

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.

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

REPLY BRIEF FOR APPELLANT

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ARGUMENT

I. OLSEN’S RFRA CLAIM IS NOT BARRED BY COLLATERAL ESTOPPEL BECAUSE THE PRIOR DECISIONS INVOLVING OLSEN DID NOT APPLY THE COMPELLING INTEREST TEST MANDATED BY RFRA UNDER THE CONTROLLING SUPREME COURT PRECEDENT.

Neither the Federal nor State Appellees contest the principle cited by Olsen that an intervening change in the controlling statutory or decisional law applicable to a claim render a previous judicial decision obsolete and render collateral estoppel inapplicable. *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948). Instead, both Appellees’ briefs argue that notwithstanding the intervening enactment of the Religious Freedom Restoration Act (RFRA) and the Supreme Court’s application of RFRA to restrictions imposed under the Controlled Substances Act in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006), the decisions in other cases involving Olsen¹ still collaterally estop Olsen’s RFRA claim raised in the Complaint at issue in this appeal. Appellees claim that because RFRA was intended to re-impose Free Exercise Clause jurisprudence as it existed prior to the decision in *Employment Division v. Smith*, 494 U.S. 872

¹ *Olsen v. Drug Enforcement Administration*, 878 F.2d 1458 (D.C. Cir. 1989) (hereafter “DEA”), *United States v. Rush*, 738 F.2d 497 (1st Cir. 1984), and *State v. Olsen*, 315 N.W.2d 1 (Iowa 1982).

(1990), and the other decisions were made with reference to pre-*Smith* case law, Olsen's prior claims were decided under the analysis required by *O Centro* and should still be deemed to be barred.

This argument wholly fails to acknowledge the plain inconsistency between the result and analysis employed in Olsen's prior cases as against the analysis and result in the *O Centro* case. Each case relied upon for applying collateral estoppel here found a compelling interest for prohibiting Olsen's cannabis use on the basis of Congressional or legislative findings. *See DEA*, 878 F.2d at 1462; *Rush*, 738 F.2d at 512; *Olsen*, 315 N.W.2d at 8. This is directly contrary to the analysis required by RFRA under the *O Centro* decision; “[u]nder the more focused inquiry required by RFRA and the compelling interest test, the Government’s mere invocation of the general characteristics of Schedule I substances, as set forth in the Controlled Substances Act, cannot carry the day.” *O Centro*, 546 U.S. at 432. “RFRA requires the Government to demonstrate that the compelling interest test is satisfied *through application of the challenged law ‘to the person’*—the particular claimant whose sincere exercise of religion is being substantially burdened.” *Id.* at 430-31 (citing 42 U.S.C. § 2000bb-1(b)).

None of the prior cases engaged in the kind of individualized analysis now required under RFRA as construed in *O Centro*. The Federal Appellees

assert that the focused inquiry required by *O Centro* did take place relying upon the *DEA* decision and its consideration of whether the cannabis use at issue in that case could be accommodated. The *DEA* decision cited to *United States v. Lee*, 455 U.S. 252 (1982)², in connection with considering this accommodation inquiry and the Federal Appellees' brief similarly argues that the accommodation analysis employed in *Lee* was approved as a method of analysis under RFRA.

In truth, in *O Centro* the Supreme Court **specifically rejected** the analysis used in *Lee*, and by necessity the analysis used in *Olsen v. DEA*, as a proper test for determining RFRA claims where the burden on religious exercise arises from the Controlled Substances Act. The *O Centro* decision cited *Lee* as an example of a case involving a government law requiring uniformity and that would be wholly undermined if religious accommodations were allowed. *O Centro*, 546 U.S. at 435. However, the Court went on to hold that the Controlled Substances Act is not a law in which there is a compelling interest in uniformity:

We do not doubt that there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA. But it would have been

² In *Lee*, 455 U.S. at 258, the Supreme Court held that the Free Exercise Clause did not require a religious exemption from payment of Social Security taxes because mandatory participation in the system was indispensable.

surprising to find that this was such a case, given the longstanding exemption from the Controlled Substances Act for religious use of peyote, and the fact that the very reason Congress enacted RFRA was to respond to a decision denying a claimed right to sacramental use of a controlled substance.

