

Case No. 07-3062

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UNITED STATES COURT OF APPEALS  
for the  
EIGHTH CIRCUIT

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CARL ERIC OLSEN,

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,

Appellees.

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
Hon. John S. Jarvey, Judge

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BRIEF OF APPELLEES

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## **SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT**

Plaintiff, who is now represented by counsel but who appeared pro se in the district court, brought this action against a number of federal, state, and county officials (including the Iowa Attorney General, Thomas Miller, on whose behalf this brief is filed), challenging the constitutionality of various federal and state laws prohibiting the possession and use of marijuana and cannabis, which plaintiff contends is necessary for his religious beliefs. Plaintiff's complaint alleged violations of several federal statutes (the Religious Freedom Restoration Act [RFRA], the Religious Land Use and Institutionalized Persons Act [RLUIPA], the federal Administrative Procedure Act), a variety of constitutional provisions (First Amendment, Equal Protection, Due Process, Ex Post Facto, Fourth Amendment), and various international laws and treaties.

All three groups of defendants filed motions to dismiss, which the district court granted. On appeal, Olsen apparently challenges only the dismissal of his claims under the First Amendment, Equal Protection clause, RFRA and RLUIPA.

Olsen has, over the years, brought other lawsuits challenging the controlled substances laws, all of them unsuccessful. For this reason, Attorney General Miller believes that Olsen's arguments are so wholly unsubstantial that oral argument is probably not necessary. If oral argument is granted, however, Defendant Miller requests that fifteen minutes per side be allotted.

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## **JURISDICTIONAL STATEMENT**

Jurisdiction in the district court was based on 28 U.S.C. § 1331. Jurisdiction in this Court is based on 28 U.S.C. §§ 1291, 1294. Plaintiff appeals from a final decision of the district court.

### **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

- I. THE RELIGIOUS FREEDOM RESTORATION ACT DOES NOT APPLY TO STATE GOVERNMENT AND THEREFORE A CLAIM BROUGHT UNDER THIS STATUTE STATES NO CAUSE OF ACTION AGAINST THE IOWA ATTORNEY GENERAL. EVEN IF THE STATUTE WERE APPLICABLE, IT WOULD NOT JUSTIFY INVALIDATION OF A STATE LAW PROHIBITING THE POSSESSION OR USE OF MARIJUANA. THE DISTRICT COURT THEREFORE PROPERLY DISMISSED PLAINTIFF'S RFRA CLAIM.**

*City of Boerne v. Flores*, 521 U.S. 507 (1997).

*Employment Division, Department of Human Services of Oregon v. Smith*  
494 U.S. 872 (1990).

*Olsen v. State of Iowa*, 808 F.2d 652 (8<sup>th</sup> Cir. 1986).

*United States v. Israel*, 317 F.3d 768 (7<sup>th</sup> Cir. 2003).

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*United States v. Rush*, 738 F.2d 497 (1<sup>st</sup> Cir. 1984).

*Olsen v. State of Iowa*, 808 F.2d 652 (8<sup>th</sup> Cir. 1986).

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*United States v. Rush*, 738 F.2d 497 (1<sup>st</sup> Cir. 1984).

*Olsen v. Drug Enforcement Administration*, 878 F.2d 1458 (D.C. Cir. 1989).

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DISMISSED PLAINTIFF'S CLAIM UNDER  
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*Multi Denominational Ministry of Cannabis and Rastafari, Inc. v. Gonzales*,  
474 F. Supp. 2d 1133 (N.D. Cal. 2007).

**STATEMENT OF THE CASE**

This action marks plaintiff's most recent attempt to invalidate laws which prohibit the use or possession of marijuana. His complaint in district court sought the invalidation of these laws on a variety of statutory and constitutional grounds, and the district court dismissed all counts of the complaint, relying heavily on the fact that a number of courts, including this one, have, in lawsuits to which Olsen has been a party, concluded that these laws serve a compelling state interest and are narrowly tailored to address that interest.

For purposes of their various motions, none of the defendants challenged the sincerity of Olsen's religious beliefs or the underlying facts concerning Olsen's desire to use marijuana in a manner that is now proscribed by state and federal law.

All defendants' motions were based on the fact that, notwithstanding Olsen's religious-based desire to use cannabis in this way, he simply has no right to do so.

### **STATEMENT OF FACTS**

Because of the procedural posture of this case, the relevant facts are few and undisputed. Olsen is a member of the Ethiopian Zion Coptic Church, and he alleges that his church uses marijuana ("continually all day," according to one court) for religious purposes. Both state and federal law prohibit this use, and Olsen seeks invalidation of these laws. He has sought this before, in other cases, and his arguments have consistently been rejected.

