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

CARL ERIC OLSEN,	*	
	*	
Plaintiff,	*	No. 4-07-CV-00023-JAJ-RAW
	*	
v.	*	
	*	
ALBERTO R. GONZALES, et al.,	*	
	*	
Defendants.	*	

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S RESPONSE TO
FEDERAL DEFENDANTS' MOTION TO DISMISS

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MEMORANDUM OF LAW IN SUPPORT OF
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INTRODUCTION

The Federal Defendants have provided the Court with a detailed description of the Plaintiff's long line of previous legal efforts seeking protection of the Plaintiff's Religious Freedom from assaults by the Federal Defendants. This long line of previous legal efforts shows a history of non-violent, peaceful protest consistent with the Plaintiff's religious beliefs and practice of acting morally. The Federal Defendants carefully detail every injury and assault they have inflicted on the Plaintiff

The Plaintiff has suffered irreparable harm because the Federal Defendants have completely extinguished the Plaintiff's Religious Freedom and are now preventing the Plaintiff from Establishing and Exercising his Religious Freedom under the Religious Freedom Restoration Act (RFRA) of 1993 as amended by the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000 and the Constitution of the United States. 42 U.S.C. §§ 2000bb et seq. and 42 U.S.C. §§ 2000cc et seq.

On November 24, 2006 the Plaintiff sent the Federal Defendants a certified letter informing them of his intention to move forward with the Establishment and Exercise of his Religious Freedom after the United States Supreme Court made

it clearly apparent that the RFRA applies to federal drug laws in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006), (UDV hereafter). See Exhibit #7G1-7G2 attached to Plaintiff's Original Complaint. When the Plaintiff did not receive a response to his certified letter within a reasonable amount of time, the Plaintiff moved forward with this complaint for Declaratory and Injunctive relief.

The Federal Defendants point to cases involving the Sacramental use of Marijuana decided after the passage of the RFRA but preceding the decision in UDV which found that the RFRA did not require the compelling interest test that was required in UDV, most notably United States v. Brown, No. 95-1616 (8th Cir. December 12, 1995) and Lepp v. Gonzales, No C-05-0566 VRW (N.D. Cal. August 2, 2005). UDV overturns these cases.

In United States v. Valrey, No. CR96-549Z (W.D. Wash., February 22, 2000), the court did apply the compelling interest tests of Sherbert v. Verner and Wisconsin v. Yoder, concluding: "The Court will allow Mr. Valrey's personal use and possession of marijuana exclusively in connection with his practice of his religion." In United States v. Forchion, No. 04-949-ALL (E.D. Penn., July 22, 2005), the court remanded the case because the sentence did not take into consideration the RFRA:

> Forchion and Duff maintain that Rastafarians are free to smoke marijuana in national parks, but the First Amendment does not guarantee any such right. To the extent that RFRA creates a potential defense to the possession charges of which they were convicted, Forchion and Duff failed to establish that defense because they did not prove that the criminalization of marijuana possession in Independence National Historical Park substantially burdens the exercise of Rastafarianism. Though their failure to establish a RFRA defense requires us to affirm their convictions, we shall vacate their sentences and remand this case for further proceedings because the magistrate judge did not consider whether six of the probation conditions that he imposed violate the Constitution and/or RFRA.

See also United States v. Bauer, 84 F.3d 1549 (9th Cir. 1996) (personal use and possession protected by RFRA); and see Guam v. Guerrero, 290 F.3d 1210 (9th Cir. 2002) (follows United States v. Bauer as to personal use and possession, but no

Sherbet v. Verner and Wisconsin v. Yoder tests were applied to issue of importation and distribution). The decision in UDV goes beyond any of these cases because it protects the unrestricted importation of a Schedule I drug for sacramental use.

The Purpose of the Religious Freedom Restoration Act is: (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsen v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where the free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened. 42 USCS § 2000bb(b).

The Federal Defendants have stolen the Plaintiff's property, physically assaulted the Plaintiff, taken away the liberty of the Plaintiff, and now insist that the Plaintiff be forever barred from practicing his religion. The Plaintiff has harmed no one by his Establishment and Exercise of Religion.

To add insult to injury, the Federal Defendants now claim that the Plaintiff's Grievances are not ripe for review because the Plaintiff has abandoned his religious exercise and will not expose himself to further assault and injury by the Federal Defendants. The facts that the Federal Defendants have assaulted the Plaintiff in the past, now insist that there is no Religious Freedom to use Marijuana as a Sacrament provided by the RFRA, and have refused to answer the Plaintiff when the Plaintiff presented them with clear and convincing evidence that the law has changed, proves a prima facie case under the RFRA.

The Federal Defendants also insult the People of the United States, by completely ignoring the Will of the People as expressed through their elected representative through the enactment by Congress of the Religious Freedom Restoration Act (RFRA) of 1993 as amended by the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000.

The RFRA and the RLUIPA provide the Plaintiff with greater protection than was previously available under United States Supreme Court jurisprudence prior to the decision in Employment Division v. Smith, 494 U.S. 872 (1990).

The people of the United States strongly rebuked the United States Supreme Court through their elected representatives when Congress unanimously passed the Religious Freedom Restoration Act (RFRA) of 1993 to overturn the ruling in Employment Division v. Smith. The Plaintiff now seeks redress for the crimes the Federal Defendants have committed against the Plaintiff and are now committing against the People of the United States by refusing to respect the RFRA.

BACKGROUND

The Federal Defendants have provided the Court with the details of the non-violent, peaceful protest of the Plaintiff and the many assaults which the Federal Defendants have made upon the Plaintiff. Not once in the description provided by the Federal Defendants is there any mention of an injury to any person because of the Plaintiff's Sacramental use of Marijuana. The Federal Defendants do not think it is necessary for them to prove actual harm to anyone because they say that the Controlled Substances Act of 1970 (CSA hereafter) is sufficient proof of actual harm.

On the other hand, the Federal Defendants have provided the Court with a detailed description of their attempts to destroy an emerging religious movement in the United States. The Federal Defendants have inflicted actual harm on the Plaintiff.

What is clear from all of the cases cited by the Federal Defendants is that there is no compelling interest test of Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972), mandated by the RFRA and the RLUIPA. The following quote from Olsen v. DEA, 878 F.2d 1458, 1467 (D.C. Cir. 1989), "Beginning with Leary v. United States, 383 F.2d 851 (5th Cir. 1967)", proves the Federal Defendants have never been held to the strict

scrutiny required by UDV. The only evidence the Federal Defendants have been required to prove prior to UDV was the mere existence of the drug law:

> 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).

Not one of these cases applied the compelling interest test of Sherbert v. Verner and Wisconsin v. Yoder which are now mandated by the RFRA and the RLUIPA. All of these cases employed a "rational basis test" type of analysis which assumed the Federal Controlled Substances Act was proof that Congress did not intend to allow adjudication of compelling interest and least restrictive means which could allow for an exception for the Sacramental use of Marijuana.

