

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)	
Plaintiff,)	
v.)	No. 8:08-cr-00388
)	
DEJAY MONSON,)	
Defendant.)	

**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT’S MOTION TO DISMISS
FOR FAILURE TO STATE A VALID CAUSE OF ACTION,
NOTICE OF CONSTITUTIONAL AND STATUTORY DEFENSE,
AND MOTION FOR EMERGENCY INJUNCTION**

INTRODUCTION

In 1993, Congress enacted and the President signed into law the Religious Freedom Restoration Act (“**RFRA**” hereafter), 42 U.S.C. §§ 2000bb et seq. On February 21, 2006, the United States Supreme Court issued its decision in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006) (“*O Centro*” hereafter), which involved the application of the prohibitions of the Controlled Substances Act (“**CSA**” hereafter), 21 U.S.C. §§ 801-904, in light of **RFRA**. The decision in *O Centro* requires a court to review *de novo* the particular use of a controlled substance made by a claimant or defendant and to determine whether such use is protected and allowed by **RFRA**.

“The purposes of this Act are-- (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of

religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.” 42 USC § 2000bb(b).

Because the United States Supreme Court acknowledge in *Employment Division v. Smith*, 494 U.S. 872, 884 (1990), that the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and must be applied in all cases where free exercise of religion is substantially burdened by a law which contains secular exceptions, the First Amendment also provides a claim or defense to the application of the prohibitions of the CSA.

EXCEPTIONS TO THE CSA

CSA regulations expressly exempt the sacramental use of peyote despite the fact that peyote is listed in Schedule I of the CSA. See 21 C.F.R. § 1307.31. And, See 42 U.S.C. § 1996a (“Traditional Indian religious use of the peyote sacrament”). No such express exemption exists for Defendant’s sacramental use of marijuana.

CSA regulations exempt the medical use of marijuana despite the fact that marijuana is listed in Schedule I of the CSA. See *Conant v. Walters*, 309 F.3d 629, 648-649 (9th Cir. 2002), *cert. denied*, *Walters v. Conant*, 540 U.S. 946 (2003). And, See *Raich v. Gonzales*, 500 F.3d 850, 860 n.8 (9th Cir. 2007) (“The program is highly restricted and has not accepted new medical marijuana patients since 1992.”).

In *O Centro*, the Supreme Court of the United States recognized that the religious use of the Schedule I controlled substance DMT (contained in “hoasca” tea) is also exempt from the general prohibitions of the CSA.

IRREPARABLE INJURY

The actions of the Plaintiffs have a chilling and prohibitive effect on Mr. Monson’s establishment and exercise of his religion and are causing Mr. Monson to suffer physically and spiritually because he is deprived of his medicine and sacrament.

“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). “A petitioner is not required to exhaust administrative remedies in ‘a situation in which primary conduct is affected.’” *Toilet Goods v. Gardner*, 387 U.S. 158, 164 (1967). “Failure to comply with the challenged Regulations could have serious consequences if they are valid.” *Toilet Goods v. Gardner*, 360 F.2d 677, 682 (2nd Cir. 1966).

We think that the threat of federal prosecution here is realistic. [Plaintiff] Owen, a farmer as well as a legislator, proposes to grow cannabis sativa plants to produce industrial products if permitted to do so. The DEA has made clear, both by its conduct in New Hampshire and elsewhere, that it views this as unlawful under the federal criminal statutes governing marijuana. . . . Nor, as the medical-use controversy bears out, . . . is there any reason to doubt the government’s zeal in suppressing any activity it regards as fostering marijuana use. *Id.* at 1196 (citing *New Hampshire Hemp Council v. Marshall*, 203 F.3d 1, 5 (1st Cir 2002)).

Monson v. DEA, 522 F.Supp.2d 1188, 1196 (D.N.D. 2007).

CONCLUSION

Defendant asserts that for the foregoing reasons that: (1) the Defendant is entitled to an immediate injunction enjoining the Plaintiffs from interfering with his religious use of marijuana; (2) the Defendant is entitled to an evidentiary hearing on this matter; and (3) if a trial is held, the Defendant is entitled to present evidence of his religious use of marijuana to a jury.

Respectfully submitted:

Filed Electronically

MICHAEL F. MALONEY
Attorney for Dejay Monson
222 South 15th Street
Suite 300N, One Central Park Plaza
Omaha, NE 68102
(402) 221-7884

Carl Eric Olsen
Legal Assistant
Patients Out of Time
130 E Aurora Ave
Des Moines, IA 50313-3654
(515) 288-5798

Ralph Anthony Smith, #13905
Attorney
Patients Out of Time
11211 156th
Louisville, NE 68037
(402) 234-4152

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 12, 2008 I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

KIMBERLY C. BUNJER, Assistant U.S. Attorney

Filed Electronically

MICHAEL F. MALONEY