Roy S. Haber
Roy S. Haber, P.C.
570 East 40th Street
Eugene, Oregon 97405
Telephone (541) 485-6418
Cell (541) 913-6397

Gilbert Paul Carrasco
Willamette University
College of Law
245 Winter Street, S.E.
Salem, Oregon 97301
Telephone (503) 370-6432

Donald H. Marmaduke
Tonkon Torp LLP
1600 Pioneer Tower
888 S.W. Fifth Ave.
Portland, Oregon
Telephone (503) 802-2003

Counsel for Plaintiffs

IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

THE CHURCH OF THE HOLY LIGHT OF THE QUEEN, *et al.*, Plaintiffs, v. MICHAEL B. MUKASEY, *et al.*, Defendants.	CIV. NO. 08-3095-PA TRIAL BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION AND FACTUAL HISTORY OF THE CASE

This is a suit brought by the Christian CHURCH OF THE HOLY LIGHT OF THE QUEEN ("CHLQ") (a.k.a. "The Santo Daime Church") of Ashland, Oregon, a religion with origins in the Amazon Rainforest, its minister ("Padrinho"), Jonathan Goldman, and the other named plaintiffs who are members of the Santo Daime faith and reside in Oregon. Plaintiffs seek injunctive and declaratory relief against the defendants to enjoin them from enforcing the Controlled Substances Act ("CSA"), 21 U.S.C. § 801 *et seq.*, in such a manner as to prevent the plaintiffs from importing and ingesting the Daime Tea,[1] a central element of their religious exercise. These restrictions on plaintiffs' religious exercise and differential treatment between religious denominations violates the Religious Freedom Restoration Act ("RFRA") of 1993, 42 U.S.C. §§ 2000bb *et seq*., and the Fifth Amendment to the Constitution of the United States. Furthermore, as discussed below, the ongoing harms suffered by plaintiffs demonstrate that their claims are ripe for review and that they need not exhaust any administrative remedies. The government argues that it is not the role of this Court to enforce civil and constitutional rights in this sphere. However, as the Supreme Court held in the related case of *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006):

> 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. See [Employment Division, Dept. of Human Resources of Oregon v.] Smith, 494 U.S. [872], at 885-890, 110 S. Ct. 1595 [(1990)]. But Congress has determined that courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the

---

[1] The Daime Tea is brewed in the Amazon Rainforest in Brazil from two plants that are native to that region. It contains trace amounts of dimethyltryptamine ("DMT"), which is a Schedule I Controlled Substance, but neither the Daime Tea itself nor its component plant sources are listed as controlled substances. *See* COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970, Title II, 21 U.S.C. § 802 (1996).

particular practice at issue.

546 U.S. 418, 439 (2006).

As plaintiffs will demonstrate at trial, they are members of the Santo Daime Church and hold the sincere religious belief that ingestion of the Daime Tea is a central element of their religious exercise. The Santo Daime Church originated in the early 1920s in the Amazon region of Brazil. Its founder, Mestre Raimundo Irineu Serra, worked as a rubber tapper in the Amazon forest and became familiar with several Indian groups living in both Brazil and Peru. The religious practices of many indigenous tribes in the Amazon have for thousands of years involved the brewing and drinking of a sacramental tea often called "*ayahuasca*," a Quechua term meaning "vine of the souls." Plaintiffs believe that the sacramental Tea contains a divine being of the forest who is the same being as Christ, and who reveals His doctrines and teachings through hymns, which are the liturgy of the Santo Daime religion. The Holy Daime Tea is not simply the sacrament, but embodies the Divine and is itself considered and prayed to as the Deity.

The Daime Tea is prepared by boiling the bark and stems of *Banisteriopsis caapi* together with the leaves of another plant, *Psychotria viridis*. The preparation of the Daime Tea is undertaken in very strict rituals involving singing and prayer. The Tea is unique in that its pharmacological activity is dependent on a synergistic interaction between the active alkaloids in both plants. The leaves of the *Psychotria viridis* contain minute amounts of the indole alkaloid, DMT. DMT is not itself active when ingested orally because DMT is metabolized in the stomach by monoamine oxide ("MAO") and, therefore, never reaches the bloodstream. However, the bark of the *Banisteriopsis caapi* contains harmine which is an MAO inhibitor; the interaction between the substances in these two plants is the basis for the physiological action of

the Tea.

When properly prepared and ingested, the Daime Tea provides a direct communion between the plaintiffs' inner spirit and the Divine. The vine and leaf are not dissimilar to the bread and wine consumed in Catholic and some Protestant churches, which can provide a direct experience with Christ. As described in detail, *infra,* the Daime Tea has no harmful effect on plaintiffs. In fact, as recognized by the Brazilian Government's CONFEN[2] Report:

> The followers of the sects appear to be calm and happy people. Many of them attribute family reunification, regained interest in their jobs, finding themselves and God, etc., to the religion and the tea. . . . The ritual use of the tea does not appear to be disruptive or to have adverse effects upon the social interactions of the various sects' followers. On the contrary, it appears to orient them towards seeking social contentment in an orderly and productive manner.

Furthermore, there is no realistic danger of illicit diversion of the Daime Tea for non-religious use. In fact, there is no reason whatsoever — much less a compelling governmental interest —that can justify the government's position that the Church's sacrament must be banned.

