

The “Vine of the Soul” vs. The Controlled Substances Act: Implications of the Hoasca Case

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Abstract—In 2006, the Supreme Court paved the way for the sacramental use of a hallucinogen, hoasca, to be imported, distributed and ingested by a religious group. This case has broad implications for religious freedom for using sacramental psychotropics and how such cases might be decided in the future. This article outlines the arguments used both by the church and by the government. It lists the facts of the cases, explains and analyzes the decision, evaluates the likelihood of expansions of religion-based exceptions for entheogen use in light of the Supreme Court’s decision and offers a profile for those groups most likely to receive such an exemption.

Keywords—controlled substances, entheogens, First Amendment, hoasca, sacramental drugs, spirituality

In 2006, the U.S. Supreme Court rendered a decision certain to impact the religious use of psychotropics or “entheogens” for years to come. This decision was written by Chief Justice John Roberts and all the other Justices agreed (Mr. Justice Alito took no part in the decision). This article outlines the facts of the case, explains the legal features of them and then evaluates whether this singular expansion of religion-based exceptions for psychotropic use might continue.

THE FACTS

The facts of this case are straightforward, even though the interpretation of the facts is not. In 1999 government officials found a shipment of hoasca bound for a Christian church group called O Centro Espirita Beneficente Uniao do

Vegetal (hereinafter UDV). Hoasca (pronounced “wass-ca” and also known as ayahuasca) is a tea made from two plants grown solely in the Amazon. The controlled substance N, N-dimethyltryptamine (DMT) is present in one of the plants, *Psychotria viridis*. The other plant, *Banisteriopsis caapi*, contains alkaloids that enhance the entheogenic effect. These plants are also known as “the vision vine” or “the vine of the soul” (*Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* 2006).

The government agents seized the shipment of this tea and threatened prosecution under the Controlled Substances Act (CSA 2000). Schedule I of the CSA’s regulatory scheme bans several substances, including marijuana, mescaline, peyote, psilocybin and psilocyn. According to the regulatory scheme Schedule I drugs both have a high potential for abuse, have a lack of accepted safety for use even under medical supervision (Schedule of Controlled Substances 2003). DMT is included in the Schedule I list of prohibited compounds.

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The church (the “nucleo”) sued to place an injunction against the seizure and to litigate the First Amendment issues. To sue for an injunction means that the O Centro Church sued to disallow any possible seizures and arrests connected with its sacred use of hoasca. This case has been in litigation for seven years. The federal district court in New Mexico ruled for the UDV. The US government appealed that decision to a federal circuit court. That court, too, held for the UDV. The government appealed that decision to the U.S. Supreme Court. The Supreme Court, rendering its decision in February of 2006, also ruled for the UDV.

The narrowest reading of the Supreme Court’s ruling is that it simply affirmed the two lower court’s decision refusing to allow the government to seize and make arrests in connection with the UDV’s use of hoasca. However, Supreme Court cases rarely have such superficial impacts. Both the analysis and implications of this case reach far beyond the immediate results of a preliminary injunction. While any Supreme Court case is significant, this case is particularly important because it sets precedent not only by the content of its decision, but also by how it reached its decision. This analysis begins with the court decisions.

THE SUPREME COURT RULING

The government’s most pressing argument was that there were no exceptions to the Schedule I substances banned under the CSA. Thus, hoasca use, under any circumstances, was categorically banned. The UDV countered this categorical ban with two arguments. The first was the application of the Religious Freedom Restoration Act (RFRA 1993). The second was the exception made for peyote use among members of the Native American Church.

The government asserted that a total and categorical ban on hoasca is the “least restrictive” means to achieve the government’s “compelling interests.” These purported compelling interests were: (1) the safety of the UDV members; (2) the nondiversion of a sacred drug for recreational purposes; and (3) compliance with the 1971 United Nations Convention on Psychotropic Substances (1971, 1979-1980). If the government convinced the court that its ban appropriately met these compelling interests, it would then also have to show that those compelling interests were met by the least restrictive means. This test required the government to use the means least likely to interfere with constitutional rights. Yet, because the government failed even to convince the court of its compelling interest, the court didn’t need to reach the least restrictive means test. Figure 1 illustrates the flow of these burdens of proof. In order to prevail on the “compelling interest” test, the government had to convince the courts that these compelling interests were valid and supportable.

