

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

CARL ERIC OLSEN,	)	
	)	
Plaintiff,	)	Case No. 4-07-cv-00023 (JAJ-RAW)
	)	
v.	)	<b>REPLY MEMORANDUM IN</b>
	)	<b>SUPPORT OF FEDERAL DEFENDANTS'</b>
ALBERTO R. GONZALES, et al.,	)	<b>MOTION TO DISMISS</b>
	)	
Defendants.	)	
	)	

**REPLY MEMORANDUM IN SUPPORT OF  
FEDERAL DEFENDANTS' MOTION TO DISMISS**

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## **INTRODUCTION**

In his Memorandum of Law in Support of Plaintiff's Response to Federal Defendants' Motion to Dismiss (dkt. no. 28) (Apr. 30, 2007) ("Pl.'s Mem."), plaintiff fails to present adequate justifications for why his latest attempt to obtain judicial approval of his purported sacramental use of marijuana should not be dismissed. Plaintiff has not demonstrated that he is facing an imminent threat of prosecution from defendants Alberto Gonzales and Karen Tandy ("Federal Defendants") sufficient to make his claims ripe for review. And despite plaintiff's assertions that no one is harmed by his religious use of marijuana and that marijuana is safe, courts in plaintiff's prior cases have already determined that the government has a compelling interest in prohibiting plaintiff's use of marijuana and that the Controlled Substances Act's ("CSA") ban against marijuana is the least restrictive means of achieving that interest, such that plaintiff is precluded from litigating his claim under the Religious Freedom Restoration Act ("RFRA"). In addition, as demonstrated below and in the Memorandum in Support of Federal Defendants' Motion to Dismiss (dkt. no. 21) (Apr. 10, 2007) ("Fed. Defs.' Mem."), plaintiff's remaining claims under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"); the Free Exercise Clause of the First Amendment; the Equal Protection Clause; the Ex Post Facto Clause; the Fourth Amendment; the Fifth Amendment; the Administrative Procedure Act ("APA"); and various treaties and sources of international law all lack merit and warrant dismissal.

## **ARGUMENT**

### **I. PLAINTIFF'S CLAIMS ARE NOT RIPE FOR REVIEW**

Although plaintiff claims that he has stopped his sacramental usage of marijuana because the Federal Defendants allegedly presented plaintiff with the choice of either abandoning the practice or be criminally prosecuted, see Pl.'s Mem. at 7, plaintiff offers no evidence that the Federal Defendants or their representatives actually threatened to prosecute plaintiff. Plaintiff, himself, wrote a letter to the DEA asking if they planned to arrest him if he were to engage in the religious use of marijuana, but

the DEA did not respond to the letter or give any indication to plaintiff that they intended to prosecute him. See Plaintiff's Original Complaint for Declaratory and Injunctive Relief (dkt. no. 1) (Jan. 16, 2007) ("Complaint"), Pl.'s Ex. # 7G. Thus, plaintiff's fear of prosecution is "wholly speculative," Babbitt v. United Farm Workers National Union, 442 U.S. 289, 302 (1979), and he has not demonstrated that he currently faces "certainly impending" federal prosecution or other injury necessary to make his claims ripe for review in a declaratory judgment action. See Public Water Supply Dist. No. 8 of Clay County, Missouri v. City of Kearney, Missouri, 401 F.3d 930, 932 (8<sup>th</sup> Cir. 2005).

## **II. PLAINTIFF'S RFRA CLAIM IS BARRED BY COLLATERAL ESTOPPEL**

### **A. RFRA Did Not Significantly Change the Law Applicable to Plaintiff's Previous Cases**

Plaintiff attempts to avoid being collaterally estopped from asserting his RFRA claim in this case by arguing that RFRA significantly changed the legal principles that were applicable to his prior First Amendment Free Exercise claims that were previously asserted and rejected in United States v. Rush, 738 F.2d 497 (1<sup>st</sup> Cir. 1984), and Olsen v. DEA, 878 F.2d 1458 (D.C. Cir. 1989). See Pl.'s Mem. at 10-15. As explained in Federal Defendants' Motion to Dismiss, however, even though RFRA was enacted in 1993 – several years after plaintiff lodged his repeated claims that his right to use marijuana religiously was protected by the First Amendment – RFRA merely restored the same compelling interest test that the First Circuit and the D.C. Circuit employed in rejecting plaintiff's First Amendment claims in Rush and Olsen. See 42 U.S.C. § 2000bb(a)-(b) (indicating that RFRA was enacted in response to the Supreme Court's decision in Employment Division v. Smith, 494 U.S. 872 (1990), which eliminated use of the compelling interest test to justify burdens on religion imposed by neutral laws of general applicability, and was designed to restore the compelling interest test as set forth in prior federal court rulings in First Amendment Free Exercise cases that preceded the Smith

