

No. 08-777

**In the Supreme Court of the United States**

CARL ERIC OLSEN,  
*Petitioner,*

*v.*

MICHAEL B. MUKASEY, ATTORNEY GENERAL OF THE  
UNITED STATES; MICHELE LEONHART, ACTING  
ADMINISTRATOR OF THE UNITED STATES DRUG  
ENFORCEMENT ADMINISTRATION; THOMAS MILLER,  
ATTORNEY GENERAL OF IOWA; JOHN SARCONI,  
ATTORNEY OF POLK COUNTY, IOWA; AND  
DENNIS ANDERSON, SHERIFF OF POLK COUNTY, IOWA,  
*Respondents.*

**On Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Eighth Circuit**

**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

Petitioner Carl Olsen brought this action after this Court's decision in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006), seeking a declaration that he is allowed, under the Religious Freedom Restoration Act (RFRA) and the United States Constitution, to use marijuana in the course of his religious worship and for appropriate injunctive relief against law enforcement officials of the United States and the State of Iowa. The courts below refused to even consider the merits of Petitioner's claims, dismissing them on the basis of collateral estoppel.

Petitioner requests review and reversal of the judgment entered in the Court of Appeals, which raise the following questions:

- 1) Did the lower courts err in applying collateral estoppel to the Petitioners' claims under RFRA and the Equal Protection Clause where the prior decisions relied upon for the estoppel were decided before the enactment of RFRA and applied legal principles that conflict with this Court's decision in *O Centro Espirita*?
- 2) Did the lower courts err in ruling that the state and federal Controlled Substances Acts (CSA) are "generally-applicable" laws for purposes of the First Amendment's Free Exercise Clause, even though those laws provide exemptions for particular religious and non-religious uses?

## **PARTIES TO THE PROCEEDINGS**

Petitioner, who was Plaintiff-Appellant in the Court of Appeals, is Carl Eric Olsen, an adult citizen of the State of Iowa.

Respondent Michael B. Mukasey was an Appellee in the Court of Appeals below, is the Attorney General of the United States, and was substituted for Acting Attorney General Peter D. Keisler as the proper party to this action while the appeal was pending.

Karen Tandy was an Appellee in the Court of Appeals as the Administrator of the United States Drug Enforcement Agency. Respondent Michele Leonhart is the Acting Administrator of the United States Drug Enforcement Agency and is properly substituted for Karen Tandy.

Respondent Thomas Miller is the Attorney General of the State of Iowa.

Respondent John Sarcone is the Polk County (Iowa) Attorney.

Respondent Dennis Anderson is the Polk County (Iowa) Sheriff.

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**PETITION FOR WRIT OF CERTIORARI**

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Carl Eric Olsen respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

**OPINIONS BELOW**

The opinion of the Court of Appeals is reported as *Olsen v. Mukasey*, 541 F.3d 827 (8<sup>th</sup> Cir. 2008), and is reprinted in the Appendix beginning at page A-1. The opinion of the United States District Court for the Southern District of Iowa is not reported and is set forth in the Appendix beginning at page A-11.

## **JURISDICTIONAL STATEMENT**

The United States Court of Appeals for the Eighth Circuit entered its judgment and opinion on September 8, 2008. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1)

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The First Amendment to the United States Constitution provides, in relevant parts:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]

The Fifth Amendment to the United States Constitution provides, in relevant parts:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, . . . , nor be deprived of life, liberty, or property, without due process of law[.]

The Fourteenth Amendment to the United States Constitution, Section 1, provides, in relevant parts:

All persons born or naturalized in the United States, subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . ; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 3 of the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb-1, provides as follows:

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) of this section.

(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.

### **STATEMENT OF THE CASE**

The Petitioner, Carl Eric Olsen, brought this action in the U.S. District Court for the Southern District of Iowa seeking declaratory and injunctive relief to protect the Appellant's right to possess and use cannabis as a sacrament in connection with Appellant's exercise of his religious beliefs. The District Court had jurisdiction over Olsen's claims under 28 U.S.C. §§ 1331 and 1343(a), as the claims set forth in the Complaint arise under the Constitution, laws and treaties of the United States and such claims are to secure equitable relief under Acts of Congress providing for the protection of civil rights, specifically the Religious Freedom

Restoration Act, 42 U.S.C. §§ 2000bb et seq., and 42 U.S.C. § 1983.

Olsen is a sincere adherent of the teachings of the Ethiopian Zion Coptic Church, a centuries-old church that uses cannabis, i.e., marijuana, as its sacrament (Dist. Ct. Dkt. # 1; Complaint p.9). The Complaint<sup>1</sup> elaborates as follows:

25. As a necessary and essential part of the Ethiopian Zion Coptic Church's religious practice, church members receive communion through the Sacramental use of Cannabis, which is the blood of Christ . . . , in their religious ceremonies.

26. It is a central and essential practice of the Ethiopian Zion Coptic Church that its members assemble for communion, reasoning, and worship through the Sacramental offering of Cannabis during prayer to the living god known to the church as Rastafari.

