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

)	No. CV 09-00336 SOM-BMK
OKLEVUEHA NATIVE AMERICAN	)	DEFENDANTS’ MOTION FOR
CHURCH OF HAWAII, INC.,	)	CLARIFICATION OR PARTIAL
MICHAEL REX “RAGING BEAR”	)	RECONSIDERATION OF ORDER
MOONEY,	)	GRANTING IN PART AND
	)	DENYING IN PART MOTION TO
Plaintiffs	)	DISMISS FIRST AMENDED
	)	COMPLAINT;
v.	)	DEFENDANTS’ MEMORANDUM
	)	IN SUPPORT OF MOTION FOR
ERIC H. HOLDER, JR., U.S. Attorney	)	CLARIFICATION OR PARTIAL
General;	)	RECONSIDERATION OF ORDER
MICHELE LEONHART, Acting	)	GRANTING IN PART AND
Administrator, U.S. Drug Enforcement	)	DENYING IN PART MOTION TO
Administration;	)	DISMISS FIRST AMENDED
FLORENCE T. NAKAKUNI, U.S.	)	COMPLAINT;
Attorney for the District of Hawaii,	)	CERTIFICATE OF SERVICE
)	

Defendants)
_____)

**DEFENDANTS' MOTION FOR CLARIFICATION OR PARTIAL
RECONSIDERATION OF ORDER GRANTING IN PART AND DENYING
IN PART MOTION TO DISMISS FIRST AMENDED COMPLAINT**

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure and Rule 60.1(c) of the Local Rules of Practice of this Court, Defendants Eric H. Holder, Jr., U.S. Attorney General; Michele Leonhart, Acting Administrator, U.S. Drug Enforcement Administration; and Florence T. Nakakuni, U.S. Attorney for the District of Hawaii, hereby move for clarification or partial reconsideration of this Court's June 22, 2010, Order Granting in Part and Denying in Part Motion to Dismiss First Amended Complaint. This motion is based on the attached supporting memorandum.

Date: June 29, 2010

Respectfully submitted,

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**UNITED STATES DISTRICT COURT
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ERIC H. HOLDER, JR., U.S. Attorney)	
General;)	
MICHELE LEONHART, Acting)	
Administrator, U.S. Drug Enforcement)	
Administration;)	
FLORENCE T. NAKAKUNI, U.S.)	
Attorney for the District of Hawaii,)	
)	
Defendants)	
)	

**DEFENDANTS’ MEMORANDUM IN SUPPORT OF MOTION FOR
CLARIFICATION OR PARTIAL RECONSIDERATION OF ORDER
GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS
FIRST AMENDED COMPLAINT**

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PRELIMINARY STATEMENT

The Court's Order Granting in Part and Denying in Part Motion to Dismiss First Amended Complaint, Oklevueha Native Am. Church of Haw., Inc. v. Holder, No. 09-00336, 2010 WL 2541827 (D. Haw. June 22, 2010), granted the defendants' motion to dismiss numerous claims in this action, but it stopped short of dismissing the case altogether because the Court believed that the amended complaint contained an unresolved claim seeking return of or compensation for a seized package based on the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4. In fact, the plaintiffs' amended complaint did not present any such claim—the plaintiffs sought return of or compensation for the seized package based solely on state tort law, not based on RFRA. Accordingly, the Court should have dismissed the complaint entirely. Moreover, even if the plaintiffs had in fact pursued such a claim under RFRA, it would have to be dismissed for failure to state a claim under RFRA for reasons that the defendants presented in their motion to dismiss.

The plaintiffs' amended complaint did not present any claim seeking return of or compensation for the seized package based on RFRA. The RFRA count in the amended complaint was identical to the RFRA count in the original complaint and only pertained to the plaintiffs' claims seeking an injunction against future federal drug enforcement action. The plaintiffs' amended complaint did contain a new

request for return of or compensation for the seized package of marijuana, but the legal basis presented for that request was a claim of “theft” or “conversion” under Hawaii law, not RFRA. The plaintiffs’ opposition to the defendants’ motion to dismiss also did not allude to any claim seeking return of or compensation for the seized package based on RFRA.

