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Supplementary Material

Chapter 11: The Contemporary Era—Individual Rights/Religion/Free Exercise

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**Gonzales v. O Centro Espirita Beneficiente Uniao Do Ve, 546 U.S. 418** (2006)

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*O Centro Espírita Beneficiente União do Vegetal (UDV) is a small religious sect whose members believe they receive communion by drinking hoasca, a tea partly made from psychotria viridis, a plant native to Brazil. Psychotria viridis contains dimethyltryptamine, which is both the last question in most spelling bees and an hallucinogen banned by Schedule I of the Controlled Substances Act. In 1999, the Justice Department threatened to prosecute UDV members for importing small amounts of hoasca. The UDV asked a lower federal court for an injunction against Attorney General Alberto Gonzales, prohibiting prosecution on the ground that group members had a right under the Religious Freedom Restoration Act (RFRA) to drink the hoasca. That measure, which had been declared unconstitutional in* Employment Division v. Smith *(1990), required the federal government to have a compelling interest in order to enforce laws that burdened religious practices. The federal district court agreed that the UDV could not be prosecuted consistently with RFRA. That decision was sustained by the Court of the Appeals for the Tenth Circuit. The United States appealed to the Supreme Court.*

*Several religious organizations, libertarian public interest grounds, and civil liberties associations filed amicus briefs urging the Supreme Court to uphold the injunction against government prosecution. The brief for numerous religious and civil rights organizations declared,*

> *Legislative accommodations of religious exercise like RFRA are the exact opposite of a "frank usurpation" of the judicial function; they are consistent with this Court's recent insistence that such accommodations are principally a legislative function. Nor do broader accommodations like RFRA purport to amend the Constitution apart from the Article V process. Nor is it relevant (at all) under the Separation of Powers that RFRA imposes a strict scrutiny standard to some applications of prior federal statutes.*

*The brief for the Torts Claimant Committee urged the Supreme Court to declare RFRA unconstitutional as applied to the federal government. The brief asserted,*

> *When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides. The effect of RFRA is to advance religion across all policies, the vast majority of which Congress never considered. It is not permissible accommodation, but rather a blind handout.*

*The Supreme Court unanimously declared that, as a matter of statutory interpretation, RFRA protected the right of the UDV to drink hoasca. Chief Justice Roberts pointed out that the congressional tendency to make other exceptions to drug laws for Native American religious practices undercut claims that a compelling interest warranted a "no exceptions" policy in this case. No justice thought RFRA might be unconstitutional even when limited only to federal actions. How do you explain the difference between* O Centro *and* Employment Division v. Smith, *which in similar circumstances rejected a constitutional right? Do any policy preferences seem relevant or was this an instance where justices of all ideological persuasions based their vote on why they believed was compelled by law?*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

In *Employment Div., Dept. of Human Resources of Ore. v. Smith* (1990), this Court held that the Free Exercise Clause of the First Amendment does not prohibit governments from burdening religious practices through generally applicable laws. . . .

Congress responded by enacting the Religious Freedom Restoration Act of 1993 (RFRA), which adopts a statutory rule comparable to the constitutional rule rejected in *Smith*. Under RFRA, the Federal Government may not, as a statutory matter, substantially burden a person's exercise of religion, "even if the burden results from a rule of general applicability." The only exception recognized by the statute requires the Government to satisfy the compelling interest test—to "demonstrat[e] 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."

. . .

The Government contends that the [Controlled Substances] Act's description of Schedule I substances as having "a high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use . . . under medical supervision," by itself precludes any consideration of individualized exceptions such as that sought by the UDV. The Government goes on to argue that the regulatory regime established by the Act—a "closed" system that prohibits all use of controlled substances except as authorized by the Act itself, "cannot function with its necessary rigor and comprehensiveness if subjected to judicial exemptions." . . .

RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government's categorical approach. RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person"—the particular claimant whose sincere exercise of religion is being substantially burdened. . . .

Under the more focused inquiry required by RFRA and the compelling interest test, the Government's mere invocation of the general characteristics of Schedule I substances, as set forth in the Controlled Substances Act, cannot carry the day. It is true, of course, that Schedule I substances such as DMT are exceptionally dangerous. Nevertheless, there is no indication that Congress, in classifying DMT, considered the harms posed by the particular use at issue here—the circumscribed, sacramental use of *hoasca* by the UDV. . . .

This conclusion is reinforced by the Controlled Substances Act itself. The Act contains a provision authorizing the Attorney General to "waive the requirement for registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety." The fact that the Act itself contemplates that exempting certain people from its requirements would be "consistent with the public health and safety" indicates that congressional findings with respect to Schedule I substances should not carry the determinative weight, for RFRA purposes, that the Government would ascribe to them.

And in fact an exception has been made to the Schedule I ban for religious use. For the past 35 years, there has been a regulatory exemption for use of peyote—a Schedule I substance—by the Native American Church. In 1994, Congress extended that exemption to all members of every recognized Indian Tribe. Everything the Government says about the DMT in *hoasca*—that, as a Schedule I substance, Congress has determined that it "has a high potential for abuse," "has no currently accepted medical use," and has "a lack of accepted safety for use . . . under medical supervision,"—applies in equal measure to the mescaline in peyote, yet both the Executive and Congress itself have decreed an exception from the Controlled Substances Act for Native American religious use of peyote. If such use is permitted in the face of the congressional findings . . . for hundreds of thousands of Native Americans practicing their faith, it is difficult to see how those same findings alone can preclude any consideration of a similar exception for the 130 or so American members of the UDV who want to practice theirs. . . .

. . . [I]f any Schedule I substance is in fact *always* highly dangerous in any amount no matter how used, what about the unique relationship with the Tribes justifies allowing their use of peyote? Nothing about the unique political status of the Tribes makes their members immune from the health risks the

Government asserts accompany any use of a Schedule I substance, nor insulates the Schedule I substance the Tribes use in religious exercise from the alleged risk of diversion.

. . .

The Government repeatedly invokes Congress' findings and purposes underlying the Controlled Substances Act, but Congress had a reason for enacting RFRA, too. Congress recognized that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise," and legislated "the compelling interest test" as the means for the courts to "strik[e] sensible balances between religious liberty and competing prior governmental interests."

We have no cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one. Indeed, the very sort of difficulties highlighted by the Government here were cited by this Court in deciding that the approach later mandated by Congress under RFRA was not required as a matter of constitutional law under the Free Exercise Clause. But Congress has determined that courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue. Applying that test, we conclude that the courts below did not err in determining that the Government failed to demonstrate, at the preliminary injunction stage, a compelling interest in barring the UDV's sacramental use of *hoasca*.

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