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<sup>1</sup> Because the District Court granted judgment in favor of the Respondents upon a Fed. R. Civ. P. 12(b)(6) motion to dismiss and the Court of Appeals affirmed that judgment, the allegations of Olsen's Complaint must be accepted as true. Indeed, it has never been asserted that Olsen's religious beliefs at issue in this case are not genuine and sincerely held.

(Dist. Ct. Dkt. # 1; Complaint p. 10). Thus, “[b]ecause the Ethiopian Zion Coptic Church considers Cannabis to be its Sacrament, a prohibition against partaking in the Sacramental use of Cannabis in the United States completely prevents [Olsen] from freely practicing his religion” (Dist. Ct. Dkt. # 1; Complaint p. 11). The cultivation of cannabis is essential to the exercise of Olsen’s religion (Dist. Ct. Dkt. # 1; Complaint pp. 25, 28, 29 and 31).

The Complaint goes on to allege that “[t]he Defendants have taken the position with respect to the Ethiopian Zion Coptic Church’s use of Cannabis that Cannabis is a Schedule I control substance pursuant to 21 U.S.C. § 812(c)(1)(C)(10) and 21 C.F.R. § 1308.11(d)(19) (2001), and Iowa Code § 124.204 (2006). Severe civil and criminal penalties are prescribed for, *inter alia*, the unlawful importation, possession and distribution of Cannabis” under federal and state law. “As a result of the threat of criminal prosecution, the Plaintiff has been compelled to suspend the practice of his religion in the United States.” Olsen has been forced to forego the essential sacrament of his religion since the decision in *Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458 (D.C. Cir. 1989) became final and all avenues of direct review were exhausted (Dist. Ct. Dkt. # 1; Complaint p. 12).

In 1993, after the decision in *Olsen v. Drug Enforcement Agency*, *supra*, Congress enacted and the President signed into law the Religious Freedom

Restoration Act (RFRA), 42 U.S.C. §§ 2000bb et seq. (Dist. Ct. Dkt. # 1; Complaint p. 1). On February 21, 2006, this Court issued its decision in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006), which involved the application of the prohibitions of the Controlled Substances Act in light of RFRA (Dist. Ct. Dkt. # 1; Complaint p. 4). Olsen alleged that the decision in *O Centro Espirita* requires a court to review *de novo* the particular use of a controlled substance made by a church and determine whether such use is protected and allowed by RFRA (Dist. Ct. Dkt. # 1; Complaint pp. 5, 8). He further alleged that the application of the federal and state Controlled Substances Acts to prohibit his use of cannabis as a religious sacrament violates his right under the First Amendment to freely exercise his religion (Dist. Ct. Dkt. # 1; Complaint pp. 13-14).

Olsen contacted the Defendants and attempted to obtain an agreement that they would not seek to prosecute him for his religious use of cannabis (Dist. Ct. Dkt. # 1; Complaint p. 12). “However, Defendants, having failed and refused to guarantee they will not arrest or prosecute [Olsen] if he moves forward with the practice of his religion are effectively threatening [Olsen] with arrest and prosecution. The actions of the Defendants have a chilling and prohibitive effect on [Olsen’s] exercise of his religion” and are causing Olsen to suffer psychologically and spiritually because he is alienated from his church (Dist. Ct. Dkt. # 1; Complaint p. 13).

The Complaint also alleges as follows:

39. Federal CSA regulations and the Iowa's CSA expressly exempt the sacramental use of peyote despite the fact that peyote is listed in Schedule I of both the Federal and State versions of the CSA. See 21 C.F.R. § 1307.31 and Iowa Code § 124.204(8) (2006). No such exemption exists for Plaintiff's Sacramental use of Cannabis.

40. The Federal CSA contains other exceptions permitting the use of controlled substances for purposes such as scientific research and medical use, and the Iowa CSA specifically exempts medical use of marijuana from the prohibitions of Schedule I of the Iowa CSA while any other use of marijuana remains prohibited. See, e.g., 21 U.S.C. § 823, 21 C.F.R. §§ 291.505, 1301.26, 1301.34, and Iowa Code § 124.204(7), 124.204(7).<sup>2</sup>

(Dist. Ct. Dkt. # 1; Complaint p.14). The use and possession of marijuana for medical purposes is allowed by the Defendants and has been allowed at

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<sup>2</sup> The second reference to Iowa Code § 124.204(7) in paragraph 40 of the Complaint is a typographical error. The correct citation is Iowa Code § 124.206(7)(a).

the Iowa State Capitol. “The fact that both [sic] Defendants allow the use and the possession of marijuana in a public place like the State Capitol Building proves beyond any reasonable doubt that the use and possession of marijuana does not cause any threat to public health and safety sufficient to substantiate a ‘compelling interest’ on the part of the government to restrict the Sacramental use of Cannabis by [Olsen] because a compelling interest cannot be ignored” (Dist. Ct. Dkt. # 1; Complaint pp. 14-15).

