No. 00-71247

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PEOPLE OF GUAM,

Petitioner,

v.

BENNY TOVES GUERRERO,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Guam

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BRIEF OF *AMICI CURIAE* THE DKT LIBERTY PROJECT, DR. JOHN P. HOMIAK, AND PROFESSOR CAROLE D. YAWNEY IN SUPPORT OF AFFIRMANCE

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INTEREST OF *AMICI CURIAE*

The DKT Liberty Project is a non-profit organization based in Washington, D.C. Its mission is to protect and defend the civil liberties of citizens against overreaching by the government. It often provides *amicus* briefs as well as direct representation in cases raising civil liberties issues, especially those involving the First Amendment. Like Justice Brandeis, the Liberty Project believes that violations of civil liberties in the cause of law enforcement are especially worrying:

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, dissenting). Because the Liberty Project has a strong interest in protecting citizens against government overreaching, it is well-situated to provide this Court with additional insight into the issues presented in this case.

John P. Homiak, Ph.D. is an anthropologist currently serving as Director of the Anthropology Collections & Archives Program with the Department of Anthropology at the Smithsonian Institution in Washington, D.C. Dr. Homiak has researched Rastafari religion and culture for over twenty years. He has engaged in substantial field research both in Jamaica and elsewhere in the world, documenting

the history, practices, and belief systems of Rastafari, and has collaborated with other experts both in research and in publications. He has published numerous articles, papers, and chapters in books and encyclopedias on those subjects, and is rightly regarded as a leading scholar in the area. Because of his long-term interest and work in the field, Dr. Homiak is well-situated to provide helpful information to this Court about the nature of the claims raised.

Professor Carole D. Yawney, Ph.D., is a professor on the Faculty of Graduate Studies, Sociology, at York University in Toronto, Ontario. Professor Yawney has conducted research (including substantial field research) and has written about Rastafari for over thirty years, beginning with her dissertation research in 1969 on the cultural and religious practices of Rastafari. She has published and presented scores of articles and papers on the subject, and has been retained as an expert witness in numerous cases involving Rastafari claims. She is also a leading scholar with regard to the nature and practices of Rastafari, and is therefore able to present this Court with useful information relating to those issues.

SUMMARY OF ARGUMENT

The Supreme Court of Guam has held, in a carefully reasoned opinion, that the Guam Organic Act's protection of the free exercise of religion requires that when a Guam statute substantially burdens that exercise, the government must demonstrate both that it has a compelling interest, and that the statute represents the least restrictive means of furthering that interest. *Guam v. Guerrero*, 2000 WL 1299635, 2000 Guam 26 (Guam Terr. 1999). This test is not bizarre, unusual, or clearly erroneous; indeed, it is exactly the test applied by the United States Supreme Court for thirty years to free exercise claims under the United States Constitution, until that Court announced a new test. *Compare Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that an incidental burden on the free exercise of religion must be justified by a compelling state interest and be the least restrictive means of achieving the state's interest) *with Employment Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990) (holding that a "neutral law of general applicability" need not be justified by a compelling interest, even if it imposes incidental burdens). And, it is the test that Congress requires to be applied to *federal* government action under the Religious Freedom Restoration Act. Given that the decision falls well outside the bounds of "clear error," *Hill v. Carter*, 47 F. 2d 869, 870 (9th Cir. 1931), there is no basis for this Court to

substitute its judgment for the judgment of the Guam Supreme Court as to how the Guam Organic Act will be construed in Guam.

Nor is there a basis for this Court to alter the Guam Supreme Court's application of that test to this case. Here, Guam conceded that the prosecution substantially burdened Ras Makahna's[1/] right to freely exercise his religion. Moreover, Guam did not introduce *any* evidence establishing either (1) any compelling interest or (2) that the statute prohibiting the importation of cannabis was the least restrictive alternative to further any compelling interest. In these circumstances, this Court cannot, as a factual matter, find the test misapplied. However, to allay any concern that poor prosecution tactics might have led to a result (and precedent) that would not have otherwise occurred, *amici* will demonstrate below that the concessions were unavoidable. Indeed, Rastafari is an established religion in which cannabis provision and use is an important and sacramental religious practice. Moreover, interfering with that practice substantially burdens the free exercise of religion even if the practice is not mandatory as a matter of Rastafari doctrine. Finally, in the absence of proof, this Court cannot assume either a compelling interest or that the statute is the least

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1/ *Amici* will respect and use the Respondent's Rastafari title and name, Ras Makahna, rather than his birth name of Benny Toves Guerrero, in this brief, as Respondent did in his brief.

restrictive alternative. For all these reasons, the Supreme Court of Guam's decision should be affirmed.

