

In light of UDV, this could should take judicial notice that the decision in Olsen v. State of Iowa, 808 F.2d 652 (8th Cir. 1986), which follows United States v. Rush, 738 F.2d 497 (1st Cir. 1984), and United States v. Middleton, 690 F.2d 820 (11th Cir. 1982), is plain error and no longer valid or binding under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb et seq., and UDV.

FACTS

The Attorney General of Iowa mischaracterizes the claims of the Plaintiff.

1. The Attorney General of Iowa accuses the Plaintiff of "engaging in illegal activities" (Defendant's Brief in Support of Motion to Dismiss, at page 6). The Plaintiff is complying with the law and is not engaging in any illegal activities. The Plaintiff's Original Complaint states: "As a result of the threat of criminal prosecution, the Plaintiff has been compelled to suspend the practice of his religion in the United States. The suspension took effect in 1990, immediately after the dismissal in Olsen v. Drug Enforcement Admin., 495 U.S. 906 (April 23, 1990), on petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, 878 F.2d 1458 (1989)." (Plaintiff's Original Complaint, at page 12, paragraph 34)

2. The Attorney General of Iowa compares the Plaintiff's establishment and free exercise of religion with murder (Defendant's Brief in Support of Motion to Dismiss, at page 8). The Plaintiff has never been confronted with a witness claiming a threat to that witness' health and safety resulting from the establishment and free exercise of the Plaintiff's religion. The Attorney General of Iowa shows clear malice and prejudice toward the Plaintiff and confirms the actual and real threat to the Plaintiff complained of in the Plaintiff's Original Complaint.

LEGAL ARGUMENT

Constitutional & Statutory Claims under RFRA and UDV

The Sherbert v. Verner, 374 U.S. 398 (1963) (Sherbert hereafter), Wisconsin v. Yoder, 406 U.S. 205 (1972) (Yoder hereafter), tests were not utilized in any of the cases rejecting the constitutional claims of the plaintiff. These courts justified their decisions to deny the Sherbert and Yoder tests by relying on a series of published decisions derived from Leary v. United States, 383 F.2d 851 (5th Cir. 1967), reversed on other grounds, 395 U.S. 6 (1969). All of these cases claim that the drug laws, in and of themselves, override the Plaintiff's constitutional rights. In not one of these cases was an immediate threat to public health and safety shown to have been caused by the Plaintiff.

The Leary court did not apply the Sherbert test. The Leary court, 383 F.2d, at pages 860-861, wrote:

Appellant's reliance on Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963), for authority that the constitutionally guaranteed right of free religious exercise imposes on the Government the burden of showing a compelling interest in its abridgement, is misplaced and inapposite on the facts.

Inapposite is a legal term, not commonly used by ordinary people, that means something is irrelevant and cannot be applied. The Leary court continued by saying:

We cannot reasonably equate deliberate violation of federal marihuana laws with the refusal of an individual to work on her Sabbath Day and nevertheless claim compensation benefits.

Congress has made it a crime to traffic in marihuana and it was not incumbent upon the Government to produce evidence to controvert the testimony of witnesses on the controversial question whether use of the drug is relatively harmless.

We know the Leary court did not apply Sherbert to the religious use of a Schedule I controlled substance because the court said "it was not incumbent upon the government to produce evidence" showing an immediate threat to public health and safety caused by Dr. Leary's use of marijuana as a sacrament. Sherbert and Yoder are fact based contests. If the government is not required

to produce evidence, then there is no factual contest as described in Sherbert and Yoder.

Other courts, following Leary, have said that the drug laws cannot be questioned or put to the tests set forth in Sherbert and Yoder. In United States v. Rush, 738 F.2d 497, 512 (1st Cir. 1984), the court wrote:

In enacting substantial criminal penalties for possession with intent to distribute, Congress has weighed the evidence and reached a conclusion which it is not this court's task to review de novo.

