

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

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CARL ERIC OLSEN,

Plaintiff,

v.

ALBERTO R. GONZALES, et al.,

Defendants.

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No. 4-07-CV-00023-JAJ-RAW

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S SURREPLY  
TO FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS**

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

**ARGUMENT**

**I. PLAINTIFF'S CLAIMS ARE RIPE FOR REVIEW**

The Federal Defendants claim that recognizing the Plaintiff's right to use Marijuana as a Sacrament would render the marijuana laws unenforceable. On the other hand, the Federal Defendants claim the Plaintiff has no cognizable claim because the Federal Defendants will not enforce the marijuana laws against the Plaintiff because the Plaintiff has voluntarily suspended the Practice of his Religion. The truth of the matter is that the Plaintiff has abandoned the Establishment and Free Exercise of his Religion because of the threat of arrest and prosecution.

If the Federal Defendants are now claiming they will not arrest and prosecute the Plaintiff if the Plaintiff moves forward with the Establishment and Exercise of the Plaintiff's Religion, they had an obligation to respond by saying so when the Plaintiff sent them a letter requesting such a response (see Exhibit #7G attached to Plaintiff's Original Complaint in this case). The Plaintiff would not have filed this civil action against the Federal Defendants if they had responded by guaranteeing the Plaintiff would not be arrested or prosecuted for his Sacramental use of Marijuana.

Because the Federal Defendants did not respond in a timely manner to the Plaintiff and explain their sudden change of heart not to interfere with the Plaintiff's Religion, and because the Federal Defendants cannot simply say that the marijuana laws will not be enforced against the Plaintiff absent some kind of acknowledgment on their part or a judicial recognition as made in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal (UDV hereafter), 456 U.S. 418, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006), the Federal Defendants' Motion to Dismiss should be denied.

The Plaintiff brings a constitutional and statutory claim that arises out of the Federal Defendants' past efforts to enforce the Controlled Substances Act (CSA), 21 U.S.C. §§ 801 et seq., against the Plaintiff. The Federal Defendants clearly think that nothing has changed to prevent them from enforcing the CSA against the Plaintiff. But the law has changed because of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb et seq., and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc et seq., and the interpretation of those two statutes by the U.S. Supreme Court in Cutter v. Wilkinson, 544 U.S. 709 (2005), and UDV. The Federal Defendants can no longer rely on the sole fact the Congress enacted the CSA to support their enforcement of the CSA against the Plaintiff, because Congress has amended the CSA by enacting the RFRA and the RLUIPA. Under the new standard articulated in UDV ("strict scrutiny" and the "compelling interest test"), the Federal Defendants must show actual harm caused by the Plaintiff's use of Marijuana as a Sacrament. This is a fact-intensive claim that should not be dismissed without further opportunity for factual development.

The Plaintiff notes that the Federal Defendants do aggressively enforce the marijuana laws when they want to make a political statement. See Raich v. Gonzales, No. 03-15481 (9th Cir. March 14, 2007) (Raich hereafter), and Santa Cruz v. Ashcroft, 372 F.3d 1041 (9<sup>th</sup> Cir. 2004) (Santa Cruz hereafter) (the case was remanded by the Ninth Circuit U.S. Court of Appeals and is currently at the

trial stage in U.S. District Court, California Northern District, San Jose, Civil Docket 5:03-cv-01802-JF). Considering the large number of people using marijuana in this country and around the world, as noted by Judge Young in his 1988 ruling (See Exhibit #1 attached to Plaintiff's Original Complaint in this case), it is clear that the Federal Defendants cannot enforce the marijuana laws the majority of the time because the Federal Defendants do not have the resources that would be required to accomplish such a task. Therefore, selective prosecution is the rule rather than the exception and the Plaintiff fears a real threat that he would be targeted for arrest and prosecution if he moves forward with the Establishment and Exercise of his Religion.

The Federal Defendants are proposing that the Plaintiff move forward with Establishment and Exercise of the Plaintiff's Religion so the Federal Defendants can arrest and prosecute the Plaintiff, forcing the Plaintiff to litigate his claims in the context of a Criminal Trial. This is unethical. The Federal Defendants cannot escape the purpose of the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, which was enacted to avoid the very situation the Federal Defendants are advocating. The Act was adopted so that in such a case it would not be "necessary to breach a contract or a lease, or act upon one's own interpretation of his rights when disputed;" instead, under the Declaratory Judgment Act "it is not necessary to bring about such social and economic waste and destruction in order to obtain a determination of one's rights." S. Rep. No. 1005, 73d Cong., 2d Sess. 3 (1934).

