IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CARL OLSEN, Petitioner, v. STATE OF IOWA Respondent.	No. CVCV068508 ***SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF RESISTANCE TO MOTION TO DISMISS***

COLLATERAL ESTOPPEL

Mr. Olsen's claim is not precluded by collateral estoppel. *Olsen v. Mukasey*, 541 F.3d 827, 831 (8th Cir. 2008) ("Collateral estoppel does not apply if controlling facts or legal principles have changed significantly since Olsen's prior judgments. See *Montana v. United States*, 440 U.S. 147, 155 (1979)"). There have been dramatic changes in both state and federal law since 2008.

Changes in state law have been so profound that in 2024 the U.S. Department of Justice proposed reclassification of cannabis from schedule I to schedule III of the federal Controlled Substances Act (CSA) of 1970.[1] Changes in state laws produced data showing cannabis has lower potential for abuse as well as medical value. International law has changed as well. In 2020, the UN Commission on Narcotic Drugs (CND) reclassified cannabis to recognize its medical value.[2]

[1] Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (Oct. 27, 1070); https://www.congress.gov/91/statute/STATUTE-84/STATUTE-84-Pg1236.pdf

[2] UN Commission on Narcotic Drugs reclassifies cannabis to recognize its therapeutic uses, World Health Organization, December 4, 2020; CND votes on recommendations for cannabis and cannabis-related substances, Commission on Narcotic Drugs, Press Release, December 2, 20020; https://www.who.int/news/item/04-12-2020-un-commission-on-narcotic-drugs-reclassifies-cannabis-to-recognize-its-therapeutic-uses; https://www.unodc.org/documents/commissions/CND/CND_Sessions/CND_63Reconvened/Press_statement_CND_2_December.pdf

CHANGES IN FEDERAL POLICY

Between 2009 and 2013 federal policy changed. Large organizations were encouraged to illegally operate state cannabis programs ("compliance . . . may allay the threat that an operation's size poses").[3] Since that time, cannabis has become a multi-billion-dollar industry, albeit an illegal one. In 2014 Congress joined the fray and began restricting funds used to prosecute illegal multi-state operators in the annual appropriations for the U.S. Department of Justice.[4]

In 2014 Nebraska and Oklahoma unsuccessfully complained to the U.S. Supreme Court, claiming the federal CSA preempted Colorado's medical cannabis law. Nebraska and Oklahoma v. Colorado, Docket No. 22O144.[5] See Brief for the United States as Amicus Curiae, at page 8 (Nebraska and Oklahoma "do not contend that 'the CSA requires Colorado to criminalize marijuana'").[6]

There is no "positive" conflict between the state medical cannabis program and federal law, 21 U.S.C. § 903. Petitioner has been asking defendants for several years now to reconcile its "perceived" conflict, 21 U.S.C. § 822(d). Federal regulations provide a procedure, 21 C.F.R. § 1307.03, and a church has been registered to use a schedule I controlled substance for non-drug (non-prescription) purposes, 21 C.F.R. § 1307.31. Congress also provided judicial review if the

[3] U.S. Department of Justice, Ogden Memorandum, October 19, 2009; U.S. Department of Justice, Cole Memorandum, June 29, 2011; U.S. Department of Justice, Cole Memorandum, August 29, 2013; https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf; https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf; https://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf

[4] See Petition, pp. 12-13, for a complete list of appropriations bills Congress has enacted from 2014 through 2024, withholding funding from the U.S. Department of Justice to prevent interference with Iowa Code Chapter 124D, 2014 Iowa Acts ch. 1125 (May 30, 2014), Iowa Code Chapter 124E, 2017 Iowa Acts ch. 162 (May 12, 2017), 2020 Iowa Acts ch. 1116 (June 29, 2020).

[5] https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22o144.html

[6] https://www.justice.gov/osg/media/809551/dl?inline

state's equal or greater right to enact a medical cannabis program is not recognized, 21 U.S.C. § 877.