Under the U.S. Supreme Court's decision in UDV it is the trial court's obligation under Sherbert and Yoder to review the particular religious use of a scheduled substance de novo (as applied "to the person", 546 U.S. ___, 126 S. Ct. at 1220, 163 L. Ed. 2d at 1031). The UDV court said Sherbert and Yoder "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." 546 U.S. ___, 126 S. Ct. at 1220, 163 L. Ed. 2d at 1031. The Rush court, *id.* at 512, relied on Leary as precedent for its decision:

Every federal court that has considered the matter, so far as we are aware, has accepted the congressional determination that marijuana in fact poses a real threat to individual health and social welfare, and has upheld the criminal sanctions for possession and distribution of marijuana even where such sanctions infringe on the free exercise of religion. *United States v. Middleton*, 690 F.2d 820, 825 (11th Cir. 1982), *cert. denied*, 460 U.S. 1051, 103 S. Ct. 1497, 75 L. Ed. 2d 929 (1983); *United States v. Spears*, 443 F.2d 895 (5th Cir. 1971), *cert. denied*, 404 U.S. 1020, 30 L. Ed. 2d 669, 92 S. Ct. 693 (1972); *Leary v. United States*, 383 F.2d 851, 859-61 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6, 23 L. Ed. 2d 57, 89 S. Ct. 1532 (1969)

The pre-trial trial court ruling preventing the defendants from presenting a defense based on the First Amendment in Rush clearly contradicts the plain meaning of the Religious Freedom Restoration Act (RFRA) (which is fully retroactive and supersedes the decision in Rush). 42 U.S.C. § 2000bb-1(c) ("A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and

obtain appropriate relief against a government."). 42 U.S.C. § 2000bb-3(a) ("This Act applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.")

The previous case in this series of decisions is United States v. Middleton, 690 F.2d 820, 825 (11th Cir. 1982), which also relied on Leary (and is also plain error and superseded under RFRA and overturned by UDV):

As this court noted in *Leary v. United States*, 383 F.2d 851 (5th Cir. 1967), *rev'd. on other grounds*, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969), both the fact of legislation and the severity of the penalties provided in statutes such as the one in question clearly evidence "the grave concern of Congress" in controlling the use of drugs. *Id.* at 859. Moreover, the harm of the particular drug in question is not relevant in determining the degree of protection afforded by the free exercise clause to the defendant's actions.

Olsen v. State of Iowa, 808 F.2d 652, 653 (8th Cir. 1986), follows Rush and Middleton and is also plain error and reversed under RFRA and UDV.

We agree with the district court that Olsen's claims are without merit. See, *e.g.*, *United States v. Rush*, 738 F.2d 497, 511-513 (1st Cir.1984), *cert. denied*, 471 U.S. 1120, 105 S. Ct. 2370, 86 L. Ed. 2d 269 (1985) (rejecting free-exercise and equal protection claims by members of the Ethiopian Zion Coptic Church convicted for possession of marijuana); *United States v. Middleton*, 690 F.2d 820, 824-825 (11th Cir.1982) (rejecting similar free-exercise claim);

In UDV, 546 U.S. at ___, 126 S. Ct. at 1220; 163 L. Ed. 2d at 1031, the U.S.

Supreme Court reversed this series of cases based on Leary when it wrote: "Under the Government's view, there is no need to assess the particulars of the UDV's use or weigh the impact of an exemption for that specific use, because the Controlled Substances Act serves a compelling purpose and simply admits of no exceptions." In UDV, 546 U.S. ___, 126 S. Ct. at 1220, 163 L. Ed. 2d at 1031, the U.S. Supreme Court continued:

RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government's categorical approach. 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. 42 U.S.C. § 2000bb-1(b). RFRA expressly adopted the compelling interest test "as set forth in

Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972)." 42 U.S.C. § 2000bb(b)(1). In each of those cases, this Court 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."