## **II. PLAINTIFF'S RFRA CLAIM IS NOT BARRED BY COLLATERAL ESTOPPEL**

Simply calling a thistle a rose does not make it a rose, and calling the "rational basis test" the "compelling interest test" does not make it so. The Plaintiff clearly never received the compelling interest test in any of his prior cases. This is obvious because, just as the Federal Defendants now claim, the only evidence the government had to produce at trial was the Controlled Substance Act (CSA). The CSA was simply assumed to provide a compelling

interest in prohibiting the Plaintiff's religion and simply assumed to be the least restrictive means of achieving that interest. That is not the compelling interest test that was applied in UDV.

Congress amended the CSA when it passed the RFRA and the RLUIPA. The CSA is now subject to the compelling interest test that was denied in United States v. Rush, 738 F.2d 497 (1<sup>st</sup> Cir. 1984) (Rush hereafter), and Olsen v. DEA, 878 F.2d 1458 (D.C. Cir. 1989) (Olsen hereafter), both prior to the decision in Employment Division v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) (Smith hereafter). Whether it was an error of law to prohibit the Plaintiff from presenting his only defense in United States v. Rush, 738 F.2d 497 (1<sup>st</sup> Cir. 1984) (Rush hereafter), or whether the legal standard was the rational basis test when Rush was decided really doesn't matter because the result is the same. The Plaintiff did not receive the compelling interest test now mandated and fully retroactive to Rush by the RFRA.

On November 23, 1982, the district court ruled as a matter of law that the first amendment did not protect the possession of marijuana with intent to distribute by the defendants, and further ordered that the defendants be precluded from introducing at trial any evidence concerning the Ethiopian Zion Coptic Church and the use of marijuana by its members, insofar as such evidence related to their alleged first amendment defense.

Rush, at page 512 (withholding evidence of the Plaintiff's innocence from the jury).

In enacting substantial criminal penalties for possession with intent to distribute, Congress has weighed the evidence and reached a conclusion which it is not this court's task to review *de novo*. Every federal court that has considered the matter, so far as we are aware, has accepted the congressional determination that marijuana in fact poses a real threat to individual health and social welfare, and has upheld the criminal sanctions for possession and distribution of marijuana even where such sanctions infringe on the free exercise of religion. *United States v. Middleton*, 690 F.2d 820, 825 (11th Cir. 1982), *cert. denied*, 460 U.S. 1051, 103 S. Ct. 1497, 75 L. Ed. 2d 929 (1983); *United States v. Spears*, 443 F.2d 895 (5th Cir. 1971), *cert. denied*, 404 U.S. 1020, 30 L. Ed. 2d 669, 92 S. Ct. 693 (1972); *Leary v. United States*, 383 F.2d 851, 859-61 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6, 23 L. Ed. 2d 57, 89 S. Ct. 1532 (1969); *Randall*, 441 F. Supp. at 316 & n.2; *Kuch*, 288 F. Supp. at 448. Only last year, the Eleventh Circuit rejected identical claims raised by some of the very appellants before us in

this case, see *Middleton*, 690 F.2d 820, and the United States Supreme Court denied review. We decline to second-guess the unanimous precedent establishing an overriding governmental interest in regulating marijuana.

Finally, it has been recognized since *Leary* that accommodation of religious freedom is practically impossible with respect to the marijuana laws:

Congress has demonstrated beyond doubt that it believes marihuana is an evil in American society and a serious threat to its people. 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.

*Leary*, 383 F.2d at 861, quoted in *Middleton*, 690 F.2d at 825  
*Rush*, at page 512-513 (relying on *Leary v. United States*, 383 F.2d 851 (5<sup>th</sup> Cir. 1967) (*Leary* hereafter). Under the RFRA and the RLUIPA, the court must review the application of the CSA to the Plaintiff's Religion de novo.

