

No. 09-35770

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHURCH OF THE HOLY LIGHT OF THE QUEEN, ET AL.,

Plaintiffs-Appellees,

v.

ERIC HOLDER, ET AL.,

Defendants-Appellants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR APPELLANTS

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JURISDICTIONAL STATEMENT

Plaintiff invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1343(3)-(4). The district court entered final judgment on June 23, 2009. Defendants filed a timely notice of appeal on August 21, 2009. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

In this case, the district court held that the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb *et seq.*, precludes the outright prohibition of the plaintiffs' importation, distribution and possession of "Daime" tea (which contains a Schedule I hallucinogenic controlled substance under the Controlled Substances Act (CSA), 21 U.S.C. §§ 801-904), for use in religious ceremonies. The question presented is as follows:

Whether the injunction entered by the district court must be vacated as overbroad because, in addition to providing that the government may not prohibit the use of Daime outright, the injunction invalidates numerous Drug Enforcement Administration (DEA) regulations governing the permissible importation and possession of controlled substances, even though those regulations were not challenged and have not been shown to burden plaintiffs' religious exercise.

STATEMENT OF THE CASE

The Church of the Holy Light of the Queen (CHLQ), a religious congregation in Oregon, engages in religious ceremonies involving the ingestion of a tea-like mixture referred to as "Daime." The tea is made by brewing together two indigenous Brazilian plants, one of which contains dimethyltryptamine (DMT), a

hallucinogen listed under Schedule I of the Controlled Substances Act, 21 U.S.C. §§ 801-904. Daime is prepared in Brazil and imported into the United States.

Plaintiffs, the Church and several of its members, brought this action under RFRA, as well as several other constitutional and statutory provisions, seeking declaratory and injunctive relief. Specifically, plaintiffs sought a declaration that the government's outright prohibition of the importation, possession and distribution of Daime violated their rights under RFRA and the Constitution, and an injunction prohibiting defendants from treating their use of Daime as unlawful and arresting, prosecuting, or threatening to arrest them for their religious use of Daime.

After a short bench trial, the district court held that the "outright prohibition" on the importation, possession and distribution of Daime violated RFRA, and issued a permanent injunction prohibiting defendants from treating plaintiffs' importation, possession and distribution of Daime for use in plaintiffs' religious ceremonies as unlawful. Plaintiffs had not alleged that any of DEA's regulations governing the permissible use of controlled substances imposed a substantial burden on their religion, and the district court did not make any findings or conclusions that any of these regulations violate RFRA. The court's injunction nevertheless enjoined the enforcement of all DEA regulations unless otherwise specified in the court's order,

nullifying a number of regulations and replacing others with court-ordered provisions governing the registration, packaging, security procedures, and record-keeping requirements that DEA could enforce against plaintiffs.

In this appeal, the government does not challenge the district court's holding that the outright prohibition of Daime tea, as used by the plaintiffs in religious ceremonies, violates RFRA. Rather, the government challenges only the scope of the injunction issued by the district court.

STATEMENT OF THE FACTS

I. STATUTORY AND REGULATORY BACKGROUND.

A. The Controlled Substances Act and the Regulatory Structure Governing the Legitimate Use of Controlled Substances.

The Controlled Substances Act makes it unlawful to “manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense” any controlled substance, “[e]xcept as authorized by [21 U.S.C. §§ 801-904].” 21 U.S.C. § 841(a); *see United States v. Moore*, 423 U.S. 122, 131 (1975). The Act likewise prohibits the “planting, cultivation, growing, or harvesting of a controlled substance.” 21 U.S.C. § 802(15), (22).

Controlled substances under the CSA are divided into five schedules, with varying degrees of attendant restrictions on manufacture and distribution. See 21

U.S.C. § 812. A drug is included in Schedule I, the most restrictive schedule, if Congress finds that it “has 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.” *Id.* § 812(b)(1)(A)-(C).

The CSA is not limited to the outright prohibition of controlled substances. The Act also governs the legitimate importation, manufacture, distribution and dispensing of controlled substances by persons and entities such as researchers, health care professionals, and pharmacies. *See* ER 98. That is, the Act provides that no individual or entity may manufacture, distribute, or dispense a Schedule I controlled substance unless registered by the Attorney General, 21 U.S.C. § 822(a), who has delegated this function to the Administrator of the Drug Enforcement Administration (“DEA”). 28 C.F.R. § 0.100(b). The legitimate handling of these substances is governed by longstanding DEA regulations, which establish an orderly system to ensure that these substances are handled safely and are properly safeguarded to prevent loss, theft, or diversion to illicit use. *See* 21 U.S.C. §§ 823, 958; *see generally* 21 C.F.R. Pts. 1301, 1312.

DEA regulations require those who import, export, manufacture, distribute, or dispense controlled substances to maintain a valid registration with DEA. 21 C.F.R. §§ 1301.01-1301.52; *see id.* Pt. 1312. Registration is dependent upon,

among other things, adequate assurances that the registrant will maintain effective controls against diversion and comply with applicable state and local law.

