No. 10-17687

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

ERIC H. HOLDER, United States Attorney General, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

BRIEF FOR APPELLEES

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases : **Page**

Statutes :

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FOR THE NINTH CIRCUIT

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Oklevueha Native American Church of Hawaii, Inc.; Michael Rex "Raging Bear" Mooney,

Plaintiffs-Appellants,

v.

Eric H. Holder, as U.S. Attorney General; Michele Leonhart, as Administrator of the U.S. Drug Enforcement Administration; Florence T. Nakakuni, as U.S. Attorney for the District of Hawaii,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Hawaii

BRIEF FOR APPELLEES

STATEMENT OF JURISDICTION

The First Amended Complaint invoked the district court's jurisdiction pursuant to 28 U.S.C. 1331 (2006), asserting claims under the Religious Freedom Restoration Act, 42 U.S.C. 2000bb (2006); the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc (2006); and the First and Fourteenth Amendments to the United States Constitution.

On October 26, 2010, the district court entered an order that dismissed the remainder of all the plaintiffs' claims in this case. That order is a final order for purposes of appeal. Plaintiffs filed a timely notice of appeal from the October 26 Judgment on November 24, 2010. This Court has jurisdiction pursuant to 28 U.S.C. 1291 (2006).

ISSUES PRESENTED

1. Whether the district court correctly held that plaintiffs' request for declaratory or injunctive relief barring defendants from enforcing the Controlled Substances Act ("CSA"), 21 U.S.C. 801 *et seq.*, against them is not ripe.

2. Whether the district court correctly held that it lacked authority to order the return of, or compensation for, a single package of cannabis addressed to plaintiff Mooney that law enforcement officials seized from FedEx because the cannabis no longer exists and because plaintiffs have identified no waiver of sovereign immunity that would authorize a court to award plaintiffs compensation for that cannabis.

3. If this Court were to find that it has jurisdiction to consider the above claims, whether those claims fail on the merits because, among other reasons, the CSA's regulation of marijuana is the least restrictive means of achieving a compelling interest.

STATEMENT OF THE CASE

Plaintiffs Michael Rex "Raging Bear" Mooney and the Oklevueha Native American Church of Hawaii filed this action seeking declaratory and injunctive relief barring defendants from enforcing the Controlled Substances Act against them or for seizing cannabis from them at some unstated time in the future. Plaintiffs also seek an order requiring the return of, or compensation for, cannabis plaintiffs allege defendants wrongly seized from FedEx. The district court dismissed plaintiffs' pre-enforcement challenge to the CSA as not ripe for adjudication, noting, among other things, that plaintiffs do not allege that they have been prosecuted or threatened with prosecution or that defendants have any plan to seize cannabis from plaintiffs in the future. The district court dismissed plaintiffs' claims for the return of, or compensation for, the cannabis that was seized from Fed Ex because the cannabis no longer exists and because RFRA does not waive the United States' sovereign immunity for damages. Plaintiffs appeal the judgment against them.

STATUTORY BACKGROUND

The Controlled Substances Act, 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, with intent to manufacture, distribute, or dispense, a controlled substance," except as authorized by the Act. 21 U.S.C.

841(a)(1). The CSA also criminalizes possession of any controlled substance except as authorized by the Act. *See id.* § 844(a). Congress enacted the CSA 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." 21 U.S.C. 801(2). The CSA establishes five "schedules" of controlled substances, and places marijuana under Schedule I. *See id.* § 812(a); Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 202(c), sched. I(c)(10), 84 Stat. 1236, 1249.

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 ("DEA"). *See* 21 U.S.C. 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. 28 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. 21 C.F.R. 1307.03. *See also* 21 U.S.C. 822(d).

Any person also may apply to the DEA for an exception to the requirements of the CSA itself under RFRA. *See* 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/index.html (copy provided as an addendum to this brief).

STATEMENT OF FACTS

1a. On July 22, 2009, Mooney and the Church filed a complaint in the United States District Court for the District of Hawaii. The complaint alleged that the Church is a Hawaii independent chapter of a national organized religion, the Native American Church ("NAC"), and that members of the NAC consume cannabis as "a sacrament/eucharist in their religious ceremonies." Complaint, ¶ 1 (Supplemental Excerpts of Record ("SER") 31). According to the complaint, Mooney is a "fully authorized Spiritual Leader (commonly known as a *Medicine Man*) and the Founder, President and Medicine Custodian of [t]he NAC." *Id.* ¶ 2 (SER 31-32) (emphasis in original). The complaint named as defendants, in their official capacities, the Attorney General of the United States (Eric H. Holder, Jr.,); the Administrator of the United States Drug Enforcement Administration (Michele Leonhart); and the U.S. Attorney for the District of Hawaii (Edward H. Kubo, Jr.). *Id.* at ¶¶ 3-5 (SER 32).

The complaint alleged that "[t]he purpose of Plaintiff's cannabis use in religious ceremonies is . . . to enhance spiritual awareness or even to occasion direct experience of the divine," *id.* ¶ 13 (SER 34), and that NAC members receive communion through cannabis in religious ceremonies and daily worship "as an essential and necessary component of Plaintiffs' religion." *Id.* ¶ 30 (SER 36) . According to the complaint, "[a]ny risks to [t]he NAC's members from their use of cannabis are relatively low and contained," *id.* ¶ 15 (SER 34), because use of cannabis during NAC religious ceremonies is "controlled by an experienced and responsible church member," *id.* ¶ 19 (SER 35), and the NAC's "religious strictures against drinking to excess and using harmful drugs and substances virtually eliminates the risks associated with polysubstance abuse." *Ibid.*

The complaint alleged that the NAC's members "rightfully and justifiably fear for their ability to continue to cultivate, consume, possess and distribute cannabis," and that the "threat that Mr. Mooney and members of [t]he NAC will be criminally prosecuted is exceedingly real." *Id.* ¶¶ 32-33 (SER 37). The complaint, however, did not allege that plaintiffs or the Church have been specifically threatened with prosecution, noting instead only that "[o]ne member of [t]he NAC has already and recently had his cannabis seized from FedEx delivery by United States federal drug enforcement authorities in Hawaii." *Id.* ¶ 31 (SER 37).

