DEFENDANTS IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

THE CHURCH OF THE HOLY LIGHT OF THE QUEEN, et al. Plaintiffs, v. MICHAEL B. MUKASEY, et al. Defendants.	)	CIV. NO. **SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND FOR A MOTION FOR PRELIMINARY INJUNCTION**

PLAINTIFFS ARE NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES

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INTRODUCTION

Defendants' Opposition asks the Court to dismiss this litigation and to refrain from issuing the requested Temporary Restraining Order prohibiting the government from threatening to seize plaintiffs' sacrament, and to arrest, imprison, and bring criminal charges against these law-abiding citizens for quietly practicing their religion. Defendants continue in their attempts to intimidate plaintiffs even in light of the 8-0 decision in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006).

There are a number of reasons why this Opposition is bereft of any factual or legal support, which we will address below. Perhaps the most troubling thing about this pleading is that no less than five times in the past eight months, defendants argued to Judge Parker in the *O Centro* litigation that where the government has stated that it is banning the importation of the tea and where importation and distribution may well result in seizure of the tea,[1] plaintiffs need not exhaust any administrative remedies to make the case ripe for an Article III Judge to render a decision under the Religious Freedom Restoration Act (RFRA) regarding the government's actions. Indeed, Mr. Beane argued to Judge Parker that, because the hoasca tea had been seized and the government was taking the position it would continue to threaten criminal prosecution if the tea were imported, there was a ripe controversy and the government had no reason to argue for exhaustion. This is precisely where this litigation is today. The Attorney General of the United States informed plaintiffs several years ago that the United States will not permit

[1] In the case of plaintiff Goldman, federal agents forced their way into his house, and with rifles, handcuffed him in the presence of his terrorized young son and daughter, detained him in jail for 12 hours, and finally released him without any charges being filed.

the sacred Daime tea to be brought into this country for sacramental use. And, despite the 8-0 loss in the *O Centro* case, defendants persist in continuing their threats of arrest and prosecution of the plaintiffs. Defendants argued to the Supreme Court that there will be no exceptions granted, and the government has already evidenced that it opposes what we are seeking now.

The defendant Department of Justice (DOJ) never argued that the District Court of New Mexico did not have jurisdiction to hear the *O Centro* case. Even before the Supreme Court, the Solicitor General of the United States did not argue that the district court did not have jurisdiction. This court has jurisdiction to hear this case. Defendants have acknowledged that prudential exhaustion is not jurisdictional. In *O Centro,* defendants argued that, "Although exhaustion is not statutorily required, the prudential exhaustion doctrine should be treated as jurisdictional in this case because evasion of the DEA's administrative process would lead to the avoidance of an exclusive jurisdiction provision." Thus, the best that DOJ was hoping for in the *O Centro* litigation was for the district judge to exercise his discretion to treat a non-jurisdictional claim as jurisdictional.[2] This current move must be seen for what it is: A last ditch effort by the United States to avoid another finding by a federal district court that the defendants have no compelling interest in banning the sacred tea. The Supreme Court was correct in holding that federal district courts, not the Drug Enforcement Administration (DEA) or the DOJ, are best suited to evaluate the complicated constitutional, statutory and evidentiary issues raised in a religious freedom case.

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[2] Def. Reply Memo, *O Centro,* April 1, 2008, p. 3 ftn.2. This argument is related to what the government called "phase two" of the *O Centro* case, having acknowledged that exhaustion does not even apply at the stage of the litigation where the government seeks to ban the sacramental tea in its entirety.

Defendants admitted in the *O Centro* case that there were no statutory exhaustion requirements implicated in this case. Even if there were any applicable exhaustion statutes, the defendants have demonstrated that they have already predetermined the outcome of any such pursuit.

