

FACTUAL RECORD

The Administrator's decision on remand takes the position that "there are no facts in dispute, and, therefore, no necessity for a [due process] hearing." See Final Order 5. That position effectively responds to the procedural due process concerns raised in the Brief of Amicus at 32-35, by conceding all material facts established in the record in favor of petitioner.

The record indicates the following: (1) petitioner Olsen is a member, priest, and representative of the Ethiopian Zion Coptic Church ("the Church"); (2) the Church is a bona fide religion that has existed since at least prior to enactment of the Controlled Substances Act, 21 U.S.C. § 801-904 ("the Act") and other federal laws restricting the use of marijuana; (3) the sacramental use of marijuana is central to the sincere religious beliefs and practices of Church members; (4) the Church restricts sacramental use of marijuana to its members, and its membership is limited to persons willing to accept and live by Church teachings; (5) there currently are approximately 60 Church members living in the United States; and (6) the sacramental use of marijuana by Church members does not pose significant medical or health risks to those members. See Memorandum of Amicus 6-18.

ARGUMENT

I. THE ADMINISTRATOR'S READING OF THE ACT ON ITS FACE VIOLATES THE ESTABLISHMENT CLAUSE

The Administrator's remand decision takes the position that the Act directs the agency to grant a religious exemption to members of the Native American Church, while prohibiting the agency from granting a religious exemption to members of any other religious denomination. See Final Order 2-4. Amicus first submits that the Administrator is wrong as a matter of statutory interpretation. Religious exemptions are not prohibited by or inconsistent with the plain language of the Act. See Memorandum of Amicus 26-28. Moreover, while the legislative history relied on by the Administrator clearly supports the exemption granted to the Native American Church, it in no way suggests that exemptions for other denominations must be denied. Indeed, there is evidence that Congress has recognized that religious exemptions under the Act must be granted or denied in a manner that deals evenhandedly with different denominations. See id. at 21-25. 2/ Under such circumstances, the Act should be read to permit the agency to

2/ The Administrator's claim that the Act contemplates exemptions only for "legitimate" purposes (see Final Order 2), does not support a conclusion that exemptions for religious purposes are prohibited.

grant exemptions necessary to protect rights under the First Amendment Religion Clauses. See id. at 19-21.

If the Administrator's reading of the Act is correct, then the Act itself must be held unconstitutional. By granting a religious exemption to one church, while denying all other churches an evenhanded opportunity to obtain an exemption, the Act would establish an explicit and deliberate "denominational preference" subject to strict scrutiny under the Establishment Clause. 3/ The Administrator has offered no reason other than supposed congressional intent to support the Act's purported creation of a religious exemption for one denomination to the blanket exclusion of all others. Although there are no grounds for setting aside the exemption granted to the Native American Church (i.e. that exemption is either constitutionally required or constitutionally permissible), the Administrator's attempt flatly to limit such an exemption to one denomination effects a "favoritism among sects" that is constitutionally impermissible. 4/

3/ See Larson v. Valente, 456 U.S. 228, 245 (1982); see also United Christian Scientists v. First Church of Christian Scientist, 829 F.2d 1152, 1162 n.49 (D.C. Cir. 1987) (dicta) (statute that "singles out one religious denomination as the recipient of an unusual religious benefit" will not likely survive strict scrutiny).

4/ Larson, 456 U.S. at 246 (quoting Abington School District v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring)).

II. THE ADMINISTRATOR'S DENIAL OF OLSEN'S PETITION CANNOT SURVIVE STRICT SCRUTINY

The Administrator's explanation for his remand decision is subject to the Court's strict scrutiny in two regards. First, because the Act significantly infringes on Olsen's sincere religious beliefs and practices, the Administrator must demonstrate that his decision is "the least restrictive means of achieving some compelling state interest." 5/ Second, to the extent the Administrator justifies the existing religious exemption for the Native American Church as a permissible exercise of discretion, he must show that the distinctions drawn in granting one exemption and denying another are closely fitted to further a compelling government interest. 6/ The Final Order cannot survive strict scrutiny on either court.

Although the Administrator's observation that the Church traditionally has allowed "continuous" sacramental use

5/ Leahy v. District of Columbia, 833 F.2d 1046, 1048 (D.C. Cir. 1987); see Brief of Amicus 16-24.

6/ See Brief of Amicus 24-31. To the extent that the existing religious exemption for the Native American Church were supported not as an exercise of government discretion, but instead as mandated by the Free Exercise Clause, the two inquiries would merge; the only issue would be whether the Church's free exercise rights, like those of the Native American Church, require that an exemption be granted.

of marijuana 7/ may support reasonable time, place, and amount restrictions on any exemption granted to the Church -- in contrast with the virtually unlimited exemption granted to the Native American Church -- it cannot support the complete rejection of any religious use of marijuana whatever.

Similarly, the fact DEA seizes considerable quantities of illegal marijuana each year 8/ may justify an exemption whereby the government itself distributes marijuana to the Church in restricted amounts, but it cannot support the Administrator's complete denial of any exemption. The government's existing distribution of marijuana for medical and research purposes belies any claim that the legal use of even small amounts of marijuana undermines federal drug enforcement efforts.

Moreover, the Administrator's assertion that the agency would experience unacceptable "difficulty in trying to monitor [Church] compliance" with any limitations placed on an exemption is unsupported. The agency could require Church officials to comply with reporting requirements similar to those now imposed on physicians and researchers who provide government-grown and distributed marijuana to patients and subjects for use in their homes. And, if Church members were

7/ See Final Order 7.

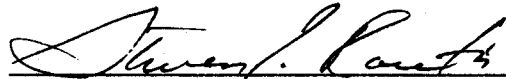
8/ See Final Order 8.

to use marijuana in any way outside the limits set by an exemption, they would be subject to detection and prosecution pursuant to the same law enforcement mechanisms that already exist to monitor and prohibit marijuana use generally.

CONCLUSION

For the reasons set forth above, amicus submits that the Administrator's decision on remand should be reversed, and the Administrator should be directed to formulate an exemption to the Act that represents the least restrictive means of accommodating the Church's religious practices consistent with the government's compelling interests in this matter.

Respectfully submitted,



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