No. 08-74457

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Marc Perkel / Church of Reality,
Petitioners,

v.

U.S. Department of Justice, Drug Enforcement Administration
Respondent.

Petition for en banc Review
From the Drug Enforcement Administration

REPLY BRIEF FOR THE PETITIONER

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I. TABLE OF AUTHORITIES

Cases

II. Petition for Rehearing or Rehearing en banc

Pursuant to rules Fed. R. App. P. 40; 9th Cir. R. 40-1 and Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3 petitioner respectfully petitions this court for rehearing en banc or in the alternative panel rehearing.

Because the Respondent is an agency of the United States the time for filing is 45 days. No mandate was issued.

III. Statement of Petitioner

The petitioner, Marc Perkel, First One (founder) of the Church of Reality asks this court to rehear and reconsider the memorandum decision this court issued on January 27, 2010 denying petitioner's review of his request for exemption for the religious use of marijuana under the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RULIPA). Petitioner states that the decision was flawed for the following reasons:

1. The decision relies on a mistaken fact that the petitioner Perkel admits that the church doctrine would have developed without the drug when no such admission exists.
2. The decision is incomplete in that it only addresses about 10% of the issues raised on appeal.

3. This case involves First Amendment issues under RFRA which requires the strict scrutiny standard and that standard was not applied.
4. This decision is in conflict with established case law. In particular, Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972).
5. Both sides admit this is a case of first impression.
6. This case is a case of exceptional importance in that it established a precedent as to how cases of this nature are processed by the courts. In this case the precedent established is that the courts should ignore religious assertions under RFRA and RULIPA. That is in direct conflict with the UDV case requiring the strict scrutiny standard.
7. Because this is a case of first impression and because it requires the strict scrutiny standard, a memorandum opinion, consisting essentially of a single paragraph, is insufficient to dispose of this cause.
8. In the decision this court crosses a bright line established by the First Amendment in that the court has decided that a ritual, location, or ceremony is required to use a drug for religious reasons. It implies that the court determined that smoking marijuana for the purpose of good ideas isn't sufficient, but smoking marijuana while throwing virgins into a volcano

would be. This is a reason for en banc review to determine what requirements the court can put on a religion.

9. The decision ignores the RULIPA laws that redefine the term "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief". This is a reason for en banc review.
10. It is well established that the standard of review for pro se cases are to be read expansively and construed liberally.

IV. Mistaken Admissions and statements taken out of Context

The decision relies on a mistaken point of fact that Perkel admits that the Church of Reality doctrine would have developed without the drug. Although the DEA is trying to put words in the petitioner's mouth, the Perkel makes no such admission Perkel's position is in fact the exact opposite, that the Church of Reality would not even exist if not for marijuana and that 3/4th of the church doctrine is marijuana inspired ideas and that marijuana is essential to the Church of Reality.

This court crosses a bright line when it claims that the founder of a religion admitted something that he has repeatedly and insistently denied that he made. Since this decision relies on this mistake the decision is fatally flawed.

The court also wrongly states the following:

> When asked to describe in what context marijuana is used by the church, Perkel stated that marijuana "has been misclassified and is a relatively harmless substance" used by church members "to inspire creative thinking, for medical purposes, relaxation, and socially [-] like social drinking." Church members are not solicited to use the drug. When the drug is consumed, it is not in any particular location or during any particular ritual or ceremony.

This is a mischaracterization of what Perkel states and it is not in the context of the Request for Exemption. There was an answer to one of the DEAs questions regarding how members of the Church of Reality typically used marijuana that we misinterpreted the meaning of what was being asked. However in later communication with the DEA and in the filings in this brief we clarified our request making it clear that the exemption we were asking for was different than the way many Church of Reality members often use marijuana. We would have liked to ask for full legalization but that would be outside the scope of RFRA.

The Church of Reality's request is narrowly tailored specifically to include only those uses that are allowed under RFRA and contains detailed and specific requests with explanations as to why these requests should be granted. Perkel does admit that some members of the Church of Reality use marijuana outside the scope of this exemption request, but those uses are not before this court as the Church of Reality cannot request an exemption outside the scope of the RFRA.

Perkel has admitted that, like that of society in general, that members of the Church of Reality ignore marijuana laws. Perkel has argued that the last three presidents of the United States admit to having smoked marijuana. Perkel has admitted that there may be some diversion of marijuana for non-religious use. Perkel has also stated his opinion the marijuana is harmless and has been misclassified. But these statements and arguments were in the context of the government's compelling interest test and not in the context that non-religious use should be granted in the context of this Request for Exemption.

In determining our request for exemption we remind this court that there were no trial, no hearings, no testimony, not even a phone call from the DEA to talk about what we wanted. This was the first request for exemption the DEA had ever processed. On their end they had no forms, no procedures, and no experience in these matters since the UDV decision of 2006. Our side grants the DEA latitude because we understand this is new for them. However we ask for some latitude as well since this is new for us as well. That is why we are turning to this court to clarify these issues for both parties by writing a detailed opinion addressing the concerns of both sides.

V. Argument

A. The Decision is Woefully Incomplete

The memorandum fails to address the following issues raised in the appeal:

1. The Church of Reality asked to use marijuana for three separate purposes and the court ruled on only one of the three. It fails to address marijuana use under the Sacred Principle of Compassion and for marijuana use under the concept of self ownership.

2. The DEA raised the issue as to whether or not the Church of Reality is a religion in the first place. The decision implies that it is a religion without addressing the issue. The decision should address the issue as to what is and is not a religion.

