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# Winner, Best Appellate Brief in the 1995 Native American Law Student Association Moot Court Competition

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# WINNER, BEST APPELLATE BRIEF IN THE 1995 NATIVE AMERICAN LAW STUDENT ASSOCIATION MOOT COURT COMPETITION

*Daniel L. Cheyette & Andrew J. Bobzien**

## *Questions Presented*

I. Under the common-law test for tribal status or under 25 C.F.R. § 83, do the LaPaz people have tribal status or acknowledgment so as to qualify for the benefits and privileges that the federal government provides to such tribes?

II. Did the Supreme Court wrongly decide *Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990), and wrongly depart from using strict scrutiny when a generally applicable law significantly burdens the free exercise of religion?

III. Whether the exemption in 21 C.F.R. § 1307.31 for the Native American Church from federal law prohibiting peyote use, and the entirety of the American Indian Religious Freedom Act Amendments of 1994 violate the Establishment Clause?

IV. Whether the exemption in 21 C.F.R. § 1307.31 for the Native American Church from federal law prohibiting peyote use, and the entirety of the American Indian Religious Freedom Act Amendments of 1994 violate the Due Process Clause and its equal protection component?

V. Does Roberto Ernesto Gonzalez qualify under the American Indian Religious Freedom Act Amendments of 1990 because he is an "Indian" practicing an "Indian religion?"

## *Statement of the Case*

### *I. Facts*

The LaPaz Indian Tribe (LaPaz) is an indigenous group that has resided in North America for over two hundred years. The La Paz have maintained a common culture and religion that both binds its people together and distinguishes them from others. Due to religious persecution, the LaPaz fled their original homeland and eventually, in the early 1900's, settled in Rancho Pacifica, New Arizona. Most members of the LaPaz religion live in Rancho Pacifica, and almost all residents of Rancho Pacifica are

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members of the religion. The practices and beliefs of the religion are inextricably intertwined with the LaPaz's culture and politics.

The LaPaz religion incorporates practices that may be related to African-Caribbean religions as well as other beliefs and practices borrowed from Indian tribes of the southwestern United States and norther Mexico. Among these latter beliefs and practices is the use of peyote in religious ceremonies. The La Paz religion maintains its world headquarters in Rancho Pacifice and also owns and operates a private religious school, where a large majority of its members send their children.

La Paz ancestors were primarily of Indian descent from different Native tribes which were, and in some cases still are, located in Mexico. However, because of the understandable lack of formal record keeping, an infusion of Spanish blood, and the LaPaz's coerced migration, the precise blood quantum of LaPaz members is extremely difficult to trace.

Roberto Ernesto Gonzalez is both a resident of Rancho Pacifica and a high priest of the LaPaz religion. On October 15, 1992, Gonzalez was conducting a religious ceremony at the religion's world headquarters in Rancho Pacifica. Suspecting that peyote was being used, the FBI witnessed Gonzalez use peyote, interrupted the ceremony and arrested Gonzalez for violating the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801-996, § 812(c) (1990) (Controlled Substances Act).

### *II. Procedural Posture*

In 1980, 1988 and 1992, the LaPaz Tribe petitioned for federal recognition pursuant to 25 C.F.R. § 83 (1994). In each instance, the Department of the Interior rejected the petition. As a result, the LaPaz Tribe brought suit against the Secretary of the Interior in the United States District Court for the District of Columbia. That Court rejected the LaPaz claim, and the D.C. Circuit affirmed. The LaPaz are now before this Court on appeal.

Gonzalez, in a separate case, was convicted of violating the Controlled Substances Act. At that trial, and on appeal, Gonzalez has contended that *Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872, (1990) (*Smith II*) was wrongly decided, and therefore, his conviction should be overturned because it violates the Free Exercise Clause of the United States Constitution. Gonzalez also protests that the Native American Church (NAC) exemption, found in 21 C.F.R. § 1307.31 (1985), from the prescription of peyote as a controlled substance, as well as the entirety of the American Indian Religious Freedom Act Amendments of 1994, 42 U.S.C. § 1996 (1994), violate the Establishment Clause and the Due Process Clause of the Fifth Amendment, including its equal protection component. Nevertheless, Gonzalez was convicted in the United States District Court for the District of New Arizona, and the Twelfth Circuit affirmed. Gonzalez is now before this Court on appeal.

The Supreme Court has consolidated all of the above issues for briefing and oral argument.

*Summary of the Argument*

The LaPaz people are a tribe because they satisfy both the common-law and the statutory definitions of a "tribe." They satisfy the common-law definition because they meet the *Native Village of Tyonek v. Puckett*, 957 F.2d 631, 635 (9th Cir. 1992), tribal status test. They satisfy the statutory definition because the historical-ethnic facts of their existence weigh heavily in favor of tribal status. Moreover, contemporary case-law favors a liberal definition of the term "tribe." Therefore, the failure of the Bureau of Indian Affairs (BIA) to recognize the LaPaz as a tribe is arbitrary and capricious.

Because the *Smith II* case was wrongly decided, Gonzalez's conviction violates the First Amendment of the Constitution. In *Smith II*, the Court departed from well established precedent, misinterpreted other cases and should therefore be overruled. In addition, the Supreme Court abdicated its duty to protect minority religious practices. Under the compelling interest test, Gonzalez's religious practice was significantly burdened while the United States government had no compelling interest to inhibit Gonzalez's use of peyote under the Controlled Substances Act. Since the government cannot meet its burden, Gonzalez's conviction must be overturned.

Furthermore, the exemption in the Drug Enforcement Agency (DEA) regulation for the Native American Church and the entirety of the American Indian Religious Freedom Act Amendments (AIRFRA) violate the Establishment Clause because the government endorses the Church and excessively entangles itself with that religion.

