UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

UNITED STATE OF AMERICA, Plaintiff, vs. ROGER CUSICK CHRISTIE (01), SHERRYANNE L. CHRISTIE (02), et al., Defendants.	CR. NO. 10-00384 LEK MEMORANDUM IN SUPPORT OF MOTION

MEMORANDUM IN SUPPORT OF MOTION

Defendants, Reverend Roger Christie and his wife Sherryanne Christie, assert a defense under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb-1, and hereby move in limine to present evidence relevant to this defense at trial.

I. RFRA DEFENSE: THE LEGAL STANDARD

The RFRA provides:

> § 2000bb-1. Free Exercise of religion protected
>
> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception

> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person–
>
> > (1) is in furtherance of a compelling governmental interest; and
> >
> > (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (c) Judicial relief
>
> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. . . .

A. Prima Facie Case Under RFRA

To prevail under the RFRA:

> defendant must first (1) articulate the scope of his beliefs, (2) show that his beliefs are religious, (3) prove that his beliefs are sincerely held and (4) establish that the exercise of his sincerely held religious beliefs is substantially burdened.

United States v. Zimmerman, 514 F.3d 851, 853 (9th Cir. 2007).

The first two prongs of the *Zimmerman* test are necessary to demonstrate that the activity burdened constitutes a "religious exercise." *Compare Zimmerman with Gonzales v. O Centro Espiriata Beneficente Uniao Do Vegetal*, 546 U.S. 418, 428 (prima facie case established where application of CSA would (1) substantially burden (2) a sincere (3) religious exercise (*citing* district court opinion, 282 F. Supp. 2d at 1252)). RFRA defines "religious exercise" as "any exercise of

religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000cc-5(7)(A). *Zimmerman*, 514 F.3d at 853.

Certainly, a person's belief is religious if it is based on his/her connection with God. *Id.*, at 854 (where defendant's belief that he could not give blood sample was based on his connection with God and not purely on philosophical secular concerns, district court erred in holding that defendant's refusal to give blood sample was not based on religious belief).

However, religious beliefs are also much broader than that. In *United States v. Seeger*, 380 U.S. 163 (1963), the United States Supreme Court construed the term "religious training and belief" under the Military Training and Service Act, 50 U.S.C. App. 456(j). The court held that this phrase included "all sincere beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent." *Id.*, at 176. The Court recognized the importance of a construction which would "embrace[] the ever-broadening modern religious community[,]" and cited with approval the eminent Protestant theologian Dr. Paul Tillich, who "identifies God not as a projection 'out there' or beyond the skies but as the ground of our very being." *Id.*, at 180. The Court further quoted Dr. David Saville Muzzey, a leader in the Ethical Culture Movement and author of the book *Ethics As a Religion*:

> Instead of positing a personal God, whose existence man can neither prove nor disprove, the ethical concept is founded on human

> experience. It is anthropocentric, not theocentric. Religion, for all the various definitions that have been given of it, must surely mean the devotion of man to the highest ideal that he can conceive. And that ideal is a community of spirits in which the latent moral potentialities of men shall have been elicited by their reciprocal endeavors to cultivate the best in their fellow men. What ultimate reality is we do not know; but we have the faith that it expresses itself in the human world as the power which inspires in men moral purpose.

An individual is not limited to the religious doctrines of his upbringing; religious beliefs may evolve or change based upon life experiences and personal revelations." *Id.*, at 853-54.

A "belief can be religious even if it is not 'acceptable, logical, consistent, or comprehensible to others.'" *Id.*, at 853 (*quoting Thomas v. Review Bd. Of Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981). In *Seeger*, the U.S. Supreme Court explained, 380 U.S. at 184-85:

> The validity of what he believes cannot be questioned. Some theologians and indeed some examiners, might be tempted to question the existence of the registrant's "Supreme Being" or the truth of his concepts. But these are inquiries foreclosed to Government. As Mr. Justice Douglas stated in *United States v. Ballard*, 322 U.S. 78, 86 (1944): "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others." Local boards or courts in this sense are not free to reject beliefs because they consider them "incomprehensible." Their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.
>
> > But we hasten to emphasize that while the "truth" of a belief is not open to question, there remains the significant question whether it is "truly held." This is the threshold question of

> sincerity which must be resolved in every case. It is, of course, a question of fact – a prime consideration to the validity of every claim . . . .

