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UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, vs. ROGER CUSICK CHRISTIE (01), SHERRYANNE L. CHRISTIE (02), et al., Defendants.	CR. NO. 10-00384-LEK DEFENDANTS' ROGER AND SHERRYANNE CHRISTIE'S JOINT REPLY TO GOVERNMENT'S MEMORANDUM IN OPPOSITION TO MOTION IN LIMINE TO PRESENT RELIGIOUS FREEDOM RESTORATION ACT DEFENSE; SUPPLEMENTAL DECLARATION OF LAURIE COZAD, PH. D.; DECLARATION OF CHARLES WEBB, M.D.; CERTIFICATE OF SERVICE

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DEFENDANTS ROGER AND SHERRYANNE CHRISTIE'S JOINT REPLY TO GOVERNMENT'S MEMORANDUM IN OPPOSITION TO MOTION IN LIMINE TO PRESENT RELIGIOUS FREEDOM RESTORATION ACT DEFENSE

Defendants, Reverend Roger Christie and Sherryanne Christie, by undersigned counsel, reply as follows to the government's opposition (Doc. 603) to the Christies' motion in limine to present a defense under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1, at trial (Doc. 587, "RFRA motion").

I. OVERVIEW OF CHRISTIES' RFRA MOTION, GOVERNMENT'S RESPONSE, AND CHRISTIES' REPLY

In the Declarations and Exhibits attached to the Christies' RFRA motion and this reply, the Christies have proffered evidence sufficient to demonstrate a prima facie RFRA defense, i.e.: that the instant prosecution (1) substantially burdens (2) their sincere (3) religious exercise. Specifically, the proffered evidence is sufficient to demonstrate that the Christies' beliefs and practices concerning cannabis sacrament are religious, and that the cultivation and distribution of cannabis sacrament to members of The Hawaii Cannabis (THC) Ministry and certified medical marijuana patients are essential practices of their Ministry. In addition, the Christies have both proclaimed and substantiated their sincerity under oath in their Declarations, which is further supported by the additional Declarations and Exhibits attached to their RFRA motion. Based on the evidence

proffered in their RFRA motion, the Christies have asserted their right to a jury determination of their RFRA defense.

In opposition, the government contends: (1) the Christies' proffered beliefs are: (a) not religious; or (b) sincerely held; (2) the instant prosecution: (a) furthers the government's interest in disallowing diversion of cannabis to non-religious use, an interest which the government asserts is compelling in this case; and (b) constitutes the least restrictive means to further the government's asserted interest; and (3) the Christies do not have a right to a jury determination of their RFRA defense.

The government's arguments have no merit. As explained in Section II, *infra,* and the attached Supplemental Declaration of expert witness Laurie Cozad, Ph.D (Cozad Supp. Dec.) ¶¶30-31, the Christies' beliefs and practices concerning cultivation and distribution of cannabis sacrament are religious. In addition, as explained in Section III, *infra,* and at Cozad Supp. Dec. ¶30.h, their practices and actions are in line with their belief system, which constitutes persuasive evidence of their sincerity. Further, as explained in Sections V and VI, *infra,* the government has not, and cannot, meet its burden of demonstrating that its asserted interest in preventing diversion of cannabis to non-religious use is compelling in this case, or that this prosecution is the least restrictive means of furthering any such diversion concerns. Finally, as explained in Section VII, *infra,* the Christies

respectfully submit that they have a fundamental constitutional right, indeed a structural constitutional guarantee, to a jury determination of these issues. Therefore, the Christies respectfully request that they be permitted to present their RFRA defense to the jury.

II. THE CHIRSTIES' BELIEFS REGARDING CANNABIS SACRAMENT ARE RELIGIOUS

The government contends the following factors demonstrate that the Christies' beliefs concerning cannabis are not religious: (1) the types of cannabis use that the Christies deem to be sacramental, e.g. — prayer, meditation, worship, nutrition, healing and fellowship-- are numerous and not restricted to Ministry premises; (2) THC Ministry membership and ordination processes;[1] and (3) the

[1] Citing *U.S. v. Lepp,* 2008 WL 3843283, at p.4 (N.D. CA 2008), the government also challenges the credibility of the Universal Life Church, where Reverend Christie was first ordained in 1972. As explained in Section V. *infra,* critical distinctions exist between this case and *Lepp.* In addition, Christie's ordination in the Universal Life Church was more than 40 years ago. Since that time, he was a member of the Religious Science Church from 1986-1993, a well-recognized New Thought spiritual movement founded in 1927 by Ernest Holmes. As explained in Dr. Cozad's original Declaration, the THC Ministry's beliefs draw upon Reverend Christie's years in the Religious Science church (Doc. 587-3, p.8; Cozad Dec., ¶¶6-7). In addition, Reverend Christie joined the Religion of Jesus Church (RJC) in 1993 and was ordained as an RJC minister in 2000. RJC was founded in 1969, and was recognized by the State of Hawaii as a bona fide religion in at least two cases (Doc. 587-3, p.9). Moreover, based on his ordination in RJC as a cannabis sacrament minister, Reverend Christie received a license to perform marriages from the State of Hawaii.

THC Ministry's description as a possible sanctuary from prosecution (Doc. 603, p.106 of 126).

These contentions have no merit. As Dr. Cozad explains, the government's challenge to the religiousity of the Christies' beliefs on the ground that sacramental use can occur outside ministry premises "reflects fundamental misconceptions about religion" (Cozad Supp. Dec., ¶30.f.). In addition, the types of cannabis use the Christies deem to be sacramental are consistent with their religious beliefs in cannabis sacrament as a "botanical savior" and the "Tree of Life" *(Id,* at ¶¶13, 14, 26, 30.a.,b.,h., 31).

