GREGORY G. KATSAS
Assistant Attorney General

KARIN J. IMMERGUT
United States Attorney
Mark O. Hatfield U.S. Courthouse
1000 SW Third Avenue, Suite 600
Portland, OR 97204-2902

VINCENT M. GARVEY
Deputy Branch Director
Federal Programs Branch

ERIC J. BEANE
eric.beane@usdoj.gov
BRIGHAM J. BOWEN
brigham.bowen@usdoj.gov
JULIE STRAUS
julie.straus@usdoj.gov
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20001
Phone: (202) 616-2035
(202) 514-6289
(202) 514-7857
Fax: (202) 616-8470

Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

THE CHURCH OF THE HOLY LIGHT OF THE QUEEN, a/k/a The Santo Daime Church, *et al.*, Plaintiffs, v. MICHAEL B. MUKASEY, *et al.*, Defendants.	CIV. NO. 08-3095-PA **DEFENDANTS' TRIAL BRIEF**

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PRELIMINARY STATEMENT

This action, brought under the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.* ("RFRA"), and other Constitutional provisions, is an effort by six named plaintiffs to shield a largely undefined group of church members – as well as a yet longer number of church "visitors" – from the Controlled Substances Act, 21 U.S.C. §§ 801–971 ("CSA"), and the regulations promulgated thereunder. Plaintiffs and their unnamed associates have been clandestinely consuming a Schedule I controlled substance (dimethyltryptamine or "DMT") for several years under the auspices of Plaintiff Church of the Holy Light of the Queen ("CHLQ"), despite knowing that its importation and consumption is unlawful, and now claim an entitlement to consume the tea without restriction. As the government will demonstrate at trial, Plaintiffs' claims lack merit.

The vast majority of the counts in Plaintiffs' complaint can be dismissed as a matter of law before the trial, and the Court lacks jurisdiction to entertain the remaining RFRA claim. As to the merits of the RFRA claim, Plaintiffs have yet to establish, either for themselves or for the broad unnamed class of nonparty church affiliates they purport to represent, that consuming the tea constitutes a sincere religious practice subject to a substantial burden imposed by the government. Indeed, their entire case is premised upon the erroneous notion that they are absolutely banned from consuming the tea – rather than merely being required to seek an administrative exemption prior to being allowed to consume it. And Plaintiffs have failed to allege or show through discovery how the requirement that they apply for an exemption (or how any regulations governing controlled substances) operates as a substantial burden on their sincere religious practices. Plaintiffs will also fail to show at trial that, pursuant to the fact-intensive and

case-specific inquiry mandated by RFRA, they should be entitled to comparable – and merely preliminary – relief to that obtained by a different church in separate litigation regarding hallucinogenic tea consumption.

Moreover, as will be shown at trial, Defendants have numerous compelling interests in requiring Plaintiffs to submit to such an administrative exemption process, and numerous compelling interests which require that consumption of the tea be prohibited unless and until such an exemption is granted. These interests are myriad, and include compelling health and safety interests in preventing potentially grave harms from the consumption of an unstudied, unproven drug; compelling interests in preventing diversion of dimethyltryptamine to illicit uses; and compelling interests in ensuring compliance with closed regulatory systems designed to monitor and safeguard the use of dangerous substances, should such use be allowed at all.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs in this action include the Church of the Holy Light of the Queen (a/k/a the "Santo Daime Church"), Jonathan Goldman, Alexandra Bliss Yeager, Jacquelyn Prestidge, Scott Ferguson, Mary Row (proceeding anonymously), and Miriam Ramsey (hereinafter referred to collectively as "Plaintiffs"). Compl. ¶¶ 5-10. The Defendants in this matter are the Attorney General of the United States, the United States Attorney in the District of Oregon, and the Secretary of the U.S. Department of the Treasury (hereinafter collectively referred to as "Defendants" or "the government").[1] *Id.* at ¶¶ 11-13. Plaintiffs allege that their religious

[1] It appears that Plaintiffs mistakenly believe that the Department of the Treasury oversees the United States Customs Service. *See id.* at ¶ 13. The Secretary should be dismissed as a matter of law.

practice requires their consumption of a hallucinogenic tea known as ayahuasca[2] which, as Plaintiffs admit, contains dimethyltryptamine ("DMT"), a Schedule I controlled substance that is banned by the CSA. *Id.* at ¶¶ 14-21.

On May 20, 1999, the United States Customs Service intercepted a large delivery of ayahuasca from Brazil to Plaintiff Jonathan Goldman. Compl. at ¶ 25. A DEA special agent obtained a valid warrant to search Goldman's home, where the agent found and seized a substantial quantity of ayahuasca and arrested Goldman. *Id.* at ¶ 26-27. (Missing from the Complaint is the undisputed fact that agents also seized from Goldman's home marijuana and bufotenine, a Schedule I controlled substance made from the excretions of a poisonous frog.) Goldman was released from detention after 12 hours. *Id.* at ¶ 27. The government never filed any charges against Goldman, and never prosecuted him for any activity leading to the seizure of ayahuasca or his arrest. *Id.* at ¶ 29. As Goldman admits, "[t]he statute of limitations for that arrest expired in May of 2004." Decl. of Jonathan Goldman, at 21.

On September 5, 2008, Plaintiffs filed a complaint, a combined application for a temporary restraining order and motion for a preliminary injunction, and a memorandum in support of that motion in this Court. *See* Complaint, Doc. #1 (Sept. 5, 2008); Pls.' App. for a Temporary Restraining Order and Mot. for a Preliminary Inj., Doc. #2 (Sept. 5, 2008); Plaintiffs' Mem. of Law in Support of App. for a Temporary Restraining Order and Mot. for Preliminary Inj., Doc. #3 (Sept. 5, 2008). The Court calendared argument on the application for a temporary

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[2] Ayahuasca is also referred to by Plaintiffs as "the Holy tea," "the Daime," "the Daime tea," "the Holy Daime tea," or "the Santo Daime tea." *Id.* at ¶¶ 1, 15-16, 30. Although these terms appear generally to be interchangeable, the government will refer to the tea as ayahuasca for the sake of simplicity.

restraining order on September 10, 2008. Scheduling Order, Doc. #5 (Sept. 5, 2008). On September 9, 2008, prior to oral argument, the government filed an opposition to Plaintiffs' motion. Defendants' Mem. in Opp. to Mot. for Temporary Restraining Order, Doc. #7 (Sept. 9, 2008). Ruling from the bench, the Court denied Plaintiffs' application for a temporary restraining order, and set trial to begin on November 12, 2008. Record of Hearing, Doc. #10 (Sept. 10, 2008).

