IN THE
SUPREME COURT OF THE UNITED STATES
AMICUS CURIE FOR THE
UNITED CANNABIS MINSITRIES
IN SUPPORT OF
O'CENTRO ESPIRITA UNIAO DO VEGETAL
Supreme Court Docket Number 04-1084

Petitioners, United Cannabis Ministries[1], respectfully request that this Court consider the facts of law provided in this Amicus Curie Brief in Support of the O'Centro Espirita Beneficiente Uniao Do Vegetal Church.

United Cannabis Ministries is an association of persons who use marijuana and other entheogenic plants in religious exercise (Appendix A).

United Cannabis Ministries comes in support of the interpretation of the Religious Freedom Restoration Act of 1993 (42 U.S.C. sec. 2000 bb et al)(RFRA hereafter), applied to the O Centro Espirita Uniao Do Vegetal church by the lower courts.

United Cannabis Ministries also comes to this Court to point out a **Plain Error** made by the lower courts in **O Centro**.

This Court is now reviewing **Gonzales v. O Centro Espirita** 04-0184 (**Gonzales** hereafter). **Gonzales** is a review of five (5) published decisions from the district court and the Tenth Circuit Court of Appeals. They are:

1. **O Centro Espirita v. Ashcroft**, 282 F.Supp. 1236, at 1253 (August 12, 2002)
2. **O Centro Espirita v. Ashcroft,** 282 F.Supp. 1271, at 1283 (December 2, 2002)
3. **O Centro Espirita v. Ashcroft**, 314 F.3d 463, at 467 (December 12, 2002)
4. **O Centro Espirita v. Ashcroft**, 342 F.3d 1170, at 1185 (September 4, 2003)

[1] A complete list of ***Amici*** is presented in more detailed Affidavit in *Appendix A* attached. Petitioners have consented telephonically to submission of this brief. Respondents emphatically refused to consent to submission of this Brief. The **United Cannabis Ministries** members have authored this brief alone and no other person or entity other than ***Amici*** has make a monetary contribution to its preparation or submission.

5. **O Centro Espirita v. Ashcroft**, 389 F.3d 973, at 984 (November 12, 2004)

6. The question presented for review by this Court in **Gonzales** is:

> "Whether the Religious Freedom Restoration Act of 1993, 42 U.S.C. sec. 2000bb et seq. requires the government to permit the importation, distribution, possession and use of a Schedule I hallucinogenic controlled substance, where Congress has found that the substance has a high potential for abuse, it is unsafe for use even under medical supervision, and its importation and distribution would violate an international treaty."

7. The **O Centro** court rulings under review in **Gonzales** state that under RFRA the **Sherbert** and **Yoder** tests must be applied to the drug laws on a factual basis and that the government must prove that an illegal use of a drug by the church members has caused a palpable and demonstrable threat to public health and safety. In **O Centro vs. Ashcroft**, 282 F.Supp. 1236, it states on page 1254:

> "Under RFRA, Congress mandated that a court **may not limit its inquiry** to general observations about the operation of a statute. Rather, 'a court is to consider whether the 'application of the burden' to the claimant 'is in furtherance of a compelling interest' and 'is the least restrictive means of furthering that compelling governmental interest."

From page 1255 thru 1269 the **O Centro** court reports an exhaustive examination of the facts of the church's use of hoasca tea conducted in pre-trial hearings. The tea contains Dimethyltryptamine (DMT hereafter). DMT is a Schedule I drug that is similar in effect to LSD or Mescaline. In fact, DMT is classified as a powerful hallucinogen. Another ingredient in the hoasca tea is an MAO inhibiter, which can possibly cause a toxic reaction to foods eaten within 24 hours of ingesting the tea.

The point is that the federal district court is devoting 14 pages to an examination of the testimony and facts submitted into evidence. Those 14 pages of evidence and argument show us the application of the **Sherbert** and **Yoder** tests exactly the way that Congress intended the RFRA to be adjudicated.