### **SUMMARY OF THE ARGUMENT**

Olsen's RFRA claim fails as a matter of law to state a claim against the non-federal defendants because that statute cannot, as definitively interpreted by the United States Supreme Court, be applied to the states. Even if the RFRA applied to state legislation, however, it would not entitle Olsen to relief because all that statute does is impose a "strict scrutiny" standard on these kind of cases, and Olsen's prior unsuccessful attempts to invalidate state and federal controlled substances laws were rejected under precisely this legal standard. Thus, not only

do these prior decisions constitute binding dispositive precedent mandating rejection of Olsen's claims, they also bar this lawsuit under the doctrine of collateral estoppel.

Olsen's First Amendment claim fares no better. The prior decisions referenced above also rejected this precise claim, and no intervening legal authority has imposed a different standard.

Olsen's equal protection argument, predicated on the fact that the use of peyote is allowed for members of the Native American Church, was also properly dismissed. A number of court decisions, including ones involving Olsen as a party, have rejected this distinction as a ground for asserting an equal protection violation and have emphasized the distinctions between the manner and frequency in which peyote is used (in tightly circumscribed rituals) and the way in which marijuana is used ("continually all day", according to one court). The Supreme Court decision which Olsen claims has changed the law, thus rendering collateral estoppel inapplicable, does not even involve equal protection, and the panel decision of the Court of Appeals in that very case noted a distinction between the use of hoasca (the controlled substance that was at issue there) and marijuana.

Finally, Olsen's RLUIPA claim is simply frivolous. That federal statute applies only in two contexts: incarcerated persons and land use laws. Olsen has

never claimed to be incarcerated (and in fact he is not) and the laws at issue here are not land use laws within the meaning of that statute. Moreover, even if the statute was applicable to this situation, it would not entitle plaintiff to relief; a law which prohibits the use or possession of marijuana is the least restrictive means of serving a compelling governmental interest, and therefore passes muster under this statute.

### **ARGUMENT**

- I. THE RELIGIOUS FREEDOM RESTORATION ACT DOES NOT APPLY TO STATE GOVERNMENT AND THEREFORE A CLAIM BROUGHT UNDER THIS STATUTE STATES NO CAUSE OF ACTION AGAINST THE IOWA ATTORNEY GENERAL. EVEN IF THE STATUTE WERE APPLICABLE, IT WOULD NOT JUSTIFY INVALIDATION OF A STATE LAW PROHIBITING THE POSSESSION OR USE OF MARIJUANA. THE DISTRICT COURT THEREFORE PROPERLY DISMISSED PLAINTIFF'S RFRA CLAIM.

#### ***Scope of Review***

Defendant Miller agrees with Plaintiff that this Court reviews the district court's decision for the correction of errors of law.

***Inapplicability of RFRA to State Legislation***

Initially– and, at least with regard to defendant Miller, dispositively– it should be noted that in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the United States Supreme Court held that the “RFRA was unconstitutional as applied to *state law* because Congress had exceeded its enforcement powers under § 5 of the Fourteenth Amendment.” *In re Young*, 141 F.3d 854, 856 (8<sup>th</sup> Cir. 1998)(original emphasis). Therefore, plaintiff’s RFRA claim states no cause of action against either Attorney General Miller or the enforcement of the state controlled substance law. For this reason alone, dismissal of the RFRA claim against Attorney General Miller was unquestionably correct. In fact, although the district court relied on this reasoning to dismiss the RFRA claims against the state defendants (Ruling, pages 7-8), Olsen neither challenges this ruling on appeal nor so much as cites the *Boerne* case in his Brief. Presumably, therefore, he has abandoned his RFRA claim as to the state defendants. However, since he does not say so explicitly, and for the sake of completeness, defendant Miller will also briefly address alternative grounds for dismissal of this claim.

*No Entitlement to Relief*

Even if the RFRA applied to the states, it would not entitle plaintiff to relief or mandate reversal of the district court. A brief summary of the history and purpose of the statute is helpful in explaining why.

Under the decision of the United States Supreme Court in *Sherbert v. Verner*, 374 U.S. 398 (1963), Free Exercise claims under the First Amendment had to be decided under a “compelling state interest” standard. Subsequently, in *Employment Division, Department of Human Services of Oregon v. Smith*, 494 U.S. 872 (1990), that Court adopted a more deferential standard for evaluation of religious-based challenges to state law. *See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006)(*Smith* “rejected the interpretation of the Free Exercise Clause announced in *Sherbert*” which would require judges to engage in case-by-case assessment of the religious burdens imposed by facially constitutional laws).