Id. at 436-37. The Court pointed out that the existence of the well-established peyote exemption undermines the contention that there is a compelling governmental interest in not applying the individualized inquiry to RFRA claims based upon burdens imposed by the Controlled Substances Act. *Id.* at 432.

Thus, the *O Centro* decision specifically held that the “accommodation” analysis employed in *Lee* and also employed in the *DEA* case against Olsen does not apply under RFRA when the burden on religion results from the enforcement of the Controlled Substances Act. The Controlled Substances Act is not a law that demands uniformity of operation such that there is a compelling interest in recognizing no exceptions. Instead, the Controlled Substances Act is a law which, under RFRA, can be applied to burden religious exercise only if it is shown that there is a compelling interest in applying the law to the RFRA claimant. The *DEA* court’s reliance on *Lee* as grounds for denying Olsen’s claim is inconsistent with the holding in *O Centro* and so the decision in *DEA* should not be the basis for imposing the bar of collateral estoppel upon Olsen’s RFRA claim.

Moreover, even to the extent the holding in *DEA*, 878 F.2d at 1462, can be construed as engaging in the required compelling interest inquiry, it was still not in conformity with the standards required by RFRA and delineated in *O Centro* because it was not the kind of focused, individualized determination required by RFRA. In rejecting the idea that any accommodation was possible, the *DEA* court wrote that three other circuits had rejected arguments seeking an accommodation of sacramental use of marijuana and expressed its unwillingness to doubt that these decisions were accurate under Supreme Court precedent. *DEA*, 878 F.2d at 1462. But each of the cases cited in the *DEA* decision simply relied upon Congressional findings for their rulings in this respect. *See Rush*, 738 F.2d at 513 (quoting *Leary v. United States*, 383 F.2d 851 (5th Cir. 1967), *rev'd on other grds.*, 395 U.S. 6 (1969) (“Congress has demonstrated beyond doubt that it believes marihuana is an evil in American society and a serious threat to its people.”), *United States v. Middleton*, 690 F.2d 820, 825 (11th Cir. 1982) (“Congress has strongly and clearly expressed its intent to protect the public from the obvious danger of drugs and drug traffic. . . . Unquestionably, Congress can constitutionally control the use of drugs that it determines to be dangerous, even if those drugs are to be used for religious purposes.”), and *Olsen v. Iowa*, 808 F.2d 652 (8th Cir. 1986) (citing, without extended

discussion, *Rush* and *Middleton* as grounds for rejecting Free Exercise Clause claim to use marijuana as a religious sacrament). Even to the extent the cases relied upon in *DEA* engaged in a compelling interest analysis, the cases employed the kind of truncated, Congressional-findings based analysis that was rejected by the Supreme Court in *O Centro*.

Thus, the Federal Appellees are simply wrong when they argue that in *DEA* “the D.C. Circuit accorded [Olsen] precisely the type of review that the Supreme Court held appropriate in *O Centro*.” (Br. for Fed. Appellees at 16). Indeed, had *O Centro* applied the analysis of the *DEA* court previously applied to Olsen, the Supreme Court would have held that the UDV church had no RFRA claim to use *hoasca*. Because no prior case afforded Olsen the individualized examination set forth in *O Centro*, those prior cases do not give rise to collateral estoppel and the District Court erred in applying that doctrine to dismiss Olsen’s RFRA claim.

The significance of RFRA and *O Centro* on prior adjudications was recognized in *Multi Denominational Ministry of Cannabis & Rastafari, Inc. v. Gonzales*, 474 F. Supp. 2d 1133 (N.D. Cal. 2007), where the court rejected the government’s res judicata argument against a church’s RFRA claim that the church’s use of marijuana in connection with the exercise of

religion was improperly burdened by the provisions of the Controlled Substances Act. The court there wrote as follows:

Res judicata “bars re-litigation of all grounds of recovery that were asserted, or could have been asserted, in a previous action between the parties, where the previous action was resolved on the merits.” *Tahoe Sierra Preservation Council Inc v Tahoe Regional Planning Agency*, 322 F3d 1064, 1078 (9th Cir 2003). “It is immaterial whether the claims asserted subsequent to the judgment were actually pursued in the action that led to the judgment; rather the relevant inquiry is whether they could have been brought.” *Id.*

But res judicata's preclusive force is extinguished by an intervening change in the law. *See Clifton v. Attorney General of State Of California*, 997 F2d 660, 663 (9th Cir 1993) (citing *State Farm v. Duel*, 324 U.S. 154, 162 (1945)). That exception applies here. For reasons discussed *infra*, the Supreme Court's decision in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S Ct 1211, 1217, 163 L. Ed. 2d 1017 (2006), shifted the legal terrain surrounding plaintiffs' suit, thereby warranting reexamination of the grounds for relief raised in plaintiffs' previous petition. Accordingly, the intervening change triggered by the *O Centro* decision is sufficient to invoke the exception to res judicata recognized in *Clifton*.

