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OCTOBER 2005

Supreme Court Considers the Use of an Illegal Substance in Religious Worship in *Gonzales v. O Centro Espirita*

On November 1, 2005, the Supreme Court will hear oral argument in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, a case that will determine whether the adherents of a religious group can continue to import and use an illegal drug in their worship services. The church, known as Uniao Do Vegetal (UDV) or the Union of the Plants, preaches a brand of “Christian spiritualism” that combines traditional Brazilian beliefs with contemporary Christian teachings. A “central and essential” tenet of the UDV faith is a belief that hoasca, a tea containing the illegal hallucinogenic drug diethyltryptamine (DMT), is sacred and that its use connects members to God.

In 1999, federal agents in Santa Fe, N.M., seized a shipment of hoasca imported from Brazil for use in UDV religious ceremonies. An additional 30 gallons were confiscated when agents searched the house of church leader Jeffery Bronfman. No criminal charges were brought against Bronfman, the UDV or individual church members.

Eighteen months later the church sued the government in U.S. District Court for the District of New Mexico and received a preliminary injunction preventing the confiscation of imported hoasca or the arrest of any UDV members using the drug while the district court trial was pending. UDV claims that the 1993 Religious Freedom Restoration Act (RFRA) exempts them from any laws prohibiting the importation and use of hoasca. RFRA states that no federal law shall “substantially burden a person’s exercise of religion” unless the government proves the law furthers a “compelling governmental interest” and that it has been implemented in a way that is “least restrictive” to religious practices.

The federal government counters that the courts cannot grant the church an exception to the nation’s drug laws — in this case the 1970 Controlled Substances Act (CSA), which prohibits the use of DMT for any purpose. Furthermore, the government argues, the 1971 United Nations Convention on Psychotropic Substances (to which the United States is a party) requires the government “to prevent and combat abuse of [psychotropic] substances and the illicit traffic to which it gives rise.” The parties dispute whether hoasca, which

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contains small amounts of DMT, is covered under the Convention. If it is, then the United States could not permit the importation of hoasca without violating an international agreement.

RFRA and the “Compelling Interest” Test

The “compelling interest and least restrictive means” test used in RFRA was established by the Supreme Court in a number of decisions in the 1960s and ’70s to evaluate the constitutionality of state and federal laws that interfered with religious practices. However, in a 1990 case, *Employment Division, Department of Human Resources of Oregon v. Smith*, the court struck down this balancing test and replaced it with one much more friendly to the government. In a majority opinion written by Justice Antonin Scalia, the court declared that “the Free Exercise Clause does not protect the exercise of religion from neutral, generally applicable laws.” Instead, Scalia wrote, the Clause only protects religion from being singled out for discriminatory treatment. Laws that do not discriminate need only advance a “legitimate” rather than a “compelling” governmental interest.

The new, more government-friendly standard in *Smith* (affirmed by the court in a 1993 decision, *Church of Lukumi Babalu Aye v. City of Hialeah*) raised alarm bells in the country’s faith communities. In 1993 Congress responded to these concerns by passing RFRA, which reinstated the compelling interest and least restrictive means test for state and federal laws that infringed on the free exercise of religion. In 1997, however, the Supreme Court in *City of Boerne v. Flores* held that Congress overstepped its constitutional authority by making RFRA applicable to the

states. As a result, RFRA now applies only to the federal government.

At the hearing to consider the UDV’s request for a preliminary injunction, the government conceded that criminalization of hoasca “substantially burdened” the church’s religious practice because the drug laws forced members to choose between practicing their religion and the possibility of criminal prosecution. However, the government argued that it had a compelling interest in protecting the health of UDV members and in preventing the recreational, non-religious or improper use and distribution of DMT. The church countered that hoasca could be safely consumed in tightly controlled religious services and that recreational and improper use was improbable.

Based on the evidence presented to it, the district court found that the government’s interests in protecting health and preventing drug abuse were equal to the UDV’s interests in the religious use of hoasca. But because RFRA imposes on the government the burden of proof in showing the importance of its interests, the district court held that the government’s interest did not trump the UDV’s religious freedom to use hoasca.

Moreover, the district court held that the 1971 UN Convention did not apply to hoasca, determining that beverages and infusions made from plants and extracts are exempt from the agreement. The government, therefore, did not have a compelling interest in preventing the importation of hoasca.

The district court concluded that, because the government did not show a compelling interest during the preliminary injunction hearing, the UDV had a high likelihood of success at the eventual trial. The court therefore granted a

preliminary injunction to protect UDV members from prosecution until then.

The government appealed the district court's decision to grant the UDV an injunction, even though it would have another opportunity to demonstrate its compelling interest when the case came to trial. But the United States Court of Appeals for the 10th Circuit upheld the preliminary injunction, finding that the evidence supported the district court's decision and that RFRA had been properly applied. On April 18, 2005, the Supreme Court agreed to review the propriety of the preliminary injunction.

Arguments in **Gonzales v. O Centro Espirita**

The UDV argues that the preliminary injunction is proper because RFRA instructs district courts to exempt religious persons or groups from federal laws when the government fails to prove a compelling interest in applying the law to those persons or groups. The UDV also contends that the district court was correct when it found that the 1971 UN Convention does not cover hoasca, because "plants..., decoctions, infusions, or beverages made from them" are exempt from the agreement.

The government counters that the injunction is improper because RFRA should not be construed to allow the courts to grant exceptions to federal drug laws. Drugs like DMT always present dangers to health and the risk of diversion to illicit traffic. The government therefore asserts a compelling interest in the uniform application of the Controlled Substances Act. The act "cannot function with its necessary rigor and comprehensiveness if subjected to

judicial exemptions," the government claims, adding that only Congress should be able to create such exemptions. For its part, the UDV repeatedly notes that Congress and the president have exempted peyote, a drug covered under the Controlled Substances Act, for use in Native American religious ceremonies. The church believes that "the government's successful accommodation of the sacramental use of peyote...belies its claim that such substances require a categorical ban, even for religious use."

Finally, the government continues to claim that hoasca is covered by the international agreement. Because hoasca is a "mixture or solution" containing DMT, the government asserts, it is a "preparation," and under the Convention "a preparation is subject to the same measure of control as the psychotropic substance which it contains." Since hoasca is covered by the UN Convention, the government argues, the preliminary injunction is improper, and the district court was in error when it failed to consider the government's interest in complying with its international agreements.

The Supreme Court will consider only the question of whether the district court was correct in issuing the preliminary injunction. A narrow victory for the government in the Supreme Court would lift the preliminary injunction and permit the Justice Department to block the importation of hoasca and criminally prosecute its religious use for the time being. The Supreme Court may also rule more broadly that courts may never apply RFRA to create exemptions to drug laws or to international obligations. If the court so rules, the case will effectively end. If the UDV prevails, the injunction will remain in place until the district court conducts its trial and renders a decision.

Released on October 27, 2005



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