The Commission on Marijuana and Drug Abuse was specifically established by the Controlled Substances Act of 1970. The Commission found in 1972, “The total prohibition scheme was rejected primarily because no sufficiently compelling social reason, predicated on existing knowledge, justifies intrusion by the criminal justice system into the private lives of individuals who use marijuana” (Dist. Ct. Dkt. # 1; Complaint Exhibit #21).

The Chief Administrative Law Judge (ALJ) for the DEA found in 1988, “[n]early all medicines have toxic, potentially lethal effects. But marijuana is not such a substance. There is no record in the extensive medical literature describing a proven, documented cannabis-induced fatality” (Dist. Ct. Dkt. # 1; Complaint Exhibit #1, page 56). “This is a remarkable statement. First, the record on marijuana encompasses 5,000 years of human experience. Second, marijuana is now used daily by enormous numbers of people throughout the world.

Estimates suggest that from twenty million to fifty million Americans routinely, albeit illegally, smoke marijuana without the benefit of direct medical supervision. Yet, despite this long history of use and the extraordinarily high numbers of social smokers, there are simply no credible medical reports to suggest that consuming marijuana has caused a single death” (Dist. Ct. Dkt. # 1; Complaint Exhibit # 1, p. 57). “Marijuana, in its natural form, is one of the safest therapeutically active substances known to man” (Dist. Ct. Dkt. # 1; Complaint Exhibit # 1, p. 58-59).

Based on these allegations, Olsen claimed that any prohibition upon his use of cannabis for sacramental purposes violates RFRA, the Free Exercise Clause of the First Amendment (Dist. Ct. Dkt. # 1; Complaint pp. 16-17), and the guarantee of equal protection of the law provided by the Fifth and Fourteenth Amendments. Olsen requested a declaratory judgment and an injunction that would forbid the Defendants from enforcing federal and state Controlled Substances Acts against him for his “Sacramental use of Cannabis, including its possession, consumption, distribution and importation for this purpose” (Dist. Ct. Dkt. # 1; Complaint p. 32).

The federal and state Defendants filed separate motions under Fed. R. Civ. P. 12(b) seeking dismissal of all the claims. The District Court entered an Order granting the motion to dismiss under Rule 12(b)(6) for failure to state a claim. It

held that Olsen’s RFRA and First Amendment claims were barred by collateral estoppel because, in cases<sup>3</sup> decided before this Court’s ruling in *O Centro Espirita*, he had previously and unsuccessfully asserted that he had a right under the First Amendment’s Free Exercise Clause to use marijuana as a sacrament in the practice of his religious beliefs (A-28, -29). It similarly held that Olsen’s equal protection claims were barred by collateral estoppel (A-31). Olsen timely appealed the District Court’s order dismissing his claims.

Affirming that decision and order, the Court of Appeals for the Eighth Circuit recognized that “[c]ollateral estoppel does not apply if the controlling facts or legal principles have changed significantly since Olsen’s prior judgments” (A-5). However, the Court of Appeals held that this Court’s decision in *O Centro Espirita* was not such a change because that decision applied RFRA and RFRA is intended 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),” which applied to Free Exercise Clause claims before the decision in *Employment Division v. Smith*, 494 U.S.

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<sup>3</sup> The cases involving Olsen’s Free Exercise Clause claim are reported and include *Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458 (D.C. Cir. 1989) (hereafter “*DEA*”), *United States v. Rush*, 738 F.2d 497(1<sup>st</sup> Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985), and *State v. Olsen*, 315 N.W.2d 1 (Iowa 1982) (hereafter “*Olsen*”).

872 (1990). “The pre-*Smith* standard applicable in *Olsen*, *Rush*, and *DEA* is the same standard applicable to Olsen’s current claim,” the Court of Appeals held. “There is no difference in the controlling law. Olsen’s federal RFRA claim is barred by collateral estoppel” (A-6).

With respect to Olsen’s Free Exercise Clause claim, the Court of Appeals recognized that even after *Smith*, which held that a compelling interest is not required to uphold neutral and generally-applicable laws against claims that the laws burden the First Amendment right to exercise religion, the compelling interest test is applicable if a law is not “neutral” or “generally-applicable” (A-8). Notwithstanding Olsen’s allegations that the federal and state Controlled Substances Acts are not “generally-applicable” because there are exemptions for medical uses of marijuana and the sacramental use of peyote by Native Americans, the Court ruled that “[g]eneral applicability does not mean absolute universality. Exceptions do not negate that the CSAs are generally applicable” (A-8). To the extent Olsen based his claim on the “hybrid rights” theory recognized by *Smith*, 494 U.S. at 881, the Court of Appeals held that it, like the RFRA claim, was barred by collateral estoppel (A-9).

The Court of Appeals also held that collateral estoppel barred Olsen’s claim under the Fourteenth Amendment’s Equal Protection Clause. Equal protection claims were raised in Olsen’s prior litigation and *O Centro Espirita* did not address

equal protection issues, so did not change the controlling law (A-9).

