

No. 07-3062

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CARL ERIC OLSEN,

Plaintiff-Appellant,

v.

MICHAEL MUKASEY, 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

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA (JARVEY, J.)

BRIEF FOR THE FEDERAL APPELLEES

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SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

This case involves a challenge to federal and state laws proscribing marijuana under various constitutional and statutory provisions. Plaintiff seeks declaratory and injunctive relief to possess and use marijuana as part of the exercise of his religious beliefs as a member of the Ethiopian Zion Coptic Church. The district court granted the various federal, state and county defendants' motions to dismiss, concluding that all of plaintiff's claims were either collaterally estopped or insufficient as a matter of law. On appeal, plaintiff challenges the dismissal of his claims under the Religious Freedom Restoration Act ("RFRA"), the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), the Free Exercise Clause, and the Equal Protection Clause.

Because plaintiff has already litigated all issues necessary to collaterally estop his current suit under RFRA and the federal constitution, and because his RLUIPA claim is wholly without merit, the United States does not believe that oral argument is necessary in this case.

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BRIEF FOR THE FEDERAL APPELLEES

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331.
This Court has jurisdiction under 28 U.S.C. §§ 1291, 1294.

STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that plaintiff's claims under the Religious Freedom Restoration Act and the Constitution are collaterally estopped by plaintiff's previous, unsuccessful suits to obtain a religious exemption from laws proscribing marijuana use.

42 U.S.C. §§ 2000bb, et seq.

U.S. Const. amend. I

U.S. Const. amend. XIV, § 1

Olsen v. DEA, 878 F.2d 1458 (D.C. Cir. 1989)

United States v. Rush, 738 F.2d 497 (1st Cir. 1984)

Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal,
546 U.S. 418 (2006)

2. Assuming that plaintiff's RFRA and constitutional claims are not collaterally estopped, whether these claims are unripe and fail as a matter of law.

42 U.S.C. §§ 2000bb, et seq.

U.S. Const. amend. I

U.S. Const. amend. XIV, § 1

Olsen v. DEA, 878 F.2d 1458 (D.C. Cir. 1989)

United States v. Rush, 738 F.2d 497 (1st Cir. 1984)

Employment Division v. Smith, 494 U.S. 872 (1990)

3. Whether the district court properly dismissed plaintiff's claim under the Religious Land Use and Institutionalized Persons Act because plaintiff is not an institutionalized person and the federal Controlled Substances Act is not a zoning or land use law.

42 U.S.C. § 2000cc, et seq.

Murphy v. Missouri Dep't of Corrections, 372 F.3d 979 (8th Cir. 2004)

Beck v. Prupis, 529 U.S. 494 (2000)

STATEMENT OF THE CASE

In 1993, Congress passed the Religious Freedom Restoration Act ("RFRA"), evidencing its intent to "restore the compelling interest test as set forth in" Supreme Court cases decided before Employment Division v. Smith, 494 U.S. 872 (1990), and "to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. §§ 2000bb(a)(4)-(5), (b)(1). Prior to the decision in Smith, plaintiff brought several unsuccessful challenges to state and federal laws proscribing his asserted religious use of marijuana under the Free Exercise and Equal Protection Clauses. Plaintiff alleges that the passage of RFRA and the Supreme Court's recent interpretation of RFRA in Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006), prevent these earlier court decisions from collaterally estopping his current claims under RFRA, the Free Exercise Clause, and the Equal Protection Clause. Plaintiff further argues that his religious use of marijuana is protected by the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc.

The district court granted all defendants' motions to dismiss, concluding that plaintiff's current RFRA and

constitutional claims were collaterally estopped, and that RLUIPA did not apply to plaintiff.

STATEMENT OF FACTS

A. Prior Litigation

Plaintiff alleges that he is a "sincere adherent of the teachings of the Ethiopian Zion Coptic Church," ("EZCC") whose members purport to receive communion through the sacramental use of marijuana. Plaintiff's Original Complaint for Declaratory and Injunctive Relief (Docket #1) ("Complaint") ¶¶ 23-26. According to plaintiff's complaint, a central and essential practice of the EZCC involves "assembl[ing] for communion, reasoning, and worship through the Sacramental offering of Cannabis during prayer to the living god known to the church as Rastafari." Id. ¶ 26; see also Complaint, Ex. # 4 at 47 (transcript of trial testimony of T. Reilly in plaintiff's state prosecution indicating that EZCC priests smoke marijuana "continually" and "right through the day").¹

¹ The teachings and practices of EZCC and its adherents regarding marijuana have been the subject of various lawsuits. See Town v. State ex rel. Reno, 377 So.2d 648, 649 (Fla. 1979) (upholding an injunction against marijuana use on EZCC member's property); King Shipping Consum, Inc. v. Commissioner of Internal Revenue, 58 T.C.M. (CCH) 574 (1989) (noting that 33 tons of marijuana were seized from church members and determining "that ZCC was formed as a cover for a large commercial drug smuggling operation"); Zion Coptic Church, Inc. v. United States, 1979 WL 1333, *1 (S.D. Fla. 1979) (noting that thirty-three tons of marijuana were seized from various church members and upholding revocation of church's tax exempt status and imposing tax assessments on church).

Plaintiff has asserted a constitutionally protected interest in his use of marijuana in several prior criminal and civil actions, and his claims have repeatedly been rejected.

Plaintiff has been twice convicted in Iowa state court of possession of marijuana with intent to deliver. See State v. Olsen, 293 N.W.2d 216, 218 (Iowa 1980) (conviction based on 129 pounds of marijuana and \$10,915 found in cash in plaintiff's trunk); State v. Olsen, 315 N.W.2d 1, 3-4 (Iowa 1982) (police found pile of cash and plastic bags containing marijuana in plaintiff's trunk). In the latter state conviction, plaintiff testified that he was a priest in the EZCC and that he smoked marijuana "continually all day, through church services, through everything that we do" as part of the church's sacrament, and thus that his possession of marijuana was protected by the Free Exercise Clause of the First Amendment. Id. at 7. The court rejected plaintiff's claim, concluding that "a compelling state interest sufficient to override Olsen's free exercise clause argument is demonstrated in this case." Id. at 9.

Plaintiff, along with 14 other EZCC members, was also previously convicted under federal law for his part in an operation to distribute marijuana in which 20 tons of marijuana were seized. See United States v. Rush, 738 F.2d 497, 501 (1st Cir. 1984). The First Circuit rejected Olsen's Free Exercise claim, finding that unanimous precedent established an overriding

governmental interest in regulating marijuana. Id. at 512-13. Furthermore, the court decided that Olsen was not entitled under the Equal Protection Clause to a religious exemption for marijuana on the same terms as the peyote exemption granted to the Native American Church. Id.

Shortly thereafter, in Olsen v. DEA, 776 F.2d 267 (11th Cir. 1985), plaintiff filed a civil action seeking to compel the DEA to amend the federal rules governing controlled substances to permit the religious use of marijuana. The court of appeals held that the rule sought by plaintiff fell outside the scope of the relevant statute and affirmed the dismissal of plaintiff's action. Id. at 268. Plaintiff then filed a petition for declaratory judgment in federal district court, asserting that the Iowa criminal statutes regarding controlled substances violated the Equal Protection Clause by affording a religious exception for the Native American Church's use of peyote but not one for his religious use of marijuana. See Olsen v. State of Iowa, 1986 WL 4045, *1 (S.D. Iowa 1986) (unpublished). The district court determined that the Iowa Supreme Court previously rejected plaintiff's Equal Protection claim and thus concluded that it was barred by collateral estoppel. Id. at *2.

Next, plaintiff filed a federal habeas corpus petition in this Court challenging his first Iowa state court conviction on First Amendment and Equal Protection grounds. See Olsen v. State

of Iowa, 649 F. Supp. 14 (S.D. Iowa 1986). The Court summarily dismissed plaintiff's habeas petition finding that his Free Exercise and Equal Protection challenges had been asserted and rejected on numerous prior occasions by the Iowa Supreme Court and the First Circuit Court of Appeals in Rush. Id. at 15. Subsequently, this Court affirmed the dismissal of plaintiff's habeas petition. See Olsen v. State of Iowa, 808 F.2d 652 (8th Cir. 1986) (per curiam).