As noted in the Declaration of plaintiffs' counsel, the plaintiffs began negotiations with the DOJ in the year 2000, pursuant to then-Attorney General Reno's desire to settle this litigation. There were 12 federal agencies that comprised an "interagency task force working group" to advise the Attorney General. All communications were between plaintiffs' counsel and senior attorneys in both Ms. Reno's office and that of her successor. In the eight years since these dozen federal agencies have denied plaintiffs their rights, not one of the senior Justice Department attorneys has ever requested or even suggested that plaintiffs had to apply to any federal agency for an exemption under any statute or regulation then or now in effect. *See:*

1. A December 11, 2000, letter from I. Michael Greenberger, Principal Deputy Associate Attorney General, advising plaintiffs that an "interagency working group has been formed' including twelve "branches of the Department of Justice"[3];
2. A December 12, 2000, letter from Robert Rabin, Office of the Attorney General, to Congressman Peter DeFazio referring to the "interagency working group. . . [charged] to investigate methods of handling religious freedom claims generally";[4]
3. A December 21, 2000 letter from Greenberger stating that "[I]t is not feasible nor advisable for the Department to reach a conclusion on the

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[3] *See* Haber Dec. Ex. "G."

[4] *See* Haber Dec. Ex "H." This letter establishes that, at that time, there were no procedures nor administrative processes in existence in any of the 12 DOJ branches to evaluate religious freedom cases. To this date neither DOJ, the DEA, nor any other agencies have promulgated any regulation regarding this issue. Mr. Beane's letter of May 1, 2008, the first ever such communication from any federal agency over the afore-mentioned eight year period, advised plaintiffs to apply to the DEA for an exemption but fails to refer to any policy or procedure that has been promulgated by the Attorney General since the inference admitted in the Rabin letter.

complex legal and factual issues that you have raised without thorough consideration. The interagency working group is the most appropriate and efficient means of undertaking such consideration";[5]

4. A February 2, 2001 letter from Stuart Schiffer, George W. Bush Administration replacement for Greenberger, stating that any information the plaintiffs wish to provide should be done in the context of the *O Centro* litigation.[6]

All communications between the parties were between plaintiffs' counsel and the various Assistant or Associate Attorneys General on behalf of the "interagency task force" created by former Attorney General Reno to settle the existing dispute.

On October 11, 2001, the predecessor of defendant Immergut, the United States Attorney for the District of Oregon, continued the pattern of intimidation of plaintiffs by advising them that "[t]he decision to prosecute your client for his conduct remains an open question pending the decision of the United States Department of Justice regarding your request for a controlled substance exemption."[7] On October 19, 2001, Assistant Attorney General McCullum advised the plaintiffs that the United States of America would ban the importation, distribution and possession of the sacred Daime tea, concluding that it was the least restrictive means to "furthering a compelling government interest," the identical position the defendants have taken in *O Centro*. Thus, from that moment on, plaintiffs have been under the threat of further seizure of their holy sacrament, and arrest, prosecution and imprisonment if they practice their religion.

From plaintiffs' very first contact with Attorney General Reno, plaintiffs made it crystal clear that they were not and are not seeking any administrative action by any

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[5] *See* Haber Dec. Ex. "J." These documents establish that the DOJ takes the position that it, not the DEA, is best qualified, with the assistance of all 12 of its branches, to evaluate these complex issues.

[6] *See* Haber Dec. Ex. "K."

[7] Exhibit "15." Although the Statute of Limitations has run regarding Mr. Goldman's arrest, the threat of further arrest remains.

government agency; plaintiffs have never invoked any administrative processes. Rather, the Attorney General was informed that the federal government's continued threats to seize the tea and prosecute Church members were a violation of law, the RFRA, which prohibits the government from imposing a "substantial burden" on a religious practice without demonstrating a "compelling interest." The Supreme Court agreed.

Defendants spend several pages arguing cases which hold that one cannot mount a facial challenge agency regulations without meeting certain criteria. But that is not this case. Plaintiffs are not challenging and the Controlled Substances Act (CSA) regulations. As Mr. Beane has noted several times in the UDV case, the challenge was there and is here to the government banning the importation of the tea without demonstrating a compelling interest. This is not a case challenging any governmental administrative decision. This case prays for relief from the illegal threats by the DOJ and the Attorney General to seize the sacrament of plaintiffs' religion and to arrest and prosecute those members of the Church who might attempt to bring the tea into the United States for the sole purpose of imbibing it during religious services. It is noteworthy, "[t]he Department [of Justice, which includes the DEA,] does not have a procedure to handle RFRA cases."[8]

As we point out below, defendants have conceded to Judge Parker that where the government is seeking to ban the tea completely, there are no exhaustion requirements. No regulations are being challenged, contrary to the government's Memorandum Nevertheless, defendants sent a letter dated May 1, 2008, stating that, if plaintiffs want

[8] *See* Exhibit "E." As we note in the Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction, the defendants have never had and still do not have a process to evaluate religious freedom claims arising under RFRA.

some exemption from the DEA, they should apply to the Administrator of the DEA for an exemption.

