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PRO SE

Intervener for the Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	
	)	
Respondent,	)	
	)	
v.	)	Criminal No. 3:04-cr-00317-WHA
	)	Civil No. 3:12-cv-05836-WHA
CHARLES EDWARD LEPP,	)	
	)	
Petitioner.	)	
_____	)	

MOTION TO INTERVENE BY CARL OLSEN
PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 24

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INTRODUCTION

Pursuant to Federal Rules of Civil Procedure 24(b)(1)(B), Carl Olsen moves to intervene permissively as a petitioner.

Mr. Olsen is an individual with longstanding interest in the sacramental use of marijuana. Mr. Olsen is a member of the Ethiopian Zion Coptic Church and believes, according to church doctrine, that marijuana is the mystical blood of Christ. Mr. Olsen seeks to intervene to protect his interest, which may not be adequately protected without his involvement.

Mr. Olsen has conferred with the petitioner, Charles Edward Lepp, and contacted counsel for the respondent, United States. Mr. Lepp consents to this motion. Alexandra P. Summer does "not" consent to this motion.

BACKGROUND

The Ethiopian Zion Coptic Church is a Rastafarian church incorporated in Jamaica, West Indies, in 1976. The Ethiopian Zion Coptic Church was incorporated in Iowa in 1984 by Mr. Olsen. Members of Mr. Olsen's church, including Mr. Olsen, have been incarcerated for violation of the federal Controlled Substances Act, P.L. 91-513, 84 Stat. 1280, Oct. 27, 1970 ("CSA" hereafter) , 21 U.S.C. §§ 801-904. Members of Mr. Olsen's church defended their actions, production and distribution of marijuana, as protected religious activity under the First Amendment to the Constitution of the United States. Those cases are catalogued in Olsen v. DEA, 878 F.2d 1458 (D.C. Cir. 1989), cert. denied, 495 U.S. 906 (1990) ("Olsen" hereafter).

Mr. Olsen's petition for writ of certiorari in Olsen was pending in the U.S. Supreme Court when the landmark case of Employment Division v. Smith, 494 U.S. 872 (1990) ("Smith" hereafter) was decided. Although Mr. Olsen's petition was not granted, the explanation for why Mr. Olsen's petition was not granted was given in Smith. Olsen is cited at page 888 in Smith. The Smith ruling is this: laws which are neutral toward religion and generally applicable are not subject to judicially crafted religious exemptions. Congress rejected the court's reasoning in Smith and reacted by enacting the Religious Freedom Restoration Act of 1993, P.L. 103-141, 107 Stat. 1488, Nov. 16, 1993 ("RFRA" hereafter), 42 U.S.C. §§

2000bb et seq., which was held unconstitutional as applied to the states in City of Boerne v. Archbishop Flores, 521 U.S. 507 (1997) ("Boerne" hereafter). Congress amended RFRA by enacting the Religious Land Use and Institutionalized Persons Act, P.L. 106-274, 114 Stat. 803, Sept. 22, 2000 ("RLUIPA" hereafter), 42 U.S.C. §§ 2000cc et seq., removing the references to the states and RFRA now remains enforceable by the federal courts as applied to the CSA. RFRA operates as an amendment to every federal law, including the CSA. See Boerne, *supra*.

The U.S. Supreme Court applied RFRA to the CSA in Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006) ("O Centro" hereafter), finding religious use of a schedule I controlled substance required a religious exception to the CSA. Mr. Olsen then petitioned the federal courts to craft a religious exception for his sacramental use of marijuana. Olsen v. Mukasey, 541 F.3d 827 (8th Cir. 2008), cert. denied, Olsen v. Holder, 556 U.S. 1221 (2009). The ruling in Olsen v. Mukasey was that RFRA restored the federal judicial scrutiny applied to religious claims to what it was prior to 1990 when Smith was decided. Because Mr. Olsen's prior religious claims were all decided prior to 1990, the court reasoned, Mr. Olsen had received the same judicial

scrutiny in his prior cases that he would have received under RFRA and barred his claim by collateral estoppel.[1]