The Supreme Court was not persuaded by the government’s assertion that no exemptions to the Schedule I prohibitions should be allowed. The Court reasoned that,

because peyote is already exempted for use by the Native American Church, it was also constitutionally permissible to extend the exemption to the O Centro nucleo. They reasoned that what is fair for the Native American Church is also constitutionally fair for the UDV. The government did not overcome this inconsistency.

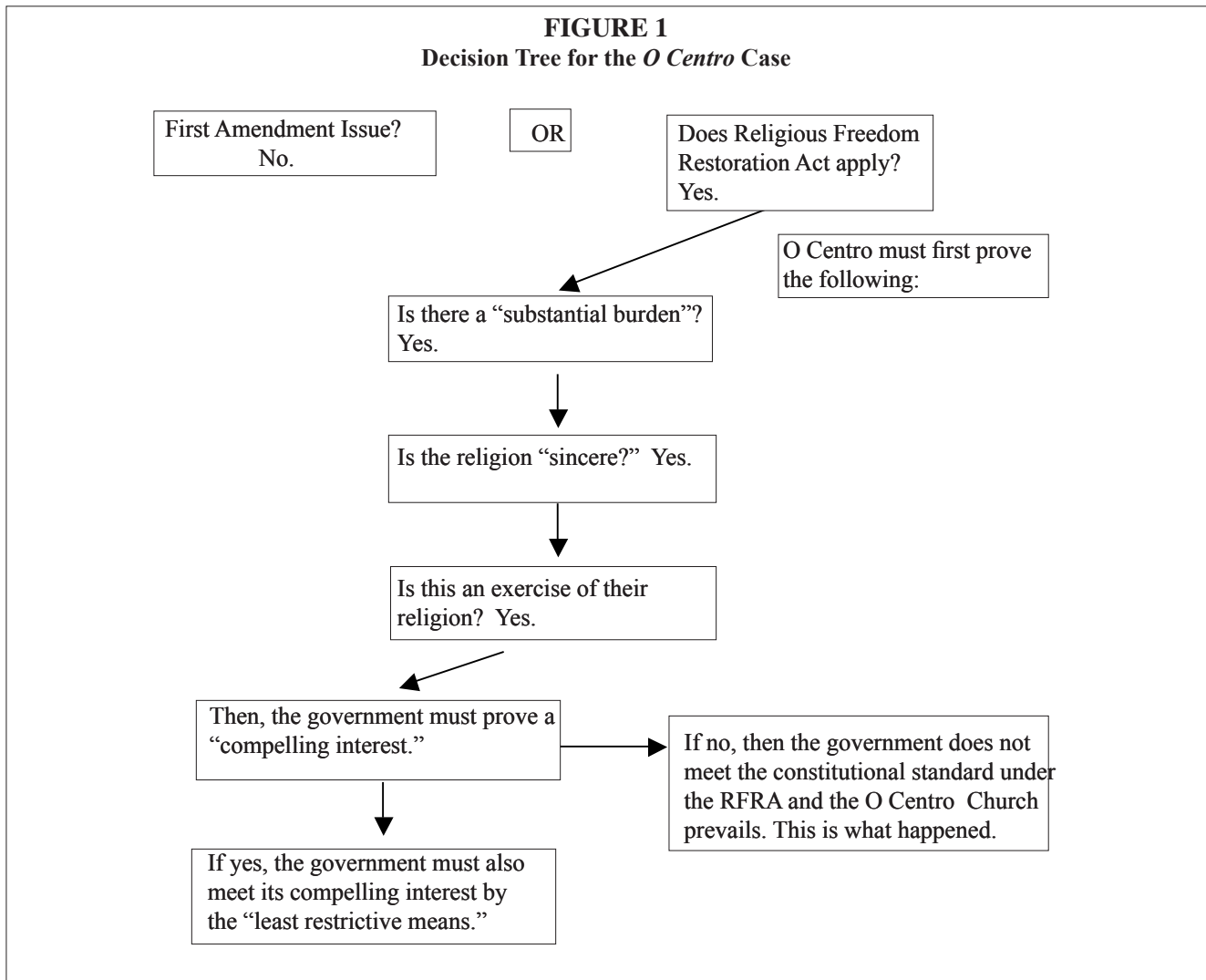
In examining the potential health effects of hoasca, the experts lined up on both sides of the issue. The district court and the court of appeals reached the same result on the risk of diversion to nonreligious use. Taken as a whole, the district court found the conflicting evidence of the government and the UDV experts to cancel each other out. “Equipose” was the legal term the district court used to state that evidence on the health and safety issue was equally balanced between the parties. In a dead heat, the tide does not go with the government; it goes to the party whose religious practice is allegedly burdened (*Gonzales v. UDV* 2006). The court of appeals also determined that the weight of evidence was equal and did not disturb the determination of the district court. The Supreme Court followed suit.