I. THE ACTIONS FOR WHICH RESPONDENT HAS BEEN CRIMINALLY PROSECUTED ARE RELIGIOUS PRACTICES.

A. It is Undisputed – And Undisputable – That Rastafari Is A Legitimate Religion Entitled to Protection under the Guam Organic Act and the Religious Freedom Restoration Act.

It is not disputed in this case – nor could it be – that Rastafari is a legitimate religion with particular beliefs and practices. Anthropologists and sociologists who have worked with Rastafari all agree on its status as a religion. *See* Homiak and Yawney, *Rastafari, in* Encyclopedia of African and African-American Religions 256-268 (Stephen D. Glazier, ed. 2001) (hereafter "Encyclopedia"); J. Gordon Melton, Encyclopedia of American Religions 870-71 (1991) (including Rastafari among the 1,558 religious groups sufficiently stable and distinctive to be identified as an existing religion in this country).[2/] Other religious bodies have agreed. Indeed, the Catholic Commission has announced its understanding of

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2/ *See also*, The Illustrated Encyclopedia of World Religions (Chris Richards, ed., 1997) (contains section on Rastafari); Austin-Broos, Diane, Jamaica Genesis: Religion and the Politics of Moral Orders 239-242 (1997); Burton, Richard D. E., Afro-Creole: Power, Opposition, and Play in the Caribbean 122-41 (1997); Chevannes, Barry, Rastafari: Roots and Ideology, 110-118 (1994); Forsythe, Dennis, Rastafari: For the Healing of the Nations 12-44 (1983); Owens, Joseph, Dread: The Rastafarians of Jamaica 90-124 (1976).

Rastafari as a religion. *See* "Rastafarians in Jamaica and England," Catholic Comm'n for Racial Justice (1982).

Similarly, federal and state courts have repeatedly found (and litigants have conceded) that Rastafari is a religion protected by the First Amendment to the United States Constitution. Indeed, this Court has specifically acknowledged as much. *United States v. Bauer*, 84 F.3d 1549 (9th Cir. 1996) (accepting Rastafari as a religion and marijuana usage as a religious practice for purposes of the Religious Freedom Restoration Act); *see also, e.g., Hicks v. Garner*, 69 F.3d 22 (5th Cir.1995) (reversing district court's dismissal of Rastafari free exercise claims as frivolous); *Overton v. Coughlin*, 133 A.D. 2d 744, 520 N.Y.S.2d 32 (2d Dept. 1987) (finding Rastafari to be a religion).

Moreover, even a brief review of the scholarly works on Rastafari reveals the presence of those criteria commonly associated with religions. *See* Freeman, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 Geo. L.J. 1519, 1565 (1983) (identifying eight paradigmatic features of religion). For example, the Rastafari worldview includes a clear distinction between the sacred and the profane, encapsulated in the opposition between Zion (their conception of a transcendent reality) and Babylon (the materialistic and Eurocentric society in which many Rastafari find themselves). *See* Timothy B. Taylor, *Soul Rebels: The*

Rastafarians and the Free Exercise Clause, 72 Geo. L. Rev. 1605-1635 (1984); Encyclopedia at 256. Indeed, the distinctive hairstyle and speech patterns serve to mark Rastafari as different or separate from the world in which they live. Further, Rastafari acknowledge a Supreme Being; they recognize and strive to live by a moral code drawn in part from Biblical texts and other teachings; they study and discuss accepted sacred texts, including the Bible; they engage in frequent and regular worship and prayer in the form of "reasonings" and meditation; they celebrate rituals and Holy Days, and they are involved as members in various organizations related to religious practice. Taylor, *supra* at 1613-1614. The House of Nyahbinghi, of which Respondent Ras Makahna is a member, is the Order that represents the most orthodox or pure practices of Rastafari. Encyclopedia at 256. And finally, the religious beliefs and practices of Rastafari have developed and been practiced for over seventy years. *Id* at 257. Thus, even without a concession in this case, there can be no serious doubt that adherents of Rastafari are protected by the Free Exercise Clause of the Organic Act of Guam, the Religious Freedom Restoration Act, and the First Amendment of the United States Constitution.