Based on the above allegations, the complaint asserted that defendants have violated plaintiffs' rights under the Religious Freedom Restoration Act ("RFRA"); the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (2006); and the Equal Protection Clause and First Amendment to the U.S. Constitution. *See* Compl. ¶¶ 34-43 (SER 37-39).[1] With respect to relief, the complaint sought a declaratory judgment recognizing plaintiffs' "[c]onstitutional and statutory rights to consume cannabis for their religious and even their therapeutic needs," *id.* ¶ 48 (SER 40), and preliminary and permanent injunctions barring defendants "from arresting or prosecuting [p]laintiffs, seizing their cannabis, forfeiting their property, or seeking civil or administrative sanctions against them" for (1) possessing cannabis for individual religious or therapeutic use, (2) obtaining cannabis from other NAC churches or from any other source permitted by state law, or (3) cultivating and distributing cannabis to any person or entity in a manner consistent with state law. *See id.* at 12-13 (SER 41-42).

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[1] Although the Complaint also refers to the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. 2000cc (2006), in its jurisdictional section, *see* Compl. ¶ 7 (SER 32), the Complaint does not actually attempt to state a claim under that statute, presumably because RLUIPA applies only to state and local governments. *See Navajo Nation* v. *U.S. Forest Service*, 535 F.3d 1058, 1077 (9th Cir. 2008) (en banc), *cert. denied*, 129 S. Ct. 2763 (2009).

b. On February 23, 2010, the district court dismissed the complaint because none of the claims stated therein are ripe for adjudication. The court noted that the complaint failed to allege facts sufficient to prove that plaintiffs are likely to be prosecuted for their cannabis-related activities or that the government is likely to seize any cannabis from plaintiffs in the future. *See* February 23, 2010 Order at 14-15 (Excerpts of Record ("ER") 50-51). The court also noted that the complaint cannot survive the prudential component of the ripeness doctrine because plaintiffs' allegations were too "thin and sketchy," *id.* at 16 (ER 52), and because, in the absence of immediate threat of prosecution, the hardship to the parties that would result from dismissal would be "minimal." *Id.* at 19 (ER 55). The court noted, however, that its dismissal was without prejudice, and that plaintiffs could have two months in which to file an amended complaint that "cures the defects of the original Complaint by setting forth facts – as opposed to conclusions – that establish an entitlement to relief and by clarifying the scope of the relief requested." *Ibid.*

2a. On March 22, 2010, plaintiffs filed an amended complaint, naming, in their official capacities, the same defendants sued in the original complaint. The amended complaint restated the allegations of the original complaint, but added that Mooney "uses cannabis sacrament daily" and that the NAC uses cannabis in its "'sweats,' which occur approximately twice a month during the new moon and the full

moon." Amend. Compl., ¶ 37 (SER 12). The amended complaint also alleged that the DEA "has this very month raided the THC Ministry, a Big Island of Hawaii church that consumes cannabis for religious use." *Id.* ¶ 51 (SER 15). Similar to the original complaint, the amended complaint alleged claims under RFRA, AIFRA, the Equal Protection Clause, and the First Amendment. *See id.* ¶¶ 54-63 (SER 16-18). In addition to the injunctive relief sought in the original complaint, the amended complaint requested "the immediate return of the cannabis that the Defendants have stolen/seized from Plaintiffs, or its monetary value . . .." *Id.* at 18 (SER 21).[2]

b. The district court dismissed the amended complaint as not ripe insofar as it requested an injunction and/or declaratory relief precluding the government from arresting or prosecuting plaintiffs or seizing cannabis from them. The amended complaint failed to cure the deficiencies that made the original complaint unripe in that respect because, among other reasons, it does not identify "a single instance in which an Oklevueha member has been prosecuted or threatened with prosecution for a cannabis-related violation." June 22, 2010 Order at 11 (ER 24).

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[2] The amended complaint also included a new claim for "Theft/Conversion." Amend. Compl. ¶¶ 66-67 (SER 18). The district court dismissed that claim as barred by sovereign immunity because, as plaintiffs had conceded, it falls within the FTCA's statutory exclusion for claims in respect of "the detention of goods . . . by any officer of customs or excise or any other law enforcement officer." June 22, 2010 Order at 20 (ER 33) (quoting 28 U.S.C. 2680 (c) (2006)). Plaintiffs do not mention this claim in their opening brief, so it is not part of this appeal.

For example, the court observed, while the amended complaint alleges that the DEA conducted a raid on an alleged cannabis-using church on the Big Island of Hawaii (the THC Ministry), it fails to allege any substantive connection between plaintiffs' church and the THC Ministry sufficient to show that defendants are likely to take enforcement action against plaintiffs. *See id.* at 12 (ER 25).[3] The court declined to dismiss plaintiffs' claims for the return of the cannabis seized from Fed Ex or compensation for that cannabis under RFRA, however, because it was "not clear from what the parties have submitted whether the return of or compensation for seized products is 'appropriate relief' under RFRA." June 22, 2010 Order at 21 (ER 34).

3. By order of October 26, 2010, the district court dismissed plaintiffs' claims for return of, or compensation for, the cannabis law enforcement officials seized from FedEx for lack of subject matter jurisdiction. The court held that it could not order the government to return that cannabis because it is undisputed that the cannabis was destroyed before plaintiffs requested its return. *See* October 26, 2010 Order at 4, 8 (ER 7, 11).[4]

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[3] As it had done with respect to its order dismissing the original complaint, the court invited plaintiffs to file another amended complaint that would provide the specificity lacking in their First Amended Complaint. *See* June 22, 2010 Order at 18 (ER 31).

[4] *See also* Exhibit A to Motion to Dismiss for Lack of Jurisdiction (Honolulu Police Department Report No. 09-207-731)(SER 3)(showing that the seized cannabis

The court also held that the doctrine of sovereign immunity barred it from ordering the government to pay plaintiffs monetary damages for the destroyed cannabis. *See* October 26, 2010 Order at 5 (ER 8). Citing numerous cases, the district court held that RFRA's provision authorizing courts to award "appropriate relief" does not unambiguously waive the United States' sovereign immunity for damages. *See id.* at 6 (ER 9) (citations omitted).

Finally, the district court held that it could not order the government to obtain substitute cannabis and provide it to plaintiffs. *See* October 26, 2010 Order at 8 (ER 11). Even if the seized cannabis had been weighed before it was destroyed, the court noted, which it was not, "the differences in potency and desirability of various cannabis would make awarding substitute cannabis unfeasible, especially when it does not appear that the Government tested the cannabis before it was destroyed." *Id.* at 8-9 (ER 11-12). The court also noted that plaintiffs had conceded they were not asking the government to purchase substitute cannabis, *see id.* at 9 (ER 12), and that "[s]uch relief would be barred by the Government's sovereign immunity, in any event, as it would be providing monetary damages in disguise." *Ibid.*

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was destroyed on September 15, 2009). As the court noted, plaintiffs appear to have first requested the return of the seized cannabis on January 28, 2010. *See* Order of October 26, 2010 at 2 (ER 5), *citing* Mooney Affidavit, ¶ 13 (R20) (SER 24).