decision); City of Boerne v. P.F. Flores, 521 U.S. 507, 515 (1997) (providing similar explanation of RFRA’s history and purpose); Christians v. Crystal Evangelical Free Church, 141 F.3d 854, 864 (8<sup>th</sup> Cir. 1998) (Bogue, J. dissenting) (same). Accordingly, far from significantly changing the law that was applicable to plaintiff’s prior cases, RFRA actually restored those same legal principles.<sup>1</sup> As a result, plaintiff’s current claim under RFRA is barred because the courts in Rush and Olsen already found that there was a compelling governmental interest in prohibiting plaintiff’s religious use of marijuana and that the CSA’s complete ban against marijuana was the least restrictive means of furthering that interest. See Rush, 738 F.2d at 512-13; Olsen, 878 F.2d at 1461-63.

**B. The Supreme Court’s Decision in O Centro Did Not Significantly Change the Law Applicable to Plaintiff’s Previous Cases**

Plaintiff also argues that the Supreme Court in Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 126 S. Ct. 1211 (2006), applied a different formulation of the compelling interest test than was previously applied to plaintiff in his prior cases. Pl.’s Mem. at 15. In O Centro,

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<sup>1</sup> Plaintiff points out that the court in Navajo Nation v. United States Forest Serv., 479 F.3d 1024, 1032-33 (9<sup>th</sup> Cir. 2007), indicated that RFRA, in some ways, provides greater protection for religious practices than did the pre-Smith Free Exercise cases. Pl.’s Mem. at 14-15. In Navajo, the court first noted that “RFRA goes beyond the constitutional language that forbids the ‘prohibiting’ of the free exercise of religion and uses the broader verb ‘burden.’” Navajo, 479 F.3d at 1032. Second, the court indicated that RFRA imposes the least restrictive means requirement in every case. Id. Third, the court explained that RFRA applies the compelling interest test in all cases, whereas it previously was not applied in some contexts. Id. at 1033. And finally, the court noted that RFRA protects a broader range of religious conduct that extends beyond just the central tenets of a religion. Id. Plaintiff, however, was afforded all of these protections in both Rush and Olsen. First, in Rush and Olsen there was no question that the free exercise clause was implicated by the CSA because the CSA did “prohibit” plaintiff’s use of marijuana. Second, the least restrictive means requirement was imposed in both cases and the courts determined that the CSA satisfied that requirement. See Rush, 738 F.2d at 513; Olsen, 878 F.2d at 1462-63. Third, the compelling interest test also was applied in both Rush and Olsen and the courts determined that that test was satisfied. See 738 F.2d at 512-13; 878 F.2d at 1461-62. And finally, the courts in Rush and Olsen presumed that plaintiff’s use of marijuana was sincerely religious. See 738 F.2d at 512; 878 F.2d at 1462. Accordingly, as demonstrated, RFRA did not significantly change the legal landscape that was applicable to plaintiff’s prior First Amendment Free Exercise claims that were rejected in Rush and Olsen.

however, the Court merely clarified that the compelling interest test requires an individualized determination that the government's compelling interest would be frustrated if the "particular claimant's" own specific religious practice were to be permitted. 126 S. Ct. at 1220. Contrary to plaintiff's contentions, the court in Olsen did conduct a fact-based, individualized analysis of plaintiff's particular practice of using marijuana as a member of the Ethiopian Zion Coptic Church ("EZCC") as well as plaintiff's own individual proposal for more circumscribed use of marijuana. Olsen, 878 F.2d at 1462-63 (explaining, for example, that "[t]he pivotal issue, therefore, is whether marijuana usage by *Olsen and other members of his church* can be accommodated without undue interference with the government's interest in controlling the drug" and concluding that "DEA cannot accommodate *Olsen's religious use of marijuana* without unduly burdening or disrupting enforcement of the federal marijuana laws.") (emphasis added).<sup>2</sup>

Plaintiff's additional contention that the courts' decisions in his previous cases are deficient because they failed to consider the findings of the National Commission on Marijuana and Drug Abuse and the recommendations of a DEA Administrative Law Judge also lacks merit. See Pl.'s Mem. at 15-16. The Supreme Court in O Centro did not indicate that the compelling interest test requires courts to completely re-evaluate the health effects of marijuana every time a person claims to use marijuana