The RFRA was a Congressional reaction to *Smith*, enacted with the purpose of overruling it and restoring the compelling state interest test enunciated in *Sherbert*. *See, e.g., Ochs v. Thalacker*, 90 F.3d 293, 295 (8<sup>th</sup> Cir. 1996). The problem for the plaintiff, however, is that even prior to *Smith*— i.e, proceeding under the compelling state interest test demanded by *Sherbert*— courts had, in

cases in which he was a party, rejected his challenge to laws prohibiting marijuana use. *See, e.g., Olsen v. State of Iowa*, 808 F.2d 652 (8<sup>th</sup> Cir. 1986); *Olsen v. Drug Enforcement Administration*, 878 F.2d 1458, 1461-63 (D.C. Cir. 1989); *State v. Olsen*, 315 N.W.2d 1 (Iowa 1982). These opinions thus resolve the critical legal issue that RFRA demands examination of, and they do so adversely to Plaintiff. His attempt to relitigate these issues therefore runs directly counter to the doctrine of collateral estoppel, since that doctrine, as the district court noted, prevents relitigation of an issue that the same party has actually litigated in a previous case if that first case resulted in a valid judgment and the determination of that issue was essential to the prior judgment. *Robinette v. Jones*, 476 F.3d 585, 589 (8<sup>th</sup> Cir. 2007)(listing elements of collateral estoppel). Although Olsen now contends that the passage of the RFRA somehow effects a change in the law which makes collateral estoppel inapplicable, all RFRA does is mandate a scope of review under which, in cases involving Olsen, his claims have already been rejected.

In any event, even if the issue is not phrased in terms of collateral estoppel, it is clear that the authority previously cited constitutes binding authority on the “compelling interest” issue and demands rejection of Olsen’s RFRA claims. Other authority, not involving Olsen, also exists. In *United States v. Israel*, 317 F.3d 768 (7<sup>th</sup> Cir. 2003), for example, the Seventh Circuit Court of Appeals found no RFRA

violation by the refusal of the government to make a religious exception to a condition of supervised release that the defendant refrain from drugs. The court began by pointing out that the RFRA would not be violated, even in cases where government action substantially burdened a religious belief, if that burden was “in furtherance of a compelling governmental interest” and was the “least restrictive means of furthering that compelling governmental interest.” *Id.* at 770. The court went on to find, citing pre-*Smith* authority, that “even under this more demanding standard, courts have properly refused to allow exceptions for marijuana use.” *Id.* at 772. “In light of this impressive amount of legislative and judicial reasoning, we conclude that the government has a proper and compelling interest in forbidding the use of marijuana.” *Id.* See also *Multi Denominational Ministry of Cannabis and Rastafari, Inc., v. Gonzales*, 474 F. Supp. 2d 1133, 1146-47 (N.D. Cal. 2007)(looking to pre-*Smith* case law as “instructive” in determining whether laws prohibiting marijuana use were violative of RFRA and concluding that Plaintiff’s Complaint did not plead a prima facie case of a violation).

### ***Summary and Conclusion***

The RFRA does not apply at all to state legislation or to the state actors, like Attorney General Miller, who enforce such legislation. Even if it did, it would not be violated by a state law prohibiting marijuana use or possession because the state

has a compelling state interest in restricting this drug and a ban on its use is the least restrictive means of effectuating that interest.

**II THE DISTRICT COURT PROPERLY  
DISMISSED PLAINTIFF'S FIRST  
AMENDMENT FREE EXERCISE CLAIM  
BECAUSE OLSEN HAS PREVIOUSLY  
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CLAIMS AND BECAUSE, IN ANY EVENT,  
THESE CLAIMS LACK LEGAL MERIT.**

*Introduction/ Scope of Review*

Olsen also asserts as error the district court's dismissal of his First Amendment claims. The court found these claims to be barred by the doctrine of collateral estoppel because identical claims have been previously rejected in cases in which Olsen has been a party. As will be argued, this conclusion is correct, and, in any event, Olsen's claims fail on the merits.

Defendant Miller agrees with Plaintiff that this Court's scope of review is de novo.

