

# RGB on UDV vs USA: Notes on the Hoasca Supreme Court Decision



By Richard Glen Boire, Esq.

On May 21, 1999 inspectors at US Customs intercepted a shipment of three drums marked as holding “herbal tea extract.” A test of the brown liquid indicated that it contained the Schedule I substance dimethyltryptamine (DMT). The tea, known as *hoasca* or *ayahuasca*, was destined for the American branch of the Brazilian-based Uniao do Vegetal (UDV), whose members drink hoasca as a sacred communion. When Customs refused to allow the hoasca through, and threatened to destroy it, the UDV filed a federal lawsuit against the Attorney General seeking a court order that the government return the hoasca and permit the UDV to import and use hoasca in their religious ceremonies.

Before the trial began, the UDV moved for a preliminary injunction, requesting that its members be permitted to import and use hoasca in their religious ceremonies prior to, and during, the trial. Although the government conceded that the UDV was a genuine religious organization whose members were sincere in their use of hoasca for religious purposes, the government opposed the preliminary injunction on the ground that hoasca is an illegal mixture containing DMT and hence

any use of it was prohibited by the federal Controlled Substances Act. The UDV replied that the Religious Freedom Restoration Act (RFRA) protected their use of hoasca.

A hearing was held and the district court subsequently ruled in favor of the UDV, granting the preliminary injunction. The government appealed and lost in the Court of Appeal for the Tenth Circuit. After being denied a second appeal to the Tenth Circuit, the government appealed to

the US Supreme Court, which in 2005, agreed to hear the case.

On February 21, 2006, in a unanimous opinion authored by new Chief Justice Roberts, the Supreme Court ruled in favor of the UDV, affirming the grant of the preliminary injunction. The Supreme Court found that by passing RFRA, Congress empowered federal courts to make a case-by-case determination of whether a federal law burdens a religious practice. Thus, the fact that hoasca contained DMT-and that DMT was a Schedule I substance-was not by itself sufficient to automatically trump the UDV's religious practices. Rather, under RFRA, the government had the burden of proving that it was unable to accommodate the UDV's religious use of hoasca. In an effort to meet this burden, the government argued that a complete ban on all use of hoasca, including religious use by UDV members, was necessary for three reasons: (1) to protect the health and safety of the UDV members; (2) to prevent diversion of hoasca beyond UDV members; and, (3) because an international drug control treaty required the US to prohibit all use of DMT, including hoasca used by UDV members.

With respect to the first two government interests (health of UDV members, and prevention of diversion), the US Supreme Court noted that the District Court had found that both the UDV and the government introduced evidence on these issues, and that the evidence virtually balanced out: the government's evidence showed that DMT was unsafe and that hoasca could be diverted, while the UDV's evidence showed that its

members' use of hoasca was quite safe, and that no actual diversion had occurred in the past. However, because the government had the burden of proof, balanced evidence like this was insufficient to meet its burden. The Supreme Court also pointed to the federal exemption that allows members of the Native American Church (NAC) to use peyote, which like DMT, is a Schedule I controlled substance. Noting that membership in the NAC

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numbered in the hundreds of thousands, and yet the federal government was able to accommodate their religious use without undue harm or diversion, the Court saw no reason why the government could not likewise accommodate hoasca use by the 130 or so US members of the UDV.

The third interest proposed by the government as a justification for barring the UDV's use of hoasca was that the 1971 Convention of Psychotropic Substances required the US to ban all use and importation of DMT. The District Court rejected this argument, finding that hoasca was not covered by the Convention because it was made from two plants that were unscheduled and was made by a simple process of simmering those two plants in water. The Supreme Court rejected

this finding by the District Court, explaining, "Hoasca is a 'solution or mixture' containing DMT; the fact that it is made by the simple process of brewing plants in water, as opposed to some more advanced method, does not change that... [T]he tea plainly qualifies as a 'preparation' under the Convention."

Nevertheless, the Supreme Court found that even though hoasca is within the 1971 Convention, the government failed to present any evidence showing

how granting an exemption to the UDV would actually frustrate the government's international duties under the Convention. By failing to introduce such evidence, the government once again failed to carry its burden of proof, and as a result, the Supreme Court held that the government's general duties under the 1971 Convention were not sufficient to justify the specific harms to the UDV that would occur if its members were prohibited from using hoasca.

Having rejected all three of the government's arguments, the Supreme Court affirmed the grant of the preliminary injunction in favor of the UDV. The case will now return to the district court where it is expected that the government will forgo a trial and instead negotiate the finer terms of allowing the UDV to import and use hoasca in its ceremonies. There is, however, the possibility that the government will continue forward to trial, meaning the case could eventually reach the Supreme Court once again in several years.

So what does this decision mean with regard to other entheogens and other religious users? It is important to remember that the Religious Freedom Restoration Act only applies to federal law. It does not apply to states, where the vast majority of entheogen arrests and prosecutions occur. So, in the vast majority of entheogen cases, RFRA will not be of any benefit.

It is also important to note the unique characteristics of the UDV: the esoteric nature of its hoasca sacrament, its careful monitoring of members' health, and the

very small number of members in the US branch (said to number about 130). Nevertheless, the decision is groundbreaking because it is the first entheogen case to reach the Supreme Court after the Court's grim holding in *Department of Human Resources of Oregon v. Smith*, where the Supreme Court held that the First Amendment's Free Exercise Clause did not protect the Native American Church's use of peyote. The UDV case is also the first entheogen case to reach the Court since the passage of RFRA, and shows that RFRA is vigorous and did indeed restore the compelling state

interest test largely abandoned in *Smith*. Under RFRA the outcome of *Smith* would have been different.

The UDV case establishes that in future entheogen cases where RFRA is applicable, the federal government will not be able to win simply by asserting that the use of a particular entheogen was prohibited by the

Controlled Substances Act. Instead, each case will be judged on a case-by-case basis with an eye to the specifics of the religious practice, the specifics of the entheogen used, and the specific reasons and evidence offered by the government as to why no accommodation is possible.

The decision is *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. \_\_\_\_ (2006).

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The Banisteriopsis caapi vine and the Psychotria viridis are brewed together to create hoasca tea