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

REPLY BRIEF FOR THE PETITIONERS

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Constitution, treaties, statutes and regulation:

Statutes and regulation—Continued: Page

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 04-1084

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

v.

O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL, ET AL.

REPLY BRIEF FOR THE PETITIONERS

Evidentiary equipoise, in the face of express congressional findings regarding the dangerousness of a Schedule I substance, is an insufficient basis for a court to order the United States to open its borders and communities to the importation, distribution, and use of a mind-altering Schedule I hallucinogen, and to violate its treaty obligations.

A. Respondents Failed To Prove Entitlement To Exceptional Preliminary Relief

"[A] preliminary injunction is an extraordinary and drastic remedy." *Mazurek* v. *Armstrong*, 520 U.S. 968, 972 (1997) (per curiam). That is especially true of the injunction issued here, which has suspended the enforcement of longstanding criminal prohibitions and compliance with equally longstanding treaty obligations, mandated the creation and implementation of a sect-specific regulatory scheme, and afforded the plaintiffs all the relief that a final judgment could provide. Respondents argue (Br. 24) that the injunction was warranted because "[t]he government failed to carry its burden" of disproving that they might prevail. That is wrong for three reasons.

First, the burden of proving entitlement to a preliminary injunction rests squarely with the movant, see *Mazurek*, 520 U.S. at 972, and to prevail, the movant must establish more than a likelihood of proving a prima facie case. The movant must

demonstrate a likelihood of ultimate success "on the merits." *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). That formulation necessarily encompasses the burden of showing that defenses will likely fail. See *Pharmaceutical Research & Mfrs.* v. *Walsh*, 538 U.S. 644, 662 (2003) (opinion of Stevens, J.) (although State failed to respond to the plaintiff's showing, "[r]egardless of the legal position taken by the State, petitioner bore the burden of establishing, by a clear showing, a probability of success on the merits").[1] While the district court may factor the allocation of burdens at trial into its assessment of

---

[1] Contrary to respondents' (Br. 49 n.38) and its amicus's (Laycock Br. 11-14) argument, lower court decisions support this proposition. See *Suntrust Bank* v. *Houghton Mifflin Co.*, 268 F.3d 1257, 1275 n.31 (11th Cir. 2001) (to obtain a preliminary injunction, "the copyright owner must demonstrate * * * that the fair use factors are insufficient to support such a defense"); *Mova Pharm. Corp.* v. *Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998) ("Mova would probably be able to show that the FDA's successful-defense requirement was contrary to the plain language of [the statute] and therefore unenforceable."); *DSC Communications Corp.* v. *DGI Techs., Inc.*, 81 F.3d 597, 601 (5th Cir. 1996) (because the record showed that defendant "may well prevail on its affirmative defense," the plaintiff "did not have a substantial likelihood of prevailing on the merits"); *Coastal Fuels of Puerto Rico, Inc.* v. *Caribbean Petroleum Corp.*, 990 F.2d 25, 27 (1st Cir. 1993) (Breyer, C.J.) (at preliminary injunction stage, "a court could reasonably want to see * * * a probability of overcoming what the evidence now shows as plausible defenses—before finding a likelihood of success on the merits"); *Atari Games Corp.* v. *Nintendo of America, Inc.*, 975 F.2d 832, 837 (Fed. Cir. 1992) ("[T]his court must determine whether Nintendo has shown a likelihood of success on its prima facie case of copyright infringement and a likelihood that it will overcome Atari's copyright misuse defense."); *Kontes Glass Co.* v. *Lab Glass, Inc.*, 373 F.2d 319, 321 (3d Cir. 1967) (analysis of likelihood of success on the merits includes the movant's "answer [to] these defenses"); see also *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 387 F.3d 522, 550 (6th Cir. 2004) (where movant "has offered no evidence of its own to dispute or even overcome" defense evidence, defendant "may benefit from the interoperability defense, at least in the preliminary injunction context").

the movant's probability of prevailing, that does not relieve the movant of making the ultimate showing of a likelihood of success on the merits. Nor does the allocation of burdens of proof diminish the movant's obligation to prevail on the balance of harms and to establish that the injunction is consonant with the public interest. Battling the government to an evidentiary draw on the threats to public health and safety is not enough.