Because of the U.S. Supreme Court's analysis in Smith, Mr. Olsen began to consider whether medical use of marijuana is an example of how the CSA is not applied in a neutral way toward religion and is not generally applicable to everyone. See O Centro at 432-433 ("The fact that the Act itself contemplates that exempting certain people from its requirements would be 'consistent with the public health and safety' indicates that congressional findings with respect to Schedule I substances should not carry the determinative weight, for RFRA purposes, that the Government would ascribe to them").

In 1990, the federal government was still in the business of supplying medical users with marijuana under the federal government's Compassionate Care IND Program. See Conant v. Walters, 309 F.3d 629, 648 (9th Cir. 2002)

[1] Mr. Olsen does not agree with the court's analysis in Olsen v. Mukasey. Regardless or Mr. Olsen's pre-Smith cases, RFRA is not limited to facts from 30 year-old cases. See O Centro, 546 U.S. at 431 (O'Connor, J., concurring) (strict scrutiny requires "a case-by-case determination of the question, sensitive to the facts of each particular claim"); Elrod v. Burns, 427 U.S. 347, 373 (1976), ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); Montana v. United States, 440 U.S. 147, 163 (1979) ("Unreflective invocation of collateral estoppel against parties with an ongoing interest in constitutional issues could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical"); Raich v. Gonzales, 500 F.3d 850, 866 (9th Cir. 2007) ("We agree with Raich that medical and conventional wisdom that recognizes the use of marijuana for medical purposes is gaining traction in the law as well").

(Kozinski, J., concurring). The federal government closed the Compassionate Care IND Program in 1992.

In 1994 the U.S. Court of Appeals rejected the appeal in the federal marijuana rescheduling petition. See Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131 (D.C. Cir. 1994).

In 1996 states began to legalize the medical use of marijuana in treatment in the United States. A total of 18 states and the District of Columbia currently have laws accepting the medical use of marijuana in treatment in the United States. On November 6, 2012, two states, Colorado and Washington, legalized the non-medical use of marijuana. If the trend continues, and it appears that it will, see Raich v. Gonzales, *supra*, marijuana will be legal in the United States for both medical and non-medical (including religious) use in the near future. Bills have been introduced in Congress to amend the CSA. The United Nations is going to reconsider global drug policy in 2016. See http://www.world-war-d.com/2012/12/02/un-special-session-on-global-drug-policy-2016/ (last accessed December 25, 2012).

Finally, Mr. Olsen is the intervener in the current federal marijuana rescheduling petition cited on page 24 of Mr. Lepp's Memorandum in Support of his Motion to Vacate, Americans for Safe Access v. DEA, No. 11-1265 (D.C. Cir.), Oral Argument held on October 16, 2012. On November 7, 2012, the court

granted Mr. Olsen's request to file a supplemental brief on the issue of standing, which is highly relevant to Mr. Lepp's Motion to Vacate, because Mr. Lepp would have standing if he were being represented in that case and it appears to Mr. Olsen that the parties in that case may not have standing (a definite and concrete injury). Mr. Lepp was arrested in California, and California has accepted the medical use of marijuana in treatment in the United States, which is an essential element of the CSA. See 21 U.S.C. §§ 812(b)(1)(B), 812(b)(2)(B), 812(b)(3)(B), 812(b)(4)(B), and 812(b)(5)(B). Mr. Lepp's activities were arguably legal under both state and federal law with or without a religious exemption.

