No. 04-1084

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL, ET AL., PETITIONERS

v.

O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

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Respondents are right about one thing. The lower court's ruling—which has forced the United States into ongoing violation of an international treaty and to open its borders and its communities to the importation, distribution, and use of a dangerous, mind-altering hallucinogen in violation of a longstanding and unquestionably constitutional criminal law—is "unique." Opp. Br. 11, 16. The bottom-line judgment is contrary to all precedent—no court has ever ordered the United States to permit a religious exemption to Schedule I of the Controlled Substances Act; numerous courts of appeals have refused. And the Tenth Circuit reached that judgment by taking an analytical path—that of independent and de novo judicial assessment of a drug's dangerousness—that every other court of appeals to address the question has rejected. While the case is interlocutory, that status is a direct outgrowth of the en banc Tenth Circuit's erroneous holding that courts can appropriately undertake such freestanding evidentiary re-trials of legislative judgments in the first instance. No such

evidentiary review was warranted and, even if it were, it should have been conducted with deference to, rather than in total disregard of, congressional factfinding. Resolution of those legal questions will profoundly affect the conduct of further legal proceedings—if any are warranted—in this case. And those questions should be decided now rather than later. It is respondents who chose to seek a preliminary injunction that alters, rather than preserves, the status quo by suspending the operation of domestic drug control laws, compelling the violation of an international drug trafficking treaty, and opening the United States' borders and streets to the importation, circulation, and ongoing use by adults and children of a mind-altering hallucinogenic substance. Having made that choice, they are ill-positioned to object to the United States' request for definitive legal direction before enduring for years those threats to public health, safety, domestic deterrence of new forms of drug abuse, and international cooperation in criminal law enforcement.

1. The court of appeals' decision squarely conflicts with decisions of the First, Fifth, Sixth, Seventh, Eighth, Eleventh, and District of Columbia Circuits, all of which addressed and all of which rejected similar religion-based claims for exemptions from the Controlled Substances Act, both under RFRA and under the strict scrutiny analysis employed under the Constitution before *Employment Division* v. *Smith*, 494 U.S. 872 (1990). See Pet. 14-15 (citing cases). Respondents attempt to distinguish those cases with a universal and unsubstantiated declaration that those other individuals' religious claims were "frivolous" (Opp. Br. 13, 15). But not a single one of the cited court decisions rested on that ground. Respondents also claim that UDV members are "law-abiding" and not engaged in "criminal drug trafficking" (*id.* at 13), and that hoasca is

safer because it is used less frequently and in a religious setting (*id.* at 12-13, 14). That is all highly debatable, given UDV's own record of "clandestine[]" trafficking of a DMT-based substance (10/22/01 Tr. 86), calculated mischaracterization of hoasca on importation forms, and distribution of hallucinogenics to children (*id.* at 131).[1]

It is also beside the point. In rejecting religious-based claims for exemption from Schedule I of the Controlled Substances Act, other courts have refused to undertake the very "fact-driven" (Opp. Br. 12) reassessment and reevaluation of Congress's decision to proscribe Schedule I controlled substances that respondents advocate and the Tenth Circuit adopted. See *United States* v. *Israel*, 317 F.3d 768, 771-772 (7th Cir. 2003) (under RFRA, "Congress' inclusion of marijuana as a Schedule I controlled substance makes clear [its] belief that Israel's drug of choice is a serious threat to the public health and safety," which gives "the government * * * a proper and compelling interest in forbidding the use of marijuana").[2] The injunction here is entirely dependent upon the district court's and Tenth Circuit's refusal to "accept[] the congressional determination that [a Schedule I controlled substance] in fact poses a real threat to individual health and social welfare." *United States* v. *Rush*, 738 F.2d 497, 513 (1st Cir. 1984), cert. denied, 470 U.S. 1004 (1985). "Every [other] federal court that has considered the matter

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[1] Compare Gov't C.A. App. 91-92, 342-358 (UDV labeled hoasca on U.S. import forms as a "herbal teal" and "health supplement"), with 21 C.F.R. 1312.18(c)(2) (DEA regulation requiring a "complete description of the controlled substances to be imported" on import declarations).

[2] See also *United States* v. *Greene*, 892 F.2d 453, 455 (6th Cir. 1989) (court refuses to sit as a "superlegislature" to review congressional classification of Schedule I substances), cert. denied, 495 U.S. 935 (1990); Pet. 17 (citing additional cases).

* * * has accepted the congressional determination." *Ibid.*

2. To the extent that any review of Congress's scheduling decision is warranted, the court of appeals' decision conflicts with this Court's decisions in *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622 (1994) (*Turner I*), and *Turner Broadcasting System, Inc.* v. *FCC*, 520 U.S. 180 (1997) (*Turner II*). In *Turner I*, the Court specifically held that, even in cases involving constitutional rights, courts "must accord substantial deference to the predictive judgments of Congress" when reviewing the factual predicate for legislation that restricts exercise of those rights. 512 U.S. at 665-666. Where such factual judgments are at issue, a reviewing court's "sole obligation is 'to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.'" *Turner II*, 520 U.S. at 195. Courts "are not to reweigh the evidence *de novo*, or to replace Congress' factual predictions with [their] own," and "are not at liberty to substitute [their] judgment for the reasonable conclusion of a legislative body." *Id.* at 211-212 (internal quotation marks omitted).

