

No. 07-3062

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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**CARL ERIC OLSEN,**  
*Plaintiff-Appellant,*

v.

**PETER D. KEISLER, Acting Attorney General of the United States,  
KAREN TANDY, Administrator of the United States Drug  
Enforcement Administration, THOMAS MILLER, Attorney General  
of Iowa, JOHN SARCONI, Attorney of Polk County, Iowa,  
and DENNIS ANDERSON, Sheriff of Polk County Iowa,**  
*Defendants-Appellees.*

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On Appeal from the United States District Court  
for the Southern District of Iowa

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**BRIEF FOR APPELLANT**

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## SUMMARY OF THE CASE

This appeal is from an order of the District Court granting a motion to dismiss a complaint under Fed. R. Civ. P. 12(b)(6). The complaint sought declaratory and injunctive relief to protect the Appellant's right to possess and use cannabis as a sacrament in connection with Appellant's exercise of his religious beliefs. Appellant is a member of and adherent to the religious teachings of the Ethiopian Zion Coptic Church and brought this action in order to prevent federal and state officials from preventing him from exercising his sincerely-held religious beliefs. Appellant sought relief under the Religious Freedom Restoration Act, the First Amendment, the Religious Land Use and Institutionalized Persons Act, and other provisions of law. The District Court granted the Appellees' (various federal and state officers) motion to dismiss as to several counts on the basis of collateral estoppel. The Court ruled that other claims were insufficient as a matter of law. Oral argument is necessary in order that the legal principles controlling Appellant's fundamental rights are thoroughly considered.

Oral argument should be held in this case because it involves novel issues relating to the application of a recent Supreme Court decision affecting the fundamental right to free exercise of religion. Twenty minutes should be allotted for argument.

**TABLE OF CONTENTS**

SUMMARY OF THE CASE..... i

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... vi

JURISDICTIONAL STATEMENT ..... 1

ISSUES PRESENTED FOR REVIEW ..... 2

STATEMENT OF THE CASE..... 3

STATEMENT OF FACTS ..... 4

SUMMARY OF THE ARGUMENT ..... 11

ARGUMENT ..... 13

    I.    OLSEN’S RFRA CLAIM IS NOT BARRED BY COLLATERAL ESTOPPEL BECAUSE THE INTERVENING ENACTMENT OF RFRA AND SUPREME COURT CONSTRUCTION OF RFRA HAS CHANGED THE LEGAL PRINCIPLES APPLICABLE TO THE DETERMINATION OF WHETHER THE GOVERNMENT HAS A COMPELLING INTEREST FOR PROHIBITING OLSEN’S SACRAMENTAL USE OF CANNABIS ..... 13

    II.   THE DISTRICT COURT ERRED IN DISMISSING OLSEN’S FREE EXERCISE OF RELIGION CLAIM ON THE BASIS OF COLLATERAL ESTOPPEL BECAUSE INTERVENING SUPREME COURT DECISIONS HAVE MATERIALLY ALTERED THE LEGAL ANALYSIS OF THOSE CLAIMS ..... 20

    III.  THE DISTRICT COURT ERRED IN DISMISSING OLSEN’S EQUAL PROTECTION CLAIM ON THE BASIS OF COLLATERAL ESTOPPEL ..... 28

IV. THE DISTRICT COURT ERRED IN DISMISSING OLSEN’S  
RLUIPA CLAIM ON THE BASIS THAT RLUIPA DOES NOT APPLY  
TO THE RELIGIOUS USE OF LAND WHERE OLSEN CLAIMED USE  
OF LAND FOR GROWING CANNABIS IN ORDER TO ESTABLISH  
HIS RELIGION AND WHERE STATE GOVERNMENT ATTACKS  
ARE FUNDED WITH FEDERAL DOLLARS ..... 32

CONCLUSION ..... 35

CERTIFICATE OF COMPLIANCE..... 36

CERTIFICATE OF SERVICE ..... 37

## TABLE OF AUTHORITIES

### Cases

<i>Allstate Co. v. Blount</i> , 491 F.3d 903 (8 <sup>th</sup> Cir. 2007) .....	13
<i>Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520 (1993) .....	passim
<i>Commissioner v. Sunnen</i> , 333 U.S. 591(1948).....	2, 18
<i>Cornerstone Bible Church v. City of Hastings</i> , 948 F.2d 464 (8 <sup>th</sup> Cir. 1991) .....	22, 26
<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005) .....	3, 34
<i>Employment Division v. Smith</i> , 494 U.S. 872 (1990).....	2, 21, 22, 26
<i>Florida Star v. B. J. F.</i> , 491 U.S. 524 (1989) .....	30
<i>Fraternal Order of Police v. City of Newark</i> , 170 F.3d 359 (3d Cir. 1999) .....	2,26
<i>Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal</i> , 546 U.S. 418 (2006) .....	passim
<i>Grinspoon v. DEA</i> , 828 F.2d 881 (1 <sup>st</sup> Cir. 1987).....	34
<i>Hobbie v. Unemployment Appeals Comm'n of Fla.</i> , 480 U.S. 136 (1987)...	24
<i>Larson v. Valente</i> , 456 U.S. 228 (1982) .....	24
<i>Leary v. United States</i> , 383 F.2d 851 (5 <sup>th</sup> Cir. 1967), <i>rev'd on other grds.</i> , 395 U.S. 6 (1969) .....	19
<i>Locke v. Davey</i> , 540 U.S. 712 (2004) .....	2, 31
<i>Morton v. Mancari</i> , 417 U.S. 535 (1974) .....	30
<i>Olsen v. Drug Enforcement Admin.</i> , 878 F.2d 1458 (D.C. Cir. 1989)5, 17, 29	
<i>Olsen v. State of Iowa</i> , 808 F.2d 652 (8 <sup>th</sup> Cir. 1986).....	22

<i>Prescott v. Little Six, Inc.</i> , 387 F.3d 753 (8 <sup>th</sup> Cir. 2004).....	13, 20, 28, 32
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963) .....	25
<i>State Farm Mut. Auto. Ins. Co. v. Duel</i> , 324 U.S. 154 (1945) .....	18
<i>State v. Atley</i> , 564 N.W.2d 817, 833 (Iowa 1997) .....	33
<i>State v. Olsen</i> , 315 N.W.2d 1 (Iowa 1982) .....	11, 22
<i>Tenafly Eruv Assn. v. Borough of Tenafly</i> , 309 F.3d 144 (3d Cir. 2002).....	21
<i>United States v. Bauer</i> , 84 F.3d 1549 (9 <sup>th</sup> Cir. 1996) .....	19
<i>United States v. Rush</i> , 738 F.2d 497 (1 <sup>st</sup> Cir. 1984).....	passim
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972) .....	25

Statutes

21 U.S.C. § 802(6) .....	23
21 U.S.C. § 812(c)(I)(c)(10) .....	5
21 U.S.C. § 823 .....	7, 23
28 U.S.C. § 1291 .....	1
28 U.S.C. § 1331 .....	1
28 U.S.C. 1343(a) .....	1
42 U.S.C. § 2000bb-1(a) .....	13
42 U.S.C. § 2000cc(a)(1).....	2, 33
42 U.S.C. §§ 2000bb et seq. ....	1, 2, 6
42 U.S.C. §§ 2000cc et seq.....	1, 2
Iowa Code § 123.29(2).....	23

Iowa Code § 124.204 (2006) .....	5
Iowa Code § 124.204(7).....	7, 23
Iowa Code § 124.204(8) (2006) .....	7, 22
Iowa Code 124.201(4).....	33
Iowa Code Chapter 123.....	23
Iowa Code Chapter 142A .....	23
 <u>Other Authorities</u>	
Memorandum Opinion for the Chief Counsel, Drug Enforcement Administration, <i>Peyote Exemption for Native American Church</i> 403, 419 (Dec. 22, 1981).....	32
<i>Restatement (Second) of Judgments</i> § 28(2)(d).....	18
 <u>Rules</u>	
Fed. R. Civ. P. 12(b)(6).....	passim
 <u>Regulations</u>	
21 C.F.R. § 1307.31 .....	7, 22, 29
21 C.F.R. § 1308.11(d)(19) (2001).....	5
21 C.F.R. § 291.505 .....	7
28 C.F.R. 1301.26.....	7, 23
28 C.F.R. 1301.34.....	7, 23
 <u>Constitutional Provisions</u>	
U.S. Const. Amend. I.....	2

## **JURISDICTIONAL STATEMENT**

The District Court had jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343(a), as the claims set forth in the Complaint arise under the Constitution, laws and treaties of the United States and such claims are to secure equitable relief under Acts of Congress providing for the protection of civil rights, specifically the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb et seq. and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc et seq. The Appellant, Plaintiff below, sought declaratory and injunctive relief under the Constitution and laws of the United States protecting his right to exercise his religion by possessing and using cannabis, i.e., marijuana, as a sacrament.

This Court has jurisdiction over this appeal under 28 U.S.C. § 1291, as it is from a judgment entered in the United States District Court for the Southern District of Iowa on July 17, 2007 (Dkt. # 50). The notice of appeal was timely filed on September 5, 2007, as an officer of the United States is a party to the action. This appeal is from a final order and judgment of the District Court that disposes of all the parties' claims.

## ISSUES PRESENTED FOR REVIEW

- I. Did the District Court err in ruling that collateral estoppel barred the Appellant's claim for declaratory and injunctive relief under RFRA?

*Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006);  
42 U.S.C. §§ 2000bb et seq.;  
*Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948).

- II. Did the District Court err in ruling that collateral estoppel barred the Appellant's claim for declaratory and injunctive relief under the Free Exercise Clause of the First Amendment?

*Employment Division v. Smith*, 494 U.S. 872 (1990);  
*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993);  
*Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006);  
*Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999).

- III. Did the District Court err in ruling that collateral estoppel barred the Appellant's claim for injunctive and declaratory relief under the Equal Protection Clause of the Fourteenth Amendment?

*Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006);  
*Locke v. Davey*, 540 U.S. 712 (2004)

- IV. Did the District Court err in ruling that RLUIPA does not protect the Appellant's sacramental use of cannabis?

42 U.S.C. § 2000cc(a)(1).

*Cutter v. Wilkinson*, 544 U.S. 709 (2005)

### **STATEMENT OF THE CASE**

The instant case is a civil action brought by Appellant, Carl Eric Olsen (hereafter “Olsen”) against Appellees (hereafter “Defendants”), who are federal and state officers responsible for the enforcement and administration of laws regulating controlled substances. Olsen’s complaint (Dkt. # 1) sought a judgment declaring that the Defendants’ interpretation and enforcement of the controlled substances law as a prohibition on Olsen’s possession and use of cannabis, i.e., marijuana, for sacramental purposes violates rights granted to Olsen under the Constitution and laws of the United States. Olsen also requested a declaration that the provisions of the federal and state Controlled Substances Act should not apply to his sacramental use of cannabis and requested that an order be entered enjoining the Defendants from preventing Olsen from possessing or using cannabis in connection with the exercise of his religious beliefs.

The Defendants responded by filing motions to dismiss pursuant to Fed. R. Civ. P. 12(b) (Dkt. # 8; Dkt. # 15; Dkt. # 21). After the parties briefed the issues, the District Court entered an order dismissing each of the counts of the complaint on the basis that the counts failed to state a claim

upon which relief could be granted, Fed. R. Civ. P. 12(b)(6) (Dkt. # 49). A final judgment of dismissal was entered July 17, 2007 (Dkt. # 50). Olsen timely filed his notice of appeal from this judgment on September 5, 2007 (Dkt. # 51).

### **STATEMENT OF FACTS**

Olsen's claims that his religious liberty is being suppressed and threatened were dismissed by the District Court based solely upon the allegations of the Complaint (Dkt. # 1) on a Rule 12(b) (6) motion. For purposes of this appeal, the allegations must be taken as true, and reasonable inferences from the Complaint must be drawn in favor of Olsen. That Complaint alleges that Olsen is a sincere adherent of the teachings of the Ethiopian Zion Coptic Church, a centuries-old church that uses cannabis as its sacrament (Dkt. # 1; Complaint p.9). The Complaint elaborates as follows:

25. As a necessary and essential part of the Ethiopian Zion Coptic Church's religious practice, church members receive communion through the Sacramental use of Cannabis, which is the blood of Christ . . . , in their religious ceremonies.
26. It is a central and essential practice of the Ethiopian Zion Coptic Church that its members assemble for communion, reasoning, and worship through the

Sacramental offering of Cannabis during prayer to the living god known to the church as Rastafari . . . .

(Dkt. # 1; Complaint p. 10). Thus, “[b]ecause the Ethiopian Zion Coptic Church considers Cannabis to be its Sacrament, a prohibition against partaking in the Sacramental use of Cannabis in the United States completely prevents [Olsen] from freely practicing his religion.” (Dkt. # 1; Complaint p. 11). The manufacture (growing) of cannabis is essential to the exercise of Olsen’s religion (Dkt. # 1; Complaint pp. 25, 28, 29 and 31).

The Complaint goes on to allege that “[t]he Defendants have taken the position with respect to the Ethiopian Zion Coptic Church’s use of Cannabis that Cannabis is a Schedule I control substance pursuant to 21 U.S.C. § 812(c)(I)(c)(10) and 21 C.F.R. § 1308.11(d)(19) (2001), and Iowa Code § 124.204 (2006). Severe civil and criminal penalties are prescribed for, inter alia, the unlawful importation, possession and distribution of Cannabis” under federal and state law. “As a result of the threat of criminal prosecution, the Plaintiff has been compelled to suspend the practice of his religion in the United States.” Olsen has been forced to forego an important sacrament of his religion since the decision in *Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458 (D.C. Cir. 1989), became final and all avenues of direct review were exhausted (Dkt. # 1; Complaint p. 12).

In 1993, Congress enacted and the President signed into law the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb et seq. (Dkt. # 1; Complaint p. 1). On February 21, 2006, the United States Supreme Court issued its decision in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006), which involved the application of the prohibitions of the Controlled Substances Act in light of RFRA (Dkt. # 1; Complaint p. 4). Olsen alleged that the decision in *O Centro* requires a court to review *de novo* the particular use of a controlled substance made by a church and determine whether such use is protected and allowed by RFRA (Dkt. # 1; Complaint pp. 5, 8). He further alleged that the application of the federal and state Controlled Substances Acts to his use of cannabis in a religious sacrament is contrary to the provisions of statutory and constitutional law (Dkt. # 1; Complaint pp. 13-14).

Olsen contacted the Defendants and attempted to obtain an agreement that they would not seek to prosecute him for his religious use of cannabis (Dkt. # 1; Complaint p. 12). “However, Defendants, having failed and refused to guarantee they will not arrest or prosecute [Olsen] if he moves forward with the practice of his religion are effectively threatening [Olsen] with arrest and prosecution. The actions of the Defendants have a chilling and prohibitive effect on [Olsen’s] exercise of his religion” and are causing

Olsen to suffer psychologically and spiritually because he is alienated from his church (Dkt. # 1; Complaint p. 13).

The Complaint also alleges as follows:

39. Federal CSA regulations and the Iowa's CSA expressly exempt the sacramental use of peyote despite the fact that peyote is listed in Schedule I of both the Federal and State versions of the CSA. See 21 C.F.R. § 1307.31, and Iowa Code § 124.204(8) (2006). No such exemption exists for Plaintiff's Sacramental use of Cannabis.

40. The Federal CSA contains other exceptions permitting the use of controlled substances for purposes such as scientific research and medical use, and the Iowa CSA specifically exempts medical use of marijuana from the prohibitions of Schedule I of the Iowa CSA while any other use of marijuana remains prohibited. See, e.g., 21 U.S.C. § 823, 21 C.F.R. §§ 291.505, 1301.26, 1301.34, and Iowa Code § 124.204(7), 124.204(7).<sup>1</sup>

(Dkt. # 1; Complaint p.14). The use and possession of marijuana for medical purposes is allowed by the Defendants and has been allowed at the Iowa State Capitol. "The fact that both [sic] Defendants allow the use and the possession of marijuana in a public place like the State Capitol Building proves beyond any reasonable doubt that the use and possession of marijuana does not cause any threat to public health and safety sufficient to substantiate a 'compelling interest' on the part of the government to restrict

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<sup>1</sup> The second reference to Iowa Code § 124.204(7) in paragraph 40 of the Complaint is a typographical error. The correct citation is Iowa Code § 124.206(7)(a).

the Sacramental use of Cannabis by [Olsen] because a compelling interest cannot be ignored.” (Dkt. # 1; Complaint pp. 14-15).

The Commission on Marihuana and Drug Abuse was specifically established by the Controlled Substances Act of 1970. The Commission found in 1972, “The total prohibition scheme was rejected primarily because no sufficiently compelling social reason, predicated on existing knowledge, justifies intrusion by the criminal justice system into the private lives of individuals who use marihuana.” (Dkt. # 1; Complaint Exhibit #21)

The Chief Administrative Law Judge (ALJ) for the DEA is the person designated by the Controlled Substances Act of 1970 as the finder of fact. The ALJ found in 1988, “Nearly all medicines have toxic, potentially lethal effects. But marijuana is not such a substance. There is no record in the extensive medical literature describing a proven, documented cannabis-induced fatality.” (Dkt. # 1; Complaint Exhibit #1, page 56) “This is a remarkable statement. First, the record on marijuana encompasses 5,000 years of human experience. Second, marijuana is now used daily by enormous numbers of people throughout the world. Estimates suggest that from twenty million to fifty million Americans routinely, albeit illegally, smoke marijuana without the benefit of direct medical supervision. Yet, despite this long history of use and the extraordinarily high numbers of

social smokers, there are simply no credible medical reports to suggest that consuming marijuana has caused a single death.” (Dkt. # 1; Complaint Exhibit # 1, p. 57). “Marijuana, in its natural form, is one of the safest therapeutically active substances known to man.” (Dkt. # 1; Complaint Exhibit # 1, p. 58-59)

Based on these allegations, Olsen alleged that any prohibition upon his use of cannabis for sacramental purposes violates RFRA and the Religious Land Use and Institutionalized Persons Act (RLUIPA) ((Dkt. # 1; Complaint pp. 15-16), the First Amendment (Dkt. # 1; Complaint pp. 16-17), the Equal Protection Clause, the Ex Post Facto Clause ((Dkt. # 1; Complaint p. 18), the Fourth Amendment (Dkt. # 1; Complaint pp. 20-21), the Fifth Amendment (Dkt. # 1; Complaint p. 21-22), the Administrative Procedure Act (Dkt. # 1; Complaint p. 22), international treaties (Dkt. # 1; Complaint pp. 22-23), and is an improper application of the federal and state Controlled Substances Acts (Dkt. # 1; Complaint pp. 18-20). Olsen requested a declaratory judgment and an injunction that would forbid the Defendants from enforcing federal and state Controlled Substances Acts against him for his “Sacramental use of Cannabis, including its possession, consumption, distribution and importation for this purpose.” (Dkt. # 1; Complaint p. 32).

The federal and state Defendants filed separate motions under Fed. R. Civ. P. 12(b) seeking dismissal of all the claims. The District Court entered an Order granting the motion to dismiss under Rule 12(b)(6) for failure to state a claim (Addendum p. 1). Initially, the District Court denied the federal Defendants' motion to dismiss for lack of jurisdiction, holding that Olsen's claims were ripe for consideration (Addendum p. 5).

