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**MARIJUANA AS A "HOLY SACRAMENT": IS THE
USE OF PEYOTE CONSTITUTIONALLY
DISTINGUISHABLE FROM THAT OF
MARIJUANA IN BONA FIDE
RELIGIOUS CEREMONIES?**

CYNTHIA S. MAZUR*

"And God said, Behold, I have given you every herb
bearing seed."

Genesis 1:29 (King James).

In April 1990, within one week, the Supreme Court: 1) denied certiorari to Carl Eric Olsen, an Ethiopian Zion Coptic priest appealing the denial of a DEA exemption for the sacramental use of marijuana;¹ and 2) held that the State of Oregon could deny unemployment compensation to two Native Americans who had been fired for the sacramental use of peyote.² Similarities between the two cases end there. The Supreme Court's latter holding does not change the fact that Congress and the Drug Enforcement Administration ("DEA"), have decided to accommodate the religious practices of the Native American Church ("NAC"), and accord it a preferential position by establishing, pursuant to regulation, its right to religious drug use over against all other churches.³ Part I of this article will set forth the favorable treatment which the federal government extends to the NAC regarding its unlimited exemption to use peyote in religious ceremonies.⁴ Part II of this article will examine the basic tenets of the Ethiopian Zion Coptic Church ("EZCC"), related to the sacramental use of marijuana.⁵ Part III of this article will detail the responses of the DEA and the courts to the EZCC's requests for an exemp-

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1. Olsen v. Drug Enforcement Admin., 110 S. Ct. 1926 (1990).

2. Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595 (1990). The Court determined that the U.S. Constitution does not mandate a free exercise right to the sacramental use of peyote. *Id.*

3. See *infra* notes 36-39 and accompanying text.

4. See *infra* notes 8-39 and accompanying text.

5. See *infra* notes 40-60 and accompanying text.

tion similar to that held by the NAC.⁶ Finally, Part IV of this article will analyze the constitutionality of the differing treatment of the two religions.⁷

I. THE NATIVE AMERICAN CHURCH ENJOYS A DEA EXEMPTION FROM THE FEDERAL DRUG LAWS PROHIBITING INGESTION OF PEYOTE

A. *The Native American Church*

When one tries to solidify a definition of the NAC, it must be remembered that America has 307 Native American tribes living within its borders.⁸ There is no majority control of the NAC and as a result, the only statement "that is safe to make is that there is, in many places and in many ways, a concept of a Native American Church."⁹ How the NAC conducts its rituals and celebrates its sacrament is subject to myriad differences.¹⁰

While the NAC has no recorded theology, members combine certain Christian teachings with the belief that peyote embodies the Holy Spirit.¹¹ It is believed that those who partake of peyote enter into direct contact with God and experience a heightened sense of comprehension which includes a deep feeling of compassion for others.¹²

Worship in the NAC centers around the "peyote meeting" which begins at sundown and continues at least until day break.¹³ Normally, the ceremony is conducted to give thanks or to receive guidance.¹⁴ Participants sit in a circle around a fire,¹⁵ consume peyote during the ceremony, and may pray, sing, or use a drum.¹⁶ Other accouterments can include a fan, eagle bone or feather, whistle, rattle, and/or a prayer ciga-

6. See *infra* notes 61-140 and accompanying text.

7. See *infra* notes 141-201 and accompanying text.

8. This number includes in its definition federally recognized bands, villages, groups, and pueblos but does not include tribes located in Alaska. THE WORLD ALMANAC & BOOK OF FACTS 1991 394 (1990).

9. A. MARRIOTT & C. RACHLIN, PEYOTE 105, 107-08 (1971) [hereinafter MARRIOTT]. For two prior definitive studies in this area, see W. LA BARRE, THE PEYOTE CULT (4th ed. 1975) and J.S. SLOTKIN, THE PEYOTE RELIGION: A STUDY IN INDIAN-WHITE RELATIONS (1956). MARRIOTT, *supra*, at ix.

10. See MARRIOTT, *supra* note 9, at 105-08.

11. *People v. Woody*, 61 Cal.2d 716, 720, 394 P.2d 813, 817, 40 Cal. Rptr. 69, 73 (1964).

12. See *id.*

13. *Id.* at 720-21, 394 P.2d at 817, 40 Cal. Rptr. at 73.

14. *Id.* at 721, 394 P.2d at 817, 40 Cal. Rptr. at 73.

15. MARRIOTT, *supra* note 9, at 121.

16. *Woody*, 61 Cal.2d at 721, 394 P.2d at 817, 40 Cal. Rptr. at 73.

rette.¹⁷ While the membership of the NAC is estimated to consist of between 250,000 and 400,000 people,¹⁸ there are no official prerequisites to membership and no written membership rolls.¹⁹ In fact, there are wide differences of opinion within the NAC regarding what constitutes a member.²⁰

B. *Peyote*

Peyote, an hallucinogenic cactus,²¹ has effects similar to lysergic acid diethylamide ("LSD").²² "The major active ingredient in peyote is mescaline."²³ The precursor of the DEA, the Bureau of Narcotics and Dangerous Drugs ("BNDD"),²⁴ has reported that mescaline may produce an altered consciousness marked by: 1) confused mental states and dreamlike revivals of past traumatic events; 2) alteration of sensory perception evidenced by visual illusions and distortion of space and perspective; 3) alteration of mood with anxiety, euphoria, or ecstasy; 4) alteration of ideation with impairment of concentration and intelligence; and 5) alteration of personality with impairment of conscious functioning and the deterioration of inhibitions.²⁵

17. *Id.*

18. *Peyote Way Church of God v. Smith*, 742 F.2d 193, 198 (5th Cir. 1984).

19. *Woody*, 61 Cal.2d at 720, 394 P.2d at 817, 40 Cal. Rptr. at 73.

20. *Id.*

21. *Peyote*, which is native to the region of the Rio Grande Valley and southward, is a plant classified botanically as *Lophophora Williamsii* Lemaire. It is a small, spineless, low growing cactus and is carrot or turnip-like in shape and size. Only the fleshy, rounded top grows above ground. After the pincushion top is sliced off and dried, it becomes a hard and brittle disk-like button, which is used ceremoniously to produce "profound sensory and psychic phenomena." 35 Fed. Reg. 14789-90 (1970).

22. *Id.* LSD is a "psychedelic" which refers to a class of drugs including mescaline and marijuana, among others, whose primary effect is to expand consciousness, heighten intellectual activity, and increase sensory awareness. *Leary v. United States*, 383 F.2d 851, 858, 860 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969). Researchers have found that religious reactions in those partaking of psychedelic drugs are present in varying degrees from about 25% to 90% of all users. *United States v. Kuch*, 288 F. Supp. 439, 444 (D.D.C. 1968). A "religious reaction" is defined as a sharpening of the senses and a mixed feeling of awe and fear. There may be a sense of mystery, peace, and a sharpening of impressions as to all natural objects, perhaps something like the vision Moses had of the burning bush. *Id.*

23. *Peyote Way Church of God v. Smith*, 742 F.2d 193, 197 (5th Cir. 1984).

24. For a discussion of the dissolution of the BNDD and the creation of the DEA, see notes to 21 U.S.C. § 881 (1988).

25. See 35 Fed. Reg. 14,791 (1970) (in addition, ingestion of peyote may result in fetal abnormalities, incurable psychosis, and personality disintegration); *Peyote Way*, 742 F.2d at 197.

Indeed, ingestion of peyote may result in such severe reactions as psychosis and suicide.²⁶ The federal drug laws which prohibit peyote use, however, do not apply to participants who ingest peyote as part of the NAC religious ritual.²⁷

C. *The Controlled Substances Act*

The Controlled Substances Act of 1970 ("CSA"), provides a comprehensive system of federal drug control laws in the United States.²⁸ The CSA establishes five schedules of controlled substances, with Schedule I containing those substances subject to the most restrictive control.²⁹ Schedule I substances are defined as those which meet the following three criteria:

- 1) "a high potential for abuse";
- 2) "no currently accepted medical use in treatment in the United States"; and
- 3) "a lack of accepted safety for use . . . under medical supervision."³⁰

Peyote is classified as a Schedule I controlled substance³¹ of the CSA which prohibits its distribution, its possession with intent to distribute, and its possession without a prescription.³² Section 1307.03 of the Code of Federal Regulations allows a petitioner to apply for an exception to "any provision" of the

26. 35 Fed. Reg. 14,791 (1970). On the other hand, some report that through the use of peyote: 1) euphoria and good feelings are heightened; 2) colors and music are more vivid and more pleasing; 3) prayers take on an intense philosophical and ethical quality; and 4) a state of inner peace takes place where the individual may experience visions or sensations of the supernatural. Marriott, *supra* note 9, at 70. Peyote is not thought to be addictive. Amicus Memorandum Before DEA, July 1988, App. 16, at 415 n.27.

27. 21 U.S.C. § 812 (1988); 21 C.F.R. § 1307.31 (1990).

28. See 21 U.S.C. §§ 801-971 (1988).

29. 21 U.S.C. § 812 (1988).

30. 21 U.S.C. § 812(b)(1) (1988).

31. Other Schedule I substances include marijuana, LSD, and heroin. 21 U.S.C. § 812(c) (1988).

32. 21 U.S.C. §§ 812(c), sched. I(c)(12), 841, 844 (1988). The manufacture and distribution of peyote were first prohibited by federal law in the Drug Abuse Control Amendments of 1965, which were superseded by the CSA. 21 U.S.C. § 812(c), sched. I(c)(12), as cited in *Native Am. Church of N.Y. v. United States*, 468 F. Supp. 1247, 1249 (S.D.N.Y. 1979).

"Peyote was classified as a 'narcotic' in the Narcotic Farm Act of 1929, 45 Stat. 1085, to enable peyote 'addicts' to seek treatment at federal facilities. The Food, Drug and Cosmetic Act of 1938 also classified peyote as a narcotic or hypnotic substance, 52 Stat. 1050, and imposed certain labeling requirements. Neither statute prohibited the manufacture or distribution of peyote." Amicus Memorandum before DEA, July 1988, App. 16, at 404 n.3 (Memorandum Opinion for the Chief Counsel, DEA, Dec. 22, 1981).

drug prohibitions.³³ Indeed, evidence may be presented to the Attorney General by any interested party in order to determine whether a particular drug should be reclassified, added, or removed from the schedules.³⁴ The CSA also authorizes the Attorney General to establish registration procedures to permit persons to manufacture, distribute, or dispense controlled substances and confers broad authority to grant and waive registration requirements.³⁵

D. *The Native American Church Exemption*

The language of the CSA contains no exemptions from its prohibitions; nonetheless, in 1965, Congress passed the Drug Abuse Control Amendments with the understanding that bona fide religious use of peyote was exempt from regulation.³⁶ The

33. 21 C.F.R. § 1307.03 (1990). The regulations implementing the CSA's provisions concerning the scheduling of controlled substances, registration of manufacturers, labelling of substances, issuance of prescriptions, record-keeping and reporting requirements, and similar matters are codified at 21 C.F.R. §§ 1300-1316 (1990).