In UDV, 546 U.S. ___, 126 S. Ct. at 1221, 163 L. Ed. 2d at 1032-1033, the U.S. Supreme Court described the de novo review required by the finder of fact under Sherbert and Yoder:

Under the more focused inquiry required by RFRA and the compelling interest test, the Government's mere invocation of the general characteristics of Schedule I substances, as set forth in the Controlled Substances Act, cannot carry the day. It is true, of course, that Schedule I substances such as DMT are exceptionally dangerous. See, e.g., *Touby v. United States*, 500 U.S. 160, 162, 111 S. Ct. 1752, 114 L. Ed. 2d 219 (1991). Nevertheless, there is no indication that Congress, in classifying DMT, considered the harms posed by the particular use at issue here -- the circumscribed, sacramental use of *hoasca* by the UDV. The question of the harms from the sacramental use of *hoasca* by the UDV was litigated below. Before the District Court found that the Government had not carried its burden of showing a compelling interest in preventing such harms, the court noted that it could not "ignore that the legislative branch of the government elected to place materials containing DMT on Schedule I of the [Act], reflecting findings that substances containing DMT have 'a high potential for abuse,' and 'no currently accepted medical use in treatment in the United States,' and that 'there is a lack of accepted safety for use of [DMT] under medical supervision.'" 282 F. Supp. 2d, at 1254. But Congress' determination that DMT should be listed under Schedule I simply does not provide a categorical answer that relieves the Government of the obligation to shoulder its burden under RFRA.

This conclusion is reinforced by the Controlled Substances Act itself. The Act contains a provision authorizing the Attorney General to "waive the requirement for registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety." 21 U.S.C. § 822(d). The fact that the Act itself contemplates that exempting certain people from its requirements would be "consistent with the public health and safety" indicates that congressional findings with respect to Schedule I substances should not carry the determinative weight, for RFRA purposes, that the Government would ascribe to them.

Finally, in Olsen v. DEA, 878 F.2d 1458, 1467 (D.C. Cir. 1989), cert. denied, US (2006), the Plaintiff sought an administrative hearing on his petition for a sacramental exemption under the provisions of 21 C.F.R. 1308 et seq., which was denied by the DEA Administrator. The DEA Administrator wrote:

Beginning with *Leary v. United States*, 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6, 23 L. Ed. 2d 57, 89 S. Ct. 1532 (1969), the federal appellate courts have found that the government has a compelling interest in controlling marijuana use. See: *United States v. Spears*, 443 F.2d 895 (5th Cir. 1971), *cert. denied*, 404 U.S. 1020, 92 S. Ct. 693, 30 L. Ed. 2d 669 (1972); *United States v. Middleton*, 690 F.2d 820 (11th Cir. 1982), *cert. denied*, 460 U.S. 1051, 75 L. Ed. 2d 929, 103 S. Ct. 1497 (1983); *United States v. Rush*, 738 F.2d 497 (1st Cir. 1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 269, 105 S. Ct. 2370 (1985) and *Olsen v. State of Iowa*, 808 F.2d 652 (8th Cir. 1986).

The United States Court of Appeals for the District of Columbia affirmed the DEA Administrator by denying the Plaintiff's right to be heard, to present evidence, and to have an administrative law judge make findings of fact. Instead, the Court of Appeals simply used the facts from the Plaintiff's criminal cases as evidence. Clearly, under RFRA and UDV, the Plaintiff was entitled to a hearing, since the purpose of filing the petition was to remedy the failure of the Leary series of decisions to apply the Sherbert and Yoder fact tests and to consider any less restrictive means than complete prohibition of the Plaintiff's religion.

In United States v. Bauer, 84 F.3d 1549m 1559 (9th Cir. 1996), the United States Court of Appeals for the 9th Circuit reversed a district court's reliance on Leary,

The 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. The district court relied on a drug case decided before the enactment of the Religious Freedom Restoration Act. We do not exclude the possibility that the government may show that the least restrictive means of preventing the sale and distribution of marijuana is the universal enforcement of the marijuana laws. Under RFRA, however, the government had the obligation, first, to show that the application of the marijuana laws to the defendants was in furtherance of a compelling governmental interest and, second, to show that the application of these laws to these defendants was the least restrictive means of furthering that compelling governmental interest.

The State of Iowa cannot rely on federal case law that has been clearly superseded by RFRA and overturned by UDV.