Finally, plaintiff sought a religious-use exemption from the federal laws proscribing marijuana. The District of Columbia Circuit affirmed the denial of plaintiff's request in Olsen v. DEA, 878 F.2d 1458 (D.C. Cir. 1989). The court indicated that plaintiff's Free Exercise claim had been raised and rejected previously by several courts, and the court agreed that the government has a compelling interest in prohibiting marijuana use and that a religious exception for plaintiff was not warranted. See id. at 1461-62. The court also rejected plaintiff's Equal Protection claim, finding that the EZCC's request for a marijuana exemption was dissimilar to the Native American Church's use of peyote in a "precisely circumscribed ritual." Id. at 1463-64.

B. The Present Litigation

Plaintiff filed this action in the Southern District of Iowa. Plaintiff asserted Free Exercise Clause and Equal Protection Clause challenges to both the Iowa and federal

versions of the Controlled Substances Act ("CSA"), asserting that these laws unconstitutionally prohibit his sacramental use of marijuana. Complaint ¶¶ 49-59. Plaintiff also alleged that these laws violate the Religious Freedom Restoration Act ("RFRA"), the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), the Ex Post Facto Clause, the Fourth and Fifth Amendments, the APA, and various treaties and principles of international law. Plaintiff sought declaratory and injunctive relief, including inter alia, a judgment declaring that the application of the Iowa and federal versions of the CSA to prohibit plaintiff's sacramental use of marijuana would violate the various provisions enumerated above; a judgment declaring that the Iowa and federal versions of the CSA do not apply to marijuana generally; as well as an injunction preventing the enforcement of the Iowa and federal versions of the CSA against plaintiff "anywhere within the jurisdiction of the federal courts of the United States" for his sacramental use of marijuana, "including its possession, consumption, distribution and importation for this purpose." See Complaint, Prayer for Relief ¶¶ 1-2, 5.

On July 16, 2007, the district court dismissed plaintiff's claims against all defendants with prejudice. See Pl.Addendum. The court concluded that plaintiff's RFRA, Free Exercise and Equal Protection claims were collaterally estopped by the First

and D.C. Circuit's decisions in Rush and Olsen. See Pl.Addendum at 10-14. The court further concluded that RLUIPA did not apply to plaintiff because he was not an incarcerated person and the challenged federal law did not affect his religious use of land. See Pl.Addendum at 12. Plaintiff filed a Notice of Appeal on September 5, 2007. Docket #51.

SUMMARY OF ARGUMENT

In the Religious Freedom Restoration Act, Congress created statutory religious exercise rights, and explicitly defined those rights by reference to the standards the Supreme Court had employed in constitutional Free Exercise cases before its decision Employment Division v. Smith, 494 U.S. 872 (1990). Plaintiff's asserted religious right to sacramentally use marijuana has been considered and rejected by multiple courts under precisely these standards, and his current claim under RFRA is thus collaterally estopped. Nor can plaintiff point to any intervening change in law that would render these previous courts' rejections of his claims under the Free Exercise and Equal Protection Clauses inconsistent with prevailing constitutional doctrine, and thus his attempted relitigation of his constitutional claims is also barred.

Even were plaintiff's current RFRA and constitutional claims not collaterally estopped, this court should affirm the district court's dismissal. Plaintiff has failed to allege his specific

intent to pursue conduct in violation of the challenged statutes, and his claims are thus unripe. Even if ripe, however, these claims fail as a matter of law. The government's failure to accommodate plaintiff's purportedly religious use of marijuana does not violate RFRA. The government has a compelling interest in enforcing laws proscribing drug-related use of marijuana, and plaintiff's proposed religious exemption from those laws involves widespread, uncontrolled use and large-scale importation of a drug in high demand. As previous courts have held, accommodating this plaintiff's religious use of marijuana would make effective enforcement of laws proscribing marijuana impossible, and thus the government's enforcement of the Controlled Substances Act against the plaintiff is the least restrictive means of accomplishing its compelling interest. Because the CSA is a neutral law of general applicability, its enforcement against plaintiff does not violate the Free Exercise Clause. Nor is plaintiff similarly situated to others who have received a religiously-based exemption to the CSA. Unlike the Native American Church's tightly controlled use of a substance for which there is little demand, plaintiff's proposed exemption involves continuous use of marijuana by - and distribution of marijuana to - an uncontrolled group of people.

Finally, plaintiff's challenge under the Religious Land Use and Institutionalized Persons Act is wholly without merit.

Plaintiff is not an institutionalized person and the challenged statute is not a zoning or land use law.

STANDARD OF REVIEW

This Court reviews the interpretation of federal statutes de novo. See, e.g., United States v. Weis, 487 F.3d 1148, 1151 (8th Cir. 2007). A district court's determination that the legal prerequisites for collateral estoppel have been met on the facts before it is a mixed question of law and fact, subject to de novo review by this Court. Boudreau v. Wal-Mart Stores, Inc., 249 F.3d 715, 719 (8th Cir. 2001).

ARGUMENT

I. Plaintiff's RFRA and Constitutional Claims Are Collaterally Estopped

A. Plaintiff's RFRA Claim Is Collaterally Estopped

Plaintiff claims that his religious use of sacramental marijuana as part of the Ethiopian Zion Coptic Church warrants an exception from the CSA under the Religious Freedom Restoration Act ("RFRA"). Under RFRA, the federal government may not implement a policy that substantially burdens a person's exercise of religion unless it can demonstrate that the policy furthers a compelling governmental interest and is the least restrictive means of furthering that interest. See 42 U.S.C. § 2000bb-1.

In enacting RFRA, Congress explicitly disapproved the Supreme Court's holding in Employment Division v. Smith, 494 U.S. 872 (1990), which eliminated use of the compelling interest test

to justify burdens on religion imposed by neutral laws of general applicability. 42 U.S.C. § 2000bb(a). Congress did not intend to change the pre-Smith legal landscape or to impose greater burdens on the Government than those that existed before the Smith decision. Rather, Congress specified that under RFRA "the compelling interest test generally should not be construed more stringently or more leniently than it was prior to Smith." S. Rep. No. 103-111, 103d Cong., 1st Sess. 9, reprinted in 1993 U.S.C.C.A.N. 1892, 1898. Congress stated its conclusion that "the compelling interest test as set forth in ... Federal court rulings" prior to Smith "is a workable test for striking sensible balances between religious liberty and competing prior governmental interests," and its intent "to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972), to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. §§ 2000bb(a)(4)-(5), (b)(1); see also City of Boerne v. P.F. Flores, 521 U.S. 507, 515 (1997) (explaining RFRA's history and purpose).

In Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006), the Supreme Court explained that in Sherbert and Yoder, it had "looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific

exemptions to particular religious claimants.” Id. at 431. Given RFRA’s emphasis on specific exemptions, the Supreme Court concluded that Congress’s findings in the CSA were not a “categorical answer that relieves the Government of the obligation to shoulder its burden under RFRA” and that the CSA was not a “closed regulatory system that admits of no exceptions under RFRA.” Id. at 433-34. Rather, the Supreme Court held, courts must “scrutinize[] the asserted need [in each RFRA claim] and explain[] why the denied exemptions could not be accommodated,” as the Court had done in pre-Smith cases such as United States v. Lee, 455 U.S. 252 (1982). O Centro, 546 U.S. 418, 435 (2006).

As the district court concluded, plaintiff’s claim under RFRA is barred by principles of collateral estoppel, also known as issue preclusion. Under these principles, a judgment in a prior suit precludes re-litigation of an issue when:

- (1) the issue sought to be precluded is identical to the issue previously decided;
- (2) the prior action resulted in a final adjudication on the merits;
- (3) the party sought to be estopped was either a party or in privity with a party to the prior action; and
- (4) the party sought to be estopped was given a full and fair opportunity to be heard on the issue in the prior action.