Gonzales, 474 F. Supp. 2d at 1142-1143.

Contrary to the Federal Appellees' contention (Brief of Federal Appellees at 15, n.2), Olsen has never admitted or conceded that any governmental entity has a compelling interest in applying laws criminalizing marijuana use to his sacramental use of marijuana. It is one thing to concede a generalized compelling interest underlying the Controlled Substances Act,

which was the very most Olsen conceded in previous litigation. *See DEA*, 878 F.2d at 1462 (noting that Olsen does not dispute the government’s compelling interest “in controlling the distribution and drug-related use of marijuana.”). It is another thing to admit that the government has a compelling interest in enforcing the drug laws against a particular person or religious denomination, a concession that has *never* been made by Olsen. Under RFRA and *O Centro*, only that latter concession would be sufficient to bar a claim against enforcement of the Controlled Substances Act under RFRA. Again, “RFRA requires the Government to demonstrate that the compelling interest test is satisfied *through application of the challenged law ‘to the person’*—the particular claimant whose sincere exercise of religion is being substantially burdened,” *O Centro*, 546 U.S. at 430-31, not simply that there is a generalized compelling interest in the law at issue. Under RFRA as interpreted in *O Centro*, “strict scrutiny ‘at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim’” and requires courts to “take ‘relevant differences’ into account -- indeed, that is its fundamental purpose” *Id.* at 431-32 (citations omitted). The Court also reaffirmed the feasibility “of case-by-case consideration of religious exemptions to generally applicable rules.” *Id.* at 436.

“The purpose of almost any law, however, can be traced to a fundamental concern of government. Balancing an individual's religious interest against such a concern will inevitably make the former look unimportant. It is therefore the ‘least restrictive means’ inquiry which is the critical aspect of the free exercise analysis. This prong forces us to measure the importance of a regulation by ascertaining the marginal benefit of applying it to all individuals, rather than to all individuals except those holding a conflicting religious conviction. *See Clark, Guidelines for the Free Exercise Clause*, 83 Harv.L.Rev. 327, 331 (1969).” *Callahan v. Woods*, 736 F.2d 1269, 1272 (9th Cir. 1984).

The same principle also requires rejection of the State Appellees argument that, even apart from collateral estoppel, the dismissal of Olsen’s RFRA claim was proper because of other post-RFRA decisions. Neither of the decisions relied upon by the State Appellees, *United States v. Israel*, 317 F.3d 768 (7th Cir. 2003)³ and *Gonzales*⁴, can be controlling because RFRA

³ The *Israel* decision is particularly inapposite because it was decided before *O Centro* and did not employ the analysis mandated by the Supreme Court in that case.

⁴ *Gonzales* also is distinguishable from the instant case. The district court there dismissed the RFRA claim but only because the relief sought by the claimants, i.e., total immunity from the federal drug laws, was fatal to their RFRA claim under prior 9th Circuit precedent in *United States v. Bauer*, 84 F.3d 1549 (9th Cir 1996) and *Guam v Guerrero*, 290 F.3d 1210 (9th Cir 2002). However, the *O Centro* decision protects both the importation and

and *O Centro* require judicial inquiry into whether the government has a compelling interest in applying the law to the particular claimant. Determinations of a compelling interest as to different claimants are not binding in this case which must be determined on the basis of the focused, individualized inquiry mandated by *O Centro*.

Olsen has never been afforded this individualized examination. RFRA and *O Centro* plainly effected a watershed revision of the legal principles applicable to claims to relief from the application of drug laws to sincerely-held religious practices. As such, any prior determination under superseded legal analysis does not give rise to collateral estoppel and the District Court judgment based on that doctrine must be reversed.