Even if the plaintiffs had sought to pursue a claim for return of the seized package based on RFRA, such a claim would have to be dismissed for failure to state a claim for several reasons that the defendants presented in their motion to dismiss but that were not addressed by the Court’s opinion. The defendants noted that the plaintiffs’ statement that the Church exists only to facilitate drug use precludes them from showing that their activities are an “exercise of religion” under RFRA. The defendants further noted that even if some of the plaintiffs’ activities could amount to an “exercise of religion,” other activities such as importation of marijuana are not “exercise[s] of religion” covered by RFRA. The defendants also noted that the plaintiffs had not alleged facts suggesting that the package was seized in the course of actions targeted at them, rather than the producer or shipper of the seized marijuana, or that the contents of the package were intended for use in Church ceremonies. Finally, the defendants noted that under the Ninth Circuit’s en banc decision in Navajo Nation v. U.S. Forest Service, 535 F.3d 1058, 1063 (9th Cir. 2008) (en banc), cert. denied, 129 S. Ct. 2763

(2009), Government action that interferes with religious practices—even to the point of rendering them impossible or stripping them of meaning—does not violate RFRA unless it directly compels a person to violate his religion. For all of these reasons, the seizure of a shipment of marijuana before it reached the plaintiffs could not amount to a “substantial[] burden” on an “exercise of religion.”

However, the Court’s opinion did not address any of these arguments.

Finally, an order requiring return of or compensation for seized property would not be authorized under RFRA. RFRA does not waive the United States’ sovereign immunity against suits for monetary compensation. Moreover, RFRA is a vehicle for vindicating religious rights, not for securing return of personal property, so the return of property is not “appropriate relief” under RFRA under the circumstances alleged in this case. “Appropriate relief” would be relief that addressed the lost religious value of the plaintiffs’ practices, not relief that simply remedied a material loss.

Accordingly, the defendants respectfully request that the Court clarify or partially reconsider its June 22, 2010, order and dismiss the entire complaint in this action.

BACKGROUND

The Church and Mooney filed their original complaint in this action on July 22, 2009. Compl. for Declaratory Relief and for Prelim. and Permanent Injunctive

Relief. The complaint sought an injunction against federal drug enforcement action related to marijuana, asserting claims under the Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4; the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996; the Free Exercise Clause, U.S. Const. amend. I; and the Equal Protection Clause, U.S. Const. amend. XIV, § 1. See Compl. ¶¶ 34–54 and at 12–14. The defendants moved to dismiss the action for lack of subject matter jurisdiction and for failure to state a claim. Defs.’ Notice of Mot. and Mot. to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim. The Court granted the defendants’ motion, concluding that the plaintiffs’ allegations failed to satisfy both the constitutional component and the prudential component of the jurisdictional requirement of ripeness. Oklevueha Native Am. Church of Haw., Inc., v. Holder, No. 09-00336, 2010 WL 649753, at *9 (D. Haw. Feb. 23, 2010). However, the Court granted the plaintiffs until March 22, 2010, to file an amended complaint. Id.

The plaintiffs filed their amended complaint on the March 22, 2010, deadline. First Am. Compl. for Declaratory Relief and for Prelim. and Permanent Injunctive Relief. The amended complaint sought the same injunction as the original complaint, based on the same set of counts as the original complaint. See Am. Compl. ¶¶ 54–65, 68–76 and at 17–18. The amended complaint further added a new claim seeking the return of or compensation for a seized package of

marijuana based on common law claims of “theft” or “conversion.” Am. Compl. ¶¶ 50, 66–67 and at 18. The amended complaint did not suggest that this new claim was supported by any provisions of law other than state common law.