### REASONS FOR GRANTING THE WRIT

In *O Centro Espirita*, this Court established that the Religious Freedom Restoration Act of 1993 requires the government to demonstrate that it has a compelling interest to apply a prohibition on possession or use of a controlled substance to the particular religious use of the person invoking RFRA. This ruling that a “focused” compelling interest inquiry is required was a significant departure from prior decisions, which had uniformly held that the classification of a substance by Congress as subject to restriction and control was enough to demonstrate a compelling interest for refusing a religious-based exemption from the prohibitions imposed by controlled substance laws. Those prior decisions included cases involving Olsen, and the lower court seized upon those decisions as a convenient basis for dismissing his religious freedom claims.

A writ of certiorari to review and reverse the judgment dismissing Olsen’s claim is required because the judgment conflicts with this Court’s decision in *O Centro Espirita* and deprives Olsen of his right to be heard on his claims under federal statutory and constitutional law. The *O Centro Espirita* decision established law which wholly undermines the reasoning that led to the pre-RFRA decisions against Olsen; where the controlling legal principles have changed or been clarified, collateral

estoppel must not be used to deprive a person of his or her right to a hearing. The lower courts treated the prior decisions as if they created in the government some vested right to continue to deprive Olsen of his ability to exercise his religious beliefs, ignoring this Court's admonitions in *O Centro Espirita* that claims to religious exemptions from controlled substance laws must be adjudged on a case-by-case basis.

**I. OLSEN'S RFRA CLAIM IS NOT BARRED BY COLLATERAL ESTOPPEL BECAUSE THE PRIOR DECISIONS FORMING THE BASIS FOR ESTOPPEL DID NOT APPLY THE RFRA ANALYSIS REQUIRED BY THIS COURT'S DECISION IN *O CENTRO ESPIRITA*.**

Neither the District Court nor the Court of Appeals considered the merits of Olsen's claim under RFRA. Instead, the lower courts avoided confronting Olsen's claim that the state and federal governments have no compelling interest for forbidding his sacramental use of marijuana by applying collateral estoppel, relying upon decisions involving Olsen that were decided before the enactment of RFRA and before this Court's watershed decision in *O Centro Espirita*. The 2006 decision in *O Centro Espirita* is crucial because it determined that RFRA may

prevent application of the Controlled Substances Act where it would forbid use of a substance in connection with the exercise of religion. *O Centro Espirita*, 546 U.S. at 432.

The court decisions rebuffing Olsen's previous claims that his sacramental use of marijuana is protected by the First Amendment should not have barred his religious freedom claims in this action because RFRA and *O Centro Espirita* changed the controlling legal analysis. This Court has held that "it is nevertheless the general rule that res judicata is no defense where between the time of the first judgment and the second there has been an intervening decision **or a change in the law creating an altered situation.**" *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 162 (1945) (emphasis added). This principle was extended to collateral estoppel in *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948), which held as follows with respect to the preclusive effect of prior judicial determinations:

But a subsequent modification of the significant facts **or a change or development in the controlling legal principles may make that determination obsolete or erroneous, at least for future purposes.** . . . [Collateral estoppel] is designed to prevent repetitious lawsuits over matters which have once been decided **and which have remained**

**substantially static, factually and legally.** It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers.

(Emphasis added). Thus, “a judicial declaration intervening between the two proceedings may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable.” *Id.* at 600. *Accord Restatement (Second) of Judgments* § 28(2)(d) (although an issue is actually litigated and determined by a valid and final judgment, “a new determination is warranted in order to take account of an intervening change in the applicable legal context[.]”).

RFRA and the decision in *O Centro Espirita* wrought precisely the kinds of change in the legal climate that deprive the *Rush*, *Olsen*, and *DEA* decisions of any preclusive effect in Olsen’s present action. In *O Centro Espirita*, this Court upheld the entry of a preliminary injunction in favor of individuals, allowing them to use for religious purposes a tea made from a plant that contains DMT, a CSA Schedule I controlled substance. The unanimous decision rejected the government’s request that it recognize a categorical prohibition on religious use exemptions from the Controlled Substances Act, holding that this was inconsistent with the mandate of RFRA:

Under the more focused inquiry required by RFRA and the compelling interest test, the Government's mere invocation of the general characteristics of Schedule I substances, as set forth in the Controlled Substances Act, cannot carry the day. It is true, of course, that Schedule I substances such as DMT are exceptionally dangerous. . . . Nevertheless, there is no indication that Congress, in classifying DMT, considered the harms posed by the particular use at issue here -- the circumscribed, sacramental use of hoasca by the UDV. The question of the harms from the sacramental use of hoasca by the UDV was litigated below. Before the District Court found that the Government had not carried its burden of showing a compelling interest in preventing such harms, the court noted that it could not "ignore that the legislative branch of the government elected to place materials containing DMT on Schedule I of the [Act], reflecting findings that substances containing DMT have 'a high potential for abuse,' and 'no currently accepted medical use in treatment in the United States,' and that 'there is a lack of accepted safety for use of [DMT] under medical supervision.'" . . . But Congress' determination that DMT should be

listed under Schedule I simply does not provide a categorical answer that relieves the Government of the obligation to shoulder its burden under RFRA.

