UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

OKLEVUEHA NATIVE AMERICAN CHURCH OF HAWAII, INC., and MICHAEL REX "RAGING BEAR" MOONEY, Plaintiffs, v. ERIC H. HOLDER, JR., U.S. Attorney General; MICHELE LEONHART, Administrator, U.S. Drug Enforcement Administration; and FLORENCE T. NAKAKUNI, U.S. Attorney for the District of Hawaii, Defendants.	No. CV 09-00336 SOM-BMK **DEFENDANTS' MEMORANDUM IN SUPPORT OF RENEWED MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

DEFENDANTS' MEMORANDUM IN SUPPORT OF RENEWED MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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PRELIMINARY STATEMENT

The request of plaintiffs Oklevueha Native American Church of Hawaii, Inc., and Michael Rex Mooney for an order granting them blanket immunity from federal drug enforcement action related to marijuana has no basis under the Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4, or any other provision of law. The Court should dismiss the Church and Mooney's claims for failure to state a claim.

In earlier proceedings before this Court, the defendants sought dismissal of the plaintiffs' claims for lack of subject matter jurisdiction, under Rule 12(b)(1) of the Federal Rules of Civil Procedure, and for failure to state a claim, under Rule 12(b)(6). The Court dismissed all of the plaintiffs' claims for lack of subject matter jurisdiction. On appeal, the Court of Appeals affirmed the dismissal of some of the plaintiffs' claims, but it reversed the dismissal of the plaintiffs' claims seeking declaratory and injunctive relief against future drug enforcement action. The Court of Appeals did not reach the defendants' arguments seeking dismissal for failure to state a claim, and instead left it to this Court to address those arguments on remand. The next step is for this Court to resolve the defendants' motion to dismiss for failure to state a claim, now renewed by this motion.

The Church and Mooney's amended complaint does not state a claim under RFRA because that statute does not support claims seeking protection for drug

activity outside the plaintiffs' alleged religious practices, such as production and trafficking of marijuana or "therapeutic" use of marijuana. Also, the Church and Mooney have not alleged that either abstaining from marijuana or having to apply to the DEA for a religious exemption requires them to violate their belief system in a way that amounts to a "substantial[] burden" within the meaning of RFRA, 42 U.S.C. § 2000bb-1(a).

The Church and Mooney also do not state claims under any other provisions of federal law. The Free Exercise Clause cannot support the plaintiffs' claims because that clause does not exempt religious practices from neutral laws of general applicability. The Equal Protection Clause cannot support the plaintiffs' claims because the Government has a rational basis for regulating different drugs differently. Finally, none of the other federal statutes cited in the Church and Mooney's amended complaint provides an independent cause of action against the Government.

The Court therefore should dismiss all of the Church and Mooney's remaining claims for failure to state a claim.

BACKGROUND

I. Statutory and regulatory background

The Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4, provides that the Federal Government "shall not substantially burden a

person's exercise of religion" unless "it demonstrates that application of the burden to the person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest." Id. § 2000bb-1(a)–(b). RFRA applies to "all Federal law, and the implementation of that law," id. § 2000bb-3(a), and it authorizes lawsuits by persons whose religious exercise has been burdened in violation of the statute, id. § 2000bb-1(c).

The Controlled Substances Act (CSA), 21 U.S.C. §§ 801–971, provides a comprehensive federal scheme to regulate controlled substances. The CSA makes it unlawful to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance," except as authorized by the Act. Id. § 841(a)(1). The CSA similarly criminalizes possession of any controlled substance except as authorized by the Act. Id. § 844(a). Congress enacted the Controlled Substances Act based on a finding that "[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." Id. § 801(2). The CSA established five "schedules" of controlled substances, and placed marijuana under Schedule I. See id. § 812(a), (c) sched. I(c)(10).

