

No. 00 - 71247

**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**

BRIEF OF RESPONDENT

GRAHAM BOYD

NELSON TEBBE

ACLU Drug Policy Litigation Project

160 Foster Street

New Haven, CT 06511

Phone: (203) 787-4188

Fax: (203) 787-4199

DANIEL N. ABRAHAMSON

The Lindesmith Center

1095 Market Street, Suite 505

San Francisco, CA 94103

Phone: (415) 554-1900

Fax: (415) 554-1980

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF JURISDICTION	1
STATEMENT OF ISSUES PRESENTED	1
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	7
ARGUMENT	11
I. THE SUPREME COURT OF GUAM’S INTERPRETATION OF ITS OWN CONSTITUTION SHOULD BE UPHELD BECAUSE IT ADDRESSES A MATTER OF PURELY LOCAL CONCERN AND IS NOT CLEAR ERROR.	11
A. <u>Congress’s Vision of Judicial Independence for Guam.</u>	12
B. <u>The Federal Judiciary’s Deference to Territorial Supreme Courts.</u>	17
C. <u>The Supreme Court of Guam Decided a Question of Local Concern</u>	20
D. <u>The Decision of the Guam High Court Is Not Manifest Error</u>	27
II. IN THE ALTERNATIVE, THE MEANING OF GUAM’S FREE EXERCISE CLAUSE SHOULD BE DETERMINED BY THE INTENT OF CONGRESS	32

III.	THE RELIGIOUS FREEDOM RESTORATION ACT IS CONSTITUTIONAL AS APPLIED TO GUAM AND PROVIDES AN INDEPENDENT GROUND FOR THE HOLDING OF THE GUAM SUPREME COURT	35
	A. <u>Boerne Has No Bearing on the Constitutionality of RFRA as Applied to Federal Instrumentalities</u>	36
	B. <u>Congress Has Clear Authority to Enact RFRA in the Federal Realm</u>	37
	C. <u>Congress Has Sufficient Authority Over Guam to Enact RFRA</u>	40
	D. <u>RFRA Does Not Violate the Separation of Powers Doctrine</u>	42
IV.	THE GOVERNMENT FAILS THE COMPELLING INTEREST TEST .	47
	CONCLUSION	55

TABLE OF AUTHORITIES

Cases

<u>Agana Bay Dev. Co. v. Supreme Court of Guam,</u> 529 F.2d 952 (9th Cir. 1976)	29
<u>American Ins. Co. v. 356 Bales of Cotton</u> , 26 U.S. 511 (1828)	41
<u>American Title Ins. Co. v. Lacelaw Corp.</u> , 861 F.2d 224, 226 (9th Cir. 1988) ..	49
<u>American Trading Co. v. H. E. Heacock Co.</u> , 285 U.S. 247 (1932)	18
<u>Attorney General v. Desilets</u> , 636 N.E.2d 233 (Mass. 1994)	27, 28
<u>Bordallo v. Reyes</u> , 763 F.2d 1098 (9th Cir. 1985)	15
<u>Braunfeld v. Brown</u> , 366 U.S. 599 (1961)	49
<u>Brown v. Civil Serv. Comm'n</u> , 818 F.2d 706 (9th Cir. 1987)	15
<u>Callahan v. Woods</u> , 736 F.2d 1269 (9th Cir. 1984)	49, 53
<u>Cantwell v. Connecticut</u> , 310 U.S. 296 (1940)	33
<u>Carscadden v. Territory of Alaska</u> , 105 F.2d 377 (9th Cir. 1939)	20
<u>Castle v. Castle</u> , 281 F. 609 (9th Cir. 1922)	20
<u>Cheema v. Thompson</u> , 67 F.3d 883 (9th Cir. 1995)	48
<u>Christian v. Waiialua Agr. Co.</u> , 93 F.2d 603 (9th Cir. 1937)	20
<u>Christians v. Crystal Evangelical Free Church (In re Young)</u> ,	

141 F.3d 854 (8th Cir. 1998)	36, 38, 39, 46, 47
<u>City of Boerne v. Flores</u> , 521 U.S. 507 (1997)	36, 44
<u>Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints</u> <u>v. Amos</u> , 483 U.S. 327 (1987)	37
<u>Crawford v. Davis</u> , 109 F.3d 1281 (8th Cir. 1997)	40
<u>De Castro v. Board of Comm’rs of San Juan</u> , 322 U.S. 451 (1944)	18
<u>Dennis v. Chang</u> , 611 F.2d 1302 (9th Cir. 1980)	31
<u>Diaz v. Gonzalez</u> , 261 U.S. 102 (1923)	17
<u>Dickerson v. United States</u> , 530 U.S. 428 (2000)	47
<u>Dorr v. United States</u> , 195 U.S. 138 (1904)	19, 30
<u>Duffield v. Robertson Stephens & Co.</u> , 144 F.3d 1182 (9th Cir. 1998)	31
<u>Duncan v. Kahanamoku</u> , 327 U.S. 304 (1946)	33
<u>EEOC v. Catholic Univ. of Am.</u> , 83 F.3d 455 (D.C. Cir. 1996)	39, 46
<u>EIE Guam Corp. v. The Supreme Court of Guam</u> , 191 F.3d 1123 (9th Cir. 1999)	20, 23, 26
<u>Employment Division v. Smith</u> , 494 U.S. 872 (1990)	passim
<u>Ewa Plantation Co. v. Wilder</u> , 289 F. 664 (9th Cir. 1923)	20
<u>Finley v. United States</u> , 490 U.S. 545 (1989)	32

<u>First Covenant Church of Seattle v. City of Seattle,</u>	
120 Wash.2d 203 (1992)	28
<u>Fox v. Haarstick</u> , 156 U.S. 674 (1895)	18
<u>Fullilove v. Klutznick</u> , 448 U.S. 448 (1980)	39
<u>Gillette v. United States</u> , 401 U.S. 437 (1971)	37
<u>Goehring v. Brophy</u> , 94 F.3d 1294 (9th Cir. 1996)	48
<u>Goldman v. Weinberger</u> , 475 U.S. 503 (1985)	45
<u>Gray v. Taylor</u> , 227 U.S. 51, 56 (1913)	18
<u>Guam v. Fegurgur</u> , 800 F.2d 1470 (9th Cir. 1986)	31
<u>Guam v. Guerrero</u> , Crim. No. 0001-91,	
slip op. (Guam Sup. Ct. July 29, 1999)	50
<u>Guam v. Inglett</u> , 417 F.2d 123, 124 (9th Cir. 1969)	5, 6
<u>Guam v. United States</u> , 179 F.3d 630 (9th Cir. 1999)	29
<u>Guam v. Yang</u> , 850 F.2d 507 (9th Cir. 1988)	14
<u>Hall v. C&P Tel. Co.</u> , 793 F.2d 1354 (D.C. Cir. 1986)	24, 25
<u>Hill v. Carter</u> , 47 F.2d 869 (9th Cir. 1931)	19
<u>Hill-Murray Fed. of Teachers v. Hill-Murray High School,</u>	
487 N.W.2d 857 (Minn. 1992)	27
<u>In re Bakersfield Westar Ambulance, Inc.</u> , 123 F.3d 1243 (9th Cir. 1997)	49

<u>INS v. Chadha</u> , 462 U.S. 919 (1983)	41
<u>Kikumura v. Hurley</u> , 242 F.3d 950 (10th Cir. 2001)	36, 37, 46, 48
<u>King v. Smith (In re Bishop’s Estate)</u> , 250 F. 145 (9th Cir. 1918)	19
<u>Kinney v. Oahu Sugar Co.</u> , 255 F. 732 (9th Cir. 1919)	20
<u>Landmark Communications, Inc. v. Virginia</u> , 435 U.S. 829 (1978)	50
<u>Lewers & Cooke v. Atcherly</u> , 222 U.S. 285 (1911)	17
<u>Magic Valley v. Fitzgerald (In re Hodge)</u> , 220 B.R. 386 (D. Idaho 1998)	39, 45, 47
<u>Mailloux v. Mailloux</u> , 554 F.2d 976 (9th Cir. 1977)	14
<u>Matos v. Hermanos</u> , 300 U.S. 429 (1937)	18
<u>Matter of McLinn</u> , 739 F.2d 1395 (9th Cir.1984)	15
<u>Mercado Riera v. Mercado Riera</u> , 167 F.2d 207 (1st Cir. 1948)	19
<u>Michigan v. Bullock</u> , 485 N.W.2d 866 (Mich. 1992)	33
<u>Michigan v. Long</u> , 463 U.S. 1032 (1983)	21
<u>Michigan v. Long</u> , 463 U.S. 1032 (1983)	21
<u>Mills v. Maine</u> , 118 F.3d 37 (1st Cir. 1997)	40
<u>Mockaitis v. Harclerod</u> , 104 F.3d 1522 (9th Cir. 1997)	43
<u>NAACP v. City of Richmond</u> , 743 F.2d 1346 (9th Cir. 1984)	30
<u>National Bank v. County of Yankton</u> , 101 U.S. 129 (1880)	20, 41
<u>Notley v. McMillan</u> , 16 F.2d 273 (9th Cir. 1926)	20

<u>Open Door Baptist Church v. Clark County</u> , 140 Wash.2d 143 (2000)	28
<u>People of the Territory of Guam v. Okada</u> , 694 F.2d 565 (9th Cir. 1982)	41
<u>Pernell v. Southall Realty</u> , 416 U.S. 363 (1974)	24
<u>Phoenix R. Co. v. Landis</u> , 231 U.S. 578, 579 (1913)	18
<u>Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico</u> ,	
478 U.S. 328, 339 (1976)	19
<u>PruneYard v. Robins</u> , 447 U.S. 74 (1980)	27
<u>Puerto Rico v. Rubert Hermanos, Inc.</u> , 309 U.S. 543 (1940)	23
<u>Sable Communications of Cal., Inc. v. FCC</u> , 492 U.S. 115 (1989)	50
<u>Sakamoto v. Duty Free Shoppers, Ltd.</u> , 764 F.2d 1285 (9th Cir. 1985)	41
<u>Saludes v. Ramos</u> , 744 F.2d 992 (3rd Cir. 1984)	14
<u>Sancho v. Texas Co.</u> , 308 U.S. 463 (1940)	18
<u>Santa Fe Cent. Ry. Co. v. Friday</u> , 232 U.S. 694 (1914)	22, 26
<u>Sherbert v. Verner</u> , 374 U.S. 398 (1963)	5, 33
<u>St. John’s Lutheran Church v. State Compensation Ins. Fund</u> ,	
252 Mont. 516 (1992)	28
<u>State v. Hershberger</u> , 462 N.W.2d 393 (Minn. 1990)	27
<u>State v. Miller</u> , 549 N.W.2d 235 (Wisc. 1996)	28
<u>Sutton v. Providence St. Joseph Medical Center</u> ,	

