specific time and a specific place, and with marijuana obtained from the only source available at that time, the federal government. *See* Licensing Marijuana Cultivation in Compliance with the Single Convention on Narcotic Drugs, memo dated June 6, 2018, from the Office of Legal Counsel, United States Department of Justice, to your agency, describing the National Center for Natural Products Research ("National Center"), a division of the University of Mississippi.

> Critically, Olsen's proposal would require the government to make supplies of marijuana available to Olsen's church on a regular basis.

Olsen, at 1462.

Establishment Clause

The Office of Legal Counsel told your agency the exemption for religious use of peyote, 21 C.F.R. § 1307.31 (Native American Church), is not required by the First Amendment and must not violate the Establishment Clause. "The Establishment Clause generally prohibits the government from granting certain preferences to religions or religious adherents which are not available to secular organizations or nonreligious individuals." Peyote Exemption for Native American Church, at page 410.

Following the enactment of the Religious Freedom Restoration Act of 1993, the U.S. Supreme Court applied an Establishment Clause / Equal Protection / General Applicability analysis to the peyote exemption.

> Nothing about the unique political status of the Tribes makes their members immune from the health risks the Government asserts accompany any use of a Schedule I substance, nor insulates the Schedule I substance the Tribes use in religious exercise from the alleged risk of diversion.

Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 434 (2006).

Substantial Burden

My sincere religious exercise is substantially burdened by the CSA. *Olsen v. DEA*, 878 F.2d 1458, 1459 (D.C. Cir., 1989) ("Petitioner Olsen is a member and priest of the Ethiopian Zion Coptic Church"); *Town v. State ex rel. Reno*, 377 So.2d 648, 649 (Fla. 1979) ("the Ethiopian Zion Coptic Church represents a religion within the first amendment to the Constitution of the United States"); *State v. Olsen*, No. 171-69079 (Iowa, July 18, 1984) ("Testimony at his trial revealed the bona fide nature of this religious organization and the sacramental use of marijuana within it").

Because my use of marijuana was rejected decisively in *Employment Division v. Smith*, 494 U.S. 872, 889 (1990), citing *Olsen v. Drug Enforcement Administration*, 279 U. S. App. D. C. 1, 878 F. 2d 1458 (1989), I stopped using marijuana in 1990.

Peyote Source

My request for federally supplied marijuana was denied in 1989. At that same time the Native American Church had a state-authorized, private source of peyote (in Texas). The Ethiopian Zion Coptic Church had no state-authorized source of marijuana, private or otherwise at that time.

> Both federal and Texas statutes criminalize the unprescribed distribution and possession of peyote. 21 U.S.C. §§ 812, 841, 844; TEX. HEALTH & SAFETY CODE ANN. §§ 481.101-481.130 (Vernon 1991). But both federal and Texas law exempt bona fide religious use of peyote by NAC members from such criminalization. 21 C.F.R. § 1307.31; TEX. HEALTH & SAFETY CODE ANN. § 481.111 (Vernon 1991).

Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1212 (5th Cir., 1991).

> There are five licensed peyote dealers in the United States, all of them in South Texas: three in the border town of Rio Grande City; one in Roma, 17 miles to the west; and one in Mirando City, a tiny town 30 miles east of Laredo.

Texas Observer, WITH THE PEYOTEROS, The fruits and thorns of the South Texas cactus trade, by Karen Olsson, March 2, 2001.

When the federal peyote exemption was created in 1966, 21 C.F.R. § 166.3(c)(3), there were several states that had laws protecting the religious use of peyote. *See Peyote Exemption for Native American Church*, Office of Legal Counsel, U.S. Department of Justice, Tuesday, December 22, 1981. In 1967, Iowa enacted a state law identical to 21 C.F.R. § 166.3(c)(3). Iowa Acts 1967 Chapter 189, § 2(12); Iowa Acts 1971 Chapter 148, § 204(5); Iowa Code § 124.204(8) (2022).

