

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 14-15143

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

Appellants,

v.

ERIC H. HOLDER, JR. as U.S. Attorney General;  
MICHELE LEONHART, as Acting Administrator of the  
U.S. Drug Enforcement Administration;  
EDWARD H. KUBO, JR., as U.S. Attorney for the District of Hawaii,

Appellees,

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**MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI  
CURIAE THE NATIONAL COUNCIL OF NATIVE AMERICAN  
CHURCHES, THE NATIVE AMERICAN CHURCH OF NORTH  
AMERICA, THE AZEE' BEE NAHAGHA OF DINE NATION, THE  
NATIVE AMERICAN CHURCH, STATE OF OKLAHOMA, AND  
THE NATIVE AMERICAN CHURCH, STATE OF SOUTH DAKOTA,  
IN SUPPORT OF APPELLEES**

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## **AUTHORITY TO FILE**

Pursuant to Fed. R. App. P. 29(b) and Cir. R. 29-3, the *Amici Curiae* Native American Church (“NAC”) organizations respectfully request leave to file the accompanying brief in support of the federal Appellees. Via email correspondence on July 11, 2014, legal counsel for the proposed *Amici* endeavored to obtain the consent of all parties to the filing of the brief. While the federal Appellees consented, the Appellants did not.

## **IDENTITY AND INTEREST OF AMICI CURIAE**

The *amici* organizations filing this brief in support of the Appellees, the United States officials named in their official capacities, include the National Council of Native American Churches, the Native American Church of North America, the Azee' Bee Nahagha of Dine Nation, the Native American Church, State of Oklahoma, and the Native American Church, State of South Dakota. Collectively, these groups and their member organizations represent hundreds of member chapters, and the vast majority of NAC members throughout the United States and Canada.

*Amicus* the National Council of Native American Churches was formed in the early 1990s by the other *amici* parties to this brief, to create a coordinated effort to overturn *Employment Div. v. Smith*, 494 U.S. 872 (1990), a decision that severely limited the religious freedom of Native

Americans who practice the peyote religion. The National Council was successful in its efforts with the enactment in 1994 of the American Indian Religious Freedom Act Amendments, 42 U.S.C. 1996a. Since the early 1990s the National Council and the other *Amici* have continued to work together on national matters involving law and policy affecting the Peyote Religion.

*Amicus* the Native American Church of North America (“NACNA”) was incorporated under articles filed in the State of Oklahoma on April 17, 1950, as amended in 1955. In this capacity, the NACNA is the national representative of chapters of the Native American Church in two dozen states in the United States, and chapters in several provinces in Canada, representing thousands of Native American people who practice the Peyote Religion. The Peyote Religion centers around the sacramental ingestion of peyote, a plant that is indigenous to North and South America. Taken in highly ritualized ceremonies, under the direction of a spiritual leader known as a ‘Roadman’, the peyote sacrament promotes a set of clearly articulated religious values, including morality, sobriety, industry, charity, right living, self-respect, brotherly love, and union among Indian tribes.

*Amicus* the Azee' Bee Nahagha of Dine Nation (“ABNDN”) began in 1966, and was formally incorporated under the laws of the State of New

Mexico in 1972. The organization was formed to foster, promote, protect, and preserve the teaching of Hina'a'h Azee' (peyote) following the principles of Nitsa'ha'kees, Nahat'a', Iina', and Sihasin; enhance self-reliance, self-respect, sobriety, charity, rightful living and work for unity in the meaningful use Hina'a'h Azee' (peyote) in a bona fide Azee' Bee Nahagha'; and to advocate, support, sustain, and conduct traditional healing that cultivate mental and social well-being, seek harmony, balance, and strive for the common goods. ABNDN Articles of Incorporation, Sections 2.1, 2.2, and 2.3. ABNDN membership is authorized and protected by Navajo constitutional, Federal statutory and constitutional, and state (New Mexico, Utah and Arizona) statutory and constitutional law. ABNDN was formerly organized under the name the Native American Church of Navajoland.