As Dr. Cozad further explains, the THC Ministry's membership and ordination processes are "one of the strongest facts in opposition to the federal government's claims" (Id., at ¶30.c). Dr. Cozad draws a comparison to Protestant traditions, where one of the "most important goals is to bring in new members[,]" and "[o]ne merely has to announce one's desire to become a member of the church and then the church would regard that individual as a member" (*Id*.). Similarly, in the Native American Church, "[a]fter an applicant completes a simple application form, he or she may participate in ceremonies involving the consumption of peyote." *Church of the Holy Light of the Queen et al. v. Mulcasey et al.,* 615 F.Supp.2d 1210, 1221 (D.Or. 2009).

As Dr. Cozad further explains, the THC Ministry's role in providing possible sanctuary from criminal prosecution was one of a number of services the Ministry offered, and providing such sanctuary has been a "role of the church since the Middle Ages" (Cozad Supp. Dec. ¶30.e).

The government cites (Doc. 603, p.112 of 126) two cases in support of its erroneous claim that the Christies' beliefs are not religious: *U.S. v. Quaintance,* 608 F.3d 717 (10th Cir.), *cert. denied,* 131 S.Ct. 544, 547 (2010) and *U.S. v. Meyers,* 95 F.3d 1475 (10th Cir. 1996), *cert. denied,* 522 U.S. 1006 (1997). Neither case supports the government's argument. *Quaintance* did "not address the district court's religiousity holding[,]" 608 F.3d at 721, and refused to consider, but specifically did not "endors[e] the pre-trial resolution of motions that implicate factual questions intertwined with the merits, all in contravention of [Fed.R.Crim.P.] 12(b)(2)." *Id.,* at 720 n.2 (citations omitted).

Meyers conflicts with Ninth Circuit law. The *Meyers* district court analysis, which the Tenth Circuit adopted, 95 F.3d at 1484, specifically declined to rely on the "functional test" adopted in *U.S. v. Seeger,* 380 U.S. 173, 176 (1963), which "defines religion in terms of the role a belief plays in the individual's or group's life" (internal quotations and brackets omitted), reasoning that this test was "at least for First Amendment purposes, dead." 906 F.Supp.2d 1494, 1500 (D. Wyo. 1995). The Ninth Circuit, on the other hand, continues to rely on *Seeger* under

RFRA. In *U.S. v. Zimmerman,* 514 F.3d 851, 853 (9th Cir. 2007), the Court, quoting *Callahan v. Woods,* 678 F.2d 679, 683 (9th Cir. 1981), stated that a RFRA defendant's beliefs must be "rooted in 'religious belief,' not in 'purely secular' concerns." Immediately following this quoted language, the *Callahan* Court cited *Seeger's* "test for religious belief' as "whether beliefs professed are sincerely held and, in claimant's scheme of things, religious[,]" and stated that *Seeger* is "applicable to First Amendment analysis generally." 678 F.2d at 683 and n.4.[2]

In *Meyers,* since the Court declined to apply the *Seeger* test, the Court placed no weight on the defendant's own belief that his beliefs were religious. 95 F.3d at 1484. In the Ninth Circuit, by contrast, a crucial inquiry is whether, by the RFRA defendant's scheme of things, his or her beliefs are religious. The Christies have made an overwhelming showing that their beliefs and practices regarding cannabis sacrament, are, in their scheme of things, religious *(See* RFRA motion, Doc. 587-3, p.7-13, Declarations and Exhibits attached to RFRA motion, and Supplemental Declarations attached hereto).

In addition, *Meyers* predates the enactment of the Religious Land Use and Institutionalized Persons Act of 2000 (RLIUPA), which broadened RFRA' s

[2] *Zimmerman* also cited *Seeger* for the proposition that: "whether Zimmerman's beliefs are sincerely held is a question of fact[,]" 514 F.3d at 854, and *Seeger* is discussed in the RFRA motion, Doc.587-3, p.3-4, and Cozad Supp. Dec., ¶ 30.h.

definition of 'exercise of religion." Prior to RLIUPA, RFRA defined "exercise of religion" as the "exercise of religion under the First Amendment," 42 U.S.C. 2000bb-2(4) (1994), which protected only "central" religious beliefs and practices. *Navajo Nation v. United States Forest Service,* 535 F.3d 1058, 1076 (9th Cir. 2008) *(en banc) (quoting Hernandez v. Commissioner of Internal Revenue,* 490 U.S., 680, 699 (1989)). RLUIPA amended RFRA's definition to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000bb-2(4), 42 U.S.C. 2000cc-5(7)(A). *See Zimmerman,* 514 F.3d at 854 (district court erred in holding that defendant's refusal to give blood sample was not based on religious belief).

Finally, *Meyers* is factually distinguishable. Unlike the THC Ministry, *Meyers'* church did not: (1) assert that cannabis helped them realize a connection to God or otherwise achieve a religious state; (2) mandate that its members ingest cannabis; and (3) attempt to propagate its beliefs. 906 F.Supp. at 1504.

In sum, the government's contention that the Christies' beliefs concerning cannabis sacrament are not religious is wholly unsupported in fact and in law.

III. THE CHRISTIES' BELIEFS ARE SINCERELY HELD

The Christies have proclaimed and substantiated their sincerity under oath in their own Declarations, and have submitted corroborating Exhibits and Declarations from others. Expert witness Laurie Cozad, Ph.D., has explained that

the Christies' practices and actions are very much in line with their beliefs, and this constitutes persuasive evidence of their sincerity (Cozad Supp. Dec. ¶ 30.h).

The government contends, without citing any legal support, that the income producing aspect of the THC Ministry demonstrates that the Christies' beliefs were not sincerely held (Doc. 603, p.112-115 of 126).

