

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

OKLEVUEHA NATIVE	)	No. CV 09-00336 SOM-BMK
AMERICAN CHURCH OF HAWAII,	)	<b>DEFENDANTS'</b>
INC.,	)	<b>MEMORANDUM IN SUPPORT</b>
MICHAEL REX "RAGING BEAR"	)	<b>OF MOTION TO DISMISS</b>
MOONEY,	)	
	)	
Plaintiffs	)	
	)	
vs.	)	
	)	
ERIC H. HOLDER, JR., U.S.	)	
Attorney General;	)	
MICHELE LEONHART, Acting	)	
Administrator, U.S. Drug	)	
Enforcement Administration;	)	
FLORENCE T. NAKAKUNI, U.S.	)	
Attorney for the District of Hawaii,	)	
	)	
Defendants	)	

**DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO  
DISMISS**

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### **PRELIMINARY STATEMENT**

The amended complaint filed by Plaintiffs Oklevueha Native American Church of Hawaii, Inc., and Michael Rex Mooney does not cure the defects that led this Court to dismiss the plaintiffs' original complaint. The plaintiffs' revived request for an order declaring them immune from federal drug enforcement action still does not satisfy the jurisdictional requirements of standing and ripeness, and it 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. As for the plaintiffs' new tort claims seeking possession of an allegedly seized package of marijuana or compensation for its value, those claims are barred by the United States' sovereign immunity. The Court should dismiss all the claims of both plaintiffs.

The Church and Mooney's request for a declaration of immunity from federal drug enforcement action should be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. The amended complaint still fails to satisfy the constitutional component of the jurisdictional requirement of ripeness, because even though the plaintiffs have embellished their factual allegations with additional details, the amended complaint still does not allege facts suggesting that the plaintiffs face a genuine threat of imminent prosecution. The plaintiffs also cannot satisfy the prudential component of the ripeness requirement, because the factual issues in the case remain ill-

defined, and the plaintiffs still have not applied for an administrative exemption from Drug Enforcement Administration regulations. Finally, the Church's claims in particular should also be dismissed because the Church lacks standing to bring claims based on the religious rights of individual church members; those church members must appear before the Court themselves to assert their own rights.

If the Court reaches the merits of the plaintiffs' claims, the Court should then dismiss the case for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The plaintiffs' new admission that the sole purpose of their "church" is to facilitate drug use precludes any claim that their activities are religious in nature, and thus precludes any claim based on the Religious Freedom Restoration Act. Even if the Court were to disregard this admission, RFRA cannot support claims seeking protection for drug activity unrelated to religious practices, such as production and trafficking of marijuana or "therapeutic" use of marijuana. And the plaintiffs have not alleged that laws requiring them to abstain from marijuana or obtain a regulatory exemption from the DEA require the plaintiffs 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 protect nonreligious practices and 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 plaintiffs' amended complaint provides an independent cause of action against the Government.

The Church and Mooney's new request that the Court compel the Government to either turn over an allegedly seized package of marijuana to the plaintiffs or compensate the plaintiffs for the value of the package also must be dismissed for lack of subject matter jurisdiction and for failure to state a claim. The plaintiffs' claims for "theft" or "conversion" are barred by the sovereign immunity of the United States, fall outside this Court's statutory jurisdiction, are insufficient under Hawaii law, and are further barred by the Supremacy Clause.

The Court therefore should dismiss all of the Church's and Mooney's claims.

## **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, 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.” 21 U.S.C. § 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. §§ 1300–1316. 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 the Administrator of the DEA, who 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.”). This statutory and regulatory waiver process allows DEA to consider individual requests for exemptions from regulation under the Controlled Substances Act, including exemptions 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.deaiversion.usdoj.gov/pubs/rfra\\_exempt012209.pdf](http://www.deaiversion.usdoj.gov/pubs/rfra_exempt012209.pdf) (DEA guidelines for submitting exemption applications).

