IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CARL OLSEN, Petitioner, v. STATE OF IOWA Respondent.	No. CVCV068508 ***PETITIONER'S RESISTANCE TO MOTION TO DISMISS***

Carl Olsen resists the State's Motion to Dismiss. In support, Mr. Olsen states the following:

DECLARATORY RELIEF REQUESTED

The respondent's motion says the petitioner was unclear about the relief being requested. Motion to Dismiss at 1. Mr. Olsen agrees.

The Religious Freedom Restoration Act (RFRA), Iowa Code Chapter 675, provides the following remedies: "... appropriate relief, including damages, injunctive relief, or other appropriate redress". Iowa Code § 675.4(2).

Mr. Olsen was last arrested by law enforcement for cannabis 1980. There is no current enforcement action against Mr. Olsen to enjoin. Mr. Olsen seeks declaratory relief.

The exceptions to Iowa Code Chapter 124 are declarations of rights, and Mr. Olsen seeks a declaration of his rights from this court pursuant to the RFRA. Exceptions to Chapter 124: Iowa Code §§ 124.204(7), 124.204(8), and 124.401(5)(c).

COLLATERAL ESTOPPEL

The respondent's motion says that a motion to dismiss is a proper vehicle to test for issue preclusion. Motion to Dismiss at 2. Mr. Olsen agrees.

The respondent's motion is deficient because it relies on facts that have changed significantly since *Olsen v. DEA*, 878 F.2d 1458 (D.C. Cir. 1989), and *Olsen v. Mukasey*, (8th Cir. 2008). Those facts have been undercut through subsequent action by the government (both state and federal, but primarily the state of Iowa). "[C]hanges in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues." *Montana v. United States*, 440 U.S. 147, 159 (1979).

For a prior determination to have preclusive effect in subsequent litigation, the issue precluded must be identical. Motion at 4 (citing *Comes v. Microsoft Corp.,* 709 N.W.2d 114, 118 (Iowa 2006).

In *Olsen v. DEA* Mr. Olsen argued his religious activity was protected by state and federal constitutional guarantees of religious freedom and argued an additional "equal protection / establishment clause" injury based on state and federal religious exemptions for peyote. There were no state or federal exceptions for cannabis at that time. Mr. Olsen did not make any arguments about accepted uses of cannabis, because there were none.

In *Mukasey* Mr. Olsen repeated his claim, but added tobacco, alcohol, and federal research, to his equal protection claim. See *Conant v. Walters*, 309 F.3d 629, 648 (9th Cir. 2002) ("From 1978 to 1992, the federal government conducted its own medical marijuana program.")

Mr. Olsen does not agree with these past decisions (comparing the popularity of cannabis to the popularity of peyote) but does agree identical arguments are precluded by collateral estoppel.

The peyote exemption, Iowa Code § 124.204(8), comes from a federal regulation, 21 C.F.R. § 1307.31. The authority for exemptions comes from 21 U.S.C. § 822(d) (consistent with "public health and safety"), not from 21 U.S.C. § 812 (the list of schedules). The Iowa

legislature copied the peyote exemption from a federal regulation in 1966 and later added it to schedule I of Chapter 124 in 1971. Federal Register, Vol. 31, No. 54, Saturday, March 19, 1966, at page 4679; 21 C.F.R. § 166.3(c)(3) (1968); 1967 Iowa Acts ch. 189, § 2(12); Iowa Code § 204A.2(12) (1968).

Including the peyote exemption in schedule I was contrary to both the Uniform Act and the federal Controlled Substances Act. Iowa rejected both of those acts. See Final Report of the Drug Abuse Study Committee to the Sixty-Fourth General Assembly of the State of Iowa (1971), at 1 ("... changes in the schedules of controlled substances will be made by the General Assembly ..., not by ... administrative action as the Uniform Act originally provided").

The legislature chose to add the peyote exemption by statute rather than by regulation, creating tension with establishment clauses of the state and federal constitutions. A statute that is neither neutral toward religion nor generally applicable is subject to strict judicial scrutiny. See *Boerne v. Flores*, 521 U.S. 507, 514 (1997) (citing *Employment Division v. Smith*, 494 U.S. 872 (1990)):

> By contrast, where a general prohibition, such as Oregon's, is at issue, "the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to [free exercise] challenges." *Id*., at 885. *Smith* held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.

The decision in *Olsen v. DEA*, over the objection of Judge Buckley, compared the popularity of cannabis to the popularity of peyote. That same popularity has created massive changes in public policy since 1989 and *Mukasey* in 2008.

In 1996 California became the first state to create an exception for the compassionate use of cannabis, and since then forty-eight (48) states, including Iowa in 2014, have enacted compassionate exceptions for cannabis.

The arguments Mr. Olsen is making in this petition are based on significant changes in both state and federal that have occurred after appeals were exhausted in *Olsen v. DEA* in 1990, and after *Mukasey* rejected the petitioner's federal RFRA claim in 2008:

1. Changes in public policy made since 2014 regarding compassionate use and interstate transportation[1] of cannabis in Iowa, Iowa Code Chapter 124D, Iowa Code Chapter 124E, Iowa Code § 124.401(5)(c).
2. Changes in public policy made since 2018 regarding recreational use of delta-9 THC in Iowa, Iowa Code Chapter 204, Iowa Code § 124;204(7).