As to the RFRA claim, the District Court held that collateral estoppel barred that claim as to the federal government. The court referred to decisions in cases involving Olsen decided in 1984, *United States v. Rush*, 738 F.2d 497 (1<sup>st</sup> Cir. 1984), and 1989, *Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458 (D.C. Cir. 1989), as previously holding that the government has a "compelling interest" in not granting Olsen an exemption for his sacramental use of cannabis (Addendum p. 10). Based upon these decisions, the District Court ruled that collateral estoppel applied to Olsen's RFRA claim and required its dismissal (Addendum p. 12).

Similarly, the District Court held that collateral estoppel barred Olsen's claim under the First Amendment's Free Exercise Clause that the federal and state Controlled Substances Act are not neutral, generally applicable laws and the Acts' prohibition on cannabis use is not supported by a compelling interest as applied to Olsen's sacramental use of cannabis

(Dkt. # 1; Complaint p. 17). Citing *Olsen, Rush*, and *State v. Olsen*, 315 N.W.2d 1 (Iowa 1982), the court ruled that this claim had previously been decided against Olsen and dismissed the First Amendment claim (Addendum p. 13). Employing the same reasoning, the District Court dismissed Olsen’s equal protection claim (Addendum p. 14).

The District Court also dismissed Olsen’s RLUIPA claim, accepting the Defendants’ argument that Olsen may not bring a claim under this statute because he is not incarcerated and the Controlled Substances Acts do not affect Olsen’s religious use of land (Addendum p. 12).

### **SUMMARY OF THE ARGUMENT**

The District Court erred in applying the doctrine of collateral estoppel in this case. Collateral estoppel does not preclude relitigation of a claim or issue where the controlling legal principles have changed in the time since the previous proceedings. Since the rulings relied upon by the District Court as the basis for estoppel, Congress enacted RFRA which requires a more focused “compelling interest” inquiry than employed in the prior cases. Although the prior cases found a compelling interest for the prohibition on marijuana use, RFRA requires that the government show there is a compelling interest for applying the prohibition to Olsen’s sacramental use

of marijuana and that the prohibition is the least restrictive means of furthering that interest.

Collateral estoppel also does not apply to bar Olsen's other constitutional claims. Because the drug laws at issue here are not generally applicable, the law is subject to strict scrutiny and must be supported by a compelling interest. A recent Supreme Court decision makes clear that under the First Amendment's Free Exercise Clause, the government must show that there is a compelling interest for applying a drug law prohibition to Olsen's sacramental use of marijuana. This recently-expressed legal principle is different from the principle employed in the prior decisions involving Olsen, and so those prior decisions do not estop Olsen from again raising his Free Exercise claim. Additionally, intervening Supreme Court decisions have held that there is no rational, much less compelling, basis for singling out Native American Church peyote use for favored treatment under the Controlled Substances Act, and this new pronouncement precludes the use of collateral estoppel as to Olsen's equal protection claims.

Olsen also is entitled to relief under RLUIPA. State drug laws are enforced with the assistance of federal monies and are part of a system that results in the incarceration of persons. As such, those laws must be shown

to be supported by a compelling government interest as applied to Olsen’s use of marijuana in the exercise of his religion.

## **ARGUMENT**

### **I. OLSEN’S RFRA CLAIM IS NOT BARRED BY COLLATERAL ESTOPPEL BECAUSE THE INTERVENING ENACTMENT OF RFRA AND SUPREME COURT CONSTRUCTION OF RFRA HAS CHANGED THE LEGAL PRINCIPLES APPLICABLE TO THE DETERMINATION OF WHETHER THE GOVERNMENT HAS A COMPELLING INTEREST FOR PROHIBITING OLSEN’S SACRAMENTAL USE OF CANNABIS.**

#### **A. Standard of Review**

A district court’s decision either granting a motion to dismiss or deciding a claim of collateral estoppel is a question of law subject to de novo appellate review. *Allstate Co. v. Blount*, 491 F.3d 903, 907-08 (8<sup>th</sup> Cir. 2007); *Prescott v. Little Six, Inc.*, 387 F.3d 753, 756 (8<sup>th</sup> Cir. 2004).

#### **B. Discussion of Authority**

RFRA sets forth as a guiding principle of the application of federal law that “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability[.]” 42 U.S.C. § 2000bb-1(a). The only exception recognized in RFRA is that a regulation may burden an individual’s exercise of religion if the government

demonstrates that the regulation “is in furtherance of a compelling governmental interest . . . and . . . is the least restrictive means of furthering that compelling governmental interest.” *Id.* § 2000bb-1(c). In its ruling below, the District Court did not question that Olsen’s Complaint set forth a prima facie case for relief under RFRA. Indeed, the Complaint alleges that Olsen’s sincerely-held religious beliefs require the use of cannabis as a sacrament and that the Controlled Substances Acts enforced by the Defendants are preventing him from exercising his religious beliefs (Dkt. # 1; Complaint pp. 10, 12).<sup>2</sup>

Instead, the District Court dismissed Olsen’s RFRA claim because it found that the essence of the claim already had been decided against him in prior federal litigation. Specifically, the court cited *United States v. Rush*, 738 F.2d 497 (1<sup>st</sup> Cir. 1984), a criminal prosecution under the Controlled Substances Act for possession and importation of marijuana in which Olsen raised the Free Exercise Clause of the First Amendment as a defense. The First Circuit denied the defense because Congress had determined there was an “overriding interest” in regulating marijuana. “In enacting substantial

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<sup>2</sup>It is significant that in *United States v. Rush*, 738 F.2d 497, 512 (1<sup>st</sup> Cir. 1984), the court wrote that “there 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 are sincere practicing members of that Church.”

criminal penalties for possession with intent to distribute, Congress has weighed the evidence and reached a conclusion which it is not this court's task to review *de novo*." *Id.* at 513. Also cited was the decision in *Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458, 1462 (D.C. Cir. 1989), which also found a compelling interest for marijuana regulation based upon "the determination that marijuana in fact poses a real threat to individual health and social welfare."

But both of these cases were decided before the 1993 enactment of RFRA and the Supreme Court's decision interpreting RFRA in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006). In *O Centro*, the Supreme Court upheld the entry of a preliminary injunction in favor of individuals allowing them to use a tea made from a plant that contains a Schedule I controlled substance, DMT. The Court rejected the government's request that it recognize a categorical prohibition on religious use exemptions from the Controlled Substances Act, holding that this was inconsistent with the provisions of RFRA:

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. It is true, of course, that Schedule I substances such as DMT are exceptionally dangerous. . . . Nevertheless, there is no indication that Congress, in classifying DMT, considered the harms posed by the particular use at issue here -- the

circumscribed, sacramental use of hoasca by the UDV. The question of the harms from the sacramental use of hoasca by the UDV was litigated below. Before the District Court found that the Government had not carried its burden of showing a compelling interest in preventing such harms, the court noted that it could not “ignore that the legislative branch of the government elected to place materials containing DMT on Schedule I of the [Act], reflecting findings that substances containing DMT have ‘a high potential for abuse,’ and ‘no currently accepted medical use in treatment in the United States,’ and that ‘there is a lack of accepted safety for use of [DMT] under medical supervision.’” . . . But Congress’ determination that DMT should be listed under Schedule I simply does not provide a categorical answer that relieves the Government of the obligation to shoulder its burden under RFRA.

*O Centro*, 546 U.S. at 433 (citations omitted).

RFRA, as interpreted and applied by *O Centro*, changes the analysis of claims like Olsen’s that a governmental burden on religious exercise should be removed by judicial declaration. Although the courts had held that the free exercise clause allows neutral and generally applicable to avoid the compelling interest and least restrictive means tests, Congress enacted RFRA and RLUIPA to countermand those rulings. *O Centro*, 546 U.S. at 424. The ruling in *Olsen* that a congressional finding of a “compelling interest” will alone support a burden on religious exercise resulting from a federal law is no longer valid. Even though prior litigation allowed a determination of a compelling interest to be deemed conclusive by the judiciary, *O Centro* makes clear that RFRA requires courts to determine in

each case whether a compelling interest exists as to the claimant and requires courts to exempt religious adherents from the operation of a controlled substance regulation if there is no compelling interest. “RFRA, . . . plainly contemplates that *courts* would recognize exceptions—that is how the law works.” *O Centro*, 546 U.S. at 434 (emphasis added).

This new law, manifested by RFRA and *O Centro*, wholly undermines the legal principle supporting the decisions relied upon by the District Court for applying collateral estoppel against Olsen. Although *Rush* found an overriding compelling interest based upon findings and held that it could not review this finding *de novo*, *Rush*, 738 F.2d at 512, *O Centro* specifically held that Congress’ determination of a compelling interest “cannot carry the day” under RFRA. The District of Columbia’s decision in *Olsen* was similarly predicated upon the determination of a compelling interest to regulate Schedule I substances, *not* on a determination that there was a compelling interest as applied to Olsen and the Ethiopian Zion Coptic Church. *Olsen*, 878 F.2d at 1462. RFRA and *O Centro* require a different analysis and inquiry in determining whether a compelling interest justifies the burden on Olsen’s exercise of religion imposed by the Controlled Substances Act.

The change of law wrought by the enactment of RFRA and the decision in *O Centro* makes the doctrine of collateral estoppel applied by the District Court inapposite here. With respect to the closely analogous doctrine of res judicata, the Supreme Court has held that “it is nevertheless the general rule that res judicata is no defense where between the time of the first judgment and the second there has been an intervening decision *or a change in the law creating an altered situation.*” *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 162 (1945) (emphasis added). It extended this reasoning to collateral estoppel in *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948), writing as follows with respect to the preclusive effect of prior judicial determinations:

But a subsequent modification of the significant facts *or a change or development in the controlling legal principles may make that determination obsolete or erroneous, at least for future purposes.* . . . [Collateral estoppel] is designed to prevent repetitious lawsuits over matters which have once been decided *and which have remained substantially static, factually and legally.* It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers.