In 1993, plaintiffs in this case were authorized by the Santo Daime Mother Church leaders in Brazil to provide the Daime Tea at Church services. The Santo Daime Church is incorporated as a non-profit corporation in Oregon and has tax-exempt status as a § 501(c) (3) organization under the Internal Revenue Code. It is also recognized as a Church pursuant to § 509(a) (1) and § 170 (b) (1) (a) (i) of the Internal Revenue Code.

On May 20, 2000, defendants intercepted a delivery of Daime Tea legally shipped from Brazil to plaintiff Goldman. Defendants surveilled a clandestine delivery of the Tea to Mr. Goldman, arrested him, and took him to jail.[3] According to the government, the reason for the

---

[2] Brazilian Federal Narcotics Council (CONFEN).

[3] One day later, a shipment of *hoasca* Tea (a tea made from the same ingredients as the Daime Tea) was being delivered to the UDV in New Mexico, was intercepted by defendants, and

arrest is that the sacred Tea contains trace amounts of DMT. No charges were ever filed against Mr. Goldman, but the government defendants continue to hold the Damocles' sword of threat of prosecution over plaintiff Goldman's and other Church members' heads and have repeatedly refused requests from plaintiffs and from members of Congress to agree not to prosecute Church members who use the Holy Daime Tea only at the organized services.

As described in greater detail, *infra*, defendants' laws and policies continue to cause ongoing irreparable injury to the plaintiffs. Plaintiffs have been informed by a U.S. Attorney that "I have not and cannot provide assurances to you or your client that this office will not prosecute him for his conduct." To date, plaintiffs cannot legally import or use the Daime Tea in their religious ceremonies.

II. ARGUMENT

A. This Court has Jurisdiction to Hear and Determine the Merits of Plaintiffs' Claims.

Jurisdiction is conferred on this court by 28 U.S.C. §§ 1331 and 1343 (a) (3)-(4), because the case arises under the Constitution and laws of the United States and seeks to redress the deprivation of rights, privileges, and immunities secured to plaintiff by the First, Fourth, and Fifth Amendments to the Constitution of the United States, and by the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 USC §§ 2000bb-2000bb (4), as well as to secure equitable or other relief under Act of Congress providing for the protection of civil rights. This court has authority pursuant to 28 U.S.C. §§ 2201-2202 and 5 U.S.C. § 706, to grant declaratory relief and to issue preliminary and permanent injunctions, and pursuant to 28 U.S.C. §§ 2201-

---

that Church's leader was threatened with prosecution. *See,* discussion of the UDV Church in *Gonzales v. O Centro,* 546 U.S. 418.

2202 and 5 U.S.C. § 706, to grant declaratory relief and to issue preliminary and permanent injunctions.

The defendants have challenged this court's jurisdiction to hear this case, claiming that the issues are not ripe for adjudication and that the plaintiffs must first exhaust administrative remedies. This court initially deferred rulings on these issues by rejecting defendants' argument at the hearing on Plaintiffs' Motion for a Temporary Restraining Order, at which defendants sought dismissal of the Complaint. Defendants then filed a formal Motion to Dismiss, which this court indicated it will address after trial. This court also instructed plaintiffs not to file a response to defendants' Motion to Dismiss. Because of this court's rulings and admonitions on these issues, plaintiffs will not undertake an analysis of them in this Trial Brief.

B. The Government's Prohibition on the Importation and Use of the Daime Tea Violates the Religious Freedom Restoration Act by Creating a Substantial Burden on the Practice of the Santo Daime Religion that is not Justified by Any Compelling Interest, and Is Not the Least Restrictive Means of Achieving Any Governmental Interest.

1. *RFRA standard.*

The Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.,* as amended by the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"),[4] specifically provides:

> (a) In general: Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception: Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person

[4] The RLUIPA amended RFRA's definition of "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb-2 (4); 42 U.S.C. § 2000cc-5 (7) (A).

> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.

Id. at § 2000bb-1 (a) and (b). A person whose religious exercise is burdened in violation of this section may assert that violation as "a claim or defense . . . and obtain appropriate relief against a government." *Id.* at § 2000bb-1 (c).

The RFRA was enacted in response to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). While RFRA was held to exceed Congress' authority in regulating the States in *City of Boerne v. Flores*, 521 U.S. 507 (1997), *Gonzales v. O Centro* establishes that RFRA is applicable to the federal defendants in this case. The RFRA restores the exacting standard applied prior to the Supreme Court's decision in *Smith, supra*, placing the burden of proof on the government to justify its restrictions on religious exercise. *See Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) ("The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden"); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141 (1987) (governmental laws burdening religions "must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest"); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest"); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion").

Congress noted in adopting RFRA that "[t]he compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty

and competing prior governmental interests." 42 U.S.C. § 2000bb (a) (5).

As will be demonstrated at trial, the criminalization of the Holy Daime Tea has a devastating effect on the Santo Daime Church. In the UDV case, the government defendants argued there were two "compelling interests" that justify banning the Tea: (1) the potential ill health effects that might be caused to plaintiffs and, in turn, the public; and (2) the risk of "diversion" of the Daime Tea to illicit markets. These are the identical claims being made by the defendants in this case. *See* Beane to Haber Letter (Sept. 15, 2008). As the Supreme Court held in *O Centro,* none of these justifications withstands the rigorous scrutiny mandated by RFRA.

2. *The prohibition on the importation and use of the Daime Tea substantially burdens the Church's religious exercise.*

There can be no question that plaintiffs' beliefs and practices are religious in nature. The Supreme Court has defined religion as any sincere and meaningful belief that occupies in the holder a place that is equivalent to the position that God has in more traditional religions. *United States v. Seeger*, 380 U.S. 163, 176 (1965). The Santo Daime Church has existed for many years in many countries around the world. There is also no dispute about the sincerity of the Church members' belief in the Daime Tea as a sacrament.