The CSA authorizes the Attorney General to "promulgate rules and regulations . . . relating to the registration and control of the manufacture,

distribution, and dispensing of controlled substances and to listed chemicals." Id. § 821. The Attorney General has delegated this authority to the Drug Enforcement Administration. See id. § 871(a); 28 C.F.R. § 0.100. The DEA has promulgated various regulations related to controlled substances in Title 21, Chapter II of the Code of Federal Regulations. 21 C.F.R. §§ 1300–1321. These regulations provide that "[a]ny person may apply for an exception to the application of any provision of [the DEA regulations]" by filing a written request with Office of Diversion Control, Drug Enforcement Administration; the Administrator of the DEA has discretion to grant any exception. Id. § 1307.03; see also 21 U.S.C. § 822(d) ("The Attorney General may, by regulation, waive the requirement for registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety."). The DEA has established clear procedures for obtaining religious exemptions from federal drug enforcement action based on RFRA. See generally Office of Diversion Control, Drug Enforcement Administration, Guidance Regarding Petitions for Religious Exemption from the Controlled Substances Act Pursuant to the Religious Freedom Restoration Act (2009), http://www.deadiversion.usdoj.gov/pubs/rfra_exempt012209.pdf (DEA guidelines for submitting applications for religious exemptions based on RFRA).

II. The plaintiffs' claims

Plaintiff Oklevueha Native American Church of Hawaii, Inc., alleges that it is a Hawaii nonprofit corporation and is a Hawaii-based chapter of the Native American Church. First Am. Compl. for Declaratory Relief and for Prelim. and Permanent Injunctive Relief ¶¶ 1, 9, ECF No. 26. Plaintiff Michael Rex "Raging Bear" Mooney alleges that he is a Hawaii resident and identifies himself as a "Spiritual Leader" and as the "Founder, President and Medicine Custodian" of the Church. First Am. Compl. ¶ 2.

The plaintiffs allege that the "main and primary purpose of the [Church] is to administer Sacramental Ceremonies" involving psychoactive drugs, and that "the Church only exists to espouse the virtues of, and to consume," such drugs. First Am. Compl. at 2; see also First Am. Compl. ¶ 25 (listing numerous psychoactive substances that the Church purportedly "honors and embraces"). The plaintiffs assert that their cultivation, acquisition, manufacture, processing, possession, use, and distribution of marijuana is protected under the Religious Freedom Restoration Act and other provisions of federal law, including the Free Exercise Clause of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996. First Am. Compl. ¶¶ 54–65, 68–76.

III. Prior proceedings in this action

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, ECF No. 1. 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 Court dismissed the complaint for lack of subject matter jurisdiction, but it authorized the plaintiffs to file an amended complaint. Oklevueha Native Am. Church of Haw., Inc., v. Holder, No. 09-00336, 2010 WL 649753, at *9 (D. Haw. Feb. 23, 2010).

The plaintiffs' amended complaint, filed March 22, 2010, sought the same injunction as the original complaint and further added new claims seeking return of or compensation for a package of marijuana seized by federal authorities. See First Am. Compl. ¶¶ 54–76 and at 17–18. The defendants moved to dismiss the amended complaint 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, ECF No. 28.

On June 22, 2010, the Court granted the defendants' motion in part and denied it in part. Oklevueha Native Am. Church of Haw., Inc. v. Holder, 719 F. Supp. 2d 1217, 1219–20, 1227 (D. Haw. 2010). The Court dismissed the plaintiffs' claims seeking an injunction against federal law enforcement action related to marijuana, as well as the plaintiffs' state law claims seeking return of or compensation for the seized marijuana. Id. at 1221–27. However, the Court concluded that further proceedings were needed to determine whether the plaintiffs could pursue a claim for return of or compensation for the marijuana under RFRA. Id. at 1227.

The defendants moved for clarification or partial reconsideration of the Court's order, requesting that the Court dismiss the entire amended complaint. Defs.' Mot. for Clarification or Partial Recons. of Order Granting in Part and Denying in Part Mot. to Dismiss First Am. Compl. The Court denied the motion but left it open to the defendants to file a further motion seeking dismissal of the remaining claims seeking return of or compensation for the marijuana under RFRA. See Oklevueha Native Am. Church of Haw., Inc., 719 F. Supp. 2d at 1228 (order denying motion for reconsideration).

The defendants then filed a motion requesting that the Court dismiss the plaintiffs' remaining claims for lack of subject matter jurisdiction or enter judgment on the pleadings. Defs.' Notice of Mot. and Mot. to Dismiss for Lack of

Jurisdiction and for J. on the Pleadings, ECF No. 40. On October 26, 2010, the Court granted the motion, finding that the Court lacked subject matter jurisdiction over the claims for return of or compensation for the marijuana. Oklevueha Native Am. Church of Haw., Inc., v. Holder, No. 09-00336, 2010 WL 4386737, at *2–4 (D. Haw. Oct. 26, 2010).