ARGUMENT

Rule 24(b) of the Federal Rules of Civil Procedure allows permissive intervention where an applicant's claim or defense, in addition to being timely, possesses questions of law or fact in common with the existing action. See Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1110–11 (9th Cir. 2002). Mr. Olsen's intervention will not unduly delay or prejudice the adjudication of an existing party's rights. Mr. Olsen's interest is not adequately represented by an existing party. Judicial economy will benefit from the intervention. Venegas v. Skaggs, 867 F.2d 527, 530–31 (9th Cir. 1989), aff'd sub nom., Venegas v. Mitchell, 495 U.S. 82 (1990); see also Kootenai Tribe, 313 F.3d at 1111 (affirming

intervention granted due to complex case where "presence of intervenors would assist").

To assess timeliness, courts look to (1) the stage of litigation, (2) the prejudice to other parties, and (3) the reason for and length of any delay. San Jose Mercury News, Inc. v. U.S. Dist. Court—N. Dist. (San Jose), 187 F.3d 1096, 1101 (9th Cir. 1999). Mr. Olsen files this motion within seven weeks of Mr Lepp's filing of the motion to vacate, before Respondent has filed its answer, and before the Court has issued any substantive orders. There has been no delay or prejudice to opposing parties. The motion is therefore timely. See id. (finding motion timely when filed twelve weeks after basis for intervening occurred); see also, e.g., PEST Comm. v. Miller, 648 F. Supp. 2d 1202, 1212 (D. Nev. 2009) (timely when filed during an early stage of the proceedings, there, two months after filing); Nikon Corp. v. ASM Lithography B.V., 222 F.R.D. 647, 649-50 (N.D. Cal. 2004) (timely when no dispositive motions have been decided, despite moving to intervene mid-discovery).

I. Federalism made Congress amend RFRA.

RFRA (as amended in 2000 by RLUIPA) was enacted in response to the U.S. Supreme Court's ruling in Smith. The ruling in Smith was based on federalism. The ruling in Smith was that where a state law makes the use of a

federal schedule I controlled substance (peyote) illegal, without any exceptions (in state law), the federal courts will not apply First Amendment strict judicial scrutiny. If a state law is neutral toward religion and generally applicable to everyone, then the federal courts will not create judicial exceptions for religious use. Congress thought this ruling was wrong and sought to overrule it by enacting RFRA. However, again, applying the principle of federalism, the U.S. Supreme Court held RFRA unconstitutional as applied to the states in Boerne. Accordingly, Congress amended RFRA with RLUIPA by striking any reference to the states. Under current law, RFRA applies only to the federal government. 42 U.S.C. §§ 2000bb et seq. As the U.S. Supreme Court described RFRA in Boerne,

> Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.

Id. 521 U.S. at 532.

> [t]he Act imposes in every case a least restrictive means requirement – a requirement that was not used in the pre-Smith jurisprudence RFRA purported to codify – which also indicates that the legislation is broader than is appropriate if the goal is to prevent and remedy constitutional violations.

Id. 521 U.S. at 535.

After reading that decision, one might question whether strict scrutiny applies at all if RFRA is in fact overly broad. However, that question was addressed again by the U.S. Supreme Court in O Centro, finding the religious use

of a federal schedule I controlled substance ("hoasca tea" which contains DMT) required a religious exception to the CSA. RFRA was not found to be overly broad in the O Centro case and RFRA was applied with full force.[2] Similarly, the Ninth Circuit has applied RFRA to the sacramental use of the federal schedule I controlled substance marijuana, as well as the sacrament use of "daime tea" which contains the federal schedule I controlled substance DMT. See: United States v. Bauer, 84 F.3d 1549 (9th Cir. 1996), cert. denied, 519 U.S. 131 (1997) (suggesting that sacramental use of marijuana is protected by RFRA); United States v. Valrey, NO. CR96-549Z (Western District of Washington, February 2, 2000), 2000 U.S. Dist. LEXIS 22390 (finding that sacramental use of marijuana is protected by RFRA); Church of the Holy Light of the Queen v. Holder, No. 1:08-cv-3095-PA (District of Oregon, November 29, 2012), 2012 U.S. Dist. LEXIS 169267 ("daime tea" which contains DMT is protected by RFRA); Oklevueha Native American Church of Hawaii v. Holder, 676 F.3d 829 (9th Cir. 2012) (suggesting that sacramental use of marijuana is protected by RFRA). O Centro, 546 U.S. at 436-437 ("[t]he very reason Congress enacted RFRA was to respond to a decision denying a claimed right to sacramental use of a controlled substance").