Constitutional Claims under Smith and Flores

As noted previously, the U.S. Supreme Court recognized the compelling interest test as set forth in Sherbert and Yoder in UDV. *Id.*, 546 U.S. ___, 126 S. Ct. at 1220, 163 L. Ed. 2d at 1031. The Sherbert and Yoder tests must be applied to the State of Iowa under both Employment Division v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) (Smith hereafter), and City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997) (Flores hereafter), because the State of Iowa has an existing statutory religious exemption for a Schedule I controlled substance, peyote, and because the State of Iowa has an existing statutory medical exemption for the Schedule I controlled substance marijuana. What this means is that Iowa's characterization of the Plaintiff's use of marijuana as "illegal" is not made under a neutral state law of general applicability, because:

- (a) since there are exemptions from Iowa drug law for special circumstances, Iowa drug law applies to some and not to others and, therefore, it is not a law of general applicability;
- (b) since the Iowa drug law exempts one church from prohibitions on Schedule I substances, it is not a law that is "neutral" in its application, and further constitutes unequal denial of right if the Plaintiff's religious use of Schedule I substances is prohibited;
- (c) since Iowa has already defined exemptions from absolute prohibition for Schedule I substances - religious use of peyote and medical use of marijuana - therefore Iowa cannot now claim a blanket denial of use of Schedule I substances by claiming that Schedule I substances always and without exception generate a compelling interest by government to prohibit their use because of the extreme and irreconcilable threat to public health and safety that occurs upon the use of a Schedule I substance; and
- (d) since Iowa has already recognized exemptions for the medical use of marijuana, Iowa cannot now claim a blanket prohibition on religious

use of marijuana in any more restrictive manner than the medical use that Iowa currently exempts from prohibition.

In Smith, *id.* at page 884, the court wrote: "As the plurality pointed out in *Roy*, our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason. *Bowen v. Roy*, *supra*, at 708."

In Flores, *id.* at page 514, the court wrote: "Those cases, the Court explained, stand for 'the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason.' 494 U.S. at 884".

In State of Iowa v. Olsen, 315 N.W.2d 1, 18-24 (1982), the Iowa Supreme Court refused to reverse the trial court's rejection of a jury instruction on the issue of constitutional protection accorded to Plaintiff's use of marijuana as part of the practice of his religion. This is plain error under UDV, Sherbert, and Yoder. The Plaintiff presented evidence of his sacramental use of marijuana, the state produced no evidence that the Plaintiff had ever injured anyone, and the jury was not allowed to consider those facts. See Plaintiff's Exhibits #3 and #4 to the Plaintiff's Original Complaint (both introduced as evidence at the Plaintiff's retrial following the reversal of his conviction in State of Iowa v. Olsen, 315 N.W.2d 1 (1982).

As the court wrote in Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993):

Although a law targeting religious beliefs as such is never permissible, *McDaniel v. Paty*, *supra*, at 626 (plurality opinion); *Cantwell v. Connecticut*, *supra*, at 303-304, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, see *Employment Div., Dept. of Human Resources of Ore. v. Smith*, *supra*, at 878-879; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.

508 U.S. at 533, 113 S. Ct. at 2227, 124 L. Ed. 2d at 490.

Further, because it requires an evaluation of the particular justification for the killing, this ordinance represents a system of "individualized governmental assessment of the reasons for the relevant conduct," *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. at 884. As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Ibid.*, quoting *Bowen v. Roy*, 476 U.S. at 708 (opinion of Burger, C. J.). Respondent's application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious [*538] reasons. Thus, religious practice is being singled out for discriminatory treatment. *Id.*, at 722, and n.17 (STEVENS, J., concurring in part and concurring in result); *id.*, at 708 (opinion of Burger, C. J.); *United States v. Lee*, 455 U.S. 252, 264, n.3, 71 L. Ed. 2d 127, 102 S. Ct. 1051 (1982) (STEVENS, J., concurring in judgment).