Diversion Control

Until 2018, there was no state-authorized source of marijuana in Iowa. In 2017, Iowa authorized two marijuana manufacturers and five marijuana dispensaries. *See* Iowa Code §§ 124E.6-124E.9 (2022). Iowa's medical marijuana program is carefully controlled to prevent both risk to health and risk of diversion.

On January 12, 2021, I filed a Petition for Declaratory Judgement requesting the state add religious use as a qualifying condition for registration in the state medical marijuana program. Since your agency does not recognize state medical use as accepted medical use under the CSA (neither does Iowa, marijuana is still in state Schedule I in Iowa), this would be a secular exemption as far as your agency is concerned. A hearing was held on the state's Motion to Dismiss on March 11, 2022. I'm waiting for a ruling from the Iowa district court.

Shifting Priorities

The governmental interest that existed in 1989 when my last application for a religious exemption was submitted to your agency has greatly diminished over time. This was recently highlighted by Justice Clarence Thomas in *Standing Akimbo v. United States*, 594 U.S. ___ (2021), 141 S.Ct. 2236, No. 20-645 (June 28, 2021).

> Whatever the merits of *Raich* when it was decided, federal policies of the past 16 years have greatly undermined its reasoning. Once comprehensive, the Federal Government's current approach is a half-in, half-out regime that simultaneously tolerates and forbids local use of marijuana. This contradictory and unstable state of affairs strains basic principles of federalism and conceals traps for the unwary.

Id., at 2236-2237.

> Whether Congress decides to address the gap with the states or not, federal control of cannabis has evolved from the strict laws and enforcement policies of the 20th century to allowing most states to implement laws authorizing the production and distribution of marijuana.

Congressional Research Service, *The Evolution of Marijuana as a Controlled Substance and the Federal-State Policy Gap (R44782)*, April 7, 2022.

Conclusion

There is now a state authorized source of marijuana in Iowa. The state program limits the use of that marijuana to specific forms, times, and places, to prevent diversion. Iowa law currently limits amounts that can be purchased and carefully tracks all transactions to ensure full compliance. Failure to comply with these requirements will result in revokation of registration. The requirements are all clearly defined in Iowa Code Chapter 124E, and in 641 Iowa Administrative Code Chapter 154. Your agency will have no difficulty knowing what these requirements are.

Dated this 27th day of April, 2022.

Carl Olsen
130 E Aurora Ave
Des Moines, Iowa 50313-3654
515-343-9933
carl@carl-olsen.com

URLS

https://www.govinfo.gov/content/pkg/CFR-2021-title21-vol9/xml/CFR-2021-title21-vol9-sec1307-31.xml
https://www.justice.gov/olc/opinion/peyote-exemption-native-american-church
https://www.justice.gov/olc/opinion/licensing-marijuana-cultivation-compliance-single-convention-narcotic-drugs
https://ethiopianzioncopticchurch.org/pdfs/olsen_1984.pdf
https://www.texasobserver.org/408-with-the-peyoteros-the-fruits-and-thorns-of-the-south-texas-cactus-trade/
https://files.iowamedicalmarijuana.org/imm/federal/31FedReg4679-1996.pdf
https://files.iowamedicalmarijuana.org/imm/states/1967_Iowa_189.pdf#page=2
https://files.iowamedicalmarijuana.org/imm/1971_ch_148.pdf#page=7
https://www.legis.iowa.gov/docs/code/2022/124.204.pdf#page=7
https://www.legis.iowa.gov/law/iowaCode/sections?codeChapter=124E&year=2022
https://iowamedicalmarijuana.org/pdfs/olsen-state-2021/05771__CVCV062566_PAPF_10306718.PDF
https://www.legis.iowa.gov/law/iowaCode/sections?codeChapter=124E&year=2022
https://www.legis.iowa.gov/law/administrativeRules/rules?agency=641&chapter=154&pubDate=04-20-2022
https://crsreports.congress.gov/product/details?prodcode=R44782