Fulton v. Philadelphia, 593 U.S. 522, 534 (2021) ("A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way").

Since 2014, the state and federal governments have authorized multi-state criminal organizations to operate state cannabis programs, such as the one in Iowa, Iowa Code Chapter 124E; Iowa Code Chapter 124, section 401(5)(c). See annual appropriations for the U.S. Department of Justice[2].

[1] 2014 Iowa Acts ch. 1125 (May 30, 2014), Iowa Code § 124D.6(1)(b) (2017) ("... shall be obtained from an out-of-state source ..."); 2017 Iowa Acts ch. 162 (May 12, 2017), Iowa Code § 124E.13 (2025) ("... shall be obtained from an out-of-state source ...").

[2] Public Law 118-42, § 531, 138 STAT. 25, 174 (March 9, 2024) Consolidated Appropriations Act, 2024 (H.R. 4366); Public Law 117-328, § 531, 136 STAT. 4459, 4561 (December 29, 2022) Consolidated Appropriations Act, 2023 (H.R. 2617); Public Law 117-103, § 531, 136 STAT. 49, 150 (March 15, 2022) Consolidated Appropriations Act, 2022 (H.R. 2471); Public Law 116-260, § 531, 134 Stat. 1182, 1283 (Dec. 27, 2020) Consolidated Appropriations Act, 2021 (H.R. 133); Public Law 116-93, § 531, 133 Stat. 2317, 2431 (Dec. 20, 2019) Consolidated Appropriations Act, 2020 (H.R. 1158); Public Law 116-6, § 537, 133 Stat. 13, 138 (Feb. 15, 2019) Consolidated Appropriations Act, 2019 (H.J. Res. 31); Public Law 115-141, § 538, 132 Stat. 347, 444 (Mar. 23, 2018) Consolidated Appropriations Act, 2018 (H.R. 1625); Public Law 115-31, § 537, 131 Stat. 135, 228 (May 5, 2017) Consolidated Appropriations Act, 2017 (H.R. 244); Public Law 114-113, § 542, 129 Stat. 2241, 2332 (Dec. 18, 2015) Consolidated Appropriations Act, 2016 (H.R.

Since 2018, the state and federal governments have authorized the sale of products containing delta-9 THC in Iowa grocery stores, Iowa Code Chapter 204; Iowa Code Chapter 124, section 204(7).

STANDING

Mr. Olsen is not going to be arrested again. The government put Mr. Olsen in prison and continues to threaten Mr. Olsen with harm for exercising his constitutional rights. Mr. Olsen's fear of government persecution is not imaginary, conjectural, or hypothetical. Protections for religious use of peyote and secular use of cannabis are not imaginary, and those users are not left defenseless and in the dark. Mr. Olsen seeks a declaration of his rights from the court for the same reason. It is unconstitutional to include a religious exemption for a single church in a statute without due process, and that process did not exist until the Iowa RFRA was enacted in 2024.

Mr. Olsen has standing to bring this action under the Religious Freedom Restoration Act, Iowa Code Chapter 675. Mr. Olsen's past religious claims have never been rejected for lack of standing. *Olsen v. Mukasey*, 541 F. 3d 827 (8th Cir. 2008) ("Strict scrutiny was the appropriate analysis ..."). Collateral Estoppel is determinate of standing, but issue preclusion does not apply here.

Mukasey found there was no change in controlling federal law, which is why the court said the claim was precluded by Collateral Estoppel at that time. *Mukasey* found the federal RFRA was inapplicable to the state of Iowa (citing *Boerne v. Flores*, 521 U.S. 507 (1997)). In contrast, there have been significant changes in controlling state law, and those changes have

2029); Public Law 113-235, § 538, 128 Stat. 2129, 2217 (Dec. 16, 2014) Consolidated and Further Continuing Appropriations Act, 2015 (H.R. 83).

only recently occurred over the past decade. The Iowa RFRA requires strict scrutiny. There have been corresponding changes in controlling federal law as well.

Mr. Olsen's current claim is narrower than his previous claim. Mr. Olsen is not making a claim for a church or for public use of cannabis. See *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 430-431 (2006):

> RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government's categorical approach. RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person" – the particular claimant whose sincere exercise of religion is being substantially burdened.

Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 432 (2006) ("Under the more focused inquiry required by RFRA and the compelling interest test, 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.")

Last year, the federal administration announced that cannabis is safer than substances in schedule II. See Federal Register, Vol. 89, No. 99, Tuesday, May 21, 2024, p. 44597.

The State has no compelling interest in prohibiting Mr. Olsen's personal, religious, private use of cannabis. Whether the state ever had any compelling interest is doubtful, but recent actions by the state and federal government have undercut any compelling interest to the point where compelling interest no longer exists.