192 F.3d 826 (9th Cir. 1999)	36, 47
<u>Swanner v. Anchorage Equal Rights Comm’n</u> , 874 P.2d 274 (Ala. 1994) ..	27, 28
<u>Sweeney v. Lomme</u> , 89 U.S. (22 Wall.) 208 (1874)	18
<u>Territory of Guam v. Olsen</u> , 431 U.S. 195 (1977)	15
<u>Territory of Hawaii v. Gay</u> , 52 F.2d 356 (9th Cir. 1931)	20
<u>Texas Monthly, Inc. v. Bullock</u> , 489 U.S. 1 (1989)	45
<u>Thomas v. Review Bd. of Indiana Employment Sec. Div.</u> ,	
450 U.S. 707 (1981)	48, 49, 53
<u>Timmer v. Michigan Dept. of Commerce</u> , 104 F.3d 833 (6th Cir. 1997)	40
<u>United States v. Ballard</u> , 322 U.S. 78 (1944)	33
<u>United States v. Bauer</u> , 84 F.3d 1549 (9th Cir. 1996)	passim
<u>United States v. Carlson</u> , 900 F.2d 1346 (9th Cir. 1990)	51
<u>United States v. Edmond</u> , 924 F.2d 261 (D.C. Cir. 1991)	24
<u>United States v. Lee</u> , 455 U.S. 252 (1982)	45
<u>United States v. Marengo County Comm’n</u> , 731 F.2d 1546 (11th Cir. 1984) ...	44
<u>United States v. Sisson</u> , 399 U.S. 267 (1970)	32
<u>Waialua Agr. Co. v. Christian</u> , 305 U.S. 91 (1938)	18
<u>Walz v. Tax Comm’n</u> , 397 U.S. 664 (1970)	38

<u>Wisconsin v. Yoder</u> , 406 U.S. 205 (1972)	33, 48, 50
<u>Woods v. Cloyd W. Miller Co.</u> , 333 U.S. 138 (1948)	40
<u>Worldwide Church of God v. Philadelphia Church of God, Inc.</u> ,	
227 F.3d 1110 (9th Cir. 2000)	36

Constitutions & Statutes

42 U.S.C. § 1424	53
42 U.S.C. § 1996a	20, 41
42 U.S.C. § 2000bb-2(2)	41
42 U.S.C. § 2000b-1	49
48 U.S.C. § 1258	18
48 U.S.C. § 1421a	27, 28
48 U.S.C. § 1421b(a)	15
48 U.S.C. § 1424-1	49
48 U.S.C. § 1424-2	15
7 G.C.A. § 3101	49, 53
9 G.C.A. § 67.23(d)(10)	33
9 G.C.A. § 67.89(a)	20
9 G.C.A. § 80.33.7	20

Religious Land Use and Institutionalized Persons Act of 2000, 114 Stat. 803 (2000)	48
U.S. Const. art. I, § 8, cl. 18	20
U.S. Const., art. IV, § 3	36, 38, 39, 46, 47

Legislative History

130 Cong. Rec. 23790 (daily ed. Aug. 10, 1984)	36, 44
146 Cong. Rec. E1563-01 (daily ed. Sept. 21, 2000), 2000 WL 1369378	37
H.R. Rep. No. 103-88 (1993), 1993 WL 158058	40
H.R. Rep. No. 105-742 (1998), <u>reprinted in</u> 1998 WL 658802	18
H.R. Rep. No. 90-1521 (1968), <u>reprinted in</u> 1968 U.S.C.C.A.N. 3564, 1968 WL 5260	31
S. Rep. No. 103-111 (1993), 1993 U.S.C.C.A.N. 1892, 1993 WL 286695	17
S. Rep. No. 81-2109 (1950), <u>reprinted in</u> 1950 U.S.C.C.A.N. 2840, 1950 WL 1716	47

Other Authorities

Aurora R. Bearse, Note, <u>RFRA: Is it Necessary? Is it Proper?</u> , 50 Rutgers L. Rev. 1045 (1998)	39
Thomas C. Berg, <u>The Constitutional Future of Religious Freedom Legislation</u> ,	

20 U. Ark. Little Rock L.J. 715 (1998)	39
Edward J.W. Blatnik, Note, <u>No RFRAF Allowed</u> ,	
98 Colum. L. Rev. 1410 (1998)	39
William J. Brennan, Jr., <u>State Constitutions and the Protection of Individual Rights</u> ,	
90 Harv. L. Rev. 489 (Jan. 1977)	27, 28
Kent Greenawalt, <u>Quo Vadis: The Status and Prospects of “Tests”</u>	
<u>Under the Religion Clauses</u> , 1995 S.Ct. Rev. 323	39
Marci A. Hamilton, <u>The Religious Freedom Restoration Act is Unconstitutional</u> ,	
<u>Period</u> , 1 U. Pa. J. Const. L. 1 (1998)	39
Stanley K. Laughlin, Jr., <u>The Law of United States Territories and Affiliated</u>	
<u>Jurisdictions</u> (1995 & Supp. 1997)	12, 19, 22
Douglas Laycock & Oliver S. Thomas, <u>Interpreting the Religious Freedom</u>	
<u>Restoration Act</u> , 73 Tex. L. Rev. 209 (1994)	39, 46
Arnold H. Leibowitz, <u>The Applicability of Federal Law to Guam</u> ,	
16 Virginia J. Int’l L. 21 (1975)	13, 22, 30
Ira C. Lupu, <u>Of Time and the RFRA: A Lawyer’s Guide to the Religious Freedom</u>	
<u>Restoration Act</u> , 56 Mont. L. Rev. 171 (1995)	39
Michael W. McConnell, <u>Institutions and Interpretation: A Critique of City of</u> Boerne	

v. Flores, 111 Harv. L. Rev. 153 (1997)	39
Michael Stokes Paulsen, <u>A RFRA Runs Through It: Religious Freedom and the</u> <u>U.S. Code</u> , 56 Mont. L. Rev. 249 (1995)	39
Mitchell F. Thompson, <u>Guam’s Bill of Rights—The Forgotten Shield</u> , 1989 Guam Bar J. 2	12, 30
<u>Review Limited to Questions Presented</u> , 5 Am. Jur. 2d Appellate Review § 369 (2000)	50, 53
William W. Van Alstyne, <u>The Failure of the Religious Freedom Restoration Act</u> <u>Under Section 5 of the Fourteenth Amendment</u> , 46 Duke L.J. 291 (1996) .	39

STATEMENT OF JURISDICTION

Respondent concurs in Petitioner's statement of jurisdiction. See Petitioner's Brief, at 2.

STATEMENT OF ISSUES PRESENTED

- 1.** Whether federal law directs this Court to defer to the Supreme Court of Guam in its interpretation of Guam's Free Exercise Clause, where that interpretation is not clearly erroneous;
- 2.** Whether Congress intended for Guam's Free Exercise Clause to provide protection for religious freedom that is greater than currently provided under the federal Constitution;
- 3.** Whether the Religious Freedom Restoration Act ("RFRA") is constitutional as applied to Guam and whether it provides an independent basis for the decision of the Supreme Court of Guam.

STATEMENT OF FACTS

On or about January 2, 1991, Respondent Iyah Ben Makahna¹ was arrested by Guam officials at the Guam International Airport after they found that he was carrying marijuana. On January 11, 1991, Ras Makahna was indicted and charged with Importation of a Controlled Substance, in violation of Guam statutes 9 G.C.A. §§ 67.23(d)(10), 67.89(a), and 80.33.7. See Guam v. Guerrero, 2000 Guam 26, 2000 WL 1299635, at *1 (Guam Sept. 8, 2000); ER Tab 1, at 1.

Ras Makahna moved to dismiss his indictment on the ground that the prosecution violated his right to freely exercise his religion under the Organic Act of Guam² and RFRA.³ The government then conceded four essential facts:

¹ Although the caption refers to the Respondent as Benny Toves Guerrero, his birth name, he has for over twenty years chosen to use his Rastafarian name, Iyah Ben Makahna. “Iyah” is a reference to Jah, the Rastafarian word for God. “Ben” means “son of.” “Makahna” is an indigenous Guamanian word for spiritual leader, and also invokes the last name of Tafari Makonnen, or Ras Tafari, the Emperor Haile Selassie I of Ethiopia, from whom Rastafarianism takes its name. The title “Ras” identifies a Rastafarian; he therefore uses the shorter name Ras Makahna as well.

² Section 1421b of the Organic Act is entitled “Bill of Rights.” The first subsection provides:

No law shall be enacted in Guam respecting an establishment of religion or prohibiting the free exercise thereof
48 U.S.C. § 1421b(a).

³ The Religious Freedom Restoration Act (“RFRA”) provides, in pertinent part:

(1) Rastafarianism is a legitimate religion. See ER Tab 3, at 7 (“[T]he government conceded in the proceedings below . . . the fact of the legitimacy of the Rastafarian religion”).

(2) Ras Makahna is a member of the Rastafarian religion. See Guam v. Guerrero, Crim. No. 0001-91, slip op. at 4 (Guam Super. Ct. July 29, 1999); ER Tab 2, at 4.

(3) The use of marijuana is a sacrament necessary for the practice of Rastafarianism. See ER Tab 2, at 4.

(4) Guam’s prosecution of Ras Makahna substantially burdens his religious practice. See ER Tab 3, at 7-8 (“[T]he government conceded in the proceedings below . . . the substantial infringement upon [Ras Makahna’s] right to freely exercise his religion.”); ER Tab 2, at 6 (“The People assert that the statute in question . . . may substantially burden [Ras Makahna’s] ability to practice his religion.”).

The trial court accordingly accepted these facts as true. See ER Tab 2, at 4. This Court has likewise acknowledged that Rastafarianism is a legitimate religion, in which marijuana plays a necessary and central role:

(a) In general

Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1.

[Rastafarianism] is a religion which first took root in Jamaica in the nineteenth century and has since gained adherents in the United States. See Mircea Eliade, Encyclopedia of Religion 96-97 (1989). It is among the 1,558 religious groups sufficiently stable and distinctive to be identified as one of the existing religions in this country. See J. Gordon Melton, Encyclopedia of American Religions 870-71 (1991). Standard descriptions of the religion emphasize the use of marijuana in cultic ceremonies designed to bring the believer closer to the divinity and to enhance unity among believers. Functionally, marijuana—known as ganja in the language of the religion—operates as a sacrament with the power to raise the partakers above the mundane and to enhance their spiritual unity.

United States v. Bauer, 84 F.3d 1549, 1556 (9th Cir. 1996). These four admitted facts must be treated as established for the purposes of this case.

The trial court held RFRA constitutional as applied to Guam. See ER Tab 2, at 4-5. It also held that under the Free Exercise Clause of the Organic Act of Guam, laws of general applicability that substantially burden the free exercise of religion are invalid unless the government can demonstrate that its prosecution is the least restrictive means of vindicating a compelling interest.⁴ See id. at 5-6. Applying the compelling interest test under RFRA and the Organic Act, the trial court noted that

[T]he Government has not demonstrated a compelling state interest to deny [Ras Makahna's] right to the free exercise of his religion by using marijuana as a sacrament [sic]. The Government has not even alleged that the law addresses a compelling state interest. . . . The

⁴ This case presented no occasion for the Guam courts to consider the very different situation in which protecting the free exercise of one person's religion might result in the imposition of those beliefs on another person.

Government has not alleged or attempted to show that the statute is the least restrictive means of carrying out its purpose.

Id. at 6. Accordingly, the trial court held that the importation statute, as applied to this case, violated both the Organic Act and RFRA; it consequently dismissed the indictment. See id. at 6-7.