Since the **O Centro** court ruled that the **Sherbert** and **Yoder** tests must be applied in a religious use of Schedule I drugs case, since the **O Centro** court cited the religious use of marijuana cases reported below as if those marijuana cases used the **Sherbert** and **Yoder** tests where they did not use those tests, it is apparent that the **O Centro** decisions are contradictory within themselves. This Court should make a factual examination of the **O Centro** use of those cases to determine whether or not those cases are in fact contradictory to the **O Centro** rulings; whether they are relevant under RFRA.

8. **O Centro** is not the only federal report that mandates the **Sherbert** and **Yoder** tests be applied to the drug laws. The court in **United States v. Bauer, 75 F.3d** 1366 (9th Cir. 1996)(**Bauer** hereafter) rules that the **Sherbert** and **Yoder** tests must be applied to a religious use of marijuana case. **Bauer** is the first published case that recognizes the **Plain Error** of the **Leary** case and overturns it. **Bauer** finds that RFRA requires the **Sherbert** and **Yoder** tests to be applied to all federal laws. **Bauer** reports how **Leary** is invalid under RFRA because **Leary** specifically exempts the federal drug laws from the **Sherbert** test.

> On page 1373 and 1375 the **Bauer** court notes how **Leary** is invalid.
>
> "Relying on several earlier appellate cases, the district court held, however, 'that the government has an overriding interest in regulating marijuana'. The district court quoted **Leary**. . ."
>
> On page 1375 -
>
> "The district court treated the **existence of the marijuana laws as dispositive** of the question whether the government had chosen the least restrictive means of preventing the sale and distribution of marijuana. . .The district court relied on a drug case decided before the enactment of RFRA (**Leary**). . .We do not exclude the possibility that the government may show that the least restrictive means of preventing the sale and distribution of marijuana is universal enforcement of the marijuana laws. **"Under RFRA, however**, the government had the obligation, **"first** to show that the application of these laws to the defendants was in

furtherance of a compelling governmental interest and, **"second** to show that the application of **these** laws to **these** defendants was the least restrictive means of furthering that compelling governmental interest."

United States v. Bauer, **84 F.3d** 1549 (9th Cir 1996). On page 1559

"The court may conduct a **preliminary hearing** in which the defendants will have the obligation of showing that they are Rastafarians and that the use of marijuana is a part of the religious practice of Rastafarians."

Since **Bauer** and **O Centro** interpret RFRA to require the **Sherbert** and **Yoder** tests be applied to religious use of Schedule I drugs, since **Bauer** rules that the **Leary** case is not binding under RFRA because **Leary** excludes the **Sherbert** tests, this Court should find that **Leary** and cases derived from **Leary** are invalid under RFRA.

9. Even before enactment of RFRA the federal courts have recognized that religious use of Schedule I drugs can be exempt from prohibition under the federal drug laws.

In **Toledo v. Nobel-Sysco**, 651 F.Supp. 483 (D.N.M. 1986), and **Toledo v. Nobel-Sysco**, 892 F.2d 1481, 1490 (10th Cir. 1989) the federal courts found that a federal regulation, written by DEA under authority of the federal drug laws, provided a religious exemption for use of Schedule I drug peyote.

Since the federal DEA acting under the federal drug laws can promulgate regulations that authorize manufacture, harvest, sales and consumption of Schedule I drug peyote, can there be any doubt that Congress itself can and did enact RFRA to provide for case by case use exemptions for religious use of Schedule I drugs?

10. Since RFRA was written specifically to provide an exemption to the drug laws for Alfred Smith and Galen Black's religious use of peyote, it should go without saying that RFRA both applies to the drug laws and can provide an exemption to them. In addition, this Court has ruled twice on the fundamental issues of whether RFRA applies to the drug

laws and can provide an exemption to their regulations.

a. In **City of Boerne v. Flores**, 138 L.Ed2d 624, this Court wrote that because RFRA as written **applies to all laws without exception** and mandates tests which most laws will fail, that RFRA exceeds the power of Congress to dictate to a State under the Fourteenth Amendment to the federal Constitution. Therefore this Court has already decided that RFRA applies to the drug laws.

b. In addition, in **City of Indianapolis vs. Edmonds**, 121 S.Ct. 447 (**Indianapolis** hereafter) this Court ruled that the drug laws are ordinary criminal statutes that bear enforcement on their face no more then any other criminal statute.

