No. 08-74457

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK PERKEL/CHURCH OF REALITY,

Petitioners,

v.

U.S. DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION

Respondent.

ON PETITION FOR REVIEW FROM A DECISION OF THE DRUG ENFORCEMENT ADMINISTRATION

BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

Statutes:

Controlled Substances Act (CSA):

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JURISDICTIONAL STATEMENT

The Drug Enforcement Agency (DEA) issued its final decision denying petitioner's request for an exemption from the Controlled Substances Act on October 1, 2008. Petitioner filed a timely petition for review in this Court on October 17, 2008. This Court has jurisdiction under 21 U.S.C. § 877, which vests jurisdiction in the court of appeals for final determinations of the DEA under the

Controlled Substances Act. *See Hemp Indus. Ass'n v. Drug Enforcement Admin.*, 333 F.3d 1082, 1084 (9th Cir. 2003).

STATEMENT OF THE ISSUE

Whether the DEA correctly denied petitioner's request, under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb, *et seq*., for a religious exemption from the Controlled Substances Act to permit members of the "Church of Reality" to use and distribute marijuana.

STATEMENT OF THE CASE

This is a direct petition for review from a decision of the United States Drug Enforcement Administration (DEA), denying a petition brought by Marc Perkel, on behalf of the "Church of Reality," seeking a religious exemption from the Controlled Substances Act (CSA) to allow members of the Church to possess and use marijuana. The Church was "a marijuana inspired idea" by Perkel, who also wrote most of the Church's doctrines "while stoned or from ideas thought up while stoned." *See* ER 67, 77.[1] The Church holds no meetings and has no rituals. It has no formal membership policy, other than to say that anyone who agrees with its principles is a member. The Church rejects "faith based" doctrines and does not

[1] "ER" refers to Respondent's Excerpts of Record filed concurrently with this brief.

purport to worship a deity or achieve spiritual enlightenment. Rather, the Church states that its mission is "the exploration of reality." ER 66.

The Church sought to use marijuana "to inspire creative thinking" in order to contribute to the sum of human understanding, although Perkel stated that members also use marijuana "recreationally" and "socially." ER 78, 79. The Church also asserts a religious right to distribute marijuana to the sick and dying. The Church places no restrictions or limitations on who can use marijuana, or who can administer it, asking only that its members "use good judgment." ER 78-81.

DEA denied Perkel's request for an exemption. The agency first held that Perkel could not establish a *prima facie* case under RFRA because the prohibition on the possession of marijuana did not impose a substantial burden on the sincere religious exercise of the Church and its members. DEA concluded that the Church of Reality is best characterized not as a religion, but as a philosophical view of the world. DEA also concluded that the Church's beliefs were not sincerely held, finding that the purported "religious" beliefs of the Church appeared to be manufactured on an ad hoc basis to justify Perkel's lifestyle and political and social belief that marijuana should not be prohibited. DEA also concluded that prohibiting marijuana did not impose a substantial burden on the Church's religious exercise, noting that there are legal ways to foster "creative thinking."

Next, DEA concluded that, even if the Church had established a *prima facie* case, the prohibition of marijuana in this case furthers compelling interests by the least restrictive means. In light of the Church's potentially limitless membership and its lack of restrictions on the use and distribution of marijuana, DEA concluded that the CSA's prohibition on the possession of marijuana is the least restrictive means of furthering the government's compelling interests in protecting public health and preventing the diversion of marijuana to recreational use.

STATEMENT OF THE FACTS

I. STATUTORY AND REGULATORY BACKGROUND.

A. The Controlled Substances Act.

The Controlled Substances Act makes it unlawful to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense" any controlled substance, "[e]xcept as authorized by [21 U.S.C. §§ 801-904]." 21 U.S.C. § 841(a); *see United States v. Moore*, 423 U.S. 122, 131 (1975). The Act likewise prohibits the "planting, cultivation, growing, or harvesting of a controlled substance." 21 U.S.C. § 802(15), (22).

Controlled substances under the CSA are divided into five schedules, with varying degrees of attendant restrictions on manufacture and distribution. See 21 U.S.C. § 812. A drug is included in Schedule I, the most restrictive schedule, if

Congress finds that it "has a high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use . . . under medical supervision." *Id.* § 812(b)(1)(A)-(C). Congress has classified marijuana as a Schedule I drug. *Id*. § 812(c).

The Act establishes a closed system of manufacture and distribution for Schedule I controlled substances. No individual or entity may manufacture, distribute, or dispense a Schedule I controlled substance unless registered by the Attorney General, 21 U.S.C. § 822(a), who has delegated this function to the Administrator of the Drug Enforcement Administration ("DEA"). 28 C.F.R. § 0.100(b). DEA will register an applicant to manufacture or distribute a Schedule I controlled substance, such as marijuana, if it determines that registration is "consistent with the public interest"– an assessment that considers, inter alia, the applicant's ability to maintain effective controls against diversion of the substance into illegitimate channels and the applicant's compliance with relevant state and local law. 21 U.S.C. § 823(a)-(b); *see generally* 21 C.F.R. Pt. 1301.

2. The Religious Freedom Restoration Act.

RFRA provides that "Government shall not substantially burden a person's exercise of religion" unless "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." 42 U.S.C. § 2000bb-1. The Act applies to "all federal law" and the implementation of that law, "whether statutory or otherwise," adopted both before and after the passage of RFRA. *Id*. § 2000bb-3(a).

Congress enacted RFRA in response to the Supreme Court's decision in *Employment Division, Dep't of Human Resources* v. *Smith*, 494 U.S. 872 (1990). In that case, the Court held that the Free Exercise Clause did not require Oregon to exempt from its criminal drug laws the sacramental ingestion of peyote by members of the Native American Church. *Id*. at 877-82. Such generally applicable laws, the Court concluded, may be applied to religious exercise regardless of whether the government demonstrates a compelling interest for its rule. *Id*. at 884-89.

RFRA was enacted to restore the compelling interest test in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), that existed prior to *Smith*. *See* 42 U.S.C. § 2000bb(b)(1). The statute's legislative history indicates that Congress expected courts to look to cases predating *Smith* in construing and applying RFRA. *See* H.R. Rep. No. 103-88, 103d Cong., 1st Sess. 6-7 (1993); S. Rep. No. 103-111, 103d Cong., 1st Sess. 9, *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898.

II. THE CHURCH OF REALITY'S PETITION FOR A RELIGIOUS EXEMPTION FROM THE CSA.

On March 26, 2006, Perkel, identifying himself as the "First One of the Church of Reality," sent a letter entitled "Request for Exemption" to the DEA's Office of Diversion Control. ER 66. Citing the Supreme Court's decision a month earlier in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006), Perkel requested "an exemption allowing members of the Church of Reality to smoke Marijuana as part of our religious practices." *Id*. Perkel stated that "[m]embers of the Church of Reality have used other drugs as well to inspire creative thinking," including "LSD, Mushrooms, Peyote, and Hoasca." ER 67. He proposed to start "with a limited use of Marijuana" and then "see how that goes," ER 60, seeking approval to use marijuana "through distribution systems already in place to provide medical Marijuana to patients." ER 67.