SUMMARY OF ARGUMENT

1. The district court correctly determined that plaintiffs' pre-enforcement challenge to prosecution under the Controlled Substances Act ("CSA") fails both the constitutional and the prudential components of the ripeness doctrine. As the district court noted, plaintiffs do not allege that defendants have threatened them with prosecution, and they have failed to allege any concrete facts showing it is likely that defendants will initiate any such prosecution.

Plaintiffs argue that law enforcement officials' seizure of a single package of marijuana that was addressed to plaintiff Mooney causes them to fear prosecution under the CSA and to be concerned that defendants will seize additional marijuana from them. Twenty-three months have passed since that seizure occurred, however, without any prosecution, threat of prosecution, or further seizure of marijuana from plaintiffs, and plaintiffs allege no facts sufficient to show that defendants are likely to seize any cannabis from plaintiffs in the future. (For example, plaintiffs do not allege that the 2009 seizure resulted from any active investigation of plaintiffs' alleged religious marijuana use.) Moreover, as the district court noted, the marijuana seized in 2009 was destroyed by the Honolulu Police Department in the normal course of business, further reducing the likelihood that plaintiffs will be prosecuted based on that seizure.

Plaintiffs also note that the DEA conducted a raid on another marijuana-using church located on the Big Island of Hawaii, but plaintiffs failed to provide any specific information regarding that church's use of marijuana or to allege that anyone has been arrested or prosecuted as a result of that raid. As a result, the court held, it would be improper to assume that defendants will take any action against plaintiffs here based on that raid. That reasoning is sound, and plaintiffs have failed to demonstrate otherwise.

2. The district court also correctly held that plaintiffs' request for the return of, or compensation for, the marijuana law enforcement officials seized from FedEx is not ripe for review. As the court noted, plaintiffs' request that the marijuana be returned to them is not redressable because the marijuana has been destroyed, and the courts lack jurisdiction to order the government to compensate plaintiffs for the marijuana because plaintiffs have identified no waiver of sovereign immunity for such a claim.

3. Although plaintiffs address the merits of their RFRA claims at length in their opening brief, the district court did not address the merits, given that it lacked jurisdiction to do so. This Court should not reach the merits either, for the same reason. If the Court were to reach the merits, however, it would find that none of plaintiffs' allegations state a claim upon which relief can be granted.

For example, plaintiffs' RFRA claims fail because courts have unanimously held that the CSA's regulation of marijuana is the least restrictive means of achieving a compelling government interest. Plaintiffs argue that RFRA allows them to use marijuana under the same conditions that members of Native American religions have a statutory right to use peyote, but the courts have rejected that argument because, among other reasons, of the vast difference in demand for marijuana on the one hand and peyote on the other. Plaintiffs forfeited their other claims by failing to address defendants' motion to dismiss them on the merits below, and those claims patently lack merit in any event, as we demonstrate below.

STATEMENT OF THE STANDARD OF REVIEW

An order dismissing a claim as not ripe for adjudication is reviewed *de novo*. *See W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 481 (9th Cir. 2011). The same standard of review also governs an appeal from an order dismissing a claim based on sovereign immunity and other jurisdictional grounds. *See Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1085-86 (9th Cir. 2007) (quoting *Park v. Shin*, 313 F.3d 1138, 1141 (9th Cir. 2002)). Whether a claim should be dismissed under Federal Rule of Civil Procedure 12(b)(6) also is reviewed *de novo*. *See V.S.* ex rel. *A.O. v. Los Gatos-Saratoga Joint Union High Sch. Dist.*, 484 F.3d 1230, 1233 (9th Cir. 2007).

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT PLAINTIFFS' REQUESTS FOR DECLARATORY AND INJUNCTIVE RELIEF BARRING DEFENDANTS FROM PROSECUTING THEM, OR FROM SEIZING CANNABIS FROM THEM IN THE FUTURE, ARE NOT RIPE FOR ADJUDICATION.

Ripeness is "'a question of timing' [which is] designed to 'prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc) (citation omitted), *cert. denied*, 531 U.S. 1143 (2001). The ripeness inquiry contains both a constitutional and a prudential component. *See ibid*. The district court correctly held that plaintiffs cannot satisfy either of those components with respect to their request that the Court prohibit defendants from prosecuting them under the CSA or seizing cannabis from them.

A. Plaintiffs' Pre-Enforcement Claims Pertaining to the Controlled Substances Act Fail the Constitutional Component of the Ripeness Inquiry.

To satisfy the constitutional component of the ripeness requirement, a plaintiff must allege an injury that is "real and concrete rather than speculative and hypothetical." *Thomas*, 220 F.3d at 1139 (citation omitted). *See Sacks* v. *Office of Foreign Asset Control*, 466 F.3d 764, 773 (9th Cir. 2006) (fear of prosecution must be "fairly certain" to provide Article III jurisdiction for pre-enforcement challenge).

The central question in determining whether the injury alleged is "real and concrete" is "whether the plaintiffs face 'a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement . . .." *Thomas*, 220 F.3d at 1139 (citation omitted). "[N]either the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or controversy' requirement." *Ibid.* (citation omitted). "Rather, there must be a 'genuine threat of imminent prosecution.'" *Ibid.* (citation omitted). *See also San Diego County Gun Rights Comm.* v. *Reno*, 98 F.3d 1121, 1127 (9th Cir. 1996) .

In evaluating the genuineness of a claimed threat of prosecution, this Court looks to "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." *Thomas*, 220 F.3d at 1139 (internal quotations omitted). The failure to satisfy any one of those factors can support concluding that a case is not ripe for adjudication, *see Sacks* v. *Office of Foreign Asset Control*, 466 F.3d 764, 773 (9th Cir. 2006), and the overriding consideration is whether the plaintiff has alleged facts sufficient to show a genuine threat of imminent prosecution, *see*, *e.g.*, *Thomas*, 220 F.3d at 1139.

1. Plaintiffs Have Not Alleged a Concrete Plan to Violate the Controlled Substances Act With Sufficient Specificity to Show That They are Likely to Face Either Imminent Prosecution Under the CSA or Imminent Seizure of Any Marijuana.

