

14-15143

**THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**OKLEVUEHA NATIVE AMERICAN CHURCH OF HAWAII, INC.;
MICHAEL REX "RAGING BEAR" MOONEY,**

Plaintiffs/Appellants,

vs.

**ERIC H. HOLDER, JR. as U.S. Attorney General;
MICHELE LEONHART, as Acting Administrator of the
U.S. Drug Enforcement Administration;
EDWARD H. KUBO, JR., as U.S. Attorney for the District of Hawaii,**

Defendants/Appellees.

**APPEAL FROM THE JUDGMENT IN A CIVIL CASE IN THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII**

APPELLANTS' OPENING BRIEF

**MICHAEL A. GLENN, ESQ.
1188 Bishop St. Suite 3101
Honolulu, Hawaii 96813
(808) 523-3079**

Rule 26.1(a) Statement

Comes now MICHAEL A. GLENN, counsel of record for Plaintiff/
Appellant OKLEVUEHA NATIVE AMERICAN CHURCH OF HAWAII,
INC. herein, now know as NATIVE AMERICAN CHURCH OF HAWAII,
INC., pursuant to FRAP Rule 26.1(a) and hereby states that there is zero
parent corporation nor any publicly held corporation owning 10% or more
of its stock.

DATED: Honolulu, Hawaii; May 5, 2014

s/ M. A. Glenn

MICHAEL A. GLENN, ESQ.
Attorney for Appellants

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Statement of Jurisdiction

The U.S. District Court for the District of Hawaii had jurisdiction pursuant to 28 USC §1331 because the action arises under the laws and Constitution of the United States of America. Plaintiffs Mr. Mooney and the Oklevueha Native American Church of Hawaii, Inc. (who have officially changed their name to The Native American Church of Hawaii, Inc., hereafter “The NAC” seek a determination under the standards of the Religious Freedom Restoration Act (“RFRA”) 42 USC §§ 2000bb-2000bb(4), The Religious Land Use and Institutionalized Persons Act (“RLUIPA”) at 42 USC §2000cc(5)(7) (which defines RFRA's term “exercise of religion” to include any exercise of religion, whether or not compelled by, or central to, a system of religious belief) and the First and Fourteenth Amendments to the U.S. Constitution of the lawfulness and constitutionality of the Government’s interpretation of the Controlled Substances Act (“CSA”) 21 USC § 801-971, and its implementing regulations as applied to Appellants. The District Court is authorized to grant declaratory relief by the Declaratory Judgment Act, 28 USC §§ 2201, 2202. The District Court is authorized to grant preliminary and permanent relief under Federal Rule of Civil Procedure 65.

This Court of Appeals has jurisdiction pursuant to 28 USC § 1291.

The Judgment in a Civil Case was entered in this action on the 16th day of January, 2014, and the Notice of Appeal was timely filed on 24th day of January, 2014. This is an appeal from a final judgment that disposed of all parties' claims.

Statement of Issues Presented for Review

1. Is the Native American Church of Hawaii a religion for purposes of RFRA and AIRFA?
2. Did the lower court err by determining that the record could not support a finding that Plaintiffs' cannabis use is an exercise of religion.
3. Did the lower court err by determining that the record could not support a finding that the United States' total prohibition of cannabis places a substantial burden on the exercise of Plaintiffs' religion.
4. Did the US Government properly observe and follow its own policy to protect and preserve the religious exercises of Mr. Mooney and all Native Americans in this case?

Statement of the Case

At issue is the United States' duty, pursuant to the American Indian Religious Freedom Act, to protect and preserve for Mr. Mooney and The NAC their inherent right of freedom to believe, express, and exercise their traditional

religious use and possession of their sacred herb cannabis, and their freedom to worship through ceremonies and traditional rites. The NAC had its cannabis seized by U.S. Federal authorities, and the Government refused to return, and indeed destroyed (after suit was brought against them), the seized cannabis. The Defendants do not allow Mr. Mooney to possess any cannabis whatsoever, for zero purposes whatsoever, be it religious or even Hawaii State-licensed therapeutic use. Rather, the Defendants consider The NAC's cannabis use and possession to be criminally prohibited. Appellant Mooney and the members of The NAC thus live in fear of arrest and imprisonment for use of their sacrament.

The NAC desires the same protections for their use and possession of cannabis as they currently have in place against the Government for their sacramental use and possession of peyote. Mr. Mooney is willing to agree to reasonable regulations, restrictions, terms, conditions and/or controls that the Government might reasonably request to address any effects or other negative issues the Government might have concerning Mr. Mooney's right to possess and consume sacramental cannabis.

Despite the fact that Mr. Mooney and The NAC filed their Complaint for Declaratory Relief and for Preliminary and Permanent Injunction almost 5 years ago on July 22, 2009, trial has not yet even began. This matter has been dismissed

by the District Court already, and that dismissal was reversed by this Honorable Court on April 9, 2012. The granting of Defendants' Motion for Summary Judgment and second dismissal of this case is the subject of this instant appeal.

Statement of the Facts

1. Cannabis has a world-wide history of religious use. (Docket # 140; excerpts of record “excerpts” 57-61).
2. Cannabis, under the names *Rosa Maria* and *Santa Rosa*, has been traditionally used in religious ceremonies of Native Americans. (excerpts 53, 56, 60, 62).
3. Plaintiff Mooney and members of the Native American Church of Hawaii can lawfully use the controlled substance Peyote for religious sacrament. (First Amended Complaint filed 3/22/10 (“Complaint”) at paragraphs 23, 24, 25).
4. The Native American Church of Hawaii, Inc. is a valid and recognized religious organization. (“Complaint” at paragraphs 19, 47, 48).
5. The current federally legislated policy of this country is to protect and preserve Mr. Mooney's right as a Native American Indian to freely exercise his traditional ceremonial practices. (42 USC §1996a(c)(3)).
6. Plaintiffs practices involving cannabis are religious ceremonies with

significant and traditional religious content. (“Complaint” at paragraphs 47, 48).