### *Collateral Estoppel*

This is, to put it mildly, not the first time Olsen has attempted to argue that marijuana prohibition laws violate his First Amendment rights.<sup>1</sup> In fact, Judge (now Justice) Ginsberg has written that “Olsen’s free exercise claim has been raised, considered and rejected in the context of criminal proceedings.” *Olsen v. Drug Enforcement Administration*, 878 F.2d 1458, 1461 (D.C. Cir. 1989), citing *Olsen v. State of Iowa*, 808 F.2d 652 (8<sup>th</sup> Cir. 1986); *United States v. Rush*, 738 F.2d 497 (1<sup>st</sup> Cir. 1984)<sup>2</sup>; *State v. Olsen*, 315 N.W.2d 1 (Iowa 1982). The fact that at least four prior judicial decisions have rejected Olsen’s First Amendment allegations should certainly mandate affirmance of the district court’s invocation of collateral estoppel in this case. *See Robinette v. Jones*, 476 F.3d 585, 589 (8<sup>th</sup> Cir. 2007)(listing elements of issue preclusion: party sought to be precluded must have been a party, or in privity with a party, in original lawsuit; issue sought to be precluded must be the same as issue in first litigation; issue sought to be precluded must have been actually litigated in the first action; issue sought to be precluded

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<sup>1</sup> One district court judge in Iowa has referenced Olsen’s “tireless efforts to ‘legalize’ his marijuana activities.” *Olsen v. State of Iowa*, 649 F. Supp. 14, 16 (S.D. Iowa 1986), *aff’d* 808 F.2d 652 (8<sup>th</sup> Cir. 1986).

<sup>2</sup>Olsen is listed in the court decision as a party to this case.

must have been determined by a valid and final judgment; determination of issue in first action must have been essential to prior judgment).

Olsen contends, however, that he should be allowed to litigate this issue for the fifth time because of “intervening court decisions” which he contends changed the legal standards for such analysis. The case he relies on most heavily is, curiously, *Employment Division, Department of Human Services of Oregon v. Smith*, 494 U.S. 872 (1990), which is universally regarded as a case that relaxes, rather than tightens, the legal standard for assessing free exercise claims. (As previously noted, Congress passed the RFRA with the intent of imposing more stringent, pre-*Smith*, standards on the government.)

Olsen argues that one change brought about by *Smith* and its progeny is that a law is subject to higher scrutiny if it is not neutral and generally applicable. The problem with this reasoning is that the various state and federal laws at issue in this case *are* neutral and generally applicable. As explained in *Larsen v. United States Navy*, 346 F. Supp. 2d 122, 137-38 (D. D.C. 2004), this requirement means that the law should not be discriminatory towards a religious viewpoint. The court gave as an example of a neutral, generally applicable law the marijuana prohibition statute discussed in *United States v. Israel*, 317 F.3d 768 (7<sup>th</sup> Cir. 2003). *See also United States v. Meyers*, 95 F.3d 1475, 1481 (10<sup>th</sup> Cir. 1996)(rejecting a First Amendment

challenge, brought by a member of the “Church of Marijuana”, to laws banning that substance, specifically finding that the ban was a valid neutral law of general applicability); *Multi Denominational Ministry of Cannabis and Rastafari, Inc., v. Gonzales*, 474 F. Supp. 2d 1133, 1146-47 (N.D. Cal. 2007)(“The parallels of *Smith* to this case are striking. Like the defendant in *Smith*, plaintiffs use a controlled substance in the practice of their religion, and the government proscribes such use through neutral, generally applicable laws.”). This is the way this Court has interpreted the phrase as well: “There is no evidence that the City has an anti-religious purpose in enforcing the ordinance. Absent evidence of the City’s intent to regulate religious worship, the ordinance is properly viewed as a neutral law of general applicability...”. *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472 (8<sup>th</sup> Cir. 1991). Clearly, the state and federal governments did not pass the laws prohibiting the use or possession of marijuana because they were interested in infringing on the rights of the Ethiopian Zion Coptic Church, or any other religion. The laws were motivated by the governments’ belief that marijuana is a substance that needs to be regulated for the benefit of the public. The statutes at issue here are thus clearly neutral and generally applicable.

Even if the laws in this case were not neutral and generally applicable, that would not in itself result in their invalidation; it would simply require a strict

scrutiny level of analysis. As previously noted, however, prior precedent upholds these laws against that kind of analysis by finding the laws narrowly tailored to a compelling state interest. Thus, neither *Smith* nor its progeny change the legal landscape in a way so as to defeat the preclusive effects of Olsen's prior unsuccessful attempt to assert a First Amendment violation.

