C.A. NO. 14-10234

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ROGER CUSICK CHRISTIE

Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
The Honorable Leslie E. Kobayashi, United States District Judge
District Court Number 10-CR-000384-LEK-1

REPLY BRIEF OF DEFENDANT-APPELLANT ROGER CUSICK CHRISTIE

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ARGUMENT

I. REPLY TO GOVERNMENT'S RFRA ARGUMENT

A. Government Wrongly Minimizes District Court's Finding That Defendants Established Prima Facie RFRA Case

The district court found that Defendants-Appellants Roger Christie ("Reverend Christie") and Sherryanne ("Share") Christie (hereinafter collectively referred to as "Defendants") established a prima facie case under RFRA. Excerpts of Record ("ER") 65-66, 71. The government cites assumptions on which the district court's finding was based. Government Brief ("GB") 26. However, the district court's finding was based on more than assumptions. The district court found that: (1) the Christies' presented evidence sufficient to make their prima facie case (ER 66); and (2) the government provided "no contradictory factual evidence (such as expert opinion or percipient witness testimony) challenging [the Christies'] beliefs and Defendants' sincerity" (ER 61).

B. Government's Attempt To Impeach Defendants' Prima Facie RFRA Case Has No Place In This Appeal, And In Any Event, Is Unfounded

The evidence Defendants presented to establish their prima facie RFRA defense included their own sworn declarations (ER 489-512, 747-52), with supporting exhibits (ER 571-88), and two sworn declarations from expert witness Laurie Cozad, Ph.D. (ER 513-18, 723-46), a highly credible and credentialed Historian of Religion well respected in her field. Appellants' Joint Opening Brief

("OB") 6-8; ER 728-29. Dr. Cozad studied the Hawaii Cannabis Ministry ("Ministry") from a variety of methodological and disciplinary approaches (ER 729), and concluded that it is a religion, complete with a clear, thoughtful dogma and other hallmarks of a religion. OB 7. Dr. Cozad further concluded that Reverend Christie demonstrates the hallmarks of a founder of New Religious Movement. ER 516-17, 729-33. The American Academy of Religion has demonstrated its respect for Dr. Cozad's work --and the Ministry-- by inviting Dr. Cozad to present papers on the Ministry at two successive annual conferences. OB 7-8.

Notwithstanding the district court's findings that Defendants presented evidence sufficient to establish their prima facie RFRA case (ER 66), and that the government wholly failed to present any contradictory evidence (ER 61), the government nonetheless continues to attempt to impeach the Christies' sincerity and religiousity by describing their beliefs as "purported," their religiousity as "ostensible," and the tenets and purposes of the Ministry as "contended." GB 4-7. However, since the government failed to challenge the district court findings, it should not continue to question the Christies' sincerity, or the religiousity of their beliefs and practices. Simply put, the government's statements attempting to impeach the Christies' credibility and sincerity, or the religiousity of their beliefs and practices, have no place in this appeal. The government's appeal brief is, as

Dr. Cozad explained in reference to the government's district court RFRA memorandum, "attempting to place a frame around [Defendants'] activities that quite simply, does not fit." ER 738.

The government's portrayal of Reverend Christie as someone who: (1) "sought recognition as a minister in order to 'enjoy a higher level of First Amendment Freedoms'" (GB 5 (quoting ER 670)); (2) purchased minister credentials from the Universal Life Church; and (3) became ordained in the Religion of Jesus Church ("RJC"), "a group that advocated the use of marijuana on ostensibly religious grounds" is incomplete, to say the least. First, while Reverend Christie was quoted as saying that ministers "enjoy a higher level of First Amendment freedoms" (ER 670), he did not state that this is why he sought to become a minister. Second, Reverend Christie did far more than simply purchase credentials from the Universal Life Church and then become ordained in RJC. The government's brief ignores: (1) Reverend Christie's honorable discharge from the military based on the U.S. Government's recognition that he was a sincere conscientious objector;[1] (2) Reverend Christie's seven years (1986-1993) of study and practice in the Religious Science Church, a well-recognized New Thought spiritual movement founded in 1927 (Br. 9; ER 485-86. 490); (3) Reverend Christie's seven year (1993-2000) mentorship in RJC prior to ordination; (4) RJC's

[1] See 50 U.S.C. App. 456(j); Gillette v. U.S., 401 U.S. 437 (1971); U.S. v. Seeger, 380 U.S. 163 (1965).

credibility as one of the earliest Cannabis churches in the U.S., founded in 1969 (ER 515), which, in at least two cases, the State of Hawaii expressly recognized as a bona fide religion (OB 9; ER 124-26, 471-74, 490); and (5) Reverend Christie's association with the Oklevueha Native American Church ("ONAC"), a tree of the Native American Church, Rosebud Reservation of South Dakota, as President and CEO of ONAC Hilo. ER 480-83, 487-88.

The government's portrayal of Share Christie (GB 6) is likewise incomplete, to say the least. The government wholly ignores Share Christie's lifelong spiritual path that led her to Reverend Christie. Share Christie's uncontested RFRA Declaration: (1) details her religious beliefs, and her exercise of her religious beliefs in all aspects of her life, for more than three decades before she ever met Reverend Christie; and (2) demonstrates her sustained, steadfast commitment to deepening her connection with God through the sincere use of indigenous earth-based healing sacraments and other spiritual healing techniques --both for herself and in service to others-- including yoga, Tai Chi, acupuncture, Oriental medicine, herbology, macrobiotic cooking, permaculture sustainable living, and Native American practices[2], including sweats, fasting, a "vision quest," and a sacred Sundance ceremony. OB 23-25; ER 478, 508-10. Not only was Share Christie's

[2] In 2009 Share Christie became an officially recognized member of the Oklevueha Native American Church. ER 503, 506, 511.

Declaration uncontested; it was also corroborated in part by a written statement from Douglas Cardinal, a spiritual mentor/teacher to Share Christie. ER 478.

Since, as the district court found, the government presented "no contradictory factual evidence" (ER 61), the government's continued attempt to impeach the Defendants' sincerity and religiousity is unfounded.

C. Government Has Failed to Meet Its Compelling Interest Burden

1. Government Has Failed to Demonstrate A Compelling Interest In Preventing Diversion To Non-Adherents

In the district court, the government contended that it had a compelling interest in enforcing the CSA against both Reverend and Share Christie in order to prevent the risk of diversion to non-adherents that the government contended existed through the Ministry's office. ER 78. The district court evaluated the Ministry's operations and the manner in which it distributed Cannabis (Id.), and concluded that: (1) a threat of diversion existed through the Ministry's "express" procedure; and (2) preventing this threat constituted a compelling government interest. ER 79-90.

As explained in their Opening Brief, Defendants respectfully submit that the district court erred because: (1) the magnitude of the diversion risk failed to be compelling (OB 33-37); (2) any arguable weaknesses in the express procedure fell far short of a compelling risk of diversion (OB 37-41); and (3) the statutory peyote exception, court-recognized RFRA exceptions for other CSA Schedule I

substances, and the U.S. Department of Justice's policy, set forth in its "Marijuana Memo" (ER 1076-79), to decline prosecuting marijuana distribution activities which fail to meet specified federal law enforcement priorities, all undermine the government's assertion that it has a compelling interest in enforcing the CSA against Defendants. OB 41-45. It is undisputed that the majority of express participants received between 1.5 and 3.5 grams of Cannabis through express. OB 29. Zero instances were identified in which an express participant received a larger amount. Distribution to Ministry adherents was protected under RFRA. Not a single instance was identified in which a non-adherent actually received Cannabis through express. Preventing the arguable risk that some express participants were non-adherents fails to meet any of the federal law enforcement priorities set forth in the Marijuana Memo, and it fails to constitute a compelling government interest.