In the UDV litigation, the government conceded that banning the sacrament for the UDV works a substantial burden on them. *Gonzales v. O Centro*, 546 U.S. at 426. *See Callahan v. Woods*, 736 F.2d 1269, 1272-73 (9th Cir. 1984) ("Focusing on the degree of the interference factor, it is clear that when the government totally precludes religious conduct by imposing criminal sanctions, the burden weighs at its heaviest"). Applying RFRA, the Ninth Circuit has recently held:

Under RFRA, a "substantial burden" is imposed only when individuals are forced

> to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert* [*v. Verner*, 374 U.S. 398 (1963)]) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*).

Navajo Nation v. U.S. Forest Service, 535 F.3d 1058, 1069-70 (9th Cir. 2008) (emphasis added). *See also Greene v. Solano County Jail*, 513 F.3d 982, 988 (9th Cir. 2008) ("We have little difficulty in concluding that an outright ban on a particular religious exercise is a substantial burden on that religious exercise").

Because ingestion of the Holy Daime Tea is at the center of the Church's religious practice, criminalizing the importation, possession, and ingestion of the Daime Tea criminalizes the Church members' ability to practice their religion. The Santo Daime Church cannot hold religious ceremonies in the absence of the Holy Sacrament. A government law or regulation that causes a party to forgo a central religious practice imposes a substantial burden on the religion. *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 140-141 (1987).

No heavier burden on the Santo Daime religion is possible. The Church and its members are currently forced underground, with the attendant fear of arrest, imprisonment, confiscation of their Holy Sacrament, loss of professional licenses, and loss of their homes if they conduct services at home. This is an intolerable burden on their religious freedom. As described, *supra,* the government's arrest of plaintiff Goldman and continuing threats to prosecute create a significant, ongoing fear in plaintiffs that they will be arrested, prosecuted, and imprisoned if they continue their good faith efforts to practice their religion. This is a substantial burden on religious exercise.

Each of the named individual plaintiffs will testify at trial about their specific beliefs and practices that have been burdened. Examples include a highly respected physician in southern Oregon, pseudonymously named in this case, "Mary Row," who fears arrest if her identity were

revealed, as well as the threat to her license to prescribe controlled substances.[5] Plaintiffs understandably fear retaliation by defendants, persecution for engaging in protected religious practice, and consequent loss of professional licenses. Defendants' criminalization of plaintiffs' use of the Daime Tea has the effect of marginalizing plaintiffs and of alienating them from their families and acquaintances. Plaintiffs have had to limit their religious practices as a result of defendants' unlawful actions, causing plaintiffs to continue to live in fear. Defendants' continued violation of RFRA is in direct contravention of the Supreme Court's controlling and unanimous decision in *O Centro.*[6]

Likewise, the ban on the plaintiffs' ability to bring the sacred Daime Tea from its religious origins in Brazil substantially burdens their religious exercise. As a simple matter of logic, without the Daime Tea there can be no ceremonies involving the sacrament. Unlike other controlled substances, the Daime Tea cannot be produced in Oregon. It is brewed in a religious ceremony from plants that grow in Brazil. The preparation and distribution itself is imbued with religious significance. As noted, *supra*, a religious practice must only be "sincere," and not "central," to be protected under RFRA. *See Smith*, 494 U.S. at 887, 110 S. Ct. 1595 ("Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating

---

[5] This fear is reasonable. These same defendants threatened such action in the "assisted suicide" case, *State of Oregon v. Ashcroft*, Civ. 01-1647JO, wherein Judge Jones issued a temporary restraining order on November 8, 2001. Exhibit "6C," Plaintiffs' Motion for Temporary Restraining Order. Ms. Row will be pleased to provide to this court under seal her real name, her address, the institutions of higher learning wherein she obtained her degrees, and the hospitals with which she has been and currently is associated.

[6] Under virtually identical circumstances involving threats of prosecution of UDV Church members in New Mexico, Judge Parker found that the threat of prosecution created significant harm, and issued a preliminary injunction. *O Centro Espirita Beneficente União Do Vegetal v. Ashcroft*, 282 F. Supp. 2d 1236 (D.N.M. 2002), *aff'd*, *O Centro Espirita Beneficente União Do Vegetal v. Ashcroft*, 342 F.3d 1170 (10th Cir. 2003), *aff'd on reh'g en banc*, *O Centro Espirita Beneficente União Do Vegetal v. Ashcroft,* 389 F.3d 973 (10th Cir. 2004), *aff'd*, *Gonzales v. O Centro*, 546 U.S. 418.

the relative merits of differing religious claims'" (*quoting United States v. Lee*, 455 U.S. 252, 263 n. 2, 102 S. Ct. 1051, 71 L.Ed.2d 127 (1982) (Stevens, J. concurring))). Without transporting the Daime Tea to Oregon, the plaintiffs' religious practices are impossible.

In *O Centro*, the Supreme Court recognized and upheld the right to import such substances intended for a religious purpose. *See* 546 U.S. at 427 (affirming "preliminary injunction prohibiting the Government from enforcing the Controlled Substances Act with respect to the UDV's importation and use of *hoasca*. The injunction requires the church to import the tea pursuant to federal permits. . . ." (emphasis added)). Importation was at issue as much as use in *O Centro*: "the UDV seeks to import and use a tea brewed from plants, ..." *Id.* at 438 (emphasis added).