The Supreme Court of Guam affirmed. However, it took pains to explain that it was doing so solely on the basis of its interpretation of the Free Exercise Clause of Guam's constitution, the Organic Act, not under the federal Constitution. The court decided that it need not reach the question of RFRA's constitutionality. Instead, it held that Guam's Free Exercise Clause provides greater protection than the corresponding provision of the U.S. Constitution:

The rule which we announce today devolves from the recognition that this court sits as the highest tribunal in this jurisdiction and that Congress intends to allow Guam to develop its own institutions.

. . . This court can reach its own conclusions on the scope of the protections of section 1421b(a) [of the Organic Act] and may provide broader rights than those which have been interpreted by federal courts under the United States Constitution. . . . The approach we take is to construe Guam's Constitution, the Organic Act, and its concomitant protection of the Free Exercise of Religion, more broadly than the U.S. Supreme Court would the federal counterpart.

ER Tab 3, at 7. Construing the Guam Free Exercise Clause, the court then adopted a version of the test that the Supreme Court of the United States had articulated for the federal Free Exercise Clause in Sherbert v. Verner, 374 U.S. 398 (1963), and

later rejected in Employment Division v. Smith, 494 U.S. 872 (1990): “[T]he government must prove that the infringement is justified by a compelling governmental interest and that the statute is the least restrictive means of achieving that objective.” ER Tab 3, at 7.

Applying that test, the Supreme Court of Guam noted that Guam had conceded that its prosecution substantially burdened Ras Makahna’s right to freely exercise his religion. See ER Tab 3, at 7-8. It went on to find that Guam had not demonstrated that the prosecution was necessary for the pursuit of a compelling state interest: “The issue then is whether some compelling government interest exists and whether the least restrictive means of obtaining that objective are used. No evidence on this score was presented [T]his court is unable to make the evaluation of whether a compelling state interest is embodied in the instant statute or whether that interest is achieved by the least restrictive means.” Id. at 7. The Guam Supreme Court therefore affirmed the trial court and held that Guam’s prosecution of Ras Makahna violated his right to the free exercise of religion guaranteed by the Organic Act of Guam. See id.

On September 28, 2000, the Guam government petitioned this Court for a writ of certiorari pursuant to 48 U.S.C. § 1424-2. See ER Tab 5, No. 85. This Court granted the writ on January 11, 2001.

SUMMARY OF ARGUMENT

This case will decide, for the first time in any federal court, a question of great significance: whether the new Supreme Court of Guam is entitled to interpret the Bill of Rights provisions of Guam's Organic Act so as to afford greater protection for individual liberty than is provided by the federal Constitution. Of course this Court has jurisdiction to review any decision of the Guam Supreme Court, but it should decline to do so here under two federal policies that have compelled the U.S. Supreme Court to defer to territorial supreme courts in the past. First, federal courts should recognize the special competence of territorial supreme courts in matters of local tradition and culture. Second and related, territorial high courts should be encouraged to develop the institutional independence necessary to cultivate that expertise. Congress has implemented a similar policy of progressive judicial independence for Guam, for instance by creating the Supreme Court of Guam and providing for its increasing autonomy, both jurisprudential and institutional. Here, federal concern for territorial culture is particularly acute because the court is confronting one of the culture's central aspects, its treatment of diverse local religions. The mere fact that Guam's constitution, the Organic Act, is contained in the U.S. Code does not mean that its Bill of Rights must be construed in lockstep with the federal Constitution. The Supreme Court of the United States

has applied a rule of deference, even where the territorial supreme court was considering an organic act contained in the U.S. Code. In another case, the Court held that an organic act provision was not a “law of the United States” for jurisdictional purposes. Deference makes particular policy sense where the law construed applies only to Guam, will have no effect outside its borders, and has no national implications. Furthermore, the local limitation on the Guam high court’s ruling here is uncommonly clear, because Congress has furnished Guam’s Bill of Rights with two free exercise provisions: a local clause, subsection (a), which was the basis for the Guam high court’s ruling, and a subsection (u) that explicitly incorporates federal First Amendment protection. Under the Attorney General’s reading, the two clauses would be redundant, and the federal conception of civil liberties would represent a ceiling—and not, as it does for other Americans, a floor—on the enjoyment of individual liberty in Guam.

But even if the Organic Act were somehow treated as a simple act of Congress, then its meaning would be determined according to the intent of Congress. And Congress has maintained a consistent view of religious liberty, both before and after Smith. The Guam Bill of Rights was enacted in 1950 and amended in 1968 against the background of a federal free exercise jurisprudence reflected in cases like Cantwell and Sherbert. Subsequent to Smith, Congress has made it

absolutely clear that it considers the rule established in that case to be a regrettable break with those precedents. Whatever it meant by Guam's free exercise provision, Congress could not have intended to implement Smith. On the contrary, the legislature has consistently understood the words of the Free Exercise Clause to mean that a significant burden on religious liberty triggers a compelling interest test.

The other question presented for the first time in this circuit is the power of Congress to regulate federal entities according to its own view of sound federal policy. Although the U.S. Supreme Court has ruled that Congress does not have the power to enact RFRA under § 5 of the Fourteenth Amendment, that ruling relates only to Congress's power over the states—it has no bearing on the constitutionality of RFRA as applied to the federal realm. And there is no question that Congress has the power to apply RFRA to federal instrumentalities. Imagine that Congress had gone through and amended each of its individual federal statutes in order to protect certain religious practices. No one would doubt that it could do so. Congress has the ability to stay its hand in order to safeguard religious practice under the same provisions that gave it the power to act in the first place. In RFRA, Congress has effectively amended various federal laws in order to protect what it views as religious liberty. Every circuit court to have addressed the issue so far has ruled accordingly that RFRA is constitutional in the federal realm. This Court should join

them.

Whether this case is decided under Guam's Free Exercise Clause or RFRA, the test is much the same: Guam must show that the substantial burden its prosecution imposed on Ras Makahna's religious liberty was justified because that prosecution was the least restrictive means of pursuing a compelling interest. As noted above, the Attorney General has conceded all the relevant facts for the purpose of this litigation, including, in sum, Ras Makahna's valid commitment to a legitimate religion and the significant burden that its criminal prosecution will place on his ability to practice a necessary sacrament of Rastafarianism. These facts have been removed from the case, and must be treated as established on appeal. Guam has also declined to argue that its prosecution of Ras Makahna is necessary for the pursuit of a compelling interest, or that it employed the least restrictive means of pursuing any such goal. Instead, the Attorney General has chosen to argue only that the compelling interest test does not apply. Having made this strategic decision, the prosecution is strictly bound to its consequences. Under settled law, a compelling interest cannot be supplied for the government; it must be established in the record. Here, the Attorney General not only failed to build such a record at trial, but it has put forward a compelling interest neither in the Guam high court, nor in its certiorari petition to this Court, nor in Petitioner's Brief. The Attorney General is free to

argue in future cases that a particular prosecution is the least restrictive means of pursuing a compelling interest. But at least in this case the unavoidable conclusion, under either the Organic Act or RFRA, is that Ras Makahna may pursue salvation according to the dictates of his religion, free of the threat of serious criminal punishment.

ARGUMENT

I. THE SUPREME COURT OF GUAM'S INTERPRETATION OF ITS OWN CONSTITUTION SHOULD BE UPHOLD BECAUSE IT ADDRESSES A MATTER OF PURELY LOCAL CONCERN AND IS NOT CLEAR ERROR.

Longstanding federal law, both Congressional and judicial, directs deference to a territorial supreme court on significant questions of local concern. Congress has carefully charted a path of progressive independence for Guam, leading from utter dependency to ever-increasing autonomy. By enacting a local Bill of Rights and authorizing a Guam Supreme Court to protect those rights, Congress has led Guam's judiciary to a point that is only one small step away from a territory like Puerto Rico, whose Supreme Court enjoys undisputed authority to interpret its constitution.

In accord with the intent of Congress, the U.S. Supreme Court and this Court

have developed a judicial rule of deference toward territorial supreme courts in matters of local concern. That rule promotes two related policies: recognizing the peculiar ability of local courts to appreciate territorial customs, and fostering the institutional independence necessary to develop that expertise. Taken together, the intent of Congress and the precedent of the federal courts compel deference to the Supreme Court of Guam, allowing it to develop institutional competence and jurisprudential authority in a manner appropriate for the local context and customs of Guam. Deference is particularly appropriate here, because the Supreme Court’s decision concerns a central aspect of Guam culture, its religions, and will have no impact outside its borders.

A. Congress’s Vision of Judicial Independence for Guam.

A profound cultural gulf divides the mainland and Guam, the nation’s most far-flung territory. One local commentator has stressed that “[t]he vast historical and cultural differences between Guam and the mainland dictate the need for courts to interpret provisions of the Guam Bill of Rights based on the local conditions and traditions of Guam.” Mitchell F. Thompson, Guam’s Bill of Rights—The Forgotten Shield, 1989 Guam Bar J. 2, 8. For instance, the local Chamorro culture, to which Ras Makahna belongs, “is treasured, and . . . there has been a concerted effort to preserve Chamorro language and culture.” See Stanley K. Laughlin, Jr., The Law of

United States Territories and Affiliated Jurisdictions 401 (1995 & Supp. 1997).

Courts recognize, for example, the Chamorro custom of pattida, by which a dying person may orally divide land among heirs. See id. at 421. Local considerations carry particular weight in this case, where the island court has construed a text—the territorial Free Exercise Clause—that goes to the very core of a culture, its religions. If a colonized civilization wishes to grant generous protection to a minority religion, that decision manifests local heritage in a way that a federal court sitting more than 3,000 miles⁵ away is poorly equipped to gainsay.

Realizing this difference, Congress has repeatedly made clear its intent to cultivate the autonomy of Guam’s judiciary. Guam was annexed by the Treaty of Paris in 1898, at the close of the Spanish-American War. See Leibowitz, supra note 5, at 21, 28. For fifty years, Guam was ruled by the executive branch directly. But in 1950, Congress created a local government under the Organic Act. See 48 U.S.C. § 1421a et seq. Along with other aspects of self-rule, the Organic Act created “an independent judiciary . . . administering a system of law based on local needs and local traditions.” S. Rep. No. 81-2109 (1950), reprinted in 1950 U.S.C.C.A.N. 2840, 1950 WL 1716, at *2. As this Court has noted, “a major purpose of the

⁵ See Arnold H. Leibowitz, The Applicability of Federal Law to Guam, 16 Virginia J. Int’l L. 21, 21 (1975) (“[Guam] is located over 8,000 miles from Washington, D.C. and 3,000 miles from any state of the Union.”).

Organic Act was to bring Guam a judiciary closely analogous to that of the United States.” Mailloux v. Mailloux, 554 F.2d 976, 977 (9th Cir. 1977), rev’d on other grounds, 434 U.S. 236 (1978).

Even before it authorized a supreme court for Guam, Congress created local courts that operated alongside a federal district court. See 48 U.S.C. § 1424(a). The District Court exercises approximately the jurisdiction of a United States District Court, see 48 U.S.C. § 1424(b), but does not have Article III status. The local Superior Court of Guam has general original jurisdiction. See 7 G.C.A. § 3101. Appeals from the Superior Court originally went to a three-judge Appellate Division of the District Court which had no institutional autonomy or special local competence.⁶

Guam’s first effort to create an institutionally autonomous judiciary failed because of a perceived lack of Congressional approval. See Territory of Guam v.