The rule announced by the court in *United State v. Middleton*, 690 F.2d 820, 824 (11<sup>th</sup> Cir. 1982) (*Middleton* hereafter):

In order to succeed, the defendant must prove both that the Ethiopian Zion Coptic Church is a religion within the meaning of the first amendment and that the statutes in question do not serve a compelling governmental interest.

is no longer valid law under the RFRA, the RLUIPA, and UDV. The new rule prohibits the Federal Defendants "from substantially burdening a person's exercise of religion, unless the Government 'demonstrates that application of the burden to the person' represents the least restrictive means of advancing a compelling interest. 42 U.S.C. § 2000bb-1(b)." UDV, at page 423. The Plaintiff is not required to prove that prohibition of marijuana does not serve a compelling governmental interest, although the Plaintiff can certainly make that argument in support of a factual finding that marijuana is not harmful. The Plaintiff cannot simply ignore the fact that the evidence shows marijuana is not harmful. The Federal Defendants themselves are the authors of the 1972 Commission on Marihuana Report (see Exhibit #21 attached to Plaintiff's Original

Complaint) and the 1988 DEA Administrative Law Judge's findings of fact (see Exhibit #1 attached to Plaintiff's Original Complaint) the very same evidence which shows that marijuana is not harmful.

In Olsen, court appointed counsel threw away the compelling interest test by: (1) conceding the Federal Defendants had a compelling interest in prohibiting marijuana; (2) failing to introduce the 1988 findings of fact by the DEA Administrative Law Judge (see Exhibit #1 attached to Plaintiff's Original Complaint) which clearly addressed the lack of compelling interest in prohibiting marijuana and to which the Plaintiff was an actual party, and (3) concocting a novel, imaginary, last minute theory of the Plaintiff voluntarily limiting his use of marijuana. The Court of Appeal remanded the case back to the DEA for administrative hearings on this new, novel and imaginary theory of self-limited use, but the DEA did not hold any evidentiary hearing on this proposal. The Court of Appeals merely accepted the opportunity to publish dicta on the new, novel, and imaginary theory. The Plaintiff never received an evidentiary hearing as clearly mandated by the RFRA as amended by the RLUIPA and clearly mandated by the Supreme Court's decision in UDV. Contrary to the Federal Defendants' assertion, Leary was indeed cited in the final ruling of the DEA Administrator in Olsen and the Court of Appeals upheld the Administrator's decision. Leary did not get the compelling interest test mandated by the RFRA and UDV, and this was recognized by the United States Court of Appeals in United States v. Bauer, 84 F.3d 1549 (9th Cir. 1996) (Bauer hereafter). In vacating and remanding the district court decision on the RFRA's application to the marijuana laws, the Court of Appeals wrote: "The district court quoted Leary v. United States, 383 F.2d 851, 861 (5th Cir. 1967)..." Bauer, at page 1557. At page 1559, the court wrote:

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 [Leary] 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 Plaintiff is not asking this court to overturn his prior state and federal cases (that will come some other day), but simply pointing out that the facts were different in those cases and the legal standard applied to those facts in those cases was different (a "rational basis test" instead of the "compelling interest test").

If this case were a collateral attack under 28 U.S.C. 2255, Collateral Estoppel would be an issue for the court to consider. The facts in this case are different. Just because the Plaintiff was not allowed to present the First Amendment as a defense or a jury instruction in prior cases does not justify an absolute ban on the Plaintiff's Religion now. Collateral Estoppel does not apply unless the facts are the same. Those prior cases were tied to the specific set of facts in those prior cases. The Federal Defendants claim that limited use was considered and rejected by the Court of Appeals in Olsen, but that proposal was a last minute effort to come up with some imaginary set of facts that are clearly not the facts presented in this case.

It is not the Plaintiff's burden to come up with some least restrictive means of limiting himself. The facts in this case are clear - the Plaintiff is seeking an order enjoining the Defendants from interfering with his Sacramental use of Marijuana and any restriction would have to be justified by facts entered into the record as evidence showing actual harm to someone as the result of participating in a ceremony of the Plaintiff's religion. Such an injury has never occurred and it is likely never to occur considering the historical record reviewed in the report of the federal Commission on Marijuana in 1972 (See Exhibit #21 attached to the Plaintiff's Original Complaint) and the findings of

fact of the DEA Administrative Law Judge in 1988 (See Exhibit #1 attached to the Plaintiff's Original Complaint).