Manion v. Nagin, 392 F.3d 294, 300 (8th Cir. 2004); see also Montana v. United States, 440 U.S. 147, 153 (1979).

Plaintiff urges that the district court wrongly applied the doctrine of issue preclusion because his present claim under RFRA implicates a different standard than that applied in previous litigation. See Pl. Br.17.

This is plainly not the case.

In Olsen, the D.C. Circuit considered plaintiff's claim for a religious-use exemption from the federal laws proscribing marijuana. The Court applied the constitutional standards the Supreme Court employed prior to Smith, examining:

(a) whether the law interferes with the free exercise of sincere religious belief; (b) whether the law is essential to accomplish an overriding governmental objective; and (c) whether accommodating the religious conduct would unduly interfere with fulfillment of the governmental interest.

Olsen, 878 F.2d at 1459, 1462 (citing United States v. Lee, 455 U.S. 252, 256-59 (1982)); see also O Centro, 546 U.S. at 437 (pointing to Lee as exemplifying the individualized examination RFRA was designed to restore).

The D.C. Circuit examined the particulars of plaintiff's proposed sacramental use of marijuana, including both his request for a "broad religious exemption" and "the time- and place-specific use he ... proposed" in the course of that litigation. 878 F.2d at 1462. The court noted that the "tenets of the Ethiopian Zion Coptic Church endorse marijuana use every day throughout the day," and thus that "Olsen's proposal for confined use would not be self-enforcing." Id. at 1462. The

court also noted that plaintiff's proposed religious use would likely impose "a large monitoring burden in light of evidence that in years past, the church's '[c]hecks on distribution of cannabis to nonbelievers in the faith [were] minimal,' there was 'easy access to cannabis for a child who had absolutely no interest in learning the religion,' and '[m]embers [partook] of cannabis anywhere, not just within the confines of a church facility.'" Id. (quoting Town v. State ex rel. Reno, 377 So. 2d 648, 649, 651 (Fla. 1979)).

Given these aspects of plaintiff's particular proposed exception, and noting plaintiff's recognition that the government has a "compelling interest in controlling the distribution and drug-related use of marijuana,"² and the Drug Enforcement Agency's acceptance for the purposes of the decision "that the Ethiopian Zion Coptic Church is a bona fide religion whose sacrament is marijuana," then-Judge Ginsburg "conclude[d] that the DEA cannot accommodate Olsen's religious use of marijuana

² Having once conceded that the government has a compelling interest in enforcing the CSA, Olsen may not now attempt to get a second bite at the apple by now contesting this point. See Olsen v. DEA, 878 F.2d 1458, 1462 (D.C. Cir. 1989) ("Olsen does not dispute the government's compelling interest in controlling the distribution and drug-related use of marijuana.") (internal quotations omitted). Moreover, in addition to accepting this concession, the court noted that "'[e]very 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.'" Id. at 1462 (citing Rush, 738 F.2d at 512).

without unduly burdening or disrupting enforcement of the federal marijuana laws.” Id. at 1462-63.

Plaintiff acknowledges that the D.C. Circuit rejected his claim that his sacramental use of marijuana as part of the EZCC is protected under the pre-Smith standards applied to Free Exercise claims. Pl. Br.14-15. He nevertheless argues that the enactment of RFRA and the Supreme Court’s decision in O Centro render this determination insufficient to foreclose his current RFRA claim.

This argument is without basis. As discussed, the standard under RFRA is the same standard that the Court applied in Free Exercise claims prior to Smith, and the D.C. Circuit applied those standards. Moreover, the D.C. Circuit accorded plaintiff precisely the type of review that the Supreme Court held to be appropriate in O Centro. The Supreme Court explained that “RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law . . . [to] the particular claimant whose sincere exercise of religion is being substantially burdened.” 546 U.S. at 430-31. The D.C. Circuit found that the government had made this type of showing. As noted, the court analyzed Olsen’s particular practice of using marijuana as a member of the EZCC, as well as his own specific proposal for more circumscribed use of marijuana than EZCC traditionally advocates. Olsen, 878 F.2d at 1462-63 (explaining that “[t]he 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" and concluding that "DEA cannot accommodate Olsen's religious use of marijuana without unduly burdening or disrupting enforcement of the federal marijuana laws." (emphasis added).

The Court in O Centro acknowledged that uniform application of a particular government program may be warranted if the government can demonstrate that granting the particular requested religious accommodation would "seriously compromise its ability to administer the program." O Centro, 546 U.S. at 435. The Olsen court applied similar reasoning in concluding that granting plaintiff an exemption for his religious use of marijuana would require "burdensome and constant official supervision and management." Olsen, 878 F.2d at 1462.

Plaintiff's attempt to avoid the bar of collateral estoppel is particularly anomalous because his claims had already been adjudicated even prior to the decision in Olsen. In United States v. Rush, 738 F.2d 497 (1st Cir. 1984), the First Circuit also provided plaintiff with the individualized analysis dictated by O Centro and precedent prior to Smith. The court applied the Lee standard to plaintiff's affirmative defense to criminal charges under the CSA relating to his participation in the importation of twenty tons of marijuana. See Rush, 738 F.2d at 512. The First Circuit concluded that the government had "an

overriding interest in controlling the use and distribution of marijuana by private citizens," and that "accommodation of religious freedom is practically impossible with respect to the marijuana laws," in contrast with exceptions for the "'readily identifiable,' 'narrow category'" of peyote, "which has minimal impact on the enforcement of the laws in question." Rush, 738 at 512-13 (quoting Lee, 455 U.S. at 260 n. 11 & 261).

Plaintiff suggests that the First Circuit erred in declining to review de novo the "congressional determination that marijuana in fact poses a real threat to individual health and social welfare." Rush, 738 F.2d at 512; Pl. Br.11, 14-15. The Supreme Court has not suggested that courts must ignore congressional findings in determining whether the government has a compelling interest in enforcement of a law alleged to abridge religious practices. Cf. Gonzales v. Carhart, 127 S. Ct. 1610, 1627 (2007) (explaining that courts should "review congressional factfinding under a deferential standard" even if not placing "dispositive weight on" them because "constitutional rights are at stake").³ That the Rush court "decline[d] to second-guess the unanimous precedent establishing an overriding governmental interest in regulating marijuana," Rush, 738 F.2d at 512-13, does not render invalid its determination that accommodating plaintiff's asserted religious marijuana uses was "practically impossible" and not

³ As explained below, plaintiff has no constitutional rights at stake in this litigation.

required under the standards governing Free Exercise claims pre-Smith, id. at 513. See also United States v. Middleton, 690 F.2d 820, 825 (11th Cir. 1982) (“Unlike the state interest advanced in Yoder, the interest advanced by the government in the case at bar is compelling and would be substantially harmed by a decision allowing members of the Ethiopian Zion Coptic Church to possess marijuana freely.”).

Plaintiff’s reliance on United States v. Bauer, 84 F.3d 1549 (9th Cir. 1996), Pl. Br.19, is misplaced. Contrary to plaintiff’s understanding, the Ninth Circuit did not suggest that the standards prior to Smith were different than those applicable under RFRA. Instead, the court reversed a conviction because “[t]he district court treated the existence of the marijuana laws as dispositive of the question whether the government had chosen the least restrictive means of preventing the sale and distribution of marijuana” - similar to the categorical approach the Supreme Court later rejected in O Centro. Id. at 1559. In contrast, plaintiff, in his prior litigation, received the requisite individualized determination that the government has a compelling interest in not accommodating his particular religious practices.

