STATE OF INDIANA	)	IN THE MARION CIRCUIT COURT
	) SS:	
COUNTY OF MARION	)	CAUSE NO. 49C01-1507-MI-022522

THE FIRST CHURCH OF CANNABIS, INC., *et al.*,	)
	)
Plaintiffs,	)
	)
v.	)
	)
STATE OF INDIANA, *et al.*,	)
	)
Defendants.	)

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This case is a story of a political crusade turned legal stunt. In early 2015, there were two bills pending before the Indiana General Assembly. One of them was Indiana's Religious Freedom Restoration Act (RFRA), S.B. 101, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015), and the other was a bill to legalize medical marijuana, S.B. 284, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015). *See also* H.B. 1487, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015). Then-Governor Mike Pence signed RFRA into law on March 26, 2015, but the medical marijuana bill never got past the first reading and died in committee. At that point, a few local marijuana legalization activists—who had opposed RFRA because they believed it to be discriminatory—decided to kill two birds with one stone. They started a marijuana "church" so that they could smoke marijuana under the protection of RFRA while at the same time mocking RFRA (and religion more generally) and the public servants who enacted it. And then they filed this lawsuit.

As an initial matter, RFRA was never intended to protect illegal conduct masquerading as religious faith. Plaintiffs profess to be sincere practitioners of a legitimate religion, but the facts on that score show they are not—or at most, that disputed issues of fact exist on each element of Plaintiffs' prima facie case that require the Court to weigh competing evidence and make credibility determinations. Accordingly, Plaintiffs' Motion for Partial Summary Judgment must be denied.

More importantly, however, even if Plaintiffs had conclusively established that they sincerely believe consuming marijuana is central to a legitimate religious exercise, they still could not prevail. That is because Defendants have conclusively established that the State has a compelling interest in preventing its citizens from using marijuana, and that enforcing its statutory prohibition against marijuana use—without exception for religious use—is the least restrictive

means available to advance that interest. Defendants' Joint Motion for Summary Judgment should be granted.

FACTUAL & PROCEDURAL BACKGROUND

I. The Advent of State RFRA Laws Generally

All Americans are constitutionally entitled to the free exercise of their religious faith without government infringement. U.S. Const. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion]"); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (noting the incorporation of this protection to the States). For many years, the Supreme Court analyzed Free Exercise claims using a two-part balancing test: first, the Court considered whether the government action imposed a substantial burden on the practice of religion; if it did, the Court evaluated whether the action was nonetheless necessary to serve a compelling government interest. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

But in 1990, the Court decided *Employment Division, Department of Human Resources of Oregon v. Smith*, a case of two members of the Native American Church who were fired after ingesting peyote for sacramental purposes, and then were denied government benefits owing to the circumstances of their discharge. 494 U.S. 872, 874 (1990). The Supreme Court rejected application of the *Sherbert* test to the resulting Free Exercise Clause challenge because balancing religious objections to generally applicable laws "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." *Id.* at 888. Accordingly, it concluded that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* at 879.

A few years later, out of concern that *Smith* had eroded the constitutional guarantee of religious liberty, Congress enacted the Religious Freedom Restoration Act (RFRA). Pub. L. No. 103-141, § 2, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb to 2000bb-4). "[L]aws [that are] 'neutral' toward religion[,]" Congress found, "may burden religious exercise as surely as laws intended to interfere with religious exercise[.]" 42 U.S.C. § 2000bb(a)(2); *see also* § 2000bb(a)(4). The federal RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government "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(a), (b).

As enacted, RFRA applied not only to the Federal Government but also to the States and their political subdivisions. But in *City of Boerne v. Flores*, the Court held that RFRA could not constitutionally be applied to States or local governments because it exceeded the scope of Congress's power to enact remedial legislation pursuant to Section 5 of the Fourteenth Amendment. 521 U.S. 507, 536 (1997). Congress responded to *City of Boerne* by enacting the Religious Land Use and Institutionalized Persons Act (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. § 2000cc-1(b)), which imposes on state prisons essentially the same burdens as RFRA as a condition of accepting federal grants. *Cutter v. Wilkinson*, 544 U.S. 709, 726 (2005).

In the two decades since *City of Boerne* was decided, nearly half the States (including Indiana) have enacted their own statutory (or in the case of Alabama, constitutional) RFRAs. Lucien J. Dhooge, *The Impact of State Religious Freedom Restoration Acts: An Analysis of the Interpretive Case Law*, 52 Wake Forest L. Rev. 585, 647 n.15 (2017) (citing Ariz. Rev. Stat. §§ 41-

1493 to -1493.02 (2016) (adopted 1999); Ark. Code §§ 16-123-401 to -407 (2016) (adopted 2015); Conn. Gen. Stat. § 52-571b(a)–(f) (2016) (adopted 1993); Fla. Stat. §§ 761.01–.05 (2016) (adopted 1998); Idaho Code §§ 73-401 to -404 (2016) (adopted 2000); 775 Ill. Comp. Stat. 35/1-99 (2016) (adopted 1998); Ind. Code §§ 34-13-9-0.7 to -11 (2016) (adopted 2015); Kan. Stat. §§ 60-5301 to -5307 (2016) (adopted 2013); Ky. Rev. Stat. § 446.350 (2016) (adopted 2013); La. Stat. §§ 13:5231–:5242 (2016) (adopted 2010); Miss. Code § 11-61-1 (2016) (adopted 2014); Mo. Rev. Stat. § 1.302.1 (2016) (adopted 2004); N.M. Stat. §§ 28-22-2 to -5 (2016) (adopted 2000); Okla. Stat. tit. 51, §§ 251–258 (2016) (adopted 2000); 71 Pa. Cons. Stat. §§ 2401–2408 (2016) (adopted 2002); R.I. Gen. Laws §§ 42-80.1-1 to - 4 (2016) (adopted 1998); S.C. Code §§ 1-32-10 to -60 (2016) (adopted 1999); Tenn. Code § 4-1-407 (2016) (adopted 2009); Tex. Civ. Prac. & Rem. Code §§ 110.001–.012 (Vernon 2016) (adopted 1999); Va. Code § 57-2.02(A)–(F) (2016) (adopted 2007)); *see also* Ala. Const. art. I, § 3.01 (adopted 1998).

Indiana's RFRA was adopted in 2015 after extensive press coverage and public debate. Some of the individual Plaintiffs in this lawsuit participated in that public debate, as described more fully below.

II. The Individual Plaintiffs in this Lawsuit

A. Bill Levin

William J. ("Bill") Levin is a local political and cultural figure. He began using marijuana in 1968, when he was "12 or 13" years old, and used it continuously from that time until around 1989, when he was required to undergo regular drug testing. Ex. 1, Deposition of Bill Levin ("Levin Dep.") at 71–72. When asked when he had last smoked marijuana, Levin invoked his Fifth Amendment right against self-incrimination. Ex. 1, Levin Dep. at 8.

As a young man, Levin worked as a punk-rock music promoter, but found that it did not support the lifestyle he desired. Ex. 2, Tim Lucas, *Punk at Heart*, Indianapolis Star (Apr. 4, 1987) ("Punk at Heart"). "My goal is to be rich[,]" he told a reporter, as explanation for why he accepted a job selling Jolt Cola. Ex. 2, Punk at Heart. "[M]erchandising's in my blood[.]" *Id.*

At some point, Levin began working in the technology field at IUPUI, but after that employment came to an acrimonious end, Ex. 1, Levin Dep. at 64–68, Levin became involved in a string of business ventures that included a party bus company. Mark Alesia & Tim Evans, *Who is First Church of Cannabis founder Bill Levin?*, Indystar.com (June 27, 2015), *available at* https://www.indystar.com/story/news/2015/06/27/part-huckster-part-high-priest-pot-indys-counter-culture-icon-sparks-controversy/29287515/ (last visited Dec. 14, 2017). Most recently, he worked retail at High on the Hill, an Indianapolis store that sells "pipes, tobacco supplements," "water pipes[,]" and other items, from 2012 until shortly after he founded FCOC. Ex. 1, Levin Dep. at 84–87, 134.

Politically, Levin describes himself as "Liberal." Ex. 1, Levin Dep. at 99. He ran for a seat on the Indianapolis City-County Council on the Libertarian ticket in 2011. Ex. 1, Levin Dep. at 99. Levin "believe[d] that the RFRA bill was written to be against gays" and that "if you're against gays, you're a bigot." Ex. 1, Levin Dep. at 105–07. Initially, he was "against" RFRA. Ex. 1, Levin Dep. at 107. But after "researching" RFRA, Levin "found out it could be beneficial." Ex. 1, Levin Dep. at 107. Specifically, he "found a ray of light and sunshine in RFRA, and [he] proceeded to make a church because RFRA stated that it's a good thing." Ex. 1, Levin Dep. at 112.

Levin, his co-plaintiff Herbert Neal Smith, and FCOC board member and operations manager Janet Keene Golden-Hogan (known as "Granny J") have all been involved with the

marijuana legalization lobby for decades; they were all on the board of directors of the National Organization for Reform of Marijuana Laws (NORML) in the 1990s. Ex. 1, Levin Dep. at 26–27; Ex. 3, Deposition of Herbert Neal Smith ("Smith Dep.") at 12–13; Ex. 4, Deposition of Janet Golden-Hogan ("Granny J Dep.") at 16. Levin has "publicly advocated for marijuana legalization" in "[e]very context[,]" including "[e]verything from creating art to running rallies to speaking fondly of [marijuana] at every given chance" and speaking to legislators about "[t]he medical health values of the cannabis plant." Ex. 1, Levin Dep. at 115, 121, 370. He has described "the legalization of recreational weed in all 50 states" as "a great idea." Ex. 5, Granny J Facebook at 2. Granny J also believes that recreational marijuana use should be legal and has participated in marches, rallies, and advocacy organizations toward that end. Ex. 4, Granny J Dep. at 45–46.

Levin is FCOC's self-styled "Grand Poobah and minister of love"—a title he says was "[i]nfluenced by Fred Flin[t]stone." Ex. 1, Levin Dep. at 211. Levin purports to be an "ordained minister" in the Universal Life Church, a certification he obtained after filling out forms and completing "a quick course[,]" the content of which he does not remember. Ex. 1, Levin Dep. at 38–39. He conducts weddings, funerals, and other ceremonies using the Universal Life Church database for an appropriate script. Ex. 1, Levin Dep. at 42. Levin has said that if FCOC "doesn't work after 30 days, we'll give you your money back[.]" Ex. 1, Levin Dep. at 336. He would like the church "to be as big as Starbucks." Ex. 1, Levin Dep. at 349. Levin does not currently earn a salary in his position as Grand Poobah (though he does receive reimbursement for some or all of his expenses), but he would like to earn a salary if sufficient funds were available. Ex. 1, Levin Dep. at 92–93.

B. Herbert Neal Smith

Herbert Neal Smith, a 64-year-old Indianapolis resident, works as a clerk at a Kroger grocery store. Ex. 6, Pl. Herbert Neal Smith's Answers to Defs.' First Set of Interrogs. to Herbert Neal Smith ("Smith Interrog. Answers") at 3–4. He is also known as "Sky Wolf." Ex. 4, Granny J Dep. at 17. Smith first used cannabis in 1968, when he was 16. Ex. 3, Smith Dep. at 25. He said it made him feel "calm" and "peaceful." Ex. 3, Smith Dep. at 26. He began viewing it as a "sacrament" about ten years later. Ex. 3, Smith Dep. at 27. He has twice been arrested for and pled guilty to misdemeanor marijuana possession. Ex. 3, Smith Dep. at 44.