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<sup>2</sup> To support his contentions, plaintiff cites to Multi Denominational Ministry of Cannabis and Rastafari, Inc. v. Gonzales, 2007 WL 404788, \*5 (N.D. Cal. 2007) ("MDMCR"), which found, in part, that the O Centro decision's case-by-case inquiry did effect an intervening change in the law such that res judicata effect would not be given to a prior lawsuit by the plaintiffs in that case. See Pl.'s Mem. at 21-22. MDMCR is distinguishable from the present case, however, because the plaintiffs in MDMCR did not receive an individualized determination regarding their own specific religious practices in their prior case, whereas here, the D.C. Circuit in Olsen focused on plaintiff's particular religious use of marijuana and did make an individualized determination that the government's compelling interest would be frustrated if plaintiff's specific religious use of marijuana were to be permitted, see Olsen, 878 F.2d at 1462-63. As a result, with respect to the plaintiff in the present case, the O Centro decision is not an intervening change of law that would make application of collateral estoppel inappropriate.

for religious purposes.<sup>3</sup> Rather, the Court merely indicated that courts must evaluate whether a “particular claimant’s” own specific religious practices can be accommodated without jeopardizing the government’s interest in restraining the use of a drug. See O Centro, 126 S. Ct. at 1220. As discussed above, the court in Olsen did consider evidence of plaintiff’s specific religious use of marijuana, noting that plaintiff smokes marijuana “continually all day, through church services, through everything we do” and that plaintiff’s church does not impose tight restrictions on marijuana use. Olsen, 878 F.2d at 1462.<sup>4</sup> Furthermore, as noted in Federal Defendants’ prior memorandum, the DEA Administrator did not endorse the 1988 findings of the ALJ recommending reclassification of marijuana, and the D.C. Circuit has upheld the decision not to reschedule marijuana on five separate occasions over the past thirty years. Fed. Defs.’ Mem. at 27 n.11 (citing Raich v. Gonzales, 545 U.S. 1, 15 (2005)). In addition, other courts have considered the National Commission’s 1972 report, which in places suggested that marijuana might be used safely, but nevertheless upheld the CSA’s prohibition of private possession and use of marijuana. See National Organization for the Reform of Marijuana Laws v. Bell, 488 F. Supp. 123, 128 (D.D.C. 1980).

As demonstrated, the Supreme Court’s decision in O Centro did not significantly change the legal analysis that the court in Olsen previously applied in concluding that the government has a

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<sup>3</sup> Plaintiff, in essence, is seeking to have the court reschedule marijuana under the CSA by pointing to the findings of the ALJ and the National Commission and arguing that marijuana is safe. Courts, however, lack jurisdiction to reschedule marijuana under the CSA. See Fed. Defs’ Mem. at 27-28; United States v. Burton, 894 F.2d 188, 192 (6<sup>th</sup> Cir. 1990) (indicating that “it has repeatedly been determined, and correctly so, that reclassification is clearly a task for the legislature and the attorney general and not a judicial one.”).

<sup>4</sup> Contrary to plaintiff’s implications, the Supreme Court in O Centro did not overrule or disagree with the decisions in plaintiff’s previous cases, including Olsen and Rush. See Pl.’s Mem. at 16. These marijuana cases were not discussed in the Court’s opinion. However, one of the lower court rulings in O Centro explicitly cited Olsen and Rush with approval in distinguishing hoasca tea from marijuana. See O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973, 1020 (10<sup>th</sup> Cir. 2004) (en banc).

compelling interest in prohibiting plaintiff's religious use of marijuana and that the CSA is the least restrictive means of serving that interest. Accordingly, plaintiff should not be allowed to re-litigate those issues once again.

**C. State Statutes Regarding Medical Marijuana Do Not Preclude the Application of Collateral Estoppel to Plaintiff's RFRA Claim**

Plaintiff alleges that the fact that eleven states have passed legislation allowing some use of marijuana for medical reasons suggests that social mores have changed from the time he lost his prior cases and that collateral estoppel, therefore, should not be applied to his present RFRA claim. See Pl.'s Mem. at 16-17. This assertion is unavailing because the fact that a handful of states have permitted the use of marijuana for medical purposes does not suggest that its use for religious purposes is also condoned. In fact, plaintiff cannot point to a single state that has permitted the religious use of marijuana. Thus, the state medical marijuana statutes do not support plaintiff's claim under RFRA seeking approval to use marijuana as part of a religious practice. Moreover, even if the eleven states had approved the use of marijuana for religious purposes under state law, that fact would have no legal impact on the preclusive effect that plaintiff's prior cases in Rush and Olsen have on his present case, because Rush and Olsen and plaintiff's current claims against the Federal Defendants are all based on federal law, not state law. Furthermore, although eleven states have allowed some medicinal use of marijuana, thirty-nine other states have not done so, indicating that social mores regarding even the medicinal use of marijuana have not changed throughout the vast majority of the United States.<sup>5</sup>