*O Centro Espirita*, 546 U.S. at 433 (citations omitted).

RFRA, as interpreted and applied by *O Centro Espirita*, changes the analysis of claims like Olsen's that a governmental burden on religious exercise should be removed by judicial declaration. *O Centro Espirita* recognized that RFRA was enacted to reverse the effect of the decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). RFRA was meant to reestablish that federal laws, including controlled substance regulations, that burden the free exercise of religion be supported by a compelling governmental interest. *O Centro Espirita*, 546 U.S. at 439.

More significantly, the *O Centro Espirita* case made clear that the "compelling interest" analysis required by RFRA precludes a court from relying solely upon a generalized congressional finding of a "compelling interest" to justify a burden on religious exercise resulting from a federal law. The unanimous Court ruled that a "more focused inquiry" is required by RFRA; courts must examine whether there is a compelling interest for applying the law to the RFRA claimant. In *O Centro Espirita*, this meant that "Congress' determination that DMT

should be listed under Schedule I simply does not provide a categorical answer that relieves the Government of the obligation to shoulder its burden under RFRA.” *Id.* at 433.

This ruling wholly undermines the preclusive effect of the previous decisions involving Olsen because those decisions applied the very “categorical” approach rejected by *O Centro Espirita*. Thus, in *U.S. v. Rush*, 738 F.2d at 512, the court rejected Olsen’s First Amendment defense to marijuana charges because

[i]n 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.

(Emphasis added). The District of Columbia’s decision in *DEA* was similarly predicated upon the determination of a compelling interest to regulate Schedule I substances, **not** on a determination that

there was a compelling interest as applied to Olsen and the Ethiopian Zion Coptic Church. *DEA*, 878 F.2d at 1462. And in *Olsen*, 315 N.W.2d at 8, the court relied upon a committee report submitted in connection with the enactment of the Iowa CSA which determined that marijuana posed a difficult problem in controlling drug abuse. Clearly, this is tantamount to the Congressional finding held insufficient to demonstrate a compelling interest under RFRA in *O Centro Espirita*.

Although the Court of Appeals recognized that a change in controlling legal principles can make collateral estoppel inapplicable, it found this rule was inapposite because after the enactment of RFRA and the decision in *O Centro Espirita*, “there is no difference in the controlling law.” It pointed to this Court’s statement in *O Centro Espirita* characterizing the compelling interest test laid down in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), as “look[ing] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinizing the asserted harm of granting specific exemptions to particular religious claimants.” 546 U.S. at 431. It also cited a single Eighth Circuit decision holding, in the context of a request for a driver’s license, that a particularized evaluation of the claim for a religious exemption was required under pre-*Smith* Free Exercise Clause jurisprudence. *Quaring v. Peterson*, 728 F.2d 1121 (8<sup>th</sup> Cir. 1984), *aff’d*, 472 U.S. 478 (1985) (A-6).

Notwithstanding the Court of Appeals' view of the law that was theoretically applicable to Olsen's previous Free Exercise Clause claims, the law that was actually applied to his claims was clearly different than the law that now controls under *O Centro Espirita*. In the first place, the case law regarding Free Exercise Clause claims for exemptions from the federal CSA **did not** involve a "particularized evaluation" of the claimed exemption. As pointed out in *Rush*, "[e]very 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." 738 F.2d at 512 (citing *United States v. Middleton*, 690 F.2d 820, 825 (11th Cir.1982), *cert. denied*, 460 U.S. 1051 (1983); *United States v. Spears*, 443 F.2d 895 (5th Cir.1971), *cert. denied*, 404 U.S. 1020 (1972); *Leary v. United States*, 383 F.2d 851, 859-61 (5th Cir.1967), *rev'd on other grounds*, 395 U.S. 6 (1969); *Randall v. Wyrick*, 441 F.Supp. 312, 316 (W.D. Mo. 1977); *United States v. Kuch*, 288 F.Supp. 439, 448 (D.D.C. 1968)).<sup>4</sup> Thus, before RFRA was enacted, the law

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<sup>4</sup> Federal appellate courts began adopting the congressional finding to find a compelling interest for forbidding use of marijuana as a religious sacrament with *Leary*, 383 F.2d at 860. It is significant, however, that the *Leary* decision found the compelling interest analysis of *Sherbert* inapplicable

accepted the generalized finding of Congress as sufficient to establish a compelling interest for rejecting a religious-based exemption from a controlled substance prohibition.<sup>5</sup> *O Centro Espirita* clearly changed this law.

Even more to the point, the “compelling interest” analysis **actually** applied in Olsen’s prior cases was different than the analysis required by RFRA under the *O Centro Espirita* decision. The Court of Appeals did not purport to rule that the courts in *Rush*, *DEA*, and *Olsen* made the kind of particular and individualized evaluation of Olsen’s Free Exercise claims that is now required under RFRA (even as to claims for exemptions from the CSA, as *O Centro Espirita* makes abundantly clear). Instead, those prior decisions used the kind of categorical approach to controlled substances that was expressly rejected by this Court in *O Centro Espirita*.