⁶ The Ninth Circuit did not accord particular deference to the Appellate Division of the federal District Court because Congress did not endow that court with institutional autonomy. See Guam v. Yang, 850 F.2d 507 (9th Cir. 1988) (en banc). The Appellate Division did not draw its judges from Guam. See id. at 510. Further, that court could look only to the Ninth Circuit and the U.S. Supreme Court for its precedents on Guam law. See id. For guidance, the Yang decision looked to a Third Circuit decision regarding the Virgin Islands, which likewise had not created a supreme court. Id. at 510 (citing Saludes v. Ramos, 744 F.2d 992, 994 (3rd Cir. 1984)). Because all of these characteristics distinguish the Appellate Division from the Supreme Court of Guam, which Congress did design to have significant autonomy, the Yang decision has no application here.

Olsen, 431 U.S. 195 (1977) (ruling that Congress had not authorized the Guam legislature to divest the District Court of its appellate powers and to create in its place a local supreme court). In response, Congress clarified that Guam was ready for a separate judiciary. In 1984, it accordingly amended the Organic Act in order to empower the Guam legislature to create a supreme court. See 48 U.S.C. § 1424-1(a).⁷ Congress intended that “the relations between the local courts of Guam and the federal courts, shall be the same as the relations between the states and the federal courts,” except that a Guam supreme court would be subject to certiorari review by the Ninth Circuit for the first fifteen years of its existence, as a transition to discretionary review by the U.S. Supreme Court. 130 Cong. Rec. 23790 (daily

⁷ The new Supreme Court draws its judges from Guam, see 7 G.C.A. § 3109(c), and is tasked with developing a jurisprudence for Guam. The Yang Court recognized that deference would be appropriate to such a court if Guam had “an independent judicial system with a body of ‘state’ law determined by its own appellate and supreme courts.” Yang, 850 F.2d at 510 n.7.

It has been suggested, in the context of the Yang line of cases, that the Organic Act is federal law subject to de novo review. See Brown v. Civil Serv. Comm’n, 818 F.2d 706, 708 (9th Cir. 1987); Bordallo v. Reyes, 763 F.2d 1098, 1102 & n.5 (9th Cir. 1985). However, both Brown and Reyes reviewed decisions of the Appellate Division of the District of Guam, and are inapposite for the same reasons that Yang is. Moreover, both cases rely on Matter of McLinn, 739 F.2d 1395, 1403 (9th Cir.1984) (en banc). That case, which also informed the Yang Court, held that federal district court judges would be reviewed de novo on questions of state law. Here, by contrast, this Court faces a ruling of a local supreme court, not a federal district court. As explained more fully below, see infra at 23, the Organic Act—and in particular, its Bill of Rights—is here determining the law solely within Guam’s borders.

ed. Aug. 10, 1984) (section-by-section analysis provided by Senator Kennedy). In 1993, the Guam legislature established the Supreme Court of Guam. See 7 G.C.A. § 3101. According to Representative Robert A. Underwood, Guam’s delegate to Congress, “[t] was the intent of the 21st Guam Legislature to make the Supreme Court of Guam the highest local court and be vested with those powers traditionally held and exercised by the highest court of a jurisdiction.” See H.R. Rep. No. 105-742 (1998), reprinted in 1998 WL 658802, at *8.

Federal parentage over the Guam judiciary is now nearing its end. Indeed, the Supreme Court of Guam has performed so well that the Ninth Circuit’s five-year progress report recommends that Congress eliminate the fifteen-year period of review.⁸ The Ninth Circuit found that “on issues of local law, [the Supreme Court of Guam’s] opinions have been ‘reasonable and fair.’” Id. at 7 (quoting EIE Guam Corp. v. The Supreme Court of Guam, 191 F.3d 1123, 1127 (9th Cir. 1999)). In order to continue the Congressionally mandated progress toward judicial autonomy, this Court should refuse to second-guess the Guam Supreme Court’s decisions on a matter of purely local concern.

⁸ See Report of the Pacific Islands Committee of the Judicial Council of the Ninth Circuit to the Senate Committee on Energy and Natural Resources and the House Committee on Natural Resources on the Supreme Court of Guam, 7, 24 (2001), available at: <http://www.justice.gov/gu/supreme/Report9thCirJudCouncil.pdf>.

B. The Federal Judiciary's Deference to Territorial Supreme Courts.

A long line of cases establishes the principle that, for territories like Guam, the decisions of a territorial supreme court receive considerable deference on review by federal courts. Although the U.S. Supreme Court has not considered a decision of the new Supreme Court of Guam, it has articulated federal principles that require such deference. The goal of developing a competent judiciary depends, as Justice Holmes explained, on strict attention to the “deference due to the understanding of the local courts upon matters of purely local concern.” Diaz v. Gonzalez, 261 U.S. 102, 105 (1923). According to Justice Holmes, this principle

is especially true in dealing with the decisions of a Court inheriting and brought up in a different system from that which prevails here. When we contemplate such a system from the outside it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have gotten from the books.

Id. at 105-06; see also Lewers & Cooke v. Atcherly, 222 U.S. 285, 294 (1911)

(Holmes, J.). Writing a generation later, Justice Stone drew on the Holmes decisions and described the

efforts of this Court . . . to insure a review by the federal courts of decisions of the local courts of our insular possessions in matters of peculiarly local concern which should leave appropriate scope for the

development by those courts of a system of law which differing from our own in its origins and principles, would nevertheless be suitable to local customs and needs.

De Castro v. Board of Comm'rs of San Juan, 322 U.S. 451, 454-55 (1944). The Court concluded that “to justify reversal in such cases, the error must be clear or manifest; the interpretation must be inescapably wrong; the decision must be patently erroneous.” Id. at 454 (emphasis added) (quoting Sancho v. Texas Co., 308 U.S. 463, 471 (1940)).⁹ As explained more fully below, see infra at 23, the principles that inform this rule apply not only where the territory construes a statute passed by the local legislature, but wherever it encounters a provision that applies only to the territory and that impacts matters of unique cultural importance. Here, of course, the Guam Supreme Court has interpreted the scope of religious freedom as it applies uniquely within Guam.

This Court too has long deferred to decisions of territorial supreme courts, absent clear error, in order to encourage the autonomy of the judicial institutions

⁹ A long line of Supreme Court cases reiterates this strict rule of deference to territorial supreme courts. See, e.g., Waiialua Agric. Co. v. Christian, 305 U.S. 91, 109 (1938) (Hawaii); Matos v. Hermanos, 300 U.S. 429, 432 (1937) (Puerto Rico); American Trading Co. v. H.E. Heacock Co., 285 U.S. 247, 261 (1932) (Philippines); Gray v. Taylor, 227 U.S. 51, 56-57 (1913) (New Mexico); Phoenix Ry. Co. v. Landis, 231 U.S. 578, 579-80 (1913) (Arizona); Fox v. Haarstick, 156 U.S. 674, 679 (1895) (Utah); Sweeney v. Lomme, 89 U.S. (22 Wall.) 208, 213 (1874) (Montana).

best positioned to appreciate local culture, history, and tradition. In a leading case, this Court affirmed the Supreme Court of the Territory of Hawaii on the ground that its decision was “a construction by the highest court of the territory of the Constitution and laws thereof . . . and is therefore entitled to great weight.” King v. Smith (In re Bishop’s Estate), 250 F. 145, 147 (9th Cir. 1918).¹⁰ By 1931, the rule “frequently announced by this and other courts” was “that an appellate court must lean toward the interpretation adopted by the Supreme Court of the territory, and will not disturb its decision unless there is clear error.”¹¹ Hill v. Carter, 47 F.2d 869, 870 (9th Cir. 1931) (internal quotation marks omitted). Most recently, this

¹⁰ Hawaii was at that time an unincorporated territory, just as Guam is now. See 48 U.S.C. § 1421a (Guam); Laughlin, *supra*, at 89 (Hawaii). “Unincorporated” means that the protections of the U.S. Constitution do not apply, apart from certain fundamental guarantees, unless specifically extended by Congress. See Dorr v. United States, 195 U.S. 138, 148-49 (1904).

¹¹ The First Circuit applied the same deferential standard of review to the Supreme Court of Puerto Rico when Puerto Rico, like Guam today, was still organized under an organic act. See, e.g., Riera v. Riera, 167 F.2d 207, 208 (1st Cir. 1948). As a territory develops—from a mere possession, to an unincorporated territory organized under an organic act, toward possible statehood—an increasing degree of deference is traditionally granted to its local courts. Today, decisions of the Supreme Court of Puerto Rico are reviewed on writ of certiorari by the U.S. Supreme Court, which follows local constructions of local law. See 28 U.S.C. § 1258; Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 339 & n.6 (1976). So too will decisions of the Supreme Court of Guam be reviewed by the U.S. Supreme Court on writ of certiorari after a fifteen-year waiting period. See 48 U.S.C. § 1424-2.

Court deferred to the new Supreme Court of Guam:

Although Congress certainly has given us jurisdiction to review issues of local Guam law, we hesitate to use this authority where, on the merits, the Guam Supreme Court appears to have construed a Guam statute reasonably and fairly. Exercising our discretionary certiorari power here would undercut Congress's intent to allow Guam to develop its own, independent institutions.

EIE Guam, 191 F.3d at 1127. Here too, this Court should follow Congressional policy and yield to the judgment of the Supreme Court of Guam.¹²

C. The Supreme Court of Guam Decided a Question of Local Concern.

In this case, the Supreme Court of Guam construed a provision of the Organic Act that has only local application. The court first recited the history of RFRA, including the U.S. Supreme Court decisions that precipitated it. ER Tab 3, at 3-7. But the court then made it absolutely clear that it was declining to rule under RFRA. It explained that its ruling relied solely upon local law—the Free Exercise Clause of the Organic Act. Id. at 7. The Organic Act is Guam's constitution. See National Bank v. County of Yankton, 101 U.S. 129, 133 (1879); Agana Bay Dev. Co. v.

¹² In numerous additional cases, the Ninth Circuit has repeated its rule of deference. See, e.g., Christian v. Waialua Agric. Co., 93 F.2d 603, 609 (9th Cir. 1937); Territory of Hawaii v. Gay, 52 F.2d 356, 359 (9th Cir. 1931); Notley v. McMillan, 16 F.2d 273, 273 (9th Cir. 1926); Ewa Plantation Co. v. Wilder, 289 F. 664, 670 (9th Cir. 1923); Castle v. Castle, 281 F. 609, 612 (9th Cir. 1922); Kinney v. Oahu Sugar Co., 255 F. 732, 736 (9th Cir. 1919). But see Carscadden v. Territory of Alaska, 105 F.2d 377 (9th Cir. 1939).

Supreme Court of Guam, 529 F.2d 952, 954 (9th Cir. 1976). To clarify that it was ruling under a law of local application, the court explicated: “The approach we take is to construe Guam’s Constitution, the Organic Act, and its concomitant protection of the Free Exercise of Religion, more broadly than the U.S. Supreme Court would the federal counterpart.” ER Tab 3, at 7.