For instance, the regulations establish physical security requirements governing how controlled substances must be stored, as well as measures to guard against loss or theft in transit. *See* 21 C.F.R. §§ 1301.71-1301.76. Registrants also must ensure proper labeling and packaging of controlled substances. *Id.* §§ 1302.01-1302.07. Moreover, registrants must maintain a complete and accurate record of their importation, receipt, distribution and disposal of controlled substances, and take a physical inventory at least once a year. *See id.* §§ 1304.21-1304.22. In addition, registrants must permit DEA to conduct inspections and to audit their records to ensure that controlled substances are being handled properly. 21 U.S.C. § 880; 21 C.F.R. §§ 1316.01-1316.13.

The regulations prohibit the employment of a person who has been convicted of a felony related to controlled substances, *id.* § 1301.76(a), and also establish screening procedures for employees who have access to controlled substances. *Id.* §§ 1301.90-1301.93. Registrants also are required to report theft or significant loss of the registered substance. *Id.* § 1301.76(b); *see also id.* § 1301.91 (employee responsibility to report internal diversion or theft). Moreover, the regulations establish administrative procedures governing the suspension or revocation of a

registration, after notice and an opportunity to be heard, for specified causes (such as material falsification of a registration or permit application, conviction of a felony related to controlled substances, or diversion of controlled substances for illicit purposes). 21 C.F.R. §§ 1301.35-1301.45; *see* 21 U.S.C. §§ 823, 824(a), 958(d) (establishing grounds for denial, revocation or suspension).

B. The Religious Freedom Restoration Act.

RFRA provides that “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. The Act applies to “all federal law” and the implementation of that law, “whether statutory or otherwise,” adopted both before and after the passage of RFRA. *Id.* § 2000bb-3(a).

Congress enacted RFRA in response to the Supreme Court’s decision in *Employment Division, Dep’t of Human Resources v. Smith*, 494 U.S. 872 (1990). In that case, the Court held that the Free Exercise Clause did not require Oregon to exempt from its criminal drug laws the sacramental ingestion of peyote by members of the Native American Church. *Id.* at 877-82. Such generally applicable laws, the Court concluded, may be applied to religious exercise regardless of whether the

government demonstrates a compelling interest for its rule. *Id.* at 884-89. RFRA was enacted to restore the compelling interest test in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), that existed prior to *Smith*. See 42 U.S.C. § 2000bb(b)(1).

II. THE CHURCH AND ITS USE OF DAIME.

The CHLQ engages in religious ceremonies involving the ingestion of a tea-like mixture referred to as “Daime.” ER 43-44. The tea (sometimes referred to as “ayahuasca”) contains the same active ingredients as those used by the plaintiff in *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal (“UDV”)*, 546 U.S. 418 (2006), although the two religions are significantly different. Daime is made by brewing together two indigenous Brazilian plants. One of the plants contains DMT, a hallucinogen listed under Schedule I of the CSA. Daime is prepared in Brazil and imported into the United States in liquid form. ER 8.

On May 20, 1999, the U.S. Customs Service intercepted a large delivery of ayahuasca from Brazil to plaintiff Jonathan Goldman. ER 46. A search of Goldman’s home yielded a substantial amount of Daime. Investigators also found marijuana and bufotenine (a substance derived from the skin of frogs that has hallucinogenic properties) on the premises. ER 6. Goldman later explained that the marijuana belonged not to him, but to his wife. *Id.* He further stated that he had

never used bufotenine, did not know what it was, and could not account for its presence in his house. ER 6, 92-93.

Goldman was arrested, but was released after 12 hours, and has never been charged. ER 46. In October 2000, plaintiffs' counsel contacted the Department of Justice, requesting a religious accommodation to permit the Church to import, possess and use ayahuasca in its religious ceremonies. ER 49. The Department, through the Deputy Attorney General, denied the accommodation request. ER 51-52.

III. THE COMPLAINT AND DISTRICT COURT PROCEEDINGS.

On September 5, 2008, the Church, Goldman and five other plaintiffs brought the instant action against the Attorney General of the United States, the U.S. Attorney for the District of Oregon, and the Secretary of the Treasury. ER 39. The complaint alleged violations of the First, Fourth and Fifth Amendments, Equal Protection, comity and international laws, and RFRA.

Specifically, plaintiffs asserted that “the defendants’ threats to arrest and prosecute members of the Santo Daime religion” who seek to import Daime for religious ceremonies “is unconstitutional, unlawful and violates RFRA in that it burdens the central practice of plaintiffs’ religion” ER 40. Plaintiffs contended that the defendants should be enjoined “from preventing the importation

or use of tea in religious ceremonies and from threatening to arrest or prosecute Church members who seek to ingest their sacramental tea.” *Id.*

Plaintiffs alleged that the government did not have a compelling interest “to prohibit the importation of Daime tea.” ER 55; *see also* ER 50. Plaintiffs also alleged that “[t]he actions of arresting, threatening to arrest and threatening to prosecute plaintiffs serves no compelling government interest and are not the least restrictive means to protect any colorable government interests.” ER 56.