B. The Use of Cannabis is a Sacred Practice for Rastafari.

It is similarly undisputed and undisputable that for Rastafari, cannabis use is sacramental. *See, e.g.*, Homiak, John P., *The Mystic Revelation of Rasta Far-Eye: Visionary Communication in a Prophetic Movement, in* Dreaming: Anthropological and Psychological Interpretations 224-27 (Barbara Tedlock, ed., 1987); Homiak, John P., *Movements of Jah People: From Soundscapes to Mediascape, in* Religion, Diaspora and Cultural Identity: A Reader in the Anglophone Caribbean 90-96 (John Pulis, ed., 1998); Yawney, Carole D., *Dread Wasteland: Rastafarian Ritual in West Kingston, Jamaica, in*, Northern Colorado Occasional Papers in Anthropology165-69 (Ross Crumrine ed., 1979) *Taylor, supra* at 1609. *See also citations in note 1, supra* (discussing sacramental nature of cannabis). From the earliest years of the movement, the ritualized use of cannabis, or "holy herbs," has been central to the Rastafari belief system. Encyclopedia at 264. As the basis of daily worship among small face-to-face groups of communicants, herbs smoking in a ritual water pipe known as the "chalice" became the primary form of Rastafari ritual practice, the basis for an experience of the sacred, and the means by which new adherents were socialized into the faith. Because Rastafari seek to know God (Jah Rastafari) directly, the ingestion of herbs encourages inspiration and insight through a visionary state

sociologists would characterize as a transcendent experience. The herbs also function as incense that accompanies praises to the Creator, and as a communion that accompanies "reasoning." *Id.*

"Reasoning" is one of the primary means by which Rastafari grow in their religious knowledge and faith, or "come up in the faith." *Id.* at 263. It is a form of collective and visionary discourse in which individuals together seek the divine inspiration of revealed knowledge. The ritual of the chalice is central to the "reasoning," and it typically involves an Elder ritually preparing the chalice, lighting it, and blessing it before circulating it to all the members of the community gathered there. *Id.* at 264. For the Rastafari, the chalice constitutes a cosmology which incorporates that basic elements of heat, air, earth, and fire – the elements of creation that link communicants with the original condition of balance and harmony. *Id.* Through symbolic association with the dreadlocks – the primary external symbol of Rastafari identity – and the value placed on ritual knowledge and the ability to properly handle herbs, cannabis is a central feature of Rastafari belief. Indeed, Rastafari regard cannabis as a God-given gift, a part of nature given to man to use to sustain health, for healing, prayer, and other spiritual purposes. Common references to cannabis include "Lamb's bread," "the tree of

life," and "the healing of the nations." *Id.* Rastafari cite passages in the Bible from Genesis to Revelation that call for these practices.

C. The Cultivation and Transport of Cannabis for Sacramental Use is A Religious Duty.

The use of cannabis is also tied up with the Rastafari concepts of "livity" and "ital." "Livity" might be translated generally as "a way of life," but it has significant theological implications as the practice of livity constitutes the essence of the redemptive processes by which Rastafari seek to know and praise the Creator, to do his will, and to seek his guidance and protection. Encyclopedia at 265. There are several expressions of livity that are central and unique to Rastafari: the wearing of dreadlocks (uncut matted hair and knotted locks and beards as commanded in Leviticus 21:5 and as a sign of separation from Babylon), speech, dress, foodways, and male-female relationships. Many of these practices of livity are based on the Code of the Nazarene and other Old Testament writings. In addition, livity encompasses protocols for devotional practices, such as the sacramental use of cannabis. This use is authenticated from sources in the Bible, such as Genesis 3:18, Exodus 10:12, Proverbs 15:17; Psalms 104:4, and Revelation 22:2. Encyclopedia at 265; *see also* Taylor, *supra*, at 1609.