A "substantial burden" is imposed where the defendants are "coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008) (*en banc*). *Accord, Braunfeld v. Brown*, 366 U.S. 599, 605 (1961) (substantial burden exists when statute "results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution").

As explained in Section II, *infra*, Reverend and Sherryanne Christie have proffered sufficient evidence to establish that the instant prosecution substantially burdens their sincere exercise of religion.

B. <u>Compelling Government Interest/Least Restrict Means Exception</u>

If a defendant establishes that application of the Controlled Substances Act (CSA) substantially burdens his/her sincere religious exercise, then the RFRA prohibits the government from enforcing the CSA against that defendant unless the government demonstrates that application of the CSA to that particular defendant "is in furtherance of a compelling governmental interest;" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 200bb-1(b). This strict scrutiny standard is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). The

government must meet "the burdens of going forward with the evidence and of persuasion," 42 U.S.C. 2000bb-2(3), before it can qualify for this "affirmative defense." *O Centro*, 546 U.S. at 428.

In examining whether the government interest at stake is compelling, the government cannot rely on broadly formulated interests. The RFRA requires a "focused inquiry," one which "scrutinize[s] the asserted harm of granting specific exemptions to particular religious claimants." 546 U.S. at 431-32. The RFRA "requires the Government to address the particular practice at issue." 546 U.S. at 439 (holing that government failed to demonstrate compelling interest in enforcing CSA against RFRA claimants in that case).

Moreover, the inquiry does not end with "compelling governmental interest." The "least restrictive means" prong is critical. *Callahan v. Woods*, 736 F.2d 1269, 1272-73 (9th Cir. 1984). This prong requires examination of the incremental benefit to the government's asserted compelling interest that would result from enforcing the law against the RFRA claimant in a particular case. If the asserted compelling government interest can be accomplished despite an exemption for that particular RFRA claimant, then denying that exemption is not the least restrictive means of furthering that interest. *Id*[1]

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[1] *O Centro*, 546 U.S. at 429 (RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the compelling government interest/least restrictive means test).

As explained in Section III, *infra*, the government cannot demonstrate that the instant prosecution is in furtherance of any compelling governmental interest, or that this prosecution is the least restrictive means of furthering any such interests.

II. REVEREND AND SHERRYANNE CHRISTIE'S PROFFER OF EVIDENCE IS SUFFICIENT TO DEMONSTRATE A PRIMA FACIE CASE UNDER RFRA

Attached hereto is a Declaration of Roger Christie setting for his beliefs and the beliefs and practices of the THC Ministry. This Declaration sets forth facts which demonstrate that these beliefs and practices are religious. Reverend Christie also explains how his beliefs evolved over time. Attached hereto is a Declaration of Sherryanne Christie which sets forth facts which demonstrate that she is a member and minister of the THC Ministry, and that she adheres to its beliefs and practices. Her Declaration also explains how her beliefs and practices evolved over time. Both Reverend and Sherryanne Christie have proclaimed their sincerity. The Christie Declarations set forth facts which demonstrate that the THC Ministry's religious beliefs and practices mandate that they cultivate Cannabis sacrament and make it available to Ministry members and medical marijuana patients, and that the instant prosecution of them for conduct mandated by their religion constitutes a substantial burden on their sincere religious exercise. Accordingly, Reverend Christie and Sherryanne Christie have each made a

sufficient showing of a substantial burden on their sincere religious exercise, and they have therefore made a prima facie showing of their RFRA defense. Moreover, every aspect of their showing is corroborated by the attached Declaration of Laurie Cozad, Ph.D., History of Religions, University of Chicago Divinity School, who is an expert in religion.

Reverend Christie founded The Hawaii Cannabis Ministry in September 2000. In doing so, Reverend Christie drew upon the beliefs and practices of churches in which he participated over a fourteen year period: the Religious Science Church of Hilo, the Religion of Jesus Church ("RJC"), and the "I Am Church of the Universe."

