IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

O CENTRO ESPIRITA BENEFICIENTE
UNIAO DO VEGETAL, et al.,

Plaintiff,

No. 02-2323

v.

Dist. Ct. No. CV 00-1647 JP/RLP

JOHN ASHCROFT, et al.,

Defendant.

PLAINTIFFS' EMERGENCY MOTION FOR RECONSIDERATION OF THE COURT'S ORDER GRANTING THE GOVERNMENT'S MOTION FOR AN EMERGENCY STAY PENDING APPEAL

On December 12, 2002, this Court issued its Order (Ex. "A") granting the government's emergency motion for a stay until further order of this Court. The plaintiffs respectfully request this Court reconsider that Order and deny the government's motion.

1. The issue before this Court is the plaintiffs' right to practice their religion.

At the outset it is important to recognize that the issue before this Court is not the plaintiffs' right to believe ("imposition on the Plaintiffs' free exercise of their religious beliefs" (Order at 6)). What is at issue is the right to practice their religion. See, e.g., Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 140-41 (1987) (compelling a party to forego a religious practice imposes a substantial burden on that party); See also Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. Chi. L. Rev. 1109, 1125 n.80 (1990) ("There can be no more 'direct' burden on free exercise than an absolute criminal prohibition.").[1]

1 See also Article 18(1) of the United Nations International Covenant on Civil and Political Rights, ("ICCPR") ratified by the United States in 1992 ("Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include freedom . . . to *manifest* his religion or belief in worship, observance, practice, and

These plaintiffs have not been able to practice their religion since May, 1999, when the government seized their sacramental hoasca and threatened to prosecute them if they continued their religious practice. This will be their fourth Christmas without the benefit of the one of the most fundamental of all liberties–the right of individuals to approach the sacred and receive communion with God without interference or the threats of criminal prosecution.

In an effort to deny the plaintiffs the relief granted by the district court after the development of an exhaustive record, the government came to this Court with exaggerated claims of "irreparable harm to the national interest" based on an inaccurate and misleading representation of the case below. This Court should defer to the district court's judgment, pending its own examination of the evidence below and the issues raised on appeal. The "irreparable harm" to the plaintiffs in the denial of their religious liberty, should not be subordinated to the speculative, totally unjustified claims of injury to the "image" of the United States Government.

This Court has recently held in United States v. Hardman, 297 F.3d 1116, 1130 (10th Cir. 2002), that in the context of RFRA, "the burden of building the record for our review falls upon the United States." The UDV is entitled to the protections for religions provided in RFRA and the accepted standards of review by an appellate court of a district's court's action. The UDV requests those here if this Court is to continue to deny the plaintiffs the right to practice their religion.

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teaching."). Article 18 of the Universal Declaration of Human Rights, which the United States endorsed as a member of the United Nations in 1948, contains a similar affirmation of the fundamental human right of freedom of religious observance and practice. See U.N. Universal Declaration of Human Rights, GA res. 217A, Dec. 10, 1948. The ICCPR and the Universal Declaration protect not just "belief" in the abstract, but the right to "manifest" that belief through practice. As the United Nations Human Rights Committee has explained, "[t]he freedom to manifest religion . . . in worship, observance, practice and teaching encompasses a broad range of acts" including "ceremonial acts" and "participation in rituals." See U.N. Hum. Rts. Comm., General Comment No. 22, at 4 (1993).