508 U.S. at 537, 113 S. Ct. at 2229, 124 L. Ed. 2d at 493.

We turn next to a second requirement of the Free Exercise Clause, the rule that laws burdening religious practice must be of general applicability. *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. at 879-881. All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice. The Free Exercise Clause "protect[s] religious observers against unequal treatment," *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148, 94 L. Ed. 2d 190, 107 S. Ct. 1046 (1987) (STEVENS, J., concurring in judgment), and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.

508 U.S. at 542-543, 113 S. Ct. at 2231-2232, 124 L. Ed. 2d at 496.

The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not "water[ed] . . . down" but "really means what it says." *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. at 888.

508 U.S. at 546, 113 S. Ct. at 2233, 124 L. Ed. 2d at 498-499.

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." *Florida Star v. B. J. F.*, *supra*, at 541-542 (SCALIA, J., concurring in part and concurring in judgment) (citation omitted).

508 U.S. at 547, 113 S. Ct. at 2234, 124 L. Ed. 2d at 499.

The Defendant deprived the Plaintiff of the Fifth Amendment right to due process by failing to apply Sherbert and Yoder, and now deprives the Plaintiff of the Fourteenth Amendment as interpreted in Smith because Iowa allows

unrestricted medical use of marijuana in the State of Iowa. See Exhibit #18 attached to Plaintiff's Original Complaint, allowing two medical patients to use marijuana on the property of the Iowa State Capitol Building (both of these patients are supplied with 300 marijuana cigarettes each month by the federal government). Iowa's drug laws are not neutral toward religion (Iowa's drug laws include a religious exemption for peyote), and they are not generally applicable (Iowa's drug laws allow a medical exemption for marijuana). The State of Iowa cannot show that sacramental use of marijuana is more dangerous than the unrestricted medical use of marijuana it allows (the Plaintiff acknowledges that medical users must comply with state and federal laws, when and if there are any).

The Defendant deprived the Plaintiff of the Sixth Amendment right to be confronted with witnesses and facts of evidence showing a real injury and no witness or evidence was introduced at his state criminal trials (the only evidence the state presented was the state statute making marijuana illegal).

Constitutional Claim under Establishment Clause

In 2006, the Plaintiff contacted the Defendant to find out if the Defendant intended to continue the persecution of his church in the light of RFRA and UDV, to which the Defendant has responded that the Plaintiff will be arrested and prosecuted if the Plaintiff moves forward with the establishment of his religion. In the Plaintiff's correspondence with the Defendant, the Plaintiff outlined the steps he had taken to establish his religion in the State of Iowa. See Plaintiff's Exhibits #5, #6, and #7 to the Plaintiff's Original Complaint. The Plaintiff's right to establish his religion without interference from the government is guaranteed by the First Amendment as well as the Ninth and Amendment.

The Plaintiff's religion has been effectively destroyed by the State of Iowa and the Plaintiff's attempts to re-establish his religion have been met with opposition without any evidence that the Plaintiff's religion is a threat

to anyone's health and safety or any evidence that the Defendant has attempted a "least restrictive means" analysis that would still be required even if the Defendant could show a threat to someone's health and safety that will result from the practice of the Plaintiff's religion. The Defendant has never been required by any court to show an injury to someone's health and safety directly caused by the Plaintiff's use of marijuana. The facts in this case demonstrate that it would be impossible for the Defendants to prove an injury to someone's health and safety caused by the Plaintiff's use of marijuana.

The purpose of the Establishment Clause is to erect a wall of separation between church and state, unless there is an immediate threat to public health and safety that would justify a governmental intrusion.

In Everson v. Board of Education, 330 U.S. 1, 15-16, 67 S. Ct. 504, 511-512, 91 L. Ed. 711, 723 (1947), the U.S. Supreme Court wrote:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to [**512] teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State." *Reynolds v. United States*, *supra* at 164.

In Davis v. Beason, 133 U.S. 333, 342, 10 S. Ct. 299, 300, 33 L. Ed. 637, 640 (1890), the U.S. Supreme Court wrote:

The first amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit

legislation for the support of any religious tenets, or the modes of worship of any sect.