Like Levin, Smith is a longtime advocate for marijuana legalization; he has been active on the issue since 1972. Ex. 3, Smith Dep. at 14. He posts pro-marijuana content on the Indiana NORML website. Ex. 3, Smith Dep. at 14, 67–68. He has testified before the Indiana General Assembly in support of several marijuana legalization bills over the years, including the 2015 medical marijuana bill introduced in the Indiana Senate. Ex. 3, Smith Dep. at 15–16. He has also been arrested numerous times in the course of participating in political demonstrations. Ex. 3, Smith Dep. at 43.

Smith has been a member of NORML since at least 1999 and met Levin through that organization. Ex. 3, Smith Dep. at 12–13. Smith was involved in the creation of FCOC; he discussed FCOC with Levin prior to the organization's establishment and supported its creation. Ex. 3, Smith Dep. at 14.

Smith practices "Shawano," a traditional Shawnee religion. Ex. 3, Smith Dep. at 12. Marijuana use is "sometimes" part of the practice of Shawano. Ex. 3, Smith Dep. at 50. Despite being a dues-paying member of FCOC, Ex. 6, Smith Interrog. Answers at 4, Smith testified he does not "practice any other religions" besides Shawano. Ex. 3, Smith Dep. at 12.

C. Bobbi Jo Young

Originally, Bobbi Jo Young was a member and volunteer at FCOC. Ex. 1, Levin Dep. at 31. She was "asked to leave" due to "[h]onesty reasons[,]" Ex. 1, Levin Dep. at 28, and "a very strong difference of opinion" with Levin. Ex. 4, Granny J Dep. at 29. Specifically, Levin believed she was stealing money and other items from FCOC and using his computer without his authorization. Ex. 1, Levin Dep. at 30. Young remains a named plaintiff but has not participated in any aspect of this litigation to date.

III. Indiana's Religious Freedom Restoration Act (RFRA)

Senate Bill 101, Indiana's RFRA, was introduced on January 6, 2015, and received extensive press coverage. *See, e.g.*, Tony Cook, *Indiana religious freedom bills fraught with rhetoric*, IndyStar.com (Feb. 7, 2015), *available at* https://www.indystar.com/story/news/politics/2015/02/07/indiana-religious-freedom-bills-fraught-rhetoric/23042389/ (last visited Dec. 14, 2017). Levin posted about it extensively on his Facebook page, describing it as "a license to discriminate" and a "turd of a bill." Ex. 7, Levin Facebook at 9. He endorsed a suggestion that businesses should refuse service to lawmakers who supported it. Ex. 7, Levin Facebook at 17. And he suggested—sarcastically—that it would turn Indiana into a "home of Christian Sharia law[.]" Ex. 1, Levin Dep. at 145.

SB 101 passed out of the Senate on February 24 by a vote of 40 to 10 and was referred to the House, where it passed on March 23 by a vote of 63 to 31. The Governor signed it into law on March 26.

As enacted, Indiana's RFRA provides:

> (a) Except as provided in subsection (b), a governmental entity may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability.

> (b) A governmental entity may substantially burden a person's exercise of religion only if the governmental entity 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.

Ind. Code § 34-13-9-8. It provides both a defense and a private right of action for relief: "[a] person whose exercise of religion has been substantially burdened, or is likely to be substantially burdened, by a violation of this chapter may assert the violation or impending violation as a claim or defense in a judicial or administrative proceeding[.]" Ind. Code § 34-13-9-9. The defense may apply "against any party" but relief is only available against the government entity and "may include . . . [d]eclaratory relief or an injunction or mandate that prevents, restrains, corrects, or abates the violation of this chapter[,] . . . [c]ompensatory damages[,]" and "all or part of the costs of litigation, including reasonable attorney's fees[.]" Ind. Code § 34-13-9-10.

Indiana's RFRA does not "authorize a provider to refuse to offer or provide services, facilities, use of public accommodations, goods, employment, or housing to any member or members of the general public on the basis of race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity, or United States military service" or "establish a defense to a civil action or criminal prosecution for refusal by a provider to offer or provide services, facilities, use of public accommodations, goods, employment, or housing to any member or members of the general public on the basis of race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity, or United States military service[.]" Ind. Code § 34-13-9-0.7.

IV. The First Church of Cannabis (FCOC)

FCOC's origins are hazy, but they seem to begin with a March 23, 2015, blog post by local political radio personality Abdul Hakim-Shabazz. Ex. 1, Levin Dep. at 35–37; Ex. 8, Abdul Hakim-Shabazz, *RFRA and Reefer*, IndyPolitics.org (Mar. 23, 2015) ("RFRA and Reefer") at 2. Shabazz begins the post by saying "Go get yourself some mary jane and Doritos because this is gonna be good." Ex. 8, RFRA and Reefer at 2. He goes on to describe historical religious use of marijuana, and then states: "I would argue that under RFRA, as long as you can show that reefer is part of your religious practices, you got a pretty good shot of getting off scott-free." Ex. 8, RFRA and Reefer at 3. Shabazz concluded by predicting this litigation: "I want a front row seat at the trial that we all know is going to happen when all this goes down. Praise the Lord and pass the grass!" Ex. 8, RFRA and Reefer at 2–3.

On the same day that post was published, Levin announced the advent of the FCOC on Facebook—in the form of a caption to an article about RFRA: "I am sad to say . . . . Here come [sic] the FIRST CHURCH OF CANNABIS . . . . When one door closes . . . another will open up . . . ." Ex. 1, Levin Dep. at 141–42; Ex. 7, Levin Facebook at 18. Levin then shared Shabazz's post on his own Facebook timeline, under the comment "Folks . . . maybe religion will take a lead here in Indiana . . . . Cause you KNOW I will open the First Church of Cannabis . . . ." Ex. 7, Levin Facebook at 19.

Levin filed incorporation papers for FCOC with the Indiana Secretary of State on March 26, 2015—the very same day that then-Governor Pence signed Indiana's RFRA into law. Ex. 1, Levin Dep. at 148. FCOC's incorporation paperwork provides that upon "dissolution or final liquidation[,]" its assets will be distributed to "Re-Legalize Indiana PAC[,]" a "political action

committee" that Levin has chaired since about 2008. Ex. 1, Levin Dep. at 204. FCOC is "allied" with Indiana NORML. Ex. 3, Smith Dep. at 68.

The following day, Levin announced FCOC's incorporation on his Facebook page. Ex. 7, Levin Facebook at 27. In this very first announcement, he stated that "Individual Membership Donations" would cost "$4.20 per month"—a number chosen because of its association with marijuana. Ex. 7, Levin Facebook at 27; Ex. 1, Levin Dep. at 224–25. But supporters could also "Donate $ 100 or more and become a GREEN ANGEL. Donate $ 500 or more and become a GOLD ANGEL[.] Donate $1000 or more and become a CHURCH POOHBA[.]" Ex. 7, Levin Facebook at 27. "Our first goal[,]" Levin said, "is to lease a building to pray in." Ex. 7, Levin Facebook at 27. Two days later, Levin posted a link to FCOC's fundraising website to his Facebook timeline. Ex. 7, Levin Facebook at 29. In the first 48 hours, the site received over $1400 in donations. Ex. 7, Levin Facebook at 33.

Immediately after founding FCOC, Levin became inundated with media requests, and he was the subject of numerous articles and interviews in the popular press. Ex. 1, Levin Dep. at 140, 149. He did as many as "five to eight interviews a day." Ex. 1, Levin Dep. at 149. He also appeared on "Almost Legal," a talk show hosted by Tommy Chong, who referred to Levin by the nickname "Cardinal of Cannabis." Ex. 1, Levin Dep. at 276, 371. In his public statements, Levin described Indiana's RFRA as "cultural fertilizer" and "some whack papers." Ex. 1, Levin Dep. at 355.

In addition to donations, FCOC also raises revenue through popcorn sales and a gift shop that sells donated items and t-shirts, bumper stickers, and other paraphernalia bearing the FCOC name. Ex. 1, Levin Dep. at 223–24. Some FCOC funding comes from a fee that prospective "ministers" pay for their ordination, Ex. 3, Smith Dep. at 62, and from fees that comedians,

musicians, yoga instructors, and others pay to rent space in the church. Ex. 4, Granny J Dep. at 69–70. Despite these revenue streams, FCOC recently increased its monthly membership fee more than 100% because, Levin said, "[w]e need money." Eric Feldman, *First Church of Cannabis two years later: financial problems replace protesters*, WISHTV.com (July 6, 2017), *available at* http://wishtv.com/2017/07/06/first-church-of-cannabis-two-years-later-financial-problems-replace-protesters/ (last visited Dec. 14, 2017).

FCOC does not have a bank account, and its funds are managed in cash by Jonathan Sturgill and Granny J. Ex. 1, Levin Dep. at 226. FCOC does not carry an insurance policy of any kind for its facility. Ex. 9, Pls.' Response to Defs.' First Set of Requests for Production of Documents to All Pls. ("Pls.' Response to Defs.' First Set of RFPs") at 7. FCOC had a website at one time, but as of this filing, the page has been taken down. *See* www.cannaterian.org. The FCOC board consists of Levin, Granny J, and Sturgill. Ex. 1, Levin Dep. at 375.

Levin testified that FCOC conducts background checks on prospective ministers and volunteers (though he has never seen any reports himself), Ex. 1, Levin Dep. at 251–53, but despite several discovery requests, none of the plaintiffs has produced any such reports. Granny J testified that she tried to run background checks but was never successful. Ex. 4, Granny J Dep. at 65–66.

If this lawsuit is successful, FCOC plans to "supply" marijuana for use in its services, Ex. 10, Pl. FCOC, Inc. Responses to Defs.' First Set of Interrogs. to Pl. [FCOC], Inc. ("FCOC Interrog. Answers") at 6, possibly in the amount of "one joint per person" Ex. 1, Levin Dep. at 181. FCOC will also sell marijuana joints in its gift shop. Ex. 1, Levin Dep. at 344–45. During the service, participants could "smok[e] as much . . . or as little as [they] want" but will not be required to smoke marijuana at all. Ex. 1, Levin Dep. at 181. At the point in the service where marijuana is

consumed, Levin envisions participants "laughing, having fun, [and] telling jokes." Ex. 1, Levin Dep. at 181.

V. Indiana's Interest in Preventing Marijuana-Related Crime and Public Health Impacts

In order to demonstrate that they have a compelling interest in preventing marijuana related crime and public health impacts, Defendants have previously disclosed to Plaintiffs, and now submit expert declarations from five experts in the fields of law enforcement and drug policy.

- Gary Ashenfelter has been the training director of the Indiana Drug Enforcement Association (IDEA), a statewide law enforcement organization that promotes and encourages consistent enforcement of federal and state narcotics laws, since 1994. Ex. 11, Declaration of Gary Ashenfelter ("Ashenfelter Dec.") at ¶¶ 2, 4. He served as IDEA's president from 1987 to 1989. Ex. 11, Ashenfelter Dec. at ¶ 2.
- Thomas D. McKay has been the Prosecutor's Chief Investigator for the Dearborn-Ohio County Prosecutor's office and the Investigative Coordinator for the Dearborn-Ohio County Special Crimes Unit since 2006. Ex. 12, Declaration of Thomas D. McKay ("McKay Dec.") at ¶ 2. He has been a law enforcement officer since 1987. Ex. 12, McKay Dec. at ¶ 2.
- Kevin J. Hobson is a Captain in the Drug Enforcement Section of the Indiana State Police. Ex. 13, Declaration of Kevin J. Hobson ("Hobson Dec.") at ¶ 2. He has been a law enforcement officer since 1995 and supervised the ISP Drug Enforcement Initiative since 2013. Ex. 13, Hobson Dec. at ¶ 4.
- Chelsey Clarke is the Strategic Intelligence Unit Supervisor for Rocky Mountain High Intensity Drug Trafficking Area (RMHIDTA), which is one of twenty-eight High Intensity

Drug Trafficking Areas (HIDTA) across the country.[1] Ex. 14, Declaration of Chelsey Clarke ("Clarke Dec.") at ¶ 2. She is an expert on the impacts of marijuana legalization. Ex. 14, Clarke Dec. at ¶ 2–4.