Second, at bottom, respondents argue that an injunction is warranted because evidentiary equipoise would be just barely enough to support a final judgment in their favor. That is wrong. The burden on a party seeking substantial relief *before* winning its case is higher. The movant must make a "*clear showing*," *Mazurek*, 520 U.S. at 972, of a "*substantial* likelihood of success on the merits," *Benten* v. *Kessler*, 505 U.S. 1084, 1085 (1992) (per curiam) (emphasis added); see *Pharmaceutical Research*, 538 U.S. at 662 (opinion of Stevens, J.); *Moore* v. *Brown*, 448 U.S. 1335, 1339 (1980). "The right must be clear and its violation palpable." *Parker* v. *Winnipiseogee Lake Cotton & Woolen Co.*, 67 U.S. (2 Black) 545, 552 (1862).[2]

Third, this Court's "stringent" standard for the issuance of preliminary injunctions generally, *Doran*, 422 U.S. at 931, must be most scrupulously adhered to, if not heightened, in a context in which the preliminary injunction creates a unique exception to a categorical criminal prohibition and directly affects the United States' foreign relations. Indeed, those are steps that a court should take only with great caution at the *end* of litigation. "Matters relating 'to the conduct of foreign relations . . .

---

[2] *Ashcroft* v. *ACLU*, 124 S. Ct. 2783 (2004), is not to the contrary. That case involved a preliminary injunction that preserved the status quo by enjoining a newly enacted, content-based prohibition on speech that "the Constitution demands * * * be presumed invalid." *Id.* at 2788. RFRA, by contrast, necessarily accepts the validity of other federal laws and simply requires courts to "sensibl[y] balance[]," 42 U.S.C. 2000bb(a)(5), the competing needs of religious claimants and government in implementing those laws.

are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" *Regan* v. *Wald*, 468 U.S. 222, 242 (1984) (quoting *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952)). In particular, the "judiciary is not well positioned to * * * assess[] the likelihood and importance of [the] diplomatic repercussions" that a preliminary injunction compelling the violation of an international treaty or impairing international cooperation may cause. *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). Thus, whatever may be true for other injunctions, a preliminary injunction that bars enforcement of a longstanding and unquestionably constitutional criminal law, overrides nearly three decades of the United States' consistent implementation of an international treaty, and compels the Executive Branch to facilitate transnational trafficking in and importation of a Schedule I controlled substance must be based on more than a court's prognostication that, by the slimmest of margins, a plaintiff might eventually eke out a win on the merits.

B. The Government Has A Compelling Interest In The Uniform Enforcement Of The Controlled Substances Act's Schedule I Prohibitions

The Religious Freedom Restoration Act (RFRA) expressly carries forward the established application of its compelling-interest test "as set forth in prior Federal court rulings." 42 U.S.C. 2000bb(a)(5). While respondents ignore them and their amici wish them away (Baptist Joint Comm. Br. 20-21 n.12), those "prior Federal court rulings" repeatedly recognized a compelling governmental interest in the uniform enforcement of certain vitally important statutory programs that could not function consistent with a regime of religious exemptions.[3] One

[3] See, *e.g.*, *Hernandez* v. *Commissioner*, 490 U.S. 680 (1989); *United States* v. *Lee*, 455 U.S. 252 (1982); *Braunfeld* v. *Brown*, 366 U.S. 599 (1961); *Reynolds* v. *United States*, 98 U.S. 145, 166-167 (1879); see also *Employment Div., Dep't*

such statutory program was the closed regulatory scheme for Schedule I drugs established by the Controlled Substances Act (CSA), 21 U.S.C. 801 *et seq.* Scores of pre-*Smith* cases consistently rejected case-specific religious exemptions to Schedule I, and they did so applying the same compelling interest test that RFRA codifies, see U.S. Br. 25-26 & n.13. Indeed, this Court has recognized that the CSA's closed system of regulation for Schedule I substances cannot co-exist with a scheme of judicially crafted, case-specific exemptions, see *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001), and that allowing isolated or localized exemptions from Schedule I's prohibitions "would leave a gaping hole in the CSA," *Gonzales* v. *Raich*, 125 S. Ct. 2195, 2197 (2005); see 21 U.S.C. 801(3) and (4). Respondents' and their amici's responses to that argument fail to grapple with that precedent or the realities of the drug culture.

First, respondents insist (Br. 44) that they are factually distinct from other sects, and that the Court could "recogniz[e] a narrow exemption for UDV based on the unique facts of this case," while denying other "religion-based exemptions from the CSA." The panoply of amici supporting respondents and identifying a range of religious claimants who, in their view, should be permitted to use a variety of Schedule I hallucinogenics as part of their religious practices (*e.g.*, Council on Spiritual Practices Br. 3-25; Halpern Br. 3-7, 22; Gable Br. 7 (advocating the safety of "LSD-like hallucinogens")), suggest otherwise.

So does the Constitution. Under the First Amendment, "neutrality as among religions must be honored" in the accommodation process, *Board of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 707 (1994), and "anomalously case-specific" exemptions are proscribed, *id.* at 703. See *Cutter* v.