### **III. PLAINTIFF IS NOT ASKING THIS COURT TO RESCHEDULE MARIJUANA**

When the Plaintiff says that marijuana does not belong in the CSA, this is not a request for the court to reschedule marijuana. It is simply a statement that marijuana is a plant and beyond the authority of the Federal Defendants to prohibit for Religious purposes. The Federal Defendants have the authority to regulate Commerce, not Religion. The only authority the Federal Defendants have over Religion is to prevent a threat to public health and safety of sufficient magnitude as to justify the intrusion into Religious liberty. A plant that has never killed or injured anyone in thousands of years of recorded history, as well as being a plant that has been used continuously for multitudes of purposes including providing the paper for the U.S. Declaration of Independence and being used a legal tender in the Virginia Colonies, just doesn't rise to this level of a threat. The findings of fact of the federal Marihuana Commission in 1972 (See Exhibit #21 attached to the Plaintiff's Original Complaint) and the findings or fact by the DEA Administrative Law Judge in 1988 (See Exhibit #1 attached to the Plaintiff's Original Complaint) acknowledge this lack of threat to public health and safety. The Plaintiff is not an attorney, so when the Plaintiff says marijuana should not be in the CSA that is the Plaintiff's opinion (not a formal request for rescheduling). This case is about Religious Freedom, not rescheduling. None of the cases cited by the Federal Defendants regarding rescheduling have anything to do with Religion.

The Federal Defendants also misconstrue the Plaintiff's references to state medical marijuana laws and the federal program that supplies marijuana to medical patients here in Iowa. The medical use of marijuana is simply another demonstration of the relative safety of the use of the marijuana plant. These medical uses are evidence to support the Plaintiff's argument that the Federal Defendants lack a compelling interest in preventing the Plaintiff from

Establishing and Exercising his Religion through the Sacramental use of Marijuana. Nobody is dying or being injured by using the huge amounts of marijuana supplied by the Federal Defendants in smoked form (cigarettes rolled by the Federal Defendants and distributed at the rate of 300 cigarettes per month) and that is what this evidence shows. On the other hand, the Federal Defendants have injured hundreds of medical patients by denying them safe, legal access to the Marijuana plant. See Raich, Santa Cruz, and Kuromiya v. United States, 78 F.Supp.2d 367 (E.D. Pa. 1999) (Kuromiya hereafter). The lead attorney in Kuromiya, Norman Elliot Hirsch, was the attorney for the Plaintiff in Olsen v. DEA, 519 U.S. 1118 (1997) (asking the DEA to reschedule marijuana from Schedule I to Schedule II because the principle psychoactive ingredient in marijuana had been moved to Schedule II in 1986 and because coca plants and opium poppies are in Schedule II).

**IV. THE PLAINTIFF WAS NOT TREATED FAIRLY IN PRIOR LITIGATION BECAUSE THE RFRA AS AMENDED BY THE RLUIPA IS FULLY RETROACTIVE TO THOSE CASES AND APPLIES A DIFFERENT LEGAL STANDARD**

The Religious Freedom Restoration Act (RFRA) as amended by the Religious Land Use and Institutionalized Persons Act (RLUIPA) is fully retroactive to any application of federal law (all of the Plaintiff's prior litigation raising Religious claims). 42 U.S.C. §§ 2000bb et seq. and 42 U.S.C. §§ 2000cc et seq. In prior litigation, the Federal Defendants were not required to show evidence of actual harm. The only evidence the Federal Defendants produced at any of those trials was a statute (they simply relied on the CSA) and proof that the Plaintiff was in constructive possession of marijuana. The decision in UDV clearly shows that the CSA alone is not sufficient to establish a compelling interest in prohibiting the Establishment and Exercise of the Plaintiff's Religion without a hearing on the facts. The Federal Defendants must now show evidence of actual harm caused by the Plaintiff and not simply a statute. The Federal Defendants have never presented any evidence of actual harm caused by

the Plaintiff from the Sacramental use of Marijuana and it is beyond any reasonable doubt that they never will.