A. The Church Of Reality's Beliefs and Practices.

Perkel founded the Church of Reality on November 7, 1998, as a "marijuana inspired idea." ER 67. Perkel conceived of the idea while smoking marijuana, and states that "[m]ost of the Sacred Principles and all of the Sacred Missions and the Sacred Contemplations were written while I was stoned. If not for Marijuana the Church of Reality wouldn't exist." ER 77; *see also* ER 83.

The Church of Reality does not worship a deity, believe in the supernatural, or encourage its members to seek spiritual enlightenment. Indeed, the Church expressly disavows such notions. In a web page entitled "What the Church of Reality is Not," the Church states: "We don't worship anything." ER 147. The web page explains that "this church is about reality, not about God. We are not theists. However, if God comes out of hiding and shows itself in objective reality then we will believe in it." ER 147; *see also* ER 141 ("God doesn't exist"); ER 90 ("we believe that nothing exists outside of reality and if deities exist they exist within the context of this reality").

Similarly, the Church disavows the notion of "salvation," stating that "[i]n the Church of Reality 'being saved' means having a good backup of your computer data. The only known afterlife in the Church of Reality is the ideas you leave behind that are worth remembering." ER 147. The Church also declares that "[w]e don't believe in the supernatural. There are things we can't explain because we don't know all the answers. But we do believe the explanations do exist and our purpose is to use science and figure it out." *Id*. The Church insists that "the Church of Reality is a religion, but it looks like Atheism, Humanism, and Science." ER 126; *id* (noting that the Church "has its roots in Atheism, Humanism, and Science"). The Church believes in "Athiestic Altruism," based upon the notion that

"[g]enerosity is part of human evolution and is necessary for our common survival." ER 132.

The Church has no rituals, proclaiming that "we don't throw virgins into volcanoes" or baptize anyone. ER 147. The Church also states that it has "no dogma," explaining that there is "no 'holy book' or 'holy web site' that contains any list of things that you are expected to believe in. You are not required to accept anything on 'faith.'" *Id*. Rather, Perkel identifies a conglomeration of writings on the Church's web site as the "Kernel," which "outlines in detail our structure, organization and belief system." Pet. Br. 17. As Perkel explained, "[w]e look to the Kernel (named after Linux kernel) as if it were software. We are essentially writing the Operating System of the human race." ER 75.

In place of faith, supernatural, deities, or seeking spiritual enlightenment, "[t]he Church of Reality is a religion based on the practice of Realism, which means believing in everything that is real. Our motto is, 'If it's real, we believe in it.'" ER 120. The Church purports to "answer the great questions that other religions address, like what is right and wrong, how do people live together in a community, and what are our responsibilities to ourselves and each other. We address these concerns in the context of our evolutionary history, our present reality and our future evolution." ER 120-21. The Church further explains: "We believe in the

Principle of Bulls**t, that bulls**t is bulls**t, no matter how many people believe in it." ER 147; *see* ER 165.

According to Perkel, "[o]ur pillars lead to the conclusion that if we are going to explore reality that the human race must continue to evolve in a positive direction and that we are evolving through knowledge and information systems. We evolve by growing the Tree of Knowledge which represents the sum total of human understanding." ER 91-92. The Church's website refers to contributions to the Tree of Knowledge as "Intellectual Tithing." ER 129.

Perkel explained to DEA that many realists seek "some level of immortality" in that "[w]e want our life story to be part of the Tree of Knowledge." ER 82. As part of this story, he predicted that "[i]n the future people will look back and realize that the marijuana laws are just plain wrong." *Id*.

B. The Church of Reality's Structure and Membership.

The Church of Reality "is an Internet based religion. We are not organized by location and we are independent of geography." ER 74. The Church has a three-member "Council of Realists" who are "like a board of directors." ER 76. Perkel described "clergy" of the Church as "people who have important blogs or radio talk shows who are preaching the gospel of Reality." ER 106. Perkel also used the term "monks" to describe "volunteers who do things for the Church," explaining that "[a]

person who creates art work for the web site would be an art monk," and "[s]omeone who corrects spelling errors is a spelling monk." *Id.*

The Church holds no formal meetings. Rather, "[m]embers participate online and often visit each other at their homes in small groups to talk about reality, often smoke some marijuana, and come up with new ideas about how the universe works." ER 76. The Church has no formal membership process. ER 75. The Church's "Membership" web page states that "[e]ven if a person only thinks about reality for one minute a day, they are still a Realist and are as entitled to the right to practice their religion as anyone else." ER 152. Perkel considers anyone who reads the Church's website and agrees with its contents "to be at least an associate member." ER 106. While there were "1060 names on our email list . . ., there are likely tens of thousands who I would call Realists at some level having accepted the principles of our church." *Id.*

C. The Use of Marijuana and other substances by Church members.

1. The Church sought a religious exemption to use marijuana in two separate ways. First, Perkel explained that an exemption was necessary to inspire "creative thinking" in Church members who wish to contribute to the Tree of Knowledge. ER 67, 105. As Perkel explained, marijuana "is used during brainstorming sessions when people explore new ideas and concepts. It is used to help us think outside the

box." ER 77. Perkel explained: "We see marijuana as a drug that inspires creative thinking as well as having significant medical benefits and the ability to lower stress. . . . We see marijuana as a substance that has been misclassified and is relatively harmless as compared to tobacco and alcohol. " ER 78.

Perkel explained to DEA that, because the Church was a marijuana-inspired idea and most of its doctrines were "written while I was stoned," ER 77, the continued use of marijuana is "necessary for the continued development of our doctrine." ER 83. Perkel claimed that "[i]f not for the continued use of marijuana the doctrine of the Church of Reality would develop at a far slower pace than it is now." ER 77. He explained, however, that "[n]ot all realists are required to use these drugs. These are substances we consider need to be available to members who wish to expand their mental functions." ER 67; *see* ER 78-79.

Perkel also candidly admits that the use of marijuana by him and other members of the Church goes beyond generating ideas to contribute to the development of the Church. He states, for instance, that "I don't come up with great ideas every time I'm stoned and sometimes I just used it to quiet the noise in my mind to help get good rest." ER 104. He also states that "[m]arijuana would be used as a substance to inspire creative thinking, for medical purposes, relaxation,

and socially like social drinking." ER 78. Perkel further explained that the Church members "use it recreationally and for medical reasons." ER 79.

In addition, Perkel candidly acknowledged that Church members use illegal drugs other than marijuana to "inspire creative thinking," including "LSD, Mushrooms, Peyote and Hoasca." ER 67. According to Perkel, "[a]lthough our request at this time is for the use of marijuana, we are not limiting ourselves to just that one drug, I personally have used LSD in the time period from 1977 to 1985 and these drugs too lead to incredibly profound revelations about reality that have stuck with me all my life." ER 84; *see* ER 80.

