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

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb et seq., requires the government to permit the importation, distribution, possession, and use of a Schedule I hallucinogenic controlled substance, where Congress has found that the substance has a high potential for abuse and is unsafe for use even under medical supervision, and where its importation and distribution would violate an international treaty.

PARTIES TO THE PROCEEDINGS

The petitioners in this Court are Alberto R. Gonzales, Attorney General of the United States, Karen P. Tandy, Administrator of the United States Drug Enforcement Administration, John W. Snow, Secretary of the Treasury, David C. Iglesias, United States Attorney for the District of New Mexico, and Hugo Martinez, Acting Resident Agent in Charge of the Department of Homeland Security Immigration and Customs Enforcement, Office of Investigations, Albuquerque, New Mexico.

The respondents are O Centro Espirita Beneficiente Uniao Do Vegetal (USA), a New Mexico Corporation, Jeffrey Bronfman, Daniel Tucker, Christina Barreto, Fernando Barreto, Christine Berman, Mitchel Berman, Jussara de Almeida Dias, Patricia Domingo, David Lenderts, David Martin, Maria Eugenia Pelaez, Bryan Rea, Don St. John, Carmen Tucker, and Solar Law.

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-120a) is reported at 389 F.3d 973. The panel opinion (Pet. App. 121a-167a) is reported at 342 F.3d 1170. The opinion granting a stay pending appeal (Pet. App. 168a-174a) is reported at 314 F.3d 463. The memorandum opinion (Pet. App. 177a-246a) of the district court is reported at 282 F. Supp. 2d 1236.

JURISDICTION

The en banc court of appeals entered its judgment on November 12, 2004. The petition for a writ of certiorari was filed on February 10, 2005, and was granted on April 18, 2005. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND TREATY INVOLVED

The relevant statutory and treaty provisions are reproduced at Pet. App. 272a-333a.

STATEMENT

1. a. The Controlled Substances Act (CSA), 21 U.S.C. 801 et seq., makes it unlawful to possess or to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense" any controlled substance, except as authorized by the Act itself. 21 U.S.C. 841(a)(1), 844(a). Congress found that "[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the

American people," 21 U.S.C. 801(2), and that commerce in such drugs is so developed and pervading that "it is not feasible to distinguish, in terms of controls," between substances distributed interstate and those distributed locally. 21 U.S.C. 801(5). With respect to mind-altering psychotropic substances in particular, "Congress has long recognized the danger involved in the[ir] manufacture, distribution, and use * * * for nonscientific and nonmedical purposes," and has concluded that "[i]t is * * * essential that the United States cooperate with other nations in establishing effective controls over" them. 21 U.S.C. 801a(1).

The CSA classifies controlled substances into five separate schedules based on their safety, the extent to which they have an accepted medical use, and the potential for abuse. 21 U.S.C. 812(b). A drug qualifies for listing on Schedule I if it "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). The CSA comprehensively prohibits the importation, manufacture, distribution, possession, and use of Schedule I substances, except as part of strictly regulated research projects. 21 U.S.C. 823 (2000 & Supp. II 2002), 841(a), 844(a), 960(a)(1). Congress placed dimethyltryptamine (DMT), as well as "any material,

compound, mixture, or preparation, which contains any quantity of [DMT],” in Schedule I. 21 U.S.C. 812(c), schedule I(c).[1]

b. The 1971 United Nations Convention on Psychotropic Substances represents an international effort involving 176 Nations "to prevent and combat abuse of [psychotropic] substances and the illicit traffic to which it gives rise." United Nations Convention on Psychotropic Substances (Convention), opened for signature Feb. 21, 1971, 32 U.S.T. 545, 1019 U.N.T.S. 175, Preamble.[2] The Convention is a cornerstone of the international effort to combat drug abuse and transnational drug trafficking, Pet. App. 269a, reflecting the Parties’ judgment that “rigorous measures are necessary to restrict the use of [psychotropic] substances to legitimate purposes,” and that “effective measures against abuse of such substances require [international] co-ordination and universal action.” Convention, Preamble.

Like the CSA, the Convention divides covered substances into schedules, and it lists DMT as a Schedule I substance subject to

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[1] In 1998, Congress passed a resolution reaffirming that the drugs “listed on Schedule I of the Controlled Substances Act * * * have a high potential for abuse, lack any currently accepted medical use in treatment, and are unsafe, even under medical supervision.” Pub. L. No. 105-277, Div. F, 112 Stat. 2681-760. Congress also expressed 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.” Id. at 2681-761.