Reverend Christie was a member of the Religious Science Church of Hilo from 1986 through 1993. This well-recognized New Thought movement, now called Centers for Spiritual Living, was founded in 1927 by Ernest Holmes. Like the THC Ministry, Religious Science is a path to God that embraces all people and draws on the wisdom of the ages and New Thought principles (*see* excerpt from Centers for Spiritual Living website, attached hereto as Exhibit (EX) 5). As explained in Dr. Cozad's Declaration, at ¶¶ 6-7, the THC Ministry's beliefs and practices draw upon Reverend Christie's years in the Religious Science church. Both religious movements share the belief that through thoughts, words and communion with God, we can attract positive energy and block negative energy.

As Dr. Cozad further explains, the THC Ministry shares two fundamental characteristics common to contemporary New Religious Movements: (a) the belief that the individual holds the key to his or her own spiritual well-being; and (b) the idea that particular techniques can empower each individual to reach his or her own spiritual enlightenment by allowing one to reveal one's own divinity in communion with a higher divinity.

While Reverend Christie shares many beliefs and practices with Religious Science, he also believes that the use of Cannabis Sacrament is essential to achieve conscious contact with God and all that flows therefrom. Dr. Cozad has confirmed that Cannabis is a religiously powerful substance capable of providing access to the divine (Cozad Dec., at ¶9-10). In 1993, Reverend Christie joined the Religion of Jesus Church (RJC), and after seven years of participation, he was ordained as an RJC minister (Rev. Christie Dec., at ¶6, 8). RJC was founded in 1969 by James D. Kimmel, and is one of the earliest Cannabis churches in the United States (Cozad Dec., at ¶8). In at least two cases, the State of Hawaii has stipulated that the Religion of Jesus Church is a bona fide religion which mandates the sacramental use of Cannabis (Rev. Christie Dec., at ¶6, and at EX 1).

The primary text of RJC is Urantia Book (*Id.*, at ¶6). Reverend Christie is drawn more to the Bible than to the Urantia Book. Dr. Cozad noted Reverend Christie's deep interest in biblical interpretation (Cozad Dec., at ¶13; *see also* Rev.

Christie Dec., at ¶7, 12(f), 14, 16, 17). Reverend Christie began learning about the Biblical recognition of Cannabis sacrament in about 1995, through his participation in the "I Am Church of the Universe" (Rev. Christie Dec. at ¶7).

In June 2000, after ordainment as a Minister in the RJC Church, Reverend Christie applied to the State of Hawaii, Department of Health for a license to perform marriages as a "Cannabis Sacrament Minister." The Department of Health issued reverend Christie his license (Rev. Christie Dec., at ¶9, and at EX 2).

In September 2000, Reverend Christie founded The Hawaii Cannabis Ministry, drawing upon the teachings and practices he learned through his participation in Religious Science, RJC, and the I Am Church of The Universe. The THC Ministry's beliefs and practices include: (1) universal spiritual principles, such as those taught by Religious Science; (2) Cannabis as a healing sacrament, which was a practice of RJC and the I Am Church of the Universe; (3) Biblical teachings and interpretation; and (4) service to the community, a practice common to most, if not all religions.

Reverend Christie founded the THC Ministry on his belief that Cannabis sacrament is a "botanical savior," a sacrament, a visible form of invisible grace, capable of saving people from hunger, stress, disease, spiritual and social loneliness, and poverty, and promoting happiness, gladness, joy and optimum health (Rev. Christie Dec., at ¶18) . The THC Ministry mandates that its members

ingest Cannabis in some form. Accordingly, the THC Ministry must cultivate Cannabis sacrament and make it available to its members.

Sherryanne Christie was introduced to the THC Ministry in 2007, after decades of her own spiritual journey. By the time Sherryanne Christie met Reverend Roger Christie, she already had a deep, well-rooted belief in the sacramental use of indigenous earth-based healing sacraments, through her participation in Native American religious traditions and other spiritual practices through which she deepened here awareness of her connection with God through caring for the earth, which is God's creation, and caring for the body, which is a manifestation of God and the home of one's Spirit (Declaration of Sherryanne Christie, at ¶3-12). Sherryanne Christie was deeply moved the first time she heard Reverend Christie speak, and she believes that Cannabis is the tree of life for the healing of the nations, spiritual food for those in need, and her personal means for achieving direct Divine intervention (*Id.*, at ¶ 13, 18, 19).