(Emphasis added). Thus, “a judicial declaration intervening between the two proceedings may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable.” *Id.* at 600. *Accord Restatement (Second) of Judgments* § 28(2)(d) (although an issue is actually litigated and

determined by a valid and final judgment, “a new determination is warranted in order to take account of an intervening change in the applicable legal context[.]”).

Both *Rush* and *Olsen* relied upon the decision in *Leary v. United States*, 383 F.2d 851 (5<sup>th</sup> Cir. 1967), *rev’d on other grds.*, 395 U.S. 6 (1969). *Leary* relied on the rationale given by Congress in the preamble to the drug law in rejecting a First Amendment defense to marijuana charges. However, in *United States v. Bauer*, 84 F.3d 1549, 1557 (9<sup>th</sup> Cir. 1996), the Ninth Circuit refused to apply *Leary* to a post-RFRA claim that marijuana use was protected religious activity. Consistent with the *O Centro* decision, the *Bauer* court held that under RFRA “the government had the obligation, first, to show that the application of the marijuana laws to the defendants was in furtherance of a compelling governmental interest and, second, to show that the application of these laws to these defendants was the least restrictive means of furthering that compelling governmental interest. The Act was relevant to the counts of simple possession.” *Bauer*, 84 F.3d at 1559. *Bauer* confirms that the reasoning underlying *Rush* and *Olsen* has been undermined by RFRA and *O Centro*.

Under *O Centro*, a RFRA claim that the application of the Controlled Substances Act to religiously-motivated uses of controlled substances must

include a determination of whether the government has a compelling interest to apply the Controlled Substances Act to the claimant. A judicial determination of a compelling interest cannot be based simply upon a finding of a compelling interest to regulate substances generally. Neither *Rush* nor *Olsen* made the “as applied” compelling interest finding required by RFRA and *O Centro*. Therefore, the findings in those prior cases do not act as an estoppel in this case. The District Court erred in doing so, and its decision on Olsen’s RFRA claim must be reversed.

**II. THE DISTRICT COURT ERRED IN DISMISSING OLSEN’S FREE EXERCISE OF RELIGION CLAIM ON THE BASIS OF COLLATERAL ESTOPPEL BECAUSE INTERVENING SUPREME COURT DECISIONS HAVE MATERIALLY ALTERED THE LEGAL ANALYSIS OF THOSE CLAIMS.**

**A. Standard of Review**

A district court’s decision to grant a Fed. R. Civ. P. 12(b)(6) motion to dismiss involves a question of law subject to de novo review in this Court. *Prescott*, 387 F.3d at 756.

**B. Discussion of Authority**

The District Court’s dismissal of Olsen’s claim for relief from the federal and state Controlled Substances Acts under the First Amendment’s

Free Exercise Clause on the basis of collateral estoppel again was error because the lower court failed to account for the effect of intervening court decisions. Specifically, the decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), changed the analysis applicable to Free Exercise claims. *Smith* holds that where a criminal prohibition is “neutral and generally applicable,” it need not be supported by a compelling interest in order to be applied in a way that burdens the religious exercise of individuals. However, if a law is not “neutral and generally applicable,” the government must demonstrate that an application which infringes upon the religious liberty of an individual is supported by a compelling governmental interest and that the law is narrowly tailored to serve that interest. *Tenafly Eruv Assn. v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002) (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 542 (1993)).

Additionally, *Smith* recognized two other circumstances in which a law burdening religious exercise is subject to strict scrutiny. First, the Court left open the viability of Free Exercise Clause attacks on laws that violate the First Amendment in conjunction with other constitutional protections. In these “hybrid rights” situations, heightened scrutiny is required. *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472-73 (8<sup>th</sup> Cir.

1991) (citing *Smith*, 494 U.S. at 881-82). Second, “in circumstances in which individualized exemptions from a general requirement are available, the government ‘may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.’” *Church of the Lukumi Babalu Aye*, 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884).

None of these legal principles springing from the *Smith* decision and its progeny were considered by the courts in the earlier cases to which Olsen was a party.<sup>3</sup> *Smith* and *O Centro* have so altered the legal landscape applicable to Free Exercise Clause claims that the decisions in the previous cases cannot have preclusive effect. *Sunnen*, 333 U.S. at 599. Furthermore, the Complaint at issue here states claims for violation of the First Amendment under the current constitutional jurisprudence.

1. The Controlled Substances Acts are not Neutral and Generally Applicable.

As pointed out in the Complaint,

39. Federal CSA regulations and the Iowa’s CSA expressly exempt the sacramental use of peyote despite the fact that peyote is listed in Schedule I of both the Federal and State versions of the CSA. See 21 C.F.R. § 1307.31, and Iowa Code § 124.204(8) (2006). No such exemption exists for Plaintiff’s Sacramental use of Cannabis.

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<sup>3</sup> In addition to *Rush* and *Olsen*, the District Court relied upon *Olsen v. State of Iowa*, 808 F.2d 652 (8<sup>th</sup> Cir. 1986), and *State v. Olsen*, 315 N.W.2d 1 (Iowa 1982), to support application of collateral estoppel to Olsen’s Free Exercise Clause claims.

40. The Federal CSA contains other exceptions permitting the use of controlled substances for purposes such as scientific research and medical use, and the Iowa CSA specifically exempts medical use of marijuana from the prohibitions of Schedule I of the Iowa CSA while any other use of marijuana remains prohibited. See, e.g., 21 U.S.C. § 823, 21 C.F.R. §§ 291.505, 1301.26, 1301.34, and Iowa Code § 124.204(7), 124.204(7).

(Dkt. # 1; Complaint p.14). Use and possession of marijuana is allowed by the Federal Defendants and has been allowed at the Iowa State Capitol by the Iowa Defendants (Dkt. # 1; Complaint pp. 14-15). Thus, the Controlled Substances Acts do not apply across-the-board, either as to Schedule I substances generally or as to marijuana in particular. Instead, both the federal government and the State of Iowa have allowed use of Schedule I substances and marijuana under particular circumstances, including as a religious sacrament.

In addition, both the Federal Defendants and the State Defendants have exempted the recreational use of alcohol and tobacco from their controlled substances laws. See, 21 U.S.C. § 802(6). The Iowa exceptions for alcohol are found in Iowa Code Chapter 123. The Iowa exceptions for tobacco are found in Iowa Code Chapter 142A. Additionally, Iowa law provides an exemption from its alcohol regulations for sacramental purposes. Iowa Code § 123.29(2).

Even if these laws are neutral in the sense that they are not targeted at religious exercise, they are by no means generally applicable. “The Free Exercise Clause ‘protect[s] religious observers against unequal treatment,’ *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring in judgment), and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.” *Church of the Lukumi Babalu Aye*, 508 U.S. at 542-543. The Constitution also is offended when the government prefers certain religious denominations. *See Larson v. Valente*, 456 U.S. 228, 245 (1982) (striking down denominational preference). The grant of exemptions from the Controlled Substances Acts for certain religious and non-religious reasons while denying similar treatment to persons such as Olsen seeking to exercise sincerely-held religious beliefs prevents these laws from being considered “generally applicable.”

As a consequence, application of the laws to Olsen must be shown to be supported by a “compelling interest.” In this connection, *O Centro* again makes clear that the rulings in Olsen’s prior cases concerning compelling interest, which were based upon a general finding of Congress, are not controlling. *O Centro* makes clear that under both RFRA *and the Free*

*Exercise Clause*, the government must show a compelling interest for applying the law to Olsen, not simply that there is generally a compelling interest for the Controlled Substances Acts' prohibitions. In elucidating the RFRA "compelling interest" inquiry in *O Centro*, the Court noted that RFRA adopts the test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), cases that were decided under the Free Exercise Clause. *O Centro*, 546 U.S. at 430-31. Therefore, the "more focused" compelling interest inquiry, and not the categorical approach used in the previous cases involving Olsen, must be applied. Because a different compelling interest test applies, the previous decisions do not raise the bar of collateral estoppel as to Olsen's Free Exercise claims.

## 2. Olsen's Claims Involve "Hybrid Rights"

A compelling interest inquiry also is required here because Olsen's claims involve the Free Exercise Clause combined with other constitutional rights. In addition to the First Amendment, the Complaint sets forth infringements of Olsen's rights to equal protection of the law, to due process under the Fifth and Fourteenth Amendments, to assemble and worship with other members of his faith, his property rights under the Fourth and Fifth Amendments, and the prohibition on ex post facto applications of the law to his religion, which is centuries old and has regularly used cannabis as its

sacrament. In *Cornerstone Bible Church*, 948 F.2d at 472-73, this Court recognized that a “hybrid rights” free exercise claim under *Smith* is stated where the First Amendment claim is combined with, *inter alia*, equal protection claims. That is precisely the situation here. The existence of this “hybrid rights” claim triggers strict scrutiny and requires judicial examination under the approach set forth in *O Centro*.

3. The Controlled Substances Acts Have Exemptions, and the Government Must Show a Compelling Interest for Refusing Olsen’s Claim for an Exemption.

As previously noted, the Complaint alleges that the federal government and Iowa provide exemptions for certain non-religious and religious uses. Having done so, these governments may not refuse to extend the exemption to Olsen’s claim of religious hardship without compelling reason. *Church of the Lukumi Babalu Aye*, 508 U.S. at 537. In *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), the court, in an opinion authored by current Justice Alito, held unconstitutional a police department policy that granted exemptions from a “no beards” policy for medical reasons but refused to grant exemptions to officers whose religious beliefs required growing a beard. In holding that the policy was subject to strict scrutiny under *Smith*, the court wrote as follows:

[T]he medical exemption raises concern because it indicates that the Department has made a value judgment that secular

(i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not. As discussed above, when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny.

*Id.*, 170 F.3d at 366.

