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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

)	No. CV 09-00336 SOM-BMK
OKLEVUEHA NATIVE AMERICAN)	DEFENDANTS’ REPLY IN
CHURCH OF HAWAII, INC.,)	SUPPORT OF MOTION TO
MICHAEL REX “RAGING BEAR”)	DISMISS;
MOONEY,)	CERTIFICATE OF SERVICE
)	
Plaintiffs)	Hearing: June 21, 2010, 10:30 a.m.
)	
v.)	Judge: Hon. Susan Oki Mollway
)	
ERIC H. HOLDER, JR., U.S. Attorney)	Trial: October 13, 2010, 9:00 a.m.
General;)	
MICHELE LEONHART, Acting)	Related document: dkt. no. 28
Administrator, U.S. Drug Enforcement)	
Administration;)	
FLORENCE T. NAKAKUNI, U.S.)	
Attorney for the District of Hawaii,)	
)	

Defendants)
)

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PRELIMINARY STATEMENT

The Church and Mooney's Memorandum in Opposition to Defendants' Second Motion to Dismiss does not demonstrate that new allegations in their amended complaint have cured the defects that led this Court to dismiss their original complaint. Instead, the Church and Mooney's memorandum primarily argues that this Court was wrong to dismiss the plaintiffs' original complaint. This Court acted correctly when it dismissed the plaintiffs' original complaint for lack of jurisdiction, and the Court should dismiss the plaintiffs' amended complaint on the same grounds.

The Church and Mooney have still failed to adequately allege subject matter jurisdiction or state any claim for relief. The Church and Mooney still have not alleged facts suggesting a genuine threat of imminent prosecution, so their request for an injunction against future federal drug enforcement action fails to meet the jurisdictional requirement of ripeness. The Church still lacks standing to assert claims based on the religious rights of its members, because the Court cannot evaluate the religious beliefs of individual Church members unless they personally participate in this lawsuit. The Church's and Mooney's state law tort claims are barred by the sovereign immunity of the United States. Finally, the Church and Mooney still have not alleged that federal drug regulation interferes with their religious exercise in a way that would amount to a "substantial[] burden" under the

Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4, or that would violate any other provision of law. The Government's motion to dismiss should be granted.

ARGUMENT

I. The Court lacks subject matter jurisdiction over the Church and Mooney's amended complaint.

A. The Church's and Mooney's claims seeking an injunction against future federal law enforcement action must be dismissed because their amended complaint does not allege a "genuine threat of imminent prosecution."

The Church and Mooney still have not established that they face a genuine threat of imminent prosecution or other law enforcement action, so their request for an injunction against future federal law enforcement action still does not satisfy the constitutional component of the jurisdictional requirement of ripeness.

In its opinion dismissing the Church and Mooney's original complaint, this Court recognized that under Thomas v. Anchorage Equal Rights Commission, 220 F.3d 1134 (9th Cir. 2000) (en banc), a plaintiff seeking an injunction against future enforcement cannot satisfy the jurisdictional requirement of ripeness unless it establishes a "genuine threat of imminent prosecution." Oklevueha Native Am. Church of Haw., Inc. v. Holder, No. 09-00336, 2010 WL 649753, at *5 (D. Haw. Feb. 23, 2010). The Court found that the Church and Mooney's complaint did not allege a genuine threat of imminent prosecution and so did not state a case or controversy. See id. at *5-7.

The Church and Mooney argue in their opposition brief that they do not have to satisfy the standard set out in Thomas because they have already satisfied the jurisdictional requirements of standing and ripeness by alleging that federal law enforcement authorities seized a package addressed to the plaintiffs. See Pls.’ Mem. at 1. But a plaintiff must satisfy the jurisdictional requirements of standing and ripeness separately for each claim in its complaint; establishing standing and ripeness with respect to one claim does not establish standing for the entire case. See DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 351–52 (2006). While the plaintiffs’ allegations about the seized package are enough to establish a ripe controversy with respect to their claims for return of or compensation for the allegedly seized material, the alleged seizure does not establish a ripe controversy with respect to their request for an injunction against future federal law enforcement. The plaintiffs cannot seek such an injunction without first establishing a genuine threat of imminent prosecution as required under Thomas.