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<sup>5</sup> Plaintiff's reference to the federal government's compassionate use research program also fails to save plaintiff's RFRA claim from collateral estoppel. See Pl.'s Mem. at 17. This research program began in 1978 to settle a civil lawsuit and provided marijuana to a limited number of participants with glaucoma and other severe illnesses. See Kuromiya v. United States, 78 F. Supp. 2d 367, 368 (E.D. Pa. 1999). The federal government, however, terminated the program in 1992 because it was increasingly skeptical about the safety and effectiveness of marijuana as a medical treatment. Id. at 370-72. The government merely decided to continue to provide marijuana to the remaining participants because those individuals had relied on the

Accordingly, time has not changed the basis on which the federal courts in plaintiff's previous cases determined, under federal law, that the government has a compelling interest in prohibiting plaintiff's religious use of marijuana and that the CSA's prohibition is the least restrictive means of achieving that interest.

**D. There is No Reason to Doubt the Fairness of the Proceedings in Plaintiff's Prior Litigation**

Contrary to plaintiff's contentions, there is no reason to question the quality and fairness of the proceedings in plaintiff's prior cases, including the decisions in Rush and Olsen. Plaintiff had a full and fair opportunity to be heard on his claims that his ability to use marijuana religiously was protected by the Free Exercise Clause in both Rush and Olsen. Nevertheless, both the Rush and Olsen courts determined that the government had a compelling interest in prohibiting plaintiff's religious use of marijuana and that the CSA's complete prohibition was the least restrictive means of fulfilling that interest. See Rush, 738 F.2d at 512-13; Olsen, 878 F.2d at 1461-63.<sup>6</sup> Thus, plaintiff should be collaterally estopped from re-litigating those issues in his current RFRA claim.

**III. PLAINTIFF'S RFRA CLAIM FAILS AS A MATTER OF LAW**

Even if the Court determines that plaintiff is not collaterally estopped from asserting his RFRA claim, that claim fails as a matter of law because the case law clearly establishes that the government

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government-supplied marijuana for many years and the government did not want to abruptly end their supply. Id. at 372. At last count there were only seven remaining participants in the program. Thus, this discontinued medical program does not suggest that social mores have changed with respect to plaintiff's proposed religious use of marijuana.

<sup>6</sup> Plaintiff's attack on the validity of Leary v. United States, 383 F.2d 851 (5<sup>th</sup> Cir. 1967), is unavailing. See Pl.'s Mem. at 18. Even if RFRA overturned Leary, which federal defendants contest, the D.C. Circuit did not even cite to Leary in denying plaintiff's First Amendment claim in Olsen. See Olsen, 878 F.2d at 1461-63. In addition, as indicated in Rush, many other cases besides Leary have concluded that the government has a compelling interest in controlling marijuana use. See Rush, 738 F.2d at 512-13.

has a compelling interest in regulating marijuana and the CSA's complete ban on marijuana use is the least restrictive means of furthering that interest.

**A. The Government has a Compelling Interest in Prohibiting Plaintiff's Use of Marijuana**

In contesting the government's compelling interest in preventing plaintiff from engaging in his alleged sacramental use of marijuana, plaintiff repeats his mantra that the Supreme Court's O Centro decision requires "a focused inquiry into the application of the law to the individual whose religious freedom is substantially burdened" and argues that the Federal Defendants have not conducted such an inquiry. See Pl.'s Mem. at 19-20. As explained above, however, the D.C. Circuit in Olsen v. DEA, 878 F.2d 1458, 1462-63 (D.C. Cir. 1989), previously performed such a focused inquiry when it analyzed plaintiff's particular practice of using marijuana as a member of the EZCC as well as plaintiff's own individual proposal for more limited use of marijuana and nevertheless concluded that the government had a compelling interest in prohibiting plaintiff's religious use of marijuana.<sup>7</sup> See id. at 1462-63.

Furthermore, contrary to plaintiff's assertions, the O Centro decision did not overturn the

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<sup>7</sup> Additionally, plaintiff's staunch defense of the sincerity of his sacramental use of marijuana is immaterial. See Pl.'s Mem. at 20. While federal defendants have a reasonable basis for questioning the religious nature and the sincerity of plaintiff's beliefs in light of his prior convictions involving *distribution* of marijuana and the large quantities of marijuana that he has been associated with, for the purposes of this motion to dismiss, Federal Defendants are not contesting the sincerity of plaintiff's beliefs. See Fed. Defs.' Mem. at 12 n.5.