3. The decision does not address the issue that the Church of Reality was denied without the DEA conducting and hearings. The Court should issue an opinion that established guidelines to DEA as to how to process RFRA cases.

4. In the case of Navajo Nation v. United States Forest Serv., 535 F.3d 1058, 1070 (9th Cir. 2008) (en banc), cert. denied, 129 S. Ct. 2763 (2009), which the Court cites in it's memorandum, there was a detailed analysis discussing the relative impact on the RFRA rights of

the Navajo vs. the public interest. The case refers to an 11 day trial balancing those rights. Because this is a strict scrutiny case this court should provide more detail has to how it concluded the Church of Reality was not substantially burdened.

5. The court failed to address the conclusion of the DEA as to if the Church of Reality's requirement to use marijuana is a sincerely held belief or if it is just a ploy to get drugs. Is the Church of Reality really a religion or, as the DEA suggests, that the Church of Reality was invented for the purpose of creating a legal way to get high. For the court not to address the issue implies that the position of the DEA stands.

6. The Court should explain how the use of marijuana, which is a felony, would not be a substantial burden to the Church of Reality but rather diminished spiritual fulfillment.

7. The DEA raised the issue of compelling government interest which was not addressed and should be addresses. DEA argues that marijuana is a street drug and should be distinguished from DMT. The Church of Reality has countered with the fact that we are not requesting to distribute marijuana and that we are asking for immunity from prosecution for possession of personal use quantities of

marijuana and the right to obtain marijuana through existing legal channels such as marijuana dispensaries. I believe that it would be useful for both parties this court to address these issues in its opinion.

8. The Church of Reality's due process rights were not addresses. Is the Church of Reality entitled to some kind of hearing at some level in order to determine if their Request for Exemption should be granted?

9. In a case where strict scrutiny is by law the standard a decision is not complete without the court addressing the strict scrutiny issue.

B. Case of First Impression

This is the first case asking for review of a DEA decision under RFRA to come to any court of appeals since Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423 (2006) (the UDV case). This court should write a detailed opinion so as to give the DEA some guidance as to how to process RFRA requests. The multitude of issues raised by this appeal is an opportunity to set precedent to clarify the procedures for both DEA and future religions that might make similar requests.

C. Compelling Interest / Strict Scrutiny

The RFRA establishes in law the strict scrutiny standard stating:

> (b) Purposes: 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.

In the UDV case the court stated (emphasis mine):

> (O'Connor, J., concurring in judgment) (**strict scrutiny "at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim"**). Outside the Free Exercise area as well, the Court has noted that "[c]ontext matters" in applying the compelling interest test, Grutter v. Bollinger, 539 U. S. 306, 327 (2003), and has emphasized that "strict scrutiny does take "relevant differences" into account -- indeed, that is its fundamental purpose," Adarand Constructors, Inc. v. Peña, 515 U. S. 200, 228 (1995).

Since the strict scrutiny standard is required under law and because it has not been applied here, this decision is fatally flawed. In a case where strict scrutiny is required, the decision should at least mention strict scrutiny.

D. The Decision not to Decide

When the court issues no opinion they are issuing an implied opinion. They have made a decision that they will refuse to decide. Decisions are not granted by the court, they are denied by the court. A decision to deny a decision is a proclamation that the issues raised by the Church of Reality are unworthy of the court's attention. It is a decision to deny the Church of Reality due process of law.

E. Pro Se Standard of Review

Pro se litigants' court submissions are to be construed liberally and held to less stringent standards than submissions of lawyers. If the court can reasonably read the submissions, it should do so despite failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or litigant's unfamiliarity with rule requirements. Boag v. MacDougall, 454 U.S. 364, 102 S.Ct. 700, 70 L.Ed.2d 551 (1982); Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)(quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)); Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972); McDowell v. Delaware State Police, 88 F.3d 188, 189 (3rd Cir. 1996); United States v. Day, 969 F.2d 39, 42 (3rd Cir. 1992) (holding pro se petition cannot be held to same standard as pleadings drafted by attorneys); Then v. I.N.S., 58 F.Supp.2d 422, 429 (D.N.J. 1999).

The courts provide pro se parties wide latitude when construing their pleadings and papers. When interpreting pro se papers, the Court should use common sense to determine what relief the party desires. S.E.C. v. Elliott, 953 F.2d 1560, 1582 (11th Cir. 1992). See also, United States v. Miller, 197 F.3d 644, 648 (3rd Cir. 1999) (Court has special obligation to construe pro se litigants'

pleadings liberally); Poling v. K.Hovnanian Enterprises, 99 F.Supp.2d 502, 506-07 (D.N.J. 2000).

Petitioner has the right to submit pro se briefs on appeal, even though they may be in artfully drawn but the court can reasonably read and understand them. See, Vega v. Johnson, 149 F.3d 354 (5th Cir. 1998). Courts will go to particular pains to protect pro se litigants against consequences of technical errors if injustice would otherwise result. U.S. v. Sanchez, 88 F.3d 1243 (D.C.Cir. 1996).

Moreover, "the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." Bonner v. Circuit Court of St. Louis, 526 F.2d 1331, 1334 (8th Cir. 1975) (quoting Bramlet v. Wilson, 495 F.2d 714, 716 (8th Cir. 1974)). Thus, if this court were to entertain any motion to dismiss this court would have to apply the standards of White v. Bloom. Furthermore, if there is any possible theory that would entitle the Plaintiff to relief, even one that the Plaintiff hasn't thought of, the court cannot dismiss this case.

Respectfully submitted,

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VI. CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure I certify that this brief is proportionately space with one inch margins on all four corners with a total of 2805 words. The limit is 4200 words.

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