Rastafari use the term "livity" to refer to their daily life practice. In addition, Rastafari use the term "ital" - in the sense of natural or organic - to embrace their livity practices. Encyclopedia at 265. Within the orthodox or Nyahbinghi context, "ital livity" then includes foodways that are as close to organic as possible, and that avoid any kind of chemical or artificial contaminant. Rastafari refer to one's physical structure as the "temple" which requires appropriate care and nurturing. Many Rastafari insist that they "do not eat from just anyone," meaning not only do they want to assure themselves that food is uncontaminated in its production, but that its preparation is "conscious," as physically and spiritually wholesome as possible. For example, in orthodox Nyahbinghi practice, food should not be cooked in vessels contaminated with flesh, and herbs should not be "ingested" from a chalice which has been touched by the mouth of flesh eaters.

Since cannabis is considered a necessary food, both physically and spiritually, principles of ital livity would also apply to its growing, harvesting, curing, preparation, and consumption. *Id.* at 264. To "eat" herbs that have been grown with the use of chemical fertilizer would be to compromise the "temple." Rastafari attempt to ensure that the cannabis is "ital" by either growing it themselves, knowing the grower and his practices, or knowing the source. The

sourcing and transportation of the herbs thus entails a kind of institutionalized trust by which Rastafari certify that all in the network of distribution know and abide by the appropriate principles and practices. Indeed, from a Rastafari perspective, the "pedigree" or lineage of the cannabis is established by knowing through whose hands it has passed. Such pedigrees reflect the fact that it is customary for those within these networks of growing and distribution to impart information about the source/purity/potency of the herbs. To take on the spiritual duty of transporting herbs is to participate in this network of institutionalized trust by which pedigrees are established and authenticated. This process ensures that herbs that reach and are consumed within Rastafari communities are proper "food" for the "healing of the nation." This latter phrase is frequently used by Rastafari to refer to herbs as spiritual healing food. *See* Encyclopedia at 264-65.

Both in and outside of Jamaica, Rastafari who consume the herbs speak of its source. The networks of Rastafari who reason together, and "come up" in the faith of Rastafari together, are an overlay on the network that produces and controls the flow of herbs. In fact, the production of cannabis or "hola herbs" in a manner consistent with "ital livity" is considered not only an art and science in Rastafari, but a sacred duty as well for those who choose to carry it out as a

devotional "work." *Id.*[3/] By the same token, some Rastafari take on the duty to transport and provide herbs. Some Rastafari provide herbs in their yards, to facilitate the communion of those assembled for reasoning. This duty also includes the responsibility of maintaining a safe and sacred space in which to pray and reason, as well as the opportunity to make use of a chalice which has not been contaminated. Others might take on the works of transporting and providing herbs for the collective celebrations known as "Nyahbinghi." Participants in those celebrations often provide specific ritual skills (drumming, chanting, speechifying) as well as donations of necessary resources such as food, firewood, and holy herbs for the general use of all communicants. *Id.* at 262. Similarly, when Rastafari travel (or "trod") on the globalizing missions or conferences that are important to their faith (Encyclopedia at 268), they may well take on the spiritual duty of carrying cannabis suitable for sacramental use during their travel.

Given these Rastafari beliefs and practices, the cultivation and transport of cannabis are important religious practices, without which Rastafari cannot participate in one of the sacramental practices of their faith. Burdening the

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3/ In Rastafari the expressions "duty" and "works" are commonly used to refer to one's personal responsibility for manifesting the teachings of Selassie I. *Id.* at 265.

Rastafari's right to carry cannabis suitable for sacramental use burdens the sacramental use.

II. THE CENTRAL OR MANDATORY NATURE OF THE RELIGIOUS PRACTICE IS NOT THE *SINA QUA NON* OF A FREE EXERCISE CLAIM.

Even if there were only a bare allegation here (instead of a concession) that marijuana use is a sacramental practice of Rastafari, "[i]t 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. 680, 699 (1989). "The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task . . . . However, the resolution of that question is not to turn upon judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of the Ind. Empl. Sec. Div.*, 450 U.S. 707, 714 (1981); *see also Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969) (holding Georgia courts could not apply legal doctrine which required court to weigh the significance and meaning of religious doctrine). "Courts must be cautious in

attempting to separate real from fictitious beliefs." *Ochs v. Thalacker*, 90 F.3d 293, 296 (8th Cir. 1996) (declining to decide case on grounds of whether the claim was based on a sincerely held religious belief).