**V. THE TEXT OF THE RFRA IS NOT JUST THE PLAINTIFF'S MANTRA, IT IS CONGRESS' MANTRA, AND IT IS THE SUPREME COURT'S MANTRA**

In an attempt to disparage the Complaint of the Petitioner, the Federal Defendants characterize the Plaintiff's assertion ("a focused inquiry into the application of the law to the individual whose religious freedom is substantially burdened") as the Plaintiff's "mantra." See Federal Defendants' Reply at page 8. As the Supreme Court noted in *UDV*, "Under the more focused inquiry required by RFRA and the compelling interest test, the Government's mere invocation of the general characteristics of Schedule I substances, as set forth in the Controlled Substances Act, cannot carry the day." *UDV*, at 432. 42

U.S.C. 2000bb(b) states:

- (b) Purposes. The purposes of this Act are--
  - (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
  - (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

The Federal Defendants mock the Plaintiff in footnote 7 on page 8 of their Reply by saying sincerity is not an issue, and yet they were the first to attack the Plaintiff's sincerity in their Motion to Dismiss, footnote 5 at page 12 of their Memorandum in support of their Motion to Dismiss.

**VI. THE RLUIPA IS AN INTEGRAL PART OF THE RFRA AND CLEARLY APPLIES TO THE CSA**

RLUIPA is an integral part of the RFRA.

The RFRA, 42 U.S.C. 2000bb-2(4), states:

- (4) the term "exercise of religion" means religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000 [42 USCS § 2000cc-5].

The RLUIPA, 42 U.S.C. 2000cc-5(7), states:

- (7) Religious exercise.

(A) In general. The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

The RLUIPA, 42 U.S.C. 2000cc-3(g), states:

(g) Broad construction. This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.

**VII. THE CSA IS NOT A NEUTRAL LAW OF GENERAL APPLICABILITY**

It is beyond question that the CSA contains an exemption for the sacramental use of the peyote plant (a Schedule I controlled substance) and it is beyond question that the Supreme Court created another exemption for hoasca (which contains DMT, a Schedule I controlled substance). As the Court of Appeals noted in Middleton, "Extended to its logical conclusion, appellant's argument would protect all drugs, not just marijuana, if any religious group chose to use them as a religious sacrament." Middleton, at page 825. This slippery slope argument has clearly been rejected by the Supreme Court in UDV.

The argument that the CSA is a law neutral toward religion is false beyond any doubt and the Federal Defendants know it is false. The argument that the CSA is generally applicable to everyone is false, because the Federal Defendants supply marijuana to two medical patients living in Iowa under the Federal Defendants' Investigational New Drug (IND) program while denying the same access to the Plaintiff. The CSA is not applied to these two patients in the same way it is being applied to the Plaintiff and the Federal Defendants know this. The Federal Government cannot apply a more restrictive application of the CSA to the Plaintiff than it applies to medical patients because the First Amendment protection of Freedom of Religion is a fundamental right.

Congress and the Supreme Court have not yet recognized a fundamental right to use Schedule I controlled substances as medicine. See Raich v. Gonzales, No. 03-15481 (9<sup>th</sup> Cir. March 14, 2007):

## CONCLUSION

We conclude that Raich has not demonstrated a likelihood of success on the merits of her action for injunctive relief. First, we hold that Raich's common law necessity defense is not foreclosed by *Oakland Cannabis* or the Controlled Substances Act, but that the necessity defense does not provide a proper basis for injunctive relief. Second, although changes in state law reveal a clear trend towards the protection of medical marijuana use, we hold that the asserted right has not yet gained the traction on a national scale to be deemed fundamental. Third, we hold that the Controlled Substances Act, a valid exercise of Congress's commerce power, does not violate the Tenth Amendment. Finally, we decline to reach Raich's argument that the Controlled Substances Act, by its terms, does not prohibit her possession and use of marijuana because this argument was not raised below.

Contrary to the Federal Defendants' assertion, the Plaintiff has not overlooked any of the cases predating UDV. UDV says that the CSA is not a neutral law of general applicability and any case that says otherwise has been overruled by UDV. The decision in Multi Denominational Ministry of Cannabis and Rastafari, Inc. v. Gonazales, No C-06-4264 VRW (N.D. Cal. February 2, 2007) (MDMCR hereafter) is only meaningful insofar as it is consistent with the decision in UDV regarding the CSA. The Supreme Court has settled this issue in UDV, not in MDMCR.