In doing so, this Court distinguished the drug laws from criminal statutes that manifest a direct connection to immediate threats to public health and safety such as drunk driving laws, laws providing for vehicle inspections, vehicle and driver licensing, and inspections of vehicles for the presence of illegal immigrants at fixed Border Patrol check points. As this Court states, all those laws are enacted to deal directly with palpable threats to public health and safety that prove compelling interest on their face.

In **Indianapolis** this Court ruled that warrentless stops for drunk driver inspection are allowed, but **not for violations of the drug laws**. This Court ruled that the drug laws do not prove the fact that their enforcement is required without exception. Drunk driving laws do prove that they must be enforced without exception.

This Court stated in **Indianapolis:**

> "For example, we have upheld certain regimes of suspicionless searches where the program was designed to serve "special needs" beyond the normal needs of law enforcement." at page 451
>
> "We have also upheld brief, suspicionless seizures of motorists at a fixed Border Patrol checkpoints designed to intercept illegal aliens, . . . and at a sobriety

checkpoint aimed at removing drunk drivers from the road. . . we suggested that a similar type of roadblock with the purpose of verifying drivers' licenses and vehicle registrations would be permissible. In none of those cases, however, did we indicate approval of a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing." at page 452

"There is no doubt that **traffic in illegal narcotics** creates social harms of the first magnitude. . . The law enforcement problems that the drug trade creates likewise remain daunting and complex, particularly in light of the myriad forms of spinnoff crime that it spawns." at page 454

"But the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officer may employ to pursue a given purpose. . . Only with respect to a smaller class of offenses, however, is society confronted with the type of immediate, vehicle-bound threat to life and limb that the sobriety checkpoint in ***Sitz*** was designed to eliminate." at page 455

d. Amicus would like to draw the attention of this Court to the fact that **Amicus agrees with the government** that "traffic in illegal narcotics creates social problems of the first magnitude." Begging the question of whether or not marijuana or peyote are narcotics, Amicus points out that it is the **illegal trade** and the **"myriad forms of spinnoff crime"** that are the problem. Toxic drugs like alcohol, tobacco and pharmaceutical chemicals are regulated and sold in commerce. Those legal commercial transactions do not in and of themselves cause threats to public health and safety. It is **illegal trade** itself, regardless of the drug sold, that causes problems.

Amicus points out that the statutory rights to unencumbered religious exercise that Congress has provided for in RFRA are certainly no less significant then the implied right of privacy and the Constitutional right to particularized suspicion and warrant for search and seizure that this Court has protected in **Indianapolis**

Amicus would draw the attention of the Court to the fact that Congress enacted RFRA specifically to provide case-by-case exemptions to the terms of the drug laws knowing full well the problems with the illegal drug trade. Certainly the record of the

enactment of RFRA shows that Congress is cognizant of the problems of drug abuse and the illegal trade that serves those who abuse drugs. Where is it that Congress has said that courts are not capable of determining the difference between drug abuse and drug use that causes no harm? For the government to suggest otherwise smacks of the kind of administrative arrogance that results in unjustified and unwinable wars of all kinds.

Since the **Leary** case in 1967, several lower courts have ruled that the drug laws prove the fact of compelling interest on their face. This Court's rulings in **City of Boerne** and **City of Indianapolis** directly contradict those cases. Therefore, citations stating that the drug laws prove compelling interest for their enforcement on their face are **Plain Error** where they are applied to a case of religious exercise under RFRA.

11. Four of the five lower court decisions under review in **Gonzales** cite **U.S. v. Brown,** 72 F.3d 134 (8th Circuit 1995) (table)(**Brown** hereafter)(attached Appendix B); **U.S. v. Greene**, 892 F.2d 453, 456-57 (6th Circuit 1989); **U.S. v. Middleton**, 690 F.2d 820, 825 (11th Circuit 1982); and **Leary v. U.S.,** 383 F.2d 851, 860-61(5th Circuit 1967).