34. See 21 U.S.C. § 811(a) (1988); see also *National Org. for the Reform of Marijuana Laws v. DEA*, 559 F.2d 735, 737-38 (D.C. Cir. 1977) ("Recognizing that the results of continuing research might cast doubts on the wisdom of initial classification assignments, Congress created a procedure by which changes in scheduling could be effected."). Citing marijuana as an example, Congress noted the need for flexibility when it enacted the CSA:

The extent to which marihuana should be controlled is a subject upon which opinions diverge widely. There are some who not only advocate its legalization but would encourage its use; at the other extreme there are some States which have established the death penalty for distribution of marihuana to minors.

H.R. REP. NO. 91-1444, 91st Cong., 2d Sess. 12, reprinted in 1970 U.S. Code Cong. & Admin. News 4566, 4577.

35. 21 U.S.C. §§ 821-23 (1988). Section 823(b), which is entitled "Registration requirements," sets forth the bases for granting registration to distribute a controlled substance under Schedule I. Public health and safety comprise one relevant factor.

36. After the Drug Abuse Control Amendments, 79 Stat. 226 § 3(a) (1965) ("H.R. 2"), passed the Senate and were being debated in the House, Congressman Harris stated the following:

Mr. Harris: The last amendment of substance made by the Senate deletes the provisions of the House bill which provided that the term "depressant or stimulant drug" does not include peyote used in connection with ceremonies of a bona fide religious organization.

Some concern has been expressed by many of the religious groups affected, and by certain civil liberties organizations concerning the possible impact of this amendment on religious practices protected by the first amendment to the Constitution.

Two court decisions have been rendered in this area in recent

Attorney General in 1966, adopted a regulation effectuating Congress' intent.³⁷ In 1970, when Congress passed the CSA, the BNDD assured Congress that a peyote use exemption

years. One, a decision by Judge Yale McFate in the case of *Arizona v. Attakai*, No. 4098, in the superior court of Maricopa County, Phoenix, Arizona, July 26, 1960; and a California decision, *People against Woody*, decided August 24, 1964, in the Supreme Court of California. Both these cases held that prosecutions for the use of peyote in connection with religious ceremonies was a violation of the first amendment to the Constitution.

In view of all this, I requested the views of the Food and Drug Administration and have been assured that the bill, even with [sic: without] the peyote exemption appearing in the House-passed bill, cannot forbid bona fide religious use of peyote.

Mr. Speaker, I ask for unanimous consent to include the letter from the Food and Drug Administration at this point in my remarks.

Dear Mr. Chairman: In response to your request we are stating the position the Food and Drug Administration expects to take if H.R. 2 becomes law as it passed the Senate with respect to the use of peyote in religious ceremonies.

We have been advised by a representative of the North [sic: Native] American Church that this church is a bona fide religious organization and that peyote has bona fide use in the sacrament of the church. The representative has agreed to document both of these statements.

If the church is a bona fide religious organization that makes sacramental use of peyote, then it would be our view that H.R. 2, even without the peyote exemption which appeared in the House-passed version, could not forbid bona fide religious use of peyote. We believe that the constitutional guarantee of religious freedom fully safeguards the rights of the organization and its communicants.

Sincerely yours,
George P. Larrick,
Commissioner of Food and Drugs

Mr. Speaker, in view of the foregoing, I recommend that the House agree to the Senate amendments to H.R. 2.

111 CONG. REC. 15,977-78 (1965). Shortly after these remarks were concluded, the House concurred in the Senate amendments. Amicus Memorandum before DEA, July 1988, App. 16 at 405-07 (Memorandum Opinion for the Chief Counsel, DEA, December 22, 1981) (footnote omitted). Responsibility for enforcing the 1965 Amendments was transferred from HEW, of which FDA is a part, to the BNDD, pursuant to Reorganization Plan No. 1 of 1968. Government Brief, Jan. 4, 1989, at 4 n.4.

37. 31 Fed. Reg. 565, 4679 (1966). Congress' delegation of this authority to the Attorney General is a lawful delegation of legislative power. Government Brief, Jan. 4, 1989, at 11 n.9 (citing *United States v. Gordon*, 580 F.2d 827, 837-40 (5th Cir. 1978), and *United States v. Pastor*, 557 F.2d 930, 939-41 (2d Cir. 1981)). The Attorney General has delegated responsibility under the CSA to the DEA Administrator pursuant to 28 C.F.R. § 0.100 (1990).

would be carried forward by regulation.³⁸ After the passage of the CSA, the BNDD promulgated the current regulation which provides:

SPECIAL EXEMPT PERSONS

§ 1307.31 Native American Church.

The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration. Any person who manufactures peyote for or distributes peyote to the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of law.³⁹

38. The CSA hearings contain the following:

Mr. [Congressman] Satterfield. I have one other question. I recall when we were discussing dangerous drugs a few years ago, the question came up about the Native American Church involving Indians in the west who use and have for centuries used peyote in connection with religious services. It is my understanding that they enjoy an exemption under the current law.

My question is whether in any of the bills we have before us, if passed, would in any way affect this present exemption?

Mr. Sonnenreich. [Deputy Chief Counsel of BNDD]. In the first instance, Mr. Satterfield, the Native American Church did ask us by letter as to whether or not the regulation, exempting them by regulation, would be continued and we assured them that it would because of the history of the church. We presently are involved in another hearing regarding another church that is a non-Indian church that is seeking the exemption and the order is going to be published, I believe, either today or tomorrow denying them the same exemption as the Native American Church.

We consider the Native American Church to be sui generis. The history and tradition of the church is such that there is no question but that they regard peyote as a deity as it were, and we'll continue the exemption.

Mr. Satterfield. You do not see anything in the Senate bill that would make this impossible?

Mr. Sonnenreich. No. Under the existing law originally the Congress was going to write in a specific exemption but it was then decided that it would be handled by regulation and we intend to do it the same way under this law.

Mr. Satterfield. Thank you. I have no other questions.

Drug Abuse Control Amendments of 1970 Hearings before the Subcommittee on Public Health & Welfare of the House of Representatives, 91st Cong., 2d Sess. 117-18 (1970).

39. 21 C.F.R. § 1307.31 (1990). For further discussion of the legislative history of the peyote exemption, see *Toledo v. Nobel-Sysco, Inc.*,

II. THE ETHIOPIAN ZION COPTIC CHURCH IS A BONA FIDE RELIGION AND MARIJUANA IS CENTRAL TO ITS WORSHIP

The EZCC, which traces its origins back 6,000 years, is headquartered in Jamaica.⁴⁰ By the end of the Sixties, the Church had received a number of visitors from the U.S. and began allowing caucasians to join the Church.⁴¹ As a result, priests and members of the Church began to travel back and forth between the U.S. and Jamaica, and a number of U.S. citizens became members and priests in the Church.⁴² The Church was incorporated in 1976 and purchased a 1,000 acre farm in White Horse, St. Thomas Parish, Jamaica.⁴³ In addition, the Church purchased a residence for its members at Star Island in Miami, Florida.⁴⁴

Church members consider themselves the historical and spiritual descendants of the Israelites of the Old Testament.⁴⁵ Because of the constraints of slavery, however, the Church's written history did not evolve and does not compare with the organizational identity enjoyed by some caucasian religions.⁴⁶ Nonetheless, the Church is understood to be a Christian religion with Jesus as its primary prophet.⁴⁷ The Church reveres

651 F. Supp. 483, 490 (D.N.M. 1986), and *Native Am. Church of New York v. United States*, 468 F. Supp. 1247, 1249-51 (S.D.N.Y. 1979).

In addition to the federal regulation, several states exempt the non-drug use of peyote from criminal prohibition. See *Whitehorn v. State*, 561 P.2d 539 (Okla. 1977); *State v. Whittingham*, 19 Ariz. App. 27, 504 P.2d 950 (1973), *cert. denied*, 417 U.S. 946 (1974); *People v. Woody*, 61 Cal.2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); COLO. REV. STAT. ANN. § 12-22-317 (West 1990); IOWA CODE ANN. § 204.204(8) (West 1987); KAN. STAT. ANN. § 65-4116(8) (Supp. 1989); MINN. STAT. § 152.02 (West 1989); NEV. REV. STAT. ANN. § 453.541 (Michie 1986); N.M. STAT. ANN. § 30-31-6(D) (Michie 1989); S.D. CODIFIED LAWS § 34-20B-14(17) (Michie Supp. 1990); TEX. REV. CIV. STAT. ANN. art. 4476-15 (Vernon Supp. 1991); WIS. STAT. ANN. § 161.115 (West 1989); WYO. STAT. ANN. § 35-7-1044 (1988).

40. Amicus Memorandum Before DEA, July 1988, at 6-7.

41. *Id.* at 11.

42. *Id.*

43. *Id.* at 10.

44. *Id.*

45. *Id.* at 7. The EZCC distinguishes itself from the Rastafarian sect because the EZCC does not revere the late Emperor of Ethiopia, Haile Selassie, as a deity. *Id.* at 10.

46. *Id.* at 8.

47. *Id.* at 7-8. Marcus Garvey is considered one of the Church's great prophets. *Id.* His work in the 1920s and 30s advocating spirituality and black empowerment related to the general movement called "Ethiopianism." *Id.* at 8-9. "Ethiopianism . . . is premised on a belief that all blacks share a common ancestry and are destined to return to a common homeland or Zion,

the Bible as its holy book, and members adhere to traditions set forth in the Old Testament regarding diet, dress, grooming, sexual conduct, and so forth.⁴⁸

"The Church historically has been extremely restrictive in its membership practices, limiting membership to those men and women who demonstrate an acceptance and adherence to the Church's tenets over a significant period of time."⁴⁹ If members fail to follow the Church's rules of conduct, they are subject to harsh sanctions and sometimes expulsion.⁵⁰

The EZCC traces its use of marijuana⁵¹ to the Bible, citing passages regarding herbs, smoke, and clouds,⁵² and stating that

"marijuana is the [e]ucharistic spiritual body and blood of Christ," and "[o]nly through the sacramental use of marijuana—combined with prayer and spiritual reasoning among the brethren—can members of the Church

symbolically identified as Ethiopia." *Id.* at 9. The goal of the Church in this regard is the "liberation of the black race and the spiritual renewal of black and white believers." *Id.* at 7.

48. *Id.* at 7.

49. *Id.* at 11. Membership involves a ritual called confession. *Id.* First, the confessor renounces the sins of the flesh and the material world. *Id.* at 12. Next, when the elders think that the individual has fully learned the tenets of the Church, the individual makes a public confession before the members. After this, the members demonstrate their acceptance of the new member through the celebration of communion with marijuana. *Id.* at 11-13.

50. *Id.*

51. The EZCC's longstanding religious tradition of marijuana ingestion may have a history that dates back further than the Native American use of peyote. Some authors postulate that many Indian religions did not incorporate the peyote ritual into their religious practices until the 1920s and 30s. See Marriott, *supra* note 9, at 78-79; see also Amicus Memorandum Before DEA, July 1988, at 34 (citing *La Barre*, *supra* note 9, at 110-23).