The Church and Mooney appealed both the June 22, 2010, dismissal order and the October 26, 2010, dismissal order. On April 9, 2012, the Court of Appeals affirmed the dismissal of the plaintiffs' claims seeking return of or compensation for the allegedly seized package of marijuana, but it reversed the dismissal of the plaintiffs' claims seeking an injunction against future federal drug enforcement action. See Oklevueha Native Am. Church of Haw., Inc. v. Holder, 676 F.3d 829, 841 (9th Cir. 2012). The Court of Appeals remanded the case to this Court for further proceedings. The mandate issued June 11, 2012. Mandate, ECF No. 59.

ARGUMENT

I. The decision of the Court of Appeals left it to this Court to resolve merits issues on remand, including the defendants' motion to dismiss the plaintiffs' amended complaint for failure to state a claim.

The Court of Appeals reversed this Court's determination that it lacked jurisdiction to hear the Church and Mooney's requests for declaratory and injunctive relief, but the Court of Appeals left it to this Court to determine whether those requests state any legally valid claim for relief. The next step in these

proceedings should be for the Court to consider the arguments presented in the defendants' motion to dismiss for failure to state a claim, as renewed by this motion.

The Court of Appeals held that the plaintiffs' claims seeking declaratory and injunctive relief satisfied the jurisdictional requirement of ripeness and that the Church adequately alleged standing to sue on behalf of its members.[1] See Oklevueha Native Am. Church of Haw., Inc. v. Holder, 676 F.3d 829, 839 (9th Cir. 2012). The court stated that it was not making any ruling on the merits and left it open to this Court to consider the merits of the plaintiffs' claims on remand. See id. ("Nothing in this opinion addresses the merits of the underlying claims. We remand the claims for prospective relief to the district court to consider the merits in the first instance.").

Whether the allegations in a complaint state a valid claim is a merits issue. See Bell v. Hood, 327 U.S. 678, 682 (1946) ("[I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits . . . .").

[1] The decision of the Court of Appeals does not foreclose the defendants from challenging this Court's subject matter jurisdiction at a later stage in this litigation if, for example, the plaintiffs fail to produce sufficient evidence to support the allegations on which subject matter jurisdiction is founded. Cf., e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (holding that the elements of Article III standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation").

Accordingly, the most appropriate next step in this litigation is for this Court to consider whether the plaintiffs' amended complaint should be dismissed for failure to state a claim for the reasons presented in the defendants' April 8, 2010, motion to dismiss. See Salmon Spawning & Recovery Alliance v. Gutierrez, 545 F.3d 1220, 1230 n.6 (9th Cir. 2008) (reversing a district court ruling dismissing the plaintiffs' claims for lack of subject matter jurisdiction, and explaining that because the district court had not ruled on the defendants' Rule 12(b)(6) motion to dismiss for failure to state a claim, it would be up to the district court to consider the merits of the Rule 12(b)(6) motion on remand).

The only claims reinstated by the decision of the Court of Appeals are the plaintiffs' claims seeking declaratory and injunctive relief against future drug enforcement action. The plaintiffs' other claims seeking restoration of or compensation for an allegedly seized package of marijuana are no longer before the Court and cannot be revived in the present proceedings. The plaintiffs appealed the dismissal of those claims only in part, and the Court of Appeals affirmed the dismissal of the claims. See Oklevueha, 676 F.3d at 839 n.3 (noting that the plaintiffs waived appeal of dismissal of their tort claims); id. at 841 (affirming dismissal of the plaintiffs' claims seeking restoration of or compensation for the marijuana based on RFRA).

II. Standards for resolving a motion to dismiss for failure to state a claim

To withstand a motion to dismiss for failure to state a claim, a complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (footnote omitted) (citations omitted). In evaluating the sufficiency of a complaint, the Court considers the facts alleged in the complaint and may also consider "matters of judicial notice." United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003); see also Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007). The rules of pleading require factual allegations "plausibly suggesting," and "not merely consistent with," the elements of a valid claim for relief. Bell Atl. Corp., 550 U.S. at 557; see Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009).