The **O Centro** rulings cite **Brown** etc. for the proposition that the **Sherbert** and **Yoder** tests were applied to the religious use of marijuana and peyote in **Brown** and the other cases. **O Centro** implies that the government proved a compelling interest and least restrictive means of regulation as in **Sherbert** and **Yoder** in order to prohibit the religious use of marijuana and peyote in those cases.

O Centro Espirita, 282 F.Supp. 1236, at page 1253, cited **Brown** stating that:

> "There is a second major distinction between the present case (of **O Centro Espirita**) and the cases involving claims that the principles of religious freedom reflected in the Free Exercise Clause and RFRA should be interpreted as permitting the sacramental use of marijuana. This distinction stems from the significant differences in the characteristics of the drugs at issue. Affirming a trial court's denial of a criminal defendant's request to rely on RFRA as a defense to

> marijuana charges, the Eighth Circuit states 'that the government has a compelling state interest in controlling the use of marijuana.' **United States v. Brown**, 72 F.3d 134 (8th Circuit 1995)(table)."

And on page 1254:

> "As support for this observation, the **Brown** court cited a number of First Amendment opinions which had emphasized problems associated with marijuana in particular. See **United States vs. Greene**, 892 F.2d 453, 456-57 (6th Circuit 1989). . .; **United States vs. Middleton**, 690 F.2d 820, 825 (11th Circuit 1982), quoting **Leary v. United States**, 383 F.2d 851, 860-61 (5th Circuit 1967)."

In fact, RFRA requires the production of evidence and argument to prove any threat to public health and safety as those issues were proven in the **Sherbert** and **Yoder** cases. The legal standard employed is a Strict Scrutiny examination for Compelling Interest regulated in the Least Restrictive Means.

In fact of law and the records of the court proceedings, not one of these cases cited by the **O Centro** court, not **Brown**, not **Greene**, not **Middleton,** not **Rush** or **Leary**, not one of these cases applied the **Sherbert** and **Yoder** tests to the religious use of marijuana.

This is evident from the actual words of the court decisions.

a. United States v. Brown, 72 F.3d 134 (9th Circuit 1995)(table).

At page 2 of the unpublished **Brown** the appellate court rules:

> "The court concluded, however, that the **law clearly established** that the government had a compelling interest in regulating marijuana and other drugs, and that the government had tailored that interest as narrowly as it could to prevent the kinds of dangers Congress believed existed. Thus, the district court concluded, **as a matter of law**, that RFRA was not available to Brown as a defense. The court granted the government's motion in limine, and **barred admission at trial of all evidence** covered in the government's motion."

At page 4 of the **Brown** decision the appellate court rules:

> "We have recognized that the government has a compelling state interest in controlling the use of marijuana. See **United States v. Fogarty**, 692 F.2d 542,

547-548 (classification of marijuana is rationally based and is a matter for legislative, not judicial, prerogative). . . see also **Greene,** 892 F.2d at 455-56; **United States v. Rush**, 738 F.2d 497, 512-13 (1st Cir. 1984). . .; **United States v. Middleton**, 690 F.2d 820, 822-24 (11th Cir. 1982). . ."

As we see from the plain meaning of the words of the decision in **Brown**, there was no consideration of any facts about marijuana in the **Brown** trial or appeal.

The appellate decision states clearly that "Thus, the district court concluded, **as a matter of law**, that RFRA was not available to Brown as a defense. The court granted the government's motion in limine, and **barred admission at trial of all evidence** covered in the government's motion".

Since the trial court made its decision "as a matter of law", and not as a matter of evidence in the record, we know that the trial court did not consider any evidence about marijuana or peyote. This is not the **Sherbert** and **Yoder** test.