[2] See <http://www.unodc.org/pdf/treaty_adherence_convention_1971.pdf>.

the most rigorous controls. See Convention, Appended Schedules. In addition, any "preparation is subject to the same measures of control as the psychotropic substance which it contains." Id. Art. 3, para. 1. The Convention defines "preparation" as "any solution or mixture, in whatever physical state, containing one or more psychotropic substances." Id. Art. 1(f)(i). The Convention obligates the United States to "prohibit all use" of DMT and preparations containing DMT, "except for scientific and very limited medical purposes * * * under the control" of or approved by the government, and to regulate stringently the import and export of DMT preparations. Id. Arts. 7(a) and (f), 12.

The Convention permits Nations, at the time they join the Convention but not thereafter, to make "reservations" for substances derived from native-grown plants that are "traditionally used by certain small, clearly determined groups in magical or religious rites." Convention, Art. 32, para. 4. The United States took a reservation for peyote use by Indian Tribes. Pet. App. 273a. Such reservations apply only to domestic use of the drug and not to the Convention's international trade provisions. Ibid.

c. The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb et seq., provides that the federal government "shall not substantially burden a person's exercise of religion" unless "it demonstrates that application of the burden to the person -- (1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1(a) and (b). RFRA applies to "all Federal law" and the implementation of that law. 42 U.S.C. 2000bb-3(a).

2. O Centro Espirita Beneficiente Uniao Do Vegetal (UDV) is a religious organization that was founded in Brazil in 1961 and opened its first branch in the United States in 1993. Pet. App. 126a-127a. At least 34 times a year, id. at 213a, UDV's members engage in religious ceremonies involving the ingestion of a DMT-based tea referred to by adherents as "hoasca," a Portuguese transliteration of its secular name "ayahuasca," id. at 126a. The tea is made by brewing together two indigenous Brazilian plants: psychotria viridis, which contains DMT, and banisteriopsis caapi, which contains certain harmala alkaloids that catalyze DMT's hallucinogenic effects. Id. at 127a. Ingestion of the chemicals distilled by the brewing process "allows DMT to reach the brain in levels sufficient to significantly alter consciousness." Ibid. Because those plants do not grow in the United States, hoasca must be prepared overseas and imported in liquid form. Ibid.

In May 1999, United States Customs inspectors intercepted a shipment from Brazil to UDV of three drums of DMT tea. The investigation revealed that UDV had received fourteen prior shipments of the same DMT preparation. Pet. App. 127a; Pltf. Mot. for Prelim. Inj., Exh. L.

3. Eighteen months later, respondents filed suit against the Attorney General and other federal law enforcement officials, seeking, inter alia, an injunction prohibiting the United States from enforcing the criminal laws against importing, possessing, distributing, and using DMT in the form of hoasca and from seizing the hoasca. J.A. 17-36. As relevant here, the complaint alleged that enforcement of the CSA against the UDV's use of its DMT tea would violate the First Amendment and RFRA.

After a two-week hearing, Pet. App. 182a, 236a, the district court granted respondents' motion for a preliminary injunction based on RFRA, id. at 247a-260a. The district court first rejected respondents' argument that hoasca is not a Schedule I controlled substance, holding that the "plain language" of the CSA "clearly covers" it. Id. at 179a. The court also found no merit to respondents' Free Exercise Clause claim. Id. at 183a-197a.

With respect to respondents' RFRA claim, the court stated that it was "struck by the closeness of the questions of fact presented in this case," and that the risks of psychosis, adverse drug interactions, and cardiac irregularities identified by the government would be sufficient to support prohibition of DMT-based hoasca "in other contexts." Pet. App. 227a. The court nevertheless concluded that the evidence presented "is essentially, in equipoise," ibid., and thus concluded that the government had not carried "its onerous burden of establishing a health risk to

UDV members." Ibid. On the risk of abuse and diversion, the court likewise held that the evidence was "virtually balanced * * on the risk of diversion," and that, as a result, the government "has failed to meet its difficult burden." Id. at 236a. The district court did not address whether compliance with the Convention constituted a compelling interest, because the court concluded that the Convention does not apply to hoasca. Id. at 242a & n.13.

