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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

OKLEVUEHA NATIVE AMERICAN)	CV 09-00336 SOM-BMK
CHURCH OF HAWAII, INC., et al.,)	Honolulu, Hawaii
Plaintiffs,)	February 22, 2010
vs.)	9:00 A.M.
ERIC H. HOLDER, JR., et al.,)	Defendants' Motion to
Defendants.)	Dismiss for Lack of Subject
_____)	Matter Jurisdiction and
)	Failure to State a Claim

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE SUSAN OKI MOLLWAY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:	MICHAEL A. GLENN 1188 Bishop St., Ste. 3101 Honolulu, HI 96813
For the Defendants:	JAMES C. LUH U.S. Dept. of Justice 20 Massachusetts Ave. NW Washington, D.C. 20530
Official Court Reporter:	Debra Kekuna Chun, RPR, CRR United States District Court 300 Ala Moana Blvd. Ste. C285 Honolulu, HI 96850 (808) 534-0667

Proceedings recorded by machine shorthand, transcript produced with computer-aided transcription (CAT).

1 MONDAY, FEBRUARY 22, 2010 9:05 O'CLOCK A.M.

2 THE CLERK: Civil 09-336SOM-BMK, Oklevueha Native
3 American Church of Hawai'i, Inc., et al., versus Eric Holder,
4 Jr., et al. And this case has been called for Defendant's
5 Motion to Dismiss for Lack of Subject Matter Jurisdiction and
6 Failure to State a Claim.

7 Counsel, please make your appearances for the record.

8 MR. GLENN: Thank you. Michael Glenn, representing
9 the Oklevueha Native American Church of Hawai'i, Incorporated,
10 and Michael Rex "Raging Bear" Mooney, plaintiffs, ready for
11 hearing.

12 MR. LUH: Your Honor, James Luh of the Department of
13 Justice on behalf of the government defendants.

14 THE COURT: Okay. Thank you.

15 Now, as is my normal practice, I did send out an
16 inclination. Did both sides get a look at that?

17 MR. GLENN: Yes, Your Honor.

18 MR. LUH: Yes, Your Honor.

19 THE COURT: Okay. So I'm going to start by checking
20 with Mr. Mooney. You know, I have a lot of concerns about this
21 case, and they're concerns about the position you're putting
22 yourself in. So in a civil case like the one you've brought,
23 you're going to have to follow the civil procedure rules.
24 Mr. Glenn knows all about this. And they include maybe having
25 to answer written interrogatories under oath. They include

1 your having to give testimony at a deposition possibly under
2 penalty of perjury. And to support the claims that you have
3 brought, you may have to give statements that will incriminate
4 you and possibly expose you to criminal charges. Those
5 criminal charges can mean that, you know, you face a federal
6 indictment here, and you may then, if convicted, face a prison
7 term. You know, it could be three years, four years longer.
8 And so I'm really concerned that you bring a civil suit that
9 kind of forces you to incriminate yourself and take on the real
10 possibility -- I mean, it's kind of begging for an indictment.
11 So I'm really concerned about that.

12 And I'm concerned that you're represented by an
13 attorney who may have a conflict of interest. I don't know
14 that, and I don't know if you and he have discussed it and you
15 have waived any conflict, but here -- let me explain how this
16 happened. Okay?

17 Now, your attorney owes you a duty of loyalty, but as
18 I understand it, Mr. Glenn himself -- and Mr. Glenn has been
19 before me in other matters, including another case that was a
20 criminal case that involved somebody who was raising as a
21 defense to criminal drug charges against him, he was raising
22 freedom of religion as a defense. He didn't win. He was
23 sentenced to prison. I can't remember, but I think he was
24 sentenced to four years in prison. And in the course of that
25 prior lawsuit, I learned that Mr. Glenn actually is -- I don't

1 know if he's a minister. He may be counsel for organizations
2 that advocate the legalization of cannabis. I'm not
3 complaining that he's doing that, but, you know, an attorney
4 who has that interest or is even a minister of a church with
5 that tenet may have a reason to pursue arguments that may hurt
6 you personally, and I'm very concerned about that. So if there
7 have not been waivers of that, then that's a real concern for
8 me.

9 So, for example, what I recall in that other lawsuit
10 was that Roger Christie came to testify, and he was perfectly
11 okay -- he said, "That's okay. That's okay if I'm going to go
12 to jail," and we had a discussion and I appointed counsel for
13 him, different counsel, independent, who didn't have any
14 interest in legalizing cannabis. That counsel talked to
15 Mr. Christie, and Mr. Christie then said, "I will not testify,"
16 because only at that point did he understand the danger he was
17 putting himself in, if he took the stand and testified.

18 I don't know that you have that -- I don't know
19 you've discussed this, and if you've discussed it, has it only
20 been with Mr. Glenn? If Mr. Glenn has a conflict, you may want
21 to discuss it with another attorney before you decide whether
22 to waive that conflict because, you know, I have a very clear
23 memory of Michael Trent Barnes taking the position of, "I don't
24 care. This is a principle. I'm here for it. That's fine.
25 That's fine," and then he was in tears when he was actually

1 picked up and placed in prison.

2 (Counsel conferring.)

3 THE COURT: And so I tell you all of these things
4 because I'm really concerned about this lawsuit that you
5 brought. Do you understand everything I've said?

6 MR. MOONEY: Yes, Your Honor. I do.

7 THE COURT: Okay. I don't know if Mr. Glenn has a
8 waiver of any conflict from you. It should be in writing. If
9 you haven't given him a written waiver, then, you know,
10 Mr. Glenn may well have a problem with proceeding without
11 getting that written waiver.