- Dr. Robert L. DuPont, M.D., has since 1978 served as the President of the Institute for Behavior and Health, Inc., a non-profit organization that works to reduce illegal drug use. Ex. 15, Declaration of Robert L. DuPont, M.D. ("DuPont Dec.") at ¶ 2. He is a co-author of the report "Drugged Driving Research: A White Paper," which was prepared for the National Institute on Drug Abuse, a federal government research institute charged with bringing the power of science to bear on drug abuse and addiction. Ex. 15, DuPont Dec. at ¶ 5.

Each of these experts has provided factual information and expert opinion demonstrating that Defendants have a compelling interest against permitting marijuana use as a religious sacrament owing to the public health and safety problems it causes, and that enforcing statutory prohibitions on marijuana possession and use, even for religious sacraments, is the least restrictive means of advancing that compelling interest.

A. Permitting marijuana use, whether through exceptions to general prohibitions or through outright legalization, has a negative impact on drug interdiction and crime-fighting efforts

Marijuana is a Schedule I controlled substance under the federal Controlled Substances Act. 21 U.S.C. § 812(b)(1); *see also* Ex. 12, McKay Dec. at ¶ 16. Accordingly, it is illegal to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense" marijuana anywhere in the United States. 21 U.S.C. § 841(a)(1); *see also* (b)(1)(A)(vii);

[1] Congress created the HIDTA program when it enacted the Anti-Drug Abuse Act of 1988 in order to provide assistance to federal, state, local, and tribal law enforcement agencies operating in critical drug-trafficking regions. Ex. 14, Clarke Dec. at ¶ 2.

(B)(vii); (D); (E)(4). It is also illegal "knowingly or intentionally to possess" marijuana. 21 U.S.C. § 844. Indiana state law also prohibits cultivating, dealing, and possessing marijuana. Ind. Code §§ 35-48-4-10, -11. Accordingly, both the federal and Indiana governments have an interest in enforcing these statutes by shutting down drug trafficking organizations and stopping the violence that often results from the distribution of illegal narcotics across state lines. Ex. 12, McKay Dec. at ¶ 16.

To vindicate that interest, federal and Indiana law enforcement agencies often engage in joint investigations of criminal drug operations. Ex. 12, McKay Dec. at ¶ 16. But in states with laws permitting marijuana use for some or all purposes, these joint federal-state enforcement efforts have been stymied. For example, Colorado legalized recreational marijuana for persons over 21 years of age in 2012. Colo. Const. art. XVIII, § 16. As one result of that legalization, Colorado courts have ordered state law enforcement officers to return seized marijuana plants to acquitted defendants—even though the U.S. Attorney advised that doing so would be a violation of federal law. Ex. 11, Ashenfelter Dec. Ex. A at 14.

What is more, it is unclear whether state law enforcement officers "would be permitted to use the scent of marijuana or plants or paraphernalia in plain view as probable cause for a search warrant." Ex. 13, Hobson Dec. at ¶ 7. Traditionally, such indicators have been "obvious sources of probable cause[,]" but a religious exception to the marijuana laws could render them "questionable[.]" Ex. 13, Hobson Dec. at ¶ 7. It is also unclear whether officers would have the authority "to arrest or detain suspects while religious claims are being investigated" without creating grounds for "additional litigation[.]" Ex. 13, Hobson Dec. at ¶ 7. And drug-detection dogs, which currently alert to marijuana in the same way that they alert to heroin and methamphetamine, would have to be retrained or replaced with dogs that are not trained to alert to

marijuana; otherwise, their reliability as sources of probable cause may be called into question. Ex. 13, Hobson Dec. at ¶ 8–9; Ex. 11, Ashenfelter Dec. at ¶ 6. Similarly, Indiana law enforcement officers are not trained "to make case-by-case determinations during criminal investigations as to whether an individual's religious beliefs legally justify" the use of marijuana. Ex. 13, Hobson Dec. at ¶ 6. Indeed, there is currently no other situation in which law enforcement officers would have to evaluate the sincerity of a suspect's religious faith in this fashion. Ex. 13, Hobson Dec. at ¶ 6; Ex. 11, Ashenfelter Dec. at ¶ 9.

Legalization also causes a wholly new and critical law enforcement problem: the diversion of marijuana from states where it is now legal to states where it remains illegal. Beginning in 2009, when Colorado legalized marijuana for medical uses, the "poundage of marijuana seized [from U.S. Postal Service shipments] increased annually beginning with zero pounds in 2009 and then increased to 57.20 pounds in 2010, 68.20 pounds in 2011, and 262 pounds in 2012[.]" Ex. 12, McKay Dec. at ¶ 15. In 2013, when Colorado removed all state law restrictions on the use of marijuana, officers seized 493.05 pounds of marijuana from parcels directed outside the state. Ex. 12, McKay Dec. at ¶ 15. That is an increase of 471% from the pre-legalization period. Ex. 14, Clarke Dec. at ¶ 6. And diversion is also a problem on interstate highways; in 2015, the Colorado highway patrol conducted 394 seizures of marijuana on its way to other states where it is still illegal—up 37% from 2013. Ex. 14, Clarke Dec. at ¶ 6.

Illicit drug use is both a serious crime itself and also is strongly correlated with other serious crime. Ex. 12, McKay Dec. at ¶ 18. In 2011, between 49% and 87% of adults who are arrested test positive for at least one illegal drug. Ex. 12, McKay Dec. at ¶ 18. IDEA's Drug Policy Source Book showed marijuana as the most common substance present and that out of those who test positive for an illegal drug "the majority is arrested on a wide range of non-drug charges." Ex. 12,

McKay Dec. at ¶ 18. Updated studies since publication of the IDEA's Drug Policy Source Book show marijuana has remained the most commonly detected drug in arrestees in 2013—ranging from 34 to 59% in different cities. Ex. 12, McKay Dec. at ¶ 19. Among juveniles entering the juvenile justice system, 53.9% test positive for drugs at the time of their arrest with 92.2% of those testing positive for marijuana. Ex. 12, McKay Dec. at ¶ 19. Individuals who are known distributors or possessors of marijuana become targets of other crimes. Ex. 12, McKay Dec. at ¶ 22.

B. Permitting marijuana use, whether through exceptions to general prohibitions or through outright legalization, has a negative impact on public health

When marijuana is legal, more people use it, which causes myriad public health problems. Since Colorado legalized marijuana in 2012, the number of Colorado adults who used marijuana in the past month increased by 63%—three times the national level. Ex. 14, Clarke Dec. at ¶ 6. Troublingly, the number of Colorado children who used marijuana in the past month also increased by 20%, even as the nationwide statistic decreased by 4%. Ex. 14, Clarke Dec. at ¶ 6. Unsurprisingly, given this increased use, Colorado saw its marijuana related hospitalizations spike by 218% from 2000 to 2013. Ex. 12, McKay Dec. at ¶ 7. The numbers continue to climb; Colorado saw 6,715 hospitalizations in 2012 and 11,439 in 2014. Ex. 12, McKay Dec. at ¶ 8; Ex. 14, Clarke Dec. at ¶ 6.

Relatedly, marijuana potency has drastically increased over the past half-century. Ex. 12, McKay Dec. at ¶ 20. Levels of THC, or delta-tetrahydrocannabinol, marijuana's main psychoactive ingredient, averaged less than 1% in the 1970s. Ex. 12, McKay Dec. at ¶ 20. In comparison, today, the average percentage of THC in samples seized by the United States Drug Enforcement Agency of traditional leaf marijuana is 12.2% and 51.6% in concentrated cannabis extracts. Ex. 12, McKay Dec. at ¶ 20. This increased potency is particularly concerning given

that law enforcement agencies found that visitors flocking to a state to use marijuana legally often overdose and mistake edibles for candy, even feeding them to children. Ex. 12, McKay Dec. at ¶ 20.

Marijuana-impaired driving is a particular risk. Numerous scientific studies have shown that marijuana use "causes impairment in every performance area that can reasonably be connected with safe driving of a vehicle, such as tracking, motor coordination, visual functions, and particularly complex tasks that require divided attention[.]" Ex. 15, DuPont Dec. at ¶ 9. Unsurprisingly, then, marijuana "ranks second (26.9%), only to alcohol (30.6%), in a study on the presence of drugs in accidents involving seriously injured drivers." Ex. 15, DuPont Dec. at ¶ 10.

Legalization of marijuana compounds the danger of impaired driving. In 2009, only 10% of all Colorado traffic fatalities involved drivers who tested positive for marijuana. Ex. 14, Clarke Dec. at ¶ 6. But by 2015, that number had doubled to 21%. Ex. 14, Clarke Dec. at ¶ 6. In fact, Colorado's marijuana-related traffic deaths increased by 62%—from 71 to 115 people—between 2013 and 2016. Ex. 12, McKay Dec. at ¶ 8; Ex. 14, Clarke Dec. at ¶ 6. Critically, there is currently no way for law enforcement officers to accurately measure a driver's marijuana level during a traffic stop in the way that they can measure alcohol level with a Breathalyzer test. Ex. 15, DuPont Dec. at ¶ 12–13. Nor is there any accepted "safe" marijuana level comparable to the 0.08 blood-alcohol level. Ex. 15, DuPont Dec. at ¶ 12–13.

VI. This Lawsuit

FCOC held its inaugural "service" on July 1, 2015, complete with food trucks and a Kool-Aid stand. Mark Alesia, "Cannabis Church founder sues former IMPD chief Hite for defamation," IndyStar.com (Mar. 4 2016), *available at* https://www.indystar.com/story/news/2016/03/04/first-church-of-cannabis-bill-levin-impd-rick-hite/81310464/ (last visited Dec. 14, 2017). Due to

concern about possible arrests and prosecutions, Levin did not invite parishioners to consume marijuana as a sacrament at this service. Vic Ryckaert, "Cannabis Church rolls up its first year," IndyStar.com (July 1, 2016), *available at* https://www.indystar.com/story/news/politics/2016/07/01/cannabis-church-rolls-up-its-first-year/86590154/ (last visited Dec. 14, 2017).

A. Plaintiffs' Complaint

One week later, on July 8, 2015, Plaintiffs FCOC, Bill Levin, Herbert Neal Smith, and Bobbi Jo Young filed a complaint in this court "pursuant to I.C. § 34-13-9-1, *et seq.* [RFRA] . . . alleging violations of their rights under the Indiana constitution and the United States Constitution, for which they seek declaratory and injunctive relief challenging as unconstitutional and illegal provisions of Indiana law relating to possession and use of marijuana." Compl. at 1. Plaintiffs named as defendants the Governor, the Attorney General, the Superintendent of the Indiana State Police (ISP) (collectively, "State Defendants"), the Chief of the Indianapolis Metropolitan Police Department (IMPD), the Mayor of Indianapolis, and the Marion County Sheriff (collectively, "City/County Defendants"), alleging each was responsible for enforcing state statutes and city ordinances (though Plaintiffs did not purport to challenge any such ordinances). Compl. at 2–4.

Plaintiffs claimed that FCOC "advocates a religious belief that involves ultimate ideas, metaphysical beliefs, a moral or ethical system, a comprehensiveness of beliefs, and accoutrements of religion" including "important writings, a gathering place, keepers of knowledge, ceremonies and rituals, a structure and organization, holidays, tenets concerning diet and appearance, and proselytizing." Compl. at 4. They alleged that Indiana Code sections 35-48-4-11, -13, and -19 "have substantially burdened and may substantially burden Plaintiffs' exercise of religion in that Plaintiffs are in a position to be prosecuted for the described offenses for use of the sacrament of

their religion, even though such burden of Plaintiffs' religion results from rules of general applicability." Compl. at 4–5. They requested "declaratory relief or injunctive relief that prevents, restrains, corrects, or abates the violations as described in this Complaint, and for all other proper relief." Compl. at 5.