III. The Religious Freedom Restoration Act (RFRA) cannot support the plaintiffs' claims because the plaintiffs seek to protect activities outside their alleged religious practices and because the plaintiffs do not allege any interference that amounts to a "substantial[] burden" under the standards established by the Ninth Circuit.

The Church and Mooney fail to state a claim under the Religious Freedom Restoration Act because the amended complaint fails to allege that future federal drug enforcement action imposes a "substantial[] burden" on an "exercise of

religion" sufficient to trigger the protections of the statute under the standards established by the Ninth Circuit.

To establish a prima facie claim under RFRA, a plaintiff must establish two elements: "First, the activities the plaintiff claims are burdened by the government action must be an 'exercise of religion.' Second, the government action must 'substantially burden' the plaintiff's exercise of religion." Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1068 (9th Cir. 2008) (en banc) (quoting 42 U.S.C. § 2000bb-1(a)) (citations omitted).

In a June 29, 2010, order, the Court concluded that the facts alleged in the Church and Mooney's amended complaint could satisfy these two requirements with respect to the plaintiffs' now-dismissed claims seeking return of or compensation for seized marijuana. See Oklevueha, 719 F. Supp. 2d at 1228 (order denying motion for reconsideration). However, that decision did not resolve whether the facts alleged in the amended complaint could satisfy these requirements with respect to the claims now before the Court—the plaintiffs' forward-looking claims seeking an injunction against future federal law

enforcement action. The present claims for prospective relief raise somewhat different issues that were not resolved by the Court's June 29, 2010, order.[2]

First, the plaintiffs are not merely seeking an injunction that would protect their alleged religious use of marijuana. They seek a broad injunction that would additionally prevent the Government from regulating the cultivation or distribution of marijuana or the possession of marijuana for purposes other than religious use, such as sale or "therapeutic" use. The plaintiffs do not allege that cultivation, distribution, or possession of marijuana carries any religious significance. These ancillary activities cannot be considered "exercise[s] of religion" any more than parking illegally during a church service could be considered an exercise of religion. Indeed, the Ninth Circuit has previously rejected attempts by criminal defendants to seek shelter under RFRA from marijuana-related charges other than simple possession or use of marijuana. See Guam v. Guerrero, 290 F.3d 1210, 1222–23 (9th Cir. 2002) (rejecting criminal defendant's assertion of RFRA as a defense to charges of importation of marijuana); United States v. Bauer, 84 F.3d

[2] Even if the conclusions drawn by the June 29, 2010, order were applicable to the plaintiffs' present claims, it would be possible, and proper, for the Court to revisit those conclusions now. "Lower courts are free to decide issues on remand so long as they were not decided on a prior appeal. Any issue not expressly or impliedly disposed of on appeal is left open for the trial court's reconsideration on remand. Beltran v. Myers, 701 F.2d 91, 93 (9th Cir. 1983) (per curiam) (citations omitted).

1549, 1559 (9th Cir. 1996) (rejecting criminal defendants' assertion of RFRA as a defense to charges of conspiracy to distribute, possession with intent to distribute, and money laundering, noting that "[n]othing before us suggests that Rastafarianism would require this conduct"); see also Multi Denominational Ministry of Cannabis & Rastafari, Inc. v. Gonzales, 474 F. Supp. 2d 1133, 1146–47 (N.D. Cal. 2007) (finding that sacramental use of marijuana could not support the plaintiffs' request for an "unconditional injunction" affording "complete immunity from the federal government's drug laws" and dismissing the plaintiffs' RFRA claims), aff'd sub nom. Multi-Denominational Ministry of Cannabis & Rastafari, Inc. v. Holder, 365 F. App'x 817 (9th Cir. 2010). The plaintiffs' claims therefore should be dismissed to the extent that they seek an injunction extending beyond the plaintiffs' allegedly religious activities. See Multi Denominational Ministry of Cannabis & Rastafari, Inc., 474 F. Supp. 2d at 1146–47; Church of the Holy Light of the Queen v. Holder, 443 F. App'x 302, 303 (9th Cir. 2011) (holding that an injunction issued under RFRA "should not reach more conduct than that which . . . violated RFRA") (unpublished opinion).

