No. 19-805

In the
Supreme Court of the United States

BEN ADAM,
Petitioner,
v.

WILLIAM P. BARR, Attorney General of the United States, GEOFFREY S. BERMAN, United States Attorney for the Southern District of New York, UTTAM DHILLON, Administrator of the United States Drug Enforcement Administration, all in their official capacities,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Questions Presented are:

(1) Did the Second Circuit err in finding that petitioner lacked standing to challenge a criminal statute under the threat of prosecution doctrine, where petitioner openly expressed his intention to violate, for religious purposes, a criminal statute which the government has openly declared its intent to enforce.

(2) How are courts to determine whether a particular religious belief/practice qualifies for protection under the Religious Freedom Restoration Act, and by extension, the First Amendment—an issue dealt with differently by different circuits.

PARTIES TO THE PROCEEDING

The petitioner is Ben Adam, who is self-represented. Respondents are WILLIAM P. BARR, Attorney General of the United States, GEOFFREY S. BERMAN, United States Attorney for the Southern District of New York, UTTAM DHILLON, Administrator of the United States Drug Enforcement Administration, all in their official capacities.

LIST OF DIRECTLY RELATED PROCEEDINGS

There are no proceedings that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit opinion below (App. 1-8) is published at --- Fed.Appx. ----, 2019 WL 6004632. The district court's opinion (App. 9-21) is published at 2019 WL 1426991.

JURISDICTION

The Second Circuit entered judgment on November 14, 2019. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Controlled Substances Act 84 Stat. 1242 and the Religious Freedom Restoration Act 42 U.S.C. § 2000bb–1(c) are reproduced in the appendix to the petition (App. 24-26).

STATEMENT

Ben Adam, the pseudonymous petitioner, believes in and is committed to the pursuit of religio-mystic experiences and ultimately, prophecy, and believes that cannabis can be used as an entheogen to induce these altered states. He is also the founder of the Bnei Haneviim organization, a non-profit organization incorporated in the state of New York. The organization is designed for individuals devoted to God's law as expressed in the written and oral

traditions of the Torah, and who believe in the entheogenic use of cannabis. To date, the organization has stalled its operations, and refrained from including any member other than Ben Adam, due to the legal questions presented in this case.

Petitioner commenced suit against defendants in the Southern District of New York, under the Religious Freedom Restoration Act ("RFRA") and the Free Exercise Clause of the First Amendment. The amended complaint stated that petitioner had an immediate intent to imbibe cannabis as part of his religious practice, and incorporated into the amended complaint by reference was an essay authored by petitioner which explains his view of the use of entheogens to pursue prophecy and religio-mystic experience, and which thoroughly discussed the purpose and parameters of his intended cannabis use. The amended complaint alleged several harms however, the one focused on in the courts below was Adam's allegation that his sincere exercise of religion was being substantially burdened as he was under threat of prosecution of the Controlled Substances Act ("CSA") 84 Stat. 1242. (2000 ed. and Supp. I). This statute lists cannabis as a schedule I controlled substance, and deems illegal the importation, manufacture, distribution, and use of psychotropic substances.

In addition to the general outstanding statutory prohibition, in a memorandum dated January 4, 2018 (commonly referred to as the "Cole Memo"), the Attorney General of the United States, announced the current administration's intention to prosecute

cannabis possession, distribution, and cultivation, and its rejection of the previous administration's relaxation of prosecution in cannabis related cases. That memorandum has not been revoked, and for all intents and purposes, is still in effect.

Given the general prohibition of cannabis and the Attorney General's declared intention to prosecute cannabis related cases, petitioner's rights under the RFRA and the First Amendment are at stake, as his ability to freely practice in accordance with his religious beliefs is hindered by the threat of prosecution and the other harms asserted in his amended complaint.

The district court dismissed petitioner's amended complaint, ruling that his complaint failed to state a claim and that he did not have standing to bring a pre-enforcement challenge for declaratory and injunctive relief. On appeal, the Second Circuit affirmed the district court, finding that petitioner lacked standing because his fear of prosecution was merely speculative, and there was no particularized threat of prosecution leveled against him individually.

REASONS FOR GRANTING THE WRIT

Two significant issues are raised by this case which can and should be addressed by this Court.

I. The threat of prosecution doctrine, which was over-minimized in this case, ought to be clarified, to avoid deprivation of due process rights.

A. The decisions below impede due process rights and deprive access to the courts, by over-minimizing the significance and meaning of this Court's "threat of prosecution" doctrine.

The lower courts misapplied and misinterpreted the standard this Court prescribed to be used in determining when there exists a threat of prosecution. Contrary to the Second Circuit's opinion that petitioner's complaint only alleged "imaginary or speculative" fears of prosecution, neither the courts nor the defendants cited a single case where this Court has found lack of standing where an individual brought suit expressing an explicit intention to violate a criminal statute, which the executive branch explicitly expressed its intent to enforce.