*Amicus* the Native American Church, State of Oklahoma, was formed under articles of incorporation filed with the State of Oklahoma on October 10, 1918. As is the case with NACNA and ABNDN, NAC of Oklahoma was formed to foster and promote the religious belief of the several tribes of the State of Oklahoma with the practice of the Peyote Sacrament as commonly understood and used among the adherents of this religion in the several tribes of the State of Oklahoma, and to teach the Peyote religion with morality, sobriety, industry, kindly charity and right living and to cultivate a spirit of

self-respect and brotherly union among the members of the Native Race of Indians. Article II, 1918 Articles of Incorporation. NAC of Oklahoma consists of over 20 affiliated chapters statewide. The chapters tend to their own affairs but coordinate broader legal and policy concerns with the statewide organization and, nationally, through the National Council of Native American Churches.

*Amicus* the Native American Church, State of South Dakota was incorporated under the laws of the State of South Dakota in 1924. By 1930 there were eleven NAC chapters incorporated statewide. The stated purpose of the organization is the promotion of morality, sobriety, industry, charity, right living and the cultivation of a Spirit of self-respect, brotherly love and union among its membership ... and belief in an Almighty God and declare full, complete and everlasting faith in our church, through which we worship for religion and the protection of the sacramental use of Peyote.

The *Amici*'s interest is ensuring that their members are able to practice their religion free from discrimination or legal obstacle. The *Amici* are also interested in ensuring that their organizations, chapters and the Peyote Religion are represented accurately in legal proceedings and that cases invoking the interests of the NAC, like the one before the Court, are decided in a manner consistent with federal laws recognizing and protecting the use

of peyote by Native Americans within the NAC. The District Court in this case referenced “NACNA” several times in its opinion, noting that plaintiffs below had failed to explain their relationship with this organization and had also failed to explain the difference or similarity between their own claims and the religion of the NAC. NACNA and the other *Amici* organizations submit this brief in effort to provide the court with information relevant to its disposition of the case.

### **RELEVANCE TO THE DISPOSITION OF THIS CASE**

*Amici* NAC organizations respectfully submit that the filing of the accompanying brief in support of Appellees is relevant to the disposition of this case. The brief is intended to provide specialized expertise and perspectives regarding the history the NAC, including the origins and purpose of legal protections for the sacramental use of peyote by the Native American Church, that should be of assistance to the Court in considering this case. As the District Court noted, the district court’s opinion notes that Oklevueha and Mooney allege that their use of marijuana is protected by their relationship with the “Native American Church,” a relationship that is not substantiated by the record. Oklevueha and Mooney make similar arguments in their opening brief before this court.

Urging affirmance, this brief explains clearly that the religion of the Native American Church neither requires nor permits the use of marijuana for religious purposes, and that never once in its long history of advocacy for religious liberties have the *Amici* NAC organizations sought legal protection for the use of marijuana. Further, this brief explains that the *Amici* NAC organizations do not recognize the Oklevueha Church of Hawaii, Inc., as a chapter, nor do they recognize Mr. Mooney as a member of a legitimate chapter of the Native American Church. To the extent that the claims of Oklevueha or Mr. Mooney rest on allegations or inferences of an affiliation with the *Amici* NAC organizations or with any legitimate chapter of the Native American Church, they should be rejected.

These arguments are intended to supplement, without repetition, those articulated in the Appellees' response brief. Accordingly, the *Amici* NAC organizations respectfully move for leave to file the accompanying brief in support of Appellees.

DATED this 25<sup>th</sup> day of July, 2014.

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 25, 2014, I electronically filed the foregoing Motion for Leave to File Brief *Amici Curiae* and Brief *Amici Curiae* with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the Court's CM/ECF system. I further certify that all parties are represented by counsel registered with the CM/ECF system, so that service will be accomplished by the CM/ECF system.

BY: /s/ Kristen A. Carpenter

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**BRIEF OF AMICI CURIAE THE NATIONAL COUNCIL OF NATIVE  
AMERICAN CHURCHES, THE NATIVE AMERICAN CHURCH OF  
NORTH AMERICA, THE AZEE' BEE NAHAGHA OF DINE NATION,  
THE NATIVE AMERICAN CHURCH, STATE OF OKLAHOMA, AND  
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IN SUPPORT OF APPELLEES**

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned states that *Amici Curiae*, the National Council of Native American Churches, the Native American Church of North America, the Azee' Bee Nahagha of Dine Nation, the Native American Church, State of Oklahoma, and the Native American Church, State of South Dakota are not corporations that issue stock or that have parent corporations that issue stock.

