

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

CARL ERIC OLSEN,

Plaintiff,

v.

ALBERTO R. GONZALES, et al.,

Defendants.

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

MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT
TO ENJOIN STATE DEFENDANTS

MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT TO ENJOIN STATE DEFENDANTS
FROM INTERFERING WITH THE SACRAMENTAL USE OF MARIJUANA

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CARL ERIC OLSEN,	*	
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Plaintiff,	*	No. 4-07-CV-00023-JAJ-RAW
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v.	*	
	*	MEMORANDUM IN SUPPORT OF
ALBERTO R. GONZALES, et al.,	*	MOTION FOR SUMMARY JUDGMENT
	*	TO ENJOIN STATE DEFENDANTS
Defendants.	*	

MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT TO ENJOIN STATE DEFENDANTS
FROM INTERFERING WITH THE SACRAMENTAL USE OF MARIJUANA

INTRODUCTION

The Plaintiff's burden on a motion for summary judgment is to show that there are no material facts in dispute and that the Plaintiff is entitled to a judgment as a matter of law. The Plaintiff's burden under the Compelling Interest Test is to show that his Establishment and Free Exercise of Religion is being burdened by the State Defendants. The States Defendants' burden under the Compelling Interest Test is to show actual harm caused by the Plaintiff's Establishment and Free Exercise of Religion, and if such harm can be shown the State Defendants must show they have used the least restrictive means of preventing that harm.

The Plaintiff has grouped the material facts into six areas: (1) evidence of the Plaintiff's sincerity; (2) evidence that the Plaintiff's Establishment and Free Exercise of Religion is being substantially burdened by the State Defendants (3) evidence which shows the State Defendants are bound by the Compelling Interest Test of the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act; (4) evidence which shows the absence of any threat to public health and safety; (5) evidence which shows the State Defendants are bound by United States Supreme Court First Amendment

jurisprudence; and (6) evidence which shows that the courts are aware of the benefits of the medical and industrial uses of marijuana and the real harm which is caused by the war on drugs.

The Iowa Supreme Court says the Plaintiff is sincere. By failing to apply the compelling interest test of Sherbert v. Verner, 374 U.S. 298 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972), the Iowa Supreme Court has created a real threat to the health and safety of the Plaintiff which has caused the Plaintiff to abandon the practice of his religion. The Iowa drug law is simply an appendage of the federal drug law. The State Defendants have never produced any evidence of any actual harm caused by the Plaintiff's Establishment and Free Exercise of Religion. The State Defendants have effectively established an official state religion by allowing the sacramental use of a controlled substance by one religion while denying the same right to the Plaintiff. The State Defendants allow the secular use of medical marijuana without any restriction on time, place, or manner while denying the Plaintiff the same right. Courts are aware of the threat to public health and safety created by drug prohibition and these are the same threats to public health and safety which caused the repeal of alcohol prohibition 75 years ago.

The Plaintiff respectfully moves the court to grant summary judgment enjoining the State Defendants from interfering with the Establishment and Exercise of the Plaintiff's Religion.

LEGAL STANDARDS

I. SUMMARY JUDGMENT

Summary judgment is proper where the pleadings, discovery and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In Burrell v Cummins Great Plains, Inc., 324 F. Supp. 2d 1000, 1010 (S.D. Iowa 2004), the Court said:

Federal Rule of Civil Procedure 56(c) states "the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986) (quoting Fed. R. Civ. P. 56(c)). "To preclude the entry of summary judgment, the nonmovant must make a sufficient showing on every essential element of its case on which it has the burden of proof at trial." *Cont'l Grain Co. v. Frank Seitzinger Storage*, 837 F.2d 836, 838 (8th Cir. 1988).

The court's function on a motion for summary judgment is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Niagara of Wis. Paper Corp. v. Paper Indus. Union-Mgmt. Pension Fund*, 800 F.2d 742, 746 (8th Cir. 1986). "Summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 257. "'On summary judgment the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962)); *Econ. Housing Co. v. Cont'l Forest Prods., Inc.*, 757 F.2d 200, 203 (8th Cir. 1985).