The defendants again moved to dismiss the action for lack of subject matter jurisdiction and for failure to state a claim. Defs.’ Notice of Mot. and Mot. to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim. The Court decided the motion without a hearing, granting the defendants’ motion in part and denying it in part. Oklevueha Native Am. Church of Haw., Inc. v. Holder, No. 09-00336, 2010 WL 2541827, at *1, 9 (D. Haw. June 22, 2010). The Court dismissed the plaintiffs’ claims for an injunction against federal law enforcement action related to marijuana, finding that the claims failed to satisfy the constitutional and prudential components of the jurisdictional requirement of ripeness. Id. at *3–8. Having dismissed those claims, the Court concluded that it would not be necessary to address the defendants’ arguments that the plaintiffs’ federal law claims failed to state a claim. Id. at *8 (“[T]his court need not address the Government’s other arguments concerning these claims.”). The Court further dismissed the plaintiffs’ state law claims seeking return of or compensation for a seized package of marijuana. Id. at *8. The Court said that it would not dismiss the action altogether, however, because “Plaintiffs also assert claims for the return of

their cannabis or compensation for the seizure as a damage authorized by the Religious Freedom Restoration Act of 1993 ('RFRA')." Id. at *8.

Because the plaintiffs in fact did not assert such a claim based on RFRA, and a claim for return of or compensation for seized property would not state a claim under RFRA under the circumstances alleged in the complaint, the defendants now respectfully seek clarification or partial reconsideration of the Court's order and request that the Court dismiss the complaint entirely.

ARGUMENT

I. Standards applicable to a motion for clarification or reconsideration.

Clarification or partial reconsideration is appropriate in this case because the Court misapprehended the claims presented in the plaintiffs' amended complaint and did not address the defendants' legal arguments discussing why the plaintiffs' allegations fail to state any claim under RFRA.

Under Rule 54(b) of the Federal Rules of Civil Procedure, a court may revise its prior rulings "at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Id. Reconsideration is appropriate, at the court's discretion, when a party "demonstrate[s] some reason that the court should reconsider its prior decision" and "set[s] forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision."

White v. Sabatino, 424 F. Supp. 2d 1271, 1274 (D. Haw. 2006). Under Rule 60.1(c)

of the Local Rules of Practice of this Court, a party may seek reconsideration based on “[m]anifest error of law or fact.” Id.

II. The plaintiffs’ amended complaint did not present any counts seeking return of or compensation for the seized package based on the Religious Freedom Restoration Act (RFRA).

The plaintiffs’ amended complaint did not present any claims seeking return of or compensation for a seized package of marijuana under RFRA; the only legal basis the plaintiffs presented for obtaining return of or compensation for the seized package was a claim of “theft” or “conversion” under state tort law. Because all the claims actually presented by the amended complaint were dismissed by the Court, including the plaintiffs’ state law tort claim, the complaint should have been dismissed entirely.

The RFRA count of the amended complaint was identical to the RFRA count in the plaintiffs’ original complaint, which had not sought return of the cannabis. See Oklevueha, 2010 WL 649753 at *7 (“Notably, while the [original] Complaint seeks to prevent future seizures of cannabis, it does not pray for the return of the seized cannabis.”). Compare Compl. ¶¶ 34–36 (RFRA count) with Am. Compl. ¶¶ 54–56 (identical RFRA count). The only basis the plaintiffs asserted for their request for return of or compensation for property was a new numbered count asserting state law claims for “theft and/or conversion.” Am. Compl. ¶¶ 66-67. No

other changes in the amended complaint suggested that the plaintiffs were seeking return of or compensation for property based on RFRA rather than state tort law.¹

The plaintiffs' opposition to the defendants' motion to dismiss further confirms that the plaintiffs did not, and did not intend to, assert claims under RFRA for return of or compensation for the seized marijuana. The plaintiffs' opposition brief contained only one mention of RFRA, on page 8 of the plaintiffs' brief. There, the plaintiffs stated that they were "seeking protection under RFRA"—that is, an injunction against law enforcement. Mem. in Opp'n to Defs.' Second Mot. to Dismiss at 8 (emphasis added).