The Church places no restrictions or limitations on who can use marijuana, who can administer it, or how much may be used. According to Perkel, when people "contemplate reality" they are "performing a religious ritual" and "could use marijuana to enhance the religious experience." ER 79. The only proviso is to "use good judgment," but the Church makes no effort to enforce any such rule, stating that "[r]eality is the only enforcer." ER 80; *see id*. at 81 ("We are not an enforcement based religion"). This policy stems from the Church's "Sacred Principle of Privacy," which prevents the Church from involving itself "in other people's private choices." ER 78. While the Petition describes marijuana use by Church members as "limited" or "infrequent," ER 77, 83, Perkel indicates that he

personally uses marijuana three times per week on the average, and states that it is "up to the individual" to decide how much to use. ER 78.

2. The Church also seeks an exemption to distribute marijuana to the sick and dying. ER 106. In response to this Court's decision in *Raich v. Gonzales*, 500 F.3d 850 (9th Cir. 2007), Perkel issued an "Edict" of the Church of Reality, declaring that "[m]embers of the Church of Reality have an absolute right to use Marijuana for any medical purpose that they see fit regardless of whether or not it is lawful to do so." ER 98. The Edict asserted that "[a] realist is not required to give their life to the government to support a false description of reality that flies in the face of science. Marijuana laws are political laws and have no basis in the real world." *Id*. Asserting that "the use of drugs for medical reasons, whether they be legal or not, is a logical extension of our religious lifestyle," Perkel concluded: "I therefore declare specifically that the Church of Reality recognizes a religious right that church members have access to marijuana specifically and any other drug in general that they determine has medical value to them." ER 99. In addition, the Edict declared that "a Realist has a religious duty to provide marijuana to a person who is not a church member as an act of compassion" where doing so would alleviate "the pain and suffering of the sick and dying," provided that "good judgment" is used. ER 100.

III. DEA'S DECISION DENYING THE CHURCH'S REQUEST.

On October 1, 2008, DEA issued a decision denying Perkel's request for a religious exemption permitting the possession and use of marijuana by the Church of Reality and its members. ER 19. DEA concluded that Perkel and the Church could not demonstrate that the CSA substantially burdened the sincere exercise of their religious beliefs, citing three independent bases.

First, DEA held that "the Church of Reality's beliefs are most aptly characterized as philosophical and technological – perhaps even medical, political and social – but not religious." ER 22. DEA noted that many of the beliefs, edicts and principles related to marijuana "appear to be means for expressing your legal, political and scientific disagreement with prevailing federal laws * * *." ER 23. The Church's purported mission of understanding the real world "is extraordinarily vague and does not appear to differentiate the Church's pursuits from that of science or philosophy." ER 26. DEA also found that the Church does not incorporate spiritual or metaphysical beliefs, and observed that the Church's "Sacred Principles" were "generated in order to obtain 501(c)(3) status (as opposed to being derived from a cohesive moral or ethical imperative) * * *." ER 27-28.

DEA also noted that the Church lacks many of the structural characteristics common to most religions, such as ceremonies or rituals, traditional clergy,

gathering places, meetings, or a membership process. ER 28-29. While DEA did not hold that any of these factors was independently dispositive, it found that, taken together, these factors indicated that "the Church of Reality fails to qualify as a religion." ER 29.

Second, DEA concluded that, even if the Church's beliefs could be characterized as religious, those beliefs were not sincerely held. DEA found that the Church's "newfound religious beliefs appear to be rationalizations designed to justify your long-held political and medical views about the alleged benefits of marijuana use." ER 30. Given the use of marijuana and other drugs predating the founding of the Church, DEA found that "you have 'conveniently founded a "religion" that affirms your right to use the same substance for "religious purposes" that you believed you were entitled to used *before* the founding of your church.'" *Id*. (quoting *United States v. Quaintance*, 471 F. Supp. 2d 1153, 1172 (D.N.M. 2006), *appeal dismissed*, 523 F.3d 1144 (10th Cir. 2008) (emphasis in original)).

Third, DEA held that the CSA's prohibition on marijuana does not substantially burden the Church's exercise of religion. DEA concluded that, since Perkel has acknowledged that there are lawful alternative ways to foster creative thinking, the prohibition on marijuana does not amount to a substantial burden on the exercise of religion of the Church of Reality or its members. ER 32.

DEA also held, in the alternative, that the prohibition of the Church's marijuana use is the least restrictive means of furthering two compelling government interests: (1) protecting public health and safety; and (2) preventing the diversion of marijuana to non-religious use. ER 37-44.

With respect to the first interest, DEA relied upon numerous scientific and medical studies, as well as previous DEA orders denying petitions to remove marijuana from Schedule I of the CSA, to conclude that the use of marijuana causes significant harm to public health and safety, including, among other things, significant impairment of cognitive function, potential emergence of psychotic symptoms, the development of psychological and physical dependence, respiratory and cardiovascular damage, and increased risk of motor vehicle accidents and fatalities. ER 37-39. While Perkel disagreed with DEA's evaluation of the medical and scientific data on the public health and safety risks of marijuana, he offered "no specific medical or scientific information whatsoever" to support his position. ER 46. In light of the Church's potentially broad membership, DEA concluded that "the harms of marijuana use by Church of Reality members have the potential to reach very large numbers of people." *Id*. With no limits on the amount of marijuana Church members may use or the frequency of use, Church members "are particularly vulnerable to the harms of chronic and long-term marijuana use." *Id*.

DEA also held that the use of marijuana by the Church would "seriously compromise DEA's compelling interest in preventing diversion of marijuana for illegal uses." ER 46. Because the Church's requested exemption would apply to "anyone who visits your website and agrees with its principles" or anyone "who thinks about reality for one minute a day," DEA found that law enforcement would have "no means to track, monitor, or control usage of marijuana." ER 46-47. DEA also found that law enforcement "could not verify a person's claim of Church membership because the Church has no list of members, no membership policy, and a 'principle of privacy' that prohibits inquiries into whether a person is a member." ER 47. DEA also noted that the Church "places no restrictions on the marijuana that a 'member' may use," has no specific ritual or central location in which marijuana is used, and no central facility for storage. These factors, along with Perkel's candid acknowledgment that he and other Church members also use marijuana for recreational purposes, "make it virtually impossible" for law enforcement to ensure that any exemption is limited to legitimate religious use. *Id*.

DEA found that these same compelling interests would be undermined by the Church's desire to distribute marijuana to the sick and dying. In addition to the public health and safety interest outlined above, DEA found that the Church's lack of any limitation on the amount of marijuana a member may distribute or the

number of recipients means that the Church's requested exemption "has the potential to place large amounts of marijuana into wide circulation." ER 48.

Finally, DEA held that the CSA's prohibition of marijuana in this instance is the least restrictive means of furthering the government's compelling interests. DEA held that "the unconstrained, decentralized, and potentially widespread marijuana permitted under Church doctrine simply cannot be accommodated in a manner that would allow DEA to pursue its compelling interest in preventing illegal diversion of marijuana to recreational and other non-religious users." ER 49.

