IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DANIEL CHAPTER ONE, a corporate sole, and JAMES FEIJO individually, and as an officer of Daniel Chapter One, Petitioners, v. FEDERAL TRADE COMMISSION, Respondent.	)	No. 10-1064

PETITIONERS' REPLY TO RESPONDENT'S OPPOSITION TO PETITIONERS' MOTION FOR HEARING ON PETITIONERS' CLAIM UNDER THE RELIGIOUS FREEDOM RESTORATION ACT

I. PETITIONERS' MOTION FOR AN EVIDENTIARY HEARING IS NOT BASED ON SECTION 5(c) OF THE FTC ACT, AS RESPONDENT HAS MISTAKENLY ASSUMED.

Respondent characterizes Petitioners' Motion as an ordinary "request to reopen the evidentiary record in this proceeding," governed by the rules set forth in section 5(c) of the FTC Act. *See* Respondent Federal Trade Commission's Opposition to Daniel Chapter One's Motion for an Evidentiary Hearing ("FTC Opp."), p. 1. This characterization is clearly wrong.

Petitioners' Motion for an Evidentiary Hearing is predicated exclusively upon 42 U.S.C. section 2000bb-1(c) of the Religious Freedom Restoration Act ("RFRA"). *See* Petitioners' Motion for Hearing On Petitioners' Claim That Application of Paragraphs II, III and V.B of the FTC Modified Final Order Substantially Burden Petitioners' Exercise of Religion in Violation of 42 U.S.C. section 2000bb-1(a) ("RFRA Motion"), p. 1.

By their RFRA Motion, Petitioners are not seeking to reopen the administrative proceeding to "adduce [additional] evidence **before the Commission,**" as contemplated by section 5(c) (emphasis added). Rather, they are seeking to introduce evidence directly into this Court in support of their "claim or defense" that, as applied, Paragraphs II, III and V.B would "substantially burden" their "exercise of religion" in violation of RFRA section 2000bb-1(a) and (c). Such a motion is not governed by section 5(c) of the FTC Act, but by RFRA section 2000bb-1(c).

Respondent is correct that section 5(c) is designed to govern efforts to place "additional evidence" that is "material" to the legal or constitutional sufficiency of an FTC order. Thus, the rule requiring proof of "materiality" and "reasonable grounds for failure to adduce such evidence in the [administrative] proceeding" makes sense if the claim asserted is one challenging the statutory authority of the

FTC or the sufficiency of the evidence supporting an FTC ruling. *See* Nuclear Energy Institute, Inc. v. EPA, 373 F.3d 1251, 1297-98 (D.C. Cir. 2004) (statutory authority) and National Association of Clear Air Agencies v. EPA, 489 F.3d 1221, 1231 (D.C. Cir. 2007) (sufficiency of evidence). In such cases, the section 5(c) rule would apply because "'[r]espect for agencies' proper role in the *Chevron* framework requires that the court be particularly careful to ensure that challenges to an agency's interpretation of its governing statute are first raised in the administrative forum.'" *See* Nuclear Energy, 373 F.3d at 1298. Further, the rule of deference to the FTC's findings of fact, embodied in section 5(c) itself, requires the court on a petition for review to give FTC expertise its due. *See, e.g.,* Removatron International Corp. v. FTC, 884 F.2d 1489, 1496-97 (1st Cir. 1989).

But these precedents and principles do not apply to a RFRA claim or defense. The FTC has no special expertise respecting whether Paragraphs II, III or V.B of its Order in this case "substantially burden [Petitioners] exercise of religion," as set forth in RFRA section 2000bb-1(a). Nor does RFRA section 2000bb-1(c) call for any judicial deference to the expertise of an agency's action taken pursuant to "a rule of general applicability," such as sections 5(a) and 12 of the FTC Act. To the contrary, RFRA section 2000bb-1(c) and 2000bb-1(b)(1) call for **intense and particularized judicial scrutiny** whether a covered government

agency — such as the FTC — has applied a general rule in such a way as to "substantially burden a person's exercise of religion,"[1] and if so, whether enforcement of the regulation to "the particular claimant whose sincere exercise of religion is being substantially burdened" is in "furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest." *See* Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 430-31 (2006).

II. THE ADMINISTRATIVE PROCEEDING BELOW IS NOT A "JUDICIAL PROCEEDING" WITHIN THE MEANING OF THAT TERM IN RFRA SECTION 2000bb-1(c).

According to Respondent, a RFRA claim or defense is not available in this court **unless** it was raised and preserved in the administrative proceeding below, because the FTC administrative proceeding below was a "judicial proceeding" within the meaning of RFRA section 2000bb-1(c).[2] *See* FTC Opp., pp. 1-2. By not having timely raised RFRA as an affirmative defense in their Answer to the

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[1] *See, e.g.,* Navajo Nation v. U.S. Forest Service, 535 F.3d 1058, 1069-73 (9th Cir. 2007).