3. *The Defendants lack any compelling government interest that justifies the banning of the Daime Tea for religious use.*

It is anticipated that the defendants will not challenge the fact that prohibiting a religious sacrament constitutes a substantial burden on plaintiffs' religious exercise, but rather will state that they possess a "compelling interest" in prohibiting the importation and use of controlled substances. However, this position was presented to, and rejected by, the Supreme Court. The government is arguing that it has a "compelling interest" (1) in protecting members of the Santo Daime Church from imbibing the sacrament because the Daime Tea is harmful to adherents; and (2) in preventing the sacred Daime Tea from being "diverted" to non-religious use. Defendants cannot establish now — as they were unable to establish in the UDV case — that the sacramental use of the Daime Tea causes any ill health effects. Similarly, the government cannot establish that permitting the controlled importation and distribution of the Daime Tea creates a threat of significant illegal diversion into the illicit drug markets in the United States. None of the

governments' arguments withstands scrutiny, legally or factually.

> The Supreme Court has described the application of the compelling interest test as:
>
> > the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "'interests of the highest order'" and must be narrowly tailored in pursuit of those interests. *McDaniel v. Paty*, 435 U.S. [618], at 628, 98 S. Ct., at 1328 [(1978)], quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S. Ct. 1526, 1533, 32 L. Ed. 2d 15 (1972). The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not "water[ed] . . . down" but "really means what it says." *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S., at 888, 110 S. Ct., at 1605.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) (emphasis added). *O Centro* summarized the well-established principles of the compelling interest standard developed over decades. In *Sherbert v. Verner,* 374 U.S. 398, 406 (1963), the Court stated, "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, 'only the gravest abuses [by religious adherents], endangering paramount interests, give occasion for permissible limitation [on the exercise of religion].'" In *Yoder*, 406 U.S. at 215, the Court emphasized that the government's asserted interest must be truly paramount. "The essence of all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." Moreover, the government bears the burden of proving the existence of a compelling interest. 42 U.S.C. § 2000cc-2 (b).

a. *A "categorical" interest cannot satisfy RFRA's strict scrutiny standard.*

In *O Centro*, the same defendants, addressing the same issue with the same religious use of the same controlled substance, argued that the Controlled Substances Act categorically prohibited any and all uses of DMT. They argued that the CSA "'cannot function with its necessary rigor and comprehensiveness if subjected to judicial exemptions.' Brief for Petitioners

18."[7] 546 U.S. at 429. In rejecting the defendants' categorical approach, the Court ruled in a unanimous opinion by Chief Justice Roberts:

> 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.

546 U.S. at 435. Earlier in its opinion, it admonished, "[T]his Court look[s] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[s] the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 431. The government's position is also weakened by the fact that another religious exemption exists:

> The well-established peyote exception also fatally undermines the Government's broader contention that the Controlled Substances Act establishes a closed regulatory system that admits of no exceptions under RFRA. The Government argues that the effectiveness of the Controlled Substances Act will be "necessarily . . . undercut" if the Act is not uniformly applied, without regard to burdens on religious exercise. Brief for Petitioners 18. The peyote exception, however, has been in place since the outset of the Controlled Substances Act, and there is no evidence that it has "undercut" the Government's ability to enforce the ban on peyote use by non-Indians.

Id. at 434-45.

Rather, the Supreme Court held, courts must analyze whether the government has a compelling interest in refusing to exempt the specific religious activity of the specific party. In discussing an exemption to compulsory education laws (which the Court held was of "paramount" importance generally), the Court "explained that the State needed 'to show with more particularity how its admittedly strong interest . . . would be adversely affected by granting an exemption to the Amish.'" 546 U.S. at 431 (*quoting Wisconsin v. Yoder*, 406 U.S. 205, 236

---

[7] The Court summarized the defendants' position: "According to the Government, there would be no way to cabin religious exceptions once recognized, and 'the public will misread' such exceptions as signaling that the substance at issue is not harmful after all. . . . Under the Government's view, there is no need to assess the particulars of the UDV's use or weigh the impact of an exemption for that specific use, because the Controlled Substances Act serves a compelling purpose and simply admits of no exceptions." *Id.*

(1972) (emphasis in original)). This applies with equal force to the Controlled Substances Act.[8]

The Ninth Circuit applied the holding of *O Centro* in *United States v. Vasquez-Ramos*, 531 F.3d 987 (9th Cir. June 27, 2008), recognizing that "[t]he Supreme Court rejected the government's primary contention on appeal — 'that [the government] has a compelling interest in the uniform application of the Controlled Substances Act, such that no exception to the ban on the use of the hallucinogen can be made to accommodate the sect's sincere religious practice.'" *Id.* at 992 (*quoting* 546 U.S. at 423).

Here, likewise, the burden is on the government to demonstrate, with regard to this small Church's practices, that it has a compelling interest to prevent the Church and its members from engaging in their sacramental use of the Daime Tea.[9] It is noteworthy that the Supreme Court emphasized the fact that "the very reason Congress enacted RFRA was to respond to a decision denying a claimed right to sacramental use of a controlled substance" — peyote.[10] *Id.* at 537.

---

[8] The RFRA amends all previous federal legislation. *See Rweyemamu v. Cote*, 520 F.3d 198, 202 (2d Cir. 2008) ("RFRA is unusual in that it amends the entire United States Code. *See* 42 U.S.C. § 2000bb-3 (a) ('This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise . . .'); . . . At bottom, the import of RFRA is that, whatever other statutes may (or may not) say, 'the Federal Government may not, as a statutory matter, substantially burden a person's exercise of religion.' *O Centro Espirita*, 546 U.S. at 424").