The thirteen page injunction issued by the district court enjoins the government from enforcing the CSA's criminal prohibitions against respondents' "importation, possession, and distribution of hoasca for use in bona fide religious ceremonies of the UDV," Pet. App. 248a-249a, and requires it to register UDV as an importer and distributer of its DMT tea, id. at 255a. The injunction imposes elaborate procedures that require the government to coordinate with UDV "persons of authority" in supervising the importation and distribution of hoasca. Id. at 250a-259a. The government is forbidden "to restrict the amounts of hoasca imported," id. at 254a, and the court suspended regulations establishing physical security controls over the hoasca. Ibid.

4. The court of appeals granted the government's motion to stay the district court's injunction pending appeal, Pet. App. 168a-174a. A divided panel of the court of appeals subsequently affirmed the injunction. Id. at 121a-167a.

The en banc court of appeals also affirmed. Pet. App. 1a-120a. A per curiam opinion for the en banc court held that the preliminary injunction altered the status quo and thus is subject to a more demanding burden of proof, but affirmed the injunction under that heightened standard. Id. at 4a-5a.

Judge Seymour issued an opinion joined in whole by five judges and in part by two judges. Pet. App. 53a-78a. While Judge Seymour acknowledged that "[c]ertainly the interests of the government as well as the more general public are harmed if the government is enjoined from enforcing the CSA against the general importation and sale of street drugs," she concluded that hoasca is not a "street drug[]." Id. at 72a. Judge Seymour also discounted the harm arising from violation of the Convention because the treaty permitted reservations. Id. at 75a.

Judge McConnell, joined in whole by one judge and in part by two judges, concluded that the preliminary injunction altered the status quo and thus required heightened justification, but agreed that the injunction was proper. Pet. App. 79a-119a. He reasoned that distinctions "between street drugs and more 'esoteric' ones" counseled against deferring to Congress's statutory findings concerning the dangers associated with DMT. Id. at 103a. Judge McConnell did not adopt the district court's holding that the Convention does not cover hoasca, but concluded that prohibiting hoasca was not the least restrictive means of furthering the

government's interest because, in his view, the United States could seek an accommodation for hoasca. Id. at 104a-107a.

Judge Murphy issued a separate opinion, joined in whole by three judges and in part by three judges. Pet. App. 6a-52a. He agreed that the preliminary injunction altered the status quo, id. at 6a-18a, but would have held that "the express congressional findings concerning Schedule I drugs" established that the government has a compelling interest that is being furthered by the least restrictive means. Id. at 21a. He rejected the court's conclusions that RFRA authorizes "a case-by-case redetermination of whether these findings are correct," id. at 22a, and that the government's compelling interest could "turn on whether the adherent has a religious affinity for street drugs or more esoteric ones." Id. at 27a. Finally, Judge Murphy concluded that requiring a violation of the Convention "could seriously impede [the government's] ability to gain the cooperation of other nations in controlling the international flow of illegal drugs." Id. at 29a.

SUMMARY OF ARGUMENT

The district court's perception of evidentiary equipoise -- in the face of specific findings by Congress that DMT preparations have a high potential for abuse and are unsafe for use even under medical supervision and the imposition of the most stringent controls by the 176 Nations that are Parties to the Convention -- is an insufficient ground for a district court to command the

United States to suspend the enforcement of its criminal laws, to violate its international treaty obligations, and to open its borders to the importation, distribution, and use of a dangerous, mind-altering hallucinogen. The preliminary injunction fundamentally alters a legal status quo that has been in existence for decades. And the harm that will befall domestic and international efforts to combat drug trafficking, to prevent the creation of new delivery systems and markets for dangerous substances, and to protect the physical health and safety of individuals who use the DMT tea, with its potential for severe adverse health consequences, will be immediate and irreparable. Experience teaches that, once new drugs take hold in the drug culture, they are extremely hard to uproot.

Nothing in the Religious Freedom Restoration Act (RFRA) compels that extraordinary and extraordinarily harmful result. Until now, the courts have broadly respected Congress's legislative findings, acknowledged the government's compelling interest in strictly controlling Schedule I substances, and generally refused to mint religious exemptions to the Controlled Substances Act, either under RFRA or the First Amendment. That is because the compelling interest/least restrictive means standard mandates careful balancing, not an absolute duty to accommodate religious practices at the expense of vital governmental interests. Congress expected courts to apply RFRA's standard with sensitivity to

context and to strike sensible balances. It is not a license for courts to disregard congressional findings and international treaty obligations or to engage in the de novo formulation of national and international drug control policy.