SUMMARY OF THE ARGUMENT

1. Under RFRA, a plaintiff must establish a *prima facie* case by demonstrating that the challenged restriction imposes a substantial burden on the exercise of sincerely held religious beliefs. In this case, DEA correctly determined that Perkel cannot establish a *prima facie* case under RFRA for three independent reasons.

a. First, the Church of Reality is a secular philosophy rather than a religion. The Church professes no theological or spiritual beliefs whatsoever, but instead expresses its tenets in terms of science, evolution and secular philosophy – precisely the sort of concepts that this Court has recognized are not rooted in religion. *See, e.g.*, *Alvarado v. City of San Jose*, 94 F.3d 1223, 1227 (9th Cir. 1996); *Peloza v.*

Capistrano Unified Sch. Dist., 37 F.3d 517, 521 (9th Cir.1994). Moreover, the Church's complete lack of structure, with no standards for membership and no formal meetings or rituals, confirms that the Church is not a "religion" under RFRA. Beliefs, no matter how fundamental and no matter how strongly held, must be "rooted in religio[n]" to receive protection under RFRA. *See Johnson v. Moore*, 948 F.2d 517, 520 (9th Cir. 1991). Because the beliefs and practices of the Church of Reality are secular rather than religious, Perkel's RFRA claim fails.

b. Second, substantial evidence supports DEA's finding that the Church's beliefs, to the extent they are characterized as religious, are not sincerely held. Long before founding the Church, Perkel believed that marijuana was beneficial and should not be prohibited. Perkel also admits that he and other Church members used marijuana and other illegal drugs in the past, and currently use marijuana "recreationally," for "relaxation," and "socially." ER 78, 79, 104. In addition, the Church's beliefs mainly consist of a series of secular philosophies cobbled together and labeled "sacred" or "holy." And, the Church has no defined membership, no rituals, no designated gathering places, and no set meetings. In light of all of these facts, DEA reasonably concluded that the Church's "newfound religious beliefs appear to be rationalizations designed to justify your long-held political and medical views about the alleged benefits of marijuana use." ER 30.

c. The Church's *prima facie* case also fails because prohibiting marijuana does not substantially burden the exercise of religion by Perkel and other Church members. Church members do not use marijuana in conjunction with a church service or ritual or as a communion or sacrament – and indeed need not use it at all. ER 67. While Perkel states that Church doctrine would develop at a slower pace if members could not use marijuana to "inspire creative thinking," he acknowledges that the Church would still progress. Given the many legal ways to foster creative thinking and the fact that marijuana is not used in any Church of Reality ritual, the CSA's prohibition does not substantially burden the Church's exercise of religion.

The prohibition on distributing marijuana to the sick and dying also does not substantially burden the exercise of Perkel's religion. While Perkel insists that the prohibition interferes with the Church's "principle of compassion," he cannot reasonably contest that there are many ways to show compassion for the sick and dying. In sum, nothing in the CSA's prohibition means that Church members are "coerced to act contrary to their religious beliefs by the threat of criminal prosecution." *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1069-70 (9th Cir. 2008) (en banc), *cert. denied*, 2009 WL 34978 (2009).

2. Even if Perkel could establish a *prima facie* case, his claim fails because prohibiting the Church's use of marijuana is the least restrictive means of furthering

compelling government interests. First, DEA, based upon numerous scientific studies, found that the use of marijuana causes significant harm to public health and safety. Second, DEA provided ample support for its conclusion that the use and distribution of marijuana presents substantial risks of diversion to illicit uses, given that it is the most widely used and trafficked illegal drug in the United States.

Contrary to Perkel's contention, DEA's decision explained in detail why prohibition of marijuana, as specifically used by the Church and its members, furthers these compelling interests. The Church's potentially unlimited (and unidentifiable) membership, lack of restrictions on the amount of marijuana members may use or the time and location of use, and Perkel's candid acknowledgment that Church members use marijuana for recreational purposes plainly support DEA's decision to deny Perkel's requested exemption. ER 46-49.

STANDARD OF REVIEW

21 U.S.C. § 877 states that DEA's findings of fact "if supported by substantial evidence, shall be conclusive." *See Penick Corp. v. DEA*, 491 F.3d 483, 488 (D.C. Cir. 2007). DEA's rationale for denying the requested exemption is reviewed "under the APA's familiar arbitrary and capricious standard." *John Doe, Inc. v. DEA*, 484 F.3d 561, 570 (D.C. Cir. 2007); *see Alra Laboratories, Inc. v. DEA*, 54 F.3d 450, 451-52 (7th Cir. 1995).

ARGUMENT

In order to establish a *prima facie* case under the Religious Freedom Restoration Act, a plaintiff must demonstrate that the challenged provision of law works a substantial burden on his ability to exercise religion. See 42 U.S.C. § 2000bb-1; *O Centro*, 546 U.S. at 428; *Guam v. Guerrero*, 290 F.3d 1210, 1222 (9th Cir. 2002). Thereafter, the burden shifts to the government to show that the law furthers a compelling interest by the least restrictive means. 42 U.S.C. § 2000bb-1(b). As discussed below, DEA correctly determined that Perkel's RFRA claim fails both because the Church could not make out a *prima facie* case, and, alternatively, the prohibition of marijuana in the circumstances presented here furthers a compelling interest by the least restrictive means.

I. PROHIBITING THE POSSESSION AND DISTRIBUTION OF MARIJUANA DOES NOT SUBSTANTIALLY BURDEN PETITIONER'S EXERCISE OF RELIGION.

Perkel's RFRA claim fails at the first step because the Church cannot establish the elements of a *prima facie* case. That is, the Church cannot show a substantial burden on the exercise of religion for three independent reasons: (1) the "Church of Reality" is a philosophy of life rather than a religion, and thus its practice of using marijuana is not the "exercise of religion" under RFRA; (2) to the extent the Church's beliefs can be characterized as religious, those beliefs are not

sincerely held; and (3) the prohibition on the possession of marijuana does not substantially burden petitioner's exercise of religion.

A. The Church of Reality Is A Secular Philosophy and Not a Religion.

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Supreme Court held that "[a] way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief." *Id*. at 215. The Court observed that claims based on the "subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond," would "not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses." *Id*. at 216.

The Supreme Court reiterated this point several years later in *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 833 (1989), emphasizing that "[p]urely secular views" do not suffice to state a Free Exercise claim. And this Court has long recognized that "[i]n order to state a valid free exercise claim, appellant must demonstrate that this belief is religious in nature." *Johnson v. Moore*, 948 F.2d 517, 520 (9th Cir. 1991); *Callahan v. Woods*, 658 F.2d 679,

683-84 (9th Cir.1981). Consistent with these cases, the courts have recognized that, to make out a cause of action under RFRA, a plaintiff must show that "his sincerely held beliefs are 'religious beliefs,' rather than a philosophy or way of life." *United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996); *Kiczenski v. Gonzales*, 237 Fed. Appx. 149 (9th Cir. 2007); *Quaintance*, 471 F. Supp. 2d at 1170.