The State Appellees make the additional argument that RFRA does not apply to state entities. Although the Supreme Court found RFRA inapplicable to the states in *City of Boerne v. P.F. Flores*, 521 U.S. 507 (1997), and RFRA was amended accordingly, the question of how the

distribution of a controlled substance for religious purposes which the 9th Circuit failed to recognize in *Bauer* and *Guerrero*. 474 F. Supp. 2d at 1146-1147. In fact, the *Bauer* defendants never argued religious exercise or establishment by their sales, distribution, and transportation of marijuana or the money laundering of the proceeds. The 9th Circuit recognized this when it wrote that the record on review fails to support a religious claim on those counts. *Bauer*, 84 F.3d at 1559. Moreover, the *Gonzales* court allowed the claimants there leave to amend their complaint to make out a prima facie RFRA claim, thereby indicating that there are circumstances under which a RFRA claim may exist based upon a sacramental use of marijuana.

federal government can fund state drug law enforcement without demanding RFRA) is not answered by *Boerne*. This question is answered by RLUIPA, which provides that “governments” covered by RLUIPA include a “State, county, municipality, or other governmental entity created under the authority of a State” and any instrumentality thereof. 42 U.S.C. § 2000cc-5. The statute also incorporates as covered “programs or activities” the definition of that term contained in 42 U.S.C. § 2000d-4a(1)(A): “a department, agency, special purpose district, or other instrumentality of a State or of a local government.” *See also Cutter v. Wilkinson*, 544 U.S. 709, 732-33 (2005) (Thomas, J., concurring).

Indeed, Iowa’s Controlled Substances Act and its enforcement simply functions as an appendage of federal drug law. Iowa Code § 124.201(4) provides “[i]f any new substance is designated as a controlled substance under federal law and notice of the designation is given to the board, the board shall similarly designate as controlled the new substance under this chapter after the expiration of thirty days from publication in the Federal Register of a final order designating a new substance as a controlled substance, unless within that thirty-day period the board objects to the new designation.” Iowa has voluntarily contracted with the federal government in the enforcement of Iowa’s drug law. Iowa’s drug law enforcement

receives significant funding from the federal government. Total Estimated FY 2007 Iowa Substance Abuse & Drug Enforcement Program Funding (by Source) - State \$35,136,294 - Federal \$42,989,290 - Other \$24,921,327. Iowa's Drug Control Strategy 2007. (Dkt. # 43; Plaintiff's Request for Judicial Notice Exhibit #9).

II. THE CONTROLLED SUBSTANCES ACT IS NOT A GENERALLY APPLICABLE LAW UNDER THE *SMITH* DECISION AND THE *SMITH* ANALYSIS PRECLUDES APPLICATION OF COLLATERAL ESTOPPEL TO OLSEN'S FREE EXERCISE CLAUSE CLAIM.

Neither the Federal nor State Appellees contest Olsen's argument that the decision in *Smith*, which was decided after any of the decisions involving Olsen that have been relied upon as grounds for applying collateral estoppel, changed the analysis applicable to claims under the Free Exercise Clause of the First Amendment. Indeed, the Federal Appellees specifically point out that *Smith* eliminated the requirement that the government demonstrate a compelling interest as to "neutral laws of general applicability" that burden religious practices (Federal Appellees' Brief at 20). Even if the Appellees are correct that a more "exacting" standard applies under *Smith*, it is nonetheless a different standard than was applied in Olsen's prior cases.

Under the intervening decision in *Smith*, the key question a court must answer is whether the law at issue is “neutral and generally applicable.”

The Appellees argue that the state and federal Controlled Substances Acts are “generally applicable,” but this flies in the face of the decision in *O Centro*, 546 U.S. at 433-434, which makes clear that, in light of the exemption for peyote, the federal Controlled Substances Act is not generally applicable. None of the cases cited by the Appellees considered whether Controlled Substances Act prohibitions are neutral and generally applicable in light of the *O Centro* decision.⁵ They do not explain how laws that allow a religious exemption only for certain religion or that allow the use of marijuana for medical reasons can be considered “generally applicable”. As pointed out in Olsen’s principal brief, a rule is not “generally applicable” when exceptions are made for certain secular reasons or only for particular religions.⁶ If a law has such exceptions, it is not generally applicable and the government must demonstrate a compelling reason for not granting an

⁵ Only one cases cited by the Appellees, *Gonzales*, was even decided after the *O Centro* case. Significantly, the *Gonzales* court did not even mention *O Centro* in connection with its discussion of the Free Exercise Clause claim in that case. The district court there merely noted the similarity with *Smith* and concluded that the Controlled Substances Act is neutral and generally applicable. *Gonzales*, 474 F. Supp. 2d at 1143-44.