Under the strict scrutiny required by UDV, the Court must consider the finding of fact made by the Commission on Marihuana and Drug Abuse established by the CSA to recommend marijuana's final placement or removal from the CSA. The Commission found the fact that marijuana is not a threat to public health and safety. This is a finding of fact under the very statute the Federal Defendants are claiming supports their compelling interest in assaulting the Petitioner. Consideration of this fact is mandatory under the compelling interest test of the RFRA and the RLUIPA. The First Report of the National Commission on Marihuana and Drug Abuse, at page 150 states, "marihuana use is not such a grave problem that individuals who smoke marihuana, and possess it for that purpose, should be subject to criminal procedures." See Public Law 91-513 - Oct. 27, 1970 [84 Stat. 1280-1281] Part F - Advisory Commission - Establishment of Commission on Marihuana and Drug Abuse – SEC. 601. And see, H.R. Rep. No. 91-1444, October 10, 1970, 1970 USCCAN 4566, at pages 4578-1580 (explaining the uncertainty of Congress in placing marihuana in Schedule I of

the CSA and the temporary nature of this placement while the Commission worked on its report). At page 56-57, the Commission wrote:

> A large amount of research has been performed in man and animals regarding the immediate effect of marijuana on bodily processes. No conclusive evidence exist of any physical damage, disturbances of bodily processes or proven human fatalities attributable solely to even very high doses of marijuana. Recently, animal studies demonstrated a relatively large margin of safety between the psychoactive dose and the physical and behavioral toxic and lethal dose. Such studies seem to indicate that safe human study could be undertaken over a wide range of doses.

Under the strict scrutiny required by UDV, the Court must consider the findings of fact made by the Chief Administrative Law Judge for the DEA, established by the Federal CSA as the person of authority to review the classification of marijuana. Judge Young found as a fact that "Marijuana, in its natural form, is one of the safest therapeutically active substances known to man." This is a finding of fact under the very statute the Federal Defendants are claiming supports their compelling interest in assaulting the Plaintiff. The consideration of this fact is now mandatory under the compelling interest test of the RFRA and the RLUIPA. See "In The Matter of Marijuana Rescheduling", DEA Docket No. 86-22, September 6, 1988. See Exhibit #1 attached to Plaintiff's Original Complaint.

Under the strict scrutiny required by UDV, the Court must consider the fact that the principle psychoactive ingredient in marijuana has been rescheduled twice because of its safety in medical use. 51 FR 17476, May 13, 1986; 64 FR 35928, July 2, 1999.

Under the strict scrutiny required by UDV, the Court must consider the fact that the Federal Defendants are currently supplying medical patients with marijuana under the federal "Compassionate Use Program." The Federal Defendants have been supplying two Iowans with 300 rolled marijuana cigarettes per month for the past 15 years. These are facts that must now be considered under the mandatory compelling interest test of the RFRA and the RLUIPA.

The Plaintiff has never injured anyone by religious Establishment and Exercise and these facts must now be considered under the compelling interest test mandated by the RFRA and the RLUIPA.

All of these facts (the Commission on Marihuana and Drug Abuse findings of fact, the 1988 DEA findings of fact, the 1986 and 1999 DEA rescheduling of THC, the non-violent history of the Plaintiff's protests, and the lack of harm caused by the Plaintiff's Sacramental use of Marijuana) which come from the Federal Defendants themselves, prove that the Plaintiff cannot injure anyone by using Marijuana as his Sacrament, because these facts prove that no one has ever been injured from using Marijuana.

The cases cited by the Federal Defendants show that the Plaintiff has never abandoned his religious freedom claims, the Plaintiff is sincere, and the Federal Defendants have inflicted actual injury on the Plaintiff.

ARGUMENT

I. THE PLAINTIFF'S CLAIMS ARE RIPE FOR REVIEW

The Plaintiff abandoned his religious exercise because the Federal Defendants gave the Plaintiff the choice ". . . of either abandoning his religious principle or facing criminal prosecution." Braunfeld v. Brown, 633 U.S. 599, 605 (1961). "[W]hen fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not 'first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute.' *Steffel v. Thompson*, 415 U.S., at 459." Babbitt v. United Farm Workers National Union, 442 U.S. 289, 302 (1979). More recently, in Medimmune v. Genentech, 549 U.S. ___, 127 S. Ct. 764, 772-773, 166 L. Ed. 2d 604, 616 (2007), the United States Supreme Court explained this Court's jurisdiction under Article III:

> Our analysis must begin with the recognition that, where threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced. The

> plaintiff’s own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction. For example, in *Terrace v. Thompson*, 263U. S. 197 (1923), the State threatened the plaintiff with forfeiture of his farm, fines, and penalties if he entered into a lease with an alien in violation of the State’s anti alien land law. Given this genuine threat of enforcement, we did not require, as a prerequisite to testing the validity of the law in a suit for injunction, that the plaintiff bet the farm, so to speak, by taking the violative action. *Id.*, at 216. See also, *e.g., Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926); *Ex parte Young*, 209 U. S. 123 (1908). Likewise, in *Steffel v. Thompson*, 415 U. S. 452 (1974), we did not require the plaintiff to proceed to distribute handbills and risk actual prosecution before he could seek a declaratory judgment regarding the constitutionality of a state statute prohibiting such distribution. *Id.*, at 458–460. As then–Justice Rehnquist put it in his concurrence, “the declaratory judgment procedure is an alternative to pursuit of the arguably illegal activity.” *Id.*, at 480. In each of these cases, the plaintiff had eliminated the imminent threat of harm by simply not doing what he claimed the right to do (enter into a lease, or distribute handbills at the shopping center). That did not preclude subject-matter jurisdiction because the threat-eliminating behavior was effectively coerced. See *Terrace, supra*, at 215– 216; *Steffel, supra*, at 459. The dilemma posed by that coercion—putting the challenger to the choice between abandoning his rights or risking prosecution—is “a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate.” *Abbott Laboratories v. Gardner*, 387 U. S. 136, 152 (1967).

The cases cited by the Federal Defendants do not involve a fundamental right protected by the RFRA and the RLUIPA. Public Water Supply District No. 8 of Clay County, Missouri v. City of Kearney, Missouri, 401 F.3d 930, 931 (8th Cir. 2005) (“whether Public Water Supply District Number 8 or the City of Kearney will supply water to certain property owners in Missouri”); County of Mille Lacs v. Benjamin, 361 F.3d 460, 462 (8th Cir. 2004) (“the legal status of the boundaries of the Mille Lacs Band of Chippewa Indians”); Clinton v. Acequia, 94 F.3d 568, 572 (9th Cir. 1996) (“breach of contract claim”).

The last legal effort by the Plaintiff resulted in his case being dismissed by the United States Supreme Court one week after the ruling in Employment Division v. Smith, 494 U.S. 872 (1990). Olsen v. DEA, 878 F.2d 1458 (DC Cir. 1989), cert denied, 495 U.S. 906 (1990).

The Plaintiff realized that the United States Supreme Court had made what would become an unpopular decision in Employment Division v. Smith. The

Plaintiff realized at that time, although his day had not yet come, the Plaintiff's day was surely coming. Rather than risk continued arrest and prosecution, the Plaintiff abandoned his religious exercise at that time. The issue in this case is not the same issue raised in the Plaintiff's long line of previous legal efforts. The issue in this case is the complete and total destruction of the Plaintiff's religion without any proof that the Plaintiff has ever injured anyone. The decision in Employment Division v. Smith encouraged the Federal Defendants to continue their assault of the Plaintiff. The Plaintiff has waited patiently for the law to become settled in this area. The RFRA and the RLUIPA, along with the interpretations of these laws in Cutter v. Wilkinson, 544 U.S. 709 (2005), and Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006), have settled the law in this area and the Plaintiff's claims are now ripe for review.