12 MR. MOONEY: Now, what waiver would you like? What
13 are you asking for?

14 THE COURT: Mr. Glenn has interests that may be --

15 MR. GLENN: I object, Your Honor. Any interests are
16 merely alleged.

17 MR. MOONEY: Actually, no, I came and approached him
18 and told him, This is what I want to do. I am aware of the
19 possibilities of me being prosecuted. That's why we're here
20 right now is because of the fear of the threat of us being
21 actually prosecuted for one of our sacraments.

22 THE COURT: Okay. Hold on. I don't want you to say
23 anything on the record now that puts you in that jeopardy.

24 But, Mr. Glenn, you need to get -- you need to have a
25 discussion.

1 MR. GLENN: Your Honor, you're assuming we haven't
2 had a discussion. You're also assuming way too many things for
3 a motion to dismiss. As I understand your role is to weigh the
4 evidence before you make a judicial decision. There's been no
5 evidence before you today to even discuss these matters with me
6 or my client. I take personal offense by even assuming that I,
7 one, would violate any professional rules of conduct or take a
8 case that is an obvious or even potential conflict of interest.
9 None of those things have occurred.

10 I also take personal offense that you've even
11 insinuated that I haven't properly informed my client based on
12 a prior case with a client who was not mine in a case in which
13 you specifically prohibited the defendant from even mentioning
14 that he was licensed reverend in a sincere religion, and so we
15 had to change his plea. Your pretrial ruling that religion
16 takes no place in a cannabis trial prevented my client from
17 even having a trial, forced him to change his plea. And if you
18 recall, there was no, zero, complaints that I was an
19 ineffective counsel by either Mr. Christie or Mr. Barnes. For
20 you to even assume or allege that Mr. Barnes hasn't been
21 properly counseled by me or any other counsels that you do not
22 even know he's even spoken to is beyond this court's kuleana.
23 I object wholeheartedly to these proceedings. Let's proceed
24 with the motion, please.

25 THE COURT: So as I said, I feel it is my duty to

1 prevent somebody from getting himself by bringing a civil case
2 into a criminal case. So I know Mr. Mooney thinks he's going
3 to prevent being indicted criminally by proceeding here. In
4 fact, he may -- he may guarantee that he's going to be indicted
5 by proceeding with this civil case. That's the concern I have,
6 and I don't know that he fully apprehends that.

7 MR. MOONEY: I've been aware of this from the very
8 beginning, Your Honor. I am fully aware of this. And he has
9 not coerced me or any way. This is all with my church and
10 myself.

11 THE COURT: Okay. I will tell you that Mr. Glenn has
12 misrepresented my earlier ruling, and if that's what you're
13 relying on, his representation of an earlier ruling I made,
14 then I'm really concerned about you. The earlier ruling was
15 not that religion would never play a role in a cannabis trial.
16 The earlier ruling was that his client did not establish a
17 right to rely on RFRA as a defense in his criminal case.
18 Whether another person could do that was not something that was
19 before me. But I ruled that Mr. Glenn's earlier client Michael
20 Trent Barnes did not establish a right to rely on that defense,
21 and that required a lot of study and there was a lot presented,
22 but it was not a blanket ruling.

23 As I said, I have a really clear memory of Mr. Barnes
24 being in tears after one night in prison. And he was -- he was
25 found to test dirty during trial. Pretrial Services brought

1 that to my attention. They brought to my attention some other
2 circumstances surrounding that. I revoked bail. Mr. Barnes
3 went to prison the next day. He stood before me in tears and
4 he pled guilty.

5 MR. GLENN: Your Honor, this suit was brought after
6 the seizure of cannabis intended for the church. The
7 department -- Drug Enforcement Agency is free to arrest the
8 recipients of that cannabis well before bringing suit. If
9 you're insinuating that because he's now fighting for his
10 rights, they're more inclined to bring suit, I hope you're
11 mistaken.

12 And if what you're insinuating is that perhaps the
13 UDV-USA Church, when they had their hoasca tea seized by DEA,
14 should have just given up and said, "Oh, my God, I'm glad we
15 didn't get arrested. We'll just stop using our sacrament,"
16 rather than file a civil suit, saying, "You can't do this.
17 It's our right," and get a unanimous Supreme Court decision in
18 their favor, saying that, yes, they can import and distribute a
19 Schedule I controlled substance because of their religious
20 freedoms. If they hadn't brought that suit, if the judge had
21 scared them by saying, Now, you could get arrested now, if you
22 try to say that was your hoasca, then they would have never had
23 a precedential ruling from the Supreme Court.

24 I believe what you're trying to do, Your Honor, is
25 scare Mr. Mooney with the threat of jail, and I don't know

1 that's this court's place.

2 THE COURT: Mr. Mooney, I'm not trying to frighten
3 you. I just want to make sure that when you proceed you
4 understand the risk of proceeding. And I also want to make
5 sure that if you are proceeding relying on the advice of
6 counsel, that you understand any possible conflict that there
7 may be with this particular counsel. I only say that given my
8 past experience with this particular counsel, and I remember in
9 the earlier case that it was represented to me that Mr. Glenn
10 was a minister of the Hawai'i Cannabis Ministry, I think it
11 was.

12 MR. MOONEY: That's fine. That's his business. I am
13 a Native American medicine man, okay, Your Honor.

14 THE COURT: I'm sorry?

15 MR. MOONEY: I am a Native American medicine man.
16 Okay. Cannabis is my medicine. That is why we're here today.
17 Okay. I am aware that I can be prosecuted or you guys can
18 attempt to prosecute me. I'm fully aware of this, and I'm
19 aware of the consequences of that. Okay. He's not going to
20 coerce me into anything. If he's a minister, that's his
21 business.

22 THE COURT: I don't think you understand what I'm
23 saying. I'm not worried that Mr. Glenn will coerce you into
24 doing anything.