52. *Id.* at 14. The EZCC has compiled works of scholarship and ancient references which substantiate and detail the religious use of marijuana from time immemorial. See Amicus Memorandum Before DEA, July 1988, App. 6. For instance, THE BOOK OF GRASS 11-12 (G. Andrews & S. Vinkenoog ed. 1967), is cited for a passage on ancient Scythia and Iran by Mircea Eliade:

Only one document appears to indicate the existence of a Getic shamanism: It is Strabo's account of the Mysian KAPNOBATAI, a name that has been translated, by analogy with Aristophanes' AEROBATES, as 'those who walk in clouds', but which should be translated as 'those who walk in smoke'. Presumably the smoke is hemp smoke, a rudimentary means of ecstasy known to both the Thracians and the Scythians. . . ."

Amicus Memorandum Before DEA, July 1988, App. 6 at 6-7. The EZCC believes that the marriage of Cana involved cannabis not wine; "[c]ana is a linguistic derivation of the present day cannabis." *Id.* App. 6, at 21.

come to know God within themselves and within others."⁵³

The non-drug use of marijuana is allowed at any point during the day, but is most commonly ingested during the three daily prayer sessions.⁵⁴ Members do not try to maximize the amount of smoke taken in or hold smoke in their lungs for long periods of time.⁵⁵ Church members state that their ingestion of marijuana during worship does not result in any side-effects⁵⁶ or intoxication, nor is that a desirable goal.

The Church not only does not encourage but in fact absolutely forbids the recreational use of marijuana for the purpose of achieving intoxication. The Church believes that such intentional misuse of marijuana, by members or nonmembers, constitutes sacrilegious behavior. Church members are strictly prohibited from using any intoxication or addictive substance — legal or illegal — for recreational purposes.⁵⁷

There has never been more than between 100 and 200 EZCC members in the U.S., and, presently, it is estimated that 60 members live in this country.⁵⁸ Membership has been greatly diminished and dispersed due to numerous arrests and

53. *Id.* at 14-15.

54. *Id.* at 15.

55. *Id.*

56. *Id.* These claims have been substantiated by several medical and psychiatric research studies done to determine the effects of marijuana on church members. See Research Report by Brian L. Weiss, M.D., P.A. of Florida (1980) (EZCC members, some of whom have smoked marijuana in high doses for sixteen hours a day for up to fifty years, suffer no apparent psychological or physical harm; tolerance appears to have developed with no acute or chronic side effects); Research Report by Kenneth C. Fischer, M.D. of Florida (1980) (after doing a "complete intensive neurological examination on 31 members" of the EZCC, the "most impressive thing . . . is the true paucity of neurological abnormalities I was able to discern"); *Cognition and Long-Term Use of Ganja*, 213 SCIENCE 465-66 (1981) (prolonged and heavy use of ganja have not resulted in any systematic decrements in mental abilities suggestive of impairment of brain or cerebral function; cognition I.Q. scores were high, and individuals appear to be healthy and highly functional); Neuropsychological Evaluation by Jeffrey Schaeffer, Ph.D. of California (1981) (despite measurable amounts of cannabinoid metabolites in his body and a history of very long-term use of cannabis, Carl Eric Olsen demonstrated no impairment of his cognitive, cerebral, intellectual, or new learning abilities, nor was there any suggestion of damage to the central nervous system or long and short-term memory ability; moreover, his ability to adapt to change remains at a very high level). Amicus Memorandum Before DEA, July 1988, App. 7, 8, 9.

57. *Id.* at 15.

58. *Id.* at 18. Roughly, 30 members live in Florida, and the remaining

prosecutions.⁵⁹ Some have left the Church, others have left the country, and others, like Olsen, have been paroled from prison on the condition that they will not associate with other members.⁶⁰

III. THE ETHIOPIAN ZION COPTIC CHURCH REPEATEDLY PETITIONS BUT IS DENIED A SACRAMENTAL DRUG EXEMPTION SIMILAR TO THAT ACCORDED TO THE NATIVE AMERICAN CHURCH

A. *Olsen Proceeds Pro Se*

From 1983 to 1985, Carl Eric Olsen, a member and priest of the EZCC, had repeated unilateral communications with the DEA attempting to procure for his Church a drug law exemption for the sacramental ingestion of marijuana.⁶¹ It was not until the District of Columbia federal district court issued a show cause order to the DEA in response to Olsen's writ of mandamus filed in 1986, that the DEA finally responded.⁶² John C. Lawn, the DEA Administrator, answered Olsen's requests in the form of a three paragraph letter which stated in part:

In 1984, an estimated 7,800 to 9,200 metric tons of marijuana were illegally consumed in the United States. It has been estimated that over 20 million people in the United States use marijuana on a regular basis. Marijuana abuse is a major public health problem in this

members live throughout Iowa, Tennessee, Massachusetts, and several East Coast cities. *Id.*

59. *Id.* at 17.

60. *Id.* at 17-18.

61. Olsen's Brief, Aug. 18, 1986, App. at 13-20, 28-29, 31-35. Olsen proposed the following statutory language:

SPECIAL EXEMPT CHURCH. Ethiopian Zion Coptic Church. The listing of marijuana as a controlled substance in Schedule I does not apply to the non-drug use of marijuana in bona fide religious ceremonies of the Ethiopian Zion Coptic Church and members of the Ethiopian Zion Coptic Church so using marijuana are exempt from registration. Any person who manufactures marijuana for or distributes marijuana to the Ethiopian Zion Coptic Church, however, is required to obtain registration annually and to comply with all other requirements of law.

Id. App., at 13, 16, 18.

62. *Id.* App. at 2-4. Olsen also had filed a mandamus petition in the Eleventh Circuit. *Olsen v. DEA*, 776 F.2d 267 (11th Cir. 1985) (affirming district court's denial of Olsen's request for a mandamus to compel DEA to respond to petitions for marijuana exemption because the statute authorizing exemptions does not provide for a religious exemption).

country. Accordingly, the investigation and prosecution of marijuana traffickers, the interdiction of marijuana smuggling and the eradication of the drug at its source continue to be major concerns of drug law enforcement both domestically and internationally.

In view of the immensity of the marijuana abuse problem in the United States and the magnitude of the criminal activity surrounding the production and trafficking in this substance, the Administrator of the Drug Enforcement Administration concludes that the interest of the Ethiopian Zion Coptic Church in the ceremonial use of marijuana is outweighed by the compelling governmental interest in controlling the use and illegal distribution of marijuana in the United States.⁶³

The district court dismissed Olsen's mandamus petition as moot; appealing the dismissal, Olsen stated, "The DEA gave no reasons at all for denying the exemption, the DEA only gave reasons for denying marijuana use to the general public."⁶⁴ Olsen also appealed the DEA's denial, admitting that the DEA had a compelling interest in the overall enforcement of the CSA, but arguing that the exemption granted to the NAC had not undermined that interest nor would a limited exemption for the EZCC.⁶⁵ Olsen pointed out that the DEA previously denied a peyote exemption to the Church of the Awakening ("CotA"), after finding that the CotA was not similar to the NAC because "peyote is essential and central to the [NAC] religion in that without peyote their religion would not and could not exist."⁶⁶ The DEA made no such findings regarding the EZCC denial.⁶⁷ In its response, the government set forth the three-part test from *United States v. Lee*,⁶⁸ for establishing a free exercise claim⁶⁹ and cited various free exercise cases.⁷⁰ Admit-

63. Olsen's Brief, Aug. 18, 1986, App. at 11-12.

64. *Id.* at 5.

65. Olsen's Brief, Sept. 3, 1986, at 2-4, 11. The cases were consolidated on appeal.

66. 35 Fed. Reg. 14790 (1970). The CotA appealed this decision to the Ninth Circuit. *Kennedy v. BNDD*, 459 F.2d 415 (9th Cir. 1972) (ruling that statute granting the peyote exemption only to NAC was unconstitutional but nonetheless holding that extending the exemption to the CotA would not cure the defect, thus, the exemption for the CotA was denied), *cert. denied*, 409 U.S. 1115 (1973).

67. Olsen's Brief, Sept. 3, 1986, at 8.

68. 455 U.S. 252 (1982).

69. Government Brief, Oct. 6, 1986, at 7. The *Lee* test inquires: 1) whether the challenged law interferes with the free exercise of religion; 2) whether the challenged law is essential to accomplish an overriding

tedly, the federal and state peyote exemptions tend to negate

governmental objective; and 3) whether accommodating the religious practice would unduly interfere with fulfillment of the governmental interest. *Lee*, 455 U.S. at 256-59.

70. Government Brief at 8-9. The following cases involve EZCC members. *Olsen v. Iowa*, 808 F.2d 652 (8th Cir. 1986) (summarily rejecting Olsen's free exercise and equal protection claims on habeas because of the state's compelling interest in controlling marijuana); *United States v. Rush*, 738 F.2d 497 (1st Cir. 1984) (applying *Lee* standard, the court affirmed convictions of 15 members of the EZCC including Olsen involving twenty tons of marijuana upon finding that marijuana constitutes a health hazard and a threat to social welfare; moreover, the court ruled that the NAC exemption is different because it is a narrow, readily identifiable category with minimal impact on law enforcement), *cert. denied*, 471 U.S. 1120 (1985); *United States v. Middleton*, 690 F.2d 820 (11th Cir. 1982) (rejecting free exercise defense of an EZCC member charged with importation and possession of marijuana because of government's clearly articulated and compelling interest in regulating marijuana), *cert. denied*, 460 U.S. 1051 (1983); *Commonwealth v. Nissenbaum*, 404 Mass. 575, 536 N.E.2d 592 (1989) (priest and member of EZCC convicted for possession of hashish and marijuana could not succeed on free exercise claim because state had overriding interest in controlling drug abuse); *State v. Olsen*, 315 N.W.2d 1 (Iowa 1982) (state demonstrated compelling interest in controlling marijuana sufficient to override Olsen's free exercise argument); *Town v. State ex rel. Reno*, 377 So.2d 648 (Fla. 1980) (state had compelling interest in restricting use of cannabis as religious practice of EZCC).