The government attempts to magnify the risk of diversion by relying on evidence extraneous to express. GB 34-37. However, since the district court's compelling interest conclusion was based exclusively on the risk that arguably existed through express (ER 79-90), the government's reliance on evidence extraneous to express fails to meet its RFRA burden.

Each individual who obtained Cannabis through the express was required to present a Ministry membership card or a medical marijuana card.[3] The government contends that the inclusion of blank membership cards in Sanctuary Kits created a risk that non-adherents would obtain Cannabis through express. GB 33. However, the record clearly demonstrates that Sanctuary Kit recipients did not participate in express. OB 38. Therefore, the government failed to prove that membership ID cards were used to obtain Cannabis through express.[4]

Express participants consisted almost exclusively of members who lived in and around the very small town of Hilo, where the Ministry was located, who joined the Ministry in person. OB 34. The government contends there was no requirement that such members demonstrate knowledge of the Ministry's tenets. GB 33. This is false. Members who joined the Ministry in person did so only after attending an in-person orientation or meeting with Reverend Christie, where he specifically explained the Ministry's beliefs and practices, including the sincere religious use requirement (ER 79, 128, 594, 739, 986-87, 1013-14, 1038-39, 1047),

[3] Approximately 85-90% of Cannabis distributed through express was to Ministry members. The remainder was distributed to medical marijuana patients. ER 905-906. Providing safe access and blessings to legal medical marijuana patients was part of the Ministry's exercise of religion. ER 504-05. Distribution to medical marijuana patients was not a basis for the district court's diversion concern. ER 78-90.

[4] The government also contends that blank cards could be obtained in person. GB 33. This is false. Members who received cards in person "filled out the signature." ER 980. No evidence was presented to suggest that any such person left the Ministry before signing the card. OB 39.

which was the "cornerstone of the THC Ministry" (ER 661) and its most important membership requirement (ER 500). Thus, this in-person orientation or meeting ensured that members who joined the Ministry in person had knowledge of the tenets and practices of the Ministry.

By joining the Ministry and signing a membership card, each member affirmed that he/she "use[d] Cannabis religiously" and that it was a "sincere, legitimate and private religious practice." ER 284-85. The government contends that an individual signing one of these cards would not reasonably believe he/she was affirming the Ministry's religious beliefs and agreeing to adhere it its practices. GB 37. The government's contention ignores not only the language on the membership cards but also the context in which new members signed these cards. New members joined the Ministry and signed their membership cards at the conclusion of their personal orientation or meeting with Reverend Christie, immediately after hearing his explanation of the Ministry's tenets and practices, where he emphasized the sincere religious use requirement. Under these circumstances, there was no need to re-state the Ministry's tenets and practices when these members acquired Cannabis through express, because they had already

been oriented to the tenets and practices, and had already affirmed that their Cannabis was for their sincere, legitimate, private religious practice.[5]

The government contends that Reverend Christie's statements concerning the number of members world-wide (GB 36), and his failure to have shipped any Cannabis off the island of Hawaii yet (GB 37), constitute evidence supporting the district court's conclusion as to the risk of diversion. Such is not the case. Since participation in express was limited to members in Hilo, the size of the Ministry's membership world-wide is not relevant. Similarly, whether or not Reverend Christie envisioned broadening his distribution activities beyond the island of Hawaii at some unspecified time in the future is simply not relevant to evaluating the threat of diversion that arguably existed through express. Moreover, Reverend Christie's alleged vision is certainly not relevant to demonstrating a compelling interest in enforcing the CSA against Share Christie.

The government contends that Defendants have minimized their distribution activities. GB 35. As explained below, the government's contention fails because it is based on evidence extraneous to express. Defendants have accurately described the evidence concerning amounts distributed through express (OB 27-29,

[5] As Reverend Christie told the undercover agent, if "[s]omebody's, you know, not sincere . . . [y]ou don't get in." Government's Supplemental Excerpts of Record ("SER") 386.

33-37). Defendants' description of this evidence is in accord with the district court's findings. ER 81-82, 85.[6]

The government's reliance (GB 35) on Reverend Christie's statements and distribution to an undercover agent many months before express began is not relevant to evaluating any arguable risk of diversion through express. The government failed to present any evidence to suggest that amounts comparable to those discussed with and distributed to the undercover agent were ever distributed through express. To the contrary, Reverend Christie stated in his sworn

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[6] In his sworn Declaration, Reverend Christie stated that he distributed Cannabis to approximately 200-400 people per month. ER 504. The district court relied on this estimate. ER 85.

The district court further relied on the testimony of key cooperating government witnesses, Jessica Walsh and Victoria Fiore, both of whom worked at the Ministry and distributed Cannabis through express. Walsh and Fiore each testified that the majority of express participants acquired amounts of Cannabis in the $20.00 -- $50.00 price range. ER 81, 992-93, 1012, 1041. Walsh stated that $20.00 was typically the price for 1.5 grams, and $50.00 was typically the price for 3.5 grams. ER 81, 904. Fiore explained that better quality Cannabis cost up to $60.00 -- $80.00 for 3.5 grams. ER 914. The government did not present any evidence of even a single instance in which more than 3.5 grams was distributed to an express participant. Thus, to the extent that there was a risk that non-adherents acquired Cannabis through express, the most that the government established was at risk of diversion to any such non-adherent was a personal use amount.

Regarding total amounts distributed on any given day, Walsh testified that Reverend Christie would refer to days that the Ministry took in a thousand dollars in donations for Cannabis as "a grand day[,]" but that Revered Christie only said this to Walsh a few times. ER 1028, 1031. The district court relied on this testimony. ER 82. Based on the prices set forth in Walsh's Declaration (ER 904), $1,000.00 represents the price for approximately 2.5 ounces of Cannabis.

Declaration that he never distributed more than one ounce to any individual at a given time other than to the undercover agent. ER 504. Moreover, Reverend Christie distributed Cannabis to the undercover agent in private meetings. The district court specifically distinguished the express procedure from any distribution Reverend Christie conducted in private meetings (ER 79), and concluded that it was the risk of diversion through express that gave rise to a compelling government interest. ER 79-90.[7] The district court did not conclude, and the government failed to present any evidence to establish, that the government had a compelling interest in enforcing the CSA against Reverend Christie in order to prevent a risk of diversion to non-adherents through his distribution to members in private meetings. Moreover, evidence concerning Reverend Christie's interaction with the undercover agent, or with anyone else in private meetings, is wholly irrelevant to establishing any interest, much less a compelling interest, in prosecuting Share Christie.

The government cites an April 2009 wiretap transcript, which the government describes as "immediately before or at the start of the express procedure" (GB 36), where Reverend Christie estimated that he saw 60-70 people in a day, and that it was more than 8 ounces (SER 159). However, this call was

[7] The district court relied on key government witness Jessica Walsh, who testified that before instituting express, Reverend Christie met with people privately in his office to distribute Cannabis (ER 79). Reverend Christie continued having private meetings with members after express began (ER 742, 916).

minimized immediately prior to this statement and the government failed to present testimony from the party to the conversation or any other evidence as to its context. Moreover, in this statement, Reverend Christie did not distinguish between distribution through express (as to which the district court found a risk of diversion), and Reverend Christie's distribution to individual members in private meetings (as to which the district court did not find a risk of diversion).