25 MR. MOONEY: Okay. Maybe I'm using the wrong word.

1 THE COURT: I am worried that the -- that the advice
2 that he's giving you --

3 MR. GLENN: Your Honor, there's been no evidence as
4 to any advice or any discussion between counsel and client.
5 You are speculating based on I don't know what.

6 THE COURT: Well, as I said --

7 MR. GLENN: You have no evidence before you to make
8 your statements.

9 THE COURT: Well, I have an earlier case, and in the
10 earlier case --

11 MR. MOONEY: Well, that's not the case with us.

12 THE COURT: No, I understand that. But, you know,
13 maybe Mr. Glenn is no longer a minister.

14 MR. GLENN: Your Honor, for you to even mention, one,
15 what my religion may or may not be or, two, that I may or may
16 not be a minister based on something you were informed goes
17 beyond judicial sanctity. What -- who told you what, when,
18 where, and how is what Mr. Mooney should be hearing, not I have
19 some indication that he may or may not -- Your Honor, evidence
20 is what you base your discussions with parties on.

21 THE COURT: I think you told me --

22 MR. GLENN: It sounds like you're basing your
23 discussion on something inside your head that no one else put
24 there but yourself.

25 THE COURT: My recollection is that you made that

1 representation to me in the earlier case that you yourself were
2 a minister of the Hawai'i Cannabis Ministry. That's my best
3 recollection.

4 MR. GLENN: No, Your Honor, that's not my
5 recollection. If you have perhaps the minutes or transcripts,
6 we wouldn't have to guess. But whether or not I'm a minister
7 in any religion is 100 percent irrelevant, and that's
8 irrelevant, Your Honor, as whether you're in any type of
9 religion.

10 THE COURT: Well, I don't think it's irrelevant if
11 you're raising that very same religion as the basis for a
12 claim, and if --

13 MR. MOONEY: Maybe if I could share with you my
14 problem.

15 THE COURT: It is true that religion is normally
16 irrelevant, but in this case religion is highly relevant. It's
17 the whole basis --

18 MR. MOONEY: Definitely. And if I could share with
19 you --

20 THE COURT: It's the whole basis of your claim.

21 MR. MOONEY: -- about the Native American Church.
22 Okay. Back in the day, back in about 1875 --

23 THE COURT: I can hardly hear you.

24 MR. MOONEY: Back in about 1875, Quantum Powell, when
25 he was actually protecting the right for us to use peyote as a

1 sacrament when we were being persecuted and killed for doing
2 our ceremonies, okay, which, you know, the peyote is a very
3 strong entheogen, okay, as well as cannabis. Excuse us. To us
4 peyote is the grandfather medicine. Okay. Then at that time
5 cannabis was not illegal. We didn't have to fight for the
6 right to use -- use cannabis, even though it was used then and
7 it was used way prior to that. You know, there's actual record
8 of George Washington telling his gardener, Sow the Indian hemp.
9 This is a direct letter to his gardener, Sow -- make the most
10 of it. Sow all the Indian hemp that you possibly can. Where
11 did they get that? They got it from us Native Americans.

12 Okay. Peyote is our grandfather medicine, our
13 sacrament, is the basis, the foundation of what we made the
14 church so that we are protected. Okay. At the time when we
15 were formulating the Native American Church cannabis was not
16 illegal. Okay. Now, to Native American, Native Americans,
17 cannabis is our grandmother medicine. It is very sacred to us.
18 We are here for the religious right and the use -- for the
19 religious use of cannabis. That is the reason.

20 What you're talking about here with Mr. Glenn, I
21 don't have anything to do with it. I don't understand it. I
22 do understand that, yes, you guys can try to prosecute me.
23 Okay. Even though I never had any possession of the cannabis.
24 Okay?

25 THE COURT: Are you understanding the possible

1 conflict of interest?

2 MR. MOONEY: I don't see any conflict of interest; so
3 I don't understand it.

4 THE COURT: Then I want to understand it. I don't
5 know what Mr. Glenn's present status is.

6 MR. MOONEY: Okay. This is about Oklevueha Native
7 American Church. Whatever he is and what he's about, that's
8 fine. I don't really care. He's here to represent me and my
9 church.

10 THE COURT: It's clear to me you don't understand the
11 possible conflict.

12 MR. GLENN: Your Honor, there is no conflict.
13 Whether alleged, possible, perceived, there is no conflict of
14 interest between any of my prior clients and Reverend Mooney.
15 Zero. Zero conflict. And for you to continue to allege that
16 there may be a potential conflict when it hasn't been brought
17 up by any party before you is further proof that this is all
18 happening up in your head.

19 THE COURT: So as I say, if it is indeed part of what
20 Mr. Glenn advocates on his own behalf that marijuana should be
21 legalized, then --

22 MR. MOONEY: I know of a lot of people that believe
23 that.

24 THE COURT: I'm sorry?

25 MR. MOONEY: I know of a lot of people, actually over

1 half our country believe that it -- religious or not religious,
2 over half of our country actually would love to see this war
3 get over with.

4 THE COURT: And they are free to believe that and to
5 advocate it. What a lawyer is not free to do is to let that
6 interest in having marijuana legalized cause him to give advice
7 to a client that puts the client at risk of criminal charges.
8 And that's the conflict that --

9 MR. MOONEY: There's no conflict because he's not
10 doing that.

11 MR. GLENN: Thank you.

12 MR. MOONEY: Okay. This is all on my part. That's
13 what I've told you from the very beginning. I do know what
14 you're trying to say.

15 THE COURT: I need for Mr. Glenn to get a written
16 waiver.

17 MR. GLENN: I don't think you do.

18 THE COURT: I need for Mr. Glenn to get a written
19 waiver from Mr. Mooney.

20 MR. GLENN: Saying what, Your Honor?

21 THE COURT: Disclosing -- you don't have to show it
22 to me, but it has to disclose your possible interests and
23 describe how that might be perceived by him or by anyone else
24 as influencing the advice you give him.