The Church and Mooney still have not alleged a genuine threat of imminent prosecution. All that the Church and Mooney have alleged is that on one occasion in the past, federal law enforcement authorities seized a small amount of marijuana from a package addressed to Mooney before Mooney ever took possession of the package. See Am. Compl. ¶¶ 49–50. That is not enough to suggest that federal authorities have ever deliberately targeted the Church or Mooney for enforcement

action or are likely to do so in the future. See Oklevueha, 2010 WL 649753 at *7 (concluding that “[t]he seizure of a single package” of cannabis was “insufficient to support a determination of ripeness” in the plaintiffs’ original complaint). It certainly does not establish the kind of “imminent” threat that Thomas requires. Thomas, 220 F.3d at 1139; see also San Diego County Gun Rights Comm. v. Reno, 98 F.3d 1121, 1127 (9th Cir. 1996) (noting that a plaintiff must demonstrate a “high degree of immediacy” to establish a genuine threat of imminent prosecution).

The Church and Mooney argue that Adult Video Ass’n v. Barr, 960 F.2d 781 (9th Cir. 1992), vacated sub nom. Reno v. Adult Video Ass’n, 509 U.S. 917 (1993), reinstated in part, 41 F.3d 503 (9th Cir. 1994), held that “active enforcement” of a statute is enough to establish a genuine threat of imminent prosecution. See Pls.’ Mem. at 2. Adult Video Ass’n does not favor a finding of ripeness in this case. The court in Adult Video Ass’n based its decision on a pattern of “active enforcement . . . against other videotape distributors” whose activities were similar to the plaintiffs’ activities. 960 F.2d at 785. The Church and Mooney have not alleged anything resembling a pattern of “active enforcement” against similar parties. The plaintiffs allege that federal authorities recently raided one other organization that purports to use cannabis for religious purposes, see Am. Compl. ¶ 51, but their amended complaint does not suggest that the plaintiffs are related to this other organization in any way that makes it likely that the plaintiffs will also be

targeted. A single instance of enforcement against another organization that may or may not be similar to the plaintiffs does not amount to a pattern of “active enforcement” that suggests the plaintiffs face a genuine threat of imminent prosecution. Cf. Thomas, 220 F.3d at 1140–41 (finding that Adult Video Ass’n was inapposite to the plaintiffs’ claims because there was only a “limited” record of past enforcement against similar parties).

With no specific threat of future enforcement against the Church and Mooney and only a slim suggestion of past enforcement against similar parties, the Church and Mooney cannot satisfy the constitutional component of the ripeness requirement.

B. Past decisions in which other courts proceeded to the merits do not support subject matter jurisdiction in this case.

The Church and Mooney assert that this Court must have subject matter jurisdiction in this case because courts exercised jurisdiction in two other cases involving claims under the Religious Freedom Restoration Act, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006), and Church of the Holy Light of the Queen v. Mukasey, 615 F. Supp. 2d 1210 (D. Or. 2009). See Pls.’ Mem. at 3–4. But neither of these decisions addressed standing or ripeness issues, so neither carries any weight as precedent on whether jurisdiction is proper. See Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360, 1363 (9th Cir. 1998) (noting that a prior case in which another court proceeded to

the merits without discussing standing does not amount to precedent on the issue of standing); see also Marley v. United States, 567 F.3d 1030, 1038 (9th Cir. 2009), cert. denied, 130 S. Ct. 796 (U.S. Dec. 7, 2009); Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285, 1288 (9th Cir. 1985) (“[U]nstated assumptions on non-litigated issues are not precedential holdings binding future decisions.”).

An earlier, unreported decision in Church of the Holy Light of the Queen v. Mukasey, No. CV 08-3095-PA, 2008 WL 5340151 (D. Or. Dec. 19, 2008), did examine standing and ripeness, but that case does not support the plaintiffs’ position in this case, because the plaintiffs in Church of the Holy Light of the Queen alleged that federal authorities had arrested the spiritual leader of the plaintiff church and that a federal prosecutor had warned the spiritual leader to cease his activities and had personally threatened him with prosecution, telling him, “I’m going to come get you.” Id. at *1–2. In this case, by contrast, the Church and Mooney have not alleged any specific threat of future prosecution or other future law enforcement action.

In addition, the court in the Church of the Holy Light of the Queen case did not analyze the separate issue of whether the church in that case had standing to assert the rights of its members, see Defs.’ Mem. at 15–17. Rather, the Court simply assumed that all of the plaintiffs were in the same position with respect to

jurisdiction.¹ See id. at *2–3. Thus, for the reasons the defendants explained above, the Church of the Holy Light of the Queen case does not carry even persuasive weight on the issue of whether the Church has standing to assert claims based on the religious rights of its members.

C. The Church and Mooney’s failure to seek exemptions through DEA administrative procedures makes judicial intervention particularly inappropriate in this case.

There is no reason to believe the Drug Enforcement Administration’s procedures for obtaining administrative exemptions from DEA regulations are ineffective. The Church and Mooney’s failure to seek exemptions through these procedures makes it particularly inappropriate for the Court to hear this case.