"Where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate. *Crain v. Board of Police Comm'rs*, 920 F.2d 1402, 1405-06 (8th Cir. 1990)." *Bell Lumber & Pole Co. v U.S. Fire Ins. Co.*, 60 F3d 437, 440-441 (8th Cir. 1995). "When a properly supported motion for summary judgment is made, an adverse party may not rest upon the mere allegations or denials of its pleadings, but rather, must set forth specific facts, supported by affidavits or other proper evidence, showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). 'If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.' *Id.*; *Celotex*, 477 U.S. at 324." *Bell Lumber & Pole Co. v U.S. Fire Ins. Co.*, 60 F3d 437, 445 (8th Cir. 1995).

II. COMPELLING INTEREST TEST (42 U.S.C.)

§ 2000bb. Congressional findings and declaration of purposes

- (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.

§ 2000bb-1. Free exercise of religion protected

(a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

- (1) is in furtherance of a compelling governmental interest; and
- (2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief. 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. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

§ 2000bb-2. Definitions

As used in this Act--

(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].

§ 2000cc-5. Definitions

In this Act:

- (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.
 - (B) Rule. The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

The United States Supreme Court interpreted 42 U.S.C. § 2000cc-5(7)(A) as applied to the states in *Cutter v. Wilkinson*, 544 U.S. 709, 725 (2005):

Further, prison officials may appropriately question whether a prisoner's religiosity, asserted as the basis for a requested accommodation, is authentic. Although RLUIPA bars inquiry into whether a particular belief or practice is "central" to a prisoner's religion, see 42 U.S.C. § 2000cc-5(7)(A), the Act does not preclude inquiry into the sincerity of a prisoner's professed religiosity. Cf. *Gillette v. United States*, 401 U.S. 437, 457, 28 L. Ed. 2d 168, 91 S. Ct. 828 (1971) ("The "truth" of a belief is not open to question"; rather, the question is whether the objector's beliefs are 'truly held.'" (quoting *United States v. Seeger*, 380 U.S. 163, 185, 13 L. Ed. 2d 733, 85 S. Ct. 850 (1965))).

The United States Supreme Court interpreted 42 U.S.C. § 2000bb-1 in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430 (2006), "Congress' express decision to legislate the compelling interest test indicates that RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test." The Court went on to explain, "Under the Government's view, there is no need to assess the particulars of the UDV's use or weigh the impact of an exemption for that specific use, because the Controlled Substances Act serves a compelling purpose and simply admits of no exceptions." Id. at 430.

RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government's categorical approach. RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person" -- the particular claimant whose sincere exercise of religion is being substantially burdened. 42 U.S.C. § 2000bb-1(b). RFRA expressly adopted the compelling interest test "as set forth in *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972)." 42 U.S.C. § 2000bb(b)(1). In each of those cases, this Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants.

Id. at 430-431. The Supreme Court summed up by explaining, "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." Id. at 432.

MATERIAL FACTS

I. Evidence of sincerity

1. In Town v. State ex rel. Reno, 377 So.2d 648, 679 (Fla. 1979), the Supreme Court of Florida wrote:

The parties agree and the trial court expressly found that: (1) the Ethiopian Zion Coptic Church represents a religion within the first amendment to the Constitution of the United States; (2) the "use of cannabis is an essential portion of the religious practice"; (3) petitioner is the owner of a residence located at 43 Star Island, Miami Beach, which she received as a gift from an elder of the church; (4) petitioner's residence was frequented daily by members of the church and others who congregated to worship; (5) under the beliefs of the church, cannabis, a controlled substance, is frequently and freely used; (6) cannabis is not itself an object of worship; (7) prayer is directed solely to a spiritual god; (8) members of the church believe that cannabis is the mystical body and blood of 'Jes-us'; and (9) through cannabis members purportedly find a spirit of love, unity, and justice, which brings them closer to their god."