As the district court properly concluded, plaintiffs have failed to allege enough specific facts regarding their stated intent to violate the Controlled Substances Act to show a "genuine threat of imminent prosecution." *Thomas*, 220 F.3d at 1139 (citation omitted). For example, although plaintiffs alleged that they consume cannabis as part of their "daily worship" and during "sweats" twice a month, plaintiffs have not stated "exactly how, where, in what quantities, and under what circumstances [they] intend to consume cannabis." June 22, 2010 Order at 8-9 (ER 21-22). Likewise, as the district court noted, while plaintiffs allege they supply cannabis by cultivating or "'acquiring it from other churches, caregivers or other state-sanctioned methods,'"

> they do not specify "how much cannabis [they] intend to cultivate or acquire, how they intend to acquire cannabis from other churches, caregivers, or other state-sanctioned methods, whether they will collect 'state-sanctioned' cannabis from various sources so that they end up holding a larger amount than would be 'state-sanctioned,' whether they will use 'state-sanctioned' cannabis for medical or other 'state-sanctioned' purposes only, where they store the cannabis when not using it, and how, how often, in what amounts, and to whom they plan to distribute cannabis."

Id. at 9 (ER 21).

Moreover, plaintiffs' amended complaint also left the district court unable to tell "whether [p]laintiffs merely grow a couple of cannabis plants on church property, or whether Mooney himself then uses the cannabis from those plants while performing his 'daily worship.'" *Ibid.* The absence of specific allegations along the above lines makes it impossible to conclude that plaintiffs face a "genuine threat of imminent prosecution" or other enforcement with respect to the Controlled Substances Act. *See* June 22, 2010 Order at 9-10 (ER 22-23). The government does not have infinite resources available for enforcing the CSA, and what is missing from the complaint is any specific ground upon which a court could reasonably conclude that *these plaintiffs* face any imminent threat of prosecution. Without that kind of showing, plaintiffs' request for declaratory or injunctive relief barring defendants from prosecuting them under the CSA is unripe.

Furthermore, as the district court also properly noted, the fact that the marijuana law enforcement officers seized before it reached plaintiff Mooney has been destroyed, and the police file on that matter has been closed, makes it particularly unlikely that plaintiffs will face arrest or prosecution under the CSA at any time in the near future. *See* October 26, 2010 Order at 3 n.1 (ER 6). *See generally Thomas*, 220 F.3d at 1139 (pre-enforcement challenge ripe only where plaintiff can prove concrete and "imminent" threat of prosecution) (citation omitted).

Plaintiffs also have failed to allege any concrete facts sufficient to show it is likely that defendants will seize any marijuana from them in the imminent future. For example, plaintiffs do not allege that they intend to receive future marijuana shipments by FedEx or by any other means that federal authorities would be likely to interrupt, or that defendants have any concrete plan to target plaintiffs for future marijuana searches and seizures. *See City of Los Angeles* v. *Lyons*, 461 U.S. 95, 105-10 (1983) (prior use of illegal chokehold on plaintiff did not give plaintiff standing to seek injunctive or declaratory relief barring use of chokehold against him in the future). Indeed, plaintiffs do not allege that defendants even knew about this Church or its activities prior to the filing of this suit. *See* June 22, 2010 Order at 21 (ER 34) (noting that plaintiffs do not allege that the government knew or should have known that the cannabis it seized from FedEx was being sent to Mooney for religious purposes). Plaintiffs do not allege that in the 22 months since this case was filed, defendants have taken any enforcement action against them or seized any other marijuana from them, and the mere filing of this suit is not itself a ground upon which the Court could conclude that plaintiffs face an imminent, concrete threat of adverse action relating to their marijuana-related activities. *See*, *e.g.*, *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 664 (1976) (per curiam) (noting that a plaintiff cannot create an Article III case or controversy by coming to the harm).

2. Plaintiffs Do Not Allege That Defendants Have Threatened to Prosecute Them or Seize Any Marijuana From Them.

As the district court properly held, plaintiffs also have failed to allege that defendants have threatened to prosecute them under the CSA or to seize any marijuana from them in the future. *See* June 22, 2010 Order at 10-11 (ER 23-24). *See generally Thomas*, 220 F.3d at 1140 (dismissing pre-enforcement challenge to statute as not ripe because the record was devoid of any threat – generalized or specific – directed toward plaintiffs).

Plaintiffs rely on the fact that in 2009, law enforcement officials seized a single FedEx shipment of marijuana that was addressed to Mooney. As the district court properly recognized, however, that single seizure of marijuana (which has since been destroyed), which occurred 23 months ago, does not show that plaintiffs face an imminent risk of *prosecution* under the Controlled Substances Act. *See* June 22, 2010 Order at 11 (ER 24). *Cf. Sacks* v. *Office of Foreign Asset Control*, 466 F.3d 764, 774 (9th Cir. 2006) (government's past assessment of penalties against plaintiff for violations of restrictions on travel to Iraq did not establish that plaintiff was likely to face future prosecution for violating restrictions on bringing medical supplies to Iraq), *cert. denied*, 549 U.S. 1338 (2007).

As the district court also correctly concluded, that single seizure of marijuana from FedEx also does not show it is likely that defendants will seize any marijuana from plaintiffs in the imminent future. *See* June 22, 2010 Order at 12 (ER 25). *See generally City of Los Angeles* v. *Lyons*, 461 U.S. 95, 105-06 (1983) (prior use of illegal chokehold on plaintiff did not give plaintiff standing to seek injunctive or declaratory relief barring use of chokehold against him in the future). As the court noted, plaintiffs do not allege that they have contracted for, or that they intend to contract for on a date certain, any future shipment of marijuana, nor have they alleged that they "intend to continue bringing in cannabis in a way likely to be noted by federal drug authorities." June 22, 2010 Order at 12 (ER 25). *Cf. Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (noting that mere unspecified intentions to engage in protected activity "some day" do not provide basis for an Article III case or controversy). Moreover, for all we know, that seizure may have resulted from a random sniff search carried out by a law enforcement drug dog – an eventuality that is far too speculative to assume will occur again in the future with respect to any particular party, much less in the immediate future. For all these reasons, therefore, the district court properly held that plaintiffs have not alleged concrete facts establishing that defendants are likely to prosecute them under the CSA or seize any more marijuana from plaintiffs in the imminent future.

3. The "History of Enforcement" of the Controlled Substances Act Does Not Suggest that Plaintiffs Face any Imminent Threat of Enforcement Based on the Allegations Plaintiffs Advance Here.