The exemption allowing the Native American Church to use peyote solely for nondrug, religious purposes and the entirety of the AIRFA Amendments violate the Due Process Clause because they deny religious rights according to racial distinctions. The NAC exemption and the AIRFA Amendments do not give similar treatment to similarly situated people.

In the alternative, Gonzalez can not be guilty of violating the Controlled Substance Act because he is an "Indian" practicing "Indian religion" and thus falls under the AIRFA Amendment's peyote exemption.

*I. The Lapaz People Are a "Tribe"*

Federal "recognition" or "acknowledgment" of Native American people as an "Indian tribe" is crucial to the tribe because it establishes a government-to-government relationship between the tribal government and the United States and entitles the tribe to benefits and privileges provided exclusively to Indian tribes. William W. Quinn, Jr., *Federal*

*Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. § 83*, 17 Am. Indian L. Rev. 37, 37 (1992).[1]

*A. The LaPaz People Are a Tribe Because They Satisfy the Traditional Common-Law Definition of a Tribe*

An Indian community constitutes a tribe if it is either (1) acknowledged as such by the federal government; or (2) if it satisfies the common-law definition of a "tribe." *Native Village of Tyonek v. Puckett*, 957 F.2d 631, 635 (9th Cir. 1992). According to the common law test, a "tribe" is: 1) a body of Indians of the same or a similar race; 2) united in a community under one leadership or government; 3) inhabiting a particular though ill-defined territory; and 4) is the modern-day successor of a historical sovereign entity that exercised minimal functions of governance. *Tyonek*, 957 F.2d at 635[2], (citing *Montoya v. United States*, 180 U.S. 261, 266 (1901)).

The LaPaz community is a tribe because it satisfies the common law test. The recent decision *Native Village of Venetie, I.R.A. Council v. State*, No. F86-0075 Civ. (HRH), F87-0051 Civ. (HRH), 1994 WL 730887, at *1 (D. Alaska Dec. 23, 1994), demonstrates a successful application of the four part common law test as defined in *Tyonek*.[3] The court viewing anthropological and historical evidence concluded that the Neets'aii Gwich'in people (who comprise the Venetie community) were a separate and distinct race of American Indians because they descended from common ancestors who resided in villages in the region. *Id.* The LaPaz people are similar in that they too are the descendants of native tribes that resided in a single region, and today remain racially distinct from the people of the surrounding regions. For these reasons, La Paz are of a distinct race. Opposing counsel will contest this comparison claiming that recent infusions of Spanish blood into the LaPaz community distinguish it. *Venetie* makes clear, however, that some intermarriage is allowable where the community remains cohesive. *Id.* Despite the Spanish infusion, the LaPaz people are cohesive in that they have remained a tightly-knit community and have retained their unique culture and religion.

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1. *See also* Rachael Paschal, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process*, 66 WASH. L. REV. 209, 212-13 (1991). Recognition gives the tribe sovereignty over their own territories including the rights to self-government and sovereign immunity, and is a requirement for receiving federal aid, services and benefits. Peyote use is one such benefit conferred to tribes. *Id.*

2. The *Tyonek* decision fashions this test for tribal status by utilizing the four part *Montoya* test and affixing its own fifth criteria. The court concluded the Tyonek Village was a tribe possessing the privilege of sovereign immunity from suit.

3. *Venetie* used the common-law test because the tribe was never federally recognized. In this case, tribal recognition gained full faith and credit for native court decisions from the state and federal government.

The LaPaz community satisfies the second criteria of the common-law test in that it is a united community under single leadership. The *Tyonek* court suggested "Political cohesiveness" as evidence of this criteria. *Tyonek*, 957 F.2d at 635. In *Venetie*, this criteria was satisfied because the Neets'aii lived in separate but inter-related bands governed by strong chiefs. *Venetie*, 1994 WL 730887, at *1. Similarly, the LaPaz people live almost entirely within the tight-knit community of Rancho Pacifica and the majority are members of the LaPaz religion which has its headquarters in that community. Furthermore, the religion operates schools that are attended by the children of almost every member and otherwise exerts influence over the lives of its members. These factors demonstrate the politically and socially cohesive community required by the common-law test.

The LaPaz people satisfy the third criteria of the common law test because they inhabit a particular territory. Almost all LaPaz people reside in Rancho Pacifica. Opposing counsel will contend that this is insufficient to establish a particular territory because over their history the LaPaz people have been migratory. This contention must fail, however, because *Venetie* illustrates that territories need not have specific boundaries. *Id.*[4]

The final common-law criteria requires that a group claiming tribal status must be the modern day successor to a historical sovereign entity. *Tyonek*, 957 F.2d at 635.[5] The *Venetie* court interpreted this criteria as requiring that some defining characteristic of the original tribe persists in the present-day community. *Venetie*, 1994 WL 730887, at *1. The LaPaz people satisfy this requirement because they have maintained their own distinct culture and religion despite contacts with the non-Native world.

The LaPaz people are comprised of one race that is united in community, leadership and territory, and who are the descendants of a historical sovereign entity. Therefore, the LaPaz satisfies the traditional common-law definition of an Indian tribe.

### *B. The Secretary of the Interior's Decision that the LaPaz People Are Not an Indian Tribe Is Arbitrary and Capricious*

Final agency action regarding the tribal acknowledgment of the LaPaz people as a "tribe" is reviewable. Indians, 25 C.F.R. § 83 (1994).[6] On review, a court must reverse an agency decision if it is, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative Procedure Act §2(A), 5 U.S.C. § 706 (1964 & Supp. V

4. Although the Neets'aii people occupied four distinct territories in both Alaska and Canada, the court determined that they nonetheless satisfied the territory criteria of the test. *Venetie*, 1994 WL 730887, at *1.