## **II. Earlier Proceedings in this Case**

The Church and Mooney filed their original complaint in this action on July 22, 2009. Compl. for Declaratory Relief and for Prelim. and Permanent Injunctive Relief. The defendants moved to dismiss the action for lack of subject matter

jurisdiction and for failure to state a claim. Defs.’ Notice of Mot. and Mot. to Dismiss for Lack of Subject Matter Juris. and Failure to State a Claim. The Court granted the defendants’ motion, concluding that the plaintiffs’ allegations failed to satisfy both the constitutional component and the prudential component of the jurisdictional requirement of ripeness. Oklevueha Native Am. Church of Haw., Inc., v. Holder, No. 09-00336, 2010 WL 649753, at \*9 (D. Haw. Feb. 23, 2010). However, the Court granted the plaintiffs until March 22, 2010, to file an amended complaint. Id. The plaintiffs filed their amended complaint on that date. First Am. Compl. for Declaratory Relief and for Prelim. and Permanent Injunctive Relief.

### **III. The Plaintiffs’ Amended Complaint**

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. Am. Compl. ¶¶ 1, 9. 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. 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. Am. Compl. at 2; see also 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. Am. Compl. ¶¶ 54–65, 68–76. They seek declaratory and injunctive relief prohibiting the Government from interfering with their marijuana-related activities. Am. Compl. at 17–18 (Prayer for Relief).

The plaintiffs further allege that federal drug enforcement authorities recently seized approximately one pound of marijuana, worth approximately \$7,000, from a FedEx package addressed to Mooney. Am. Compl. ¶¶ 49–50. The plaintiffs seek the return of the marijuana or compensation for its value based on common law claims of theft or conversion. Am. Compl. ¶¶ 50, 66–67 and at 18.

### **ARGUMENT**

- I. The Church and Mooney’s amended complaint should be dismissed for lack of subject matter jurisdiction because their request for a declaration of immunity from federal drug regulations is not justiciable and their tort claims are barred by sovereign immunity.**

This Court lacks jurisdiction over the Church and Mooney’s amended complaint, because the plaintiffs’ request for a declaration of immunity fails to

satisfy the jurisdictional requirements of standing and ripeness and because their tort claims are barred by federal sovereign immunity.

A defendant can challenge the subject matter jurisdiction of the court either through a facial attack, in which the defendant asserts that the plaintiffs' allegations are insufficient on their face to invoke the court's jurisdiction, or through a factual attack, in which the defendant disputes the plaintiffs' allegations by presenting contrary evidence. See Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004). When the defendant brings a facial attack—as the defendants are doing with this motion—the court simply assumes the allegations of the complaint to be true, and does not authorize discovery or receive evidence to resolve factual disputes. See id. If a case presents multiple jurisdictional issues, the Court can approach those issues in any order and can dismiss the case based on any jurisdictional defect that it finds. See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 127 S. Ct. 1184, 1191 (2007) (explaining that a court may “choose among threshold grounds for denying audience to a case on the merits” (quoting Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 585 (1999))).

**A. The Church's and Mooney's claims seeking a declaration of immunity are not ripe because the plaintiffs have not alleged that they face a genuine threat of imminent prosecution.**

The Court lacks subject matter jurisdiction over the Church and Mooney's request for an immunity order because the plaintiffs still have not alleged a genuine

threat of imminent prosecution and therefore have not satisfied the constitutional component of the jurisdictional requirement of ripeness.

The justiciability requirements of standing and ripeness confine action by federal courts to the resolution of “cases and controversies” and prevent courts from addressing matters better suited to legislative or executive action. See Allen v. Wright, 468 U.S. 737, 750 (1984). The requirement of standing demands that any plaintiff in federal court must have a sufficient “personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court’s remedial powers on his behalf.” Warth v. Seldin, 422 U.S. 490, 498–99 (1975) (internal quotation mark omitted). The ripeness doctrine bars the courts from “entangling themselves in abstract disagreements over administrative policies,” Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967), before those disagreements have crystallized into any concrete and material dispute between the parties. See Thomas v. Anchorage Equal Rights Comm’n, 220 F.3d 1134, 1141 (9th Cir. 2000) (en banc) (“A concrete factual situation is necessary to delineate the boundaries of what conduct the government may or may not regulate.” (quoting San Diego County Gun Rights Comm. v. Reno, 98 F.3d 1121, 1132 (9th Cir. 1996))). The standing requirement and the ripeness requirement both entail constitutional limits on the authority of the judiciary as well as further limitations that the judiciary imposes on itself for prudential reasons. See Warth,

422 U.S. at 498; Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57 n.18 (1993). A plaintiff must satisfy both the constitutional requirements and the prudential requirements, and must satisfy all the requirements for each individual claim in the case. See Warth, 422 U.S. at 517–18; DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 351–53 (2006) (explaining that “a plaintiff must demonstrate standing for each claim he seeks to press” and rejecting the notion that establishing standing for a single claim makes it unnecessary for a plaintiff to establish standing for other claims based on the same facts).

