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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' OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

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INTRODUCTION

Plaintiffs' Application for a Temporary Restraining Order and Preliminary Injunction is deeply flawed and should be summarily rejected. Plaintiffs ask the Court to view a potential future dispute as an "emergency" despite the fact that Plaintiffs have known that ayahuasca is a Schedule I controlled substance under the Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801-971, for at least eight years. Moreover, Plaintiffs have not alleged, and cannot prove, that a government arrest or seizure has been threatened or is imminent. The fundamental purpose of injunctive relief is to preserve the status quo, but there is no imminent, irreparable harm that would justify granting Plaintiffs' motion.

Even if Plaintiffs could demonstrate the possibility of irreparable injury, Plaintiffs would not be able to establish a likelihood of success on the merits because this Court lacks jurisdiction to entertain Plaintiffs' claims. Plaintiffs' claims are not ripe for review because there is an administrative process available for any group that wants an exemption from CSA regulations. *See* 21 C.F.R. § 1307.03. Plaintiffs would have the Court believe that they are entitled to preliminary injunctive relief on par with that ordered by the district court in New Mexico in *O Centro Espirita Beneficiente Unaio do Vegetal v. Ashcroft*, 282 F. Supp. 2d 1236, 1239-40 (D.N.M. 2002) ("the UDV litigation"). *See* Pls.' Mem. at 48. However, Plaintiffs have conspicuously failed to inform the Court that the district court judge presiding over the UDV litigation expressly found that the UDV plaintiffs and the Santo Daime Church differ significantly.[1] Moreover, the Supreme Court has expressly stated that the Religious Freedom

[1] Order Denying Mot. for Leave to File an *Amicus Curiae* Br. in Supp. of Pls.' Application for Prelim. Inj., Civ. No. 00-1647 (D.N.M. May 31, 2001), at Doc. #38.

Restoration Act ("RFRA") must be applied on a case-by-case basis. *See Gonzales v. O Centro Esperita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 436 (2006) (citing *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005)). Therefore, Plaintiffs cannot establish a likelihood of success on the merits based on the current status of litigation in another court, involving a different party, and a different set of factual circumstances. Rather, the Santo Daime church must avail itself of the administrative process before attempting to bring a pre-enforcement challenge in federal court.

SUMMARY OF COMPLAINT

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, 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").[2] *Id.* at ¶¶ 11-13. Plaintiffs allege that their religious practice requires their consumption of a hallucinogenic tea known as ayahuasca,[3] which contains dimethyltryptamine ("DMT"), a Schedule I controlled substance that is banned by the CSA. *Id.* at ¶¶ 14-21.

Plaintiffs allege that a shipment of ayahuasca was seized by Defendants in 1999 and that Plaintiff Goldman was arrested. Compl. ¶¶ 25-28. Plaintiffs state that "charges have never been

[2] It appears that Plaintiffs mistakenly believe that the Department of the Treasury oversees the United States Customs Service. *See id.* at ¶ 13.

[3] 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. Although these terms appear interchangeable, the government will refer to the tea as ayahuasca for the sake of simplicity.

filed against plaintiff Goldman and there is no continuing investigation into the facts surrounding the importation of the Holy Daime tea . . . ." *Id.* at ¶ 29. Plaintiffs also inappropriately detail a series of communications with federal government officials regarding a potential settlement concerning Plaintiffs' use of ayahuasca. *Id.* at ¶¶ 34-41. According to Plaintiffs' Complaint, the last communication concerning these discussions occurred on October 19, 2001 when "Assistant Attorney General McCullum [sic] advised plaintiffs that the Department of Justice would not voluntarily desist from continuing to threaten plaintiffs with arrest and prosecution for attempting to quietly practice their religion." *Id.* at ¶ 41. Plaintiffs' Complaint also includes numerous allegations concerning "The O Centro Esperita Beneficente Uniao do Vegetal (UDV) Decisions." *Id.* at ¶¶ 42-55.

Plaintiffs allege that "[t]he continuing threats of prosecution and threats to seize the Holy sacramental tea in the United States has had the effect of chilling plaintiffs' rights as United States citizens to practice their religion in this country without fear of reprisals by federal agents acting outside the law." Compl. ¶ 56. In Count One, Plaintiffs allege that enforcement of the CSA would violate Plaintiffs' First Amendment right to the free exercise of religion. *Id.* at ¶¶ 68-70. In Count Two, Plaintiffs assert a similar claim under RFRA. *Id.* at ¶¶ 71-72. In Count Three, Plaintiffs allege that "seizure of the Holy Daime tea without prior notice and an opportunity to be heard" constitutes a violation of the Fifth Amendment's due process clause. *Id.* at ¶¶ 73-75. In Count Four, Plaintiffs allege that Defendant's search and seizure in 1999 violated their Fourth Amendment rights. *Id.* at ¶¶ 76-78. In Count Five, Plaintiffs allege that they are "similarly situated to UDV members in their sacramental use of the Holy Daime tea" and that "Defendants' decision to allow the members of the UDV to use *Hoasca* for religious purposes, while denying

the same protection to plaintiffs, violates the equal protection rights of plaintiffs guaranteed by the Fifth and Fourteenth Amendments." *Id.* at ¶¶ 79-82. Finally, Plaintiffs allege in Count Six that Defendants' actions violate the comity principle and international law. *Id.* at ¶¶ 83-86.