The fact that the Ministry received donations in no way undermines the sincerity of their beliefs. As Dr. Cozad explains (Cozad Supp. Dec. ¶ 30.h):

> A church can only exist if its members give offerings, tithes, donations, in other words money. Just like any non-profit institution churches need to cover their overhead expenses. For example, every church pays their ministers and employees, and must cover their operating expenses. Moreover, whenever a ministry of any denomination performs ritual services (e.g. weddings, baptisms and funerals), the minister is always compensated for his services. . . . And regularly, the Christies gave away sacramental cannabis for free in the form of Aloha Bags, because, according to one member, "if you did not have the money, he would give you pot. And as noted above, the Christies had a very simple life-style; neither had any of the accoutrements or the rewards of a drug operation. Finally, making cannabis available to those who needed it for spiritual and/or medical reasons was a community service and one of pastoral care.

Thus, the government's challenge to the Christies' sincerity should be rejected. Moreover, as explained in the Christies' RFRA Motion (Doc. 587-3, p.18-22) and further explained below, the Christies have a fundamental constitutional right and a structural constitutional guarantee to have the jury weigh their credibility and judge their sincerity.

IV. *U.S. V BAUER* AND *GUAM V GUERRERO* DISTINGUISHED

The government contends (Doc. 603, p.105 of 126) that in *U.S. v. Bauer,* 84 F.3d 1549 (9th Cir. 1996) and *Guam v. Guerrero,* 280 F.3d 1210 9th. Cir. 2002), the Ninth Circuit rejected "virtually the same religious claims" regarding cannabis and Rastafarianism as the Christies assert regarding cannabis and the THC Ministry. This is not the case.

In *Bauer* and *Guerrero,* the court held, as a matter of law, that the defendants did not satisfy the "substantial burden" element of their RFRA defenses. 290 F.3d at 1222-23. Here, by contrast, the government concedes that the Christies have established the "substantial burden" element (Doc. 603, p.104 of 126).[3]

In *Bauer* and *Guerrero,* the defendants asserted that they were members of the Rastafarian religion and used marijuana as a sacrament, but they did not present any evidence that their religion required them to distribute or import marijuana. 84 F.3d at 1559; 290 F.3d at 1223. Therefore, prosecution for these offenses did not "substantially burden" their practice of Rastafarianism. 290 F.3d at 1222-23. *Accord, Navajo Nation,* 535 F.3d at 1073 n.15 *(construing Guerrero).*

[3] The government contends that the Christies have failed to establish only the "religious exercise" and "sincerity" elements of their RFRA defense. The government does not challenge the sufficiency of the Christies' showing of part (4) of the *Zimmerman* test, which is "substantial burden" (Doc. 603, p.104 of 126).

Since the *Bauer* and *Guerrero* defendants wholly failed to proffer any evidence to support the "substantial burden" element of their RFRA defenses, it was entirely appropriate to dismiss their RFRA, defenses as a matter of law. *See e.g., US. v. Bailey,* 444 U.S. 394, 414-16 (1980) (where defendant proffers evidence which, even if believed, is insufficient to establish an essential element of an affirmative defense, court need not submit that defense to the jury); *US. v. Darrell,* 758 F.2d 427, 430 (9th Cir. 1985) (court can exclude defense as a matter of law where defendant proffers evidence which, even if believed, would not support a finding of an essential element).

Here, by contrast, Reverend Roger Christie was the founder and leader of the THC Ministry, and Sherryanne Christie is his wife and an ordained THC Ministry minister who helped Reverend Christie manage the Ministry when he was injured with a broken ankle (Sherryanne Christie Dec., attached to RFRA Motion, ¶ 17). The Christies, unlike *Bauer* and *Guerrero,* have asserted and proffered evidence sufficient to establish that cultivating cannabis sacrament and making it available to THC Ministry members and certified medical marijuana patients was an essential part of their religious practice.

In numerous case since *Bauer* and *Guerrero,* courts have found, or, as here, the government did not dispute, that the defendants satisfied the "substantial burden" element. E.g., *Quaintance,* 608 F.3d at 720; *Meyers,* 95 F.3d at 1482;

U.S. v. Lepp, 2008 WL 3843283 (N.D. CA 2008). *See also Oklevueha Native American Church of Hawaii, Inc., et al, v. Holder, et al,* Civ. No. 09-00336-SOM (D. HI. 12/31/2012) (Doc. 85, p.11) (holding plaintiffs allegations of "substantial burden" were sufficient to survive motion to dismiss).

Since the issue in *Bauer* and *Guerrero* was the defendant's failure to establish RFRA's "substantial burden" element, and since that is not in issue here, the government's claim that *Bauer* and *Guerrero* rejected "virtually the same religious claims" as the Christies assert here is incorrect.

V. THE GOVERNMENT HAS NOT MET ITS BURDEN OF DEMONSTRATING A COMPELLING GOVERNMENTAL INTEREST

At the outset it is critical to keep in mind that the government may substantially burden Defendants' exercise of their religion only if *the government demonstrates* its application of the burden *on these particular Defendants* is in furtherance of a compelling governmental interest, and such burden is the least restrictive means of furthering that compelling governmental interest. In this case, the government claims that the Defendants' beliefs concerning cannabis and the manner in which they operated the THC Ministry raises significant diversion concerns.

The government submits that the Defendants' beliefs would make all possible associations with marijuana religious. However, the goverment fails to

explain how such statement raises diversion concerns (i.e., how the scope of Defendants' beliefs would cause cannabis to be diverted to non-members of the THC Ministry). The cannabis sacrament from the Ministry was only available to Ministry members and certified medical marijuana patients. It was not a belief of the Ministry to blindly distribute cannabis to the general public.