The Court dismissed the Church and Mooney’s original complaint upon finding that the allegations of the complaint failed to satisfy the constitutional component of the ripeness requirement. Oklevueha Native Am. Church of Haw., Inc., v. Holder, No. 09-00336, 2010 WL 649753, at \*9 (D. Haw. Feb. 23, 2010). The Court observed that under Thomas v. Anchorage Equal Rights Comm’n, 220 F.3d 1134 (9th Cir. 2000) (en banc), “[w]hen a litigant brings a preenforcement challenge to a statute, ‘neither the mere existence of a proscriptive statute nor a generalized threat of prosecution’ will satisfy the ripeness requirement. ‘Rather, there must be a genuine threat of imminent prosecution.’” Oklevueha, 2010 WL 649753 at \*5 (quoting Thomas, 220 F.3d at 1139) (citation omitted). The Court noted that Thomas identified three factors to examine in determining whether the plaintiffs had alleged a genuine threat of imminent prosecution: “whether the

plaintiffs have articulated a ‘concrete plan’ to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history of past prosecution or enforcement under the challenged statute.” Oklevueha, 2010 WL 649753 at \*5 (citing Thomas, 220 F.3d at 1139).

The Court found that the plaintiffs failed to allege a genuine threat of imminent prosecution because they had not alleged any “concrete plan[s]” to consume cannabis or to receive cannabis shipments in the future and had not alleged any specific warnings or threats from authorities. See id. at \*5–7. The Court concluded that the plaintiffs’ allegations did not suggest that the plaintiffs were likely to face criminal prosecution or have their marijuana seized by federal authorities. See id. at \*6–7.

The allegations of the amended complaint contain additional details about the plaintiffs’ use of marijuana and the alleged seizure of marijuana, see, e.g., Am. Compl. ¶¶ 37–38, 40, 49–50, but they still do not allege a genuine threat of imminent prosecution. The new allegations do not suggest that federal authorities are likely to prosecute the plaintiffs or seize marijuana from the plaintiffs. The plaintiffs do not allege that they intend to receive future marijuana shipments by FedEx or that they intend to obtain marijuana by other means that will lead to seizure of the marijuana by federal authorities. See Am. Compl. ¶ 40 (describing

how the plaintiffs obtain marijuana); cf. City of Los Angeles v. Lyons, 461 U.S. 95, 105–06 (1983) (finding that a plaintiff who alleged that police had used an illegal chokehold on him in a past police encounter could not seek an injunction barring police from using such chokeholds in the future). The plaintiffs do not allege that the marijuana that was seized by federal authorities was slated for personal use in religious practices, and they do not make any statements about the source of the marijuana. See Am. Compl. ¶¶ 49–50. The plaintiffs also state that federal authorities recently raided the THC Ministry, which the plaintiffs allege is another organization that purports to consume cannabis for religious reasons. See Am. Compl. ¶ 51. But the plaintiffs do not allege that they are related to the THC Ministry in a way that would make it likely that the plaintiffs will also be raided by federal authorities. Thus, the plaintiffs still have not alleged a genuine threat of imminent prosecution, and their claims do not satisfy the constitutional component of the ripeness requirement.

**B. The Church and Mooney also have not satisfied the prudential component of the ripeness requirement.**

The Church and Mooney’s amended complaint also does not cure their failure to satisfy the prudential component of the ripeness requirement. Consideration of the plaintiffs’ claims would be premature for the same reasons this Court noted when it dismissed the plaintiffs’ original complaint.

This Court’s earlier opinion explained that the prudential component of the ripeness analysis examines “the fitness of the issues for judicial consideration and the hardship to the parties of withholding consideration.” Oklevueha, 2010 WL 649753 at \*7 (quoting Thomas, 220 F.3d at 1141). The Court found that given the slimness of the plaintiffs’ allegations, the case did not present concrete issues fit for judicial consideration. See id. at \*8. The Court also found that withholding judicial consideration would not impose any immediate hardship on the plaintiffs. See id.