The Eighth Circuit’s decision in this case conflicts with the decision of the Ninth Circuit in *United States v. Bauer*, 84 F.3d 1549, 1557 (9<sup>th</sup> Cir.

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to cases claiming that restrictions on marijuana use violate the fundamental right to free exercise of religion.

<sup>5</sup> Significantly, the decision in *Smith*, 494 U.S. at 889, cited the decision in *DEA* as an example of a case where the court did not make an individualized decision on whether there was a compelling interest for denying an exemption from the federal CSA.

1996), *cert. denied*, 519 U.S. 907 (1996), which recognized that RFRA requires a different “compelling interest” analysis than had been applied in previous cases involving the federal drug laws. In *Bauer*, the court refused to follow the ruling in *Leary*, a circuit court decision that was followed in *Rush* and *Olsen*, and instead held that under RFRA, “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.**” *Bauer*, 84 F.3d at 1559 (emphasis added). *Bauer* confirms that the reasoning underlying *Rush* and *Olsen* has been undermined by RFRA and *O Centro Espirita*.

*O Centro Espirita*’s explication of how the “compelling interest” test should be applied in this context is clearly a “development in the controlling legal principles” and “judicial declaration” that so changes the legal atmosphere “as to render the rule of collateral estoppel inapplicable.” *Sunnen*, 333 U.S. at 599-600. The government has no vested right in the decisions in *Rush*, *DEA*, and *Olsen*, especially where it is crystal clear that the legal reasoning used in those decisions to find a compelling government interest is “obsolete [and] erroneous” in light of this Court’s controlling decisions. *Id.* at 599.

The Court of Appeals' application of collateral estoppel exalts form and theory over substance and practice and, in the process, sacrifices Olsen's right to a fair determination according to the controlling law of his request to be allowed to exercise his religious beliefs. The decisions in Olsen's prior cases are plainly in conflict with this Court's decision in *O Centro Espirita*. A wooden application of the decisions in Olsen's prior cases ignores the change in the legal atmosphere and deprives Olsen of the right to have his claim of religious freedom treated equally with those of the O Centro Espirita Beneficente União do Vegetal Church and other religious adherents seeking relief under RFRA. Application of collateral estoppel here is a "foolish consistency" that creates a conflict with this Court's recent precedent. Therefore, the judgment of the Court of Appeals against Olsen must be reversed.

**II. THE CSA IS NOT A GENERALLY APPLICABLE LAW AND OLSEN IS ENTITLED TO A DETERMINATION OF WHETHER THE RESTRICTION ON HIS SACRAMENTAL MARIJUANA USE IS SUPPORTED BY A COMPELLING INTEREST OR VIOLATES HIS RIGHTS UNDER THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.**

Olsen's complaint also sought relief under the Free Exercise Clause of the First Amendment,

claiming that the CSA's restriction on his sacramental use of marijuana was an improper and unjustified burden on his ability to practice his religion. Although the decision in *Employment Div. v. Smith* holds that restrictions on the use of controlled substances for religious purposes need not be justified by a compelling state interest, *Smith* qualified the rule by holding that the prohibition must be neutral and generally applicable. *Smith*, 494 U.S. at 879. Thus, if a law is not "neutral and generally applicable," the government must demonstrate that an application which infringes upon the religious liberty of an individual is supported by a compelling governmental interest and that the law is narrowly tailored to serve that interest. *Tenaflly Eruv Assn. v. Borough of Tenaflly*, 309 F.3d 144, 165 (3d Cir. 2002), *cert. denied*, 539 U.S. 942 (2003) (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 542 (1993)). "[I]n circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of 'religious hardship' without compelling reason.'" *Church of the Lukumi Babalu Aye*, 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884).

Additionally, the *Smith* Court left open the viability of Free Exercise Clause attacks on laws that violate the First Amendment in conjunction with other constitutional protections. In these "hybrid rights" situations, heightened scrutiny is required. *Cornerstone Bible Church v. City of Hastings*, 948

F.2d 464, 472-73 (8<sup>th</sup> Cir. 1991) (citing *Smith*, 494 U.S. at 881-82).

**1. The Controlled Substances Acts Are Not Neutral and Generally Applicable.**

As pointed out in the Complaint, the federal and Iowa CSA make express exemption for certain controlled substance use, such as use of peyote for religious purposes. The federal CSA contains other exceptions permitting the use of controlled substances for purposes such as scientific research and medical use, and the Iowa CSA specifically exempts medical use of marijuana from the prohibitions of Schedule I of the Iowa CSA, while any other religious use of marijuana remains prohibited. *See, e.g.*, 21 U.S.C. § 823, 21 C.F.R. §§ 291.505, 1301.26, 1301.34, and Iowa Code § 124.204(7), 124.204(7). Thus, the Controlled Substances Acts do not apply across-the-board, either as to Schedule I substances generally or as to marijuana in particular. Instead, both the federal government and the State of Iowa have allowed use of Schedule I substances and marijuana under particular circumstances, including as a religious sacrament.