All three courts likewise held that the United Nations Convention on Psychotropic Substances does not preclude a First Amendment analysis. The district court held that the Convention does not apply to hoasca (*O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft* 2002). The court of appeals held that even if the Convention does apply to hoasca, where a conflict of law exists, the U.S. Constitution trumps a United Nations Convention (*O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft* 2003).

The Supreme Court took a slightly different approach. While they allowed that the U.N. Convention may apply to hoasca, they ruled that the government presented only two affidavits by State Department officials maintaining the general importance of adhering to international treaties. The Court reasoned that these general assertions did not amount to a “compelling interest” (*Gonzales v. UDV* 2006). Thus, the Supreme Court in all respects affirmed the lower court’s determination that the CSA does not, and cannot, provide a blanket prohibition.

While presenting how the UDV won their case, it is important to note upon which points they lost. The RFRA precedent was not the only legal argument they made. They also argued that the First Amendment’s free exercise of religion clause prevented the government from interfering with this sacramental use of hoasca. The district court followed the lead of *Church of the Lukumi Babalu Aye v. City of Hialeah* (1993), where the Supreme Court struck down ordinances that seemed to have been enacted specifically to impose restrictions on the animal sacrifices of the Santeria religion.

Similarly, the district court had to determine whether the UDV was being selectively singled out by the government. The UDV argued that the CSA has exceptions for medical, industrial and scientific research. The UDV argued that it is discrimination not to allow it such an exemption for religious



usage. The court refused this argument, saying that the government's sole concern was to promote public health and that allowing scientific and medical research is consistent with that nondiscriminatory intent. All three courts agreed that UDV's "free exercise" claim failed. However, all three courts ruled that the federal RFRA applied.

Once the RFRA is properly invoked, there must be a specific, searching and "strict" scrutiny of the alleged governmental compelling interests to ban a drug used for sacramental purposes. Thus, the case hinged upon the analysis of that act.

THE RELIGIOUS FREEDOM RESTORATION ACT AND PEYOTE

The Religious Freedom Restoration Act of 1993 (RFRA 1993) was passed in response to a Supreme Court case penalizing peyote use in a Native American Church (*Employment Div., Dept. of Human Resources of Ore. v. Smith* 1990). The *Smith* decision upheld a law prohibiting peyote

use by members of the Native American Church. Neither did the law inhibiting the free exercise of religion require a strict, case-by-case scrutiny (see Bullis 1990). The RFRA was passed with the express purpose of restoring the "strict scrutiny" of religious infringement (*Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* 2006).

The Supreme Court ruled that the RFRA applied in the hoasca case. In effecting this "strict scrutiny" the Supreme Court said that the mere listing of DMT on Schedule I does not categorically relieve the government of its burden of proof. This burden of proof requires particular, specific evidence of hoasca's harm. The Court held that a categorical prohibition did not meet the strict scrutiny test. Interference with religious acts must be narrowly tailored to meet compelling state interests.

As mentioned above, the Supreme Court ruled that the government's assertions of a categorical ban on Schedule I substances is undermined by its own previous exemption for the Native American Church. The exemption for the Native American Church, with its sacramental use of peyote, meant

two things for the hoasca case. First, the Court cannot play favorites. Second, there was no evidence that the Native American Church exemption has opened the floodgates to recreational use. In fact, there is no dispute that the exemption granted to the Native American Church has been a success, neither producing harmful effects on members nor provoking diverted use among nonmembers of the church (Brief for Respondents 2005).