The prohibition on marijuana use as applied to Olsen also must be supported by a compelling interest as applied to the individual. The “compelling interest” analysis required under *O Centro* was not employed in Olsen’s previous cases raising the First Amendment as claim or defense to the application of the Controlled Substances Acts. Therefore, collateral estoppel may not be based on those cases. Instead, this Court must reverse the dismissal of Olsen’s First Amendment claims and remand the case for additional proceedings to determine whether the federal and state governments can satisfy their burden of demonstrating an appropriate compelling interest for burdening Olsen’s exercise of religion.

### **III. THE DISTRICT COURT ERRED IN DISMISSING OLSEN'S EQUAL PROTECTION CLAIM ON THE BASIS OF COLLATERAL ESTOPPEL.**

#### **A. Standard of Review**

A district court's decision to grant a Fed. R. Civ. P. 12(b)(6) motion to dismiss involves a question of law subject to de novo review in this Court.

*Prescott*, 387 F.3d at 756.

#### **B. Discussion of Authority**

Olsen's claims against the Defendants based upon the Fifth and Fourteenth Amendments' guarantees to equal protection also were dismissed on the basis of collateral estoppel (Addendum p. 14). With respect to those claims, Olsen alleged as follows:

57. The Plaintiff is similarly situated to Native American Church members in their sacramental use of a substance considered a Schedule I controlled substance under the Federal and Iowa version of the CSA. Nevertheless, Defendants have refused to accord the same deference to the Plaintiff.
58. The Plaintiff is similarly situated to UDV Church members in their sacramental use of a substance considered a Schedule I controlled substance under the Federal and Iowa versions of the CSA. Nevertheless, Defendants have refused to accord the same deference to the Plaintiff.
59. Consequently, the Defendants' decision to allow the members of the Native American Church to use peyote and members of the UDV church to use DMT for

religious purposes, while denying the same protection to Plaintiff, violates the Equal Protection rights of the Plaintiff guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution.

(Dkt. # 1; Complaint p. 18). The District Court determined that these claims are identical to those brought in previous litigation involving Olsen,<sup>4</sup> and so were barred by collateral estoppel.

Again, this decision was error because it fails to take into account the decision in *O Centro*. In rejecting the federal government's claim that it had demonstrated a sufficient compelling interest to require denial of the preliminary injunction, the Supreme Court stressed that the government's claim to a compelling interest was undermined by the exemption given to Native American churches for peyote. The Supreme Court stressed that there is no reasonable distinction between the sacramental use of the tea with DMT and Native American use of peyote:

For the past 35 years, there has been a regulatory exemption for use of peyote -- a Schedule I substance -- by the Native American Church. *See* 21 C.F.R. § 1307.31 (2005). In 1994, Congress extended that exemption to all members of every recognized Indian Tribe. *See* 42 U.S.C. § 1996a(b)(1). Everything the Government says about the DMT in hoasca -- that, as a Schedule I substance, Congress has determined that it "has a high potential for abuse," "has no currently accepted medical use," and has "a lack of accepted safety for use . . . under medical supervision," 21 U.S.C. § 812(b)(1) -- applies in

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<sup>4</sup> *See Olsen*, 878 F.2d at 1463, *Olsen*, 808 F.2d at 653, and *Rush*, 738 F.2d at 513.

equal measure to the mescaline in peyote, yet both the Executive and Congress itself have decreed an exception from the Controlled Substances Act for Native American religious use of peyote. *If such use is permitted in the face of the findings in § 812(b)(1) for hundreds of thousands of Native Americans practicing their faith, it is difficult to see how those same findings alone can preclude any consideration of a similar exception for the 130 or so American members of the UDV who want to practice theirs. See Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) (“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” (quoting *Florida Star v. B. J. F.*, 491 U.S. 524, 541-542 (1989) (Scalia, J., concurring in part and concurring in judgment)).

The Government responds that there is a “unique relationship” between the United States and the Tribes, Brief for Petitioners 27; *see Morton v. Mancari*, 417 U.S. 535 (1974), but never explains what about that “unique” relationship justifies overriding the same findings on which the Government relies in resisting any exception for the UDV’s religious use of hoasca. In other words, if any Schedule I substance is in fact always highly dangerous in any amount no matter how used, what about the unique relationship with the Tribes justifies allowing their use of peyote? 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.

*O Centro*, 546 U.S. at 433-434 (emphasis added).

This passage demonstrates the Supreme Court’s opinion that there is really nothing to distinguish Native American church use of peyote from the

sacramental use by other individuals of Schedule I controlled substances. This recent declaration wholly undermines prior decisions, including those involving Olsen, that there is some rational basis for singling out the Native American church for a Schedule I religious exemption. Indeed, because the distinction drawn here involves the fundamental right to free exercise of religion and the Native American peyote exemption exhibits a discrimination between religions, the classification made here should be subjected to strict scrutiny. *Locke v. Davey*, 540 U.S. 712, 720 n.2 (2004).

The same reasoning has previously been expressed by the Department of Justice's legal counsel in a memo concerning the exemption granted the Native American Church:

The special treatment of Indians under our law does not stem from the unique features of Indian religion or culture. With respect to these matters, Indians stand on no different footing than do other minorities in our pluralistic society. Rather, the special treatment of Indians is grounded in their unique status as political entities, formerly sovereign nations preexisting the Constitution, which still retain a measure of inherent sovereignty over their peoples unless divested by federal statute or by necessary implication of their dependent status. See *United States v. Wheeler*, 435 U.S. 313, 55 L. Ed. 2d 303, 98 S. Ct. 1079 (1978).

An exemption for Indian religious use of peyote would not be grounded in the unique political status of Indians. Instead, the exemption would be based on the special culture and religion of the Indians. In this respect, Indian religion cannot be treated differently than other religions similarly situated without violation of the Establishment Clause.

*Olsen v. Drug Enforcement Admin.*, 878 F.2d at 1469 (Buckley, J., dissenting) quoting Memorandum Opinion for the Chief Counsel, Drug Enforcement Administration, *Peyote Exemption for Native American Church* 403, 419 (Dec. 22, 1981).

Again, the legal principles applicable to Olsen's equal protection claims have changed in the time since his prior claims were disposed of in earlier cases. This change in the law means the collateral estoppel is inapplicable and the District Court erred in dismissing Olsen's equal protection claims under that doctrine.

**IV. THE DISTRICT COURT ERRED IN DISMISSING OLSEN'S RLUIPA CLAIM ON THE BASIS THAT RLUIPA DOES NOT APPLY TO THE RELIGIOUS USE OF LAND WHERE OLSEN CLAIMED USE OF LAND FOR GROWING CANNABIS IN ORDER TO ESTABLISH HIS RELIGION AND WHERE STATE GOVERNMENT ATTACKS ARE FUNDED WITH FEDERAL DOLLARS.**

**A. Standard of Review**

A district court's decision to grant a Fed. R. Civ. P. 12(b)(6) motion to dismiss involves a question of law subject to de novo review in this Court.

*Prescott*, 387 F.3d at 756.

## **B. Discussion of Authority**

Olsen's Complaint also sought relief under RLUIPA, a federal law that also requires governmental entities to demonstrate a "compelling interest" for regulations that burden the exercise of religious beliefs by individuals. Thus, RLUIPA provides:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--  
    (A) is in furtherance of a compelling governmental interest;  
and  
    (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1).

The State of Iowa expressly concedes its version of the Uniform Controlled Substances Act is simply an implementation of federal law. Iowa Code 124.201(4), "If any new substance is designated as a controlled substance under federal law and notice of the designation is given to the board, the board shall similarly designate as controlled the new substance under this chapter after the expiration of thirty days from publication in the Federal Register of a final order designating a new substance as a controlled substance, unless within that thirty-day period the board objects to the new designation." *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997) ("in

construing chapter 124, our codification of the Uniform Controlled Substances Act, we are to ‘effectuate its general purpose to make uniform the law of those states which enact it.’” *Grinspoon v. DEA*, 828 F.2d 881, 887 (1<sup>st</sup> Cir. 1987) (“The Uniform CSA, like its federal counterpart, creates five schedules of controlled substances and, indeed, was modeled on the federal CSA.”).

*Cutter v. Wilkinson*, 544 U.S. 709 (2005), requires state institutions accepting federal funds to guarantee protection of religious establishment and exercise as defined in *Sherbert* and *Yoder*. RLUIPA must be construed broadly, 42 U.S.C. § 2000cc-3(g). Words like “facility” and “institution” must be interpreted according to their plain meaning to “institute” and “facilitate” the enforcement of Iowa’s version of the Uniform Controlled Substances Act. Any restraint on liberty such as an arrest, probation, parole, judicial hearings, or anything that “facilitates” a pre-trial detention is within the meaning of RLUIPA. Any state agency, such as a state law enforcement agency, a state corrections agency, a judicial system, or anything that “institutes” is an institution. An institution that receives substantial federal funding is within the meaning of RLUIPA. When the state uses federal money to interfere with the Plaintiff’s establishment and exercise of religion

by the act of growing cannabis, RLUIPA requires that interference be strictly scrutinized by the tests set forth in *Sherbert* and *Yoder*.

### **CONCLUSION**

For the reasons set forth above, the Appellant, Carl Eric Olsen, respectfully requests that the judgment of the District Court be reversed and that this Court remand the case to the District Court for further proceedings on the claims set forth in the Complaint.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that the foregoing Brief for Appellant complies with the type-volume limitation provided in Fed. R. App. P. 32(a)(7)(B). The foregoing brief contains 7,394 words of Times New Roman (14 point) proportional type. The word processing software used to prepare this brief was Microsoft Office Word 2003.

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James R. Cook

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on October 16, 2007, the foregoing Brief for Appellant was served upon the Appellees by depositing two true and correct copies of said brief and CD-ROM of same with the United States Postal Service, first class postage prepaid, addressed to each of the following:

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# **ADDENDUM**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION**

CARL ERIC OLSEN,

Plaintiff,

vs.

ALBERTO R. GONZALES, et al.,

Defendants.