[9] *See* Clark, *Guidelines for the Free Exercise Clause,* 83 HARV. L. REV. 327, 330-331 (1969) ("The purpose of almost any law can be traced back to one or another of the fundamental concerns of government: public health and safety, public peace and order, defense, revenue. To measure an individual interest directly against one of these rarefied values inevitably makes the individual interest appear the less significant"); Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 2 (1943) ("When it comes to weighing or valuing claims or demands with respect to other claims or demands, we must be careful to compare them on the same plane . . . [or else] we may decide the question in advance in our very way of putting it").

[10] Similarly, the sacramental use of wine was exempted during Prohibition, even though there was infinitely more evidence demonstrating the harm of abuse of alcoholic beverages than of the Daime Tea. *See* National Prohibition Act, Pub. L. No. 66, tit. 11, § 6, 41 Stat. 305, 311 (1919), repealed by Act of Aug. 27, 1935, ch. 740, tit. 1, § 1, 49 Stat. 872, 872. *See also Smith,* 494 U.S. at 910 (Blackmun, J., dissenting) ("[A] government interest in 'symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs,' *Treasury Employees v. Von*

The RFRA was enacted specifically to override the *Smith* case, which, like the instant case and *O Centro*, involved the government's insistence that the Controlled Substances Act trumps religious freedom in the United States. There can be no clearer intent of Congress – and no clearer precedent of the Supreme Court – that the religious use of the Daime Tea is protected by RFRA.

b. *The sacramental Daime Tea presents no danger to public health.*[11]

Notwithstanding the Supreme Court's clear pronouncement, the defendants continue to argue that the "federal government has a compelling health and safety interest in banning the use of ayahuasca."[12] There is no evidence to support this position, and the Supreme Court's decisions have rejected government speculation about potential harms, instead demanding solid evidentiary support for a refusal to allow a religious exception. *See Thomas*, 450 U.S. at 719 (rejecting State's reasons for refusing religious exemption, for lack of "evidence in the record"); *Yoder*, 406 U.S. at 224-229 (rejecting State's argument concerning the "dangers of a religious exemption as speculative, and unsupported by the record"); *Sherbert*, 374 U.S. at 407 ("[T]here is no proof whatsoever to warrant such fears . . . as those which the [State] now advance[s]").

Similarly, the Ninth Circuit applied this principle to reject general claims by the government regarding the cost of providing kosher meals to prisoners, even under the deferential standard applied to prisons. "Based on the record, which contains no competent evidence as to

---

Raab, 489 U.S. 656, 687 (1989) (Scalia, J., dissenting), cannot suffice to abrogate the constitutional rights of individuals").

[11] Plaintiffs filed a Motion for Partial Summary Judgment, arguing that the defendants are estopped from asserting that the government has a "compelling interest" in banning the tea for health reasons and that there is the possibility of diversion of the tea. The defendants had argued and lost these very points in the *O Centro* litigation. The Court denied this Motion and Plaintiffs will not repeat those arguments in this Trial Brief.

[12] *See* Beane to Haber Letter (Sept. 15, 2008).

the additional cost of providing Halal or kosher meat to ADOC's Muslim prisoners, we cannot affirm the district court's grant of summary judgment." *Shakur v. Schriro,* 514 F.3d 878, 890 (9th Cir. Jan. 23, 2008). *See Cheema v. Thompson*, 36 F.3d 1102 (9th Cir. 1994) ("[t]he district has a compelling interest not in protecting students from all fears, but rather only those which are reasonably related to a real threat . . . [and] has provided no evidence . . ." in that regard).

The burden is on the government to demonstrate that the purported harm exists, rather than on the plaintiff to prove a negative. However, the plaintiffs intend to demonstrate through their own testimony and that of expert witnesses at trial that there is no danger to the public health — and, in fact, that those citizens who become members of the Santo Daime Church serve as model citizens bestowing a general beneficial effect on the public social order. Plaintiffs intend to produce the following expert witnesses: Dr. Nicholas Cozzi,[13] George Gerding,[14] Professor Jimmy Gurulé,[15] Dr. John Halpern,[16] Dr. Edward John Baptista MacCrae,[17] and Dr.

---

[13] Ph.D., Pharmacology, specializing in psychoactive pharmacology, American Chemical Society, Division on Medicinal Chemistry, American Society for Pharmacology, Division of Neuropharmacology. Dr. Cozzi will testify that there are no pharmacological properties in the Daime Tea that are likely to cause any toxicity or other significant health problems for persons who take the Tea as the sacrament of the Church.

[14] Mr. Gerding was twice appointed by different Oregon Governors as President of the Oregon Board of Pharmacology, which regulates various controlled substances in Oregon in a similar fashion to DEA's federal jurisdiction. Mr. Gerding will testify that there are no pharmacological properties in the Daime Tea that are likely to cause any toxicity or other significant health problems for persons who take the Tea as the sacrament of the Church, that the sacramental use of the Tea is a "non drug use," and that it is unlikely that the Tea will be diverted to illicit markets.