7. A crucial part of NAC tradition and that members consume cannabis as a sacrament and eucharist in their religious ceremonies and rites, in addition to or as a substitute for peyote, which is their “primary sacrament/great-medicine of choice.” (“Complaint” at paragraphs 23, 24, 26, 27, 33, 36).

8. Plaintiff Mooney was raised, since he was ten years old, as an active participant in Native American Church Teepee and Sweat Lodge ceremonies, including carrying stones, pouring cedar, playing drum. (9/30/13 Deposition Transcript “Depo”, page 12, lines 6-10; excerpts 63).

9. The Native American Church of Hawaii, Inc. requires that individual participants adhere to a specific set of religious beliefs. (Depo, page 68, lines 6-9; excerpts 65).

10. The Native American Church of Hawaii, Inc. encourages people to regain their relationship with God. (Depo, page 74, lines 14-19; excerpts 66).

11. The Native American Church of Hawaii, Inc. trains members regarding the use of cannabis in church ceremonies. (Depo, page 83, lines 23-25; excerpts 67).

12. Plaintiff Mooney has sat down with county prosecutors in Hawaii and

they have indicated that they are fully aware of the Church and its practices and they have zero intention of interfering whatsoever. (Depo, page 101, lines 1-7; excerpts 69).

13. The Native American Church of Hawaii, Inc. ceremonies are open to church members only and are currently only publicized within the church. (Depo, pages 135-6, lines 24-14; excerpts 72-73).

14. The Native American Church of Hawaii, Inc. does maintain records of its members. (Depo, page 133, lines 4-8; excerpts 71).

15. Being a member of The Native American Church of Hawaii, Inc. does not authorize one to distribute cannabis. (Depo, pages 172-174, lines 18-3; excerpts 74-76).

16. Native American Church of Hawaii, Inc. medicine men do not allow non-members into the grandfather (peyote) ceremony. (Depo, page 96, lines 3-13; excerpts 82).

17. A majority of Native American Church of Hawaii, Inc. members possess State of Hawaii medical cannabis card permits, and the church itself does not currently provide cannabis. (Depo, page 197, lines 1-18; excerpts 77).

18. Many Native Americans utilize cannabis in their religious ceremonies.

(Depo, pages 68-70, lines 23-21; excerpts 79-81).

19. Plaintiff Mooney is a Native American of Seminole Native American ancestry. (“Complaint” at paragraph 10).

Summary of Argument

The lower court erred when it took the well established and undisputed religion that is Peyotism / Native American Church and argued it into non-existence. The lower court erred by finding that no jury could ever find that the United States Government's criminal prohibition and seizure of Plaintiffs' sacrament cannabis is not a substantial burden on the Church and its members. It was error to disregard the United States' policy of preservation and protection afforded to possession and use of Native American sacrament. The lower court erred by failing to accept the asserted, indisputable and undisputed facts as true and by failing to consider the pleadings in a light most favorable to the non-moving Appellants. The District Court erred by dismissing the case prior to any trial on the merits.

Argument

Standard of Review

The dismissal of this case is reviewed *de novo* and the pleadings must be

construed in a light most favorable to The NAC. Kniewel v. ESPN, 393 F.3d 1068, 1072 (2005). A district court's grant of summary judgment of summary judgment is reviewed *de novo*. Whitman v. Mineta, 541 F.3d 929, 931 (9th Cir. 2008). A grant of summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In a *de novo* review of a district court's summary judgment ruling, the evidence is viewed in the light most favorable to the non-moving party. San Diego Police Officers' Ass'n v. San Diego City Emps.' Ret. Sys., 568 F.3d 725, 733 (9th Cir. 2009). "[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A "material" fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. The materiality of a fact is thus determined by the substantive law governing the claim or defense. Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment.

"[T]he issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial."

Id. at 288-89, 88 S.Ct. at 1592.

Thus, at this stage of the litigation, the judge does not weigh conflicting evidence with respect to a disputed material fact, nor does the judge make credibility determinations with respect to statements made in affidavits, answers to interrogatories, admissions, or depositions. If direct evidence produced by the moving party conflicts with direct evidence produced by the nonmoving party, the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact. Put another way, if a rational trier of fact might resolve the issue in favor of the nonmoving party, summary judgment must be denied.

Matsushita, 106 S.Ct. at 1356; Cities Serv., 391 U.S. at 289. Inferences must also be drawn in the light most favorable to the nonmoving party. T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630-1 (C.A.9 (Hawaii), 1987).

1. There are multiple issues of genuinely disputed facts

What is a religion? Who gets to define precisely what is and what is not

religious? The only definitions given that rightfully apply in this matter are the right to one's "exercise of religion" under RFRA and "Indian Religion" as defined by 42 USC §1996a(c)(3). The United States has a clear definition of Indian Religion as any religion (A) which is practiced by Indians, and (B) the origin and interpretation of which is from within a traditional Indian culture or community. RFRA's definition of exercise of religion clearly includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief. That definition further states that the use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose. 42 U.S.C. §2000cc-5(7). This definition is undeniably very broad, so the term "exercise of religion" should be understood in a generous sense. Korte v. Sebelius (735 F.3d 654, 698 (7th Cir., 2013). "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." Employment Division v. Smith, 494 U.S. 872, 877 (1990). It is enough that the claimant has an "honest conviction" that what the government is requiring, prohibiting, or pressuring him to do conflicts with his religion. Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707, 716 (1981). Our

United States Supreme Court has noted that, "the 'exercise of religion' often involves not only the belief and profession but the performance of ... physical acts [such as] assembling with others for a worship service [or] participating in sacramental use of bread and wine." Cutter v. Wilkinson, 544 U.S. 709, 720(2005).

“It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith?”

Employment Division v. Smith, 494 U.S. 872, 887 (1990).

