10-17687

THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OKLEVUEHA NATIVE AMERICAN CHURCH OF HAWAII, INC.;
MICHAEL REX "RAGING BEAR"MOONEY,

Plaintiffs/Appellants,

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/Appellees.

APPEAL FROM THE JUDGMENT IN A CIVIL CASE IN THE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

APPELLANTS' OPENING BRIEF

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Rule 26.1(a) Statement

Comes now MICHAEL A. GLENN, counsel of record for Plaintiff/ Appellant OKLEVUEHA NATIVE AMERICAN CHURCH OF HAWAII, INC. herein, pursuant to FRAP Rule 26.1(a) and hereby states that there is zero parent corporation nor any publicly held corporation owning 10% or more of its stock.

DATED: Honolulu, Hawaii; March 17, 2011

s/ M. A. Glenn
MICHAEL A. GLENN, ESQ.
Attorney for Appellants

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Statement of Jurisdiction

The US District Court for the District of Hawaii had jurisdiction pursuant to 28 USC § 1331 because the action arises under the laws and Constitution of the United States of America. The NAC seeks a determination under the standards of the Religious Freedom Restoration Act ("RFRA") 42 USC §§ 2000bb-2000bb(4), The Religious Land Use and Institutionalized Persons Act ("RLUIPA") at 42 USC §2000cc(5)(7) (which defines RFRA's term "exercise of religion" to include any exercise of religion, whether or not compelled by, or central to, a system of religious belief) and the First and Fourteenth Amendments to the U.S. Constitution of the lawfulness and constitutionality of the Government's interpretation of the Controlled Substances Act ("CSA") 21 USC § 801-971, and its implementing regulations as applied to Appellants. The District Court is authorized to grant declaratory relief by the Declaratory Judgment Act, 28 USC §§ 2201, 2202. The District Court is authorized to grant preliminary and permanent relief under Federal Rule of Civil Procedure 65.

This Court of Appeals has jurisdiction pursuant to 28 USC § 1291.

The Judgment in a Civil Case was entered in this action on the 26th day of October, 2010, and the Notice of Appeal was timely filed on 24th day of

November, 2010.

This is an appeal from a final judgment that disposed of all parties' claims.

Statement of Issues Presented for Review

1. Does RFRA allow Mr. Mooney to seek appropriate remedy from the US Government for substantially burdening his religious freedom without having been criminally prosecuted?

2. Does the specific intent of Mr. Mooney to continue to possess and consume cannabis daily as religious sacrament in religious ceremony constitute a concrete plan to violate the Controlled Substances Act?

3. Is the replacement of The NAC's wholly fungible cannabis sacrament an appropriate remedy for the seizure and destruction of that sacrament by the US Government?

4. Did the US Government properly observe and follow its own policy to protect and preserve the religious exercises of The NAC in this case?

Statement of the Case

At issue is the United States' duty, pursuant to the American Indian Religious Freedom Act, to protect and preserve for Mr. Mooney and The NAC

their inherent right of freedom to believe, express, and exercise their traditional religious use and possession of their sacred herb cannabis, and their freedom to worship through ceremonies and traditional rites. The NAC had its cannabis seized by US Federal authorities, and the Government refused to return, and instead destroyed (after suit was brought against them), the seized cannabis. The Government does not allow Mr. Mooney to possess any cannabis whatsoever, for zero purposes whatsoever, be it religious or even Hawaii State-licensed therapeutic use. Rather, the Government considers The NAC's cannabis use and possession to be criminally prohibited. Appellant Mooney and the members of The NAC thus live in fear of arrest and imprisonment for use of their sacrament.

The NAC desires the same protections for their use and possession of cannabis as they currently have in place against the Governement for their sacramental use and possession of peyote. Mr. Mooney is willing to agree to reasonable regulations, restrictions, terms, conditions and/or controls that the Government might reasonably request to address any effects or other negative issues the Government might have concerning Mr. Mooney's right to possess and consume sacramental cannabis.

Mr. Mooney and The NAC filed their Complaint for Declaratory Relief and for Preliminary and Permanent Injunction on July 22, 2009. Appellees filed their Motion to Dismiss for lack of Jurisdiction on October 22, 2009. After a hearing, the District Court filed its Order Dismissing Complaint on February 23, 2010. The First Amended Complaint was filed March 22, 2010, followed by Defendants' second Motion to Dismiss on April 8, 2010. The Court entered its Order Granting in part and Denying in part Motion to Dismiss First Amended Complaint on June 22, 2010, without a hearing. After a hearing on Defendants' third Motion to Dismiss filed July 22, 2010, the Court filed its Order Dismissing Remaining Claims and Judgment in a Civil Case on October 26, 2010.