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." 42 U.S.C. § 2000bb-1(a), (b). RFRA applies to "all Federal law" and the implementation of that law. 42 U.S.C. § 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. 21 U.S.C. §§ 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." 21 U.S.C. § 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. 21 U.S.C. § 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. One such

substance is dimethyltryptamine. 21 U.S.C. § 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. §§ 1300–1316. Most relevant to the present motion, 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." 21 C.F.R. § 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.

STANDARD OF REVIEW

In determining whether to grant Plaintiffs' request for injunctive relief, this Court must evaluate whether Plaintiffs have shown either (1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of

hardships tips in its favor. *See Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 917 (9th Cir. 2003) (en banc); *Clear Channel Outdoor Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003). "The district court must also consider whether the public interest favors issuance of the injunction." *Shelley*, 344 F.3d at 917. Under this approach, the Court assesses the issues as part of a "continuum: the less certain the district court is of the likelihood of success on the merits, the more plaintiffs must convince the district court that the public interest and balance of hardships tip in their favor." *Id*. at 918; *see Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 731 (9th Cir. 1999).

The purpose of preliminary injunctive relief is to preserve the status quo or to prevent irreparable injury pending the resolution of the underlying claim on the merits. *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984); *see also Chalk v. U.S. Dist. Ct.*, 840 F.2d 701, 704 (9th Cir. 1988). A party's effort to procure preliminary relief that goes beyond maintaining the status quo *pendente lite*, however, constitutes a so-called mandatory injunction. *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1319-20 (9th Cir. 1994). Such injunctions are "particularly disfavored," and courts should be "extremely cautious" to grant such extraordinary relief only where "'the facts and law clearly favor the moving party.'" *Id*. at 1320 (quoting *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1979)). Moreover, mandatory injunctions "are not issued in doubtful cases." 612 F.2d at 1115.

ARGUMENT

I. PLAINTIFFS HAVE NO LIKELIHOOD OF SUCCESS ON THE MERITS

A court must satisfy itself that it has jurisdiction before proceeding to evaluate the merits. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89, 94, 101-02 (1998) (reaffirming basic

tenet that "requirement that jurisdiction be established as a threshold matter" is "'inflexible and without exception'"). Because Plaintiffs in this case clearly do not have standing to bring an unripe claim, they cannot establish a likelihood of success on the merits.[4]

Plaintiffs cannot establish a likelihood of success on the merits because this Court lacks jurisdiction to entertain Plaintiffs' claims for at least three different reasons. First, Plaintiffs lack standing to challenge a regulation that has not been applied to them and from which they have refused to seek an exemption. Second, and relatedly, Plaintiffs' claims, like most claims challenging regulations in the pre-enforcement context, are unripe for review. Third, 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. Additionally, even if this Court did have jurisdiction to entertain Plaintiffs' challenge to the Controlled Substances Act, Plaintiffs could not establish a likelihood of success on the merits by reference to the UDV litigation alone.[5]

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[4] Defendants plan to file a motion to dismiss on jurisdictional grounds within the time limits prescribed by the Federal Rules of Civil Procedure.

[5] It should be noted that the district court judge in the UDV matter entered a preliminary injunction only after extensive discovery and a two-week evidentiary hearing. As the Supreme Court expressly stated, RFRA must be applied on a case-by-case basis. *See O Centro*, 546 U.S. at 436 (citing *Cutter*, 544 U.S. at 722). Even if the Court finds it has jurisdiction here, a preliminary injunction should not be entered until the parties have undertaken discovery and the court has weighed the case-specific evidence. To be clear, Defendants strongly believe that this matter should first be evaluated in an administrative process, which may obviate entirely the need for litigation, instead of assuming, as Plaintiffs do now, that this matter will end up in an adversarial posture. This, of course, is the very purpose of Article III limitations on judicial review.