2. The injunction did not alter the status quo.

First, the Controlled Substances Act [hereinafter, CSA] does not–and did not before the issuance of the injunction–prohibit the plaintiffs from practicing their religion. Second, the 1971 Convention on Psychotropic Substances [hereinafter, Convention] does not–and did not before the issuance of the injunction–prohibit the religious use of the UDV's sacrament, hoasca. As this Court recognized, by passing RFRA Congress effectively amended both the CSA and the Convention to be consistent with RFRA's requirement that religious conduct be tolerated unless the government can demonstrate a compelling need to ban the particular conduct by the particular adherents. Therefore, the preliminary injunction reinstated the *status quo ante litem* by providing that the UDV members could practice their religion. The government had interfered with this religious practice when it seized the hoasca and threatened to prosecute the plaintiffs. The government's actions were in violation of RFRA because the government did not first demonstrate a compelling interest in burdening the plaintiffs' religious practice and, only if it could establish a compelling interest, proceed by the least restrictive means. It is this *status quo ante litem* that this Court should restore pending this appeal. See Valdez v. Applegate, 616 F.2d 570, 572 (10th Cir. 1980) (the public has an interest in preserving the status quo ante litem until the merits of a serious controversy can be fully considered by a trial court) (quotations omitted); see also Crowley v. Local No. 82, 679 F.2d 978, 995-96 (1st Cir. 1982), rev'd on other grounds, 467 U.S. 526 (1984)

("The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo."). **3. The government had the burden of going forward in this case.**

The district court–based on substantial evidence which this Court has not had the opportunity to review–found that the government failed to meet the burden RFRA imposes "to demonstrate that the burden furthers a compelling governmental interest and is the least restrictive means of furthering that interest." (Order at 4) The government cannot come before this Court and ask it to ignore the factual findings below unless the government can substantiate that those findings are not supported by the evidence. See Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709 (1986). The government has not done so here. This Court should be loath to accept the losing party's assertions that it should have won below without a careful review of the record.

4. The Convention does not control the religious use of hoasca.

This Court acknowledges, but then fails to contend with, the fact that it must consider the Convention in light of RFRA. Regardless of whether the Convention does or does not apply to hoasca, the government must meet its burden of showing a compelling interest in burdening this religion. See United States v. Hardman, 297 F.3d 1116, 1126 (10th Cir. 2002). The court below found that the government did not do so. This Court must perform this analysis first in order to determine whether the government has shown the likelihood of success on appeal.

Secondly, the district court's conclusion that the Convention does not include hoasca is *not* "in considerable tension" (Order at 4) with the language of the Convention. Articles 1(f) and 3 § 1 of the Convention regarding preparations must be considered with the list of controlled substances in the Convention. For example, peyote is a plant that is listed in Schedule I of the CSA, but is *not* included in Schedule I (or anywhere) in the Convention. This adds support to the district court's finding that plants are not included in the Convention and that, therefore, preparations from plants are not included.

The language of Articles 1(f) and 3 § 1 must also be considered with the statement in Article 32, § 4 of the Convention which makes special allowances for the use of plants "in magical and religious rites, by small clearly defined groups where there has been a history of use." The ceremonial use of hoasca existed for hundreds of years in the Amazon region and recognized religious use within the UDV existed a full decade before the opening of the Convention, and almost two decades before the United States ratified the Convention in 1980.[2]

This Court's (and the government's) interpretation of Article 32, § 4 is also at odds with the interpretation of Congress at the time of ratification of the Convention that it was making the reservation for peyote because "the inclusion of peyote itself as an hallucinogenic substance is possible in the future. See S. Exec. Rep. No. 96-29, Convention on Psychotropic Substances, 96th Cong., 2d Sess. 4 (1980).

This Court also erred in accepting the "plausible interpretation of the Convention by the executive" (Order at 5) in this case. The government cited to no authority to support its interpretation that the Convention controls preparations from plants containing DMT. The "executive" is a litigant here and its "interpretation" of the Convention's language is merely its argument to this Court. See Appalachian States Low-Level Radioactive Waste Comm's v. Pena, 126 F.3d 193, 198 (3d Cir. 1997) ("No deference is due an agency's litigation position."). This is the same argument the district court considered and rejected. In fact, the executive's position here that the Court should not consider the official Commentary is "in tension" with (and contrary to) its previous position that the Commentary does provide guidance to the meaning of the Convention. If this Court is to rely on the executive's opinion, it makes more sense to look to an opinion *not* written in the midst of this litigation. See 51 F.R. 17476, 17477 (1986) (DEA asserted that the Commentary "provides guidance to parties in meeting [their]

2 United Nations Convention on Psychotropic Substances, 1971, was opened for signature February 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175 (1971 Convention), entered into force internationally in 1976, and ratified by the United States in 1980.

obligation [under the Convention])."