The role of the church in society is part of the American fabric. It is woven in our history, our religion and our laws, including the U.S. Constitution. In America, the legal protection of religion has been regarded as an essential part of the liberties and unalienable rights secured for the people. Historically, this legal protection has been extended to the church as one of the primary institutions for carrying out religious activities. The right to define the institutional church is part of the broader liberty of religion which is inherent in the people, not their government. The First Amendment protects the unfamiliar and idiosyncratic as well as commonly recognized religions.

"Church" is a term usually associated with the Christian religion. Judaism's adherents worship in "synagogues," not churches. Muslims worship in "mosques" and Jehovah's Witnesses worship in "kingdom halls." Bahai faith has "Houses of Worship." Other religious faiths conduct worship in "temples." If any exercise of religion were construed to include only Christian churches, but to exclude Jewish synagogues, Islamic mosques, etc., then it will have been applied so as to make a distinction among religions which is clearly prohibited by the Establishment Clause. The term "church" must also include, for statutory purposes, religious organizations and faiths which do not refer to themselves as a church either within the context of their religious doctrine or common usage. Even if you can exercise your religion in a portable TeePee like the Plaintiffs in this matter, "Church" cannot be construed so as to favor some religious organizations over other religious organizations merely on the basis of terminology.

It has long been recognized that the federal government is precluded from limiting the forms of religion entitled to legal protection. To paraphrase the doctrine of the separation of church and state, "Congress is unable to define what a church is, as much as any church is unable to define what Congress is." If Congress can define what a church is, it has effectively established the form

religion must assume in order to be protected, which is exactly what Congress cannot do.

The form and organization of religious institutions and the conduct of public worship are not otherwise regulable in the public interest. Rather, they are quintessentially religious in nature, and consequently, beyond the scope of governmental authority. Clearly, the authority to define a "church" is a matter which lies solely between man and his God, for which he owes account to none other.

While the government legislating a definition of a religion is rare, it has been done, and Plaintiffs cite to one of the most famous and inclusive governmental definitions of Religion – that of the Commonwealth of Virginia's Declaration of Rights. Written by George Mason, it was adopted by the Virginia Constitutional Convention on June 12, 1776. Section 16 reads:

“That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.”

The religion of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This

right is in its nature an unalienable right. Congress, in enacting any law, is duty bound to have acted in favor of religious liberty, not against it. Accordingly, provisions in laws relating to churches must be accorded an interpretation which secures for the people the liberty the law was intended to respect. This is the high duty of any Court, charged with the responsibility of interpreting and administering the law. The legal presumption is that the authority to define the institutional church runs in favor of the people, not their government. The people, not their government, have the jurisdiction to define the institutions by which religious activities are administered or carried out. Once a matter is determined to be religious, it is the exclusive right of the people to choose the form of its exercise and to define the institutions by which it will be administered.

According to Madison's Remonstrance, religion "must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right." That is, free exercise rights necessarily include freedom to choose the form of religious conduct, and religious conduct is merely faith put into action. (To the Honorable the General Assembly of the Commonwealth of Virginia: A Memorial and Remonstrance Against Religious Assessments, 1785).

Moreover, it is the freedom of individuals to combine themselves into any form of organization devoted to religious activities which is protected. A ministry's lack of denominational affiliation in zero way affects its status as a religion.

Whether a religious organization administers sacraments or holds worship services in a fashion similar to other groups, or whether such things are even done at all, is of zero Constitutional relevance. The only proper inquiry is one of purpose, that is, whether the organization is formed for the purpose of engaging in bona fide religious exercise. If the purpose test is not satisfied, no regulation of the choice of means is necessary; if the purpose test is satisfied, then no regulation of the choice of means is permitted.

"Neither the trappings of robes, nor temples of stone, nor a fixed liturgy, nor an extensive literature or history is required to meet the test of beliefs cognizable under the Constitution as religious." Stevens v. Berger, 428 F.Supp. 896, 900 (E.D.N.Y.1977). Since "a religion may exist without any of these signs, ... they may not be determinative, at least by their absence, in resolving a question of definition." Malnak v. Yogi, 592 F. 2d 197, 209 (Adams, J., concurring).

Even a small and unknown sect that denies its religious character may be defined as religious for purposes of the First Amendment. See Engel v. Vitale, 370

U.S. 421 (1962) (a school prayer case holding that prayers invoking even a "generic" God violated the Establishment Clause in this context); Torcaso v. Watkins, 367 U.S. 488 (1961) (holding unconstitutional a statute requiring appointees to state office to profess a belief in God, because it discriminated against nonreligious persons and non-theistic religious persons).

The federal government lacks authority to prohibit or inhibit any particular means employed in the furtherance of Plaintiffs' religious purposes by comparison to any perceived "normal church" practice. If a religious practice is *bona fide*, any attempt to regulate it or make legal distinctions based on its use or nonuse is unwarranted, just as governmental distinctions based on the orthodoxy of religious belief are prohibited under the Establishment Clause. *Bona Fide* ("good faith") denotes sincere philosophy, honest intention or belief; the opposed concepts are bad faith, *mala fides* (duplicity) and *perfidia* (pretense).

The Establishment of Religion Clause of the First Amendment means at least this: neither a state nor the federal government can set up a church. It should be self-evident that the exercise of federal power to define a church is equivalent to the federal establishment of a church. In other words, no state has authority to prescribe the **form** a church must take to be entitled to the equal protection of the

laws. Congress and this Court are not under any lesser duty.

Imagine (if you will) if you lived in a place whose Constitution read something like this:

“That all persons and religious societies who acknowledge that there is one God, and a future state of rewards and punishments, and that God is publicly to be worshipped, shall be freely tolerated. The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State. . . . And that whenever fifteen or more male persons, not under twenty-one years of age, professing the Christian Protestant religion, and agreeing to unite themselves in a society for the purposes of religious worship, they shall, (on complying with the terms herein after mentioned,) be, and be constituted, a church, and be esteemed and regarded in law as of the established religion of the State, and on a petition to the legislature shall be entitled to be incorporated and to enjoy equal privileges.”