The district court also correctly held that the history of enforcement of the CSA does not show plaintiffs face any nonspeculative, imminent risk of prosecution under the Act or of having any future drug shipments seized by defendants. As the court observed, the First Amended Complaint "is devoid of allegations as to the enforcement of the statute," June 22, 2010 Order at 13 (ER 26), and "[w]hile this court's own experience is that the Government does prosecute violations of the [CSA], this court is still in no position to guess how frequently cannabis is seized, or how often and under what circumstances cannabis seizures lead to criminal charges, especially when the entity using cannabis identifies himself a church that uses cannabis for religious reasons." *Id.* at 14 (ER 27). Likewise, for reasons already explained, the fact that government officials seized from FedEx one marijuana package that was addressed to Mooney does not prove that any similar seizures will likely follow in the imminent future. *See* p. 19, *supra*. *See also Stormans, Inc.* v. *Selecky*, 586 F.3d 1109, 1125 (9th Cir. 2009) (key inquiry is whether the government is specifically threatening to enforce a statute against plaintiffs or those in plaintiffs' position, not how aggressively the government enforces a statute in general).

Plaintiffs argue that they are likely to be prosecuted under the CSA and have marijuana seized from them because the DEA conducted a raid on another self-described marijuana-using church (THC Ministry), which is located on the Big Island of Hawaii. The district court correctly rejected that argument, however, because plaintiffs failed to describe the circumstances of that raid or to allege "any substantive connection between the two churches" or "how the two churches are similarly situated." June 22, 2010 Order at 12 (ER 25). *Ibid.*[5]

For the above reasons, the district court correctly distinguished *Adult Video Ass'n v. Barr*, 960 F.2d 781, 785 (9th Cir. 1991), *vacated sub nom. Reno v. Adult Video Ass'n*, 509 U.S. 917 (1993), *reinstated in relevant part*, 41 F.3d 503, 504 (9th Cir. 1994), *cert. denied*, 514 U.S. 1112 (1995). There, distributors of sexually explicit video tapes demonstrated a threat of prosecution by pointing to the government's active enforcement of obscenity laws against other videotape distributors. *Adult Video* is distinguishable because, as discussed, plaintiffs have alleged no specific facts showing they are similarly situated to THC Ministry.

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[5] For example, the court noted if THC Ministry "was offering cannabis over the internet and/or at a store to the general public, the alleged religious reason for using cannabis might have been suspect." *Id.* at 12-13 (ER 25-26). *See generally United States* v. *Christie*, 2010 WL 2900371 *6 (D. Haw. July 20, 2010) (noting evidence that the purpose of THC Ministry is "to legalize an otherwise illegal activity by selling marijuana by way of purported 'donations'").

Plaintiffs also cannot prove that their enforcement-related claims are ripe based on *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). In *O Centro*, U.S. Customs Inspectors had specifically threatened a church with prosecution for use of the drug *hoasca*, which is a schedule I controlled substance. *See id.* at 1217. Plaintiffs do not allege they have been subjected to any such threat, or any threat at all. Moreover, as the district court correctly observed, "[t]here is no established history of importation of cannabis analogous to the history in *O Centro*," June 22, 2010 Order at 14 (ER 27), since plaintiffs here allege only one instance of importation. Furthermore, the Supreme Court in *O Centro* did not discuss whether the plaintiffs' pre-enforcement challenge to the CSA in that case was ripe for adjudication. Where an opinion does not specifically address whether a court has jurisdiction, it has no precedential effect regarding that issue. *See Steel Co.*v. *Citizens for a Better Environment*, 523 U.S. 83, 91 (1998) ("drive-by jurisdictional rulings . . . have no precedential effect").[6]

[6] Plaintiffs' reliance on *Church of the Holy Light of the Queen* v. *Mukasey*, 615 F. Supp. 2d 1210 (D. Or. 2009), is unavailing for the same reason; the district court in that case did not address standing or ripeness. Moreover, plaintiffs in that case alleged that their spiritual leader had been previously arrested in connection with a seizure of a controlled substance. Plaintiffs do not allege any prior arrests of themselves or any Oklevueha church member involving religious marijuana use.

B. Plaintiffs' Pre-Enforcement Challenge to the CSA Also Fails to Satisfy the Prudential Component Of the Ripeness Doctrine.

In addition to holding that plaintiffs' pre-enforcement challenge to the CSA does not satisfy the constitutional component of the ripeness doctrine, the district court also held that this claim does not satisfy that doctrine's prudential component. *See* June 22, 2010 Order at 15-19 (ER 28-32). Because both of those components are jurisdictional, the Court could affirm on either ground consistent with *Steel Co*., *supra*, which holds that a court may not assume jurisdiction for the purpose of deciding the merits. *Steel Co.*, 523 U.S. at 94. *See Sinochem Int'l Co.* v. *Malay. Int'l Shipping Corp.*, 127 S. Ct. 1184, 1191 (2007) (noting that a court may "chose among threshold grounds for denying audience to a case on the merits") (citation omitted).

If the Court chooses to address the ripeness doctrine's prudential component, it will find that it is not satisfied here. As this Court explained in *Thomas*, the prudential component of the ripeness doctrine is "guided by two overarching considerations: the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Thomas*, 220 F.3d at 1141 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). Both considerations establish that plaintiffs' enforcement claims are not ripe.

1. Plaintiffs' Pre-Enforcement Challenge to the CSA is not Fit for Judicial Consideration.

The district court held that plaintiffs' pre-enforcement challenge to the CSA is not fit for judicial consideration under the ripeness doctrine's prudential component for the same reasons plaintiffs' pre-enforcement claims fail that doctrine's constitutional component: plaintiffs have not alleged any specific and concrete facts showing that it is likely that defendants will prosecute them under the CSA or seize any more drugs from them in the imminent future. *See* June 22, 2010 Order at 15 (ER 28). With respect to prudential ripeness, the court also noted that because of the lack of specificity in their claims, plaintiffs can be considered essentially to be seeking "a broad declaration that they can grow, use, possess, and distribute cannabis in any way they choose free of criminal or civil repercussions under the [CSA]," *id.* at 16-17 (ER 29-30) – a fact that confirms the extreme fatuity of their case on the merits. Plaintiffs do not address prudential ripeness in their opening appeal brief, and the district court's above reasoning is manifestly valid.[7]

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[7] In its discussion of prudential standing, the district court also concluded that the Church lacks standing to raise the claims of its members. *See* June 22, 2010 Order at 17 (ER 30). As the court noted, "[a] general averment that Oklevueha's members use, possess, cultivate, and distribute marijuana is insufficient to establish standing regarding each individual member's free exercise of religion." *Ibid.* Plaintiffs do not challenge that ruling in their opening brief on appeal, and thus have forfeited any argument regarding that issue.

