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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,	No. CV 09-00336 SOM-BMK **DEFENDANTS' REPLY IN SUPPORT OF RENEWED MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM** Hearing: December 10, 2012, 9:00 a.m. Judge: Hon. Susan Oki Mollway Trial: May 1, 2013, 9:00 a.m. Related document: dkt. no. 63

Defendants.)
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DEFENDANTS' REPLY IN SUPPORT OF RENEWED MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

FEDERAL STATUTES

FEDERAL REGULATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The plaintiffs argue that their suit should be allowed to proceed because claims related to religious use of controlled substances were allowed to proceed under the Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4, in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006), and because certain religious uses of peyote are permitted under other provisions of federal law. But the plaintiffs overlook several key differences between this case and the O Centro case, differences that are all fatal to the plaintiffs' claims. And provisions of federal law pertaining to religious use of peyote are irrelevant to the plaintiffs' claims, because the plaintiffs' claims pertain to marijuana, not peyote. The plaintiffs' complaint fails to state a claim for relief under RFRA or any other provision of federal law, and their remaining claims in this action should be dismissed.

This case differs from O Centro in several key respects. For one, the plaintiffs in O Centro employed only one regulated substance in their religious ceremonies, a hallucinogenic tea. The plaintiffs in this action, by contrast, allege that their ceremonies can be conducted with a variety of psychoactive substances, and they have not alleged that having to conduct their ceremonies with substances other than marijuana causes them to act contrary to their religion in a way that would support a claim under RFRA. Second, the plaintiffs in this case are

requesting protection not only for religious use of marijuana but also for nonreligious activities related to marijuana. Nothing in O Centro supports such a request. Finally, the plaintiffs in this case can apply for an exemption from federal law enforcement action through a religious exemption process established by the Drug Enforcement Administration (DEA). This process did not exist at the time of O Centro and was thus not considered in that case. For all of these reasons, the plaintiffs in this case have failed to allege that the threat of federal law enforcement action related to marijuana imposes a substantial burden on an exercise of religion. Thus, the plaintiffs cannot state a claim under RFRA.

The treatment of traditional Indian religious use of peyote under federal law has no bearing on the Church and Mooney's claims in this case, because the plaintiffs' claims in this case pertain exclusively to marijuana, not peyote. The plaintiffs have not presented any other arguments against dismissal of their claims. Accordingly, the Court should dismiss this action for the reasons set forth in the defendants' opening memorandum.

ARGUMENT

I. The plaintiffs' reliance on Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006), is misplaced because the Church and Mooney's allegations differ from the O Centro plaintiffs' allegations in critical ways.

The Church and Mooney argue that their claims should be permitted to proceed because they are similar to claims raised in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006), in which the Government conceded that application of the Controlled Substances Act (CSA), 21 U.S.C. §§ 801–971, to a hallucinogenic tea used in religious ceremonies likely imposed a substantial burden on the plaintiffs' exercise of religion. See id. at 428. But this case differs from O Centro in several critical ways.

First, the plaintiffs in O Centro alleged that they used only one psychoactive substance in their religious practices, a hallucinogenic tea. See id. at 425. The plaintiffs in this case, however, claim that marijuana is just one of a variety of psychoactive substances they may use in their ceremonies. See First Am. Compl. ¶ 25.The Church and Mooney have not alleged that having to conduct their ceremonies using only substances other than marijuana causes them to act contrary to their religion in a way that violates RFRA. See Def.'s Mem. 14–16. Indeed, the plaintiffs state that "the significant sacrament for Plaintiffs" is peyote, not

marijuana. First Am. Compl. ¶ 25. The plaintiffs have not asserted any claims related to peyote in this action; their claims pertain exclusively to marijuana.

Second, the plaintiffs in this case are seeking a broad injunction that would protect nonreligious activities related to marijuana as well as religious activities. O Centro does not support such a broad injunction, and neither does RFRA. See Def.'s Mem. 13–14; see also United States v. Martines, No. 11-00952, 2012 WL 5463297, at *3 (D. Haw. Nov. 8, 2012) (holding that a criminal defendant could not rely on RFRA as a defense against charges related to distribution of marijuana because there was no evidence that the defendant's religious beliefs required commercial distribution of marijuana).

Finally, at the time of the O Centro case, the Government did not have any established procedures for granting exemptions under RFRA for religious use of controlled substances. Rather, at the time of O Centro, the Government took the position that RFRA did not authorize exemptions for religious use of substances classified under Schedule I of the Controlled Substances Act. See O Centro, 546 U.S. at 430. After the Supreme Court ruled in O Centro that RFRA does permit exemptions for such substances in appropriate cases, the DEA established procedures to permit religious practitioners to seek exemptions from federal drug enforcement action under RFRA. See Defs.' Mem. 4, 16–19; 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. The DEA's decisions on such applications are subject to review before the U.S. Courts of Appeals. Cf. Perkel v. U.S. Dep't of Justice, 365 F. App'x 755, 755–56 (9th Cir. 2010) (unpublished opinion) (considering a petition for review of a DEA decision denying an exemption from the Controlled Substances Act). Given the existence of this exemption process, there is no basis for the plaintiffs' claim that the threat of possible future federal law enforcement action imposes a substantial burden on their religious practices. The Church and Mooney can put their fears of future law enforcement action to rest by applying to the DEA for an exemption. If the Church and Mooney's activities are protected by RFRA and their application is granted, they will no longer face any threat of law enforcement action. If the plaintiffs' activities are protected by RFRA but their application is denied for some reason, they will be able to seek review of the denial before a U.S. Court of Appeals. And, of course, if the plaintiffs' activities simply are not protected by RFRA, they have no cause for complaint.

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

The Church and Mooney's lengthy discussion of regulatory exemptions for Indian religious use of peyote and the treatment of Indian tribes under federal law, see Pls.' Mem. at 10–15, is irrelevant. Neither the treatment of traditional religious use of peyote nor the treatment of Indian tribes under federal law has any bearing on the Church and Mooney's claims in this case.

The Church and Mooney are correct when they note that federal law permits use of peyote under certain circumstances "in bona fide religious ceremonies of the Native American Church," 21 C.F.R. § 1307.31,[1] and by members of recognized Indian tribes, 42 U.S.C. § 1996a(b)(1). But these regulatory exemptions are simply irrelevant to the plaintiffs' claims, because the plaintiffs' claims pertain to marijuana, not peyote.

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

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

III. The Church and Mooney's memorandum does not raise any arguments in opposition to dismissal of their claims under the First Amendment, the Fourteenth Amendment, or the American Indian Religious Freedom Act (AIRFA).

The defendants' memorandum of law explained at length why the allegations in the Church and Mooney's amended complaint do not state claims under the Free Exercise Clause of the First Amendment; the Equal Protection Clause of the Fourteenth Amendment; the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996; or the other federal statutes cited in the amended complaint. See Defs.' Mem. at 19–25. The Church and Mooney's memorandum does not respond at all to the defendants' arguments, so these claims should be dismissed.

CONCLUSION

Because this case differs from Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006), in key respects, because laws pertaining to traditional Indian religious use of peyote are inapplicable to marijuana, and because the plaintiffs have not presented any other arguments in opposition to the defendants' renewed motion to dismiss, the Court should dismiss this action for the reasons stated in the defendants' opening memorandum.

Date: December 6, 2012

Respectfully submitted,

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