Plaintiff also argues that his past cases are distinct from his present case and that he would confine his use of marijuana solely to his religious worship. See Pl.'s Mem. at 23. Plaintiff's past behavior and his prior testimony indicating that his religious practice as a member of the EZCC required the smoking of marijuana "continually all day, through church services, through everything we do," Olsen v. DEA, 878 F.2d at 1458 (quoting State v. Olsen, 315 N.W.2d 1, 7 (Iowa 1982)), however, are instructive of what his habits and tendencies would be if his RFRA claim succeeded. Moreover, as explained repeatedly herein, the D.C. Circuit Court of Appeals already considered and rejected plaintiff's proposal for very circumscribed use of marijuana. Olsen, 878 F.2d at 1462.

numerous other cases previously cited by the Federal Defendants finding that the government has a compelling interest in prohibiting marijuana cultivation, possession, consumption, or distribution under the CSA. See Fed. Defs.’ Mem. at 13-14 (citing United States v. Israel, 317 F.3d 768, 771-72 (7th Cir. 2003); United States v. Brown, 72 F.3d 134, \*2 (8<sup>th</sup> Cir. 1995) (unpublished); United States v. Greene, 892 F.2d 453, 456-57 (6th Cir. 1989); United States v. Middleton, 690 F.2d 820, 825 (11th Cir. 1982);<sup>8</sup> Loop v. United States, 2006 WL 1851140, \* 7 (D. Minn. 2006); Lepp v. Gonzales, 2005 WL 1867723, \*10 (N.D. Cal. 2005); United States v. Jefferson, 175 F. Supp. 2d 1123, 1130 (N.D. Ind. 2001).<sup>9</sup> Far from overturning these decisions, the Supreme Court and the lower courts in O Centro recognized that marijuana is different than hoasca (the tea-like substance at issue in O Centro), and explained that the differences warranted different treatment of the two substances. See O Centro, 126 S. Ct. at 1218 (emphasizing “the thinness of any market for hoasca, the relatively small amounts of the substance

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<sup>8</sup> Even though the decisions in Greene and Middleton preceded the passage of RFRA, they also preceded the Supreme Court’s decision in Employment Division v. Smith, 494 U.S. 872 (1990); thus they employed the same compelling interest and least restrictive means standards restored by RFRA following the Smith decision.

<sup>9</sup> Plaintiff’s reliance on United States v. Valrey, 2000 WL 692647 (W.D. Wash 2000), is unavailing. See Pl.’s Mem. at 2. While the court in Valrey sustained the defendant’s RFRA claim and modified the conditions of his supervised release to allow his personal use and possession of marijuana exclusively in connection with the practice of his Rastafarian religion, the facts in Valrey are distinguishable from the present case. In Valrey, because the defendant was under supervised release, the court was able to impose additional conditions to ensure that the defendant’s marijuana use was limited to his religious practice and would not lead to further criminal activity, including requirements that he undergo regular urine testing for other controlled substances and that he submit to regular criminal history checks. Valrey, 2000 WL at \*4. In the present case, however, plaintiff is not under supervised release and, as the D.C. Circuit previously found, monitoring plaintiff’s use of marijuana would be unduly burdensome. See Olsen, 878 F.2d at 1462. Furthermore, unlike plaintiff, there was no evidence that the defendant in Valrey smoked marijuana all the time, that distribution of marijuana was part of his religious practice, or that he had a history of dealing with vast amounts of marijuana. Finally, under similar circumstances, the Seventh Circuit rejected the result in Valrey and denied another Rastafarian’s request under RFRA to be able to use marijuana for religious purposes while under supervised release. See United States v. Israel, 317 F.3d 768, 771-72 (7<sup>th</sup> Cir. 2003).

imported by the church, and the absence of any diversion problem in the past.”); O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973, 1023 (10<sup>th</sup> Cir. 2004) (en banc) (explaining that “the fact that hoasca is a relatively uncommon substance used almost exclusively as part of a well-defined religious service makes an exemption for bona fide religious purposes less subject to abuse than if the religion required its constant consumption, or if the drug were a more widely used substance like marijuana or methamphetamine.”); O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft, 342 F.3d 1170, 1185-86 (10<sup>th</sup> Cir. 2003) (noting that “hoasca and marijuana differ. Marijuana is associated with problems of abuse and control, leading courts to ascertain a particular government interest in its prohibition even for religious uses” and stating that “[o]ur ruling in the present appeal in no way calls into question cases refusing to grant an exemption to the CSA for marijuana, LSD, heroin, or any other controlled substances.”).<sup>10</sup> Accordingly, the fact that the decisions finding a compelling governmental interest in prohibiting marijuana use preceded the decision in O Centro does not negate their validity, despite plaintiff’s claims to the contrary.<sup>11</sup>