/s/ Kristen A. Carpenter  
Counsel for the *Amici Curiae*

July 25, 2014

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## **ARGUMENT**

Peyote is a small, spineless cactus indigenous to Mexico and Texas, used as a religious sacrament by American Indians. With ancient origins among the indigenous peoples of Mexico, Peyote Religion spread to the Native American tribes of the U.S. prior to the 19<sup>th</sup> century. *See* Thomas C. Maroukis, *The Peyote Road: Religious Freedom and the Native American Church* 21-3 (2010). Beginning in 1918, practitioners of the Peyote Religion incorporated into chapters of the Native American Church (“NAC”), and many chapters later affiliated with several national umbrella groups, including *Amici* organizations and affiliated chapters represented herein.<sup>1</sup> Today, across the country, there are over 300,000 Native Americans who are NAC members and for whom the ritual harvest and ceremonial ingestion of peyote serve as the central sacrament of a religion devoted to maintaining strong families and communities, traditional Indian culture, sobriety, and other spiritual values. Accordingly, the NAC is recognized and studied as a significant world religion by scholars. *See* Sam Gill, *Native American Religions*, in Jacob Neusner, ed., *World Religions in America* 22-23 (4th ed. 2009).

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<sup>1</sup> One of the purposes of this brief is to clarify relevant terminology relationships. Consistent with community and scholarly norms, this brief uses the terms Peyote Religion and Native American Church (“NAC”) interchangeably to describe the religious beliefs and practices of the members of these organizations. To *Amici*’s knowledge, Appellants are not affiliated with any legitimate organization of the Peyote Religion or NAC.

The current vitality of the Peyote Religion belies a long legal struggle for the freedom to worship. When a number of states and the federal government classified peyote as a controlled substance in the 19th and 20th centuries, many Native Americans faced criminal prosecution for participating in their religion. In 1990, the U.S. Supreme Court held that the First Amendment did not prevent the State of Oregon from denying unemployment benefits to two individuals fired from their jobs for using peyote in NAC ceremonies. *See Employment Div.*, 494 U.S. 872. Following *Smith*, *Amici* NAC organizations and others advocated for legislation to protect their religious freedom, leading to the passage of the Religious Freedom Restoration Act of 1993 (“RFRA”) and the American Indian Religious Freedom Act Amendments of 1994 (“AIRFA Amendments”). The AIRFA Amendments recognize the right of members of federally recognized Indian tribes to possess and use peyote in conjunction with the practice of a traditional Indian religion.

In an effort to invoke this history of religious persecution and accommodation for their own purposes, Appellants in this case, the Oklevueha Native American Church of Hawaii, Inc., and Michael Rex “Raging Bear” Mooney, represent themselves as affiliated with the NAC. The Appellants here invoke the “NAC” name, history, and religious practices, all in support of their claims regarding marijuana, *see* App. Br. 4-7, 20-33, much as they did below. *See*

*Oklevueha Native American Church of Hawaii, Inc. v. Holder*, No. 09-00336, 2013 WL 6892914, at \*2, 8 (D. Hawaii Dec. 31, 2013). As the District Court noted, however, the record contains no evidence of a relationship with the NAC generally, nor with the NACNA in particular, and mere use of the “NAC” name does not entitle Appellants to the claimed legal exemptions. *See id.* at \*2, 11.

*Amici* NAC organizations do not recognize Oklevueha as a chapter, nor does it recognize Mr. Mooney as a member. In addition, *Amici* organizations do not recognize, condone, or allow the religious use of marijuana, or any other substance other than peyote, in any of its religious services. To the contrary, the only plant that serves as a sacrament in the NAC is peyote, and without peyote, the NAC services could not take place. The *Amici* organizations fully reject Appellants’ contention that marijuana serves as a substitute for peyote in services of any Native American Church.

Similarly, the AIRFA Amendments do not apply in this case. The statute expressly and exclusively provides an exemption to federal and state drug laws for members of federally-recognized Indian tribes who use peyote in traditional Indian religious practices. Mr. Mooney is, by his own admission, not a member of a federally-recognized tribe, and in this case, neither he nor Oklevueha seeks legal protection for the use of peyote. The AIRFA Amendments do not apply in a case like this one where an individual who is not a member of a federally recognized

tribe seeks legal protection for the possession, use, and distribution of marijuana.