5. The *Tyonek* court interpreted this requirement liberally requiring that the historical sovereign exercise only the minimal functions of a governing body.

6. A decision is reviewable as a federal question pursuant to 28 U.S.C. § 1331 (1988).

1993). The case-law interpreting this standard requires the court to consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

Applying this standard to the present case, the Secretary's decision not to acknowledge the tribal status of the LaPaz people must be reversed. The LaPaz people have lived for over two hundred years in a tightly-knit community, are the descendants of Native tribes, have maintained their own unique religion and culture despite extensive contact with non-Native people and reside within a particular historical territory. The ethnohistorical facts relevant to the determination of tribal status weigh heavily in favor of the LaPaz people. Furthermore, many cases have advocated a liberal definition of Indian tribe.[7] For these reasons, it is an abuse of discretion and an error of judgment not to acknowledge the LaPaz people as an Indian tribe.

### *C. Because They Preclude Deserving Tribes of Federal Acknowledgment, the Regulations Promulgated at 25 C.F.R. § 83 Are Inadequate*

The acknowledgment program administered by the Bureau of Indian Affairs (BIA) pursuant to 25 C.F.R. § 83 precludes many unrecognized tribes from federal recognition. Rachael Paschal, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process*, 66 Wash. L. Rev. 209, 210 (1991).[8] Prior to the promulgation of the rules in 1978, acknowledgment was made on a case-by-case in a ad hoc fashion. A tribe was considered recognized if the BIA determined that a historic relationship between the government and the tribe existed and then decided to perpetuate this relationship. L.R. Weatherhead, *What is an "Indian Tribe"? - The Question of Tribal Existence*, 8 Am. Indian L. Rev. 1, 15 (1980).[9] In 1975, Congress created the American Indian Policy Review Commission (AIPRC) to investigate the status of the American Indians. AIPRC recognized that serious flaws existed in the current ad hoc acknowledgment system and suggested a systematic acknowledgment procedure. Paschal, *supra*, at 212. These recommendations led to the BIA's promulgation of regulations. The goal of these regulations is to set relevant standards that are clear enough to provide useful standards for decision

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7. It is appropriate that the definition of "tribe" remain broad enough to reflect inevitable changes in the meaning and importance of tribal relations and the wide variations among tribal groups living in different parts of the country. *Venetie*, 1994 WL 730887, at *1; *see also* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979).

8. Paschal advocates that Congress should amend the criteria to more accurately reflect contemporary tribal society, adequately acknowledge tribal petitioners and provide for more accountability by the Bureau of Indian Affairs. Paschal, *supra* note 1, at 209.

9. Recognition refers to two elements: (1) operative legal facts indicating actual recognition, and (2) a legal status recognizing an obligation to the tribe. R.L. Weatherhead, *What is an "Indian Tribe"? — The Question of Tribal Existence*, 8 AM. INDIAN L. REV. 1, 15 (1980).

makers, yet are broad and flexible enough to eschew ethnohistorical fallacy and the exclusion of tribes that do not fit into preconceived stereotypes. Weatherhead, *supra*, at 18, 30.

The C.F.R. regulations fail this essential task. Although Congress has repeatedly shown an intent to define "tribe" so as to reach the greatest number of Indians possible. *Id.* at 21. Regulations led to the acknowledgment of only eight tribes between 1978 and 1992. Quinn, *supra*, at 8. Clearly, more tribes are deserving of federal acknowledgment.

In petitioning for acknowledgment under 25 C.F.R. § 83, the petitioner carries the burden of proof, and failure to prove even one criteria results in denial of the application. 25 C.F.R. §§ 83.7, 83.9(j). The BIA interprets the criteria narrowly and requires extensive documentation to establish each criteria. Paschal, *supra*, at 218. This can create an insurmountable barrier to a number of tribes.[10] A less prejudicial and more accurate procedure to acknowledge Indian tribal status is necessary. The common-law test elaborated above would be both less prejudicial and more accurate. The factors the common law test considers are relevant to the determination, provide workable standards for federal decision-makers and are non-prejudicial to the petitioning tribes who carry the burden of proving tribal status. Finally, using the common law standard will bring to fruition the liberal approach to acknowledgment that Congress envisioned following the AIPRC recommendations. Weatherhead, *supra* at 22.

### *II. The Smith Case Was Wrongly Decided and Therefore the Conviction of Gonzalez for Violating the Controlled Substance Act's Prohibition of Peyote Use Violates the Free Exercise Clause*

In 1990 a devastating blow was delivered to those whose religious practices conflict with government laws and regulations. In *Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990) (*Smith II*), the Supreme Court incorrectly focused on the criminality of peyote in Oregon and held that the First Amendment[11] does not protect individuals

10. For example, North American Indians did not have writing systems and so all early documentation must come from non-Indian observers; the use of ill-defined terms and the inconsistent application of these terms during the acknowledgment adjudication preclude petitioners' attempts to provide the necessary documentation; no standards exist to indicate the cumulative levels of documentation necessary to meet the BIA's criteria; and the word "tribe" is a European construction that is inapplicable to many historic Indian peoples. Paschal, *supra* note 1, at 224-26. Difficulties such as these make the procedure of petitioning for tribal acknowledgment overly burdensome, and as a result, Indians deserving tribal acknowledgment, such as the LaPaz people, are denied this acknowledgment.