CHANGES IN IOWA LAW

Iowa enacted a medical cannabis program in 2017.[7] Iowa Code Chapter 124E. The act authorizes cultivation, manufacture of extracts, and distribution of these cannabis extracts to Iowans with certified medical conditions. Chapter 124E does not include an explicit disclaimer that participation requires violation of federal law and the state refuses to apply for a federal exemption. As a result, purchasing these products is a federal crime. The manufacturers and distributors are aware they are violating federal law because they cannot deduct ordinary business expenses from their federal income tax. 26 U.S.C. § 280E.

CHANGES IN FEDERAL LAW

In 2018, the federal agriculture act legalized interstate transportation of cannabis seeds and raw cannabis (limited to .3% delta-9 THC or less).[8] Raw cannabis contains THCa which converts to delta-9 THC when heated. Web MD, THCA (Tetrahydrocannabinolic acid) (last accessed on April 11, 2025).[9] There is no limit on THCa. Iowa has limited some of these products from being produced or sold in Iowa, but they are still shipped interstate into and through Iowa. Iowa Code Chapter 204.

[7] 2017 Iowa Acts ch. 162 (May 12, 2017); 2020 Iowa Acts ch. 1116 (June 29, 2020).
[8] Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490 (December 20, 2018)
[9] https://www.webmd.com/mental-health/addiction/what-is-thca

RELIGIOUS FREEDOM

Olsen v. Mukasey held the federal Religious Freedom Restoration Act (RFRA) of 1993 does not apply to state law.[10] *Id.*, 541 F.3d at 830 ("The Iowa CSA is state law, not subject to RFRA").

In 1990, the U.S. Supreme Court held that Oregon's controlled substances act did not violate the First Amendment because Oregon was not favoring one religious organization over another or favoring secular use over religious use. *Employment Division v. Smith*, 494 U.S. 872 (1990). Congress tried to make a law reversing that decision, but the U.S. Supreme Court rejected its application to the states. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

States began enacting their own RFRAs. Iowa enacted one in 2024.[11] Iowa's CSA has never been religiously neutral and since 2014 it is no longer generally applicable to secular use of cannabis. Iowa's RFRA provides strict scrutiny, the same legal principle applied to Mr. Olsen in the past. Iowa's RFRA allows Mr. Olsen to bring this civil complaint because facts and laws have changed since *Olsen v. Mukasey* was decided.

Whether a government is being neutral toward religious activity and/or generally applicable to non-religious activity is a separate question for each of the fifty-one governments, states and federal. The U.S. Supreme Court thinks state laws should be analyzed in the context of state constitutions, before federal analysis is considered. *Employment Division v. Smith*, 494 U.S. 872 (1990) (a federal exemption for religious use of peyote did not require Oregon to provide the same exception if Oregon did not make any exceptions, religious or otherwise, to its state controlled substances act). Accord., *Mitchell County v. Zimmerman*, 810 N.W.2d 1 (Iowa 2012).

[10] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993).
[11] Religious Freedom Restoration Act, 2024 Iowa Acts ch. 1003 (April 2, 2024), codified at Iowa Code Chapter 675.

The federal government has an administrative process allowing anyone to petition for reclassification of a controlled substance, 21 U.S.C. § 811(a), or an exception, 21 U.S.C. § 822(d). Iowa does not have an administrative process for either of them.

Iowa rejected administrative process recommended in the Uniform Act. In 1971, the Iowa Drug Abuse Study Committee recommended that Iowa classify all controlled substance by legislation rather than by regulation.[12] The Iowa CSA is not uniform in this regard, although it says it must be construed as uniformly as possible. Iowa Code § 124.601 ("This chapter shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it"). Uniform controlled substances acts do not embed religious exceptions in the statute, they embed a process for evaluating them, like 21 U.S.C. § 822(d). The general purpose of these acts, uniform and federal, imply regulation, but Iowa does not see it the same way.