Although the Court need not reach this issue in order to affirm, it also could conclude that plaintiffs' request for declaratory or injunctive relief barring defendants from prosecuting them under the CSA is not fit for judicial review because plaintiffs have failed to exhaust their administrative remedies in that regard.[8] While the text of RFRA does not expressly require exhaustion, courts have discretion to require plaintiffs to resort to administrative remedies before seeking relief under RFRA. *See McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) ("[W]here Congress has not clearly required exhaustion [by statute], sound judicial discretion governs."); *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).

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[8] The district court did not address that argument, but this Court can affirm on any ground that is fairly supported by the record. *See*, *e.g.*, *Thompson* v. *Paul*, 547 F.3d 1055, 1058-59 (9th Cir. 2008)

As noted above, any person may file an administrative claim requesting an exception to the application of any provision of the CSA and its regulations. *See* pp. 4-5, *supra*. Plaintiffs have failed to do so, and that failure makes this case unfit for judicial resolution. Requiring plaintiffs to exhaust their administrative remedies would serve each of the purposes for which the courts require such exhaustion. *See generally McCarthy*, 503 U.S. at 145; *Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1223 (9th Cir. 1987), *cert. dismissed*, 488 U.S. 935 (1988). First, requiring plaintiffs to exhaust their administrative remedies would allow the DEA to apply its considerable expertise in the area of narcotics to plaintiffs' wish to be free to use marijuana for religious purposes. Second, requiring administrative exhaustion could moot this case, if the DEA were to allow plaintiff's administrative claim. *See Fones4All Corp.* v. *FCC*, 550 F.3d 811, 818 (9th Cir. 2008) (plaintiff required to exhaust administrative remedies despite argument that exhaustion would be futile because agency had not committed to denial of administrative claim and record did not show that administrative claim would necessarily be denied). Third, even if the DEA were to deny plaintiffs' request for administrative relief, requiring administrative exhaustion would help build a record for judicial review of the RFRA claims. *See Barnes v. Briley*, 420 F.3d 673, 677 (7th Cir. 2005) (noting that resort to the administrative process may avoid litigation and "may reduce the dispute to one that can be resolved amicably").

2. Especially in Light of Their Failure to Exhaust Their Administrative Remedies, Plaintiffs Cannot Show That This Court Must Hear This Suit To Prevent Them From Experiencing Undue Hardship.

Because plaintiffs have failed to allege an immediate threat of prosecution or future seizure of marijuana, the district court held that dismissing their enforcement challenge to the CSA as unripe would not cause plaintiffs any undue hardship. *See* June 22, 2010 Order at 18 (ER 31). *See generally Thomas*, 220 F.3d at 1142 ("the absence of any real or imminent threat of enforcement, particularly criminal enforcement, seriously undermines any claim of hardship"). Plaintiffs devote a large portion of their brief to a discussion of alleged burdens they bear as a result of governmental action that has yet to occur, Appellants' Brief at 24-32, but as explained above, they have failed allege facts showing an imminent threat of enforcement of the CSA against them. Plaintiffs' claim of hardship also is particularly weak with respect to their request for declaratory and injunctive relief barring future *prosecution* under the CSA, given that "adequate procedures exist for the vindication of [plaintiffs'] claims." *Am.-Arab Anti-Discrimination Comm.*, 970 F.2d at 511-12. *See* p. 27, *supra* (discussing plaintiffs' failure to exhaust their administrative remedies). For all the above reasons, therefore, plaintiffs fail to satisfy the prudential component of the ripeness doctrine.

II. THIS COURT ALSO LACKS JURISDICTION TO ORDER DEFENDANTS TO RETURN THE MARIJUANA THAT WAS SEIZED FROM FEDEX, TO COMPENSATE PLAINTIFFS FOR THE LOSS OF THAT MARIJUANA, OR TO PROVIDE PLAINTIFFS WITH SUBSTITUTE MARIJUANA.

In addition to their request for declaratory and injunctive relief barring defendants from prosecuting them or seizing marijuana from them, plaintiffs also seek return of, or compensation for, the single marijuana shipment law enforcement officials seized from FedEx. The district court properly dismissed those claims for lack of jurisdiction.

A. Plaintiffs Lack Standing To Seek Return Of The Marijuana Seized from FedEx Because It Has Been Destroyed.

For a plaintiff to have standing, he must have suffered an injury that will be redressed by a favorable decision. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 181 (2000). As the district court correctly held, plaintiffs' request for return of the marijuana that was seized from Federal Express is not redressable because that marijuana was destroyed by the Honolulu Police Department on September 15, 2009, prior to plaintiffs' request (in their First Amended Complaint) that it be returned. *See* October 26, 2010 Order at 4-5 (ER 7-8). *See also* Honolulu Police Department Report No. 09-207-731, Exhibit A to Defendants Motion to Dismiss for Lack of Jurisdiction, R40-2 (SER 3).

Plaintiffs do not directly challenge the district court's holding in that regard, which is fully supported by the facts and the case law. *See Armendariz-Mata v. DEA*, 82 F.3d 679, 682 (5th Cir. 1996) (rejecting plaintiff's prayer for return of certain property because "[a]ll the property has . . . been destroyed . . . and cannot be returned"), *cert. denied*, 519 U.S. 937 (1996); *United States v. Redd*, 2007 WL 4276408 at *2 (E.D. Va. Dec. 3, 2007) ("Given that the Government destroyed Defendant's property, the [item] is obviously no longer in the Government's possession, and the Court cannot order the Government to return it."); *cf. G.M. Leasing Corp. v. United States*, 429 U.S. 338, 359 (1977) (acknowledging that, because the photocopies in question had been destroyed by the government, they could not be returned).

B. Plaintiffs' Request For Monetary Compensation Is Barred By Sovereign Immunity.

The district court also properly concluded that plaintiffs' request for compensation for the marijuana law enforcement officials seized from Fed Ex is barred by the doctrine of sovereign immunity. *See* October 26, 2010 Order at 5-8 (ER 8-11). Plaintiff has not specifically challenged the district court's holding or reasoning in that regard on appeal, and the Court therefore should consider plaintiffs as having forfeited any such challenge. *See*, *e.g.*, *Rodriquez* v. *Hayes*, 591 F.3d 1105, 1118 n.6 (9th Cir. 2010).