A. Plaintiffs Lack Standing To Challenge the CSA's Regulatory Scheme.

Plaintiffs do not have standing to challenge the CSA's implementing regulations. In order to establish standing, Plaintiffs must demonstrate an "injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *INS v. Chadha*, 462 U.S. 919, 936 (1983) (quotation and citation omitted). Plaintiffs do not have an "injury in fact" sufficient to confer standing. To demonstrate injury sufficient for standing, a party must show an "injury in fact" – an "invasion of a legally protected interest which is (a) concrete and particularized" and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quotation and citation omitted); *Pritikin v. Dep't of Energy*, 254 F.3d 791, 796-97 (9th Cir. 2001); *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996). In the absence of a final agency decision on a waiver request or an enforcement action against Plaintiffs, any "injury" that may ensue is entirely conjectural and hypothetical.[6]

Plaintiffs also do not have standing to bring an as-applied challenge in the pre-enforcement context because they have not applied for a waiver from any allegedly burdensome regulations. The DEA regulations specifically 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." 21 C.F.R. § 1307.03. Any requests for a waiver should be filed with the Administrator, who has discretion to grant any

[6] There is no need to consider the second-prong of the standing test because, in the absence of any concrete injury, there is nothing to be "redressed." *Chadha*, 462 U.S. at 936.

exception. *Id*. Plaintiffs have not filed an application with the Administrator for an exception from any CSA regulation.

Aside from generally stating that the CSA regulations apply to Plaintiffs' use of ayahuasca, neither the DEA nor any other government entity has applied any DEA regulations to Plaintiffs since 1999, much less forecasted how any application for an exemption would be treated if Plaintiffs availed themselves of the administrative process and explained to the Administrator how any particular regulations would affect their religious practice. Many courts have declined to entertain challenges to governmental regulations that affect religious practices when the party had not been injured by an agency's denial of the right to engage in a religious practice. *See United States v. Hardman*, 297 F.3d 1116, 1120-21 (10th Cir. 2002) (citing cases); *United States v. Hugs*, 109 F.3d 1375, (9th Cir. 1997) ("We agree with the decisions of several district courts in this circuit that failure to apply for a permit [to take or possess eagles or eagle parts] precludes challenge to the manner in which the [Bald and Golden Eagle Protection Act] is administered.").

Although it is not clear that Plaintiffs are attempting to bring a facial challenge to the validity of the CSA regulations, such a claim is unsustainable outside the context of a criminal prosecution. Plaintiffs lack standing to bring a facial challenge because there are many circumstances in which the regulations can be enforced without violating RFRA. *See United States v. Salerno*, 481 U.S. 739, 745 (1987); *Lanier v. City of Woodburn*, 518 F.3d 1147, 1150 (9th Cir. 2008). As the Supreme Court has stated, "a facial challenge is 'the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [rule] would be valid.'" *Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995) (quoting *Salerno*, 481 U.S. at 745) (alteration in original). The CSA and its implementing

regulations apply to all uses of controlled substances. The CSA regulations are plainly constitutional as applied to, *inter alia*, recreational drug use or the medical use of controlled substances. Federal law in those circumstances certainly does not violate RFRA. Plaintiffs cannot seriously argue that the CSA and its implementing regulations are unconstitutional in nearly all circumstances such that the entire regulatory scheme must be invalidated. *See Gonzales v. Raich*, 545 U.S. 1, 15 (2005) (finding it undisputed that "passage of the CSA . . . was well within Congress' commerce power").

Plaintiffs' attempt to obtain an advisory opinion from the Court in the absence of a concrete dispute runs afoul of well-established Article III limitations on the power of the courts. An as-applied challenge could only be brought if Plaintiffs had already applied for, and been denied, a waiver, or if Plaintiffs were faced with an enforcement action or charged with a crime. Neither circumstance is present here.[7]

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[7] Plaintiffs' contention that they face "virtually identical circumstances" to those giving rise to standing in *O Centro*, 282 F. Supp. 2d at 1240 (cited in Pls.' Mem. at 17), ignores the very real distinction between their case and that of the UDV plaintiffs. In its initial complaint, UDV established standing by virtue of the United States Customs Service's May 21, 1999 seizure of a substantial quantity of *hoasca* that UDV had imported into the United States. 282 F. Supp. 2d at 1240. The UDV plaintiffs had standing to challenge that seizure because the CSA was being enforced against them. Plaintiffs here might have had standing had they timely challenged Defendants' May 20, 1999 interception of a delivery of ayahuasca from Brazil to Plaintiff Goldman and Goldman's consequent arrest. However, as Plaintiff Goldman admits, "[t]he statute of limitations for that arrest expired in May of 2004." Decl. of Jonathan Goldman, at 21. Thus, unlike the UDV plaintiffs, Plaintiffs here lack standing because they do not challenge a government action enforcing the CSA against them. *See United States v. Tawahongva*, 456 F. Supp. 2d 1120, 1127-29 (D. Ariz. 2006) (denying standing for an as-applied challenge to a permitting system when plaintiff "did not apply for a permit" but allowing a RFRA claim to proceed as a defense to a criminal prosecution). Once again, only Plaintiffs' own inaction can be blamed for any alleged injury they may suffer now.