The decision in Smith addressed the application of the First Amendment to state law, not federal law. The Plaintiff's case is also not about the denial of an unemployment insurance claim. The Plaintiff's case is about the absolute and total ban on his Religion. Smith did not say that the sacramental use of peyote is unprotected by the First Amendment under any set of circumstances.

But the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display.

Smith, 494 U.S. 872, 877 (1990). Compare the Oregon state law to the federal law where the CSA allows the sacramental use of peyote and hoasca as well as the

distribution of marijuana by the Federal Defendants under the IND program to medical patients here in Iowa. None of these factors existed under Oregon state law. The CSA is different from the Oregon law (which had no exemptions for religious or medical use of peyote). This explains why the Court in Smith said the Oregon law was neutral toward religion and generally applicable to everyone. The Oregon law did not discriminate against Smith on the basis of Smith's religion being different than someone else's religion, nor did it discriminate against Smith because of some other secular exception such as the Federal Defendants' IND program. It was both neutral and generally applied.

The Plaintiff agrees with Congress that Smith was decided incorrectly, but there are vast differences between that case and this one (and Smith preserved the compelling interest test in cases where the law is not neutral toward religion and not generally applicable to everyone). The ruling in UDV clearly shows that the failure of the courts to allow a Religious defense or to allow a jury instruction on Religious Freedom in the Plaintiff's prior litigation was an error of law under the retroactive scope of the RFRA. The error of law caused facts to be withheld from the jury in Rush, failure to instruct the jury on the religious defense in Plaintiff's prior state criminal cases in Iowa, and denial of a DEA administrative hearing in Olsen. Similarly, Iowa's drug law is not neutral toward religion because it contains an exemption for the sacramental use of peyote (at the same time the Plaintiff being denied a jury instruction on the Sacramental use of Marijuana here in Iowa state courts) and people in Iowa are now receiving marijuana from the Federal Defendants under the Federal Defendants' IND program (which will be considered as new evidence when a collateral attack is filed attacking Plaintiff's prior state criminal cases). "As the plurality pointed out in Roy, our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of

'religious hardship' without compelling reason. *Bowen v. Roy, supra*, at 708." Smith, 494 U.S. 872, 884 (1990).

Additionally, the combination of Establishment, Freedom of Assembly, and Free Exercise of Religion was clearly contemplated as a hybrid situation in 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." Smith, at 887-888.

The individual exemption for the Plaintiff required in this case is due to the Investigational New Drug Program through which 5 Americans are exempted from criminal prosecution for the medical use of marijuana. If a state has a provision allowing an exemption to a statute for "good cause", that exemption should apply for Religious use. Smith, at page 884. In this case the "good cause" exemption is medical use under the IND program. As noted in Smith the "good cause" exemption is applicable when a determination must be made for individual cases (such as employment compensation cases or, as in the instant case, religious cases) to determine when an exemption should apply. The CSA is not a neutral law of general applicability, because a clear exemption has been made to the CSA for medical use of marijuana under the IND.

The Federal Defendants correctly point out that that the Plaintiff claimed to smoke marijuana "continually all day, through church services, through everything we do". Olsen, at page 1459. Likewise, patients in the Federal Defendants' IND smoke marijuana continually all day, for medical purposes, through everything they do. The Federal Defendants do not impose tight restrictions on their marijuana use (see Exhibit #18 attached to Plaintiff's Original Complaint). The Plaintiff is not seeking to have the court reschedule marijuana under the CSA but simply seeking the same exemption from prosecution enjoyed by patients in the IND program.

In Kuromiya the court applied a rational basis test. "As the government had a rational basis for its decision not to supply marijuana to the plaintiffs

through the compassionate use program, the court must grant the government's motion." Kuromiya, 78 F.Supp.2d, at page 368. The Supreme Court has stated many times, in various forms, that whether one analyzes equal protection under the Fifth or the Fourteenth Amendment, "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." Romer v. Evans, 517 U.S. 620, 631 (1996); see also Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985) ("legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest"). However, unlike Kuromiya, the Plaintiff's claim in this case involves fundamental rights, Religious Freedom, Freedom of Assembly, Equal Protection and Due Process.