The plaintiffs' discussion in their opposition brief of their state law tort claims also confirms that those claims were the only claims seeking return of or compensation for the seized package. The plaintiffs argued:

If Plaintiffs prevail at trial, and application of the CSA to their possession of cannabis is thus declared to be unconstitutional or violative of federal law, and Defendants are further enjoined from

¹ At the February 22, 2010, hearing on the defendants' motion to dismiss the original complaint, the plaintiffs emphasized that the only claims they sought to bring were the claims clearly presented in the numbered counts of their complaint. Asked by the Court about potential claims under the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5, counsel for the plaintiffs stated, "Well, I would like to understand why you even think we're bringing [a claim under RLUIPA]. We're not. If you read each of our numbered counts, nowhere is RLUIPA mentioned." Tr. of Hr'g at 23:7-9. Counsel for the plaintiffs stated that the defendants and the Court had misinterpreted the complaint, concluding, "to say we're asserting a claim either misreads it or inserts stuff that wasn't there." Tr. of Hr'g at 24:8-9.

seizing cannabis from Plaintiffs, and if nevertheless Defendants still refuse to return (or are unable to return) the seized cannabis, the Plaintiffs' theft/conversion count may then be properly heard.

Pls.' Mem. at 9. In other words, the plaintiffs maintained that a decision in their favor on all their federal law claims, including their RFRA claims, would not itself result in return of or compensation for the seized package. Rather, according to the plaintiffs, a favorable decision on their federal law claims would merely remove obstacles standing in the way of state law tort claims for return of or compensation for the package.²

Thus, the Court's statement that "Plaintiffs . . . assert claims for the return of their cannabis or compensation for the seizure as a damage authorized by the Religious Freedom Restoration Act of 1993 ('RFRA')," Oklevueha, 2010 WL 2541827, at *8, was based on a misapprehension of the complaint. The Court in fact dismissed all the claims presented by the complaint, and this case should be dismissed entirely.

² As the defendants explained in their reply brief and as the Court recognized in its opinion, the plaintiffs' logic was flawed. Sovereign immunity bars the plaintiffs' state law tort claims regardless of how the Court resolves the federal claims. See Defs.' Reply in Supp. of Mot. to Dismiss at 8–10; Oklevueha, 2010 WL 2541827, at *8.

III. Even if the plaintiffs had sought to pursue additional claims under RFRA, such claims would fail to state a claim for reasons explained in the defendants' motion to dismiss.

Even if the plaintiffs had sought to pursue an additional claim seeking return of or compensation for the seized package under RFRA, such a claim would fail to state a claim for the numerous reasons the defendants presented in section II.A of Defendants' Memorandum in Support of Motion to Dismiss. See Defs.' Mem. at 21–26.

The Court's opinion stated that it had no occasion to address the arguments presented in section II.A of the defendants' memorandum. Oklevueha, 2010 WL 2541827, at *8 (“[T]his court need not address the Government's other arguments concerning these claims.”). However, the numerous arguments presented in section II.A of the defendants' memorandum were directed at and pertinent to any claim presented under RFRA, regardless of the relief sought, so they merited consideration in the Court's resolution of any outstanding RFRA claim. See Defs.' Mem. at 21–26.

The defendants' memorandum noted that, to state a prima facie claim under RFRA, a plaintiff must establish two elements: first, that the activities at issue are an “exercise of religion,” and, second, that Government action “substantially burden[s]” that exercise of religion. See Defs.' Mem. at 21 (quoting Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1068 (9th Cir. 2008) (en banc) (citations

omitted) (quoting 42 U.S.C. § 2000bb-1(a)), cert. denied, 129 S. Ct. 2763 (2009)).

The defendants' memorandum explained that, based on the allegations of the amended complaint, the plaintiffs would not be able to establish either element.

