No. 08-777

In the Supreme Court of the United States

CARL ERIC OLSEN, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in relying on principles of issue preclusion in rejecting petitioner's claims under the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb-1 *et seq.* and the Equal Protection Clause of the United States Constitution.

2. Whether the court of appeals correctly rejected petitioner's contention that the Free Exercise Clause of the United States Constitution entitles him to a religious use exemption from various federal and state laws that regulate the manufacture, distribution, and use of marijuana.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 541 F.3d 827. The opinion of the district court (Pet. App. A11-A37) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 2008. The petition for a writ of certiorari was filed on December 8, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In the early 1980's, petitioner was convicted in Iowa state court of possessing marijuana with the intent to deliver it. Pet. App. A2; *State* v. *Olsen*, 315 N.W.2d 1 (Iowa 1982) (*Olsen I*). The Supreme Court of Iowa re-

versed and remanded for a new trial after the State conceded that the trial court erred in admitting certain expert testimony. *Id.* at 3. Because it determined that certain issues would "doubtless recur on retrial," the court proceeded to address those issues as well. *Id.* at 2. In particular, the court specifically rejected petitioner's claim that "the State's prohibition against the possession of marijuana unconstitutionally infringes upon his use of the drug for religious purposes." *Id.* at 7; see *id.* at 8-9. Citing *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), see *Olsen I*, 315 N.W.2d at 8, the Iowa court held that "[a] compelling state interest sufficient to override [petitioner's] free exercise clause argument is demonstrated in this case," *id.* at 9; see *id.* at 8-9.

On remand, petitioner was convicted a second time and the Supreme Court of Iowa affirmed in an unreported opinion. See *Olsen* v. *State*, Civ. No. 83-301-E, 1986 WL 4045, at *3-*4 (S.D. Iowa Mar. 19, 1986) (*Olsen II*) (reprinting the Supreme Court of Iowa's unreported opinion). The Supreme Court of Iowa stated that it saw "no reason to retreat from" its previous rejection of petitioner's free exercise claim. *Id.* at *4. The Iowa court also specifically rejected an "equal protection challenge, based on the legislative exemption granted the peyote ceremonies of the Native American Church." *Ibid.*

Petitioner filed a petition for a writ of habeas corpus in federal district court, which the court summarily dismissed. *Olsen* v. *Iowa*, 649 F. Supp. 14 (S.D. Iowa) (*Olsen III*), aff'd, 808 F.2d 652 (8th Cir. 1986) (per curiam). The court of appeals affirmed the dismissal of petitioner's petition for a writ of habeas corpus in a brief per curiam opinion. *Olsen* v. *Iowa*, 808 F.2d 652 (8th Cir. 1986) (*Olsen IV*) (per curiam).

b. Around the same time, petitioner was also convicted in federal district court of possessing marijuana with the intent to distribute it. Pet. App. A2; *United States* v. *Rush*, 738 F.2d 497, 500, 502 n.7 (1984), cert. denied, 470 U.S. 1004 (1985). In affirming that conviction, the First Circuit specifically rejected petitioner's contention that the prosecution violated his rights under the Free Exercise Clause of the United States Constitution. *Id.* at 511-513. The court of appeals also specifically rejected petitioner's argument that he was "entitled as a matter of equal protection to a religious exemption from the marijuana laws on the same terms as the peyote exception granted the Native American Church." *Id.* at 513.

c. In 1986, petitioner filed a petition for judicial review of the Drug Enforcement Agency's denial of his request for a religious use exemption from the federal laws that prohibit the possession and distribution of marijuana. Pet. App. A2; *Olsen* v. *DEA*, 878 F.2d 1458, 1459 (1989), cert. denied, 495 U.S. 906 (1990). In an opinion by then-Judge Ginsburg, the D.C. Circuit rejected petitioner's claims that the denial of such an exemption violated his rights under the Free Exercise Clause of the United States Constitution. *Id.* at 1461-1462. The court of appeals determined that the government has a "compelling interest in controlling the distribution and drug-related use of marijuana," and it described "[t]he pivotal issue" before it as "whether marijuana usage by [petitioner] and other members of his church can be accommodated without undue interference with the government's interest." *Id.* at 1462. The court answered that specific question "no." *Ibid.* It explained that, "[b]ecause the tenets of [petitioner's] church endorse marijuana use every day throughout the

day," any "proposal for confined use would not be self-enforcing" and it was "hardly unreasonable to forecast a large monitoring burden." *Ibid.* The court also noted that those concerns had specific evidentiary support: It observed that, "in years past, the church's '[c]hecks on distribution of cannabis to nonbelievers in the faith [were] minimal,' there was 'easy access to cannabis for a child who had absolutely no interest in learning the religion,' and '[m]embers [partook] of cannabis anywhere, not just within the confines of a church facility." *Ibid.* (brackets in original) (quoting *Town* v. *State*, 377 So. 2d 648, 649, 651 (Fla. 1979), cert. denied, 449 U.S. 803 (1980)). *DEA* also specifically rejected petitioner's contention that the denial of a religious use exemption to him with respect to marijuana "on the same terms as * * * granted the Native American Church" with respect to peyote violated his rights under the Equal Protection Clause of the United States Constitution. *Id.* at 1463; see *id.* at 1463-1465.