As we look at the other cases cited where **O Centro** mentions **Brown**, we see that none of those courts consider any evidence as to any threat to public health and safety caused by that religious use of marijuana claim.

b. In **United States v. Fogarty**, 692 F.2d at page 547 the court rules:

"Because there is no fundamental constitutional right to import, sell, or posses marijuana, the legislative classifications complained of here must be upheld unless it bears no rational relationship to a legitimate government purpose."

The **Fogarty** court uses the "rational relationship test". RFRA imposes the compelling interest test on government. Therefore, **Fogarty** is irrelevant to a determination of a case under RFRA.

c. In **United States v. Greene**, 892 F.2d 453, at page 455:

"Defendant contends that the indictment should be dismissed because the classification of marijuana as a Schedule I controlled substance . . . and the

imposition of penalties for its use, possession, or distribution are irrational and arbitrary, thus violating the due process mandates of the fifth amendment.

Again, this case rests on a rational relationship test, not the compelling interest test set forth in RFRA, **Sherbert** and **Yoder**. This case is irrelevant under RFRA.

d. In **United States v. Rush**, 738 F.2d 497, 512-13 the court rules:

"In enacting substantial criminal penalties for possession with intent to distribute, Congress has weighed the evidence and reached a conclusion which it is not this court's task to review *de novo*. Every federal court that has considered the matter, so far as we are aware, has accepted the congressional determination that marijuana in fact posses a real threat to individual health and social welfare, and has upheld the criminal sanctions for possession and distribution of marijuana even where such sanctions infringe on the free exercise of religion. (citing **Leary v. United States**, 383 F.2d 851, 859-61). . . Finally, it has been recognized since **Leary** that accommodation of religious freedom is practically impossible with respect to the marijuana laws."

Under RFRA **it is** the courts obligation to review the particular use of a scheduled drug made by the church members ***de novo***. The court rulings under review in **Gonzales** do review the particular use of DMT in Hoasca Tea by the church ***de novo***.

Under RFRA, no court can merely accept a statement in a laws preamble indicating a congressional determination that a law is necessary. Congress has enacted RFRA in order to amend all federal laws to provide for the proof at trial that the enforcement of the law is necessary. That is why RFRA requires the **Sherbert** and **Yoder** fact tests at trial. Those tests require submitting evidence to prove a palpable threat to public health and safety sufficient to substantiate a compelling interest on the part of government to enforce the law.

e. In **United States v. Middleton**, 690 F.2d at page 825 court rules:

"Unlike the state interest advanced in **Yoder**, the interest advanced by the government in the case at bar is compelling and would be substantially harmed by a decision allowing members of the Ethiopian Zion Coptic Church to posses marijuana freely. Congress had strongly and clearly expressed its intent to protect

> the public from the obvious danger of drugs and drug traffic. . . As this court noted in **Leary v. United States**. . . both the fact of legislation and the severity of the penalties provided in statutes such as the one in question clearly evidence 'the grave concern of Congress' in controlling the use of drugs. . . Moreover, the **harm of the particular drug in question is not relevant** in determining the degree of protection afforded by the free exercise clause to the defendant's actions."

However, as pointed out so clearly in the **O Centro** decisions under review, it is exactly the "harm of the particular drug in question" that is relevant to the determination of a compelling interest on the part of government, and the least restrictive means of having regulated that compelling interest under the RFRA.

f. In **Leary v. United States**, 383 F.2d 851, at page 860 court rules:

> "Appellant's (Leary) reliance on **Sherbert v. Verner**. . . for authority that the constitutionally guaranteed right of free religious exercise imposes on the government the burden of showing a **compelling interest** in its abridgement, is **misplaced and inapposite on the facts**. . . We cannot reasonably equate deliberate violation of the federal marihuana laws with the refusal of an individual to work on her Sabbath Day and nevertheless claim compensation benefits. . . Congress has made it a crime to traffic in marihuana and **it was not incumbent upon the government to produce evidence** to controvert the testimony of witness's on the controversial question of whether use of the drug is relatively harmless."