On September 22, 2008, the government moved to dismiss this action for lack of jurisdiction. As the government argued in its Motion to Dimiss, Doc. #20 (Sept. 22, 2008), this action should be dismissed because the Court lacks jurisdiction over Plaintiffs' claims for at least four different reasons. First, Plaintiffs' complaint does not assert a case or controversy giving rise to federal judicial review under Article III. Second, Plaintiffs lack standing to challenge a regulation that has not been applied to them and from which they have refused to seek an exemption. Third, and relatedly, Plaintiffs' claims, like most claims challenging regulations in the pre-enforcement context, are unripe for review. And finally, Plaintiffs have never applied for a waiver from any regulations. Even *if* they had, and even *if* they were unsatisfied with the final decision of the DEA Administrator, jurisdiction to challenge that decision would lie exclusively in the court of appeals. Each of these jurisdictional doctrines provides an independent basis for dismissal. *See* Defs.' Mot. to Dismiss at 12-23. Plaintiffs also filed a motion for summary judgment, which the Court denied. Doc. #22 (Sept. 25, 2008).

STATUTORY AND REGULATORY BACKGROUND

The Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.*, provides that the federal government "shall not substantially burden a person's exercise of religion" unless "it demonstrates 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." *Id.* § 2000bb-1(a), (b). RFRA applies to "all Federal law" and the implementation of that law. *Id.* § 2000bb-3(a).

The Controlled Substances Act, 21 U.S.C. §§ 801–971, makes it unlawful to possess or to "manufacture, distribute, or dispense" any controlled substance, except as authorized by the Act itself. *Id.* §§ 841(a)(1), 844(a). Congress found that "[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." *Id.* § 801(2). With respect to mind-altering psychotropic substances in particular, "Congress has long recognized the danger involved in the[ir] manufacture, distribution, and use . . . for nonscientific and non-medical purposes," and has concluded that "[i]t is . . . essential that the United States cooperate with other nations in establishing effective controls over" them. *Id.* § 801a(1).

Schedule I of the CSA applies to "any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances." 21 U.S.C. § 812(c). One such substance is dimethyltryptamine. *Id.* § 812 Schedule I(c).

The Attorney General has delegated his authority to regulate controlled substances to the Drug Enforcement Administration ("DEA"). *See* 21 U.S.C. § 871(a); 28 C.F.R. § 0.100(b). Section 821 authorizes the Attorney General to "promulgate rules and regulations . . . relating to

the registration and control of the manufacture, distribution, and dispensing of controlled substances and to listed chemicals." In accordance with this authority, the DEA has promulgated regulations on importation of listed chemicals that closely track the language of the statute. *See generally* 21 U.S.C. § 971; 21 C.F.R. § 1313.12 *et seq.* Other regulations concerning the use of controlled substances are published in 21 C.F.R. Chapter II. 21 C.F.R. § 1300. The DEA regulations provide that "[a]ny person may apply for an exception to the application of any provision of this chapter [containing all DEA regulations] by filing a written request stating the reasons for such exception." *Id.* § 1307.03. Requests for a waiver should be filed with the Administrator, who has discretion to grant any exception. *Id. See also* 21 U.S.C. § 822(d) ("The Attorney General may, by regulation, waive the requirement for registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety."). This statutory and regulatory waiver process authorizes DEA to entertain individual requests for exemption from the CSA itself, including those exemptions which may be required by RFRA.

BURDEN OF PROOF

When bringing a claim under RFRA, a plaintiff bears the burden of demonstrating that the government's action substantially burdens his sincere religious exercise in violation of RFRA. *See Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1121 (9th Cir. 2000) (citing *Goehring v. Brophy*, 94 F.3d 1294, 1299 (9th Cir. 1996), *superseded on other grounds by statute*). Under RFRA, the plaintiff's obligation to "demonstrate[]" a substantial burden "means meet[ing] the burden of going forward with the evidence and of persuasion." 42 U.S.C. § 2000bb-2(3). Absent such a demonstration, a plaintiff cannot make a

prima facie case under RFRA. If a plaintiff "cannot prove" the elements of a prima facie case, "his RFRA claim fails." *Navajo Nation v. United States Forest Service*, 535 F.3d 1058, 1068 (9th Cir. 2008) (en banc). Only if a plaintiff succeeds in establishing a substantial burden on his religious exercise does the burden then shift to the government "to prove that the challenged government action is in furtherance of a 'compelling governmental interest' and is implemented by 'the least restrictive means.'" *Id.* Plaintiffs have never applied for an exemption.

ARGUMENT

I. THE ENTIRE ACTION SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

The entire action should be dismissed for lack of jurisdiction for the reasons set forth in the Memorandum in Support of Defendants' Motion to Dismiss. Defendants will not recite the various grounds for dismissal since the Court has not yet ruled on that motion, but Defendants reiterate the well-established rule that a Court must address any jurisdictional arguments prior to a consideration of the merits.

II. PLAINTIFFS CANNOT ESTABLISH THAT THE GOVERNMENT'S ENFORCEMENT OF THE CSA VIOLATES RFRA.

A. Plaintiffs Have Not Made a Prima Facie Case Under RFRA.

To establish a prima facie claim under RFRA, "a plaintiff must present evidence sufficient to allow a trier of fact rationally to find the existence of two elements": (1) the plaintiff must show that the activities burdened by the government action constitute "an exercise of religion"; and (2) the plaintiff must show that the government action "substantially burden[s]" the plaintiff's exercise of religion. *See Navajo Nation*, 535 F.3d at 1068 (*citing* 42 U.S.C. § 2000bb-1(a)).