B. The challenged statutes: Indiana Code sections 35-48-4-11, -13, and -19

Indiana Code section 35-48-4-11 provides, in relevant part:

> (a) A person who:
>
> > (1) knowingly or intentionally possesses (pure or adulterated) marijuana, hash oil, hashish, or salvia;
> >
> > (2) knowingly or intentionally grows or cultivates marijuana; or
> >
> > (3) knowing that marijuana is growing on the person's premises, fails to destroy the marijuana plants;
>
> commits possession of marijuana, hash oil, hashish, or salvia, a Class B misdemeanor, except as provided in subsections (b) through (c).
>
> (b) The offense described in subsection (a) is a Class A misdemeanor if the person has a prior conviction for a drug offense.
>
> (c) The offense described in subsection (a) is a Level 6 felony if:
>
> > (1) the person has a prior conviction for a drug offense; and
> >
> > (2) the person possesses:
> >
> > > (A) at least thirty (30) grams of marijuana; or
> > >
> > > (B) at least five (5) grams of hash oil, hashish, or salvia.

Indiana Code section 35-48-4-13 was repealed on July 1, 2016. Pub. L. 59-2016, 1st Reg. Sess. (2016). Plaintiffs have thus far not amended their complaint to account for this repeal.

There is not now, and never has been, any Indiana Code section 35-48-4-19. And indeed Plaintiffs seem to have abandoned that claim, whatever it was supposed to be, as they have not referenced it in any filing since their Complaint.

C. Procedural history

On September 16, 2015, before Defendants had even filed their Answers, much less tendered any discovery of their own, Plaintiffs tendered their First Request for Admissions to both State and City/County Defendants. Many of the requests addressed issues of fact which Defendants had not yet had an opportunity to fully investigate through the discovery process. For instance, Request Number One required Defendants to admit or deny that FCOC "is an entity that engages in and advances the exercise of religion." Ex. 16, Pls.' First Request for Admissions to Defs. State of Indiana et al. ("Pls.' First RFA to State Defs.") at 2; Ex. 17, Pls.' First Request for Admissions to Defs. Chief Rick Hite et al. ("Pls.' First RFA to City/County Defs.") at 2. And several other Requests were focused on ultimate legal, rather than predicate factual, issues. For example, Request Number Twelve required Defendants to admit or deny that "enforcement of Indiana Code 35-48-4-11 and Indiana Code 35-48-4-13 substantially burden Plaintiffs' exercise of religion." Ex. 16, Pls.' First RFA to State Defs. at 4–5; Ex. 17, Pls.' First RFA to City/County Defs. at 4–5.

Defendants timely and fully responded to Plaintiffs' Requests on October 16, 2015. In a preliminary statement to their response, State Defendants asserted several general objections to the requests on grounds including irrelevance, violation of privilege, vagueness, and calling for expert knowledge or opinion. Ex. 18, State Defs.' Response to Pls.' First Request for Admissions ("State Defs.' Response to Pls.' First RFA") at ¶¶ 6, 8, 13, 17. State Defendants also stated they were "available at a mutually convenient time to meet and confer with Plaintiffs' counsel" regarding

their response. Ex. 18, State Defs.' Response to Pls.' First RFA at ¶ 5. Notwithstanding these objections, all Defendants expressly denied that FCOC "is an entity that engages in and advances the exercise of religion[,]" that FCOC members and leaders believe marijuana to be "a sacrament[,]" that "Plaintiffs are sincere in their religious beliefs[,]" and that enforcement of Indiana's statutory prohibitions on marijuana possession and use "substantially burden Plaintiffs' exercise of religion." Ex. 18, State Defs.' Response to Pls.' First RFA at 7–8, 10; Ex. 19, City/County Defs.' Responses to Pls.' First Request for Admissions ("City/County Defs.' Responses to Pls.' First RFA") at 1–2, 4–5.

Five months later, on March 18, 2016—without ever previously suggesting that Defendants' Responses had been in any way unsatisfactory—Plaintiffs filed a "Motion for Partial Summary Judgment" in an effort to establish their prima facie case. This motion was predicated almost entirely on the notion that Defendants' Responses had been so inadequate that the court should deem the Requests admitted. Memorandum Br. in Support of Pls.' Mot. for Partial Summ. J. ("Pls.' SJ Br.") at 2–14.

In their motion, Plaintiffs asked the court to rule on three issues: (1) whether FCOC "is an entity that engages in and advances the exercise of religion," (2) whether the "consumption" of marijuana "is an exercise of religion in the Church" such that the enforcement of Indiana Code sections 35-48-4-11, -13, and -19 "substantially burdens Plaintiffs' religious practices[,]" and (3) whether "the burden is on the State of Indiana to enforcement of the statutes in question, pursuant to [RFRA], under a standard of strict scrutiny." Pls.' Mot. for Partial Summ. J. ("Pls.' SJ Mot.") at 1–2. In support of this motion, Plaintiffs designated their Complaint, Defendants' Answers, Plaintiffs' Requests for Admissions and Defendants' responses, and an affidavit executed by Plaintiff Bill Levin. Designation of Matters in Support of Pls.' Mot. for Partial Summ. J. at 1–2.

At Defendants' request, the court agreed to defer ruling on Plaintiffs' Motion until after completion of discovery and full briefing.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only when "the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C). The burden is on "the party seeking summary judgment" to "demonstrate the absence of any genuine issue of fact as to a determinative issue, and only then is the non-movant required to come forward with contrary evidence." *Jarboe v. Landmark Cmty. Newspapers of Indiana, Inc.*, 644 N.E.2d 118, 123 (Ind. 1994). The "court does not weigh the evidence but must indulge every factual inference in favor of the nonmoving party." *Kottlowski v. Bridgestone/Firestone, Inc.*, 670 N.E.2d 78, 83 (Ind. Ct. App. 1996).

ARGUMENT

A party asserting a claim under Indiana's RFRA must first show that their (1) "exercise of religion" (2) is sincerely felt (3) and "substantial[ly] burdened" by some state action. *Tyms-Bey v. State*, 69 N.E.3d 488, 490–91 (Ind. Ct. App. 2017), *trans. denied*. Only if that showing is made does the burden shift to the state to show that enforcement of the challenged statutes "is in furtherance of a compelling interest and is the least restrictive means of furthering that compelling interest." *Id.* Plaintiffs have not made that showing. Based upon the evidence and case law, Defendants are entitled to summary judgment on every element of Plaintiffs' prima facie case. At most, Plaintiffs might be able to raise a material issue of fact regarding one or more of those elements.

But even if FCOC could meet its entire prima facie burden, it still could not prevail in this lawsuit, because Defendants have conclusively shown there is no material factual dispute as to (1)

the State's compelling interest in preventing marijuana use and its accompanying evils, or as to (2) whether enforcement of laws prohibiting the possession and use of marijuana—even in a purportedly "religious" context—is the least restrictive means of serving that compelling interest. Accordingly, the State is entitled to judgment as a matter of law.

Indeed, several courts have already concluded that, when it comes to claims of sacramental marijuana use, regardless whether a party can show a substantial burden on a sincerely held religious belief, the government nevertheless has a compelling interest in protecting public health and safety and enforcing marijuana prohibitions—without exception for religious sacrament—is the least restrictive means of advancing that interest. *See, e.g.*, *United States v. Anderson*, 854 F.3d 1033, 1036 (8th Cir. 2017), *cert. denied*, No. 17-6347, 2017 WL 4574191 (U.S. Nov. 13, 2017); *United States v. Christie*, 825 F.3d 1048, 1057 (9th Cir. 2016); *United States v. Israel*, 317 F.3d 768, 772 (7th Cir. 2003); *United States v. Brown*, 72 F.3d 134 (8th Cir. 1995) (per curiam).

No court has held to the contrary.

I. Plaintiffs Are Not Entitled to Summary Judgment as to Any Element of Their Prima Facie Case

Under RFRA, before the State must shoulder any burden at all, the plaintiff must first show (1) a religious belief that is (2) sincerely held and (3) substantially burdened. Ind. Code § 34-13-9-8; *see, e.g.*, *United States v. Quaintance*, 608 F.3d 717 (10th Cir. 2010); *see also Tyms-Bey*, 69 N.E.3d at 490–91. Even before Defendants undertook discovery on these points, Plaintiffs moved for summary judgment on this threshold showing. *See* Pls.' SJ Mot. at 1–2.

The timing of that motion alone—*i.e.* before Defendants had any opportunity to investigate the facts—should be cause for suspicion about its merit. While some questions in this case are more appropriately understood to be matters of law rather than fact (including whether Indiana's marijuana laws are the least restrictive means to advance a compelling state interest), each element

of Plaintiffs' prima facie case requires factual proof. Defendants have never conceded that Plaintiffs' beliefs are religious, sincere, or substantially burdened, and in fact have consistently denied all of these issues from the beginning of the case. *See* State Defs.' Answer to Pls.' Compl. at ¶¶ 6, 16–19, 21; City/County Defs.' Answer to Pls.' Compl. at ¶¶ 6, 16–19, 21. Furthermore, as described here, Defendants are able to designate ample evidence that calls each of these claims into question.

Still, it is important for the Court to bear in mind that, ultimately, these questions of fact as to Plaintiffs' prima facie case are immaterial because Defendants prevail as a matter of law on multiple dispositive legal issues. *See infra* part II. But in no event are Plaintiffs entitled to summary judgment on any element of their prima facie case.

A. Defendants are not "deemed to have admitted" any of Plaintiffs' requests for admission

Plaintiffs' entire argument in support of their motion for partial summary judgment rests on the assumption that Defendants' responses to Plaintiffs' Requests for Admission were somehow so inadequate that "the matters should be deemed admitted." Pls.' SJ Br. at 3. As a threshold matter, Defendants were wholly unaware that Plaintiffs found the responses to be in any way objectionable until Plaintiffs filed their Motion for Partial Summary Judgment. Nor have Plaintiffs requested any supplementation of Defendants' responses since filing their Motion. If Plaintiffs truly believed Defendants' responses were inadequate, they should have conferred with Defendants in an effort to obtain satisfactory responses. *See* Ind. T.R. 26(F) (encouraging "informal resolution of discovery disputes"). Asking the court to deem certain facts "admitted" based solely upon the purported formal inadequacy of a response smacks of gamesmanship. *See Smith v. Smith*, 793 N.E.2d 282, 286 (Ind. Ct. App. 2003) (disapproving generally of "prejudicial and unscrupulous 'gotcha' litigation tactics [that] should not be tolerated."). Such a "gotcha"

demand is a wholly disproportionate (and therefore inappropriate) response to whatever technical flaws Plaintiffs claim of Defendants' discovery responses.

Part of Plaintiffs' dissatisfaction with Defendants' responses appears to stem from Plaintiffs' belief that "State Defendants do not state they have made any inquiry into the substance of any of the Requests for Admissions propounded by Plaintiffs" and "There is no statement [City/County][2] Defendants have undertaken any inquiry into the matters for which Plaintiffs seek admissions." Pls.' SJ Br. at 4, 11. These assertions are patently false, given that the very first sentence of State Defendants' response to those Requests for Admission is: "State Defendants' investigation and development of all facts and circumstances relating to this action is ongoing." Ex. 18, State Defs.' Resp. to Pls.' First RFA at 1. Similarly, City/County Defendants stated in each answer: "At this time discovery is just commencing and neither non-party requests have yet been issued nor depositions conducted . . . Discovery is ongoing[.]" Ex. 19, City/County Defs.' Resp. to Pls.' First RFA at 1–2. Plainly, all Defendants did state they were making an "investigation" or "inquiry" into the entire action. Plaintiffs' assertions to the contrary are simply untrue.