The **Leary** court rules that **Sherbert** will not be applied to the trial of Leary's religious use of marijuana. Under RFRA **Sherbert** and **Yoder** must be applied to Leary's religious use of marijuana.

We know that Dr. Leary did not get the **Sherbert** test because the **Leary** court say's "Appellant's (Leary's) reliance on **Sherbert**. . . is misplaced and **inapposite** on the facts."

Inapposite is a word that means is **irrelevant and cannot be applied**. So, the **Leary** court tells us that **Sherbert** was not applied to Dr. Leary's case at trial.

We also know that **Sherbert** was not applied in **Leary** because the court say's "**it**

was not incumbent on the government to produce evidence to controvert the testimony of witness's on the controversial question of whether use of the drug is relatively harmless." We can see that "**it was not incumbent**" is a phrase meaning the government **was not obligated to do it**.

The **Leary** court ruled that the government is not obligated to produce evidence to "controvert the testimony" on whether or not marijuana is harmless. Under RFRA, the government is obligated to produce evidence that marijuana is harmful to public health and safety, in which particular ways the use of marijuana causes harm, and how no other means other then complete prohibition, will stop the harm the government has proven to be caused by the particular religious use of marijuana made by the defendants.

Since none of the cases cited in **O Centro** are adjudicated in keeping with **Sherbert** and **Yoder**, citation of **Brown, Rush, Greene, Fogarty, Middleton, or Leary** in the **O Centro** cases for the proposition that **Sherbert** and **Yoder** were applied is **Plain Error**.

g. In addition, a district court in the Ninth Circuit has cited both **Leary** and the unpublished decision in **Brown**, in direct contradiction to the **Bauer** decision cited above, for the proposition that RFRA does not require the proofs as in **Sherbert** and **Yoder** to a marijuana case. See **Lepp v Gonzales**, Case Number C-05-0566 VRW (Appendix C, on page 19).

This Court is now faced with the problem of the unpublished Eighth Circuit decision in **Brown** being cited for authority by a court in the Ninth Circuit where the **Brown** decision directly contradicts the published Ninth Circuit decision in **Bauer**.

In addition, this Court is now faced with the **Leary** decision being cited for

authority where the Ninth Circuit specifically ruled in the published **Bauer** decision that **Leary** is invalid where relied upon for authority in a religious use of marijuana case

12. In addition, this Court should find the cases cited in **Brown** are irrelevant under RFRA because the lower courts in **Brown** and the cases cited in **Brown**, have failed to follow the federal drug statute and the federal Administrative Procedure Act as Congress wrote them and intended them to be adjudicated.

a. Appendix #C attached is a copy of the federal DEA Administrative Law Judge decision and recommended ruling in the matter of rescheduling marijuana for medical use. That document was introduced into evidence in **Brown**.

b. The DEA Rescheduling Decision is authorized by Title 21 U.S.C. section 802(1)(5)(25), section 811(a)(b)(c) and (d), Title 5 U.S.C. sec. 551 et seq..

c. This federal Drug Enforcement Agency document was introduced into evidence to the **Brown** pre trial court record, but the trial, appellate court, and all other courts have refused to consider it.

d. The Court will note that on page 1 of the report the Administrative Law Judge states that:

> "This is a rulemaking pursuant to the **Administrative Procedure Act, 5 USC sec. 551 et seq.,** to determine whether the marijuana plant (Cannabis Sativa L) considered as a whole may lawfully be transferred from Schedule I to Schedule II of the schedules established by the Controlled Substances Act (the Act), **21 USC sec. 801 et seq."**

e. Congress established administrative procedures by statute for the purpose of enabling the federal government to function in a regular, open and reliable manner.

f. Congress wrote the federal drug control statutes to provide for public health and safety in a regular, open and reliable manner.

g. The founders of the Republic intended that the federal courts would reliably follow and observe the statutes enacted by Congress in order that public health and safety might be reliably and openly protected.

h. That has not occurred in the case of **Brown.** or any of the other cases cited in support of **Brown**.