ARGUMENT

CONGRESS'S PROHIBITION AGAINST THE IMPORTATION, DISTRIBUTION, AND USE OF HOASCA COMPORTS WITH THE RELIGIOUS FREEDOM RESTORATION ACT

The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb et seq., requires federal government actions that "substantially burden" the exercise of religion to be justified by a "compelling government interest" that is furthered by "the least restrictive means." 42 U.S.C. 2000bb-1(b). While that statutory standard of protection for religious exercise is exacting, it is not "strict in theory, but fatal in fact." Johnson v. California, 125 S. Ct. 1141, 1151 (2005). To the contrary, it is a "workable test" designed to "strik[e] sensible balances" between religious exercise and important governmental interests. 42 U.S.C. 2000bb(a)(5); see Cutter v. Wilkinson, 125 S. Ct. 2113, 2123 (2005); Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring in the judgment). Just as in applying the identical statutory standard to States under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc et seq., "[c]ontext matters," and the test must "be applied in an appropriately balanced way, with

particular sensitivity" to important law enforcement concerns. Cutter, 125 S. Ct. at 2123; see S. Rep. No. 111, 103d Cong., 1st Sess. 9 (1993) (RFRA "should be interpreted with regard to the relevant circumstances in each case.").[3]

A. Respondents Bear The Burden Of Proving Entitlement To Exceptional Preliminary Relief

The burden on a party moving for a preliminary injunction, especially one that will fundamentally alter the status quo, is substantial and clear. "[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (per curiam); see Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) ("stringent" showing required). Such preliminary relief is particularly disfavored when it enjoins the enforcement of federal laws. See Mazurek, supra; Wisconsin Right to Life, Inc. v. FEC, 125 S. Ct. 2, 3 (2004) (Rehnquist, C.J., in chambers) ("An injunction pending appeal barring the enforcement of an Act of Congress would be an extraordinary remedy, particularly when * * * th[e] Act [is] facially constitutional."). To obtain such exceptional relief, the movant bears the heavy burden of "show[ing] that in the absence of its issuance he will suffer irreparable

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[3] This Court reviews the court's legal rulings de novo and the decision to issue a preliminary injunction for an abuse of discretion. McCreary County v. ACLU, No. 03-1693 (June 27, 2005), slip op. 19.

injury and also that he is likely to prevail on the merits." Doran, 422 U.S. at 931. Moreover, the central purpose of a preliminary injunction "is merely to preserve the relative positions of the parties until a trial on the merits can be held." University of Texas v. Camenisch, 451 U.S. 390, 395 (1981).

The preliminary injunction ordered in this case defies traditional constraints on judicial intervention at the preliminary stage of litigation. The 36-paragraph injunction profoundly alters the status quo -- indeed, it grants respondents all the relief they could obtain at the end of the litigation -- by (i) enjoining the government's enforcement of a longstanding and unquestionably constitutional criminal law; (ii) forcing the United States into the ongoing violation of an international treaty that has stood for decades as a central pillar in the international effort to combat drug abuse and drug trafficking; (iii) "modif[ying] or enjoin[ing] enforcement of a staggering number of regulations implementing the CSA," Pet. App. 160a n.3; (iv) compelling the federal government to undertake ongoing and burdensome monitoring and supervision of church activities; (v) forcing the United States to open its borders to an internationally outlawed hallucinogenic substance; (vi) rendering the American public, including children, vulnerable to significant physical and mental health risks by authorizing the distribution and use of a Schedule I controlled substance; and

(vii) putting a new drug delivery system for a Schedule I substance on American soil.