Finally, defendants concede that the district court does have jurisdiction at this stage of the litigation where the government seeks to ban the tea entirely. Mr. Beane argued to Judge Parker that, "Well, those jurisdictional issues don't arise until you get to the issue of the regulations themselves. The government had seized their shipment of Hoasca. Clearly there was an injury . . . The phase II uniquely raises the issues concerning the administrative process that applies, after all, only after somebody is lawfully importing them in the first place. . .First, it wasn't relevant in phase I of the litigation. . . ." Transcript of *O Centro,* Hearing, April 9, 2008, at 77.

A. There is No Statutory Requirement The Plaintiffs Exhaust Administrative Remedies before Filing.

Defendants admit that there is no statute requiring plaintiffs to seek any exemptions or otherwise exhaust any administrative remedies before filing this case. In the *O Centro* litigation defendants argued, that while "[e]xhaustion is not statutorily required," Judge Parker should order "prudential exhaustion" in the Court's discretion. Defs.' Mem. in Supp. of Mot. to Dismiss, at 16-17, Doc. #166-2, *O Centro*, No. CV-00-1647 (D. N.M, Nov. 21, 2007).

Defendants made the same argument again several months later saying, "Exhaustion is not statutorily required." Defs.' Reply Memorandum to Motion to Dismiss, *O Centro,* No. CV-00-1647 (D.N.M. April 1, 2008), at 3.[9]

[9] DEA Regulations provide that a person "may" apply for an exemption to the application of any regulations, but this provision is not an exhaustion requirement as, for example, compared to Title VII of the Civil Rights Act, which requires that aggrieved

B. Defendants Have Acknowledged that Exhaustion is Not Required at This Stage of This Litigation.

Defendants characterized the posture of the UDV case after remand as follows:

> A sharp distinction must be drawn between Phase I of this litigation, which concerned the government's attempt to ban Plaintiffs' use of *hoasca*, and Phase II of this litigation, which concerns a challenge to the government's authority to regulate Plaintiffs' use of *hoasca*. United States Customs officers had seized a shipment of *hoasca* to Plaintiffs, thus creating an actual dispute concerning the government's ban on any use of *hoasca*. [10]
>
> After receiving briefing and hearing oral argument about further litigation proceedings, this Court recognized that there were two distinct components to Plaintiffs' reformulated case against the government—the first phase addressing the government's right to ban Plaintiffs' use of *hoasca* and the second phase concerning the lawfulness of regulating Plaintiffs' use of *hoasca.* In this case, the government had no reason to discuss an exemption process for regulations because Phase I addressed a threshold question about the lawfulness of any importation or use of *hoasca.*[11]

Defendants continued to press this argument/distinction with Judge Parker.

> The first phase of this litigation concerned the government's right to ban Plaintiffs' use of *hoasca* [hereinafter Phase I]. Phase I of this case presented a ripe controversy because the government had seized Plaintiffs' *hoasca* and took the position that the importation and use of a Schedule I controlled substance was entirely banned by the Controlled Substances Act ("CSA").[12]

Defendants make it clear that:

> [I]n Phase I of this litigation, Plaintiffs' claims concerning Defendants' seizure of *hoasca* were ripe for review because there was a concrete dispute for the Court to resolve.[13]

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persons first seek relief from the Equal Opportunity Employment Commission before filing suit in federal court, or the Prisons Litigation Reform Act, enacted after RFRA, which specifically requires that all prisoners must first exhaust administrative remedies before filing civil rights cases in federal court. See discussion below.