2. In 1993, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (42 U.S.C. 2000bb-1 *et seq.*). As described by Congress, the purpose of RFRA was "to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963)[,] and Wisconsin v. Yoder, 406 U.S. 205 (1972)[,] and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. 2000bb(b)(1).[1]

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[1] In *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), this Court held that RFRA could not constitutionally be applied to state governments. RFRA continues to be applicable to the federal government. See *Gonzales* v. *O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 423-424 & n.1 (2006).

3. The current litigation began in 2007, when petitioner filed suit in the United States District Court for the Southern District of Iowa. Petitioner sought a declaratory judgment that his religious use of marijuana would not violate the Controlled Substances Act (CSA), 21 U.S.C. 801 *et seq.*, or comparable state laws, and an injunction barring federal, state, and local officials from enforcing those laws against him. As relevant here, petitioner raised claims under RFRA, as well as the Free Exercise and Equal Protection Clauses of the United States Constitution (U.S. Const. Amends. I, XIV). Pet. App. A19-A31.

The district court granted respondents' motions to dismiss petitioner's complaint in an unpublished opinion. Pet. App. A11-A37. The court concluded that principles of issue preclusion required rejection of petitioner's RFRA claim against the federal defendants, as well as his claims under the Free Exercise and Equal Protection Clauses of the United States Constitution. *Id.* at A19-A31.

4. The court of appeals affirmed. Pet. App. A1-A10. With respect to petitioner's RFRA claim, the court acknowledged that "[c]ollateral estoppel does not apply if controlling facts or legal principles have changed significantly since [petitioner's] prior judgments." *Id.* at A5. But it rejected petitioner's contention that this Court's decision in *Gonzales* v. *O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 428-429 (2006) (*O Centro*), "changed the method for determining whether the government has a compelling interest in prohibiting his sacramental use of marijuana." Pet. App. A5. The court of appeals stated that, "[t]o the contrary, an explicit purpose of RFRA was to 'restore the compelling interest test as set forth in *Sherbert* * * * and * * * *Yoder*,

* * * and to guarantee its application in all cases where free exercise of religion is substantially burdened." *Ibid.* (quoting 42 U.S.C. 2000bb(b)(1)). The court rejected petitioner's assertion that *O Centro* established any additional requirements that "did not exist pre-*Smith*," noting that *O Centro* "says that *Sherbert* and *Yoder* 'looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants.' " *Id.* at A6 (quoting *O Centro*, 546 U.S. at 431). The court of appeals thus concluded that "[t]he pre-*Smith* standard applicable in [*Olsen I*], *Rush*, and *DEA* is the same standard applicable to [petitioner's] current claim," and that petitioner's RFRA claim was thus "barred by collateral estoppel." *Ibid.*

The court of appeals also rejected petitioner's claims under the Free Exercise Clause. Pet. App. A8-A9. The court noted that petitioner did not allege that the object of the CSA was "to restrict the religious use of marijuana or target" adherents of his particular faith. *Id.* at A8. The court also concluded that the federal and state drug laws that petitioner was challenging were laws of general applicability notwithstanding the fact that "they exempt the use of alcohol and tobacco, certain research and medical uses of marijuana, and the sacramental use of peyote." *Ibid.* The court explained that "[g]eneral applicability does not mean absolute universality" and that "[e]xceptions do not negate that [such laws] are generally applicable." *Ibid.* The court also observed that petitioner's "free exercise claim was previously considered in *Olsen [I]*, *Rush*, and *DEA*," and stated that it was "barred by collateral estoppel." *Id.* at A9.

Finally, the court of appeals rejected both a "hybrid rights" claim and petitioner's freestanding equal protection claim. Pet. App. A9. The court reiterated that petitioner's free exercise claim had been previously considered and previously rejected, and it stated that any such claim "alone or hybrid—is barred by collateral estoppel." *Ibid.* The court of appeals also stated that petitioner "ha[d] also already litigated his equal protection claim," and it concluded that *O Centro* did not represent "an intervening change in law" with respect to that claim, because "*O Centro* does not address equal protection." *Ibid.* Accordingly, the court of appeals held that petitioner's equal protection claim was also "barred by collateral estoppel." *Ibid.*

ARGUMENT

Petitioner asserts that the court of appeals erred in relying on principles of issue preclusion in rejecting his RFRA (Pet. 14-24) and equal protection (Pet. 30-35) claims. Petitioner also renews (Pet. 24-30) his claims that the federal and state drug laws that he challenges in this litigation are neither neutral nor generally applicable, as well as his assertion that, even if those laws are neutral and generally applicable, the court of appeals should have applied strict scrutiny because this case involves "hybrid rights." The court of appeals' decision is correct and does not conflict with any decision of this Court or with the decisions of another court of appeals. Further review is not warranted.