B. Plaintiff’s Free Exercise Claim Is Collaterally Estopped

Plaintiff’s Free Exercise claim was fully litigated in the Olsen and Rush decisions, and there has been no intervening change in the principles governing courts’ application of the

First Amendment that enables plaintiff to relitigate this claim. Plaintiff's argument that Employment Division v. Smith, 494 U.S. 872 (1990), 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," Pl. Br.22, is without merit. O Centro addressed only statutory rights created by RFRA, not any constitutionally based rights. See 546 U.S. at 423. Smith eliminated the requirement that the government demonstrate it has a compelling interest in abridging religious practices via a neutral law of general applicability, and made such laws virtually immune from a Free Exercise challenge. See 494 U.S. at 878-90; 42 U.S.C. § 2000bb(a)(4) (stating that in Smith, "the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion"). Thus, any "change or development in the controlling legal principles" implemented by Smith imposes a more exacting standard than existed when the D.C. and First Circuits rejected plaintiff's Free Exercise claim. C.I.R. v. Sunnen, 333 U.S. 591, 599 (1948); Pl. Br.22. Any intervening change thus could not "render a previous determination inconsistent with prevailing doctrine," and therefore does not warrant allowing plaintiff to relitigate his Free Exercise claim. Montana v. United States, 440 U.S. 147, 161 (1979).

Plaintiff's assertion that the CSA is not a neutral law of general applicability, Pl. Br.22, is unavailing. First, as many courts have concluded, the CSA is neutral and generally applicable. See United States v. Meyers, 95 F.3d 1475, 1481 (10th Cir. 1996); Multi Denominational Ministry of Cannabis and Rastafari, Inc. v. Gonzales, 474 F. Supp. 2d. 1133 (N.D. Cal. 2007). There is no evidence - nor even an allegation - that the "object of [the CSA] is to infringe upon or restrict practices because of their religious motivation," the governing standard for measuring a law's neutrality. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (11th Cir. 1993) (emphasis added). Plaintiff's argument that the CSA is not "generally applicable" because it contains exemptions for peyote use and some forms of medical research, is equally meritless. The CSA does not target religious groups or specific denominations. Cf. Larson v. Valente, 456 U.S. 228, 245 (1982) (striking down a law imposing registration and reporting requirements only on religious charitable organizations).

Second, even if the CSA were not a neutral law of general applicability, the only impact upon the Free Exercise analysis would be that the government would have had to establish that it had a compelling interest in enforcing the CSA and not accommodating plaintiff's religious use request. See Lukumi Babalu, 508 U.S. at 533. As discussed above, the government has

already done this in previous cases rejecting plaintiff's request for an accommodation under the Free Exercise Clause. Plaintiff has already invoked the exceptions to the CSA as evidence that the government has no compelling interest in refusing to accommodate his religious practices and has already failed. See Olsen, 878 F.2d at 1463 n.4 ("We think the tightly-drawn, closed system for access to controlled substances by, or on the order of, medical doctors and researchers cannot tenably be compared to the permission sought here.").

Plaintiff's invocation of "hybrid rights" is equally meritless. Pl. Br. 21-22. Even assuming there is some alchemic change effected by basing one's challenge on more than one constitutional provision, collateral estoppel would still be appropriate. Plaintiff's previous Free Exercise claims also involved other constitutionally based challenges, see Olsen, 878 F.2d at 1459, the cases upon which the significance of hybrid rights are based were decided long before he brought those challenges, see, e.g., Yoder, 406 U.S. at 232-34, and plaintiff points to no intervening change in the law that warrants relitigation of this issue. Moreover, as with plaintiff's attack on the CSA's neutrality, the only advantage he seeks by invoking the "hybrid" nature of the rights he asserts is examination under the compelling interest test, which he was already received.

C. Plaintiff's Equal Protection Claim Is Collaterally Estopped

Plaintiff previously asserted identical Equal Protection claims based on the CSA's exception for certain forms of Native American use of peyote and lost. Olsen, 878 at 1463-65. As the D.C. Circuit explained, differences between peyote and marijuana, and between the contexts of the peyote exception and the plaintiff's requested exception, render plaintiff's Equal Protection argument unavailing:

The DEA has cogently explained why a tightly-cabined exemption for peyote use in a religious rite need not mean that religious use of marijuana (or any other widely used controlled substance) must be accommodated: '[T]he actual abuse and availability of marijuana in the United States is many times more pervasive . . . than that of peyote The amount of peyote seized and analyzed by the DEA between 1980 and 1987 was 19.4 pounds. The amount of marijuana seized and analyzed by the DEA between 1980 and 1987 was 15,302,468.7 pounds. This overwhelming difference explains why an accommodation can be made for a religious organization which uses peyote in circumscribed ceremonies, and not for a religion which espouses continual use of marijuana.' We agree that the vast difference in demand for marijuana on the one hand and peyote on the other warranted the DEA's response to Olsen's petition.

Olsen, 878 F.2d at 1463-64. This unqualified rejection of plaintiff's Equal Protection argument precludes relitigation of this issue here. Indeed, the issue had likely already received all the attention necessary to collaterally estop this claim even before the D.C. Circuit's analysis in Olsen. See id. at 1463 ("We join our sister courts in rejecting [Olsen's Equal

Protection] plea. Indeed, had the DEA timely objected, we might have held the issue precluded.”) (citing Olsen v. Iowa, 808 F.2d at 653, and Rush, 738 F.2d at 513).

Nor can plaintiff escape collateral estoppel by invoking the Supreme Court’s decision in O Centro. O Centro addressed only statutory rights under RFRA, not the Equal Protection Clause. Even if relevant to an Equal Protection claim, plaintiff’s citation to a portion of O Centro comparing Native American religious use of peyote and the plaintiffs’ proposed use of hoasca is inapposite. Pl. Br.30-31. This passage highlighted the need for case-by-case determinations whether “particular religious claimants” warranted exemptions to the CSA, 546 U.S. at 420, 431, but it does not stand for the proposition that such an individualized determination must conclude 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,” Pl. Br.30-31. Here, the D.C. Circuit compared the Native American peyote exception and plaintiff’s proposed exception as part of a church that “endorse[s] marijuana use every day throughout the day” and concluded that petitioner was not similarly situated to those utilizing the peyote exception. Olsen, 878 F.2d at 1462-64.

II. Plaintiff's RFRA and Constitutional Challenges Are Unripe and Fail As a Matter of Law

As explained above, this Court should affirm the district court's conclusion that plaintiff's RFRA and constitutional claims are barred by collateral estoppel. However, this Court has the discretion to "affirm on any ground supported by the record even if the issue was not pleaded, tried, or otherwise referred to in the proceedings below," especially where a plaintiff has been "fully aware" of the issue throughout the case. Brown v. St. Louis Police Dept. of City of St. Louis, 691 F.2d 393, 396-97 (8th Cir. 1982). Should this Court disagree with the district court's collateral estoppel ruling, this Court should conclude that plaintiff's RFRA and constitutional challenges are unripe, and in any case, fail as a matter of law.

A. Plaintiff's Claims Are Unripe

Plaintiff's challenge is unripe for review. This Court has "encourage[d] 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) (internal quotations omitted). However, this Court has required that in such

instances, the plaintiff must "have alleged a specific intent to pursue conduct in violation of the challenged statute" in order to establish a claim ripe for declaratory judgment. Id. at 487 (internal quotations omitted); see Renne v. Geary, 501 U.S. 312, 322 (1991) (dismissing a case as unripe where the Court did not "know the nature of the endorsement [that plaintiffs sought to have declared constitutionally protected], how it would be publicized, or the precise language petitioners might delete from the voter pamphlet"); see also Arkansas Right to Life State Political Action Committee v. Butler, 146 F.3d 558, 560 (8th Cir. 1998) (distinguishing a case in which plaintiff "did not allege an intention to engage in the proscribed conduct with sufficient specificity").

Plaintiff has not alleged any intent to pursue conduct in violation of the federal or state laws he alleges violate his statutory and constitutional rights, let alone specified the precise nature of his intended sacramental use of marijuana.⁴ Accordingly, plaintiff has not demonstrated that he is currently confronted with a "certainly impending" injury that would render his case ripe for review, nor has he provided sufficiently specific details of his intent to engage in conduct that would violate the challenged statutes. Public Water Supply Dist. No. 8

⁴ In fact, plaintiff alleges that he has suspended his religious use of marijuana as a result of his subjective fear of future criminal prosecution. See Complaint ¶¶ 34-36.

of Clay County, Missouri v. City of Kearney, Missouri, 401 F.3d 930, 932 (8th Cir. 2005). If this Court concludes that this action is not collaterally estopped, it should affirm dismissal of this case on ripeness grounds.