Statement of the Facts

The following asserted facts of Appellants' First Amended Complaint (District Court Docket Number 26 (DCD#26) at pages 4 - 12) must be accepted as true. Leatherman v. Tarrant County Narcotics, 507 U.S 163, 164 (1993):

1. The NAC is registered as a State of Hawaii Nonprofit Corporation.

2. Mr. Mooney is of Seminole Native American ancestry.

3. With the advents of European colonization of North and South America, the health, culture, and social organization of the American Native indigenous

people and their earth-based religious beliefs were all but destroyed by 1890.

4. In the 1800's, the United States government implemented an American Native Genocide policy with "Manifest Destiny" rationality, whereupon the killing of the American Native was not only tolerated, but encouraged by levying a bounty for every proven American Native person murdered.

5. During the 1800's, because of the United States Government's unconstitutional removal of indigenous American Native people from their historically sacred lands and the placing of American Native children in church-controlled schools, a total annihilation of the American Native culture was nearly accomplished by 1890.

6. The Wounded Knee Massacre was the final coordinated effort of the government-sanctioned murder of American Native spiritual practitioners by the United States Army.

7. Starting in the mid-1800's, various Native American spiritual leaders encouraged the return of indigenous American Native spiritual practices under the most grievous of circumstances.

8. These leaders, such as Lakota Sioux Red Cloud (1822-1909), Comanche

Quanah Parker (1844-1911), Paiute Wovoka (1856-1932) among others, formulated a set of moral instructions that included abstinence from addictive substances (primarily alcohol), deviate sexual activities, matrimonial infidelity and prohibitions against acting out greedy and prideful behaviors that propagated deceit, vengeance and violence.

9. These peoples discovered that the ingestion of peyote as a sacrament fostered charity and humility that enhanced honest, forgiving and peace loving activities and those who adhered to these behavior codes and participated in ceremonies involving peyote showed a tendency to live a disciplined and productive life.

10. Today there are presently over 100 branches of the Native American Church incorporated in more than 24 states and it is estimated that there are more than 500,000 members of the Native American Church (although membership or attendance is not well recorded).

11. The Appellant Oklevueha NAC, however (and as a condition of their Federally approved and allowed use of peyote), maintains accurate records of its authorized participants and Medicine People, as does all Oklevueha NAC Branches.

12. The storage of this information is collected and maintained to provide a clear and concise paper trail that will insure all Oklevueha NAC practitioners receive protection to worship, practice, and teach in the manner the spirit moves them.

13. Each branch of the Oklevueha Native American Church is an independent branch and is responsible for its own Church management, ceremonies and Medicine People.

14. The herb, known as *Rosa Maria* amongst certain North American Indian tribes, and referred to as cannabis by Appellants, has been traditionally consumed as sacrament and for therapeutic needs by Native American peoples -- Cannabis was particularly consumed in times of shortage of these tribes' primary sacrament/ great-medicine of choice – peyote, or more specifically, *Lophophora Williamsii*.

15. Members of The NAC, in addition to, and in the substitute for, their primary entheogenic sacrament peyote, also consume cannabis as a sacrament/ eucharist in their religious ceremonies and rites.

16. While peyote is the significant sacrament for Appellants, The NAC honors and embraces all entheogenic naturally occurring substances, including

ayahuasca, cannabis (aka *Rosa Maria* and *Santa Rosa*), iboga, kava, psilocybin, San Pedro, Soma, teonanacatyl, tsi-ahga, and many others.

17. The purpose of Mr. Mooney's cannabis use in religious ceremonies is similar to the purpose of many other intensive religious practices - to enhance spiritual awareness or even to occasion direct experience of the divine.

18. The primary purpose of The NAC is to administer Sacramental Ceremonies pursuant to their Code of Ethics. In this regard, The NAC's use of cannabis is similar to practices such as meditation, intensive prayer, flagellation and fasting, which form a crucial part of many religious traditions.

19. Any risks to The NAC's members from their use of cannabis are relatively low and contained, and any alleged risks of the use of this non-toxic herb are insufficiently compelling to prohibit The NAC from practicing its religion.