Respondents' footnoted response (Opp. Br. 20 n.11) is that *Turner* involved constitutional rights entitled to intermediate scrutiny not strict scrutiny. But as a matter of *constitutional law*, and the attendant role of the Judicial Branch in reexamining the factual judgments made by Congress in the unquestionably constitutional exercise of its legislative power in enacting the Controlled Substances Act and scheduling DMT, the rights at issue here are entitled to only rational basis scrutiny, see *Smith*, *supra*, and thus to the maximum judicial deference to congressional factfinding. *E.g.*, *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313-316 (1993). Respondents' supposition (Opp. Br.

20 n.11) that RFRA's *statutory* compelling interest standard renounced such deference and licensed courts to engage in an even more "searching, fact-specific" reexamination of the scheduling decision, and the findings concerning DMT's unconditional and unqualified dangerousness that underlie it, is, of course, the very legal question presented and the one on which the courts of appeals are now in irreconcilable conflict.[3]

Respondents stress (Opp. Br. 1, 17-21) the district court's finding that the government did not establish a compelling interest in public health or the risk of diversion. But neither did the district court find the absence of those compelling interests. The court found the evidence to be "in equipoise." Pet. App. 227a. Furthermore, what respondents, like the court of appeals, overlook is that the evidentiary equipoise was equipoise *in the record before the district court*. The court's absolute refusal to consider at all Congress's independent judg-

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[3] Furthermore, prior to *Smith*, this Court recognized, as a matter of constitutional law, categorical compelling interests, the nature of which did not admit of the type of individualized reexamination prescribed by the court of appeals here. See *United States* v. *Lee*, 455 U.S. 252 (1982) (uniform application of the Social Security Act); *Hernandez* v. *Commissioner*, 490 U.S. 680 (1989) (uniform application of the tax laws). As the other courts of appeals have held, Schedule I of the Controlled Substances Act is another area where the very nature of the government's compelling interest does not admit of individualized exemptions. Accord *Smith*, 494 U.S. at 905 (O'Connor, J., concurring in the judgment) ("uniform application" is "essential to accomplish" the government's "overriding interest in preventing the physical harm caused by the use of a Schedule I controlled substance," and "is essential to the effectiveness" of "preventing trafficking in controlled substances"; because the "health effects caused by the use of controlled substances exist regardless of the motivation of the user, the use of such substances, even for religious purposes, violates the very purpose of the laws that prohibit them").

ment (shared by the 160 other nations that signed the 1971 United Nations Convention on Psychotropic Substances) as, at a minimum, a tiebreaker demonstrates how far afield the en banc court's ruling is from this Court's precedent.[4]

3. This Court's review is warranted because the court of appeals' decision has forced the United States into the ongoing violation of an international treaty. The 1971 United Nations Convention on Psychotropic Substances (Convention), *opened for signature* Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175, reflects a broad international consensus that preparations containing DMT are so dangerous to the public health and safety that their importation, distribution, and use by members of the public must be comprehensively proscribed. See Pet. 3 (citing relevant treaty provisions). While the court of appeals specifically held that compliance with the Convention did not amount to a compelling interest, Pet. App. 75a, 104a-107a, not a single court of appeals judge disputed that the Convention does, in fact, proscribe the importation, distribution, and use of hoasca.[5]

It is extraordinary, if not unprecedented, for the Judicial Branch to order the United States into violation of an international treaty *in the absence of a final judgment determining that domestic law compels that result*. Respondents identify no sound justification for

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[4] Respondents complain (Opp. Br. 15) that the government "has never attempted to explain" why the statutorily prescribed exemption for peyote is different. We certainly have. See Pet. 26-27 n.3.

[5] Contrary to respondents' assertion (Opp. Br. 27), the Convention's general prohibitions are not subordinated to domestic law. That would empty the treaty of any practical force. Only certain specified penal provisions, none of which are implicated here, are subject to that limitation. See Convention, Art. 22, 32 U.S.T. at 565.

perpetuating that court-ordered disruption of foreign relations and interference with day-to-day international cooperation in transnational drug trafficking while the parties return to district court to continue reconsidering legislative judgments that no other court of appeals, in the 35-year history of the Controlled Substances Act, has disturbed.