The alleged burden imposed by a governmental action upon an individual's religious exercise must be analyzed "to the person." 42 U.S.C. § 2000bb-1(b). *See also id.* § 2000bb-1(a) (subject of the burden imposed by a governmental action stated to be "a person's exercise of religion," not the general exercise of a church or other religious community). Because the government is "required to show that it is using the least restrictive means" in burdening a plaintiff's religious exercise "consistent with [that individual's] sincerely held religious beliefs," *United States v. Zimmerman*, 514 F.3d 851, 855 (9th Cir. 2007), it necessarily follows that the sincerity element of a prima facie case under RFRA must be satisfied by each individual seeking relief under RFRA. Because "[t]he burden on religion prohibited by RFRA . . . 'is written in terms of what the government cannot do to an individual, not in terms of what an individual can exact from the government[,]'" *United States v. Vasquez-Ramos*, 531 F.3d 987, 993 (9th Cir. 2008), the scope of relief that could possibly follow from an individual person's RFRA claim is limited to a declaration of "what the government cannot do to [that] individual"; one individual cannot, via a RFRA claim, "exact from the government" relief on behalf of others not bringing their own RFRA claims, *id.*

Here, at most, Plaintiffs have the opportunity to demonstrate at trial the sincerity of the six individual named "claimant[s] whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 546 U.S. 418, 430-31 (2006). However, to date Plaintiffs have not made any showing as to the sincerity of the individual unnamed members of CHLQ, nor to the large number of non-member participants in CHLQ's gatherings in which ayahuasca is consumed. Indeed, Plaintiffs' counsel have repeatedly curtailed inquiry regarding any church members or affiliates other than the six named plaintiffs

by asserting – improperly – a "privilege" based in *NAACP v. Alabama*, 357 U.S. 949 (1958), against such discovery. A prima facie case under RFRA can only be established by demonstrating the sincerity of religious exercise for each individual, and only the six individual named plaintiffs have presented evidence raising even the specter of a valid claim for judicial relief under RFRA from the CSA. As to the church itself, the limited testimony of a small set of hand-picked church members, accompanied by the church's refusal to allow discovery requesting the scores of other members and affiliates, is fatal to any organizational claim for relief. Therefore, should the Court determine any relief is appropriate under RFRA, that relief may be limited to those few individuals for whom Plaintiffs succeed in establishing sincerity of religious exercise.

Although RFRA itself does not define "substantial burden," its stated purpose is to "restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). The Ninth Circuit has held that "[t]he same cases that set forth the compelling interest test also define what kind or level of burden on the exercise of religion is sufficient to invoke the compelling interest test" or, in other words, to support a prima facie case under RFRA. *Navajo Nation*, 535 F.3d at 1069.

In *Navajo Nation*, the Ninth Circuit's most recent RFRA case, the Ninth Circuit extensively analyzed the foundational cases to which Congress looked for guidance in enacting RFRA, and determined that there are two types of circumstances in which a plaintiff can make a prima facie showing under RFRA. *Id.* at 1069-70. As the Ninth Circuit explained, "[u]nder RFRA, a 'substantial burden' is imposed only when individuals are forced to choose between

following the tenets of their religion and receiving a government benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)." *Id.*; *see also Snoqualmie Indian Tribe v. FERC*, No. 05-72739, 2008 WL 4478591, at *4 (9th Cir. Oct. 7, 2008) (denying petition for review of RFRA case based on *Navajo Nation*, in which the Ninth Circuit "reconsidered what constitutes a substantial burden under RFRA, adopting a narrower definition of that term than we had in prior decisions"). Failure to show the existence of one of these two circumstances, or the pleading of "[a]ny burden imposed on the exercise of religion short of that described by *Sherbert* and *Yoder* is not a 'substantial burden' within the meaning of RFRA," and therefore, does not invoke the compelling interest test. *Navajo Nation*, 535 F.3d at 1070. Under *Navajo Nation*, Plaintiffs here must show that the government's enforcement of the CSA "coerce[s] the Plaintiffs to act contrary to their religion under the threat of . . . sanctions[.]" *Id.* Should Plaintiffs fail to make such a showing at trial, judgment must be entered for the government. Only if Plaintiffs establish a "substantial burden" as that term is defined in *Sherbert*, *Yoder*, and RFRA itself, will the compelling interest test be triggered and the burden of persuasion shifted to the government. *Id.*

Moreover, Plaintiffs doom their substantial burden claims by miscasting the alleged burden on their practice. Contrary to Plaintiffs' characterization, the government's purported "Prohibition on the Importation and Use of the Daime Tea," Pls.' Mem. at 14, does not impose a substantial burden on Plaintiffs' religious exercise, because, as Plaintiffs are aware, Pls.' Mem. at Exh. Q, the government has in place a process by which a party may seek a religious-based exemption from the CSA and its implementing regulations – and has directed Plaintiffs to that process to obtain the relief Plaintiffs seek here instead, *see* 21 C.F.R. § 1307.03; *see also* 21

U.S.C. § 822(d). To cast the "burden" as an "outright ban," Pls.' Br. at 19, therefore, is not accurate. What Plaintiffs must demonstrate is that the regulatory requirement that Plaintiffs seek an exemption from the CSA through the administrative process (and otherwise may not consume the tea) imposes a substantial burden on Plaintiffs religious exercise. To date, Plaintiffs have failed to make any such showing.

B. The Government Will Demonstrate at Trial That Enforcement of the CSA Furthers Compelling Governmental Interests Through the Least Restrictive Means.

Only if a plaintiff succeeds in establishing a prima facie RFRA claim does the burden then shift to the government to persuade the court that the challenged governmental action furthers a compelling governmental interest implemented by the least restrictive means. *Navajo Nation*, 535 F.3d at 1070. Even if Plaintiffs' evidence at trial were sufficient to establish a prima facie case under RFRA, judgment should nonetheless be entered for the government because, as the government will clearly demonstrate, enforcement of the CSA furthers at least six compelling governmental interests by the least restrictive means.

1. The government has a compelling health and safety interest in banning the use of ayahuasca.

The government has a compelling interest in protecting public health and safety from the risks associated with the consumption of ayahuasca, including by both individuals participating in Plaintiffs' purportedly religious ingestion of the Schedule I controlled substance DMT, and those introduced to such substances via Plaintiffs' purportedly religious activities but who continue to consume such substances outside the sacramental context. The government will demonstrate at trial that consumption of ayahuasca, for religious or non-religious purposes,

presents risks to public health and safety. For example, the government will demonstrate that consumption of ayahuasca, *inter alia*, produces dangerous interactions when consumed close in time to consumption of other substances, can trigger or exacerbate background health conditions, and particularly in unknown quantities and concentrations (as is the case here), can be toxic.