B. Plaintiff's RFRA Claim Fails as a Matter of Law

Even if plaintiff's claims are ripe, this Court should conclude that the CSA as applied to plaintiff is valid under RFRA's compelling interest test. Based on the negative effects of marijuana and its high potential for abuse, federal courts uniformly have recognized that the government has a compelling interest in prohibiting marijuana cultivation, possession, consumption, and distribution under the CSA. See, e.g., United States v. Israel, 317 F.3d 768, 771-72 (7th Cir. 2003) (concluding, under RFRA, that Congress has a compelling interest in regulating marijuana because "there is ample medical evidence establishing the fact that the excessive use of marijuana often times leads to the use of stronger drugs such as heroin and crack cocaine" and denying Rastafarian's RFRA claim to use marijuana religiously); United States v. Brown, 1995 WL 732803, *2 (8th Cir. 1995) (per curiam) (unpublished) (indicating that "the government has a compelling state interest in controlling the use of marijuana" and denying RFRA claim); United States v. Greene, 892 F.2d 453, 456-57 (6th Cir. 1989) (indicating that Congress has determined that "marijuana poses a real threat to individual

health and social welfare"); United States v. Middleton, 690 F.2d 820, 825 (11th Cir. 1982) (finding that "Congress had demonstrated beyond doubt that it believes marihuana is an evil in American society and a serious threat to its people" and rejecting claimed right of member of the Ethiopian Zion Coptic Church to possess marijuana as part of his religious practice).

Moreover, as previous courts recognized, an exemption for plaintiff's particular religious use of marijuana - which he asserts adherents use continually throughout the day - would prove unworkable, given the EZCC's widespread, uncontrolled use and large-scale importation of a drug in high demand. See Olsen, 878 F.2d at 1459, 1462-63 (noting that plaintiff smokes marijuana "continually all day, through church services, through everything we do" and that the EZCC does not impose tight restrictions on marijuana use); see also Rush, 738 F.2d 497; Complaint, Prayer for Relief ¶ 5 (indicating that plaintiff's sacramental use of marijuana includes "possession, consumption, distribution, and importation"); Pl.'s Ex. # 7G at 2 (noting plaintiff's inquiry as to whether the DEA will arrest him if he exercises his "Sacramental right to use, grow, possess, and distribute marijuana"). Therefore prohibiting plaintiff's EZCC use of marijuana was the least restrictive means the government could have employed to accomplish its compelling interest in proscribing drug-related use of marijuana. See Brown, 1995 WL

732803 at *2 (“[B]ased on Our Church’s broad use, the government could not have tailored the restriction to accommodate Our Church and still protected against the kinds of misuses it sought to prevent” and “[t]hus, under the circumstances of this case, we conclude the district court correctly determined that Brown could not prevail under the RFRA or the First Amendment.”).

This conclusion is supported by the recognition by both the Tenth Circuit and the Supreme Court in the O Centro litigation that marijuana is significantly different from and poses a greater danger than hoasca tea due to the immensity of the demand for marijuana and the extent of the marijuana abuse problem in this country. The Court of Appeals 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.” O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft, 342 F.3d 1170, 1185 (10th Cir. 2003). The Supreme Court also pointed out “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.

In any event, as discussed earlier, several courts previously have found compelling governmental interests specifically in prohibiting plaintiff’s particular religious use of marijuana. See State v. Olsen, 315 N.W.2d 1 (Iowa 1982);

United States v. Rush, 738 F.2d 497 (1st Cir. 1984); Olsen v. State of Iowa, 1986 WL 4045 (S.D. Iowa 1996); Olsen v. State of Iowa, 808 F.2d 652 (8th Cir. 1986); Olsen v. DEA, 878 F.2d 1458 (D.C. Cir. 1989). Even if this Court determines that these cases do not have preclusive effect, they are persuasive precedents that support a finding that there is a compelling governmental interest in prohibiting plaintiff's alleged religious use of marijuana in the present case.

C. Plaintiff's Constitutional Claims Fail As A Matter of Law

As discussed above, the CSA is a neutral law of general applicability, and thus does not violate the Free Exercise Clause. See Employment Division v. Smith, 494 U.S. 872 (1990). Nor does the CSA's peyote exemption for Native American Church uses render the government's failure to accommodate plaintiff's very different asserted religious practices an equal protection violation. See supra § I.A; Olsen, 878 F.2d at 1464 (resting its rejection of plaintiff's previous Equal Protection claim "on the immensity of the marijuana control problem in the United States" and noting distinctions between the Native American Churches "precisely circumscribed [peyote] ritual" and the EZCC's advocacy of continual use of marijuana).

III. RLUIPA IS INAPPLICABLE HERE AND THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFF'S CLAIM UNDER IT

This Court should affirm the district court's dismissal of

plaintiff's claim that the CSA's prohibition of his purportedly sacramental use of marijuana violates the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc. RLUIPA is limited to "laws and regulations concerning institutionalized persons or land use." Murphy v. Missouri Dep't of Corrections, 372 F.3d 979, 987 (8th Cir. 2004). Plaintiff is not an institutionalized person.⁵ The CSA is not a "land use regulation" as defined under the Act. RLUIPA establishes that "[t]he term 'land use regulation' means a zoning or landmarking law, or the application of such law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest." 42 U.S.C. § 2000cc-5(5). Simply because the CSA prohibits plaintiff from smoking marijuana on his own land (as well as anywhere else)

⁵ The significance of plaintiff's statement that "State drug laws are enforced with the assistance of federal monies and are part of a system that results in the incarceration of persons," Pl. Br.12, is not clear. To the extent that plaintiff is asserting that he is "a person residing in or confined to an institution," 42 U.S.C. 2000cc-1(a), as is required to come within RLUIPA's ambit, because he resides in a state and "[any] state agency, such as a state law enforcement agency, a state corrections agency, a judicial system, or anything that 'institutes' is an institution," Pl. Br.34, this argument is absurd and would render Congress's limitations on the scope of RLUIPA meaningless. See Beck v. Prupis, 529 U.S. 494, 506 (2000) (noting the "longstanding canon of statutory construction that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous").

does not convert the CSA into a "zoning or landmarking law."
See Multi Denominational Ministry of Cannabis and Rastafari, Inc.
v. Gonzales, 474 F. Supp. 2d. 1133, 1143 (N.D. Cal. 2007).
Accordingly, this court should affirm the district court
dismissal of plaintiff's claim under RLUIPA.

CONCLUSION

For the foregoing reasons, the judgment of the district
court should be affirmed.

Respectfully submitted,

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December 2007

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. Rule 32(a)(7)(C). The brief contains 6,987 words, according to the count of Corel WordPerfect 12.

I also certify that the computer disk containing the full text of the foregoing brief has been scanned for viruses and, to the best of our ability and technology, is virus-free.

Mark Stern

CERTIFICATE OF SERVICE

I hereby certify that on this third day of December 2007, I caused ten copies of the foregoing brief, and one electronic copy, to be filed with the Court by Federal Express overnight delivery; and caused two additional copies of the same brief, and one electronic copy, to be served by Federal Express overnight delivery on the following counsel:

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ADDENDUM



72 F.3d 134
72 F.3d 134, 1995 WL 732803 (C.A.8 (Ark.))
(Cite as: 72 F.3d 134, 72 F.3d 134 (Table))

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H

U.S. v. Brown
C.A.8 (Ark.),1995.
NOTICE: THIS IS AN UNPUBLISHED
OPINION.(The Court's decision is referenced in a
"Table of Decisions Without Reported Opinions"
appearing in the Federal Reporter. Use FI CTA8 Rule
28A, FI CTA8 IOP and FI CTA8 APP. I for rules
regarding the citation of unpublished opinions.)

United States Court of Appeals, Eighth Circuit.
UNITED STATES of AMERICA, Appellee,

v.

Thomas F. BROWN, Appellant.

No. 95-1616.

Submitted Nov. 29, 1995

Filed Dec. 12, 1995.