---

of Human Res. v. *Smith*, 494 U.S. 872, 883, 884-885 (1990) (noting that *Lee* applies the same test that RFRA codifies).

Wilkinson, 125 S. Ct. 2113, 2121 (2005) (statutory standard identical to RFRA must "be administered neutrally among different faiths"); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533-536 (1993) (selective accommodation of kosher slaughter but not Santerian sacrifices struck down) .

Respondents stress (Br. 1, 21, 44) their small size and their sincerity. But respondents have no monopoly on sincerity, see U.S. Br. 22 n.10, or small size, see *Olsen* v. *DEA*, 878 F.2d 1458, 1459 (D.C. Cir. 1989) (R.B. Ginsburg, J.) (Ethiopian Zion Coptic Church has 100-200 members in the United States), cert. denied, 495 U.S. 906 (1990). Moreover, RFRA contains no quotas, the injunction imposes no caps, and it is difficult to see how the Establishment Clause would permit differential accommodations based on a religion's popular appeal. In any event, one doubts that, if the UDV grows in membership, as its leadership advocates, 10/22/01 Tr. 183, UDV will later agree to prohibition of its more extensive use of hoasca.

Respondents note (Br. 25) that hoasca is a sacrament that they do not ingest "continually all day." But the injunction imposes no limit on the frequency of hoasca ceremonies, and respondents make no effort to explain how RFRA would distinguish their current theology of drug ingestion at least 34 times a year, Pet. App. 213a, from UDV Brazil's sacramental practice of "often" ingesting hoasca "as frequently as several times per week," J.A. 82, or the Ethiopian Zion Coptic Church's proposed sacramental use of marijuana 52 times a year, *Olsen*, 878 F.2d at 1460.

What respondents fail to realize is that their vision of selectivity in the accommodation process—especially along theological fault lines like evangelistic practices, proselytization, and the frequency of sacramental rites—could raise independent Establishment Clause concerns and afford those whose sacramental practices are selectively accommodated a government-

ally generated advantage in the religious "marketplace of ideas." *McCreary County* v. *ACLU*, 125 S. Ct. 2722, 2747 (2005) (O'Connor, J., concurring). That problem is particularly acute in the context of Schedule I substances, the usage of which raises unique concerns such that Congress concluded that a categorial approach was needed. It is precisely the difficulty of cabining drug exemptions to particular sects that underscores Congress's compelling interest in maintaining the CSA's tightly closed system of drug regulation and "prohibit[ing] entirely" the use of Schedule I substances. *Raich*, 125 S. Ct. at 2210; see *United States* v. *Lee*, 455 U.S. 252, 260 (1982) (potential for "myriad exceptions flowing from a wide variety of religious beliefs" justifies uniform enforcement of Social Security law).

Second, that interest does not diminish because hoasca has not yet attained broad popularity in the drug culture. The necessity of maintaining a closed system for a Schedule I substance does not disappear just because the regulatory scheme has met with success, or because the controlled substance is not currently in vogue among illicit drug users. Drugs are placed on Schedule I based on their "high *potential* for abuse," 21 U.S.C. 812(b)(1)(A) (emphasis added), with the hope that the potential will not be realized. It thus "would make little sense to require a [government] to wait for a substantial portion of its [population] to begin using drugs before it was allowed to institute a * * * program designed to deter drug use." *Board of Educ. of Indep. Sch. Dist. No. 92* v. *Earls*, 536 U.S. 822, 836 (2002).

DMT, moreover, is in the class of hallucinogenics that have been abused and have shown a recent resurgence in popularity. U.S. Br. 15-16, 35-36. Indeed, 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 docu-

mented the risk of diversion and abuse of DMT-teas by shamans, self-deputized religious leaders, and others, U.S. Br. 36-38, and respondents' amicus acknowledges that "the abuse potential of DMT will be similar to LSD," Gable Br. 12. The fact that this DMT is ingested as a tea makes no difference. Tea, made by boiling plants, is a known delivery system for marijuana, opium, cocaine, and psilocybin mushrooms,[4] and the tea is potent enough to cause the types of mind-altering hallucinations, Pet. App. 127a, 214a; J.A. 127, that are an express concern of the CSA, see 21 U.S.C. 811(f).[5]

In short, the government's compelling interest in maintaining the CSA's closed system for Schedule I substances reflects the realities of an entrenched drug culture and the intractable law enforcement problems that it poses. Few other accommodations implicate a $300 billion dollar illicit transnational economy that is persistently searching for new drugs, new delivery systems for drugs, and new legal channels to tap for diversion.[6] "If history is any guide, this new market would not be long overlooked." *United States* v. *Rutherford*, 442 U.S. 544, 558 (1979); see *Raich*, 125 S. Ct. at 2213-2214.

