Clarifying the Religious Freedom Restoration Act:
Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal
126 S. Ct. 1211 (2006)

By Frank J. Ducoat*

The issue before the United States Supreme Court in *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*[1] was whether the government could prohibit the importation, distribution, possession, and use of a Schedule I hallucinogenic controlled substance, notwithstanding passage of the Religious Freedom Restoration Act of 1993 ("RFRA").[2] A unanimous Court, per Chief Justice Roberts, held that the United States failed to carry the burden placed on it by Congress in RFRA and affirmed the injunction blocking prosecution of the religious sect under the Controlled Substances Act ("CSA").[3]

In 1999, U.S. Customs Service agents confiscated a shipment of hoasca (pronounced "wass-ca"), a tea prepared by compounding two plants indigenous to Brazil. One of these plants, psychotria viridis, contains dimethyltryptamine, a drug whose manufacture, distribution, disbursal and possession is prohibited by the CSA.[4] The shipment was bound for the president

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* New Developments Editor, Rutgers Journal of Law & Religion; J.D. Candidate December 2006, Rutgers-Camden School of Law; B.A. 2003, William Paterson University.

[1] Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 126 S. Ct. 1211 (2006).

[2] *Id.* at 1216; The Religious Freedom Restoration Act 42 U.S.C. § 2000bb-1 (2005). *See also infra,* notes 7-8 and accompanying text.

[3] *O Centro,* 126 S. Ct. at 1216. The Controlled Substances Act is codified at 21 U.S.C. §§ 801-904 (2000 & Supp. I 2005). It regulates the importation, manufacture, distribution, and use of certain psychotropic substances. The CSA uses a 5-schedule classification (I being the most restricted, V being the least) based on potential for abuse, medical use and safety concerns. 21 U.S.C. § 812(b).

[4] *O Centro*, 126 S. Ct. at 1217. Hoasca's components are listed under Schedule I of the CSA, indicating that they are the most restricted and subject to an "outright ban on all importation and

of respondents' church, O Centro Beneficiente Uniao de Vegetal ("UDV"), a congregation of about 130 members nationwide.[5] Respondents filed a complaint in U.S. District Court for declaratory and injunctive relief and a motion for a preliminary injunction against the United States Attorney General and other law enforcement officials seeking to block enforcement of the CSA against them on the grounds that any prosecution under said law would violate RFRA.[6]

RFRA, passed in retaliation to the Court's decision in *Employment Division v. Smith*,[7] prevents the government from substantially burdening a person's exercise of their religion, even in the form of a law of general applicability, unless the government satisfies a two-prong test: The burden must 1) serve a compelling governmental interest and 2) be implemented in the least restrictive means.[8]

The United States conceded that application of the CSA would substantially burden respondents' sincere exercise of religion, but argued that uniform application of the CSA is a sufficiently compelling and the least restrictive means available to satisfy that interest.[9] The

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use, except pursuant to strictly regulated research projects." *Id.* (*citing* 21 U.S.C. §§ 823, 960(a)(1)).

[5] *Id.*

[6] *Id.*

[7] *Employment Division v. Smith*, 494 U.S. 872 (1990). *Smith* held that the First Amendment's Free Exercise Clause does not prohibit a government from burdening a religious practice so long as it is done through laws of general applicability. In doing so, *Smith* rejected the compelling interest test announced in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

[8] *O Centro*, 126 S. Ct. at 1217.

[9] *Id.* at 1217-18.

District Court and the Court of Appeals (both in part and en banc[10]) rejected this argument, finding that the evidence was in equipoise and insufficient to prove the government met its burden under RFRA.[11]

The Court began by holding that the burden of proof at the preliminary injunction stage tracks the burden of proof at trial.[12] Thus, under RFRA, the burden is on the government.[13] Evidentiary equipoise as to potential harm and diversion is an insufficient basis for granting a preliminary injunction.[14] The reasoning is clear: if the government fails to show a compelling interest, it follows that respondents "must be deemed likely to prevail."[15] RFRA challenges are therefore to be determined in the same manner as application of the test, even at the preliminary injunction stage.[16]

Next, the Court found that since RFRA requires a focused inquiry, the government's reliance on the broad characteristics of Schedule I and the CSA in its entirety are insufficient bases to satisfy the strict scrutiny test compelled by the statute.[17] In rejecting the government's claim that the CSA serves as a compelling interest on its own and forecloses any assessment of

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[10] *See O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 282 F. Supp. 2d 1236 (D.N.M. 2002), *aff'd*, 342 F.3d 1170 (10th Cir. 2003), *aff'd,* 389 F.3d 973 (10th Cir. 2004) (en banc).