Specifically, the federal courts in **Brown** have not followed the Administrative Procedures statute or the drug statute as Congress wrote it and intended it to be followed.

i. The drug statute provides that drugs sold in commerce will be evaluated in a scientific manner to determine their medical efficacy and any toxicity or danger in use.

j. The drug statutes provide that an Administrative Law Judge will conduct an administrative evaluation of the scientifically produced evidence about a particular drug and then report and recommend to the DEA Administrator the conclusions reached from that evaluation. Congress intended that the DEA would follow a scientific analysis in scheduling drugs.

k. Under the authority of the Administrative Procedures Act and the federal drug law written by Congress, it is the DEA Administrative Law Judge that determines the facts of toxicity and danger in use of any drug. The part of the federal drug statute that enables an Administrative Law Judge to conduct the review process for scheduling a drug is as important and necessary a part of the law for a federal judge to observe and follow as any other part of the drug law.

l. Congress enacted RFRA in order to amend all federal laws in order to provide protection for religious establishment and exercise that does not threaten public health and safety. RFRA states that any federal law that substantially burdens religious

establishment or exercise must be justified by factual proofs that the act of the person is a substantial and demonstrable threat to public health and safety.

m. The DEA Administrative Law Judge made the decision about the toxicity and danger of use of Marijuana; reported in DEA Docket Number 86-22, on page 57-58:

> "5. Estimates suggest that from twenty million to fifty million Americans routinely, albeit illegally, smoke marijuana without the benefit of direct medical supervision. Yet, despite this long history of use and the extraordinarily high numbers of social smokers, there are simply no credible medical reports to suggest that consuming marijuana has caused a single death."
>
> "6. By contrast aspirin, a commonly used, over the counter medicine, causes hundreds of deaths each year."
>
> "8. A smoker would theoretically have to consume nearly 1,500 pounds of marijuana within about fifteen minutes to induce a lethal response."
>
> "9. In practical terms, marijuana cannot induce a lethal response as a result of drug related toxicity."
>
> "15. In strict medical terms, marijuana is far safer than many foods we commonly consume. For example, eating ten raw potatoes can result in a toxic response. By comparison, it is physically impossible to eat enough marijuana to induce death. . . "

n. Examination of **Brown** and the other cited cases shows that the courts never examined the DEA Marijuana Rescheduling Petition. Those courts simply accepted the governments position that the words of the preamble to the federal drug law are the final determination of the issues of compelling interest and least restrictive means of regulation - as a matter of law.

o. Under RFRA, under **Strict Scrutiny**, no court can simply accept a congressional determination enunciated in a preamble to the law, that a law is enacted to protect public health and safety because:

1) Congress says in RFRA that it intends to <u>amend all federal laws</u>,

2) RFRA requires that the government justify the law whenever it is applied to the defendant who is substantially burdened by the law in sincere religious exercise;

3) RFRA provides that specific application of the laws to the particular person must be justified;

4) In RFRA, Congress decided to provide for the **Sherbert** and **Yoder** fact tests at trial for a palpable threat to public health and safety sufficient to substantiate a compelling interest on the part of government to regulate the drug use.

5) Under RFRA, as with any federal statute, it is the courts obligation to follow the words of Congress wherever the act of Congress is within the power of Congress to act.

13. Amicus supports the interpretation of RFRA applied to the O Centro Espirita church made by the lower courts in **Gonzalez**. That application of RFRA clearly follows the words of Congress written in RFRA, and follows those words of Congress as they are interpreted in the **published** decisions of the federal courts that interpret RFRA.

14. Amicus notes that Rule 10 of the Supreme Court rules states in part that the jurisdiction of this Court should be exercised when:

> "(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on some important matter; . . or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for the exercise of this Court's supervisory power; "
>
> "(c) a . . . United States court of appeals had decided an important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question that conflicts with relevant decisions of this Court."

As set out in the pages above, the **O Centro** court has cited **Brown** as if **Brown** was adjudicated under RFRA in the same manner as the **O Centro** court implemented RFRA. As pointed out in detail above, the **Brown** interpretation of RFRA is 180 degrees out of alignment from the **O Centro** interpretation of RFRA. This is an example of a U.S. court of appeals entering a judgment in conflict with another court of appeals on an important matter.