---

[4] See *New York Medical Marijuana Buyers' Club Guide to Using Marijuana* <http://www.cures-not-wars.org/nycbc.html>; http://www.marijuana-tea.com; http://cocaine.org/cocatea.htm; *Poppy Seed Tea—A Cheap, Effective Morphine High*<http://www.totse.com/en/drugs/otc/poppyseedteare17956.html>; http://www.erowid.org/plants/mushrooms/mushrooms_prep2.shtml#Tea2.

[5] Respondents' emphasis (Br. 2) on the small amount of DMT needed to render hoasca fully hallucinogenic simply confirms Congress's judgment about the dangerous potency of DMT and reinforces its pharmacological kinship with LSD. See *Chapman* v. *United States*, 500 U.S. 453, 457 (1991) (noting the "infinitesimal amount" of LSD in doses of the substance).

[6] See http://www.unodc.org/pdf/ WDR_2005/volume_1_web.pdf., at p. 182.

Third, respondents stress (Br. 13) that RFRA's text requires the government to identify a compelling interest in application of the burden "to the person," 42 U.S.C. 2000bb-1(b). True enough. But nothing in that language precludes the government from justifying the burden on a person by showing that accommodating all similarly situated claimants, as the Establishment Clause's neutrality guarantee would require, would unravel the statutory scheme and broadly imperil public health and safety.

Congress, moreover, was aware of and gave consideration to the needs of religious adherents. The United Nations Convention on Psychotropic Substances, *opened for signature* Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175 (1971 Convention), expressly addressed the regulation of native-grown plants that are "traditionally used by certain small, clearly determined groups in magical or religious rites," *id.* Art. 32, para. 4. Congress specifically amended the CSA in 1978 to bring domestic law into compliance with the Convention. See Psychotropic Substances Act of 1978, Pub. L. No. 95-633, Title I, § 101, 92 Stat. 3768; 21 U.S.C. 801a(2). In so doing, Congress determined that compliance with the Convention's terms—including its carefully delimited exception for indigenous cultural and religious uses—was critical not just to "reducing the diversion of psychotropic substances," but also to "the prevention of illicit trafficking in other countries." S. Rep. No. 959, 95th Cong., 2d Sess. 16 (1978); see 21 U.S.C. 801a(1). Congress, moreover, specifically considered the regulatory peyote exemption and religious claims for parallel treatment in hearings leading up to the enactment of the CSA.[7]

Congress also erected a specialized administrative mecha-

[7] See 21 C.F.R. 320.3(c)(3) (1970); 35 Fed. Reg. 2874 (1970); 34 Fed. Reg. 9871 (1969); *Drug Abuse Control Amendments—1970: Hearings Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 117-118 (1970).

nism for evaluating the safety of a controlled substance. Through the scheduling system, Congress created a comprehensive process for evaluating a substance's dangerousness and susceptibility to abuse that does not invite second-guessing by courts based on less comprehensive evidentiary showings. See 21 U.S.C. 811(b); *Touby* v. *United States*, 500 U.S. 160, 162 (1991). Congress reiterated its commitment to that framework in 1978, see 21 U.S.C. 801a(3), and again in 1998—five years *after* the passage of RFRA—when Congress reaffirmed its "continue[d]" "support [for] the existing Federal legal process for determining the safety and efficacy of drugs and oppose[d] efforts to circumvent this process" and to establish legal uses for Schedule I drugs "without valid scientific evidence" established through the CSA's standards and procedures. Act of Oct. 21, 1998, Pub. L. No. 105-277, Div. F, 112 Stat. 2681-761.

Yet, in this case, the district court relied on an admittedly "only preliminary" study, Pet. App. 215a, of hoasca that examined a statistically unrepresentative sample of 15 long-term, male UDV members, *id.* at 215a-217a, notwithstanding the author's admission that his "pilot" study provided *no* basis for concluding, "with a reasonable degree of scientific certainty, that there is little risk of adverse consequences of ayahuasca use," J.A. 650-651. That, combined with the *absence* of a substantial body of published scientific research on the effects of UDV's particular DMT tea, was deemed sufficient to supplant Congress's judgment concerning the dangerousness of "any" DMT preparation. Pet. App. 215a-217a. Reading RFRA's command that the government justify the burden "to the person" as opening up the CSA's closed and comprehensive regulation of Schedule I substances to case-by-case, judicially compelled exemptions based on such low standards of medical safety and scientific study would set at naught Congress's carefully crafted

scheme and the compelling public health and safety interests that it advances.[8]