In any event, assuming *arguendo* that approximately 60-70 people received a total of 8 ounces on a given day through express, this would still represent personal use amounts for each single individual. Indeed, the government failed to identify a single instance in which anyone acquired more than 3.5 grams through express. Moreover, every express participant presented a Ministry membership or medical marijuana card, and the government did not produce evidence of even a single instance in which a non-adherent actually received Cannabis through express. Distribution of this magnitude under these circumstances fails to establish a compelling risk of diversion.

The government cites two RFRA cases which have recognized that avoiding diversion can be a compelling government interest (GB 32-33, n.7). U.S. v. Lepp, 446 Fed. Appx. 44, 46 (9th Cir. 2011) (unpublished), aff'g United States v. Lepp, No. 04-CR-00317, 2008 WL 3843283, at *11 (N.D. Cal. Aug. 14, 2008); Multi-Denominational Ministry of Cannabis and Rastafari, Inc. v. Holder, 365 Fed.

Appx. 817, 820 (9th Cir. 2010) (unpublished), aff'g Multi-Denominational Ministry of Cannabis and Rastafari, Inc. v. Mukasey, No. 06-CV-04264, 2008 WL 914448, at *5 (N.D. Cal. 2008) (hereinafter "MDMCR"). However, the risk of diversion herein pales in comparison to the diversion risk in Lepp and MDMCR.

MDMCR was a civil suit brought by Lepp's wife and others arising from several seizures of marijuana plants growing on property owned by Lepp and his wife. In total, approximately 40,000 plants were seized. 2008 U.S. Dist. LEXIS, 118583, *5-6. Lepp was a criminal prosecution arising from the seizure of 24,784 of these plants. 2008 U.S. Dist. LEXIS 123895, *1.

In light of the vast quantities seized from Lepp's property (40,000 plants), the Ninth Circuit agreed with the MDMCR district court that the government met its burden of demonstrating a compelling interest in preventing the diversion of thousands of marijuana plants to non-members. 365 Fed. Appx. At 820. The Lepp district court emphasized that the mass quantities found in Lepp's possession during the single seizure involved in the criminal case (24,784 plants) allowed Lepp to distribute Cannabis to thousands of people. 2008 U.S. Dist. LEXIS 123895, *29.

Here, by contrast, the government seized 284 plants (ER 362, 946-60), a tiny fraction of the amounts seized in Lepp. The government did not contend, and the district court did not find, that any of these plants were at risk of diversion. ER 77.

Regarding Cannabis distributed through express, Reverend Christie was never shown to have possessed vast quantities at any given time.

Lepp's church asserted that distribution of tens of thousands of marijuana plants to non-adherents furthered their mission to heal the masses, and the district court concluded that this mission itself gave rise to a very high threat of diversion. 2008 U.S. Dist. LEXIS 118583, *12-14. Here, by contrast, the Ministry's intent, and Reverend Christie's instructions to all Ministry employees, was that only Ministry members and medical marijuana cardholders could obtain Cannabis (ER 905). Thus, while the district court found fault with the Ministry's identification system, the Ministry's mission itself failed to give rise to a threat of diversion.

In addition, Lepp's vast quantities of marijuana plants were growing in plain view from the highway on property with no barriers to access and signs on the perimeter informing others that marijuana was grown on the property. 2008 U.S. Dist. LEXIS 123895, *30-31. Any non-adherent member of the public could easily have walked onto Lepp's property and accessed his marijuana. Id. Here, by contrast, the Cannabis was kept in Reverend Christie's private office where only Reverend Christie, and Share Christie in his absence, could access it.

Finally, the district court found that Lepp's alleged distribution to an undercover agent constituted further evidence of the government's compelling interest "against *this* defendant." Id., at *31 (emphasis in Lepp). Here, the district

court concluded that the threat of diversion arose from express, not from Reverend Christie's distribution to an undercover agent many months before, and wholly extraneous to, express. Moreover, the Lepp district court's RFRA-required defendant-specific analysis highlights the irrelevancy of Reverend Christie's interaction with the undercover agent to Share Christie.

MDMCR and Lepp also pre-date the U.S. Department of Justice's (USDOJ) "Smart on Crime Report" for "Reforming the Criminal Justice System for the 21st Century." ER 927-34. Attorney General Holder announced this report at the American Bar Association's House of Delegates 2013 annual meeting (ER 920-25), where he questioned the efficacy of the "war on drugs" and its "draconian" mandatory minimum sentences (ER 922-23), and called upon every member of the legal profession to: (1) "question that which is accepted truth"; (2) "break free of a tired status quo" (ER 920); (3) "fight for the sweeping, systemic changes we need" "to reform a broken [criminal justice] system;" and (4) help "bring America's criminal justice system in line with our most sacred values" (ER 925), one of which, as RFRA emphasizes, is the unalienable right to the free exercise of religion. 42 U.S.C. 2000bb(a)(1).

USDOJ's Smart on Crime Report: (1) emphasizes the need to shift away from over-reliance on incarceration; (2) requires the development of guidelines to ensure that federal law enforcement efforts are focused on the most serious cases

that implicate clear, substantial federal interests; and (3) specifically identifies federal law enforcement priorities as: (a) national security threats; (b) violent crime; (c) financial fraud; and (d) protecting the most vulnerable members of society. ER 929. USDOJ's Smart on Crime Report constituted an "initial package of reforms," which was "only the beginning of an ongoing effort to modernize the criminal justice system[,]" pursuant to which USDOJ would "continue to hone an approach." Id. On August 29, 2013, USDOJ honed its approach by issuing its Marijuana Memo, which identifies federal priorities "to guide the Department's enforcement of the CSA against marijuana–related conduct[,]" with specific guidance "to Department attorneys and law enforcement to focus their enforcement resources and efforts, including prosecution, on persons or organizations whose conduct interferes with any one or more of these priorities" ER 1077.

As explained in Defendants' Opening Brief (OB 43-45), Defendants respectfully submit that USDOJ's policy to decline enforcing the CSA against marijuana-related conduct unless such conduct meets a priority set forth in its Marijuana Memo constitutes an admission that the federal government lacks a compelling interest in enforcing the CSA in cases which fail to meet its stated enforcement priorities. As further explained in the Opening Brief (OB 43-45), preventing any arguable risk of diversion created by the Ministry's express service fails to meet any of the enforcement priorities identified in the Marijuana Memo.

Therefore, the Marijuana Memo, along with its backdrop of USDOJ's Smart on Crime Report and Attorney General Holder's announcement of these reforms at the ABA Annual Conference, constitute admissions by the government that it lacks a compelling interest in enforcing the CSA against Defendants in this case.[8]

The government contends that since USDOJ's Marijuana Memo is not a law or regulation, it is "entitled to little weight in the compelling interest analysis." GB 42. The government is wrong. Since RFRA imposes a burden on the government to demonstrate that enforcing the CSA against each Defendant furthers a compelling government interest, government admissions as to what constitutes, and what does not constitute, a federal law enforcement priority, are directly relevant.