[10] Def. Motion To Dismiss Amended Complaint, *O Centro, November 21, 2007, at 25.*

[11] Defendants' Reply Memorandum in Support of Their Motion to Dismiss**,** No. CV 00-1647 JP/RLP, April 1, 2008, at 5 (hereinafter, "Def. UDV Motion").

[12] Def. UDV Motion at 2.

[13] *Id.* at 11.

Such is the posture of this case. As we note above, it was the Attorney General who notified plaintiffs on October 19, 2001, that the government would continue to ban the tea, and it was the U.S. Attorney who suggested that any decision about criminal prosecution would be based on whether the DOJ decided to ban the tea. The defendants are estopped from even asserting most, if not all, of their UDV arguments.[14]

Simply stated, the defendants are looking for a way to take a second bite at the same apple and to retry the UDV case again in their offices with their Administrator deciding if she is violating RFRA, rather than have the decision made in this Court, which is the forum RFRA intended to resolve such issues.

C. There is No Requirement that Plaintiffs Exhaust Administrative Remedies Pursuant to any Administrative Regulations.[15]

In passing RFRA, Congress determined that federal courts should undertake to evaluate the competing interests involved in government decisions to burden a religious practice. There is nothing in the RFRA statute or legislative history to suggest that a federal agency that is taken to task in an Article III Court for violating RFRA, should have the case remanded to it, to hold its own set of hearings and decide, in the first instance, whether its policies are illegal as applied to the plaintiff and therefore violate RFRA.[16]

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[14] *See,* Plaintiffs Memorandum in Support of Application for a Temporary Restraining Order.

[15] In the past, the DEA has taken the position (and we agree) that the DEA does not have jurisdiction even to entertain an exemption for religious use of the Daime tea. *See, Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458 (D.C. Cir. 1989).

[16] However, where a government agency's administrative process has already been initiated, there is nothing in RFRA to prevent that agency from initially looking at constitutional impediments or other statutory impediments that may require it to alter its behavior.

Congress has generally determined that the "civil rights" laws are an exception to the exhaustion doctrine. See, *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 501-02 (1982). The Supreme Court there held that, in the specific context of section 1983 claims, Congress did not intend to require exhaustion of State administrative remedies before a section 1983 claim could be brought in federal court because of its concern that the States would attempt to undermine constitutional rights. *Id.* at 516.

In *Patsy*, the Court opined:

> [T]he initial question whether exhaustion is required should be answered by reference to congressional intent; and a court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent.

Id. at 501–02.

The logic of *Patsy* applies with particular force here in that the DOJ and its DEA have already been found wanting in protecting the religious freedom of the UDV plaintiffs and have said many times that they will treat the plaintiffs in this case as they have the UDV plaintiffs. This is an excellent example of why these religious freedom issues are more appropriately directed to the federal judge than to the administrator of a branch of the very Department (DOJ) that is violating plaintiffs' rights.

RFRA does not, by its own terms, require that an aggrieved party must prove anything to the very agency that violates the Act. A person whose religious practices are burdened in violation of RFRA "may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief." 42 U.S.C. § 2000bb-1 (c) (emphasis supplied). Nothing in the wording of RFRA supports the defendants' new tactic.

RFRA places the burden on the agency to establish in court, after the plaintiff establishes that a religious practice has been burdened, that its actions are the least

restrictive means to accomplish a compelling government interest. RFRA specifically requires that this burden-shifting process take place "in a judicial proceeding."

In this case, the evidence clearly establishes that the taking of the sacramental tea is a "non drug use" as found by the Oregon Pharmacy Board. Professor Jimmy Gurulé, who recently stepped down as Under Secretary of the Treasury (Enforcement) offered the following expertise:

> I have been advised that the plaintiffs recently requested the Oregon Pharmacy Board to receive copies of their Sacrament Receipt forms which track the shipment of the Daime tea from Brazil to Oregon. The Board reaffirmed that the sacramental ingestion of the tea is a non-drug use and therefore the Board has no jurisdiction over their religious practices including tracking the tea or acting in any other oversight capacity. From a drug policy perspective that position is correct because a drug oversight agency is concerned with abuse of controlled substance. Because the tea is used in a non-drug manner, the Oregon Pharmacy Board declined the offer. The same must be said of the DEA. Given the non-drug use of the Daime tea and the DEA's inability to establish a "compelling state interest," *this is not a case where the DEA has jurisdiction to ban the tea or apply any of its regulations to the religious practices of the Santo Daime Church.* This case is about the defendants threatening to arrest plaintiffs for activity that is legal under RFRA (emphasis supplied). [17]

Finally, the defendants acknowledged in the UDV case that there is no statutory exhaustion requirement but ask the Court to apply a "common law, prudential exhaustion." Below we establish that the history of the UDV litigation and the defendants' arguments in that case, including those that mention the plaintiffs in this case, strongly militate against this Court referring this RFRA case to one of the several branches of the DOJ violating the law (RFRA).

D. <u>This Court Should Decline to Require Exhaustion of Any Administrative Remedies</u>

[17] Certainly, we assume that the defendants are in consultation with the DEA, as they have been with the other eleven DOJ branches in this case.

The Supreme Court has committed the decision of whether to require common law exhaustion in a given case to the "sound discretion of the district courts." *NLRB v. Industrial Union of Marine & Shipbuilding Workers of Am.,* 391 U.S. 418, 426 (1968). While we have established that there is no statutory requirement of exhaustion here, even the Supreme Court's enunciated criteria for the exercise of discretionary exhaustion have not been satisfied here. "[I]f congressional intent to require exhaustion is not clearly apparent, courts should determine whether a common law exhaustion requirement is applicable; this inquiry gives broad discretion to district courts." *See, McCarthy v. Madigan*, 503 U.S. 140, 144, 117 (1992).

For example, in *Yahweh Ben Yahweh v. U.S. Parole Comm'n*, 158 F. Supp. 2d 1332 (S.D. Fla. 2001), the court had occasion to review the legislative history of RFRA and found there was no indication that Congress intended that exhaustion of remedies should be required before invoking the federal court's protection under RFRA. The Court noted that exhaustion should not be required

> where an administrative remedy would be inadequate. For example, the administrative remedy may be inadequate when an agency "lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute."
> While the Parole Commission has great expertise in determining an individual's risk level, and in setting appropriate restraints on his release, its institutional competence may be less suited to the evaluation of these highly complex constitutional and statutory arguments.

See id.

Eight years of litigation in the UDV case establish that the DEA does not have the "institutional competence" to assess such fundamental issues as whether its regulations banning the tea are based on compelling government interests, or how to balance the

various interests and concerns of the parties under the pre-*Smith*[18] Supreme Court decisions and the many relevant court of appeals decisions. And as we note above, the letter of Principal Deputy Associate Attorney General Greenberger dated December 21, 2000, acknowledges how complex the legal and factual issues raised by the Santo Daime are and that a 12-member interagency task force, not the DEA, would be better suited to address such issues. Failing their resolution, we now turn to this court for relief from the Damocles' sword that continues to chill plaintiffs' religious expression.

The UDV litigation rejects the extraordinarily myopic view that the CSA has no room for exceptions, which is the position that the DEA has continually taken. The DOJ suggests deference to the experience of the DEA in assessing whether it has a compelling interest in banning the tea. Had the District Court, the Tenth Circuit, and the Supreme Court deferred to the Administrator's expertise and findings on these subjects, as the government now suggests, UDV would be unable to practice its religion. Fortunately, the Court relied on its own expertise in finding facts and applying the balancing tests in adjudicating the issues assigned to it under RFRA. The Supreme Court rejected defendants' argument in *O Centro* that the district courts are not competent to undertake such analysis. No less then 17 federal district, court of appeals, and Supreme Court Judges (and Justices) have considered the government's expertise, and each rejected the defendants' self proclaimed expertise. There is no reason that this court should decline to exercise the powers conferred on it by Congress to hear this case. The Supreme Court remonstrated its disapproval in the *O Centro* case in concluding that the Executive Branch is not as well equipped for such tasks as are federal district judges.

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[18] *Employment Division v. Smith*, 494 U.S. 872 (1990).