It is clear, that absent any injury to the equal rights of others, the Plaintiff has an absolute right to establish his religions without interference from the government. The Defendants cannot speculate as to some injury they imagine would occur. They must show an actual, real injury that has resulted from the Plaintiff's use of marijuana. The Plaintiff stopped using marijuana in 1990 in response to the U.S. Supreme Court's rejection of his Petition for Writ of Certiorari in Olsen v. DEA, 878 F.2d 1458 (D.C. Cir. 1989), cert. denied, 495 U.S. 906 (1990), and has not used it since that time due to the threat of arrest and prosecution. See Exhibit #7 to the Plaintiff's Original Complaint. Which of the Plaintiff's activities does the Defendant consider to be "illegal activity" as alleged in the States of Iowa's Motion to Dismiss?

Constitutional Claims under Equal Protection

The Defendant's reliance on the dicta regarding the Plaintiff's equal protection arguments in the lower court rulings prior to the U.S. Supreme Court ruling in UDV are misplaced because of the reasons previously stated and also because the U.S. Supreme Court did not repeat them in its decision in UDV. In fact, the U.S. Supreme Court in UDV found that equal protection was violated by extending a religious exemption for one religion while claiming that no others could be accommodated:

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 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. See 42 U.S.C. § 2000bb(a)(4). And in fact the Government has not offered evidence demonstrating that granting the UDV an exemption would cause the kind of administrative harm recognized as a compelling interest in *Lee*, *Hernandez*, and *Braunfeld*.

UDV, 546 U.S. at ___, 126 S. Ct. at 1224, 163 L. Ed. 2d at 1035.

Constitutional Claims under Ex Post Facto and Bill of Attainder

In Weaver v. Graham, 450 U.S. 24, 31 (1981), the United States Supreme Court wrote, "The critical question is whether the law changes the legal consequences of acts completed before its effective date." Clearly, the enactment of criminal statutes changed the legal consequences for members of the Ethiopian Zion Coptic which is "centuries old and has regularly used cannabis as its sacrament." Town v. State ex rel. Reno, 377 So.2d 648, 649 (Fla. 1979).

The enactment of Iowa's drug laws without accommodation for the members of the Ethiopian Zion Coptic Church also makes the life, liberty, and property of members of the Ethiopian Zion Coptic Church completely owned by the States and is a bill of attainder which has the effect of making members of the Ethiopian Zion Coptic Church slaves of the state with no rights to life, liberty, or property. See Landgraf v. USI Film Products, 511 U.S. 244, 266-268, 114 S. Ct. 1483, 1497-1498, 128 L. Ed. 2d 229, 252-254 (1994).

Constitutional Claims under Fourth, Fifth, and Fourteenth Amendments

"The right to acquire, enjoy, and dispose of property is declared in the constitutions of several states to be one of the inalienable rights of man; ..." Crowley v. Christensen, 137 U.S. 86, 90 (1890). "That rights in property are basic civil rights has long been recognized". Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972). "The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Silverman v United States, 365 U.S. 505, 511 (1961). In Nebbia v. New York, 291 U.S. 502, 545-546, 548 (1934), the U.S. Supreme Court wrote:

The XIV Amendment wholly disempowered the several States to "deprive any person of life, liberty, or property, without due process of law." The assurance of each of these things is the same. If now liberty or property may be struck down because of difficult circumstances, we must expect that hereafter every right must yield to the voice of an impatient majority when stirred by distressful exigency. Amid the turmoil of civil war Milligan was sentenced: happily this Court intervened. Constitutional guaranties are not to be "thrust to and fro and carried about with every wind of doctrine." They were intended to be immutable so long as within our charter. Rights shielded yesterday should remain indefeasible today

and tomorrow. Certain fundamentals have been set beyond experimentation; the Constitution has released them from control by the State. Again and again this Court has so declared.

If validity of the enactment depends upon emergency, then to sustain this conviction we must be able to affirm that an adequate one has been shown by competent evidence of essential facts. The asserted right is federal. Such rights may demand and often have received affirmation and protection here. They do not vanish simply because the power of the State is arrayed against them. Nor are they enjoyed in subjection to mere legislative findings.