The predicate for that extraordinary injunction was not that respondents had proven a likelihood of success on the merits, but that the United States had failed to disprove that respondents would prevail -- that is, to prove by a preponderance of the evidence that DMT is as harmful as Congress determined and that uniform enforcement of the CSA and compliance with longstanding treaty obligations constitute compelling interests. Pet. App. 72a-73a, 93a-94a, 227a, 236a. But the burden of proving entitlement to the extraordinary relief of a preliminary injunction "by a clear showing" rests squarely on the respondents. Mazurek, 520 U.S. at 972; see Doran, 422 U.S. at 931. RFRA requires the government, at trial, to bear the burden of proving the existence of a compelling interest advanced by the least restrictive means, 42 U.S.C. 2000bb-1(b), 2000bb-2(3), but RFRA does not alter the centuries-old equitable standard for preliminary injunctive relief. Even if a court may account for RFRA's burden shifting in assessing the likelihood of success on the merits, the ultimate burden of justifying extraordinary preliminary injunctive relief, of prevailing on the balance of harms, and of clearly showing a substantial likelihood of winning remains with the movant.[4]

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[4] See, e.g., Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1275 n.31 (11th Cir. 2001) (preliminary injunction movant must disprove affirmative defense); Mova Pharm. Corp. v. Shalala,

The court of appeals' reliance (Pet. App. 112a-114a) on Ashcroft v. ACLU, 124 S. Ct. 2783 (2004), to shift the burden to the government was misplaced. That case involved a facial, pre-enforcement challenge to the constitutionality of a content-based prohibition on speech. To the extent Ashcroft imposed special burdens on the government to avoid entry of a preliminary injunction, the decision is just one of a number of special procedural rules required by the First Amendment for adjudicating constitutional free speech claims. Id. at 2788 ("[T]he Constitution demands that content-based restrictions on speech be presumed invalid.").[5]

There is no comparable basis for altering the preliminary injunction movant's traditional burden in this case. Certainly the Constitution does not dictate such a change. The courts below rejected respondents' constitutional claims, Pet. App. 183a-197a, and, unlike the "presum[ptively] invalid" law in Ashcroft, 124 S. Ct. at 2788, the CSA is a longstanding and unquestionably

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140 F.3d 1060, 1066 (D.C. Cir. 1998) (same); DSC Communications Corp. v. DGI Techs., Inc., 81 F.3d 597, 600 (5th Cir. 1996) (same); Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp., 990 F.2d 25, 27 (1st Cir. 1993) (Breyer, C.J.) (same); Atari Games Corp. v. Nintendo of America, Inc., 975 F.2d 832, 837 (Fed. Cir. 1992) (same); Kontes Glass Co. v. Lab Glass, Inc., 373 F.2d 319, 320 (3d Cir. 1967) (same); see also Lexmark Int'l, Inc. v. Static Control Components, Inc., 387 F.3d 522, 550 (6th Cir. 2004).

[5] Another related rule readily permits pre-enforcement facial challenges to laws burdening speech, and preliminary injunctions in such cases generally seek to prevent a new law from taking effect and thus preserve the status quo. Ashcroft, 124 S. Ct. at 2794.

constitutional law, see Gonzales v. Raich, 125 S. Ct. 2195 (2005), including its application to the religious use of DMT preparations and other controlled substances, see Smith, supra. In addition, the court went far beyond Ashcroft by allowing burden allocation at trial to control every step of the preliminary injunction analysis, including evaluation of the irreparable harm to the government. Finally, respondents never proved that it was more likely than not that they would prevail, let alone made a "clear showing," Mazurek, 520 U.S. at 972, of a substantial likelihood of success on the merits. Their showing left the record in a state of "equipoise." Pet. App. 227a. Because "[t]he history of equity jurisdiction is the history of regard for public consequences," Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 717 (1996), a court faced with evidentiary equilibrium "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction," Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982), and should require a more definitive showing before enjoining enforcement of a longstanding criminal law and ordering the Executive Branch to violate an equally longstanding treaty.

B. The CSA's Closed System Of Regulating Schedule I Drugs Is The Least Restrictive Means Of Furthering The Government's Compelling Public Health And Safety Interests

1. DMT Preparations are Dangerous and Susceptible to Abuse

The CSA is one part of a larger legislative effort "to deal in a comprehensive fashion with the growing menace of drug abuse in

the United States." H.R. Rep. No. 1444, 91st Cong., 2d Sess., Pt. 1, at 1 (1970). Congress enacted the CSA as a "comprehensive" and "'closed' system of drug distribution" for all controlled substances, id. at 1, 6, which strictly demarcated the drug transactions that would be permitted, while rendering all "transactions outside the legitimate distribution chain illegal," id. at 3. Individual departures from that scheme are proscribed. United States v. Moore, 423 U.S. 122, 141 (1975). Within that framework, Congress comprehensively banned the import, manufacture, distribution, possession, and use of Schedule I substances outside of tightly controlled research projects. 21 U.S.C. 841(a)(1).