⁶ Moreover, the government’s position would violate the Establishment Clause if only one church could qualify for an exemption. *DEA*, 878 F.2d at 1461.

exemption to an individual based upon the burden the rule imposes upon the individual's exercise of religion. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993); *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999).⁷

The fact that the law exempts tobacco and alcohol from any prohibition further demonstrates the laws are not generally applicable when it comes to regulating drugs. "It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye*, 508 U.S. at 547. *Accord O Centro*, 546 U.S. at 433. The State cannot deny a religious claim in the face of such broad secular exceptions. *See also City of Indianapolis v. Edmonds*, 531 U.S. 32, 42-43 (2000) (scope of problem of drug trafficking did not justify program of vehicle searches aimed at uncovering illegal drugs).

⁷ Each of the Appellees argues that because the Controlled Substances Acts are not targeted at religion they are "neutral and generally applicable." Even assuming this is the case, the fact that the purpose of a law is not to suppress religious exercise only bears on whether the law is "neutral." *See Church of Lukumi Babalu Aye*, 508 U.S. at 533 ("if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral."). Apart from a law's purpose, it still must be "generally applicable" to be free from strict scrutiny. *See id.* at 542 (second requirement after *Smith* is that law be "generally applicable.").

Notwithstanding the Appellees' arguments to the contrary, Olsen did not receive in his previous actions the required "compelling interest" scrutiny applicable to his claim in this case in light of the intervening decision in *O Centro* and *Smith*. The prior decisions placed reliance simply upon legislative findings and did not use the focused, individualized analysis that is the standard after *O Centro*. Those cases and the principles they employed have been overtaken by the more recent and controlling Supreme Court precedent and should not have been given preclusive effect in this case.

As to Olsen's hybrid rights claim, the Appellees resort to criticizing the existence of this doctrine as opposed to providing any reasoned analysis of why it should not trigger strict scrutiny here. The State Appellees contend that the hybrid rights doctrine is controversial and suggest that it is not viable (State Appellees' Brief at 15-16). Of course, this would require this Court to ignore not only Supreme Court precedent recognizing the doctrine, *Smith*, 494 U.S. at 881-82, but a decision from this Court doing so. *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472-73 (8th Cir. 1991). The Federal Appellees argue that the hybrid rights doctrine should not be applied here because there has been no intervening case law since the decisions in *DEA* and *Rush*. Of course, this fails to recognize that the very

case giving rise to hybrid rights claims, i.e., *Smith*, was decided after both *Rush* and *DEA*.

The Appellees cannot avoid strict scrutiny under the hybrid rights doctrine by the mere expedient of labeling the cognate rights asserted by Olsen “utterly meritless.” If nothing else, Olsen’s equal protection claim is not baseless for the reasons set forth *infra* and in Olsen’s principal brief. This claim was not dismissed by the District Court because it was “meritless” but because the District Court erred in applying collateral estoppel (Brief for Appellant at 29-32; Addendum p. 14). Therefore, Olsen’s Free Exercise Clause claim also is not barred by collateral estoppel.

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

Appellees’ response to Olsen’s equal protection claim again fails to appreciate the full effect of the decision in *O Centro*, and, in particular, the Supreme Court’s criticism of the discriminatory exemption granted only to peyote use by Native American religion adherents. *O Centro*, 546 U.S. at 433-434. The point of the Supreme Court’s holding was that the government cannot claim there is a good reason for granting a religious exemption only for peyote and not other Schedule I substances where the

health risks of peyote are identical to other substances, like *hoasca*, that are used in connection with bona fide religious ceremonies and practices. The Supreme Court found the distinction the government tried to make especially disingenuous when the peyote exemption was available “for hundreds of thousands of Native Americans practicing their faith[.]” *Id.* at 433.