25 MR. GLENN: You say I have to. What if I don't or it

1 doesn't say that?

2 THE COURT: Then if he loses and he brings a
3 complaint against you with the disciplinary authorities, you
4 will not have the protection.

5 MR. GLENN: Okay. So how on earth is that the
6 court's concern at all?

7 THE COURT: It's always my concern to make sure --

8 MR. GLENN: Okay. Well, we appreciate your concern,
9 but as I mentioned however many moments ago, can we get on with
10 the motion, please.

11 MR. MOONEY: I do understand what you're saying, and
12 there is not --

13 THE COURT: You can be seated. I've counseled you
14 that you should get -- you should talk about your counsel with
15 this and you might even want independent counsel, not just
16 Mr. Glenn, to discuss whether Mr. Glenn has a conflict. Okay.
17 Do you understand?

18 MR. MOONEY: Yes, I do.

19 THE COURT: Okay. You can sit down.

20 Okay. Now, I would like to know from Mr. Glenn how
21 much cannabis was seized, where it was seized, and who seized
22 it?

23 MR. GLENN: I'm sorry. You're asking me?

24 THE COURT: I am.

25 MR. GLENN: Wouldn't you rather ask the DEA who

1 seized it? We didn't -- we've never received it. The DEA has
2 it. I gave them the airbill number. Perhaps you're asking the
3 wrong party.

4 THE COURT: Mr. Luh, are you able to answer the
5 question?

6 MR. LUH: Your Honor, at this stage the motion is
7 attacking the allegations of the complaint on their face, and
8 there's no dispute as to the facts. The court simply assumes
9 the facts in the complaint to be true.

10 THE COURT: Right.

11 MR. LUH: The facts alleged in the complaint state
12 that -- the allegations of the complaint state that a FedEx
13 delivery of -- containing cannabis was seized by federal Drug
14 Enforcement authorities in Hawai'i. The court doesn't -- I'm
15 mean, I'm sorry. The government does not take any factual
16 position on this at this time. It may do so later on in the
17 answer or any further proceedings.

18 MR. GLENN: I'm sorry. I didn't get a single answer
19 as to your question of how much, where, and who. Not a single
20 answer. Could you ask it again and direct counsel to please
21 answer your specific questions.

22 THE COURT: Well, the reason that I was asking you,
23 Mr. Glenn, was that in the opposition to the motion to dismiss,
24 you attached as exhibit 2 a copy of a FedEx --

25 MR. GLENN: Incorrect, Your Honor. That's attached

1 to the affidavit, not the opposition.

2 THE COURT: Okay. Attached to the affidavit of
3 Mr. Mooney in opposition to defendant's motion to dismiss --
4 that's the title of the document, quote, Affidavit of Michael
5 Rex "Raging Bear" Mooney In Opposition to Defendant's Motion to
6 Dismiss -- there is an exhibit 2, and that is a FedEx U.S.
7 airbill. And it says "total weight," and I can't quite tell
8 what that total weight is. So since it's your exhibit, can you
9 help me understand this exhibit.

10 MR. GLENN: Not whatsoever, Your Honor. We didn't --
11 we never received this package. The church -- Mr. Mooney has
12 no idea what was sent to him or who sent it. However, the DEA
13 who is in possession of the cannabis we're seeking to have
14 returned should be asked that question once again: how much,
15 when, and where was it seized? If you refuse to ask the people
16 who have this cannabis that question and persist on asking
17 Mr. Mooney to incriminate himself, I will object.

18 THE COURT: I'm not asking Mr. Mooney --

19 MR. GLENN: You're asking Mr. Mooney to say how much
20 pot was sent to you, are you not?

21 THE COURT: No, I'm not.

22 MR. GLENN: Then what is it you're asking, Your
23 Honor?

24 THE COURT: How much cannabis was seized --

25 MR. GLENN: Being sent to you.

1 MR. MOONEY: I don't really --

2 THE COURT: Well, you attached this document.

3 MR. GLENN: Correct.

4 MR. MOONEY: Your Honor --

5 MR. GLENN: To show that it's not a speculative,
6 hypothetical thing we're dealing with. This is a real
7 controversy dealing with real cannabis that was actually seized
8 by the government, not something that may at some time in the
9 future be seized through this plan to continue to violate the
10 law. This is the case where we're saying, just like the
11 UDV-USA Church, they seized the sacrament. We would rather sue
12 in civil court, putting our butts on the line, saying, Yes, we
13 use it as a sacrament, and, yes, we want it back, than live in
14 fear of having all cannabis shipments seized and DEA agents
15 knocking at your door and arresting you in the middle of the
16 night because they don't like your sacrament.

17 THE COURT: I'm not really asking him to incriminate
18 himself --

19 MR. GLENN: You're asking how much cannabis. I don't
20 see how you can get more incriminating.

21 THE COURT: Well --

22 MR. MOONEY: Your Honor, I'm a very, very honest guy.

23 THE COURT: I know. You know what, I can't allow you
24 to just stand up and speak. When you are represented by an
25 attorney, there's a difference between what you can do when

1 you're represented by an attorney and when you're represented
2 by yourself. When you're represented by an attorney, you've
3 got to speak through your attorney. So I need you to sit down,
4 unless I ask you directly. Okay? So at this point I have to
5 deal with your attorney.

6 And in this affidavit of Mr. Mooney's in opposition
7 to defendant's motion to dismiss, paragraph 9 says, "Defendants
8 have -- paragraph 8 says, "Defendants have confiscated cannabis
9 from the plaintiffs and have refused to return it to
10 plaintiffs."

11 Paragraph 9 says, "The cannabis intended for myself
12 and my church was sent to me on June 8, 2009, as evidenced by
13 the attached FedEx U.S. airbill, exhibit 2."