The cases from this Court have ruled the opposite. In numerous preenforcement cases this Court has found standing on a showing that a statute indisputably proscribed the conduct at issue, without placing the burden on a plaintiff to show an intent by the government to enforce the law against it. Rather, the Court presumed such intent in the absence of a disavowal by the government or another reason to

conclude that no such intent existed. *See for example Holder v. Humanitarian Law Project,* 561 U.S. 1, 15 (2010); *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, certified question answered sub nom. *Commonwealth v. Am. Booksellers Ass'n, Inc.*, 236 Va. 168 (1988); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

The decisions by the lower courts defy this Court's policy that a plaintiff need not expose himself to actual prosecution if there is a credible threat of enforcement. *Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 121 (2007). It is essential that the threat of prosecution doctrine be maintained to continue to afford standing because, as this and many of the circuit courts have recognized, a citizen should not be required to sacrifice his or her wish to conform to valid social prescriptions in order to test his or her belief of invalidity; citizens should be allowed to prefer official adjudication to private disobedience. *New Hampshire Hemp Council, Inc. v. Marshall,* 203 F.3d 1, 4–6 (1st Cir. 2000) cert. denied, 531 U.S. 828 (2000); see also *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007) (collecting cases); *Susan B. Anthony List v. Driehaus,* 573 U.S. 149, 159 (2014).

Furthermore, although it is not necessary to establish such, as the standard requires only that there be a statute prohibiting the action, upon information and belief, federal prosecutors are indeed prosecuting possession of cannabis cases nationwide (though petitioner is not in a position to have those numbers). Additionally, although the Second Circuit distinguished the case from serving as an instance of prior

enforcement because petitioner in this case has willfully refrained from distributing until having his case heard, the case here is not totally dissimilar to *United States v. Meyers*, 95 F.3d 1475, 1479 (10th Cir. 1996), where the appellant argued that his convictions of conspiracy to possess with intent to distribute marijuana, and aiding and abetting possession with intent to distribute marijuana, should be overturned because marijuana use was part of his religious practice. The court disagreed, finding that the appellant's "beliefs more accurately espouse a philosophy and/or way of life rather than a 'religion.'" *Id.* at 1484. The appellant was then imprisoned. In addition to the *Meyers* case, courts have on several other occasions denied the religious use defense, and thereupon punished those who asserted it unsuccessfully with penalties including imprisonment. *See United States v. Christie*, 825 F.3d 1048, 1055 (9th Cir. 2016); *Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 834 (9th Cir. 2012); *see also United States v. Lafley*, 656 F.3d 936 (9th Cir. 2011); *Olsen v. Drug Enf't Admin.*, 878 F.2d 1458, 1459 (D.C. Cir. 1989); *United States v. Rush*, 738 F.2d 497, 516 (1st Cir. 1984).

Considering the courts' prior approaches to dealing with analogous cases, and the defendants' failure to disclaim enforcement intentions, and the Attorney General's declared intent to prosecute these types of cases, it is unfair, and deprives petitioner and similarly situated individuals of due process rights, to deny them the opportunity to be heard on such claims. Such individuals should not be forced to risk criminal sanctions in order to have their claims adjudicated.

B. The threat of prosecution doctrine has varied interpretations in the circuit courts, and it should be especially clarified that the standard is relaxed in First Amendment Cases.

The threat of prosecution doctrine has varied interpretations by the different circuits, with some circuits, outside the Second, finding that a mere failure to disclaim enforcement intentions in response to the litigation can confer standing. *Green Party of Tennessee v. Hargett*, 791 F.3d 684, 695-696 (6th Cir. 2015); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1251-1252 (11th Cir. 2012), cert. denied,133 S. Ct. 856 (2013); *Wersal v. Sexton*, 613 F.3d 821, 829-831 (8th Cir. 2010), reh'g en banc granted, (Oct. 15, 2010); see also *Holder v. Humanitarian Law Project,* 561 U.S. 1, 15 (2010); *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, certified question answered sub nom. *Commonwealth v. Am. Booksellers Ass'n, Inc.*, 236 Va. 168 (1988).

It is of particular importance that this Court address the variation among the circuit courts on the threat of prosecution doctrine where religious freedom is at issue. The decisions below work to solidify bad precedent which significantly impedes due process rights, particularly in cases where a party's intention to violate a statute is based on religious beliefs and practices, where standing and ripeness requirements are supposed to be relaxed. *See Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 8-10 (1st Cir. 2012); *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1000-1001 (9th Cir. 2010),

cert. denied, 131 S. Ct. 1477 (2011); *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988); *Wisconsin Right to Life State Political Action Committee v. Barland*, 664 F.3d 139, 147, 148 (7th Cir. 2011); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1122-1126 (9th Cir. 2009); *Watchtower Bible and Tract Soc. of New York, Inc. v. Village of Stratton, Ohio*, 240 F.3d 553, 564 n. 7 (6th Cir. 2001), judgment rev'd on other grounds, 536 U.S. 150 (2002); *Krantz v. City of Fort Smith*, 160 F.3d 1214, 1217–1218, (8th Cir. 1998), cert. denied, 527 U.S. 1037 (1999); *Presbytery of New Jersey of Orthodox Presbyterian Church v. Florio*, 40 F.3d 1454, 1462–1470 (3d Cir. 1994)