The Federal Defendants claim they are not threatening the Plaintiff and that the Plaintiff has voluntarily stopped practicing his religion as if to say the Plaintiff is now free to move forward with the Establishment and Exercise of his Religion. The Plaintiff would be foolish to rely on such an assumption and cannot move forward in light of the Federal Defendants prior seizure the Plaintiff's property, kidnapping of the Plaintiff, and incarceration of the Plaintiff. The Plaintiff has not voluntarily stopped practicing his religion. If the Federal Defendants will stipulate they will never do these things again and allow the Plaintiff's peaceful use of Marijuana as his Sacrament, the Plaintiff will dismiss the Federal Defendants. In light of the detailed description of the numerous assaults the Federal Defendants have made on the Plaintiff, the Federal Defendants are being disingenuous and lack credibility. The Plaintiff has suffered enough injury to have a legitimate fear of threat and imminent danger from the Federal Defendants sufficient to justify the abandonment of his Establishment and Exercise of Religious Freedom pending the outcome of this litigation.

Under the facts alleged, there is a substantial continuing controversy between the parties. The plaintiff has alleged facts from which the continuation of the dispute may be reasonably inferred. The continuing controversy is not conjectural, hypothetical, or contingent; it is real and immediate.

II. COLLATERAL ESTOPPEL DOES NOT APPLY

"To determine the appropriate application of collateral estoppel . . . necessitates three further inquiries: . . . first, whether the issues presented by this litigation are in substance the same . . .; second, whether controlling facts or legal principles have changed significantly . . .;and finally, whether other special circumstances warrant an exception to the normal rules of preclusion." Montana v. United States, 440 U.S. 147, 155 (1979). "[C]hanges in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues . . ." Montana, at 159. "Unreflective invocation of collateral estoppel against parties with an ongoing interest in constitutional issues could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical." Montana, at 163. "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." Montana, at 164.

A. The RFRA represents a significant change in legal principles.

In Employment Division v. Smith, 494 U.S. 872, 888-889, 110 S. Ct. 1595, 1605-1606, 108 L. Ed. 2d 876, 891-892 (1990), the Supreme Court indirectly guaranteed the Plaintiff's right to bring this action by explaining what would happen if the compelling interest test were applied to the Plaintiff:

> If the "compelling interest" test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if "compelling interest" really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the

> society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld v. Brown*, 366 U.S., at 606, and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind -- ranging from compulsory military service, see, *e. g., Gillette v. United States*, 401 U.S. 437 (1971), to the payment of taxes, see, *e. g., United States v. Lee*, *supra*; to health and safety regulation such as manslaughter and child neglect laws, see, *e. g., Funkhouser v. State*, 763 P. 2d 695 (Okla. Crim. App. 1988), compulsory vaccination laws, see, *e. g., Cude v. State*, 237 Ark. 927, 377 S. W. 2d 816 (1964), drug laws, see, *e. g.,* ***Olsen v. Drug Enforcement Administration***, 279 U. S. App. D. C. 1, 878 F. 2d 1458 (1989), and traffic laws, see *Cox v. New Hampshire*, 312 U.S. 569 (1941); to social welfare legislation such as minimum wage laws, see *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985), child labor laws, see *Prince v. Massachusetts*, 321 U.S. 158 (1944), animal cruelty laws, see, *e. g., Church of the Lukumi Babalu Aye Inc. v. City of Hialeah*, 723 F. Supp. 1467 (SD Fla. 1989), cf. *State v. Massey*, 229 N. C. 734, 51 S. E. 2d 179, appeal dism'd, 336 U.S. 942 (1949), environmental protection laws, [**1606] see *United States v. Little*, 638 F. Supp. 337 (Mont. 1986), and laws providing for equality of opportunity for the races, see, *e. g., Bob Jones University v. United States*, 461 U.S. 574, 603-604 (1983). The First Amendment's protection of religious liberty does not require this. (footnote omitted and emphasis added)

Seven years later, in <u>City of Boerne v. P.F. Flores</u>, 521 U.S. 507; 532, 117 S. Ct. 2157; 2170, 138 L. Ed. 2d 624, 646-647 (1997), the Supreme Court explained the effect of the RFRA's mandate of the compelling interest test:

> Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA's restrictions apply to every agency and official of the Federal, State, and local Governments. 42 U.S.C. § 2000bb-2(1). RFRA applies to all federal and state law, statutory or otherwise, whether adopted before or after its enactment. § 2000bb-3(a). RFRA has no termination date or termination mechanism. Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.

The Eighth Circuit Court of Appeals recognized the expansive protection of the RFRA in <u>Christians v. Crystal Evangelical Free Church</u>, 82 F.3d 1407, 1417 (8th Cir. 1996):

> [T]he RFRA is more protective of the right of free exercise than Smith, see, e.g., Flores v. City of Boerne, 73 F.3d at 1361

> (describing RFRA as 'a substantive expansion of First Amendment doctrine' and in effect 'an assignment by Congress of a higher value to free-exercise-secured freedoms than the value assigned by the courts-- that is, strict scrutiny versus a form of intermediate scrutiny') . . .

In Christians v. Crystal Evangelical Free Church, 521 U.S. 1114, 117 S. Ct. 2502, 138 L. Ed. 2d 1007 (1997), the Supreme Court wrote, "The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of *City of Boerne v. Flores*, 521 U.S. 507, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997)." In Christians v. Crystal Evangelical Free Church, 141 F.3d 854, 856 (8th Cir. 1998), the Eighth Circuit affirmed its previous finding that: "RFRA is constitutional as applied to federal law." At 141 F.3d, page 860, the Eighth Circuit Court of Appeals wrote:

> While Congress cannot, through ordinary legislation, amend the Court's authoritative interpretation of the Constitution, "congressional disapproval of a Supreme Court decision does not impair the power of Congress to legislate a different result, as long as Congress had that power in the first place." United States v. Marengo County Comm'n, 731 F.2d 1546, 1562 (11th Cir. 1984); see also Flores, 117 S. Ct. at 2171 ("When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution. This has been clear from the early days of the Republic."). Congress has often provided statutory protection of individual liberties that exceed the Supreme Court's interpretation of constitutional protection. See, e.g., Privacy Protection Act of 1980, 42 U.S.C. §§ 2000aa to 2000aa-12 (reacting to Zurcher v. Stanford Daily, 436 U.S. 547, 56 L. Ed. 2d 525, 98 S. Ct. 1970 (1978), and providing journalists with greater protection against searches and seizures); National Defense Authorization Act for Fiscal Years 1988 and 1989, § 508, 10 U.S.C. § 774 (reacting to Goldman v. Weinberger, 475 U.S. 503, 89 L. Ed. 2d 478, 106 S. Ct. 1310 (1986), and providing that members of military were entitled to wear religious headgear); cf Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (reacting to Geduldig v. Aiello, 417 U.S. 484, 41 L. Ed. 2d 256, 94 S. Ct. 2485 (1974), and equating employment discrimination based on pregnancy with employment discrimination based on gender). Because Congress need not agree with everything the Supreme Court does in order for its legislation to pass constitutional muster, we conclude that RFRA is not contrary to the Constitution merely because Congress disagreed with the Smith Court's interpretation of the Free Exercise Clause.

Congress enacted the CSA and Congress has the authority to amend it. The Federal CSA is now amended with a religious freedom component that was not available to the Plaintiff in any previous case.