11. The First Amendment provides in relevant part that "Congress shall make no law respecting an establishment of religion or prohibit the free exercise thereof." U.S. CONST. amend. I.

from generally applicable and neutral laws that inhibit, or even prohibit, the practice of religion.[12] *Smith II*, 494 U.S. at 877-882.

In *Smith II*, the Supreme Court departed from well established precedent, misinterpreted and mischaracterized other free exercise cases, and abdicated its responsibility to protect the interests of unpopular and minority religious practices.

For the foregoing reasons, appellant Gonzalez respectfully requests that *Smith II* be overruled, and that this court reverse appellants conviction because it violates the Free Exercise Clause under the compelling interest test.

### *A. Smith II Departed from Well-Established Precedent in Addition to Misinterpreting and Mischaracterizing Past Cases in the Free Exercise of Religion Context*

Modern free exercise analysis began in 1963 when the Supreme Court decided *Sherbert v. Verner*, 374 U.S. 398 (1963).[13] Applying strict scrutiny, the Court set out the test that dominated free exercise jurisprudence until *Smith II*: any government regulation that substantially burdens a sincere religious practice violates the Free Exercise Clause, unless the government justifies the burden by a compelling state interest that is the least restrictive means of achieving that interest. *Sherbert*, 374 U.S. at 402.

Subsequent Supreme Court cases continued to apply strict scrutiny to protect religious practices.[14] However, in *Smith II*, the Court incorrectly

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12. *Smith II* limits First Amendment strict scrutiny to cases where the government singles out a particular religion and purposely limits the right to practice that group's religion. *See* Church of Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217, 2226 (1993) (government could not prohibit religiously motivated animal sacrifice when the law was aimed at that particular religiously motivated conduct). Proving intent to discriminate is next to impossible, as we discovered when people of color claiming equal protection violations were required to provide direct proof of a motive to discriminate when the law in question was neutral on it face. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977); Washington v. Davis, 426 U.S. 229, 239-40 (1976).

13. In the case, it was held that a South Carolina unemployment law that denied benefits to a Seventh Day Adventist who was fired from her job for refusing to work on Saturday (her Sabbath), violated her free exercise of religion. *Sherbert*, 374 U.S. at 403.

14. Wisconsin v. Yoder, 406 U.S. 205 (1972) (reversing conviction under a criminal statute requiring compulsory education because the statute infringed on the Amish's belief that such schooling was against their faith and way of life); Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707 (1981) (invalidating denial of unemployment to Jehovah's Witness who would not transfer to employer's munitions department for religious reasons); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (holding that denying unemployment compensation to an employee who refused to work on her Sabbath violated her free exercise of religion); and Frazee v. Illinois Dept. of Employment Sec., 489 U.S. 829 (1989) (reversing the denial of unemployment benefits to complainant, a Christian who refused to work on Sunday, even though he was not a member of a sect that precluded Sunday work).

departed from strict scrutiny analysis, and interpreted subsequent cases inconsistent with their meaning and application.

*1. Sherbert Requires Application of the Compelling Interest Test Because the Criminality of Oregon's Statute Was Not Relevant to the State's Ability to Interfere with Smith's Free Exercise of Religion*

The *Smith* Court's analysis relied upon the fact that Oregon did not exempt Smith from the state law prohibiting the use of peyote. The Supreme Court indicated that the criminality of peyote in Oregon was relevant to the analysis under the federal Constitution because in the other unemployment compensation cases, *Sherbert, supra, Thomas v. Review Board*, 450 U.S. 707 (1981), and *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 142 (1987), "the conduct that gave rise to the termination of employment was perfectly legal." *Oregon v. Smith*, 485 U.S. 660, 670 (1988). This analysis was incorrect because in *Yoder*, the Court expanded the scope of the *Sherbert* compelling interest test to a criminal law. *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972). Likewise, the Court ignored *McDaniel v. Paty*, 435 U.S. 618 (1978), where the Court, applying the compelling interest test, invalidated a Tennessee law that disqualified ministers from holding the office of convention delegate. The Supreme Court inappropriately relied on the criminality factor to distinguish the unemployment cases. Smith, however, was never charged with violating the state statute prohibiting peyote use. Moreover, the state had never enforced the statute for peyote use during religious ceremonies. *Smith II*, 494 U.S. at 910 (Blackmun, J., dissenting). In addition, the Employment Appeals Board of Oregon did not rely on the criminal statute when it denied benefits to Smith. *Smith I*, 721 P.2d 445, 450 (Or. 1986). More importantly, Oregon's highest court found the illegality of peyote use to be irrelevant when determining the balance between the states' interest and Smith's interest in the free exercise of his religion. *Id.*

In summary, the fact that *Yoder* expanded the compelling interest test to a criminal law and that the criminality of peyote use was irrelevant to the decision, undermines the *Smith II* Court's reliance on peyote's illegality to distinguish *Smith II* from the employment cases.

*2. The Smith Court's Characterization of Yoder as a "Hybrid" Case, To Distinguish It from the Facts of Smith II, Was Ill-founded*

While skirting the application of the compelling interest test to the facts of its own case, the *Smith II* Court characterized *Yoder* as a "hybrid" case that combined free exercise of religion and parenthood rights. *Smith II*, 494 U.S. at 881. It appears this was done for the sole purpose of distinguishing *Yoder* from *Smith II*.

The majority relied on language in *Yoder* that could arguably, but unconvincingly, be interpreted to mean that the parental interest was required

for the Amish's free exercise claim to succeed. *Smith II* at 881 n.1 (quoting *Yoder*, 406 U.S. at 233).