**B. A Complete Ban on Plaintiff’s Use of Marijuana is the Least Restrictive Means to Achieve the Government’s Interest**

Plaintiff asserts that the federal compassionate use research program discussed previously

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<sup>10</sup> In alleging that the government does not have a compelling interest to prohibit his use of marijuana, plaintiff again argues that marijuana is safe and once more relies on the 1972 report of the National Commission on Marihuana and Drug Abuse and the 1988 recommendations of a DEA Administrative Law Judge. See Pl.’s Mem. at 22. As explained previously, see supra note 3 and accompanying text, plaintiff is essentially seeking to have the court reschedule marijuana under the CSA, but courts lack jurisdiction to undertake such rescheduling. See Fed. Defs’ Mem. at 27-28; United States v. Burton, 894 F.2d 188, 192 (6<sup>th</sup> Cir. 1990). Furthermore, the findings of the National Commission and the DEA ALJ have been rejected and courts have consistently found marijuana to be a threat to individual health and social welfare. See supra Section II.B.; Fed. Defs.’ Mem. at 13.

<sup>11</sup> Significantly, the decision in Loop v. United States, 2006 WL 1851140 (D. Minn. 2006) post-dates the Supreme Court’s decision in O Centro, but the court still denied plaintiff’s RFRA claim based on plaintiff’s religious use of marijuana.

indicates that plaintiff's religious use of marijuana can be accommodated. See Pl.'s Mem. at 24. As noted earlier, however, the compassionate use program ended in 1992 because the federal government doubted the safety and effectiveness of marijuana as a medical treatment. See supra note 5. Furthermore, this program was for the medical use of marijuana, not its religious use, hence the program does not suggest that plaintiff's alleged sacramental use of marijuana can be permitted without jeopardizing the government's compelling interest in controlling marijuana consumption.

In addition, as noted throughout this memorandum, in Olsen v. DEA, 878 F.2d at 1462, the court decided that even plaintiff's proposal for tightly restricted use of marijuana could not be permitted because it would require "burdensome and constant official supervision and management."<sup>12</sup> Plaintiff's current request for a religious exemption would require no less; thus uniform application of the CSA with respect to plaintiff's marijuana use is the least restrictive means of furthering the government's interests, and the court should dismiss plaintiff's RFRA claim.

#### **IV. RLUIPA IS NOT APPLICABLE TO THE CSA**

Plaintiff offers no effective rebuttal of the common sense holding in Multi Denominational Ministry of Cannabis and Rastafari, Inc. v. Gonzales, 2007 WL 404788, \*5-\*6 (N.D. Cal. 2007), finding that the CSA "does not constitute a zoning or landmarking law" and thus denying a nearly identical claim challenging the CSA's prohibition against purported religious use of marijuana under RLUIPA. Nor can plaintiff claim that he currently is an institutionalized person. As a result, plaintiff's claim under RLUIPA should be dismissed.

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<sup>12</sup> Plaintiff's argument that there was no factual hearing in Olsen regarding his circumscribed use proposal does not undermine the D.C. Circuit's rejection of the proposal. See Pl.'s Mem. at 24. Plaintiff's proposal was fully set forth to the court by competent counsel and was actually litigated by the parties; nevertheless, the court concluded that plaintiff's plan was not a viable less restrictive means of achieving the government's interest. See Olsen, 878 F.2d at 1462.

**V. PLAINTIFF’S FIRST AMENDMENT CLAIM LACKS MERIT BECAUSE THE CSA IS A NEUTRAL LAW OF GENERAL APPLICABILITY**

Plaintiff’s assertion that the Federal Defendants rely on Employment Division v. Smith, 494 U.S. 872 (1990), for the proposition that the CSA is a neutral law of general applicability is inaccurate. See Pl.’s Mem. at 25. Instead, Federal Defendants cite several other cases which clearly hold that the CSA is a neutral law of general applicability and which reject First Amendment challenges to the CSA’s ban on marijuana. See Fed. Defs.’ Mem. at 20-21 (citing United States v. Meyers, 95 F.3d 1475, 1481 (10th Cir. 1996); Multi Denominational Ministry of Cannabis and Rastafari, Inc. v. Gonzales, 2007 WL 404788, \*6 (N.D. Cal. 2007); Loop v. United States, 2006 WL 1851140, \*2, \*6 (D. Minn. 2006); O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 282 F. Supp. 2d 1236, 1246 (D.N.M. 2002))<sup>13</sup>. Plaintiff overlooks these cases and offers no response to their clear findings.<sup>14</sup> Accordingly, plaintiff’s First Amendment claim lacks merit and must be dismissed.