The following cases involve members of other religions seeking a marijuana exemption: *United States v. Greene*, 892 F.2d 453 (6th Cir. 1989) (Native American failed to convince court that possession and distribution of marijuana was constitutionally required), *cert. denied*, 110 S. Ct. 2179 (1990); *United States v. Spears*, 443 F.2d 895 (5th Cir. 1971) (summarily rejecting Black Muslim's first amendment defense to conviction for heroin, marijuana, and peyote smuggling because there is no constitutional privilege to use drugs), *cert. denied*, 404 U.S. 1020 (1972); *Randall v. Wyrick*, 441 F. Supp. 312 (W.D. Mo. 1977) (affirming conviction for marijuana and LSD possession of Aquarian Brotherhood Church leader because state had compelling interest in regulation of narcotic drug trafficking); *United States v. Kuch*, 288 F. Supp. 439, 445-46 (D.D.C. 1968) (affirming conviction for drug offenses of ordained minister of Neo-American Church, which embraces principle that marijuana and LSD are the true Host, because church did not appear to be a bona fide religion and "under any common sense view of undisputed facts" the public interest is paramount); *Hawaii v. Blake*, 695 P.2d 336 (Haw. App. 1985) (no free exercise defense for member of religion, Hindu Tantrism, convicted of possessing marijuana because members can freely practice their religion without marijuana); *Whyte v. United States*, 471 A.2d 1018 (D.C. 1984) (upholding conviction for marijuana possession of Rastafarian of the Twelve Tribes of Israel where there were serious and compelling concerns of government regarding drug-related problems); *State v. Rocheleau*, 451 A.2d 1144 (Vt. 1982) (no first amendment defense for Tantric Buddhist convicted for possession of marijuana); *New Mexico v. Brashear*, 92 N.M. 622, 595 P.2d 63 (1979) (defendant's belief in the religious use of marijuana was derived from defendant's personal views of the Bible, and he failed to show that his belief was religious); *Lewellyn v. State*, 592 P.2d 538 (Okla. 1979) (priest in

the existence of a compelling government interest in prohibiting its non-drug use in bona fide religious worship.⁷¹ Thus, the government tried to distinguish the NAC, stating that Congressional testimony presented by the director of the BNDD during the CSA hearings indicated that the NAC was considered "*sui generis*. The history and tradition of the church is such that there is no question but that they regard peyote as a deity."⁷² By contrast, the EZCC "does not have such a Congressional recognition of its status."⁷³

Holy American Church could not raise religious defense to sale of marijuana to undercover officer who was not member of professed religion); *People v. Mullins*, 50 Cal.3d 61, 123 Cal. Rptr. 201 (1975) (pastor of Universal Life Church of Christ Light failed to prove that marijuana was indispensable to his religion and that prohibition of marijuana use resulted in virtual inhibition of practice of his religion); *People v. Crawford*, 328 N.Y.S.2d 747, 748, 755 (1972) (member and minister of Church of Missionaries of the New Truth who used marijuana and LSD to achieve religious experience denied exemption because there was no evidence that defendant used drugs as part of religious ceremony, used drugs with other members of his Church, drugs were an intrinsic part of the Church's dogma, or that his exercise of religion would be inhibited without the use of drugs); *People v. Werber*, 19 Cal. App.3d 598, 97 Cal. Rptr. 150 (1971) (defendant's use of marijuana did not constitute religious practice within the constitutional concept of religion where it was not an object of worship essential to exclusively religious ritual); *People v. Collins*, 273 Cal. App.2d 486, 78 Cal. Rptr. 151 (1969) (defendant did not worship marijuana but used it as an "auxiliary to a desired capacity for communication"); *People v. Mitchell*, 244 Cal. App.2d 176, 52 Cal. Rptr. 884 (1966) (defendant did not offer any evidence that use of marijuana was a religious practice, instead he was expressing his own personal philosophy and way of life).

The following cases involve churches seeking a peyote exemption. *Peyote Way Church of God v. Smith*, 742 F.2d 193 (5th Cir. 1984) (reversing summary judgment which had been entered for government and remanding for weighing of interests involved because Texas and federal exemptions for NAC tended to negate compelling state interest in denying such exemption to Peyote Way Church); *United States v. Warner*, 595 F. Supp. (D.N.D. 1984) (non-Indians who alleged that their use of peyote was part of their ceremonies in NAC were not entitled to exemption accorded to Indians); *Native American Church of New York v. United States*, 468 F. Supp. 1247 (S.D.N.Y. 1979) (interest of minister of Native American Church of New York seeking declaratory judgment in using drugs other than peyote must be subordinated to the important governmental purposes served by the CSA; as to peyote, group, while admittedly having no ties to NAC, must show it was a bona fide religion), *aff'd mem.*, 633 F.2d 205 (2d Cir. 1980); *Birnbaum v. United States*, 80 Civ. 1534 (RLC) (S.D.N.Y. Apr. 11, 1983) (would extend exemption to peyotist religions in general if group could establish that it was a bona fide religion) (unpublished).

71. Government Brief, *supra* note 69, at 9.

72. *Id.* For the full quotation, see note 38.

73. *Id.* See also Government Memorandum Before DEA, July 22, 1988, at 13-16.

Olsen replied by distinguishing the key case regarding the sacramental use of marijuana, *Leary v. United States*.⁷⁴ Timothy Leary and his daughter were found in possession of marijuana upon their re-entry into this country by car from Mexico.⁷⁵ Raising a free exercise defense, Leary argued that he was part of the Hindu sect of Brahmakrishna and that "the experience [I find] through the use of marihuana is the essence of [my] religion."⁷⁶ A Hindu monk testifying for Leary stated that he was partially able to achieve and practice his religious beliefs in the religious sect without the use of marijuana.⁷⁷ Leary admitted that if he could not use marijuana, it would not affect his religious beliefs.⁷⁸ The court stated that the laws regulating marijuana serve a compelling governmental interest in avoiding a "substantial threat to public safety, peace or order."⁷⁹

Examining the NAC exemption, the *Leary* court reviewed two California cases.⁸⁰ In *People v. Woody*, the state court found a free exercise right to use peyote for NAC members who had been arrested during a ceremony,⁸¹ and in *In re Grady*, the state court held that a peyote preacher could offer a first amendment defense to prosecution for possession of peyote.⁸² The court found that unlike Leary's use of marijuana, peyote "played 'a central role in the ceremony and practice of the Native American Church, [and that the] ceremony marked by sacramental use of peyote, composes the cornerstone of the peyote religion.'"⁸³ The court continued "The exemption accorded the use of peyote in the *limited bona fide* religious ceremonies of the *relatively small, unknown* Native American Church is clearly dis-

74. 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969), *cited in* Olsen's Reply Brief, Oct. 10, 1986, at 3, 6-7.

75. 383 F.2d at 855-56.

76. *Id.* at 857, 860.

77. *Id.* at 857-58.

78. *Id.* at 857. The court found that Leary drew no distinction between his religious beliefs and his scientific experimentation. *Id.*

79. *Id.* at 860.

80. *Id.* at 861.

81. 61 Cal.2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

82. 61 Cal.2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964).

83. *Leary*, 383 F.2d at 861. Seventeen years later, the Fifth Circuit again distinguished Leary's practice from other religious drug use cases. Deciding that the Peyote Way Church of God would be entitled to the peyote exemption if it could establish that it was a bona fide religion, the court stated that Leary had not established that marijuana played a *central role* in the ceremony and practice of the church, and Leary sought unrestricted freedom to possess and use marijuana in any manner. *Peyote Way Church of God v. Smith*, 742 F.2d 193, 200 (5th Cir. 1984) (emphasis added).

tinguishable from the *private and personal use* of marijuana by any person who claims he is using it as a religious practice."⁸⁴

B. *Amicus is Appointed to Represent Olsen*

The Court of Appeals appointed *amicus curiae* for Olsen.⁸⁵ Amicus filed a brief discussing other marijuana exemptions extended by the federal government.⁸⁶ Since the late 1960s, the government has been involved in growing, processing, and distributing marijuana to registered persons and entities.⁸⁷ That program is administered by the National Institute on Drug Abuse ("NIDA"), which has contracted with the University of Mississippi to grow marijuana; NIDA processes the marijuana and provides it to researchers and medical treatment programs.⁸⁸ A number of marijuana exemptions have been issued to state governments which supervise local distribution of NIDA marijuana primarily for use in programs to lessen the negative side-effects of chemotherapy and to treat glaucoma.⁸⁹ In the years between 1978 and 1987, NIDA has authorized and overseen the distribution of 477,507 cigarettes for human consumption.⁹⁰ "[Clearly,] some limited level of marijuana use is not inconsistent with the government's" goals.⁹¹

C. *Remand to the DEA*

The government petitioned the court of appeals to remand the case to the DEA so that it could "explain more fully the basis for its decision."⁹² The court denied the motion; then, changing its mind six days later, the court issued an order remanding the case to the DEA.⁹³

84. *Id.* at 861 n.11 (emphasis added).

85. Judges Wald, Mikva, and Edwards issued an order appointing William Bradford and Steven Routh of the Washington, D.C. law firm, Hogan and Hartson. *Olsen v. DEA*, No. 86-1442, *Court Order*, Feb. 1, 1988.

86. Amicus Brief, Mar. 24, 1988, at 7-9, 21.

87. *Id.* at 7-9.

88. *Id.* at 7-8.

89. *Id.* at 8.

90. *Id.* at 9.

91. *Id.* at 21. Distinguishing the free exercise cases relied upon by the government, Amicus argued that granting broad after the fact exemptions once a defendant has been arrested for drug abuse is quite different from working to find a measured response to a prospective request for authorization. *Id.* at 23.

92. Respondent's Motion For Remand To The Agency, Apr. 7, 1988, at 2.

93. The panel consisted of Judges Edwards, Starr, and Weigel; Judge Stanley A. Weigel is a senior U.S. district judge for the Northern District of

Amicus submitted a memorandum with supporting documents to the DEA wherein Olsen withdrew the language of his prior exemption⁹⁴ and proposed the following exemption:

1. [EZCC] members would be restricted to using marijuana during their Saturday evening prayer ceremony, which lasts from 8:00 p.m. until 11:00 p.m.;
2. During that ceremony, and for the eight hours following that ceremony, Church members would not leave the place where the ceremony is conducted; they would not drive automobiles or otherwise go out in public;
3. Ingestion of marijuana would be limited to Church members who had reached the age of majority, according to the laws of the state in which the ceremony takes place; and
4. Ingestion of marijuana would be limited to full Church members who had undergone the confession ritual⁹⁵ for entering the Church's community.⁹⁶

Turning to the substantive arguments, Amicus stated that contrary to the position espoused by the government, the legislative history of the American Indian Religious Freedom Act of 1978 (AIRFA)⁹⁷ did not support the argument that Congress specifically intended to limit the peyote exemption to the NAC; instead, Congress recognized that preferential treatment of the NAC would run afoul of the establishment clause.⁹⁸ Indeed, an

California. Olsen v. DEA, No. 86-1442, Court Orders, Apr. 15, 1988, and Apr. 21, 1988.

94. See *supra* note 61.

95. See *supra* notes 49-50 and accompanying text.

96. Amicus Memo Before DEA, July 1988, at 29-30. Olsen stated that he was willing to work out any details or arrangements with the DEA that would facilitate mutual agreement on the exemption and its logistics. *Id.*

97. AIRFA provides in pertinent part:

Whereas the traditional American Indian religions, as an integral part of Indian life, are indispensable and irreplaceable:

* * * *

be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

American Indian Religious Freedom Act of 1978, Pub. L. No. 95-341, 92 Stat. 469 (1978).