In addition, we have emphasized that "at the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home." Soldal v. Cook County, 506 U.S. 56, 61 (1992). "Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands." Soldal v. Cook County, at page 70. See United States v. Carolene Products Co., 304 U.S. 144, 152, 58 S. Ct. 778, 783, 82 L. Ed. 1234, 1241 (1938) (footnote 4): "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See *Stromberg v. California*, 283 U.S. 359, 369-370; *Lovell v. Griffin*, 303 U.S. 444, 452."

The case cited by the Defendant, Helton v. Hunt, 330 F.3d 242 (4th Cir. 2003), is instructive because it recognizes that property is not "intrinsically illegal in character" without knowing the purpose for which the property is being used. Helton v. Hunt, at page 247. In the case of marijuana, simply looking at marijuana does not reveal whether the marijuana is being used for medical purposes under the state medical marijuana statute or whether the marijuana is being used as the sacrament of the Plaintiff's religion.

Constitutional Rights under the Ninth Amendment

As stated in the Plaintiff's Original Complaint, the plaintiff has an inalienable right to possess the plants the creator provided. The people do not have the authority to empower the government to take away this natural right.

It would have been unthinkable to the authors of the Declaration of Independence or the Constitution of the United States that government would one day tell them that growing marijuana is illegal. "In 1682, Virginia tried to encourage hemp production by making hemp legal tender for as much as one-fourth of the farmer's debts. Similar laws were enacted in Maryland in 1683 and by Pennsylvania in 1706." Earnest L. Abel, *Marihuana: The First Twelve Thousand Years* (McGraw-Hill Book Company, 1982), at pages 77-78. "Thomas Jefferson was one of Virginia's major hemp producers." *Ibid.* at page 82. Marijuana "was recognized at the standard commodity for the first three or four decades of the new American republic." *Ibid.* at page 90. The growing, use and possession of plants is a fundamental freedom and liberty. See, Loving v. Virginia, 388 U.S. 1, 12, 87 S. Ct. 1817, 1824, 18 L. Ed. 2d 1010, 1018 (1967) (finding that marriage is a fundamental freedom and liberty, which the state cannot deny to an individual without violating due process of law). And see, Shapiro v. Thompson, 394 U.S. 618, 634, 89 S. Ct. 1322, 1331, 22 L. Ed. 2d 600, 615 (1969) (finding a fundamental liberty interest in travel). And see, Stanley v. Georgia, 394 U.S. 557, 564, 89 S. Ct. 1243, 1247-1248, 22 L. Ed. 2d 542, 549 (1969) (recognizing a fundamental right to privacy - "For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy").

Constitutional & Statutory Claims under RLUIPA and Cutter

The Defendant's reliance on Murphy v. Missouri Department of Corrections, 372 F.3d 979 (8th Cir. 2004), is misplaced. In Murphy, at page 987, the court said, "[w]e required the government to meet a higher burden than the rational relation test applicable in constitutional claim cases." What this means is that RLUIPA requires a higher standard of review than previously applied in the context of prison cases. As the Murphy court explained at page 982:

Constitutional claims that would otherwise receive strict scrutiny analysis if raised by a member of the general population are evaluated under a lesser standard of scrutiny in the context of a

prison setting. *Turner v. Safley*, 482 U.S. 78, 81, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987).

Therefore, RLUIPA only applies a higher standard to state laws that are neutral toward religion and of general applicability. In this case, where Iowa's drug laws are not neutral toward religion because of the peyote exemption and are not generally applicable because of the medical exemption of marijuana, RLUIPA simply guarantees the Sherbert and Yoder standard of review required by Smith and Flores.

In Cutter v. Wilkinson, 544 U.S. 709, 715, 125 S. Ct. 2113, 2118, 161 L. Ed. 2d 1020, 1030 (2005), the U.S. Supreme Court wrote:

"Universal" in its coverage, RFRA "applied to all Federal and State law," *id.*, at 516, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (quoting former § 2000bb-3(a)), but notably lacked a Commerce Clause underpinning or a Spending Clause limitation to recipients of federal funds.

