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*** ***REPLY 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 Reply Brief in Support of Appeal of Denial of Medical Cannabidiol Registration Card.

THE EXISTENCE OF OTHER RELIGIOUS EXEMPTIONS, ESPECIALLY FOR PEYOTE, DEMONSTRATES THE UNDERINCLUSIVENESS OF CHAPTERS 124 AND 124E.

Appellant draws attention to existing religious exemptions only to show that the Department has the ability to evaluate claims for religious exemptions in other health-related contexts.

Chapter 124 is underinclusive because it contains a religious exemption for one substance to the exclusion of other substances and other bona fide religious practices. There is no administrative process available to apply for another exemption, so it lacks due process.

In *Employment Division v. Smith*, 494 U.S. 872 (1990), the United State Supreme Court opined the state could deny a bona fide religious claim if the law, which in that case was a criminal statute regarding the Oregon controlled substances act, was generally applicable. That law was both facially and operational neutral toward religion because there was no religious exemption whatsoever, not even for peyote. It was also generally applicable due to the lack of any exceptions, religious or secular.

In contrast, the Iowa controlled substances act, chapter 124, is neither facially neutral nor operationally neutral toward religion. The state has long recognized a peyote exemption since 1971. And the controlled substances act is not generally applicable because of the secular exemption for marijuana extracts, which are not approved for medical use under chapter 124.

While collateral estoppel may bar Appellant from arguing his use of marijuana is equal to the use of peyote in Iowa, that is not the argument he advances presently. Iowa law contains a quite unique and state-specific exception for the possession and use of marijuana. The right to participate in the program did not exist until 2017 when the General Assembly enacted chapter 124E.

The cases cited by the Department ostensibly hold there is no religious claim for waiving vaccine mandates unless the legislature creates one and further that those laws are otherwise neutral toward religion and generally applicable. However, the legislature has already created religious exemptions in a number of health-related contexts. And, of course, there is a religious exemption for peyote. This is settled law. The fundamental question here is whether a secular exception for medical necessity is underinclusive. In other words, once the legislature creates a religious exemption, then the focus shifts to whether a request for an additional exemption, based on a centuries-old religious practice, is being evaluated fairly.

The examples cited from other states miss the mark for a couple of reasons. The statutes do not have any religious exemptions so the question of whether those exemptions were constitutionally required is irrelevant. The Iowa Controlled Substances Act already has a religious exemption.

Also, Iowa does not limit religious exemptions for vaccine mandates to only members of the Native American Church. It is not a question of whether religious exemptions are required. Rather, the issue is whether the state can limit religious exemptions to specific religions or specific controlled substances to the exclusion of all others. *See Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458, 1461 (D.C. Cir. 1989) ("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")(Ginsburg, J.).

One thing is certain. The aforementioned case and *Olsen v. Mukasey*, 541 F.3d 827 (8th Cir. 2008) both make clear that some religious exemptions are harder to accommodate than others. Peyote and marijuana are not the same. Strict scrutiny was applied by those courts in every instance to deny Appellant's claim based on the differences between the two substances. Also, there was a higher demand for marijuana than peyote. And fewer controls on the religious use of marijuana than peyote. There was source for peyote in Texas that was legal at both the state and federal levels. However, there was no legal state or federal source for marijuana anywhere in the United States at the time.

But that is not the case in Iowa today. Arguably there more demand for marijuana extracts in Iowa with currently 10,000 registered card holders. Iowa has established a legal source for marijuana extracts by licensing two manufacturers and five dispensaries and permitting access to qualified patients and caregivers. There are now regulations and controls to prevent diversion that did not previously exist. Also, federal law provides a process to evaluate exemptions for religious use of controlled substances. Finally, the

religious exemption sought here is *identical* to the secular exemption provided in chapter 124E. Appellant seeks precisely what chapter 124E provides. That distinguishes Appellant's claim from the prior holdings.

Chapter 124E is essentially an amendment to chapter 124. It excepts marijuana and cannabidiol from the context of controlled substances. *See State v. Middlekauff*, 974 N.W.2d 781, 803 (Iowa 2022). It is not possible to evaluate chapter 124E apart from chapter 124.

THERE IS NO CENTURIES-OLD RELIGIOUS PRACTICE THAT EMBRACES THE SACREMENTAL USE OF OPIOIDS, OR ANY OTHER SYNTHETIC, NON-PLANT MATERIAL.

The Department provides a parade of horribles that would result from granting a religious exemption in this case. It goes as far as to say that it would then apply to "any controlled substance of [the person's] choosing" and potentially contribute to the nationwide opioid crisis. *See* Br. at 12.

We should not get too far ahead of ourselves. To be sure, the Native American Church (peyote), Ethiopian Zion Coptic Church (cannabis) and União do Vegetal (UDV) (hoasca) all embrace the bona fide sacramental use of a naturally occurring plant. But there are no known centuries-old religious practices that claim sacramental use of synthetic, non-plant materials of the kind identified in the schedules found in chapter 124. If there were, then the Department would undoubtedly identify them. So, even if there was an administrative process to approve of other religious exemptions, the Department could easily distinguish a religion that believes in the sacramental use of say, hydrocode, a semisynthetic opioid first patented in 1923.

This example raises an especially critical point that the Department has so far ignored. The legislature carved out an exception for marijuana extracts for medical use from chapter 124. Marijuana is a state schedule I controlled substance. It lacks any "accepted medical use in treatment in the United States; or lacks accepted safety for use in treatment under medical supervision." *See* Iowa Code § 124.203 (2022) (listing criteria for schedule I). If the Iowa legislature can establish a non-prescription, federally illegal manufacturing and distribution program for schedule I marijuana extracts, then it can *absolutely* establish a parallel program for substances listed in schedule II, like hydrocodone, which by definition have "currently accepted medical use in treatment in the United States, or currently accepted medical use with severe restrictions." *See* Iowa Code § 124.205 (2022). But the legislature would have to first create that program, which is a hugely speculative outcome at best. And, yes, if such a program existed, then a person with a valid claim for a religious exemption for the sacramental use of hydrocodone could certainly make the same arguments.

We should keep in mind, too, that Appellant is likely the only person in the state of Iowa who can make a valid claim for a religious exemption under chapter 124E. A ruling in his favor is not opening the floodgates to other applicants. It is adding one additional cardholder to the rolls.

THE DEPARTMENT CANNOT USE THE PROHIBITION AGAINST SMOKING MEDICAL CANNABIDIOL TO DEFEAT APPELLANT'S CLAIM FOR A RELIGIOUS EXEMPTION.

While there may be a prohibition against smoking medical cannabidiol in Iowa Code section 124E.17, Appellant is not seeking more than what the program permits. He requests equal access to whatever forms are available to qualifying patients, including

vaporizable and nebulizable medical cannabidiol, in the allowable periodic amounts. *See* Iowa Code 124E.9(14) (4.5 grams of total THC every 90 days); Iowa Admin. Code r. 641-154.2r. 641-154.14(2) (allowable oral and inhaled forms). The record demonstrates that Appellant's past sacramental use of cannabis certainly involved inhalation but extended as well to eating and drinking cannabis preparations. Like any other qualified person, how Appellant chooses to lawfully consume medical cannabidiol under the statute and administrative rules is not the Department's concern.

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)