In Kuromiya v. United States, 37 F.Supp.2d 717, 729 (E.D. Pa. 1999), the court explained the circumstances of the equal protection claim. "A different conclusion must be reached, however, with respect to plaintiffs' claims regarding the compassionate use program. Here, the classification being challenged is apparent: plaintiffs argue that it is a violation of equal protection for the government to make an exception to its criminal laws for one group of individuals but not for another group of individuals that is similarly situated." As Judge Katz pointed out in Kuromiya, "While, when defending government actions under a rational review standard, the government has no burden to present evidence supporting its decision, see, e.g., Heller v. Doe., 509 U.S. 312, 320-21, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993); FCC v. Beach Comm., Inc., 508 U.S. 307, 315, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993), it is not clear that there is no set of facts that could be proven under which the plaintiffs would prevail." Kuromiya, 37 F.Supp.2d, at page 729. Because the Plaintiff's case involves fundamental rights, the Federal Defendants' actions must be evaluated under a strict scrutiny standard in which the Federal

Defendants have the burden of presenting evidence supporting their decision to totally prohibit Religious use of Marijuana.

The total prohibition of the Plaintiff's Sacramental use of Marijuana is a totally arbitrary deprivation of liberty, which violates the substantive Due Process guarantee. The substantive due process analysis is available to protect civil rights. See United States v Carolene Products, 304 U.S. 144, 152-53 n.4 (1941). The court has a duty to protect those liberties and rights of "fundamental" constitutional magnitude. The rights the court has recognized as fundamental and deserving of significant judicial protection are most of the guarantees of the Bill of Rights. All of the provisions of the First Amendment are protected under the Fourteenth Amendment. The rights which have been violated create a "penumbra", representing fundamental constitutional magnitude which must be protected by the court. See Griswold v. Connecticut, 381 U.S. 479, 483-384 (1965).

#### **VIII. EQUAL PROTECTION TO THE PLAINTIFF IS NOT BARRED**

The Plaintiff is not barred by Rush from bringing an equal protection claim because Rush was based on a specific set of facts which are not the facts in this case. Additionally, the Supreme Court in UDV has now added another controlled substance to the list of controlled substances recognized as sacraments, ending any speculation that the exemption for peyote was based on the special status of Indian Tribes. See Rush at page 513:

We reject as well appellants' claim that members of the Ethiopian Zion Coptic Church are entitled as a matter of equal protection to a religious exemption from the marijuana laws on the same terms as the peyote exemption granted the Native American Church. Marijuana is not covered by the peyote exemption; this in itself distinguishes this case from *Kennedy v. Bureau of Narcotics and Dangerous Drugs*, 459 F.2d 415 (9th Cir. 1972), cert. denied, 409 U.S. 1115, 34 L. Ed. 2d 699, 93 S. Ct. 901 (1973). Moreover, the peyote exemption is uniquely supported by the legislative history and congressional findings underlying the American Indian Religious Freedom Act, which declares a federal policy of "protect[ing] and preserv[ing] for American Indians their inherent right of freedom to believe, express and exercise the[ir] traditional religions . . . , including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional

rites." 42 U.S.C. § 1996. The legislative history of the Act "is clear in finding that religion is an integral part of Indian culture and that the use of such items as peyote are necessary to the survival of Indian religion and culture." *Peyote Way Church of God, Inc. v. Smith*, 556 F. Supp. 632, 637 (N.D. Tex. 1983). In light of the sui generis legal status of American Indians, see *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16-17, 8 L. Ed. 25 (1831) (Marshall, C.J.), and the express policy of the American Indian Religious Freedom Act (which was passed after *Kennedy* was decided), we think the Ethiopian Zion Coptic Church cannot be deemed similarly situated to the Native American Church for equal protection purposes.

As mentioned in the Plaintiff's response to the Federal Defendants' Motion to Dismiss, three members of the Ethiopian Zion Coptic Church met with Iowa Senator Harold Hughes in Washington in 1972 (the Plaintiff can produce an affidavit from Brother James Tranmer; Brother Thomas Reilly died last year; the Plaintiff is unsure if Brother Jacob Shnurman would be willing to make an affidavit). Senator Hughes was one of two U.S. senators on the federal Commission on Marihuana (see Exhibit #21 to Plaintiff's Original Complaint), and the Commission was recommending that marijuana be decriminalized. There was no need to consider a Sacramental exception for Marijuana at that time because the Commission found no threat to public health and safety sufficient to make it illegal for anyone to possess Marijuana.