While the plaintiffs have alleged additional details about their marijuana-related activities, the case still does not satisfy the prudential component of ripeness. The allegations of the amended complaint are still simply too slim and too general to suggest that this case can be distilled into a dispute that the Court can readily resolve through judicial action—that is, applying law to specific facts and crafting a precise order to fit those facts. Moreover, the plaintiffs still do not allege that they have availed themselves of DEA administrative procedures for seeking exemptions from DEA regulations. See 21 C.F.R. § 1307.03 (“Any person may apply for an exception to the application of any provision of [the DEA regulations] by filing a written request stating the reasons for such exception.”). The Court has discretion to require plaintiffs to resort to administrative remedies before seeking relief from the Court under RFRA or other provisions. See

McCarthy v. Madigan, 503 U.S. 140, 144 (1992) (“[W]here Congress has not clearly required exhaustion [by statute], sound judicial discretion governs.”). Requiring the plaintiffs to proceed through the exemption process and allowing that process to run its course could completely resolve the plaintiffs’ grievances, and even if it does not, it will at least help clarify the facts surrounding the dispute and the precise issues that need to be resolved, thus rendering the case more “fit[] . . . for judicial decision,” Thomas, 220 F.3d at 1141. On the other hand, prematurely considering the plaintiff’s claims now would permit plaintiffs to bypass the exemption process and deny DEA a fair opportunity to examine and resolve the plaintiffs’ claims within the administrative process under the authority that Congress vested in the DEA. See, e.g., Manufactured Home Communities Inc. v. City of San Jose, 420 F.3d 1022, 1033–34 (9th Cir. 2005) (finding that a landlord’s suit seeking enforcement of a statutory exemption was unripe because the landlord “never engaged in the administrative process,” which could have completely resolved the landlord’s complaints); Am.-Arab Anti-Discrimination Comm. v. Thornburgh, 970 F.2d 501, 510–11 (9th Cir. 1992) (finding a First Amendment challenge to an immigration statute unfit for judicial decision because “the facts . . . [had] not been well-developed” and because the appropriate government agency had not yet had an opportunity to interpret or implement the statute).

As for the second part of the prudential ripeness analysis, the plaintiffs' allegations still do not suggest that withholding judicial consideration will impose any hardship on the plaintiffs. Indeed, the plaintiffs' failure to pursue administrative relief undermines their ability to demonstrate any present hardship. See, e.g., Manufactured Home Communities, 420 F.3d at 1033 (finding that delaying judicial consideration would only impose a "minor" hardship on the plaintiff landlord); Am.-Arab Anti-Discrimination Comm., 970 F.2d at 511–12 (finding that withholding consideration would not impose a hardship on the plaintiffs because "adequate procedures exist[ed] for the vindication of the [plaintiffs'] claims"). The Court should dismiss the Church's and Mooney's claims as unripe and should exercise its discretion to require the plaintiffs to resort to administrative remedies before bringing claims in court.

**C. The Church lacks standing to sue based on its members' rights because the nature of the claims requires the participation of individual members in the lawsuit.**

The Church lacks standing to assert claims based on the religious rights of its members, because determining whether Church members are entitled to any statutory or constitutional protections based on their religious convictions necessarily requires examining the quality and degree of the convictions of individual church members, and that in turn necessarily requires that those individual church members appear in court to assert their own rights.

A plaintiff in federal court ordinarily may only assert its own rights and cannot seek relief based on the rights of third parties. See Warth, 422 U.S. at 499. An organization can bring claims based on the rights of individual members of the organization only when the organization meets three requirements: “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” Hunt v. Wash. State Apple Adver. Comm’n, 432 U.S. 333, 343 (1977). Even leaving aside the first and second requirements, the Church fails the third requirement, because individual members would have to participate in the lawsuit to demonstrate that they are entitled to relief from federal drug regulations and to obtain that relief. Religious belief is a deeply personal matter of conscience, and individual adherents to the same religion differ in the nature and sincerity of their religious beliefs, the scrupulousness of their observance of religious ritual, and the precise role and meaning of that observance in their personal faith. For this reason, in Harris v. McRae, 448 U.S. 297 (1980), the Supreme Court held that the Women’s Division of the Board of Global Ministries of the United Methodist Church lacked standing to assert the free-exercise rights of its members in challenging restrictions on the use of federal funds for reimbursing the costs of abortions. See id. at 321; see also Soc’y of Separationists, Inc. v.