This is not to say that no free exercise claim can ever be doubted. The Supreme Court has delineated the outer limits of the Free Exercise Clause: "One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Thomas*, 450 U.S. at 715. But the claim here that Ras Makahna was importing the marijuana for sacramental use in a religion widely known to use marijuana as a sacrament lies far from those outer limits.

Nor could a court measure the free exercise protection by whether the practice was mandatory or not, since "[t]here is nothing in the First Amendment's guarantee of the free exercise of religion that restricts the guarantee to the requirements of the church." *Peterson v. Minidoka County School Dist.*, 118 F. 3d 1351, 1357, *as amended*, 132 F. 3d 1258 (9th Cir., 1997) (fact that principal's church did not require him to home school his children did not invalidate his free exercise claim); *Mack v. O'Leary*, 80 F.3d 1175 (7th Cir. 1996), *vacated and remanded on other grounds,* 118 S. Ct. 36 (1997), *vacated on other grounds*, 151 F.3d 1033 (7th Cir. 1998) (holding substantial burden test did not depend on

whether practice was mandatory, and noting many significant religious practices are not mandatory such as praying the rosary, or wearing a yarmulke). When a Rastafari takes on the duty of transporting herbs that have been grown and harvested in a way that comports with Rastafari beliefs, he or she is carrying out a religious practice.

For this reason, the government's belated argument on appeal (which was apparently not raised in the petition for *certiorari*) that a conviction for "importation" as opposed to "possession" does not burden Ras Makahna's free exercise of religion because the government claims it is not "required" is flawed. In fact, as demonstrated above, it is a religious duty, especially for orthodox Nyahbinghi, to use and to provide marijuana that is appropriate and suitable for the sacrament. If one is traveling to another country, one must still practice the sacraments of one's faith, and the action necessary to do that is to bring "ital" marijuana for religious use from a source one is assured of. Thus, the importation of ital marijuana is as significant to the religious practice as the use of it.

Guam's argument also fails for another reason. Guam concludes, without citation to any support, that importation is "more analogous to manufacture, or even distribution, than to simple possession." Petitioner's Brief at 42. But the word "import" is defined as "to bring from a foreign country or external source."

Webster's Ninth New Collegiate Dictionary 605 (1988). Indeed, it derives from the French word "portare" which means simply "to carry." *Id.* Thus, the word itself does not suggest or imply any connection with either manufacturing or distribution. To the contrary, the essential elements are simply possession and travel. Guam's attempt to make "possession and travel" more nefarious (and thus less religious) than plain "possession" simply lacks any reference to law or link to logic.

III. WHERE GUAM CHOSE TO PRESENT NO EVIDENCE, THIS COURT CANNOT ASSUME A COMPELLING INTEREST OR THE LACK OF LESS RESTRICTIVE ALTERNATIVES.

In the trial court, Guam argued, as it does here, that the compelling interest test did not apply to this case. As a conscious strategy to bolster that argument, Guam decided not to introduce any evidence relating to what its interest was. Guam made that decision with full knowledge that Ras Makahna's position was that the compelling interest test did apply, either under the Organic Act of Guam or under the Religious Freedom Restoration Act. *Guam v. Guerrero*, 2000 WL 1299635 (noting Guam was on notice of competing tests for a free exercise claim, and criticizing Guam's "disingenuous" argument that by making a record of a compelling governmental interest, it would essentially have rendered moot its

argument that the compelling interest test did not apply). Guam is now bound by that trial strategy.

Nor can this Court assume either of these requirements. In the strict scrutiny context, the Supreme Court has held, "In the absence of a *factual basis* substantiating the harm and the efficacy of the proposed cure, we cannot assume that the harm exists or that the regulation redresses it." *Denver Area Educ. Tele. Consortium v. FCC*, 518 U.S. 727, 766 (1996) (emphasis added); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141 (1987) (requiring "proof by the State of a compelling interest" in strict scrutiny of claims under the Free Exercise Clause).