This ruling demonstrates that the singular peyote exemption is not rational and wholly undermines the reasoning previously used for denying Olsen’s equal protection claims. Thus, the Federal Appellees point to the passage from *DEA*, 878 F.2d at 1463, in which the D.C. Circuit found a rational basis for distinguishing marijuana from peyote because of the amount of marijuana seized by the DEA greatly exceeded the amount of peyote seized by law enforcement. But the key issue stressed in *O Centro* is not how much of different controlled substances are seized, but what would be the overall alleged health problem if a religious exemption were recognized. As pointed out in *O Centro*, it is not rational for the government to claim a compelling health and safety interest for other Schedule I substances and not for peyote when “hundreds of thousands of Native Americans” are allowed to use peyote.

O Centro demonstrates that the rationality of refusing a religious exemption in the face of the existing peyote exemption depends upon whether the health risks arising from the proposed exemption are significantly greater than the risks arising from the peyote exemption. Neither the *DEA* case nor the other cases cited by the Appellees engaged in this analysis when considering an equal protection challenge to the refusal of a religious exemption for marijuana. Instead, the cases focused on the kind of control problems and monitoring problems that were not even considered by the Supreme Court in *O Centro*. See, e.g., *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 342 F.2d 1170, 1185 (10th Cir. 2003), *aff'd on reh'g en banc*, 389 F.3d 973 (10th Cir. 2004), *aff'd*, 546 U.S. 418 (2007) (citing *DEA* and problems of “abuse and control” as grounds for other decisions rejecting equal protection claim to marijuana religious use exemption).

Certainly on the record and posture in this case, which was resolved on a Fed R. Civ. P. 12(b)(6) motion to dismiss, it cannot be said that the marijuana exemption proposed by Olsen is distinguishable in any relevant respect from the peyote exemption. The District Court here had no grounds for determining that allowing Olsen and other members of the Ethiopian Zion Coptic Church to use cannabis in their sacraments poses a greater

health and safety risk than that posed by the use of peyote by “hundreds of thousands of Native Americans practicing their faith.” Therefore it should not have ruled, either as a matter of collateral estoppel or as a matter of law, that Olsen’s equal protection claim was subject to dismissal.

IV. OLSEN’S RFRA AND CONSTITUTIONAL CLAIMS ARE RIPE FOR CONSIDERATION AND REVIEW.

The Federal Appellees make the additional argument that Olsen’s claims were subject to dismissal because they are not “ripe for review.” The gist of this argument is that Olsen did not allege “any intent to pursue conduct in violation of federal or state law,” and so he is not presently confronted with certain or pending injury (Federal Appellees’ Brief at 26).

The argument that Olsen is not faced with present or impending injury is disingenuous at best in light of the history of prosecution Olsen has suffered for attempting to practice his religion. A litany of prior litigation involving state and federal prosecution of Olsen arising from his sacramental use of marijuana is cited by the Appellees as grounds for dismissing his claims, yet the Federal Appellees claim that Olsen does not face imminent harm from practicing his religion. Clearly, the Appellees will bring the full force of their respective governments to bear upon Olsen should they

determine that he has or is practicing his faith by engaging in the sacramental use of marijuana.

Be that as it may, Olsen has properly alleged facts demonstrating that his claims are ripe. The Complaint alleges that Olsen is a sincere adherent of the teachings of the Ethiopian Zion Coptic Church, a centuries-old church that uses cannabis as its sacrament (Dkt. # 1; Complaint p. 9). The Complaint elaborates as follows:

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

(Dkt. # 1; Complaint p. 10). The Complaint goes on to allege that all the Defendants-Appellees have taken the position that Olsen's religious use of marijuana is forbidden and impose severe civil and criminal penalties therefore (Dkt. # 1; Complaint p. 12). As a direct result of the Defendants' threat of criminal prosecution, Olsen has been compelled to suspend this aspect of the practice of his religion (Dkt. # 1; Complaint p. 12). Thus, "[b]ecause of these mortal threats to the Plaintiff's life and limb, the Plaintiff

is forced under duress to cease Establishing and Exercising his Religion.” (Dkt. # 1; Complaint p. 13). This is identical to the posture of the *O Centro* case which was decided by the Supreme Court without any mention of ripeness problems. See *O Centro v. Ashcroft*, 282 F.Supp. 1236, 1240 (D.N.M. 2002) (“In light of the government's interpretation of the CSA's application to hoasca, the UDV has ceased using the tea in the United States.”)