Herman, 959 F.2d 1283, 1288 (5th Cir. 1992) (en banc) (“It is often difficult for religious organizations to assert free exercise claims on behalf of their members because the religious beliefs and practices of the membership differ.”).

To determine whether any rights granted under RFRA are relevant in this case, the Court would have to examine individual Church members’ religious beliefs and religious observance to make an independent determination for each individual whether federal government regulation imposes a “substantial burden” on genuine religious beliefs. See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430–31 (2006) (explaining that application of 42 U.S.C. § 2000bb-1(b) turns on “application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.”). Individual members’ participation would also be necessary for purposes of relief—for one thing, to issue an order that would bar the federal government from enforcing federal drug regulations against Church members, the Court would at the very least need to identify the Church members who should be held exempt from federal regulation. See Fed. R. Civ. P. 65(d)(1)(B)–(C) (providing that any injunction issued by a court must “state its terms specifically” and “describe in reasonable detail . . . the act or acts restrained or required”). Accordingly, the Church cannot pursue religion-based claims on behalf of its individual members, and the Church should be dismissed from this lawsuit.

**D. The Church's and Mooney's tort claims against the Government are barred by sovereign immunity and fall outside this Court's subject matter jurisdiction.**

The Church's and Mooney's tort claims seeking recovery of the allegedly seized marijuana package or monetary compensation for its value are barred by the sovereign immunity of the United States and fall outside this Court's subject matter jurisdiction.

Sovereign immunity bars claims against the United States and federal employees sued in their official capacities unless the United States has explicitly waived its sovereign immunity. Balser v. Dep't of Justice, Office of the U.S. Trustee, 327 F.3d 903, 907 (9th Cir. 2003). The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671–2680, provides a limited waiver of sovereign immunity for certain tort claims against the United States, but that waiver is not applicable here, because the FTCA specifically excludes “[a]ny claim arising in respect of . . . the detention of any goods, merchandise, or other property by any . . . law enforcement officer.” Id. § 2680(c), discussed in Foster v. United States, 522 F.3d 1071, 1074 (9th Cir. 2008). The plaintiffs' tort claims fall squarely within this exception, so the FTCA waiver of sovereign immunity does not apply. Moreover, the FTCA does not waive sovereign immunity “unless the claimant has first exhausted administrative remedies” by filing an administrative claim with the appropriate federal agency. Id. § 2675(a), discussed in Brady v. United States, 211

F.3d 499, 502 (9th Cir. 2000). The Church and Mooney have not alleged that they have brought any such administrative claim. The Church and Mooney also have not identified any other waiver of sovereign immunity that would permit their tort claims, so the claims are barred and fall outside this Court's subject matter jurisdiction. See Balseer, 327 F.3d at 907 ("A court lacks subject matter jurisdiction over a claim against the United States if it has not consented to be sued on that claim."); see also FDIC v. Meyer, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature.").

Furthermore, the fact that the plaintiffs cannot bring their tort claims under the FTCA or any other federal statute that waives sovereign immunity also means that there is no statute that authorizes this Court to exercise subject matter jurisdiction over these claims. The absence of any statutory authority for jurisdiction is an additional reason the Court must dismiss the plaintiffs' claims. See Alvarado v. Table Mountain Rancheria, 509 F.3d 1008, 1016 (9th Cir. 2007) ("[T]he cornerstone of federal subject matter jurisdiction is statutory authorization. . . . To confer subject matter jurisdiction in an action against a sovereign, in addition to a waiver of sovereign immunity, there must be statutory authority vesting a district court with subject matter jurisdiction."<sup>1</sup>).

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<sup>1</sup>The plaintiffs have not sought any relief under Rule 41(g) of the Federal  
(continued...)

**II. The Plaintiffs' amended complaint fails to state a claim under any of the sources of law cited in the amended complaint.**

Even if the Court could reach the merits of the plaintiffs' claims, it would have to dismiss the plaintiffs' claims, because the allegations in the amended complaint do not state a valid claim under the Religious Freedom Restoration Act, the Constitution, any of the other statutory provisions invoked in the amended complaint, or Hawaii common law.