If the Court were to consider plaintiffs' request for compensation, however, it would find that the district court correctly rejected it for lack of jurisdiction. Sovereign immunity bars claims against the United States and federal employees sued in their official capacities unless the United States has waived its immunity. *See Hawaii v. Gordon,* 373 U.S. 57, 58 (1963); *Balser v. Dept/ of Justice, Office of the U.S. Trustee*, 327 F.3d 903, 907 (9th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004). Any waiver of sovereign immunity must be unequivocally expressed in statutory text. *See*, *e.g.*, *Lane v. Pena*, 518 U.S. 187, 192 (1996); *United States v. Mitchell*, 445 U.S. 535, 538 (1980).[9]

Plaintiffs have identified no statutory waiver of the United States' sovereign immunity for the compensation they seek here. As noted above, plaintiffs' First Amended Complaint attempted to state a claim for conversion under the Federal Tort Claims Act, but the district court properly dismissed that claim pursuant to one of the FTCA's express statutory exceptions, and plaintiffs do not challenge that ruling in this appeal. *See* p. 9 n.2, *supra*.

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[9] The existence of sovereign immunity is a jurisdictional question; if immunity has not been waived, the court must dismiss for lack of subject matter jurisdiction a claim for monetary relief against the government. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994).

Plaintiffs also invoke the Religious Freedom Restoration Act in this case, but as the district court correctly held, RFRA does not waive the United States' sovereign immunity for damages. *See* October 26, 2010 Order at 6-8 (ER 9-11). RFRA authorizes courts to award "appropriate relief" for violations of that statute, 42 U.S.C. 2000bb-1(c) (2006), but that language does not constitute an express waiver of the United States' sovereign immunity. *See ibid.* (citing, *e.g.*, *Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006)). Moreover, in a decision rendered after the district court entered judgment in this case, the Supreme Court held that the same "appropriate relief" language in the Religious Land Use and Institutionalized Persons Act (RLUIPA), which was taken from RFRA, is not clear enough to constitute a waiver of sovereign immunity. *See Sossamon* v. *Texas*, 131 S. Ct. 1651 (2011). Thus, *Sossamon* confirms that RFRA does not waive the United States' sovereign immunity with respect to damages.

C. Plaintiffs' Request That Defendants Provide Them With Substitute Marijuana Also Is Not Redressable.

Finally, plaintiffs lack standing to demand that defendants provide them with substitute marijuana to replace the marijuana law enforcement officials seized from FedEx because that claim also is not redressable.

As the district court correctly noted, defendants cannot return the marijuana law enforcement officials seized from FedEx because that marijuana was destroyed (by the Honolulu Police Department) in the routine course of affairs, prior to plaintiffs' request that it be returned. *See* p. 10, *supra*. Plaintiffs do not specifically challenge that ruling on appeal.

Plaintiffs argued below that defendants could give them meaningful relief in that regard by providing them with marijuana from the "ready supply of cannabis" plaintiffs allege the government holds. October 26, 2010 Order at 8, p.8 (ER 11). The district court properly rejected that argument, however, because "not all cannabis is the same," *ibid.*,[10] and because the seized cannabis was not tested or weighed before it was destroyed. *See id.* at 8-9 (ER 11-12). As a result, the court noted, to award substitute cannabis would not be "feasible," since there would be no way to determine what type and amount of cannabis would serve as a proper "substitute" for the cannabis seized. *See ibid.* Plaintiffs also do not challenge this ruling or the district court's reasoning on appeal.

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[10] For example, the court noted, "[i]t may be that certain parts of the cannabis plant are of a higher quality than other parts of the same plant, or that cannabis from certain regions may be more or less potent or desirable than cannabis from elsewhere." October 26, 2010 Order at 8, p. 2 (ER 11).

Finally, the district court correctly noted that it lacked the authority to order defendants to purchase substitute marijuana because "[t]o hold otherwise would allow a plaintiff to get around the sovereign immunity bar by simply requesting that the government pay for items instead of providing direct money damages." October 26, 2010 Order at 9 (ER 12). The case law supports the district court's ruling. *See generally Dep't of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 262-63 (1999) (court lacked jurisdiction to grant plaintiff's request for an equitable lien because it was essentially a request for compensation to substitute for a loss, and therefore should be treated as a request for money damages, for which there had been no waiver of sovereign immunity); *Clow* v. *U.S. Dep't of Hous. & Urban Dev.*, 948 F.2d 614, 623-25 (9th Cir. 1991) (O'Scannlain, J., dissenting) (claim for a replacement home was equivalent to a claim for money damages for purposes of sovereign immunity analysis).[11] Moreover, plaintiffs had conceded that they were not asking defendants to go out and purchase substitute cannabis, so the claim is not properly preserved in any event. *See ibid.* For all the above reasons, therefore, the district court correctly held that it lacked jurisdiction to grant plaintiffs any meaningful relief concerning their request to have the seized marijuana returned, or substitute marijuana provided.

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[11] The majority in *Clow* did not reach the sovereign immunity issue because the majority assumed jurisdiction in order to reach the merits. *See* 948 F.2d at 616.

III. THIS COURT ALSO COULD AFFIRM BECAUSE PLAINTIFFS' CLAIMS FAIL TO STATE A CLAIM UNDER RULE 12(b)(6).

Because the district court lacked jurisdiction to grant plaintiffs relief on any of their claims, the court did not address the merits of plaintiffs' claims, and this Court should not either. *See Steel Co.*, 523 U.S. at 94. If the Court were to reach the merits, however, it would find that none of plaintiffs' claims state a claim upon which relief can be granted. *See generally Thompson* v. *Paul*, 547 F.3d 1055, 1058-59 (9th Cir. 2008)(noting that the court can affirm on any ground supported by the record).[12]

A. Plaintiffs Cannot State a Claim under the Religious Freedom Restoration Act.

RFRA provides that "Government shall not substantially burden a person's exercise of religion" unless it "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling government interest." 42 U.S.C. 2000bb-1(a) - (b) (2006).

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[12] Defendants raised a number of merits-related arguments in the district court in addition to the points we discuss below. For example, we noted, it is not at all clear that plaintiffs are engaged in bona fide religious activity, *see* Amended Complaint, p. 2 (SER 5) (noting that the church exists only to use entheogens), or that defendants have substantially burdened plaintiffs' purported religious exercise, *see id.* ¶ 25 (SER 10)(noting that marijuana is only one of a host of drugs plaintiffs "honor and embrace[]"). Any such arguments not fully explained in this brief would continue to be pursued below, if the Court for some reason were to remand.

1. Plaintiffs Cannot Prove a Substantial Burden on the Free Exercise of Religion With Respect to Their Pre-Enforcement Challenge to the CSA.