Its interests in prohibiting the tea are no different and, no more compelling regarding the Daime tea than with respect to the hoasca tea.

E. The Government Has Already Demonstrated its Intent to Impede the Importation of the Daime Tea into the United States

In *McCarthy, supra,* 503 U.S. at 144, 148, the Court held that "an administrative remedy may be inadequate where the administrative body has been shown to be biased or has otherwise predetermined the issue before it."

The government/DEA has predetermined the outcome of this case. We have referenced the letter from the Attorney General dated October 19, 2001, stating that the government had compelling interests justifying its banning the tea. In *Yahweh*, 158 F. Supp. 2d at 1343, there was no statutory requirement, as in this case, that parolees be required to exhaust before challenging the constitutionality of the conditions of parole. In declining to order exhaustion, the court stated:

> In addition, it is fair to conclude that the administrative appeal presented little hope for Yahweh Ben Yahweh that the Parole Commission would, under these established procedures, reverse its underlying determination that Yahweh Ben Yahweh poses an extreme risk to the community.

There can be little doubt that if the defendants/DEA were to be permitted to revisit this case, it would revert to its prior position that there is a compelling interest in banning the tea. This would be a comparably futile exercise, as where the *Yahweh* court noted:

> Rather, all parties recognized that the fundamental issue on appeal inevitably would have been the validity of the parole conditions in light of the RFRA and the First Amendment.[19]

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[19] Defendants cited two cases to support their exhaustion argument to Judge Parker on remand from the Supreme Court. Neither is relevant and both are easily distinguishable. First, in *Jackson v. District of Columbia*, 254 F.3d 262, 265 (D.C. Cir. 2001), the prisoner plaintiff argued that RFRA excused his obligation to exhaust administrative remedies prior to bringing an action against the government. The D.C.

This is the reality of this litigation as well. In this case, as we note in our Memorandum of Law, the government defendants infer that this Court does not have the capability to decide the fundamental issue of religious freedom. "District courts, operating within the constraints of case-bound litigation, do not have the requisite capacity to evaluate and comprehend fully the far-reaching implications for law enforcement that attend any decision to exempt a Schedule I substance from the CSA's rigorous controls." *O Centro,* United States Brief for Petitioners, at 23.

This audacious position was summarily rejected by the Supreme Court in the 8-0 UDV decision. The Court stated:

> We have no cause to pretend that the task assigned by Congress to the Courts under RFRA is an easy one . . . But Congress has determined that Courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue.

O Centro, 546 U.S. at 439.

Circuit held that the explicit exhaustion requirement under the Prison Litigation Reform Act (PLRA) was passed in 1995 and contains an *express provision* that any civil rights suits brought by prisoners, included those asserting religious claims, can only be brought after exhaustion of administrative remedies. PLRA amends all legislation that was passed before it. PLRA was passed two years after RFRA and is an explicit Congressional mandate that applies to prisoners. Strictly speaking, the religious freedom cases brought in federal courts by prisoners are brought pursuant to PLRA, not RFRA. However, the RFRA balancing tests nevertheless apply.

The next case cited by defendants*, St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 629 (7th Cir. 2007), is equally unavailing. That case held that where there is an FAA administrative proceeding already initiated and RFRA claims have been presented in that proceeding, the losing party may not then initiate a proceeding in federal district court but must seek review in the court of appeals. Of course, that is not the case here because there are no such proceedings and none has ever been initiated by either party. The Court had no occasion to perform the prudential exhaustion analysis required in *McCarthy* because the administrative process had already been initiated.

The two exceptions to exhaustion, incompetence of the agency to deal with certain issues and prejudice or predetermination, are both at work in the position argued by the Solicitor General in the UDV case. The Solicitor argued that:

> [Distribution of Schedule I controlled substances, where allowed for medical purposes] is done to very strict—pursuant to very strict controls that are really incompatible with sacramental use of a substance. There is a requirement of prescription, or dispensing by a physician under physician control, with recordkeeping—identifying the dosage, the amount of the sacrament—recordkeeping of the person who takes it. There is—there is an incompatibility and potential entanglement problem in how to—in trying to apply a system like that, even under Schedule II."