The intersection between the THC Ministry and Native American religious beliefs and practices is made further evident by the attached Declaration of James 'Flaming Eagle' Mooney, CEO of the Oklevueha Earth Walks Native American Church of Utah, Inc. (ONAC), which accepts indigenous earth-based healing sacraments as central to its established religious belief. James Mooney's lineage is documented in EX 4, at Affidavit of Fact. On June 1, 2009, after engaging in

discourse with Reverend Christie over a period of approximately one year, James Mooney blessed ONAC Hilo as an independent branch of ONAC, and Reverend Christie as President and CEO.[2]

Like many religious movements, the THC Ministry's practices mandate that they use their spiritual practices to help heal the sick. This is a principle of Religious Science (see EX 5, p.2) and other New Thought religious groups, and it is also common among Native American religious traditions, as well as many other religions. Pursuant to this practice, the THC Ministry mandates that Cannabis sacrament be made available to medical marijuana patients.

In at least two cases, district courts have found that RFRA claimants alleged facts sufficient to make a prima facie showing that prosecution, or threat thereof, for cultivation and distribution of marijuana, would substantially burden their sincere exercise of their religion. *Oklevueha Native American Church of Hawaii, Inc., et al. v. Eric H. Holder, Jr. et al.,* Civ. No. 0-00336-SOM/BMK , District of Hawaii (Doc. 85, decided 12/31/12); *U.S. v. Lepp,* 2008 U.S. Dist. LEXIS 123895 at 25 (N.D. Cal. 2008). The Declarations and Exhibits attached hereto far exceed

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[2] As explained in Dr. Cozad's Declaration, at ¶11, in line with Religious Science and many New Religious Movements, Reverend Christie and his followers, including Sherryanne Christie, believe in inclusivity, not exclusivity, and maintain that people can belong to, and even be ordained in, more than one church. Reverend Christie, like many leaders of contemporary New Thought religious movements, deeply believes in this non-heirarchical model in which laypeople are empowered both to effect their own salvation and take responsibility for leading others.

these cases is ONAC Hawaii, another branch of ONAC.

III. THE GOVERNMENT CANNOT DEMONSTRATE THAT THE INSTANT PROSECUTION IS IN FURTHERANCE OF A COMPELLING GOVERNMENT INTEREST, OR THAT IT IS THE LEAST RESTRICT MEANS OF FURTHERING ITS ASSERTED INTERESTS

A. The Government Cannot Demonstrate that It Has a Compelling Interest to Substantially Burden These Particular Defendants' Exercise of Their Religion In this Case

Under RFRA, the government must "demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' - - the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430-431. The government cannot meet its burden in this case by simply relying on marijuana's classification as a Schedule I substance under the Controlled Substances Act ("CSA"). *O Centro*, 546 U.S. 432 (where the Supreme Court of the United States held that Congress' determination that the subject substance, DMT, should be listed as a Schedule I substance under the CSA did "not provide a categorical answer that relieves the Government of the obligation to shoulder its burden under RFRA.").

> This conclusion is reinforced by the Controlled Substances Act itself. The Act contains a provision authorizing the Attorney General to "waive the requirement for registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety." *21 U.S.C. § 822(d).* The fact that the Act itself contemplates that exempting certain people from is 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.

O Centro, 546 U.S. at 432-33.

As discussed in further detail below, the government cannot meet its burden in this case. There is no compelling governmental interest justifying the substantial burden *on Reverend Christie and Sherryanne L. Christies'* exercise of their sincere religious beliefs in this case. However, assuming, *arguendo*, the government is able to set forth a compelling governmental interest, the prosecution of Reverend Christie and Sherryanne L. Christie is certainly not the least restrictive means to asserting its interests.