20. There are many religious practices, across numerous faiths, which are accepted and lawful and yet create some risk of harm for the individual practitioners while simultaneously these practices bestow spiritual benefits that those outside of the particular tradition might have trouble comprehending; The NAC's religious use of cannabis is similar.

21. Plaintiffs' consumption of cannabis is during religious ceremony and is an ordered, guided and calm process, led by those who are experienced, trained, and titled within The NAC.

22. The NAC's supervision, and the ceremonial setting, minimize the risk that members might engage in any harmful behavior while under the influence of cannabis.

23. The dosage of cannabis is controlled by an experienced and responsible church member, and The NAC’s religious strictures against drinking to excess and using harmful drugs and substances virtually eliminates the risks associated with polysubstance abuse.

24. The NAC's nondrug use of cannabis is embedded within a set of deeply rooted and sincere religious beliefs and traditions; this, along with the guidance of religious leaders, minimizes any psychological risks of consuming cannabis.

25. The NAC's ceremony and tradition help members derive religious benefit from the spiritual states of awareness they may experience while under the influence of cannabis.

26. The NAC's use of cannabis in religious ceremonies emphasizes the

proper “set and setting” and make it much more likely that church members will experience something spiritual, rather than anxiety or disorientation.

27. The NAC's use of cannabis is somewhat similar to their controlled ritual use of peyote, and in the beneficial effects the use has on their members.

28. Mr. Mooney uses cannabis sacrament daily, and members of The NAC also use cannabis in its "sweats," which occur approximately twice a month during the new moon and the full moon. These sweats are only open to members of The NAC and take place at various private locations on Oahu.

29. Mr. Mooney will continue to consume cannabis daily and will continue to participate in sweats every month, even if the Defendants prevail in this case and The NAC will continue to use cannabis as its sacrament, and plans to continue offering its members the use of cannabis and peyote as sacraments for daily worship and for lunar cycle sweats.

30. Mr. Mooney also possesses a State of Hawaii Department of Public Safety Narcotics Enforcement Division Medical Marijuana Registry Patient Identification Certificate which allows him to acquire, possess, cultivate and consume cannabis without State criminal penalty in the State of Hawaii.

31. Mr. Mooney acquires his cannabis by cultivating it or acquiring it from other churches, caregivers or other state-sanctioned methods.

32. The NAC has approximately 250 members in Hawaii, all of which consume cannabis in their religious ceremonies.

33. Peyote is used by Mr. Mooney, with the Government's full approval, and by all members of The NAC, yet the Government insists that there is a compelling interest in completely prohibiting any cannabis use by Mr. Mooney.

34. Unless the Government can show a significant and essential difference between The NAC's peyote use and its cannabis use, the Government's claim of a compelling interest to prohibit cannabis is defeated by their own treatment of peyote.

35. The Government does not have a compelling interest in prohibiting a religious practice that entails a relatively low risk of harm.

36. Prohibiting consenting adults from incurring some risk of harm to themselves in the context of religious rituals or practices does not, in itself, serve a compelling governmental interest.

37. The Government considers Mr. Mooney and members of The NAC to

be criminals solely because of their religious/sacramental/ceremonial cannabis use, they provide for no exception and have utterly refused to return the seized cannabis sacrament to the Plaintiffs.

38. Mr. Mooney and members of The NAC consume, possess, cultivate and/or distribute cannabis as sanctioned and required by their legitimate religion and sincere religious beliefs, and as such, their free exercise of religion is protected by RFRA and the First Amendment of the U.S. Constitution.

39. As an essential and necessary component of the Appellant's religion, The NAC members receive communion through cannabis in their religious ceremonies and daily worship. The NAC considers cannabis, in addition to peyote, to be sacred or most holy.

40. Mr. Mooney has already and recently had cannabis intended for The NAC seized from FedEx delivery by United States Federal drug enforcement authorities in Hawaii.

41. Mr. Mooney is of the information and belief that approximately one pound of cannabis was seized by the Government before its delivery to him. The value of this cannabis is approximately $7,000, and Mr. Mooney demands that they

be compensated for the Government's theft of this cannabis or have the cannabis returned to them.

42. At least one of the Appellees in this case, the DEA, had in April 2010 raided the THC Ministry, a Big Island of Hawaii church that consumes cannabis for religious use, and The NAC has filed suit to prevent the very real threat of such a Federal drug raid from occurring to their Church.