[2] See O Centro, 546 U.S. at 436 (citing *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005)) ("no cause to believe" that the compelling interest test "would not be applied in an appropriately balanced way").

Congress also enacted amendments to the American Indian Religious Freedom Act, codified at 42 U.S.C. § 1996a, requiring all 50 states to exempt the religious use of peyote from their state drug laws. American Indian Religious Freedom Act Amendments of 1994, P.L. 103-344, 108 Stat. 3125, October 6, 1994. No state has challenged the constitutionality of this provision, which is something Mr. Olsen now asks the court to pay particular attention to, because it again brings up the issue of federalism. Can Congress force the states to exempt the sacramental use of peyote? What if the states have consented to it? If there's no injury, then there's no violation of federalism. This is where the issue of "standing" becomes important. Who has standing to complain? See, generally, New York v. United States, 505 U.S. 144, 181 (1992) ("How can a federal statute be found an unconstitutional infringement of state sovereignty when state officials consented to the statute's enactment?").

II. Federalism in the CSA

I've been pointing out the principle of federalism as I go along, because I want to put particular emphasis on it as it applies to the CSA. Conventional wisdom tells us that federal law is supreme. See Gonzales v. Raich, 545 U.S. 1 (2005) (finding the CSA constitutional as applied to state authorized medical use of marijuana). However, often overlooked in conventional analysis is the comment

from the U.S. Supreme Court that marijuana may well be classified (scheduled) incorrectly. Id. 545 U.S. at 28 n.37. This point was further amplified a year later in 2006 when the U.S. Supreme Court held that state authorized medical use of controlled substances is beyond the power of a federal administrative agency to criminalize using administrative rules. See Gonzales v. Oregon, 546 U.S. 246, 258 (2006) ("The Attorney General . . . is not authorized to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law"). The U.S. Supreme Court pointed to the non-preemption clause in the CSA, 21 U.S.C. § 903, id. 546 U.S. at 251, and the CSA's limited purpose of preventing the non-authorized use of controlled substances:

> The statute and our case law amply support the conclusion that Congress regulates medical practice insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood. Beyond this, however, the statute manifests no intent to regulate the practice of medicine generally. The silence is understandable given the structure and limitations of federalism, which allow the States "'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985)).

Id. 546 U.S. at 269. And, see U.S. District Judge Alsup's ruling:

> The government is legitimately concerned that a physician might in bad faith issue recommendations that would then be used to enlarge the distribution of marijuana to those who really do not need it. From time to time, physicians registered under the Controlled Substances Act abuse their privileges, dispensing, for example, excessive

> controlled substances or otherwise circumventing the Act. See, e.g., *United States v. Moore*, 423 U.S. 122, 46 L. Ed. 2d 333, 96 S. Ct. 335 (1975). Physicians who issue insincere recommendations without a medical basis and with knowledge that they would be used to illegally obtain marijuana would be subject to DEA revocation.

Conant v. McCaffrey, No. 3:97-cv-00139-WHA (Northern District of California, September 7, 2000), 2000 U.S. Dist. LEXIS 13024 at 47, aff'd, Conant v. Walters, 309 F.3d 629 (9th Cir. 2002).