Congress itself placed DMT and any preparation containing DMT in Schedule I because they "ha[ve] a high potential for abuse," "ha[ve] no currently accepted medical use in treatment in the United States," and have "a lack of accepted safety for use * * * under medical supervision." 21 U.S.C. 812(b)(1)(A)-(C), (c); see Raich, 125 S. Ct. at 2204. That classification reflects a congressional judgment that DMT preparations warrant a categorical prohibition on importation, distribution, and use, rather than the regime of limited but highly regulated production and use provided for substances in the other Schedules.

Indeed, stanching the rapid expansion in the use of hallucinogens like DMT was of particular concern to Congress. At the time of the CSA's enactment, "hallucinogens accounted for the

greatest single increase in drug offenses in the United States." H.R. Rep. No. 1444, supra, at 7. Congress had before it evidence that DMT is a "known and abused" hallucinogen, that has mind-altering effects "because of [its] direct action on the brain-cells."[6] DMT's pharmacological properties are similar to LSD. Pet. App. 218a; see United States v. Green, 548 F.2d 1261, 1265, 1269 (6th Cir. 1977) (drug user interchanged DMT and LSD). DMT can precipitate psychoses, cause prolonged dissociative states, and can catalyze latent anxiety disorders. J.A. 124-127, 297, 654-659. In fact, DMT was first listed as a dangerous controlled substance by the Food and Drug Administration in 1966 based on its "hallucinogenic effect" and "potential for abuse." 31 Fed. Reg. 4679 (1966).

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[6] Controlled Dangerous Substances, Narcotics and Drug Control Laws: Hearings Before the House Comm. on Ways and Means, 91st Cong., 2d Sess. 305 (1970); see Drug Abuse Control Amendments -- 1970: Hearings Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce (Drug Abuse Hearings), 91st Cong., 2d Sess. 843-844 (1970) (DMT is one of a number of hallucinogens that "act on the central and autonomic nervous systems to increase pupil size, blood pressure, wakefulness, attentiveness, acuity, suggestibility, distractibility; to promote illusions (common) and visual hallucinations (rare); to produce rapid swings of emotion from marked euphoria (most common) to marked depression or anxiety (less usual); and to increase suspiciousness (paranoia)"; evidence that such hallucinogens cause "[a]cute anxiety, panic, depressive and paranoid reactions; accidental or deliberate suicide * * *; persistent mood changes usually of depressed nature lasting weeks or months; * * * confusion with increased difficulty in distinguishing between reality and fantasy; possible violence from paranoia," and "increased heart rate and blood pressure (mainly DMT)"); ibid. (no validated medical uses for DMT).

2. Preventing the Harms Caused by DMT Preparations is a Compelling Interest

The use of and trafficking in controlled substances "creates social harms of the first magnitude," City of Indianapolis v. Edmond, 531 U.S. 32, 42 (2000), making drug abuse "one of the most serious problems confronting our society today." National Treasury Employees Union v. Von Raab, 489 U.S. 656, 674 (1989). "Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances." Harmelin v. Michigan, 501 U.S. 957, 1003 (1991) (Kennedy, J., concurring in part). Protecting the public from those threats to health and safety is a prototypical compelling governmental interest. See Wisconsin v. Yoder, 406 U.S. 205, 220 (1972); Sherbert v. Verner, 374 U.S. 398, 403 (1963).

3. Congress's Findings Satisfy RFRA and Preclude Individual Religious Exemptions

The government has a compelling interest in the uniform enforcement of the CSA's Schedule I prohibitions. This Court repeatedly recognized in pre-Smith free exercise cases that certain vitally important statutory programs could not function consistent with a regime of religious exemptions. See Hernandez v. Commissioner, 490 U.S. 680 (1989) (uniform application of the tax laws); United States v. Lee, 455 U.S. 252 (1982) (Social Security Act); Braunfeld v. Brown, 366 U.S. 599 (1961) (Sunday closing laws); Reynolds v. United States, 98 U.S. 145, 166-167 (1878)

(criminal prohibition on polygamy). Those precedents include cases that unambiguously applied the same compelling interest test that RFRA codifies. See, e.g., Smith, 494 U.S. at 883, 884-885 (noting that Lee applied that test). In each case, the comprehensiveness of the government's regulatory program, the legislature's narrow delineation of any viable exceptions, and the critical importance of the interests advanced by the programs combined to create a compelling interest in uniform enforcement that could not be advanced if subjected to piecemeal exemptions.