43. The NAC's members rightfully and justifiably fear for their ability to continue to cultivate, consume, possess and distribute cannabis sacrament without the exceedingly significant burden placed upon their lives by being branded criminals mandated for Federal imprisonment and whose real property and assets can be seized civilly with no applicable legal defense.

44. The threat that Mr. Mooney and members of The NAC will be criminally prosecuted is exceedingly real, and any threat of criminal prosecution of American citizens for engaging in religious devotional practices and communion of sacrament during their law-abiding lives substantially burdens the practice of the Appellant's religions within the meaning of RFRA/RLUIPA and the U.S. Constitution.

Summary of Argument

The burden upon Mr. Mooney and The NAC's free exercise of religion is neither speculative nor insignificant, and they have asserted a concrete plan to continue to use and possess cannabis every day and in twice-monthly sweat rituals. Replacement of the cannabis which the Government seized from The NAC and then willfully destroyed is an appropriate remedy under RFRA. The District Court erred by failing to accept the asserted facts as true and by failing to consider the pleadings in a light most favorable to the Appellants. The District Court erred by dismissing the case prior to any trial on the merits, inasmuch as The NAC and Mr. Mooney have standing to bring suit and the issues are indeed ripe and justiciable.

Argument

Standard of Review

The dismissal of this case is reviewed *de novo* and the pleadings must be construed in a light most favorable to The NAC. Knievel v. ESPN, 393 F.3d 1068, 1072 (2005).

Discussion of Issues

1. **The Claims, as Alleged, are Indeed Ripe** - The Order Dismissing

Complaint found that the initial Complaint failed to allege ripe claims on its face. (Excerpt of Record (EoR) at 7). Mr. Mooney's and The NAC's case, however is not at all similar to Thomas v. Anchorage, 220 F.3d 1134 (9th Cir. 2000), a case heavily relied upon by the District Court. (EoR 45-53). Unlike Thomas, this claim 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. The NAC faces 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 NAC's cannabis by the Government is neither imaginary nor speculative, thus this is in zero way a pre-enforcement challenge.

The District Court's reliance on Thomas requires investigation as to whether Mr. Mooney has 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.

Mr. Mooney has 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, Mr. Mooney's 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 (see facts 28, 29).

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 factual allegations made in the First Amended 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, Mr. Mooney and his fellow Native American Church members are not required to await arrest or expose themselves to prosecution before entertaining a challenge to the constitutionality of a statute. 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 NAC by the Government's seizure and willful destruction 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 Government's actual enforcement of the CSA in the seizure and destruction of The NAC's cannabis. As of today the Government wholly refuses to allow the The NAC to possess any cannabis whatsoever, for zero purposes whatsoever, be it religious or even Hawaii State-licensed therapeutic use. Not only is Mr. Mooney's actual religious use of the cannabis sacrament being wholly prevented by virtue of its seizure from him and by the acts and policies of Government, but Appellant Mooney and the members of

The NAC rightfully live in fear of arrest, imprisonment and future seizures of their sacramental cannabis. Advertising or even discussing The NAC's use of cannabis sacrament in public exposes NAC members to arrest!

A. Fitness for Judicial Review

The issues of this case are indeed fit for review by a District Court. The relief sought by The NAC for cannabis use in this case is exceedingly similar to the relief sought by the plaintiffs for religious ayahoasca use in Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal, 546 U.S. 418 (2006). The UDV-USA's initial complaint in O Centro, filed 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-USA importation, distribution, and use of ayahoasca, in addition to mandating the return of the seized tea. Id. at 425. There was no prosecution whatsoever of the UDV-USA or its members prior to the Complaint being filed. Ibid.

Besides the successful suits brought by entheogen consuming churches, other parties who have sued civilly prior to any criminal charges being brought include the pornographers (who did not even have a seizure of their property prior to suit, let alone any arrest), in Adult Video Ass'n v. Barr, the farmworkers in Babbitt, the handbiller in Steffel v. Thompson, 415 US 452 (1974), and the teacher in Epperson v. Arkansas, 393 U.S 97 (1968). The "negro resident" in Evers v. Dwyer, 358 U.S. 202 (1958) set a prime example of how suing over something as basic as riding a bus in a certain seat can give rise to a change in the prevailing political mindset that often traps lower courts. The NAC hopes to change the political mindset that would allow the criminalization of their religious exercises and the permit (without recourse) the seizure and destruction of their sacrament despite the clear statutory directive to preserve and protect these exercises and sacrament.