The majorities "hybrid" theory is refuted by the *Yoder* Court's unambiguous language that "compulsory attendance law . . . carries with it precisely the kind of objective danger to the free exercise of religion that the first amendment was designed to prevent." *Yoder*, 406 U.S. at 218. In addition, the *Yoder* Court never once stated that two constitutional interests must be present for strict scrutiny to apply. If anything, the language in *Yoder* conveys that the addition of the parental right simply added weight to the free exercise analysis but was not necessary to tip the balance in favor of the Amish. Moreover, the Free Exercise Clause itself cannot be construed to require a "hybrid" situation. If it does, its usefulness as intended by its drafters is non-existent.

*3. The Smith II Court Misinterpreted Post-Sherbert Case Law To Justify that the Compelling Interest Test Was Confined to the Unemployment Cases, and that the Compelling Interest Test Had Become Useless Outside of that Context*

To justify its movement away from strict scrutiny analysis, except in the unemployment compensation area, the Court in *Smith II* discussed several cases where the Court refused to use the compelling interest test outside of that specific area.[15] The Court also examined cases where the challenged law did not involve unemployment compensation law, and the law was upheld using strict scrutiny.[16] These lines of reasoning are unconvincing.

*Goldman v. Weinberger*, 475 U.S. 503 (1986), involved a challenge to a military regulation that forbid the complainant from wearing his yarmulke (a Jewish skullcap) indoors. *Goldman*, at 504. *O'Lone v. Shabazz*, 482 U.S. 342 (1987), involved a prison regulation that conflicted with some inmates' religious service. *O'Lone*, 482 U.S. at 344-45. *O'Lone* and *Goldman* are distinguishable from *Smith II* because both those cases dealt with situations where not all constitutional rights were available and there was a need for discipline and uniformity. *See Smith II*, 494 U.S. at 899 (O'Connor, J., concurring).

*Bowen v. Roy*, 476 U.S. 693 (1986), and *Lyng v. Northwest Indian Cemetary Protective Assoc.*, 485 U.S. 439 (1988), are also distinguishable from *Smith II*. In *Bowen*, a Native American challenged on religious grounds

15. Bowen v. Roy, 476 U.S. 693 (1986); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987); Goldman v. Weinberg, 475 U.S. 503 (1986).

16. United States v. Lee, 455 U.S. 252 (1982); Gillette v. United States, 401 U.S. 437 (1971). The *Smith II* Court argued that the compelling interest test had failed religious claimants in non-employment compensation cases, and thus had lost utility outside of the unemployment context. *Smith II*, 494 U.S. at 881. This reasoning is unsound because the validity of a constitutional test should not be based on a win/loss record.

the government's use of a social security number to identify his daughter. *Bowen*, 476 U.S. at 695. In *Lyng*, an Indian organization challenged the building of a road and timber harvesting on federal land that was used by Indians for religious purposes. *Lyng*, 485 U.S. at 441-42. Both cases are distinguishable because the compelling interest test is not applicable to the way the government conducts its "internal affairs." *See Smith II*, 494 U.S. at 899 (O'Connor, J., concurring in judgment).

### *B. The Smith II Court Abdicated Its Responsibility To Protect Unpopular and Minority Religious Practices*

The *Smith II* Court defers to the legislatures the duty to protect the interests of minority religious objectors by making exemptions from generally applicable laws.[17] Because courts function as defenders against legislative indifference and abuse, by deferring to legislatures, the *Smith II* Court abdicated its constitutional responsibility. This is especially troubling given the nature of legislatures, where compromise is the rule of thumb and majority political ideology usually prevails.

The Framers of the Constitution intended the courts to check legislative abuse and majority rule. *The Federalist* No. 51, at 357 (J. Madison) (B.F. Wright ed. 1961). The Framers also created the courts with the power to determine what the is law. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (the Court is to review the acts of the legislative and executive branch). History shows that the Framers were conscious of the inherent problems of majority controlled law making bodies: The very reason the colonists came to America was to flee religious persecution, and furthermore, those colonists were not associated with the majority religious group in England.

For decades the Court has used the power bestowed upon it to defend the free exercise rights of minority religious groups. *See Thomas*, 450 U.S. 707 (1981); *Yoder*, 406 U.S. 205 (1972); *Sherbert*, 374 U.S. 398 (1963); and *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Protecting the minority religious groups is an integral part of the Supreme Court's duty, and by rejecting this obligation, the *Smith II* Court has ignored one of its fundamental roles in our federal system that prides itself on its record of respecting human rights.

### *C. Under The Compelling Interest Test the Conviction of Gonzalez Violated Free Exercise Clause*

As discussed above, the *Smith II* case should be overruled, and the compelling interest test should be used to determine that the Controlled

17. The *Smith II* majority left Smith and those like him with the political process as their remedy. The Court indicated that placing the burden on those who practice minority religions is an "unavoidable consequence of democratic government." *Smith II*, 494 U.S. at 890.

Substances Act, 21 U.S.C. § 812(c), violates the Free Exercise Clause. The compelling interest test provides that laws which substantially burden sincere religious practices violate the Free Exercise Clause, unless the burden is justified by a compelling state interest that is the least restrictive means of achieving that interest. *Sherbert*, 374 U.S. at 403.

In this case, Gonzalez, like Smith, meets the first prong of the test. Peyote serves as the sacrament and central event in LaPaz religious ceremonies. Thus prohibiting peyote significantly burdens Gonzalez's religious practice. The United States, on the other hand, does not have a compelling interest to preclude its use by Gonzalez. It is well established that peyote use for religious purposes is not harmful to Indian practitioners, does not present a drug problem to society, and in fact, is beneficial to those who use it for bona-fide religious purposes. H.R. Rep. No. 675, 103rd Cong., 2nd Sess. 4-7 (1994). Because the United States cannot meet this second prong of the test, Gonzalez's use of peyote is exempt from the federal drug law, and thus, his conviction must be overturned.