Even more surprisingly, Plaintiffs contend that State Defendants' responses to Requests for Admission numbers 1, 3, 9, 12, and 13 were "insufficient . . . to constitute a denial." Pls.' SJ Br. at 6. But each of those responses—which Plaintiffs quote in their brief—are plain denials: "State Defendants are without sufficient knowledge or information sufficient to form a belief as to the truth of the allegations set forth in [the request] and therefore *deny said allegations*." Ex. 18, State Defs.' Resp. to Pls.' First RFA at 7–10 (emphasis added).

[2] Confusingly, Plaintiffs use the term "State Defendants" in this sentence, but it seems apparent from the context that they are actually referring to the City/County Defendants.

To the extent that Plaintiffs cite *Gariup Construction Co. v. Foster*, 519 N.E.2d 1224 (Ind. 1988), for the proposition that other magic language is somehow required for a denial, they read it too broadly. First, the responding party in *Gariup* stated only that it "was without knowledge to determine whether a certain request was inaccurate or incorrect;" it did *not* include an actual denial. *Id.* at 1231. Furthermore, *Gariup* was a relatively straightforward tort action featuring a well-established legal standard and straightforward factual background involving one person. It was not the first major test of a controversial religious freedom law with uncertain legal standards brought by plaintiffs whose claims stem from a hazy, multi-faceted factual history featuring multiple players. Also, unlike this case, it was not a public-policy case; it did not carry implications and potential consequences for an array potential future claimants or society as a whole, nor did it involve a request for an injunction precluding law enforcement officers from enforcing longstanding criminal prohibitions. Its impact was limited to one case of very narrow scope.

Plaintiffs further assert that Defendants should be "deemed to have admitted" Requests for Admission numbers 4, 5, 6, 7, and 8 because the responses "do not address the full content of the Requests." Pls.' SJ Br. at 8–9, 13–14. But Plaintiff ignores the fact that State Defendants objected to all of the requests on several grounds, including relevance and calling for expert knowledge and conclusions. Ex. 18, State Defs.' Resp. to Pls.' First RFA at 3–5. If Plaintiffs were dissatisfied with these responses, they should have requested to confer about them, *see* Ind. Trial Rule 26(F) (requiring, as a prerequisite to a motion to compel, that a party "[m]ake a reasonable effort to reach agreement with the opposing party"), and if that conference yielded no agreement, filed a motion to compel. Ind. T.R. 37(A); *Walker v. McCrea*, 725 N.E.2d 526, 531 (Ind. Ct. App. 2000) (holding that a trial court may impose monetary sanctions on a party that files a motion to compel without first attempting informal resolution of the discovery dispute); *see also Trost-Steffen v. Steffen*, 772

N.E.2d 500, 512 (Ind. Ct. App. 2002) ("Discovery is designed to be self-executing with little, if any, supervision of the court."). At that point, the parties could have litigated Defendants' objections to the requests. Jumping straight to a demand that Defendants be deemed to have admitted the assertions is wholly disproportionate and inappropriate.

Finally, Plaintiffs contend that Defendants should be deemed to have admitted Request for Admission Number 2 ("A 'sacrament' is something regarded as possessing a sacred character or mysterious significance." Ex. 16, Pls.' First RFA to State Defs. at 2) because Defendants "failed to admit or deny that a 'sacrament' is as set forth in" the request. Pls.' SJ Br. at 6–7, 13. The relevance of this Request to Plaintiffs' claims is not immediately apparent. Regardless, however, this Request requires Defendants to admit or deny that a single definition of "sacrament" is the only definition of the word "sacrament." Accordingly, the plain language of Defendants' response ("Defendants deny that the above definition is the only definition of the word 'sacrament'") is clearly a sufficient denial. Ex. 18, State Defs.' Resp. to Pls.' First RFA at 7; Ex. 19, City/County Defs.' Resp. to Pls.' First RFA at 2. Again, if Plaintiffs did not think Defendants' answer was fully responsive, they should have requested a conference about it, or perhaps followed up with an interrogatory asking what definitions of sacraments Defendants had in mind.

Plaintiffs' premature service of the Requests, taken together with their focus on the ultimate legal issues in the case and their long silence on the purported inadequacy of Defendants' responses, adds up to a "gotcha" summary judgment strategy. But discovery is not supposed to be a trap for the unwary or a means to force the opposing party into revealing its legal arguments prematurely. Rather, the "purposes of discovery" are "to allow parties to obtain evidence necessary to evaluate and resolve their dispute based on a full and accurate understanding of the true facts, to promote settlement, to remove surprise from trial preparation, and to narrow the

disputed issues and facts requiring trial." *Outback Steakhouse of Florida, Inc. v. Markley*, 856 N.E.2d 65, 76 (Ind. 2006). Particularly in a case such as this—the first major test of Indiana's RFRA—a fair and reasonable discovery process is imperative to ensure the court has "a full and accurate understanding of the true facts." *Id.* Plaintiffs' requests were not part of that process; rather, they were calculated to short-circuit it for strategic reasons.

This court should deny Plaintiffs' repeated requests to ignore Defendants' plain denials and recast them as admissions. Plaintiffs have in no way been prejudiced by Defendants' denials, even if they deem them technically deficient in some way. Defendants denied Plaintiffs' requests for admission back then, and they continue to deny them now. Too-clever-by-half discovery tactics should not be a predicate for summary judgment.

B. Ample evidence calls into question Plaintiffs' prima facie case

As a threshold matter, Plaintiffs cite *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 426 (2006), for the proposition that they have established their prima facie case such that Indiana's RFRA applies to their use of marijuana. Pls.' SJ Br. at 17–18. That case, however, is unhelpful to them. There, the court never addressed the plaintiffs' prima facie case at all because "the Government conceded that the challenged application of the Controlled Substances Act would substantially burden a sincere exercise of religion by the UDV." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 426 (2006). Thus, that case has nothing to say on the issue of whether Plaintiffs in *this* case—where the government disputes Plaintiffs' prima facie case—are engaged in an exercise of religion (sincere or otherwise). Here, the evidence is critical, and it is genuinely in dispute.

1. The evidence designated by Defendants establishes a genuine dispute as to whether Plaintiffs' beliefs are social or political rather than religious

Plaintiffs' entire argument that FCOC and its members are engaged in a practice of religion protected by RFRA is based upon (1) Defendants' supposed admission that FCOC "through the beliefs and activities of its members and leaders, is an entity that engages in and advances the exercise of religion" and (2) Plaintiff Levin's own self-serving declaration. Pls.' SJ Br. at 18. As discussed above, Defendants have made no such admission. And with regard to FCOC's religiosity, Levin's declaration is as incredible as it is threadbare. For example, he states in his declaration that the church is a "religious society," Ex. 20, Affidavit of Bill Levin ("Levin Aff.") at ¶ 2, but on FCOC's own Facebook page, FCOC stated that it has "No God. Who you worship or believe in is of no consequence. It's all about benefits of Cannabis and bringing people together." Ex. 21, FCOC Facebook at 1. And Levin's only statement about his own beliefs is brief and conclusory: "The statutes set forth in this Affidavit, and enforcement of those statutes, substantially burden my exercise of religion." Ex. 20, Levin Aff. at ¶ 11. His affidavit therefore has very little evidentiary value.

In contrast, the evidence that FCOC is *not* a religion is legion. FCOC is essentially a political organization, not a religious one, and its founder and members are pursuing a political agenda rather than practicing religion. Levin has admitted as much in several news articles. For instance, he said that by enacting RFRA, the Governor "opened up the door for me to take my campaign to religion." Matt Ferner, "Church of Marijuana Gets Boost from Indiana's Anti-Gay 'Religious Freedom' Bill," Huffington Post (Mar. 30, 2015), *available at* https://www.huffingtonpost.com/2015/03/30/indiana-marijuana-church_n_6970028.html (last visited Dec. 14, 2017).

As is true of the First Amendment, RFRA could easily become a means by which defendants could cry "religion" to justify illegal conduct. To assert a free exercise defense, a defendant first must show that his "belief is a *religious* one, and not a personal belief or philosophy." *United States v. Barnes*, 677 F. App'x 271, 277 (6th Cir. 2017) (emphasis added) (finding defendant was not engaged in the practice of a religion when he had a "long history of marijuana use" followed by a "quick epiphany and conversion to the" purported religion, and he admitted "that marijuana was not a necessary part of his religion").

When determining whether something is "religion" for the purposes of constitutional and statutory protection, courts have considered fourteen factors. *United States v. Meyers*, 95 F.3d 1475, 1483–84 (10th Cir. 1996). These factors suggest that, whatever Plaintiffs are engaged in, it is not the practice of religion.

a. Ultimate ideas

Religions typically have beliefs that "address fundamental questions about life, purpose, and death." *Meyers*, 95 F.3d at 1483. By Levin's own admission, FCOC does not have any "doctrine" regarding "fundamental questions about the meaning of life and the purpose of life and death." Ex. 1, Levin Dep. at 299. Nor does Levin himself have any defined belief about what happens to the human soul after death. Ex. 1, Levin Dep. at 155. Plaintiff Smith described FCOC's "doctrine" only as "nondenominational." Ex. 3, Smith Dep. at 21. This factor, then, weighs against FCOC.

b. Metaphysical beliefs

"Metaphysical beliefs"—in other words, beliefs that "address a reality which transcends the physical and immediately apparent world" are common features of religion. *Meyers*, 95 F.3d at 1483. But FCOC does not espouse any beliefs about non-physical reality. On the contrary, its

agenda is focused upon the physical health benefits of marijuana use. *See, e.g.*, Ex. 3, Smith Dep. at 33–35 (describing numerous purported health benefits). And Levin does not believe the soul has any independent existence from the human body. Ex. 1, Levin Dep. at 156. Nothing here supports FCOC's claim to be a religion.

c. Moral or ethical system

Most religions require their adherents to adopt "a particular manner of acting, or way of life, that is 'moral' or 'ethical.'" *Meyers*, 95 F.3d at 1483. FCOC, however, has no "moral beliefs that would describe certain acts as right or wrong[.]" Ex. 1, Levin Dep. at 299. It does have a "list of suggestions" called the Deity Dozen, but members are not "required" to follow them. Ex. 3, Smith Dep. at 22–23. In fact, "[n]o one's required to do anything." Ex. 3, Smith Dep. at 23. FCOC does not "recognize [sin] as a church belief." Ex. 1, Levin Dep. at 239. Instead, FCOC is all about personal pleasure: "religion makes you feel good." Ex. 1, Levin Dep. at 130. These facts suggest FCOC is not a religion.

d. Comprehensiveness of beliefs

Religions typically address all facets of human life through an overarching "array of beliefs that coalesce to provide the believer with answers to many, if not most, of the problems and concerns that confront humans." *Meyers*, 95 F.3d at 1483. But Levin has said he doesn't have a belief about what happens to humans after death. Ex. 1, Levin Dep. at 155–56. Nor does Levin have any opinion as to whether it is possible to be both a member of FCOC and a member of a mainstream religion. Ex. 1, Levin Dep. at 288. He himself still believes in the religion he was raised in, Judaism. Ex. 1, Levin Dep. at 289. And Smith is a practitioner of "Shawano," a traditional Shawnee religion—indeed, Smith stated he does not "practice any other religions"

besides Shawano. Ex. 3, Smith Dep. at 12. FCOC does not exhibit the sort of comprehensive belief system characteristic of a religion.