(Tr. Sup. Ct. Oral Arg., 11/1/05, at 13.)

In the UDV case Judge Parker said:

> "[O]ne of the underlying problems is that the regulations are not formulated for the purpose of applying them to religious uses as opposed to research and other uses."

The government responded:

> "That's true, Your Honor."

Transcript of Hearing April, 9, 2008, *O Centro v. Mukasey.*

The government's position in the Supreme Court applies equally to the issue of importation of both teas. The Supreme Court characterized the government's position as follows:

> The Government contends that the Act's description of Schedule I substances as having "a high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use . . . under medical supervision," 21 U. S. C. §812(b)(1), by itself precludes any consideration of individualized exceptions such as that sought by the UDV. The Government goes on to argue that the regulatory regime established by the Act—a "closed" system that prohibits all use of controlled substances except as authorized by the Act itself . . . cannot function with its necessary rigor and comprehensiveness if subjected to judicial exemptions (emphasis supplied).

546 U.S. at 430.

These positions were rejected by the Court.

Given that the Act does not permit religious use of the tea, according to defendants, it is entirely known and predictable how the DEA Administrator would rule if permitted to revisit the issues unanimously rejected so clearly by the Supreme Court. The defendants will continue to ban the Daime tea unless this Court enjoins them from doing so. As noted above, thern-Assistant Attorney General Robert D. McCallum, Jr. wrote to the plaintiffs on October 19, 2001, that the government would not cease banning the tea. The Supreme Court characterized the government's position as follows:

> Under the Government's view, there is no need to assess the particulars of the UDV's use or weigh the impact of an exemption for that specific use, because the Controlled Substances Act serves a compelling purpose and simply admits of no exceptions.[20]

546 U.S. at 430.

> The defendants/DEA will not agree with the Supreme Court, but will find:
>
> [t]hat the effectiveness of the Controlled Substances Act will be "necessarily . . . undercut" if the Act is not uniformly applied, without regard to burdens on religious exercise.

Brief for Petitioners 18.

How can the defendants argue that this case is not ripe for review, when they have just recently made their intransigent position know to the Supreme Court? None of the cases cited in the Opposition is determinative of this litigation. Thus plaintiffs should not be required to go to the DEA to seek an exemption. The Deputy Solicitor General advised the Supreme Court that no exception could be made for sacramental use of the tea, even

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[20] It is difficult to imagine a more definitive statement of the government's position which satisfies the test in *Abbot Laboratories v. Gardner,* 387 U.S. 136, 151-53 (1967), cited by defendants.

for "rigorously policed" use of just "one drop" of tea "once a year". See Tr. of Oral Arg. 17 (emphasis supplied).

The DOJ/DEA's predetermined positions that terrible harm will befall domestic and international efforts to combat drug trafficking, that efforts to prevent the creation of new delivery systems and markets for the most dangerous controlled substances, and efforts to protect the physical health and safety of individuals who use the tea, with its potential for severe adverse health consequences, will be thoroughly compromised by permitting even one drop of tea into the United States (Pet. Brief., at 8-9, filed 7/13/05). These consequences have already been asserted by the defendants have previously been stated as the reasons for refusing to settle this case. All of these reasons have already been rejected at all levels of appeal in the UDV case.

There is obviously strong bias here. Another example is the fantastic additional dire consequence predicted by the DOJ as a result of perhaps one to two hundred people in the entire country taking the sacramental tea: "[N]either the CSA nor RFRA requires the government to wait until it has a full- blown drug epidemic on its hands before it may belatedly attempt to stem the tide of usage[.]" (Doc. 15, filed 1/25/01.) The DEA acknowledges the legality of 250,000 Native Americans consuming peyote each month, [subject to regulation by the Texas Department of Public Safety, *see* 42 U.S.C. §1996a(b)(3)], but in its infinite wisdom, projects a "full-blown drug epidemic," if one or two drops of the sacramental Daime tea is imported, even if it were "rigorously policed."