To this end, the Religious Freedom Restoration Act of 1993 plainly contemplates that *courts* would provide a forum in which to determine whether a party's First Amendment rights are burdened by laws of general applicability. (See 42 U.S.C. § 2000bb–1(c)) ("A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government"). "RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 434 (2006). "Moreover, RFRA is explicit that such right may be invoked against the government as either a "claim or defense," a sword or a shield. If a person has a sufficiently realistic fear that the government is going to punish him for exercising his religious beliefs in defiance of the law, he may unsheathe RFRA and file a preemptive strike in an effort to subdue the government before it

treads further." *United States v. Christie*, 825 F.3d 1048, 1055 (9th Cir. 2016) (internal citations omitted).

II. This case has also ripened the issue of the definition of religious belief sufficient to qualify for protection under the RFRA, and by extension, the First Amendment—an issue dealt with differently by different circuits.

This case also raises a ripened issue of the definition of protected religious belief. Assuming the courts below erred in their determination that there was no threat of prosecution, the next major issue, never addressed below, but which would be ripe for this Court to decide, as it is essential to the determination of whether petitioner has standing, is whether petitioner stated a valid claim under the RFRA. This in turn would depend on whether petitioner's religious views and practices are of a religious nature that is protected by law.

Although never addressed by the courts below, defendants argued below that petitioner's complaint failed to state a prima facie claim under the Religious Freedom Restoration Act because his faith does not include any religious ceremonies that actually require the use of cannabis, and cannabis is not an essential sacrament of his faith. Defendants' argument focused on tests developed in various circuit courts which ask whether an individual is forced to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion on the other hand," (*Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 348 [2d Cir. 2007]), or whether one is

"coerced to act contrary to their religious beliefs" (*Oklevueha Native Am. Church Of Hawaii, Inc. v. Lynch,* 828 F.3d 1012, 1016 [9th Cir. 2016]), or whether the activity in question is "required by [one's] religion" *United States v. Barnes,* 677 F. App'x 271, 276 (6th Cir. 2017).

In the same vein, in the district court, defendants also argued that cannabis is inessential to the practice of petitioner's religion and so petitioner's injury is mere "diminishment of spiritual fulfillment" which "is not a substantial burden on the exercise of religion." *Navajo Nation v U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008); see also *Perkel v U.S. Dep't of Justice,* 365 F. App'x 755 (9th Cir. 2010); *see also Turner-Bey v Lee,* 935 F. Supp. 702 (D. Md. 1996) citing *Goodall v. Stafford County Sch. Bd.,* 60 F.3d 168, 172–73 (4th Cir.1995), *cert. denied,* 516 U.S. 1046 (1996); *Sample v. Lappin,* 479 F. Supp. 2d 120, 124 (D.C. 2007).

This Court can and should clarify that the various and diverging tests of essentiality developed and used by the circuit courts, but never addressed by this Court, should not be used as exclusive tests or factors in determining whether or not a substantial burden on religious exercise exists. These questions were developed by various circuit courts in their attempts to understand and gauge the substantiality of a particular burden because the "RFRA itself provides no explicit definition of 'substantial burden.'" *Oklevueha Native Am. Church Of Hawaii, Inc. v. Lynch* at 1016. However, the general rule, espoused by this Court is that, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or

the validity of a particular litigant's interpretation of those creeds." *Hernandez v. Comm'r of Internal Revenue,* 490 U.S. 680, 699 (1989) citing *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707, 716 (1981); *see also Jolly v. Coughlin,* 76 F.3d 468, 476-477 (2d Cir.1996) *citing Patrick v. LeFevre,* 745 F.2d 153, 157 (2d Cir.1984).

As an example of why the test proposed by defendants, and sometimes used by the circuit courts, is flawed, consider persons of faith who choose to take on monastic lives, or to take the cloth. There is no question that an individual can be a fully observant, upstanding member of a religion, without going to these extremes. Nevertheless, the choice to dedicate one's life to religious service in these ways is a choice which is clearly, "religious in nature" intended to be protected by the RFRA and the First Amendment, such that imposing limitations on an individual's right to pursue these paths would no doubt be considered a "substantial burden" on religious exercise. It would be patently inappropriate for the government to prevent these types of religious expressions and pursuits, yet under the strictly applied test advocated by defendants and at times practiced by the circuit courts, such activities would go unprotected.

Similarly, a strict application of some of these tests developed by the circuit courts would be inappropriate in this case. Although petitioner's individual beliefs may not be shared by mainstream Judaism (see *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707 [1981] [the fact that an individual's particular interpretation of religious law or practice is

controversial, and subject to intra-faith dispute, does not change the fact that the belief or interpretation is fundamentally religious in nature, and therefore protected by the First Amendment:]), or strictly required by the Jewish faith, they are sincerely held, and clearly religious in nature. His entheogenic use of cannabis is akin to the entheogenic use which was found to be protected by the Supreme Court in the controlling case of *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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