Respondents (Br. 18) and their amici (Baptist Joint Comm. Br. 12-13) portend that recognizing a compelling interest in uniform enforcement of the CSA's closed system will "effectively nullify" RFRA. That is incorrect. The scores of cases refusing to grant religious exemptions to Schedule I prior to *Smith* did not render the First Amendment a "dead letter" (Conf. of Catholic Bishops Br. 2), nor did this Court's recognition of compelling governmental interests in uniform enforcement of the social security system, the tax code, Sunday closing laws, or criminal prohibitions on polygamy. And it is difficult to believe that Justice O'Connor viewed the compelling interest test that she so forcefully advocated preserving in her concurrence in *Smith*, 494 U.S. at 891-903, to be emptied of force a couple of pages later by her determination that "uniform application of Oregon's criminal prohibition" on peyote served an "overriding interest in preventing the physical harm caused by the use of a Schedule I controlled substance," *id.* at 905.

---

[8] Respondents' claim (Br. 2-3) that it is "undisputed" that no significant health consequences or diversion occurred during UDV's 17 years in the United States is baseless. Any use of hoasca before the government's seizure in May 1999 was undertaken covertly and secretly, J.A. 566-573, 897, which is hardly an environment that is conducive to reliable public reporting of adverse reactions. During that same period, UDV Brazil recorded a number of incidents in which hoasca caused or contributed to psychotic episodes, U.S. Br. 33 & n.18, and respondents' own amicus acknowledges that "the hallucinogenic effect of *hoasca* has the potential to worsen pre-existing psychosis or to precipitate an adverse psychological reaction," Gable Br. 8. Moreover, the fact that UDV imported barrels of hoasca into the United States illicitly for years *proves* the government's point that DMT tea is subject to smuggling and diversion. Finally, from the government's seizure of UDV's hoasca in May 1999 until the injunction took effect in December 2004, UDV discontinued its import and ingestion of hoasca, so those years prove nothing.

Fourth, abandoning the logic of their argument that they seek only a sect-specific, narrow exemption to Schedule I, respondents contend (Br. 20-23) that a statutory exemption for peyote use by members of federally recognized Indian Tribes, see 42 U.S.C. 1996a(b)(1) and (c)(1), demands exemptions to the CSA for religious claimants. But the narrowly crafted peyote exemption undermines respondents' claim. It was only after rigorous study and review that Congress concluded that a narrow exception for the traditional use of a native-grown substance—the ceremonial usage of which pre-dates the founding of this Country—could be implemented without unraveling the CSA's closed system of drug distribution. Even then, Congress carefully demarcated the bounds of the exception, confining it to federally recognized Indian Tribes, which have a unique sovereign status. See 42 U.S.C. 1996a(b)(1), (c)(1) and (2).[9]

The peyote exception thus is more accurately described, not as a religious accomondation as such, but as a political accommodation for federally recognized Tribes. It is based on the unique cultural needs of another sovereign authority—one with its own distinct constitutional status, U.S. Const. Art. I, § 8, Cl. 3, law enforcement authority, *e.g.*, *United States* v. *Lara*, 541 U.S. 193 (2004), and governmental structure with which the federal government can reliably coordinate drug control matters without raising Establishment Clause concerns, see H.R. Rep. No. 675, 103d Cong., 2d Sess. 8-9 (1994). Indeed, Congress specifically found that the use of peyote "has for centuries been integral to a way of life, and significant in perpetuating Indian tribes and culture," 42 U.S.C. 1996a(a)(1).[10] Congress's

---

[9] The peyote exemption, moreover, does not violate the 1971 Convention. The United States took a reservation for peyote at ratification, and the statutory exemption for this indigenous substance does not authorize transnational trafficking in peyote, see 42 U.S.C. 1996a(b); J.A. 898, 909; U.S. Br. 43 n.31.

[10] See 42 U.S.C. 1996a(a)(5), (c)(2) and (3); 25 U.S.C. 2901(1); *United States* v. *Antelope*, 430 U.S. 641, 645 (1977) ("Indian tribes are unique aggregations

careful creation of that distinct legislative scheme does not suggest that the CSA can safely be opened to a series of judicially crafted religious exceptions. Indeed, the rarity of the peyote exemption, its *sui generis* design arising out of the United States' historic trust responsibilities and premised on a coordinated inter-sovereign relationship, and the lengthy legislative process that led to its enactment prove the opposite.

C. Congress's Findings Merit Substantial Deference

Even if, under RFRA, a court may reexamine on a case-by-case basis Congress's findings concerning the dangerousness and susceptibility to abuse and diversion of DMT preparations, Congress's findings merit substantial deference in that process. *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 195 (1997); *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622 (1994).