Defendants cite to the letter Mr. Beane wrote to plaintiffs' counsel on May 1, 2008, in which he stated, "Plaintiffs months ago were advised that '[i]f [they] wish to seek an exemption from the 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)). Defendants neglect to note that plaintiff wrote to Mr. Schiffer in November 2007, asking if the DOJ was prepared to negotiate a settlement and back down from its previous position that it will continue to ban the tea. Mr. Beane's letter months later did not answer the inquiry but, for the first time in eight years of communications with the government on this issue, suggested seeking an exemption, which is not required under RFRA and is not required by virtue of any federal regulation or statute.

Despite all of the rhetoric in the government Opposition that an exemption might be granted, as noted in the *Yahweh* case, it is simply not conceivable that the DEA will now reverse its hard and fast rule of no exemptions even if that burdens a religious practice. In light of the UDV litigation, it simply defies reality to believe that the DEA would reverse its position in the UDV case and agree with the plaintiffs in this case that its regulations criminalizing the tea do not represent a compelling government interest. There is no rational basis for this court to consider discretionary exhaustion in this case.

F. Even if There Were an Exhaustion Requirement, That Would Not Affect Plaintiffs' Right to Immediate Injunctive Relief to Protect it From the Defendants' Threats.

The ultimate question for decision here is whether the government can demonstrate that it has a compelling interest in banning the tea. On this question, there can be little disagreement. The defendants have already litigated these issues and lost. Therefore, plaintiffs have a high probability of prevailing on the merits of their claim; moreover, it is incontrovertible that the threats to seize the tea and prosecute plaintiffs

constitute a "substantial burden" on plaintiffs' religious expression.

The Supreme Court has long recognized that federal courts possess a "traditional power to issue injunctions to preserve the *status quo* while administrative proceedings are in progress and prevent impairment of the effective exercise of appellate jurisdiction." *FTC v. Dean Foods Co*., 384 U.S. 597, 604, (1966). In *Wagner v. Taylor*, 836 F.2d 566, 571-72 (D.C. Cir. 1987), the court held that, although Title VII complainants must ordinarily exhaust administrative remedies before seeking judicial relief, because Title VII does not expressly foreclose courts' "inherent equitable power to issue . . . injunctions to preserve the status quo," district courts retain jurisdiction to grant interim injunctive relief where plaintiffs face either irreparable injury or imminent retaliation. *Id.* at 574-76. The court stated:

> [I]f a court may eventually have jurisdiction of the substantive claim, the Court's incidental equitable jurisdiction, despite the agency's primary jurisdiction, gives the Court authority to impose a temporary restraint in order to preserve the status quo pending ripening of the claim for judicial review.

Id.

In *Jackson,* 254 F.3d at 268, the court held:

> Like Title VII, the PLRA contains nothing expressly foreclosing courts from exercising their traditional equitable power to issue injunctions to prevent irreparable injury pending exhaustion of administrative remedies. The district court therefore had no need to recognize an irreparable injury exception to the PLRA's exhaustion requirement; the Court had inherent power to protect the prisoners while they exhausted prison grievance procedures. Of course, the district court had no need to exercise that authority in this case, for by the time BOP raised its exhaustion defense, the Court had issued a temporary restraining order. . .[21]

[21] "[T]hat, by agreement of the parties, remained in effect until the court ruled on the merits." *Id.*

Thus, even if this matter were properly before an agency, which it is not, this court would still have inherent power to grant the temporary relief for which plaintiffs pray pending the outcome of any agency action. [22]

CONCLUSION

Defendants admit that there is no statutory requirement that plaintiffs exhaust and that this court does have jurisdiction because discretionary exhaustion is within the sound discretion of the court and is not jurisdictional. One cannot imagine a fact pattern that would justify requiring the plaintiffs to go to the DEA, when the United States has already told the plaintiffs that they will not settle this case because permitting even one drop of tea into the country will cause the sky to fall. For the many reasons given above, this matter should remain where the statute says it belongs, in the federal district court, and where there the Supreme Court in *O Centro* agreed RFRA cases belong for adjudication.

Respectfully submitted,

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[22] Any administrative process would itself be a substantial burden on plaintiffs' right to practice their religion, unless it were accompanied by a restraining order pending final resolution by this court

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