### *III. The Exemption in 21 C.F.R. § 1307.31 for the Native American Church from Federal Drug Law Prohibiting Peyote Use, and the Entirety of the AIRFA Amendments Violate the Establishment Clause*

The proper test to decide whether a law violates the Establishment Clause,[18] the proper test was set out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Both the DEA regulation, 21 C.F.R. § 1307.31, that exempts the NAC from the federal drug law prohibiting peyote use,[19] and the American Indian Religious Freedom Act Amendments of 1994, 42 U.S.C. § 1996 (1994) (AIRFA Amendments), violate the *Lemon* standard and are therefore unconstitutional.

#### *A. The Lemon Standard Precludes the Government from Making Laws That Convey a Message of Endorsement and that Foster Governmental Entanglement with Religion*

In *Lemon* the Supreme Court set out the three part test, holding that to pass Establishment Clause scrutiny, a governmental action must (1) have a secular purpose, (2) not have a primary effect that either advances or inhibits religion, and (3) not foster governmental entanglement with religion. *Lemon*, 403 U.S. at 612-13. A subsequent Supreme Court case altered the *Lemon* test by adding to the second prong that the government cannot convey a "message of endorsement." *County of Allegheny v. ACLU*, 492 U.S. 573, 595 (1989). The *Lemon* Court determined that excessive entanglement under the

18. The Establishment Clause of the First Amendment dictates that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.

19. 21 U.S.C. § 812(c).

third prong of the test occurs when the law or regulation creates a need for the government regulation and monitoring. *Lemon*, 403 U.S. at 622-23. Both the DEA regulation and the AIRFA Amendments of 1994 violate the second and third prong of the *Lemon* test.

*B. Both the DEA Regulation and the AIRFA Amendments Convey an Endorsement of the NAC, and Promote Excessive Governmental Entanglement with that Religion*

The DEA regulations and the AIRFA Amendments also promote excessive entanglement with the NAC. The AIRFA Amendments themselves although protecting the right of NAC members to use peyote for bona fide traditional ceremonial purposes, contain disclaimers which authorize further regulation of peyote use in certain circumstances. For example, 42 U.S.C. § 1996a sec. (b) (2) allows the DEA to impose registration requirements on the cultivation and distribution of peyote. Section (b)(4) of the same provision allows any federal department or agency, after "consultation with representatives of traditional Indian religions," i.e. the NAC, to impose restrictions on the use of peyote by its personnel. 42 U.S.C. § 1996a sec. (b)(2) and (b)(4). The entanglement of the federal government in the NAC is further noted in the legislative history of the AIRFA Amendments. H.R. No. 675, 103d Cong., 2d Sess. 9 (1994). Finally, Justice Blackmun, dissenting in *Smith II*, noted that federal regulations strictly control the availability of peyote for religious uses. *Smith II*, 494 U.S. at 916 (Blackmun, J., dissenting). In particular, Justice Blackmun cited 21 U.S.C. §§ 821-823 which require the registration of all controlled substances and 21 C.F.R. § 137.31 which subjects the NAC to the registration requirements for peyote. *Id.* These authorities demonstrate that the federal government is extensively entangled in the NAC.

The same legislative history supports the proposition that the AIRFA Amendments also endorse the NAC. Although the AIRFA Amendments do not specifically mention the NAC in the section that exempts peyote use in bona fide religious ceremonies, 42 U.S.C. § 1996 sec. 3(b)(1), the legislative history demonstrates that the threatened minority religion and target group that the Amendments are intended to protect, is the NAC. H.R. No. 675, *supra*, at 4-8.

The DEA regulation and the AIRFA Amendments also promote excessive entanglement with the NAC. *See Smith II*, 494 U.S. at 916 (Blackmun, J., dissenting) (noting the strict regulation of peyote by the federal government); 42 U.S.C. § 1996 sec. (b)(2) and (3) (detailing the regulation of the growing and distribution of peyote, and the regulation of the use of peyote after "consultation with representatives of traditional Indian religions," i.e., the NAC); and H.R. No. 675, *supra*, at 4, 7, 9 (recognizing the strict regulation of peyote distribution and use and the ability of agencies to so regulate).

Opposing counsel may argue that *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991), precludes a finding of an

Establishment Clause violation. In that case, the Fifth Circuit ruled that the DEA exemption did not violate the Establishment Clause because the trust responsibility precludes the separation of church and state ordinarily required by the First Amendment. *Id.* at 1217. However, in upholding the exemption, the Court noted that the government's singling out of the NAC was understandable because the NAC was the only Native American organization of which the government was aware that uses peyote in bona fide religious ceremonies. *Id.* This finding ignores the fact that there are other groups, such as the LaPaz Indians, that use peyote in bona fide religious ceremonies. Because the LaPaz tribe also uses peyote for religious purposes, the Court's reasoning is inapposite.[20]

## *IV. The Exemption for the Native American Church Found at 21 C.F.R. § 1307.31 and the Entirety of the American Indian Religious Freedom Act Amendments of 1994 Violate the Due Process and Equal Protection Clauses of the Constitution*

The DEA lists peyote as a controlled substance in Schedule I of the Controlled Substances Act. A special exemption to this listing, however, is extended to members of the NAC for the "nondrug use of peyote in bona fide religious ceremonies." Food and Drugs, 21 C.F.R. § 1307.31 (1985). In 1994, the AIRFA Amendments codified a similar ceremonial use of peyote exemption for Indians. 42 U.S.C. § 1996.

