MICHAEL A. GLENN
Attorney at Law #6480
1188 Bishop St. Suite 3101
Honolulu, Hawaii 96813
(808) 523-3079
maglenn@iLowCostLegal.com

Attorney for Plaintiffs
OKLEVUEHA NATIVE AMERICAN CHURCH OF HAWAII, INC.
MICHAEL REX "RAGING BEAR" MOONEY

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

OKLEVUEHA NATIVE AMERICAN CHURCH OF HAWAII, INC.; MICHAEL REX "RAGING BEAR" MOONEY, Plaintiffs, vs. ERIC H. HOLDER, JR., as U.S. Attorney General; MICHELE LEONHART, as Acting Administrator of the U.S. Drug Enforcement Administration; EDWARD H. KUBO, JR., as U.S. Attorney for the District of Hawaii, Defendants.	Civil No. 09-00336 SOM BMK **MEMORANDUM IN OPPOSITION TO DEFENDANTS' SECOND MOTION TO DISMISS; CERTIFICATE OF SERVICE** Hearing: June 21, 2010 @ 10:30 Honorable: Susan Oki Mollway Trial Week: October 13, 2010

MEMORANDUM IN OPPOSITION TO

DEFENDANTS' SECOND MOTION TO DISMISS

Comes now Plaintiffs, by and through their undersigned attorney, and hereby present their Memorandum in Opposition to Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim, filed herein on April 8, 2010, pursuant to Local Rules of Civil Procedure Rule 7.4, as follows:

1. **The Claims, as Alleged, are Indeed Ripe** - The Order Dismissing Complaint, filed February 23, 2010 found that the initial Complaint failed to allege ripe claims on its face. This case, however (unlike Thomas v. Anchorage, 220 F.3d 1134 (9th Cir. 2000)), is most certainly NOT a case in search of a controversy. An actual constitutional case or controversy exists and the issues presented are definite and concrete, not hypothetical or abstract. Plaintiffs face much more than a realistic danger of sustaining a direct injury as a result of the CSA's operation or enforcement, -- their injury is not alleged, it has already occurred. The seizure of the Plaintiffs' cannabis by Defendants is neither imaginary nor speculative, and this is in zero way a pre-enforcement challenge.

This Court's reliance on Thomas requires investigation as to whether the Plaintiffs have articulated a concrete plan to violate the law in question, whether authorities have communicated a specific warning or threat to initiate proceedings, and the history of past prosecution **or enforcement** under the challenged statute. Plaintiffs have asserted much more than a hypothetical intent to violate the law. While the Plaintiffs in Thomas pledged their intent to violate the law in the future,

they did not specify when, to whom, where, or under what circumstances they would violate the law. Here, Plaintiffs' religious, controlled use of cannabis for daily sacrament and lunar-specific ritualistic ceremony does indeed rise to the level of the articulated, concrete plan Thomas purports to require.

The NAC and Mr. Mooney's First Amended Complaint goes far beyond the "some-day intentions without specification of when the some-day will be" that doomed the Thomas petitioners. The allegations made in the Complaint clearly support a finding of both actual and imminent injury to Mr. Mooney and members of The NAC.

As to a specific threat of enforcement, Plaintiffs are not required to await arrest or expose themselves to prosecution before entertaining a challenge to the constitutionality of a statute, see Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979). There is no need to discuss a **threat** of enforcement in this case, because the CSA has already been enforced against the Plaintiffs by the Defendants' seizure of the cannabis. Thus the history of enforcement under the CSA in this case is clear and undisputed. Courts have held that the government's "active enforcement" of a statute rendered the plaintiff's fear of prosecution reasonable. See Adult Video Ass'n v. Barr, 960 F.2d 781, 784 (1992), rev'd on other grounds, 509 U.S. 917 (1993), adopted in pertinent part sub nom. Adult Video Ass'n v. Reno, 41 F.3d 503 (9th Cir. 1994).

The NAC has gone far beyond merely alleging "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement," Babbitt, 442 U.S. at 298, and has indeed already undisputedly sustained a direct

injury by suffering property loss/theft by the Defendants' actual enforcement of the CSA in the seizure of Plaintiffs' cannabis. As of today, Defendants wholly refuse to allow the Plaintiffs to possess any cannabis whatsoever, for zero purposes whatsoever, be it religious or even Hawaii State-licensed therapeutic use. Not only is the Plaintiffs' actual religious use of the cannabis sacrament being wholly prevented by virtue of its seizure from Plaintiffs and by the acts and policies of Defendants, Plaintiff Mooney and the members of The NAC rightfully live in fear of arrest, imprisonment and future seizures of their sacramental cannabis.

A. Fitness for Judicial Review

The issues of this case are fit for review by this Court. The relief sought by The NAC for cannabis use in this case is exceedingly similar to the relief sought by the Plaintiffs in O'Centro for ayahoasca use. The UDV-USA's initial complaint in O'Centro, filed November 21, 2000 in New Mexico district court, asked the court to declare that federal authorities had acted illegally in seizing sacramental ayahoasca from church offices, and to enjoin enforcement of federal drug laws against UDV importation, distribution, and use of ayahoasca, in addition to mandating the return of the seized tea. There was no prosecution nor threatened prosecution of the UDV-USA or its members prior to the Complaint being filed.