The government also argues that there were 60,000 members of the THC Ministry worldwide, and that Defendants advertised and promoted their Sanctuary Kits all over the world. Again, the government fails to adequately establish how these assertions raise diversion concerns.

First, even if there were 60,000 members worldwide, only a few hundred were actually receiving cannabis sacrament from Defendants. Defendant Roger Christie disbursed cannabis only to members who were in Hilo (approximately 200-400 members per month and no more than one ounce per member at a time). See Decl. of Roger Christie at ¶¶47-48 [Docket No. 587-4.] He did not mail cannabis to individuals, nor did he travel outside of Hilo to disburse cannabis. As such, the Ministry's disbursement of cannabis was limited to a very small group of people in a very small and remote geographical location (i.e., Hilo, Hawaii). Hilo is a very small town on a very small island located in the middle of the Pacific Ocean. This is not a situation where someone would be able to receive cannabis sacrament in Hilo, then easily transport it to another geographic location as any

such movement would involve getting on an airplane or mailing the cannabis, both of which are very difficult to do due to increased security measures.

Second, the fact that Defendants advertised and promoted their Sanctuary Kits is not evidence that supports the government's supposed compelling governmental interest, diversion of cannabis to non-ministry members. The Sanctuary Kits did not contain cannabis, and the Defendants are not charged with promoting and distributing Sanctuary Kits. As such, any evidence concerning the use of Sanctuary Kits to support the government's diversion of Cannabis argument is completely without merit.

The government attempts to establish a diversion concern regarding the potential use of the Ministry's propaganda (i.e., Sanctuary signs and plant tags) as evidence of diversion. Again, Defendants are not charged with distributing the Ministry's signs and plant tags. The signs and plant tags did not contain cannabis. The government speculates that the Ministry's signs and plants tags might be used for non-Ministry purposes, however presents no evidence that this was actually happening. Further, the government presents no evidence as to how distributing such propaganda raises legitimate concerns about diversion of the Ministry's cannabis sacrament to non-members. In sum, the government wholly fails to establish that the Defendants' actions or inaction caused any significant diversion of cannabis to non-members.

The government further speculates that members could give their cannabis sacrament to non-members once they left the Sanctuary. It is true that Defendants did not stalk their members to ensure that each member did not share his/her cannabis sacrament with non-members. However, the government's theory is pure speculation.

The government has gone to great lengths to investigate Defendants (e.g., ground surveillance, air surveillance, wire-taps for approximately 15,000 telephone calls, undercover agents and a confidential informant). Despite the grand scope of the government's investigation, it has failed to produce any evidence that Ministry members were giving/sharing their cannabis sacrament with non-Ministry members. However, even assuming, *arguendo,* that the government did establish that certain members were sharing/giving their cannabis sacrament to non-members, considering the small amount of cannabis that was distributed to each member (no more than one ounce at a time) and how often it was distributed to a single member (at most every two to three weeks), the amount of cannabis being diverted to non-members would have been very insignificant. Such insignificant diversion does not rise to the level of a compelling governmental interest that would justify the substantial burden of Defendants' exercise of their religion.

Further, as discussed in detail in the memorandum in support of Defendants' motion [Docket No. 587-3], the following factors further support the argument that

the government has not met its burden. First, lawmakers and law enforcement officials are no longer vigorously pursuing criminal charges involving cannabis. Second, 18 states (including Hawaii) have approved the medical use of cannabis and two states have approved the recreational use of cannabis. Third, there is overwhelming evidence that cannabis is not a dangerous substance[4] and that it is improperly scheduled as a Schedule I substance under the Controlled Substances Act. (See, the Declaration of Charles Webb, M.D. for further discussion about the safety of using cannabis.) As such, the incredibly insignificant, if any, diversion of cannabis (a non-harmful substance) to non-members certainly does not rise to the level of a compelling governmental interest that would justify substantially burdening these Defendants' right to exercise their religion.

The government attempts to downplay the factual differences between this case and *Lepp,* however such differences cannot be ignored. First, *Lepp* involved 25,000 cannabis plants on a farm that was easily accessible to the public. Second, it was well known by the public that the farm cultivated cannabis plants. Third, the amount of cannabis plants in *Lepp* was grossly more than what Lepp needed for his ministry members. In this case, there are approximately 280 plants at issue. The plants were not accessible to the public as they were grown indoors in a secure facility. (See Decl. of Roger Christie at ¶54 [Docket No. 587-4.].) And lastly, the

[4] The government has not presented any evidence to dispute this fact.

farm that was tasked with supplying cannabis sacrament for the THC Ministry was so small that it was incapable of cultivating enough cannabis to satisfy the needs of the Ministry as demonstrated by the fact that the Ministry continued to purchase cannabis from other suppliers. In sum, the government has failed to demonstrate that the diversion concerns present in *Lepp* are present in this case.

The government also argues that the fact that Reverend Christie turned down cannabis from suppliers when he did not need it for his Ministry is evidence that supports its diversion argument. However, this could not be farther from the truth. If the Ministry was truly just a cover-up for a drug dealing operation, then Reverend Christie would have bought all the cannabis he could get his hands on because he could turn around and sell it to members (in large quantities) and non-members thereby making a large profit. Reverend Christie did not do this. He purchased only what he needed for his Ministry. He did not start the THC Ministry "for the money". In fact, this is the reason he turned down the undercover agent's offer to fund a farm for the THC Ministry. As evidenced by the recorded telephone conversation between Reverend Christie and the Confidential Source on September 26, 2008, Reverend Christie did not believe the undercover agent was sincere and believed he was only in it for the money, and Reverend Christie wanted nothing further to do with him.