Well, that was Article 38 of the South Carolina Constitution of March 19, 1778. According to this Constitution, a church was legally defined as fifteen or more adult men united in association for the purpose of religious worship in accordance with the Christian Protestant religion. The key assumption underlying this provision was that the Christian Protestant religion was the "established religion of this State." Even though all Protestants were free to form their own church under their own name, every church so formed legally became part of the state's established religion.

The effect would have been the same had South Carolina defined a church as an organization which conducted public worship services, had a recognized clergy, and performed traditional priestly functions. Under either definition, the state would be wielding power in a matter which is purely religious in nature. In each case, religious liberty would be denied to the people who hold contrary religious beliefs and observe different religious practices. Hence, any attempt to legally define a church should be as objectionable to society today as it was to Catholics in South Carolina in 1778.

It is inappropriate for any Court to attempt to assess the truth or falsity of an announced article of faith. Judges are not oracles of theological verity, and the Founders did not intend for them to be declarants of religious orthodoxy. Courts are ill-equipped to examine the breadth and content of an avowed religion. In considering a First Amendment claim arising from a non-traditional "religious" belief or practice, some courts have nevertheless "look(ed) to the familiar religions as models in order to ascertain, by comparison, whether the new set of ideas or beliefs is confronting the same concerns, or serving the same purposes, as unquestioned and accepted 'religions.' " Malnak, 592 F.2d at 207 (concurring opinion).

As a matter of logic, every attempt to legally define a church implicitly establishes religion by recognizing only certain prescribed forms of religion and treating them differently from the non-recognized forms. The legal definition of a church is but the necessary means to the impermissible end of an established church. Once church establishments are rejected as a matter of law, the necessary means of establishment must also be rejected. Otherwise, the disestablishment is illusory. Korte v. Sebelius, 735 F.3d 654, 698 (7th Cir., 2013). The First Amendment, of course, does not define “religion.” More than a century ago, the Supreme Court said that “[t]he term ‘religion’ has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.” Davis v. Beason, 133 U.S. 333, 342, 10 S.Ct. 299, 300, 33 L.Ed. 637 (1890), abrogated on other grounds by Romer v. Evans, 517 U.S. 620, 634, 116 S.Ct. 1620 1628, 134 L.Ed.2d 855 (1996); see also Cnty. of Allegheny v. A.C.L.U. Greater Pittsburgh Chapter, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (Stevens, J., concurring in part & dissenting in part) (noting that “religion” as used in establishment clause was “understood primarily to mean ‘[v]irtue, as founded upon reverence of God, and expectation of future rewards and punishments,’ and only secondarily ‘[a] system of divine faith

and worship as opposite to others.’ ” (quoting S. Johnson, A Dictionary of the English Language (7th ed. 1785))).

Not only is the Peyotism of the Native American Church unquestionably a thoroughly studied and historic, continuing religion, Mr. Mooney is an Indian. He is the Medicine man of a state-registered Native American Church that uses peyote as well as cannabis in its ritualistic ceremonies, items of significant religious import and historically-documented, traditional Indian use. The United States has created a clear definition of Indian Religion as any religion (A) which is practiced by Indians, and (B) the origin and interpretation of which is from within a traditional Indian culture or community - 42 USC §1996a(c)(3). Furthermore, RFRA's definition of exercise of religion clearly includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

2. The lower court's ruling misrepresents and thoroughly disrespects the Native American Church and its sacraments – The major flaw in the legal reasoning of the lower court can be summed up in its stated belief that “a religion should encompass more than getting 'high.'” The lower court's theory thoroughly mocks and discounts all entheogen consuming religions of this planet. Plaintiffs merely seek the same protections for their traditional, sacramental use and

possession of cannabis as the UDV-USA and Santo Daime religions currently have to consume their entheogenic sacrament Ayahoasca and as the Plaintiffs currently have in place against Defendants for their traditional, sacramental use and possession of peyote. Plaintiffs have indicated to the Defendants that they are more than willing to agree to reasonable regulations, restrictions, terms, conditions and/or controls that the Defendants might reasonably request to address any effects or other negative issues the Defendants are likely to espouse concerning the Plaintiffs' right to possess and consume cannabis. Because the main and primary purpose of The NAC is to administer Sacramental Ceremonies (pursuant to their Code of Ethics), the attempt by Defendants to argue that the Church would not be burdened by wholly prohibiting the Church's sacrament and branding all members as criminals is unsettling to say the least.

The federal Defendants in this instant case, for reasons unknown, have chosen to ignore and severely downplay the position they took in O'Centro, when they vigorously contested the UDV-USA's attempt to compare its situation to the federal exemption to the CSA permitted to Native American Church for use of peyote, arguing that the NAC exemption flowed from the special political status of Native Americans, so that the UDV-USA was not similarly situated for purposes of

legal analysis. The government advanced the same logic to argue against the UDV-USA's First Amendment claim, the bulk of which also hinged on the comparison to The NAC.

The term "entheogen" was coined to avoid the implication that the religious experiences of individuals who ingest such plants are hallucinations caused by hallucinogens. The NAC's purpose in using cannabis during its worship is to bring about enhanced states of spiritual awareness. The NAC uses cannabis as a link to the divinities and as a sacrament and holy communion. The NAC's sacramental use of cannabis bears no resemblance to drug abuse. Because The NAC currently uses peyote as a "nondrug", its use of cannabis is likewise nondrug use. The U.S. government and the U.S. military have distinguished differences between drug use and sacramental use of peyote. "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." 21 C.F.R. §1307.31 (emphasis added). Furthermore, the U.S. Armed Forces have determined that peyote use within Native American ceremonies is compatible with military service. See April 25, 1997 Memorandum for Secretaries of the Military Departments Re:

Sacramental Use of Peyote by Native American Service Members.