[2] According to RFRA section 2000bb-1(c), "[a] persons whose religious exercise has been burdened in violation of this section may assert that violation as a **claim or defense** in a **judicial proceeding** and obtain appropriate relief against **a government**." (Emphasis added.) The term, government, in turn, "includes [any] branch, department, **agency**, instrumentality, and official ... of the United States." (Emphasis added.)

FTC complaint, Respondent claims Petitioners have "waived" their RFRA claim or defense. *See id.*, pp. 2-4, 6-7.

Respondent's sole support for its claim that the administrative proceeding below is a "judicial proceeding" — within the meaning of that term in RFRA section 2000bb-1(c) — is the generic definition of that term in *Black's Law Dictionary.* FTC Opp., p. 7. Remarkably, Respondent completely fails to address Petitioners' express reliance on the Supreme Court's decision in the O Centro case which ruled that the "judicial proceeding" referred to in RFRA section 2000bb-1(c) is a "court" proceeding before an Article III judge, not an administrative adjudicatory hearing before an administrative law judge. *See* RFRA Motion, pp. 4-5. Indeed, the Supreme Court understood what Respondent apparently does not — that RFRA's very purpose would be defeated if an administrative agency was authorized to decide, as the FTC Commission did in this case, that its own Order did not "substantially burden" Petitioners' "exercise of religion," subject only to deferential review by this Court on Petition for Review. *See* O Centro, 546 U.S. at 434.

As RFRA section 2000bb(b)(1) explicitly states, RFRA was designed "to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its

application in **all** cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1) (emphasis added). In Sherbert, for example, the Supreme Court found that a Seventh-Day Adventist's free exercise of religion was factually and unconstitutionally "burden[ed]" by a state unemployment agency's decision to deny her employment benefits. *Id.*, 374 U.S. at 403-06. There, the Court most definitely did not remand her case to the state unemployment agency with instructions to ascertain whether her religious convictions and practices were, in fact, burdened. *Id.*, 374 U.S. at 402. Contrary to Sherbert, the Respondent erroneously presumes that it could assess whether its own order violates RFRA. Petitioners urge this Court to follow the Supreme Court's and Congress's direction not to assign hen house guard duty to the FTC fox.

III. PETITIONERS HAVE IDENTIFIED THE EVIDENCE THAT THEY WOULD INTRODUCE IN THE HEARING BEFORE THE COURT AND ITS MATERIALITY.

Respondent claims that Petitioners have "give[n] no indication whatsoever of the sort of evidence that it would attempt to introduce during the hearing it (*sic*) desires" and no explanation of "how such evidence would be material." FTC Opp., p. 5. To the contrary, in their motion Petitioners stated the essence of their RFRA claim that Paragraphs II and III would place a substantial burden adverse to Petitioners' reliance on God's revelation, as defined and dictated by their Christian

faith, not on "science," as defined and dictated by the FTC. *See* RFRA Motion, pp. 2-3. Further, Petitioners have stated that Paragraph V.B would place a substantial burden adverse to Petitioners' Christian "watchman ministry" to warn people of the dangers of conventional medical treatments, and to inform people of the superiority of Biblical holistic healing alternatives. *Id.*

The requested hearing would, at a minimum, adduce testimony from Respondent Feijo, overseer of Daniel Chapter One ("DCO"), and from his wife, Patricia, secretary to DCO, regarding (i) the Christian ministry to which God has called them (*Ezekiel* 3:17); (ii) their Christian convictions regarding human well-being, and God's provision in nature for herbs and all that is necessary for the healing of the human body (*Genesis* 1:29-31), and (iii) the role of science within a Christian worldview (*Matthew* 11:2-5; 16:1-17). Additionally, there would be testimony confirming the sincerity and good faith of the Feijos' convictions and the substantial burden that Paragraphs II, III and V.B would place upon them.

Such testimony was truncated in the administrative proceeding below, because the Administrative Law Judge ("ALJ") — having ruled the RFRA defense out as having been untimely raised — did not address the merits of Petitioners' RFRA claims. ALJ. *See* FTC Opp., pp. 2-3, 5. On appeal, however, the Commission ignored the ALJ's procedural ruling and proceeded to decide

Petitioners' RFRA defense on the merits[3] without regard to the fact that Petitioners had been thwarted by the ALJ ruling in their attempt to fully develop the evidentiary foundation upon which Petitioners based their RFRA claims.

CONCLUSION

In the interests of justice, and in accordance with the RFRA mandate in 42 U.S.C. section 2000bb-1(c), the evidentiary hearing sought by Petitioners before this Court is warranted. Therefore, Petitioners' Motion for an Evidentiary Hearing should be granted.

Respectfully submitted,

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May 17, 2010

[3] *See* FTC Commission Opinion, p. 24 (Dec. 18, 2009). By addressing and ruling on the merits of Petitioners' RFRA claim, the Commission *de facto* overturned the ALJ's determination that it was raised too late. Thus, the FTC cannot now be permitted to reverse direction and argue before this court that Petitioners "waived that argument before this Court," as the FTC has done in its Response to Petitioners' RFRA Motion (FTC Opp., p. 6).