Roger Christie (talking about the undercover agent):

> *He's all money, money, money. I don't do money money money. . . . [I] don't need to have another meeting with him.*

The government argues that the manner in which an individual could become a member/minister also supports its diversion concerns. However, in *Church of the Holy Light of the Queen et al. v. Mukasey et al.,* 615 F.Supp.2d 1210 (D. Or. 2009), the court discussed how the Native American church, which is permitted to distribute peyote to its members, does not have stringent requirements to becoming a member authorized to use peyote.

> [The government] criticize[s] plaintiffs for not conducting a more formal interviewing process. I note that the Native American Church does not request medical information before allowing new applicants to participate in services, even though the peyote consumed during NAC religious ceremonies contains. . . a hallucinogen comparable in strength to the DMT in Daime Tea. The application form for membership in the Native American Church seeks only name, address, phone number, tribe, and tribal enrollment.

Mukasey, 615 F.Supp.2d at 1217.

In *Mukasey,* the court found, *inter alia,* that the government did not present evidence in support of its argument that the church even allowed Daime tea to be used without the church's authorization. *Id.* at 1218. Nor did the government produce evidence that Daime tea caused any safety concerns. *Id.* at 1220. In sum, the court found that the government failed to show that its interests justified prohibiting Daime tea outright. *Id.* at 1220. It further stated that the government

"failed to show that outright prohibition of the Daime tea is the least restrictive means of furthering its interests." *Id.* at 1220.

> The Native American Church's use of peyote in religious ceremonies is instructive on the feasibility of allowing plaintiffs to continue the religious use of Daime tea. The NAC has about 300,000 members. After an applicant completes a simple application form, he or she may participate in ceremonies involving the consumption of peyote. There is no evidence that the NAC's distribution and use of peyote have resulted in any significant diversion to recreational users, or serious health effects to NAC members.

Id. at 1221. In sum, the court noted that the DEA, which monitors the NAC's use of peyote, was capable of monitoring the importation and distribution of Daime tea in Oregon. *Id.* Likewise, in this case, the government has not demonstrated that it is not capable of monitoring the activities of the THC Ministry in Hilo concerning its use of cannabis as a sacrament.

VI. THE PROSECUTION OF ROGER AND SHERRYANNE CHRISTIE IS NOT THE LEASE RESTRICTIVE MEANS OF FURTHERING THE GOVERNMENT'S SUPPOSED COMPELLING INTEREST

As the government has not met its burden of demonstrating a compelling governmental interest, it likewise has not met its burden of demonstrating that the criminal prosecution of Roger and Sherryanne Christie is the least restrictive means of furthering any governmental interest, compelling or not. Like *Mukasey,* the government in this case has failed to show that an outright prohibition of the substance at issue, in this case cannabis, is the least restrictive means of furthering

its interests. The government cites Olsen v. Drug Enforcement Administration, 878 F.2d 1458 (D.C. Cir. 1989) in support of its position that this prosecution is the least restrictive means. However, Olsen is almost 24 years old. As discussed in the motion, since Olsen, there have been drastic changes in the laws concerning cannabis (i.e., decriminalization for medical and recreational uses). As well, there have been numerous studies concerning the medical benefit and safe use of cannabis. As such, public opinion has very much changed about cannabis since Olsen was decided.

The bottom line is that, applying the set of facts present in this case, the government has not demonstrated that the instant criminal prosecution against Roger and Sherryanne Christie, is the least restrictive means of furthering its interests. If the compelling governmental interest is diversion of cannabis to non-members, there are a number of means, other than a criminal prosecution, that could be set in place to eliminate the government's diversion concerns. Reverend Christie has always wanted to work with, not against, law enforcement and the lawmakers. There has been no showing by the government that the establishment of procedures, guidelines and rules for the THC Ministry to follow concerning its use of cannabis as a sacrament, would not be effective in eliminating the diversion concerns. Instead of exploring such options, the government has decided to utilize the most drastic and extreme weapon in its power against Roger and Sherryanne

Christie (i.e., criminal prosecution) instead of attempting a less draconian, yet clearly available and feasible, method to resolving diversion concerns.

VII. THE CHRISTIES' OFFER OF PROOF ENTITLES THEM TO PRESENT THEIR RFRA DEFENSE TO THE JURY

In their RFRA motion, the Christies assert a right to a jury determination of their RFRA defense on three grounds: (1) right to meaningful opportunity to present complete defense; (2) right to have jury perform its fact-finding function; and (3) right to have vagueness issue determined based on facts as they emerge at trial.

In opposition, the government misstates the Christies' argument. According to the government, the Christies contend that their RFRA defense is solely a jury issue, and that the district court may not make any admissibility determination (Doc. 603, p.9-10 of 126). This is not the case.

Notably, the government goes to great lengths to emphasize that RFRA provides an "affirmative defense" (Doc. 603, p.9-20 of 126; Doc. 526, p.4-6). Indeed, the government concedes that a defendant's eligibility to present a RFRA defense "is generally consistent with how other affirmative defenses are handled in Federal criminal practice," (Doc. 603, p.13 of 126).

The Christies readily recognize that, as with any affirmative defense, the Court can exclude a RFRA defense as a matter of law in an appropriate case, and

therefore can make an admissibility determination. However, such is not the case here.

In deciding whether to exclude a defense as a matter of law, the issue is whether "the proffered evidence, construed most favorably to the defendant, would fail to establish all elements of that defense." *U.S. v. Cervantes-Flores,* 421 F.3d 825, 828 (9th Cir. 2005). "The sole question presented in such situations is whether the evidence, as described in the defendant's offer of proof, is insufficient as a matter of law to support the proffered defense" *(quoting US. v. Dorrell,* 758 F.3d 427, 430 (9th Cir. 1985)). In deciding whether to exclude a defense as a matter of law, the Court cannot weigh the credibility of the proffered evidence, but rather must view it as "if believed," *Dorrell,* 758 F.2d at 430.