### *A. Section 1307.31 Violates the Due Process and the Equal Protection Clause of the Fifth Amendment*

The exemption extended to members of the NAC allowing peyote use in religious ceremonies violates the Due Process Clause of the Fifth Amendment which guarantees equal protection under the law. U.S. Const. Amend. V. The regulation creates arbitrary classifications between (a) members of the NAC and (b) members of other religions who also use peyote for "bona fide religious ceremonies." 21 C.F.R. § 1307.31. The former group is exempt from regulation, the latter group is not. The Ninth Circuit has held that this arbitrary classification can not withstand a substantive due process attack. *Kennedy v. Bureau of Narcotics and Dangerous Drugs*, 459 F.2d 415, 417 (9th Cir. 1972), *cert. denied,* 409 U.S. 959 (1973), *reh'g. denied*, 410 U.S. 959 (1973). That court determined that since the sole government interest served by regulating peyote is the protection of health,[21] any distinctions that the government makes between

20. At least three other courts have suggested that governmental protection of Indian religious practices may violate the Establishment Clause in cases involving sacred sites on public land. Bandoni v. Higginson, 638 F.2d 172, 179 (10th Cir. 1980); Inupiat Community v. United States, 548 F. Supp 182, 189 (D. Alaska 1982); Crow v. Gullett, 541 F. Supp 785, 794 (D.S.C. 1982), *aff'd* 706 F.2d 856 (8th Cir. 1983).

21. 21 U.S.C. § 801(2) (The use of controlled substances has "a substantial and detrimental

different religious groups lack any relationship to the legitimate health interest that the regulation serves. The health effect of ingesting peyote is unrelated in any way to the religion of the person ingesting the drug or the importance of the use of peyote in the religious ceremonies of his church. *Id.* Based on these findings, the court ruled that the NAC distinction of 21 C.F.R. § 1307.31 "creates an arbitrary classification that cannot withstand substantive due process attack." *Id.* at 417.[22]

The facts surrounding Gonzalez's arrest are similar to those of the *Kennedy* case. Gonzalez is a high priest of the LaPaz religion which uses peyote in a number of religious rites and ceremonies. Gonzalez was arrested while conducting a holy-day ceremony on the grounds of the LaPaz religion's world headquarters. Gonzalez's use of peyote during this ceremony fits into the exemption at 21 C.F.R. § 1307.31 as it was used for a "bona fide religious ceremony." Because the regulation only applies to members of the NAC, however, Gonzalez is unprotected by it. This distinction is based on religion and violates Gonzalez's substantive due process rights. Since the government's sole interest in promulgating Title 21 is health related and Gonzalez's health is impacted by the ingestion of peyote as much as that of any member of the NAC, a regulation that exempts the latter, but not Gonzalez, violates his substantive due process right to equal protection under the law as guaranteed by the Fifth Amendment.

The view that an exemption for the religious use of peyote granted to one religion must necessarily be open to the legitimate religious use of peyote by all religions, also finds support in the Congressional Record. When Congress first debated the proscription of peyote in 1965, Representative Oren Harris remarked that it was the view of the Food and Drug Administration that a "bill, even with the peyote exemption, . . . cannot forbid bona fide religious use of peyote." 111 Cong. Rec. 15,977 (1965) (statement of Rep. Harris). On the basis of this and similar congressional comments, the United States District Court for the Southern District of New York has held that where peyote is regarded as a deity, Congress can not restrict the use of peyote for sacramental purposes to the NAC, but must also extend this exemption to other bona fide religious organizations. *Native American Church of New York v. United States*, 468 F. Supp. 1247, 1247 (S.D.N.Y. 1979).[23] The LaPaz religion, which uses peyote for sacramental purposes, is a bona fide religion and the regulation must provide an exemption for Gonzalez's use of peyote. Nevertheless, the regulation provides only an exemption to members of the

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effect on the health and general welfare of the American people.").

22. *See also* Meyer v. Nebraska, 262 U.S. 390 (1923); Boddie v. Connecticut, 401 U.S. 371 (1971).

23. The comments of Senator Yarborough, Representative Satterfield and the Commissioner of the Food and Drug Administration were also relied on. *Native American Church*, 468 F. Supp. at 1250-51.

NAC. A regulation that acts along such an arbitrary classification violates the equal protection clause.

Opposing counsel will argue on the basis of *Peyote Way Church of God v. Thornburgh* that the exemption of the NAC is a political distinction. *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991).[24] This allegation is false. The majority of NAC congregations maintain an "open door" policy that does not exclude persons on the basis of their race. *United States v. Boyll*, 774 F. Supp 1333, 1336 (D.N.M. 1991), *appeal dismissed*, 968 F.2d 21 (10th Cir. 1992). Racial restrictions to membership have never been a general part of the Peyote Religion or of the NAC. *Id.* Consequently, there are both Indian and non-Indian members within the NAC and a classification scheme making a distinction based on NAC membership will necessarily create racial distinctions. Non-Indians within the NAC will be protected; non-Indians outside the NAC will not. People similarly situated (non-Indian), are not treated similarly under this regulation. As *Peyote Way* itself admits, equal protection requires similar treatment. *Peyote Way*, 922 F.2d at 1214.

*B. The AIRFA Amendments Violate the Due Process and Equal Protection Guaranties of the Fifth Amendment*

The Due Process Clause's equal protection component mandates similar treatment under the law for those similarly situated. *Bolling v. Sharpe*, 347 U.S. 497 (1954).[25] The AIRFA Amendments fail to accomplish this requirement.

The Peyote religion has existed for centuries; the corporate form of the religion is the NAC which was established in Oklahoma in 1918. *Boyll*, 774 F. Supp. at 1336.[26] The cornerstone of the Peyote religion is the peyote ceremony. When arrested, this is the ritual Gonzalez was conducting in his capacity as a high priest of that religion. Gonzalez is a member of the Peyote religion just as are the members of the NAC.