2. On July 18, 1984, the Iowa Supreme court found as material facts, "Olsen is a member and priest of the Ethiopian Zion Coptic Church. Testimony at his trial revealed the bona fide nature of this religious organization and the use of marijuana within it." State of Iowa v. Carl Eric Olsen, No. 171/69079 (See Plaintiff's Request for Judicial Notice Exhibit #5).

3. On March 19, 1986, the United States District Court for the Southern District of Iowa found as material facts, "Plaintiff is a priest of the Ethiopian Zion Coptic Church. This religion uses marijuana as an integral part of its religious doctrine." Carl Eric Olsen v. State of Iowa, No. 93-301-E (See Plaintiff's Request for Judicial Notice Exhibit #6).

4. In 1984, Elders of the Ethiopian Zion Coptic Church in Jamaica appointed the Plaintiff as the legal representative of the parent church in Jamaica (See Exhibit #5-E1 attached to Plaintiff's Original Complaint).

5. On July 12, 1984, the United States District Court for the Southern District of Florida, in refusing to allow the Plaintiff to represent the Ethiopian Zion Coptic Church in Jamaica (because the Plaintiff is not an attorney), allowed the Plaintiff to represent the spokesman for the Ethiopian

Zion Coptic Church in the United States. Ethiopian Zion Coptic Church v. Drug Enforcement Administration, No. 83-1932 (See Plaintiff's Request for Judicial Notice Exhibit #7, and see Exhibit #4 attached to Plaintiff's Original Complaint).

6. The Plaintiff has maintained the corporate identity of the Ethiopian Zion Coptic Church in the State of Iowa since 1984 (see Exhibit #5 attached to Plaintiff's Original Complaint).

II. Substantial burden on religion

7. In United States v. Rush, 738 F.2d 497, 512-513 (1st Cir. 1984), the United States Court of Appeals for the First Circuit refused to allow the Plaintiff to present facts supporting a religious defense to the jury:

The question whether the government has an overriding interest in controlling the use and distribution of marijuana by private citizens is a topic of continuing political controversy. Much evidence has been adduced from which it might rationally be inferred that marijuana constitutes a health hazard and a threat to social welfare; on the other hand, proponents of free marijuana use have attempted to demonstrate that it is quite harmless. See *Randall v. Wyrick*, 441 F. Supp. 312, 315-16 (W.D.Mo. 1977); *United States v. Kuch*, 288 F. Supp. 439, 446 & 448 (D.D.C. 1968). 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; see also *Kuch*, 288 F. Supp. at 447. Although a narrow administrative exception has been carved out from the Schedule I classification of peyote for the benefit of the Native American Church, see 21 C.F.R. § 1307.31, we think this exemption is properly viewed as a government "effort toward accommodation" for a "readily identifiable," "narrow category" which has minimal impact on the enforcement of the laws in question. *Lee*, 455 U.S. at 260 n.11 & 261. No broad religious exemption from the marijuana laws is constitutionally required. We therefore affirm the district court's ruling rejecting appellants' first amendment defense as a matter of law.

8. In State of Iowa v. Carl Eric Olsen, No. 171/69079 (See Plaintiff's Request for Judicial Notice Exhibit #5) at page 3, the Iowa Supreme Court refused to apply the compelling interest test of Sherbert v. Verner and Wisconsin v. Yoder to the Plaintiff's sacramental use of marijuana. "Olsen now contends we must make an independent finding of a compelling state rather than defer to the legislature's decision to regulate marijuana. The cases do not support Olsen's assertion. See Leary v. United States, 383 F.2d 851, 860-861 (5th Cir. 1967), rev'd on other grounds, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969); Whyte, 471 A.2d at 1021; State v. Rocheleau, 142 Vt. 61, 68, 451 A.2d 1144, 1148 (1982)."

9. In Carl Eric Olsen v. State of Iowa, No. 93-301-E (See Plaintiff's Request for Judicial Notice Exhibit #6), the United States District Court for the Southern District of Iowa refused to apply the compelling interest test of Sherbert v. Verner and Wisconsin v. Yoder to the Plaintiff's sacramental use of marijuana.