And the fact that Guam has a criminal statute prohibiting the importation of marijuana does not justify such an assumption, either. Indeed, in *Bauer*, this Court rejected the District Court's assumption that the "existence of the marijuana laws [was] dispositive of the question whether the government had chosen the least restrictive means of preventing the sale and distribution of marijuana." 84 F.3d at 1559. Indeed, in the First Amendment context, even direct legislative findings may be insufficient (let alone the mere existence of a statute), to satisfy the requirement that the government prove both its compelling interest and the least

restrictive means prong. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989).

In addition to being prohibited as a matter of law, any assumption that Guam has a compelling interest which is furthered by this statute in the least restrictive way is likely to be factually flawed. All states have laws restricting the possession and use of controlled substances, but many of those laws contain exemptions for religious use. For example, numerous states exempt the use of peyote (a Schedule I substance, like cannabis) for religious purposes. *See, e.g.*, Wyo. Stat. § 35-7-1044 (exempting members of the Native American Church and those participating in bona fide religious ceremonies of the Native American Church); Wisc. Stat. § 961.115 (same); S.D. Codified Laws § 34-20B-14 (same); Colo. Rev. Stat. 12-22-317(3)(exempting use of peyote in the religious ceremonies of "any bona fide religious organization"); N.M. Stat. § 30-31-6(D) (same); Nev. Rev. Stat. Ann. § 40-453.541 (same); Idaho Code 37-2732A (exempting use by users who are "members or eligible for membership in a federally recognized Indian tribe"). Indeed, the federal government itself has similarly exempted peyote from the criminal drug laws when it is used for religious purposes. 21 CFR § 1307.31.

Further, many statutes that exempt use of peyote from the criminal laws also exempt manufacture and distribution of peyote from those laws if the manufacturers and distributors register annually and comply with other requirements of law for manufacturers of controlled substances. *E.g.*, 21 C.F.R. 1307.31; Minn. Stat. Ann. sect. 152-02; Tex. Health & Safety Code Ann. section 481.111 (Vernon 1999).

In addition, several states have exempted marijuana use for medical purposes from prosecution under the controlled substances laws. Thus, in Hawaii, for example, individuals suffering from certain defined medical conditions who have been advised by their doctor that they are likely to benefit from marijuana may not be convicted under the general statute. Haw. Rev. Stat. §329. This particular statute controls the program by requiring a registration process for such individuals. Similar provisions apply in Alaska, California, Colorado, Maine, Nevada, Oregon, and Washington, with various requirements imposed to insure that the use is medically motivated. Alaska Stat. §17.37; Or. Rev. Stat. §475.300; Colo. Const. amend. 20; Nev. H.B. 121 (proposed legislation implementing constit utional amendment); 22 Maine Rev. Stat. §§ 2383-B; Rev. Code Wash. § 69.51A. Thus, these states have exempted some drug use for particular purposes from the general statute criminalizing that drug use.

These exemptions and procedures are all less restrictive alternatives to the otherwise total ban on peyote and marijuana. They at least suggest that even if Guam had proved a compelling interest below, there could well be less restrictive alternatives to this prosecution that would further such an interest.

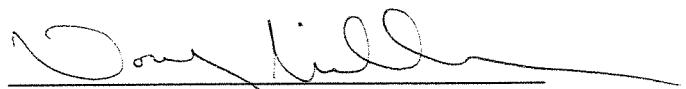
Thus, as a matter of law, because Guam offered no evidence, and as a matter of fact, because there are many examples of other alternatives, this Court cannot posit or assume either a compelling interest for Guam or the lack of a less restrictive alternative.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Guam Supreme Court.

Respectfully submitted,

THE DKT LIBERTY PROJECT,
DR. JOHN P. HOMIAK, and
PROF. CAROLE D. YAWNEY



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CERTIFICATE OF COMPLIANCE PURSUANT TO
FED. R. APP. p. 32(a)(7)(C) AND
CIRCUIT RULE 32-1 FOR CASE NO. 00-71247

I certify that , pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less.

June 1, 2001
Date

Julie M. Carpenter, counsel for *amici*