Determining what beliefs are "religious" is "a most delicate question." *Yoder*, 406 U.S. at 215; *see Alvarado*, 94 F.3d at 1227 (noting that attempting to define religion "is a notoriously difficult, if not impossible, task"). "It is nonetheless incumbent on the courts to ensure that a free exercise claim is granted only when the threatened belief is religious in nature." *Callahan*, 658 F.2d at 685; *see Yoder*, 406 U.S. at 215. Thus, "[i]t is not enough in order to enjoy the protections of the [RFRA] to claim the name of a religion as a protective cloak. Neither the Government nor the court has to accept the [claimants'] mere say-so." *United States v. Bauer*, 84 F.3d 1549, 1559 (9th Cir. 1996).

This Court, borrowing from the Third Circuit's decision in *Africa v. Commonwealth of Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981), has identified three "useful indicia" to aid in determining whether a claim involves religious exercise: "'First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in

nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.'" *Alvarado*, 94 F.3d at 1229 (quoting *Africa*, 662F.2d at 1032). The Tenth Circuit has adopted a similar, but more detailed, set of guidelines. *See Meyers*, 95 F.3d at 1483-84.[2]

However, this Court need not attempt to define what is and it not a religion, nor must it designate a definitive list of factors that identify religious beliefs from secular ones. That is because under any set of criteria recognized in First Amendment or RFRA jurisprudence, the "Church" of Reality is not a religion.

As noted above (pp. 8-9, *supra*), the Church of Reality professes no theological or spiritual beliefs whatsoever. The Church expressly disavows any notion of a Supreme Being or supernatural force, professing that "[w]e don't worship anything" and that "God doesn't exist" (while leaving open the possibility of such beliefs if God "comes out of hiding"). ER 141, 147.

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[2] *Meyers* considers whether a particular set of beliefs addresses: (1) "ultimate ideas," such as fundamental questions about life, purpose, and death; (2) "metaphysical beliefs," that is, beliefs addressing a reality that transcends the physical and immediately apparent world; (3) a "moral or ethical system" proscribing a particular manner of behavior; (4) an overarching array of beliefs that provide the believer with answers to many of the problems and concerns confronting humans; and (5) "accoutrements of religion," such as the typical external signs (meeting places, rituals, etc.) that characterize a typical religion. 95 F.3d at 1483-84.

Indeed, all of the tenets of the Church are expressed in terms of science, evolution, and principles of secular philosophy. *See, e.g.,* ER 126-32, 154-67. Perkel's own description of the Church's beliefs (Pet. Br. at 26-32) confirms this. While dressed up with religious terms such as "sacred" and "holy," Perkel's own discussion shows that the Church is nothing more than a philosophy made up of a series of secular beliefs: (1) the human race is evolving (and "must evolve for our understanding of the universe to increase") (Pet. Br. 27); (2) we contribute to the sum total of human understanding (the "Tree of Knowledge") and are remembered ("become immortal") on the basis of the ideas we leave behind (Pet. Br. 27-28); (3) the future depends upon "the choices that we as a society make" (Pet. Br. 31); and (4) good judgment is mandated "to ensure our survival" (Pet. Br. 29). The secular nature of the Church of Reality also is evident from the 24 "sacred" principles listed on the Church's website, all of which refer to secular concepts. ER 154-67.[3]

It is therefore not surprising that the Church's website, while insisting that the Church is a "religion," acknowledges that it has "roots" in, and "looks like Atheism, Humanism, and Science." ER 126; *see* ER 121 ("Our values are based on

[3] The 24 principles are: positive evolution; exploration; curiosity; honesty and integrity; freedom; peace; courage; patience and persistence; environmentalism; compassion; communication; justice; inclusiveness; respect; scrutiny and doubt; humility; reason; wisdom; personal responsibility; bulls**t; activism and maintenance; personal privacy; historical preservation; and humor and fun. ER 154.

Humanism rather than a fictional holy book"). Yet those are precisely the concepts that this Court has held not to be religious in nature. *Peloza*, 37 F.3d at 521 ("[N]either the Supreme Court, nor this circuit, has ever held that evolutionism or secular humanism are 'religions' for Establishment Clause purposes.").

In *Alvarado*, for instance, this Court held that the "New Age" movement – notwithstanding its emphasis on spiritual and mystical matters – is not a religion. 94 F.3d at 1229. Citing the "flexible, amorphous [and] spontaneous" nature of the movement, the Court noted: "there is no New Age organization, church-like or otherwise; no membership; no moral or behavioral obligations; no comprehensive creed; no particular text, rituals, or guidelines; no particular object or objects of worship; no requirement or suggestion that anyone give up the religious beliefs he or she already holds. In other words, anyone's in and 'anything goes.'" *Id*. at 1230.

Those words – "anyone's in and anything goes" – fairly describe the Church of Reality. Anyone who thinks about reality is a member (entitled to use marijuana). ER 152. There are no obligations (other than the unenforceable proviso to "use good judgment"), and no meetings or rituals. And, as in *Alvarado*, no one need give up the religious beliefs he or she already holds to become a "realist." ER 151.

It is no answer to dismiss this lack of structure as unimportant because the Church of Reality is a "young religion" (Pet. Br. 35, 37). Structure, rituals,

holidays, and meetings are not important simply for their own sake; rather, they help to demonstrate that the principles and actions in question are rooted in religious belief. While not dispositive, the lack of structure of the Church of Reality, coupled with the clearly secular nature of its beliefs, show that the Church is not a "religion" within the meaning of RFRA.

Moreover, to the extent that the Church's version of "reality" includes the view that marijuana is beneficial (or at least not harmful) and should not be prohibited, *see* ER 78, 105, Pet. Br. 11, that belief is secular and not religious. *See Meyers*, 95 F.3d at 1479, 1484 (finding Meyers's belief that he must "use, possess, grow and distribute marijuana for the good of mankind and the planet earth" to "more accurately espouse a philosophy and/or way of life rather than a 'religion'"); *Kiczenski*, 237 Fed. Appx. at 150 ("The district court properly concluded that Kiczenski's First Amendment challenge to the Controlled Substances Act failed because his belief in hemp's economic, social and philosophical value is not rooted in religious belief"). The fact that Perkel's "edict" concerning the right to distribute medical marijuana was issued in response to this Court's decision in *Raich* (ER 96) merely serves to highlight the political, secular nature of Perkel's belief.

Perkel appears to argue that the Church's beliefs are religious rather than secular not on the basis of the substance of those beliefs, but upon the strength with

which they are held. *See* Pet. Br. 28-29 (asserting the difference between a religion and a philosophy is that a philosophy is "what you think" and a religion is "who you are"); Pet. Br. 38 (asserting that the Church "is not secular in that our religion requires a strong commitment to putting reality first, accepting what is real, and rejecting what is not real"). However, as the Third Circuit has cautioned, "it is crucial to realize that the free exercise clause does not protect all deeply held beliefs, however 'ultimate' their ends or all-consuming their means." *Africa*, 662 F.2d at 215. Vegetarians, for instance, may have a "strong commitment" not to eat meat, and that choice may define "who they are." Yet, as this Court has recognized, it is not a burden on religious exercise to deny a vegetarian diet absent evidence that the "professed vegetarianism is rooted in religious belief." *Johnson*, 948 F.2d at 520 (holding that the Free Exercise Clause does not protect non-religious "vegetarian belief"); *Africa*, 662 F.2d at 1026, 1036 (finding Africa's devotion to a "natural, moving, active, and generating way of life" to be non-religious (quotation marks omitted)).