14 Paragraph 10 says, "Defendants have seized this
15 cannabis sacrament from us at some point prior to its delivery
16 to myself and the NAC."

17 In light of those statements in the affidavit, I
18 think Mr. Glenn's display of outrage that I'm asking Mr. Mooney
19 to incriminate himself is nothing but a big act. I mean,
20 that's exactly what it says. So --

21 MR. GLENN: Your Honor, I'm sorry to interrupt. If I
22 were to ship some cannabis to you and it got seized, would you
23 be able to tell the court how much it was or who seized it or
24 where? Or would you say, I have no idea. I never received the
25 cannabis. You're asking Reverend Mooney to, one, either

1 implicate himself that he had something to do with this
2 cannabis being shipped prior to it being shipped or, two,
3 implicate that, yes, indeed, he knew what it was. None of
4 that's in the affidavit. In fact, what's in the affidavit is
5 he never got it. The people who do have it is the DEA. If
6 you're interested truly in how much cannabis we're talking
7 about, force the DEA to tell you. They have the cannabis.

8 THE COURT: It says "the cannabis intended for myself
9 and my church was sent to me on June 8, 2009."

10 MR. GLENN: Right. Because that's what the airbill
11 says. But it also says "seized prior to delivery." You're
12 asking him to name the contents of the package he never got,
13 assuming he knew what was in it. There's no such assumption to
14 be made, Your Honor. Just as if I told you if I sent you
15 cannabis. Could I assume you knew what was in it? Could I?
16 Of course not. Would you be guilty if someone mailed cannabis
17 and they seized it at the airport before you got it? Of course
18 not.

19 THE COURT: You say, "Defendants have seized this
20 cannabis sacrament from us. They've refused to return it to
21 plaintiffs."

22 MR. GLENN: Yes. All that's correct, but you're not
23 listening to the words that I'm saying. I'm saying how did he,
24 one, know what was in it? Or, two, how can you assume he even
25 knew it was being shipped to him? For all you know, Your

1 Honor, he found out about the cannabis after it didn't get to
2 him when someone said, Did you like what I sent? And he goes,
3 What did you send? And then he did working to find out what
4 happened. For all you know, for all the evidence that's before
5 you, that's the only logical assumption I draw. And you're --

6 THE COURT: Well, you know what, that's great because
7 then this case is not ripe before me because, if cannabis was
8 sent to him without his knowledge and he wasn't expecting it,
9 he need have no fear that he is going to be indicted, and,
10 therefore, I have no case or controversy in front of me.

11 MR. GLENN: The complaint makes no mention that he
12 didn't know. I'm just saying you can't infer certain things.

13 THE COURT: Well, if -- the plaintiff brought this
14 suit. If you want me to make any decision about whether you
15 can or cannot have cannabis to use in the way that you describe
16 in your complaint, then you don't get to come to court and say,
17 Can you just tell me, yes or no. You have to have what is
18 called a case or controversy. I have to think that there is
19 some reason that you need to know right now. And as I
20 understood it, the reason that you were presenting to me was
21 your fear of prosecution. It cannot be a theoretical fear.
22 You don't have to actually be indicted to bring this, but it
23 has to be a fear of imminent prosecution.

24 MR. MOONEY: Okay.

25 THE COURT: So I'm having some trouble with Mr. Glenn

1 taking the contradictory position of, It's imminent because,
2 look, they seized it. But on the other hand, Gee, he can't say
3 that it was intended for him. That's none of your business,
4 Judge; so, you know, how dare you infer that. Well, you can't
5 have it both ways. You either have a ripe case or you have an
6 unripe case.

7 MR. GLENN: Your Honor --

8 THE COURT: And so that's the problem that you're in.

9 MR. GLENN: Perhaps you're misreading the actual law.

10 THE COURT: I don't think so. You better tread
11 carefully right now, Mr. Glenn.

12 MR. GLENN: Perhaps you're forgetting the word
13 "enforcement" because it's not just prosecution; it can be
14 enforcement. Enforcement can mean the seizing of property.
15 Whether or not prosecution follows is irrelevant, if you're
16 dealing just with the enforcement of the statute.

17 He may not fear ever getting arrested for small
18 quantities of cannabis, but you know what, he definitely fears
19 having his sacred sacrament stolen from him by the DEA
20 continually with no recourse. You don't have to prove, I am
21 definitely going to get arrested, in order to seek recourse in
22 this court. You can say, The enforcement of this statute
23 violates my right. Whether or not the criminal prosecution
24 occurs is misreading the law, Your Honor.

25 THE COURT: Okay. And then can you look at the third

1 question that I have in my inclination. We have a Ninth
2 Circuit case cited that says that you cannot bring a claim
3 under the Religious Land Use and Institutionalized Persons Act
4 against the federal government, and I want to understand how
5 you can bring such a claim which you seek to bring in your
6 complaint.

7 MR. GLENN: Well, I would like to understand why you
8 even think we're bringing such a claim. We're not. If you
9 read each of our numbered counts, nowhere is RLUIPA mentioned.
10 In fact, the only cite to RLUIPA is required when you're
11 dealing with 2000cc-5, "Definition of religious exercise."
12 That's what I specifically cited and that's why I specifically
13 cited it. You cannot make reference to RFRA without
14 referencing RLUIPA and the definition of religious exercise,
15 which is the only thing plaintiffs have done.

16 For the court to say plaintiffs assert a claim under
17 RLUIPA misreads the complaint. And if you want to point out to
18 me where in my complaint I assert a claim, I am open to
19 suggestion.