A SPIRITUAL-FORENSIC ANALYSIS OF THE HOASCA DECISION

In order to understand the implications of this decision, it is necessary to delve into the principles underlying it. This analysis had three parts: (1) how does the court establish a “sincere” religion? (2) the power of legal hermeneutics in this dispute, and (3) proof of a “compelling interest” through expert testimony.

What is a “Sincere” Religion?

If the RFRA protects sacred acts, then the religion must be sincere. In the hoasca decisions, none of the courts seriously questioned either the validity of the UDV or the sincerity of its members. In the hoasca case, the government conceded at the district court level that the government substantially burdens the UDV with its prohibition of hoasca, that the UDV is a “sincere” religion and that the UDV’s use of hoasca is a religious exercise (*Gonzales v. UDV* 2006).

Nonetheless, the determination of a sincere religion is a crucial element in all sacred psychotropic cases. It may be helpful to cite a case where the ideology did not rise to the level of religion. In 1994 Michael Meyers was arrested for the intent to distribute and conspiracy to possess marijuana. He was convicted and defended himself by claiming that he was the Reverend of the Church of Marijuana. His religious exercise claim was that his religion requires him to use and grow marijuana for the good of humankind and for the planet earth. Meyers appealed his conviction.

The appeals court, following the lead of the district court (*U.S. v. Meyers* 1995: 1502-03), applied a set of criteria to distinguish a religion from a philosophy of life or an ideology. These five criteria are:

1. Ultimate ideas: They address fundamental questions about the meaning and purpose of life.
2. Metaphysical beliefs: These beliefs are not only fundamental, but must be transcendental.
3. Moral and ethical systems: Religion proposes a system or organized moral and ethical codes.
4. Comprehensiveness of beliefs: These beliefs are also encyclopedic and reach a broad array of issues.
5. The accoutrements of religion: These include a founder or prophet, sacred writings, specified gathering places, keepers of knowledge (ministers, clergy) ceremonies and ritual and holidays.

Based upon these factors, the Meyers’ Court of Appeals reviewed the District Court’s rationale for convicting him. The district ruled that his “religious” beliefs about the medical, therapeutic and social benefits of marijuana stemmed from secular beliefs. The court ruled that his ideas were more “philosophy” than “religion” (*U.S. v. Meyers* 1995). His claim failed because the constitution protects religion not philosophy.

The definition of religious activity is narrowed, not broadened, by the Meyers ruling. Courts are unlikely to include heightened experience, altered states of consciousness, clairvoyant experiences or expanded social or philosophical awareness in their definition of religion. It is worth remembering that courts have affirmed that the First Amendment protects freedom of religion, not freedom of philosophy. Likewise, the statute the courts used to apply to the hoasca case was the Religious Freedom Restoration Act, not the Ideological Freedom Restoration Act.

It is an ongoing, open question as to exactly what the legal difference is between religion and philosophy. Yet, the law often turns on the precise parsing of words. The next section discusses the importance of how words are used in the law of sacred substances.

The Power of the Hermeneutic and Amicus Briefs

“Hermeneutics” means the way one interprets or understands something. Hermes was the Greek messenger of the gods. He had wings on his feet to speed the message of the gods. Law functions in a culture of words, and hermeneutics is the professional use of words.

Words are the work of the law and they are the children of the law. The law often turns on nuances and strict definitions. For example, in the Meyers case, noted above, the court ruled that his beliefs were “philosophy,” or a “way of life,” but not a “religion.” His conviction was upheld because his beliefs were deemed to fall into one definitional category and not another.

Names form identities and sometimes determine outcomes. The legal properties between “hallucinogen,” “psychotropic” and “sacrament” can mean the difference between allowing a religious act and banning it. The Council on Spiritual Practices offered an amicus curiae brief on behalf the UDV. “Amicus curiae” means “friend of the court” and these briefs are papers designed to aid the court in its deliberations. The authors are not parties to the suit.

Among the authors of the amicus brief by the Council on Spiritual Practices is Huston Smith. Smith (2000) is a world-renowned authority on comparative religion and the author of *Cleansing the Doors of Perception: The Religious Significance of Entheogenic Plants and Chemicals*. In disputing the government’s assertion that hoasca presents a risk to public health, the brief makes the point that perfectly legal religious practices also have risks, including refusing medical treatment, practicing meditation, fasting from certain foods and drinking alcohol. The brief argues it is

“paternalistic” and constitutionally impermissible to single out hoasca for specific prohibition when other religious acts also have risks.