98. Amicus Memo Before DEA, at 21-23. In the Senate Select

attorney for the Justice Department advised the Senate Select Committee on Indian Affairs that granting preferential treatment to Native American religions would be unconstitutional.⁹⁹ In response, the Senate redrafted its resolution to make "absolutely clear that AIRFA directed government agencies simply to ensure that Indian religions enjoyed the same guarantee of 'freedom of religion for all people' that is required by the First Amendment."¹⁰⁰ When the Department of Justice informed the administration that it did not object to the President's signing of AIRFA, it made specific mention of the fact that Congress had incorporated the Department of Justice's position that a preference for Native American religions could not be extended without violating the establishment clause.¹⁰¹ Furthermore, DEA attorneys concurred in the remarks made by the Justice Department, writing, in a memo commenting on the Justice Department's position, that "no line can be drawn between religions claiming a bona fide use of drugs."¹⁰² In 1981, the Office of Legal Counsel (OLC) published a memorandum opinion for the Chief Counsel of the DEA, stating that

Committee on Indian Affairs Hearing on AIRFA the following statements were reported:

The clear intent of this section is to insure for traditional native religions the same rights of free exercise enjoyed by more powerful religions. However, it is in no way intended to provide Indian religions with a more favorable status than other religions, only to insure that the U.S. Government treats them equally.

Id. App. 11, at 6 (S. Rep. No. 95-709, 95th Cong., 2d Sess. 6 (1978)). Other pertinent statements include:

[D]irect Federal interference in the religious ceremonies imposes upon one religion, by Government action, the values of another. Such action is a direct threat to the foundation of religious freedom in America. It comes far too close to an informal state religion.

* * * *

There is room for and great value in cultural and religious diversity.

* * * *

[B]ecause Indian religious practices are different . . . they somehow do not have the same status as a 'real' religion.

Id. App. 11, at 4-5 (S. Rep. No. 95-709, 95th Cong., 2d Sess. 4-5 (1978)).

99. The legislative history of AIRFA indicates that the original Senate resolution contained language giving preferential treatment to Native American religions. *Id.* at 23-24 & App. 11, at 10. The Department of Justice attorney gave the same advice regarding the establishment clause violation to Counsel to the President. *Id.* at 24 & App. 12 (Memorandum for Hon. R.J. Lipshutz, Mar. 10, 1978, at 3).

100. *Id.* at 24 (quoting Pub. L. No. 95-341 (1978)).

101. *Id.* at 24 & App. 13 (Pat Wald, Assist. Atty. Gen., Office of Legal Affairs, Letter to Honorable McIntyre).

102. *Id.* at 24 & App. 14, at 5 (Harry L. Myers, DEA Memorandum on the OLC's Comment on the Peyote Exemption, Feb. 28, 1979).

"Indian religion cannot be treated differently than other religions similarly situated without violation of the Establishment Clause."¹⁰³

Finally, Amicus seriously questioned whether a first amendment claim could be denied on the basis of health concerns.¹⁰⁴ The "agency's sanctioning of marijuana use by hundreds of persons involved in registered medical and research programs strongly suggests that marijuana use is not in all instances detrimental to an individual's health and psychological well-being."¹⁰⁵ Nor has the NIDA program or the peyote exemption undermined public respect for the CSA.¹⁰⁶

The government responded to Olsen's proposed EZCC exemption by stating that "such restrictions could not be monitored or enforced without significant intrusion by the Government into the religious practices of the Church. The monitoring of such restrictions would be extremely burden-

103. *Id.* at 25. The Assistant Attorney General for the OLC stated in full:

[T]he special treatment of Indians under our law does not stem from the unique features of Indian religion or culture. With respect to these matters, Indians stand on no different footing than do other minorities in our pluralistic society. Rather, the special treatment of Indians is grounded in their unique status as political entities, formerly sovereign nations preexisting the Constitution, which still retain a measure of inherent sovereignty over their peoples unless divested by federal statute or by necessary implication of their dependent status.

An exemption for Indian religious use of peyote would not be grounded in the unique political status of Indians. Instead, the exemption would be based on the special culture and religion of the Indians. In this respect, Indian religion cannot be treated differently than other religions similarly situated without violation of the Establishment Clause.

Memorandum Opinion for the Chief Counsel, DEA, Dec. 22, 1981, at 403, 420 (citation and footnote omitted), *appended to* Amicus Memo Before DEA, App. 16.

104. Amicus Memo Before DEA, at 32-33. Amicus quoted Lawrence Tribe as stating that the government is in effect:

telling the individual that it knows what is best for his body and mind. Surely the individual may respond, "I know what is best for my soul." To allow the government thus to impose the World of the Flesh upon the World of the Spirit seems an overwhelming abridgement of religious freedom.

Id. at 32 (quoting L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1269-70 (2d ed. 1988)).

105. *Id.* at 32.

106. *Id.* at 32-33.

some on an agency which is charged with enforcement of a very comprehensive drug law."¹⁰⁷

D. *The DEA Denies the Exemption*

In a nine-page decision, John Lawn denied the EZCC an exemption for the religious use of marijuana.¹⁰⁸ Citing *Leary*,¹⁰⁹ in addition to other cases,¹¹⁰ the Administrator asserted that the EZCC had no free exercise right to use marijuana; moreover, it did not enjoy an "equal protection" right to an exemption because the EZCC "advocates the continuous use of marijuana or 'ganja', while the Native American Church's use of peyote is isolated to specific ceremonial occasions."¹¹¹ The Administrator further distinguished marijuana from peyote stating that "the actual abuse and availability of marijuana in the United States is many times more pervasive in American society than that of peyote."¹¹² Substantiating this claim, the Administrator stated that between 1980 and 1987, the DEA seized 19.4 pounds of peyote as compared to 15,302,468.7 pounds of marijuana.¹¹³

This overwhelming difference explains why an accommodation can be made for a religious organization which uses peyote in circumscribed ceremonies, and not for a religion which espouses continual use of marijuana. The Administrator also notes that Mr. Olsen's conviction in *United States v. Rush* involved the illegal importation of 20 tons of marijuana. . . . If Mr. Olsen's assertions that the Ethiopian Zion Coptic Church in the United States has

107. Government Memorandum Before DEA, at 17. Indeed, the government asserted that if the EZCC were granted its exemption, many of today's buyers and sellers would "find religion." Government Brief Before CTA, Jan. 4, 1989, at 22. Additionally, there would be no way to enforce the Saturday night exemption proposed by Olsen short of constant surveillance, requiring "Herculean efforts." *Id.* Amicus responded that it would be highly unlikely that large numbers of illegal drug users would come forward and identify themselves to the DEA hoping to obtain a religious drug exemption. Amicus Reply Brief, Jan. 23, 1989, at 16.

108. DEA's Final Order, July 26, 1988, at 2.

109. 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969).

110. *United States v. Spears*, 443 F.2d 895 (5th Cir. 1971), *cert. denied*, 404 U.S. 1020 (1972); *United States v. Middleton*, 690 F.2d 820 (11th Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983); *United States v. Rush*, 738 F.2d 497 (1st Cir. 1984), *cert. denied*, 471 U.S. 1120 (1985); *Olsen v. Iowa*, 808 F.2d 652 (8th Cir. 1986).

111. DEA's Final Order, July 26, 1988, at 6-7.

112. *Id.* at 7-8.

113. *Id.* at 8.

never had, "more than between 100 and 200 members in this country," 20 tons of marijuana would be an outrageous quantity to supply their religious needs.¹¹⁴

Specifically addressing Olsen's proposed exemption, the Administrator determined that the large quantity of marijuana in this country would make monitoring compliance very difficult and would make accommodation impractical.¹¹⁵ Olsen challenged the DEA's final order, requesting review by the court of appeals.¹¹⁶

E. *The Court of Appeals Denies the Exemption*

1. The Majority

In June of 1989, the D.C. Court of Appeals, over a strongly worded dissent by Judge Buckley, denied Olsen both a free exercise right and an "equal protection-establishment clause" right to a religious-use exemption.¹¹⁷ Regarding Olsen's proposal, the majority found that because EZCC members were allowed to use marijuana "every day throughout the day," the proposal would not be "self-enforcing" and would require "burdensome and constant official supervision and management."¹¹⁸ Concerned with the EZCC's lack of stringent control over the sacramental use of marijuana in the past, the court noted that the "church's '[c]hecks on distribution of cannabis to nonbelievers in the faith [were] minimal,' there was 'easy access to cannabis for a child who had absolutely no interest in

114. *Id.* (citation omitted).

115. *Id.* at 8-9.

116. Olsen v. DEA, No. 86-1442, Motion To Establish Schedule For Briefing And Argument, Aug. 10, 1988. Relying for the most part on its prior filings, Amicus argued that a *complete rejection* of a marijuana exemption would violate both the establishment clause and the free exercise clause. See Amicus Supplemental Brief, Dec. 1, 1988; Amicus Reply Brief, Jan 23, 1989.

117. Olsen v. DEA, 878 F.2d 1458 (D.C. Cir. 1989). The case was argued before Circuit Judges Bader Ginsburg, Silberman, and Buckley. Amicus was asked if he knew of any decisions where courts had held that the free exercise clause required government accommodation of religiously motivated conduct despite the government's position that accommodation posed a significant health risk. In a subsequent letter to the court, counsel cited cases wherein people had been allowed to refuse medical treatment for religious reasons despite the state interest in preserving the health of, or even the life of, the individual. Amicus Letter to Court, Feb. 13, 1989, at 1-2. In addition, Amicus cited the line of cases where state courts had found that a free exercise exemption for peyote was mandated despite the undisputed health risks. *Id.* at 2.

118. 878 F.2d at 1462.

learning the religion,' and '[m]embers [partook] of cannabis anywhere, not just within the confines of a church facility."¹¹⁹

Reviewing the "establishment clause-equal protection challenge," the court accorded great deference to the DEA and found that the EZCC is not similarly situated to the NAC,¹²⁰ because of the vast differences between peyote and marijuana regarding their demand, abuse, and availability.¹²¹ Resting its decision upon the "immensity of the marijuana control problem in the United States," the court refused to find an establishment clause violation and pointed out additional distinctions between the two religions:

- 1) The peyote ritual is a traditional, precisely circumscribed ritual;
- 2) Peyote is itself an object of worship;
- 3) Use of peyote outside of the ritual is sacrilegious for the NAC; and
- 4) The NAC, for all practical purposes other than the special stylized ceremony, reinforces the state's prohibition.¹²²

The sharp contrast between the NAC and the EZCC was further evidenced by Olsen's statement that marijuana is smoked continually "through everything that we do."¹²³ Again reviewing Olsen's proposed exemption, the court cryptically concluded that "'narrow' use, concededly, is not his religion's tradition."¹²⁴

2. Judge Buckley's Dissent

Judge Buckley dissented "because the majority fail[ed] to address the Establishment Clause implications of the Drug Enforcement Agency's rejection of Olsen's request for a limited religious exemption."¹²⁵ The DEA's denial "creates a

119. *Id.* at 1462 (quoting *Town v. State ex rel. Reno*, 377 So.2d 648, 649, 651 (Fla. 1979)).