Under Perkel's argument, virtually anything can be characterized as a religion simply by asserting that the a particular set of beliefs is important to the adherents However, "'if anything can be a religion, then anything the government does can be construed as favoring one religion over another, and . . . the government is

paralyzed . . . .'" *Alvarado*, 94 F.3d at 1230 (quoting Donovan, "God is as God Does: Law, Anthropology and the Definition of 'Religion,'" 6 Seton Hall Const. L. J., 23, 70 (1995)). "While the First Amendment must be held to protect unfamiliar and idiosyncratic as well as commonly recognized religions, it loses its sense and thus its ability to protect when carried to the extreme" in cases such as this one. *Alvarado*, 94 F.3d at 1230; [4] *see also Meyers*, 95 F3d at 1484 ("Were the Court to recognized Meyers' beliefs as religious, it might soon find itself on a slippery slope where anyone who was cured of an ailment by a 'medicine' that had pleasant side-effects could claim that they had founded a constitutionally and statutorily protected religion based on beneficial 'medicine'").

The question is not simply whether beliefs define who a person is or require a strong commitment; those principles must be "rooted in religious belief." *Johnson*, 948 2d at 520. The Church may indeed ask questions about "who we are,

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[4] Perkel also points out (Pet. Br. 32-33) that the Church is a member of an organization that is "responsible for controlling domain names on the internet," has a registered trademark, and has received section 501(c)(3) status from the Internal Revenue Service. Yet none of these factors supports its claim to religious exercise under RFRA or the First Amendment. Indeed, as Perkel freely admits (Pet. Br. 35), the Church developed many of its purported values in response to the IRS form for requesting a tax exemption. While Perkel purports to "give the IRS credit for the religious inspiration," the fact that his "Church" hadn't bothered to think about many of its tenets until receiving the IRS form supports the DEA's conclusion that the Church merely espouses a secular philosophy cloaked in religious garb.

how we got here, and the role of humanity in the universe" (Pet. Br. 19), but those are questions addressed not just by religion, but also by secular philosophy. Darwin attempted to answer those questions, as have many secular philosophers throughout history. The key distinction in this case is that the ideas espoused by the Church all involve secular concepts.

Perkel's reliance (Pet. Br. 39-40) on *Welsh v. United States*, 398 U.S. 333 (1970), and *United States v. Seeger*, 380 U.S. 163 (1965), is misplaced. Those cases involved the interpretation of a statute governing conscientious objection from military service. In *Seeger* the Court interpreted the statutory language "in relation to a Supreme Being" to include a belief "which occupies in the life of its possessor a place parallel to that filled by God in traditional religions. *Seeger*, 380 U.S. at 165. Importantly, however, the Court (consistent with the statutory language), made clear that the definition excludes "essentially political, sociological, or philosophical views." *Id*.

As interpretations of a separate statute with different aims, *Seeger* and *Welsh* have little relevance to the interpretation of RFRA (which in turn incorporated First Amendment principles). *See Kalka v. Hawk*, 215 F.3d 90, 98 (D.C. Cir 2000) ("Whether *Seeger* meant to define 'religion' as used in the First Amendment is doubtful"). Moreover, as discussed above, the views of the Church are "essentially

political, sociological, or philosophical" and thus would not qualify for protection even under *Seeger* and *Welsh*.

B. DEA's Finding That Petitioners' "Religious" Beliefs Are Not Sincere Is Supported By Substantial Evidence.

Perkel's claim fails for a second, independent reason. A claimant under RFRA must establish the existence of a *sincerely held* religious belief. *United States v. Zimmerman*, 514 F.3d 851, 853 (9th Cir. 2007) ; *see O Centro*, 546 U.S. at 428; *Meyers*, 95 F.3d at 1482. Here, DEA's holding that the "religious" beliefs of Perkel and the Church are not sincere is supported by substantial evidence.

This Court has cautioned that "[a] person seeking to advance a secular interest might, if frustrated in his pursuit, decide to mask the cause in religious garb in order to bring it under First Amendment protection. The existence of a longstanding philosophical belief which has only recently, and to the claimant's advantage, taken on theological overtones could certainly give rise to reasonable suspicion of dissimulation." *Callahan*, 658 F.2d at 683-84. That is precisely the case here.

Long before founding the Church of Reality, Perkel believed that marijuana use was beneficial and should not be prohibited. ER 101, 104. He freely admits that he used both marijuana and other drugs long before deciding that doing so amounted to religious exercise, and that Church members use illegal drugs other

than marijuana, including "LSD, Mushrooms, Peyote and Hoasca." ER 67; Pet. Br. 46. Indeed, he states that he was "stoned" when he came up with the idea for the Church. ER 104. Perkel also admits that the use of marijuana by him and other Church members goes well beyond the purported religious uses of enhancing creative thought, extending to "recreational[]" uses, "relaxation," "socially like social drinking," or simply to "help get good rest." ER 78, 79, 104. The fact that Perkel and other Church members use both marijuana and other drugs recreationally "undermines [their] claim that they consume marijuana for religious, as opposed to secular, purposes." *Quaintance*, 471 F. Supp. 2d at 1174.

The ad hoc nature of the Church's new found beliefs also supports DEA's decision. As discussed above (pp. 8-9, 28-29, *supra*), the Church's views mainly consist of a list of secular principles to which they attach religious labels such as "sacred" and "holy." Indeed, many of those precepts were developed only in response to an IRS form for seeking a tax exemption. ER 104. And Perkel's "edict" permitting Church members to distribute marijuana to the sick and dying was issued in direct response to a decision of this Court. ER 96. Moreover, as discussed above (pp. 9-11, 30, *supra*), the Church has no defined membership, no rituals, no designated gathering places, and no set meetings.

Given Perkel's longstanding political and social belief in the benefits of marijuana use and the ad hoc nature of the Church's teachings and practices, DEA correctly concluded that Perkel's "newfound religious beliefs appear to be rationalizations designed to justify your long-held political and medical views about the alleged benefits of marijuana use." ER 30. *See, e.g., Quaintance*, 471 F. Supp. 2d at 1171-72 (finding that the plaintiff's purported religious beliefs regarding marijuana "have an ''ad hoc quality'" that "'neatly justif[ies] [your] desire to smoke marijuana'") (quoting *Meyers*, 95 F.3d at 1484). For that reason alone, the petition should be denied.

C. Prohibiting Marijuana Use Does Not Substantially Burden Petitioners' Exercise of Religion.

DEA also correctly determined that prohibiting marijuana use does not substantially burden the Church's exercise of religion. Under RFRA, "a substantial burden is only imposed when individuals are forced to choose between following the tenets of their religion and receiving a government benefit" or are "coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." *Navajo Nation*, 535 F.3d at 1069-70. A statute burdens the exercise of religion "if it 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Guerrero*, 290 F.3d at 1222 (quoting *Thomas v. Review Bd. Of Ind. Employment Div.*, 450 U.S. 707, 718 (1981)). A substantial burden must be more

than an "inconvenience." *Worldwide Church of God v. Philadelphia Church of God*, 227 F.3d 1110, 1120 (9th Cir. 2000); *see also San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034-35 (9th Cir. 2004) (substantial burden must be "oppressive" to a "significantly great" extent, rendering religious exercise "effectively impracticable").