The government relies on U.S. v. Antoine, 318 F.3d 919, 921-22 (9th Cir. 2003) for the proposition that a "proposed regulatory rule 'carries less weight than a final rule' in the RFRA analysis." GB 42 (quoting Antoine). The government's reliance on Antoine is misplaced. First, the Antoine Court noted that the proposed rule at issue therein was relevant to determining whether and to what extent the government's interest had weakened. 318 F.3d at 921. Thus, Antoine supports the Christies' reliance on USDOJ's Marijuana Memo and its backdrop of USDOJ's

[8] Stated another way, if DOJ believed it had a compelling interest in prosecuting cases which do not meet the Marijuana Memo's enforcement priorities, why would DOJ set a policy not to prosecute such cases?

Smart on Crime Report and Attorney General Holder's announcement of USDOJ's package of reforms at the ABA annual conference.

Second, the government proposal at issue in Antoine was pending further review because it was based on incomplete information. Under that circumstance, the Court declined to find that the asserted government interest had weakened to the point of being un-compelling. Here, by contrast, the federal government's interest in prosecuting marijuana-related conduct is consistently weakening. Pursuant to the Marijuana Memo, the federal government is not prosecuting large-scale commercial marijuana distribution when such activity is in compliance with state law. In addition, Section 538 of the Consolidated and Further Continuing Appropriations Act, 2015 ("2015 Appropriations Act") prohibits USDOJ from using funds to prevent states from implementing medical marijuana laws. Pub. L. No. 113-235, sec. 538, 128 Stat. 2130, 2217 (2014). Further, a bi-partisan bill, S.683 (CARERS ACT), has been introduced in the U.S. Senate which would: (1) allow states to legalize marijuana for medical use without federal interference; (2) reclassify marijuana to a Schedule II substance; (3) allow banks to provide financial services to medical marijuana dispensaries; and (4) allow Veterans Affairs Administration physicians to recommend medical marijuana to patients. Thus, evidence of the federal government's weakening interest in using the full force of the CSA against marijuana-related conduct continues to mount.

Since the government has chosen to recognize exceptions from the CSA for particular groups – including policy exceptions for large commercial marijuana operations which are in compliance with state law— the government has a higher burden of showing that the CSA, as applied to Defendants, furthers a compelling interest. See McAllen Grace Brethren Church v. Salazar, 764 F.3d 465, 472-73 (5th Cir. 2014) (citing Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2781-82 (2014); Tagore v. U.S., 735 F.3d 324, 331 (10th Cir. 2013)). RFRA requires the Court "'to scrutinize the asserted harm of granting specific exemptions to particular religious claimants' –in other words, to look to the marginal interest in enforcing" the CSA against each defendant. Hobby Lobby, 134 S. Ct. at 2779 (quoting Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 431 (2006). Here, particularly in light of USDOJ's decision not to prosecute commercial marijuana distribution activities which are in compliance with State law, the government has failed to show a compelling interest in enforcing the CSA against Defendants, who, as the district court found, established a prima facie case for federal protection under RFRA.

The government contends that enforcing the CSA against Defendants furthers a compelling interest because it implicates one priority listed in the Marijuana Memo: preventing distribution to minors. This contention has no merit. The government failed to present any evidence that marijuana was distributed to

minors, or that there was a risk of diversion to minors. Distribution to minors was not a basis for the district court's compelling interest conclusion. ER 85-86. While the Ministry's website stated that individuals under age 21 could join the Ministry if they had their parents' written permission, or lived independently of their parents (ER 662), no evidence was presented that anyone under 21 actually joined the Ministry, or that the Ministry ever distributed, or would knowingly distribute, Cannabis to anyone under age 21. To the contrary, the Ministry's literature stated that they only provided a defense for sincere practitioners over age 21 (ER 661-62), and Reverend Christie stated in his sworn Declaration that membership was limited to people over age 21 (ER 500).

2. The Government Has Failed to Establish That Enforcing The CSA Against Defendants Furthers A Compelling Interest In Preserving The Government's Ability To Enforce The CSA

The government contends (GB 39) that enforcing the CSA against the Christies furthers a compelling interest in preserving its ability to enforce the statute. The district court did not find that this constituted a compelling interest. ER 75-84. Accordingly, this Court should not do so.

Relying primarily on inapplicable pre-RFRA case law, the government contends that granting an accommodation to the Christies "would very likely spawn 'a multitude of spurious free exercise claims' that would 'hamstring [the government's] enforcement efforts.' O Centro Espirita Beneficiente Uniao Do

Vegetal v. Ashcroft, 389 F.3d 973, 1023 (10th Cir. 2004) (McConnell, J., concurring). It would also likely lead to claims from groups and individuals that their free exercise of religion requires the distribution of other drugs in high demand, perhaps cocaine or heroin." GB 39-40. This is precisely the uniformity argument that the Supreme Court rejected in O Centro, 546 U.S. at 435-36:

> Here the Government's argument for uniformity . . . rests not so much on the particular statutory program at issue as on slippery-slope concerns that could be invoked in response to any RFRA claim for an exception to a generally applicable law. The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to "rules of general applicability." 42 U.S.C. 2000bb-1(a).

Accordingly, this Court should not recognize the government's slippery slope concern as a compelling interest in this case.[9]

D. The Government Has Failed to Satisfy RFRA's Least Restrictive Means Requirement

The district court applied the wrong legal standard in its least restrictive means analysis. OB 46-47. The district court stated that the "pivotal issue" was whether the Christies and other Ministry members' Cannabis use could be

[9] Since the government has failed to demonstrate that this prosecution furthers a compelling interest in preserving its ability to enforce the CSA, this asserted interest likewise fails to constitute a substantial federal interest under DOJ's Marijuana Memo.

accommodated "without undue interference with the government's interest in controlling" Cannabis. ER 91 (quoting Lepp, 2008 WL 3843282, at *12 (quoting Olsen v. Drug Enforcement Agency, 878 F.2d 1458, 1462 (D.C. Cir. 1989)). However, as the Lepp court recognized, Olsen, a pre-RFRA case, "is inapposite because the 'undue interference' standard is simply not the standard under RFRA." Lepp, 2008 U.S. Dist. LEXIS 123895, *32.

The government has failed to provide a substantive response to this aspect of Defendants' argument. Rather, it baldly asserts that the Olsen standard is not relevant. GB 46, n.9. Clearly, it is relevant, because the district court erroneously identified the Olsen standard as the "pivotal issue" (ER 91) and then proceeded to apply it. ER 94.[10]

As explained in the Opening Brief, pp.50-51, DOJ's Marijuana Memo constitutes compelling evidence that the very office that has prosecuted Defendants recognizes that it has means less restrictive than this prosecution to further its interests in marijuana enforcement. The government's response (GB 46-47)

[10] The government contends that "[t]he Supreme Court has not resolved whether RFRA's least restrictive means test goes 'beyond what was required by its pre-Smith decisions.' Hobby Lobby, 134 S. Ct. at 2768 n. 18." GB 46, n.9. This is incorrect. In City of Boerne v. Flores, 521 U.S. 507, 535 (1997), the Supreme Court stated: RFRA "imposes in every case a least restrictive means requirement--a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify[.]" The Hobby Lobby majority adhered to this understanding of its pre-Smith cases. 134 S. Ct. at 2761, n.3. It is clear that Olsen's undue interference standard did not include RFRA's least restrictive means requirement.

misconstrues Defendants' argument. Defendants' have not asserted that deference to State authorities constitutes a less restrictive means.