In the prayer for relief, plaintiffs sought declaratory judgments that: (1) “the actions described in this Complaint violated plaintiffs’ rights to freedom of religion under the First Amendment” as well as a violation of RFRA; (2) the actions described in the complaint, “including the obtaining of a search warrant, the arrest of plaintiff Goldman, the continuing threat of prosecution of plaintiffs, and the threats of arrest and prosecution of all Santo Daime Church members in the United States who wish to engage in taking the sacrament” violated RFRA; and (3) “confiscating the Holy Daime tea” violated plaintiffs rights to substantive and procedural due process. ER 62-63.

Plaintiffs also sought a permanent injunction enjoining the defendants from: “arresting, prosecuting, or threatening plaintiffs and members of the Santo Daime Church with arrest, prosecution and/or imprisonment for importing, distributing and

ingesting the Daime tea solely at Santo Daime Church services.” ER 63. Plaintiffs also sought an order requiring the parties to “present the Court with a plan to effectuate the importation, distribution, and accounting for the Holy Daime tea consistent with the rights of the Church members to use the Holy tea in ceremonies.” *Id.* Finally, plaintiffs also requested attorney’s fees, costs, and “[s]uch other and further relief as the Court may deem just and proper.” ER 64.

The complaint did not allege that any specific DEA regulation burdens the exercise of plaintiffs’ religion, or violates RFRA or any statutory or constitutional provision. Moreover, the complaint did not request that any DEA regulation governing the permissible use of controlled substances be enjoined.

2. The district court denied plaintiff’s motion for a temporary restraining order, and scheduled expedited discovery and a trial on the merits. During the discovery phase of the litigation, defendants made efforts to confirm that plaintiffs’ challenge was limited to the outright ban on the importation, possession and use of Daime, and did not encompass a challenge to the regulations governing the permissible use of controlled substances. In response to an interrogatory asking whether plaintiffs intended to challenge the CSA or its regulations, plaintiffs stated that they “have not alleged in the Complaint that the CSA violates their rights.” ER 69. Plaintiffs explained in a subsequent letter that this statement “obviously

includes CSA's regulations as well." *Id.* Plaintiffs went on to state that "[t]he prayer [for relief in the Complaint] seeks relief from the illegal actions of Defendants in banning the tea. It does not seek any relief regarding the CSA regulations." *Id.* Plaintiffs also asserted that, since the government had sought to ban Daime entirely, "there is no need to grapple over which CSA regulations, if any, might or might not apply." ER 70; see also ER 72 ("Plaintiffs have already answered that they are not challenging CSA regulations").

3. The district court conducted a two-day bench trial, permitting direct testimony only through written statements from the witnesses, who were not required to appear at trial unless the opposing party wished to cross-examine them.¹ During closing arguments, the court asked counsel for plaintiffs whether they would "accept some control and regulation" of the use of Daime if they were to prevail on the merits. ER 95. Counsel responded that plaintiffs would accept such restrictions, but only "under the auspices of the court" and not the DEA regulations. *Id.* The district court responded: "I would never under any circumstances just turn it over

¹ Because plaintiffs chose not to cross-examine the government's expert witnesses, the government was not permitted to present live testimony at trial. In addition, because the district court held that the government would not be permitted to depose any of plaintiffs' seven expert witnesses without plaintiffs' consent (which was not forthcoming), the government's first opportunity to question those witnesses was at the trial.

to the DEA. They've got too much work to do. So the regulations, they may have some input into the regulation." ER 95-96.

IV. THE DISTRICT COURT'S DECISION AND INJUNCTION.

1. The district court, "[g]uided by the unanimous decision of the United States Supreme Court in a very similar case, *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418 (2006)," held "that the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4, requires that plaintiffs be allowed to import and drink Daime tea for their religious ceremonies, subject to reasonable restrictions." ER 1-2. The district court generally found the members of the Church who testified to be credible. ER 2-3. The district court noted that marijuana had been seized from Goldman's bedroom, and that Goldman acknowledged being aware of the marijuana (without giving an explanation for its presence), but held that "a spiritual leader's possible personal failings should not discredit the entire church." ER 6. With respect to the discovery of another hallucinogenic substance, bufotenine, at Goldman's residence, the district court noted that Goldman testified that he had no knowledge of bufotenine in his house, and in fact did not know what bufotenine was until seeing the police report a few months before the trial. *Id.* n.1.

With respect to the health effects of ayahuasca and the risk of diversion to illicit uses, the district court recognized that the tea “could be dangerous if used improperly,” ER 8, but credited Goldman’s testimony that he had never “observed anyone who suffered serious physical or mental harm caused by Daime tea.” ER 9. The court found that the government had not met its burden of showing that Daime may cause long-term health problems or that its prohibition was necessary to protect health and safety. ER 9-16.