In Cutter v. Wilkinson, 544 U.S. 709, 714, 125 S. Ct. 2113, 2118, 161 L. Ed. 2d 1020, 1029-1030 (2005), the Supreme Court wrote:

> The Court recognized, however, that the political branches could shield religious exercise through legislative accommodation, for example, by making an exception to proscriptive drug laws for sacramental peyote use.

In fact, Congress has chosen to make an exception to the proscriptive drug laws for sacramental use of peyote. Codified at 42 U.S.C. § 1996a.

In Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, ___, 126 S. Ct. 1211, 1222, 163 L. Ed. 2d 1017, 1033-1034 (2006), the Supreme Court wrote:

> The Government argues that the existence of a congressional exemption for peyote does not indicate that the Controlled Substances Act is amenable to *judicially crafted* exceptions. RFRA, however, plainly contemplates that courts would recognize exceptions -- that is how the law works. See 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"). Congress' role in the peyote exemption -- and the Executive's, see 21 CFR § 1307.31 (2005) -- confirms that the findings in the Controlled Substances Act do not preclude exceptions altogether; RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress.

In Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, ___, 126 S. Ct. 1211, 1225, 163 L. Ed. 2d 1017, 1037 (2006), the Supreme Court wrote:

> The Government repeatedly invokes Congress' findings and purposes underlying the Controlled Substances Act, but Congress had a reason for enacting RFRA, too. Congress recognized that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise," and legislated "the compelling interest test" as the means for the courts to "strike sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. §§ 2000bb(a)(2), (5).

See also, Navajo Nation v. Forest Service, No. 06-15371, No. 06-15436, No. 06-15455 (9th Cir. March 12, 2007), pages 12-17:

> In 1997, in *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997), the Supreme Court held RFRA unconstitutional as applied to state and local governments because it exceeded Congress's authority under § 5 of the Fourteenth Amendment. *Id*. at 529, 534-35. The Court did not, however, invalidate RFRA as applied to the federal government. *See Guam v. Guerrero*, 290 F.3d 1210, 1220-21 (9th Cir. 2002) (holding RFRA constitutional as applied to the federal government). Three years later, in response to *City of Boerne*, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc *et seq.*). RLUIPA prohibits state and local governments from imposing substantial burdens on the exercise of religion through prisoner or land-use regulations. 42 U.S.C. §§ 2000cc, 2000cc-1. In addition, RLUIPA replaced RFRA's original, constitution-based definition of "exercise of religion" with the broader definition quoted above. RLUIPA §§ 7-8, 114 Stat. at 806-07. Under RLUIPA, and under RFRA after its amendment by RLUIPA in 2000, "exercise of religion" is defined to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb-2(4), 2000cc-5(7)(A).
>
> In several ways, RFRA provides greater protection for religious practices than did the Supreme Court's pre-*Smith* free exercise cases. First, as we have previously noted, RFRA "goes beyond the constitutional language that forbids the 'prohibiting' of the free exercise of religion and uses the broader verb 'burden': a government may burden religion only on the terms set out by the new statute." *United States v. Bauer*, 84 F.3d 1549, 1558 (9th Cir. 1996) [*14] (as amended). *Cf*. U.S. Const. amd. 1 ("Congress shall make no law . . . prohibiting the free exercise [of religion]."); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988) ("The crucial word in the constitutional text is 'prohibit': 'For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'" (quoting *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring))).
>
> Second, as the Supreme Court noted in *City of Boerne*, RFRA provides stronger protection for free exercise than the First Amendment did under the pre-*Smith* cases because "the Act imposes in every case a least restrictive means requirement -- a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify." 521 U.S. at 535.
>
> Third, RFRA provides broader protection for free exercise because it applies *Sherbert*'s compelling interest test "in all cases" where the free exercise of religion is substantially burdened. 42 U.S.C. § 2000bb(b). Prior to *Smith*, the Court had refused to apply the compelling interest analysis in various contexts, exempting entire classes of free exercise cases from such heightened scrutiny. *Smith*, 494 U.S. at 883 ("In recent years, we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at

> all."); *see, e.g., O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987) (not applicable to prison regulations); *Bowen v. Roy*, 476 U.S. 693, 707, 106 S. Ct. 2147, 90 L. Ed. 2d 735 (1986) (Burger, J., for plurality) (not applicable in enforcing "facially neutral and uniformly applicable requirement for the administration of welfare programs"); *Goldman v. Weinberger*, 475 U.S. 503, 506-07, 106 S. Ct. 1310, 89 L. Ed. 2d 478 (1986) (not applicable to military regulations).
>
> Finally, and perhaps most important, Congress expanded the statutory protection for religious exercise in 2000 by amending RFRA's definition of "exercise of religion." Under the amended definition -- "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" -- RFRA now protects a broader range of religious conduct than the Supreme Court's [*16] interpretation of "exercise of religion" under the First Amendment. *See Guru Nanak Sikh Soc'y v. County of Sutter*, 456 F.3d 978, 995 n.21 (9th Cir. 2006) (noting same). To the extent that our RFRA cases prior to RLUIPA depended on a narrower definition of "religious exercise," those cases are no longer good law. *See, e.g., Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995) (burden must prevent adherent "from engaging in conduct or having a religious experience which the faith mandates" and must be "an interference with a tenet or belief that is central to religious doctrine" (quoting *Graham v. Commissioner*, 822 F.2d 844, 850-51 (9th Cir. 1987)); *Stefanow v. McFadden*, 103 F.3d 1466, 1471 (9th Cir. 1996) (no substantial burden because prisoner was not prevented from "engaging in any practices mandated by his religion"); *Goehring v. Brophy*, 94 F.3d 1294, 1299 (9th Cir. 1996) (plaintiffs failed to establish "a substantial burden on a central tenet of their religion"). The district court in this case therefore erred by disregarding the amended definition and requiring Appellants to prove that the proposed [*17] action would prevent them "from engaging in conduct or having a religious experience *which the faith mandates*." 408 F. Supp. 2d at 904 (quoting *Worldwide Church of God, Inc. v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1121 (9th Cir. 2000), decided before RLUIPA's passage) (emphasis added).

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006) (UDV hereafter) applied a different standard than previously applied to the Plaintiff, applying the compelling interest tests from Sherbert v. Verner and Wisconsin v. Yoder to the drug laws. This fact based test is absent in previous cases involving the Plaintiff because there is no mention of the findings of the Commission on Marihuana and Drug Abuse established by the Federal CSA (finding insufficient threat to public health and safety), and there is no mention of the 1988 findings of fact of the DEA Chief Administrative Law Judge in Olsen v. DEA, 878 F.2d 1458 (D.C. Cir. 1989) (emphasizing marijuana's record of safety). The Federal Defendants did

not have to justify their application of the CSA to the Plaintiff in any previous case. The only evidence the Federal Defendants produced was the bare fact of the CSA itself. They did not have to produce any evidence that the Plaintiff had actually harmed anyone by his Sacramental use of Marijuana. These are the fact based tests missing from the long line of previous efforts by the Plaintiff and they are required under Sherbert v. Verner and Wisconsin v. Yoder and now made applicable to the Federal CSA through the RFRA and the RLUIPA.