120. The court stated that had the government raised collateral estoppel in a timely fashion, it may have considered the equal protection-establishment clause issue precluded. *Id.* at 1463 (citing *Olsen v. Iowa*, 808 F.2d 652, 653 (8th Cir. 1986) (controlled and isolated NAC ceremony is different from EZCC's allowance of continuous and public use of sacrament regardless of age or occupation of member), and *United States v. Rush*, 738 F.2d 497, 513 (1st Cir. 1984) (NAC exemption is based on federal policy meant to confer a benefit on NAC which is *sui generis*)).

121. *Id.* at 1463-64.

122. *Id.*

123. *Id.* (quoting *State v. Olsen*, 315 N.W.2d 1, 7 (Iowa 1982)).

124. *Id.*

125. *Id.* at 1468. Judge Buckley found it irrelevant that the NAC could

clear-cut denominational preference in favor of the Native American Church."¹²⁶ Application of strict scrutiny requires the DEA to show a compelling interest served by the denominational preference and to show that the different treatment was closely fitted to further that interest.¹²⁷ Judge Buckley found that the DEA's explanation fell "far short" of meeting the strict scrutiny standard.¹²⁸

In fact, Judge Buckley found the DEA's reasoning to be extremely superficial in light of the Supreme Court decision of *Larson v. Valente*.¹²⁹ In *Larson*, religious denominations in Minnesota receiving more than fifty percent of their funds from members and affiliated organizations were not required to comply with registration and reporting laws regarding their fund raising activities.¹³⁰ This statute had the effect of granting a denominational preference to well-established churches, and the Court applied strict scrutiny to Minnesota's well reasoned explanations as to how its registration and reporting exemption was closely fitted to furthering a compelling state interest.¹³¹ While the Supreme Court agreed that Minnesota had a

be distinguished on the basis of the *sui generis* legal status of American Indians, stating, "[T]hat Church's status as an indigenous faith does not affect its religious character." *Id.* at 1469.

126. *Id.* (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982), and *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947)).

127. *Id.* at 1468-69 (quoting *Larson*, 456 U.S. at 246-47). Instead of using the *Larson* establishment clause analysis as urged by Judge Buckley which would have required strict scrutiny in view of the denominational preference, the majority relied on an equal protection analysis. *Id.* at 1463-64 & n.5. The majority cited *Walz v. Tax Comm'n*, 397 U.S. 664, 694, 696 (1970), for this proposition and Judge Buckley acknowledged that this equal protection analysis had been mentioned previously. *Id.* at 1463 n.5, 1468 (noting the concurring opinion by Justice Frankfurter in *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953)). However, both of these cases involved laws which applied equally to all religions. The *Walz* Court examined the New York tax exemption law for religious, educational, or charitable uses, 397 U.S. at 666-67, while the Court in *Fowler* reviewed the constitutionality of a law that prohibited all religious meetings in any public park in Rhode Island. 345 U.S. at 67. The *Larson* Court found this distinction critical, stating that the *Lemon* test applied to "laws affording a uniform benefit to all religions," while a law that discriminates among religions must "be invalidated unless it is justified by a compelling governmental interest and unless it is closely fitted to further that interest." *Larson*, 456 U.S. at 246-47, 252 (citations omitted). Indeed, the Court in *Gillette v. United States*, 401 U.S. 437 (1971), specifically stated that in the establishment clause cases, equal protection is not an independent argument. 401 U.S. at 449 n.14.

128. *Olsen*, 878 F.2d at 1469.

129. 456 U.S. 228 (1982).

130. *Id.* at 230.

131. *Id.* at 248-51.

compelling state interest in protecting its citizens from abusive solicitation practices, it found that Minnesota had not demonstrated that the exemption was necessary to further that interest nor that the exemption was closely fitted to furthering the interest.¹³² Finding that the statutory exemption failed to pass a strict scrutiny analysis, the Supreme Court extended it to the Unification Church of Sun Myung Moon, holding that any bona fide religion would qualify for the exemption.¹³³

Addressing the DEA's argument that the EZCC and the NAC warranted different treatment because of: 1) their differing sacramental drug use rituals; and 2) the different law enforcement problems vis a vis the two drugs, Judge Buckley asserted that Olsen's proposed exemption effectively eliminated the first distinction.¹³⁴ Additionally, Judge Buckley challenged the DEA's argument that the abuse and availability of marijuana justified the disparate treatment "The government's interest in preventing abuse of a given drug is not proportional to the drug's prevalence. By classifying both marijuana and peyote as Schedule I controlled substances, Congress has determined that the federal government has a compelling interest in preventing the illegal distribution and use of both drugs."¹³⁵

Noting that the DEA had no difficulty monitoring compliance of more than 250,000 members of the NAC, Judge Buckley questioned the DEA's lack of solid reasoning why monitoring compliance of one-hundred to two-hundred EZCC members would be so impossible.¹³⁶ Indeed, the exemption would place no restrictions on the DEA's normal enforcement operations other than at the church for a limited number of hours once a week.¹³⁷ Judge Buckley stated that he would remand the case to the DEA so that it could more adequately review and address Olsen's establishment claim.¹³⁸

132. *Id.*

133. *See id.* at 255. The majority in *Olsen* had asserted that even if it were to find an establishment clause violation, it was not certain that extension rather than invalidation of the exemption was proper. *Olsen*, 878 F.2d at 1464. Judge Buckley retorted that such indecision could not excuse the court from properly reviewing an underinclusive statute. *Id.* at 1471.

134. *Olsen*, 878 F.2d at 1469-70.

135. *Id.*

136. *Id.* at 1471.

137. *Id.*

138. *Id.* at 1468.

The court of appeals denied Olsen's Petition for Rehearing and Suggestion For Rehearing En Banc.¹³⁹ The Supreme Court denied Olsen's Certiorari Petition.¹⁴⁰

IV. THE COURT OF APPEALS DECISION VIOLATES THE CONSTITUTION

The establishment clause prohibits both the state and federal government from passing laws which prefer one religion over another.¹⁴¹ Whether one adheres to the "broad" interpretation of the establishment clause or the "narrower" interpretation, all scholars agree that the establishment clause was meant by the framers to prevent the government from bestowing a preference on one religion;¹⁴² and, as such, to protect the "small, new, or unpopular denominations"¹⁴³ from "subtle departures from neutrality, 'religious gerrymanders,' as well as

139. Chief Judge Wald and Judge Buckley voted to grant the Suggestion. Olsen v. DEA, No. 86-1442, *Court Order*, Sept. 15, 1989. Judge Buckley voted to grant the Petition For Rehearing as well. Olsen v. DEA, No. 86-1442, *Court Order*, Sept. 15, 1989.

140. Olsen v. DEA, 110 S. Ct. 1926 (1990). In the Petition For Writ Of Certiorari, Amicus argued that the D.C. Court of Appeals decision conflicted with the Supreme Court precedent which requires that strict scrutiny be applied whenever a "denominational preference" is conferred by governmental action. Amicus Certiorari Petition, Dec. 13, 1989, at 9-14 (citing Larson v. Valente, 456 U.S. 228 (1982)). Moreover, Amicus argued that confusion surrounding the definition of "denominational preference" was arising, and courts needed guidance on when strict scrutiny should be applied. *Id.* at 15-22.

In response, the government asserted that no free exercise, establishment, or equal protection rights had been violated because "DEA's exemption for religious peyote use in 21 C.F.R. § 1307.31 applies equally to all *bona fide* religious groups." Respondent's Opposition To Petition For Writ Of Certiorari, Feb. 1990, at 9. As a result, no denominational preference was created and the *Lemon* test as opposed to strict scrutiny was applicable. *Id.* at 10. Moreover, the government argued that the DEA's "considered professional judgment" concerning the burden of monitoring the exemption should not be questioned. *Id.* at 12.

141. Everson v. Board of Educ., 330 U.S. 1, 15 (1947). Before the fourteenth amendment was passed, some states persisted in discriminating against particular religions. *Id.* at 13-14 & n.17. In North Carolina, test provisions required that officeholders believe in the Protestant religion, and Maryland permitted taxation for the support of Christian religion and limited civil office to Christians. *Id.* at 14 & n.17.

142. T. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 204-09 (1986). The church/state scholars differ as to how much government accommodation of religion was intended by the framers and early interpreters of the Constitution. *Id.*

143. *Larson*, 456 U.S. at 244-45.

obvious abuses."¹⁴⁴ The EZCC is small, new to this country, and unpopular.¹⁴⁵ As a result, the EZCC has been denied even the narrowest exemption for its sacrament while the NAC enjoys an unlimited exemption for peyote.

A. *Comparing The Two Exemptions*

The majority stated that Olsen had proposed an exemption identical to the one accorded to the NAC.¹⁴⁶ This is not true. Olsen's proposed exemption is very narrow, restricting the sacramental use of marijuana to three hours, one day per week.¹⁴⁷ The exemption states that once the three hour worship service has finished, members may not leave the place where the ceremony was conducted for eight additional hours. The exemption specifically prohibits members from driving or going out in public during that post-worship period. Only EZCC members who are of the age of majority may participate in the service and "membership" is strictly construed.¹⁴⁸

While the majority described the NAC exemption as "tightly-cabined,"¹⁴⁹ nothing could be further from the truth. The NAC exemption is unlimited; it states that "Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church."¹⁵⁰ The only benefit strictly limited to "members" is a waiver of the registration requirement if the member manufactures or distributes peyote to the NAC.¹⁵¹ Other than that, the exemption does not limit the actual ceremony or participation in the peyote ceremony in any way. The exemption is not limited to

144. *Gillette v. United States*, 401 U.S. 437, 452 (1971) (citations omitted).

145. The total denial of an exemption to the EZCC has had tragic results for the members. The EZCC has publicly stated:

Through . . . the police force, the church has been severely harassed, victimized and discriminated against. Our members have passed through several acts of police brutality, our legal properties maliciously destroyed, members falsely imprisoned, divine services broken up, and all these atrocities performed upon the Church, under the name of political laws and their justice.

1 *The Coptic World*, Dec. 19, 1987, at 8. As the Court in *Larson* explained, the free exercise clause and the establishment clause work in close conjunction, the guarantees of one reinforcing the guarantees of the other. *Larson*, 456 U.S. at 244-45.

146. *Olsen*, 878 F.2d at 1464.

147. *See supra* notes 94-96 and accompanying text.

148. *See supra* notes 49-50, 94-96 and accompanying text.

149. *Olsen*, 878 F.2d at 1463.

150. *See supra* note 39 and accompanying text.

151. *Id.*

people of majority, nor does it restrict driving or even suggest a detoxification period. Given the lack of any consensus on the meaning of "Native American Church," either among Native Americans or by those outside of the Church, and the widely diverging views on how the religious ceremony is to be conducted,¹⁵² the peyote exemption is very broad, indeed.