Olsen also states that the district court's reliance on the doctrine of collateral estoppel is incorrect because he states a "hybrid rights" claim under *Smith*. This argument also fails for a number of different reasons. The doctrine of "hybrid rights" is discussed in some detail in *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643 (10<sup>th</sup> Cir. 2006). The court pointed out that the doctrine derives from the statement in *Smith* that "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause, but the Free Exercise Clause in conjunction with other constitutional protections." *Smith*, 494 U.S. at 881. The court went on to say that the "hybrid rights doctrine is controversial. It has been characterized as mere dicta not binding on the lower courts, ... criticized as illogical, ... and dismissed as untenable." 451 F.3d at 656. This Court seems to have mentioned the doctrine on only two occasions— in *Cornerstone Bible Church*, 948 F.2d at 473, where it held that the reversal of the

district court's summary judgment ruling on other constitutional issues "breathes life back into the Church's 'hybrid rights' claim" and should be considered by the district court on remand, and in *McCarthy v. Ozark School District*, 359 F.3d 1029, 1033 (8<sup>th</sup> Cir. 2004), where it mentioned the term, cited *Smith*, but did not reach the merits of the claim, which the district court had rejected. Thus, while this Court has recognized this doctrine, it apparently has never applied it to find an actual violation of the Free Exercise Clause.

Nevertheless, assuming that the doctrine is a viable one, it is not applicable here because, for one thing, the Plaintiff has no independent valid constitutional claims. As the Seventh Circuit has pointed out: "We agree with the Court of Appeals for the Ninth Circuit that 'a plaintiff does not allege a hybrid rights claim entitled to strict scrutiny analysis merely by combining a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right.'" *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 765 (7<sup>th</sup> Cir. 2003). In the present case, the plaintiff argues that the doctrine is applicable because his complaint alleged "infringements of Olsen's rights of 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....” (Appellant’s Brief, page 25.) What he neglects to mention, of course, is that while these violations were alleged, they were also all dismissed, and (with the exception of the equal protection claim) those dismissals have not even been challenged on appeal. The equal protection issue is discussed in more detail in the next Division of this brief; suffice it to say now that unless it is reversed on appeal, there are no other viable constitutional claims made by Olsen that could support a “hybrid rights” claim.

Finally, even if Olsen did establish a “hybrid rights” claim, that would simply result in the invocation of strict scrutiny analysis to his free exercise claim. *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d at 764-65. As has previously been noted, courts have consistently held that even under this standard, the laws prohibiting use and possession of marijuana have been upheld. Thus, the possible existence of a “hybrid rights” claim does not change the legal analysis of plaintiff’s allegations in a way that renders issue preclusion inappropriate: Olsen’s prior litigation activities have resulted in cases that say that laws prohibiting marijuana use are narrowly tailored to meet a compelling governmental interest, and that is all that is required to defeat such a claim.<sup>3</sup>

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<sup>3</sup>Olsen’s claim that the “compelling interest” test was “not employed in Olsen’s previous cases raising the First Amendment”, his brief at 27, is simply false. In *Rush*, for example, the court concluded that the government has an

*Alternative Basis for Affirmance*

Even if this Court concludes that issue preclusion does not justify dismissal of Olsen's free exercise claims, the district court's decision on this issue should still be affirmed. This Court can affirm the district court for any reason supported by the record, even if not the reason given by the district court, *McGinnis v. Union Pacific Railroad*, 496 F.3d 868, 873 (8<sup>th</sup> Cir. 2007); *Ballinger v. Culotta*, 322 F.3d 546, 548 (8<sup>th</sup> Cir. 2003), and it is manifestly clear that even absent the preclusive effect of Olsen's prior litigation, his free exercise claim states no cause of action.

The authority cited previously, even if not given issue preclusive status, nonetheless is persuasive authority on the First Amendment issue, and other courts, not involving Olsen as a party, have also reached the conclusion that a First Amendment challenge to marijuana prohibitions fails as a matter of law. In *Multi*

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“overriding ... interest in regulating marijuana” and that the CSA's ban on that substance was the least restrictive means of furthering that interest because the religious exemption requested by plaintiffs would make enforcement of the law extremely difficult. 738 F.2d at 512-13. Similarly, in *Olsen v DEA*, the court also determined that there was a compelling government interest in controlling marijuana and that the ban was the least restrictive means of furthering that interest. 878 F.2d at 1461-63. The court there specifically considered Olsen's individual circumstances and rejected his particular request for an accommodation based on its assessment of the facts surrounding Olsen and his Church's use of marijuana. 878 F.2d at 1460, 1462-63. To the extent that Olsen may argue, therefore, that intervening cases require individualized scrutiny, the simple response is that such scrutiny has already taken place.