The defendants' memorandum presented two reasons why receipt of a package of marijuana through FedEx could not amount to an "exercise of religion" under RFRA. First, the plaintiffs' allegation that the Church "only exists to espouse the virtues of, and to consume entheogens [psychoactive drugs]," Am. Compl. at 2, precludes any finding that the plaintiffs' activities are rooted in religious belief that is protected by RFRA, and not in purely secular philosophical concerns that are not protected by RFRA. See Defs.' Mem. at 22–23 (citing United States v. Zimmerman, 514 F.3d 851, 853 (9th Cir. 2007) (per curiam); United States v. Ward, 989 F.2d 1015, 1018 (9th Cir. 1992); United States v. Meyers, 95 F.3d 1475, 1482–84 (10th Cir. 1996); Wright v. Or. Metallurgical Corp., 360 F.3d 1090, 1098 (9th Cir. 2004); and Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir.), modified, 275 F.3d 1187 (9th Cir. 2001)). Second, the defendants explained that even if some of the plaintiffs' marijuana-related activities could amount to "exercise of religion" under RFRA, other activities, like receipt of a package of marijuana through FedEx, could not amount to an exercise of religion. See Defs.' Mem. at 23–24. Among the cases the defendants cited was Guam v. Guerrero, 290 F.3d 1210 (9th Cir. 2002), in which the Ninth Circuit rejected a

criminal defendant’s assertion of RFRA as a defense to charges of importation of marijuana. See id. at 1222–23. Moreover, as the Court noted in its opinion, the plaintiffs did not allege any facts suggesting that the Government “knew or should have known that [the package] was being sent to Mooney for religious purposes,” Oklevueha, 2010 WL 2541827, at *8. Indeed, the plaintiffs did not allege that the seized marijuana was intended for religious purposes at all. See id. at *9 (noting that the plaintiffs had not made allegations about the “intended use of the seized cannabis”). This gap in the plaintiffs’ allegations is especially salient because, as the defendants noted in their memorandum, the plaintiffs allege that they engage in “therapeutic” use of marijuana in addition to purportedly religious use. See Defs.’ Mem. at 23 (noting that “therapeutic” use of marijuana cannot amount to an exercise of religion); see also Am. Compl. ¶ 70 and at 17–18 (referring to “therapeutic” use of marijuana). The plaintiffs’ allegations also did not include any information about who shipped the marijuana to the plaintiffs or who owned the marijuana—the shipper, the plaintiffs, or a third party—at the time of the seizure. See Am Compl. ¶¶ 49–50.

The defendants’ memorandum further explained why the seizure of a package of marijuana could not amount to a “substantial[] burden” under RFRA as interpreted by the Ninth Circuit, sitting en banc, in Navajo Nation v. U.S. Forest Service, 535 F.3d 1058 (9th Cir. 2008) (en banc). See Defs.’ Mem. at 24–26. Under

Navajo Nation, Government action that simply interferes with religious exercise does not amount to a “substantial[] burden” under RFRA; such an action amounts to a “substantial[] burden” only if it directly compels plaintiffs to violate their religion. See Defs.’ Mem. at 24–26. In Navajo Nation, the challenged Government action had the effect of “spiritually desecrating” a mountain the plaintiffs considered sacred; it effectively made it impossible for the plaintiffs to worship in their chosen manner. See Navajo Nation, 535 F.3d at 1072 (accepting that the challenged action would “virtually destroy” the plaintiffs’ ability to practice their religion). Nevertheless, the court found that the challenged action imposed no substantial burden under RFRA, because there was no element of direct compulsion or coercion in the sense of overcoming an individual’s religious conscience. See id. at 1069–70 (“Under RFRA, a ‘substantial burden’ is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit . . . or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions”). Likewise, in this case, even if the Government’s seizure of the marijuana shipment made it completely impossible for the plaintiffs to practice their religion—which it did not, since the plaintiffs allege that they acquire marijuana in numerous ways, see Am. Compl. ¶ 40, and can use drugs other than marijuana in their ceremonies, see Am. Compl. ¶ 25—the seizure would not amount to a substantial burden on any

religious exercise, because the seizure would not directly compel the plaintiffs to violate their religion.