B. Law Makers and Law Enforcement Officials Are No Longer Vigorously Pursuing Criminal Charges Involving Cannabis

There has been a clear decline in the vigor with which law makers and law enforcement officials (federal, state and county) have pursued prosecution of crimes involving cannabis. Due to the scientific evidence that has been made public over the years, as well as the countless stories of individuals who have bravely come forward with their stories of how cannabis has helped them spiritually and physically, the negative stigma long associated with the use of cannabis is rapidly disappearing. For example, cannabis, has been approved for medical use in 18 states *plus the District of Columbia*. As well, Colorado and

Washington have recently legalized the *recreational* use of cannabis. Locally, even in Hawaii, the fact that a number of bills involving the decriminalization of cannabis were introduced in the 2013 legislative session is a clear indicator that public opinion regarding the medicinal and recreational use of cannabis is quickly shifting in support of decriminalization. In fact, in 2008, the Hawaii County Code was amended adding Article 16 known as the Lowest Law Enforcement Priority of Cannabis Ordinance, which states in part:

> Section 14-96. Purpose.
> The purpose of this article is to:
> (1) Provide law enforcement more time and resources to focus on more serious crimes;
> (2) Allow our court systems to run more efficiently;
> (3) Create space in our prisons to hold serious criminals;
> (4) Save taxpayers money and provide more funding for necessities such as education and health care; and
> (5) Reduce the fear of prosecution and the stigma of criminality from non-violent citizens who harmlessly cultivate and/or use cannabis for personal, medicinal, religious, and recreational purposes.
>
> . . .
>
> Section 14-99. Lowest law enforcement priority policy relating to the adult personal use of cannabis.
> (a) The cultivation, possession and use for adult personal use of cannabis shall be the Lowest Law Enforcement Priority for law enforcement agencies in the county.

Hawaii County Code, Art. 16, §§14-96 – 14-105.

In further support of the fact that law enforcement officials were not overly concerned with the practices of Reverend Christie and the THC Ministry is the fact

that Reverend Christie was very open about the use of cannabis as part of the THC Ministry. He had open, honest, and ongoing communication with members of Hawaii Island's and the federal government's law enforcement agencies related to the activities and philosophies of the THC Ministry through the years of its existence. See the Declaration of Roger Christie at paragraph 51 for examples of the communication Reverend Christie had with law enforcement agencies about the THC Ministry's beliefs and practices. *In the almost ten years of the THC Ministry's very public existence, Reverend Christie was never informed by any of the above individuals or any law enforcement agency that there was a concern with the practices and beliefs of the THC Ministry until the raid by the DEA in March, 2010. See* Declaration of Roger Christie at ¶51.

C. The Government Cannot Meet Its Burden by Arguing that Cannabis Is Dangerous

Although the government has not yet set forth its argument concerning its compelling interest in this case, it is anticipated that one of its arguments will be that cannabis is dangerous.[3] As discussed in great detail in the Motion to Dismiss Indictment, filed by Defendant Roger Christie herein on December 3, 2012 [Docket No. 468] ("Motion to Dismiss") there is overwhelming evidence to contradict any argument by the government that it has compelling interest in this

[3] Defendants will fully address the government's arguments set forth in its opposition to this motion in their reply memorandum.

case because cannabis is dangerous.[4] There is overwhelming scientific evidence that: (1) cannabis does not have a high potential for abuse, (2) cannabis has immense medicinal value, and (3) cannabis can be safely used. For example, studies have found the any physical dependence caused by cannabis use is "mild and short-lived." As well, the withdrawal symptoms associated with cannabis use have been compared to the symptoms associated with caffeine withdrawal. Lastly, there are countless studies concerning the tremendous medicinal value of cannabis. *See* Motion to Dismiss at pp. 15-40.