*Denominational Ministry of Cannabis and Rastafari, Inc., v. Gonzales*, 474 F. Supp. 2d 1133, 1144 (N.D. Cal. 2007), for example, the court considered and dismissed a claim that enforcement of the federal CSA violated the First Amendment rights of the plaintiffs, a religious group that used marijuana as part of its religious practices: “Like the defendant in *Smith*, plaintiffs use a controlled substance in the practice of their religion, and the government proscribes such use through neutral, generally applicable laws. Under *Smith*, then, the government may constitutionally punish plaintiffs, even if doing so substantially burdens their ability to practice their religion. Accordingly, plaintiffs’ First Amendment claim is dismissed.” Likewise, the Tenth Circuit, in *Meyers*, rejected a First Amendment challenge to laws prohibiting marijuana use based on the reasoning and holding of *Smith*, and its conclusion that the CSA was a neutral law of general applicability. *Meyers*, 95 F.3d at 1481.

In summary, therefore, the district court did not err in dismissing Olsen’s claims under the First Amendment.

**III THE DISTRICT COURT PROPERLY  
DISMISSED OLSEN'S EQUAL  
PROTECTION CLAIM BECAUSE OLSEN  
HAS ALREADY UNSUCCESSFULLY  
LITIGATED THIS CLAIM IN OTHER  
CASES AND BECAUSE HE IS NOT  
SIMILARLY SITUATED WITH USERS OF  
DRUGS OTHER THAN MARIJUANA.**

*Introduction/Scope of Review*

Olsen also asserts as error the district court's dismissal of his Equal Protection claims. The court found these claims to be barred the doctrine of collateral estoppel because identical claims have been previously rejected in cases in which Olsen has been a party. As explained below, this conclusion is correct, and, in any event, Olsen's claims fail on the merits as well.

Defendant Miller agrees that this Court exercises de novo review of the district court's dismissal of this Court of the complaint.

*Collateral Estoppel*

Olsen's Equal Protection claim is based on the fact other religious groups are allowed to use different controlled substances in the practice of their religion. He alleges, for example, that Native Americans can use peyote and that members of the UDV Church can use hoasca. From this, he argues that the refusal to allow his church to use marijuana violates his Equal Protection rights.

As with his First Amendment issue, this is not the first time that Olsen has made these claims, at least with regard to peyote, and it is not the first time that courts have rejected them. In *United States v. Rush*, 738 F.2d 497, 513 (1<sup>st</sup> Cir. 1984), for example, the court concluded that the Native American Church was not similarly situated to the Ethiopian Zion Coptic Church because of the “sui generis legal status of the American Indians, and the express policy of the American Indian Religious Freedom Act.” Likewise, in *Olsen v. DEA*, 878 F.2d 1458 (D.C. Cir. 1989), the court also rejected the same Equal Protection argument, focusing on the differences between peyote and marijuana both in regard to the amount of product (the court noted, 878 F.2d at 1463, that between 1980 and 1987 the DEA seized and analyzed 19.4 pounds of peyote, and 15,302,468.7 pounds of marijuana)<sup>4</sup> and, *id.* at 1464, the way in which the controlled substances were used (as contrasted with peyote, which was used in a precisely circumscribed ritual, marijuana was used by the EZCC “continually all day through everything that we do”). Olsen’s Equal Protection arguments have also been rejected in other federal district court opinions in Iowa, both published and unpublished. *Olsen v. State of Iowa*, 649 F.

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<sup>4</sup>Olsen himself has been convicted of distributing twenty-five tons of marijuana. See *Olsen v. United States*, 2007 WL 1100457 (D. Me. 2007).

Supp. 14 (S.D. Iowa 1986); *Olsen v. State of Iowa*, 1986 WL 4045 (S.D. Iowa 1986).

It follows, for the same reasons as expressed in the previous Division of this brief, that Olsen's claims are barred by collateral estoppel. He has been a party to previous lawsuits in which the same issue was litigated through to valid judgments, and in each case the decision on this issue was essential to the resulting judgment. As in Division II of this brief, however, Olsen contends that an intervening change in the law affects this analysis. This time, the intervening change, he claims, is the decision of the United States Supreme Court in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006), which he says recognizes 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." (Appellant's Brief, pages 30-31.)

In fact, *O Centro* does no such thing. For one thing, *O Centro* was a case arising under the RFRA rather than the Equal Protection clause, and, more significantly, both the Supreme Court decision and the lower court decisions in that case reflect an understanding of the fact that marijuana use poses threats and problems that are simply not presented by the use of substances like hoasca or peyote. In one of the published district court decisions in the *O Centro* case, for

example, the court specifically rejected an Equal Protection challenge based on peyote exemptions. The court specifically drew an analogy to cases in which religious officials had attempted to obtain marijuana exemptions based on allowed peyote use, and noted that in those cases the courts compared “the public health and safety risks posed by the ceremonial use of marijuana to the risks presented by the ceremonial use of peyote.” *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 282 F. Supp. 2d 1271, 1283 (D. N.M. 2002). The court went on to consider the differences between peyote and hoasca and concluded that no preliminary injunction should issue on the Equal Protection claim.