The Federal Defendants claim that their inability to enforce the marijuana laws supports the denial of an equal protection claim, but the Federal Defendants fail to explain how the denial of a Religious exception makes the marijuana laws enforceable when the marijuana laws cannot be enforced even in the absence of a Sacramental exception. Additionally, the Federal Defendants supply marijuana to medical patients, which undercuts their claim that Sacramental use of Marijuana must be subjected to greater restriction than medical use.

The Federal Defendants' claim that marijuana is in greater demand ignores the actual safety of the substance itself. Marijuana is not toxic. Both peyote and hoasca are toxic. At what point do demand and toxicity meet so that one

outweighs the other? The Federal Defendants claim that demand is the only factor the court should consider. The Plaintiff claims that toxicity is of greater importance than demand. Both the Commission on Marihuana and the DEA Administrative Law Judge found marijuana to have a low threat to public health and safety compared to everyday items such as aspirin and raw potatoes.

**IX. THE CSA IS AN EX POST FACTO LAW IN THE CONTEXT OF RELIGIOUS FREEDOM**

The Ethiopian Zion Coptic Church "is centuries old and has regularly used cannabis as its sacrament." Town v. State ex rel. Reno, 377 So.2d 648, 649 (Fla. 1979). The Plaintiff's right to become a member of the Ethiopian Zion Coptic Church is unconditionally guaranteed by the First Amendment and enforcing the CSA against the Plaintiff for using Marijuana as a Sacrament is ex post facto.

**X. THE PLAINTIFF IS NOT ASKING THE COURT TO RESCHEDULE MARIJUANA**

The Sacramental use of Marijuana cannot be prohibited without an actual showing of an injury to someone. The scheduling of marijuana is not relevant because the Sacramental use of Marijuana cannot be scheduled. The Plaintiff believes that Marijuana was created by God and was given to us as equal co-inheritors of the Creation. No authority exists for Congress to take away this God-given birthright as guaranteed by the Ninth Amendment to the Constitution.

**XI. CLAIMS UNDER THE FOURT AND FIFTH AMENDMENT**

The Plaintiff has a right to possess Marijuana as a Sacrament and in that context the Plaintiff is guaranteed the Fourth and Fifth Amendment rights associated with the right to possess property which is not contraband. Marijuana used for Sacramental purposes is not contraband.

**XII. THE PLAINTIFF IS NOT ASKING FOR A REVIEW OF ADMINISTRATIVE ACTIONS**

The Plaintiff is not introducing the findings of fact from the DEA Administrative Law Judge for the purpose of reviewing the final ruling of the DEA administrator rejecting rescheduling in that case. This case has nothing to do with Scheduling. The findings of the DEA Administrative Law Judge (see Exhibit #1 attached to the Plaintiff's Original Complaint) are evidence to show

the Federal Defendants cannot prove that the Sacramental use of Marijuana is harmful to anyone because the DEA Administrative Law Judge found that the medical use of marijuana was not harmful to anyone. The Federal Defendants are incorrect in suggesting that this case is about overturning the final ruling of the DEA in that case.

**XIII. THE PLAINTIFF DOES NOT HAVE AN INDEPENDENT CLAIM UNDER INTERNATIONAL LAW**

The international laws cited by the Plaintiff do not give the Plaintiff any greater protection than the RFRA, the RLUIPA, or the First Amendment and are simply cited to re-enforce the Plaintiff's claims under the RFRA, the RLUIPA, and the First Amendment. They are expressions of the will of the people and go to the weight of the evidence in favor of the Plaintiff.

**CONCLUSION**

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

Respectfully submitted this 1<sup>st</sup> day of June, 2007

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CERTIFICATE OF SERVICE

I hereby certify that on this 1<sup>st</sup> day of June, 2007 all of the following Defendants are ECF system registrants and copies of this reply are being distributed to them electronically by the Court pursuant to the Court's Text Order of May 3, 2007 (Docket Entry 32):

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