Moreover, the proffered evidence need not be strong. *US. v. Gurolla,* 333 F.3d 944, 956 (9th Cir. 2006). Indeed, the evidence could even be "weak, insufficient, inconsistent, or of doubtful credibility." *US. v. Becerra,* 992 F.2d. 960, 963 (9th Cir. 1993) *(cited* in Gurolla) *(quoting United States* v. *Yarbrough,* 852 F.2d 1522, 1541 (9th Cir. 1988). Therefore, "the trial court rarely rules on a defense as a matter of law. *See Sandstrom v. Montana,* 442 U.S. 510, 52.3 .. . (1979)." *United States v. Contento-Pachon,* 723 F.2d 691, 693 (9th Cir. 1984).

The government erroneously contends that recognizing the Christies' fundamental constitutional right to present their RFRA defense to the jury would

be "in contravention of RFRNs express statutory requirements" (Doc. 603, p.12 of 26). The Christies' argument in no way contravenes RFRA.

By its terms, RFRA may be asserted as a "defense in a judicial proceeding." 42 U.S.C. 2000b-1(c). This includes the right to assert a RFRA defense in a criminal case, *see US. v. Bauer,* 84 F.3d 1549, 1556-59 (9th Cir. 1996) (district court erred in precluding defendants from presenting evidence of religious defense to marijuana possession counts), where a defendant has a Sixth Amendment right to a jury determination of whether or not he or she is guilty. The "jury's function of determining the guilt or innocence of the accused" includes deciding the facts necessary to establish the defendant's defense. *Sherman v. United States,* 356 U.S. 369, 377 (1958) *(Sorrells* v. *US.,* 287 U.S. 435 (1932) rejected argument that factual issue of entrapment should be decided by judge, not jury).

Nowhere does RFRA suggest that a criminal defendant's right to a jury determination of the merits of a RFRA defense should differ in any way from a defendant's right to a jury determination of the merits of any other affirmative defense. Indeed, as stated, the government concedes that the Court should handle a defendant's assertion of a RFRA defense consistent with how the Court would handle the assertion of any other affirmative defense (Doc. 603, p.13 of 126). *Cf Matthews v. US.,* 458 U.S. 58, 65 (1988) (declining to limit availability of

entrapment defense by subjecting it to requirement to which no other defense is subject).

RFRA prohibits the government from (1) substantially burdening (2) a sincere (3) religious exercise (with one exception discussed below). 42 U.S.C. 2000bb-1, *Gonzales v. 0 Centro Espirito Beneficente Uniao Do Vegetal,* 546 U.S. 418, 428 (2006). A person's sincerity is, of course, a question of fact, and heavily dependent on credibility. E.g., *Zimmerman,* 514 F.3d at 854. "The Anglo-Saxon tradition of criminal justice, embodied in the United States Constitution and in federal statutes, makes jurors the judges of the credibility of testimony offered by witnesses." *U.S. v. Bailey,* 444 U.S. 394, 414 (1980) (discussing role of jury as arbiter of factual disputes regarding affirmative defense).[5] In addition, in *Navajo Nation,* the *en banc* Ninth Circuit made clear that as long as sufficient evidence is presented which, if believed, would support a rational finding of "exercise of religion" then this, too, is an issue for the "trier of fact," 535 F.3d at 1068, which, in a criminal case, is the jury.' As explained in Sections II and III, *supra,* the

[5] The Christies' RFRA motion cites *Cudjo v. Ayers,* 698 F.3d 752, 763 (9th Cir. 2012), for the proposition that credibility questions are for the jury to decide (Doc. 587-3, p.19). The government contends that *Cudjo* is distinguishable because it is a 2254 *habeas* case that does not address an affirmative defense (Doc. 603, p.15-16 of 26). Notably, however, *Cudjo* relies on *Bailey,* which specifically addressed the role of the jury in deciding affirmative defenses. 444 U.S. at 414-16

[6] The government erroneously contends that since *Navajo Nation* is a civil case, it has no precedential value herein (Doc. 603, p.16 of 26). By its terms,

Christies have proffered evidence sufficient to create triable issues of fact on RFRA' s sincerity and religious exercise elements.[7] Accordingly, they have a right to a jury determination of these issues.

The government suggests (Doc. 603, p.11 of 126) that *Bauer* imposes some higher standard on asserting a RFRA defense than any other affirmative defense. Such is not the case. The *Bauer* Court states, 84 F.3d at 1559,:

> It is not enough in order to enjoy the protections of the Religious Freedom Restoration Act to claim the name of a religion as a protective cloak. Neither the government nor the court has to accept the defendant's mere say-so. The court may conduct a preliminary hearing in which the defendants will have the obligation of showing that they are in fact Rastafarians and that the use of marijuana is a part of the religious practice of Rastafarians.

The *Bauer* court did not discuss the quantum of proof the defendants would be required to present at such a preliminary hearing. *Bauer* does not suggest that a RFRA defendant would be required to do anything more than would be necessary

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RFRA may be asserted as a claim or defense in any judicial proceeding. No distinction is made between civil and criminal cases. On its face, the elements of a RFRA claim are the same, whether it is asserted as a claim in a civil case or as a defense in a criminal case. Thus, the issue whether an element presents a question of fact is the same whether the issue is presented in a civil case or in a criminal case. *Navajo Nation* makes clear that RFRA' s "exercise of religion" element is a matter for the trier of fact. In a criminal case, the trier of fact is the jury.