20 THE COURT: Okay. So you don't have a claim under
21 that.

22 MR. GLENN: No, Your Honor. But what we mention, as
23 made clear -- perhaps I'll reread it with emphasis so that the
24 court can have a thorough understanding of what we meant. In
25 the paragraph 33 we indicate that "the threat that Mr. Mooney

1 and members of the NAC will be criminally prosecuted is
2 exceedingly real, and any threat of criminal prosecution of
3 American citizens for engaging in religious devotional
4 practices and communion of sacrament during their law-abiding
5 lives substantially burdens the practice of plaintiffs'
6 religions within the meaning of RFRA or RLUIPA."

7 So we're talking about religion as defined by RLUIPA.
8 That's all we've done. For you to say we're asserting a claim
9 either misreads it or inserts stuff that wasn't there.

10 THE COURT: Okay. Okay.

11 MR. GLENN: Do you thoroughly agree with me, Your
12 Honor?

13 THE COURT: I don't know, but I understand your
14 position.

15 MR. GLENN: Or are you confused? You need more
16 explanation?

17 THE COURT: No, I understand the position you're
18 taking.

19 MR. GLENN: Thank you. So you agree that perhaps we
20 are not asserting a claim --

21 THE COURT: You know what, I'm not a witness on the
22 stand that's going to be cross-examined by counsel.

23 Mr. Luh, would you like to add anything here?

24 MR. LUH: Yes, Your Honor.

25 Your Honor, the court in *Thomas versus Anchorage*

1 *Equal Rights Commission* requires a genuine threat of imminent
2 prosecution. That's on page 1139 in the opinion. And
3 examining -- to examine whether there's a genuine threat of
4 imminent prosecution, the court examines whether there's a
5 concrete plan, a specific threat of enforcement, and a history
6 of enforcement.

7 Now, Mr. Glenn is now stating that his client had no
8 idea what was in the package --

9 THE COURT: That sure sounded --

10 MR. LUH: Or may have no idea. Assuming -- even
11 assuming that he didn't -- well, if he didn't know what was in
12 the package, the case for ripeness under the Thomas factors is
13 even weaker than it is.

14 THE COURT: Yes. I agree.

15 MR. LUH: But even -- even if you would go to the
16 complaint as it was drafted, which states in paragraphs 31 of
17 the complaint and paragraphs 9 and 10 of the affidavit, if you
18 assume that there was cannabis in the package, the Thomas
19 factors still would not be satisfied. There's no indication in
20 these allegations from these facts alleged in the complaint and
21 in the affidavit that there would be any risk of any future
22 seizure, be it criminal or civil, of materials from the
23 plaintiff. And the allegations of the complaint and the
24 affidavit both state that this seizure occurred before the
25 delivery of the package; therefore, there's no -- there's no

1 risk of any future action, which is the test that Thomas sets
2 out.

3 Now, it's also -- I'd also like to point out that
4 it's not really the plaintiff's subjective fear of prosecution
5 that's at issue. It's whether there's a genuine threat of
6 imminent prosecution. Of course, no plaintiff is going to
7 bring a lawsuit if they don't have a subjective fear that
8 they're going to face criminal or civil sanctions. The
9 plaintiffs in Thomas also must have had some subjective fear.
10 The test is whether there are facts from which the court can
11 discern a genuine threat of imminent prosecution.

12 Now, with respect to the RLUIPA claim, the reason it
13 was addressed in our motion to dismiss was because the statute
14 was cited in the complaint. If Mr. Glenn is saying that the
15 complaint is not intending to assert claims under RLUIPA, the
16 government obviously has no problem with that.

17 Now, there are many other points made in our
18 memorandum that we could go through. I'm not sure to what
19 extent you want us to rehash our arguments.

20 THE COURT: Well, I don't think I need anything more.
21 I'm highly likely to issue a written order in the next day or
22 so, and then we'll go from there.

23 MR. GLENN: Your Honor, are you going to give
24 plaintiff's counsel a chance to argue the motion?

25 THE COURT: Sure. I thought you had said everything

1 you wanted to already.

2 MR. GLENN: We were only arguing your inclinations,
3 Your Honor. We never got a chance to talk about the motion.

4 THE COURT: Okay. Go ahead. You didn't say that
5 much. That's why I --

6 MR. GLENN: I'm sorry?

7 THE COURT: I thought you had already responded in
8 your comments.

9 MR. GLENN: I was responding to your point-by-point
10 inclinations that you've given us. That's what you've directed
11 me to respond to. At no point did you say, You may proceed
12 with your motion.

13 THE COURT: I know. What I was saying was that I
14 thought what Mr. Luh said was pretty much on the same subject
15 matters that you had already addressed. For example, he said,
16 If you don't have this claim that we all thought you had, fine.
17 I don't see what more you need to say on that. He said, You
18 know, you have this ripeness issue, if you didn't know it was
19 coming to you. You and I have already discussed that. But,
20 you know, you're welcome --

21 MR. GLENN: Thank you, Judge.

22 THE COURT: -- to go ahead.

23 MR. GLENN: Because you never really gave us a chance
24 to discuss *Thomas v. Anchorage*. And, see, in that case what
25 they said is you can't have a case that's based on the

1 occurrence of unforeseeable events. So what the defendants
2 would have you believe is you can't base on -- a case on
3 something that maybe he's going to get cannabis seized; in
4 fact, that's not even likely. Which is bull hockey. It's a
5 hundred percent likely that not only will his future cannabis
6 be seized by the DEA, but, eventually, he's going to get
7 arrested by the DEA for possession of cannabis.

8 The reason we're bringing this suit isn't just
9 because you can get arrested; it's because the defendants in
10 this case do not allow for cannabis to be used or consumed by
11 anyone for any reason in this country at all. So is it likely
12 that someone who admits that cannabis is required by their
13 religion and a sacrament considered most holy is going to be
14 hassled by the DEA? Of course.

15 Now, is he required to show that prosecution is
16 imminent? No, not at all. All he's required to show is that
17 enforcement is likely.