On the subject of diversion, the district court acknowledged the testimony of a DEA official that the amount of tea seized in 1999 was far beyond what could be used by Church members only, but held that the government “had not presented evidence that plaintiffs have ever allowed Daime tea to be used without the church’s authorization.” ER 17. The court noted that the use of Daime tea outside of the church would violate church doctrine, and also found no evidence of a viable outside market for the tea. *Id.*

In light of these factual findings, the court held that plaintiffs had met their *prima facie* burden under RFRA to demonstrate a substantial burden on their religion, and further held that the government had not met its burden of demonstrating that the interests of protecting health and safety and preventing diversion “justify prohibiting Daime tea outright.” ER 19. The court noted that

“[t]hese interests will [be] addressed through the terms of the injunction I will issue governing plaintiffs’ use of Daime tea.” *Id.* The court then held that the government “has failed to show that outright prohibition of the Daime tea is the least restrictive means of furthering its interests.” *Id.* at 21.²

The district court did not address the validity of any of the DEA regulations governing the permissible use of controlled substances. Nor did the court make any factual findings that any DEA regulation substantially burdens plaintiffs’ exercise of religion.

2. The district court thereafter issued a permanent injunction. ER 23. The injunction prohibits the government from “directly or indirectly treating Plaintiffs’ importation, possession, and distribution of Daime tea for use in Plaintiffs’ religious ceremonies as unlawful” under the CSA, and from intercepting shipments of the tea, prosecuting plaintiffs, or otherwise interfering with their use of tea in religious ceremonies. ER 23, ¶ 1.

However, the injunction goes beyond merely prohibiting the outright ban on Daime tea and requiring defendants to treat plaintiffs as a legitimate importer and distributor of controlled substances. As the court later described it, the injunction

² In light of its RFRA holding, the court found it unnecessary to address plaintiffs’ constitutional claims. ER 22.

“selectively incorporates DEA regulations to satisfy the government’s interest in preventing the diversion of Daime tea.” ER 33.

The injunction generally requires plaintiffs “to conduct themselves in accordance with the conduct that is described in the laws and regulations governing the importation and distribution of Schedule I controlled substances, as set forth at 21 U.S.C. §§ 801-971 and 21 C.F.R. §§ 1300-1316, except as indicated below.” ER 23. However, the injunction goes on to state: “The Court enjoins the Defendants from imposing on Plaintiffs regulatory or other requirements, which by their terms apply to the importation, distribution, possession or religious use of Daime Tea.” *Id.* More significantly, the injunction provides that defendants “are enjoined from requiring Plaintiffs to conform their conduct to any regulations except as set forth herein.” ER 24, ¶ 3.³

In place of the comprehensive regulatory system established by DEA to monitor the permissible use of controlled substances, the court devised its own procedure for regulating plaintiffs’ use of Daime. The injunction therefore sets

³ The injunction also states: “The Defendants, their agencies, agents, employees, and persons under their control, are enjoined from applying or enforcing any of the laws, regulations, and treaties that govern the legal importation and distribution of Schedule I substances for the purpose of prohibiting, preventing, unduly delaying, or otherwise interfering with Plaintiffs’ religious use of Daime tea in a manner that is inconsistent with this Court’s Findings of Fact and Conclusions of Law dated March 18, 2009.” ER 30, ¶ 24.

procedures for the registration of plaintiffs as importers and distributors of controlled substances, borrowing at times from DEA regulations, adjusting those procedures in several regards, and prohibiting defendants “from denying Plaintiffs’ applications for registration to import and distribute Daime tea or for an import permit.” ER 28. The injunction also sets standards governing the storage of Daime and initial on-site inspections by DEA (ER 28), and includes some record-keeping requirements. ER 29.

3. The government moved to amend the judgment, pointing out that the injunction prohibits the enforcement of numerous regulations that were never challenged by plaintiffs and that have never been held to violate RFRA (or even to constitute a substantial burden on plaintiffs’ exercise of religion). The government further pointed out that enjoining these regulations disrupts the “closed regulatory system” used by DEA to distribute Schedule I substances to avoid diversion, creating numerous practical problems for DEA.

Specifically, the government pointed out that the injunction omits numerous record-keeping requirements in DEA regulations. For instance, the injunction eliminates statutory and regulatory requirements that records be maintained at each registered location for 2 years, 21 U.S.C. § 827(a)(1)(2), 21 C.F.R. § 1304.04(a),

and a regulatory provision requiring registrants to maintain inventories at each registered location, as required by 21 C.F.R. 1304.11.

Moreover, while the injunction appears to contemplate that DEA may exercise its authority to conduct inspections (*see* ER 26), it does not include authorization for DEA to inspect or audit records, as provided by 21 U.S.C. § 880 and 21 C.F.R. §§ 1316.01-1316.13, to ensure that Daime is not being diverted. In addition, in place of the procedures governing administrative inspection warrants in 21 C.F.R. § 1316.07, and despite the fact that plaintiffs did not raise a freedom of association claim in this case, the injunction allows plaintiffs to withhold from DEA inspection any item or items if they “believe that DEA’s inspection of such item or items would violate their right to freedom of association or the freedom of association of others associated with” the Church. ER 26, ¶ 11.