[7] The Christies have also proffered evidence sufficient to support RFRA' s substantial burden element, which *Navajo Nation* makes clear is also a matter for the trier of fact. The government does not contest the sufficiency of the Christies' showing on this element (Doc. 603, p.104 of 126).

in order to assert any other affirmative defense; that is, proffer evidence sufficient to "meet a minimum standard as to each element of the defense so that, if a jury finds it to be true, it would support an affirmative defense . . . ." *U.S.* v. *Bailey,* 444 U.S. 394, 415 (1980).[8] *Bauer* did not discuss the role of the jury as fact-finder, and there is no reason to infer that the Court was suggesting that the role of the jury differs in the context of a RFRA defense than in any other defense.' The issue was simply not presented to, or decided by, the *Bauer* Court.

Once a prima facie RFRA defense has been established, the goverment can still defeat this defense if it demonstrates that its prosecution is in furtherance of a compelling governmental interest and is the least restrictive means of doing so. 42 U.S.C. 2000bb-1(b). The term "demonstrates" means "meets the burdens of going forward with the evidence and of persuasion." 42 U.S.C. 2000bb-2(3).[1] Thus, in a

[8] *See also Contento-Pachon,* 723 F.2d at 696 and n.2 (district court's exclusion of duress defense deprived defendant of right to have jury consider credibility of proffered evidence-and resolve factual issues); *Gurolla,* 333 F.3d at 956 (reversing district court's exclusion of defendant's entrapment defense; although defense was not strong, weight and credibility of defendant's evidence was for jury to determine).

[9] "As Justice Scalia has noted in his concurrence in *Carella* [v. California, 491 U.S. 263, 268-69 (1989)], the jury's fact-finding function is a structural matter that the Constitution guarantees." *US. v. Gaudin,* 28 F.3d 943, 946 (9th Cir. 1993), *aff'd,* 515 U.S. 506 (1995).

10 *0 Centro* describes RFRA's compelling governmental interest/least restrictive means exception set forth at 42 U.S.C. 2000bb-1(b) as the "Government's affirmative defense." 546 U.S. at 428. Thus, the government's

criminal case, this becomes part of what the government must prove in order to find the defendants guilty. Therefore, under the Sixth Amendment, the Christies have the right to have these issues determined by the jury. *US. v. Gaudin,* 515 U.S. 506, 510 n.2 (1995) *(citing Williams v. Florida,* 399 U.S. 78, 100 (1970) (emphasizing that jury's determination of ultimate guilt is indispensable). Criminal defendants enjoy "the historical and constitutionally guaranteed right . . . to demand that the jury decide guilt or innocence on every issue. . . ." *Id.,* at 513.

Moreover, the least restrictive means issue is a matter for the trier of fact. *See International Church of the Foursquare Gospel v. San Leandro,* 673 F.3d 1059, 1066-70 (9th Cir.), *cert. denied,* 123 S.Ct. 251 (2011) (reversing summary judgment where genuine issue of material fact existed as to "least restrictive means"); *Shakur v. Schirro,* 514 F.3d 878, 889-91 (91h Cir. 2008)(same).[11] Therefore, in a criminal case where the jury serves as fact-finder, this issue must be determined by the jury.

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disagreement with this description (Doc. 603, p.12 of 126 at n.4) is incorrect. Contrary to the government's contention (Doc. 603, p.11-12 of 126), the Christies' assertion of their right to present their RFRA defense to a jury in no way alters the government's right and burden to prove the applicability of the exception. The only issues are: when does the government present its evidence, and who decides whether the exception applies. As explained above, the Christies respectfully submit that the evidence must be presented to, and decided by, the jury.

[11] *Foursquare Gospel* and *Shakur* address RLIUPA, which allows federal and state prisoners to seek religious accommodations pursuant to the same standard set forth in RFRA. *0 Centro,* 546 U.S. At 436.

In addition, *0 Centro* makes clear that the issue whether a government's asserted interest is compelling in a particular case is a fact-intensive determination, and that the incremental harm to the asserted government interest that would result from exempting to specific religious claimants must be scrutinized. 546 U.S. At 430-31. Indeed, the government is required to produce competent evidence in order to meet its burdens of production and persuasion to demonstrate the existence of a compelling government interest in a particular case. *See 0 Centro,* 546 U.S. at 427 (district court found that evidence on diversion was virtually balanced, and therefore that government did not demonstrate compelling interest in preventing diversion to recreational users); *Shakur,* 514 F.3d at 889-90 (9th Cir. 2008) (reversing summary judgment where factual dispute existed as to whether government's asserted interest in cost containment was compelling in this case). Where an element of a defense presents a mixed question of fact and law, or application of the law to the facts, it falls within the province of the jury. *See Gaudin,* 515 U.S. at 513. In any event, these issues implicate factual questions intertwined with the merits, and are therefore inappropriate for pretrial resolution under Fed.R.Crim.P. 12(b)(2). *See Quaintance,* 608 F.3d at 720 n.2 (raising but not deciding this issue).

The government's reliance on Fed.R.104(a) as a basis to exclude the Christies' RFRA defense is misplaced. Rule 104(a) does not authorize the court to

exclude a defense where, as here, the defendants have proffered evidence which, if believed and viewed most favorably to the defendants, is more than sufficient to support a finding that the defense applies.

Likewise, *Gaudin* does not support the government's position. In *Gaudin,* the Court held that the district court erred by not submitting an element of the offense to the jury 515 U.S. at 510. There is no basis to infer from this holding that a defendant does not have a right to a jury determination of its affirmative defense, where, as here, the defendants have made a sufficient evidentiary proffer.