18 Well, let's look at the past history. Has
19 enforcement occurred? Of course it has. They seized the
20 cannabis. That's why we're here. Now, are they willing to
21 give the cannabis back and solve this problem? No, not at all.
22 Are they willing to allow Mr. Mooney the same exemptions he has
23 in place for peyote as for cannabis? No, not at all. In fact,
24 they're not even willing to allow Mr. Mooney to fight about
25 that in court. They want this case dismissed. How dare he

1 assert his rights in federal court.

2 We're here for a trial. All the evidence that Your
3 Honor needs about how much cannabis, when, where, that's going
4 to come out at trial. There will be discovery. There will be
5 evidence. All the evidence Your Honor needs about his religion
6 and religious practices and how it's substantially burdened by
7 the enforcement of the Controlled Substance Act against him,
8 that will come out at trial.

9 But this isn't a trial. This is a motion saying this
10 isn't ripe; this case isn't ripe because there's no actual
11 controversy. Give him back the cannabis, then, if there's no
12 actual controversy because, if they're going to insist on being
13 able to seize all future shipments and keep the shipment they
14 seized, it's the definition of a controversy. He's not sitting
15 here saying, I plan in the future someday to use cannabis.
16 He's saying, I'm a member of a church that next to peyote only
17 uses cannabis.

18 And perhaps the court wasn't familiar with the
19 history of the Native American Church. It's not a church that
20 uses drugs in sacrament. The church is created only for
21 ceremony and sacramonial purposes. That's the only reason this
22 church exists is to do controlled substances. For you to say,
23 Well, the fact that the government can prohibit one of your
24 controlled substances, seize it at will, and brand you a
25 criminal, that's not ripe for discussion, that's not judicial

1 standing to proceed. Of course it is. The only thing lacking
2 in this case is the arrest of Mr. Mooney. Everything else has
3 happened.

4 Are you -- if you were to deny or grant the motion
5 today, what you're basically saying is you have to wait for you
6 to get arrested for this court to think there's a problem
7 because up until then this government's going to seize all your
8 cannabis, and there's nothing you can do about it. He doesn't
9 want to hear that. And if that's what you're going to rule,
10 you're going to have to explain it to him in a court of law on
11 how that's proper and how because he wasn't arrested yet, wait
12 until you get arrested. It's not going to fly.

13 THE *Thomas v. Anchorage* case says, Unforeseeable
14 events, renting to someone that you may not have ever rented
15 to, or there's no history that you've ever been problemized by
16 failing to rent to nonmarried couples, there's direct evidence
17 before you, evidence, that he's been harmed by application of
18 the statute, harmed in significant ways. His sacrament, his
19 most holy substance that he needs to use, has been confiscated.
20 Confiscated.

21 Now, I guess the DEA is going to say, Be lucky you're
22 not arrested. But as I mentioned in the UDV-USA case, he's not
23 going to bend over and take it again. He's not going to say,
24 Boy, I'm glad I didn't get arrested. He's going to stand up in
25 this court for his rights under the United States Constitution

1 and the Religious Freedom Restoration Act and the American
2 Religious Freedom Act and say, Protect me. Protect me from the
3 overzealous DEA, who feels any and all use of cannabis is
4 prohibited and we can seize it at any time, and we don't care
5 if you're allowed to use peyote. We're going to take your
6 cannabis because cannabis can hurt you. Peyote, even though
7 it's a Schedule I drug and he has the right to use it, I guess
8 they're okay with that; they can't seize his peyote. But they
9 think there's no right yet for religious cannabis use. We can
10 seize that all we want. And I tell you what, if you dare make
11 a peep about giving it back, we're going to send DEA to your
12 door to arrest you. So shut up or get arrested is what the DEA
13 is basically telling Mr. Mooney.

14 He's not going to stand for that. And, yes,
15 Mr. Mooney is a very religious man, a very righteous man, a
16 very law-abiding man. He has a specific threat of enforcement
17 against him because, one, it's probably -- it's already
18 occurred. And, two, unless the DEA is going to stand up today
19 and say, We're not going to seize future cannabis, then there's
20 a direct likelihood he's going to get his future cannabis
21 seized.

22 It boggles my mind how anyone can think, Well, just
23 because he got one package of cannabis seized doesn't mean he's
24 ever going to have any problems with the DEA. In fact, that
25 tends to me to think of course he's going to have problems with

1 the DEA. They know who to look for now.

2 As far as the court's concerns in the Snowbowl case
3 where the court indicated that -- well, RLUIPA applies, but,
4 actually, in reality we all know it doesn't. We feel our case
5 clearly meets the standard set forth in the Snowbowl case. I
6 mean, that case is so inapposite to this case, it's not worthy
7 of discussion. The only case that I'm wondering, and my client
8 wonders also, why the court has failed to even mention or even
9 address or even agree that it's on point is the UDV-USA case,
10 the unanimous Supreme Court decision that ruled Schedule I
11 substances can be both imported and distributed due to
12 religious freedom. That seems to be on point here. They have
13 their sacrament seized; they sued in civil court. He had his
14 sacrament seized; he's suing in civil case.

15 If the court would like to explain to Reverend Mooney
16 how that's not factually significant or is inapposite to this
17 case, we're all ears, but we feel that case controls.

18 MR. LUH: Your Honor, can I -- Your Honor, going back
19 to the ripeness issue, the test in Mooney -- or the test in
20 Thomas, I'm sorry, is the genuine threat of imminent
21 prosecution. I agree the prosecution can include either civil
22 or criminal enforcement, but what Mr. Glenn is talking about
23 does not establish a concrete plan. What he's talking about is
24 a generalized intent to use marijuana in the future, and the
25 court made clear in Thomas on page 1139 that generalized intent

1 of that nature without any specifics does not amount to a
2 concrete plan.