Respondents discard as "entirely unrelated" (Br. 17) this Court's *Turner* decisions because they involved constitutional rather than statutory challenges and did not involve the application of strict scrutiny. Respondents, however, fail to explain why constitutional rights should receive less independent judicial scrutiny than statutory rights. In any event, deference to congressional findings is not a unique adjunct to the Court's intermediate scrutiny test for content-neutral regulations of speech. It is a longstanding principle of inter-Branch comity and respect for Congress's specialized institutional capacity "to amass the stuff of actual experience and cull conclusions from it." *United States* v. *Gainey*, 380 U.S. 63, 67 (1965); see *Oakland Cannabis*, 532 U.S. at 493 (noting deference due congres-

---

possessing attributes of sovereignty over both their members and their territory, * * *; they are 'a separate people' possessing 'the power of regulating their internal and social relations.'") (citations omitted); *Morton* v. *Mancari*, 417 U.S. 535 (1974); *Peyote Way Church of God, Inc.* v. *Thornburgh*, 922 F.2d 1210, 1216 (5th Cir. 1991).

sional findings in context of a statutory question concerning the CSA).

While judicial scrutiny of congressional findings is more exacting when the Court applies strict scrutiny, respondents cite no case entirely suspending the separation-of-powers principles embodied in such deference whenever strict scrutiny is applied. The opposite is true. See *Grutter* v. *Bollinger*, 539 U.S. 306, 328 (2003) (in applying strict scrutiny to a racial classification, "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer," as it "tak[es] into account complex educational judgments in an area that lies primarily within the expertise of the university").[11] Because deference remains appropriate even under the Constitution's most exacting standard of judicial scrutiny, *a fortiori* such deference is required in applying a statutory standard of review to congressional findings made in another Act of Congress. Indeed, there is no basis for presuming that Congress, in enacting RFRA's statutory standard, intended courts to abandon traditional principles of deference afforded to congressional findings. This Court made that clear last Term in holding that the identical statutory standard must be applied "with 'due deference to the experience and expertise of prison and jail administrators.' " *Cutter*, 125 S. Ct. at 2123 (quoting 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Senators Hatch and Kennedy), and S. Rep. No. 111, 103d Cong., 1st Sess. 10 (1993)).[12] That deference—indeed,

---

[11] See also *Board of Educ.* v. *Mergens*, 496 U.S. 226, 251 (1990) (deference under the Establishment Clause); *Rostker* v. *Goldberg*, 453 U.S. 57, 82-83 (1981) (deference under the Equal Protection Clause); *Jacobson* v. *Massachusetts*, 197 U.S. 11, 24 (1905) (deference under the Free Exercise Clause).

[12] Such deference is especially appropriate when, as here, Congress's judgment rests on complex medical and scientific determinations. See *Jones* v. *United States*, 463 U.S. 354, 365 n.13 (1983); *Marshall* v. *United States*, 414 U.S. 417, 427 (1974); *Lambert* v. *Yellowley*, 272 U.S. 581, 594-595 (1926).

any deference—would have broken the district court's evidentiary tie in the government's favor.

Respondents argue (Br. 17) that congressional findings are necessarily too "general" to "assist courts with fact-specific assessments." But there is nothing general about Congress's finding that "any material" containing "any quantity" of DMT, 21 U.S.C. 812(c), Schedule I(c), "has a high potential for abuse," "has no currently accepted medical use in treatment in the United States," and has "a lack of accepted safety for use * * * under medical supervision," 21 U.S.C. 812(b)(1). Those categorical and unambiguous findings are properly subject to deference, and not to judicial second-guessing based on Congress's failure separately to consider some narrow question that is already encompassed within the broader findings. See *Raich*, 125 S. Ct. at 2208 n.32; *Oakland Cannabis*, 532 U.S. at 493. That is why courts applying the same test that RFRA prescribes have routinely and expressly deferred to those findings in denying requests for religious accommodations under Schedule I.[13]

D. The United States Has A Compelling Interest In Complying With Its Treaty Obligations

Respondents (Br. 36-38) and their amici (Liberty Legal Br.; Int'l Academy Br.) argue that RFRA applies to and modifies the 1971 Convention. That is debatable.[14] It is also beside the

---

[13] See, *e.g.*, *United States* v. *Israel*, 317 F.3d 768, 771 (7th Cir. 2003); *United States* v. *Greene*, 892 F.2d 453, 456 (6th Cir. 1989), cert. denied, 495 U.S. 935 (1990); *United States* v. *Rush*, 738 F.2d 497, 513 (1st Cir. 1984), cert. denied, 470 U.S. 1004 (1985); *United States* v. *Middleton*, 690 F.2d 820, 825 (11th Cir. 1982), cert. denied, 460 U.S. 1051 (1983); *United States* v. *Spears*, 443 F.2d 895, 896 (5th Cir. 1971), cert. denied, 404 U.S. 1020 (1972); *Leary* v. *United States*, 383 F.2d 851, 860-861 (5th Cir. 1967), rev'd on other grounds, 395 U.S. 6 (1969).