All these arguments supported the dismissal of any outstanding claims under RFRA and were supported by citations to binding Ninth Circuit precedent. They merited consideration in the Court's resolution of any outstanding RFRA claims.

IV. RFRA cannot support claims for return of or compensation for seized property, for the reasons noted in the Court's opinion.

For additional reasons noted in the Court's opinion and for several related reasons, RFRA is not an appropriate vehicle for seeking return of or compensation for religious property mistakenly or wrongfully seized by the Government under the circumstances alleged in the plaintiffs' amended complaint. Monetary compensation would not be permissible, because RFRA does not waive the United States' sovereign immunity against actions for monetary compensation. An order to return seized marijuana would also be inappropriate under RFRA, because such an order would address only secular property interests, not the kinds of religious interests RFRA is designed to protect.

As the Court noted in its opinion, the United States is immune from suit except to the extent that Congress has expressly waived sovereign immunity. Oklevueha, 2010 WL 2541827, at *8; see also United States v. Nordic Vill., Inc., 503 U.S. 30, 33–34 (1992) (noting that a waiver of sovereign immunity must be “unequivocally expressed” in a statute and “must be construed strictly in favor of

the sovereign, and not enlarge[d] . . . beyond what the language requires” (alteration in original) (citation omitted) (internal quotation marks omitted)), cited in Defs.’ Reply at 9. Thus, a court generally should not interpret a statute as permitting claims for monetary compensation against the United States unless the statute unambiguously authorizes such relief.

RFRA authorizes suits for violations of 42 U.S.C. § 2000bb-1 and specifies that a claimant may obtain “appropriate relief” against the federal Government, 42 U.S.C. § 2000bb-1(c), but this authorization of “appropriate relief” does not authorize suits for monetary compensation. As the Court observed in its opinion, the D.C. Circuit held in Webman v. Federal Bureau of Prisons, 441 F.3d 1022 (D.C. Cir. 2006), that the use of the term “appropriate relief” in 42 U.S.C. § 2000bb-1(c) is not the kind of unambiguous expression that is needed to waive sovereign immunity for monetary relief, so the provision does not authorize monetary compensation against the United States. See id. at 1026.

The Ninth Circuit has not squarely ruled on the issue presented by Webman, but several district court decisions within the Ninth Circuit have followed Webman and held that RFRA does not authorize monetary compensation. See Multi Denominational Ministry of Cannabis & Rastafari, Inc. v. Mukasey, No. C 06-4264, 2008 WL 914448, at *3 (N.D. Cal. Mar. 21, 2008), aff’d sub nom. Multi-Denominational Ministry of Cannabis & Rastafari, Inc. v. Holder, No. 08-16083,

2010 WL 547578 (9th Cir. Feb. 16, 2010) (unpublished decision); Keen v. Noble, No. CV F 04-5645, 2007 WL 2789561, at *8 (E.D. Cal. Sep. 20, 2007); Gee v. Kempthorne, No. CV 03-432, 2007 WL 317051, at *2 (D. Idaho Jan. 30, 2007). Also, in Holley v. California Department of Corrections, 599 F.3d 1108 (9th Cir. 2010), the Ninth Circuit held that an analogous “appropriate relief” provision in the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-2(a), did not abrogate state sovereign immunity and therefore did not expose states to actions for money damages. See Holley, 599 F.3d at 1112–13.

Furthermore, as Judge Tatel observed in his concurring opinion in Webman, the purpose of RFRA was to authorize certain claims that would not be available under the Free Exercise Clause as interpreted by the Supreme Court’s decision in Employment Division v. Smith, 494 U.S. 872 (1990). See Webman, 441 F.3d at 1028 (Tatel, J., concurring); see also 42 U.S.C. § 2000bb(b) (Congressional declaration of purposes). With that purpose in mind, RFRA “is most naturally read to exclude damages against the government,” because compensatory damages are not available against the Government under the Free Exercise Clause. Webman, 441 F.3d at 1028 (Tatel, J., concurring). Indeed, the Supreme Court recently expressed doubt that damages would be an appropriate remedy for Free Exercise Clause violations even in suits where federal officers are sued in their individual capacities—as opposed to their official capacities—and where sovereign immunity

consequently is not an issue. See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948 (2009) (noting that the Supreme Court has never “found an implied damages remedy under the Free Exercise Clause”). Thus, it is clear that monetary compensation is unavailable under RFRA.³

The plaintiffs also cannot seek return of the seized marijuana under RFRA, because an action for return of property seeks to vindicate secular property rights, not to vindicate religious interests of the kind RFRA is designed to protect.