Finally, as the Federal Defendants point out, the lower court rulings in UDV approved of the decisions in Olsen v. DEA, 878 F.2d 1458 (D.C. Cir. 1989), Olsen v. State of Iowa, 808 F.2d 652 (8th Cir. 1986), United States v. Rush, 738 F.2d 497 (1st Cir. 1984), and United States v. Middleton, 690 F.2d 820 (11th Cir. 1982), but the U.S. Supreme Court did not follow these lower courts and did not lend its agreement to any of these cases. The United States Supreme Court could not approve of the decisions in any of these cases because the compelling interest test mandated by the RFRA and the RLUIPA was not applied in any of them. Attached to this pleading is an Affidavit the Plaintiff in the UDV case filed on September 7, 2005, asking the U.S. Supreme Court to do exactly what it did, ignore the dicta regarding the Plaintiff's prior cases in the lower court decisions in UDV.

B. Medical marijuana legislation in eleven states allowing personal cultivation represents a significant change in social mores and the Federal Defendants have been supplying patients with marijuana in rolled cigarette form continuously for the past 30 years

As the Supreme Court noted in Montana v. United States, 440 U.S. 147, 155 (1979), "Unreflective invocation of collateral estoppel against parties with an ongoing interest in constitutional issues could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical." In 1854 the Eighth Circuit decided that Dred Scott was not a human being thus legitimizing slavery. Time changes things.

In Raich v. Gonzales, No. 03-15481 (9th Cir. March 14, 2007) footnote 8 at page 20, the Federal Defendants argued that marijuana was available through the Secretary of Health and Human Services:

> The Government suggests that certain federal programs exist which might allow Raich to obtain marijuana lawfully. See, e.g., 21 U.S.C. § 823(f) (authorizing the Secretary of Health and Human Services to permit medical practitioners to design and implement research protocols using Schedule I substances, including marijuana, on a case-by-base basis). Amici curiae American Civil Liberties Union Foundation and Marijuana Policy Project and Rick Doblin, Ph.D make abundantly clear that this is not a tenable "alternative." The program is highly restricted and has not accepted new medical marijuana patients since 1992.

Two of the patients currently in this program live here in Iowa and have been receiving 300 rolled marijuana cigarettes per month from the Federal Defendants for 15 years or more. Although the fundamental right to use marijuana as a medicine is not recognized by the courts at this time, there is a definite movement in that direction. In Raich v. Gonzales, No. 03-15481 (9th Cir. March 14, 2007) footnote 8 at pages 39-40, the Court wrote:

> As stated above, Justice Anthony Kennedy told us that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence*, 539 U.S. at 579. For now, federal law is blind to the wisdom of a future day when the right to use medical marijuana to alleviate excruciating pain may be deemed fundamental. Although that day has not yet dawned, considering that during the last ten years eleven states have legalized the use of medical marijuana, that day may be upon us sooner than expected. Until that day arrives, federal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering. n16
>
> n16 Because we find no fundamental right here, we do not address whether any law that limits that right is narrowly drawn to serve a compelling state interest. *See Flores*, 507 U.S. at 301-02. We note, however, that, a recent Supreme Court case suggests that the Controlled Substances Act is not narrowly drawn when fundamental rights are concerned. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S. Ct. 1211, 1221-23, 163 L. Ed. 2d 1017 (Feb. 21, 2006) (observing that "mere invocation of the general characteristics of Schedule I substances, as set forth in the Controlled Substances Act, cannot carry the day," and that the government had presented no evidence that narrow exceptions to the Schedule I prohibitions would undercut the government's ability to effectively enforce the Controlled Substances Act).

This is an area of the law where patterns of conduct and social mores are changing.

C. There is reason to doubt the quality, extensiveness, and fairness of procedures followed in prior litigation

As previously noted, the decisions against the Plaintiff's in the long line of previous legal efforts by the Plaintiff are all negated by the retroactive application of the RFRA and the RLUIPA which now require the compelling interest test retroactively. See 42 U.S.C. § 2000bb-3.

United States v. Leary never was good law because the First Amendment should have required the Federal Defendants to apply the strict scrutiny of the compelling interest test, but United States v. Leary has clearly been overturned by the RFRA. United States v. Bauer, 84 F.3d 1549 (9th Cir. 1996), was the first court to recognize that United States v. Leary is no longer good law under the RFRA:

> The district court first found that the challenged law substantially burdened the free exercise of the Rastafarian religion. Relying on several earlier appellate cases, the district court held, however, "that the government has an overriding interest in regulating marijuana." The district court quoted *Leary v. United States*, 383 F.2d 851, 861 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6, 23 L. Ed. 2d 57, 89 S. Ct. 1532 (1969), as follows: "'It would be difficult to imagine the harm which would result if the criminal statutes against marihuana were nullified as to those who claim the right to possess and traffic in this drug for religious purposes. For all practical purposes the anti-marihuana laws would be meaningless, and enforcement impossible.'" The district court concluded that the government's in limine motion would have been granted even if the Religious Freedom Restoration Act had been the law of the land at the time.

United States v. Bauer, 84 F.3d at 1557.

> 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 Act was relevant to the counts of simple possession.

United States v. Bauer, 84 F.3d at 1559.

III. PLAINTIFF'S RFRA CLAIM DOES NOT FAIL AS A MATTER OF LAW

If the Federal Defendants could prove a compelling interest in regulating marijuana, a compelling interest in the general enforcement of the drug law is still not sufficient to prove a compelling interest in regulating the Sacramental use of Marijuana by the Plaintiff, nor does it show that completely destroying the Plaintiff's religion is the least restrictive means of applying the law to the Plaintiff. As the Supreme Court wrote in UDV, "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)." UDV, 546 U.S. at ___, 126 S. Ct. at 1220, 163 L. Ed. 2d at 1031.

The Federal Defendants question the Plaintiff's sincerity because of vast quantities of marijuana seized from members of the Plaintiff's church. The vast increase in amounts of alcohol produced at Catholic monasteries during National Prohibition did not demonstrate insincerity, but it did demonstrate the effect National Prohibition had on the Catholic Church.

The vast amounts of marijuana consumed by human beings since the beginning of recorded history prove marijuana's safety. DEA Judge Francis Young found as a fact that, "Yet, despite this long history and the extraordinarily high numbers of social smokers, there are simply no credible medical reports to suggest that consuming cannabis has caused a single death." DEA Docket No. 86-22, Sept. 6, 1988, at Page 57.

The Plaintiff questions the sincerity and credibility of the Federal Defendants for claiming the RFRA and the compelling interest test it mandates

was applied in any of the Plaintiff's previous cases. The bare fact of the CSA cannot show a compelling interest under the RFRA and the RLUIPA. The Federal Defendants can no longer claim to be ignorant of this fact.

A. The Federal Defendants Have No Compelling Interest

Contrary to the Federal Defendants' interpretation of the compelling interest test which reduces it to nothing more than a rational basis test, the compelling interest test is a focused inquiry into the application of the law to the individual whose religious freedom is substantially burdened. The cases cited by the Federal Defendants illustrate this point well.

In United States v. Israel, 317 F.3d 768, 771-72 (7th Cir. 2003), the court accepted Israel's sincerity. Israel said he was not employed but said he was buying marijuana every day. Israel said he was not making child support payments. Israel was convicted of illegal possession of a firearm. Nevertheless, the court accepted Israel's sincerity. In Contrast, the Plaintiff, Carl Eric Olsen, is gainfully employed, is not neglecting any of his obligations, and all of the Plaintiff's criminal convictions have been for possession of his Sacrament. There is a clear difference in the individuals involved in these RFRA claims. The sincerity and credibility of the Federal Defendants again is called into question for trying to compare these two situations. This also calls into question whether vast quantities of marijuana indicate insincerity while illegal possession of firearms, unexplained sources of income, and failure to pay child support do not show insincerity. The vast quantities of alcohol being consumed in this country have no bearing on the sincerity of a member of the Catholic Church receiving Holy Communion. The quantities used for sacramental purposes are directly proportional to the safety of the particular sacrament being used. Acting morally is evidence of sincerity.