The majority was quite concerned with how rigidly membership was enforced in the EZCC and whether membership was required before one was allowed to participate in the sacrament.¹⁵³ But the majority failed to note that the NAC exemption is not limited to members; even if it were so limited, membership in the NAC has no prerequisites nor is there any consensus within the NAC as to what even constitutes a member.¹⁵⁴

B. Comparing the Law Enforcement Problems

The majority stated that it based its "decision on the immensity of the marijuana control problem."¹⁵⁵ But under a strict scrutiny analysis, this statement becomes less persuasive.¹⁵⁶ Thirty-three states have enacted some type of legislation which recognizes that marijuana has valid medicinal uses.¹⁵⁷ These states have not found that an immense "marijuana control problem" presents any barrier to creating limited

152. See *supra* notes 8-10 and accompanying text.

153. *Olsen*, 878 F.2d at 1462.

154. See *supra* notes 18-20 and accompanying text. As noted above, the NAC has no written membership rolls. *Id.* Marriott has stated that a list of NAC members would be almost impossible to gather. MARRIOTT, *supra* note 9, at 105-09.

155. 878 F.2d at 1464.

156. Since *Larson*, there can be no doubt that the Supreme Court requires the application of strict scrutiny when the government grants a denominational preference. See *County of Allegheny v. ACLU*, 109 S. Ct. 3086, 3090, 3109 (1989) (strict scrutiny is required for practices suggesting denominational preference); *Hernandez v. Commissioner*, 109 S. Ct. 2136, 2139, 2142, 2146 (1989) (claim of denominational preference, which would require strict scrutiny, necessitates an initial inquiry of whether the law facially differentiates among religions); *Lynch v. Donnelly*, 465 U.S. 668, 697, 699 (1984) (law granting a denominational preference must be reviewed under a strict scrutiny analysis).

157. ACT, "Cannabis & Medicine," at 4. These states include: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Iowa, Louisiana, Maine, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, and Wisconsin. *Id.*

marijuana exemptions. In light of the fact that the federal government dispenses marijuana for medical uses,¹⁵⁸ and that five people in America have federal permission to use marijuana to help with chronic ailments,¹⁵⁹ the arguments that marijuana poses serious health risks and has no acceptable safety use are highly suspect.¹⁶⁰ Moreover, the majority accepted without question the DEA data about abuse, availability, and demand instead of examining marijuana in terms of current trends.

The DEA set forth statistics regarding the amounts of marijuana seized between 1980-1987.¹⁶¹ Yet a breakdown of these statistics year-by-year establishes that the use of marijuana has been steadily decreasing since 1979.¹⁶² Many people assert that both production and consumption of marijuana in the country is declining,¹⁶³ and that any threat posed by marijuana is waning.¹⁶⁴ Indeed, when casual possession of marijuana was decriminalized in California in 1976 (those caught with an ounce or less paid fines similar to that of a traffic ticket), marijuana "fell out of fashion. . . . Polls taken over the last 10 years show marijuana use down as much as 50 percent."¹⁶⁵ The fact that Alaska, the only state where marijuana possession was legal, recently voted to re-criminalize it and

158. See *supra* notes 86-91, 104-06 and accompanying text. Administrative Law Judge Francis Young concluded after two years of hearings that marijuana has an accepted medical use in the treatment of chemotherapy and in the treatment of multiple sclerosis, spasticity, and hyperparathyroidism. *In re* Marijuana Rescheduling Petition, No. 86-22, at 34, 54-55 (Sept. 6, 1988).

159. Of the five Americans who have federal permission to smoke marijuana in the U.S., three of them do so for the treatment of glaucoma. UPI, Apr. 13, 1990. In one such case, Elvy Musikka was arrested for growing marijuana in her home; a judge acquitted her, ruling that marijuana would save her eyesight. She now receives marijuana from a federal farm in Mississippi. *Id.*

160. See *supra* notes 29-30 and accompanying text.

161. 878 F.2d at 1463.

162. U.S. Dep't of Health & Human Serv., Press Release No. RPO729, at 3 & marijuana graph showing annual usage from 1972-90 (Dec. 19, 1990).

163. Los Angeles Times, Sept. 16, 1990, at 6, col. 3.

164. Police and communities want to designate police resources to more serious crimes. USA Today, Sept. 4, 1990, at 9A (regarding rally where pot was smoked openly, police stated that justice system has more important crimes to worry about). In July, residents of Berkeley ignored a signature drive to repeal a 1979 marijuana ordinance which, "in effect, orders Berkeley's police force to make marijuana enforcement its lowest priority item." PR Newswire, July 13, 1990.

165. Washington Times, Sept. 11, 1990, at A3. Californians believe that the interest in pot would have decreased regardless of the decriminalization. *Id.*

other similar trends,¹⁶⁶ calls into question the continued vitality of marijuana's allure. Whether marijuana is decriminalized or re-criminalized, the population appears less and less interested in pursuing its use. These types of changes in attitudes about marijuana make "the job of law enforcement so much easier,"¹⁶⁷ and cast some doubt not only on the DEA's complaints concerning marijuana control problems in general but more specifically the monitoring burden the DEA states would accompany the EZCC exemption.

In addition, it simply defies logic that a church with a membership of 250,000 to 300,000 people would be easier to monitor than a church with a membership of one-hundred to two-hundred people. Olsen agreed to provide a list of member names and places of worship. Under the NAC exemption, however, the DEA has no idea where or when ceremonies will take place or who will be participating. This would appear to make monitoring exponentially more difficult. Nonetheless, monitoring the NAC exemption, apparently, has not imposed a burden on the DEA. Nor does it seem likely that monitoring the limited EZCC exemption would be significant.

C. *Comparing the Churches' Rituals*

The NAC ritual which involves an all night service perhaps once a week,¹⁶⁸ is more acceptable in the court's view than the EZCC ritual which traditionally is a daily observance. The majority's concern about the EZCC's regular use of its sacrament seems to state a clear preference for religions that engage sparingly in the use of their sacrament.¹⁶⁹ The Catholic Church offers the holy sacrament for ingestion at every worship service (mass), and members are free to engage in worship on a daily basis, if not more.¹⁷⁰ On the other hand, many protestant denominations offer the holy sacrament once a month, or

166. Washington Post, Nov. 8, 1990, at A45. Young people all over the country have lost interest in decriminalizing marijuana; in a survey of college freshmen in 1977, 53% favored legalization; in 1990, 17% favored legalization. PR Newswire, Oct. 31, 1990. The ABA's House of Delegates voted to nullify the 1973 policy advocating decriminalization of marijuana. 76 A.B.A. J. 105 (1990).

167. PR Newswire, Oct. 31, 1990 (Pennsylvania Attorney General's remarks regarding the changing attitude toward marijuana).

168. Participants gather at sunset and ingest peyote all through the night. See MARRIOTT, *supra* note 9, at 76.

169. 878 F.2d at 1464.

170. See M. B. PENNINGTON, *THE EUCHARIST YESTERDAY & TODAY* xi (1984); J. EMMINGHAUS, *THE EUCHARIST: ESSENCE, FORM, CELEBRATION* xx, 95, 101 (1978).

less.¹⁷¹ Speaking in terms of one's religious tradition, how often one partakes of holy communion should not be a basis upon which one church receives an exemption and another church does not. The EZCC ritual is more akin to the lifestyle of a religious order living in community where communion might be celebrated at various times throughout the day.

The majority found it significant that EZCC members were allowed to ingest their sacrament outside of the confines of the church facility.¹⁷² This concern again seems to be placing an unfair premium on certain types of rituals. The Protestant and Catholic Churches of America celebrate and distribute their sacrament in shopping malls,¹⁷³ parking lots,¹⁷⁴ buses,¹⁷⁵ hospitals,¹⁷⁶ parks,¹⁷⁷ homes,¹⁷⁸ in fact there is no place where the sacrament cannot be celebrated. Furthermore, finding it significant that ingestion of the sacrament be limited to the confines of a "church facility" appears suspect when it is not at all clear that the NAC even has the functional equivalent of a "church facility."¹⁷⁹

The majority dispensed with Olsen's proposed exemption by stating that "'narrow' use, concededly, is not his religion's tradition."¹⁸⁰ The court cannot in good faith use the tradition of the EZCC as a basis for suggesting that the exemption will not be adhered to. Whether an exemption tracks a religious tradition or not is irrelevant, has never been the law, and should not be used to circumvent a religious group's proposal to compromise. Accepting the EZCC's offer to modify its traditions rather than resorting to total ban on the religion's sacrament would seem to serve the government's best interest. Given the choice between an unlimited drug exemption for a church which is loosely knit together with few checks on behavior¹⁸¹ and a narrowly drawn exemption which incorporates

171. See J. WHITE, *PROTESTANT WORSHIP: TRADITIONS IN TRANSITION* 14, 56, 67, 87, 90, 110, 131, 155, 175, 186, 187, 200, 211-12 (1989).

172. 878 F.2d at 1462.

173. See *Los Angeles Times*, Mar. 16, 1986, at 1, col. 1.

174. See *Los Angeles Times*, Jan. 20, 1990, at 14, col. 1; *Los Angeles Times*, Mar. 27, 1989, at 1, col. 2; *Los Angeles Times*, Mar. 25, 1985, at 1, col. 5.

175. See *Los Angeles Times*, Aug. 19, 1989, at 7, col. 3.

176. See J. WHITE, *supra* note 171, at 261-68.

177. See *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979).

178. See J. White, *supra* note 171, at 88.

179. See *Woody*, 61 Cal.2d at 721, 394 P.2d at 817, 40 Cal. Rptr. at 73 (meeting convenes in enclosure); *MARRIOTT*, *supra* note 9, at 39-47, 69.

180. 878 F.2d at 1464.

181. See *MARRIOTT*, *supra* note 9, at 81, 105-09.

many checks on behavior for a church that nonetheless has not traditionally restricted its sacrament, the latter seems preferable.

The majority noted "further distinctions" between the rituals of the two religions:

- 1) the peyote exemption was accorded for a traditional, precisely circumscribed ritual;
- 2) peyote is an object of worship;
- 3) for the NAC, use of peyote outside of the ritual is sacrilegious; and
- 4) the NAC, for all practical purposes, "reinforces" the state's prohibition.¹⁸²

First, marijuana is a traditional ritual for the EZCC.¹⁸³ Moreover, the NAC's "precisely circumscribed ritual" lasts at least twelve hours, while the EZCC proposal would limit the service to three hours.¹⁸⁴ The peyote ceremony has myriad manifestations, and there is *no* prohibition on how often one might participate in a NAC ceremony—while Olsen has limited participation in the EZCC sacrament to one night per week, and it is always the same night.¹⁸⁵

Second, the DEA has conceded in its briefs that marijuana for the EZCC is an object of worship.¹⁸⁶ Third, for the EZCC, use of marijuana outside of the ritual is sacrilegious: "The Church believes that [recreational use] of marijuana, by members or nonmembers, constitutes sacrilegious behavior."¹⁸⁷ Even during the ceremony, those ingesting marijuana do not inhale the smoke into their lungs; they avoid its intoxicating effects by taking it into their mouths and exhaling it from their noses.¹⁸⁸ Finally, the EZCC religion, for all practical purposes, reinforces the state's prohibitions. The members of the EZCC do not approve of drug abuse in any form, and alcohol is strictly forbidden.¹⁸⁹ Indeed, all aspects of conduct are strictly

182. 878 F.2d at 1464.