Even if the state and federal CSA are neutral (in the sense that they are not targeted at religious exercise), the existence of these exemptions and exceptions to the CSA's prohibitions means that the laws are not generally applicable. "The Free Exercise Clause 'protect[s] religious observers against unequal treatment,'" *Hobbie v.*

*Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring in judgment). The Constitution is offended when the government prefers certain religious denominations. See *Larson v. Valente*, 456 U.S. 228, 245 (1982) (striking down denominational preference).

The federal government and Iowa provide exemptions from the prohibition on the use of marijuana and other controlled substances for certain non-religious and religious uses. Having done so, these governments may not refuse to extend the exemption to Olsen's claim of religious hardship without compelling reason. "[W]here 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." *Smith*, 494 U.S. at 884; accord *Church of the Lukumi Babalu Aye*, 508 U.S. at 537. In *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir.), cert. denied, 528 U.S. 817 (1999), the court, in an opinion authored by then circuit judge Alito, held unconstitutional a police department policy that granted exemptions from a "no beards" policy for medical reasons but refused to grant exemptions to officers whose religious beliefs required growing a beard. In holding that the policy was subject to strict scrutiny under *Smith*, the court wrote as follows:

[T]he medical exemption raises concern because it indicates that the Department has made a value judgment that secular (i.e., medical) motivations

for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not. As discussed above, when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny.

*Id.*, 170 F.3d at 366.

The Court of Appeals ruling that the CSAs are generally applicable is simply unsupported. It wrote that “[g]eneral applicability does not mean absolute universality. Exceptions do not negate that the CSAs are generally applicable,” citing *O Centro Espirita*, 546 U.S. at 436, and two circuit court decisions<sup>6</sup> as support for its ruling (A-8, -9). Neither circuit court decision involved general applicability under the Free Exercise Clause and so are inapposite.<sup>7</sup> Moreover, this Court in *O Centro*

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<sup>6</sup> *United States v. Milk*, 281 F.3d 762, 768 (8<sup>th</sup> Cir. 2002), and *United States v. Meyers*, 95 F.3d 1475, 1481 (10<sup>th</sup> Cir. 1996), *cert. denied*, 522 U.S. 1006 (1997).

<sup>7</sup> The decision in *Milk* made a passing reference to the “general applicability” of the drug laws, but simply for the purpose of rejecting a defendant’s claim that an exception for tribal housing should be implied into the definition of “public housing” in 21 U.S.C. § 860. In *Meyers*, the defendant never argued

*Espirita*, 546 U.S. at 436, stressed that because the federal government granted exemptions to some controlled substance uses, including religious uses, it could not categorically deny exemptions for other religious uses.

The grant of exemptions from the CSAs for certain religious and non-religious reasons while denying similar treatment to persons such as Olsen seeking to exercise sincerely-held religious beliefs prevents these laws from being considered “generally applicable.” As a consequence, application of the laws to Olsen must be shown to be supported by a “compelling interest” and to be narrowly tailored to serve that interest. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 532, 542.

**2. Olsen’s Claims in This Case Involve “Hybrid Rights” Requiring Strict Scrutiny.**

A compelling interest inquiry also is required here because Olsen’s claims involve the Free Exercise Clause, combined with other constitutional rights. In addition to the First Amendment, the Complaint sets forth infringements of Olsen’s rights to equal protection of the law, *see infra*, to due process under the Fifth and Fourteenth Amendments, to assemble and worship with other

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that the CSA’s prohibition on marijuana was not generally applicable, and so the court never addressed that issue.

members of his faith, his property rights under the Fourth and Fifth Amendments, and the prohibition on ex post facto applications of the law to his religion, which is centuries old and has regularly used cannabis as its sacrament. In *Cornerstone Bible Church*, 948 F.2d at 472-73, the court recognized that a “hybrid rights” free exercise claim under *Smith* is stated where the First Amendment claim is combined with, *inter alia*, equal protection claims. That is precisely the situation here. The existence of this “hybrid rights” claim triggers strict scrutiny and requires judicial examination under the approach set forth in *O Centro Espirita*.

**III. COLLATERAL ESTOPPEL DOES NOT BAR OLSEN’S EQUAL PROTECTION CLAIMS BECAUSE THE RECENT DECISION IN *O CENTRO ESPIRITA* DEPRIVES ANY PREVIOUS DECISIONS OF THEIR PRECLUSIVE EFFECT.**

The lower courts also relied upon collateral estoppel to dismiss Olsen’s claims against the Defendants based upon the Fifth and Fourteenth Amendments’ guarantees to equal protection (A-9).<sup>8</sup> With respect to those claims, Olsen alleged that he is similarly situated to Native American Church members in their sacramental use of a substance

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<sup>8</sup> The lower courts relied upon the decisions in the cases set forth in footnote 3, *supra*.

considered a Schedule I controlled substance and to UDV Church members who were claimants in the *O Centro Espirita* case. “Consequently, the Defendants’ decision to allow the members of the Native American Church to use peyote and members of the UDV church to use DMT for religious purposes, while denying the same protection to Plaintiff, violates the Equal Protection rights of the Plaintiff guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution (Dkt. # 1; Complaint p. 18).