The Attorney General rests much of its brief on the premise that the court below ruled under the federal Constitution. See Petitioner’s Brief, at 7-12, 27-30. However, the plain text of the opinion itself refutes this interpretation. In an effort to support its stretch, Guam ignores the passages cited above and latches instead onto a single phrase, in which the court referred to “the United States Constitution and the Organic Act of Guam.” ER Tab 3, at 8. Although this phrase introduces some ambiguity, it does nothing to overthrow the clear intention of the court, expressed in numerous passages throughout the opinion, to rest its holding on the Organic Act alone. See Michigan v. Long, 463 U.S. 1032, 1041 (1983) (“If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.”). The Supreme Court of Guam cited little Guam law because the court is not yet five years old, and had developed no free exercise law before this case. Cf. Petitioner’s Brief, at 21. Moreover, it cites federal

religious liberty cases mainly to explain the origins of RFRA, not to support its reading of the Guam Free Exercise Clause. Undeniably, the Guam high court rested its holding on adequate and independent territorial law.

The Attorney General likewise errs—ignoring considerable case law and history—when it makes the formalistic argument that the Guam Supreme Court deserves no deference in interpreting the Organic Act merely because the Act was passed by Congress. Cf. Petitioner’s Brief, at 18. This Court should exercise traditional restraint in reviewing the Guam court’s decision for at least three reasons—any one of which would be more than sufficient. First, the U.S. Supreme Court has applied the federal rule of deference even where a territory’s organic act was implicated. In a case reviewing a territorial Supreme Court’s interpretation of its Organic Act,¹³ Justice Holmes emphasized that “[w]e should not decide against the local understanding of a matter of purely local concern unless we thought it clearly wrong.” Santa Fe Cent. Ry. Co. v. Friday, 232 U.S. 694, 700 (1914). Even though the Organic Act was passed by Congress, the provision at issue in that case (concerning the jurisdiction of territorial courts) was a matter of local concern

¹³ “The term ‘Organic Act’ has a traditional reference point in American law . . . [denoting] standard relationships between an unincorporated territory governed by an organic act and the federal government.” Arnold H. Leibowitz, The Applicability of Federal Law to Guam, 16 Virginia J. Int’l L. 21, 34 (1975); see also Laughlin, supra at 13, at 89-90.

requiring deference from a federal court. Similarly here, restricting the meaning of Guam's Free Exercise Clause to that of the federal Constitution would frustrate what this Court has recognized as "Congress's intent to allow Guam to develop its own, independent institutions." EIE Guam, 191 F.3d at 1127.

Second, the Organic Act is local law in the sense that it applies only within Guam's borders. The U.S. Supreme Court employed exactly this reasoning when it held that a land ownership provision of the Organic Act of Puerto Rico, though enacted by Congress, was not one of the "laws of the United States." Puerto Rico v. Rubert Hermanos, Inc., 309 U.S. 543, 549-50 (1940). Much as Petitioner here has argued, the petitioners in Hermanos urged the court to impose a federal interpretation of the Organic Act's land ownership rules because the Organic Act was a "law[] of the United States." The U.S. Supreme Court rejected that contention on the ground that the Organic Act provision was "peculiarly concerned with local policy," not "designed for the protection of policies having general application throughout the United States." Id. For similar reasons, the First Circuit deferred to the Supreme Court of Puerto Rico's interpretation of the same land use provision in the Organic Act, even though it embodied "Congressional policy." Campose v. Central Cambalache, Inc., 157 F.2d 43, 43-44 (1st Cir. 1946).

The Supreme Court has given similarly deferential treatment to decisions of District of Columbia Court of Appeals, the highest local court in the District of Columbia. As with Guam Supreme Court, Congress intended that the D.C. Court of Appeals provide a judicial system ““comparable to those of the states .”” Pernell v. Southall Realty, 416 U.S. 363, 367(1974) (quoting H.R.Rep. No. 91-907, at 23 (1970)); compare 130 Cong. Rec. 23790 (daily ed. Aug. 10, 1984) (describing Congress’s intent that “the relations between the local courts of Guam and the federal courts, shall be the same as the relations between the states and the federal courts.”). Consistently, federal courts have deferred to the D.C. Court of Appeals, even when the case involves interpretation of Congressionally enacted statutes, so long as its decision concerns only local matters and is not clearly erroneous. See, e.g., Pernell, 416 U.S. at 363 (deferring to local construction of Congressional act absent “egregious error”); United States v. Edmond, 924 F.2d 261, 263 (D.C. Cir. 1991) (deferring to local construction of “an Act of Congress applicable exclusively to the District of Columbia”). In one particularly striking case, the federal court of appeals considered a District of Columbia workers’ compensation statute, enacted by Congress and containing language identical to that of a national statute. See Hall v. C&P Tel. Co., 793 F.2d 1354 (D.C. Cir. 1986). The local court had provided its own interpretation of the statute, differing in significant ways from federal court

interpretations of the federal statute. Id. at 1359. Nonetheless, bound by the Pernell doctrine, the federal court “defer[red] to the decisions of the [local court] construing Acts of Congress that apply exclusively to the District of Columbia.” Id. at 1360.

Likewise here, this Court should follow Pernell and Hermanos and hold that Guam’s highest court deserves deference for its construction of the Free Exercise Clause of the Organic Act, a provision enacted by Congress but applicable only within Guam. To be sure, public policy concerns regarding controlled substances are not confined to Guam. See Petitioner’s Brief, at 19. But the federal drug laws remain applicable in Guam, regardless of whether the Guam statute at issue in this case violates the Organic Act, and can address any federal policy consideration that extends outside its borders. Moreover, the degree of religious freedom afforded by a government to citizens within its borders is an issue of purely local concern. As discussed more fully below, see infra at 29, the local Free Exercise Clause in subsection (a) only builds additional local protection onto the floor established by the federal Constitution. Federal constitutional policies are protected by a second provision, subsection (u), that explicitly extends the federal Free Exercise Clause to Guam.

Third, the Attorney General suggests that the issue here is not of local concern because the Guam legislature cannot overturn a decision with which it

disagrees. See Petitioner’s Brief, at 18. Yet, this was equally true of the territorial legislatures in Friday and Campose—both decisions in which a federal court deferred to an interpretations of an organic act by a local supreme court. Indeed, when a local supreme court (state or territorial) construes local constitutional law, its ruling is often the final word, insulated from legislative review. No one would suggest that a state supreme court’s constitutional decision is a matter of federal concern simply because it is isolated from attack by the state legislature. On the contrary, that protection is a core feature of the separation of powers that Guam has so successfully developed. Furthermore, Congress established the Supreme Court of Guam in order to move Guam toward local control, not away from it. Whereas previously the Guam Bill of Rights would have been construed on appeal by federal courts, its interpretation is now entrusted to the Guam Supreme Court. And unlike federal courts, the new Supreme Court is subject to a measure of local control—it is comprised of Guam residents appointed by the Governor with the advice and consent of the local legislature. See 7 G.C.A. § 3103(a).

D. The Decision of the Guam High Court Is Not Manifest Error.

The Guam Supreme Court did not commit error of any sort, much less the manifest error that would warrant involvement of this Court in a matter of local concern. In fact, the Supreme Court of Guam acted well within its authority when it held that a compelling state interest test applies under Guam's religious liberty provision. It is settled that local courts have the power to provide greater protection to individual rights under local constitutions than the protection that is afforded under the federal Constitution. See PruneYard v. Robins, 447 U.S. 74, 81 (1980); William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 501 & n.80 (Jan. 1977) (citing cases).

Accordingly, several state supreme courts have interpreted the religious liberty provisions of their state constitutions to require a version of the compelling state interest test when religious liberty is substantially burdened by a law of general applicability, even after the U.S. Supreme Court decided Smith. See, e.g., Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280 (Ala. 1994) (per curiam) (interpreting the state constitution's Free Exercise Clause to require a version of the Sherbert test); Attorney General v. Desilets, 636 N.E.2d 233, 235-36 (Mass. 1994) (same); Hill-Murray Fed. of Teachers v. Hill-Murray High School, 487 N.W.2d 857, 864 (Minn. 1992) (same); State v. Hershberger, 462 N.W.2d 393, 398 (Minn. 1990)

(same); Open Door Baptist Church v. Clark County, 995 P.2d 33, 38 (Wash. 2000) (en banc) (same); State v. Miller, 549 N.W.2d 235, 239-40 (Wisc. 1996) (same).

The mere fact that the text of the Organic Act’s Free Exercise Clause is similar to that of the federal Constitution does not establish error of any sort, much less clear error. Cf. Petitioner’s Brief, at 23. In Swanner, the Supreme Court of Alaska interpreted the identically-worded free exercise provision of its state constitution to require a version of the Sherbert compelling state interest in the wake of Smith:

[E]ven though the Free Exercise Clause of the Alaska Constitution is identical to the Free Exercise Clause of the United States Constitution, we are not required to adopt and apply the Smith test to religious exemption cases involving the Alaska Constitution merely because the United States Supreme Court adopted that test to determine the applicability of religious exemptions under the United States Constitution.

Swanner, 874 P.2d at 280-81 (construing Ala. Const., art. 4, § 1); see also Desilets, 418 N.E.2d at 235 (finding greater state protection “despite the similarity of the two constitutional provisions”); Brennan, supra at 500 (“[E]xamples abound where state courts have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they find unconvincing, even where the state and federal constitutions are similarly or identically phrased.”) (citing cases).

The Guam Free Exercise Clause should not be forced into lockstep with its federal counterpart for another reason: That reading would render another provision of the Organic Act superfluous. In addition to subsection (a), which contains Guam’s Free Exercise Clause, Guam’s Bill of Rights contains a subsection (u), which makes the federal Free Exercise Clause applicable to Guam:

The following provisions of and amendments to the Constitution of the United States are hereby extended to Guam to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States: . . . the first to ninth amendments inclusive . . .

48 U.S.C. § 1421b(u). This Court has already warned against interpretations of subsection (u) that render its provisions “purposeless.” Guam v. Inglett, 417 F.2d 123, 124 (9th Cir. 1969). If the meaning of subsection (a) were restricted to that of the federal First Amendment, subsection (u), which extends federal free exercise protection to Guam, would be superfluous.

The plain language of that provision means exactly what it says: Subsection (u) undergirds the Guam Bill of Rights with federal constitutional protection, in much the same manner that the federal Constitution provides a baseline for state constitutional provisions. While the plain meaning of the Organic Act is binding without further inquiry, see Guam v. United States, 179 F.3d 630, 633 (9th Cir. 1999), its legislative history only bolsters that sense. Subsection (u)—called the

“Mink Amendment” after Congresswoman Patsy T. Mink, its sponsor—was added to the Organic Act in 1968. Because Guam is an unincorporated territory, see 48 U.S.C. § 1421a, it is protected only by those sections of the Constitution that Congress explicitly extends to it (with the exception of certain fundamental guarantees, of which religious liberty is not one). See Dorr, 145 U.S. at 148-49. The Mink Amendment was passed to ameliorate this situation by explicitly extending the federal Bill of Rights to Guam. See H.R. Rep. No. 90-1521 (1968), reprinted in 1968 U.S.C.C.A.N. 3564, 1968 WL 5260, at *18 (letter from Legislative Reference Service Attorney to Rep. Mink). Representative Mink wanted to put the citizens of Guam in the same constitutional position as the citizens of any state. See Inglett, 417 F.2d at 125 (“[T]he legislative history [of subsection (u)]. . . reflects a congressional desire to extend to residents of Guam the same constitutional safeguards available to residents of the several states.”); Leibowitz, supra note 5, at 30 n.43 (“It was clear that Congresswoman Mink’s intention was to equate the citizens of Guam with the citizens of any state of the Union.” (citing legislative history)). Summing up the legislative history, one prominent local commentator has noted:

It would seem clear that subsection (u) has no effect on the other provisions in Guam’s Bill of Rights as independent protection of individual rights, separate from the federal [C]onstitution.