To withstand a motion to dismiss for failure to state a claim, the 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, 127 S. Ct. 1955, 1965 (2007) (footnote omitted) (citations omitted). In evaluating the sufficiency of the 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). The rules of pleading require factual

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<sup>1</sup>(...continued)

Rules of Criminal Procedure. In any event, the facts alleged in the amended complaint would not support an exercise of equitable jurisdiction under Rule 41(g). See Ramsden v. United States, 2 F.3d 322, 324–25 (9th Cir. 1993) (noting that a district court must exercise "caution and restraint" before exercising equitable jurisdiction under the rule and discussing the requirements for an exercise of jurisdiction).

allegations “plausibly suggesting,” and “not merely consistent with,” the elements of a valid claim for relief. Bell Atl. Corp., 127 S. Ct. at 1966; see Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009).

**A. The amended complaint does not state a claim under the Religious Freedom Restoration Act (RFRA) because it does not allege facts that suggest that restrictions on marijuana use “substantially burden” an “exercise of religion.”**

The Church and Mooney fail to state a claim under the Religious Freedom Restoration Act. Given the plaintiffs’ new assertion that drug use is the sole purpose of the Church, the plaintiffs’ marijuana-related activities cannot amount to “exercise[s] of religion” protected by RFRA. Even if some of the plaintiffs’ activities could be considered exercises of religion, Government restrictions on the plaintiffs’ use of marijuana cannot support a RFRA claim, because Government action that merely diminishes a person’s religious experience, but does not directly compel the person to act contrary to his religion, does not “substantially burden” religious exercise in a way that can support a claim under RFRA.

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), cert. denied, 129 S. Ct. 2763 (2009).

The Church and Mooney’s amended complaint does not adequately plead a prima facie claim under RFRA, because the amended complaint contains a new allegation that the Church exists solely to facilitate drug use, which would make it impossible that the plaintiffs’ marijuana-related activities could amount to “exercise[s] of religion” under RFRA. A party asserting claims under RFRA must show that the beliefs he seeks to protect are “rooted in religious belief, not in “purely secular” philosophical concerns.” United States v. Zimmerman, 514 F.3d 851, 853 (9th Cir. 2007) (per curiam) (quoting Callahan v. Woods, 658 F.2d 679, 683 (9th Cir. 1981)). This requires the party to “show that his beliefs are religious” in nature. Id. The Church and Mooney can no longer show that their activities are religious in nature, because they have alleged in their amended complaint that the only purpose of the Church is to facilitate drug use—in the plaintiffs’ own words, “[t]he Church only exists to espouse the virtues of, and to consume entheogens [psychoactive drugs].” Am. Compl. at 2. While RFRA applies to a very broad range of religious beliefs and practices, the activities of a “church” whose only purpose is to facilitate consumption of psychoactive drugs cannot be considered “religious.” Cf. United States v. Ward, 989 F.2d 1015, 1018 (9th Cir. 1992) (“‘Religious’ beliefs . . . are those that stem from a person’s ‘moral, ethical, or

religious beliefs about what is right and wrong’ and are ‘held with the strength of traditional religious convictions.’”); United States v. Meyers, 95 F.3d 1475, 1482–84 (10th Cir. 1996) (concluding that a RFRA claimant’s beliefs about marijuana amounted to a secular philosophy or way of life, not religious beliefs protected by RFRA); id. at 1483 (noting that “religious beliefs generally are not confined to one question or a single teaching”). The plaintiffs’ own allegations therefore compel dismissal. See Wright v. Or. Metallurgical Corp., 360 F.3d 1090, 1098 (9th Cir. 2004) (affirming dismissal of claims in a situation where “Plaintiffs’ alleged facts effectively preclude[d] a claim”); Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir.) (“[A] plaintiff can . . . plead himself out of a claim by including unnecessary details contrary to his claims.”), modified, 275 F.3d 1187 (9th Cir. 2001).

Even if the plaintiffs’ use of marijuana could conceivably amount to an “exercise of religion,” the plaintiffs’ other activities, such as cultivation or distribution of marijuana or possession of marijuana for purposes other than religious use, such as sale or “therapeutic” use, still could not amount to “exercise[s] of religion.” 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 seeking 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 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).