Appeal from the United States District Court for the
Western District of Arkansas.
W.D.Ark.

AFFIRMED.

Before [WOLLMAN](#), [MAGILL](#), and [HANSEN](#), Circuit
Judges.

PER CURIAM.

*1 A jury found Thomas F. Brown guilty of one count
of manufacturing marijuana and one count of
manufacturing peyote, in violation of [21 U.S.C. §
841\(a\)\(1\)](#), and found Brown used his forty-acre tract of
land to facilitate the manufacturing process, thus
subjecting the property to forfeiture under [21 U.S.C. §
853](#); the district court ^{FN1} sentenced Brown to 121
months imprisonment. Brown challenges his
conviction and sentence, and we affirm.

^{FN1}. The Honorable H. Franklin Waters,
Chief Judge, United States District Court for
the Western District of Arkansas.

In January 1994 Brown helped establish Our Church,
and he deeded one of his forty acres of property to the
church. The covenants of deed provided that Our
Church would produce medicinal herbs and plants
"possessed of the properties of spiritual enlightenment"
and would distribute such herbs to the sick. Brown
informed law enforcement officials and the media that
Our Church members intended to grow and distribute
marijuana on the property; Our Church members had
a public marijuana planting ceremony. In August 1994
law enforcement officials seized 435 marijuana plants
and a bucket containing 3 peyote plants which had
formed 5 buds.

Following Brown's indictment, the government filed a
motion in limine to exclude from the trial any evidence
or references relating, inter alia, to Brown's contention
that his religious beliefs provided him with a legal right
to grow or distribute marijuana and peyote, and that the
First Amendment and the Religious Freedom
Restoration Act of 1993 (RFRA), [42 U.S.C. §
2000bb-2000bb-4](#), provided him with a legal defense to
the charges. At a one-day hearing on the motion in
limine, Brown and other Our Church members or
participants testified about the role marijuana played in
their spiritual quest, how their interest in supplying
marijuana to the sick was part of their religious tenets,
and that church policy allowed distribution to anyone
who wanted to join the spiritual quest, including
children with parental permission.

The district court assumed for the purposes of the
hearing and trial that Brown was engaged in the
exercise of a religion, and that the grand jury indictment
was a burden on his free exercise of that religion. The
court concluded, however, that the law clearly
established that the government had a compelling
interest in regulating marijuana and other drugs, and
that the government had tailored the interest as
narrowly as it could to prevent the kinds of dangers
Congress believed existed. Thus, the district court
concluded, as a matter of law, that the RFRA was not
available to Brown as a defense. The court granted the

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government's motion in limine, and barred admission at trial of all evidence covered in the government's motion.

After Brown's first two appointed attorneys were allowed to withdraw because of disagreements with Brown over his representation, the district court gave Brown the choice of proceeding pro se with standby counsel or utilizing the full assistance of counsel who would present his defense. Brown chose to proceed pro se rather than have counsel direct the course of the representation.

*2 Following a two-day criminal trial, the jury returned a guilty verdict on all three counts. The district court sentenced Brown to 121 months imprisonment, four years supervised release, and \$17,500 in fines. Brown moved for a new trial, arguing only that he was denied the assistance of counsel, which the district court denied.

On appeal Brown argues (1) the district court erred in restricting him from advancing any of his defenses at trial, (2) the government lacked power under the Commerce Clause to prohibit growing and using marijuana, (3) the court improperly denied him a reduction for acceptance of responsibility at sentencing under [U.S.S.G. § 3E1.1](#), and (4) the court denied him assistance of counsel.

It is well established that religious conduct does not enjoy the absolute constitutional protection afforded freedom of religious belief. See [United States v. Greene](#), 892 F.2d 453, 456 (6th Cir.1989), cert. denied, 495 U.S. 935 (1990). Under the RFRA, the “[g]overnment 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.” [42 U.S.C. § 2000bb-1\(b\)](#). See also [United States v. Lee](#), 455 U.S. 252, 256-59 (1982) (First Amendment challenge; standard for determining if law interferes with religious conduct).

We have recognized that the government has a

compelling state interest in controlling the use of marijuana. See [United States v. Fogarty](#), 692 F.2d 542, 547-48 (8th Cir.1982) (classification of marijuana is rationally based and is matter for legislative, not judicial, prerogative), cert. denied, 460 U.S. 1040 (1983); see also [Greene](#), 892 F.2d at 455-56; [United States v. Rush](#), 738 F.2d 497, 512-13 (1st Cir.1984), cert. denied, 470 U.S. 1004 (1985); [United States v. Middleton](#), 690 F.2d 820, 822-24 (11th Cir.1982), cert. denied, 460 U.S. 1051 (1983).

We agree with the district court that, based on Our Church's broad use, the government could not have tailored the restriction to accommodate Our Church and still protected against the kinds of misuses it sought to prevent. Cf. [United States v. Merkt](#), 794 F.2d 950, 956-57 (5th Cir.1986) (national border control laws), cert. denied, 480 U.S. 946 (1987). Thus, under the circumstances of this case, we conclude the district court correctly determined that Brown could not prevail under the RFRA or the First Amendment. See [Rush](#), 738 F.2d at 513 (rejected First Amendment defense as matter of law). We also conclude the district court did not abuse its discretion in disallowing Brown's other defenses. See [Fed.R.Evid. 402](#); [United States v. Hollister](#), 746 F.2d 420, 422 (8th Cir.1984) (district court has broad discretion in determining relevance).

We need not consider Brown's Commerce Clause and sentencing arguments because they are raised for the first time on appeal. See [Fritz v. United States](#), 995 F.2d 136, 137 (8th Cir.1993), cert. denied, 114 S.Ct. 887 (1994) (absent plain error, we will not consider issues raised for first time on appeal).

*3 Finally, we note Brown does not have a constitutional right to hybrid representation, see [McKaskle v. Wiggins](#), 465 U.S. 168, 184 (1984), which means he cannot demand the right to act as co-counsel. See [United States v. Swinney](#), 970 F.2d 494, 497 (8th Cir.), cert. denied, 113 S.Ct. 632 (1992), and cert. denied, 113 S.Ct. 1650 (1993). The record is clear that, given the choice of proceeding pro se with standby counsel or utilizing the full assistance of counsel, Brown unequivocally chose to represent himself. Thus, the district court committed no error.

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72 F.3d 134, 1995 WL 732803 (C.A.8 (Ark.))
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Accordingly, Brown's conviction and sentence is affirmed.

C.A.8 (Ark.),1995.
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Page 1

Not Reported in F.Supp., 1979 WL 1333 (S.D.Fla.), 44 A.F.T.R.2d 79-5022, 79-1 USTC P 9325

(Cite as: Not Reported in F.Supp.)

C

Zion Coptic Church, Inc. v. U.S.
S.D.Fla. 1979.

United States District Court; S.D. Florida.

Zion Coptic Church, Inc., Plaintiff

v.

United States of America, Defendant.

No. 78-1984-CIV-WMH

78-1984-CIV-WMH

3/19/79

HOENELER, District Judge.

Order

*1 The Plaintiff, Zion Coptic Church, Inc., instituted this action for review of jeopardy and termination assessments by the Commissioner of Internal Revenue. This Court has jurisdiction under [26 U. S. C. § 7429](#).

On February 28, 1978, the Commissioner imposed jeopardy assessments against the Church under [26 U. S. C. § 6851\(a\)](#) for the years 1974 through 1976. The total tax imposed, including penalties and interest, was almost \$600,000.00.

That same day the Commissioner imposed termination assessments against the Church under [26 U. S. C. § 6851\(a\)](#) for the years 1977 and 1978. The tax imposed under this section was more than one and one-half million dollars.

The scope of judicial review of these assessments is limited by [26 U. S. C. § 7429\(b\)](#). The district court is empowered by the statute to determine only the questions of whether the making of the assessment is reasonable under the circumstances. The statute expressly places the burden of proof on the Secretary as to the first issue, the reasonableness of making the assessment. The taxpayer has the burden of proof on the second issue, the reasonableness of the amount.