This Court found that the Church and Mooney’s original complaint failed to satisfy the prudential component of the ripeness requirement because it did not present concrete issues fit for judicial consideration and because withholding judicial consideration would not impose any immediate hardship on the plaintiffs.

See Oklevueha, 2010 WL 649753 at *7–8. As the defendants explained in their

¹ In Leonard v. Clark, 12 F.3d 885 (9th Cir. 1994), the Ninth Circuit stated that in a case involving multiple plaintiffs bringing similar claims, if the court concludes that at least one plaintiff has standing, it generally need not examine whether each of the remaining plaintiffs has standing. See id. at 888. However, this general principle does not always hold. In Leonard itself, the Ninth Circuit went on to conclude that the general principle did not apply and that claims brought by a union had to be analyzed separately from similar claims brought by its members. See id. at 888–89. Similarly, in this case, the Church’s claims should be analyzed separately from Mooney’s claims.

memorandum, the Church and Mooney's amended complaint has not cured these flaws, and their decision not to seek administrative exemptions from the DEA further weighs against any finding that the amended complaint satisfies the requirements of ripeness. See Defs.' Mem. at 12–15.

The Church and Mooney assert that the DEA exemption procedures are irrelevant because the DEA will surely deny any application for an exemption. See Pls.' Mem. at 3–4. The Church and Mooney's bare assertion that it would be futile to seek an exemption is not an adequate reason to excuse their failure to proceed through the DEA exemption process. The absence of any history of similar exemptions for marijuana use does not suggest by itself that an application for an exemption by the Church or Mooney would inevitably be denied. Cf. Fones4All Corp. v. FCC, 550 F.3d 811, 818 (9th Cir. 2008) (rejecting a plaintiff's argument that because the FCC's past behavior suggested that the FCC would not agree with the plaintiff's position, the plaintiff should not be required to exhaust administrative remedies before seeking review in court).

D. The Church's and Mooney's state law tort claims are barred by sovereign immunity.

The Church's and Mooney's state law tort claims must be dismissed because they are barred by the sovereign immunity of the United States and because there is no statute that authorizes this Court to exercise jurisdiction over those claims.

The Church and Mooney argue that their state law tort claims should not be dismissed because their amended complaint also asserts claims under federal law. See Pls.’ Mem. at 9. But even if the plaintiffs asserted valid claims based on some federal statute or constitutional provision, their state law tort claims would still be barred by the United States’ sovereign immunity. Sovereign immunity bars any claim against the United States, or U.S. officers sued in their official capacities, as long as the United States has not explicitly consented to be sued on that particular claim. See Balser v. Dep’t of Justice, Office of the U.S. Trustee, 327 F.3d 903, 907 (9th Cir. 2003). A waiver of sovereign immunity must be “unequivocally expressed” in a statute, United States v. Nordic Vill., Inc., 503 U.S. 30, 33 (1992), and it “must be construed strictly in favor of the sovereign, and not enlarge[d] . . . beyond what the language requires,” id. at 34 (alteration in original) (citation omitted) (internal quotation marks omitted). The plaintiffs have not identified any federal statute that waives sovereign immunity for claims under Hawaii state tort law, so those claims are barred by sovereign immunity no matter how the Court resolves the plaintiffs’ other claims. See Marley, 567 F.3d at 1034 (“Unless Congress enacts legislation that subjects the federal government to tort liability, the United States, as sovereign, cannot be sued.”).

There is also no federal statute that authorizes this Court to exercise subject matter jurisdiction over the plaintiffs’ state law tort claims. The Church and

Mooney point to 28 U.S.C. § 1331, the statute that confers general federal question jurisdiction on the district courts. See Pl.’s Mem. at 9. But § 1331 generally does not authorize jurisdiction over claims based on state law. See Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg., 545 U.S. 308, 312–14 (2005) (explaining that § 1331 generally only encompasses claims based on federal causes of action and that a state law claim falls within the scope of § 1331 only if it “necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities”); see also Empire HealthChoice Assurance, Inc. v. McVeigh ex rel. Estate of McVeigh, 547 U.S. 677, 699 (2006) (noting that the class of state law claims that fall within the scope of § 1331 is a “special and small category”).

Accordingly, the Court lacks jurisdiction over the plaintiffs’ state law claims, and the claims must be dismissed.

II. The Church and Mooney’s amended complaint fails to state a claim for relief.

A. The Church and Mooney’s amended complaint fails to state a prima facie claim under the Religious Freedom Restoration Act (RFRA) because it does not allege facts suggesting that federal restrictions on marijuana “substantially burden” any “exercise of religion.”