10. In Employment Division v. Smith, 494 U.S. 872, 888-889 (1990), the United States Supreme Court recognized that the compelling interest test of Sherbert v. Verner and Wisconsin v. Yoder had not been applied to the Plaintiff:

The rule respondents favor would open the prospect of constitutionally required religious exemptions from . . . drug laws, see, e. g., *Olsen v. Drug Enforcement Administration*, 279 U. S. App. D. C. 1, 878 F. 2d 1458 (1989)

11. In 1990, the Plaintiff was forced to abandon the Sacramental use of Marijuana because of a credible threat of arrest, fines, forfeiture of property, social condemnation, prosecution, and incarceration resulting from the refusal of the state and federal courts to apply the compelling interest test of Sherbert v. Verner and Wisconsin v. Yoder to the sacramental use of marijuana.

III. Commerce Clause

12. The Federal Controlled Substances Act as amended by the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act is binding on the states by way of the Commerce Clause. 21 U.S.C. § 801 explains Congress' reasons for invoking the Commerce Clause:

§ 801. Congressional findings and declarations: controlled substances

The Congress makes the following findings and declarations:

- (1) Many of the drugs included within this title have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.
- (2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.
- (3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because--
 - (A) after manufacture, many controlled substances are transported in interstate commerce,
 - (B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and
 - (C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.
- (4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.
- (5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.

(6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.

(7) The United States is a party to the Single Convention on Narcotic Drugs, 1961, and other international conventions designed to establish effective control over international and domestic traffic in controlled substances.

In Gonzales v. Raich, 545 U.S. 1 (2005), the Court wrote: "[A] primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets." Id. at 19 (footnote omitted).

The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is "'superior to that of the States to provide for the welfare or necessities of their inhabitants,'" however legitimate or dire those necessities may be. Wirtz, 392 U.S., at 196, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (quoting Sanitary Dist. of Chicago v. United States, 266 U.S. 405, 426, 69 L. Ed. 352, 45 S. Ct. 176 (1925)). See also 392 U.S., at 195-196, 20 L. Ed. 2d 1020, 88 S. Ct. 2017; Wickard, 317 U.S., at 124, 87 L. Ed. 122, 63 S. Ct. 82 ("'[N]o form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress'").

Id. at 29.

13. Congress has invoked the Commerce Clause by enacting statutes to protect the Establishment and Free Exercise of Religion in states which do not recognize the sacramental use of the Schedule I controlled substance peyote, in 42 U.S.C. § 1996a:

§ 1996a. Traditional Indian religious use of the peyote sacrament

(a) Congressional findings and declarations. The Congress finds and declares that--

(3) while at least 28 States have enacted laws which are similar to, or are in conformance with, the Federal regulation which protects the ceremonial use of peyote by Indian religious practitioners, 22 States have not done so, and this lack of uniformity has created hardship for Indian people who participate in such religious ceremonies;

(b) Use, possession, or transportation of peyote.

(1) Notwithstanding any other provision of law, the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful, and shall not be prohibited by the United States or any State. No Indian shall be penalized or discriminated against on the basis of

such use, possession or transportation, including, but not limited to, denial of otherwise applicable benefits under public assistance programs.

IV. Absence of threat to public health and safety

14. When Congress placed Marijuana in the Controlled Substances Act of 1970 (CSA), Congress expressed doubt about the need to control Marijuana as a controlled substance in the CSA and said the placement was temporary. Congress established a Presidential Commission to review the temporary placement and recommend final placement. See the Legislative History of the CSA, H.R. Rep. No. 91-1444, October 10, 1970, 1970 USCCAN 4566, at pages 4578-4580 (See Plaintiff's Request for Judicial Notice Exhibit #1).