Preserving the narrowly-tailored exemptions contained in the AIRFA Amendments, achieved through a long and hard-fought legal struggle, is of the utmost importance to the *Amici* organizations, which are deeply concerned about Appellants' attempts to distort and manipulate the Peyote Religion for their own benefit in the present case. As the Court considers Appellants' claim for a legal right to use marijuana pursuant to the legal exemptions for religious use of peyote, it is important to note that never, in the long history of the struggle for religious freedom, have members of the *Amici* NAC organizations, or their constituent members, sought legal protection for the religious use of marijuana. This is because, as described above, the Peyote Religion does not recognize marijuana as a religious sacrament.

*Amici* organizations take no position on Appellants' claims that their use of marijuana is protected by RFRA, except to agree with the government that RFRA requires appellants to demonstrate a substantially burden on the free exercise of "religion," and to note that the District Court held Appellants' had failed to demonstrate any such burden. *Amici* organizations do, however, oppose Appellants' argument that federal laws protecting the religious right to use peyote in Native American Church services, most notably the AIRFA Amendments, protect Appellants' use of marijuana. Moreover, to the extent that Appellants'

claims for a legal right to use marijuana rely on the allegation of an affiliation with the *Amici* organizations or any legitimate Native American Church, these claims should be rejected and the holding of the District Court should be affirmed.

**I. The Peyote Religion Centers around the Sacramental Use of Peyote and Does Not Substitute Marijuana for Peyote.**

Appellants argue that peyote is no different from marijuana in that both can be classified as “entheogens” and thereby serve as a sacrament in the Peyote Religion. Yet, historical and anthropological research suggests otherwise. For thousands of years, indigenous peoples have been using peyote, a plant indigenous to the Americas, in their religious ceremonies. It is this religion which is protected by federal law today. There is no role for marijuana, much less as a sacrament, in the Peyote Religion.

**A. Indigenous Peoples have been Using Peyote in Religious Ceremonies for Thousands of Years.**

According to scholars, “the Native American deification of the plant is estimated to be about 10,000 years old.” Jay C. Fikes, A Brief History of the Peyote Religion, in Houston Smith and Reuben Snake, eds., *One Nation Under God* 167 (1985). Peyote may have been used by the Aztecs in 8000 B.C. and the Huichol and Tarahumara Indians of Northern Mexico in 1600 B.C. *See id.*; *see also* Maroukis, *supra*, at 14-20. To this very day, Huichol healers and singers



achieve ... union with their Creator, as incarnated in Peyote,” Fikes at 167. In this indigenous belief system, the Creator sacrificed himself and came back as peyote to aid humans in their healing, confessions, and hunting practices. *Id.*

The Peyote Religion may have spread to North America as early as the 17<sup>th</sup> century, with evidence of religious use (and persecution by the Spanish) by Pueblo people. Carrizo and Apache groups likely brought the Peyote Religion to United States tribes in the Plains region. *See* Maroukis, *supra*, at 22-23. By the 1860-70’s, the Peyote Religion was beginning to flourish among the Kiowas, Apaches, and Comanches. *See* Maroukis, *supra*, at 23–24. As documented in the 1880’s, the Kiowa people told a creation story in which peyote played a central role, and practiced rituals around the ceremonial ingestion of peyote that closely resemble today’s peyote services. *See* Omer C. Stewart, *Peyote Religion: A History* 36-40 (1987). There are a number of features, such as the all-night duration of the ceremony, use of the sacred number four, and cleansing power of fire and smoke, that link ancient indigenous religions with the contemporary practices of the Peyote Religion. *Id.* at 41. The “most significant of all is the ancient persistent belief in the supernatural power of the peyote plant.” *Id.*

Practitioners of the Peyote Religion do not hold these beliefs about marijuana. Accordingly, the NACNA cannot agree with Appellants’ claim that the use of marijuana by Appellants has anything to do with the Peyote Religion

as practiced by over 300,000 members of the NAC.