The court went on to hold, though, in a different ruling, that a preliminary injunction was appropriate on the RFRA claim, and that ruling was appealed to the Tenth Circuit, which issued two decisions, a panel decision followed by an en banc one. In the first decision, a panel of the Tenth Circuit affirmed the district court’s conclusion that no Equal Protection violation existed. *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 342 F.3d 1170, 1186 n.4 (10<sup>th</sup> Cir. 2003). The court also noted that “hoasca and marijuana differ. Marijuana is associated with problems of abuse and control, leading courts to ascertain a particular government interest in its prohibition even for religious uses.” *Id.* at 1185. The court emphasized that its ruling “in no way calls into question cases

refusing to grant an exemption to the CSA for marijuana, LSD, heroin, or any other controlled substances.” *Id.* at 1186.

In its en banc decision, *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1023 (10<sup>th</sup> Cir. 2004)(en banc), the Tenth Circuit also discussed the differences between various controlled substances, noting that “hoasca is a relatively uncommon substance used almost exclusively as part of a well-defined religious service” and therefore an exemption for bona fide religious purposes is “less subject to abuse than if the religion required its constant consumption, or if the drug were a more widely used substance like marijuana or methamphetamine.” Thus, all the lower court decisions in this case, far from undermining any judicial distinction between marijuana and either hoasca or peyote, actually tend to emphasize the distinction. Nothing in the decision of the United States Supreme Court, affirming the en banc decision of the Tenth Circuit, undermines this distinction either. In fact, to the contrary, the Court also noted evidence of the “thinness of any market for hoasca, the relatively small amounts of the substance imported by the church, and the absence of any diversion problem in the past.” *O Centro*, 546 U.S. at 426, 126 S. Ct at 1218. It also noted that there was no indication that Congress, in classifying DMT (a controlled substance found in hoasca) considered the harms posed by the “particular use” presented in that

case, specifically the “circumscribed” sacramental use of hoasca by the UDV. *Id.* at 432, 126 S. Ct at 1221. The “particular use” of marijuana by the plaintiff in this case and his fellow Church members is, of course, anything but “circumscribed”, and involves the use of literally tons of the drug.

For the foregoing reasons, the *O Centro* decision does not undermine all those previously decided cases in which Olsen unsuccessfully attempted to assert an Equal Protection argument. This Court should therefore affirm the district court’s dismissal, on preclusion grounds, of Olsen’s latest attempt to make this argument.

### ***The Merits***

Moreover, as was argued in Division II of this brief, even if the district court improperly dismissed the Equal Protection count on preclusion grounds, the previously-cited authority makes clear that the Equal Protection claim fails as a matter of law, and that affirmance on this alternative ground is appropriate. In considering the merits of the Equal Protection claim without regard to preclusion principles, this Court can consider authority not involving Olsen as a party, such as the district court decision in *O Centro* itself (affirmed on the Equal Protection claim, as previously noted, by a panel of the Tenth Circuit) and the decision in

*McBride v. Shawnee County, Kansas Court Services*, 71 F. Supp. 2d 1098, 1100-03 (D. Kansas 1999), also finding, after extensive discussion, no Equal Protection violation. The court found, for example, that the circumstances surrounding the use of peyote and marijuana were “drastically different”, that “enforcement of drug laws is compromised by a marijuana exemption, but not a peyote exemption”, and that “peyote and marijuana are not abused at the same rate, and their abuse has a substantially different effect on society”. *Id.* at 1101.

In view of this compelling authority, and particularly in view of the apparent total absence of any authority to the contrary— plaintiff cites no case in which a court has held that the Equal Protection Clause requires an exception be made for marijuana because peyote is allowed— this Court should now hold that even if Olsen had never litigated this issue before, his Equal Protection count was properly dismissed.

**IV THE DISTRICT COURT PROPERLY  
DISMISSED PLAINTIFF'S CLAIM UNDER  
THE RELIGIOUS LAND USE AND  
INSTITUTIONALIZED PERSONS ACT,  
BECAUSE THAT STATUTE HAS NO  
APPLICABILITY TO THE PRESENT  
SITUATION AND, IN ANY EVENT, IS NOT  
VIOLATED BY LAWS PROHIBITING THE  
USE OR POSSESSION OF MARIJUANA.**

*Introduction/ Scope of Review*

In his final argument, Olsen argues the district court erred by dismissing his claim under the Religious Land Use and Institutionalized Persons Act (RLUIPA). This argument, however, can only be described as frivolous, because it is obvious that the statute does not even apply in this situation. In any event, even if it applied, it would not be violated, because statutes prohibiting the possession and use of marijuana are narrowly tailored to serve a compelling government interest, and that is all the statute requires.