As set out in the pages above, a district court in the Ninth Circuit has cited the unpublished decision in **Brown** in direct contradiction to the published Ninth Circuit ruling in **Bauer**. See **Lepp v Gonzales**, Case Number C-05-0566 VRW (Appendix D, on page 19). This is an example of a lower court that has so far departed from the accepted and usual course of judicial proceedings, as to call for the exercise of this Court's supervisory power.

As set out in the pages above, the **Brown** court interpreted RFRA in direct contradiction to the published decisions of the Eighth Circuit courts both prior to and subsequent to the **Brown** decision. The rules of the federal courts are plain that the published decisions of the federal courts are to be either followed in subsequent court cases, or are to be distinguished from the prior decisions. The fact that this rule of the federal courts has not been followed in **Brown** calls the integrity of the federal courts into question. This is an example of a district court and an appellate court having so far departed from the accepted and usual courts of judicial proceedings as to call the fundamental integrity of the federal courts into question.

As set out in the pages above, the **Brown** court and the **O Centro** court interpret RFRA as applied to the federal drug laws. As set forth in the pages above those two

rulings are directly opposed to each other on the fundamental issue of whether or not the government is required to demonstrate that enforcement of the law is in response to a threat to public health and safety of sufficient dimension as to substantiate a compelling interest on the part of government that has been further regulated in the least restrictive manner. After the government demonstration, then the plaintiff/defendant must be allowed to enter evidence for factual consideration that the government's proofs are not true or substantial. The fact that the **Brown** and **O Centro** decisions are opposed to each other on this issue is an example of a United States court of appeals having decided an important question of federal law that has not been, but should be settled by this Court.

As set forth in detail above, this Court has ruled in **Boerne** and in **Indianapolis**, that RFRA applies to all federal laws and that the drug laws are ordinary criminal statutes which do not substantiate a threat to public health and safety of sufficient dimension as to substantiate a compelling interest on their face. Since the **Leary**, **Greene**, **Middleton, Rush** and **Brown** decisions are all made in direct contradiction to this Courts ruling in **Boerne** and **Indianapolis**, this is an example of a case where the appellate court have decided an important federal question that conflicts with relevant decisions of this Court.

In light of Rule 10 and as set out in detail above, this Court should:

a. Find that the **Brown** decision, and any citations that rule that the **Sherbert** and **Yoder** tests are not applied to religious use of marijuana, have defined RFRA in contradiction to the plain meaning of the words of Congress in the enactment of RFRA,

b. That RFRA by the plain meaning of the words used by Congress, requires the government to prove the facts of any threat to public health and safety caused by the particular individual or organization at bar as those proofs were made in the **Sherbert**

and **Yoder** decisions, and

c. That RFRA by the plain meaning of the words used by Congress, requires the government to prove the facts of having used the least restrictive means of regulation to control the particular threat to public health and safety caused by the particular individual or organization at bar as those proofs were made in the **Sherbert** and **Yoder** decisions, and

d. That RFRA acts as an amendment to any international treaty so that the terms of the treaty cannot be interpreted or effected by government to deny the protections of RFRA to the persons described by Congress in the enactment of RFRA.

For all these reasons, Amicus requests that this Court recognize that the effect of RFRA given to the O Centro Espirita Beneficiente Uniao Do Vegetal Church by the 10th Circuit Court rulings are a true and accurate interpretation of RFRA.

For all these reasons this Court should issue a decision interpreting RFRA to apply to all federal laws, mandating the fact based tests set forth in **Sherbert** and **Yoder**, and placing the burden on government to make the factual proofs of inevitable threats to public health and safety caused by religious establishment and exercise, as was the tradition of our Law prior to **Smith**.

Respectfully Submitted by:

United Cannabis Ministries
as set forth in the affidavits of
Appendix A attached to this Brief
and as represented by: