In a unanimous decision announced this Spring, the Supreme Court bolstered the Religious Freedom Restoration Act ...

A CLOSER LOOK AT THE UDV CASE POST-DECISION

By K. Hollyn Hollman

The Supreme Court's unanimous decision in *O Centro Espírita Beneficente União do Vegetal (UDV), et al vs. Gonzalez*, issued February 21, was welcome news. We typically have to wait until the last day of the Court's term for the results of religious liberty cases. In the midst of winter in the nation's capital, the decision felt like a sign of spring.

The decision was a solid victory for the continuing vitality of the Religious Freedom Restoration Act (RFRA). The Court firmly rejected the Government's argument that it had a compelling interest in the uniform application of the Controlled Substances Act that would not allow exceptions to accommodate UDV, a religious sect with origins in Brazil. As part of its religious ceremonies, UDV members ingest tea that contains a substance that is regulated by the Controlled Substances Act. The Court enforced RFRA according to its terms, leaving the burden on the government to prove that its infringement on religious practice was warranted under a strict legal standard. The case prompted applause for the BJC's commitment and its leadership role in the Coalition for the Free Exercise of Religion. It also offered an occasion to reflect on the history and importance of RFRA and the changing face of the Supreme Court. Here are some questions and answers that may help explain the decision.

Does this unanimous decision indicate a positive turn in the Supreme Court's Free Exercise jurisprudence?

While the case is a good one for religious liberty, it is based on the statutory protection provided by Congress and signed into law by former President Bill Clinton in the 1993 Religious Freedom Restoration Act (RFRA). It does not address the question of a religious claim under the First Amendment's Free Exercise Clause.

What does the case tell us about the newest members of the Court and their approach to religious freedom?

The decision was unanimous, written by Chief Justice John Roberts in his first religious freedom case. Because the case was decided on statutory grounds, however, it does not tell us about the new Chief's approach to the Religion Clauses. Justice Samuel Alito took no part in this case because he did not hear oral argument.

Has Justice Antonin Scalia changed the position he took as author of *Employment Division vs. Smith*?

In the 1990 free exercise case of *Employment Division vs. Smith*, Justice Antonin Scalia famously said that "we could not afford the luxury" of deeming presumptively invalid all regulations that burden religion that do not protect interests of the highest order. The BJC decried the *Smith* decision as a "bombshell" and led the Coalition for the Free Exercise of Religion that worked tirelessly for the passage of RFRA. The UDV case, however, does not indicate any change in Justice Scalia's approach to free exercise, only his willingness in this case to follow the statute Congress passed. At oral argument, Justice Scalia noted that "Congress didn't like *Smith*" and passed RFRA to alter the effects of that case. His concerns were echoed in the opinion: "We have no cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one. Indeed, the very sort of difficulties highlighted by the Government here were cited by

this Court in deciding that the approach later mandated by Congress under RFRA was not required as a matter of constitutional law under the Free Exercise Clause. But Congress has determined that courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue."

What does the Court's decision tell us about the continuing vitality of the *Smith* decision?

Smith is now not exactly "super-dooper" precedent, to use the language of recent judicial nomination hearings, but it is now more than 15 years old. Since that 1990 decision, only a few dissenting opinion attempts have asked the Court to revisit the decision. While it is unlikely the court will overturn the 1990 decision anytime soon, early attempts were made to have the Court revisit it. In 1993 Justice Souter argued in *Church of Lukumi vs. City of Hialeah* that *Smith* was contrary to both Free Exercise Clause history and legal precedent and that it should be reexamined.

Are constitutional questions over for RFRA?

When the Supreme Court heard its first RFRA decision in the 1993 *City of Boerne* case, the Court held that Congress lacked the power to extend such broad protections to actions of the states. RFRA remained in effect with regard to federal law, with few questioning its constitutional legitimacy. In the UDV case, the Court did not rule on that issue explicitly, but its decision enforcing RFRA according to its terms makes such challenges more difficult.

Have states responded to the *Boerne* decision?

Thirteen states have now passed legislation similar to RFRA that requires their state courts to grant free exercise protections consistent with the pre-*Smith* standard. Several other states are considering or have considered similar bills. Courts in ten additional states have interpreted their state constitutions to grant greater free exercise protections than granted by the Supreme Court in *Smith*.

Is this case a dangerous decision that opens the door for other controversial practices in religious services? Are there religious practices that the BJC would not support?

As the Court recognized in its decision, the case is limited to the facts. In this case, the Government did not dispute that the religious practice at issue was an exercise of their sincerely held religious beliefs, circumscribed to religious ceremonies. The Court upheld the preliminary injunction that had been granted to UDV because the Government failed to meet its burden to show a compelling interest in stopping this particular religious practice. This does not mean that a case with different facts would have the same result.

The BJC supports the legal standard enacted in RFRA; we do not endorse specific religious practices. While our mission is to promote religious freedom for all, we recognize that government has responsibilities to protect the health, welfare and safety of citizens that will sometimes conflict with and override religious freedom claims.

Does the case mean that all federal laws will have exemptions for religious claims?

The Court stopped short of finding that the Government would never have a compelling interest in the uniform application of a statute. In this instance, however, the Government's argument that the Controlled Substances Act could bear no exemptions was fatally undermined by the longstanding exemption for religious use of *peyote* by Native Americans.

What happens next to UDV?

The decision upheld preliminary relief granted to the church, which means that the case goes back down to the district court for additional proceeding to determine if the ruling will be permanent. While the Court rejected the Government's claim under the Controlled Substances Act, it held that *hoasca* was covered by an international treaty. The lower court will determine whether the Government's interest in the application of that treaty to UDV is sufficient to prevent an exception under RFRA.