2. The government has a compelling interest in banning the use of ayahuasca by high-risk groups (age, medical history, history of drug abuse, and history of psychiatric disorders).

The government has a compelling interest in protecting the health and safety of special populations including, *inter alia*, minors, pregnant women and developing fetuses, narcotics users, persons with histories of psychiatric disorders, persons with histories of substance abuse, persons with histories of hypertension, and persons with histories of stroke. The government will demonstrate that exposure of vulnerable groups to unknown strengths and quantities of ayahuasca in the context of Plaintiffs' purportedly religious activities raises significant risks to public health and safety.

3. If an exemption is granted for the Santo Daime Church to consume ayahuasca for ceremonial purposes, the government has a compelling interest in verifying the quantity of ayahuasca imported or manufactured and the concentration of DMT and all other active substances contained in the ayahuasca.

The government has a compelling interest, arising out of its compelling interest in protecting public health and safety, in verifying the quantity of ayahuasca imported or manufactured for use by any persons, and in verifying, sampling, testing, and ensuring the consistency of the concentration of DMT contained in such ayahuasca. The government will demonstrate the significant public health and safety risks which would accompany any laxity in such verification.

The government also has a compelling interest in verifying all active ingredients contained in the ayahuasca. The government further has a compelling health and safety interest in protecting participants in CHLQ gatherings from consumption of untested and/or contaminated ayahuasca – as is the case here, where the tea is concededly *never* tested. The government will demonstrate that the lack of information and processes for verification of ayahuasca composition significantly threatens the government's ability to protect the public health and safety.

4. The government has a compelling interest in preventing the diversion of ayahuasca to non-religious use or to participants who are not sincere adherents to the Santo Daime Church.

The government has a compelling interest in ensuring that controlled substances, including hallucinogenic controlled substances which are manufactured, imported, and/or distributed by Plaintiffs for purported religious uses, are not diverted into illicit channels. The government will demonstrate that there is a significant illicit market in ayahuasca specifically, as well as in DMT, tryptamines, and hallucinogenic Schedule I controlled substances, more generally. The government will also demonstrate that its compelling interests in deterring and preventing diversion of controlled substances, including those manufactured, imported, distributed, and/or consumed for purportedly religious purposes, necessitate restricting access to products containing the Schedule I controlled substance DMT by individuals with a record of non-religious use of, possession of, or trafficking in controlled substances. The government will further demonstrate that diversion of ayahuasca to illicit channels and uses raises additional risks for public health and safety. Each of these risks is implicated here, as demonstrated by, for

example, Mr. Goldman's history of illicit drug possession, by the Church's decision to move underground after its tea was seized, and by the Church's lax admissions practices.

The government also has a compelling interest in administering DEA's Diversion Control Program, which tracks controlled substances to maintain accountability and deter and prevent diversion into illicit channels, and ensures that controlled substances remain in legitimate and regulated channels from their entry into this country until their ultimate use or disposal. Evidence brought forward in discovery, including Plaintiffs' admission that for years they did not even keep records, raises significant concerns in this regard.

5. The government has a compelling interest in requiring requests for exemptions from the CSA and/or for petitions for rescheduling to be addressed first through an administrative process.

The government has a compelling interest in ensuring that persons granted exemptions from the otherwise general applicability of the CSA receive such exemptions only after rigorous review pursuant to applicable regulations and administrative processes. The government will demonstrate at trial that the administrative process is best equipped to conduct the intensive, fact-specific inquiry necessary for evaluating requests for exemption from the CSA and its implementing regulations. To date, Plaintiffs have not yet provided sufficient information to determine whether the CHLQ should be considered for an exemption. That information is used in the administrative process to determine the appropriateness of an exemption from the CSA based upon, for example, the quantity and strength of the illicit substance sought to be imported, distributed, processed, or consumed; the adequacy of security measures for safeguarding stored illicit substances; and whether individuals with previous controlled substances-related felony

convictions will have access to any substance for which a religious exemption for use is authorized.

The government also has a compelling interest in requiring any requests for exemption from the CSA for religious use first go through the administrative process. The administrative process gives the government the opportunity to collect sufficient evidence for evaluating whether and how the government's compelling interests and an individual's religious practice can both be accommodated. The government will demonstrate at trial how the administrative process provides the best and least restrictive means for collecting and evaluating a sufficiently detailed and complete body of information as is necessary to ensure the compelling governmental interests while considering individual requests for religious use exemptions.

6. If an exemption is granted for the Santo Daime Church to consume ayahuasca for ceremonial purposes, the government has a compelling interest in full compliance with the CSA's closed regulatory scheme, which includes compliance with the exemption process.

The government has a compelling interest in enforcing the closed regulatory system under which controlled substances are manufactured, imported into the United States, and/or distributed within this country. As the government will demonstrate at trial, only in accordance with the closed regulatory system established by the CSA and implemented through DEA regulations can the government ensure accountability, prevent diversion, and protect public health and safety. In their complaint, Plaintiffs allege only that the ban on importation, distribution, and use of ayahuasca under the CSA violates RFRA, *see* Compl. ¶ 1; any future claims brought by Plaintiffs concerning any of the CSA's implementing regulations are outside the scope of the complaint here. Therefore, Plaintiffs cannot sufficiently demonstrate that any

particular regulation operates as a de facto ban on their religious use, thereby entitling them to relief.

The government also has a compelling interest in ensuring that controlled substances, including controlled substances which are manufactured, imported, and/or distributed for purported religious uses, are not repackaged or re-labeled in such as a manner as to frustrate the application of the closed regulatory system to maintain accountability and deter and prevent diversion into illicit channels. The government will demonstrate at trial that Plaintiffs' practices significantly hamper the government's efforts to pursue this compelling interest.

C. The *O Centro* Litigation Has No Estoppel Effect on the Case-Specific Inquiry Now Before the Court.

Plaintiffs have contended to this Court (in their Motion for Partial Summary Judgment, *see* Doc. # 19) that Defendants are estopped from raising various arguments regarding (1) the CSA; (2) the government's compelling interests in regulating and/or banning use of DMT; and (3) application of the CSA to Plaintiff's purported use of ayahuasca. Rooted in numerous misconstructions and misinterpretations of the litigation regarding the UDV, these contentions lack merit. (Defendants recognize that the Court has denied Plaintiffs' motion; as Defendants expect that Plaintiffs will re-raise such arguments by invoking *O Centro* at trial, Defendants provide the following responsive arguments.)