15. In 1972, the Commission on Marihuana, established by Congress in the CSA and appointed for the very purpose of resolving Congress' doubt about the placement of marijuana in the CSA, found as a finding of fact that Marijuana is not a sufficient threat to public health and safety to justify arresting or prosecuting anyone for using Marijuana. See Exhibits #20 and #21 attached to Plaintiff's Original Complaint.

16. In 1986, the DEA transferred the pharmaceutically pure psychoactive ingredient in marijuana in sesame oil encapsulated in soft gelatin capsules from Schedule I to Schedule II of the Federal Controlled Substances Act. See Plaintiff's Request for Judicial Notice Exhibit #2.

17. In 1988, the DEA Chief Administrative Law Judge, established by Congress in the CSA as the authority for reviewing the placement of Marijuana in the Federal Controlled Substances Act, found as a finding of fact that, "Marijuana, in its natural form, is one of the safest therapeutically active substances known to man." See Exhibit #1 attached to Plaintiff's Original Complaint.

18. In 1999, the DEA transferred the pharmaceutically pure psychoactive ingredient in marijuana in sesame oil encapsulated in soft gelatin capsules from

Schedule II to Schedule III of the Federal Controlled Substances Act. See Plaintiff's Request for Judicial Notice Exhibit #3.

19. In 2007, the DEA Administrative Law Judge, established by Congress in the CSA as the authority for reviewing the placement of Marijuana in the Federal Controlled Substances Act, found as a finding of fact that the National Institute on Drug Abuse has a monopoly on the supply of marijuana for scientific and medical research and that the National Institute on Drug Abuse has been withholding supplies of marijuana for legitimate medical research. See Plaintiff's Request for Judicial Notice Exhibit #4.

V. Iowa drug law

20. The lack of any statutory or judicially recognized exception to the State and Federal drug law for the Sacramental use of Marijuana establishes a credible threat of arrest, fines, forfeiture of property, social condemnation, prosecution, and incarceration sufficient to substantially burden the Establishment, Free Exercise, Assembly, and Worship of the Plaintiff's Religion.

21. Iowa drug law allows an exception for the Sacramental use of Peyote. See Iowa Code 124.204(8).

22. Iowa drug law does not contain an exception for the Sacramental use of Marijuana,

23. Iowa has arrested, fined, forfeited property, prosecuted, labeled as a criminal, and incarcerated the Plaintiff for possession of Sacramental Marijuana.

24. Iowa allows the use of Marijuana for medical purposes pursuant to a federal program which manufactures Marijuana in Mississippi and distributes Marijuana in Iowa. See Iowa Code 124.204(7). See Kuromiya v. United States, 37 F. Supp. 2d 717 (E.D. Pa. 1999), and Kuromiya v. United States, 78 F. Supp. 2d 367 (E.D. Pa. 1999). Common carriers and the postal service are used for the delivery of the Marijuana under Interstate Commerce provisions. See Plaintiff's Request for Judicial Notice Exhibit #8.

25. The use of Marijuana for medical purposes allowed by the State of Iowa is not restricted to any particular time, place, or manner. See Exhibit #18 attached to Plaintiff's Original Complaint.

26. The use of Marijuana for medical purposes allowed by the State Defendants is every day, throughout the day, throughout everything the medical users do. See Exhibit #18 attached to Plaintiff's Original Complaint.

27. Iowa has never been required by any court to show any actual harm caused by the Plaintiff's Sacramental use of Marijuana. See Plaintiff's Request for Judicial Notice Exhibits #5 and #6.

28. The state and federal courts applied a "rational basis" test analysis to the Plaintiff's Free Exercise of Religion claims in Olsen v. Iowa, 808 F.2d 652 (1986), and Iowa v. Olsen, 315 N.W.2d 1 (1982).

29. The "hallmark" of the "rational basis" test analysis is that the only evidence required at trial is a Marijuana Prohibition statute and the actual possession of Marijuana by the individual. No other evidence is required under the "rational basis" test. No showing of actual harm is required under the "rational basis" test.