When considering the "plausible interpretation" (Order at 5) of the executive, this Court should also consider the plausible interpretation of the executive's chosen representative to the very agency whose task it is to monitor and implement the Convention. The interpretation of Ambassador Herbert Okun, the United States member of the International Narcotics Control Board [hereinafter INCB] until May, 2002 is certainly worthy of this Court's consideration,[3] as is the opinion letter of the Secretary to the INCB which was written to a government agency in The Netherlands requesting the same information at issue here. The opinion letter from the INCB could not have been more clear: "No plants (natural materials) containing DMT are at present controlled under the 1971 Convention on Psychotropic Substances. Consequently, preparations (e.g. decoctions) made of these plants, including ayahuasca are not under international control and, therefore, nor subject to any of the articles of the 1971 Convention." Add. 4 at Ex. B to Plaintiffs' Opposition to Gov't Motion.

At the very least, this Court should review the Convention, the official Commentary, Congress's interpretation and the record below which also established that the United States permits the exportation of peyote, (a plant containing a Schedule I controlled substance–mescaline) to NAC groups in Canada, (Memorandum opinion, August 12, 2002, at 56) rather than taking the word of the losing party below.

5. The CSA must be considered in light of RFRA.

Again, this Court recognizes that RFRA "is incorporated into the CSA" (Order at 4) but then fails to apply RFRA here. The case this Court cites to support the proposition that the CSA's prohibitions are extremely broad is inapposite. United States v. Cannabis

3 The government argued that this Court should not consider the United States member to the INCB, Ambassador Okun's declaration (Add. 4 to plaintiffs' opposition to gov't motion to stay) because "it goes to the merits" but urged the Court to consider DEA employee Jacobson's and Department of Justice employee Dalton's declarations ostensibly because they do not. The government's distinctions belie the point here: the issue is whether the Convention applies. All three declarations–none of which were admitted into evidence at the hearing below–address this same point.

Buyers' Coop, 532 U.S. 483 (2001) is not relevant here because that case did not involve RFRA and the exceptional protections Congress afforded religions under that act.

Based on no review of the record–other than the snippets identified by the government–the Court holds that the district court's findings are "in tension with (if not contrary to)" (Order at 5) the CSA. Considerable time was spent during the hearing below discussing whether Congress made any findings regarding DMT and what it means for a substance to be placed into Schedule I of the CSA. Additionally Congress made no findings regarding hoasca, which is a plant decoction with a history of thousands of years of religious use. To determine whether the government has met its burden of likelihood of success on the merits, this Court must review that record. The district court fully analyzed the government's claims of health concerns and, applying RFRA, found that the government had not met the burden RFRA requires to justify the prohibition of plaintiffs' sacramental use of hoasca. Without a review of that record, this Court cannot assume those findings were clear error. See Davis v. Mineta, 302 F.3d 1104, 1110-1111 (10th Cir. 2002) (appellate court examines the district court's underlying factual findings for clear error).

6. The UDV is different from every previous case where courts have rejected religious exemptions.

The cases the Court cites for the proposition that courts "have routinely rejected religious exemptions from laws regulating controlled substances employing tests similar to that required by RFRA," (Order at 5), and the cases decided after enactment of RFRA can be easily distinguished from the instant case. Every one of the cases this Court cites involved marijuana use and in most cases, daily and continuous marijuana use.

The differences between hoasca and marijuana should be enough to set them apart. As the government admitted in its Brief in Opposition to Preliminary Injunction, "[n]ot all controlled substances present identical concerns." Id. at 41. See, e.g., United States v. Rush, 738 F.2d 497, 513 (1st Cir. 1984), in which the court commented that

"accommodation of religious freedom is practically impossible with respect to the marijuana laws . . . ."; State v. Olsen, 315 N.W. 2d (Iowa 1982), in which the court characterized marijuana as "'perhaps the drug most readily accessible to and widely used by young people,'" Id. at 8 (quoting Iowa Drug Abuse Study Comm. Final Report, 64th G.A. 1 (1971)). No such evidence exists for hoasca. Furthermore, in none of those cases was a record developed that comes close to the extensive record below regarding how the UDV uses its sacramental hoasca or how the UDV protects its hoasca (and its members).