Yet, in respondents' view, when the district court is done revisiting and supplanting Congress's legislative findings, the court should turn its attention to conducting still another evidentiary hearing and deciding, apparently as a matter of fact, whether the Convention applies to hoasca. But international treaties are laws, see U.S. Const. Art. VI, Cl. 2, and their construction is a question of law. The Convention's meaning—indeed, its plain text—cannot vary based on the factual record compiled and the factual findings made by more than 700 different district court judges. Resort to secondary sources is appropriate only if the treaty's language is ambiguous, which is not the case here. See *United States* v. *Stuart*, 489 U.S. 353, 373 (1989). Respondents' further contention (Opp. Br. 26 n.14) that this Court should stay its hand so the district court can conduct a trial on whether violating the Convention will impair international relations overlooks that, "[t]he judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions." *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).[6]

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[6] In an attempt to manufacture ambiguity where the treaty's text is clear, respondents cite a two-month old decision by the Court of Appeals of Paris, 10th Chamber, Section B, apparently indicating that hoasca is not a "substance" under French law or "the Vienna conventions." Opp. Br. App. 92. But the fact that the *French government* brought the criminal prosecution for importing and distributing hoasca proves the United States' points about

4. Respondents emphasize (Opp. Br. 9-12) that the case is interlocutory. It certainly is. But this case is also, in multiple respects, a prime example of when this Court's review of a preliminary injunction is appropriate.

First, the court of appeals has enjoined the enforcement of the criminal prohibitions of the Controlled Substances Act notwithstanding the profound governmental interest in comprehensively combating drug trafficking. That is the precise scenario—involving the same statute and identical efforts to craft judicial exemptions to Schedule I of the Controlled Substances Act—that this Court found warranted an exercise of this Court's certiorari jurisdiction to review a preliminary injunction in *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001).

Second, the injunction has compelled the United States into immediate and ongoing violation of an international treaty. The need for certainty and stability in the interpretation of international treaties—the need to ensure that the United States can speak with a single and definitive voice in foreign affairs—has commonly warranted exercises of this Court's certiorari jurisdiction from interlocutory orders.[7]

Third, the essence of the legal dispute between the parties and the conflict in the circuits is whether there should be further proceedings at all and, if so, within what legal framework—the court of appeals' absolutist

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how foreign government signatories read the Convention's plain text and their justifiable concern about illicit diversion and abuse of DMT-based substances like hoasca.

[7] See *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 124 S. Ct. 2466, 2475-2476 (2004); *Societe Nationale Industrielle Aerospatiale* v. *United States Dist. Ct.*, 482 U.S. 522, 525-529 (1987) (review of discovery dispute).

de novo review, in which congressional findings count for naught in the evidentiary balance, or *Turner*'s deferential mode of review.[8]

Fourth, in ordering the suspension of the Controlled Substances Act, the court of appeals has opened members of the public to the very health and safety risks that the drug laws work to combat. The district court found "a great deal of evidence suggesting that hoasca may pose health risks to UDV members and may be subject to diversion to non-religious use." Pet. App. 244a. *Respondents' own evidence* documented that use of hoasca creates a "tremendous potential for fragmentation of the psyche," and can produce "horrible and terrifying experiences" for those who ingest it. Gov't C.A. App. 335, 338, 417.[9] The risk that respondents' importation, distribution, and use of hoasca will

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[8] Respondents' contention (Opp. Br. 11) that the record "is inadequate for certiorari review" misunderstands that the petition raises fundamental questions of law that do not depend upon the state of the record. While the evidence submitted by respondents fell far short of supporting the extraordinary preliminary injunction issued in this case, the record compiled over nine days of hearings provides an ample backdrop for resolution of the *legal* questions of whether such judicial reexamination was appropriate in the first instance and, if so, what standard of deference and burdens of proof apply.

[9] See Gov't C.A. App. 363 (hoasca a "contributing factor" in worsening the UDV member's obsessive-compulsive disorder and paranoia); *id.* at 364 (hoasca acted as "triggering factor" for psychotic episode in schizophrenic member); *id.* at 376-377 (hoasca was a "predisposing factor" for the member's schizophrenia); *id.* at 389-390 (hoasca "a factor in renewing the acuteness of" the member's "non-organic psychotic disorder"); *id.* at 391-392 (hoasca was "the factor which triggered" the member's dissociative disorder); *id.* at 401-403 (hoasca a factor in "renewed acuteness" of member's schizophrenia); *id.* at 406-408 (hoasca a factor in "renewal of acuteness" of member's schizophrenia); *id.* at 409-411 (hoasca "contributed as a predisposing factor" in a psychotic episode).

result in its illicit diversion and will increase demand for hoasca as a hallucinogenic delivery system is also well documented in the record. Pet. 27-28 & nn.4, 6. Those physical and psychological harms are real; they are immediate; and they are irreversible.

Each of those factors alone would warrant an exercise of this Court's certiorari jurisdiction. Their coalescence in this case makes the case for review clear. The court of appeals' judgment has suspended the operation of an unquestionably constitutional criminal law, compelled the ongoing violation of an international treaty, forced the United States to open its borders to transnational trafficking in an internationally outlawed hallucinogenic, rendered the American public, including children, vulnerable to significant physical and mental health risks, and put a new drug delivery system for a Schedule I controlled substance on American soil. If the United States government is going to be subjected to a preliminary injunction that so profoundly alters the status quo, then the government should be afforded more definitive and authoritative resolution of the disputed legal questions that laid the foundation for that order before being consigned to endure those harms pending further litigation of issues that no court for more than three decades ever considered appropriate.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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