In 1994, when Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131 (D.C. Cir. 1994), was decided, there was no violation of federalism when the court said the DEA had the discretion to decide whether marijuana had accepted medical use in treatment in the United States, because there were no states in the United States that had accepted marijuana for use in medical treatment in 1994. Today, the answer to that question is just the opposite. 18 states have now accepted the medical use of marijuana in treatment in the United States. DEA does not have the discretion to maintain a regulation making marijuana illegal in a state that has accepted it for medical use. And see Grinspoon v. DEA, 828 F.2d 881, 886 (1st Cir. 1987):

> We add, moreover, that the Administrator's clever argument conveniently omits any reference to the fact that the pertinent phrase in section 812(b)(1)(B) reads "in the United States," (emphasis supplied). We find this language to be further evidence that the Congress did not intend "accepted medical use in treatment in the United States" to require a finding of recognized medical use in every state or, as the Administrator contends, approval for interstate marketing of the substance.

III. Federalism gives Mr. Lepp standing

At the Oral Argument held on October 16, 2012, in Americans for Safe Access v. DEA, No. 11-1265 (D.C. Cir.) ("ASA" hereafter), cited in Mr. Lepp's Memorandum in Support of his Motion to Vacate on page 24, the court requested additional briefs from ASA and DEA on the issue of standing. Mr. Olsen was also granted permission to file a supplemental brief on the issue of standing. See Exhibit #1 attached to this motion. ASA's standing was based on a disabled veteran, Michael Krawitz, who was denied medical treatment from the Veterans Administration in the state of Virginia because of his "non-authorized" medical use of marijuana. Virginia, however, is not one of the states that has accepted the medical use of marijuana in treatment. In ASA's supplemental brief, an additional claim was added that Mr. Krawitz lives in Oregon for one or two months per year, but that he has not contacted the Veterans Administration in Oregon for assistance because he assumes they would not assist him. That seems like a weak argument to Mr. Olsen. Mr. Lepp, on the other hand, is a person directly injured by the federal misclassification of marijuana because he is currently being detained (incarcerated). See Bond v. United States, ___ U.S. ___, 131 S. Ct. 2355, 2364, 180 L. Ed. 2d 269, 280, 2011 U.S. LEXIS 4558, 79 U.S.L.W. 4490, 22 Fla. L. Weekly Fed. S 1156:

> The limitations that federalism entails are not therefore a matter of rights belonging only to the States. States are not the sole intended beneficiaries of federalism. See *New York, supra*, at 181, 112 S. Ct. 2408, 120 L. Ed. 2d 120. An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate.

Because Mr. Lepp was "authorized" under California law, if not for the federal misclassification of marijuana, Mr. Lepp would not have been arrested by federal authorities, and that gives Mr. Lepp standing to complain about it.

CONCLUSION

The threshold legal requirements for permissive intervention are clearly met here. Allowing Mr. Olsen to intervene will not delay the litigation. Further, questions of law are shared with the main parties: Mr. Olsen seeks to intervene to address the legality of Mr. Lepp's detention (incarceration), and Mr. Olsen's intervention will revolve around the same factual background, whether a compelling governmental interest exists in preventing Mr. Lepp to freely exercise his religion. Mr. Olsen's intervention would neither delay the litigation nor alter the factual background around which the claims revolve.

Mr. Olsen has contributed specifically to the development of federal case law regarding the sacramental and medical use of marijuana. Mr. Olsen is well

positioned to present the legal and factual bases for Mr. Lepp's action from his perspective, without the potentially conflicting duress of Mr. Olsen being under direct criminal prosecution. Mr. Olsen will represent interests in this litigation that may not otherwise be represented, and his participation will contribute to the equitable resolution of this conflict.

Accordingly, Mr. Olsen requests permissive intervention.

Dated this 27th day of December, 2012.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2012, a copy of the foregoing Motion to Intervene by Carl Olsen Pursuant to Federal Rule of Civil Procedure 24, with attached exhibits, was mailed, postage paid, to each of the following:

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TABLE OF EXHIBITS

Ex. No.	Description
1	Order of the U.S. Court of Appeals for the District of Columbia allowing Carl Olsen to file a supplement brief on standing in Americans for Safe Access v. DEA, No. 11-1265 (November 7, 2012)