The defendants explained in their memorandum that the amended complaint does not state a claim under the Religious Freedom Restoration Act because it does

not allege that federal restrictions on marijuana impose a “substantial[] burden” on any “exercise of religion.” The plaintiffs’ practices cannot amount to “exercise[s] of religion” covered by RFRA because the only purpose of the Church is to facilitate drug use. See Defs.’ Mem. at 22–23. Moreover, even if the Church’s practices could be considered religious in nature, all that the Church and Mooney have alleged is that carrying out Church activities without marijuana “decreases the spirituality, the fervor, or the satisfaction,” Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1063 (9th Cir. 2008) (en banc), cert. denied, 129 S. Ct. 2763 (2009), of those activities. This kind of “diminishment of spiritual fulfillment” is not enough by itself to amount to a “substantial burden” on religious practices. Id. at 1070; see Defs.’ Mem. at 24–26.

The Church and Mooney assert that the Government has misrepresented the nature of the Church, and they purport to be “particularly upset” by any contention that the only purpose of the Church is to facilitate drug use. See Pls.’ Mem. at 6. But the Government’s arguments only reflect the plaintiffs’ own allegations about the Church and its activities:

The main and primary purpose of the NAC is to administer Sacramental Ceremonies (pursuant to their Code of Ethics). In other words, the Church only exists to espouse the virtues of, and to consume, entheogens.

Am. Compl. at 2. The plaintiffs are bound to these allegations even though they are fatal to their claims. See Sprewell v. Golden State Warriors, 266 F.3d 979, 988

(9th Cir.) (“[A] plaintiff can . . . plead himself out of a claim by including unnecessary details contrary to his claims.”), modified, 275 F.3d 1187 (9th Cir. 2001).

B. Neither the regulatory exemption permitting use of peyote in Native American Church religious ceremonies nor the treatment of Indian tribes under federal law has any bearing on the Church’s and Mooney’s claims.

The Church and Mooney’s lengthy discussion of regulatory exemptions for Indian religious use of peyote and the treatment of Indian tribes under federal law, see Pls.’ Mem. at 5–9, is irrelevant. Neither the treatment of traditional religious use of peyote nor the treatment of Indian tribes under federal law has any bearing on the Church’s and Mooney’s claims in this case.

The Church and Mooney are correct when they note that federal law permits use of peyote under certain circumstances “in bona fide religious ceremonies of the Native American Church,” 21 C.F.R. § 1307.31,² and by members of recognized Indian tribes, 42 U.S.C. § 1996a(b)(1). But these regulatory exemptions are simply

² It is unclear whether plaintiff Oklevueha Native American Church of Hawaii, Inc., is part of or affiliated with the Native American Church referenced in 21 C.F.R. § 1307.31. The plaintiffs allege that the Oklevueha Native American Church of Hawaii is a “chapter” of the Native American Church, but they also claim to be “independent” of the Native American Church. Am. Compl. ¶ 1; see also Am. Compl. ¶¶ 19, 22. Whatever the relationship between the plaintiffs and the Native American Church, the Native American Church peyote exemption is irrelevant, because the plaintiffs’ claims pertain to marijuana, not peyote.

irrelevant to the plaintiffs' claims, because the plaintiffs' claims pertain to marijuana, not peyote.

The treatment of Indian tribes under federal law is also irrelevant to the plaintiffs' claims. The plaintiffs have not alleged that they are associated with any federally recognized Indian tribe, nor have they identified any provision of law that affords Indians or Indian tribes immunity from federal law enforcement action related to marijuana. Court cases suggesting that the Government can provide special accommodations for American Indian religious practices involving peyote do not suggest that the Government must provide special accommodations for the plaintiffs' practices involving marijuana.

C. The Church and Mooney's memorandum does not contest dismissal of their claims under the First Amendment, the Fourteenth Amendment, the American Indian Religious Freedom Act (AIRFA), and Hawaii state law.

The defendants' memorandum of law explained at length why the allegations in the Church and Mooney's amended complaint do not state claims under the Free Exercise Clause of the First Amendment; the Equal Protection Clause of the Fourteenth Amendment; the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996; the other federal statutes cited in the amended complaint; or Hawaii state tort law. See Defs.' Mem. at 26–34. The Church and Mooney's memorandum does not respond at all to the defendants' arguments. The

Court should dismiss all of these claims for the reasons explained in the defendants' memorandum.

CONCLUSION

For the reasons above, the Court should dismiss all the claims of both plaintiffs in this action.

Date: June 7, 2010

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