Moreover, as Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, all of whom were in the majority in Employment Div. v. Smith, 494 U.S. 872 (1990), wrote in dissent in Board of Education v. Grumet, 512 U.S. 687 (1994):

> Not every religion uses wine in its sacraments, but that does not make an exemption from Prohibition for sacramental wine use impermissible, accord, Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S., at 561, n.2, 113 S. Ct., at 2241, n. 2 (SOUTER, J., concurring in judgment), nor does it require the State granting such an exemption to explain in advance how it will treat every other claim for dispensation from its controlled-substances laws. Likewise, not every religion uses peyote in its services, but we have suggested that legislation which exempts the sacramental use of peyote from generally applicable drug laws is not only permissible, but desirable, see Employment Div., Dept of Human Resources of Ore. v. Smith, 494 U.S. 872, 890, 110 S. Ct. 1595, 1606, 108 L.Ed.2d 876 (1990), without any suggestion that some "up front" legislative guarantee of equal treatment for sacramental substances used by other sects must be provided. The record is clear that the necessary guarantee can and will be provided, after the fact, by the courts. See, e.g., Olsen v. Drug Enforcement Admin., supra (rejecting claim that peyote exemption requires marijuana exemption for Ethiopian Zion Coptic Church); Olsen v. Iowa, 808 F.2d 652 (CA8 1986) (same); Kennedy v. Bureau of Narcotics and Dangerous Drugs, 459 F.2d 415 (CA9 1972) (accepting claim that peyote exemption for Native American Church requires peyote exemption for other religions that use that substance in their sacraments).

Id. at 747 (emphasis added). One can extract from Justice Scalia's dissent in Grumet his view (in which Justices Rehnquist and Thomas joined) that if one religion receives an exemption, and a similarly-situated religion does not, it will fall to the courts to accommodate other religions, such as the UDV. Justice Souter, concurring in Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993), said the same, although his

constitutional threshold might be somewhat lower than Justice Scalia's:

> A secular law, applicable to all, that prohibits consumption of alcohol, for example, will affect members of religions that require the use of wine differently from members of other religions and nonbelievers, disproportionately burdening the practice of, say, Catholicism or Judaism. Without an exemption for sacramental wine, Prohibition may fail the test of religion neutrality.*
>
> ....
>
> [*f.n.2] Our cases make clear, to look at this from a different perspective, that an exemption for sacramental wine use would not deprive Prohibition of neutrality. Rather, "[s]uch an accommodation [would] 'reflec[t] nothing more than the governmental obligation of neutrality in the face of religious differences.' "

508 U.S. at 561, 561 n.2 (Souter, J., concurring) (brackets in original). What these statements, and the decision in Smith, establish is that the Supreme Court would either insist on application of the "compelling state interest test," or would require that the courts ensure equal treatment of similarly situated religions that use similar substances, or both. Because the government has conceded the applicability of RFRA to the federal government, no doubt exists that this Court must apply a compelling state interest/least restrictive means test here. This Court cannot grant this stay without performing the analysis RFRA requires to determine whether the government meets the standards for a stay set out in McClendon, 79 F.3d 679 (10th Cir. 1996).

The government and the Court are simply wrong in asserting that permission for sacramental use of peyote was granted only after RFRA and suggesting that Congress had doubts about the sufficiency of RFRA to grant an exemption. The peyote exception for the Native American Church existed for many years before RFRA, through the regulatory exemption, 21 C.F.R. § 1307.31, provided in the rules by which the DEA implements the CSA. It was there at the CSA's inception.[4]

Congress passed the American Indian Religious Freedom Act Amendments, 42

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4 The Food and Drug Administration originally promulgated the regulation. See 31 Fed. Reg. 565 (1966) (proposed rule; no exemption proposed or discussed); 31 Fed. Reg. 4679 (1966) (exemption included in final rule), when it was re-promulgated by the Bureau of Narcotics and Dangerous Drugs, see 36 Fed. Reg. 4928, 4950 (1971) (proposed rule); 36 Fed. Reg. 7776, 7802 (1971) (final rule), or when it was redesignated, see 38 Fed. Reg. 26,609 (1973).