[14] It is doubtful that a non-self-executing treaty constitutes "Federal law," for purposes of RFRA, 42 U.S.C. 2000bb-3(a), or that RFRA's text constitutes the type of clear statement necessary to alter international treaty obligations through the "otherwise unambiguous general terms of [a] statute," *Spector* v.

point, because RFRA plainly applies to the domestic implementing legislation—the CSA. The government's argument is not that the Convention renders RFRA inapplicable, but that compliance with a longstanding, multi-Nation international treaty that is critical to combating illicit transnational drug trafficking and to obtaining international law enforcement cooperation, 21 U.S.C. 801a(1), constitutes a compelling interest under RFRA. Because "treaty rights [and obligations] are too fundamental to be easily cast aside," *United States* v. *Dion*, 476 U.S. 734, 739, 740 (1986), this Court "should be most cautious before interpreting" RFRA's compelling-interest test "in such manner as to violate international agreements." *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 539 (1995). "The question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts." *Chae Chan Ping* v. *United States*, 130 U.S. 581, 602 (1889). On the other hand, construing RFRA's test in the same manner that it was "set forth in prior Federal court rulings," 42 U.S.C. 2000bb(a)(5), that consistently rejected religious exemptions from the CSA would be faithful both to RFRA and to the United States' international obligations and foreign relations.

Respondents first contend (Br. 26-36) that the Convention does not apply to their DMT tea. But their argument pays no heed to the Convention's text and relies entirely on extra-textual assertions. That is not surprising. The Convention's text leaves them no room for argument. The Convention expressly applies to DMT and to any "preparation" containing DMT, including "*any* solution or mixture, in whatever physical state, containing one or more psychotropic substances." 1971 Convention Art. 1(f)(i) (emphasis added); *id.* Art. 3, para. 1, and

---

Norwegian Cruise Line Ltd., 125 S. Ct. 2169, 2182 (2005); *Chew Heong* v. *United States*, 112 U.S. 536, 550 (1884).

Appended Schedules. To make hoasca, the *psychotria viridis* plant, which contains DMT, is boiled together with the *banisteriopsis caapi* plant, creating a unique mixture of DMT and MAOI inhibitors (harmala alkaloids) that trigger the DMT's hallucinogenic effects. Pet. App. 127a. Mixing two plants together and using heat to create a unique brew that renders the DMT "fully hallucinogenic," J.A. 127, and "allows DMT to reach levels in the brain sufficient to produce a significantly altered state of consciousness," Pet. App. 214a, falls within the plain meaning of "solution or mixture."[15] Because the text is clear —and is also consistent with the Executive Branch's interpretation, which merits "great weight," *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961)—resort to non-textual and post hoc materials is inappropriate. *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989).[16]

---

[15] See, *e.g.*, *Chapman*, 500 U.S. at 459-462; *Webster's Third New Int'l Dictionary of the English Language* 1449 (3d ed. 1986) (defining "mixture" as including "an act, process, or instance of mixing"; "a combination of several different kinds of some article of consumption (as tea or tobacco)"); *id.* at 2170 (defining "solution" as "the process of altering material (as by dissolving, fusing, or distilling) through the agency of heat"); accord *Webster's New Int'l Dictionary of the English Language* 1574, 2396 (2d ed. 1958).

[16] Respondents emphasize (Br. 27) that the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Convention), *opened for signature* Dec. 20, 1988, 28 I.L.M. 493, states that governments "shall take due account of traditional licit uses, where there is historic evidence of such use." *Id.* Art. 14(2). Article 14, however, pertains to the *domestic* "cultivat[ion]" of plants "in [a Party's] territory," *ibid.*, not their importation. Furthermore, there is no tradition of licit use of hoasca in the United States because (i) respondents' religion and use of hoasca dates back only to 1961 in Brazil, Pet. App. 180a-181a; (ii) UDV did not arrive in the United States until five years *after* the 1988 Convention, *ibid.*; (iii) UDV's only argument that its use of hoasca is licit is based on a statute that was just enacted in 1993; and (iv) hoasca's component plants are not native-grown. In any event, Article 14(2) does "not derogate from any * * * obligations undertaken by Parties to this Convention under the * * * 1971 Convention." 1988 Convention Art. 25.