Most glaring is Plaintiffs' failure to recognize the "well-established" rule that so-called nonmutual offensive collateral estoppel may not be asserted against the federal government. *Nat'l Med. Enters., Inc. v. Sullivan*, 916 F.2d 542, 545 (9th Cir. 1990) (noting "the well-established rule that nonmutual offensive collateral estoppel cannot be asserted against the

government") (citing *United States v. Mendoza*, 464 U.S. 154 (1984)); *see also Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 689-90 (9th Cir. 2004) (citing *Sullivan*, 916 F.2d at 545). This rule, as articulated in *Mendoza* – wherein the court rejected efforts to apply estoppel principles to the government – recognizes numerous reasons why collateral estoppel does not and should not lie against the government. These reasons include, *inter alia*, the government's status as a far more frequent litigator than any other litigant; the frequency with which the government is involved in litigation over matters of great public importance; the legitimate reasons successive administrations may decide to take different positions on issues from those taken by predecessor administrations; and the fact that a contrary rule would require the Solicitor General to appeal every adverse decision against the government. *Mendoza*, 464 U.S. at 158-64. Plaintiffs ignore all these reasons set forth by the Court, and instead mischaracterize *Mendoza* as resting on one solitary reason for exempting the government from the collateral estoppel doctrine: the Court's observation that "[a] rule allowing nonmutual collateral estoppel against the government . . . would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *Id.* at 160; Pls.' Mot. at 8-9. Of course, even this rationale does not apply here, as there was no final decision rendered in UDV on any legal issue presented in this case. Indeed, the Supreme Court's UDV decision counsels quite to the contrary by recognizing of the highly case- (and fact-) specific nature of the RFRA inquiry. *O Centro*, 546 U.S. at 424, 431. In any event, Plaintiffs' mischaracterization of the case law does nothing to alter the "well-established rule" that forecloses their arguments entirely. *Sullivan*, 916 F.2d at 545.

Even if the collateral estoppel doctrine *could* be asserted against the government, it is far from satisfied here. The doctrine requires that the following three elements be met: (1) "the issue necessarily decided in the previous proceeding is identical to the one which is sought to be relitigated;" (2) "the first proceeding ended with a final judgment on the merits;" and (3) "the party against whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding." *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 (9th Cir. 2006). Both the first and second criteria are unsatisfied here.

First, there was no final judgment on the merits in UDV, and courts have uniformly rejected that notion that a preliminary injunction is sufficiently "final" to warrant estoppel. *Starbuck v. City & County of San Francisco*, 556 F.2d 450, 457 n.13 (9th Cir. 1977) (holding that the grant of a preliminary injunction "is not a final judgment sufficient for collateral estoppel purposes"). Plaintiffs are wrong, therefore, to cavalierly suggest that the question of the government's compelling interests in controlling access to ayahuasca by the UDV was decided *at all* in the UDV litigation. The decision was only preliminary and each appeal of that decision was decided pursuant to highly deferential abuse-of-discretion review. The merits remain pending.

Second, the issues to be decided by this court are vastly different from those preliminarily addressed in *O Centro*. That the issues may be related does not carry the day. As the Ninth Circuit has repeatedly observed, "the issues litigated must not be 'merely similar,' but must be 'identical.'" *Central Delta Water Agency v. United States*, 306 F.3d 938, 953 (9th Cir. 2002) (citation omitted), quoted in *Orff v. United States*, 358 F.3d 1137, 1143 (9th Cir. 2004)). And here, both as a matter of fact and by definition (because both the RFRA inquiry and the

government's as-applied interests are individualized and fact-specific), the relevant factual issues presented are decidedly dissimilar. For example, the UDV and the CHLQ responded very differently to governmental seizures of their respective illicit ayahuasca. Although both churches attempted to persuade the government to grant an exemption from the CSA shortly after their respective seizures, the UDV responded to the government's denial of those efforts by seeking judicial relief. The CHLQ, by contrast, chose instead to illegally import and consume ayahuasca clandestinely. This decision, maintained for many years, raises serious questions about Plaintiffs' activities, about Plaintiffs' own views about the lawfulness of their alleged religious practices, and about whether Plaintiffs could be trusted to comply with governmental regulations if they were eventually granted an exemption.

The two churches' histories and worldviews likewise differ significantly. As the government will demonstrate at trial, CHLQ and UDV trace their distinct identities to two markedly different religious leaders emerging from the broader Santo Daime tradition founded by Raimundo Irineu Serra: José Gabriel da Costa (UDV), who claimed to have received through ayahuasca esoteric knowledge unique to the faith he founded; and Sebastião Mota de Melo (CHLQ), who introduced an eclectic brand of Santo Daime faith which, among other things, encourages the use of marijuana as a feminine counterpart to (and to be consumed in conjunction with) the masculine Daime – consumption which, despite recent public disavowals by the Santo Daime church, continues unofficially within the Santo Daime faith. The two traditions likewise differ as to the alleged therapeutic use of ayahuasca, with Santo Daime embracing such use and UDV rejecting it. *See* Row Decl. at 4 (claiming that Daime promotes "healing on all levels"). Moreover, the churches inherently differ in organizational structure – a critical aspect of the

government's regulatory and policy concerns regarding ayahuasca use by CHLQ. Finally, the CHLQ church has more broadly opened its ayahuasca ceremonies than has the UDV – a critical distinction for purposes of diversion risks to non-sincere religious users, especially by non-initiated visitors to CHLQ ceremonies.

III. THE GOVERNMENT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON PLAINTIFFS' REMAINING CLAIMS FOR RELIEF.

A. Plaintiffs' First Amendment Claim Fails Because the CSA is a Neutral Law of General Applicability.

In their First Claim for Relief, Plaintiffs assert that enforcement of the CSA violates their rights under the Free Exercise Clause of the First Amendment. Compl. at ¶ 69. It is well-established that "the Free Exercise Clause of the First Amendment does not prohibit governments from burdening religious practices through generally applicable laws." *See O Centro*, 546 U.S. at 424 (*citing Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990)). Plaintiffs cannot prove a violation of the Free Exercise Clause at trial because the CSA and its implementing regulations are neutral laws of general applicability. As every Circuit Court of Appeals to consider the question of whether the CSA violates the Free Exercise Clause has found, the CSA is a neutral law of general applicability. *See e.g.*, *Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 992 (10th Cir. 2004); *United States v. Israel*, 317 F.3d 768, 770 (7th Cir. 2003); *see also Multi Denominational Ministry of Cannabis and Rastafari, Inc. v. Gonzales*, 474 F. Supp. 2d 1133, 1143-44 (N.D. Cal. 2007).