Moreover, any argument that there is a compelling governmental interest based on the dangerousness of a controlled substance has been rejected by the Supreme Court. *U.S. v. Lepp,* 2008 U.S. Dist. LEXIS 123895 at 25 (N.D. Cal. 2008) *(*citing *O Centro,* 546 U.S. at 432). In *Lepp*, the defendant was charged with manufacturing and possessing marijuana with the intent to distribute and conspiracy to possess with intent to distribute. *Id.* at 1. Defendant Lepp sought an order from the court allowing him to present a defense at trial based on his religious beliefs as he was a practicing Rastafarian and minister of Rastafarian faith. *Id.* at 1-2. The government argued that the dangerousness of marijuana

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[4] Defendants incorporate by reference herein all evidence and arguments set forth in the Motion to Dismiss, as well as all arguments and evidence presented at the hearing on the Motion to Dismiss, including but not limited to the testimony of Charles Webb, M.D. *See also U.S. v. Lepp,* 2008 U.S. Dist. LEXIS 123895 at 23-25 (N.D. Cal. 2008).

created a compelling governmental interest in regulating it. *Id.* at 20-21. The district court disagreed and found that the prosecution did not demonstrate the dangerousness of marijuana, and stated that even if the government had established the dangerousness of marijuana, that such fact, standing alone, was insufficient to be a compelling interest for the purposes of RFRA. *Id.*, at 23.

IV. REVEREND AND SHERRYANNE CHRISTIE HAVE A FUNDAMENTAL CONSTITUTIONAL RIGHT TO PRESENT THEIR RFRA DEFENSE TO THE JURY

Congress' enacted the RFRA for the express purpose of providing a "defense to persons whose religious exercise is substantially burdened by government," 42 U.S.C. 2000bb(b)(2), even if such burden results from the Controlled Substances Act. [5]

"Whether rooted directly in the Due Process Clause of the [Fifth and] Fourteenth Amendment[s] or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes v. South*

[5] The Supreme Court and the Ninth Circuit have "recognized that RFRA 'plainly contemplates that *courts* would recognize exceptions [to the CSA] – that is how the law works." *Oklevueha Native American Church of Hawaii, Inc. v. Holder*, 678 F.3d 829, 838 (9th Cir. 2012) (*quoting O Centro*, 546 U.S. at 434 (italics in *O Centro,* brackets in *Oklevueha*). Indeed, "the very reason Congress enacted RFRA was to respond to a [Supreme Court] decision denying a claimed right to sacramental use of a controlled substance." *O Centro*, 546 U.S. at 436-437.

Carolina, 547 U.S. 319, 324 (2006) (*quoting Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (*quoting California v. Trombetta*, 467 U.S. 479. 485 (1984). Thus, where, as here, a defendant proffers evidence of facts which, if proved, will establish a defense, he/she has a fundamental constitutional right to present that defense to the jury.

Whether a person's beliefs are sincerely held is a question of fact. *Zimmerman*, 514 F.3d at 854 (*citing U.S. v. Seeger*, 380 U.S. 163 (1965)). The defendant's "credibility and demeanor bear heavily" on this determination. *Id.* Therefore, it is a question for the jury. *Cudjo v. Ayers,* 698 F.3d 752, 763 (9th Cir. 2012):

> Supreme Court precedent makes clear that questions of credibility are for the jury to decide. *See* United States v. Bailey, 444 U.S. 394, 414, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980) ("The Anglo-Saxon tradition of criminal justice embodied in the United States Constitution . . . makes jurors the judges of the credibility of testimony offered by witnesses. It is for them, generally, . . . to say that a particular **[**26]** witness spoke the truth or fabricated a cock-and-bull story."); *see also* Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) (discussing the right to offer witness testimony to the jury).

Whether a particular activity constitutes an "exercise of religion," and whether the government action "substantially burdens" a person's exercise of religion are likewise matters for the trier of fact. In *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008) (*en banc*), the Ninth Circuit held that:

> To establish a prima facie RFRA claim, a plaintiff[6] must present evidence sufficient to allow a trier of fact rationally to find the existence of two elements. First, the activities the plaintiff claims are burdened by the government action must be an "exercise of religion." *See id.* § 2000bb-1(a). Second, the government action must "substantially burden" the plaintiff's exercise of religion. *See id.*

Relying on *Navajo Nation*, United States District Judge Susan Oki Mollway recently denied in part the government's Fed.R.Civ.P. 12(b)(6) motion to dismiss a RFRA claim, reasoning that the First Amended Complaint contained sufficient factual allegations of substantial burden and religious exercise. *Oklevueha Native American Church of Hawaii, Inc., et al. v. Eric H. Holder, Jr., et al.,* Civ. No. 09-00336-SOM-BMK (D. HI) (Doc. 85, p.11-13). Judge Mollway reiterated *Navajo Nation's* holding that "exercise of religion" and "substantial burden" are questions for the trier of fact, as follows:

> The Ninth Circuit has held that, "to establish a prima facie RFRA claim, a plaintiff must present evidence sufficient to allow a trier of fact rationally to find" that the activities burdened by Government action are an "exercise of religion" and that the Government action "substantially burdens" the plaintiffs exercise of religion. *Navajo Nation*, 535 F.3d at 1068.