[11] *O Centro*, 126 S. Ct. at 1218.

[12] *Id.* at 1219.

[13] *Id.*

[14] *Id*.

[15] *Id.*

[16] *O Centro*, 126 S. Ct. at 1220.

[17] *Id.*

the particulars of UDV or its use, the Court concluded RFRA's "more focused inquiry" could not carry the day by reliance on general characteristics.[18] To support this conclusion, the Court noted that the CSA itself provides for exceptions when the Attorney General deems it "consistent with the public health and safety."[19] Post-RFRA, such exceptions are "the obligation of the courts[,]" despite the government's claim that the CSA only permits exemptions by Congress.[20]

The Court also found the government's claim of need for uniformity of application of the CSA lacking and chastised its argument as "the classic rejoinder of bureaucrats throughout history[.]"[21] The RFRA was written to avoid the problems of false religions popping up and proclaiming a sincere need for drug use and abuse by "mandating consideration . . . of exceptions" and case-by-case inquiry.[22]

Finally, the government failed to prove any compelling interest under the 1971 United Nations Convention on Psychotropic Substances[23] except for broad generalizations such as "honoring international obligations and of maintaining the leadership position of the United States in the international war on drugs."[24] While the District Court did err in concluding that

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[18] *Id.* at 1221.

[19] *Id.* (quoting 21 U.S.C. § 822(d)). Such exceptions do exist. *See* 21 C.F.R. § 1307.31 (2005); 42 U.S.C. § 1996a(b)(1) (2005).

[20] *O Centro,* 126 S.Ct. at 1222.

[21] *Id.* at 1223.

[22] *Id.*

[23] United Nations Convention on Psychotropic Substances, 32 U.S.T. 543 (1971).

[24] *O Centro*, 126 S. Ct. at 1225.

the Convention did not cover hoasca, the Convention does not provide the government a compelling interest that justifies the substantial burdening of respondents' religious practice.[25]

The *O Centro* decision clarifies two points about RFRA, one explicitly one implicitly. Explicitly, the holding of *O Centro* interprets RFRA's use of the phrase "to the person." RFRA's strict scrutiny test is to be applied to the individual claimant and not just society as a whole.[26] The compelling interest must be examined in connection with the individual claimant's burden, not the general harms that could befall everyone. Here, the government failed to show a compelling interest in enforcing the CSA against UDV. As Justice Ginsburg said during oral argument, it is uncontested that compelling interests exist for enforcing the CSA.[27] But after RFRA, courts cannot look at the CSA and nothing else. Courts can no longer perform the compelling state interest analysis "in a vacuum."[28] They must view it with an eye towards RFRA and its compelling interest "to the person" test.

Implicitly, *O Centro* announces that, despite its inapplicability to the States,[29] RFRA is constitutional as applied to the federal government. Though the Court left this question open last term[30] and did not specifically reach the issue in *O Centro*, the opinion leaves little room for

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[25] *Id.* at 1224-25. Since the government never established a compelling interest, the Court never addressed the least restrictive means prong of RFRA. *Id.* at 1219.

[26] *Id.* at 1220. As the Court said, to do so is consistent with the pre-*Smith* case law that RFRA was designed to reinstate as the controlling precedent. *See id.* (citing *Yoder*, 406 U.S. at 213, 221; *Sherbert*, 374 U.S. at 410).

[27] Tr. Oral Arg. at 6-7 (*available at* 2005 WL 3046682, *6-7).

[28] *Id.* at *7.

[29] RFRA was held unconstitutional as applied to the states in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

[30] *Cutter v. Wilkinson*, 521 U.S. 507, 515-16 (2005).

doubt as to RFRA's constitutionality. That the Court addressed the RFRA claim on the merits should quell the debate (at least temporarily) amongst lower courts as to whether RFRA is still applicable to the federal government.[31] Lower courts have already taken *O Centro* as an implicit sign that RFRA is here to stay[32] and without specific orders from the Supreme Court, that is precisely what they should be doing.

[31] *Compare* O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973, 1010 n. 7 (10th Cir. 2004) (en banc) (applicable to the federal government), Henderson v. Kennedy, 265 F.3d 1072, 1073 (D.C. Cir. 2001) (same), *and In re* Young, 141 F.3d 854, 858 (8th Cir. 1998) (same) *with* United States v. Indianapolis Baptist Temple, 224 F.3d 627, 629 (6th Cir. 2000) (applicability "not without doubt") *and* La Voz Radio de la Communidad v. FCC, 223 F.3d 313, 319 (7th Cir. 2000) (same).

[32] *See, e.g.,* United States v. Winddancer, 435 F. Supp. 2d 687, 391 n.1 (M.D. Tenn. 2006).