Finally, the injunction eliminates regulatory provisions requiring registrants to report theft or loss of controlled substances. *Id.* §§ 1301.76(b), 1301.91. It also replaces the regulatory system governing importation, and DEA’s ability to test samples of international shipments to detect adulteration or alteration, with a system requiring plaintiffs to extract and maintain small samples of each shipment for possible testing. ER 27, ¶ 15. There is no requirement, however, for advance notice

to DEA of pending international shipments to enable DEA to facilitate shipments at a specific port of entry through liaison with other federal agencies. ER 101-02.

The district court denied the motion. ER 32-38. The court reasoned that the Supreme Court's decision in *UDV* had already rejected the government's position, "holding that RFRA authorizes federal courts to create exceptions to the [CSA]." ER 35. The court then held that "this court's authority under RFRA to create exceptions to the Controlled Substances Act necessarily includes the authority to create exceptions to the DEA regulations that implement the Act." ER 36. Finally, the court opined that "[m]any of the issues the government raises in its motion could have been resolved through discussions with plaintiffs" under the injunction's provisions requiring liaisons to discuss and resolve outstanding issues. ER 37.

STANDARD OF REVIEW

The scope of an injunction is reviewed for abuse of discretion. *United States v. Schiff*, 379 F.3d 621, 625 (9th Cir. 2004). However, "[a]n overbroad injunction is an abuse of discretion." *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991).

SUMMARY OF THE ARGUMENT

The plaintiffs in this case challenged the government's refusal to permit them to import, distribute and use Daime, alleging that the outright prohibition of Daime

violates their rights under RFRA. The district court agreed, holding that the “outright prohibition” of Daime was not supported by a compelling interest furthered by the least restrictive means, and therefore violated RFRA. The government does not challenge that holding.

However, in addition to enjoining defendants from prohibiting the importation and distribution of Daime outright, the district court selectively enjoined DEA from requiring plaintiffs to comply with numerous DEA regulations governing the permissible use of controlled substances (regulations that require such things as registration, secure storage and transit, record-keeping, and inspections and audits), replacing them with a patchwork of judicially created rules governing the importation, distribution, storage and possession of Daime. The court took this action even though plaintiffs never alleged (and the court never found) that any of these regulations substantially burden plaintiffs’ exercise of religion or violate RFRA.

The district court’s injunction must be vacated as an abuse of discretion. The permissible scope of an injunction is defined by the extent of the violation established, and can extend no further than necessary to remedy the specific harms alleged and proved by the plaintiffs. The injunction in this case cannot be squared with this principle. Having determined only that an “outright ban” on the plaintiffs’

use of Daime violates RFRA, the district court nevertheless invalidated numerous regulations as they apply to plaintiffs – without even an allegation, let alone a finding, that any of these regulations burden plaintiffs’ religious exercise. And the injunction covers matters (such as plaintiffs’ purported associational rights) that cannot possibly be protected by RFRA.

The district court did not find that replacing DEA regulatory authority with a series of judicially crafted rules governing the importation and distribution of Daime was necessary to effectuate the relief sought in this case. The district court did not find that these regulations burden plaintiffs’ religion in any way. Indeed, merely requiring a person importing and distributing a controlled substance to maintain proper security, keep adequate records, and report theft or loss of the substance does not interfere with that party’s ability to conduct religious ceremonies using that substance. Because the injunction far exceeds the scope of what is necessary to remedy the RFRA violation found in this case, the injunction must be vacated and the case remanded for entry of a more limited injunction that does not invalidate DEA regulations governing the permissible use of controlled substances.

ARGUMENT

THE DISTRICT COURT ABUSED ITS DISCRETION BY ENJOINING THE ENFORCEMENT OF REGULATIONS THAT WERE NEITHER CHALLENGED NOR FOUND TO VIOLATE RFRA

In this appeal, the government does not challenge the district court's holding that the outright prohibition of Daime tea, as it used by the plaintiffs for religious ceremonies in the circumstances presented here, violates RFRA. Nor does the government challenge the district court's issuance of an injunction limited to precluding the government from carrying out such an outright prohibition. Rather, the government challenges only the scope of the injunction issued here, which goes far beyond what is necessary to remedy the actual violation found in this case.

A district court generally has broad discretion in fashioning injunctive relief. *Schiff*, 379 F.3d at 625. However, “[t]here are limitations on this discretion; an injunction must be narrowly tailored to give only the relief to which plaintiffs are entitled.” *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990). Thus, injunctive relief “must be tailored to remedy *the specific harm alleged*.” *Lamb-Weston*, 941 F.2d at 974 (emphasis added). And “[t]he scope of injunctive relief is dictated by the extent of the violation established.” *Lewis v. Casey*, 518 U.S. 343, 359 (1996); see *Zepeda v. INS.*, 753 F.2d 719, 728 n.1 (9th Cir.1983)

(referring to the “traditional rule that injunctive relief should be narrowly tailored to remedy specific harms shown by plaintiff”).