The kind of threat of prosecution faced by Olsen clearly makes this case ripe for decision by the federal courts:

Even when the criminal statute that a litigant challenges has not yet been enforced against her, the challenger's claim may be justiciable if the challenger can demonstrate that she faces a threat of prosecution under the statute which is credible and immediate, and not merely abstract or speculative. In the proper circumstances, such threats of enforcement can simultaneously ripen a preenforcement challenge and give the threatened party standing. See, e.g., *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298-99 (1979); *American Library Ass'n v. Barr*, 956 F.2d 1178, 1196 (D.C. Cir. 1992); see generally 13A CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3532.5 (1984). A credible threat of imminent prosecution can injure the threatened party by putting her between a rock and a hard place--absent the availability of preenforcement review, she must either forego possibly lawful activity because of her well-founded fear of prosecution, or willfully violate the statute, thereby subjecting herself to criminal prosecution and punishment. See *Babbitt*, 442 U.S. at 298-99. In such situations the threat of prosecution provides the foundation for justiciability as a constitutional and prudential matter, and the Declaratory Judgment Act, 28 U.S.C. § 2201 (1994), provides

the mechanism for seeking preenforcement review in federal court. *See Steffel v. Thompson*, 415 U.S. 452, 480 (“the declaratory judgment procedure is an alternative to pursuit of the arguably illegal activity”) (Rehnquist, J., concurring). Federal courts most frequently find preenforcement challenges justiciable when the challenged statutes allegedly “chill” conduct protected by the First Amendment, but preenforcement challenges have been heard outside of the First Amendment context as well.

Navegar, Inc. v. United States, 103 F.3d 994, 998-99(D.C. Cir. 1997).

Olsen has alleged a direct injury resulting from the Appellees’ enactment and enforcement of the Controlled Substances Acts. But for the enforcement of these Acts, Olsen would be able to exercise his religious beliefs by engaging in the sacramental use of cannabis. There is plainly a ripe controversy here and Olsen’s claims are ready and due to be considered by this and the lower court.

V. RLUIPA IS BROADLY APPLICABLE TO LAWS LIKE THE CONTROLLED SUBSTANCES ACTS.

The Appellees also contend that RLUIPA is not applicable in this case. But this is contrary to the language of the statute as explained by the concurrence of Justice Thomas in *Cutter v. Wilkinson*, 544 U.S. 709 (2005). The Justice wrote that “[i]n addition, RLUIPA’s text applies to all laws passed by state and local governments, including ‘rules of general applicability,’ . . ., whether or not they concern an establishment of religion.

State and local governments obviously have many laws that have nothing to do with religion, let alone establishments thereof. Numerous applications of RLUIPA therefore do not contravene the Establishment Clause.” *Id.* at 732 (Thomas, J., concurring). Justice Thomas also emphasized that Congress had conditioned the receipt of federal funds by state and localities upon compliance with RLUIPA and “while Congress’ condition stands, the States subject themselves to that condition by voluntarily accepting federal funds.” *Id.* at 732-733. This is in accord with 42 U.S.C. § 2000cc-1(b), which provides that

This section applies in any case in which—

- (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or
- (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

The state has not challenged 42 U.S.C. § 1996a(b)(1)⁸ which imposed protection for the religious use of peyote on the state of Iowa in 1994 - which means the state of Iowa voluntarily accepts Congress’ authority to set

⁸ “Notwithstanding any other provision of law, the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful, and shall not be prohibited by the United States or any State. No Indian shall be penalized or discriminated against on the basis of such use, possession or transportation, including, but not limited to, denial of otherwise applicable benefits under public assistance programs.”

minimum standards for the protection of religious freedom in Iowa - RFRA and RLUIPA.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Brief for Appellant complies with the type-volume limitation provided in Fed. R. App. P. 32(a)(7)(B). The foregoing brief contains 5,019 words of Times New Roman (14 point) proportional type. The word processing software used to prepare this brief was Microsoft Office Word 2003.

James R. Cook

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 20, 2007, the foregoing Brief for Appellant was served upon the Appellees by depositing two true and correct copies of said brief with the United States Postal Service, first class postage prepaid, addressed to each of the following:

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