[15] Professor Gurulé was the Deputy Chief of the Major Narcotics Section of the U.S. Attorney's Office in Los Angeles, California. He was awarded the Attorney General's Distinguished Service Award and the Drug Enforcement Administration (DEA) Administrator's Award. In 1992, Professor Gurulé was awarded by DEA for his "Outstanding Contributions in the Field of Drug Law Enforcement." Professor Gurulé also served as the Assistant Attorney General of the United States Department of Justice Office of Justice Programs. He served in the current Administration as Under Secretary of Enforcement, Department of the Treasury with direct oversight of the operations of the U.S. Customs Service, and is now Professor of Law at Notre Dame University. Professor Gurulé will testify that the government does not have drug

Michael Winkelman.[18] These expert witnesses will provide evidence that the importation and use of the Daime Tea will create no danger to the public health and that there is no realistic chance of any significant illicit diversion. *See infra*. They will testify that there is no evidence that the Daime Tea causes any neurotoxicological damage, or any short- or long-term harmful health effects. The National Institute on Drug Abuse never mentioned the Daime Tea or *ayahuasca* or any concerns regarding their potential for abuse in its Community Epidemiology Work Group. NATIONAL INSTITUTE ON DRUG ABUSE, EPIDEMIOLOGIC TRENDS IN DRUG ABUSE, PROCEEDINGS OF THE COMMUNITY EPIDEMIOLOGY WORK GROUP (Jan. 2007).

Plaintiffs will demonstrate at trial that the sacred Daime Tea is not a substance that has a

---

policy reasons that reflect any "compelling government interest" in criminalizing the importation and ingestion of the Daime Tea as a sacrament, that there is no a significant risk of the Tea being diverted to illicit purposes, and that the government can satisfy any interests it may have by reasonable oversight of the importation and distribution of the Tea.

[16] Dr. Halpern is a psychiatrist in residence at the Harvard Medical School. Dr. Halpern was the recipient of a major grant from the National Institute of Mental Health to study the neurocognitive effects of chronic peyote use in the Native American Church. *See also* Dr. Halpern's Brief *Amicus Curiae* in *Gonzales v. O Centro,* Supreme Court No. 04-1084. Dr. Halpern will testify that there is no evidence that ingestion of the Tea causes any short- or long-term ill health effects. He will testify that his recent study of over 30 members of the Santo Daime Church reveals that the participation in the Santo Daime religion generally has a beneficial effect on Church members' lives.

[17] Dr. MacCrae is a Brazilian anthropologist who is also a drug policy expert recently appointed by the Brazilian National Anti-Drug Office to assist in drawing up a new national drug policy for Brazil because of his acknowledged experience in research in the area of the social and cultural aspects of drug use and prevention of abuse in Brazil. Dr. MacCrae will testify that the Brazilian government and Catholic Churches in Brazil recognize the Santo Daime Church as a full partner in the Brazilian ecumenical establishment, that the Brazilian government protects the sacramental ingestion of the Tea, and that participation in the religion orders people's lives in a socially desirable way.

[18] Dr. Winkelman is a medical anthropologist who served on the Executive Committee, Arizona Graduate Program in Public Health, and is Past President of the Religion Section of the American Anthropological Association. Dr. Winkelman will testify that the Santo Daime is a valid religion, that its roots stem from hundreds of years of tribal practices inculcated into traditional Catholic religious doctrine, that all of the evidence to date supports the conclusion that the sacramental use of the Tea is a positive experience for the people who are members of the Church, and that there is no evidence to date that the Tea causes any ill health effects.

"high potential for abuse" because the amounts ingested during the ceremony are self-limiting (the body purges the Tea after small amounts are ingested) and contain very low levels of DMT. There is no risk to public health, both because the amount of DMT in the Daime Tea poses no appreciable risk, and because the Tea is used only in carefully controlled religious ceremonies conducted by the Church. There is absolutely no evidence whatsoever that ingestion of the Daime Tea carries any risk of physiological dependence. Plaintiffs' expert witnesses will testify that the Daime Tea creates no reasonable risk of toxicity, no neurocognitive risks, no risk to cognitive functioning, no risk of physical dependence, no risk of overdose, no risk of long-term ill health effects, and no risk of behavioral deterioration.[19]

Moreover, the government has no evidence of any kind of violent or criminal behavior associated with the practice of taking the sacrament by members of the Santo Daime or the UDV Church membership. On the contrary, plaintiffs' expert witnesses will testify that there is evidence that the use of Daime Tea as a sacrament has resulted in social and psychological benefits to Church members. Positive effects of the Santo Daime religion (including participation in the sacrament) include family reunification, regained interest in members' employment, a search for holiness and self-knowledge, and social contentment. There is simply no credible evidence to suggest that the Daime Tea creates any threat to public health.

The carefully circumscribed ritual context in which respondents use Daime Tea is far

---

[19] Plaintiffs will testify that the Church has developed Confidential Medical Record forms that it uses to screen people prior to permitting any participation in religious services where the Daime Tea might be consumed. These forms are structured to screen carefully for a variety of medical and psychiatric conditions that can then be reviewed by a physician, should there be any questions about risks to physical or mental health. The documents clearly indicate that should there be any question about health, a physical examination and access to medical and psychiatric records could be requested by Church officials. For example, the form asks individuals if they have ever taken certain psychotropic medications, and whether they ever required a psychiatric hospitalization. This question does provide an indirect way of inquiring about remote major psychiatric illness and psychotropic medication use.

removed from the irresponsible and unrestricted recreational use of unlawful drugs. Plaintiffs have internal restrictions on, and supervision of, its members' use of Daime Tea, substantially obviating the government's health and safety concerns. As in the Native American Church members' use of peyote, it is sacrilegious to use the Daime Tea for non-religious purposes. *See People v. Woody*, 61 Cal. 2d 716, 721, 394 P. 2d 813, 817 (1964) ("[T]o use peyote for nonreligious purposes is sacrilegious").

c. *The sacramental Daime Tea presents no threat of illicit diversion.*

Defendants' final contention is that the religious use of the Daime Tea somehow creates an unreasonable risk of "illicit diversion." Unlike cases involving ritual use of marijuana, there is no evidence to support such a contention for the Daime Tea. Plaintiffs' expert witnesses will testify that the Church has never been reported to be associated in any way with illicit drug markets, that it is virtually unknown in the United States, and that the characteristics of the Daime Tea prevent it from being used as a recreational drug.[20] The plaintiffs will testify that they consider it a sacrilege for anyone to have the Daime Tea outside of the ritual services, and that they will inform law enforcement should they learn of any such illicit drug trafficking of their sacrament.