e. Founder, prophet, or teacher

Many religions have a "founder, prophet, or teacher . . . who is considered to be divine, enlightened, gifted, or blessed." *Meyers*, 95 F.3d at 1483. Levin may have founded FCOC, but he does not claim to be "divine, enlightened, gifted, or blessed," and no witness testified that he is any of those things. Nor does any other person in the FCOC formation process appear to fit this mold; Abdul Hakim-Shabazz, who wrote the blog post that purportedly inspired the FCOC, stated in that very post that he has "never been a very deeply religious person." Ex. 1, Levin Dep. at 36–37; Ex. 8, RFRA and Reefer at 1. This factor, therefore, does not help FCOC's claims.

f. Important writings

"[S]eminal, elemental, fundamental, or sacred writings" play a role in most religions. *Meyers*, 95 F.3d at 1483. But FCOC members are not "encouraged to read any books." Ex. 3, Smith Dep. at 21–22. Levin does suggest that prospective "ministers" read "The Emperor Wears No Clothes," by Jack Herer. Ex. 1, Levin Dep. at 218. He describes it as "a wonderful fact-based book about the cannabis plant"—but not as a sacred text. Ex. 1, Levin Dep. at 218, 339. That description does not match the typical view of a "religious" text as recognized by courts.

g. Gathering places

Religions typically feature "particular structures or places" that are "sacred, holy, or significant." *Meyers*, 95 F.3d at 1483. FCOC holds its gatherings at a former Christian church located at 3700 South Rural Avenue in Indianapolis. Ex. 3, Smith Dep. at 17. This building also hosts comedy shows and comedy classes. Ex. 3, Smith Dep. at 18. But this location is not the only place that FCOC envisions its members using marijuana. Rather, FCOC wishes to establish

"home sanctuaries," by "bless[ing]" a person's home and "put[ting] an ornament" of the FCOC "logo" "on the doorway[,]" thus providing that person with legal authorization to smoke marijuana in the home "whenever they feel" like it. Ex. 1, Levin Dep. at 260–61. FCOC's building is thus not "sacred" or "holy" in a way that would suggest FCOC is a religion.

h. Keepers of knowledge

In many religions, certain persons act as "keepers of knowledge" by virtue of their "enlightenment, experience, education, or training." *Meyers*, 95 F.3d at 1483. FCOC, however, has no "keepers of knowledge within the church." Ex. 1, Levin Dep. at 300. Levin himself purports to be an ordained minister in the "Universal Life Church," a certification that can be obtained by the simple expediency of filling out an online form and completing a short online course.[3] Ex. 1, Levin Dep. at 37–39. Levin stated he does not remember any of the content of the course, Ex. 1, Levin Dep. at 39; thus, this certification does not qualify him as a "keeper of knowledge."

Similarly, FCOC is "ordaining" other "ministers," but the process has no formal requirements and only takes 90 days. Ex. 1, Levin Dep. at 217. Levin testified that FCOC has a written examination for candidates, Ex. 1, Levin Dep. at 219, but despite multiple requests, Plaintiffs have failed to produce it. Only one person has ever been refused ordination: Bobbi Jo Young, the same person that Levin asked to leave FCOC. Ex. 1, Levin Dep. at 216. This ad hoc approach is atypical of most religions and does not qualify any FCOC minister as a "keeper of knowledge."

[3] The Universal Life Church describes itself as "a multi-denominational religious organization with millions of members all over the world." Universal Life Church, https://www.ulc.org (last visited Dec. 11, 2017). It offers the opportunity to "Get Ordained Instantly" to "anyone who feels called to join" at no cost and "entirely online" without "years of training or expensive courses[.]" *Id.*

i. Ceremonies and rituals

Most religions have certain "acts, statements, and movements" that "are prescribed by the religion and are imbued with transcendent significance." *Meyers*, 95 F.3d at 1483. FCOC does have "services," but they are often political in nature. For instance, Smith has spoken at FCOC about "the cannabis policy" and "the need to put people in office that support cannabis reform." Ex. 3, Smith Dep. at 63. And Granny J "made some comments about the oil pipeline in North Dakota" known as "Standing Rock." Ex. 4, Granny J Dep. at 43–44. FCOC has "sermons" during its services, but there is no "church view what the purpose of a sermon is[.]" Ex. 1, Levin Dep. at 242. As for the "sacramental" use of cannabis, Levin testified that "[w]e don't have any official sacrimonial [sic], ceremonial use of the sacrament written . . . yet." Ex. 1, Levin Dep. at 307. FCOC's "ceremonies" are thus either undeveloped or not religious at all.

j. Structure or organization

Religions typically have a "group of believers who are led, supervised, or counseled by a hierarchy of" leaders. *Meyers*, 95 F.3d at 1483. FCOC, however, has very little hierarchy; Levin has no "plan for succession" in the event he is no longer able to serve as Grand Poobah. Ex. 1, Levin Dep. at 213. There are other "ministers," but they have no defined role and instead are just "out running around" doing "whatever they want to do." Ex. 1, Levin Dep. at 308. This is not the sort of formal hierarchy typical of a religion.

k. Holidays

Holidays—"sacred, or important days, weeks, or months"—are common features of religion. *Meyers*, 95 F.3d at 1483. FCOC recognizes several "holidays," including "Festivus," which Levin "lifted from" the television comedy program "Seinfeld." Ex. 1, Levin Dep. at 249. But Festivus is intended to provide FCOC members who "don't want to give gifts *under the name*

of a religion" with "a fun reason to give gifts." Ex. 1, Levin Dep. at 249–50 (emphasis added). The church also organizes the days of the week by assigning a different purpose to each day: "Live, Laugh, Love, Learn, Create, Grow, Teach"—but Levin appropriated those concepts from the popular inspirational signs sold at many big-box stores. Ex. 1, Levin Dep. at 244–45. Thus, this factor hardly weighs in favor of FCOC.

l. Diet or fasting

Religions frequently mandate or forbid "the eating of certain foods and the drinking of certain liquids on particular days or during particular times." *Meyers*, 95 F.3d at 1483. True, Levin has said that "Going out and eating poisonous food in a fast food restaurant, to me, is a sin." Ex. 1, Levin Dep. at 95. But again, FCOC does not recognize the concept of sin. Ex. 1, Levin Dep. at 239. The mere encouragement to avoid unhealthy food does not rise to the level of a "religious" proscription.

m. Appearance and clothing

Requirements for "the manner in which believers should maintain their physical appearance" are common features of religion. *Meyers*, 95 F.3d at 1483. The only element of FCOC that even approaches such a requirement is the black "veil" that Levin and other "ministers" wear around their necks; Levin "borrowed [the veil] a little bit from the Jewish religion" tradition of wearing "tallits" or "prayer shawls" and says it is "basically the same[.]" Ex. 1, Levin Dep. at 221. There is no other prescribed clothing. Ex. 1, Levin Dep. at 315. This transparent appropriation of the established clothing of *another* religion tends to suggest that FCOC is not a bona fide religion.

n. Propagation

Most religions engage in some form of proselytization or missionary work. *Meyers*, 95 F.3d at 1484. But FCOC does not do formal outreach. Ex. 1, Levin Dep. at 315; Ex. 4, Granny J Dep. at 23. Levin does not even "go out to [members'] houses because that can tend to lead for some experiences I would rather not go through." Ex. 1, Levin Dep. at 212–13. This sentiment would be unfamiliar to most truly religious people.

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As the above discussion illustrates, under the *Meyers* factors, FCOC is not a religion. Rather, it is an organization devoted to a political goal: marijuana legalization. It is helpful to imagine this sort of political action organization masquerading as a church in the context of other hot-button issues. For example, consider the effect if a group of animal-rights activists that advocated for the "liberation" of animals by means of burglarizing zoos and farms, were to incorporate itself as a "church" and claim RFRA's protection for its members' illegal activities. See Bruce Friedrich, *The Church of Animal Liberation: Animal Rights As "Religion" Under the Free Exercise Clause*, 21 Animal L. 65, 109 (2014) (suggesting that "[a]ny decision not to cause animals harm, if it stems from a belief in animal liberation . . . would qualify as religious."). No reasonable person would imagine its goals to be truly religious; rather, it would be clear that the purpose of the "church" was political advocacy and circumvention of criminal laws against activities like trespassing and theft that activists violate when they "liberate" animals from zoos and private owners. And just so here.

The bottom line is that while politics may be a religion for some, it is not a "religion" entitled to statutory protection in Indiana. Defendants contend that the undisputed evidence

supports summary judgment in their favor on this issue, but at most, Plaintiffs have established an issue for trial, where the court could weigh evidence and judge the credibility of the witnesses.

2. Plaintiffs have not established that their beliefs are sincerely held

Similarly, on the element of sincerity, Plaintiffs have made a scant showing, relying solely upon a statement from Levin's affidavit that he is sincere in his beliefs. Pls.' SJ Br. at 18. Perhaps this is because they think that the court is required to accept the sincerity of their beliefs without any evidence at all: "in *Ballard*, the Court held that sincerity of one's belief is not a proper area for government to invade." Pls.' SJ Br. at 17. The seventy-year-old case that Plaintiffs refer to, however, *United States v. Ballard*, says no such thing. Rather, the *Ballard* Court held: "Men . . . may not be put to the proof of their religious doctrines or beliefs." 322 U.S. 78, 86 (1944). In other words, this court cannot require Plaintiffs to prove (for example) that using marijuana *actually* brings them into communion with a deity. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014) (noting that "federal courts have no business addressing . . . whether the religious belief asserted in a RFRA case is reasonable"). But it most certainly can require them to prove *that they genuinely believe* that using marijuana brings them into communion with a deity, and that they are not just claiming to believe it so as to engage in consequence-free drug use. *See also United States v. Bauer*, 84 F.3d 1549, 1559 (9th Cir. 1996) (observing, in response to defendants' assertion of a RFRA defense to a marijuana prosecution based upon their purported Rastafarianism, that "[n]either the government nor the court has to accept the defendants' mere say-so.").

Indeed, on the federal level, the sincerity of a RFRA claimant's religious belief cannot be taken for granted. *United States v. Quaintance* is instructive on this point. 608 F.3d 717 (10th Cir. 2010). In that case, two defendants charged with marijuana trafficking moved to dismiss the

indictment against them, arguing that they were "members of the Church of Cognizance, which Mr. Quaintance founded" and sincerely believed "that marijuana is a deity and sacrament." *Id.* at 719. The Tenth Circuit agreed with the district court that plaintiffs' beliefs were not sincere, noting that their claims of belief were undercut by the facts that they were "in the marijuana business[,]" *id.* at 722 (quotation omitted), that the transaction for which they faced charges was part of that business, that they "hastily inducted" their drug courier into the church "the night before" his first drug run "because they thought it might insulate their drug transactions from confiscation," and that they used other drugs, such as cocaine, for recreational purposes. *Id.* at 722–23.

Similarly in this case, Defendants supply substantial evidence demonstrating that Plaintiffs do not sincerely believe that their marijuana use is "sacred." Plaintiffs have given little thought to how the use of marijuana would fit into their "services." They have not even considered why marijuana should be FCOC's "sacrament," other than because the word "cannabis" is in FCOC's name, Ex. 1, Levin Dep. at 179, and they have made clear that they do not consider the plant itself to be the object of worship. Ex. 1, Levin Dep. at 341. They have not seriously considered where they would obtain the marijuana, what form it would be consumed in, or how much would be consumed. Ex. 1, Levin Dep. at 136–37, 180–82, 345; Ex. 10, FCOC Interrog. Answers at 5–6. They have repeatedly said that FCOC members are not required or even encouraged to consume marijuana at all. *See, e.g.*, Ex. 1, Levin Dep. at 50, 181–82, 320–21, 342–43; Ex. 3, Smith Dep. at 24. They have said that persons under 21 would not be permitted to consume it, but only "[b]ecause of the legal issues that would come up with the State and the City"—not for any reason related to religious doctrine or public health. Ex. 1, Levin Dep. at 174–75.