Moreover, an injunction “should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). In determining the proper breadth of an injunction, this Court considers whether the district court’s injunction “heel[s] close to the identified violation and respect[s] the interests of state and local authorities in managing their own affairs, consistent with the Constitution.” *Gilmore v. People of the State of California*, 220 F.3d 987, 1005 (9th Cir.2000) (citation and internal quotation marks omitted).

The district court’s injunction invalidating DEA regulations governing the permissible use of controlled substances is inconsistent with these principles. The injunction in this case far exceeds both the “specific harm alleged,” *Lamb-Weston*, 941 F.2d at 974, and the “violation established,” *Lewis*, 518 U.S. at 359.

As noted above (pp. 9-10), plaintiffs alleged only that the outright prohibition on Daime (coupled with threats to arrest plaintiffs for their activities) violated RFRA. *See* ER 50, 55-56. Indeed, plaintiffs vigorously disavowed any intention to challenge the DEA regulatory structure governing the importation and distribution of controlled substances. They asserted that “one need only look at the

prayer for relief in the Complaint” to verify this limitation on the relief they sought. ER 69. According to plaintiffs, “[t]he prayer seeks relief from the illegal actions of Defendants in banning the tea. It does not seek any relief regarding the CSA regulations.” *Id*; *see also* ER 70 (stating that “there is no need to grapple over which CSA regulations, if any, might or might not apply”).

The district court, likewise, did not find that any of the DEA regulations violate RFRA, or that any of the regulations substantially burden plaintiffs’ exercise of religion. Rather, all of the court’s holdings pertain to the outright prohibition of Daime. The court first held that “prohibiting the use of Daime tea would substantially burden the exercise of plaintiffs’ religion.” ER 18. The court then held that the interests asserted by the government were insufficient to “justify prohibiting Daime tea outright.” ER 19. Finally, the court held that the government “has failed to show that outright prohibition of the Daime tea is the least restrictive means of furthering its interests.” *Id.* at 21.

The only RFRA violation established in this case pertains to the “outright prohibition” of Daime. Yet, despite plaintiffs’ express statements that they were not challenging DEA regulations governing the legitimate importation and distribution of controlled substances, and despite making no findings that any of these regulations violate RFRA or burden plaintiffs’ religion, the district court invalidated

numerous DEA regulations and replaced the agency's administrative scheme with a judicially created regulatory structure by "selectively incorporat[ing]" DEA regulations into its injunction (ER 33).

This Court's decision in *Meinhold v. Department of Defense*, 34 F.3d 1469 (9th Cir. 1994), demonstrates the district court's error here. In *Meinhold*, a military service member alleged that the military had improperly discharged him, and sought reinstatement. The district court issued an injunction reinstating the plaintiff, and also enjoined the government from creating or maintaining certain files with respect to plaintiff and any other service members. *Id.* at 1473. This Court affirmed the injunction, but only to the extent it enjoined the plaintiff's discharge. *Id.* at 1480. Noting that the plaintiff "sought only to have his discharge voided and to be reinstated," the court held that "[b]eyond reinstatement, and not separating [plaintiff] on that basis, DOD should not be constrained from applying its regulations to [plaintiff] and all other military personnel." *Id.*

Here, plaintiffs challenged only the outright ban on the importation, distribution and use of Daime in religious ceremonies. As *Meinhold* makes clear, while the district court can enjoin the government from banning Daime entirely, and from arresting plaintiffs for importing, distributing and possessing Daime, it cannot

enjoin the government from applying valid regulations that were not challenged in this case.

This Court's decision in *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009), also is instructive. In that case, the district court preliminarily enjoined state agency rules requiring pharmacies to deliver medications, holding that the rules violated the plaintiffs' Free Exercise rights. The court of appeals held that the injunction was overbroad both because it applied beyond the individual plaintiffs and their employers, *and* because it was not limited to refusals to dispense drugs on religious grounds. *Id.* at 1140-41. As the court noted, the injunction "permits pharmacies or pharmacists to refuse to provide Plan B for any reason, including refusals grounded in individual morals, conscience, or even personal distastes or discriminatory prejudices." *Id.* at 1140. Thus, "the injunction, supposedly based on a free exercise challenge to the new rules, is fatally overbroad because it is not limited to the only type of refusal that may be protected by the First Amendment – one based on religious belief." *Id.* at 1141.

The injunction in this case suffers from a similar flaw. Having determined only that an "outright ban" on the plaintiffs' use of Daime violates RFRA, the district court nevertheless invalidated numerous regulations as they apply to plaintiffs – without even an allegation, let alone a finding, that any of these

regulations burden plaintiffs' religious exercise. And, like *Stormans*, the injunction encompasses conduct that cannot possibly be protected by RFRA.