No. 4:07-cv-0023-JAJ

**ORDER**

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<b>I. INTRODUCTION</b> .....	2
<b>II. CONCLUSIONS OF LAW</b> .....	3
<b>A. Fed. R. Civ. P. 12(b)(1)</b> .....	3
<b>B. Failure to state a Claim under Fed. R. Civ. P. 12(b)(6)</b> .....	6
<b>1. Statutory Claims</b> .....	7
<b>a. Count I: RFRA</b> .....	7
<b>b. Count I: RLUIPA</b> .....	12
<b>2. Constitutional Claims</b> .....	13
<b>a. Count II: First Amendment</b> .....	13
<b>b. Count III: Equal Protection Clause</b> .....	14
<b>c. Count IV: Ex Post Facto Clause</b> .....	15
<b>d. Count VI: Fourth Amendment</b> .....	15
<b>e. Count VII: Fifth Amendment</b> .....	16
<b>3. Other Claims</b> .....	17
<b>a. Count V: Iowa Controlled Substances Act</b> .....	17
<b>b. Count VIII: Administrative Procedure Act</b> .....	17
<b>c. Count IX: Treaties and Conventions</b> .....	18
<b>d. Count X: Request for Declaratory Judgment</b> .....	19
<b>III. CONCLUSION</b> .....	19

## I. INTRODUCTION

This matter comes before the court pursuant to Attorney General of Iowa Thomas Miller's February 7, 2007 Motion to Dismiss (docket 8) and Attorney of Polk County John Sarcone and Sheriff of Polk County Dennis Anderson's March 19, 2007 Joinder (docket 15) (hereinafter "State Defendants" where applicable) and Attorney General of the United States Alberto Gonzales and Administrator of the United States Drug Enforcement Administration Karen Tandy's (hereinafter "Federal Defendants") April 10, 2007 Motion to Dismiss (docket 21).

Plaintiff Carl Eric Olsen's (hereinafter "Olsen") January 16, 2007 Complaint raises the following claims against State and Federal Defendants ("Defendants" collectively): (Count I) Violation of the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA); (Count II) Violation of the First Amendment; (Count III) Violation of the Equal Protection Clause; (Count IV) Violation of the Ex Post Facto Clause; (Count V<sup>1</sup>) Improper Application of the Controlled Substances to Cannabis; (Count VI) Violation of the Fourth Amendment; (Count VII) Violation of the Fifth Amendment; (Count VIII) Violation of the Administrative Procedure Act; (Count IX) Violation of International Law and Treaties; and (Count X) Request for Declaratory Judgment. Defendant Miller filed his Motion to Dismiss on February 7, 2007 (docket 8). Olsen filed his Response on February 23, 2007 (docket 9). Defendants Sarcone and Anderson joined Defendant Miller's Motion and brief in support on March 19, 2007 (docket 15). Federal Defendants filed their Motion to Dismiss on April 10, 2007 (docket 21). Olsen filed his Response on May 2, 2007 (docket 30). Federal Defendants filed their Reply on May 25, 2007 (docket 38). Olsen filed a Motion for Leave to File

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<sup>1</sup> The court re-numbered the last five claims as Olsen labeled two claims as claim four.

Surreply and Motion For Leave to File Overlength Brief on June 4, 2007 (docket 40). The court denied both of Olsen's Motions regarding his proposed Surreply on June 5, 2007 (docket 41). Olsen filed a Motion for Summary Judgment on July 3, 2007 (docket 46).

Olsen asserts that the RFRA and RLUIPA amend the Federal Controlled Substances Act and the Iowa Controlled Substances Act. As such, Olsen urges this court to find that Defendants' interpretations of the Federal CSA and the Iowa CSA are unlawful and unconstitutional as applied to him. Specifically, Olsen seeks an order determining that "Cannabis is not a controlled substance under the Federal CSA or the Iowa CSA" and "an order enjoining Defendants from applying the Federal CSA and the Iowa CSA [to him] for his sacramental use of cannabis." For the reasons listed below, the court dismisses Olsen's claims against all Defendants.

## **II. CONCLUSIONS OF LAW**

Defendants base their motions upon Fed. R. Civ. P. 12(b)(6) (failure to state a claim upon which relief can be granted). Federal Defendants further assert that this court should dismiss Olsen's complaint for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The court first addresses the issue of subject matter jurisdiction. See Brotherhood of Maintenance of Way Employees Div. of Intern. Broth. of Teamsters v. Union Pacific R. Co., 2007 WL 541826, 9 (N.D. Iowa 2007) (court notes that challenges to subject matter jurisdiction must be addressed prior to other challenges) (citations omitted).

### **A. Fed. R. Civ. P. 12(b)(1)**

Federal Rule of Civil Procedure 12(b)(1) provides a party may move to dismiss in a pre-answer motion due to "lack of jurisdiction over the subject matter." Id. Here,

Federal Defendants raise the issue “in the form of a Rule 12(b)(1) pre-answer motion, [and] the question may be resolved either on the face of the pleadings or upon factual determinations made in consideration of matters outside of the pleadings.” *Id.* Federal Defendants assert that Olsen has failed to demonstrate that his claims are ripe for review because he is not currently facing an impending threat of prosecution. The court addresses the issue as to all Defendants, as “subject matter jurisdiction goes to the court's power to hear the case.” See Brotherhood of Maintenance of Way Employees Div. of Intern. Broth. of Teamsters v. Union Pacific R. Co., 475 F.Supp.2d 819, 831 (N.D. Iowa 2007) (court acknowledges the question of subject matter jurisdiction may be raised by any party or the court at any time).

“The ripeness doctrine flows both from the Article III ‘cases’ and ‘controversies’ limitations and also from prudential considerations for refusing to exercise jurisdiction.” Pub. Water Supply Dist. No. 10 of Cass County, Mo. v. City of Peculiar, Mo., 345 F.3d 570, 572 (8th Cir. 2003) (quoting Nebraska Pub. Power Dist. v. MidAmerican Energy Co., 234 F.3d 1032, 1037 (8th Cir.2000)). The test for ripeness includes two prongs: (1) whether the issue is fit for judicial decision, i.e. whether the case would benefit from further factual development, and (2) hardship to the parties, i.e. whether Olsen “has sustained or is immediately in danger of sustaining some direct injury.” Pub. Water Supply Dist. No. 10, 345 F.3d at 573. Here, the issue centers upon the second prong.

A claim must be ripe in a declaratory judgment action, however such an action “can be sustained [even] if no injury has yet occurred.” Public Water Supply Dist. No. 8 of Clay County, Mo. v. City of Kearney, Mo., 401 F.3d 930, 932 8th Cir. 2005) (internal citations omitted). The Eighth Circuit recently stated, “Like the Fourth Circuit, we ‘encourage a person aggrieved by laws he considers unconstitutional to seek a declaratory judgment against the arm of the state entrusted with the state's enforcement power, all the

while complying with the challenged law, rather than to deliberately break the law and take his chances in the ensuing suit or prosecution.’” St. Paul Area Chamber of Commerce v. Gaertner, 439 F.3d 481, 488 (8th Cir. 2006) (quoting Mobil Oil Corp. v. Attorney Gen., 940 F.2d 73, 75 (4th Cir.1991)). “[D]ismissal for lack of subject matter jurisdiction is appropriate only in those rare instances when the challenged claim ‘clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.’ ” Id. (citing Trimble v. Asarco, Inc., 232 F.3d 946, 953 (8th Cir.2000) (quoting Bell v. Hood, 327 U.S. 678, 682-83, 66 S.Ct. 773, 90 L.Ed. 939 (1946))).

The court acknowledges that “[a] document filed pro se is ‘to be liberally construed,’ and ‘a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.’” Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007) (internal citation omitted). Federal Rule of Civil Procedure 8(a) dictates that a plaintiff must make a short, plain statement of the grounds for this court’s subject matter jurisdiction. In the present case, Olsen states that this court has jurisdiction “under 28 U.S.C. § 1331 because the action arises under the laws and Constitution of the United States.” Complaint, p. 4. Specifically, Olsen seeks a determination of his rights under the RFRA and RLUIPA, raises numerous constitutional and state law claims, and asserts rights under various international treaties. The court finds that Olsen survives the basic requirements of Rule 8(a).

### **B. Failure to state a Claim under Fed. R. Civ. P. 12(b)(6)**

A plaintiff survives a Rule 12(b)(6) motion by adequately stating a claim<sup>2</sup>; to do so, the plaintiff must provide “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1965 (2007). “Factual allegations must be enough to raise a right to relief above the speculative level,” Id. (citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed.2004)). When analyzing the adequacy of a complaint's allegations under Rule 12(b)(6), the court must accept as true all of the complaint's factual allegations and view them in the light most favorable to the plaintiff. Id.; see Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508 n.1 (2002); Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007) (“when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint”)(citations omitted)). “The issue is not whether plaintiffs will ultimately prevail, but rather whether they are entitled to offer evidence in support of their claims.” U.S. v. Aceto Agr. Chemicals Corp., 872 F.2d 1373, 1376 (8th Cir. 1989) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds, Davis v. Scherer, 468 U.S. 183 (1984)). As

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<sup>2</sup> The Supreme Court recently clarified the applicable standard under Rule 12(b)(6) in Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955 (2007). Previously, a court would not dismiss a complaint pursuant to Rule 12(b)(6) according to “the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Conley v. Gibson, 355 U.S. 41, 46 (1957). The Bell Atlantic Court rejected Conley's “no set of facts” standard and instead determined that “once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.” Bell Atlantic, 127 S.Ct. at 1969. The Supreme Court clarified Conley to stand for the “breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival.” Bell Atlantic, 127 S.Ct. at 1969.

noted previously, the court views pro se complaints more liberally, however a pro se plaintiff must still provide more than conclusory allegations. Harris v. Gadd, 2007 WL 1106114, 1 (E.D. Ark. 2007) (citations omitted).