30. Iowa does not deny it uses federal financial assistance in the enforcement of Iowa drug law as alleged in the Plaintiff's Original Complaint, Numbered Paragraph 19, at Page 9.

31. Iowa's drug law is designed to be a replica of federal drug law and simply functions as an appendage of federal drug law. Iowa Code 124.201(4) states: "If any new substance is designated as a controlled substance under federal law and notice of the designation is given to the board, the board shall similarly designate as controlled the new substance under this chapter after the expiration of thirty days from publication in the Federal Register of a final order designating a new substance as a controlled substance, unless within that thirty-day period the board objects to the new designation."

32. Iowa has voluntarily contracted with the federal government in the enforcement of Iowa's drug law. Iowa's drug law enforcement receives significant funding from the federal government. Total Estimated FY 2007 Iowa Substance Abuse & Drug Enforcement Program Funding (by Source) - State \$35,136,294 - Federal \$42,989,290 - Other \$24,921,327. Iowa's Drug Control Strategy 2007. See Plaintiff's Request for Judicial Notice Exhibit #9.

VI. Court opinions

33. In Morse v. Frederick, No. 06-278, June 25, 2007, three Justices of the United States Supreme Court wrote, "Surely our national experience with alcohol should make us wary of dampening speech suggesting -- however inarticulately -- that it would be better to tax and regulate marijuana than to persevere in a futile effort to ban its use entirely." (Stevens, J., dissenting, Slip Op. at page 16). See Plaintiff's Request for Judicial Notice Exhibit #10.

34. In Gonzales v. Raich, 545 U.S. 1 (2005), the Court wrote: "We acknowledge that evidence proffered by respondents in this case regarding the effective medical uses for marijuana, if found credible after trial, would cast serious doubt on the accuracy of the findings that require marijuana to be listed in Schedule I." Id. at 28 n37.

35. In Raich v. Gonzales, No. 03-15481, March 14, 2007, the United States Court of Appeals for the Ninth Circuit 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. 16

16 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*, 126 S. Ct. 1211, 1221-23 (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).

See Plaintiff's Request for Judicial Notice Exhibit #11.

36. In *United States v. White Plume*, 447 F.3d 1067 (8th Cir. 2005), the Court wrote, "It may be that the growing of hemp for industrial uses is the most viable agricultural commodity for that region. And we do not doubt that there are a countless number of beneficial products which utilize hemp in some fashion." *Id.* at 1076.

37. In *Ravin v. State of Alaska*, 537 P.2d 494 (Alaska 1975), the Supreme Court of Alaska found that private possession of marijuana in the home was not a sufficient threat to public health and safety to prohibit its use in Alaska.

38. In *People v. Sinclair*, 387 Mich. 91, 104 194 N.W.2d 878, 881 (1972), the Supreme Court of Michigan wrote: "Comparison of the effects of marijuana use on both the individual and society with the effects of other drug use demonstrates not only that there is no rational basis for classifying marijuana with the "hard narcotics", but, also, that there is not even a rational basis for treating marijuana as a more dangerous drug than alcohol."

IOWA IS BOUND BY FEDERAL LAW

1. Employment Division v. Smith (1990) (Smith hereafter)

Under the analysis given by the United States Supreme Court in Smith, the application of Iowa's drug law to the Plaintiff must be analyzed under the "compelling interest test" analysis:

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. at page 884.

Iowa's drug law is not neutral toward religion because it contains an exception for the Sacramental use of Peyote and Iowa's drug law is not applicable to everyone because it contains an exception for the medical use of Marijuana. These facts are confirmed by the decision in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006), "The fact that the Act itself contemplates that exempting certain people from its requirements would be 'consistent with the public health and safety' indicates that congressional findings with respect to Schedule I substances should not carry the determinative weight, for RFRA purposes, that the Government would ascribe to them." Id. at 433-434. "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." Id. at 434.