The lower court could have allowed these Plaintiffs to possess and consume cannabis (unlike any other possible Plaintiffs) not only by the test provided by RFRA, but also because The NAC is not similarly situated with other religions, much like the numerous federal and state courts that have held the peyote exemption is constitutional. See Olsen, 878 F.2d at 1458 (Ethiopian Zion Coptic Church which encourages uncontrolled marijuana use was not similarly situated with the NAC); United States v. Rush, 738 F.2d 497 (1st Cir.1984) (Ethiopian Zion Coptic Church is not similarly situated with NAC); State v. Peck, 143 Wis.2d 624, 422 N.W.2d 160 (Ct.App.1988) (Israel Zion Coptic Church is not similarly situated with NAC).

Native American tribes have been described as domestic, dependent nations. Cherokee Nation v. Georgia, 30 U.S. (5 Peters) 1, 17, 8L.Ed. 25 (1831). This is the first principle of modern federal-tribal relations. The doctrine of trust responsibility, under which the federal government is required to promote tribal self-government and cultural integrity in the context of the domestic dependent

nation classification, provides the legal framework for this relationship. See Morton v. Mancari, 417 U.S. 535, 541-42 (1974). In Mancari, the Supreme Court ruled that in order to meet this trust responsibility, special rights and status can be afforded Native Americans that would otherwise be unconstitutional so long as the law is rationally connected to fulfilling the trust responsibility. Id. at 555.

In 1971, the DEA adopted a regulation which expressly allows the NAC to use peyote in its ceremonies notwithstanding the criminalization of peyote (21 U.S.C. §812(c)(12) (1970)). At a congressional hearing at which this regulation was discussed, the Bureau of Narcotics and Dangerous Drugs (nka the DEA) stated it regarded NAC as *sui generis*, and that NAC members' right to consume peyote derived from that status. See U.S. v. Boyll, 774 F.Supp. 1333, 1339 (D.N.M.1991).

Peyotism is the larger religion that Mr. Mooney and the Native American Church of Hawaii follow. For unknown years pre-contact, and for a considerable time post-contact, the indigenous people's intentional and ceremonial use of a spineless cactus and other naturally occurring entheogens did not have any name unto itself. The New People, that is, Europeans, definitely did not know what to call it. This “Indian Religion” had no name because it was essentially a natural part of all Indian life.

Mr. Mooney grew up practicing Peyotism in the church of his Father, the Oklevueha Earth Walks Native American Church of Utah, and he became a medicine man in The Native American Church of Hawaii, an independent branch from Oklevueha.

According to Defendants' own expert witness (Deward Walker of the Walker Research Group, Ltd.), Peyotism has many manifestations and is now practiced under many names, such as the Peyote Church, the Native American Church of Navajoland, the Native American Church of Oklahoma, the Native American Church of South Dakota, the native American Church of North America, the Peyote Way Church of God and many others.

The lower court, before hearing Defendants' Motion for Summary Judgment, set forth inclinations and questions which clearly demonstrated the lower court's confusion and lack of understanding as to the religion of Peyotism, the origins of the Native American Church, the non-significance of The Native American Church of North America, Inc., and the traditional use of *Rosa Maria* by Native Americans. It appeared that the lower court assumed that the Native American Church of North America was a large church from which branch churches sought membership, and she questioned whether or not The NAC was a member. The

Native American Church of North America describes itself officially as “a coalition of church organizations” (Docket #135 Defendants' Ex. 3, BY-LAWS Article 3, Section 1A). It is not a church *per se*, but but rather one of several overarching groups that integrate and join local chapters. NACNA is merely an association of many individual peyote consuming Indian religion groups. It has mandatory dues of 150 peyote buttons every year per member (Article 7, section 3A) and insists that no motion picture industry and television networks can make pictures of religious services (Article 12, section 2).

Peyotism is a *sui generis* religion that is incomparable with any other social institution or practice and thus cannot be explained by naturalistic theories of religion. Because it is so culturally removed and different from non-Indian religions, some “unenlightened” non-Indians have a difficult time affording Native American peyote churches the same status as their own “real” religions.

Contemporary peyote churches have roots that go back at least 10,000 years according to anthropological evidence--making it among the oldest ongoing religious traditions in the Americas, and grounding it firmly among the historic and respected religions of the world. Essentially, peyotism is a Native American religious phenomenon based on personal contact with the Creator, Great Spirit, or

God, through the medium of visionary experience induced by the ritual consumption of peyote, a small desert cactus with entheogenic properties, and other herbs. Veneration of the small spineless cactus called peyote probably began immediately after the first hunter-gatherers discovered its remarkable effects. The Native American deification of the plant is estimated to be about 10,000 years old.

All current variations of Peyotism have their roots in the so-called “peyote cult,” a ritual performance with a long history among Mexican Indian tribes. One of the earliest reports of the peyote cult, from a white perspective, comes from a decree by the Catholic Church in seventeenth-century Mexico, which brought the Inquisition against practitioners of Indian Religion who consumed peyote, herbs and other similar substances as “an act of superstition condemned and opposed to the purity and integrity of our Holy Catholic faith.” Thus, relations between Peyotists and the Church got off to a difficult start. From the very beginning, immigrants to the New World have misunderstood the Native American adoration of naturally occurring, entheogenic psychoactive plants. In 1620 the Spanish Inquisition denounced peyote and similar substances as diabolic and made their use illegal. Inquisitional persecution of Mexican Indian peyotists and cannabis users included torture and death. Norwegian ethnographer Carl Lumholtz in 1902

discovered that records also show that references to *Rosa Maria* (aka cannabis) are profuse in the Inquisition archives, and closely associated with peyote. The Decree by which the Inquisition in 1620 “formally banned the use of peyote and similar substances” in New Spain, is quoted by Isaac Campos in his book *Home Grown*, University of North Carolina Press, Chapel Hill 2012 at 47:

“Seeing that said herb, nor any other can possibly have by nature such virtues and efficacy that is attributed to the stated effects... and that in those one obviously sees the effects of the suggestion and assistance of the Devil, author of this abuse taking advantage of... indians and their inclination toward idolatry, and overcoming later many other people... we mandate that from here forward no one of whatever social status can use said herb, peyote, nor any others for the same or similar effects, under no title or color nor shall they encourage indians or other persons to take them understanding that if they do so... we will proceed against the rebellious and disobedient... as against persons suspected of violations against the Holy Catholic faith.