Perkel cannot show a substantial burden on the exercise of religion here. The CSA's prohibition of marijuana does not compel Perkel or any member of the Church to act contrary to his or her religious beliefs. Neither the Church nor its members use marijuana in conjunction with a church service or ritual. More important, Perkel declares that the use of marijuana is not required, and that members need not use it at all. ER 67, 78-79.

Perkel asserts that a substantial burden exists because "creative thinking" will be harder to come by without marijuana. However, as Perkel acknowledges, without marijuana the Church "*would still exist and still progress*, but it would do so at a far slower pace." Pet. Br. 42 (emphasis supplied). Perkel also acknowledges alternative ways to explore "reality." ER 78 (noting that Church members can choose to use marijuana only "if they are inclined to" because "[d]ifferent people pursue reality in different way[s]"; ER 79 ("Not everyone chooses to use marijuana for creating thinking").

Thus, Perkel cannot reasonably argue that he or any Church member is precluded from developing Church of Reality doctrine simply because the CSA prohibits the use of marijuana. Because there are other ways to foster creative thinking among Church members, the prohibition of marijuana does not substantially burden Perkel's religious exercise. *Cf. Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001) (prohibiting the plaintiffs from selling religious T-shirts on the National Mall did not substantially burden religion in light of the many alternative means by which the plaintiffs could spread the gospel).

Perkel also argues (Pet. Br. 42-44) that without marijuana the Church would have to abandon its "Sacred Principle of Compassion" because Church members could not provide marijuana to the sick and dying. But Church members are not prohibited from exercising compassion or providing medical care to the sick and dying. Perkel has not cited a case – and we are aware of none – suggesting that there mere prohibition of one type of medical care or compassionate act substantially burdens religion. Because no one is "forced to choose between following the tenets of their religion and receiving a government benefit" or are "coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions" *Navajo Nation*, 535 F.3d at 1069-70, the CSA does not substantially burden the religious exercise of Perkel or the Church of Reality.

II. PROHIBITING PETITIONERS' USE AND DISTRIBUTION OF MARIJUANA IS THE LEAST RESTRICTIVE MEANS OF FURTHERING COMPELLING GOVERNMENT INTERESTS.

Because Perkel did not establish a *prima facie* case under RFRA, the government need not show that the prohibition of marijuana furthers a compelling interest. However, even if Perkel could make out a *prima facie* case, his claim fails because prohibiting the Church's use of marijuana is the least restrictive means of furthering compelling government interests. Here, there are two compelling interests that justify the prohibition of marijuana to Perkel and the Church of Reality: (1) the interest in protecting public health and safety; and (2) the interest in preventing diversion of marijuana to recreational use.

1. As DEA explained, numerous scientific and medical studies, as well as previous DEA orders denying petitions to remove marijuana from Schedule I of the CSA, demonstrate that the use of marijuana causes significant harm to public health and safety, including, among other things, significant impairment of cognitive function, potential emergence of psychotic symptoms, the development of psychological and physical dependence, respiratory and cardiovascular damage, and increased risk of motor vehicle accidents and fatalities. ER 37-39. While Perkel disagrees, he makes no attempt to refute the scientific evidence cited by DEA. Rather, both in his submissions to DEA and in his brief, he merely states his belief

that marijuana is beneficial rather than detrimental to health. However, Perkel's unsupported belief plainly is insufficient to undermine DEA's compelling interest.

Perkel notes that several states have enacted statutes regarding the use of marijuana for medical purposes. Even those states, however, do not purport to permit the general use of marijuana to "inspire creative thinking" and for recreational and social purposes as sought by the Church here. In any event, the fact that a state legislature has determined to permit the limited use of a controlled substance is no substitute for scientific evidence, and thus does not undermine DEA's compelling interest in enforcing the CSA to prevent the use of marijuana.

Perkel's reliance (Pet. Br. 47-48) upon a recent public statement of the Attorney General likewise is misplaced. During a "Pen & Pad" interview with the press on March 18th, 2009, the Attorney General discussed the Department of Justice's enforcement priorities in States with laws allowing use of marijuana for medical purposes. The Attorney General explained that the federal government would follow a consistent policy of focusing scarce law enforcement resources on large-scale marijuana traffickers. Contrary to Perkel's assertion, the Attorney General did not "announce" that the federal government would no longer "enforce the marijuana laws." (Pet. Br. 48). The federal government continues to vigorously enforce federal narcotics laws.

2. DEA also demonstrated that marijuana carries with it a substantial risk of diversion to illicit uses. Marijuana is not only the most widely used illegal drug in the Nation; it is also the most widely trafficked. *See* ER 39. Indeed, from 2002 to 2007, the United States seized over a thousand metric tons of marijuana each year, including 1,192,957.5 kilograms in 2007 alone. *Id*. DEA also cited extensive data showing disturbing patterns of actual abuse, and scientific data indicating the risks of dependence from the use of marijuana. ER 40-43.

Perkel does not dispute any of this data, and in fact acknowledges that "[i]f the [Church of Reality] had a legal means of obtaining marijuana there is a strong likelihood that some of it would get diverted to people who are not legally entitled to use it." Pet. Br. 49; *See* ER 104 ("If the Church of Reality is granted this exemption every stoner in the country is going to claim to be a Realist in order to get pot"). Of course, given that the Church *itself* states that its members use marijuana "recreationally," ER 79, diversion is all but assured.

3. The interests in public safety and preventing diversion are undoubtedly compelling. Protecting the public from threats to health and safety is the prototypical compelling government interest. *Yoder*, 406 U.S. at 220. There can be "no doubt" that the use of and trafficking in controlled substances "creates social harms of the first magnitude," *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 42

(2000), and that drug abuse is "one of the most serious problems confronting our society today." *Treasury Employees* v. *Von Raab*, 489 U.S. 656, 674 (1989).

Thus, based on the negative effects of marijuana and its high potential for abuse, federal courts uniformly have recognized that the government has a compelling interest in prohibiting marijuana cultivation, possession, consumption, and distribution under the CSA. *See, e.g., United States v. Israel*, 317 F.3d 768, 771-72 (7th Cir. 2003) (concluding, under RFRA, that Congress has a compelling interest in regulating marijuana because "there is ample medical evidence establishing the fact that the excessive use of marijuana often times leads to the use of stronger drugs such as heroin and crack cocaine" and denying Rastafarian's RFRA claim to use marijuana religiously); *United States v. Greene*, 892 F.2d 453, 456-57 (6th Cir. 1989) (indicating that Congress has determined that "marijuana poses a real threat to individual health and social welfare"); *United States v. Rush*, 738 F.2d 497, 512-13 (1st Cir. 1984) (recognizing the "overriding governmental interest in regulating marijuana."); *United States v. Middleton*, 690 F.2d 820, 825 (11th Cir. 1982) (finding that "Congress had demonstrated beyond doubt that it believes marijuana is an evil in American society and a serious threat to its people" and rejecting claimed right of member of the Ethiopian Zion Coptic Church to possess marijuana as part of his religious practice); *United States v. Brown*, 1995

WL 732803, *2 (8th Cir. 1995) (per curiam) (unpublished) (indicating that "the government has a compelling state interest in controlling the use of marijuana" and denying RFRA claim); *see also Olsen v. DEA*, 878 F.2d 1458 (D.C. Cir. 1989); *Olsen v. State of Iowa*, 808 F.2d 652 (8th Cir. 1986).