U.S.C. § 1996– in reaction to Employment Div., Dept. Of Human Resources v. Smith, 494 U.S. 872 (1990)–to insure that *all* Indians could use peyote in a religious context without fear of prosecution even in those states that had not enacted laws in conformance with RFRA.

7. The irreparable harm to the plaintiffs outweighs any harm to the defendants.

The Court's balancing of harms fails to consider that this litigation involves the right of the plaintiffs to *practice* their religion, as argued in ¶ 1 above. The sacramental use of hoasca is central and essential to UDV's religion. This Court is effectively denying the right to practice religion to these plaintiffs even though the government has conceded for the purposes of the preliminary injunction that this is a valid religion.

The Court's reference to burdensome supervision and management is somewhat perplexing. The "burdensome" order came about through the government's insistence that the plaintiffs must adhere to the requirements of the Code of Federal Regulations for the importation and distribution of Schedule I Controlled Substances. The government and the plaintiffs spent two months attempting to create a preliminary injunction that both sides could live with–even though neither side agreed with the final product. At the end of this process the government complained to this Court that the district court failed to burden the UDV as much as the government wanted. Gov't Motion at 17. Throughout this process, the plaintiffs consistently argued that these regulations were unconstitutionally entangling.[5] Despite this, the plaintiffs have agreed to adhere to all the "burdensome" requirements (the district court adopted most of the conduct the government requested) for the purposes of the preliminary injunction and in a show of good faith. It is hardly fair to deny the plaintiffs the right to practice their religion

5 In a letter to the district court (at the court's request) the plaintiffs wrote that if the government wishes to regulate UDV's importation, possession and use of hoasca, it must choose the "least entangling" alternatives. Lanner v. Wimmer, 662 F.2d 1349, 1359 (10th Cir. 1981).

because they are willing to abide by the regulations the government insisted upon. If the regulations are excessively burdensome, it is the regulations that must go–not the religion.

The importers, manufacturers and researchers of Schedule I drugs are required to abide by extensive regulations. The DEA is not heard to say that those regulations are so burdensome that no importation, manufacture or research will be permitted. For this Court to say that a religion should cease to exist because the government's regulation of it is too extensive is to turn RFRA into a weapon against religion, rather than a protection for religion.

Moreover, the UDV has always adhered to very strict rules of its own to secure the hoasca and to protect the health and safety of its members. For example, the requirement of a locked refrigerator in a locked room is not new–the UDV has always stored its sacrament in a locked refrigerator in a locked room; since learning of possible contra-indications of certain prescription drugs with hoasca, the UDV has so notified its members; the UDV has always kept records of the hoasca imported, which UDV congregations received it and when, which members attended services, etc. Finally, in balancing harms, this Court has failed to consider the fact that a stay is simply not necessary here. The government does not dispute that in the fourteen years the UDV religion has been practiced in the United States, during which its members have imported and used hoasca, not one drop of hoasca has ever been diverted to non-religious use. Hr'g Tr. at 51. It is also undisputed that during the fourteen years the UDV religion has been practiced in the United States, no serious or lasting adverse health consequences have been connected to its members' use of hoasca. Hr'g Tr. at 199-200.[6]

CONCLUSION

The plaintiffs respectfully request this Court to reconsider its grant of the government's motion for a stay for all the reasons stated herein and in the plaintiffs'

6 Additionally, during the decades the government has permitted hundreds of thousands of Native American Church members to possess and distribute a Schedule I controlled substance–peyote and mescaline–no health or diversion problems have resulted from that use. Hr'g. Tr. at 277-78, 1420.

opposition to the government's motion and deny the government's motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent this 18th day of December, 2002: by Federal Express to Matthew Collette and Michael J. Singer at the address listed below:

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and hand-delivered to:
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