B. Plaintiffs' Claims Are Not Ripe for Review.

Plaintiffs' claims regarding hypothetical future disputes regarding their religious drug use are not ripe for review. Whether or how the DEA will enforce specific provisions in the future is entirely speculative. In *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967), the Supreme Court explained that determining whether a controversy is "ripe" for judicial review involves considering both (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. For the fitness prong of the *Abbott* test, a court must "evaluate 'whether the controversy generated is essentially legal in nature or whether further factual amplification is necessary." *United States v. Lazarenko*, 476 F.3d 642, 652 (9th Cir. 2007) (quoting *W. Oil & Gas Ass'n v. Sonoma County*, 905 F.2d 1287, 1291 (9th Cir. 1990)). Thus, in assessing ripeness, courts typically consider such factors as whether the agency action is a definitive statement of the agency's position, whether judicial review would be aided by evaluating the challenged rule or policy in the context of its application to specific facts, and whether the regulation or interpretation requires immediate and significant change in the plaintiff's conduct at the risk of serious penalties for non-compliance. *Abbott Labs.*, 387 U.S. at 151-53; *Toilet Goods Ass'n*, 387 U.S. at 163-65.

Pre-enforcement challenges to regulations are generally unripe because courts "possess no factual record of an actual or imminent application of [the law] sufficient to present the constitutional issues in 'clean-cut and concrete form.'" *Renne v. Geary*, 501 U.S. 312, 321-22 (1991); *see also Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 163-64 (1967) (judicial appraisal of relevant factors "is likely to stand on a much surer footing in the context of a specific

application of [the challenged] regulation than could be the case in the framework of the generalized challenge made here"). In this pre-enforcement context, Plaintiffs cannot prove that any regulation, *as applied*, constitutes a substantial burden on their religious practice. That distinguishes this case from the UDV matter, in which a seizure of ayahuasca was promptly challenged.[8]

First, the issues presented in Plaintiffs' RFRA claims are not "purely legal." *See Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 695 (9th Cir. 2007) (finding pre-enforcement challenge ripe for review because challenge presented "purely legal question" which could be resolved "without reference to more specific facts"). *See also Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1441 (9th Cir. 1996) (finding unripe claim requiring more factual knowledge to evaluate); *Municipality of Anchorage v. United States*, 980 F.2d 1320, 1323 (9th Cir. 1992) (finding legal challenge to agency regulations unripe when further factual development is required). Rather, the opposite is true. RFRA requires a search for "sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(5). Resolving a dispute between two important interests under the RFRA standard involves an inherently fact-intensive inquiry. 42 U.S.C. § 2000bb-1 (requiring a factual inquiry into any

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[8] The UDV plaintiffs' claim was ripe because it challenged the United States Customs Service's May 21, 1999 seizure of a substantial quantity of *hoasca* that UDV had imported into the United States, a final action involving the specific application of the CSA to UDV. 282 F. Supp. 2d at 1240. The UDV plaintiffs thus were not bringing a pre-enforcement challenge because the CSA was being enforced against them. Similarly, Plaintiffs here might have been able to establish standing had they timely challenged Defendants' May 20, 1999 interception of a delivery of ayahuasca from Brazil to Plaintiff Goldman and Goldman's consequent arrest. However, as Plaintiff Goldman admits, "[t]he statute of limitations for that arrest expired in May of 2004." Decl. of Jonathan Goldman, at 21. Thus, unlike the UDV plaintiffs, Plaintiffs' claim here is unripe because they do not challenge a government action enforcing the CSA against them.

"compelling governmental interest" and "the least restrictive means of furthering that compelling governmental interest" in circumstances where the government has "substantially burden[ed] a person's exercise of religion"). "If an issue can be illuminated by the development of a better factual record, a challenge may be unripe." *Dodd v. Hood River County*, 59 F.3d 852, 860 (9th Cir. 1995). *See also Doe v. DEA*, 484 F.3d 561, 567 (D.C. Cir. 2007) ("Where the record provides inadequate factual information to resolve novel legal claims, the court can dismiss those claims as unripe."). This is not a case "where the disagreement is largely a matter of law, [and] an extensive administrative record may not be necessary for effective judicial review." *Id.* Plaintiffs' RFRA claims do not present "purely legal" issues that are readily susceptible to the pre-enforcement adjudication that Plaintiffs seek, especially given that an administrative process may obviate the need for litigation altogether.