Indeed, Plaintiffs seem to have cobbled their "religion" together from inspirational quotations ("Live, Laugh, Love"), Ex. 1, Levin Dep. at 244–45, popular television programs ("The

Flintstones" and "Seinfeld"), Ex. 1, Levin Dep. at 211, 249–50; military slogans ("Be All You Can Be"), Ex. 1, Levin Dep. at 334–36, and elements of bona fide religions (the Jewish tradition of wearing a prayer shawl), Ex. 1, Levin Dep. at 221. That is hardly surprising, given that their focus is political reform rather than genuine faith, and that Levin and Smith are both lifelong recreational users of marijuana. Ex. 1, Levin Dep. at 71–72; Ex. 3, Smith Dep. at 25–27. In light of this information, there is clearly a dispute over a material fact: whether Plaintiffs are sincere in their beliefs. As such, Plaintiffs are not entitled to summary judgment on this issue.

3. Plaintiffs have not established that the statutes they challenge "substantially burden" any sincerely held religious beliefs

Even assuming that FCOC is a religious entity and that plaintiffs are sincerely engaged in the practice of a religion, plaintiffs' own statements show that Indiana's marijuana laws do not substantially burden that practice. Indiana's RFRA does not include a statutory definition of "substantial burden," and no court has yet considered the term's meaning. The federal RFRA also does not include a statutory definition of "substantial burden," but courts have defined it as existing "only when individuals are . . . coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." *Oklevueha Native Am. Church of Hawaii, Inc. v. Lynch*, 828 F.3d 1012, 1016 (9th Cir. 2016) (quotations omitted), *cert. denied sub nom. Oklevueha Native Church of Hawaii, Inc. v. Lynch*, 137 S. Ct. 510 (2016). The Seventh Circuit has articulated the definition of "substantial burden" more specifically: a government practice "that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs." *Koger v. Bryan*, 523 F.3d 789, 798 (7th Cir. 2008).

RLUIPA similarly does not include a statutory definition of substantial burden, but the Seventh Circuit has defined it as a government practice "that necessarily bears direct, primary, and

fundamental responsibility for rendering religious exercise . . . effectively impracticable." *Id.* at 799. And in the context of a Free Exercise Claim, the Supreme Court has found a substantial burden exists when a proscribed activity is "an integral part of [plaintiffs'] religion." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). *Cf. Lindh v. Warden, Fed. Corr. Inst., Terre Haute*, Ind., No. 2:09-CV-00215-JMS, 2013 WL 139699, at *9 (S.D. Ind. Jan. 11, 2013) ("the same definition of 'substantial burden' applies under RFRA, RLUIPA, and the Free Exercise Clause.").

Regardless of the precise terminology of the definition, the case law says than when plaintiffs have testified that their religion does not *require* them to use marijuana, there is no substantial burden. *Oklevueha Native Am. Church*, 828 F.3d at 1017 (finding no substantial burden when plaintiffs admitted "that no religious ceremonies engaged in by [plaintiffs] actually require the use of cannabis, and that cannabis is simply a substitute for peyote"); *United States v. Barnes*, 677 F. App'x 271, 274 (6th Cir. 2017) (finding no substantial burden where plaintiff "testified that his religion did not require that he grow and donate marijuana").

Here, the evidence shows that "[y]ou don't have to smoke marijuana to be a member" of the FCOC; nor is using marijuana a requirement imposed by the Deity Dozen. Ex. 1, Levin Dep. at 50; Ex. 3, Smith Dep. at 38. Rather, marijuana is "one of many sacraments that might be used." Ex. 3, Smith Dep. at 28. Indeed, FCOC does not even "encourage its members to use cannabis." Ex. 3, Smith Dep. at 24. And Levin admitted he could experience love, one of FCOC's central foci, without using marijuana. Ex. 1, Levin Dep. at 374–75. Thus, the non-use of marijuana cannot be "contrary to [plaintiffs'] beliefs[,]" *Koger*, 523 F.3d at 798, nor render their religious exercise "effectively impracticable[,]" *id.* at 799, because marijuana use is neither "a central tenet[,]" *id.*

at 798, nor "an integral part of [plaintiffs'] religion." *Church of the Lukumi Babalu Aye*, 508 U.S. at 531.

What is more, FCOC has no defined plan for how marijuana would be consumed within the church. Ex. 1, Levin Dep. at 136. Surely if the use of marijuana were so "central" that the prohibition of it created a substantial burden, FCOC would have some concept of how it would be used. The record shows, however, that Plaintiffs can practice their religion (assuming for the sake of argument that is what they are doing) without actually using marijuana—and that they have been doing so for over two years now. Defendants should prevail as a matter of law on the substantial burden element, *see, e.g.*, *Oklevueha Native Am. Church*, 828 F.3d at 1017, and in no event are Plaintiffs entitled to prevail on this element at this stage of the case.

II. Regardless Whether Plaintiffs Can Prove Their Prima Facie Case, Defendants Are Entitled to Summary Judgment Because Indiana's Marijuana Laws Are Narrowly Tailored to Vindicate Multiple Compelling Governmental Interests

A. The State has a compelling interest in enforcing its drug laws

Even assuming that Indiana Code sections 35-48-4-11 (criminalizing possession of marijuana) and -13 (now repealed) substantially burden Plaintiffs' religious exercise, they still cannot prevail. Under RFRA, the government "may substantially burden a person's exercise of religion" so long as "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." Ind. Code § 34-13-9-8(b).

Indiana has a compelling interest in preventing plaintiffs and all other persons in the state from using and selling marijuana, and its laws prohibiting the sale, possession and use of marijuana are the least restrictive means available of vindicating that interest. Permitting exceptions to those statutes for religious exercise would undermine Indiana's ability to enforce anti-marijuana laws at

every turn, for anyone wishing to smoke marijuana could invoke the religious sacrament excuse, and law enforcement would have no practical way to sort legitimate from illegitimate uses.

1. Courts have long recognized the government's compelling interest in enforcing marijuana laws in the context of RFRA and pre-*Smith* free exercise claims

To begin, judicial recognition of the government's compelling interest in prohibiting the sale, possession and use of illicit drugs predates even the federal RFRA. In 1980, Justice Powell acknowledged that "[t]he public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit." *United States v. Mendenhall*, 446 U.S. 544, 561 (1980) (Powell, J., concurring in part and concurring in the judgment). Two years later, the Eleventh Circuit considered that compelling interest in the context of a pre-RFRA religious freedom claim and concluded: "Unquestionably, Congress can constitutionally control the use of drugs that it determines to be dangerous, even if those drugs are to be used for religious purposes." *United States v. Middleton*, 690 F.2d 820, 825 (11th Cir. 1982). Other federal courts agreed. *See, e.g.*, *Olsen v. DEA*, 878 F.2d 1458, 1462 (D.C. Cir. 1989) ("every federal court that has considered the matter, so far as we are aware, has accepted the congressional determination that marijuana in fact poses a real threat to individual health and social welfare." (quoting *United States v. Rush*, 738 F.2d 497 (1st Cir. 1984))).

Subsequent to the enactment of RFRA, our own Seventh Circuit has held that there is a compelling government public-safety interest in forbidding the use of marijuana. In *United States v. Israel*, a convicted felon disputed a condition of his supervised release that required him to refrain from using illegal drugs, arguing his religion (Rastafarianism) encouraged adherents to smoke marijuana. 317 F.3d 768, 772 (7th Cir. 2003). A panel of the Seventh Circuit rejected his federal RFRA claim, citing "ample medical evidence establishing the fact that the excessive use

of marijuana often times leads to the use of stronger drugs such as heroin and crack cocaine" and concluding "that the government has a proper and compelling interest in forbidding the use of marijuana." *Id.* at 771–72. "Furthermore, demanding that a convicted felon on parole abstain from marijuana use is a legitimately restrictive means for safeguarding this interest." *Id.*

Other circuits have reached the same conclusion in similar cases. For instance, the Ninth Circuit noted the strong possibility that a religious exception could open the door to unsanctioned uses: "We have little trouble concluding that the government has a compelling interest in preventing drugs set aside for sacramental use from being diverted to non-religious, recreational users." *United States v. Christie*, 825 F.3d 1048, 1057 (9th Cir. 2016). Particularly, the court noted, "insofar as diverted cannabis could foreseeably fall into the hands of minors, or otherwise expose them to the hazards associated with illegal, recreational drug use, the government's interest in reducing the likelihood of diversion is contained within its compelling interest in protecting the physical and psychological well-being of minors." *Id.* (internal quotations omitted).

The Eighth Circuit followed suit in a case where the criminal defendant alleged that he had distributed heroin as part of his religious practice: "[W]e have no difficulty concluding that prosecuting [the defendant] under the CSA would further a compelling governmental interest in mitigating the risk that heroin will be diverted to recreational users." *United States v. Anderson*, 854 F.3d 1033, 1036 (8th Cir. 2017), *cert. denied*, No. 17-6347, 2017 WL 4574191 (U.S. Nov. 13, 2017).

Just as the federal government has a compelling interest in preventing marijuana use and its concomitant problems, so too do the Defendants in this case. Marijuana use is correlated to health problems and crime, *Olsen*, 878 F.2d at 1462, and is a gateway drug to other dangerous and illegal substances. *Israel*, 317 F.3d at 771. There is also a substantial danger that "religious"

marijuana could be diverted to recreational users or even children. *Christie*, 825 F.3d at 1057. These facts are true across the country, and they are no less true in Indiana.

2. Plaintiffs' requested relief would hinder law enforcement

Here, Defendants demonstrate specific compelling interests in enforcing Indiana Code section 35-48-4-11 (criminalizing possession of marijuana). Permitting a religious exemption to laws that prohibit the use and possession of marijuana would hinder drug enforcement efforts statewide and negatively impact public health and safety.

Any permissible use of marijuana in the State would cause myriad problems for law enforcement officers. Consider: an officer, during the course of a traffic stop, sees marijuana and paraphernalia in the subject's car. May the officer seize the contraband? If so, what must the authorities do with it if the subject later successfully asserts a religious defense? After all, if they return the marijuana to the subject, they will be violating federal law—but if they retain it, they may be violating the subject's religious rights. May the officer use his observation as probable cause for a search warrant? If so, would any evidence obtained pursuant to that warrant—even evidence of other crimes—be suppressed if the subject successfully asserted a religious defense? How should the officer respond if the subject asserts a religious defense during the traffic stop itself? And what should the officer do if his drug-detection dog alerts to the subject's vehicle, given that such an alert could be prompted by the odor of marijuana but also by the odor of other illicit drugs such as heroin and methamphetamine? All of these previously settled questions would be reopened if a religious exception were established.

And in addition to the many new uncertainties they would face on a daily basis, Indiana law enforcement officers would likely be busier than ever combatting a sharp increase in illegal diversion of "religious" marijuana from Indiana to states that have no such exception, as well as

dealing with the additional crime that studies have shown accompanies drug use. A regular gathering of individuals known or reasonably expected to be carrying, and growing, marijuana ready for consumption would be a tempting target for non-believers looking to turn marijuana intended for sacrament into a source for recreational use or illicit trade. Ex. 12, McKay Dec. at ¶ 22. The lack of any security plan or protocol may invite thieves, gangs, and drug dealers to see FCOC as a target for robbery. Ex. 12, McKay Dec. at ¶ 22.