B. Hardship to the Parties

There will be undue hardship to the Plaintiffs through the withholding of court consideration in this case, and there will be zero hardship to Defendants if this case is not dismissed.

Despite Defendants' counsels' argument that an administrative exemption

must be applied for before this Honorable Court may hear this case, Defendants conveniently fail to mention the fact that zero administrative exemptions have ever been issued for cannabis, and fail to mention that it is the Defendants' position that even industrial, non-psychoactive cannabis hemp is not legal and may never be utilized by America's citizens (unlike every other industrialized nation). (see Monson v. Drug Enforcement Agency, 522 F. Supp. 2d 1188 (2007). Because the Defendants have not informed Plaintiffs nor this Court of any change in the DEA's position on its treatment of cannabis under the CSA, Plaintiffs should not be required to pursue a futile course of action. In any event, even if the Defendants posit that they may be inclined to grant an exemption to Plaintiffs (if only they had asked), the Defendants' continued refusal to return the Church's sacramental cannabis and their tactic of fighting the Plaintiffs' right to even try to seek judicial relief by demanding dismissal of this case discredit that position.

Any attempt by Defendants to argue that the Plaintiffs in this instant case have no standing, have no justiciable claims, have no ripe claims or can not sue as a Church is simply inapposite to the facts of the thoroughly litigated O Centro Espirita Beneficiente Uniao Do Vegetal, 546 U.S. 418 (2006), and Church of the Holy Light of the Queen, 615 F.Supp.2d 1210 (D.Or 2009) cases. In fact, rather than the very potent hallucinogenic tea being imported from foreign countries in the aforementioned cases, Plaintiffs in this case are merely seeking to use the historically traditional and very common herb cannabis, and moreover, use it pursuant to the current federally legislated policy of this country to protect and preserve Mr. Mooney's right as an American Indian to freely exercise his traditional ceremonial practices.

2. **Defendants misrepresent and thoroughly disrespect the Native**

American Church and its Sacraments - Despite the "spin" put on this case by Defendants' assertion that Mr. Mooney and his Church are seeking unconditional immunity to traffic "marijuana," Plaintiffs merely seek the same protections for their traditional, sacramental use and possession of cannabis as they currently have in place against Defendants for their traditional, sacramental use and possession of peyote. Plaintiffs have indicated to the Defendants that they are more than willing to agree to reasonable regulations, restrictions, terms, conditions and/or controls that the Defendants might reasonably request to address any effects or other negative issues the Defendants are likely to espouse concerning the Plaintiffs' right to possess and consume cannabis. Plaintiffs in this case are concerned with an apparent lack of knowledge and/or respect for the historic institution that is the Native American Church. Because the main and primary purpose of The NAC is to administer Sacramental Ceremonies (pursuant to their Code of Ethics), the attempt by Defendants to argue that the Church would not be burdened by wholly prohibiting the Church's sacrament and branding all members as criminals is unsettling to say the least. Native Americans' traditional religious use of peyote is codified, and even "Indian Religion" is defined at 42 USC §1996a(c)(3) to mean any religion (A) which is practiced by Indians, and (B) the origin and interpretation of which is from within a traditional Indian culture or community.

The federal Defendants in this instant case, for reasons unknown, have chosen to ignore and severely downplay the position they took in O'Centro, when they vigorously contested the UDV-USA's attempt to compare its situation to the federal exemption to the CSA permitted to Native American Church for use of peyote, arguing that the NAC exemption flowed from the special political status of Native Americans, so that the UDV-USA was not similarly situated for purposes of

legal analysis. The government advanced the same logic to argue against the UDV-USA's First Amendment claim, the bulk of which also hinged on the comparison to The NAC.

The term "entheogen" was coined to avoid the implication that the religious experiences of individuals who ingest such plants are hallucinations caused by hallucinogens. The term "drug" has been used by the Defendants in this case to describe cannabis, most likely for the built-in prejudice the word often evokes. Plaintiffs are particularly upset by the statement made by Defendants at page 26 of their Motion to Dismiss that "the Church exists solely to facilitate drug use." The NAC's purpose in using cannabis during its worship is to bring about enhanced states of spiritual awareness. The NAC uses cannabis as a link to the divinities and as a sacrament and holy communion. For this reason, the pejorative use of the term 'drug' to describe The NAC's sacrament is prejudicial. The NAC's sacramental use of cannabis bears no resemblance to drug abuse. Because The NAC currently uses peyote as a "nondrug", its use of cannabis is likewise nondrug use. The U.S. government and the U.S. military have distinguished differences between drug use and sacramental use of peyote. Regulations pursuant to the American Indian Religious Freedom Act expressly condone and allow for the nondrug use of peyote. "The listing of peyote as a controlled substance in Schedule I does not apply to the **nondrug** use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration." 21 C.F.R. §1307.31 (emphasis added). Furthermore, the U.S. Armed Forces have determined that peyote use within Native American ceremonies is compatible with military service.