Moreover, the allegations in the amended complaint do not suggest that restrictions on the use of marijuana "substantially burden" the plaintiffs' exercise of religion in a way that justifies relief under RFRA under the standards established by the Ninth Circuit. The Church and Mooney do not allege that having to conduct

their ceremonies without marijuana causes them to act contrary to their religion; indeed, they state that their religious practices involve the use of a whole panoply of drugs, some of which are not currently regulated by federal law. See First Am. Compl. ¶ 25. At most, the plaintiffs have perhaps alleged that conducting their ceremonies without marijuana "decreases the spirituality, the fervor, or the satisfaction" with which they practice their religion, Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1063 (9th Cir. 2008) (en banc). Such allegations cannot support a RFRA claim.

In Navajo Nation v. U.S. Forest Service, 535 F.3d 1058 (9th Cir. 2008) (en banc), the Ninth Circuit explained that "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." Id. at 1069–70. In that case, American Indians brought a RFRA challenge against the Government's approval of the use of recycled wastewater for making artificial snow on Government-owned land. Id. at 1063. The plaintiffs used the land for religious exercises and claimed that the use of wastewater would contaminate the mountain and devalue their religious practices. Id. The court rejected the plaintiffs' challenge because even though the challenged action might seriously diminish the plaintiffs' religious practices, it did not force the plaintiffs to violate their religion. Id. at

1070. The court explained that "a government action that decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what Congress has labeled a 'substantial burden'" in RFRA. Id. at 1063. Indeed, the D.C. Circuit, applying a similar standard, has held that regulations that restrict only "one of a multitude of means" for accomplishing the plaintiff's alleged religious purposes do not impose a substantial burden under RFRA. Mahoney v. Doe, 642 F.3d 1112, 1121–22 (D.C. Cir. 2011). So the plaintiffs in this case, who allege that marijuana is just one of numerous drugs used in their ceremonies, have not alleged a substantial burden. See Perkel v. U.S. Dep't of Justice, 365 F. App'x 755, 756 (9th Cir. 2010) (unpublished opinion).

Moreover, in evaluating the burden imposed on the plaintiffs' alleged religious activities, the Court must take note that the Controlled Substances Act's restrictions on drug-related activities are not absolute. As explained above, the Controlled Substances Act and the DEA's regulations provide various avenues for obtaining exemptions from federal drug regulation, and the DEA has established procedures for obtaining religious exemptions from federal drug enforcement action. See supra p. 4. Thus, the burden the Court must evaluate is not the burden

of forgoing the use of marijuana altogether; it is the burden of being required to apply to the DEA for an exemption from federal drug enforcement action.[3]

Several federal courts have held that the burden of obtaining a permit or exception for religious activities ordinarily does not amount to a substantial burden under RFRA. For example, in United States v. Friday, 525 F.3d 938 (10th Cir. 2008), the Tenth Circuit wrote:

> We are skeptical that the bare requirement of obtaining a permit can be regarded as a "substantial burden" under RFRA . . . . Many religious activities, from building a church to homeschooling a child to obtaining peyote for a Native American Church ceremonial, require some form of advance authorization from the state. . . . Without any evidence that Mr. Friday's religious tenets are inconsistent with using an application process, we cannot find a substantial burden under this theory.

Id. at 947–48; see also United States v. Tawahongva, 456 F. Supp. 2d 1120, 1132 (D. Ariz. 2006) (concluding that the defendant's religious exercise, "although slightly burdened, [was] not substantially burdened by the requirement that he

[3] The Court of Appeals determined that the availability of administrative exemptions from the Controlled Substances Act did not affect whether the plaintiffs' claims are ripe for review. See Oklevueha, 676 F.3d at 838 (noting that RFRA does not include an administrative exhaustion requirement and declining to impose such a requirement as a matter of discretion). However, that only means that the plaintiffs do not have to seek an administrative exemption as a prerequisite to filing a lawsuit under RFRA. It does not mean that a court should ignore the existence of the exemption scheme when evaluating whether the plaintiffs have alleged a substantial burden.

acquire a permit from the Hopi tribe" before taking a protected golden eagle for religious use).