The AIRFA Amendments only exempt "Indians" from criminal prosecution for the possession of peyote. As defined by those Amendments, "Indians" include only those people "recognized as eligible for . . . special programs and services . . . because of their status as Indians." 42 U.S.C. § 1996(3)(c)(2) (1994). This definition creates racial criteria; one must be an

24. Holding that since the NAC limits its own membership to people of at least 25% Native American blood, the federal regulation limited to members of that Church creates political rather than racial classifications. *Peyote Way*, 922 F.2d at 1216.

25. Holding that the segregation of children in public schools requires a proper government objective to justify itself. *Bolling*, 347 U.S. 497 (1954). *Peyote Way* similarly required such an objective. *Peyote Way*, 922 F.2d at 1219.

26. At that time, the Peyote Religion leaders reasoned that an incorporated Church would provide greater protection from attempts to suppress the religious use of Peyote. *Boyll*, 774 F. Supp. at 1336.

Indian by blood to qualify. Any attempt to restrict religious liberties along racial lines violates the equal protection clause. *Boyll*, 774 F. Supp. at 1340.[27] Furthermore, race conscious federal programs that impose "undue burdens on non-minorities" violate the equal protection clause. *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990).[28] The AIRFA Amendments create this undue burden. Gonzalez, although similarly situated in terms of religion with Indians, does not qualify for the AIRFA exemption because he does not fit its racial criteria. This creates an undue burden on Gonzalez who as a member of the Peyote religion can not, under the law, practice peyotism because he is not Indian. The effect of the AIRFA Amendments is to regulate the Peyote religion on the basis of race and to impose an undue burden on non-minorities. This violates the Equal Protection Clause.

Opposing counsel will contend that the classification scheme in the AIRFA Amendments makes distinctions along political rather than racial lines. This argument is false just as the political classification made pursuant to *Peyote Way* above is false. Studies have demonstrated that for "[a] variety of circumstances, . . . many contemporary Indian tribes . . . remain federal unrecognized." Paschal, *supra*, at 213. Therefore, there are Indians both within and without the protections provided by the AIRFA Amendments. Those included within the protections can practice peyotism; those without can not. Similarly situated people are not receiving similar treatment. For these reasons, the AIRFA Amendments violate the Equal Protection Clause.

### *V. Appellant Gonzalez Is Eligible for the Peyote Exemption of the AIRFA Amendments Because He Falls Within Its Definition of "Indian" Practicing an "Indian Religion"*

Although opposing counsel will contend that the AIRFA Amendments only apply to Indians who are members of federally "acknowledged" tribes, this contention is misleading. The AIRFA Amendments apply to "Indians" practicing "Indian religion." Gonzalez fits this criteria and qualifies for its peyote exemption. The AIRFA Amendments specifically include as "Indians" all members of tribes that are "recognized" by the federal government. 42 U.S.C. § 1996(3)(c). For the purposes of the AIRFA Amendments, "acknowledged" and "recognized" are two distinct terms. The former is a much more restrictive term that is limited pursuant to the acknowledgment requirements of 25 C.F.R. § 83.7; the latter is a more inclusive term that includes members of "any tribe, band, nation, pueblo, or other organized group or community of Indians." 42 U.S.C. § 1996(3)(c). A definition of

27. Holding that permitting Indians' nondrug use of peyote in bona fide religious ceremonies of the NAC, but prohibiting such use by non-Indian members, would violate the equal protection clause. *Boyll*, 774 F. Supp at 1340.

28. Holding that FCC policies fostering minority ownership of radio and television stations can not unduly burden non-minority owners. Metro Broadcasting v. FCC, 497 U.S. 547 (1990).

"Indian group" is found in the C.F.R. regulations. This definition includes "any Indian . . . aggregation within the continental United States that the Secretary of the Interior does not acknowledge to be an Indian tribe." 25 C.F.R. § 83.1. Considering these definitions together, the LaPaz religion which is not "acknowledged" as an "Indian tribe," must consequently be "recognized" as an "Indian group" and therefore is within the AIRFA Amendments. Gonzalez, as a member of this group, must receive the AIRFA peyote exemption.

The legislative history surrounding the passage of the AIRFA Amendments and the consideration of other legislation regarding Native American cultures further supports this inclusive interpretation of "Indians." Senate debate recognized that "the federal government's discrimination against Native American traditional cultural and religious practices was exercised against individuals and did not follow a line defined by the federally recognized tribal status; and that protection afforded to the traditional cultural and religious practices of native peoples . . . must be extended within a cultural context." S. Rep. No. 411, 103d Cong., 2d Sess. (1994). Using this reasoning, Congress emphasized that the legislation should, "extend to many individuals and groups who are not members of federally recognized Indian tribes." S. Rep. No. 411. Clearly, it was the intent of Congress in passing the AIRFA Amendments to include in the definition of "Indian" as broad a range of Native Americans as possible. Gonzalez, recognized by the LaPaz religion as a high priest, is most certainly an "Indian" by that tribes definition and must fit within the broad AIRFA definition. Furthermore, the LaPaz religion is a form of the Peyote Religion which is itself an "Indian religion." According to legislative history, these two factors qualify him as an "Indian" practicing "Indian religion" for the purposes of the 1994 AIRFA Amendments.

### *VI. Conclusion*

For all the reasons set forth above, the Appellants request that this Court reverse the decisions of the courts below, by acknowledging the LaPaz Tribe and vacating the conviction of Roberto Ernesto Gonzalez.