### **1. Statutory Claims**

Olsen states that the RFRA and RLUIPA were passed by Congress “to prevent the government from burdening the free exercise of religion unless it had a compelling government interest in doing so and it accomplished its goal by the least restrictive means.” As such, Olsen asserts that Defendants have violated his statutory rights under both statutes because,

- (44) Defendants’ interpretations of the Federal and Iowa versions of the CSA substantially burden the Plaintiff’s Exercise of his Religion and use of his land.
- (45) Defendants’ criminalization of Plaintiff’s Sacramental use of Cannabis serves no compelling government interest.
- (46) Even assuming that Defendants’ interpretations of the Federal and Iowa versions of the CSA did serve a compelling interest, a complete ban on the Sacramental use of Cannabis by the Plaintiff on his own land is not the least restrictive means of furthering any such interest.

Complaint, p. 16.

Defendant Miller asserts that “neither the RFRA nor the RLUIPA apply under the facts of this case, and, even if they did apply, they would not, as a matter of law, affect the validity of any prohibition of the use, possession or sale of marijuana since such statutory prohibitions are the least restrictive means of addressing a compelling state interest.”

#### **a. Count I: RFRA**

State Defendants assert that Olsen’s RFRA claim fails “because the United States Supreme Court has explicitly held that application of this statute to the states is

unconstitutional.” City of Boerne v. Flores, 521U.S. 507 (1997). The court agrees and dismisses this Count as to the State Defendants.

Congress enacted the RFRA in response to the Supreme Court’s decision in Employment Division v. Smith, 494 U.S. 872 (1990) in order to restore the “compelling interest” test previously established in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972).<sup>3</sup>

The RFRA provides that

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

- (1) is in furtherance of a compelling governmental interest; and
- (2) is the least restrictive means of furthering that compelling governmental interest.

© Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief

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<sup>3</sup> The Senate Judiciary Committee noted that

The Religious Freedom Restoration Act of 1993 is intended to restore the compelling interest test previously applicable to free exercise cases by requiring that government actions that substantially burden the exercise of religion be demonstrated to be the least restrictive means of furthering a compelling governmental interest. The committee expects that the courts will look to free exercise cases decided prior to Smith for guidance in determining whether the exercise of religion has been substantially burdened and the [] least restrictive means have been employed in furthering a compelling governmental interest.

S. Rep. No. 103-111 at 8-9 (1993) as reprinted in 1993 U.S.C.C.A.N. 1892,1898.

against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C.A. § 2000bb-1

Olsen argues that the Supreme Court's decision in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 126 S. Ct. 1211 (2006) supports his bringing of the instant action. The O Centro court affirmed the granting of a preliminary injunction under the RFRA where it determined that "the Government failed to demonstrate... a compelling interest in barring the [plaintiff]'s sacramental use of hoasca." O Centro, 126 S.Ct. at 1225. This court finds Olsen's reasoning unpersuasive. In the initial decision granting the preliminary injunction at issue in O Centro, the district court distinguished its treatment of hoasca from cases involving marijuana.

There is a second major distinction between the present case and the cases involving claims that the principles of religious freedom reflected in the Free Exercise Clause and RFRA should be interpreted as permitting the sacramental use of marijuana. This distinction stems from the significant differences in the characteristics of the drugs at issue. Affirming a trial court's denial of a criminal defendants' request to rely in \*1254 RFRA as a defense to marijuana charges, the Eighth Circuit stated "that the government has a compelling state interest in controlling the use of marijuana." United States v. Brown, 72 F.3d 134 (8th Cir.1995) (table). As support for this observation, the Brown court cited a number of First Amendment opinions which had emphasized problems associated with marijuana in particular. See, e.g., United States v. Greene, 892 F.2d 453, 456-57 (6th Cir.1989) ("Every federal court that has considered this issue has accepted Congress' determination that marijuana poses a real threat to individual health and social welfare and had upheld criminal penalties for possession and distribution even where such penalties may infringe to some extent on the free exercise of religion."); United States v. Middleton, 690 F.2d 820, 825 (11th Cir.1982), quoting Leary v. United States, 383 F.2d 851, 860-61 (5th Cir.1967) ("It would be difficult to imagine the harm which would result if

the criminal statutes against marihuana were nullified as to those who claim the right to possess and traffic in this drug for religious purposes.”)

O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 282 F.Supp.2d 1236, 1253-1254 (D.N.M. 2002)

Further, the government has previously met the “compelling interest” test in lawsuits brought by Olsen on the same issue. See United States v. Rush, 738 F.2d 497(C.A. Me. 984); Olsen v. Drug Enforcement Admin., 878 F.2d 1458 (C.A.D.C. 1989). In fact, Olsen’s previous unsuccessful lawsuit in United States v. Rush, 738 F.2d 497 (C.A. Me. 984) has been cited as a reason for dismissing “claims which, while constituting a RFRA prima facie case, had already been ruled invalid.” O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 342 F.3d 1170, 1179 (10<sup>th</sup> Cir. 2003) (court notes that “a plaintiff seeking to use marijuana for religious purposes would likely not be able to demonstrate a substantial likelihood of success on the merits because courts have already ruled against sacramental marijuana claims”)(citing Rush, 738 F.2d at 512, for the conclusion that “the Government has a compelling interest in banning the possession and distribution of marijuana notwithstanding the burden on religious practice”).

Federal Defendants thus properly assert that collateral estoppel, or “issue preclusion,” blocks Olsen’s claim. In the Eighth Circuit, issue preclusion has five elements:

- (1) the party sought to be precluded in the second suit must have been a party, or in privity with a party, to the original lawsuit;
- (2) the issue sought to be precluded must be the same as the issue involved in the prior action;
- (3) the issue sought to be precluded must have been actually litigated in the prior action;
- (4) the issue sought to be precluded must have been determined by a valid and final judgment; and
- (5) the determination in the prior action must have been essential to the prior judgment.

Robinette v. Jones, 476 F.3d 585, 589 (8th Cir. 2007)(citing Anderson v. Genuine Parts Co., Inc., 128 F.3d 1267, 1273 (8th Cir.1997).

The court in Rush analyzed the government's interest in controlling marijuana use and distribution as follows:

Much evidence has been adduced from which it might rationally be inferred that marijuana constitutes a health hazard and a threat to social welfare; on the other hand, proponents of free marijuana use have attempted to demonstrate that it is quite harmless. See Randall v. Wyrick, 441 F.Supp. 312, 315-16 (W.D.Mo.1977); United States v. Kuch, 288 F.Supp. 439, 446 & 448 (D.D.C.1968). In enacting substantial criminal penalties for possession with intent to distribute, Congress has weighed the evidence and reached a conclusion which it is not this court's task to review de novo. Every federal court that has considered the matter, so far as we are aware, has accepted the congressional determination that marijuana in fact poses a real threat to individual health and social welfare, and has upheld the criminal sanctions for possession and distribution of marijuana even where such sanctions infringe on the free exercise of religion. United States v. Middleton, 690 F.2d 820, 825 (11th Cir.1982), cert. denied, 460 U.S. 1051, 103 S.Ct. 1497, 75 L.Ed.2d 929 (1983); United States v. Spears, 443 F.2d 895 (5th Cir.1971), cert. denied, 404 U.S. 1020, 92 S.Ct. 693, 30 L.Ed.2d 669 (1972); Leary v. United States, 383 F.2d 851, 859-61 (5th Cir.1967), rev'd on other grounds, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969); Randall, 441 F.Supp. at 316 & n. 2; Kuch, 288 F.Supp. at 448. Only last year, the Eleventh Circuit rejected identical claims raised by some of the very appellants before us in this case, see Middleton, 690 F.2d 820, and the United States Supreme Court denied review. We decline to second-guess the unanimous \*513 precedent establishing an overriding governmental interest in regulating marijuana.

United States v. Rush, 738 F.2d 497, 512 -513 (C.A. Me. 984).

In Olsen, Olsen conceded that the government had a "compelling interest in controlling the distribution and drug-related use of marijuana" and instead challenged the government's means. See Olsen, 878 F.2d at 1462. The court upheld the government's means as follows,

The pivotal issue, therefore, is whether marijuana usage by Olsen and other members of his church can be accommodated without undue interference with the government's interest in controlling the drug. Three circuits have so far considered pleas for religious exemption from the marijuana laws; each has rejected the argument that accommodation to sacramental use of the drug is feasible and therefore required. Rush, 738 F.2d at 513 (First Circuit); Olsen v. Iowa, 808 F.2d at 653 (Eighth Circuit); Middleton, 690 F.2d at 825 (Eleventh Circuit). We have no reason to doubt that these courts have accurately gauged the Highest Court's pathmarks in this area.

Olsen v. Drug Enforcement Admin., 878 F.2d 1458, 1462 (C.A.D.C. 1989).

The court finds that Olsen was a party in the above-mentioned lawsuits in which the current issue was involved, actually litigated, determined by a valid, final judgment, and the current claims were essential to the prior judgment. As such, this Court agrees that collateral estoppel applies to Olsen's claims under RFRA and dismisses Count I as to the Federal Defendants as well.

#### **b. Count I: RLUIPA**

Olsen seeks a determination of his rights under the RLUIPA, which protects "Religious Exercise in Land Use and by Institutionalized Persons," as interpreted by the Supreme Court in Cutter v. Wilkinson, 544 U.S. 709, 715, 125 (2005). In Cutter, the Supreme Court's analyzed Section 3 of the RLUIPA, which provides, in part, that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution." Id. 42 U.S.C.A. § 2000cc. Defendants argue that Olsen may not bring a claim under this statute as he is not incarcerated, and the CSA does not affect Olsen's religious use of land. The court agrees and dismisses Olsen's claims brought under the RLUIPA as to all Defendants.

## 2. Constitutional Claims

Olsen alleges violations regarding his First Amendment free exercise rights, Equal Protection, the Ex Post Facto Clause, the Fourth Amendment, and the Fifth Amendment.