Citing only one case, *US. v. Rush,* 738 F.2d 497, 511-12 (1st Cir. 1984) *cert. denied,* 470 U.S. 1004 (1985), the government contends that prior to RFRA's enactment, the "District Court's prior approval was always necessary for a defendant to present a 'free exercise' defense at his/her trial" (Doc. 603, p.14 of 26). The government's reliance on *Rush* is misplaced for three reasons. First, *Rush* affirmed a district court's dismissal of a first amendment defense as a matter of law. The Christies do not dispute the Court's general authority to exclude a defense as a matter of law in an appropriate case. Second, *Rush* is based on a categorical approach which does not survive RFRA.' Third, in *Rush,* the

[12] The First Circuit affirmed the district court's exclusion of a First Amendment defense as a matter of law, reasoning that by enacting substantial criminal penalties, Congress determined that marijuana poses a threat to individual health and social welfare which it was not the court's task to review. 738 F.2d at 512. In *0 Centro,* the Supreme Court made clear that under RFRA, the

government was not required to prove that its prosecution was the "least restrictive means" of furthering the government's asserted compelling interest. *See Navajo Nation v. United States Forest Service,* 535 F.3d 1058, 1076 (9th Cir. 2008) (once substantial burden is established, RFRA requires government to demonstrate compelling governmental interest and least restrictive means, whereas government was only required to establish compelling government interest to withstand free exercise challenge).

Finally, the government cites RFRA cases which it contends support its request that the Court, not the jury, decide the Christies' RFRA defense (Doc. 603, p.19-21 of 126). These cases are inapposite. In none of these cases did the defendant specifically assert that the exclusion of evidence deprived him of his right to have a jury weigh the credibility of proffered evidence and decide the facts.

The government claims (Doc. 603, p.21 of 126) that in *Zimmerman,* 514 F.3d at 854-55, the Court held that the RFRA prerequisites were to be determined by the district court. *Zimmerman* addressed whether RFRA provided a defense to compliance with a standard condition of probation. The right to a jury determination was not in issue.

government cannot rely on the CSA's description of Schedule I substances or the regulatory scheme established by the CSA to meet its burden of demonstrating a compelling governmental interest in a particular case. 546 U.S. At 430-31.

The government notes (Doc. 603, p.13 of 126) that in *0 Centro,* 546 U.S. at 434, the Court stated that RFRA plainly contemplates that courts would recognize exceptions to the CSA. This statement had nothing whatsoever to do with the province of the jury. Rather, this was part of the Court's explanation as to why the government's categorical approach to demonstrating a compelling interest was unacceptable. In *0 Centro,* the Court reviewed a district court's issuance of a preliminary injunction against the government. The right to a jury determination was not issue.

In U.S. v. *Duncan,* 356 Fed. Appx. 250, 253-54 (11th Cir. 2009), an unpublished Eleventh Circuit opinion, the Court held that the district court did not abuse its discretion in refusing a RFRA jury instruction, reasoning that whether RFRA applies is a pure question of law. However, the Court specifically did "not address Duncan's arguments about the applicability of RFRA." *Duncan* cited only one case, *Lawson v. Singletary,* 85 F.3d 502, 511-12 (11th Cir. 1996), where the issue presented was whether a prison rule was facially invalid under RFRA, which the court described as a pure question of law. Of course, a facial attack on a rule is markedly different than the fact specific RFRA defense asserted herein. Besides, this Court is bound by Ninth Circuit law, not unpublished Eleventh Circuit law. Ninth Circuit law makes clear that "religious exercise," "substantial burden," "sincerity," and "least restrictive means" are all matters for the trier of fact.

Navajo Nation, 535 F.3d at 1068 (religious exercise and substantial burden); *Zimmerman,* 514 F.3d at 854 (sincerity); *International Church of the Foursquare Gospel,* 673 F.3d at 1066-70 ("substantial burden" and "least restrictive means"); *Shakur,* 514 F.3d at 889-91 (same). In addition, *0 Centro* makes clear that the issue whether a government's asserted interest is compelling in a particular case is a fact-intensive determination. 546 U.S. at 430-31. *See also Shakur,* 514 F.3d at 889-90 (9th Cir. 2008) (reversing summary judgment where factual dispute existed as to whether government interest was compelling).

The government claims that the Ninth Circuit's published decision in *US. v. Antoine,* 318 F.3d 919 (9lh Cir. 2003), strongly implied that RFRA eligibility determinations were questions of law and statutory construction. *Antoine* merely affirmed the district court's denial of a motion to dismiss. It contains no implications concerning the admissibility of evidence.

The government also cites an unpublished decision, *US. v. Antoine,* 59 Fed. Appx. 178, 179 (9th Cir. 2003), where the Court stated; "[w]hether application of a federal law violates RFRA is a question of statutory construction for the court, not a question of fact for the jury" (Doc. 603, p.20 of 126). The government's reliance on the unpublished *Antoine* opinion is misplaced for three reasons. First, since this case is prior to 2007, it may not be cited excepted in limited circumstances not applicable here. Ninth Circuit Rule 36-3. Second, it pre-dates *0 Centro,* which

makes clear that a fact-based determination is now required. Third, it relies on *US. v. Hugs,* 109 F.3d 1375, 1379 (9th Cir. 1997), which, like *Lawson,* addressed only the facial validity of the statute under which the defendant was prosecuted. While a facial challenge to a statute or rule under RFRA may be a question of law, this has no bearing on a criminal defendant's right to have the jury determine the facts where, as here, the defendants assert a fact specific RFRA defense supported by a sufficient evidentiary proffer.

For the foregoing reasons, the Christies respectfully request that they be permitted to present their RFRA defense to the jury.

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Respectfully submitted,

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