B. Hardship to the Parties

The Federal Government's 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. DEA, 589 F.3d 952 (8th Cir.

2009); the Government's refusal to return the Church's sacramental cannabis and their purposeful destruction of that cannabis; and the Government's ability to continue to seize and destroy The NAC's cannabis sacrament (seemingly without recourse) all create an atmosphere so hostile and antithetic to The NAC's religious exercises that their burden can not be questioned.

The District Court's conclusions that the Plaintiffs in this case have no justiciable claims and no ripe claims are simply inapposite to the facts of the thoroughly litigated O'Centro and Church of the Holy Light of the Queen, 615 F.Supp.2d 1210 (D.Or 2009) cases. In fact, rather than the very potently psychoactive tea being imported from foreign countries in the aforementioned cases, Mr. Mooney is merely seeking to use the historically traditional and very common herb cannabis, and moreover, use it pursuant to the current federally legislated policy of the United States of America to protect and preserve Mr. Mooney's right as an American Indian to freely exercise his traditional ceremonial practices (see 42 USC §1996).

The District Court's decision essentially renders the plain purpose of RFRA obsolete. The restoration of one's religious freedom can come about as a civil claim made by a burdened party. A person whose religious practices are burdened

in violation of RFRA "may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief." §2000bb-1(c). Mr. Mooney doubts whether the District Court would even allow him a RFRA defense in a criminal trial if he were indeed arrested.

2. **The Native American Church and its Sacraments may be afforded special, beneficial treatment from the US Government -** Despite the "spin" put on this case by the Government's assertion that Mr. Mooney and his Church are seeking unconditional immunity to traffic "marijuana" (DCD#12 at 1), The NAC merely seeks the same protections for their traditional, sacramental use and possession of cannabis as they currently have in place against the Government for their traditional, sacramental use and possession of peyote (see facts 14, 15). Mr. Mooney has indicated to the Government that he is indeed willing to agree to reasonable regulations, restrictions, terms, conditions and/or controls that the Government might reasonably request to address any effects or other negative issues the Government is likely to espouse concerning Mr. Mooney's right to possess and consume cannabis (DCD#13 at 3). Mr. Mooney is especially concerned with the Government's 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 (see fact 18), the attempt by the Government 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 Appellees 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, such that the UDV-USA was not similarly situated for purposes of legal analysis. O Centro, 546 U.S. at 433. 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. Ibid.

Mr. Mooney asserts that 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 Government purposefully chooses to use the term "drug" in this case to describe cannabis, most likely for the built-in prejudice the word often evokes. (DCD#12 at 5). Mr. Mooney is particularly upset by the statement made by the Government that "the Church exists solely to facilitate drug use." (DCD#29 at 26). 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 (see facts 21-27). 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 consumes peyote as a "nondrug", its sacramental consumption of cannabis is, likewise, nondrug use.

The U.S. government and the U.S. military have classified and 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 even 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; EoR 58).

Several federal and state courts have held the peyote exemption is constitutional because The NAC is not similarly situated with other religions. See Olsen v. DEA, 878 F.2d 1458 (DC Cir. 1989) (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' rights 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 anthropomorphically, 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).

Mr. Mooney finds it to be appallingly *Orwellian* that the District Court ruled 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. Mr. Mooney is also rightfully concerned that the Honorable District Court, in all of its Orders 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.

Conclusion

The District Court erred by dismissing this case. Appellants ask this Honorable Court to reverse the lower court's Orders and Judgment and allow Mr. Mooney and The NAC to seek declaratory and injunctive relief at trial, as well as the appropriate remedy of the replacement of the destroyed cannabis sacrament.

DATED: Honolulu, Hawaii; March 17, 2011

s/ M. A. Glenn

MICHAEL A. GLENN, ESQ.
Attorney for Appellants

10-17687

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 17, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: Honolulu, Hawaii; March 17, 2011

s/ M. A. Glenn
MICHAEL A. GLENN
Attorney for Appellants

Certificate of Compliance with Rule 32(a)

This Brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because this Brief contains 5,796 words.

DATED: Honolulu, Hawaii; March 17, 2011

s/ M. A. Glenn
MICHAEL A. GLENN
Attorney for Appellants

Statement of Related Cases

Counsel knows of zero related cases.