Subsection (u) merely provides that federal constitutional rights also apply in Guam. This is the same situation as in one of the states of the United States, in which there are two separate sources of individual rights, the federal [C]onstitution and the state constitution.

Thompson, supra at 12, at 4.

The Attorney General insists that subsection (u) does not mean what it says. See Petitioner's Brief, at 23-26. But nothing in the legislative history even hints that the Mink Amendment was intended to restrict the meaning of Guam's Bill of Rights to that of the federal Constitution. On the contrary, civil rights provisions like subsection (u) should be construed broadly, in accordance with their remedial intent. See Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1192 (9th Cir. 1998); Dennis v. Chang, 611 F.2d 1302, 1306 (9th Cir. 1980). Viewed practically, the structure of Guam's constitutional protection for individual liberties is much like a state's.¹⁴ Under the Attorney General's reading, however, subsection (u) would be

¹⁴ There is language in a footnote not cited by Petitioner that would seem to indicate otherwise. See Guam v. Fegurgur, 800 F.2d 1470, 1473 n.3 (9th Cir. 1986) ("[T]he Guamanian due process guarantee has been identified with the federal guarantee by statute. 48 U.S.C. § 1421b(u)."). The criminal defendant in that case had urged the court to remand, should he lose his federal due process claim, in order to allow the lower court to consider protecting him under Guam's Due Process Clause. The Fegurgur court rejected this contention in a footnote two sentences long. See id. But it did so in a very different context. No Guam court had yet held that the Guam Bill of Rights provides greater protection than the federal constitution, as the Supreme Court has here. Moreover, that appeal came from the District Court, not the Supreme Court (which had not yet been established). While a local supreme court has the authority to read a provision of

rendered redundant and the federal Free Exercise Clause would become a restrictive ceiling on individual rights, not the protective floor that it is for other Americans.

II. IN THE ALTERNATIVE, THE MEANING OF GUAM'S FREE EXERCISE CLAUSE SHOULD BE DETERMINED BY THE INTENT OF CONGRESS.

Even if this Court were to strip the Supreme Court of Guam of its authority to interpret Guam law, an independent examination of Congressional intent demonstrates that, when it enacted the Organic Act, Congress meant for Guam's Free Exercise Clause to provide broad protection of the sort found by the Guam Supreme Court in this case.

When Congress enacts technical legal language, it does so against the background of existing common-law determinations of the meaning of that language. See United States v. Sisson, 399 U.S. 267, 280 (1970). In a similar context, the U.S. Supreme Court held that when Congress grafted language from the old Hawaii Constitution into the new Organic Act of Hawaii, the Court would determine the intent of Congress by looking to decisions of the Hawaii Supreme Court before Congress enacted the Organic Act. See Duncan v. Kahanamoku, 327

the local constitution more broadly than its federal counterpart, federal district courts must adhere to established local law. In quickly dismissing one of the defendant's laundry list of challenges, the Court of Appeals could not have intended to write a footnote that would strip a future Guam Supreme Court of its core authority to interpret Guam law.

U.S. 304, 316 (1946); see also Michigan v. Bullock, 485 N.W.2d 866, 873 (Mich. 1992) (construing the state constitution according to U.S. Supreme Court decisions prior to its 1963 enactment). Here, Congress has consistently made it clear that it regards the words “government shall make no law . . . prohibiting the free exercise [of religion]” as meaning that the government must justify a substantial burden on the free exercise by showing that its interference is necessary to vindicate a compelling interest.

When Congress enacted the Organic Act in 1950, the Smith rule was not even a glimmer in the Supreme Court’s eye. The Court did not at that time choose among free exercise tests according to whether the law at issue was one of general applicability. See, e.g., Cantwell v. Connecticut, 310 U.S. 296, 304 (1940); United States v. Ballard, 322 U.S. 78, 86 (1944). The Sherbert compelling interest test, while not developed until 1963, merely systematized the balancing test that had been developed in earlier cases. See Sherbert, 398 U.S. at 402-03 (citing Cantwell and other early cases). In opinions written both before and after Sherbert, the Court balanced the interests of the individual against those of the government, even where the government acted pursuant to a law of general applicability. See Cantwell, 310 U.S. at 304; Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). And by the time Congress added subsection (u) in 1968, thereby amending and re-enacting Guam’s

Bill of Rights, Sherbert itself had been decided. Undeniably, then, when Congress enacted Guam's Free Exercise Clause in 1950, and when it added subsection (u) in 1968, it had no intention of implementing the test that would be formulated decades later in Smith.

Smith represented a sharp break from precedent and has been widely and intensely criticized—not least by Congress. Whether or not one agrees with Justice O'Connor that Smith “disregard[s] our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct,” Smith, 494 U.S. at 892 (O'Connor, J., concurring in the judgment), the opinion of Congress is not in doubt. As discussed more fully below, see infra at 43, Congress enacted RFRA out of explicit disagreement with the Court's ruling in Smith. See 42 U.S.C. § 2000bb(b) (“The purposes of this chapter are— (1) to restore the compelling interest test as set forth in Sherbert . . .”); S. Rep. No. 103-111 (1993), 1993 U.S.C.C.A.N. 1892, 1993 WL 286695, at *1-2 (“[RFRA] responds to [Smith] by creating a statutory prohibition.”). Giving even minimal consideration to the intent of Congress absolutely rules out the Attorney General's reading of the Free Exercise Clause of the Organic Act. Whatever Congress intended when it enacted Guam's religious liberty provisions, it could not have meant to impose the

Smith test.¹⁵ On the contrary, Congress has consistently understood those words to mean that a substantial burden on the free exercise of religion triggers a compelling interest test.

III. THE RELIGIOUS FREEDOM RESTORATION ACT IS CONSTITUTIONAL AS APPLIED TO GUAM AND PROVIDES AN INDEPENDENT GROUND FOR THE HOLDING OF THE GUAM SUPREME COURT.

There is a growing consensus among federal courts that RFRA is constitutional as applied to federal instrumentalities. Even if the meaning of Guam's Free Exercise Clause were restricted to that of its federal counterpart, RFRA would provide an autonomous rationale for applying a compelling interest test in this case.

¹⁵ To be sure, the Ninth Circuit has held that the U.S. Supreme Court's 1973 decision in Roe v. Wade, 410 U.S. 113 (1973), is applicable to Guam. See Guam Soc'y of Obstetricians & Gynecologists v. Ada, 962 F.2d 1366, 1370 (9th Cir. 1992). But it based that holding on subsection (u), which clearly does incorporate provisions of the U.S. Constitution as interpreted by the U.S. Supreme Court. Here, by contrast, the Supreme Court of Guam based its ruling not on subsection (u), but on the local free exercise provision. See ER Tab 3, at 7 (construing 48 U.S.C. § 1421b(a)).

A. Boerne Has No Bearing on the Constitutionality of RFRA as Applied to Federal Instrumentalities.

This Court has already determined that the Supreme Court’s holding in City of Boerne v. Flores, 521 U.S. 507 (1997), does not control the constitutionality of RFRA as applied to the federal government. In Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826 (9th Cir. 1999), the Ninth Circuit “disagree[d] with [the proposition] that City of Boerne invalidated RFRA as applied to federal law.” Id. at 831. It held instead that the Court’s analysis in Boerne concerned only Congress’s power to legislate under § 5 of the Fourteenth Amendment. The Boerne analysis could have no bearing on Congress’s authority over the federal government because “Congress . . . does not enact legislation regulating the federal government pursuant to section 5 of the Fourteenth Amendment; Congress acts under that section only when regulating the conduct of the states.” Id. at 832 (original emphasis); see also Worldwide Church of God v. Philadelphia Church of God, Inc., 227 F.3d 1110, 1120 (9th Cir. 2000) (reaffirming Sutton). Every other circuit court that has reached the issue has agreed. See Kikumura v. Hurley, 242 F.3d 950, 958 (10th Cir. 2001); Christians v. Crystal Evangelical Free Church (In re Young), 141 F.3d 854, 858 (8th Cir. 1998).

B. Congress Has Clear Authority to Enact RFRA in the Federal Realm.

Congress has affirmative authority to pass laws that regulate the federal realm, entirely apart from its power under § 5 of the Fourteenth Amendment. It can also decline to exercise that power by carving out exceptions to its laws. Congress's ability to exempt religious practice from individual statutes is settled, even in closely analogous contexts. During prohibition, for instance, Congress exempted the sacramental use of wine from its general ban on alcohol. See National Prohibition Act, Title II, § 6, 41 Stat. 307, 311 (1919). There can be no doubt that Congress could enact an analogous provision protecting the religious use of a controlled substance. In fact, Congress recently did exactly that when it nullified the result of Smith by creating an exception to the Controlled Substances Act for the religious use of peyote. See 42 U.S.C. § 1996a. The Supreme Court has explicitly ratified several of Congress's religious exemptions. For instance, it upheld the Title VII exemption for religious organizations that make religiously-based employment decisions. See Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (upholding 42 U.S.C. § 2000e-1). And it approved the statutory protection of conscientious objectors from draft laws. See Gillette v. United States, 401 U.S. 437 (1971) (upholding 50 U.S.C. App. § 456(j)). The Court also expressed approval of the property tax exemption

for religious organizations. See Walz v. Tax Comm'n, 397 U.S. 664, 677-78 (1970) (discussing 26 U.S.C. § 501(c)(3)).

Congress derives its ability to carve out a given exemption from its power to enact the underlying statute in the first place. Just as Congress has the power to act, it also has the power to stay its hand in order to protect religious liberty. RFRA has done this in a uniform way by, in effect, amending various federal statutes. The Tenth Circuit accordingly held that Congress derived its ability to apply RFRA to federal prisons from its Article I authority over the federal criminal justice system. See Kikumura, 242 F.3d at 959. And the Eighth Circuit reasoned that “RFRA . . . has effectively amended the Bankruptcy Code,” in order to protect the free exercise of religion. In re Young, 141 F.3d at 861. It concluded that “RFRA is an appropriate means by Congress to modify the United States bankruptcy laws. . . . [W]e can conceive of no argument to support the contention, that Congress is incapable of amending the legislation that it has passed.” id. at 862. Another federal court agreed:

RFRA, in effect, amends all federal laws to provide enhanced protection for the free exercise of religion. In so doing, it is properly grounded in the enumerated powers upon which Congress relied in enacting those laws. Congress could have achieved the same result by individually amending each federal statute, and no one would seriously question whether Congress had the authority to amend legislation which it had the authority to adopt in the first instance.