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 542 (1993) ("*Lukumi*"), the Supreme Court defined neutrality as follows: "[I]f the object of a law is to

infringe upon or restrict practices because of their religious motivation, the law is not neutral[.]" *Id.* at 533. A statute is non-neutral on its face "if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* If the language of the statute is neutral, a more careful statutory interpretation may still be necessary to determine the drafters' intent, because "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id.* at 534. In all cases, however, the purpose of the inquiry is to determine whether the legislature intended to target religion. Thus, the Court in *Lukumi* found that the Hialeah ordinances were non-neutral because "[t]he record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances." *Id.* at 534; *see also id.* at 540 (holding that Hialeah ordinances "were enacted because of, not merely in spite of, their suppression of Santeria religious practice") (internal quotation marks and citation omitted). In order to show that the CSA and its implementing regulations are similarly not neutral, Plaintiffs would have to show "that the object or purpose of [the] law is the suppression of religion or religious conduct." *Id.* at 533. To the contrary, the legislative history of the CSA makes clear that Congress's primary goal was a secular one: preventing the recreational use of controlled substances. *Compare Lukumi*, 508 U.S. at 535-40 (reviewing the legislative history of the animal slaughtering ordinances) *with* H.R. Rep. No. 91-1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566. Plaintiffs cannot seriously argue that suppression of the religious conduct of CHLQ (or any other religion) was the object of the Controlled Substances Act. The Act is therefore neutral from the standpoint of a First Amendment analysis.

The CSA is also generally applicable in that it does not "in a selective manner impose burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543. The CSA prohibits all secular use of scheduled substances, except for research, medical, scientific, and industrial uses. The mere existence of exceptions within the CSA does not impair its validity under the Free Exercise Clause. Indeed, the *Lukumi* Court was careful to acknowledge that "[a]ll laws are selective to some extent[.]" *Lukumi*, 508 U.S. at 542. What concerned the Court was not the fact of selectivity itself, but the "categories of selection." *Id.* The Court defined the principle of general applicability as "[t]he principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens *only* on conduct motivated by religious belief." *Id.* at 543 (emphasis added). The Court found that the City of Hialeah's ordinances were not generally applicable, not because the ordinances made distinctions between permissible and impermissible types of animal slaughter, but because "the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice." *Id.* In concluding its analysis of the ordinances' general applicability, the Court stated,

> We conclude, in sum, that each of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief. The ordinances ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshipers] but not upon itself. *This precise evil is what the requirement of general applicability is designed to prevent.*

Id. at 545-46 (emphasis added) (internal quotation marks and citation omitted). In other words, in order to be considered "generally applicable" for First Amendment purposes, a statute cannot draw distinctions in such a way that the statute's effect is divided along religious/secular lines. While the legislative history of Hialeah's ordinances makes clear that the city had no serious intention of targeting the non-religious killing of animals, the drafting of the CSA makes clear

that Congress's primary target was a secular one: the recreational use of controlled substances. *Cf. Lukumi*, 508 U.S. at 535-40 (reviewing the drafting of the ordinances) *with* H.R. Rep. No. 91-1444, 91st Cong., 2d Sess., *reprinted in* U.S.C.C.A.N. 4566. This is not "a prohibition that society is prepared to impose upon [religious worshipers] but not upon itself." *Lukumi*, 508 U.S. at 545. As the CSA cannot be characterized as an act that disproportionately burdens religion without any commensurate burden on secular usage, it accordingly does not violate the principle of general applicability.

Moreover, a neutral law of general applicability does not violate the First Amendment's Free Exercise Clause "if it is rationally related to a legitimate governmental purpose." *Stormans Inc. v. Selecky*, 526 F.3d 406, 413 (9th Cir. 2008). Here, the CSA does not offend the Free Exercise Clause because it is rationally related to the legitimate governmental purpose of preventing the diversion of controlled substances to non-permissible users or uses and, thus, does not violate the First Amendment. *See id.* at 412.

B. Defendants Are Entitled To Judgment as a Matter of Law on Plaintiffs' Fourth and Fifth Amendment Claims.

Plaintiffs cannot prevail on a Fourth or Fifth Amendment claim for relief because both claims are derived from the false premise that it was unlawful for the government to enforce the CSA. When DEA agents undertook the search of Mr. Goldman's home and seized the ayahuasca within his possession, those agents reasonably believed that Plaintiffs "possess[ed] . . . a controlled substance" in violation of the CSA, 21 U.S.C. § 841(a)(1), and thus the search and seizure at issue were permissible under the Fourth and Fifth Amendments.

Plaintiffs' claims and underlying arguments are premised wholly on the Plaintiffs' as-yet-unestablished claim that the First Amendment and RFRA require the government to afford Plaintiffs unfettered access to import, distribute, and use ayahuasca tea which contains, as Plaintiffs admit, DMT, a schedule I controlled substance. Compl. at ¶ 14, 21. Plaintiffs' Third and Fourth Claims for Relief, therefore, are premised entirely upon resolution of Plaintiffs' First and Second Claims for Relief. These duplicative and derivative claims should be dismissed as a matter of law.

Further weighing in favor of disposing of these two claims is Mr. Goldman's own admission that the statute of limitations for the arrest arising out of the government's May 20, 1999 search and seizure expired in May 2004. *See* Goldman Decl. at 21. Because the government is now time-barred from taking any action against Plaintiffs based on the events of May 20, 1999, there is no injunctive relief that this Court could enter for Plaintiffs. Therefore, whatever standing Mr. Goldman may once have had to challenge this search and seizure does not persist today, rendering Plaintiffs' Third and Fourth Claims moot. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) (mootness principle ensures Article III jurisdiction limited to "live" controversies). The mootness of any once-live controversy underlying Plaintiffs' Third and Fourth Claims further supports entering judgment as a matter of law for the government on these two claims.