Second, Plaintiffs are not challenging any "final agency action" or definitive application of the CSA regulations. Plaintiffs do not cite any particular governmental action pursuant to the regulations that could be considered "final." As the Supreme Court has explained, the purpose of the ripeness doctrine is to

> prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Abbott Labs., 387 U.S. at 148-49.

Finally, in addition to failing to satisfy the fitness element of *Abbott*'s ripeness test, Plaintiffs have also not demonstrated that they will incur extraordinary hardship absent immediate

judicial review.[9] To meet the hardship requirement of the *Abbott* test, a party must show that "withholding review would result in direct and immediate hardship." *Western Oil*, 905 F.2d at 1291 (quotation and citation omitted). Even if Plaintiffs would face some hardship from delay in resolving the extent to which the DEA can regulate their use of ayahuasca, the responsibility for the delay is Plaintiffs' alone. Plaintiffs months ago were advised that "[i]f [they] wish to seek an exemption from the Controlled Substances Act ("CSA") and/or its implementing regulations, . . . the CSA regulations permit a person or group to seek an exemption from the DEA Administrator," including "[p]etitions for religious exemptions from the CSA." *See* Pls.' Mem. at Ex. Q (Email from Eric J. Beane to Roy Haber (May 1, 2008)). Therefore, Plaintiffs cannot genuinely assert that any hardship they may incur is the direct result of the Court withholding emergency relief at this time. Rather, any alleged hardship Plaintiffs might now face is due not to the postponement of their requested relief until the Court can properly adjudicate their claims in a trial on the merits but, rather, to Plaintiffs' own dilatory refusal to pursue relief at the administrative level, despite clear notice that the administrative process is the proper venue for an application for the exemption they now seek.

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[9] In applying *Abbott*, the Ninth Circuit has held that both prongs – fitness and hardship – must be satisfied in order for an issue to be ripe for adjudication. *See W. Oil*, 905 F.2d at 1291 ("In deciding whether an issue is ripe for review, the court 'evaluate[s] *both* the fitness of the issues for judicial decision *and* the hardship to the parties of withholding court consideration.'") (alteration in original) (emphasis added) (*quoting Abbott*, 387 U.S. at 148-49). *See also Neb. Pub. Power Dist. v. MidAm. Energy Corp.*, 234 F.3d 1032, 1038-39 (8th Cir. 2000) (citing *W. Oil*, 905 F.2d at 1291, for proposition that Ninth Circuit has "held that both prongs [of the *Abbott* test] must be satisfied in order for an issue to be ripe"). Therefore, because Plaintiffs have failed to satisfy the fitness element of the *Abbott* ripeness test, the Court need not consider whether Plaintiffs will incur any hardship absent immediate review.

C. Plaintiffs Must Exhaust Administrative Remedies.

This Court lacks jurisdiction over Plaintiffs' claims because Plaintiffs have failed to exhaust administrative remedies by applying for an exemption from any regulations they view as burdensome. Although the CSA does not specify that exhaustion of administrative remedies is a jurisdictional requirement,[10] the exhaustion doctrine must be applied in the present circumstances because jurisdiction over final DEA decisions lies exclusively in the court of appeals:

> All final determinations, findings, and conclusions of the Attorney General under this subchapter shall be final and conclusive decisions of the matters involved, except that any person aggrieved by a final decision of the Attorney General may obtain review of the decision in the United States Court of Appeals for the District of Columbia or for the circuit in which his principal place of business is located upon petition filed with the court and delivered to the Attorney General within thirty days after notice of the decision. Findings of fact by the Attorney General, if supported by substantial evidence, shall be conclusive.

21 U.S.C. § 877. Congress clearly and unambiguously provides the court of appeals with exclusive jurisdiction over disputes arising under the Controlled Substances Act.

The exclusive jurisdiction of the court of appeals over disputes concerning the regulation of controlled substances has been widely recognized. *See Doe v. DEA*, 484 F.3d at 568 (finding court of appeals had exclusive jurisdiction over review of import permit denial and noting that 21 U.S.C. § 877 "vests exclusive jurisdiction in the courts of appeals over '[a]ll final determinations, findings, and conclusions' of the DEA applying the CSA"); *Oregon v. Ashcroft*, 368 F.3d 1118, 1120 (9th Cir. 2004) (finding court of appeals had original jurisdiction over challenge to

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[10] Whether exhaustion under the CSA is mandatory or prudential, requiring Plaintiffs to exhaust their administrative remedies makes sense here, where Plaintiffs are trying to evade a perfectly adequate regulatory scheme in favor of a manufactured emergency, and where exhaustion would at least give a reviewing court an administrative record to provide the case-specific facts necessary for a RFRA analysis.