The brief makes another point. It asserts that it is equally paternalistic to use the terms “hallucinogen” or “drug” in that it denigrates its religious character. The brief asserts that the very term “hallucination” carries the implication that the insights gained in such ceremonies are “delusionary” and “false” (Amicus Curiae Brief 2005). Indeed, the Schedule I of the Schedules of Controlled Substances (2003) specifically uses the term “hallucinogenic” to describe marijuana, mescaline, peyote, psilocybin and other substances.

In the legal sense, the difference between hallucinogen and “entheogen” or “agent of revelation” or other theological designation serves to heighten the distinction between a philosophy of life and religion. Using an entheogen is not a matter of becoming healthier or even wiser. It is ordered by the sacred texts. The religious use of hoasca is not only a blessing, it is a sacrament. A sacrament is a commandment. It may have social and psychological benefits, but that is not the reason for its use. The entheogen must be a sacramental part of the group’s religious practice and central to its theological thought.

Expert Witnesses Proving “Compelling” Interest

Claiming a compelling interest in enforcing drug laws and proving it are two different things. Both the government and the UDV used expert witnesses to prove their cases.

Each side lacked the empirical evidence sufficient to make a conclusive argument. Research data is the kind of proof all courts sought. One witness for the UDV testified that a controlled experiment in 1993 comparing 15 long-term UDV members and a control group yielded an overall positive experience using the tea. Another researcher testified that the sacred setting is significant to promote the spiritual benefits of hoasca and to negate the negative physical and psychological reactions. A government witness cited a study of two subjects who took DMT intravenously; one experienced a high rise in blood pressure and another had a recurrence of depression (*O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft* 2003). Both the district court (*O Centro v. Ashcroft* 2002) and the circuit court (*O Centro v. Ashcroft* 2003) concluded that this mixed testimony was insufficient for the government to prove its case.

As a legal, technical matter, the UDV did not have to prove that hoasca was a beneficial drug or that it was a cure for any disease. Evidence of beneficial effects is shown as a defense against the charges of the government. It was the government’s duty to prove that hoasca poses a serious threat.

Research results are essential in proving the case for a compelling interest. All level of federal courts examined empirical evidence to find out if hoasca posed a danger or if it is likely to be easily converted to recreational use. The results were not just “in equipoise.” The relevant research

lacked the depth of research subjects and longitudinal scope. Each individual research was credible by itself, but there were too few studies with too few subjects to reach scientific consensus. The court was making a decision in an empirical vacuum. Courts could not hope to reach informed conclusions and tie the hands of jurists who must decide the compelling interest standard. Such claims are the subject of the next section. This research is not undertaken simply for academic curiosity; it is undertaken out of legal necessity. Decisions on religious freedom are too important to be made in an empirical vacuum.

Researchers must be given greater access to test samples of Schedule I-prohibited substances, especially if they have entheogenic value. The hoasca case indicates that cases involving entheogens are likely to increase. In order for courts to credibly assess the potential either for harm or for medical use, the research on such entheogens must also increase.

WILL FEDERAL COURTS EXTEND THE ENTHEOGENIC EXEMPTION?

Any Supreme Court case offers powerful precedent: i.e., by law and custom, later cases are built upon previous cases. This analysis concludes with a consideration of whether the hoasca decision anticipates a trend of federal courts to expand the entheogenic exception. In other words, does the hoasca decision signal a willingness among federal courts to allow a broader use of religiously-motivated entheogens?

On the “no” side of the argument is that nowhere does the Supreme Court decision seek to create wholesale exemptions to the CSA. Sometimes court decisions are significant in what they do not say. None of the three courts who tried this case, including the Supreme Court, intimated that they were unhappy with the CSA’s regulatory scheme. Thus, federal courts are not likely to change the contents of the substances under the Schedules or change the nature of enforcement policies. Rather, this decision should be seen as illustrating the statutory accommodations on the CSA that already exist, especially the application of the RFRA.

The hoasca decision has already been used as precedent to restrict religious materials in jail. The Seventh Circuit Court of Appeals refused to allow Odinist books to an inmate (*Borzzych v. Frank* 2006). That court reasoned that the prison had a compelling interest in preserving security and that this particular reading material, though religious, also advocated violence.