**B. Services of the Native American Church Are Highly Structured, Revolve Around the Sacrament of Peyote, and Promote a Defined Set of Religious Values.**

Appellants' claims regarding cannabis depart quite starkly from the religious beliefs and practices of the NACNA regarding peyote. By their own description, Appellants' use of entheogens does not appear to be geared toward any particular or identifiable set of religious values. Appellants promote the use of several, apparently interchangeable entheogens, such as Ayahuasca, Cannabis, Kava, San Pedro, and Tsi-Ahga, without articulating the religious origins or significance of any of them. *See e.g.* Appellant Opening Br., Doc. 6, at 2. Appellants encourage the use of these substances outside of structured ceremonial settings, "during individual prayer time with Cannabis". *See* Pl.' Third Ans. to Def. First Set of Interrogs., Resp. to Interrog. 2, attached as Ex. 3 (Doc. 135-6) to Def. Br. in Support of its Mot. for Summ. J., Doc. 135-1 (Nov. 1, 2013). In contrast to Appellants' practices, the Peyote Religion centers around certain well-defined religious values: worship of a Heavenly Father; morality, sobriety, industry, charity, and right living; a spirit of self-respect and brother love and union among the members of the several tribes of Indians and other people throughout North America; and unity in the sacramental use of Peyote and its religious use. *See, e.g.*, NACNA, Articles of Incorporation, Art. 4 (1955)

(Attachment A). *See also* Maroukis, *supra*, at 201-11.

It is to attain these values that NAC members participate in rituals centered on taking the peyote sacrament. The California Supreme Court has acknowledged, “Although peyote serves as a sacramental symbol similar to bread and wine in certain Christian churches, it is more than a sacrament. Peyote constitutes in itself an object of worship; prayers are directed to it much as prayers are devoted to the Holy Ghost.” *People v. Woody*, 61 Cal.2d 716, 721 (1964). Peyote is deeply revered and handled carefully, and it is a sacrilege to take it outside of NAC services. *See id.*

The rituals and beliefs surrounding this sacrament are highly consistent among many practitioners spread throughout the U.S. and Canada. *See id.* at 720. Held on a regular schedule by each community, NAC services may also be sponsored for special life events, such as a birth, marriage, and death, or to heal a sick individual. *See* Maroukis, *supra*, at 94. In the day leading up to the service, a special tipi or other meeting space is prepared, sacred foods obtained, and religious accoutrements such as a rattle, staff, sage, and cedar placed on an altar. At dusk, church members are led into the tipi by the leader or Roadman who obtains the peyote and leads the ritual practice, lasting from sundown to sunrise, consisting of a highly ordered set of songs and prayers, purification, and ingestion of the sacrament. *See id.* at 96-102. At the conclusion of the all-night service, the

participants share food and fellowship, and disperse around noon. *See Woody*, 61 Cal. 2d. at 721.

While peyote plays a central role in the service, it is not to induce visions (per the common misunderstanding), but to bring people closer to their creator and to facilitate healing and fellowship. *See Gill, supra*, at 22. Participation in the NAC is known to be effective in the treatment of drug and alcohol addiction, as well as in facilitating the other values of the religion described above. *See id.* The religion is facilitated and expressed through a rich aesthetic of symbols, songs, and, art, that expresses a “life lived according to the direction of the Peyote spirit” also known as the “Peyote Road.” *Id. See also Maroukis, supra*, at 152-182.

In sum, unlike Appellants’ use of marijuana, the Peyote Religion centers around only one sacrament, peyote, which is taken in a highly ritualized, structured manner, toward a set of clearly identified religious values that guide the lives of many thousands of Native American people today.

## **II. Appellants’ Claims Do Not Fit Within the Framework of Legislative Exemptions for Peyote Use by the Native American Church.**

Appellants argue that “the NAC desires the same protections for their use and possession of cannabis as they currently have in place against the Government for their sacramental use and possession of peyote,” App. Br. at 3. Again, despite the use of “NAC” in the name of the Oklevueha organization, this argument cannot be attributed to the *Amici* nor, to their knowledge, any legitimate chapter or

organization of the Native American Church. While the *Amici* and their chapters have a long history of advocating for the freedom to practice the Peyote Religion, they have never made any claim regarding marijuana use. Similarly, the federal laws recognizing an exemption for the religious use of peyote by the NAC do not reference or protect marijuana usage.