2. Religious Freedom Restoration Act of 1993 (RFRA)

Passed unanimously by both the House and Senate in 1993, the RFRA (as originally enacted, but later amended) guaranteed the Plaintiff the "compelling interest test" even in the absence of a state system of individual exemptions:

SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) FINDINGS.---The Congress finds---

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(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.

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.

(a) IN GENERAL.---Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) EXCEPTION.---Government may substantially burden a person's exercise of religion only if it determines that application of the burden to the person---

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

SEC. 5. DEFINITIONS.

As used in this Act---

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burden of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means exercise of religion under the First Amendment to the Constitution.

SEC. 6. APPLICABILITY.

(a) IN GENERAL.---This Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of the Act.

(b) RULE OF CONSTRUCTION.---Federal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act.

(c) RELIGIOUS BELIEF UNAFFECTED.---Nothing in this Act shall be construed to authorize any government to burden any religious belief.

107 STAT. 1488; PUBLIC LAW 103-141 -- NOV. 16, 1993.

Even though the RFRA was later amended, a judge should take judicial notice that it was the intent of Congress in 1993 to impose the compelling interest test standard (strict scrutiny) on state drug laws (Smith was a case involving the application of the Oregon drug law to the religious use of a Schedule I controlled substance, peyote).

3. American Indian Religious Freedom Act Amendments of 1994 (AIRFAA)

Congress' power to enforce protection of Establishment and Free Exercise of Religion with regard to the Sacramental use of Peyote has not been questioned by the State of Iowa. The State Defendants have not challenged this federal statute as being outside the scope of Congress' constitutional powers. 42 U.S.C. 1996a((b)(1) states:

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

PUBLIC LAW 103-344 [H.R. 4230]; October 6, 1994.

The Commerce Clause of the United States Constitution, Article I, Section 8, gives Congress the power, "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Congress cited the Commerce Clause as its authority for enacting the CSA. 21 U.S.C. § 801.

The State Defendants have also never challenged the federal government's authority to distribute Marijuana to medical patients here in Iowa, because Congress has the authority under its Commerce Clause powers to distribute marijuana to medical patients in Iowa.

4. City of Boerne v. Flores (1997) (Boerne hereafter)

The United States Supreme Court found that the RFRA cannot be applied to the states under the Enforcement Clause of the Fourteenth Amendment:

Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.

Boerne, 521 U.S. 507 (1997), at page 536.

The *Smith* decision acknowledged the Court had employed the *Sherbert* test in considering free exercise challenges to state unemployment compensation rules on three occasions where the balance had tipped in favor of the individual. See *Sherbert, supra; Thomas v. Review*

Bd. of Indiana Employment Security Div., 450 U.S. 707, 67 L. Ed. 2d 624, 101 S. Ct. 1425 (1981); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 94 L. Ed. 2d 190, 107 S. Ct. 1046 (1987). Those cases, the Court explained, stand for "the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason." 494 U.S. at 884 (internal quotation marks omitted). By contrast, where a general prohibition, such as Oregon's, is at issue, "the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to [free exercise] challenges." *Id.*, at 885. *Smith* held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.

Boerne, 521 U.S. 507 (1997), at page 514.

5. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)

RLUIPA amended the RFRA by expanding the meaning of "religious exercise" and by clarifying that RFRA's application to the states attaches when a state program, activity, or institution voluntarily accepts federal financial assistance.

42 U.S.C. 2000cc-2 states:

(a) General rule. No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person--

- (1) is in furtherance of a compelling governmental interest;
- and
- (2) is the least restrictive means of furthering that compelling governmental interest.

(b) Scope of application. This section applies in any case in which--

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

42 U.S.C. 1997(1) states:

As used in this Act--

- (1) The term "institution" means any facility or institution--
 - (A) which is owned, operated, or managed by, or provides services on behalf of any State or political subdivision of a State; and
 - (B) which is--
 - (i) for persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped;
 - (ii) a jail, prison, or other correctional facility;

- (iii) a pretrial detention facility;
- (iv) for juveniles--
 - (I) held awaiting trial;
 - (II) residing in such facility or institution for purposes of receiving care or treatment; or
 - (III) residing for any State purpose in such facility or institution (other than a residential facility providing only elementary or secondary education that is not an institution in which reside juveniles who are adjudicated delinquent, in need of supervision, neglected, placed in State custody, mentally ill or disabled, mentally retarded, or chronically ill or handicapped); or
- (v) providing skilled nursing, intermediate or long-term care, or custodial or residential care.