interpretive rule issued by Attorney General), *aff'd sub nom Gonzales v. Oregon*, 546 U.S. 243 (2006); *Steckman v. DEA*, No. Civ. A.H-97-1334, 1997 WL 588871 at *1-2 (S.D. Tex. Sept. 16, 1997) (finding that district court had no subject matter jurisdiction over CSA-related claim because the only proper forum was in the court of appeals). Following a lengthy analysis of Section 877, the District Court for the District of Columbia concluded that "Section 877 . . . seems to explicitly vest exclusive jurisdiction in the courts of appeals over any CSA-based agency determination that could properly be before a federal court." *Doe v. Gonzalez* [*sic*], No. 06-966, 2006 WL 1805685 at *22 (D.D.C. June 29, 2006), *aff'd sub nom Doe v. DEA*, 484 F.3d at 568-70. The exhaustion doctrine should be applied here because declining to apply the doctrine would be tantamount to granting a circumvention of the CSA's exclusive jurisdiction provision.[11]

Therefore, Plaintiffs cannot establish a likelihood of success on the merits because of three distinct jurisdictional defects in their Complaint: (1) Plaintiffs' lack of standing; (2) the absence of a ripe dispute; and (3) Plaintiffs' failure to exhaust administrative remedies.

D. Likelihood of Success on the Merits Cannot Be Established by Reference to Other Litigation.

Even if this Court did have jurisdiction to entertain Plaintiffs' challenge to the CSA, Plaintiffs could not establish a likelihood of success on the merits by reference to the UDV

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[11] Once again, Plaintiffs here can be distinguished from the UDV plaintiffs whose initial complaint challenged the United States Customs Service's May 21, 1999 seizure of a substantial quantity of *hoasca* that UDV had imported into the United States, a final action involving the specific application of the CSA to UDV. 282 F. Supp. 2d at 1240. This distinguishing factor explains why the federal government did not argue in the UDV case that exhaustion was a prerequisite to the UDV plaintiffs' initial complaint. See Pls.' Mem. at 3. Even if Defendants had taken a position inconsistent with their exhaustion argument here, which they did not, a jurisdictional defense can never be waived. Plaintiffs' citation to Rule 11, therefore, is totally inappropriate.

litigation alone. Although it is correct that a preliminary injunction currently limits the federal government's right to enforce certain, but not all, CSA regulations, Plaintiffs are wrong to imply that there is a decision on the merits of the UDV's RFRA claim or that Defendants have conceded in that case. *See* Pls.' Mem. at 18, 47. More fundamentally, Plaintiffs are wrong to suggest that any and all religious groups would automatically be entitled to the same exemption that another religious group preliminarily obtained.[12] The Supreme Court clearly stated that RFRA analysis, just like analysis pursuant to the Religious Land Use and Institutionalized Persons Act, must be applied on a case-by-case basis to "specific claims for exemptions." *O Centro*, 546 U.S. at 436 (citing *Cutter*, 544 U.S. at 722). The Supreme Court's decision in the UDV matter is expressly limited to the facts in that case.

Moreover, the district judge presiding over the UDV litigation expressly found that "the factual circumstances relating to the consumption of hoasca tea by members of O Centro Espirita Benificiente Uniao do Vegetal (UDV), and the government's actions in regard to that use of hoasca, differ significantly from the facts involving the consumption of Daime tea by members of the Santo Daime Church, and the government's reaction to that use of Daime." Order Denying Mot. for Leave to File an *Amicus Curiae* Br. in Supp. of Pls.' Application for Prelim. Inj., Civ.

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[12] Plaintiffs' argument misconstrues the Supreme Court's ruling in the UDV case. 546 U.S. at 439. Notwithstanding Plaintiffs' unsupported assertions to the contrary, the Supreme Court's limited holding in UDV was, simply, that the government had not sufficiently "demonstrate[d] . . a compelling interest in barring the UDV's sacramental use of *hoasca*." *Id.* (emphasis added). In so holding, the Supreme Court was applying the Congressionally-mandated RFRA "compelling interest test that requires the Government to address the particular practice at issue." *Id.* (emphasis added). Thus, the compelling interest test which serves as the sole thread sustaining Plaintiffs' argument is not at all dispositive of their case, as that very test demands "a case-by-case determination of the question, sensitive to the facts of each particular claim." *Id.* at 431 (internal quotations and citations omitted).

No. 00-1647, at 2-3 (D.N.M. May 31, 2001), at Doc. #38. Plaintiffs made no mention of this order when asserting that "[t]he religious practice and other relevant issues establish that the Santo Daime and UDV are similarly situated." Pls.' Mem. at 48. Therefore, Plaintiffs cannot establish a likelihood of success on the merits based on the current status of litigation in another court, involving a different party, and a different set of factual circumstances.