Previous to the hoasca decision, federal courts were unlikely to extend the exemption beyond the Native American Church. For example, The Peyote Way Church of God also sought an exemption to use sacramental peyote. This was a non-Native American religious group seeking the same exemption as the Native American Church enjoys. Peyote Way argued for an exemption under the free exercise clause. Peyote Way also argued that exempting the Native American Church and not their church was an unconstitutional violation

of equal protection as well as an illegal establishment of religion. These arguments were unsuccessful and Peyote Way's claim was dismissed (*Peyote Way Church of God v. Thornburgh* 1991).

Besides peyote, marijuana, mescaline, the law might prohibit other entheogenic substances used in traditional aboriginal ceremonies. Among these could be "nu-nu," a substance used by Peruvian Matses. This group also uses "sapo" or dried frog secretions from the *bufo alvarius* (Kra-jick 1992). It can be expected that other groups will use the precedent, now established by the hoasca decision, to press their own case.

On the "yes" side, the Court clearly is abandoning the categorical outlawing of entheogens in this situation. The model for the exemption for Native Americans to use peyote left the categorical approach to outlawing entheogens untouched; it was a separate, legislative exemption carved out specifically for that church.

Next, the hoasca exemption was founded upon a statute, not case law. The RFRA is not likely to be overturned, modified or otherwise abridged any time soon. Case law changes more rapidly than a constitutionally-tested statute, such as the RFRA. The RFRA may well be applied to a wider class of religious groups using entheogens. The Supreme Court expanded the application of that rationale to a group that is not analogous in size to the Native American Church. While the Native American Church could serve nearly a quarter of a million Native Americans in the U.S., the UDV "nucleos" amount to about 130 members. As is proper, the Supreme Court should not use membership numbers to justify an exemption. The RFRA applies to all religions, no matter how large or small.

Finally, the experience of the Native American Church's exemption for peyote use was a positive one. There is no indication of diversion or harm arising from the Native American Church's exemption (Brief for Respondents 2005; Oral Argument 2005). There is no reason to believe that the UDV Church will not duplicate the Native American Church's exemplary record.

The next section outlines the factors at play when a religious group seeks an exemption under the RFRA to use entheogens. The likelihood that they will prevail will be based upon a number of factors.

LIKELY PROFILE FOR THE ENTHEOGENIC EXCEPTION

The following is a profile for those groups most likely to prevail when suing for an exemption to use an entheogen.

1. The group can show that it is a "religion," not a "philosophy" or "ideology." Federal courts are unlikely to expand the application of the RFRA to groups who espouse a philosophy of life or a social ideology.
2. The group has a strong, provable record of entheogen use. This record will provide evidence that the entheogen is sacramental, not just incidental to the theology of the group. A regime on how the entheogen is controlled and used during the religious ceremony is important.
3. Using the entheogen is a religious requirement. Its use must be a central, sacramental use for the religious group.
4. The group must show that the entheogen has a low risk of diversion. The group would show that use outside its sacred acts is either minimal or beyond its control.
5. The group shows that the entheogen has little harm associated with sacramental use. The group may not need to show that use outside and unconnected with sacred use is free of harm, but it should show that the harm is less under sacred use and that the group addresses these risks in light of its theology.

CONCLUSION

The recent Supreme Court hoasca decision affirmed the role of the Religious Freedom Restoration Act in exempting entheogen use. That decision broke new ground. It parted with the government's compelling interest contention that its Schedule prohibitions are categorical and without exception. All federal courts considering this case, however, noted an exemption is already in place for the Native American Church's use of peyote. In opening the door for the use of hoasca to the UDV "nucleo," the Supreme Court created a precedent for expanding entheogenic use not only to a new substance but by a different cultural group. Additional litigation for other exemptions can be expected.

Additionally, the federal courts deciding this case were all handicapped by the lack of empirical evidence of the effect of hoasca upon users, particularly sacred users. This was a central legal question that hinged upon pharmacological evidence. The cure for ignorance is not more ignorance. Research regimes need to be established for hoasca and for other entheogens. A lack of such data, particularly when religious freedoms are at stake, is an affront to the legal process.

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