Second, even if resort to post hoc commentary were appropriate, it would not help respondents. The commentary merely states that "[p]lants *as such*" are not prohibited. Commentary on the Convention on Psychotropic Substances, U.N. Doc. E/CN.7/589, at 385 (1976) (emphasis added). But hoasca is not a "plant[] as such." Hoasca is a preparation that brews and mixes two plants together so that the hallucinogenic effect of the DMT in one plant can be activated by the MAOI inhibitors in another plant, and thus creates a liquid not found in nature. Under the Commentary, such "products obtained from plants" are covered. *Ibid.*[17]

Third, respondents' reliance (Br. 30-31) on a letter from the executive secretary of the International Narcotics Control Board and a declaration from a former Board member is misplaced. The International Narcotics Control Board has no official role in resolving disputes about the meaning of the Convention's provisions. See 1971 Convention Arts. 18, 19, 31. Even if it did, an "official position" (Resp. Br. 35) would require the concurrence of two-thirds of the entire Board, 1971 Convention Art. 19(6), rather than isolated comments by the executive secretary—who has no vote on the Board, see http://www.incb.org/incb /en/about.html—or a past member.[18]

---

[17] Respondents also cite the Commentary's statement that "[n]either * * * the roots of the plant Mimosa hostilis nor Psilocybe mushrooms themselves are included in Schedule I, but only their respective active principles," and two accompanying footnotes, which observe that "[a]n infusion of the roots is used" to consume Mimosa hostilis, and that "[b]everages * * * are used" to consume Psilocybe mushrooms. Commentary at 387 & nn.1227-1228. That Commentary says *nothing* about whether those "infusion[s]" and "[b]everages," in contradistinction to their plant parts, are covered, and, in fact, could fairly be read to indicate that infusions and beverages *are* covered. At best, the Commentary is ambiguous, and thus provides no basis for overriding the Convention's plain text or the Executive Branch's interpretation of it.

[18] Respondents' reliance (Br. 38) on the International Covenant on Civil and Political Rights (ICCPR), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171,

Fourth, respondents note (Br. 37) that Article 22 of the 1971 Convention states that the Convention's penal provisions are "[s]ubject to the constitutional limitations of a Party, its legal system and domestic law." The fact that the Convention leaves criminal penalties and prosecutions up to the constitution and laws of each signatory nation is hardly a remarkable proposition. But that does not alter the substantive requirements of the treaty or the reality that the United States has committed to ensuring that its domestic legal system operates in a manner that maintains compliance with the Convention.

Fifth, respondents claim (Br. 39-40) that the government introduced no evidence of a compelling interest in treaty compliance. That is wrong. Two government declarations were devoted to that subject. Pet. App. 261-271a. What the government left "for another day" (Br. 39) was the *legal* question of whether the Convention's covers hoasca, J.A. 769, which the court later decided, albeit incorrectly, Pet. App. 242a & n.13.

Finally, respondents argue (Br. 9-10) that this Court can disregard the foreign policy consequences of a judicially directed, ongoing violation of an international treaty because no foreign government has lodged a formal objection in the first nine months of the injunction's operation. As an initial matter, the purpose of a preliminary injunction is not to undertake a judicial sortie into international relations to take the temperature of foreign governments. Nor is it reasonable to expect other Nations to time their protests or resistance to interna-

---

fares no better. "[T]he Senate has expressly declined to give federal courts the task of interpreting and applying international human rights law," like the ICCPR, *Sosa* v. *Alvarez-Machain*, 124 S. Ct. 2739, 2763 (2004), and compliance with Article 18 of the ICCPR, which is non-self-executing, was not among the identified purposes of RFRA, cf. 42 U.S.C. 2000bb(b). In any event, Article 18 of the ICCPR expressly provides that "[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals."

tional law enforcement efforts to meet domestic litigation timetables. The consternation and confusion of foreign governments would be more likely to arise were the Court to conclude that RFRA precludes the government from speaking with one voice in foreign affairs, and that, henceforth, the government's interpretation and implementation of the 1971 Convention will be subject to open-ended revision by more than 700 district court judges, with each of them applying RFRA to an inevitable stream of religious claimants for Schedule I exemptions, each potentially authorizing transnational trafficking in dangerous controlled substances, and each putting a judicial imprimatur of safety on the usage of dangerous, mind-altering substances that the Political Branches and 176 Nations have determined are unsafe for use even under medical supervision. Nothing in RFRA's text, legislative history, purpose, or the backdrop of pre-*Smith* case law against which Congress enacted RFRA supports that outcome. And established principles of deference to Congress's resolution of complex medical and scientific matters and to the Political Branches' plenary control over foreign affairs and the Nation's borders make clear that such extraordinary disruption is not the province of the Judiciary's preliminary injunctive authority.

* * * * *

For the foregoing reasons, and for those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

OCTOBER 2005