The experts will also testify that in Brazil, where the religious use of the Daime Tea is more widespread and legal, it has not become a recreational drug. Finally, plaintiffs have engaged in scaled-down use of the Daime Tea for 15 years, and there is no evidence that it has

[20] Since DMT can be produced synthetically, logic dictates that any illicit market in DMT would draw upon the synthetic forms rather than as a result of any diversion of Daime Tea. The process of extracting the very minute quantities of DMT in the Daime Tea would be technically difficult and would require an enormous amount of the Tea to be sufficient for purposes of entering the illicit drug market.

ever been diverted for recreational use. The government will not be able to meet its burden in demonstrating that the plaintiffs' religious exercise will create an unreasonable risk of illicit diversion.

4. *Even if the defendants possessed a compelling government interest in prohibiting the Daime Tea, an outright ban that included religious use is not the least restrictive means of achieving such an interest.*

Since the government lacks a compelling interest in banning the Daime Tea, as noted *supra*, this court need not engage in the least restrictive means analysis. However, if this court holds that the government somehow possesses a compelling interest in prohibiting the Santo Daime Church (but not the UDV church) from engaging in its sacrament, the government must also prove that an outright and complete ban is the "least restrictive means" of achieving such an interest.

As with the compelling interest issue, *O Centro* closed the door to the defendants to re-argue in this case the position that a total ban on the Daime Tea is the least restrictive means of protecting vital government interests. As the Supreme Court noted:

> The Government failed to convince the District Court at the preliminary injunction hearing that health or diversion concerns provide a compelling interest in banning the UDV's sacramental use of *hoasca*.

Gonzales v. O Centro, 546 U.S. at 537.

If the second part of the test were at issue, RFRA places the burden of proof on the government defendants to establish that banning the Tea is the "the least restrictive means of furthering [its] compelling governmental interest." 42 U.S.C. § 2000bb-1 (b) (2). The Ninth Circuit has held that the "least restrictive means" analysis requires the government to consider and reject alternatives for achieving its compelling interest:

> [W]e admonished that a prison "cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice."

Shakur, 514 F.3d at 890 (*quoting Warsoldier*, 418 F.3d at 996); *see also Greene*, 513 F.3d at 989 (same).

A complete ban on a religious practice is usually held to be unwarranted, particularly where the practice can be "regulated within reasonable limits." *Prince v. Massachusetts,* 321 U.S. 158, 169 (1944). Evidence of "obvious easy alternatives" to the government's position of arrest, confiscation, and the resultant complete prohibition of the religion establishes that a total ban on the Tea is unreasonable.

One obvious alternative is the oversight adopted for regulating the religious use of peyote. The plaintiffs could submit reports on the amount of Daime Tea used for religious services. Obviously, the administrative requirements would be much less onerous for the tiny churches at issue here than for the 250,000 Native American peyote users. Plaintiffs' drug policy experts will testify that there are a number of ways to oversee the importation and distribution of the Tea that would not be onerous**.**

D. <u>Prohibiting the Santo Daime Church from Ingesting the Daime Tea as a Religious Sacrament, While Another Religious Denomination Is Permitted to Do So, Violates the Plaintiffs' Right to Equal Protection of the Laws.</u>

Simply stated, the defendants have recently taken the position that they will no longer attempt to ban the importation of the UDV *hoasca* tea. Yet, the defendants continue to threaten the plaintiffs with arrest and prosecution for engaging in identical activities that the defendants no longer are attempting to criminalize. This is a clear deprivation of plaintiffs' right to equal protection of the laws. The Equal Protection Clause "is essentially a direction that all persons

similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439 (1985), *citing Plyler v. Doe,* 457 U.S. 202, 216 (1982).[21] The equal protection component of the Due Process Clause protects citizens from selective enforcement of the laws based upon religion. *United States v. Batcheldler,* 442 U.S. 114, 125, n.9 (1979).

Permitting the UDV to use the same substance that is denied to the plaintiffs violates these equal protection principles. In the prison context, the Ninth Circuit has held that "the Equal Protection Clause entitles each prisoner to 'a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts.' *Cruz* [*v. Beto*, 405 U.S. 319, 322 (1972)]." *Shakur*, 514 F.3d at 891 (emphasis added). There, the court reversed a ruling against a Muslim inmate requesting kosher meals that were provided to Jewish inmates. *See also Reed v. Faulkner*, 842 F.2d 960, 964 (7th Cir. 1988) (holding selective enforcement of hair length rules against some groups asserting religious exemption but not others could constitute violation of equal protection, despite the general validity of the rules). The equal protection rights of plaintiffs are even more extensive than those of prisoners, whose claims are judged under the deferential balancing test of *Turner v. Safley*, 482 U.S. 78 (1987). *Id.*