The compelling interest test was not applied in United States v. Isreal, because the fact tests of Sherbert v. Verner, Wisconsin v. Yoder, and UDV were

not applied. The court simply accepted the United States v. Leary line of cases as proof that the bare fact of the CSA proves the government has a compelling interest in prohibiting religious freedom.

In United States v. Brown, 72 F.3d 134 (8th Cir. 1995), there is no RFRA compelling interest test, but it predates UDV. In United States v. Greene, 892 F.2d 453 (6th Cir. 1989) there is no RFRA compelling interest test, but it predates the RFRA. United States v. Middleton, 690 F.2d 820 (11th Cir. 1982), also predates the RFRA and does not apply the compelling interest test.

In Loop v. United States, Civil. No. 05-575 (D. Minn. June 30, 2006), Loop was arrested for bringing marijuana into a federal court house. Although it would be difficult to imagine the harm caused by bringing a sacramental marijuana pipe into a federal courthouse, those facts are sufficiently different than the Plaintiff's facts and "context matters." The facts in this case are the complete absence of any religious activity as the result of threats and intimidation by the Federal Defendants. In UDV, 546 U.S. at ___, 126 S. Ct. at 1221, 163 L. Ed. 2d at 1032, the court wrote:

> Outside the Free Exercise area as well, the Court has noted that "context matters" in applying the compelling interest test, *Grutter* v. *Bollinger,* 539 U.S. 306, 327, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003), and has emphasized that "strict scrutiny *does* take 'relevant differences' into account -- indeed, that is its fundamental purpose," *Adarand Constructors, Inc.* v. *Pena,* 515 U.S. 200, 228, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995).

In Lepp v. Gonzales, No C-05-0566 VRW (N.D. Cal. August 2, 2005), there is no RFRA compelling interest test, but the case predates UDV..

United States v. Jefferson, 175 F.Supp.2d 1123 (N.D. Ind. 2001) is simply the lower court decision in United States v. Israel. Again, context matters.

Particularly instructive is the ruling in Multi Denominational Ministry of Cannabis and Restafari, Inc. v. Gonzales, No. 3:06-cv-4264 (N.D. Cal. February 2, 2007) (MDMCR hereafter) which is cited in the Federal Defendants' motion to dismiss. This is the first case that actually takes both the RFRA and the

decision in UDV into account. It also involves the defendant in United States v. Brown cited previously. At pages 10-11, Judge Vaughn Walker wrote:

> 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.

Judge Walker dismissed all the claims against the Federal Defendants with prejudice except for the claims under the RFRA and invited the individual plaintiffs to re-file their claims under the RFRA.

Under the ruling in UDV, each case must be considered in its individual context. Courts cannot generalize that the CSA proves a compelling interest in any or all situations without a focused inquiry on the application of the CSA to the individual whose religious freedom is substantially burdened. All of the cases cited by the Federal Defendants have been clearly overturned by the decision in UDV (with the exception of MDMCR as noted above).

The Federal Defendants point out that UDV considered the specific facts that the market for hoasca was thin, relatively small amounts were imported, and diversion problems had not occurred. The specific facts in this case are different, but that does not mean the RFRA allows this case to be dismissed without a hearing on the facts. There is a huge market for marijuana, but that is not the only fact. The Plaintiff is not practicing his religion for fear of being assaulted by the Federal Defendants and that means there is no possession, there is no importation, there is no manufacturing, and there is no diversion, because the Plaintiff has completely abandoned the practice of his Religion. The critical factor that distinguishes marijuana is the lack of harm caused by the use of marijuana as documented in the only official reviews of the CSA that have been conducted, the 1972 Final Report of the Commission on Marihuana and Drug Abuse and the 1988 decision of DEA Administrative Law Judge. How can the Federal Defendants show a compelling interest in preventing the Plaintiff from

using marijuana if their own official findings of fact show there is no threat to public health and safety from the use of marijuana by millions of people daily over the course of thousands of years? A fact the Court should consider is how much money the Federal Defendants and the legal system are confiscating from peaceful, non-violent marijuana users rather than dealing with the real problems of drug abuse. The Federal Defendants know that many people who use marijuana use it for spiritual and physical healing and they know that people who use it are usually easy prey.

The Federal Defendants claim the Plaintiff would not restrict or confine his use of Marijuana, but that is absurd considering the fact the Plaintiff has not used marijuana for the past 17 years. It defies logic to think the Plaintiff would not abide by any restriction imposed on him, since he is abiding by the greatest restriction of all, absolute prohibition of his Religion. The Federal Defendants give examples of past cases, but those cases are not this case and those facts in those cases are not the facts in this case. Beyond that, however, is the fact that none of those cases show any harm to anyone. If nobody has been hurt, then the government has no compelling interest in prohibiting an individual's Establishment and Exercise of Religion.

The Plaintiff's Sacramental use of Marijuana should not be restricted unless the Federal Defendants can show actual harm to another person. The Plaintiff has been completely prevented from Establishing and Exercising his Religion. The Plaintiff must not be restricted in any way without a showing of actual harm to another person. The Federal Defendants must be enjoined from preventing the Plaintiff from moving forward with the Establishment and Exercise of his Religion in accordance with the RFRA. Without a showing of actual harm there can be no restriction.

B. A complete ban on the Plaintiff's religion is not the least restrictive means of achieving a compelling interest

In light of the fact that the Federal Defendants grow and distribute marijuana to people for medical purposes and that the Federal Defendants supply those patients with 300 rolled marijuana cigarettes per month, the Federal Defendants have not shown how the Sacramental use of Marijuana should be subject to any stricter regulation. Under the standard articulated in Employment Division v. Smith, the court acknowledged that religious claims could not be subject to stricter regulation than secular claims.

The Federal Defendants point out a proposal for more circumscribed use in Olsen v. DEA, 878 F.2d at 1462, but Olsen v. DEA was about the denial of a factual hearing under the Administrative Procedures Act. There never was a factual hearing in that case. The proposal made by court appointed counsel during the appeal was never remanded to the agency for a factual hearing. Cases cannot be litigated on mere speculation introduced for the first time during an appeal. A proposal for self-restricted use is contrary to the compelling interest test. Once the Plaintiff proves a sincere religious practice is being substantially burdened by the government, the burden of proof shift to the government to show: (1) a compelling interest; and (2) least restrictive means.

IV. RLUIPA

Insofar as the RLUIPA amends the RFRA, it is part of the RFRA. Insofar as the Federal Defendants have not guaranteed the Plaintiff the right to Freedom of Religion on the Plaintiff's land, the burden on the Plaintiff is exactly the same as a zoning or landmarking law and it would absurd to think the Federal Defendants could impose a stricter restriction on a state than it would apply to itself. If a state cannot impose a zoning or landmarking law on the Plaintiff, then the Federal Defendants cannot impose the CSA on the Plaintiff on the Plaintiff's land. The religious use of land is protected by the Religious Land Use and Institutionalized Persons Act.