LESS RESTRICTIVE MEANS

The U.S. Court of Appeals for the First Circuit explored simple possession in *United States v. Rush*, 738 F.2d 497, 512 (first amendment does not protect intent to distribute), 738 F.2d at 513-15 (simple possession and joint possession are not distribution). Mr. Olsen did not make a simple or joint possession defense in *Rush*.

Mr. Olsen's first attempt at an exemption was a petition to the U.S. Drug Enforcement Administration (DEA), *Olsen v. DEA*, 878 F.2d 1458 (D.C. Cir. 1989), and the second attempt was the federal RFRA, *Olsen v. Mukasey*, 541 F.3d 827 (8th Cir. 2008).

Mr. Olsen did not initially rely on simple possession as a primary argument in *Olsen v. DEA*, 878 F.2d at 1462 ("Critically, Olsen's proposal would require the government to make

[12] Final Report of the Drug Abuse Study Committee to the Sixty-Fourth General Assembly of the State of Iowa (1971); https://www.legis.iowa.gov/docs/publications/IP/255497.pdf

supplies of marijuana available to Olsen's church on a regular basis"). There was only one legal source of cannabis in the United States that Mr. Olsen could identify, the University of Mississippi. Licensing Marijuana Cultivation, at page 67.[13] Licensing is consistent with 21 C.F.R. § 1307.31 (persons supplying peyote to the church must register).

Mr. Olsen was thinking an exemption for a church would include simple possession because the peyote exemption works that way. Court-appointed counsel added simple possession for the purpose of least restrictive means analysis. *Olsen v. DEA*, 878 F.2d 1458, 1469 (D.C. Cir. 1989) (Buckley, J., dissenting) ("the majority fails to address the Establishment Clause implications of the Drug Enforcement Agency's rejection of Olsen's request for a limited religious exemption").

Iowa authorized the cultivation of cannabis in 2017.[14] The federal government began licensing additional growers in 2018.[15] Federal law authorized interstate transportation of cannabis seeds and THCA-rich cannabis in 2018.[16] The potential for a legal supply for religious use is greater today because growers are registered in Iowa as well as federally. Registration is consistent with Iowa Code § 124.204(8) (persons supplying peyote to the church must register). Home-grown cannabis is also possible today because it's completely legal to get viable seeds.[17]

In 1972, the federal Commission on Marihuana and Drug Abuse recommended that private use not be criminalized and that public use be prohibited. Petitioner's Petition, at page 7. In 1972, there was no legal way to obtain cannabis. Now there is. Anyone can get seeds, but

[13] Licensing Marijuana Cultivation, Office of Legal Counsel, U.S. Department of Justice (June 6, 2018); https://www.justice.gov/olc/opinion/licensing-marijuana-cultivation-compliance-single-convention-narcotic-drugs
[14] Medical Cannabidiol Act, 2017 Iowa Acts 162 (May 12, 2017)
[15] See footnote 13.
[16] See footnote 8.
[17] https://www.scribd.com/document/603081409/U-S-DEA-Official-Determination-on-the-Legality-of-Cannabis-Seeds

nobody can grow them without a license. And licensed growers now exist both locally and nationally since 2018.

Olsen v. Mukasey held the decision in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006) (UDV), did not create greater protection for religious freedom than Mr. Olsen had previously received. *Id*., 541 F.3d at 831, 832 ("Strict scrutiny was the appropriate analysis . . ."). Simple possession had been rejected in 1989, *Olsen v. DEA*, and nothing had changed significantly by 2008, *Olsen v. Mukasey*, that would make a simple possession argument any stronger.

Simple possession clearly receives greater protection under strict scrutiny than distribution. See, *Rush*, *supra*, and *United States v. Bauer*, 75 F.3d 1366, 1376 (9th Cir. 1996) ("As to the three counts on which the appellants were convicted of simple possession, the exclusion of the religious defense was in error"). Accord., Guam v. Guerrero, 290 F.3d 1210, 1222-1223 (9th Cir. 2002).