Indeed, a statute closely related to RFRA, the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5, explicitly provides that providing avenues for religious practitioners to obtain exemptions can vitiate what would otherwise be substantial burdens. See 42 U.S.C. § 2000cc-3(e) (specifying that "providing exemptions from the policy or practice for applications that substantially burden religious exercise" is one way to "eliminate[] [a] substantial burden"). And several courts have noted that the legislative history of the RLUIPA makes clear that the statute was not intended to relieve religious practitioners of the burden of having to apply for variances or exceptions from land use regulations; rather, it was only intended to ensure that they are able to apply for such exceptions. See, e.g., Konikov v. Orange Cnty., 410 F.3d 1317, 1323 (11th Cir. 2005) (per curiam) (citing legislative history indicating that requiring religious institutions to apply for special exceptions from general regulations is consistent with RLUIPA); Hale O Kaula Church v. Maui Planning Comm'n, 229 F. Supp. 2d 1056, 1071 (D. Haw. 2002) (same); see also San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1035–36 (9th Cir. 2004) (holding that enforcement of a city's technical requirements for rezoning applications did not impose a substantial burden on a religious college).

The plaintiffs have not alleged any facts suggesting that being forced to apply for an exemption from controlled-substances laws amounts to any "substantial" burden on their religious practices. Accordingly, the plaintiffs cannot obtain relief under RFRA.

IV. The Free Exercise Clause does not protect the plaintiffs' use of marijuana because Government restrictions on marijuana are neutral laws of general applicability.

The Church and Mooney's amended complaint also does not state a claim under the Free Exercise Clause of the First Amendment, U.S. Const. amend. I, because neutral laws of general applicability do not violate the First Amendment even if they impair religious practices.

The Church and Mooney's Free Exercise Clause claims are legally insufficient because Government restrictions on marijuana use are neutral laws of general applicability. The Supreme Court established in Employment Division v. Smith, 494 U.S. 872 (1990), that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes . . . conduct that his religion prescribes.'" Id. at 879. As the Ninth Circuit explained in Stormans, Inc. v. Selecky, 586 F.3d 1109 (9th Cir. 2009), a law is neutral as long as it does not "single out the practice of any religion because of religious content," and a law is generally applicable as long as it is not "substantially underinclusive," meaning

that the law does not impose burdens that fall only on religious practitioners and not on other persons. Id. at 1131, 1134. As a number of federal courts have recognized, the federal Controlled Substances Act and associated regulations are both neutral and generally applicable, as they do not single out religious practice, and they affect religious drug use and nonreligious drug use equally. See, e.g., Olsen v. Mukasey, 541 F.3d 827, 832 (8th Cir. 2008); O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft, 389 F.3d 973, 992 (10th Cir. 2004) (en banc) (per curiam), aff'd sub nom. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006); Multi Denominational Ministry of Cannabis & Rastafari, Inc., 474 F. Supp. 2d at 1144. Accordingly, the federal Controlled Substances Act and associated regulations do not violate the Free Exercise Clause.

V. Restrictions on the use of marijuana are supported by a rational basis and so do not violate the Equal Protection Clause.

The Government's regulation of marijuana also does not violate the plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, because distinctions drawn between marijuana and other drugs, such as peyote and hoasca, are supported by a rational basis.

As the Supreme Court explained in FCC v. Beach Communications, Inc., 508 U.S. 307 (1993), "a statutory classification that neither proceeds along suspect

lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Id. at 313; accord Armour v. City of Indianapolis, 132 S. Ct. 2073, 2080 (2012).

The challenged restrictions on the use of marijuana do not rely on suspect classifications; marijuana users are not a suspect class. Restrictions on the use of marijuana also do not burden any fundamental rights for purposes of equal protection analysis. As the defendants explained in Section IV above, Government restrictions on marijuana do not violate the Free Exercise Clause even if they interfere with religious practices. Government action that does not violate the Free Exercise Clause also does not burden religious rights for purposes of equal protection analysis. See KDM ex rel. WJM v. Reedsport Sch. Dist., 196 F.3d 1046, 1052 n.4 (9th Cir. 1999); see also Droz v. Comm'r, 48 F.3d 1120, 1125 (9th Cir. 1995) ("For equal protection purposes, heightened scrutiny is applicable to a statute that applies selectively to religious activity only if the plaintiff can show that the basis for the distinction was religious, not secular.").