V. THE FIRST AMENDMENT APPLIES BECAUSE THE CSA IS NOT A NEUTRAL LAW OF GENERAL APPLICABILITY

The Federal Defendants rely on Employment Division v. Smith for the proposition that the Federal CSA is a neutral law of general applicability, but Employment Division v. Smith was about state laws in Oregon and had nothing to do with the Federal CSA. The facts in Employment Division v. Smith showed that Oregon had no religious exemption for peyote and no evidence was presented that the Oregon law was not neutral or generally applicable to everyone. The Federal CSA, on the other hand, does contain a religious exemption for use of the Schedule I drug peyote. The Federal CSA also has a judicially crafted religious exemption for hoasca created by the courts in UDV. The decision in UDV clearly held that the Federal CSA is not a neutral law of general applicability. "The well-established peyote exception also fatally undermines the Government's broader contention that the Controlled Substances Act establishes a closed regulatory system that admits of no exceptions under RFRA." UDV, 546 U.S. at ___, 126 S. Ct. at 1222, 163 L. Ed. 2d at 1034.

Moreover, in Employment Division v. Smith, the court said that the First Amendment in conjunction with other rights creates "a hybrid situation." Employment Division v. Smith, 494 U.S. at 882, 110 S. Ct. at 1602, 108 L. Ed. 2d at 888. The situation in Employment Division v. Smith was in the narrow context of state unemployment insurance claims. The context in this case is the complete prohibition of the Plaintiff's religion. This case involves other rights: the Plaintiff's Establishment of Religion, The Plaintiff's Free Exercise of Religion, the Plaintiff's Freedom to Assemble with other members of his church, the Plaintiff's use of his property, the Plaintiff's control of his life, the Plaintiff's liberty, and the Plaintiff's natural rights to the God-given plant that is his by divine birthright and protected by the Ninth Amendment. In other words, the Plaintiff is being prevented from worshipping God in the tradition of his religion when actual injury to another person should be the only restriction placed on the Plaintiff. The Plaintiff is being denied numerous rights guaranteed to him by the Constitution. The Supreme Court

acknowledged this in Employment Division v. Smith: "And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns." Employment Division v. Smith, 494 U.S. at 882, 110 S. Ct. at 1602, 108 L. Ed. 2d at 887-888.

VI. EQUAL PROTECTION

The Federal Defendants cite United States v. Rush and Olsen v. DEA for the proposition that the Plaintiff is precluded from raising equal protection here. Those cases are not this case, but it is worth noting that the Plaintiff was precluded from raising equal protection before a jury in United States v. Rush and was never given an evidentiary hearing in Olsen v. DEA. The courts in those cases talked about the overwhelming difference in the use of the respective churches' sacraments, but there was never any evidence of actual harm caused by the Plaintiff's use of marijuana. The courts decided those cases on the sole issue of the alleged immensity of the marijuana problem, but did not address the issue of whether there actually is a marijuana problem, or whether the use of marijuana by the particular individual is a problem. It is not enough to rely on the general reasons Congress gave in 1970 for making marijuana illegal. In fact, Congress actually said it was unsure marijuana should be illegal at all, H.R. Rep. No. 91-1444, 1970 USCCAN at pages 477-479 (Legislative History of the CSA), and appointed a Commission to make recommendations. The Commission found that marijuana was not sufficiently harmful to be criminalized. Equal protection is not precluded now because it was never fairly addressed in any previous case.

The case the Federal Defendants cite, McBride v. Shawnee County, Kansas Court Servs., 71 F.Supp.2d 1098 (D. Kan. 1999) says, "peyote and marijuana are not the same drug". The sacramental use of peyote was exempted from the CSA because there was no question that peyote was going to be prohibited and religious freedom would have been violated if no exemption had been created. Three members of the Ethiopian Zion Coptic Church, Thomas Reilly, Jacob

Shnurman, and James Tranmer, met with Senator Harold Hughes of the Commission on Marihuana and Drug Abuse in Washington, DC in 1972 and at that time the Commission was recommending decriminalization of marihuana. There was no reason the Commission would have recommended a sacramental exemption for the use of marihuana under those circumstances because it wasn't thought to be necessary to protect religious freedom. It seemed all was well.

Similarly, marijuana and hoasca differ. A hearing is required to determine the facts, which will show that marijuana is the least dangerous substance included in the CSA. The Federal Defendants indicate that marijuana and methamphetamine are similarly situated because of their constant consumption, while ignoring the actual difference in harm caused by these two substances.

VII. EX POST FACTO

"The Ethiopian Zion Coptic Church is centuries old and has regularly used cannabis as its sacrament." Town v. State ex rel. Reno, 877 So.2d 648, 649 (Fla. 1979). The Plaintiff's right to join a Religion that is centuries old and has regularly used Cannabis as its Sacrament predates the enactment of the CSA.

VIII. SCHEDULING UNDER THE CSA

Any argument the Plaintiff made about scheduling should be considered by this court as evidence and as well as a separate request for the Court to determine that marijuana should not be included in the CSA. Under the compelling interest test, the government must prove justification for prohibition and it cannot rely solely on the CSA to provide that justification. The Plaintiff is asking the Court to rule that marijuana should not be scheduled at all and is not requesting the court to move marijuana from one of the schedules to another schedule.

IX. FOURTH AMENDMENT

The Plaintiff refers the Court to the "hybrid" right under the First Amendment as articulated in Employment Division v. Smith as grounds for

including the Fourth Amendment as a right being violated in conjunction with the First Amendment. If there is an independent claim that can be made under the Fourth Amendment, the Plaintiff reserves the right to make such a claim.

X. FIFTH AMENDMENT

The Plaintiff refers the Court to the "hybrid" right under the First Amendment as articulated in Employment Division v. Smith as grounds for including the Fifth Amendment as a right being violated in conjunction with the First Amendment. If there is an independent claim that can be made under the Fifth Amendment, the Plaintiff reserves the right to make such a claim.

XI. ADMINISTRATIVE PROCEDURES ACT

Yes, this count is completely derivative of Plaintiff's other claims. The DEA failed to provide the Plaintiff with an evidentiary hearing in Olsen v. DEA, and so the Plaintiff feels that he has exhausted reasonable attempts to obtain relief under the APA. If there is an independent claim that can be made under the APA, the Plaintiff reserves the right to make such a claim.

XII. TREATIES AND INTERNATIONAL LAW

The various treaties cited are evidence of national and international intent to guarantee religious freedom. These treaties are evidence. If there is an independent claim that can be made under any of them, the Plaintiff reserves the right to make such a claim.

CONCLUSION

For the foregoing reasons, the Plaintiff respectfully requests that the Court deny the Federal Defendants' motion to dismiss.

Respectfully submitted this 27th day of April, 2007

CARL ERIC OLSEN
130 E Aurora Avenue
Des Moines, IA 50313-3654
515-288-5798
IN PROPRIA PERSONA

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 27th day of April, 2007 to each of the following defendants:

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CARL ERIC OLSEN
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IN PROPRIA PERSONA

TO THE INDIVIDUAL JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

O CENTRO ESPIRITA UNIAO DO VEGETAL DOCKET #04-1084

Affidavit

I, Carl Eric Olsen, am a resident of the State of Iowa. My mailing address is Post Office Box 4091, Des Moines, IA 50333. Any other contact information is listed on the signature line below.