For instance, the injunction (ER 28, ¶17) requires DEA to grant plaintiffs registrations and issue import permits on request, without an exception for instances in which pre-registration inspections reveal improper or even criminal activity unrelated to religious ceremonies. Indeed, while borrowing numerous provisions from the preliminary injunction issued (and later vacated) in *UDV* (see ER 33), the district court omitted language from the *UDV* injunction that would have limited the injunction to registration and permit denials based on specific grounds (e.g., that the use of ayahuasca violates the law or that its use would not promote technical advances), and reserved the government's right to deny or revoke permits on the basis of the material falsification of an application, conviction of a drug-related felony, or evidence of diversion. See *UDV* injunction, ¶¶ 19-20 (ER 85-86), ¶ 29 (ER 88-89).

In addition, the district court's injunction purports to protect plaintiffs' *associational* rights. See ER 26, ¶ 11 (permitting plaintiffs to withhold from inspection any item when they believe inspection "would violate their right to freedom of association"). Plaintiffs in this case never asserted a violation of their

associational rights, which in any event are not protected by RFRA (the only statute found to have been transgressed here).

2. In addition to exceeding the scope of the harm alleged and the violation actually found in this case, the injunction also impermissibly intrudes upon the functioning of DEA. “An injunction against a government agency must be structured to take into account the well-established rule that the government has traditionally been granted the widest latitude in the dispatch of its own internal affairs.” *Bresgal v. Brock*, 843 F.2d 1163, 1171 (9th Cir. 1987) (citations omitted); *see Gilmore*, 220 F.3d at 1005. In *Bresgal*, for instance, this Court held that an injunction requiring the Department of Labor to enforce the Migrant and Seasonal Agricultural Worker Protection Act was overbroad. Because the injunction “requires the Secretary to take specific measures in enforcing the Act . . . , it intrudes unnecessarily on the administrative function of the agency.” 843 F.3d at 1171. While the court could order the Secretary generally to enforce the Act, “the manner in which the Secretary implements the court’s order to enforce the Act is, in the first instance, a matter of agency discretion.” *Id.* The district court order requiring specific action to rewrite the agency’s enforcement plan “therefore requires more than is necessary to give complete relief to the plaintiffs.” *Id.*

The district court's order here likewise impermissibly circumscribes agency discretion. The district court certainly had the authority to enjoin DEA from enforcing an outright ban on plaintiffs' use of Daime. But under the principles recognized in *Bresgal*, the court could not tell the agency *how* to go about allowing plaintiffs' importation, possession and use of the tea. The agency's existing internal procedures govern the latter question, and none of those procedures has been challenged, let alone found to violate RFRA.

The district court's decision would allow a court essentially to take over an agency's entire regulatory apparatus simply because one agency action violates RFRA. Indeed, the district court made quite clear that, even after lifting the outright ban on Daime, any controls over its importation and use would be a matter for the court and not the agency. As the court related in its order denying the motion to amend (ER 36), at trial plaintiffs stated they would accept controls on the use of ayahuasca, but only "under the auspices of the court" and not the DEA regulations. The district court responded: "I would never under any circumstances just turn it over to the DEA. They've got too much work to do. So the regulations, they may have some input into the regulation." ER 95-96.

Of course, the district court did not permit DEA's "input," but merely entered an injunction enjoining much of DEA's regulatory scheme. More important, the

law requires more than permitting the agency to have “input” on its own regulations. The regulations enjoy a presumption of validity, *Guardians Ass’n v. Civil Service Comm’n of City of New York*, 463 U.S. 582 (1983), and can only be enjoined if they are found to violate plaintiffs’ rights under RFRA.

While the court *could* have adjudicated the question whether a given regulation or regulations violate RFRA in a case in which those regulations were actually challenged, it did not do so here. Instead, the district court *sua sponte* put the regulatory scheme in play and then purported to address the government’s “interests” by tailoring its injunction to permit only those regulations that the court deemed necessary to further the agency’s asserted interests in preventing diversion and protecting public health. In this respect the court got it backwards. It is not for the court to presume that each DEA regulation is invalid unless it is necessary to prevent diversion and protect the health of church members (matters that were not litigated).

Nor is there any basis for the district court’s rationale that it can substitute a different regulatory scheme because DEA has “too much work to do.” ER 95-96. The regulations at issue apply to all persons who handle Schedule I drugs for approved purposes, setting up a uniform system administered by DEA, guided by its expertise and experience. Invalidating numerous regulations and establishing a

competing regulatory scheme does not relieve DEA of its workload; it creates administrative chaos and more work for the agency. The additional work is particularly troubling here, where the injunction eliminates DEA's authority in several important areas – such as audits, inspection, record-keeping requirements, and reporting loss or theft – severely undermining the agency's ability to track the importation of Daime, ensure that the substance is in fact Daime, and confirm that it is in fact being used in religious ceremonies and not for other purposes.

3. The injunction in this case also goes far beyond what is “necessary to provide complete relief” to plaintiffs. *Califano*, 442 U.S. at 682. In this case, the district court did not find that eliminating DEA's regulatory authority (or, perhaps more accurately, ceding that authority to the court) is in any way necessary to effectuate the relief sought in this case. Nor would such a finding be supported by the record. The DEA regulations enjoined here are the same rules that apply to all persons who legitimately import, distribute or possess controlled substances, and there is no evidence to suggest that complying with them will substantially burden the exercise of their religion.