**VI. PLAINTIFF’S EQUAL PROTECTION CLAIM IS BARRED BY COLLATERAL ESTOPPEL AND OTHERWISE FAILS AS A MATTER OF LAW**

Plaintiff cannot escape the preclusive effect of the decisions in Rush, 738 F.2d at 513 and Olsen, 878 F.2d at 1463-65, which both considered and rejected the very same equal protection claim based

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<sup>13</sup> Contrary to plaintiff’s contention, the Supreme Court in O Centro did not conclude that the CSA is not a neutral law of general applicability. See Pl.’s Mem. at 25. The Court merely indicated that the CSA does provide for an exception for the Native American Church’s use of peyote. See O Centro, 126 S. Ct. at 1222. Moreover, as noted, the district court in O Centro concluded that the CSA is a neutral law of general applicability despite its various exceptions for research and other uses. O Centro, 282 F. Supp. 2d at 1246-47.

<sup>14</sup> Plaintiff’s additional claim that his case presents a “hybrid situation,” alluded to in Smith, involving not only freedom of religion concerns but multiple other constitutional protections is incorrect. In Smith, the Court noted that the First Amendment has barred application of a neutral, generally applicable law to religiously motivated action only where the action also implicated freedom of speech or fundamental rights of parents. See Smith, 494 U.S. at 881-82. Here, plaintiff’s purported sacramental use of marijuana is not accompanied by “any communicative activity or parental right” that would present such a hybrid situation. See id. at 882.

on the Native American Church's peyote exemption that plaintiff once again asserts in the present case. Plaintiff asserts that he was not able to present his Equal Protection claim to a jury in Rush and that he was not provided an evidentiary hearing in Olsen. See Pl.'s Mem. at 26. Presenting claims to juries and holding evidentiary hearings, however, are not prerequisites of the doctrine of collateral estoppel. Instead, the relevant inquiry is whether plaintiff was provided a full and fair opportunity to be heard on his Equal Protection claim. See Manion v. Nagin, 392 F.3d 294, 300 (8<sup>th</sup> Cir. 2004) (listing elements of collateral estoppel). The decisions in Rush and Olsen clearly indicate that both the First Circuit and the D.C. Circuit allowed plaintiff to present his Equal Protection claims in a full and complete manner, which the courts thoroughly considered but ultimately denied due to the differences between marijuana and peyote and the differences between the Native American Church's precisely circumscribed peyote ritual and plaintiff's widespread use of marijuana. See Rush, 738 F.2d at 513; Olsen, 878 F.2d at 1463-65. Thus, plaintiff has not demonstrated why his Equal Protection claim based on the peyote exemption should not be barred by collateral estoppel principles.<sup>15</sup>

In addition, plaintiff has not rebutted the fact that he is not similarly situated to the members of the UDV religion who were the litigants in the O Centro litigation. In fact, plaintiff admits that marijuana and hoasca (the substance ingested by UDV members during their religious ceremonies) differ. See Pl.'s Mem. at 27. And, as noted repeatedly by the Federal Defendants, the lower courts and the Supreme Court in the O Centro litigation already have emphasized that the prevalence and high demand for marijuana make it a greater threat to public health and safety than hoasca and that UDV members' tightly restricted use of hoasca is substantially different than plaintiff's expansive and

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<sup>15</sup> Plaintiff also has not demonstrated why the other decisions rejecting nearly identical Equal Protection challenges by religious users of marijuana should not control here. See McBride v. Shawnee County, Kansas Court Servs., 71 F. Supp. 2d 1098, 1101-02 (D. Kan. 1999); United States v. Carlson, 959 F.2d 242, \*3 (9<sup>th</sup> Cir. 1992) (unpublished).

continual use of marijuana under the teachings of the EZCC. See O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973, 1020, 1023 (10<sup>th</sup> Cir. 2004) (en banc). As a result, a hearing in plaintiff's present case regarding the safety of marijuana is not required in order to determine that plaintiff's Equal Protection claim fails and should be dismissed. See Stutzka v. McCarville, 420 F.3d 757, 760 n.2 (8<sup>th</sup> Cir. 2005) (indicating that courts may take judicial notice of judicial opinions and may consider them on a motion to dismiss).