1. The doctrines of claim preclusion and issue preclusion "preclude parties from contesting matters that they have had a full and fair opportunity to litigate." *Montana* v. *United States*, 440 U.S. 147, 153 (1979). "Issue preclusion * * * bars 'successive litigation of an

issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Taylor* v. *Sturgell*, 128 S. Ct. 2161, 2171 (2008) (quoting *New Hampshire* v. *Maine*, 532 U.S. 742, 748-749 (2001)); see Restatement (Second) of Judgments § 27 (1982) (Restatement).

a. Petitioner contends (Pet. 14-24) that the court of appeals erred in relying on principles of issue preclusion in rejecting his RFRA claim. That argument does not merit further review.

The court of appeals correctly rejected petitioner's RFRA claim. The controlling questions under RFRA are whether there is "a compelling government interest" in controlling the distribution and use of marijuana and whether failing to grant petitioner a religious use exemption "is the least restrictive means of furthering that compelling government interest." 42 U.S.C. 2000bb-1(b). As the court of appeals correctly explained (Pet. App. A6), three previous decisions to which petitioner was a party—*Olsen I*, *Rush*, and *DEA*—all considered those very questions and resolved them against petitioner. See *DEA*, 878 F.2d 1461-1463; *Rush*, 738 F.2d 511-513; *Olsen I*, 315 N.W.2d at 8-9; see also pp. 2-4, *supra*.

Petitioner asserts that issue preclusion does not apply here because this Court's 2006 decision in *O Centro* "changed the controlling legal analysis" under the compelling interest test. Pet. 15; see Restatement § 28(2)(b) (stating that issue preclusion is not warranted where there has been "an intervening change in the applicable legal context"). As the court of appeals correctly explained (Pet. App. A6), that is incorrect. In *O Centro*, this Court acknowledged that "RFRA expressly adopted

the compelling interest test '*as set forth in Sherbert* v. *Verner*, 374 U.S. 398 (1963)[,] and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972).'" 546 U.S. at 431 (emphasis added) (quoting 42 U.S.C. 2000bb(b)(1)). In addition, as the court of appeals also observed (Pet. App. A6), *O Centro* expressly relied on the fact that *Sherbert* and *Yoder* had themselves "looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants." 546 U.S. at 431. *O Centro* thus makes clear that the Court was engaged in the application, rather than the alteration, of the same legal standard that it had applied under the Free Exercise Clause before its decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990); accord S. Rep. No. 111, 103d Cong., 1st Sess. 9 (1993) (stating that, under RFRA, "the compelling interest test generally should not be construed more stringently or more leniently than it was prior to *Smith*").

Petitioner also asserts (Pet. 22) that issue preclusion is not appropriate here because "the 'compelling interest' analysis *actually* applied in [petitioner's] prior cases was different than the analysis required by RFRA under the *O Centro Espirita* decision." Specifically, petitioner contends (*ibid.*) that the previous decisions failed to make "the kind of particular and individualized evaluation of [his] Free Exercise claims" that *O Centro* makes clear was required under the *Sherbert*/*Yoder* standard and instead "used the kind of categorical approach to controlled substances that was expressly rejected by this Court in *O Centro.*"

That claim fails for two independent reasons. First, the D.C. Circuit's decision in *DEA* makes clear that that court engaged in precisely the sort of particularized

analysis described in *O Centro*. The *DEA* court did not take a "categorical approach to controlled substances." Pet. 22. Instead, it analyzed both petitioner's request for "a broad religious exception" and his plea for a more particularized "time- and place-specific use" exemption that he had proposed during the course of that litigation. *DEA*, 878 F.2d at 1462. Nor did the D.C. Circuit's decision in *DEA* rely on the need for "the *uniform* application of the Controlled Substances Act" as a basis for rejecting petitioner's request for a particularized exemption. *O Centro*, 546 U.S. at 423. Instead, the Court examined both the tenets and the past practices of petitioner and his particular religious community in reaching its conclusion that the granting of any such exemption to petitioner would unduly burden the enforcement of the federal laws regarding marijuana. See *DEA*, 878 F.2d at 1462; pp. 3-4, *supra*; see also *O Centro*, 546 U.S. at 435 (stating that, under the *Sherbert*/*Yoder* standard, "the Government can demonstrate a compelling interest in uniform application * * * by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program").[2]