The Court finds that the government has met its burden

of proof on the issue of the reasonableness of making the assessment.

The government adduced evidence that the Church through various of its members, has been engaged in illegal activities and that it has failed to file any federal tax returns reporting the income it has earned from 1974 to the present date. There was evidence that the Church utilized shell corporations, individual members, aliases, and false identities to disguise its activities and to hide its assets, and that the Coptic organization was involved with foreign individuals and corporations similarly engaged in illegal activities, all of which indicate an adversity on the part of the organization towards voluntary compliance with the federal income tax laws and regulations, and which tend to prejudice or render wholly or partially ineffectual proceedings to collect the outstanding income taxes due.

The Coptic "Church" had filed no federal income tax returns, despite its accumulation of substantial assets and despite an instruction from IRS to file returns for the years 1975 through 1977 contained within the Final Adverse Determination with respect to the tax exempt status of the taxpayer on February 27, 1978.

The Court further finds that the taxpayer has failed to meet its burden of proof on the second issue, the reasonableness of the amount of the assessment. The government's reconstruction of the taxpayer's cash accumulations and expenditures for one six-month period alone amounted to more than two million dollars. In addition, some thirty-three tons of marijuana was seized in November of 1977 and February of 1978. Various members of the Coptic organization were directly involved in this transaction.

Conservatively estimating the value of this marijuana at \$50.00 per pound adds another \$3,300,000.00 in further expenditures during the same six-month period.

In view of these large transactions, the Court cannot say that the amount of the assessments here imposed was unreasonable under the circumstances.

*2 The plaintiff filed a motion to strike the

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government's answer on the grounds that the defendant had not complied with [26 U. S. C. § 7429\(a\)\(1\)](#), which provides:

Within five days after the day on which an assessment is made under [section 6851\(a\)](#), [6861\(a\)](#), or [6862](#), the Secretary shall provide the taxpayer with a written statement of the information upon which the Secretary relies in making such assessment.

The government apparently concedes that it did not provide a separate written statement five days after the assessment. It argues, however, that the plaintiff had adequate notice through other means of the facts upon which the Secretary relies. First, the letter of February 27, 1978 revoking the Church's tax-exempt status recited in twelve numbered paragraphs various facts which were considered by the Service in revoking the plaintiff's tax-exempt status. Second, two letters dated February 28, 1978, notifying the plaintiff of the jeopardy and termination assessments, recite that the Director has determined that the Church was attempting to place assets beyond the reach of the government. Attached to these letters was a detailed schedule of expenditures made by the Church, which was the basis for computing indirectly the income tax liability of the plaintiff. Third, within five days of the making of the assessments, representatives of the plaintiff met with IRS representatives concerning the assessments at which time the basis for the assessments was discussed in detail.

The underlying purpose of [26 U. S. C. § 7429\(a\)\(1\)](#) is to give the taxpayer notice of the information on which the government relies so that the taxpayer may raise any available defenses. The Court finds that the taxpayer here did receive sufficient notice, both in the letter of revocation of tax-exempt status and in the letters notifying the plaintiff of the assessments. While it would have been preferable for IRS to have sent a separate written statement of the information upon which it relied, denominated as such, the taxpayer was not so clearly prejudiced by the lack of a separate statement as to mandate striking of the government's answer.

The Court notes that the taxpayer had actual notice in

great detail of the facts upon which the government might rely by virtue of a similar jeopardy assessment case by a transferee of this plaintiff, *King Shipping Consum, Inc. v. United States*, Case No. 78-1835-CIV-WMH. Since the information available to the plaintiff as a result of the *King Shipping* case was far more detailed and specific than that required by [§ 7429\(a\)\(1\)](#), striking the government's answer would be grossly disproportionate to the technical statutory violation alleged to have been committed.

The plaintiff later modified its motion to strike to include only those portions of the government's answer which reflect information known to the government at the time of making the assessments but not furnished to the plaintiff within five days thereafter. The Court must reject this proposal because it would necessitate inquiry by the Court into the questions of when and how the government acquired various bits and pieces of information about the taxpayer. Even if such a reconstruction of the government's investigation were possible, it would require testimony of indeterminate length by various IRS agents involved in this investigation. Such a procedure is unwarranted, the Court feels, in the type of summary proceeding contemplated by [26 U. S. C. § 7429\(b\)](#) where the only issues before the Court are the reasonableness of the making of the assessments and the reasonableness of the amount. It is therefore,

***3 ORDERED AND ADJUDGED** that the plaintiff's motion to strike the answer is denied. The making of the assessments and the amounts thereof having been found to be reasonable under the circumstances. It is further,

ORDERED AND ADJUDGED that this cause be and it is hereby dismissed with prejudice.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 19 day of March, 1979.

S.D.Fla. 1979.

Zion Coptic Church, Inc. v. U.S.

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Olsen v. State of Iowa
 S.D.Iowa,1986.

Only the Westlaw citation is currently available.

United States District Court, S.D. Iowa, Central
 Division.

Carl Eric OLSEN and the Ethiopian Zion Coptic
 Church, Plaintiffs,

v.

STATE OF IOWA, Defendant.

Civ. No. 83-301-E

March 19, 1986.

James R. Cook, Des Moines, Iowa, for plaintiffs.
 Joseph P. Weeg, Asst. Atty. Gen., Des Moines, Iowa,
 for defendant.

ORDER

DONALD E. O'BRIEN, District Judge.

*1 This matter is before the Court on defendant's resisted motion for summary judgment. A hearing was held on November 25, 1985. After careful consideration of the parties' briefs and arguments, this Court grants defendant's motion.

Plaintiff is a priest of the Ethiopian Zion Coptic Church. This religion uses marijuana as an integral part of its religious doctrine. [United States v. Rush, 738 F.2d 497, 512 \(1st Cir.1984\)](#), cert. denied, --- U.S. ---, 105 S.Ct. 1355 (1984). In 1978, plaintiff was convicted of possession of a controlled substance (marijuana) with intent to deliver in violation of [Iowa Code Section 204.401\(1\) \(1977\)](#). The Iowa Supreme Court reversed plaintiff's conviction on appeal. [State v. Olsen, 293 N.W.2d 216 \(Iowa\)](#), cert. denied, 449 U.S. 993 (1980). Olsen was retried, convicted, and appealed. The Iowa Supreme Court affirmed, finding that plaintiff's right to equal protection was not violated by the Iowa laws on marijuana usage. No. 171-69079 (July 18, 1984) at 3-4 (unreported opinion attached). On May 9, 1985, plaintiff filed a Petition for

Declaratory Judgment, claiming that the Iowa criminal statutes regarding controlled substances discriminated against his religious beliefs, thereby denying him equal protection of the laws.

The Iowa Supreme Court has already upheld the constitutionality of [Iowa Code Section 204.401\(1\)](#) against plaintiff's equal protection attack. *State v. Olsen, supra*, at 3-4. The federal declaratory judgment statute, [28 U.S.C. §§ 2201-2202](#) does not give this Court the power to review a state court decision. [Travelers Insurance Co. v. Davis, 490 F.2d 536, 644 \(3rd Cir.1974\)](#). Plaintiff cites [Peyote Way Church of God, Inc. v. Smith, 742 F.2d 193 \(5th Cir.1984\)](#), for the proposition that this Court can enter a declaratory judgment on the constitutionality of the Iowa controlled substance laws. However, the *Peyote Way* decision is distinguishable from the instant case because in the former, there was no prior state court decision involving the constitutionality of the criminal statute in the religious context.