DOJ's Marijuana Memo describes DOJ's policy not to prosecute a marijuana case unless it meets at least one of eight clearly defined federal law enforcement priorities or some other important federal interest. ER 1076-77. As explained in the Opening Brief, p.49, by recognizing policy exceptions to federal prosecution for all cases which do not meet these priorities, the government is essentially admitting the availability of less restrictive means. Moreover, DOJ's Marijuana Memo "rests on its expectation" that States which have legalized marijuana in some form "will implement strong and effective regulatory and enforcement systems" that will address "for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system." ER 1077-78. As explained in the Opening Brief, pp.50-52, DOJ's expectation that States can and will implement effective measures to prevent diversion outside of State-wide regulated systems constitutes compelling evidence that DOJ and federal law enforcement agencies have the means to do the same in order to prevent diversion on a much smaller scale, ie – diversion from the Ministry's express procedure to non-adherents. By misconstruing this aspect of Defendants' argument, the government has wholly failed to respond to it.

In their Opening Brief and in the district court, the Christies asserted that one obvious less restrictive alternative would have been for the government to notify Reverend Christie that the Ministry's express procedure gave rise to what the government believed was a compelling risk of diversion, and to request that Reverend Christie cooperate in mitigating that risk, including, if necessary, by shutting down express. OB 51. The government contends that the Ministry's tenets demonstrate that this alternative was not realistic. GB 48. The government's contention falls far short of meeting its RFRA burden to demonstrate that Defendants' proposed alternative was not viable. Moreover, the Ministry's openness, Reverend Christie's cooperative communications with law enforcement (ER 505), and the fact that the Ministry was in operation for almost nine years before instituting express, all undermine the government's assertion that notice regarding the government's interest in preventing diversion through express was not a viable alternative. Indeed, the district court's diversion concerns stemmed primarily from the Ministry's: (1) acceptance of express participants' Ministry membership cards without checking photographic identification and confirming that they were in fact members; and (2) failure to remind express participants of the parameters of use when they received their personal use amounts of Cannabis (ER 84, 87-89). Clearly, means less restrictive than applying the full force of the CSA to Defendants would have been sufficient to address these concerns.

The government contends that U.S. v. Vasquez-Ramos, 531 F.3d 987 (9th Cir. 2008) runs contrary to Defendants' notice argument. Such is not the case. In Vasquez-Ramos, the defendant was convicted of violating the Bald and Golden Eagle Protection Act. Granting the defendant a RFRA exemption would have resulted in substantially burdening another group's religious practice. The Court concluded that this redistribution of burdens on religion did not raise a valid RFRA claim. 531 F.3d at 992. The Court specifically distinguished Vasquez-Ramos from O Centro, because O Centro, as here, "dealt with the pursuit of a secular interest, drug prohibition, in a manner that burdened religion." Id. The Court further rejected the defendant's contention that the government could avoid having to redistribute religious burdens by taking action to increase salvage and recovery of eagle carcasses, reasoning that RFRA is written in terms of what the government cannot do to an individual, not in terms of what an individual can exact from the government. First, since this analysis was in the context of a situation involving the redistribution of religious burdens, it is wholly inapplicable here. Second, the Vasquez-Ramos defendants sought to require the government to take affirmative action to increase the supply of eagle carcasses, which is far more burdensome, and therefore far less viable, than the notice alternative proposed by Defendants. Third, this part of Vasquez-Ramos was based on pre-RFRA case law,

Id., at 993 which, as recognized in Hobby Lobby, 134 S. Ct. 2761, n.3, did not use the least restrictive means requirement.

The government's reliance on U.S. v. Friday, 525 F.3d 938 (10th Cir. 2008) is likewise misplaced. It is another bald eagle case, and is therefore distinguishable for the same reasons as Vasquez-Ramos. In addition, the defendant in Friday asserted that the government should have been required to reach religious groups and advertise government programs that would be useful to them. This is entirely different than requiring the government to provide notice of its assertion of a compelling interest in preventing what would otherwise be protected RFRA activity. Moreover, Friday, like Vasquez-Ramos, relies on pre-RFRA case law which did not use RFRA's least restrictive means requirement, 525 F.3d at 957, and is therefore unlikely to survive Hobby Lobby.

In their Opening Brief, p.53, Defendants contend that another less restrictive alternative would have been to apply 21 U.S.C. 841(a)(1)(C) to them, rather than 841(a)(1)(B), and a sentencing guidelines drug quantity calculation which would have accounted for the fact that the Christies intended that all of the Ministry's Cannabis be used for sacramental purposes. The government contends (GB 49) that enforcing a statutory penalty provision and applying sentencing guidelines which would have resulted in lesser penalties does not constitute a less restrictive means. The government cites no support for its position. To the contrary, the

government's argument is contradicted by Alleyne v. U.S., 133 S. Ct. 2151 (2013), which held that any fact which increases the statutory mandatory minimum sentence is an element of the crime. The government's argument is further undermined by DOJ's policy not to charge mandatory minimum offenses unless certain criteria are met, and to argue for below-guidelines sentences when such is sufficient to satisfy the purposes of sentencing. ER 937-38. Here, an indictment with no mandatory minimum and no specific drug quantity allegation would have been less restrictive and far more appropriate, given the fact that no quantity was shown to have actually been diverted through express.

E. Share Christie's Additional RFRA Argument

The Opening Brief, pp.54-57, sets forth additional reasons why the government has failed to meet its compelling interest and least restrictive means burdens as to Share Christie. The government wrongly contends that there is no basis to distinguish between Reverend and Share Christie. GB 49-50. The government ignores the fundamental distinction between Reverend Christie, the Ministry's founder, and others, like Share Christie, who acted in reliance on Reverend Christie's assurances that the Ministry's activities were lawfully protected under RFRA. ER 512. Share Christie relied not only on Reverend Christie's assurances, but also on the fact that the Ministry had openly, and very publicly, operated for seven years before she joined. The record clearly

demonstrates that but for Reverend Christie and the Ministry he founded, Share Christie would never have gotten involved in this activity.

The government misstates the issue when it contends that enforcing the CSA against both defendants furthers its interests. GB 50. RFRA requires the government to meet its burdens as to each defendant individually. Enforcing the CSA against Reverend Christie wholly eliminated any risk of diversion that arguably existed through the Ministry. RFRA's compelling interest test requires the Court to scrutinize the harm that would result to the government's diversion interest if the Court granted Share Christie a RFRA exemption to the CSA. OB 55-56; O Centro, 546 U.S. at 431. Since any arguable diversion risk was eliminated by enforcing the CSA against Reverend Christie --the Ministry's founder and leader-- no harm to the government's interest would result from its failure to enforce the CSA against Share Christie. Therefore, the instant prosecution of Share Christie fails to further a compelling government interest. Moreover, enforcing the CSA against Share Christie is hardly the least restrictive means of furthering any arguable remaining diversion interest.

II. REPLY TO GOVERNMENT'S VAGUENESS ARGUMENT

As explained in their Opening Brief, pp.57-67, Defendants respectfully submit that RFRA is unconstitutionally vague. Specifically, RFRA did not provide Defendants fair notice as to whether their conduct in the Ministry was protected

under RFRA or prohibited under the CSA. Moreover, RFRA impermissibly delegates this question to the Court for an ad hoc determination under an inherently subject, imprecise, fact-intensive balancing test which the Supreme Court described as "not within the judicial ken," "courting anarchy," "horrible to contemplate," and best left "to the political process." Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 884-890 (1990) (refusing to read RFRA standard into First Amendment Free Exercise Clause). As further explained in their Opening Brief, pp.67-69, since RFRA has created an ambiguity as to the scope of conduct protected under RFRA, and therefore the scope of conduct prohibited under the CSA, the rule of lenity requires that the CSA not be applied to the religious conduct charged against Defendants.