II. PLAINTIFFS CANNOT SATISFY THE REQUIREMENTS FOR EMERGENCY INJUNCTIVE RELIEF

When the moving party cannot demonstrate a strong likelihood of success on the merits of their claims, "the degree of harm required to justify" emergency injunctive relief is "greater than if plaintiffs had made a stronger showing on the merits." *Or. Natural Res. Council Fund v. Goodman*, 382 F. Supp. 2d 1201, 1206 (D. Or. 2004). In such cases, the moving party must show that the balance of hardships tips "decidedly" in their favor. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1124 (9th Cir. 2002). Plaintiffs here cannot make "the requisite showings that they will suffer 'irreparable injury' and that they are favored by the balance of hardships," *id.*, or show that the public interest weighs in favor of granting a temporary restraining order, *see Hells Canyon Preservation Council v. Jacoby*, 9 F. Supp. 2d 1216, 1245 (D. Or. 1998). Therefore, Plaintiffs' application for emergency relief must be denied.

A. Plaintiffs Cannot Identify Any Emergency Necessitating the Relief They Seek.

Plaintiffs cite no immediate or imminent circumstances warranting emergency relief. The seizure of Plaintiffs' ayahuasca and arrest of Plaintiff Goldman occurred nearly a decade ago, Compl. ¶ 25, Defendants have not filed charges or prosecuted Plaintiff Goldman or another Plaintiff for the illegal importation of ayahuasca, Compl. ¶ 29, and the statute of limitations on the

events leading to Plaintiff Goldman's arrest has long since expired. *See* Goldman Decl., at 21. Despite Plaintiffs' disingenuous and decidedly vague claim of "continuing threats of prosecution and threats to seize the Holy sacramental tea," Compl. ¶ 56, Defendants have made no representations to Plaintiffs that Defendants intend to prosecute or take another enforcement action against Plaintiffs since at least as long ago as October 2001. *See* Pls.' Mem. at Ex. N (Letter from Robert D. McCallum, Jr. to Roy Haber (Oct. 19, 2001)).[13] At most, Plaintiffs' complaint raises the possibility of a future dispute between the Santo Daime Church *if* Plaintiffs file a request for an exemption from the CSA and/or its regulations and *if* Plaintiffs are dissatisfied with the decision reached by the DEA Administrator. However, courts have "long since determined that speculative injury does not constitute irreparable injury." *See, e.g.*, *Colo. River Indian Tribes v. Town of Parker*, 776 F.2d 846, 849 (9th Cir. 1985).[14]

Since at least as early as February 2001, Plaintiffs have been aware that Defendants had neither resolved the question of whether Plaintiffs were entitled to an exemption from the CSA nor made a final determination on Plaintiffs' request for an exemption. *See* Pls.' Mem. at Ex. K

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[13] Furthermore, the Department of Justice's October 19, 2001 letter, which Plaintiffs allege gave rise to the "extreme jeopardy" they currently face, made no threat or other representation that Defendants intended to take action against Plaintiffs. All then-Assistant Attorney General Robert D. McCallum, Jr. wrote at that time was that "the Department believes the prohibition on the importation, distribution and possession of ayahuasca tea is the least restrictive means of furthering a compelling governmental interest, and neither [RFRA] nor the United States Constitution compels the United States to permit such importation, distribution and possession." Ex. N.

[14] The entirely speculative nature of Plaintiffs' claims render their application for a temporary restraining order particularly inappropriate given the mandatory nature of the injunction they seek. Mandatory injunctions, which are "particularly disfavored," are "not issued in doubtful cases" such as this one, where Plaintiffs cannot show a likelihood of success on the merits, or establish with any certainty that irreparable harm will result absent the injunction they seek. *Anderson v. United States*, 612 F.2d at 1114, 1115.

(Letter from Stuart E. Schiffer to Roy Haber (Feb. 2, 2001)), at 1-2. Moreover, at that time, the Department of Justice solicited additional information from Plaintiffs, including answers to "written questions the Department submitted to [Plaintiffs]" and "any additional information that [Plaintiffs] may wish to provide in response to the position set out by the government" in its opposition to the motion for a preliminary injunction filed in the UDV case. *Id.*[15] Plaintiffs declined to respond to the Department's "written questions." *Id.* Plaintiffs also did not provide "any additional information . . . in response to the position set out by the government" in its opposition motion in the UDV case. *Id.*