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[2] Petitioner errs in asserting (Pet. 22 n.5) that this Court's decision in *Smith* "cited the [D.C. Circuit's] decision in *DEA* as an example of a case where the court did not make an individualized decision on whether there was a compelling interest for denying an exemption from the federal CSA." The Court's passing citation of *DEA* in *Smith* was made in the context of noting that the constitutional rule favored by the respondents in that case "would *open the prospect of* constitutionally required religious exemptions from civic obligations of almost every conceivable kind," including exemptions from "drug laws." *Smith*, 494 U.S. at 888-889 (emphasis added).

Second, even assuming *arguendo* that petitioner has made a prima facie case that one or more of the previous decisions misapplied the controlling legal analysis in rejecting his free exercise claims, that fact would not by itself warrant refusing to grant those decisions preclusive effect in this case. The overriding purposes of preclusion doctrines are to avoid "the expense and vexation attending multiple lawsuits, [to] conserv[e] judicial resources, and [to] foster[] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana*, 440 U.S. at 153-154. Preclusion doctrines cannot serve that purpose if a losing party may avoid their application simply by arguing that one or more of three previous decisions to which he was a party was incorrectly decided.

Petitioner's assertion (Pet. 22-23) that the court of appeals' rejection of his RFRA claim conflicts with *United States* v. *Bauer*, 84 F.3d 1549 (9th Cir.), cert. denied, 519 U.S. 907 (1996), 519 U.S. 1131, and 519 U.S. 1132 (1997), is without merit. *Bauer* was a direct appeal from a federal criminal conviction. It did not involve the preclusive force that should be accorded to any previous decision, much less the continuing preclusive force of *Olsen I*, *Rush*, and *DEA* post-RFRA. Nor did the Ninth Circuit's brief analysis in *Bauer* suggest that any previous decision—much less the specific decisions at issue in this case—had been incorrectly decided. Instead, *Bauer* stated that the district court in that case had erred in "treat[ing] the existence of the marijuana laws as *dispositive* of the question whether the government had chosen the least restrictive means of preventing the sale and distribution of marijuana," and it remanded for further proceedings. *Id.* at 1559 (emphasis added). As explained previously, the *DEA* court did not take the cate-

gorical approach that the Ninth Circuit rejected in *Bauer*. In addition, the *Bauer* court expressly did "not exclude the possibility that," even under RFRA, "the government may show that the least restrictive means of preventing the sale and distribution of marijuana is the universal enforcement of the marijuana laws." *Ibid.*

b. Petitioner's assertion (Pet. 30-35) that the court of appeals erred in relying on issue preclusion in rejecting his equal protection claim is likewise without merit. As the court of appeals correctly explained (Pet. App. A9), petitioner "has also already litigated his equal protection claim" in *Olsen II*, *Rush*, and *DEA*. See *DEA*, 878 F.2d at 1463; *Rush*, 738 F.2d at 513; *Olsen II*, 1986 WL 4045, at *4.

Petitioner does not assert that the court of appeals' decision with respect to this point conflicts with the decisions of another court of appeals. In addition, although petitioner asserts (Pet. 31) that the court of appeals "fail[ed] to take into account the decision in *O Centro*," the court of appeals correctly explained (Pet. App. A9) that *O Centro* "does not address equal protection."

2. Petitioner also renews (Pet. 24-30) his constitutional claims under the Free Exercise Clause. Petitioner does not assert that the court of appeals' rejection of these claims conflicts with the decisions of any other court of appeals.

Petitioner's free exercise claim also fails on the merits. Although petitioner contends that the CSA is not a neutral law of general applicability, Pet. 26-29, he does not and cannot contend that the "*object* of [the CSA] is to infringe upon or restrict practices because of their religious motivation," which is the governing standard for measuring a law's neutrality. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533

(1993) (emphasis added). In addition, the court of appeals correctly explained that "[g]eneral applicability does not mean absolute universality" and that the existence of certain exemptions with respect to use of other substances or for other purposes "do[es] not negate" the fact that the federal drug laws are "generally applicable." Pet. App. A8.

Finally, even if petitioner were able to establish that the CSA is not a neutral law of general applicability, or that his claim is otherwise subject to strict scrutiny because it involves hybrid rights, that claim would still fail. *Olsen I*, *Rush*, and *DEA* all held that the refusal to grant petitioner a religious use exemption satisfies strict scrutiny. As a result, the court of appeals correctly held that petitioner's "free exercise claim—alone or hybrid—is barred by collateral estoppel" as well. Pet. App. A9. Further review is thus unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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