The government contends that since RFRA is not a penal statute, it should not be reviewed for vagueness. GB 52-56. The government does not cite any controlling or even persuasive authority to support its position. Moreover, the government's argument is contradicted by U.S. v. Clark, 912 F.2d 1087 (9th Cir. 1990) and U.S. v. Woodley, 9 F.3d 774, 779 (9th Cir. 1993), which both demonstrate that this Court has not limited vagueness challenges exclusively to statutory definitions of elements of criminal offenses. OB 59. In Clark, this Court reviewed the merits of a defendant's claim that a statutory and regulatory

exemption to criminal liability was vague. Since a RFRA defense constitutes a statutory exemption to the CSA, this is precisely what Defendants request here.[11]

The government attempts to distinguish RFRA from Clark on the ground that Clark addressed a statutory/regulatory exemption to a single statute, whereas RFRA constitutes a statutory exemption to the entire criminal code. GB 56.[12] This distinction actually supports Defendants' argument. RFRA's sweeping breadth increases its need for clarity and objective standards.

In addition to failing to meaningfully distinguish Clark and Woodley, the government also cites (GB 54) a law review article which actually supports Defendants' request that this Court review RFRA for vagueness. Paul H. Robinson, Fair Notice and Fair Adjudication: Two Kinds of Legality, 154 U. Pa. L. Rev. 335, 384 (2005). Although Professor Robinson distinguishes between the vagueness analysis that would apply to a justification defense and the vagueness analysis that would apply to rules defining prohibitions and duties, he nonetheless

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[11] RFRA "has effectively . . . engrafted the additional clause to" the CSA, which provides that when its enforcement "places a substantial burden on a [defendant's] exercise of religion [such enforcement] will not be allowed unless it is the least restrictive means to satisfy a compelling governmental interest. See 42 U.S.C. § 2000bb-1(a) & (b)." Christians v. Crystal Evangelical Free Church, 141 F.3d 854, 861 (8th Cir. 1998) (applying this RFRA analysis to Bankruptcy Code). See also Guam v. Guerrero, 290 F.3d 1210, 1221 (9th Cir. 2002) (relying on Christians' description of RFRA as an amendment to legislation).

[12] See also Rweyemanu v. Cote, 520 F.3d 198 (2d Cir. 2008) (RFRA "amends the entire United States Code").

applies the vagueness analysis to justification defenses. Professor Robinson stated, 154 U. Pa. L. Rev. at 383-84:

> [A]s a rule of conduct, the special function of the objective justification defenses is not to exculpate blameless offenders but rather to announce ex ante the conduct rules that will govern when a person justifiably may do what otherwise is prohibited.
>
> That function means that the legality doctrines ought to apply to justification defenses in much the same way as they apply to the definition of prohibitions and duties, the other half of the rules of conduct. Any other approach would fail to assure fair notice of what is criminal, would fail to accurately signal the criminal law's authorized response to future justifying circumstances, and would fail to ensure legislative control over defining the rules of conduct.
>
> . . .
>
> Because the goal of justification defenses as rules of conduct is to give future conduct guidance, not to adjudicate past violations, the primary goals of the legality doctrines when applied to justification defenses ought to be to assure fair notice of the conduct rules, to increase future compliance with them, and to ensure legislative control over them. Just as fair notice and legislative supremacy require fixed and clear statutory definitions of prohibitions and duties, so too do they require fixed and clear justification defenses. . . .
>
> . . .
>
> Finally, vague justification defenses should be barred.

As Professor Robinson further explained, id., at 362:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and then leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent,

> substitute the judicial for the legislative department of government.

As Smith demonstrates, this is precisely what Congress did by enacting RFRA.[13]

The government contends that this Court should not review Defendants' vagueness challenge because their conduct does not fall squarely within RFRA. GB 57. In light of the district court's finding that Defendants established their prima facie case under RFRA, this government contention is plainly erroneous.

The government contends that RFRA is not unconstitutionally vague. GB 56-61. This contention flies in the face of Smith, 494 U.S. at 884-890, which refused to read the RFRA standard into the Free Exercise Clause based upon an analysis which clearly demonstrates that the RFRA standard suffers from all of the fatal defects against which the vagueness doctrine protects. OB 60-63. Moreover, the vagueness problems forecast by Smith are clearly seen in decisions applying

[13] The government also cited a second law review article which has nothing whatsoever to do with RFRA. Meir Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 Harv. L. Rev. 625, 639 (1984). The portion of the article on which the government relies is limited to the defenses of duress and necessity. The author observed that the vagueness of these defenses "makes a mockery of the standards of clarity and specificity that criminal statutes are generally required to meet." Id. The author further suggested that the basis for tolerating vagueness in these non-statutory defenses is that the policies underlying the defenses require that the availability of the defenses not be known. Id. RFRA, by contrast, is a statutory defense, and its intent, as demonstrated by its usage, is that it be widely known.

RFRA. OB 63-66. The government correctly points out that numerous Courts have enforced RFRA without evaluating whether it is unconstitutionally vague. GB 60. However, that is simply because until now, no Court had been asked to do so.

It appears that the government does not understand how the rule of lenity applies to Defendants' argument. GB 62-63. Since RFRA has created an ambiguity in the scope of conduct protected under RFRA and therefore the scope of conduct prohibited under the CSA, Defendants respectfully submit that the rule of lenity requires that Defendants' conduct be deemed protected under RFRA rather than prohibited under the CSA.

III. THE DISTRICT COURT ERRED WHEN IT DENIED DEFENDANTS' MOTION TO SUPPRESS

The government argues that the undercover agent was no longer a viable option because Reverend Christie suspected he was a law enforcement officer. GB 81. However, there was no discussion in the application as to why a subsequent and different undercover agent could not have been utilized. Reverend Christie was very open with the confidential source ("the Source") as to why he was suspicious of the undercover agent. ER 349. The government recorded this conversation and therefore heard first hand exactly what it was the undercover agent did, and did not do, that made Reverend Christie suspicious of him. ER 349-50. Utilizing a subsequent undercover agent would have taken some time and

effort, but there is no indication that the government was unable to proceed as such. A second undercover agent would have had the insight and knowledge necessary to fully gain Reverend Christie's trust. Gaining access to Reverend Christie was not difficult. He was an open book and willing to speak with anyone about the Ministry. Instead of taking the time and effort entailed in utilizing a second undercover agent, the government took a shortcut by obtaining wiretaps.

The government further argues that recruiting additional informants in Hilo was difficult because it is a "small and tight-knit community where people are reluctant or afraid to cooperate with law enforcement." GB 82. However, the wiretap application only discussed one individual that did not want to talk about Reverend Christie. ER 349. There is no discussion in the application about any other attempts to recruit informants.

With regard to its argument that physical surveillance had limited usefulness, the government makes generalized statements about the Hilo community and its residents. ER 345; GB 82-83. Such generalized statements about Hilo being a tight-knit community, unsupported conclusions that individuals hanging out outside the Ministry were acting as "look-outs", and claiming that Reverend Christie "appeared" to be keeping his eyes open for law enforcement because he "frequently look[ed] outside the THC Ministry windows and at times driv[ed] slowly," cannot justify a wiretap in this case. Finding that such general

statements satisfy the specificity requirements to justify a wiretap, would ultimately render the specificity requirements moot, especially in small communities.