UDV was not a question of diversion and falls squarely within the definition of joint possession, although importation requires federal registration. UDV, 546 U.S. at 427. Again, this is consistent with 21 C.F.R. § 1307.31 (persons supplying peyote to the church must register).

STANDING

Being arrested is not a prerequisite to filing an Iowa RFRA claim. The Iowa RFRA authorizes a civil claim against the state. In 1984, the Iowa Supreme Court found Mr. Olsen is a member of a bona fide religious organization that uses cannabis as its sacrament. The reason Mr. Olsen lost is because there was no evidence presented showing the church had any controls in

place to prevent diversion (along with the assumption that anything in schedule I of the controlled substances act is extremely dangerous, which has since been debunked).[18]

Mr. Olsen' injury has been recognized and is ongoing. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 67 (2020) ("There can be no question that the challenged restrictions, if enforced, will cause irreparable harm. 'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.' *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)"). It is beyond doubt that if not for Iowa Code Chapter 124, Mr. Olsen would be using the sacrament of his church.

Mr. Olsen has long believed that cannabis is safer than the alcohol sacrament, peyote, or ayahuasca (UDV), and so did the members of the church. The lack of any controls to prevent diversion was not surprising. Nevertheless, the government just stands on schedule I as if cannabis is as dangerous as peyote and ayahuasca, or heroin, etc. Last year, the U.S. Secretary of Health and Human Services told us cannabis is not as dangerous as it has been made out to be.[19]

CONCLUSION

Mr. Olsen would not have filed this case if simple possession was the only "new" argument today and the Iowa RFRA was the only change in the law today. The State has been gradually undercutting its classification of cannabis as a substance without accepted medical use and unsafe for use under medical supervision since 2014. *Fulton v. Philadelphia*, 593 U.S. 522, 534 ("A law lacks general applicability if it prohibits religious conduct while permitting conduct

[18] Rescheduling of Marijuana. Federal Register, Vol. 89, No. 99, Tuesday, May 21, 2024, p. 44597; https://www.federalregister.gov/documents/2024/05/21/2024-11137/schedules-of-controlled-substances-rescheduling-of-marijuana

[19] See footnote 18.

that undermines the government's asserted interest in a similar way") (citation omitted). Accord., *UDV*, 546 U.S. at 434.

Declaratory and injunction relief can include controls on diversion that were previously lacking by simply confining the use to personal, private, religious use of cannabis using least restrictive means analysis. *Olsen v. DEA*, 878 F.2d at 1469 (Buckley, J., dissenting) ("request for a limited religious exemption"). Iowa patients use products with up to 80% pure THC without any direct supervision. Any adult can purchase pure THC infused into a beverage in the grocery store. Manufacture and distribution require a license and are regulated. Public use is beyond the scope of the relief requested by Mr. Olsen. Commercial use is beyond the scope of the relief requested by Mr. Olsen. Joint possession is beyond the scope of the relief requested by Mr. Olsen.

The state argues that Mr. Olsen's claim is too general, that anyone could make it. The Iowa RFRA speaks directly to that point. Iowa Code § 675.4(1) ("State action shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability"). Accord., *UDV*, 546 U.S. at 424.

UDV, 546 U.S. at 432 ("the Government's mere invocation of the general characteristics of Schedule I substances, as set forth in the Controlled Substances Act, cannot carry the day"). *Id*., 546 U.S. at 436 ("The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions"). *Id*., 546 U.S. at 438 ("under RFRA invocation of such general interests, standing alone, is not enough").

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Respectfully submitted.

CARL OLSEN

/s/ Carl Olsen

CARL OLSEN, Pro Se
130 E. Aurora Ave.
Des Moines, IA 50313
Phone: 515-343-9933
Email carl@carl-olsen.com

Copy to:

Jeffrey Peterzalek
Deputy Attorney General
Department of Justice
Hoover State Office Building, 2nd Floor
Des Moines, IA 50319
by
ECF System Participant (Electronic Service)