An exception to Indiana's marijuana prohibitions would also create ambiguity regarding the permissible means of using the drug. Ex. 12, McKay Dec. at ¶ 13. During his deposition, Levin stated FCOC "will supply sacrament through the gift shop," said that he anticipated to sell marijuana in the gift shop, and suggested "that there are many growers out there that will give us product." Ex. 12, McKay Dec. at ¶ 11. In sum, FCOC has not stated who will supply the marijuana, what form or forms its consumption will take, where it will be stored and used, or how (if at all) it would be safeguarded from children, criminals, and recreational users—or even where the dividing line between "sacramental" and recreational use might lie (if one exists). The lack of clarity on how individuals permitted to use marijuana for religious purposes would obtain or grow marijuana would have a negative operational effect on law enforcement efforts. Ex. 12, McKay Dec. at ¶ 12.

3. Plaintiffs' requested relief would negatively impact public health and safety

States that have legalized marijuana for some or all uses have experienced increases in marijuana-related public health and safety problems, and it stands to reason that if Indiana effectively legalized marijuana for religious uses, it would experience the same problems. Those problems include increased marijuana use in both adults and children, as well as increases in marijuana-related hospitalizations due both to the increased use and to the heightened potency of the drug in the modern era.

The risks to children are particularly acute. During his deposition, Levin stated that he has no plan to secure sacramental marijuana, beyond growing the plant behind a locked door in the FCOC building. Ex. 12, McKay Dec. at ¶ 21. In such an unsecure environment, children may have access to sacramental marijuana products, particularly edible products, and may consume them, despite Levin's stated plan to bar children from the service during the marijuana sacrament. Ex. 12, McKay Dec. at ¶ 21.

Some of the public health effects of a religious exception allowing marijuana use would impact non-users of the drug as well. Ex. 12, McKay Dec. at ¶ 17. Based upon the experiences of other states, Indiana would likely see more traffic accidents, injuries, and fatalities caused by marijuana-impaired drivers. And with no safe legal limit established for marijuana intoxication, no reliable field test to identify marijuana-impaired drivers, and no immediate way to assess the validity of a driver's asserted religious defense to an impaired driving charge, law enforcement officers will have little power to address the problem. Ex. 15, DuPont Dec. at ¶ 12–13.

B. The challenged statutes are the least restrictive means of vindicating the government interest at stake

There is simply no way for Indiana to advance its interest in preventing illegal drug abuse and its negative public safety and health effects without fully enforcing its statutory prohibitions against the possession and use of marijuana, without exception. Several federal circuit courts have held that the federal government could not advance its parallel interest without fully enforcing the federal Controlled Substances Act against those who would use marijuana for religious purposes. *See, e.g.*, *Anderson*, 854 F.3d at 1037, (holding that "prosecuting [a defendant who claimed a religious mandate to distribute heroin] under the CSA represents the least restrictive means for the Government to further its compelling interest in mitigating diversion of heroin to recreational users"); *Christie*, 825 F.3d at 1063 (holding that "the government could not achieve its compelling

interest in mitigating diversion through anything less than mandating . . . full compliance with the Controlled Substances Act"); *Israel*, 317 F.3d at 772 (holding that "[a]ny judicial attempt to carve out a religious exemption . . . would lead to significant administrative problems for the probation office and open the door to a weed-like proliferation of claims for religious exemptions"); *United States v. Brown*, 72 F.3d 134 (8th Cir. 1995) (per curium) (holding that "the government could not have tailored the restriction to accommodate [purportedly religious marijuana use] and still protected against the kinds of misuses it sought to prevent").

This case is perhaps most like *Christie*, where criminal defendants charged with drug trafficking asserted a RFRA defense. 825 F.3d at 1052. Though they had organized themselves as a "church," the Ninth Circuit observed that they "hardly regulated who could join" and "actively marketed their church as a safe haven from the federal drug laws." *Id.* at 1063. Indeed, "even the barebones membership requirement was not enforced as a meaningful check on who could receive the [church's] cannabis" because the defendants "simply gave cannabis to those who showed up, took their money, and sent them on their way" as part of their asserted goal to "liberate cannabis" and distribute it worldwide. *Id.* (quotations omitted).

Here, similarly, anyone who provides contact information and pays a nominal fee can be a member of FCOC. Ex. 10, FCOC Interrog. Answers at 4. But one need not even have become a member to attend services, Ex. 1, Levin Dep. at 229, and FCOC plans to supply cannabis—from unspecified sources, in unspecified forms and unlimited quantities—to those who attend the services. Ex. 10, FCOC Interrog. Answers at 6. Levin has said that he thinks "every house in the world should have a pint of cannabis oil[.]" Ex. 1, Levin Dep. at 114.

A judicially-created exception to Indiana's marijuana prohibitions would create confusion for law enforcement and encourage illegal activity. Ex. 12, McKay Dec. at ¶ 16. When faced with

a person in possession of marijuana, officers may not be able to evaluate in the moment whether that person is engaging in criminal conduct or not. Ex. 12, McKay Dec. at ¶ 13; *see also United States v. Lafley*, 656 F.3d 936, 942 (9th Cir. 2011) ("Requiring continuous monitoring of . . . marijuana use to determine whether the use was recreational or religious would place an unreasonable burden on a probation office."). Levin himself has admitted that only the marijuana user can know for sure whether the use is "sacramental" or merely recreational: "pretty much you have to ask yourself that, you know. That's – that's within yourself." Ex. 1, Levin Dep. at 351.

Similarly, officers may not know whether the distribution of marijuana is still prohibited if it is being distributed to persons whose use is permitted under the exception. Ex. 12, McKay Dec. at ¶ 12. If some individuals are exempted, even for limited purposes, from the prohibition against using marijuana, law enforcement officers and investigators would need to make case-by-case determinations during criminal investigations whether an individual's religious beliefs legally justify that particular use of cannabis. Ex. 12, McKay Dec. at ¶ 9. Law enforcement is not trained or equipped to make this type of determination as to whether an individual is or should be permitted to use cannabis based on their beliefs and is in no position to measure the sincerity of an individual's beliefs–whether religious or not–to make this determination. Ex. 12, McKay Dec. at ¶ 9. Any such discretion will inhibit law enforcement agencies' public safety mission by requiring additional resources and is likely to lead to legal disputes in individual cases. Ex. 12, McKay Dec. at ¶ 9.

What is more, even permitted distribution and use could easily become a haven for black market operations. Ex. 12, McKay Dec. at ¶ 14. For example, as has happened in Colorado since that state legalized marijuana, distributors may provide marijuana to persons whose use is permitted while also supplying illicit markets in other states. Ex. 12, McKay Dec. at ¶ 14. The

danger is particularly acute given that FCOC members' marijuana use would not be limited to consumption in the FCOC facility; rather, Levin has said members should be able to "use it in [their] home[s.]" Ex. 1, Levin Dep. at 260. "We'll bless your house. We'll make it a home sanctuary, and you will be able to consume within your own home sanctuary." Ex. 1, Levin Dep. at 260. This "blessing" would consist of "say[ing] a prayer" and "put[ting] an ornament on the doorway . . . that reflects the church's logo." Ex. 1, Levin Dep. at 261. Thus, hundreds or even thousands of households could be transformed into locations for permitted marijuana use—with the accompanying risks of inviting crime and exposing children to drugs, just to name a few.

This case demonstrates how it is compelling and appropriate to treat the illicit drug market in a unitary way. It would be impossible to combat illicit drug use and trade in a piecemeal fashion that allowed for numerous exceptions, each of which was ripe for abuse. In that regard, FCOC's demand for limited legalization is directly analogous to a similar demand in *Gonzales v. Raich* that the Controlled Substances Act be deemed to exclude marijuana growers who produce only enough for themselves, and not for interstate sale. 545 U.S. 1, 22 (2005). There, the Supreme Court recognized "that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA" in light of "the enforcement difficulties" related to distinguishing between local and interstate marijuana, not to mention "concerns about diversion into illicit channels" of "legal" (*i.e.*, locally grown) marijuana. *Id.* And just so here; failure to regulate all marijuana in Indiana would leave a gaping hole in our state's drug prohibitions. There is just no way to tailor these laws more narrowly without undermining the entire enforcement scheme.

III. For Additional Reasons, Plaintiffs Cannot Prevail on Their Claims Against the State of Indiana, the Governor, or the Attorney General

Finally, Plaintiffs cannot prevail on any of their claims against the State of Indiana, because it enjoys sovereign immunity from suit, or against the Governor and Attorney General, because they cannot redress Plaintiffs' alleged injuries.

First, the State of Indiana itself "retains common-law sovereign immunity for non-tort claims based on a statute[.]" *Esserman v. Indiana Dep't of Envtl. Mgmt.*, 84 N.E.3d 1185, 1191 (Ind. 2017). And because the State retains common-law sovereign immunity, courts must presume that a statute does not waive that immunity unless it includes express language evincing the opposite intent. *Id.* Indiana's RFRA contains no such language, so sovereign immunity remains intact. Nor can a party bring claims directly against the State for declaratory and injunctive relief. *See, e.g.*, *Sendak v. Allen*, 330 N.E.2d 333, 335 (Ind. Ct. App. 1975) (noting that a declaratory judgment action "may not be brought directly against the State"); *State v. Larue's, Inc.*, 154 N.E.2d 708, 712 (Ind. 1958) (noting that a plaintiff may not bring a declaratory judgment action against the State absent "statutory authority"). Accordingly, Plaintiffs' claims against the State cannot succeed, so the State itself is entitled to summary judgment for this additional reason.

As for Plaintiffs' claims against the Governor, they are similarly unavailing. For jurisdiction to exist—and for plaintiff to state a claim on which relief can be granted—plaintiffs must allege an injury "fairly traceable to the defendants" and "likely to be redressed by the requested relief." *See Alexander v. PSB Lending Corp.*, 800 N.E.2d 984, 989 (Ind. Ct. App. 2003). Where plaintiffs' claim is not redressable, it is not justiciable. *See, e.g., Schultz v. State*, 731 N.E.2d 1041, 1046 (Ind. Ct. App. 2000), *trans. denied*.

Here, Plaintiffs' alleged injuries are neither traceable to, nor redressable by, the Governor. He has no role in giving effect to the challenged statutes or otherwise in enforcing them. Levin

even admitted that, with regard to this lawsuit, the Governor is "doing everything I want him to do." Ex. 1, Levin Dep. at 18. Similarly, the Attorney General has no role in enforcing or giving effect to the challenged statutes, and when asked what he wanted the Attorney General to do or not do with regard to Plaintiffs' Complaint, Levin said "I do not know." Ex. 1, Levin Dep. at 19–20. Accordingly, a judgment against the Governor and Attorney General would do nothing to redress Plaintiffs' purported injuries, and they are entitled to summary judgment for this additional reason.

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Ultimately, even if FCOC were a bona fide religion in which Plaintiffs sincerely believed (rather than at most a political cause), and even if Indiana's prohibitions on possession and use of marijuana did sincerely burden Plaintiffs' religious exercise, Plaintiffs still cannot prevail. Defendants have established that they have a compelling interest in protecting public health and safety from the dangers of drug abuse and concomitant crime and public health problems, and that fully enforcing the challenged statutes is the least restrictive means available to vindicate that interest. This court should deny Plaintiffs' Motion for Partial Summary Judgment and grant Defendants' Joint Motion for Summary Judgment.

CONCLUSION

The Plaintiffs' Motion for Partial Summary Judgment should be denied and the Defendants' Joint Motion for Summary Judgment should be granted.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on December 15, 2017, I electronically filed the foregoing document using the Indiana E-filing System ("IEFS"). I also certify that on December 15, 2017, the foregoing document was served upon the following persons using the IEFS:

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I also certify that a copy of the foregoing document was served upon the following person via U.S. Mail, first class postage prepaid, this 15th day of December, 2017.

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