THE RELIGIOUS FREEDOM RESTORATION ACT

The Religious Freedom Restoration Act (RFRA) evolved from a case involving the religious use of peyote. Congress reacted to a Supreme Court decision rejecting First Amendment protection for religious use of peyote in Oregon. Oregon had no exceptions to its

drug laws. See *Employment Division v. Smith*, 494 U.S. 872 (1990). The Supreme Court then held the federal RFRA unconstitutional as applied to the states. See *Boerne v. Flores*, 521 U.S. 507 (1997). As a result, states began enacting their own RFRAs, and Iowa enacted a RFRA in 2024.

Unlike Oregon's neutral and generally applicable drug law, Chapter 124 has never been neutral toward religious use of controlled substances. Since 2014 Chapter 124 hasn't been generally applicable to cannabis, either. Under the RFRA, strict scrutiny would be required even if Iowa did not have a religious exemption in Chapter 124, because secular exceptions for cannabis have recently been added, and secular exceptions for cannabis do not hold higher social value or public interest than religious freedom.

Iowa has already valued religious freedom for peyote over a categorical approach to schedule I. But placing an exemption for a single church in schedule I, against the advice of the Uniform Act, makes no sense.

The recent secular cannabis exceptions for organized crime and sale of delta-9 THC in grocery stores, are not higher social values or public interests than religious freedom.

Mr. Olsen rejects the respondent's claim that religious freedom isn't for everyone. Privilege and immunities not equally available on the same terms to all citizens are forbidden by article 1, section 6 of the Iowa Constitution. Exceptions are neither forbidden nor required, but equal protection, due process, and redress are required once the state starts making them. *Employment Division v. Smith*, 494 U.S. 872 (1990); *Carson v. Makin*, 596 U.S. 767, 779-780 (2022) ("A State need not subsidize private education," we concluded, "[b]ut once a State decides to do so, it cannot disqualify some private schools simply because they are religious.") (citing *Espinoza v. Montana Department of Revenue*, 591 U.S. 464, 487 (2020)).

The fact that delta-9 THC is available in grocery stores for every adult in Iowa is more than sufficient to overcome the respondent's objection to religious freedom.

Unlike Iowa, federal law allows anyone to petition for federal reclassification of cannabis, 21 U.S.C. § 811(a), and anyone can petition for federal exemption, 21 U.S.C. § 822(d). And, since 1993, anyone can file a federal RFRA claim in a federal district court.

The only petition anyone can file in Iowa to request religious protection from Chapter 124 is a RFRA claim in an Iowa district court (Chapter 675).

OTHER DEFICIENCIES

The controlled substances act says cannabis has no medical use and is unsafe for use under medical supervision. *State v. Middlekauff*, 974 N.W.2d 781 (Iowa 2022); *State v. Bonjour*, 694 N.W.2d 511 (Iowa 2005); Iowa Code §§ 124.203(1)(b), 124.204(4)(m).

The respondent's medical cannabis program is inconsistent with both state and federal drug law and exposes everyone who participates to federal jeopardy. Promoting crime and abusing Iowans with severe medical conditions does not have higher social value or public interest than religious freedom.

The respondent's medical cannabis program has a misleading name that conceals its purpose, "cannabidiol", Chapter 124E. Cannabidiol (CBD) is just a single cannabinoid, but the program authorizes the use of "any" cannabinoid. Iowa Code 124E.2(10). 9% of these products being consumed are balanced THC:CBD; 8.5% are high CBD, and 82.6% are High THC. Medical Cannabidiol Board, Annual Report, 2024, at page 19.

CONCLUSION

The compelling interest test required by the RFRA requires strict scrutiny. Highly significant changes in both state and federal law since the petitioner's last arrest in 1980, and since his claims were ultimately rejected in 2008, require strict scrutiny.

The petitioner is not asking for unlimited constitutional protection for a church, distinguishing his current claim from other claims involving more than one person. The respondent cites *U.S. v. Middleton*, 690 F. 2d 820 (11th Cir. 1982), a case also involving a religious freedom claim by a member of the Ethiopian Zion Coptic Church. That Circuit's Court of Appeals determined the governments compelling interest, "... would be substantially harmed by a decision allowing members of the Ethiopian Zion Coptic Church to possess marijuana freely." *Id*., at 825. Mr. Olsen is not seeking relief for a church.

None of petitioner's previous cases, nor the cases cited by the respondent, involved the use of cannabis in the privacy of the petitioner's home. In addition, none of petitioner's previous cases involved pre-existing state and federal exceptions for cannabis: (1) a federally illegal program with a misleading name to conceal its true purpose, and (2) THC in grocery stores. Promoting recreational use of THC is not a higher social value or public interest than religious use of cannabis.

The petitioner appreciates this opportunity to address the respondent's concerns. Collateral Estoppel is inappropriate due to dramatic changes in state and federal law since 2008.

WHEREFORE: The petitioner asks the court to deny the respondent's motion to dismiss.

Dated February 25, 2025.

Respectfully submitted.

CARL OLSEN

/s/ Carl Olsen

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