3 With regard to the past seizure that may have
4 affected Mr. Mooney, first of all, as I stated earlier, it's
5 not clear at all, you know, whether there was any -- it's not
6 now clear whether he knew whether there was cannabis in the
7 package. But even assuming that he did know that cannabis was
8 in the package, the past seizure of this package before it ever
9 reached him is no indication that any action will be taken
10 against him in the future.

11 THE COURT: Well, I --

12 MR. LUH: I look at *Los Angeles versus Lyons*, which
13 is cited in both our opening brief and our reply brief, in
14 which the Supreme Court held that a person who had had a police
15 chokehold applied to him could not seek an injunction
16 preventing future use of police chokeholds against him because
17 he hadn't sufficiently alleged facts that would suggest that he
18 was going to have a future encounter with the police where he
19 would suffer a chokehold.

20 THE COURT: Well, I guess what I don't have is I
21 don't have a concrete -- I don't have allegations of a concrete
22 plan by Mr. Mooney to bring in more cannabis that might be
23 subject to seizure. I understand Mr. Glenn to be arguing that
24 Mr. Mooney has the use of cannabis as part of his religion.
25 That may be. But unless he has a concrete plan to get more

1 cannabis in for that use, then I don't understand why this is
2 ripe. And that's what I'm missing. I hear the concern that,
3 if he does this again, it may get seized again. What I don't
4 have is evidence of a concrete plan to bring in cannabis.

5 MR. LUH: Right. We argue that there's no concrete
6 plan, no specific threat of enforcement, and that the history
7 of enforcement is quite weak, as in Thomas.

8 Now, Mr. Glenn also referred to the UDV case. That
9 case was deciding an issue about the government's compelling
10 interest defense under RFRA 2000bb-1. That defense is not
11 apposite at this point. Certainly, the government may raise
12 defenses later in this litigation, but the government has not
13 yet raised defense -- has not yet filed an answer.

14 Does Your Honor have any other further questions?

15 THE COURT: No. Thank you.

16 MR. GLENN: Your Honor, let me see if I got this
17 right. Unless Mr. Mooney says, On this day and at this time I
18 intend on acquiring and possessing more cannabis, then he
19 hasn't articulated a concrete plan to possess more cannabis in
20 the future? As made clear by the complaint, his religion uses
21 cannabis as a sacrament. It's used all the time, as often as
22 can be. He will continue to use cannabis. It's not
23 speculative. And if you want it to be more concrete, perhaps
24 Mr. Mooney himself can stand up today and testify that, Yes,
25 within the next few days he will acquire and possess cannabis,

1 if that's required --

2 THE COURT: This is not --

3 MR. GLENN: -- because, basically, what you're saying
4 is, Well, they got one shipment. There's no proof he's going
5 to get more shipments. He doesn't need proof he's going to get
6 more shipments. All he needs to assert is he uses cannabis
7 sacramentally all the time. Whether or not he gets it shipped,
8 he grows his own, or someone gives it to him who lives next
9 door to him, he's violating federal law and risks being, one,
10 thrown in jail and, two, being put on a trial where he's not
11 even allowed to mention his religious rights. It's happened
12 before. It can happen again.

13 If you would really like Reverend Mooney to stand up
14 and articulate a concrete plan while we're here taking
15 evidence, he can. If you feel that the complaint wasn't
16 concrete enough, he'll be glad to testify, one, he's not going
17 to be bullied into giving up his cannabis use; and, two, he's
18 not going to be coerced by anyone into giving up his cannabis
19 use; and, three, he's not going to stand up and say, You're
20 right. I will never have cannabis again out of fear that I
21 might get in trouble.

22 If you would like testimony from Mr. Mooney, here he
23 is. You can ask him all about his concrete plans.

24 THE COURT: This is a motion to dismiss.

25 MR. GLENN: Right.

1 THE COURT: On a motion to dismiss, I'm taking your
2 allegations and your complaint as true; so we don't take
3 evidence. Certainly, I didn't schedule this for an evidentiary
4 hearing. You submitted an affidavit. Presumably, you put
5 everything you wanted to put in to that affidavit, which was --
6 which was without limitation --

7 MR. GLENN: Certainly, Your Honor.

8 THE COURT: Hold on. Okay? I think I've been pretty
9 patient.

10 MR. GLENN: Sure.

11 THE COURT: You might want to sit down, in fact.

12 MR. GLENN: Thank you.

13 THE COURT: You had no limitation on what you put
14 into your affidavit. Why you now feel that I should be taking,
15 you know, evidence at this hearing, which was not scheduled for
16 it, is beyond me. You could have put whatever you wanted to
17 into your affidavit.

18 Now, if there is a factual challenge to jurisdiction,
19 it is possible that I can have discovery -- I can allow
20 discovery on the jurisdictional issue. Whether I should do
21 that or not, I will let you know in a written order, but I am
22 not taking evidence now. For one thing, since you never
23 indicated an intent to put on evidence, I think you can
24 understand why the government didn't come prepared to put on
25 evidence on its side.

1 So I'm going to take this under advisement. As I
2 say, I'm highly likely to be able to give you a written ruling
3 this week.

4 MR. LUH: Your Honor, if I may briefly. The
5 government's motion is -- is not a factual challenge to the
6 allegations in the complaint. It's a facial challenge. I just
7 wanted to point that out for the court.

8 THE COURT: Okay. Thank you.

9 MR. MOONEY: Your Honor --

10 (Court recessed at 9:54 A.M.)

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COURT REPORTER'S CERTIFICATE

I, Debra Kekuna Chun, Official Court Reporter, United States District Court, District of Hawaii, do hereby certify that the foregoing is a true, complete, and correct transcript from the record of proceedings in the above-entitled matter.

DATED at Honolulu, Hawaii, March 31, 2010.

/s/ Debra Chun

DEBRA KEKUNA CHUN

RPR, CRR