183. See *supra* notes 51-53 and accompanying text.

184. See *supra* notes 13, 94-96 and accompanying text.

185. See *supra* notes 8-10, 39, 94-96 and accompanying text.

186. *Olsen*, 878 F.2d at 1460; see also Government Brief, Oct. 6, 1986, at 7 (citing *Town v. State ex rel. Reno*, 377 So.2d 648, 650 (Fla. 1979) (EZCC represents a centuries old religion within the first amendment and the use of cannabis is an essential portion of the religious practice), *app. dismissed and cert. denied*, 449 U.S. 803 (1980)).

187. See *supra* notes 55-57 and accompanying text.

188. *Commonwealth v. Nissenbaum*, 404 Mass. 575, 589, 536 N.E.2d 592, 599 (1989); *supra* notes 55-57 and accompanying text.

189. See *supra* notes 56-57 and accompanying text.

regulated by a literal interpretation of the Old Testament.¹⁹⁰ Thus, the differences noted by the majority are instead distinct similarities between the two churches.

D. *Comparison of the Drugs*

Both peyote and marijuana are Schedule I drugs which means that they both: 1) have a high potential for abuse; 2) have no currently accepted medical use in treatment; and 3) lack of accepted safety for use under medical supervision.¹⁹¹ The only argument that can be made that these drugs are not similarly situated in terms of the government's definition regarding dangerous drugs, is that marijuana does not even meet the second and third criteria whereas peyote meets all three. Marijuana has several currently accepted medical uses in treatment,¹⁹² and has an accepted level of safety for use under medical supervision.¹⁹³ Many people are not only openly stating that marijuana poses no health risks,¹⁹⁴ but are claiming that legalization would be downright beneficial.¹⁹⁵ More and

190. See *supra* notes 48-50 and accompanying text.

191. 21 U.S.C. § 812(b)(1) (1988).

192. See *supra* note 158 and accompanying text.

193. See *supra* note 159 and accompanying text; see also *supra* note 157 and accompanying text.

194. Some of the following people hotly dispute that marijuana is harmful. "But in terms of a direct physical threat to the body, 'it's probably true that [marijuana's] greatest danger is if a bale of it falls on you,' said David Friedman, deputy director of the National Institute on Drug Abuse's preclinical research division and the official in charge of overseeing that agency's marijuana research." *Washington Post*, Sept. 19, 1990, at A19. Administrative Law Judge, Francis L. Young, found that "[m]arijuana, in its natural form, is one of the safest therapeutically active substances known to man." In re Marijuana Rescheduling Petition, No. 86-22 at 58-59 (Sept. 6, 1988) ("In strict medical terms marijuana is far safer than many foods we commonly consume."). The Judge stated further that "[a] smoker would theoretically have to consume nearly 1,500 pounds of marijuana within about fifteen minutes to induce a lethal response." *Id.* at 57-58. Based on his findings, after two years of testimony, Judge Young recommended that marijuana be transferred from Schedule I to Schedule II. *Id.* at 67-68. It is interesting to note that Olsen was a party to this suit. *Id.* at 4, 6.

195. Some people assert that a severe crackdown on the safer drug of marijuana leads directly to the sharp increase in crack use. *Washington Times*, Sept. 11, 1990, at A3. Others claim that decriminalizing marijuana in California "has freed up police resources for those more dangerous drugs . . . [saving the state] 'easily over \$1 billion' since 1976 in police, court and penal costs by not prosecuting casual pot smokers." *Id.* In addition, the Washington-based Drug Policy Foundation compares crime statistics from Amsterdam, where marijuana and hashish are legally available in youth clubs, to those of D.C. "Although Amsterdam has more people than Washington, it

more public officials are speaking out in support of the legalization of marijuana.¹⁹⁶

E. *Comparison of Attitudes Towards the Two Churches*

The Native American religion has been singled out to receive special protections by the Congress, the DEA, federal courts, state legislators, and state courts.¹⁹⁷ Preservation of the Native American culture, including the native religion, is federal policy.¹⁹⁸ That the American people show a sympathy and romantic affinity for the Native Americans is clear and is explicitly understood to be part of Congress' agenda:

[T]he country is now sympathetic to the cultural needs of Indians. The American Indian Religious Freedom Act of

reported only 11 drug-related homicides in 1989, compared with 262 in the U.S. capital." *Chicago Tribune*, May 24, 1990, at 2.

In an altogether different vein, Jack Herer of HEMP (Help Eliminate Marijuana Prohibition), said that "restoring the crop [of marijuana] would enable America to produce clothing fibers softer and more durable than cotton, paper fibers five or ten times longer lasting than wood pulp and seeds providing one of earth's most complete vegetable proteins." *Los Angeles Times*, June 11, 1990, at 3, col. 1. Indeed, HEMP states that an acre of marijuana as a crop, which needs no herbicides or pesticides, will yield as much paper as four acres of trees and as much energy as twenty-five barrels of oil. *UPI*, Aug. 27, 1990.

196. A California state advisory commission, which was created by the Legislature in 1969 and appointed by state agencies and the governor, recently recommended that California legalize marijuana. *Los Angeles Times*, August 18, 1990, at 35, col. 1. The *Los Angeles Times* reported on the pro-marijuana candidates running for election: 1) Kentucky gubernatorial candidate Gatewood Galbraith; 2) New Hampshire GOP congressional primary candidate, Michael Weddle; 3) Kansas Democratic congressional candidate, Mark Creamer; 4) incumbent U.S. Rep. George Crockett, Jr. (D. Mich.); 5) incumbent Democratic State Rep. Elbert Walton of Missouri; 6) incumbent Democratic State Sen. Joe Galiber in New York; and 7) incumbent Bill Mathesius, a Republican county executive in Mercer County, New Jersey. *Los Angeles Times*, July 29, 1990, at 24, col. 1. In addition, Dr. Fred Oerther, Oregon's Libertarian Party nominee for governor, is calling for the legalization of marijuana for personal use by adults. *UPI*, May 20, 1990.

Other supporters of legalization include: economist Milton Friedman, Columnist William Buckley, Jr., former Attorney General Ramsey Clark, Baltimore Mayor Kurt Schmoke, and U.S. District Judge Robert Sweet of New York. *Los Angeles Times*, July 29, 1990, at 24, col. 1. Even former Secretary of State, George Shultz has said that legalization should be considered. *Id.* The Americans for Democratic Action have recently approved a drug platform calling for the legalization of marijuana while rejecting the wholesale legalization of other drugs. *22 National Journal*, July 7, 1990, at 1639.

197. See *supra* notes 36-39, 70, 81-82, 97 and accompanying text.

198. See *supra* notes 97-99, 103.

1978 . . . is evidence of this concern. If we took steps to revoke the [NAC] Exemption, Congress, the Indians and the public would be "on our backs."¹⁹⁹

It is not inappropriate to suggest that a church originating in Africa, coming to America via Jamaica would meet with much less sympathy. Indeed, the EZCC denial may stem from racial animus where the general perception equates blacks with drugs and crime.²⁰⁰ Moreover, the specter of xenophobia cannot be dismissed. If Native Americans have a much higher level of political and popular support, this is exactly the type of case that should trigger the protections of the establishment clause.²⁰¹

V. CONCLUSION

Congress and the DEA have accorded a sacramental drug exemption to Native Americans regarding peyote.²⁰² The EZCC has tried for years to obtain a similar exemption regarding marijuana.²⁰³ This past June, the Supreme Court denied certiorari to the District of Columbia Court of Appeals decision denying the EZCC a sacramental drug exemption similar to that held by the NAC.²⁰⁴

The D.C. Court of Appeals decision to deny an exemption to the EZCC violates the establishment clause of the U.S. Constitution.²⁰⁵ This court's reliance on the DEA's statement that it has greater law enforcement control problems with marijuana will not satisfy an application of strict scrutiny. The DEA must explain why a very narrow exemption extended to one-hundred to two-hundred people would undermine its interest

199. Harry L. Myers, DEA Memorandum on OLC's Comment on the Peyote Exemption, Feb. 28, 1979, *appended to Amicus Brief Before DEA*, App. 14.

200. See USA Today, Nov. 29, 1990, at 10A (drug research director calls for commission to research "how drugs have preferentially blighted blacks"); Los Angeles Times, Sept. 28, 1990, at 6, col. 1 (discussion of origin of "disenfranchised blacks' problems of drugs, crime, gang violence, murder, AIDS, poverty, homelessness and poor education"); Los Angeles Times, Sept. 16, 1987, at 5, col. 1 (black community scarred from "centuries of cultural racism," as shown in studies presented at American Psychological Association meeting that black children generally prefer white dolls over black dolls — understood to be the result of the poor quality of African-American images in the country and rejection by the broader society).

201. See *supra* notes 141-44 and accompanying text.

202. See *supra* notes 36-39 and accompanying text.

203. See *supra* notes 61-62 and accompanying text.

204. See *supra* note 1 and accompanying text.

205. See *supra* notes 141-201 and accompanying text.

in preventing drug abuse when an unlimited exemption for peyote extended to 300,000 to 400,000 people does not.²⁰⁶ Additionally, there must be a forthright analysis of the current trends regarding the public's abuse of marijuana and the growing body of information concerning marijuana's use for medicinal purposes.²⁰⁷

The appeals court set forth various aspects of the NAC which made it particularly well suited for an exemption, and then failed to recognize that the EZCC has demonstrated significant similarity to the NAC regarding these aspects.²⁰⁸ For example, the EZCC views the recreational use of its sacrament as sacrilegious, has much stricter controls on its membership, and regards marijuana as a deity as does the NAC concerning peyote.²⁰⁹ Additionally, as a result of its proposed exemption, the EZCC would exercise much greater control over its ceremony than the NAC.²¹⁰

The EZCC is being denied a benefit accorded to another church because of its ritual, its traditions, because it is not indigenous, and because of the abuse of its sacrament by non-members. The EZCC has proposed to modify its tradition and ritual, to adhere to practices which are much more restrictive than those of the NAC, and to help with monitoring problems, to no avail.²¹¹ The reasons for the denial appear to flow from the fact that the EZCC is a relatively new religion to this country, of black origin, small and unpopular.²¹² The establishment clause was specifically written to protect these very types of religions from being denied benefits extended to more politically popular religious groups.²¹³ If the EZCC were accorded the basic protections guaranteed by the establishment clause, its right to partake of marijuana as its holy sacrament, in accordance with its narrow exemption proposed by Olsen, could not be denied.

206. See *supra* notes 155-67 and accompanying text.

207. See *supra* notes 155-67, 191-96 and accompanying text.

208. See *supra* notes 122-23 and accompanying text.

209. See *supra* notes 183-90 and accompanying text.

210. See *supra* notes 146-54 and accompanying text.

211. See *supra* notes 1, 94-96, 117 and accompanying text.

212. See *supra* notes 40-60, 145 and accompanying text.

213. See *supra* notes 141-44 and accompanying text.