I affirm under penalty of perjury as defined in the laws of the United States and the State of Iowa that the following Affidavit is true and complete to the best of my ability.

I am making this statement for the purpose of notifying the Supreme Court of the United States of Plain Errors of fact and law contained in the decisions under review by this Court in Gonzalez vs. O Centro Espirita Uniao Do Vegetal, docket Number 04-1084 as set forth in the Amicus Curie Brief to which this Affidavit is attached.

I am making this statement for the purpose of supporting the O Centro Espirita Uniao Do Vegetal Church in the decisions of the lower courts that interpret the Religious Freedom Restoration Act of 1993 - 42 U.S.C. sec. 2000bb et al - to mean that a sincere act of religious exercise that is substantially burdened by a federal law must be justified at trial by government proofs of the facts of a threat to public health and safety of such magnitude as to support a compelling interest on the part of government to regulate the act of religious exercise. Further, I support the interpretation of RFRA that is applied to the O Centro Espirita Uniao Do Vegetal Church to mean that the government must make the fact proofs that the least restrictive means of regulation has been used to regulate the sincere act of religious exercise that is found to cause a compelling interest on the part of government to regulate it. I support the interpretation of RFRA to mean that RFRA applies to the drug laws, provides a means of exemption from the drug laws for sincere religious exercise, and provides exemptions from international treaties affirmed by the United States Senate and otherwise effective upon my actions as a citizen of the State of Iowa, member of the United States of America.

I now state for the record under penalty of perjury that:

I sincerely use Cannabis in my religious exercise.

I am substantially burdened by the federal drug laws that restrict my growing, possession, use, transfer and acquisition of cannabis, commonly known as marijuana, for my sincere religious exercise.

I have found that my use of Cannabis enables me to come to a greater understanding of my status as a human being faced with decisions about the morality of my acts and the acts of others.

I have found that my use of Cannabis enables me to exert greater control over my human nature in body, spirit, psychology, family interaction, social interaction, economic interaction, political interaction, community interaction, and my fundamental interaction with the Creator of All.

Further I wish to inform this Court that I am the petitioner in Olsen v. Drug Enforcement Administration, 878 F.2d 1458 (D.C. Cir, 1989), cert. denied, 495 U.S. 906 (1990), as well as a petitioner In The Matter of Marijuana Rescheduling Petition, DEA Docket No. 86-22, September 6, 1988 (Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of Administrative Law Judge).

On page 20 of the 10th Circuit U.S. Court of Appeals decision in O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL vs. JOHN ASHCROFT, No. 02-2323, the 10th Circuit U.S. Court of Appeals states:

> "Employing [the pre-Smith compelling interest test], courts routinely rejected religious exemptions from laws regulating controlled substances. See United States v. Greene, 892 F.2d 453, 456-57 (6th Cir. 1989); Olsen v. DEA, 878 F.2d 1458, 1462-63 (D.C. Cir. 1989); Olsen v. Iowa, 808 F.2d 652, 653 (8th Cir. 1986); United States v. Rush, 738 F.2d 497, 512-13 (1st Cir. 1984); United States v. Middleton, 690 F.2d 820, 824 (11th Cir. 1982)."

Although I was a pro se plaintiff in Olsen v. DEA, 878 F.2d 1458, the court appointed a law firm to represent me as Amicus Curiae. In its Brief of Court-Appointed Amicus Curiae filed on March 24, 1988, Amicus Curiae stated:

> "Olsen does not dispute the government's compelling interest in controlling the distribution and drug-related use of marijuana. Presumably the government's interest in that regard is both to protect the health and well-being of the ultimate consumers of marijuana and to safeguard society from the hazards and debilitating effects of marijuana intoxication. See 21 U.S.C. § 801." BRIEF OF COURT-APPOINTED AMICUS CURIAE, 24 March 1988, page 18.

The government did not prove it had a compelling interest in prohibiting my religious use of marijuana. If the compelling interest test had been applied in my case, the decision would have permitted me to use marijuana. At the same time this was going on, DEA Administrative Law Judge Francis L. Young ruled that marijuana is safer than aspirin or eating ten raw potatoes. In the Matter of Marijuana Rescheduling Petition, DEA Docket No. 86-22, Sept. 6, 1988, at pages 56-59. I was one of the petitioners in DEA Docket No. 86-22. It would have been impossible for the government to prove a compelling interest in prohibiting my use of marijuana if Amicus Curiae had introduced this ruling as evidence challenging the DEA interest in preventing me from using marijuana. Olsen v. DEA, 878 F.2d 1548 was not decided until June 20, 1989.

The U.S. Court of Appeals in Olsen v. DEA never required the Drug Enforcement Administration to prove it had a compelling interest in prohibiting my religious use of marijuana. The U.S. Court of Appeals in Olsen v. DEA simply took the language of a general statute (the Controlled Substances Act) as evidence that the government had a compelling interest in overriding my religious freedom. This is completely contrary to Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972). The compelling interest test has since been enacted into statutory law as the Religious Freedom Restoration Act of 1993, 107 Stat. 1488 Public Law

84 103-141 -- November 16, 1993, and it is retroactive (which means it applies retroactively to
85 Olsen v. DEA, 878 F.2d 1458).

86 In U.S. v. Bauer, 84 F.3d 1549 (9th Cir. 1996), the U.S. Court of Appeals for the Ninth Circuit
87 stated:

88 "The district court treated the existence of the marijuana laws as dispositive of
89 the question whether the government had chosen the least restrictive means of
90 preventing the sale and distribution of marijuana. . . The district court relied on a
91 drug case decided before the enactment of RFRA (Leary). . .We do not exclude
92 the possibility that the government may show that the least restrictive means of
93 preventing the sale and distribution of marijuana is universal enforcement of the
94 marijuana laws. "Under RFRA, however, the government had the obligation,
95 "first to show that the application of these laws to the defendants was in
96 furtherance of a compelling governmental interest and, "second to show that the
97 application of these laws to these defendants was the least restrictive means of
98 furthering that compelling governmental interest." U.S. v. Bauer, 84 F.3d at page
99 1375.
100
101 In O Centro vs. Ashcroft, 282 F.Supp. 1236, the U.S. District Court stated:
102
103 "Under RFRA, Congress mandated that a court may not limit its inquiry to general
104 observations about the operation of a statute. Rather, 'a court is to consider whether the
105 'application of the burden' to the claimant 'is in furtherance of a compelling interest' and
106 'is the least restrictive means of furthering that compelling governmental interest." At
107 page 1254.

108 I respectfully request that the Supreme Court of the United States reject the dicta of the U.S.
109 Court of Appeals for the 10th Circuit in Olsen v. DEA, 878 F.2d 1458 (D.C. Cir. 1989) stating that
110 the compelling interest test was correctly applied to me, since the U.S. Court of Appeals for the
111 District of Columbia did not require the Drug Enforcement Administration to prove it had a
112 compelling interest in prohibiting my sacramental use of marijuana and simply relied on general
113 observations about the operation of a statute in making its ruling..

114 I respectfully request that the Supreme Court of the United States affirm the interpretation of
115 RFRA made in the Bauer and O Centro cases.

116 I affirm under penalty of perjury that afore made statement is true and complete to the best of
117 my ability as indicated by my signature below on the date indicated.

118 Signed____________________

119 Carl Eric Olsen
120 Des Moines, IA
121 515-288-5798
122 http://mojo.calyx.net/~olsen/

123 Date: September 7, 2005