Government regulation of marijuana therefore does not violate the Equal Protection Clause as long as the classifications it employs can be supported by some conceivable rational basis. See Beach Commc'ns, 508 U.S. at 314–15; Armour, 132 S. Ct. at 2079–80. Differing treatment of marijuana, peyote, and

hoasca is supported by a rational basis because the production, distribution, and use of different drugs conceivably can affect individuals and the public in different ways.

The plaintiffs protest that marijuana, peyote, and hoasca have similar effects, but this is irrelevant. Even if the plaintiffs could produce overwhelming evidence that the three drugs had similar effects on individuals and the public at large—or even identical effects—distinctions among the drugs would still survive rational basis scrutiny. A classification survives rational basis scrutiny as long as there is a conceivable rational basis for those classifications, regardless of whether that rational basis is actually supported by evidence. See Beach Commc'ns, 508 U.S. at 314–15 ("[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."); see also Heller v. Doe ex rel. Doe, 509 U.S. 312, 320–21 (1993); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955) ("Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others." (citations omitted)).

Numerous federal court decisions have found that it is rational for the Government to regulate different drugs differently. See, e.g., United States v. Fry, 787 F.2d 903, 905 (4th Cir. 1986) (rejecting challenge to different treatment of marijuana, alcohol, and tobacco); O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft, 282 F. Supp. 2d 1271, 1283 (D.N.M. 2002) (finding that "differences between various drugs are relevant" in equal protection analysis); McBride v. Shawnee Cnty., Kan. Court Servs., 71 F. Supp. 2d 1098, 1101–02 (D. Kan. 1999) (rejecting equal protection claims and noting differences between peyote and marijuana). This Court should follow these decisions and dismiss the plaintiffs' equal protection claims.

VI. The American Indian Religious Freedom Act (AIRFA), the Declaratory Judgment Act, and the Religious Land Use and Institutionalized Persons Act (RLUIPA) do not provide any basis for the Church's or Mooney's claims.

None of the other federal statutes cited in the amended complaint—the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996; the Declaratory Judgment Act, 28 U.S.C. § 2201; and the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5—provides independent support for claims against the Government in federal court.

The American Indian Religious Freedom Act (AIRFA) states that "it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise" traditional religions. 42 U.S.C. § 1996. The Supreme Court and the Ninth Circuit have held that this provision is only a statement of policy and does not create any rights that can support claims against the Government in federal court. See Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 455 (1987); United States v. Mitchell, 502 F.3d 931, 949 (9th Cir. 2007); Henderson v. Terhune, 379 F.3d 709, 715 (9th Cir. 2004). Accordingly, all claims purportedly based on this provision should be dismissed.

The Declaratory Judgment Act also does not provide a cause of action against the Government; it merely authorizes a form of relief. See Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950) ("'[T]he operation of the Declaratory Judgment Act is procedural only.'" (quoting Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937)) (alteration in original)); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 508–09 (1959) (noting that the Declaratory Judgment Act was designed to "leav[e] substantive rights unchanged"). Accordingly, claims purportedly based on the Declaratory Judgment Act should be dismissed.

Finally, the Jurisdictional Statement in the amended complaint invokes the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C.

§§ 2000cc to 2000cc-5. The plaintiffs previously stated, in discussing their initial complaint, that they do not intend to assert claims under RLUIPA. See Tr. of Hr'g 23:7–24:9 (Feb. 22, 2010). In any event, RLUIPA is inapplicable in this case, because the only provisions of RLUIPA that can support independent claims for relief apply exclusively to state and local regulations governing land use or institutionalized persons, and not to Federal Government action. See Navajo Nation, 535 F.3d at 1077. This case pertains exclusively to Federal Government action and has no discernible connection to state or local land use regulations or institutionalized persons. RLUIPA therefore provides no independent basis for the plaintiffs' claims.

CONCLUSION

Because the Church and Mooney seek an injunction that goes beyond protecting any exercise of religion, and because their allegations do not suggest that Government regulation of marijuana "substantially burden[s]" their religious practices under the standard established by the Ninth Circuit, the Church and Mooney's RFRA claims should be dismissed. Moreover, because the Church and Mooney fail to state a claim under the Free Exercise Clause, the Equal Protection Clause, or any other provision of federal law, the Church and Mooney's remaining claims should also be dismissed.

Date: July 13, 2012 Respectfully submitted,

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