Further, the government argues that the pen register alone would not lead to a successful prosecution. GB 83. Such a statement would be true in any case. There is nothing specific about this case that rendered the pen register an inadequate investigative tool. A pen register alone would never lead to a successful prosecution. However, a pen register in combination with other investigative methods could be quite useful.

With regard to vehicle trackers, the government claims there was one occasion when a vehicle was used to deliver what appeared to be marijuana plants, however the vehicle departed too quickly making placement of a tracker on it impossible. ER 348. The government fails to elaborate on whether it made any other attempts to track the particular vehicle, or any other suspect vehicle. It does not appear the government made any attempt to track any vehicles, and instead made generalized statements in the application about Hilo being a large rural and agricultural area rendering tracking ineffective. ER 348. However, the application then claims that vehicle tracking will become more effective if used in conjunction with a wiretap, but fails to explain how obtaining a wiretap will mitigate the "problems" the government had already claimed existed with vehicle tracking

(e.g., one of the claimed "problems" being that Hilo is a large rural agricultural area). ER 348.

The application further claimed that tracking Reverend Christie's vehicle would be ineffective because "it appears that marijuana plants are delivered by other persons to [Reverend Christie] at the THC Ministry." ER 347. However, earlier in the application there is a transcript of a recorded telephone conversation between Reverend Christie and the undercover agent wherein Reverend Christie states that his supplier of marijuana plants prefers to not come to the Ministry, but instead prefers to meet at a private place. ER 316. The undercover agent could have arranged to purchase marijuana plants from the supplier, received a date of delivery from Reverend Christie, and placed a vehicle tracker on Reverend Christie's vehicle to track the location where Reverend Christie would accept delivery of the marijuana plants. Such a scenario would not have been complicated to set up, nor would it have wasted a large amount of government resources if it was ultimately not successful. The cost benefit analysis weighed in favor of at least attempting such a scenario. The bottom line is that the government never even attempted this scenario (or anything similar to it) and instead, based on general statements about tight-knit rural communities, applied for a wiretap. In sum, the wiretap was a short cut, not a necessity at the time the application was submitted.

In support of its argument that the district court's necessity finding was not an abuse of discretion, the government cites to U.S. v. Rivera, 527 F.3d 891 (9th Cir. 2008). However, the circumstances in Rivera were much different than the circumstances in this case. In Rivera, the investigative methods utilized by the government prior to applying for a wiretap were much more extensive than what the government did in this case. For example, in Rivera, prior to applying for a wiretap the government utilized six "confidential sources" and four "sources of information." Rivera, 527 F.3d at 898. In Rivera the government explained that the numerous sources were unlikely to further help the government identify other members of the criminal organization because of *actual* (not anticipated/expected) threats to the sources thus making the sources unwilling to continue cooperating with the government. Whereas in this case, the government utilized one confidential source and one undercover agent, and gave no specific reason for not being able to utilize additional sources other than the general statement that it is difficult to recruit informants in Hilo because it is a "small and tight-knit community where people are reluctant or afraid to cooperate with law enforcement." AB 82. In Rivera the Court stated:

> [T]he affidavit here did more than recite the inherent limitations of using confidential informants; it explained in reasonable detail why each confidential source or source of information was unable or unlikely to succeed in achieving the goals of the Rivera investigation.

Rivera, 527 F.3d at 899.

Further, in Rivera, with regard to why the government did not use grand jury subpoenas, the government's application for a wiretap included the inherent limitations of such an investigative tool, however the application also illustrated "the anticipated effect of those inherent limitations on the Rivera investigation[.]" Id. at 900-01. For example, the application discussed how in 2003, an individual fled to Mexico after he was served with a subpoena to testify about a different drug trafficking organization because of fear of arrest for his role in the trafficking. As such, the Court stated "the affidavit does more than recite the inherent limitations of using grand jury subpoenas as an investigative tool; it also demonstrates that those limitations were likely to prevent the DEA from successfully using that investigative tool in the Rivera investigation." Id. at 901.

In assessing the necessity of the wiretap in Rivera, the Court noted that "the DEA conducted far more than a cursory investigation before applying for the wiretap."

> Over the course of 19 months, the DEA conducted physical surveillance of various targets of the investigation; conducted telephone information analysis of Target Telephones 1 and 2 and other telephone numbers associated with the Rivera organization; used several confidential sources to try to infiltrate the Rivera organization or purchase narcotics from it, including from Jerardo Rivera and Rigoberto; consulted with several sources of information to obtain information about the Rivera organization; used an undercover agent

> to gain information about the Rivera organization's money laundering activities; collected trash at the residences or two members of the Rivera organization and attempted to collected trash at the residence of Rigoberto; and attempted to persuade . . . a member of the Rivera organization, to cooperate with the Rivera investigation.

Rivera, 527 F.3d at 903.

The investigation conducted by the government in this case prior to applying for the wiretap was not nearly as extensive as the investigation conducted in Rivera, nor was the application for the wiretap nearly as detailed as was the application in Rivera.

Moreover, it is important to recall that when the government applied for the wiretap order for Reverend Christie's cell number and extensions of the previous wiretap orders the affidavit stated that *law enforcement had already identified multiple sources of supply* to Reverend Christie for marijuana and marijuana products. ER 165; OB 80-81. The government was already in possession of detailed information about the identity of Reverend Christie's suppliers of Cannabis, as well as date, time and location information concerning the delivery of Cannabis to Reverend Christie. OB 80-81. Such information, in conjunction with traditional investigative techniques, negated the necessity for the additional wiretap orders.

Lastly, with regard to a Franks hearing, as discussed in detail in the opening brief, as well as above, it is clear that defendants at least demonstrated a preliminary showing that the wiretap applications contained numerous material misrepresentations and omissions. Further, the requisite state of mind of the agent applying for the wiretap was demonstrated by his key role in the investigation. As such, the district court erred when it denied defendants' request for a Franks hearing.

IV. THE DISTRICT COURT ERRED WHEN IT DENIED REVEREND CHRISTIE'S MOTION TO DISMISS

A. The Government's Argument Regarding Criminal Penalties for the Cannabis Offenses Should Be Stricken as They Are Raised for the First Time On Appeal

In its Brief for the United States, the government raises *for the first time* the argument that the defendants cannot make a showing that the government's classification of Cannabis as a Schedule I substance deprived them of a constitutionally protected liberty interest because they would have faced the same criminal penalties for the Cannabis offenses regardless of whether Cannabis was scheduled as a Schedule I or III substance. GB 68-69. This argument was not raised before the district court, and is being raised for the first time on appeal. (See District Court Docket No. ("DN") 504, the government's memorandum in opposition to Reverend Christie's motion to dismiss, and ER 376, 417 – 456. ("DN" refers to documents filed in District Court Cr. No. 10-CR-00384 LEK

unless otherwise noted.)) The general rule is that the appellate court will not consider issues raised for the first time on appeal. U.S. v. Carlson, 900 F.2d 1346, 1349 (9th Cir. 1990). There are three exceptions to this rule: (1) if there are "exceptional circumstances" why the issue was not raised in the trial court, (2) the new issue arose while the appeal was pending because of a change in the law, or (3) the issue presented is purely one of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court. The three exceptions do not apply in this case. In fact, the government did not even argue that any of the three exceptions apply.