³ The Court’s opinion mentions Helbrans v. Coombe, 890 F. Supp. 227 (S.D.N.Y. 1995), a case in which the Southern District of New York authorized attorney’s fees to a RFRA plaintiff based on the Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. § 1988(b). See Oklevueha, 2010 WL 2541827, at *8. The fact that the court awarded attorney’s fees in that case does not suggest that damages are available against the United States in this case.

Helbrans is not directly pertinent even on the issue of attorney’s fees, because Helbrans involved claims against New York state officials, not federal officials, and therefore raised different issues. See Helbrans, 890 F. Supp. at 229–30. RFRA plaintiffs can recover attorney’s fees from the United States in some circumstances, but that is not because RFRA or 42 U.S.C. § 1988(b), either by themselves or in conjunction, permit attorneys’ fees against the United States. They do not, because neither statute waives the United States’ sovereign immunity. Rather, attorney’s fees are available against the United States in RFRA cases only through the operation of the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(b), which does waive the United States’ sovereign immunity. See Lauritzen v. Lehman, 736 F.2d 550, 554 (9th Cir. 1984) (explaining that § 2412(b) “authorizes fee awards against the United States under the terms of statutes allowing fees against ‘any party’ or ‘any person,’” including statutes such as 42 U.S.C. § 1988(b)).

EAJA waives sovereign immunity with respect to attorney’s fees, but it does not waive sovereign immunity with respect to awards of damages. See 28 U.S.C. § 2412(b). Accordingly, even though attorney’s fees are available in RFRA cases against the United States, damages are not.

Assuming the plaintiffs were the owners of the marijuana, returning the marijuana might ameliorate a financial or material loss that they suffered because of the Government's seizure of the marijuana, but it would not repair any religious harm they suffered because of the Government's seizure of the marijuana. Return of the property therefore would not be "appropriate relief" under RFRA.

As discussed above, diminishment of religious experience is not a harm that can serve as the foundation for a RFRA claim. See supra pp. 12–14 (discussing the Ninth Circuit's requirements for establishing a "substantial[] burden" under RFRA). Even if diminishment of religious experience could support a claim under RFRA, appropriate relief for such a claim would be relief that restored the lost religious experience, not relief that required the return of property. Religious experience is not measured by the weight or dollar value of a quantity of marijuana.

While it might be possible to conceive of a case where an action for return of seized property would be an appropriate use of RFRA, this is not that case. The property at issue in this case is a small quantity of a fungible, replaceable product. A church seeking to recover cash wrongfully or mistakenly seized by the Government would have to do so through ordinary channels for recovering seized property, see, e.g., Fed. R. Crim. P. 41(g), even if the money had been earmarked for religious services. RFRA would not provide a special, additional vehicle for

obtaining return of the funds. Likewise, RFRA does not provide a vehicle for the plaintiffs in this case to obtain return of the allegedly seized marijuana.

Thus, return of or compensation for the seized marijuana would not be appropriate relief under RFRA.

CONCLUSION

Because the plaintiffs' amended complaint did not present a claim for return of or compensation for the seized marijuana, and because any such claim would have to be dismissed for failure to state a claim, the defendants respectfully request that the Court clarify or partially reconsider its June 22, 2010, order and dismiss the entire complaint in this action.

Date: June 29, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on the dates and by the methods of service noted below, a true and correct copy of the foregoing was served on the following at their last known addresses:

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June 29, 2010

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