The district court offered no reason to believe that (for example) invalidating the regulatory requirement to maintain sufficient inventories of Daime at each registered location (*see* 21 C.F.R. § 1304.11) was necessary to implement its

decision precluding an outright ban on Daime. Nor did the court offer a rationale to explain how eliminating the requirement to report loss or theft of Daime, adjusting the procedures for processing international shipments, and rewriting record-keeping, inspection and sampling rules were required to ensure that Daime was not banned outright.

Moreover, the court did not find that any of these regulations burden plaintiffs' religious exercise in any way. Merely requiring a party importing and distributing a controlled substance to maintain proper security, keep adequate records, and report theft or loss of the substance does not substantially burden that party's ability to conduct its religious ceremonies using that substance. Plaintiffs have in fact never contended that any of these regulations burden their religious exercise in any way. They are of course free to do so if a concrete dispute arises, and the district court would have authority in such a case to determine whether any individual regulation violates RFRA. But until such a finding is made, it is an abuse of discretion to invalidate DEA regulations that have been neither challenged nor found to violate any provision of law.

4. The district court also incorrectly held that the Supreme Court's decision in *UDV* provided support for a broad injunction invalidating the regulations. The court held that "[t]he government has already lost its battle for a closed regulatory

system,” citing the Supreme Court’s decision in *UDV* rejecting the government’s argument that no RFRA exceptions can be made to the Controlled Substances Act. ER 35 (citing *UDV*, 546 U.S. at 434). The court recognized that *UDV* dealt with exceptions to the CSA and did not address DEA regulations, but concluded that “this court’s authority to create exceptions for the Controlled Substances Act necessarily includes the authority to create exceptions to the DEA regulations that implement the Act.” ER 36.

The district court’s reasoning is fundamentally flawed. It is true that *UDV* rejected the contention that no exceptions could be made to the CSA. And we do not take issue with the district court’s suggestion that a court can fashion exceptions to DEA regulations under RFRA in an appropriate case. However, nothing in *UDV* permits a court to create exceptions to a regulation that has not been found to violate RFRA or to burden an individual’s religious exercise.

In fact, the district court in *UDV* itself made that clear on remand from the Supreme Court. After the *UDV* plaintiffs amended their complaint to add a claim asserting that the CSA’s regulatory scheme did not apply to their use of hoasca (a substance with the same properties as Daime), the district court emphatically rejected that contention. ER 108-09. The court explained that the Supreme Court’s decision in *UDV* concerned the government’s compelling interest in banning

hoasca, and explained that “[t]he decision cannot be read to exempt Plaintiffs from any and all regulation under the CSA, because the balancing of interests required by RFRA may be different for regulation of hoasca than for a ban on hoasca.” ER 109.⁴ The court went on to note that its previous ruling granting an initial preliminary injunction “does not amount to a determination that the application of any and all CSA regulations violate RFRA.” ER 111-12. The *UDV* injunction itself made that clear, indicating that in granting a preliminary injunction to maintain the status quo, the court was not deciding whether the application of any DEA regulations “would or would not violate the RFRA.” ER 82.

The district court suggested that the *UDV* district court holding is irrelevant because the plaintiffs in this case do not “seek a blanket exemption from DEA regulations.” ER 37. But that distinction misses the point. First, the plaintiffs in this case did not seek *any* exemption from DEA regulations – blanket or otherwise. But, more to the district court’s point here, whether a party seeks a blanket exemption or a partial exemption from DEA regulations, a court cannot enjoin their operation without first finding that the regulations violate plaintiffs’ rights – a finding that was never made (or even requested) here.

⁴ The parties in the *UDV* case subsequently settled, and the preliminary injunction in that case was vacated.

The “closed regulatory system” at issue here is not a system refusing to grant any exceptions to the CSA. Rather, it is the regulatory scheme governing the *permissible* use of controlled substances – a system that, because of the inherent risks involved with transporting and distributing those substances, requires a uniform system of registration and monitoring by DEA from the time they enter the United States until they reach the end user. That system was not challenged here, much less found to violate any provision of law. Accordingly, the district court abused its discretion in invalidating DEA’s regulations and replacing DEA’s administrative scheme with one of its own creation.

CONCLUSION

For the foregoing reasons, the injunction entered by the district court should be vacated and the case should be remanded for entry of an injunction that enjoins only an outright prohibition of Daime.

Respectfully submitted,

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BRIEF FORMAT CERTIFICATION

I hereby certify that the Brief for Appellants complies with the Type-Volume requirements of Fed. R. App. P. 32(a)(7)(B) in the following manner:

The Brief was prepared using Corel Wordperfect 14. It is proportionately spaced in 14-point type, and contains 7,384 words.

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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2011, I electronically filed the foregoing Brief for Appellants with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, which will send Notice of Electronic Filing to the following person:

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STATEMENT OF RELATED CASES

Appellants are aware of no related cases.