## **VII. THE CSA IS NOT AN EX POST FACTO LAW**

Plaintiff's assertion that the EZCC is centuries old and that other people may have smoked marijuana hundreds of years before the passage of the CSA does not make the CSA an ex post facto law. See Pl.'s Mem. at 27. The relevant inquiry here for ex post facto purposes is whether the CSA retroactively changed the legal consequences of any of plaintiff's acts that were completed prior to its effective date. See, e.g., Lynce v. Mathis, 519 U.S. 433, 441 (1997). Plaintiff cannot contest that the CSA was in effect prior to any of plaintiff's numerous transgressions involving marijuana; thus the CSA did not retroactively alter the legal consequences of any of plaintiff's actions and his ex post facto claim must be dismissed out of hand.

## **VIII. THIS COURT LACKS JURISDICTION TO GRANT PLAINTIFF'S REQUEST TO RESCHEDULE OR REMOVE MARIJUANA FROM THE CSA**

Plaintiff's indication that he is not asking the Court to move marijuana from one schedule to another under the CSA but rather is requesting that the Court remove marijuana altogether as a controlled substance from the CSA does not alter the fact that the court lacks jurisdiction to grant either form of relief. See Pl.'s Mem. at 27. As explained previously, the CSA provides an administrative remedy for any interested party to request that a substance be deleted entirely from the CSA or be transferred to a less restrictive schedule. See 21 U.S.C. § 811(a). Courts uniformly have held that this

administrative rescheduling process is the exclusive means for contesting Congress's scheduling decisions regarding controlled substances and that courts thus lack authority to review such scheduling decisions themselves in the first instance, including decisions to include or exclude substances entirely under the CSA. See, e.g., United States v. Burton, 894 F.2d 188, 192 (6<sup>th</sup> Cir. 1990); United States v. Middleton, 690 F.2d 820, 823 (11<sup>th</sup> Cir. 1982); Lepp v. Gonzales, 2005 WL 1867723, \*10 (N.D. Cal. 2005). Having no jurisdiction to consider plaintiff's request, the Court should dismiss this claim summarily.

**IX. PLAINTIFF'S CLAIMS UNDER THE FOURTH AND FIFTH AMENDMENTS ARE NOT SUSTAINABLE AND MUST BE DISMISSED**

In defense of his claims under the Fourth and Fifth Amendments, plaintiff merely refers to the so-called "hybrid" situation mentioned in Employment Division v. Smith, 494 U.S. at 881-82 and appears to claim that these amendments are being violated in conjunction with his First Amendment Free Exercise rights. See Pl.'s Mem. at 27-28. As discussed earlier, the hybrid situation mentioned in Smith referred only to a few prior cases where religiously motivated action that also implicated freedom of speech or fundamental rights of parents was held to be exempt from neutral and generally applicable laws. See supra note 14. Here, plaintiff's religious use of marijuana does not also involve free speech rights or rights of parents to raise their children, thus plaintiff's case does not raise such a hybrid situation. Furthermore, plaintiff has yet to state a viable claim for relief under the Fourth Amendment, and he cannot refute the fact that he has no legal property interest in marijuana to support his Fifth Amendment Due Process claim. Accordingly, for the reasons set forth in the Federal Defendants' prior memorandum, plaintiff's claims under the Fourth and Fifth Amendments should be dismissed. See Fed. Defs.' Mem. at 28-30.

**X. PLAINTIFF CONCEDES THAT HE DOES NOT HAVE AN INDEPENDENT APA CLAIM**

Plaintiff admits that his claim under the Administrative Procedure Act is “completely derivative of Plaintiff’s other claims.” Pl.’s Mem. at 28. As a result, for the same reasons that each of plaintiff’s other claims should be dismissed, as discussed herein and in Federal Defendants’ prior memorandum, plaintiff’s APA claim lacks merit and should be dismissed.

**XI. PLAINTIFF’S CLAIMS UNDER VARIOUS TREATIES AND INTERNATIONAL LAW ARE NOT VIABLE AND SHOULD BE DISMISSED**

Plaintiff’s scant assertion that the treaties and sources of international law that he invokes in Count Eight of his complaint are “evidence of national and international intent to guarantee religious freedom” is not at all sufficient to sustain these claims. For the reasons stated in Federal Defendants’ prior memorandum, there are no independent claims that can be raised under these provisions and these claims also should be dismissed out of hand. See Fed. Defs.’ Mem. at 31-33.

**CONCLUSION**

For the reasons stated herein and in the Memorandum in Support of Federal Defendants’ Motion to Dismiss, Federal Defendants respectfully request that the Court grant their motion to dismiss and dismiss this action with prejudice.

Dated: May 24, 2007

Respectfully submitted,

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