**A. Federal and State Officials Historically Sought to Eradicate the Peyote Religion in Conjunction with Their Efforts to Assimilate and Christianize American Indians.**

During much of the 19<sup>th</sup> and 20<sup>th</sup> centuries, the federal government's policy toward Indians was one of "assimilation," in which federal officials worked with various churches to eradicate the traditional lifestyles of American Indians. *See Bear Lodge Multiple Use Ass'n v. Babbit*, 175 F.3d 814, 817 (10th Cir. 1999). Federal lawmakers believed that encouraging Indians to "put aside all savage ways" would help them achieve "salvation" through Christianity. Report of Commissioner of Indian Affairs W.A. Jones, Oct. 16, 1902, *reprinted in* Washburn, *The American Indian and the United States: A Documentary History*, Volume II, 727 (1973).

The U.S. promoted these policies by, for example, criminalizing Indian dances and the practices of medicine men, *see* H.R. Exec. Doc. No. 1, at 28-31 (1892), *reprinted in* Prucha, ed., *Documents of United States Indian Policy* 185-187 (3d. ed. 2000). In one infamous 1890 incident, the Seventh Cavalry killed over

200 Lakota Indians engaged in a religious ceremony known as the Ghost Dance, gunning them down as they prayed. *See* James Mooney, *The Ghost Dance Religion and Wounded Knee*, in *Fourteenth Annual Report of the Bureau of Ethnology, Part 2*, 867-72 (1973 reprint). During this same timeframe, Indian Affairs sought to end the Peyote Religion by seizing and destroying peyote buttons; fining and denying food rations to reservation-based peyote practitioners; and calling for state and federal legislation to outlaw peyote possession and use. *See* Joel W. Martin, *A History of Native American Religion: The Land Looks After Us* 106 (2001); Maroukis, *supra*, at 106-116.

**B. Contemporary Federal Indian Law and Policy Protect the Religious Use of Peyote, Not Marijuana.**

In 1965, Congress passed the Controlled Substances Act, listing peyote as a Schedule I controlled substance and prohibiting its use, possession, and distribution. 21 U.S.C. § 841 (2014). Shortly thereafter, the Drug Enforcement Agency (“DEA”) issued a regulation providing, in relevant part: “The listing of peyote as a controlled substance... does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church.” 21 C.F.R. § 1307.31.

In the 1970’s, federal Indian policy reversed course from the assimilationist goals of the past. President Nixon announced a new policy in favor of Indian “self-determination” over education, health care, economics, culture and religion.

Richard M. Nixon, Special Message to Congress on Indian Affairs, 213 Pub. Papers 564 (July 8, 1970). In 1978, Congress passed the American Indian Religious Freedom Act (“AIRFA”), providing:

[I]t shall be the federal policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

42 U.S.C. § 1996 (2013).

Despite the passage of AIRFA, however, many state laws continued to prohibit peyote possession and use. Legal actions surrounding these laws culminated in *Smith*, in which the Supreme Court held that it was not unconstitutional for the state of Oregon to deny unemployment benefits to individuals fired from their jobs for religious peyote use. *See* 494 U.S. at 890. The breadth of *Smith* inspired a wave of concern and activism among religious groups nationwide who, fearing their own sacraments and beliefs might be in jeopardy, pushed for a legislative response.

In 1993, Congress passed RFRA to restore the substantial burden/compelling interest to neutral laws of general applicability that impinge on the free exercise of religion. *See Burwell v. Hobby Lobby Stores*, Nos. 13–354, 13–356, 2014 WL 2921709, \*7 (U.S. June 30, 2014) (describing that Congress enacted RFRA in response to *Smith*). RFRA prohibits the “Government [from]

substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability” unless the Government “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 governmental interest.” 42 U.S.C. §§ 2000bb–1(a), (b).<sup>2</sup>

Notwithstanding its broad protection for the free exercise of religion, RFRA did not directly address peyote. NAC leaders finally succeeded in persuading Congress to pass the AIRFA Amendments of 1994. *See* Walter Echo-Hawk, *In the Courts of the Conqueror* 317-322 (2010) (describing this effort). Enacted pursuant to Congress’ plenary power in Indian affairs, the AIRFA Amendments provide:

Notwithstanding 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). Under the statute, “Indian” is defined as “a member of a