See April 25, 1997 Memorandum for Secretaries of the Military Departments Re: Sacramental Use of Peyote by Native American Service Members (available at http://www.deomi.org/DiversityMgmt/documents/ASDMemo1997.pdf).

Several federal and state courts have held the peyote exemption is constitutional because The NAC is not similarly situated with other religions. See Olsen, 878 F.2d at 1458 (Ethiopian Zion Coptic Church which encourages uncontrolled marijuana use was not similarly situated with the NAC); United States v. Rush, 738 F.2d 497 (1st Cir.1984) (Ethiopian Zion Coptic Church is not similarly situated with NAC); State v. Peck, 143 Wis.2d 624, 422 N.W.2d 160 (Ct.App.1988) (Israel Zion Coptic Church is not similarly situated with NAC).

Native American tribes have been described as domestic, dependent nations. Cherokee Nation v. Georgia, 30 U.S. (5 Peters) 1, 17, 8L.Ed. 25 (1831). This is the first principle of modern federal-tribal relations. The doctrine of trust responsibility, under which the federal government is required to promote tribal self-government and cultural integrity in the context of the domestic dependent nation classification, provides the legal framework for this relationship. See Morton v. Mancari, 417 U.S. 535, 541-42 (1974). In Mancari, the Supreme Court ruled that in order to meet this trust responsibility, special rights and status can be afforded Native Americans that would otherwise be unconstitutional so long as the law is rationally connected to fulfilling the trust responsibility. Id. at 555.

The Supreme Court reached its ruling in significant part based upon the federal obligation to promote tribal self-government in the context of the tribes' dependent nation status. Id. at 551-53. Federal law promoting tribal self-government and Native American welfare is not, therefore, premised on racial

distinctiveness; rather, such laws are based upon the political relationship existing between tribal and federal governments which predates the U. S. Constitution. Id. at 554.

In 1971, the DEA adopted a regulation which expressly allows the NAC to use peyote in its ceremonies notwithstanding the criminalization of peyote (21 U.S.C. § 812(c)(12) (1970)). At a congressional hearing at which this regulation was discussed, the Bureau of Narcotics and Dangerous Drugs (nka the DEA) stated it regarded NAC as *sui generis*, and that NAC members' right to consume peyote derived from that status. See U.S. v. Boyll, 774 F.Supp. 1333, 1339 (D.N.M.1991). The nondrug ingestion of entheogens by The NAC is thus theologically and politically acceptable.

The Native American Church allows Native Americans to bond spiritually, and it encourages a sense of community, which is essential to tribal self-government. "The trust relationship between the United States and the Indians is broad and far reaching.....The history of the treatment of Indians by the United States justifies this interpretation of the trust relationship..." St. Paul Intertribal Housing Bd. v. Reynolds, 564 F.Supp. 1408, 1413 (D.Minn. 1983). Trust responsibility must encourage cultural integrity, and The NAC plays a central role in Native American culture. McBride v. Shawnee County, 71 F.Supp.2d 1098, 1100, 1103 (D.Kan. 1999).

Plaintiffs believe it to be appallingly *Orwellian* that the Government in this case is actually arguing that an experienced Native American Church Medicine Man is precluded from seeking protection under RFRA, whilst RFRA itself was enacted by Congress to address the lack of protection the U.S. Supreme Court gave

to Native American Church members. Plaintiffs are also rightfully concerned that this Honorable Court, in its Order Dismissing Complaint, is woefully void of any referral to the unique position The NAC has in relation to the Federal government and is likewise lacking any mention of entheogens or the Native American Church in general.

3. **Jurisdiction** - Jurisdiction in this case is indeed proper pursuant to 28 USC §1331 because the action arises under the laws and Constitution of the United States of America. Furthermore, this Court is indeed authorized to grant declaratory relief by the Declaratory Judgment Act, 28 USC §§2201, 2202. This Court is likewise clearly authorized to grant preliminary and permanent relief under Federal Rule of Civil Procedure 65. While Plaintiffs may not, at this time, be able to pursue their theft/conversion claim against the Defendants, Plaintiffs assert that a dismissal of this count, prior to judgment on the merits of the other claims, would not be proper. 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 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.

DATED: Honolulu, Hawaii; May 28, 2010

MICHAEL A. GLENN, ESQ.
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

OKLEVUEHA NATIVE AMERICAN CHURCH OF HAWAII, INC.; MICHAEL REX "RAGING BEAR" MOONEY, Plaintiffs, vs. ERIC H. HOLDER, JR., as U.S. Attorney General; MICHELE LEONHART, as Acting Administrator of the U.S. Drug Enforcement Administration; EDWARD H. KUBO, JR., as U.S. Attorney for the District of Hawaii, Defendants.	) Civil No. 09-00336 SOM BMK) **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date he hand delivered a filed copy of this Memorandum in Opposition to Defendants' Motion to Dismiss to the Defendants at:

United States Department of Justice
Derrick K. Watson, A.U.S.A.
300 Ala Moana Blvd. 6-100
Honolulu, Hawaii 96850

DATED: Honolulu, Hawaii; May 28, 2010

MICHAEL A. GLENN / Attorney for Plaintiffs