In the mid-to-late nineteenth century, this cult, known as the Old Peyote Complex was introduced to the Plains peoples of Texas and Oklahoma. As Peyotism spread, it gathered as many opponents as adherents. A number of attempts were made to suppress the movement, no longer considered the work of the Devil but, in terms more fitting with the dominant Protestant and rationalized language of the day, as an “evidently injurious” custom, utilizing drugs which were “obviously” harmful.

The ingestion of peyote and cannabis has, as do all entheogens, a goal of a sort of inebriation, or a transformation of consciousness. Indeed, the main Christian argument against Peyotism has been the centrality of the narcotic substance in the ritual. Yet it must be clarified that though a “higher state of consciousness” may be the goal of Plaintiffs' peyote and cannabis ingestion, these sacraments are entheogens, and even Defendants have admitted that schedule 1 substances can be used as nondrugs.

Defendants asked the lower court to rely on “three useful indicia” to discern whether a particular set of beliefs and practices amounts to a religion, citing to Alvarado v. City of San Jose, 94 F.3d 1223 (9th Cir. 1996). In Alvarado, the dispute was the current religious significance, if any, of Quetzalcoatl (the Plumed Serpent of Aztec mythos) and whether the object in question can be defined as “religious” for Establishment Clause purposes.

The Alvarado Court was basically examining the “New Age” movement to explain why it was not a religion. The court found there is no New Age Organization, church-like or otherwise; no membership; no moral or behavioral obligations; no comprehensive creed; no particular text, rituals, or guidelines; no particular object or objects of worship.

In essence, the Alvarado analysis consists of a "definition by analogy" approach. It is an "inherently vague definitional approach" set out in the concurring opinion in Malnak, which explicitly adopted the "definition by analogy" process, and three "useful indicia" to determine the existence of a religion were identified and discussed. First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs. Applying these three factors, the concurring opinion in Malnak concluded that the Science of Creative Intelligence - Transcendental Meditation constituted a religion under the First Amendment despite the contentions of its leaders to the contrary.

The lower court's reliance on these "useful indicia" is both misplaced and inapposite to the analytical framework of the cases cited, however. The only reason the courts looked at a definitional approach to determine whether Transcendental Meditation in Malnak, MOVE in Africa and New Age culture in Alvarado were religions was because no prior case-law was cited nor was found to exist by the courts' own research that examined the legitimacy of these alleged religions.

“The Court will first discuss the question whether MOVE may be classified as a "religion" within the purview of the first amendment. Before undertaking this discussion, however, it must be noted that no case has been cited by the parties nor revealed by the Court's research in which the present issue has been decided. Accordingly, a definitional approach to the inquiry must be utilized. As the district court stated in Malnak v. Yogi, 440 F.Supp. 1284, 1315 (D.N.J.1977), *aff'd per curiam*, 592 F.2d 197 (3d Cir. 1979):

When courts are faced with forms of the press or forms of religion unknown in prior decisional law, they must look to the prior interpretations of the constitutional provisions for guidance as to the substantive characteristics of theories or practices which have been found to constitute religion under the First Amendment.

Africa v. State of Pa., 520 F.Supp. 967, 969 (E.D. Pa. 1981).” (emphasis added)

Here, in this instant matter, not only has the question of whether the Native American Church is a legitimate religion been answered overwhelmingly in the affirmative in all prior decisional law, the Defendant Department of Justice itself has made it clear to the DEA that the NAC is unquestionably a religion for First Amendment Free Exercise Clause purposes. (Docket #145, excerpts 35). This “NAC” as cited by Defendants is an institutional religion whose beliefs are shared by large numbers of Indians including members of many different tribes. While the D.o.J. cites references of religious peyote use as early as 1560, they state that the NAC's doctrine developed between 1870 and 1885, and that the ritual was never observed by “white men” until 1897. Defendants further state that the NAC was

incorporated in Oklahoma in 1921 and is now (1981) an international organization with affiliated branches in other states and Canada. Defendants have literally asserted as FACT that The NAC is an established religion with a significant history of sacramental controlled substance use. Because The NAC also has a history of sacramental cannabis use, this Court must make sure Plaintiffs' rights are protected and preserved by Defendants, not utterly prohibited.

It is now painfully clear that the lower court has actually ruled that the Native American Church of Hawaii is not a religion! Yet, the only reason RFRA exists is to prevent the result of Employment Division v. Smith, 494 U.S. 872 (1990), which concerned the right of the Native American Church to consume its primary religious sacrament/medicine without being subject to discrimination by the government. See 42 U.S.C. §2000bb(a).

“And in fact an exception has been made to the Schedule I ban for religious use. For the past 35 years, there has been a regulatory exemption for use of peyote, a Schedule I substance, by the Native American Church. See 21 CFR §1307.31 (2005). In 1994, Congress extended that exemption to all members of every recognized Indian Tribe. See 42 U. S. C. §1996a(b)(1). Everything the Government says about the DMT in hoasca that, as a Schedule I substance, Congress has determined that it has a high potential for abuse, has no currently accepted medical use, and has a lack of accepted safety for use . . . under medical supervision, 21 U. S. C. §812(b)(1). applies in equal measure to the mescaline in peyote, yet both the Executive and Congress itself have decreed an exception from the Controlled

Substances Act for Native American religious use of peyote. If such use is permitted in the face of the congressional findings in §812(b)(1) for hundreds of thousands of Native Americans practicing their faith, it is difficult to see how those same findings alone can preclude any consideration of a similar exception for the 130 or so American members of the UDV who want to practice theirs.”