4. Perkel's suggestion (Pet. Br. 46) that DEA discussed the government's compelling interests only generally, without applying them specifically to the Church, is incorrect. DEA's decision explains in detail why prohibition of marijuana, as specifically used by the Church and its members, furthers these compelling interests. With respect to health and safety risks, DEA explained that the Church's potentially broad membership and lack of constraints on the amount of marijuana that may be used mean that the public health harms "have the potential to reach very large numbers of people," and make Church members "particularly vulnerable to the harms of chronic and long-term marijuana use." ER 46.

With respect to the risk of diversion, DEA cited a number of factors unique to the Church that compromise the compelling interest in preventing diversion, including: (1) the Church's potentially unlimited membership (including "anyone who visits your website and agrees with its principles" or who "thinks about reality for one minute a day"); (2) the fact that the membership cannot be identified; (3) the fact that the Church "places no restrictions" on the amount of marijuana a member

may use, or the time or location of use; (4) the fact that the Church has no central facility for the storage of marijuana; and (5) Perkel's candid acknowledgement that Church members use marijuana for recreational purposes. ER 78, 79. In light of these facts, DEA correctly determined that it would be "virtually impossible" to ensure that marijuana is not diverted to illicit use. ER 47.

DEA also explained how the Church's proposed distribution of marijuana to the sick and dying would not only cause harm to public health, but also risk diversion. ER 47-48. Again, DEA explained that the Church's complete lack of control and vast membership made it impossible to prevent illicit diversion. ER 48.

Finally, DEA explained why prohibiting marijuana is the least restrictive means of furthering these compelling interests. Not only did the Church propose no less restrictive means, but DEA reasonably concluded that "the unconstrained, decentralized, and potentially widespread marijuana use permitted under Church doctrine simply cannot be accommodated in a manner that would allow DEA to pursue its compelling interest in preventing illegal diversion of marijuana to recreational and other non-religious users." ER 49. As previous courts recognized, an exemption for the widespread, uncontrolled use of a drug in high demand would be unworkable. *See Olsen,* 878 F.2d at 1459, 1462-63; *Rush*, 738 F.2d 497. Therefore, prohibiting the Church's use of marijuana is the least restrictive means

the government could have employed to accomplish its compelling interest in proscribing drug-related use of marijuana. *See Brown*, 1995 WL 732803 at *2 ("[B]ased on Our Church's broad use, the government could not have tailored the restriction to accommodate Our Church and still protected against the kinds of misuses it sought to prevent" and "[t]hus, under the circumstances of this case, we conclude the district court correctly determined that Brown could not prevail under the RFRA or the First Amendment.").

5. Perkel places heavy reliance upon *O Centro*, even suggesting that the Supreme Court's decision in that case means that, as the leader of the Church of Reality, he can unilaterally exempt any controlled substance from the CSA. *See* Pet. Br. 13. However, *O Centro* does not stand for such a broad proposition, and in fact is easily distinguishable from this case.

In *O Centro*, a 130-member religious group with its roots in the Amazon rainforest sought a preliminary injunction to permit the use of a hallucinogenic tea (hoasca) as its sacrament. 546 U.S. at 425. The government conceded for purposes of the preliminary injunction hearing that the CSA substantially burdened the sincere exercise of religion, *id*., at 426, but asserted a compelling interest in the uniform application of the CSA. After both parties submitted evidence concerning the health risks of hoasca and the risk of diversion, the district court granted an

injunction, finding the evidence concerning hoasca's harmful effects and the risk of diversion to be "in equipoise." *Id*. at 426.

The Supreme Court affirmed the preliminary injunction, rejecting the contention that the government "has a compelling interest in the uniform application of the Controlled Substances Act, such that no exception to the ban on the use of the hallucinogen can be made to accommodate the sect's sincere religious practice." *Id*. at 423. The Court held that "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law ... [to the] particular claimant whose sincere exercise of religion is being substantially burdened." *Id*. at 430-31.

Nothing in *O Centro* supports Perkel's argument here. Unlike *O Centro*, DEA did not simply assert a compelling interest in the uniform application of the CSA; it carefully analyzed the compelling interests in the specific context of the Church's exemption request, and concluded that the unlimited and uncontrolled use of marijuana by the Church's members would cause significant harms.

Marijuana has a much larger market. Moreover, the fact that the Church of Reality has no list of members, no membership policy, no limit on the amount of marijuana its members can use, no enforcement mechanism to ensure that use is limited to religious matters, and no central control over the narcotics amplifies the

public health risk and the risk of diversion. Indeed, the fact that Perkel candidly *admits* the Church members engage in recreational use (ER 79) makes diversion not merely a risk, but a certainty.

Given the vast differences between the markets for hoasca and marijuana, it is not surprising that the Tenth Circuit in *O Centro* distinguished the two. The court of appeals panel noted that "hoasca and marijuana differ. Marijuana is associated with problems of abuse and control, leading courts to ascertain a particular government interest in its prohibition even for religious uses." *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 342 F.3d 1170, 1185 (10th Cir. 2003). The *en banc* Court did the same. *See O Centro*, 389 F.3d 973, 1008, 1023 (10th Cir. 2004) ("[T]he fact that hoasca is a relatively uncommon substance used almost exclusively as part of a well-defined religious service makes an exemption for bona fide religious purposes less subject to abuse than if the religion required its constant consumption, or if the drug were a more widely used substance like marijuana or methamphetamine") ; *see also id.* at 1020 (McConnell, J., concurring) (contrasting the pre- and post-RFRA routine rejection of requests for religious exemptions to permit continuous religious use of a drug in widespread illegal use – marijuana – and the successful claim for an exemption for the circumscribed use of a drug not commonly diverted to illegal uses).

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

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BRIEF FORMAT CERTIFICATION

I hereby certify that the Brief for Respondent complies with the Type-Volume requirements of Fed. R. App. P. 32(a)(7)(B) in the following manner:

The Brief was prepared using Corel Wordperfect 12.0. It is proportionately spaced in 14-point type, and contains 10,722 words.

/s/
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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2009, I electronically filed the foregoing Brief for Respondent with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, which will send Notice of Electronic Filing to the following person:

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STATEMENT OF RELATED CASES

Lepp, et al. v. Mukasey, et al., 9th Cir. No. 08-16083, is an appeal from the dismissal of a RFRA claim seeking to enjoin the federal government from enforcing the CSA to prohibit the religious use of marijuana by the plaintiffs. That case is pending in this Court.

Respondent is aware of no other related cases.