Moreover, even assuming the plaintiffs’ use of marijuana could be considered religious in nature, the amended complaint does not adequately allege that restrictions on the use of marijuana “substantially burden” any exercise of religion, because the plaintiffs only allege that abstaining from marijuana diminishes their religious experience. They do not allege that the Government’s prohibition of marijuana forces them to act contrary to their religious beliefs.

While RFRA’s definition of an “exercise of religion” is expansive, the statute’s notion of what kinds of interference constitute a “substantial burden” on such an exercise of religion is very narrow. In Navajo Nation, 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.

The plaintiffs do not claim that being forced to apply for a regulatory exemption from controlled-substances laws, or being forced to abstain from the use of marijuana altogether, necessarily causes them to violate the tenets of any

religion. Indeed, the plaintiffs state that the practices of their “church” entail use of a whole panoply of drugs, some of which are not currently regulated by federal law. See Am. Compl. ¶ 25. At most, the plaintiffs have alleged that Government restrictions on marijuana use “decrease[] the spirituality, the fervor, or the satisfaction” with which they practice their religion, Navajo Nation, 535 F.3d at 1063. Under Navajo Nation, such allegations do not state a RFRA claim. See, e.g., Perkel v. Dep’t of Justice, No. 08-74457, 2010 WL 331433 at \*1 (9th Cir. Jan. 27, 2010) (unpublished opinion).

**B. The Free Exercise Clause does not protect the plaintiffs’ use of marijuana, because the plaintiffs’ use of marijuana is not “religious,” and 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 the plaintiffs’ use of marijuana is not “religious” and because neutral laws of general applicability do not violate the First Amendment even if they impair religious practices.

As the defendants discussed in Section II.A, the Church and Mooney, having pleaded in their amended complaint that the Church exists solely to facilitate drug use, can no longer establish that their activities are “religious” activities protected by the Religious Freedom Restoration Act. The Church and Mooney’s admission

similarly dooms their claims under the Free Exercise Clause. See Callahan v. Woods, 658 F.2d 679, 683 (9th Cir. 1981) (“A religious claim, to merit protection under the free exercise clause of the First Amendment . . . must be rooted in religious belief, not in ‘purely secular’ philosophical concerns.”).

The Church’s and Mooney’s Free Exercise Clause claims also fail 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), cert. denied, 129 S. Ct. 2178 (2009); O Centro Espirita

Beneficente 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, 474 F. Supp. 2d at 1144. Accordingly, the federal Controlled Substances Act and associated regulations do not violate the Free Exercise Clause.

**C. 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.

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 II.B 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. 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 County, 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.

**D. 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 Act 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 Act 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. 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.

**E. The Church’s and Mooney’s tort claims are insufficient under Hawaii law and are barred by the Supremacy Clause.**

As the defendants explained in Section I.D above, the Church’s and Mooney’s state law tort claims based on “theft” or “conversion” must be dismissed

because they are barred by the United States' sovereign immunity. In any event, the tort claims are insufficient as a matter of Hawaii law. Conversion under Hawaii law is "wrongful dominion over the property of another." Matsuda v. Wada, 101 F. Supp. 2d 1315, 1321 (D. Haw. 1999) (citing Tsuru v. Bayer, 25 Haw. 693, 696–98 (Haw. 1920)). The Church and Mooney have not alleged that either of them owned the seized marijuana; rather, they allege that the marijuana was seized from a package addressed to Mooney before Mooney ever received the package. Am. Compl. ¶¶ 49–50. The Church and Mooney also have not alleged facts suggesting that the alleged seizure of the marijuana was "wrongful[]."

Even if the Church and Mooney could somehow bring tort claims under Hawaii law, their claims would be barred by the Supremacy Clause of the Constitution, U.S. Const. art. VI, cl. 2. The Supremacy Clause prevents state laws from imposing tort liability on the United States for acts by federal officers that are entirely authorized by federal law. See Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372–73 (2000) (explaining that federal law preempts a state law when federal law "occup[ies] the field" or the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"); Blackburn v. United States, 100 F.3d 1426, 1435 (9th Cir. 1996) (noting that application of state regulations against the Federal Government would violate the

Supremacy Clause). The Church's and Mooney's state law tort claims should be dismissed.

### **CONCLUSION**

For the reasons above, the Court should dismiss all the claims of both plaintiffs in this action.

Date: April 8, 2010

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