Less sweeping than RFRA, and invoking federal authority under the Spending and Commerce Clauses, RLUIPA targets two areas: Section 2 of the Act concerns land-use regulation, 42 U.S.C. § 2000cc; n3 § 3 relates to religious exercise by institutionalized persons, § 2000cc-1.

42 U.S.C. § 2000cc(a)(1) states: "No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution-- (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest."

42 U.S.C. § 2000cc-1(a) states: "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that 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. § 2000cc-2(b) states: "If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2 [42 USCS § 2000cc], the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion."

42 U.S.C. § 2000cc-3(g) states: "This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution."

What this means is that Congress has the power to pass legislation making the receipt of federal funding conditional. It is beyond doubt that Congress' intention in passing RFRA was to impose the standards of Sherbert and Yoder on state legislation that is neutral toward religion and of general applicability. The Plaintiff has already shown that Iowa's drug laws are not neutral nor generally applicable, but, if the state of Iowa's drug laws were neutral and generally applicable, RLUIPA would still require the State of Iowa to apply Sherbert and Yoder analysis for two reasons: (1) the Defendant is preventing the Plaintiff from using his land for religious purposes; and (2) the Defendant is using federal funding in the enforcement of Iowa drug laws. It would be absurd to think that the Sherbert and Yoder tests apply to pretrial detention and prison, but not to arrest and prosecution.

In South Dakota v. Dole, 483, 203, 206-207 (1987), the court wrote:

The Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. I, § 8, cl. 1. Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal

statutory and administrative directives." *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C. J.). See *Lau v. Nichols*, 414 U.S. 563, 569 (1974); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958); *Oklahoma v. Civil Service Comm'n*, 330 U.S. 127, 143-144 (1947); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937). The breadth of this power was made clear in *United States v. Butler*, 297 U.S. 1, 66 (1936), where the Court, resolving a longstanding debate over the scope of the Spending Clause, determined that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." Thus, objectives not thought to be within Article I's "enumerated legislative fields," *id.*, at 65, may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.

The Plaintiff's right to use his land for religious purposes is guaranteed by RLUIPA as well as the First, Fourth, Fifth, and Ninth Amendments. The Defendant is precluded from interfering with the Plaintiff's establishment of religion on his land absent a showing of an immediate threat to another person's health or safety (which would require a fact finding hearing in order to comply with Due Process - see Helton v Hunt).

The Defendant cannot use federal funding to flagrantly ignore federal statutes (RFRA and RLUIPA), or federal case law (Sherbert and Yoder).

The Defendant correctly points out that RLUIPA would not protect the owner of property from murdering someone, since murder adversely affects the health and safety of another person. Comparing the use of marijuana to murder is not a fair comparison because the federal commission appointed by the Controlled Substances Act to recommend the scheduling of marijuana found that marijuana had never killed anyone and was not a threat to public health and safety sufficient to justify criminalizing its use. The federal DEA has admitted in 1986 when synthetic THC was first made a legal prescription drug, in 1988 when the DEA Administrative Law Judge recommended rescheduling for medical use, and more recently when synthetic THC was again rescheduled to Schedule III for medical use, that marijuana never killed or injured a single human being in 5000 years of recorded history. A higher standard of review applies when the state can show no threat to public health and safety sufficient to override the

Plaintiff's property rights. The authorities cited by the Defendant claiming that no showing of a threat to public health and safety is required precede the ruling in UDV and are overruled by it.

State Law Claims

The Plaintiff erroneously made state law claims in the Plaintiff's Original Complaint and agrees with the Defendant that these claims are not properly before this court.

Conclusion

In Watson v. Jones, 80 U.S. 679, 728, 20 L. Ed. 666, 676 (1871), the Supreme Court wrote: "In this country the full and free right to entertain any religious belief, to practice any religious principle and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." What this means is that without showing an injury to someone's personal rights, the state cannot prohibit the sacramental use of marijuana. This is a how the law has been interpreted in the past and how it should be interpreted now.

Respectfully submitted this 20th day of February, 2007

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing memorandum in support of response to the state's motion to dismiss were mailed by first class mail on this 20th day of February, 2007 to each of the following defendants:

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