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 433 (2006).

“The Government responds that there is a unique relationship between the United States and the Tribes, Brief for Petitioners 27; see Morton v. Mancari, 417 U. S. 535 (1974), but never explains what about that unique relationship justifies overriding the same congressional findings on which the Government relies in resisting any exception for the UDV's religious use of hoasca. In other words, if any Schedule I substance is in fact always highly dangerous in any amount no matter how used, what about the unique relationship with the Tribes justifies allowing their use of peyote? Nothing about the unique political status of the Tribes makes their members immune from the health risks the Government asserts accompany any use of a Schedule I substance, nor insulates the Schedule I substance the Tribes use in religious exercise from the alleged risk of diversion.

Id., 434.

The United States Department of Veterans Affairs has zero problem recognizing the Native American Church as a religion and readily makes the funeral/headstone emblem available for this country's deceased veterans, listing it as its twelfth available emblem (visit <http://www.cem.va.gov/hmm/emblems.asp>).

“I agree with Justice O'CONNOR that courts should refrain

from delving into questions whether, as a matter of religious doctrine, a particular practice is "central" to the religion, *ante*, at 906-907, I do not think this means that the courts must turn a blind eye to the severe impact of a State's restrictions on the adherents of a minority religion. Cf. *Yoder*, 406 U.S., at 219, 92 S.Ct., at 1535 (since "education is inseparable from and a part of the basic tenets of their religion . . . [, just as] baptism, the confessional, or a sabbath may be for others," enforcement of State's compulsory education law would "gravely endanger if not destroy the free exercise of respondents' religious beliefs"). Respondents believe, and their sincerity has *never* been at issue, that the peyote plant embodies their deity, and eating it is an act of worship and communion. Without peyote, they could not enact the essential ritual of their religion. See Brief for Association on American Indian Affairs et al. as *Amici Curiae* 5-6 ("To the members peyote is consecrated with powers to heal body, mind and spirit. It is a teacher; it teaches the way to spiritual life through living in harmony and balance with the forces of the Creation. The rituals are an integral part of the life process. They embody a form of worship in which the sacrament Peyote is the means for communicating with the Great Spirit"). See also O. Stewart, *Peyote Religion* 327-330 (1987) (description of peyote ritual); T. Hillerman, *People of Darkness* 153 (1980) (description of Navajo peyote ritual). If Oregon can constitutionally prosecute them for this act of worship, they, like the Amish, may be "forced to migrate to some other and more tolerant region." *Yoder*, 406 U.S., at 218, 92 S.Ct., at 1534-1535. This potentially devastating impact must be viewed in light of the federal policy—reached in reaction to many years of religious persecution and intolerance—of protecting the religious freedom of Native Americans. See American Indian Religious Freedom Act, 92 Stat. 469, 42 U.S.C. § 1996 (1982 ed.) ("[I]t 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 . . . , including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites"). Congress recognized that certain substances, such as peyote, "have religious significance

because they are sacred, they have power, they heal, they are necessary to the exercise of the rites of the religion, they are necessary to the cultural integrity of the tribe, and, therefore, religious survival." H.R.Rep. No. 95-1308, p. 2 (1978), U.S.Code Cong. & Admin.News 1978, pp. 1262, 1263.

"The American Indian Religious Freedom Act, in itself, may not create rights enforceable against government action restricting religious freedom, but this Court must scrupulously apply its free exercise analysis to the religious claims of Native Americans, however unorthodox they may be. Otherwise, both the First Amendment and the stated policy of Congress will offer to Native Americans merely an unfulfilled and hollow promise."

Employment Division v. Smith, 494 U.S. 872, 919-21 (1990).

"It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." Hernandez v. Commissioner, 490 U.S., at 699, 109 S.Ct., at 2148.

"Although the church claims no official prerequisites to membership, no written membership rolls, and no recorded theology, estimates of its membership range from 30,000 to 250,000, the wide variance deriving from differing definitions of a 'member.' As the anthropologists have ascertained through conversations with members, the theology of the church combines certain Christian teachings with the belief that peyote embodies the Holy Spirit and that those who partake of peyote enter into direct contact with God."

People v. Woody, 61 Cal.2d 716, 40 Cal.Rptr. 69, 73 (Cal., 1964).

"Peyotism discloses a long history. A reference to the religious use of peyote in Mexico appears in Spanish historical sources as early as 1560. Peyotism spread from Mexico to the United States and

Canada; American anthropologists describe it as well established in this country during the latter part of the nineteenth century. Today, Indians of many tribes practice Peyotism. Despite the absence of recorded dogma...”

Id.

The Native American Church was formally established in Oklahoma in 1918. Peyote Way, 922 F.2d at 1212. The formation of this entity was motivated, at least in part, to protect the religious use of peyote from early attempts to suppress it. Boyll, 774 F. Supp. at 1336. “The Native American Church has now grown to include many local branches or chapters, including, according to the Mooneys, the defendant Oklevueha Earthwalks Native American Church.” State v. Mooney, 2004 UT 49, 98 P.3d 420 (Utah, 2004).

“The Mooneys practiced Native American religion before founding their church, and provided religious programs and services to inmates of Utah correctional facilities, both as volunteers and, in Mr. Mooney's case, as an employee. James and Linda Mooney founded their Oklevueha Earthwalks Native American Church in April of 1997 in Benjamin, Utah. Because Texas is the only state in the nation in which peyote is grown, the Mooneys obtained peyote for use in their church services by registering and complying with the requirements of the Texas Department of Public Safety Narcotics Services.”

Id.

It was undisputed at trial that the Native American Church is a bona fide

religion. Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481, 1486 (C.A.10 (N.M.), 1989).