First, there are no exceptional circumstances as to why the issue was not raised in the trial court. Second, the issue did not arise while the appeal was pending because of a change in the law. Third, defendants *will* suffer prejudice as a result of the failure to raise the issue in the trial court. As discussed in further detail below, had the issue been raised in the trial court, the defendants would have presented different arguments in support of their motion to dismiss. As such, this argument by the government regarding criminal penalties for the Cannabis offenses regardless of whether Cannabis was scheduled as a Schedule I or III substance should be stricken and not considered by this Court. However, as the government has raised the argument in its brief, defendants will address it below.

B. Whether Cannabis Was Classified as a Schedule I or III Substance May Have Had an Effect on Defendants' Criminal Punishment

The Government argues that the classification of Cannabis as a Schedule I substance, as opposed to a Schedule III substance had no effect on defendants' actual or potential punishment. GB at 68. This is an overly simplified statement and does not take into consideration the method for sentencing defendants in federal court.

1. If Cannabis was scheduled as a Schedule III, and not as a Schedule I substance, the mandatory minimum penalties for Cannabis offenses would be less severe.

First, 21 U.S.C. section 841 sets forth the mandatory minimum penalties for violations of federal law concerning controlled substances such as Cannabis. If Cannabis were scheduled as a Schedule III substance (as opposed to a Schedule I substance) the mandatory minimum penalties for Cannabis offenses would likely be different than what is currently set forth in 21 U.S.C. section 841. As noted by the District of Columbia Circuit, "Schedule I drugs are subject to the most severe controls and give rise to the harshest penalties for violations of these controls; they are deemed to be the most dangerous substances[.]" Alliance for Cannabis Therapeutics v. DEA, 930 F.2d 936, 937 (D.C. Cir. 1991) (emphasis added). The government is correct that the current punishment in the mandatory minimum laws does not, on its face, take into consideration whether Cannabis is a Schedule I or

III substance. However, this argument lacks integrity as it fails to recognize that the classification of Cannabis as a Schedule I substance may have influenced the mandatory minimum punishment *from the outset*. In other words, it does not matter that the current mandatory minimum punishment is not affected by the categorical scheduling of a substance under the CSA. What matters is that if Cannabis was a Schedule III substance, the mandatory minimum punishment for a Cannabis offense would likely be much less severe because it would not be considered as dangerous a substance with no redeeming medicinal value.

2. If Cannabis was scheduled as a Schedule III, and not a Schedule I, substance, the court's imposition of a sentence for Cannabis offenses would be impacted.

18 U.S.C. section 3553(a) sets forth factors for a court to consider when imposing a sentence. The nature and circumstances of the offense should be considered and the sentence imposed should reflect the seriousness of the offense. It is difficult to imagine that the scheduling of Cannabis as a Schedule III substance, as opposed to Schedule I substance (the category reserved for the most dangerous substances), would not have an impact on the court when imposing a sentence. It seems obvious that the court would consider offenses involving Schedule I substances to be much more serious than offenses involving Schedule III substances. As such, it cannot be said that the scheduling of Cannabis as a

Schedule I substance, as opposed to a Schedule III substance, did not have any effect on the defendants' punishment in this case.

The government cites to U.S. v. Tat, 2014 WL 1646943 (W.D. Penn. 2014) for the premise that a defendant does not have standing to challenge the classification of marijuana in Schedule I on due process grounds because changing the classification would not affect the criminality of defendants' conduct. GB 69. Defendants disagree with the government's reading of Tat as the lack of standing argument in Tat is not based on the classification of Cannabis as a Schedule I versus Schedule III substance. Instead, Tat discusses a criminal defendant lacking standing to challenge a drug's classification in Schedule I because he had not sought authorization "from the Attorney General prior to manufacturing or distributing a Schedule I controlled substance." Tat, 2014 WL 1646943 at *4.

C. Classification as Arbitrary and Irrational

It is indisputable that the public and scientific view of Cannabis and laws concerning Cannabis use are rapidly evolving towards acceptance and legalization. When Defendants filed their opening brief on October 30, 2014, 22 states plus the District of Columbia had already legalized the use of Cannabis for medicinal purposes, and Washington and Colorado had already legalized the recreational use of Cannabis. Since the filing of the opening brief, the District of Columbia

(effective February 26, 2015), Alaska (effective February 24, 2015), and Oregon (effective July 1, 2015) legalized the recreational use of Cannabis.

When the district court denied Reverend Christie's motion to dismiss it based its ruling in part on U.S. v. Miroyan, 577 F.2d 489 (9th Cir. 1978). The district court stated, "Christie has not shown that Mirovan [sic] has been abrogated or is no longer controlling law." ER 6. The district court further relied on Gonzales v. Raich, 545 U.S. 1 (2005) noting that "the Supreme Court has upheld Congressional authority to regulate cultivated medical marijuana." ER 6. The district court further stated, "In short, the Court [in Raich] found the Act's classification of substances, including marijuana, on its schedules was rationally related to its legislative purpose." ER 7. The district court relied on cases decided in 1978 and 2005. In this case, an evidentiary hearing was held on Reverend Christie's motion to dismiss. ER 417-56. Reverend Christie called an expert witness, Charles Webb, M.D., to testify in support of his motion to dismiss. It was stipulated that Dr. Webb was qualified as an expert to render opinions about, *inter alia*, the efficacy and safety of the use of Cannabis as a medicinal product. ER 419. The government did not present any expert witness to oppose Reverend Christie's motion to dismiss or to rebut Dr. Webb's testimony.

Instead of relying on the evidence presented in support of Reverend Christie's motion to dismiss the district court, and the government's opposition to

said motion, relied on prior case law involving legal and factual circumstances and evidence that were different from the present case. Simply because a prior case (e.g., Miroyan) has held that the classification of Cannabis as a Schedule I controlled substance has been determined to be constitutional, does not render any subsequent challenge to such classification moot. This is especially true as there presently continues to be more and more scientific evidence in support of rescheduling Cannabis in the CSA.

> *Miroyan* does not foreclose a court's consideration of future constitutional challenges to the classification of marijuana as a Schedule I drug. The case does not stand for the proposition that even if defendants proffer credible evidence, raising serious questions regarding the constitutional soundness of marijuana's listing on Schedule I, district courts cannot entertain a constitutional challenge.
>
> . . .
>
> Miroyan does not stand for the broad, unbendable proposition that district courts are foreclosed from hearing constitutional challenges to the classification of marijuana under the CSA.

U.S. v. Pickard, ___ F.Supp.3d ___ (E.D. Ca. 2015) (2015 WL 1767536 at *11). The district court erred as it appeared to rely solely on prior case law involving factual and legal circumstances very different from this case, as opposed to the evidence presented to it in this case when it denied Reverend Christie's motion to dismiss.

CONCLUSION

For the foregoing reasons Reverend Christie respectfully requests that his and Sherryanne Christie's respective convictions be reversed.

DATED: Honolulu, Hawaii, June 8, 2015.

/s/ Thomas M. Otake
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ROGER CUSICK CHRISTIE

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), we hereby state that this principal brief is not in full compliance with Fed. R. App. P. 32(a)(7)(B)(ii). This brief is proportionately spaced in 14-point Times New Roman typeface, however contains 10,985 words. A motion for enlargement of brief size is being filed with this brief.

DATED: Honolulu, Hawaii, June 8, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2015, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: Honolulu, Hawaii, June 8, 2015.

/s/ Thomas M. Otake
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