Defendant Miller agrees with Olsen that this Court exercises de novo review of the district court's dismissal of this count of the complaint.

*The Statute*

In *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the United States Supreme Court discussed the history of the RLUIPA. It pointed out that after the RFRA was

declared unconstitutional as to the states, Congress enacted RLUIPA. “Less sweeping than RFRA, and invoking federal authority under the Spending and Commerce Clauses, RLUIPA targets two areas: Section 2 of the Act concerns land-use regulation, 42 U.S.C. § 2000cc; § 3 relates to religious exercise by institutionalized persons, § 2000cc-1.” 544 U.S. at 715. *See also Murphy v. Missouri Department of Corrections*, 372 F.3d 979, 987 (8<sup>th</sup> Cir. 2004)(“In RLUIPA, Congress resurrected RFRA’s language, but narrowed the scope of the act, limiting it to laws and regulations concerning institutionalized persons or land use.”).

It is not even clear from Olsen’s brief which of these two sections he now relies on. He quotes section 2 on land-use regulation, but then refers to the holding of *Cutter*, a case which exclusively involved the section dealing with institutionalized people, *id.* at n.3 (“Section 2 of RLUIPA is not at issue here.”), and also goes to great length to define the term “institution”. In the end, however, it does not matter which section Olsen relies on, because it is quite clear that neither section applies.

Section 2 does not apply because the state and federal statutes at issue in this case are not “land use regulations” as that term is defined in 42 U.S.C. § 2000cc-5(5): “a zoning or land marking law, or the application of such a law, that limits or

restricts a claimant's use or development of land....". The various controlled substances acts that are challenged in this appeal are, by no stretch of the imagination, "zoning or landmarking" laws. *See, e.g., Multi Denominational Ministry of Cannabis and Rastafari, Inc., v. Gonzales*, 474 F. Supp. 2d 1133, 1143 (N.D. Cal. 2007)("Here, plaintiffs challenge the enforcement of the CSA, which does not constitute a zoning or landmarking law. Accordingly, RLUIPA does not apply to the case at bar and this claim is dismissed."). While the laws challenged here do prevent plaintiff from engaging in certain conduct on his property (or anywhere else, for that matter), they are no more land use regulations than would be a statute prohibiting murder, since such a statute also restricts a person's ability to do anything he wants on his land.

Section 3 of the RLUIPA does not apply either, because plaintiff does not allege that he is incarcerated and, in fact, it is clear from the face of his complaint that he is not. In connection with this, Olsen engages in an exercise in tortured semantics, apparently trying to show that state and federal drug-enforcement agencies are somehow "institutions" within the meaning of the statute. However, it is clear from the language of 42 U.S.C. § 2000cc-1 ("No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution" unless that burden is the least restrictive means of

furthering a compelling government interest) that the word “institution”, as used in this section, refers to a prison or a facility like a prison. *Navajo Nation v. United States Forest Service*, 479 F.3d 1024, 1032 (9<sup>th</sup> Cir. 2007)(“RLUIPA prohibits state and local governments from imposing substantial burdens on the exercise of religion through prisoner or land-use regulations.”) Plaintiff’s apparent attempt to argue that any state agency is an institution (Appellant’s brief at 34) and that therefore any state agency which uses federal money to control illegal drugs is subject to the RLUIPA, simply ignores this statutory language: whatever the meaning of the word “institution” may be in other contexts, the simple fact is that no person can be confined to, or reside in, an agency. RLUIPA simply does not apply here.

Finally, even if the RLUIPA did apply, the enforcement of laws prohibiting the possession or use of marijuana would not violate that Act. As has previously been observed on several occasions in this brief, such laws *do* serve a compelling government interest and are the least restrictive means of doing so. Just as such laws pass muster under the RFRA, they do so under the RLUIPA, which invokes the same legal standard.

## CONCLUSION

The decision of the district court was, in all respects, correct, and should be affirmed.

Respectfully submitted,

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Attorney for Appellees  
Dated: November 13, 2007

**CERTIFICATE OF SERVICE**

I, Mark Hunacek, Assistant Attorney General for the State of Iowa, hereby certify that I mailed two (2) copies of Brief for Defendants-Appellees on the 13th day of November, 2007, to the following:

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