C. Defendants Are Entitled to Judgment as a Matter of Law on Plaintiffs' Equal Protection Claim.

Plaintiffs' equal protection claim fares no better. Plaintiffs' allegation that because the federal government is bound by a preliminary injunction issued by the district court in *O Centro*,

the government is somehow obligated to provide identical "accommodat[ion]" to the CHLQ, and that the government's failure to do so – despite the absence of any court order or any effort by the CHLQ to seek "accommodat[ion]" through the administrative exemption process – runs afoul of the Fifth Amendment, is simply untrue.

The principles of equal protection set forth in the Fourteenth Amendment are applicable to the federal government via the Fifth Amendment's due process guarantees. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 231-32 (1995). Depending on the type of government action or classification challenged, differing levels of scrutiny apply in different cases. Here, Plaintiffs allege a denial of equal protection based upon their religion – a fundamental right that often gives rise to heightened judicial scrutiny. "For equal protection purposes," however, "heightened scrutiny is applicable to a statute that applies selectively to religious activity only if the plaintiff can show that the basis for the distinction was religious, not secular." Where "the basis for the distinction is secular," courts apply highly deferential rational-basis scrutiny. *Droz v. C.I.R.*, 48 F.3d 1120, 1125 (9th Cir. 1995). That level of scrutiny asks only whether "there is any reasonably conceivable state of facts that could provide a rational basis" for the challenged action. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). Here, there is no selective application in the statute at issue at all, and the sole basis for the supposed differing "treatment" of the two groups is the injunction requiring the government to provide temporary relief to the UDV from the otherwise general applicability of the CSA. Religion is not the basis for this purported differential "accommodat[ion]" between UDV and CHLQ. Accordingly, the Court must apply rational-basis scrutiny.

But the Court need not apply any scrutiny at all, for even if equal protection could *theoretically* be implicated by differential treatment of UDV and CHLQ, such principles are not *yet* implicated because the government has taken no final action regarding UDV. That dispute remains pending. Plaintiffs' claims here, therefore, are not ripe. Defs.' Mot. at 17-21. (They are also unripe as a result of Plaintiffs' failure to seek an administrative exemption from the CSA and because Plaintiffs cannot show an imminent threat of enforcement of the CSA against them. *See generally id.* at 12-21.)

Moreover, the "actions" about which Plaintiffs complain are not legislative, statutory or administrative, but are the result of a single preliminary court order – and it is well-established that equal protection does not guarantee uniformity of judicial decisions. As the Supreme Court cautioned in *Beck v. Washington*, 369 U.S. 541 (1962), "[w]e have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions ... (or) immunity from judicial error.... Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question." *Id.* at 554-55 (citation omitted); *Camacho v. White*, 918 F.2d 74, 78 (9th Cir. 1990) (that other parties obtained sought-after remedies in other cases does not entitle litigant to relief) (citing *Beck*).

Nor are Plaintiffs similarly situated to the UDV plaintiffs, as they must be in order to be entitled to relief on the basis of equal protection principles. "The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Here, Plaintiffs are dissimilar to the UDV because unlike Plaintiffs, the UDV – after the completion of an extensive preliminary injunction hearing – obtained an injunction. Plaintiffs'

equal protection claim thus places the cart before the horse. And after trial (and regardless of the outcome), they will likewise have no basis for alleging a violation of equal protection principles since equal protection does not guarantee uniformity of judicial decisions. *Beck*, 369 U.S. at 554-55.

Plaintiffs are also dissimilar to the UDV in numerous other ways, all to be shown at trial. To make any claim for equal protection relief, Plaintiffs must be "in all relevant aspects alike" to the allegedly more-favorably-treated group. *Nordlinger*, 505 U.S. at 10. Plaintiffs here and the UDV plaintiffs are not so alike. As noted, and simply by way of example, their origins, doctrines, individual practices, and organizational structures differ markedly. *See* II.C, *supra*.

Plaintiffs' theory of liability appears to be a perversion of so-called "selective enforcement" claims, whereby plaintiffs challenge the selective enforcement of otherwise valid laws, which enforcement favors or disfavors particular groups for impermissible reasons. In such cases, plaintiffs must show that the government's basis for such differential treatment is "pretext for an impermissible motive." *Engquist v. Oregon Dep't of Agric.*, 478 F.3d 985, 993 (9th Cir. 2007), *aff'd*, 128 S. Ct. 2146 (2008). For such a showing, a plaintiff must establish that the defendant "intentionally, and without rational basis, treated the plaintiff differently from others similarly situated" and must demonstrate "that the discriminatory treatment 'was intentionally directed just at him, as opposed . . . to being an accident or a random act.'" *North Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 486 (9th Cir. 2008) (citation omitted). Plaintiffs can establish none of these things. Any differential treatment of the UDV is rooted in a court order, not in any intentional effort by the government to single out the CHLQ.

Moreover, "[i]n addition to the showing of discriminatory purpose and effect, plaintiffs seeking to enjoin alleged selective enforcement must demonstrate the [alleged] misconduct is part of a policy, plan, or a pervasive pattern." *Rosenbaum v. City and County of San Francisco*, 484 F.3d 1142, 1152-53 (9th Cir. 2007) (citations and quotations omitted). And for purposes of declaratory relief via an as-applied challenge to the application of the CSA against the CHLQ, plaintiffs must "demonstrate[] a genuine threat of enforcement" of the disputed statute. *Steffel v. Thompson*, 415 U.S. 452, 475 (1974). Plaintiffs, who base their claims on a solitary preliminary injunction and who do not allege any threat of enforcement of the CSA against them in the last seven years, can do neither. For all of these reasons, their equal protection claim must be rejected.

D. Defendants Are Entitled to Judgment as a Matter of Law on Plaintiffs' International Law Claim.

Finally, the government is entitled to judgment as a matter of law on Plaintiffs' Sixth Claim for Relief because the government has not acted contrary to the doctrine of comity or in violation of international law. Plaintiffs suggest that the government acts in violation of the doctrine of comity by failing to abide by "the findings of the Brazilian Federal Narcotics Council ("CONFEN") . . . ." Compl. at ¶ 85. Plaintiffs further allege that the government's enforcement of the CSA "violate[s] the United Nations International Covenant on Civil and Political Rights ("ICCPR") and Article 18 of its Universal Declaration of Human Rights [("UDHR")]." *Id.* at ¶ 86. Plaintiffs' assertions are unsupported. Neither the doctrine of comity nor any international instrument requires the United States government to excuse Plaintiffs' actions here.