Furthermore, Plaintiffs have long been aware that if they wish an exemption from the CSA, they should send a petition for exemption to the DEA. On May 1, 2008, the Department of Justice provided Plaintiffs with the contact information for the Deputy Assistant Administrator, Office of Diversion Control, DEA, to whom petitions for religious exemptions should be sent. *See* Ex. Q. Additionally, Plaintiffs' counsel is admittedly very familiar with the details of the UDV litigation in the district court in New Mexico.[16]

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[15] Plaintiffs' assertion that "the defendants advised plaintiffs that any issues they wanted to raise should be done in the context of the UDV case at the district court level," Pls.' Mem. at 42, 44 (citing Ex. K), misrepresents Defendants' communication to Plaintiffs which was, more accurately, an offer to "consider any additional information that [Plaintiffs] may wish to provide in response to the position set out by the government" in its filing in the UDV case. Ex. K, at 2. This excerpt from Mr. Schiffer's letter was merely an invitation to Plaintiffs to provide information, not a refusal to consider Plaintiffs' concerns unless presented in a formal filing to the district court in the UDV case.

[16] In fact, Mr. Haber's December 8, 2007 letter to officials at the Department of Justice, *see* Pls.' Mem. at Ex. O (Letter from Roy Haber to Stuart E. Schiffer (Dec. 8, 2007)), cites the Department's November 21, 2007 Motion to Dismiss the UDV plaintiffs' amended complaint. That same motion, familiarity with which Mr. Haber has repeatedly demonstrated, makes plain the Department's position that petitions for religious exemption from the CSA or its implementing regulations should be directed to the DEA Administrator. Therefore, since at least

B. Plaintiffs' Delay Indicates They Face No Irreparable Harm.

Plaintiffs argue that they "should not be forced to make a Hobson's choice of either abandoning their religion or risk[ing] arrest and prosecution by defendants," *see* Pls.' Mem. at 16, but their ability to claim hardship is fatally undermined by their failure to seek any administrative or judicial relief for seven or eight years. Plaintiffs acknowledge that they were advised on October 19, 2001 that federal law does not permit the use of a substance containing DMT, *see id*., but they offer no justification for their seven-year delay in challenging the CSA. As Plaintiffs describe at length, albeit inaccurately in many instances, case law regarding religious drug use has developed in recent years, which is why the Department of Justice advised Plaintiffs that they should avail themselves of the DEA's administrative process for seeking exemptions from the CSA and its implementing regulations. To the extent Plaintiffs face any uncertainty about whether an application for an exemption from the CSA would be granted, that uncertainty is due to Plaintiffs' failure to apply for an exemption. To be clear, Defendants have not determined whether an application for an exemption would be granted. Therefore, Plaintiffs cannot establish any hardship that would be imposed by deferring judicial review at this time.

Plaintiffs' long and entirely unexplained delay in filing their complaint and seeking relief "implies a lack of urgency and irreparable harm." *Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985). *See also Docusign, Inc. v. Sertifi, Inc.*, 468 F. Supp. 2d 1305, 1310 (W.D. Wash. 2006) (finding plaintiff's delay of nearly one year "undermines its claim of irreparable harm and request for immediate injunctive relief"); *Prindable v. Ass'n of Apartment*

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as early as December 2007, Plaintiffs, by and through their counsel, have been on notice of the proper administrative process for the relief they now improperly seek in district court.

Owners of 2987 Kalakaua, 304 F. Supp. 2d 1245, 1262 (D. Haw. 2003) ("Such a lengthy delay, when there has been no change in the relevant factual circumstances, cuts decidedly against a finding of harm or hardship – irreparable or otherwise."). Accord *Lydo Enters. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) ("A delay in seeking [injunctive relief] is a factor to be considered in weighing the propriety of relief.").

Plaintiffs' claim that they "have been in extreme jeopardy since" the Department of Justice's October 19, 2001 letter is disingenuous. Defendants have not taken any enforcement or prosecutorial action against Plaintiffs, despite being well aware of the identity of Plaintiff Goldman due to his arrest in May 1999, as well as the existence of the Church as a result of their attempt to participate in the UDV litigation. In the more than nine-year period since Plaintiff Goldman's arrest and seizure, the relationship between the parties has not changed in any way, let alone so dramatically as to convert what has for years been a tolerable situation for Plaintiffs into a pressing emergency, now requiring immediate action by the Court.

C. Plaintiffs' Requested Relief Does Not Serve the Public Interest.

Finally, the public interest would be disserved if a temporary restraining order were issued because Congress has found that the use of controlled substances outside of the framework specified by the CSA has "a substantial and detrimental effect on the health and general welfare of the American people." 21 U.S.C. § 801(2). Because the public interest is at the heart of the government's prohibition on the importation, distribution, and use of ayahuasca, Plaintiffs' motion for a temporary restraining order must be denied.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Temporary Restraining Order should be denied.

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Respectfully submitted,

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