### a. Count II: First Amendment

Olsen asserts that the Defendants' interpretation of the statutory and regulatory scheme of the Federal Controlled Substances Act has violated his rights under the Free Exercise Clause of the First Amendment, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." US CONST AMEND I.

State Defendants note that Olsen's free exercise claims "have already been found to have no merit by both the Eighth Circuit Court of Appeals and by the Iowa Supreme Court." Olsen v. State of Iowa, 808 F.2d 652 (8th Cir. 1986); State v. Olsen, 315 N.W.2d 1 (Iowa 1982).

Federal Defendants assert that Olsen's claim alternatively fails as a matter of law because the CSA is a neutral law of general applicability, and thus may burden Olsen's "religiously motivated conduct without compelling justification," citing Employment Div. Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 883 (1990); United States v. Meyers, 95 F.3d 1475, 1481 (10th Cir. 1996); O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 282 F. Supp. 2d 1236, 1246 (D.N.M. 2002).

As noted previously in the section regarding Olsen's RFRA claim in Count 1, the court finds that Olsen is collaterally estopped from bringing the same claim in this court. See Olsen, 878 F.2d at 1461. (court notes that "Olsen free exercise claim has been raised, considered, and rejected in the context of criminal proceedings" citing Olsen v. Iowa, 808 F.2d at 653; Rush, 738 F.2d at 512-13; Middleton, 690 F.2d at 824-26; State v. Olsen,

315 N.W.2d at 7-9; Town v. State ex rel. Reno, 377 So.2d at 650-51). The court dismisses Count II as to all Defendants.

**b. Count III: Equal Protection Clause**

Olsen raises his equal protection claim as follows

57. The Plaintiff is similarly situated to Native American Church members in their sacramental use of a substance considered a Schedule I controlled substance under the Federal and Iowa versions of the CSA. Nevertheless, Defendants have refused to accord the same deference to the Plaintiff.
58. The Plaintiff is similarly situated to UDV Church members in their sacramental use of a substance considered a Schedule I controlled substance under the Federal and Iowa versions of the CSA. Nevertheless, Defendants have refused to accord the same deference to the Plaintiff.
59. Consequently, the Defendants' decision to allow the members of the Native American Church to use peyote and members of the UDV church to use DMT for religious purposes, while denying the same protection to the Plaintiff, violates the Equal Protection rights of the Plaintiff guaranteed by the Fifth and Fourteenth Amendments to the United States.

Complaint, pp. 17-18.

As noted for Counts I and II, Olsen previously brought this identical claim and is collaterally estopped from re-litigating the same claim. See Olsen, 878 F.2d at 1463. (court notes that “Olsen has urged before that members of his church are similarly situated to the beneficiaries of the exemption prescribed in 21 C.F.R. § 1307.31. See Olsen v. Iowa, 808 F.2d at 653; Rush, 738 F.2d at 513. We join our sister courts in rejecting this plea.”). The court grants dismisses Count III as to all Defendants.

### **c. Count IV: Ex Post Facto Clause**

Olsen improperly invokes the Ex Post Facto Clause, which provides that “No Bill of Attainder or ex post facto Law shall be passed.” U.S.C.A. Const. Art. I § 9, cl. 3. Olsen states that, “Based upon the erroneous and unlawful determination that Cannabis is a controlled substance under the CSA, Defendants have criminally prosecuted the Plaintiff in the past...and have threatened to criminally prosecute the Plaintiff [in the future].”

Our test for determining whether a criminal law is *ex post facto* derives from these principles. As was stated in Weaver, to fall within the ex post facto prohibition, two critical elements must be present: first, the law “must be retrospective, that is, it must apply to events occurring before its enactment”; and second, “it must disadvantage the offender affected by it.”

Miller v. Florida, 482 U.S. 423, 430 (1987)(emphasis in original) (quoting Weaver v. Graham, 450 U.S. 24, 29 (1981)). Defendants argue that this clause does not apply to Olsen’s claims. This court agrees; Olsen fails to establish the first element as the CSA was not applied to him retrospectively. The court dismisses Count IV as to all Defendants.

### **d. Count VI: Fourth Amendment**

Olsen claims that “Defendants cannot substantially burden his right to be secure in his person, house, papers, and effects, without demonstration of the facts of a threat to public health and safety which triggers the application of the Compelling Interest Test to review the facts and application of the law de novo.” Complaint, p. 21.

The Fourth Amendment protects

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S.C.A. Const. Amend. IV.

State Defendants note as follows,

The nature of this allegation is unclear. Apart from general rubric about what the Fourth Amendment protects, little is said to support such a claim. There is no allegation that Olsen was ever the victim, or will ever be the victim, of an illegal search and/or seizure. There is certainly no allegation that any particular defendant ever participated in, or caused, such an event.

Federal Defendants also argue that Olsen fails to raise a viable claim and cannot save his claim by comparing it to the “hybrid” situation presented in Employment Division v. Smith, 494 U.S. at 881-882. Federal Defendants point out that “the hybrid situation mentioned in Smith referred only to a few prior cases where religiously motivated action that also implicated freedom of speech rights or rights of parents to raise their children.”

The court agrees that Olsen fails to state a claim for which relief can be granted and dismisses Count VI as to all Defendants.

#### **e. Count VII: Fifth Amendment**

Olsen claims Defendants violated his rights under the Fifth Amendment due to their failure provide him with a pre-deprivation notice and hearing prior to seizing his property, i.e. his marijuana, in the past. Defendants state that Olsen’s claim is frivolous as he cannot claim a constitutionally protected property interest in marijuana. This court agrees and dismisses Count VII as to all Defendants.

### **3. Other Claims**

#### **a. Count V: Iowa Controlled Substances Act**

Olsen asserts that Defendants have criminally prosecuted him in the past and have threatened to criminally prosecute him in the future due to the “erroneous and unlawful determination that Cannabis is a controlled substance under the CSA.”

Defendants assert that this court lacks jurisdiction to remove marijuana from the CSA and that the “CSA provides “an administrative remedy for any interested party to request that a substance be deleted entirely from the CSA or be transferred to a less restrictive schedule.” citing 21 U.S.C. § 811(a). This court agrees and dismisses Count V as to all Defendants.

#### **b. Count VIII: Administrative Procedure Act**

Olsen claims that

The Federal Defendants’ conduct as set forth above constitutes agency action that is: (a) arbitrary and capricious; (b) an abuse of discretion and otherwise not in accordance with the law; (c) contrary to the Plaintiff’s constitutional and statutory rights; (d) in excess of statutory jurisdiction and authority; and (e) without observance of procedures required by law. Such action should be set aside and declaratory and injunctive relief provided under the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

Complaint, p. 22.

Federal Defendants argue that “plaintiff merely cross-references his previous allegations...[and thus] this count is completely derivative of plaintiff’s other claims.” Fed. Def. Brief, p. 30. Olsen agrees, stating that he “feels that he has exhausted reasonable attempts to obtain relief under the APA.” Response, p. 28. The court dismisses this count as to all Defendants.

### **c. Count IX: Treaties and Conventions**

Olsen contends that his religious use of cannabis is protected under the United Nations International Covenant on Civil and Political Rights (“ICCPR”), 138 Cong. Rec. S4781-84 (1992), the Universal Declaration of Human Rights (“UDHR”), GA res. 217A, Dec. 10, 1948, the International Religious Freedom Act (“IRFA”), Pub. L. No. 105-292, 112 Stat. 2787 (1998) (codified at 22 U.S.C. §§ 6401-6481), and the 1971 Convention on Psychotropic Substances (“CPS”), 32 U.S.T. 543, 1019 U.N.T.S. 175.

State Defendants note that: (1) Plaintiff cites to documents that refer to the United States government, rather than the states; (2) Plaintiff lacks standing to raise any claim as an individual; (3) Under O Centro, international treaties and conventions may “not be read as negating an unambiguous statute such as the Controlled Substances Act”; and (4) None of the international treaties/conventions “specifically prohibits the criminalization of marijuana.”

Federal Defendants note that: (1) The ICCPR is not self-executing and thus the Plaintiff has no privately enforceable rights absent implementing legislation by Congress, citing U.S. ex rel. Perez v. Warden, FMC Rochester, 286 F.3d 1059, 1063 (8th Cir. 2002) Payne-Barahona v. Gonzales, 474 F.3d 1, 3 (1st Cir. 2007); Martinez-Lopez v. Gonzales, 454 F.3d 500, 502 (5th Cir. 2006); Guaylupo-Moya v. Gonzales, 423 F.3d 121, 133 (2nd Cir. 2005); (2) The UDHR is not an enforceable source of law in federal courts, citing Guaylupo-Moya, 423 F.3d at 133; (3) The CPS is also not self-executing and thus creates no private cause of action for the Plaintiff absent implementing legislation. Similarly, the CPS also does not create a private right of action. citing Hernandez v. Ciba-Geigy Corp. USA, 200 F.R.D. 285, 294 (S.D. Tex. 2001); and (4) The IFRA applies only internationally and the statute specifically precludes judicial review. 22 U.S.C. § 6450. The court agrees and dismisses Count IX as to all Defendants.

**d. Count X: Request for Declaratory Judgment**

As noted previously, the court dismisses all claims brought by Olsen against all Defendants, thus Olsen's request for declaratory judgment is denied.

**III. CONCLUSION**

Upon the foregoing,

**IT IS ORDERED** that State Defendant Miller's February 7, 2007 Motion to Dismiss (docket 8), State Defendants Sarcone and Anderson's March 19, 2007 Joinder (docket 15), and Federal Defendants April 10, 2007 Motion to Dismiss (docket 21) are **GRANTED**. Olsen's July 2, 2007 Motion for Summary Judgment is **DENIED** as moot. (docket 43). The clerk shall enter judgment for all Defendants on all claims.

**DATED** this 16th day of July, 2007.

  
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JOHN A. JARVEY  
UNITED STATES DISTRICT JUDGE  
SOUTHERN DISTRICT OF IOWA