Assuming for purposes of discussion that *Peyote Way* applies, the equal protection issue has already been decided adverse to plaintiff by another federal circuit. In [United States v. Rush, 738 F.2d 497 \(1st Cir.1984\)](#), cert. denied, --- U.S. ---, 105 S.Ct. 1355 (1984), the Court held that, "the Ethiopian Zion Coptic Church cannot be deemed similarly situated to the Native American Church for equal protection purposes." *Id.* at 513. In *Rush*, the Ethiopian Zion Coptic Church claimed it should be afforded a religious exemption from the marijuana laws on the same terms as the peyote exemption granted to the Native American Church. *Id.* The Court reasoned that the Native American Church's exemption was a product of congressional findings and legislative history underlying the American Indian Religions Freedom Act, and that the Ethiopian Zion Coptic Church had not received similar congressional dispensation for marijuana use. *Id.*

*2 While this Court is not bound by another circuit's decision, the Eighth Circuit has recently spoken of the

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need for deference to other circuits:
 [a]lthough we are not bound by another circuit's decision, we adhere to the policy that a sister circuit's reasoned decision deserves great weight and precedential value. As an appellate court, we strive to maintain uniformity in the law among our circuits, wherever reasoned analysis will allow ... [t]his duty applies to the district courts in this circuit.

Keasler v. United States, 766 F.2d 1227, 1233 (8th Cir.1985), (footnote and citations omitted). Thus, even were this Court to consider granting plaintiff a declaratory judgment, such relief is foreclosed by the *Rush* decision.

Plaintiff's equal protection issue is also barred by collateral estoppel, or issue preclusion. "Under collateral estoppel, once a court has decided an issue of law or fact necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." Montana v. United States, 440 U.S. 147, 153 (1979). The Supreme Court faced a similar problem in Allen v. McCurry, 449 U.S. 90 (1980). In that case, plaintiff brought a § 1983 action against the officers who entered his home seizing evidence used against him in his state criminal trial. *Id.* at 91. The Court noted that 28 U.S.C. § 1738 requires federal courts to give preclusive effect to state court judgments whenever the courts of the state where the judgments were issued would do so. *Id.* at 96.

Justice Stewart's majority opinion held that as the state court had already decided the search and seizure issue, and because petitioner did not assert that the state court failed to provide him with a full and fair opportunity to litigate the issue, collateral estoppel barred relitigation in federal court on the same issue in a § 1983 action. *Id.* at 101. Justice Stewart wrote, "the Court's view of § 1983 in *Monroe* lends no strength to any argument that Congress intended to allow relitigation of federal issues decided after a full and fair hearing in a state court simply because the state court's decision may have been erroneous." *Id.*

Thus, the only issue remaining is whether the Iowa Supreme Court's order can be given collateral estoppel

effect under the test announced in In re Piper Aircraft Litigation, 551 F.2d 213 (8th Cir.1977). Four elements must be satisfied under the collateral estoppel test: (1) [T]he issue sought to be precluded must be the same as that involved in the prior action; (2) that issue must have been actually litigated; (3) it must have been determined by a valid and final judgment; and (4) the determination must have been essential to the prior judgment.

Id. at 218-219.

Applying the above elements to the facts of the instant case, this Court concludes that collateral estoppel effect must be given to the Iowa Supreme Court's judgment. Plaintiff here challenges the statute on equal protection grounds, which is the same issue decided by the Iowa Supreme Court. (see attached unreported opinion at 3-4). The issue was also actually litigated at the state level. The Iowa Supreme Court based its' decision on testimony regarding the Church's indiscriminate use of marijuana, indicating that this issue was fully litigated. *Id.* at 4. The equal protection issue was also determined in a judgment by the Iowa Supreme Court, and plaintiff has failed to produce any reason why the decision should not be considered valid and final. Finally, the determination of the equal protection issue was essential to the prior judgment, for had the Iowa Supreme Court ruled otherwise, plaintiff's conviction would have been reversed.

*3 The above analysis demonstrates that collateral estoppel applies to bar litigation of the equal protection issue before this Court. These same principles also apply to plaintiff's first amendment issue, as the Iowa Supreme Court decided that aspect of plaintiff's claim in State v. Olsen, 315 N.W.2d 1, 7-9 (Iowa 1982). In that case, the court held that "[a] compelling state interest sufficient to override Olsen's free exercise clause argument is demonstrated in this case." *Id.* at 9. Therefore, as the issues plaintiff seeks to litigate before this Court are barred by collateral estoppel, defendant's motion for summary judgment must be granted, and defendant's case dismissed.

IT IS THEREFORE ORDERED that defendant's motion for summary judgment is hereby granted.

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IT IS FURTHER ORDERED that plaintiff's petition for a declaratory judgment is hereby denied, and the case dismissed.

EXHIBIT "A"

IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Appellee,

vs.

CARL ERIC OLSEN, Appellant.

Filed July 18, 1984

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69079

Appeal from the Iowa District Court for Muscatine County, R.K. Stohr, Judge.

Defendant appeals from a judgment convicting him of unlawful possession of marijuana with intent to deliver, a violation of [Iowa Code section 204.401\(1\)](#).
AFFIRMED.

Carl Eric Olsen, Miami Beach, Florida, pro se. James R. Cook of Cook & Waters, Des Moines, on the brief.

Thomas J. Miller, Attorney General, Joseph P. Weeg, Assistant Attorney General, and Stephen J. Petersen, County Attorney, for appellee.

Considered by Reynoldson, C.J., and Uhlenhopp, Larson, Schultz, and Wolle, JJ.
PER CURIAM.
Defendant, Carl Eric Olsen, appeals from a judgment

convicting him of unlawful possession of marijuana with intent to deliver, a violation of [Iowa Code section 204.401\(1\)](#). This case was before us in [State v. Olsen, 293 N.W.2d 216 \(Iowa\), cert. denied, 449 U.S. 993, 101 S.Ct. 530, 66 L.Ed.2d 290 \(1980\)](#), in which we reversed and remanded when a State's witness was permitted to testify beyond the scope of the minutes of testimony. Following his conviction on a second trial, defendant again appeals and we affirm.

Olsen admits that when stopped by the West Liberty police in May of 1978, he was transporting 129 pounds of marijuana and \$10,915 in cash. His sole defense is that his possession and use of the marijuana are protected by the first amendment's guarantee of religious freedom.

Olsen is a member and priest of the Ethiopian Zion Coptic Church. Testimony at his trial revealed the bona fide nature of this religious organization and the sacramental use of marijuana within it. Testimony also revealed church members use marijuana continuously and publicly, commencing at an early age. Olsen admitted to smoking marijuana while driving and to using the drug a few hours before testifying in his second trial. Nonetheless, he asks us on this appeal to afford his religious use of marijuana unlimited constitutional protection.

I. This court dealt at length with Olsen's first amendment claim in [State v. Olsen, 315 N.W.2d 1, 7-9 \(Iowa 1982\)](#), a case involving this defendant but based on a different automobile stop and arrest. We find no reason to retreat from our holding there that "[a] compelling state interest sufficient to override Olsen's free exercise clause argument is demonstrated in this case." In fact, since our last *Olsen* decision, we have been joined in our analysis by yet another court, see [Whyte v. United States, 471 A.2d 1018 \(D.C.1984\)](#).

*4 Olsen now contends we must make an independent finding of a compelling state interest rather than defer to the legislature's decision to regulate marijuana. The cases do not support Olsen's assertion. See [Leary v. United States, 383 F.2d 851, 860-61 \(5th Cir.1967\)](#), *rev'd on other grounds*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969); [Whyte, 471 A.2d at 1021](#); [State v.](#)

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[Rocheleau](#), 142 Vt. 61, 68, 451 A.2d 1144, 1148 (1982).

II. Defendant also raises an equal protection challenge, based on the legislative exemption granted the peyote ceremonies of the Native American Church. See [Iowa Code § 204.204\(8\)](#) (1983). This statutory exemption may be derived from the California Supreme Court's decision in [People v. Woody](#), 61 Cal.2d 716, 394 P.2d 813, 40 Cal.Rptr. 69 (1964). The *Woody* court noted in granting the prosecution exemption that peyote was used only in a desert enclosure and only during a special Saturday sundown to Sunday sunrise ceremony.

The participants were fed breakfast at the close of the ceremony and were kept isolated from the general population until the drug's effects had dissipated. Defendant can point to no such safeguards in the Coptic Church's indiscriminate use of marijuana; the drug is smoked publicly and continuously and made available to church members regardless of age or occupation. These significant distinctions render meritless defendant's equal protection argument.

We affirm the judgment of the district court.

AFFIRMED.

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