---

[21] The Fifth Amendment to the United States Constitution provides that "[N]o person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." These Fifth Amendment protections apply to the federal defendants. While the Fourteenth Amendment prohibits a State from "deny[ing] to any person within its jurisdiction the equal protection of the laws," the basic concept of fairness embodied in the Fourteenth Amendment applies to the federal government through the Fifth Amendment. *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954). *See Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964) ("[While] the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process'"). Fifth Amendment equal protection claims have been reviewed in the same manner as equal protection claims brought under the Fourteenth Amendment, with exceptions not relevant to this case. *See*, *e. g., Schlesinger* v. *Ballard*, 419 U.S. 498 (1975); *Jimenez* v. *Weinberger*, 417 U.S. 628, 637 (1974); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *cf. Mathews v. Diaz*, 426 U.S. 67 (1976).

The religious practices and other relevant issues establish that the Santo Daime and UDV are similarly situated. Defendants have announced that they are no longer opposing importation of the *hoasca* tea for the UDV, while Santo Daime enjoys no such exception. When the distinction is based on the particular religious denomination at issue, it cannot be upheld. *See United States v. Navarro-Vargas,* 408 F.3d 1184, 1206 (9th Cir. 2005) (courts may make judgments about selective prosecutions that violate the promise of due process or equal protection of the laws); *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (the equal protection component of the Due Process Clause of the Fifth Amendment prohibits selective prosecutions based on "race, religion, or other arbitrary classification").

The evidence at trial will demonstrate that the UDV case is similar in many respects to this case.[22] The UDV is a Brazilian religion and the sacred Tea is the sacrament of both religions, which are syncretic Christian religions. Both Teas are made from the same two plants native to the Amazon River. As in the case of the sacred Daime Tea, the sacramental *hoasca* Tea contains a small amount of naturally occurring DMT. And, as in the case of the sacred Daime Tea, the UDV *hoasca* Tea is imported from Brazil, after religious leaders (*Mestres*) of the UDV prepare it during a religious ritual held in Brazil for that purpose.[23] Both religions consider that, when they receive the sacramental Teas, they receive the Divine Holy Spirit. At trial, plaintiffs will demonstrate that they are similarly situated to the UDV in all relevant aspects and, therefore, are entitled to equal treatment with respect to the Daime Tea. Indeed, the government conceded as much in their Merits Brief wherein the Solicitor stated:

---

[22] *See O Centro Espírita Beneficente União do Vegetal (UDV) v. Ashcroft*, Civ. No. 00-1647 JP/RLP (D.N.M. 2000) (Plaintiffs' Complaint).

[23] *O Centro v. Clement,* CV 00-1647JP RLP (D. N. M., First Amended Complaint) (September 21, 2007).

> At a minimum, an equivalent exemption will be demanded by other religious groups that use ayahuasca, like the Santo Daime Church.[24] While the Santo Daime Church has more broadly opened its hoasca ceremonies to others, J.A. 178, 587, courts may consider differences in evangelistic theology to be a tenuous basis for selectivity in governmental accommodations. Courts might also be concerned that a selective accommodation would effectively give the UDV a competitive advantage over the Santo Daime Church in the religious "marketplace of ideas."

In any event, the evangelistic differences between UDV and Santo Daime may not be that great.[25] The Santo Daime Church is entitled to equal treatment under the law.

III. CONCLUSION

The continuing threats by defendants to arrest and prosecute members of the Santo Daime Church have caused the plaintiffs to live in fear and practice their religion underground. Plaintiffs fear for their lives, their homes, their families, their jobs and, in some instances, their professional licenses. The dearth of any evidence proving any harm caused by this sincere religious exercise demonstrates that the substantial burden on plaintiffs' religious freedom cannot be justified by any legitimate interest, much less a compelling one. Finally, defendants have not ceased the threat to plaintiff Goldman and to other members of the Santo Daime faith that, if the government determines that the Church is holding services, defendants will come after them. Coupled with six years of failed government appeals based on its meritless "compelling

---

[24] The Solicitor's use of the phrase "will be demanded" was not an entirely accurate representation to the Court. The Solicitor's brief was written in 2005. Negotiations with the Santo Daime under Attorney General Reno's explicit direction began in 2000. Indeed, at the first meeting held at Attorney General Reno's direction in Washington, in the year 2000, the Solicitor General's office had a representative present who participated in the discussions. Thus, long before writing the brief, the Solicitor already knew that the Santo Daime had made demands that the government cease its illegal activity of interfering with transporting the sacred Tea into the United States.

[25] Appellants' Merits Brief at 21-22 (available to this court upon request).

interest" arguments, the defendants' continued recalcitrance and their impending threat to prosecute plaintiffs for use of their sacrament necessitates this court's intervention.

Respectfully submitted,

/s/ Roy S. Haber
Roy S. Haber
Roy S. Haber, P.C.
570 East 40th Street
Eugene, Oregon 97405
haberpc@cyber-dyne.com
Telephone: (541) 485-6418
Mobile: (541) 913-6397

Gilbert Paul Carrasco
Professor of Law
Willamette University College of Law
245 Winter Street, S.E.
Salem, OR 97301
carrasco@willamette.edu
Telephone: (503) 370-6432

Donald H. Marmaduke
Tonkon Torp LLP
1600 Pioneer Tower
888 S.W. Fifth Ave.
Portland, Oregon
don.marmaduke@tonkon.com
Telephone: (503) 802-2003

Counsel for Plaintiffs