The application of collateral estoppel to these equal protection claims was error because it again fails to take into account the decision in *O Centro Espirita*. *O Centro Espirita* rejected the federal government’s claim that it had demonstrated a compelling interest to require denial of the preliminary injunction. This Court stressed that the government’s claim of a compelling interest was undermined by the exemption given to Native American churches for peyote. The unanimous decision concluded that there is no reasonable distinction between the sacramental use of the tea with DMT and Native American use of peyote:

For the past 35 years, there has been a regulatory exemption for use of peyote -- a Schedule I substance -- by the Native American Church. *See* 21 C.F.R. § 1307.31 (2005). In 1994, Congress extended that exemption to all members of every recognized Indian Tribe. *See* 42

U.S.C. § 1996a(b)(1). Everything the Government says about the DMT in hoasca -- that, as a Schedule I substance, Congress has determined that it “has a high potential for abuse,” “has no currently accepted medical use,” and has “a lack of accepted safety for use . . . under medical supervision,” 21 U.S.C. § 812(b)(1) -- applies in equal measure to the mescaline in peyote, yet both the Executive and Congress itself have decreed an exception from the Controlled Substances Act for Native American religious use of peyote. **If such use is permitted in the face of the findings in § 812(b)(1) for hundreds of thousands of Native Americans practicing their faith, it is difficult to see how those same findings alone can preclude any consideration of a similar exception for the 130 or so American members of the UDV who want to practice theirs.** See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) (“It is established in our strict scrutiny jurisprudence that ‘a law cannot be regarded as protecting an interest ‘of the highest order’ . . . when it leaves appreciable damage to that supposedly vital interest unprohibited” (quoting *Florida Star v. B.J.F.*, 491 U.S.

524, 541-542 (1989) (Scalia, J., concurring in part and concurring in judgment)).

The Government responds that there is a “unique relationship” between the United States and the Tribes, Brief for Petitioners 27; see *Morton v. Mancari*, 417 U.S. 535 (1974), but never explains what about that “unique” relationship justifies overriding the same findings on which the Government relies in resisting any exception for the UDV’s religious use of hoasca. In other words, if any Schedule I substance is in fact always highly dangerous in any amount, no matter how used, what about the unique relationship with the Tribes justifies allowing their use of peyote? Nothing about the unique political status of the Tribes makes their members immune from the health risks the Government asserts accompany any use of a Schedule I substance, nor insulates the Schedule I substance the Tribes use in religious exercise from the alleged risk of diversion.

*O Centro Espirita*, 546 U.S. at 433-434 (emphasis added).

This passage establishes as a matter of law that there is really nothing to distinguish Native American church use of peyote from the sacramental use of Schedule I controlled substances by other individuals. The recent recognition of this principle wholly undermines prior decisions, including those involving Olsen, that there is some rational basis for singling out the Native American church for a Schedule I religious exemption. Indeed, because the distinction drawn here involves the fundamental right to free exercise of religion and the Native American peyote exemption exhibits discrimination between religions, the classification made here should be subjected to strict scrutiny. *Locke v. Davey*, 540 U.S. 712, 720 n.2 (2004).

The same reasoning has previously been expressed by the Department of Justice's legal counsel in a memo concerning the exemption granted the Native American Church:

The special treatment of Indians under our law does not stem from the unique features of Indian religion or culture. With respect to these matters, Indians stand on no different footing than do other minorities in our pluralistic society. Rather, the special treatment of Indians is grounded in their unique status as political entities, formerly sovereign nations preexisting the Constitution, which still retain a measure of inherent sovereignty over

their peoples unless divested by federal statute or by necessary implication of their dependent status. See *United States v. Wheeler*, 435 U.S. 313, 55 L. Ed. 2d 303, 98 S. Ct. 1079 (1978).

An exemption for Indian religious use of peyote would not be grounded in the unique political status of Indians. Instead, the exemption would be based on the special culture and religion of the Indians. In this respect, Indian religion cannot be treated differently than other religions similarly situated without violation of the Establishment Clause.

*DEA*, 878 F.2d at 1469 (Buckley, J., dissenting) *quoting* Memorandum Opinion for the Chief Counsel, Drug Enforcement Administration, *Peyote Exemption for Native American Church* 403, 419 (Dec. 22, 1981).

Again, the legal principles applicable to Olsen's equal protection claims have changed in the time since his prior claims were disposed of in earlier cases. This change in the law means the collateral estoppel is inapplicable and the District Court erred in dismissing Olsen's equal protection claims under that doctrine.

## CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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