(*Id.*, p.7). Judge Mollway held that the facts alleged in the *Oklevueha* First Amended Complaint were sufficient to state a claim under the RFRA, as follows (*Id.*, p.11-13):

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[6] RFRA provides that a person who asserts a violation may do so as a claim or a defense. 42 U.S.C. 200bb-1(c). On its face, the requisites for establishing a RFRA violation are the same, whether it is asserted as a claim or as a defense. 42 U.S.C. 200bb-1(a),(b).

> To the extent the First Amended Complaint seeks an injunction under RFRA concerning Plaintiffs' alleged religious use of cannabis, Plaintiffs allege a substantial burden on their religion sufficient to survive the present motion to dismiss. Mooney alleges that he "uses cannabis sacrament daily," that Oklevueha members use cannabis in twice monthly "sweats," that Oklevueha's 250 members in Hawaii "consume cannabis in their religious ceremonies," and that "receiving communion through cannabis" is "an essential and necessary component of the Plaintiffs' religion." . . . Plaintiffs allege that they "consume, possess, cultivate, and/or distribute cannabis as sanctioned and required by their legitimate religion and sincere religious beliefs, as such, their free exercise of religion protected by RFRA." . . . Plaintiffs also say that they "fear for their ability to continue to cultivate, consume, possess and distribute cannabis sacrament without the exceedingly difficult burden placed upon their lives by being branded criminals mandated for Federal imprisonment and whose real property and assets can be seized civilly with no applicable legal defense." [*quoting* Plaintiffs First Amended Complaint].
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> These allegations, coupled with Plaintiffs' contention that they are being "coerced to act contrary to their religious beliefs by the threat of civil and criminal sanctions," sufficiently describe a "substantial burden on what Plaintiffs say is their "exercise of religion." *See Navajo Nation*, 535 F.3d at 1069-1070.

Since sincerity, exercise of religion, and substantial burden are all matters for the trier of fact, Reverend and Sherryanne Christie each have a right to have the jury determine these facts.

In the event that the government asserts an affirmative defense of compelling government interest/least restrictive means, this will necessarily be a fact specific inquiry focused on the specific practices of the THC Ministry and Reverend and Sherryanne Christie, the specific plants charged in the indictment, and the sacred nature of the specific premises charged in the indictment. The

government would need to demonstrate a compelling interest in prosecuting the specific conduct of Reverend and Sherryanne Christie that is the subject of the charges in the Indictment. *O Centro*, 546 U.S. at 431-32. The Christies have a fundamental constitutional right to have a jury determine the facts concerning their conduct. Thus, since any affirmative defense that the government might raise will be inextricably intertwined with the facts, it will implicate the trial of the general issue, and is therefore inappropriate for pre-trial resolution under Fed.R.Crim.P. 12(b)(2). *Cf. U.S. v. Quaintance,* 608 F.3d 717, 720 n.2 (10th Cir. 2010) (raising but not deciding issue of right to jury determination under RFRA).

Finally, the Christies also request that their vagueness challenge be examined in light of the facts concerning their religious defense. They have a right to a determination whether the RFRA, together with the CSA, provided fair notice that their specific conduct was prohibited. They have a right to present the evidence to the jury in order to have that determination made. *See U.S. v. Reed,* 114 F.3d 1067, 1070 (10th Cir. 1997) (holding that analysis of vagueness issue should be based on facts as they emerge at trial).

For the foregoing reasons, Reverend and Sherryanne Christie respectfully request that they be permitted to introduce evidence of their RFRA defense at trial.

DATED: April 1, 2013, Honolulu, Hawaii.

Respectfully submitted,

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