3. Plaintiffs' free exercise of religion is being burdened.

As of today, the Defendants wholly ban **all use*** of cannabis. (*all use that is except for the few remaining surviving participants in the FDA's and NIDA's Compassionate Investigative New Drug program of 1976 grandfathered in since 1992). "We have little difficulty in concluding that an outright ban on a particular religious exercise is a substantial burden on that religious exercise." Murphy v. Mo. Dep't of Corrs., 372 F.3d 979, 988 (8th Cir.2004) (concluding that a ban on "communal worship" substantially burdened inmate's religious exercise, thereby precluding summary judgment); Meyer v. Teslik, 411 F.Supp.2d 983, 989 (W.D.Wis.2006) (holding that ban on group worship substantially burdened inmate's religious exercise and noting that, "It is difficult to imagine a burden more substantial than banning an individual from engaging in a specific religious practice"). It boggles Plaintiffs' collective minds that Defendants in this matter will argue that their complete prohibition of a sacred and traditionally used religious sacrament would not burden the Native American Church, while other courts have found free exercise burden in the mere undoing of a prisoner's dreadlocks for temporary safety inspection. See May v. Baldwin, 109 F.3d 557 (C.A.9 (Or.),

1997).

“There is no dispute that Oregon's criminal prohibition of peyote places a severe burden on the ability of respondents to freely exercise their religion. Peyote is a sacrament of the Native American Church and is regarded as vital to respondents' ability to practice their religion. See O. Stewart, *Peyote Religion: A History* 327-336 (1987) (describing modern status of peyotism); E. Anderson, *Peyote: The Divine Cactus* 41-65 (1980) (describing peyote ceremonies); *Teachings from the American Earth: Indian Religion and Philosophy* 96-104 (D. Tedlock & B. Tedlock eds. 1975) (same); see also People v. Woody, 61 Cal.2d 716, 721-722, 40 Cal.Rptr. 69, 73-74, 394 P.2d 813, 817-818 (1964).

As we noted in Smith I, the Oregon Supreme Court concluded that "the Native American Church is a recognized religion, that peyote is a sacrament of that church, and that respondent's beliefs were sincerely held." 485 U.S., at 667, 108 S.Ct., at 1449. Under Oregon law, as construed by that State's highest court, members of the Native American Church must choose between carrying out the ritual embodying their religious beliefs and avoidance of criminal prosecution. That choice is, in my view, more than sufficient to trigger First Amendment scrutiny.”

Employment Division v. Smith, 494 U.S. 872, 903-4 (1990)

As of today, Defendants still wholly and completely refuse to allow the Plaintiffs to possess any cannabis whatsoever, for zero purposes whatsoever, be it religious or even Hawaii State-licensed therapeutic use. Not only is the Plaintiffs' actual religious use of the cannabis sacrament being wholly prevented by virtue of its seizure from Plaintiffs and by the acts and policies of Defendants, Plaintiff

Mooney and the members of The NAC rightfully live in fear of arrest, imprisonment and future seizures of their sacramental cannabis. The Plaintiffs are further burdened by the illegal status of their sacrament by being prevented from being able to adequately publicize their church and seek new members for fear of criminal investigation and even civil asset forfeiture. Until protection from arrest is either agreed to by the parties or ordered by this Court, Plaintiffs must basically criminally incriminate themselves whenever they discuss or publicize their religion's essential and ceremonial use of cannabis sacrament.

4. The Defendants have zero compelling interests in this matter.

Society has changed for the better since Plaintiffs filed this case almost 5 years ago. Cannabis has become a *defacto* non-black-market industry in many states. Colorado and Washington have removed criminal penalties for even non-medical “social” cannabis consumption and possession. States have decided to pretty much regulate and tax cannabis sales much like alcohol. In light of this new political environment the United States Department of Justice has produced a Memorandum (excerpts 40) and given Congressional testimony (excerpts 44) that sets forth what should be Defendants' only concerns as to any compelling interests in this matter. Not a single compelling interest (as delineated by the Memo and

Testimony) is a factor in this case concerning the Native American Church's sacramental use of cannabis.

Defendants claim at least two key governmental interests are at stake: protection of public health and safety and preventing cannabis intended for religious use from being improperly diverted to nonreligious sale and use. Defendants have absolutely zero evidence that Mr. Mooney nor any member of The Native American Church of Hawaii have ever been physically harmed by their consumption of cannabis and possess zero evidence that any cannabis has ever been diverted by Mr. Mooney or any church member to any non church member – EVER.

The lower court determined that “[o]n the bare record before the court, a jury could not reasonably find in favor of Plaintiffs without, in effect, determining that any individual could use any drug by simply asserting that he or she was part of a religion that used that drug as a sacrament.” This reasoning is improper and fails to account for the actual facts of this case and relevant caselaw concerning the Native American Church and other entheogen using religions.

5. RFRA was Passed by Congress for Cases JUST LIKE THIS.

The Ninth Circuit has held that a "substantial burden" under RFRA "is

imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1070 (9th Cir. 2008) (internal references omitted).

Here, as in the other successful RFRA cases brought by entheogen using churches, the sacred sacrament itself is prohibited and seized and its users labeled criminals.

Conclusion

The District Court erred by dismissing this case. A trial on the merits is overdue. Appellants ask this Honorable Court to reverse the lower court's Order Granting Motion for Summary Judgment and vacate the Judgment in a Civil Case and allow Mr. Mooney and The NAC to seek declaratory and injunctive relief at trial.

DATED: Honolulu, Hawaii; May 5, 2014

s/ M. A. Glenn

MICHAEL A. GLENN/Attorney for Appellants

14-15143

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 5, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: Honolulu, Hawaii; May 5, 2014

s/ M. A. Glenn

MICHAEL A. GLENN

Attorney for Appellants

Certificate of Compliance with Rule 32(a)

This Brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because this Brief contains 9,362 words.

DATED: Honolulu, Hawaii; May 5, 2014

s/ M. A. Glenn

MICHAEL A. GLENN

Attorney for Appellants

Statement of Related Cases

Counsel knows of zero related cases.