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.

42 U.S.C. 2000cc-5(6) states:

(6) Program or activity. The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 606 of the Civil Rights Act of 1964 (42 U.S.C. 2000d-4a).

42 U.S.C. 2000d-4a states:

For the purposes of this title, the term "program or activity" and the term "program" mean all of the operations of--

- (1)
 - (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
 - (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;
- (2)
 - (A) a college, university, or other postsecondary institution, or a public system of higher education; or
 - (B) a local educational agency (as defined in section 9101 of the Elementary and Secondary Education Act of 1965 [20 USCS § 7801]), system of vocational education, or other school system;
- (3)
 - (A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship--
 - (i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or
 - (ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or
 - (B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

Broad construction of the RLUIPA means that any deprivation of liberty by a state law enforcement agency would fit both the meaning of a pre-trial detention and an institution as described in RLUIPA. Congress has applied the RFRA to the states' drug laws as it originally intended to do in the original language of the RFRA.

6. Cutter v. Wilkinson (2005) (Cutter hereafter)

As Justice Thomas wrote in his concurring opinion in Cutter, "RLUIPA's text applies to all laws passed by state and local governments, including 'rules of general applicability,' *ibid.*, whether or not they concern an establishment of religion." Cutter, 544 U.S., at page 732 (concurring opinion of Justice Thomas). "The States' voluntary acceptance of Congress' condition undercuts Ohio's argument that Congress is encroaching on its turf." Cutter, 544 U.S., at page 732 (concurring opinion of Justice Thomas).

7. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal (2006) (UDV hereafter)

"Under the more focused inquiry required by the 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, 546 U.S., at page 432.

THE HYBRID RIGHTS MENTIONED IN SMITH

"The only instances where a neutral, generally applicable law had failed to pass constitutional muster, the *Smith* Court noted, were cases in which other constitutional protections were at stake. *Id.*, at 881-882." City of Boerne v. Flores, 521 U.S. 507, 513-514 (1997).

"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. Cf. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) ('An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed')." *Employment Division v. Smith*, 494 U.S. 871, 881 (1990).

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. See, e. g., *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 294 (1981). According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. See, e. g., *Gilmore v. City of Montgomery*, 417 U.S., at 575; *Griswold v. Connecticut*, 381 U.S., at 482-485; *NAACP v. Button*, 371 U.S. 415, 431 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S., at 462. Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. See, e. g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-909, 932-933 (1982); *Larson v. Valente*, 456 U.S. 228, 244-246 (1982); *In re Primus*, 436 U.S. 412, 426 (1978); *Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977).

Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984).

CONCLUSION

The Plaintiff has the right to Communion with his Creator through the Assembly and Worship with members of his Faith. That right cannot be denied

without evidence of an injury to another person. The mere fact that Iowa made Marijuana illegal does establish an injury where no injury exists. Iowa has failed to produce any evidence to support their threat to enforce the Iowa drug law against the Plaintiff for using Marijuana as his Sacrament.

The States Defendants have failed to introduce any evidence that anyone has ever been hurt by the Plaintiff's Sacramental use of Marijuana.

The State Defendants have failed to introduce any evidence that anyone could ever be hurt by the Plaintiff's Sacramental use of Marijuana.

Wherefore, because the Plaintiff has met his burden of proof under the Compelling Interest Test and the State Defendants have failed to meet their burden of proof under the compelling interest test, the Plaintiff respectfully moves the court to grant summary judgment enjoining the State Defendants from interfering with the Establishment and Exercise of the Plaintiff's Religion.

Respectfully submitted this 2nd day of July, 2007

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of July, 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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