Plaintiffs refer to the "doctrine of comity" as supporting an exemption for CHLQ's religious use of ayahuasca. Comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). Here, Plaintiffs argue that the doctrine of comity requires the United States to permit CHLQ's use of ayahuasca because, as Plaintiffs allege, "the Brazilian Federal Narcotics Council ("CONFEN") . . . specifically ruled that the Santo Daime Church may lawfully utilize the Holy Daime tea for sacramental purposes." Compl. at ¶ 85. Plaintiffs' argument is without merit. The Supreme Court has described the doctrine of international comity as "the recognition which one nation allows within its territory due to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its law." *Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 543 n.27 (1987) (quoting *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895)). Concerns for international comity only arise when there is a "true conflict between domestic and foreign law." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798-99 (1993) (citing *Societe Nationale*, 482 U.S. at 555 (Blackmun, J., concurring in part and dissenting in part)). Here, Plaintiffs' comity claim fails because they have not identified – nor could they – a true conflict between U.S. and Brazilian law.

Plaintiffs invocation of the doctrine of comity flips that doctrine on its head. Plaintiffs appear to suggest that because Brazilian law may permit an individual to consume ayahuasca for religious purposes within Brazil, the United States must permit Plaintiffs to consume ayahuasca in the United States. However, Plaintiffs present no evidence – nor could they – that Brazilian

law applies extraterritorially to permit Plaintiffs, or anyone for that matter, to consume ayahuasca outside the boundaries of Brazil. In fact, to the contrary, Brazilian law prohibits exporting ayahuasca tea from Brazil. Thus, the considerations of deference to foreign laws undergirding the doctrine of comity would actually *support* the United States' continued prohibition on the importation of ayahuasca from Brazil, which conforms with the Brazilian law prohibition exportation of ayahuasca from Brazil.

Moreover, Plaintiffs overstate the findings of CONFEN contained in the CONFEN report attached as Exhibit 4 to Plaintiffs' Memorandum of Law in Support of Application for a Temporary Restraining Order and Motion for Preliminary Injunction. Plaintiffs claim that "CONFEN found that Church members should be permitted to use the Daime tea for sacramental purposes" but cite to no such statement in the CONFEN report. *Compare* Pls.' Mem. at 6 *with* Ex. 4. Similarly, nowhere in the CONFEN report did the Council "specifically rule[] that the Santo Daime Church may lawfully utilize the Holy Daime tea for sacramental purposes." *Compare* Compl. at ¶ 85 *with* Ex. 4. Rather, the limited conclusion of the CONFEN report was simply that the "plant species which are used in the preparation of 'ayahuasca'" could be excluded from the DIMED (Division of Medications of the Ministry of Health) listings of medications. Ex. 4, at unnumbered pages 33-34. Reading the CONFEN report expansively, then, the most that report shows is that the Brazilian government has chosen not to include the two plants used in the preparation of ayahuasca in a list of drugs that are prohibited substances. Ex. 4, at unnumbered page 33. The government also notes that CONFEN has been dissolved and that the cited report has been superceded by more recent resolutions of the Brazilian National Anti-Drug Council (CONAD). *See e.g.*, *id*. Thus, contrary to Plaintiffs' assertions, comity in

fact weighs *against* granting an exemption for Plaintiffs' importation, possession, distribution, and use of ayahuasca imported from Brazil. The doctrine of comity does not in any way require the United States to alter its own domestic statutes, such as the CSA, to comply with the internal recommendations or domestic policies of any foreign government.

Plaintiffs also assert that the ICCPR, 138 Cong. Rec. S4781-84 (1992), and UDHR, GA res. 217A, Dec. 10, 1948, require "an injunction preventing Defendants from further interfering with plaintiffs' religious conduct." Compl. at ¶ 86-88. But neither of these instruments creates a private cause of action. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 734, 738 (2004) (finding no private cause of action arising out of either the ICCPR or the UDHR). Therefore, as these international instruments create no federal remedy, judgment as a matter of law should be entered for the government on this claim.

Moreover, the United States has always recognized that there are two aspects to the First Amendment protections of religious freedom: "freedom to believe and freedom to act. The first is absolute. The second is 'subject to regulation.'" *N.L.R.B. v. World Evangelism, Inc.*, 656 F.2d 1349, 1354 (9th Cir. 1981) (*quoting Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940)). Thus, "activities of individuals, even when religiously based, are often subject to regulation . . . in the exercise of [the government's] undoubted power to promote the health, safety, and general welfare." *Yoder*, 406 U.S. at 220. The international agreements to which Plaintiffs refer also recognize this principle. The ICCPR provides that "[f]reedom to manifest one's religion or beliefs may be subject . . . to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." ICCPR art. 18. The UDHR similarly provides that people, in the exercise of their rights and

freedoms, are subject to "such limitations as are determined by law . . . for the purpose of securing due recognition and respect for the rights and freedoms of others and meeting the just requirements of morality, public order and the general welfare in a democratic society." UDHR art. 29 ¶ 2.

Because neither international law, nor comity, are implicated by Plaintiffs' complaint, their Sixth Claim for Relief should be rejected.

CONCLUSION

For the foregoing reasons, judgment should be entered in favor of the government at trial and Plaintiffs' Complaint and causes of action should be dismissed with prejudice.

Dated: October 16, 2008

Respectfully submitted,

GREGORY G. KATSAS
Assistant Attorney General

KARIN J. IMMERGUT
United States Attorney
District of Oregon
Mark O. Hatfield U.S. Courthouse
1000 SW Third Avenue, Suite 600
Portland, OR 97204-2902

VINCENT M. GARVEY
Deputy Branch Director
Federal Programs Branch

s/ Julie Straus
ERIC J. BEANE
BRIGHAM J. BOWEN
JULIE STRAUS
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.

Washington, D.C. 20001
Phone: (202) 616-2035
(202) 514-6289
(202) 514-7857
Fax: (202) 616-8470
eric.beane@usdoj.gov
brigham.bowen@usdoj.gov
julie.straus@usdoj.gov

Attorneys for Defendants