Magic Valley v. Fitzgerald (In re Hodge), 220 B.R. 386, 398 (D. Idaho 1998); see also EEOC v. Catholic Univ. of Am., 83 F.3d 455, 470 (D.C. Cir. 1996) (holding, pre-Boerne, that Congress has the power in RFRA “to determine against whom, and under what circumstances, Title VII and other federal laws will be enforced.”).¹⁶ In sum, Congress derives its ability to protect the free exercise of religion from its authority to act in the federal realm in the first place.¹⁷

¹⁶ The fact that Congress acted here in a wholesale manner, as opposed to statute-by-statute, is of no constitutional moment. The Supreme Court has noted that Congress may enact a statute pursuant to an “amalgam of its specifically designated powers,” with each power supporting a particular application of the statute. Fullilove v. Klutznick, 448 U.S. 448, 473, 475 (1980) (plurality opinion). By the same logic, one court observed that it was “aware of no reason that prohibits Congress from achieving on a wholesale basis what it clearly is empowered to do on a statute-by-statute basis.” In re Hodge, 220 B.R. at 398; cf. In re Young, 141 F.3d at 861 (“[W]e can conceive of no argument to support the contention, that Congress is incapable of amending legislation it has passed.”). There is no principled difference between Congress’s authority to amend each of its statutes to protect the free exercise of religion and its authority to do so in the aggregate.

¹⁷ The great majority of commentators agree. See, e.g., Thomas C. Berg, The Constitutional Future of Religious Freedom Legislation, 20 U. Ark. Little Rock L.J. 715, 729 (1998); Michael W. McConnell, Institutions and Interpretation: A Critique of City of Boerne v. Flores, 111 Harv. L. Rev. 153, 162 n.68 (1997); William W. Van Alstyne, The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment, 46 Duke L.J. 291, 294 n.12 (1996); Kent Greenawalt, Quo Vadis: The Status and Prospects of “Tests” Under the Religion Clauses, 1995 S.Ct. Rev. 323, 342; Ira C. Lupu, Of Time and the RFRA: A Lawyer’s Guide to the Religious Freedom Restoration Act, 56 Mont. L. Rev. 171, 213 (1995); Michael Stokes Paulsen, A RFRA Runs Through It:

Congress understood the source of its power to enact RFRA. See H.R. Rep. No. 103-88 (1993), 1993 WL 158058, at *7 (identifying its power under the “Necessary and Proper Clause embodied in Article I, Section 8 of the Constitution”). But nothing depends on whether Congress has articulated its authority to pass a given law. See Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948) (“[T]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise”). So long as there is an objective basis for Congress’s action, it is constitutional, regardless of any explicit recitation. Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997); Mills v. Maine, 118 F.3d 37, 43 (1st Cir. 1997); Timmer v. Michigan Dep’t of Commerce, 104 F.3d 833, 838-39 (6th Cir. 1997). Here, the objective basis for Congress’s application of RFRA to Guam includes its authority over the territories.

Religious Freedom and the U.S. Code, 56 Mont. L. Rev. 249, 253 (1995); Douglas Laycock & Oliver S. Thomas, Interpreting the Religious Freedom Restoration Act, 73 Tex. L. Rev. 209, 211 (1994). But see Marci A. Hamilton, The Religious Freedom Restoration Act is Unconstitutional, Period, 1 U. Pa. J. Const. L. 1, 1 (1998); Edward J.W. Blatnik, Note, No RFRAF Allowed: The Status of the Religious Freedom Restoration Act’s Federal Application in the Wake of City of Boerne v. Flores, 98 Colum. L. Rev. 1410, 1410 (1998); Aurora R. Bearse, Note, RFRA: Is it Necessary? Is it Proper?, 50 Rutgers L. Rev. 1045, 1045 (1998).

C. Congress Has Sufficient Authority Over Guam to Enact RFRA.

Regarding Guam, Congress has the ability to protect free exercise under its plenary authority over the territories. Congress explicitly applied RFRA to Guam. See 42 U.S.C. § 2000bb-2(2). Its power to do so may be rooted in the Territorial Clause, see U.S. Const., art. IV, § 3, augmented by the Necessary and Proper Clause, see U.S. Const. art. I, § 8, cl. 18. Whatever its constitutional source, Congress's plenary authority over the territories has long been settled:

It is certainly now too late to doubt the power of Congress to govern the Territories. There have been some differences of opinion as to the particular clause of the Constitution from which the power is derived, but that it exists has always been conceded . . . [Congress] may make a void act of the territorial legislature valid, and a valid act void.

Yankton, 101 U.S. at 132-33; see also American Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511, 543 (1828) (Marshall, C.J.). This Court too has recognized that “Guam is subject to the plenary authority of Congress.” Agana Bay, 529 F.2d at 954; see also Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285, 1286-87 (9th Cir. 1985); People of the Territory of Guam v. Okada, 694 F.2d 565, 568 (9th Cir. 1982).

It might be argued, in opposition to this otherwise obvious conclusion, that RFRA originally contained a provision defining “the term ‘State’ . . . [to mean] the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States.” 42 U.S.C. § 2000bb-2(2) (1994). See ER Tab 3,

at 7. However, that provision was probably intended to ensure that territories would be covered by RFRA, before Congress realized that RFRA would be inapplicable to the states. In order to clarify its intent, Congress subsequently amended RFRA, substituting the phrase “covered entity” for the term “State.” See Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”), § 7, 114 Stat. 803 (2000) (codified at 42 U.S.C. § 2000bb-2(2)). Congress made this change specifically so that RFRA would remain in force as to federal instrumentalities after Boerne. See 146 Cong. Rec. E1563-01 (daily ed. Sept. 21, 2000), 2000 WL 1369378, at *5 (statement of Rep. Canady) (“Section 7 . . . conform[s] RFRA to the Supreme Court’s decision in [Boerne], eliminating all references to the states and leaving RFRA applicable only to the federal government.”).

In sum, Congress has ample authority over the territories to enact RFRA with respect to Guam. “Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction.” INS v. Chadha, 462 U.S. 919, 941 (1983) (internal quotation marks omitted). Here, Congress has effectively amended Guam law so as to prohibit the territory from substantially burdening the free exercise of religion unless necessary to vindicate a compelling interest.

D. RFRA Does Not Violate the Separation of Powers Doctrine.

Not only does Congress have the affirmative power to act, but in so doing it runs afoul of no Constitutional limitation on that power. The Attorney General contends in this case only that RFRA, as applied to Guam, violates the separation of powers doctrine.¹⁸ See Petitioner’s Brief, at 36-41. It is true that Congress enacted RFRA in response to the Supreme Court’s decision in Smith. See 42 U.S.C. § 2000bb(a). But while Congress may not remove individual liberties granted by the Constitution, it may act under its plenary powers to supplement those liberties with greater statutory protections. In the legislative history, Congress explained:

While the act is intended to enforce the right guaranteed by the free exercise clause of the first amendment, it does not purport to legislate the standard of review to be applied by the Federal courts in cases brought under that constitutional provision. Instead, it creates a new statutory prohibition on governmental action that substantially burdens the free exercise of religion, except where such action is the least restrictive means of furthering a compelling governmental interest.

S. Rep. No. 103-111, at n.43. This Court has accordingly noted that “[RFRA] does not present itself as an interpretation of the Constitution overruling Smith; rather it consists of a command that must be followed as a matter of federal law.” Bauer, 84

¹⁸ Guam does not argue that RFRA violates the Establishment Clause. This Court has already held that it does not. See Mockaitis v. Harclerod, 104 F.3d 1522, 1530 (9th Cir. 1997).

F.3d at 1558. So long as federal legislation falls within Congress’s plenary power, Congress may require federal instrumentalities to be more protective of individual rights than the Constitution requires without transgressing the separation of powers doctrine.

Guam tries to argue nevertheless that the Court’s reasoning in Boerne somehow also impugns RFRA in the federal context. See Petitioner’s Brief, at 36-38. Admittedly, the Boerne Court employed broad rhetoric at the beginning and end of its discussion. See Boerne, 521 U.S. at 536 (“RFRA contradicts vital principles necessary to maintain separation of powers”). However, that language is entirely derivative of the Court’s discussion of § 5 of the Fourteenth Amendment. Under § 5, the Supreme Court has held that Congress may only enforce constitutional provisions, and only as the Supreme Court has defined them, because Congress’s § 5 power is remedial, not substantive. When acting pursuant to its plenary power, by contrast, Congress has the ability—and indeed the duty—to legislate according to its own interpretation of the Constitution. The Boerne Court recognized this: “When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and the force of the Constitution. This has been clear from the early days of the Republic.” Boerne, 521 U.S. at 535. As one court put it, “congressional disapproval of a

Supreme Court decision does not impair the power of Congress to legislate a different result, as long as Congress had that power in the first place.” United States v. Marengo County Comm’n, 731 F.2d 1546, 1562 (11th Cir. 1984). It may even act for no constitutional reason whatsoever, but in order to pursue its view of public policy. In sum, the “separation of powers concerns the Court expressed in [Boerne] . . . do not apply to RFRA as applied to the federal government.” Kikumura, 242 F.3d at 959.

It is hardly novel for Congress to respond to a Supreme Court decision by requiring federal instrumentalities to operate in a manner that is more protective of individual liberties than the Constitution requires. See Bauer, 84 F.3d at 1558-59 (giving examples); In re Hodge, 220 B.R. at 397 (same). In the religion context, Congress passed section 508 of the National Defense Authorization Act, 10 U.S.C. § 774, in order to remedy a Supreme Court decision, Goldman v. Weinberger, 475 U.S. 503 (1986), which had held that soldiers have no constitutional right to wear religious headgear on peacetime duty. And after the Supreme Court decided United States v. Lee, 455 U.S. 252 (1982), Congress passed the Exemption Act of 1988, 26 U.S.C. § 3127, which provided a special Social Security tax exemption to certain religious organizations that were religiously opposed to the tax. The Supreme Court has never suggested that such legislative protections violate the separation of

powers doctrine. On the contrary, the Court has indicated its approval of the Congressional reaction to Goldman. See Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 18 n.8 (1989). And in Smith, the Court invited Congress to create statutory exemptions for religious practice, even where those exemptions would not be required by the Free Exercise Clause; it indicated that such exemptions would be “permitted” and even “desirable.” Smith, 494 U.S. at 890.¹⁹

Every circuit court that has addressed the issue has accordingly held that RFRA does not contravene the separation of powers. The Eighth Circuit held that “[b]ecause Congress need not agree with everything the Supreme Court does in order for its legislation to pass constitutional muster, we conclude that RFRA is not contrary to the Constitution merely because Congress disagreed with the Smith Court’s interpretation of the Free Exercise Clause.” In re Young, 141 F.3d at 860;

¹⁹ It does not matter for separation-of-powers purposes that Congress acted broadly, applying RFRA to the federal government, federal instrumentalities, and federal territories. Cf. Petitioner’s Brief, at 37-38. Congress considered and rejected the piecemeal alternative, figuring that leaving free exercise protection to individual policy-making bodies would be impracticable and unfair. See H.R. Rep. No. 103-88, 1993 WL 158058, at *4 (1993) (“It is not feasible to combat the burdens of generally applicable laws on religion by relying upon the political process for the enactment of separate religious exemptions in every . . . statute.”); S. Rep. No. 103-111, 1993 WL 286695, at *7 (1993); see also Smith, 494 U.S. at 890 (“leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in”). As one court noted, “[t]here is no separation-of-powers requirement that Congress legislate narrowly.” In re Hodges, 220 B.R. at 387.

see also Kikumura, 242 F.3d at 959; Catholic Univ., 83 F.3d at 469 (ruling pre-Boerne). As a federal district court explained most clearly: “No doubt, Congress disliked . . . Smith. In response, it provided statutory protection above and beyond the constitutional floor set by Smith. From a separation-of-powers perspective, there is no hint of impropriety in this.”²⁰ In re Hodge, 220 B.R. at 397. There being no other conceivable impediment,²¹ RFRA is constitutional as applied to Guam.