As explained above, there is an administrative process available by which plaintiffs can request an exemption from the restrictions on marijuana set out by the Controlled Substances Act. *See* pp. 4-5, *supra*. Where, as here, plaintiffs have failed to exhaust their administrative remedies, they cannot argue that *defendants* have substantially burdened their free exercise of religion.

2. The Government Has A Compelling Interest In Regulating Marijuana.

Every court to have addressed the issue has recognized that the government's regulation of marijuana under the Controlled Substances Act is the least restrictive means of accomplishing a compelling interest. *See, e.g.*, *United States v. Israel*, 317 F.3d 768, 772 (7th Cir. 2003); *United States v. Greene*, 892 F.2d 453 (6th Cir. 1989), *cert. denied*, 494 U.S. 935 (1990); *Olsen v. DEA*, 878 F.2d 1458, 1463 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 906 (1989); *United States v. Rush*, 738 F.2d 497, 512 (1st Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985); *United States v. Middleton*, 690 F.2d 820 (11th Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983).

Plaintiffs argue that the government lacks a compelling interest to enforce the CSA against them because they are members of the Native American Church (NAC) who are permitted to use peyote, another Schedule I controlled substance, pursuant to a statutory exemption. *See* 42 U.S.C. 1996a(b)(1).[13] The courts have rejected this kind of argument, however, among other reasons because of "the vast difference in demand for marijuana on the one hand and peyote on the other." *Olsen*, 878 F.2d at 1463-64 (noting "the immensity of the marijuana control problem in the United States"). *See also Rush*, 738 F.2d at 513 (noting that the peyote exemption has "minimal impact on the enforcement" of the CSA regarding peyote in general).

Plaintiffs also argue that *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006), entitles them to a religious exemption to the CSA's regulation of marijuana, but that is not the case. In *O Centro*, the Supreme Court rejected the government's argument that it necessarily has a compelling interest in regulating the religious use of a Schedule I substance in any particular case simply because the substance is listed in Schedule I. *See id.* at 1221.

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[13] The above statute provides that "[n]otwithstanding any other provision of law, the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful, and shall not be prohibited by the United States or any State." 42 U.S.C. 1996a(b)(1).

As noted above, cases decided prior to *O Centro* rejected requests for religious exemptions to the federal marijuana laws based not only on Congress's identification of marijuana as a Schedule I controlled substance, but also based on *facts* showing the immensity of the marijuana problem in the United States. *See Olsen*, 878 F.2d at 1463-64. *See also Israel*, 317 F.3d at 771 (noting "there is ample medical evidence establishing the fact that the excessive use of marijuana often times leads to the use of stronger drugs such as heroin and crack cocaine"). Moreover, *O Centro* itself specifically noted the "thinness of any market" for the Schedule I substance that was at issue in that case (hoasca), *O Centro*, 546 U.S. at 426, and, as the Tenth Circuit pointed out in *O Centro*, the market for marijuana is far greater than it is for hoasca. *See O Centro Espirita Beneficiente Uniao Do Vegetal* v. *Ashcroft*, 342 F.3d 1170, 1185 (10th Cir. 2003) (distinguishing marijuana from hoasca on that basis), *aff'd and remanded*, 546 U.S. 418 (2006). *See also Multi Denominational Ministry of Cannabis and Rastafari, Inc.* v. *Mukasey*, 2008 WL 914448 *5 (N.D. Cal. 2008) (noting that the "threat of diversion of plaintiffs' [alleged religious use of marijuana as a] sacrament into black markets is high"), *aff'd*, 2010 WL 547578 (9th Cir. 2010) (Mem.). For all the above reasons, therefore, the restrictions on marijuana contained in the CSA are the least restrictive means to accomplish compelling government interests, even as applied to plaintiffs' purported religious uses.

B. Plaintiffs Also Cannot State a Claim Under the Free Exercise Clause, the American Indian Religious Freedom Act, or the Equal Protection Clause.

In the district court, defendants explained why plaintiffs cannot state a claim under the Free Exercise Clause, the American Indian Religious Freedom Act, or the Equal Protection Clause. *See* Defendants' Memorandum in Support of Motion to Dismiss (R28-2), pp. 26-31. In their Reply to Plaintiffs' Response to that Motion, defendants also pointed out that plaintiffs had failed to respond to any of those arguments. *See* Defendants' Reply In Support of Motion to Dismiss (R33), at pp. 13-14. As a result, if the Court were to reach the merits in this appeal, it should conclude that plaintiffs have forfeited those claims. *See*, *e.g.*, *United States* v. *Flores-Montano*, 424 F.3d 1044, 1047 (9th Cir. 2005). Plaintiffs also do not advance any specific arguments related to any of those claims in their opening appeal brief, and those claims are patently meritless in any event.

For example, the Free Exercise Clause is implicated only by laws that are aimed at religion. *See Employment Div.* v. *Smith*, 494 U.S. 872, 879 (1990). The CSA is a valid law of general applicability, *see*, *e.g.*, *Olson* v. *Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 2178 (2009), and as noted above, defendants did not know of plaintiffs' intended religious use of the marijuana defendants seized from FedEx before this suit was filed. *See* p. 19, *supra*.

The American Indian Religious Freedom Act 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. This statute 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. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 455 (1987); *United States* v. *Mitchell*, 502 F.3d 931, 949 (9th Cir. 2007), *cert. denied*, 553 U.S. 1094 (2008).

Finally, plaintiffs cannot state a claim under the Equal Protection Clause because government action that does not violate the Free Exercise Clause also does not burden religious rights for purposes of equal protection analysis. *See Droz* v. *Comm'r*, 48 F.3d 1120, 1125 (9th Cir. 1995), *cert. denied*, 516 U.S. 1042 (1996). Moreover, the distinctions between marijuana and peyote in the CSA serve compelling interests. *See* pp. 37-39, *supra*.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed on the ground that the district lacked jurisdiction over them, or, in the alternative, because they fail to state a claim.

Respectfully submitted,

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[14] The Department of Justice gratefully wishes to acknowledge the assistance of a student intern, Devin Anderson, in the preparation of this brief.

STATEMENT OF RELATED CASES

Counsel are aware of no related cases within the meaning of Ninth Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), I hereby certify that the attached Brief for Appellees is proportionally spaced, in 14-point Times New Roman font, and contains 9630 words, excluding sections that need not be counted under Rule 32, according to the word count provided by this office's word processing system.

S/Lowell V. Sturgill Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May, 2011, I filed the foregoing Brief for Appellees by use of the Ninth Circuit's CM/ECF system. A copy of the Brief will be served electronically by that system on counsel listed below:

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