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<sup>2</sup> *Amici* NAC organizations take no position on whether Appellants’ use of marijuana falls within RFRA’s protection for governmental activities that impose a substantial burden on religious exercise, an argument that the District Court found unsubstantiated in the record. Most courts have found similar claims to marijuana to fall outside the protections of RFRA’s protection for the free exercise of “religion.” *See, e.g., United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996) (“Church of Marijuana” of which defendant claimed to be founder did not satisfy requirements for “religion” under RFRA). *See also Hobby Lobby Stores*, 2014 WL 2921709, at \*18, n. 28 (RFRA claimant must show governmental activity imposes a substantial burden on a sincere religious belief).



tribe... which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” 42 U.S.C. § 1996a(c)(1)-(2). *See also Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1216 (5th Cir. 1991) (“We hold that the federal NAC exemption allowing tribal Native Americans to continue their centuries-old tradition of peyote use is rationally related to the legitimate governmental objective of preserving Native American culture.”) (citing *Morton v. Mancari*, 417 U.S. 535 (1974)). As the plain language of the AIRFA Amendments makes crystal clear, this statutory exemption applies only to members of federally-recognized Indian tribes who use peyote in traditional Indian religious practices.

In addition to Congress’ plenary authority in Indian Affairs, the courts have noted that the peyote exemption is also justified by the fact that the federal government, in regulating controlled substances, must be able to distinguish among different substances. *See Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458, 1463 (D.C. Cir. 1989) (rejecting establishment clause-equal protection challenge to DEA’s decision that AIRFA Amendments did not apply to religious claims of church that uses marijuana). This is because different drugs bring different law enforcement, social, and health concerns. As DEA officials have explained, marijuana and other drugs are heavily abused, trafficked, and prosecuted, whereas peyote is none of these things. *Id.* It is “this overwhelming difference that explains

why an accommodation can be made for a religious organization which uses peyote in circumscribed ceremonies, and not for a religion which espouses continual use of marijuana.” *Id.* (quoting Final Order of the DEA). *See also McBride v. Shawnee County*, 71 F. Supp.2d 1098 (D. Kan. 1999) (rejecting claims that the AIRFA Amendments should be applied to protect claims to use drugs other than peyote for religious purposes).

The AIRFA Amendments expressly exempt religious use of “peyote” from the Controlled Substances Act and other laws prohibiting the possession, use, and distribution of controlled substances. The statute does not mention “marijuana” and courts have unanimously declined to read a protection for marijuana into the statute. This court should do the same and reject Appellants’ arguments that the AIRFA Amendments entitle them to use marijuana.

### **CONCLUSION**

The *Amici* NAC organizations respectfully submit that federal laws specially protecting the right to use peyote in religious services of the Native American Church, such as the 1994 AIRFA Amendments, do not protect Appellants’ use of marijuana. Moreover, to the extent that Appellants’ claims for a legal right to use marijuana rely on an allegation of an affiliation with these *Amici* organizations, these claims should be rejected and the holding of the District Court should be affirmed.

DATED this 25<sup>th</sup> day of July, 2014.

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*Legal counsel for Amici would like to express their appreciation to Jacquelyn Jampolsky, a 2014 graduate of the University of Colorado School of Law and candidate for admission to the Bar of the State of Colorado.*

**CERTIFICATION OF COMPLIANCE**  
**PURSUANT TO FED. R. APP. P. 29 AND**  
**32(a)(7)**

I certify that pursuant to Federal Rule of Appellate Procedure 29 and 31(a)(7), the attached Brief of Amici Curiae NAC Organizations is proportionally spaced, has a typeface of 14 point Times New Roman, and contains fewer than 7,000 words. No counsel for a party has authored the brief in whole or in part. No counsel for a party, or any person other than Amici Curiae, has made a monetary contribution to the preparation or submission of the brief.

**STATEMENT OF RELATED CASES**

Pursuant to Circuit Rule 28.2-2.6(b), Amici Curiae state that there are no related cases pending before this Court.

**CERTIFICATE OF SERVICE**

I hereby certify that on July 25, 2014, I electronically filed the foregoing Motion for Leave to File Brief Amici Curiae and Brief Amici Curiae with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the Court's CM/ECF system. I further certify that all parties are represented by counsel registered with the CM/ECF system, so that service will be accomplished by the CM/ECF system.

*BY: /s/ Kristen A. Carpenter*

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