IV. THE GOVERNMENT FAILS THE COMPELLING INTEREST TEST.

Whether this case is analyzed under the Free Exercise Clause of the Organic Act or under RFRA, Ras Makahna is protected from prosecution in this case because the government has conceded the crucial facts for the purposes of this case. The test under either provision is much the same. Under the Supreme Court of Guam’s reading of Organic Act, as under the federal test that was in place before

²⁰ The fact that Congress has enacted greater protection for individual liberties distinguishes this case from Dickerson v. United States, 530 U.S. 428 (2000). Cf. Petitioner’s Brief, at 38-40. In Dickerson, the Supreme Court held that “a constitutional decision of this Court, may not be in effect overruled by an Act of Congress.” Id. at 432. Here, however, RFRA seeks not to remove constitutional protection, as did the statute in Dickerson, but rather to provide additional protection on a statutory basis. There is simply no conflict between this action and any decision of the Supreme Court.

²¹ This Court has already established that the application of RFRA to the federal government is severable from its application to the states. See Sutton, 192 F.3d at 833 n.3; see also Kikumura, 242 F.3d at 959-60; In re Young, 141 F.3d at 858-59.

Smith, the government must prove that a substantial burden on the free exercise of religion is “justified by a compelling state interest and . . . is the least restrictive means of achieving that objective.” ER Tab 3, at 7; see also Yoder, 406 U.S. at 215. Likewise, the application of RFRA is guided by federal cases decided before Smith. See Goehring v. Brophy, 94 F.3d 1294, 1299 (9th Cir. 1996). Accordingly, the government must defend an action that substantially burdens sincere religious practice by showing that it is necessary for the pursuit of a compelling interest. See 42 U.S.C. § 2000bb-1; Cheema v. Thompson, 67 F.3d 883, 885 (9th Cir. 1995). The prosecution of Ras Makahna fails either test, given the government’s admissions. Of course the government is free to argue in future cases that it has a compelling interest in the prosecution of a particular individual under the marijuana laws. But for the purposes of this case, it has repeatedly waived its opportunities to do so and has instead chosen to argue that the compelling interest test does not apply. It is now bound by that strategic decision, and has indeed made no effort to argue otherwise to the Guam courts or to this Court.

To begin, Rastafarianism is a recognized religion. Only beliefs that are “rooted in religion” are protected, and “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit . . . protection.” Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 713-14 (1981).

As explained above, see supra at 3, the Attorney General admitted that Rastafarianism is a religion, ER Tab 3, at 7, and that Ras Makahna is a “legitimate member of the Rastafarian religion.” ER Tab 2, at 4. Formal admissions remove facts from the case and are binding on appeal. See In re Bakersfield Westar Ambulance, Inc., 123 F.3d 1243, 1248 (9th Cir. 1997); American Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224, 226, 227 (9th Cir. 1988). The legitimacy of Ras Makahna’s Rastafarianism is therefore established for the purposes of this case.

Likewise, the government conceded that its prosecution substantially infringed on Ras Makahna’s religious practice. A substantial burden on religion is one that “[p]uts substantial pressure on [the] adherent to modify his behavior and to violate his beliefs.” Thomas, 450 U.S. at 718; see also Callahan v. Woods, 736 F.2d 1269, 1273 (9th Cir. 1984). A criminal statute imposes the heaviest burden possible upon religious practice, for, if enforced, it “results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.” Braunfeld v. Brown, 366 U.S. 599, 605 (1961). And it has already been determined that marijuana laws “substantially burden[] the free exercise of the Rastafarian religion.” See Bauer, 84 F.2d at 1557 (describing the holding of the district court).

Accordingly, the Attorney General sensibly conceded that its prosecution substantially burdened Ras Makahna’s religious liberty because “marijuana is a

necessary sacrament . . . of the Rastafarian religion.” ER Tab 2, at 4. As the Supreme Court of Guam noted, “the government conceded in the proceedings below . . . the substantial infringement upon [Ras Makahna’s] right to freely exercise his religion.” ER Tab 3, at 7-8 (emphasis added).

Under the compelling interest test, “only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.” Yoder, 406 U.S. at 215. Guam has made no effort to satisfy either aspect of this test. Under a strict scrutiny regime, a court may not rely on legislative findings; rather, the government must put into the record affirmative evidence of a compelling interest. See Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 129 (1989); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978). And it must show a compelling interest to enforce the law against a particular individual. See Callahan, 736 F.2d at 1272-73. Here, the trial court found that “the Government has not demonstrated a compelling state interest to deny [Ras Makahna’s] right to the free exercise of his religion by using marijuana as a sacrament. The Government has not even alleged that the law addresses a compelling state interest.” ER Tab 2, at 6. Similarly, the Supreme Court of Guam noted that Guam chose not to include in the record any evidence of a compelling governmental interest. See ER Tab 3, at 8.

To the extent that the government’s failure to articulate a compelling interest is considered a factual admission, that too has been conclusively established for the purposes of this case. And to the extent that it is considered a legal omission, the Attorney General has waived it on appeal. The Ninth Circuit will not normally consider a legal argument not raised below—unless it falls into one of three “narrow exceptions”: (1) where exceptional circumstances justify the omission; (2) where the new issue arises because of an intervening change of law; or (3) where the issue is purely one of law and the opposing party will suffer no prejudice if it is raised for the first time on appeal. United States v. Carlson, 900 F.2d 1346, 1349 (9th Cir. 1990). None of these exceptions applies here. The government has presented no excuse at all, let alone an “exceptional” one; it points to no intervening change of law; and any introduction of a compelling interest argument at this late hour would indeed prejudice Ras Makahna, who would have no opportunity to introduce contrary evidence. Accordingly, this Court should refuse to entertain any belated compelling interest that was not articulated at trial.

In addition, the government failed to raise the issue in its certiorari petition, and therefore the question is not properly before this Court. See Sup. Ct. R. 14.1(a); Review Limited to Questions Presented, 5 Am. Jur. 2d Appellate Review § 369 (2000) (“The cases are legion reciting that the Supreme Court will ordinarily limit

its consideration to questions presented by the petition for the writ, even though properly presented to and passed on by the lower court. . . . State jurisdictions which provide for review by certiorari also limit such review to the questions presented in the petition for certiorari.”).

And finally, a compelling interest may not now be supplied for the government. The Ninth Circuit held only recently that the mere existence of the marijuana laws does not serve to demonstrate that the government has a per se compelling interest in prosecuting a Rastafarian who has raised a religious liberty defense. See Bauer, 84 F.3d at 1559; cf. ER Tab 3, at 8. The trial court in Bauer had refused to allow practicing Rastafarians to pursue a RFRA defense to marijuana charges on the ground that the government had demonstrated a per se compelling interest by merely pointing to the drug laws. This Court reversed, holding that “the government ha[s] the obligation . . . to show that the application of the marijuana laws to the defendants was in furtherance of a compelling governmental interest.” Id. Apparently recognizing this obstacle, as well as the others noted above, the Attorney General neither contests on appeal that it is bound by its failure to assert a compelling interest, nor tries to present any such interest in its briefs.

Because Guam has failed to assert a compelling state interest, it is not necessary to decide whether it employed the least restrictive means of pursuing that

interest. But even if that question were at issue, Guam would have to abide by its choice to forego all necessity arguments. See ER Tab 2, at 6 (“The Government has not alleged or attempted to show the statute is the least restrictive means of carrying out its purpose.”). Neither has the Attorney General chosen to make any such argument before the Supreme Court of Guam or before this Court. In cases where the government failed to produce any evidence of a less restrictive alternative, courts have not hesitated to find a free exercise violation. See Thomas, 450 U.S. at 719 (granting free exercise protection where “no [least-restrictive-means] claim was advanced” by the government); Callahan, 736 F.2d at 1274-75 (same); NAACP v. City of Richmond, 743 F.2d 1346, 1356 (9th Cir. 1984) (striking down a speech ordinance where the government made “no attempt to prove that [the ordinance] is the least restrictive means of achieving its interest”). Guam’s omission here is conclusive because, as the Callahan court explained, the least restrictive means showing is “the most critical aspect of our free exercise inquiry.” Callahan, 736 F.2d at 1274. Moreover, that inquiry must be made on a case-by-case basis; the Bauer Court accordingly rejected any possible per se argument with respect to the least restrictive means requirement as well. See Bauer, 84 F.3d at 1559. Here, Guam has conclusively failed to carry its burden by failing to make any effort to satisfy the least restrictive means test before this Court or any of the courts below.

Because Guam has failed to carry its burden, its prosecution of Ras Makahna violates the Guam Free Exercise Clause. The Supreme Court of Guam should be affirmed.

In lieu of carrying its affirmative burden, Guam argues now only that prosecution for importing cannabis, as opposed to possessing it, does not substantially burden the exercise of Ras Makahna's religion. See Petitioner's Brief, at 41-42. This curious argument fails for several reasons. First, the Attorney General conceded below that its prosecution substantially burdened the exercise of Ras Makahna's religion. See ER Tab 3, at 7 ("the government conceded below . . . the substantial infringement upon [Ras Makahna's] right to freely exercise his religion"); ER Tab 2, at 6. Ras Makahna was charged with only one crime: importation of marijuana. The government cannot now pretend that its earlier concessions somehow covered not importation but possession, with which Ras Makahna was never charged. Furthermore, Guam waived this argument by failing to raise it in its Petition for Writ of Certiorari. See Sup. Ct. R. 14.1(a); 5 Am. Jur. 2d Appellate Review § 369. Neither was the argument addressed by either court below. Either way, the government's belated argument is not properly before this Court.

The sole case that the government cites to support its argument, Bauer, 84

F.3d at 1559, only bolsters the validity of Ras Makahna's RFRA claim. In Bauer, this Court held that while the factual record did not necessarily show that Rastafarianism required the distribution of marijuana, it did show that simple possession was central to the religion. See id. In this case, by contrast, there is absolutely no suggestion that Ras Makahna intended to distribute marijuana. On the contrary, the importation of marijuana for personal religious use is much closer to the possession approved of in Bauer than it is to drug dealing.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Guam should be affirmed.

Dated: May 23, 2001

GRAHAM BOYD
NELSON TEBBE
ACLU Drug Policy Litigation Project
160 Foster Street
New Haven, CT 06511
Phone: (203) 787-4188
Fax: (203) 787-4199

DANIEL N. ABRAHAMSON
The Lindesmith Center
1095 Market Street, Suite 505
San Francisco, CA 94103
Phone: (415) 554-1900
Fax: (415) 554-1980