In light of the vital governmental interests in public health and safety served by the CSA, Congress's findings concerning the inherent dangerousness of Schedule I substances, the intractable law enforcement problems posed by drug trafficking, and the imperative of a comprehensive and closed regulatory scheme satisfy RFRA's compelling interest and least restrictive means inquiries.

First, Congress did not just find that DMT was "dangerous in the abstract," Pet. App. 95a. By placing it in Schedule I, Congress determined that DMT actually "has a high potential for abuse" and cannot be safely used even "under medical supervision." 21 U.S.C. 812(b)(1)(A), (C). Congress further found that, for mind-altering hallucinogens like DMT, the potential for abuse extends to "any material, compound, mixture, or preparation which contains any quantity of" DMT. 21 U.S.C. 812(c), Schedule I(c) (emphases added). The vital public health and safety interests

served by the CSA thus are implicated by all uses under all conditions of all DMT-based substances, regardless of the user's motive or preference for delivery through a needle, pipe, or tea.

Congress's determination that a categorical ban is required encompasses the very individualized consideration and judgment that RFRA requires. Religious motivation does not change the science. The serious adverse "health effects caused by the use of controlled substances exist regardless of the motivation of the user," and as a result "the use of such substances, even for religious purposes, violates the very purpose of the laws that prohibit them." Smith, 494 U.S. at 905 (O'Connor, J., concurring in the judgment).

Second, the CSA cannot function with its necessary rigor and comprehensiveness if subjected to judicial exemptions. Few law enforcement tasks have proved more formidable than the detection of unlawful drug usage and the prevention of drug abuse and diversion. Indeed, "the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement." United States v. Mendenhall, 446 U.S. 544, 562 (1980).[7] Congress enacted the CSA to "strengthen" federal control over drugs, Pub. L. No. 91-513, 84 Stat. 1236 (preamble), to "attack[] with the full power of the Federal Government" the "illegal traffic in drugs," H.R. Rep. No.

[7] See Edmond, 531 U.S. at 42 (law enforcement problems are "daunting and complex."); Reina v. United States, 364 U.S. 507, 512 (1960) (drug trafficking "present[s] particularly difficult problems of law enforcement").

1444, supra, at 9, and to supplant a scattershot system of drug regulation that had failed to prevent the burgeoning epidemic of drug abuse, see id. at 1, 6; Raich, 125 S. Ct. at 2202-2203. Congress concluded that only a "closed system of drug distribution," H.R. Rep. No. 1444, supra, at 6; Raich, 125 S. Ct. 2203, would avert the significant dangers associated with the use of Schedule I drugs and combat the growing and intractable problems of drug abuse and drug trafficking. The effectiveness of that closed system will necessarily be undercut by judicially crafted exemptions on terms far more generous than the narrow clinical studies that Congress authorized. See United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 492, 499 (2001).

With respect to Schedule I substances in particular, the very psychic and physiological features that render the drugs so dangerous also render them attractive to drug users and susceptible to abuse. Indeed, Congress specifically found, 21 U.S.C. 801(3), and this Court recently reaffirmed, that, as a result of the pervasive and entrenched market for illicit drugs and the constant demand for new and variant forms of Schedule I controlled substances, isolated or localized exemptions from Schedule I's prohibitions are infeasible. Raich, 125 S. Ct. at 2203 n.20, 2211-2215. The religious motives of the distributor or user do not change that drug culture or the law-enforcement realities, and, "[i]f 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 2214.

Third, the court of appeals' foundational premise that religious exemptions could be cabined, so that the compelling interests served by the CSA would be unimpaired, blinks reality. The framework adopted by RFRA, pre-Smith precedent, and fundamental principles under the Religion Clauses, reinforced just last Term, see Cutter, 125 S. Ct. at 2121, generally require that any religious exemption be extended to all similarly situated adherents. Thus, in considering only whether the government had a compelling interest in prohibiting the "use of hoasca by the UDV" (Pet. App. 73a), the court below repeated the error this Court corrected in Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 654 (1981):

> By focusing on the incidental effect of providing an exemption from Rule 6.05 to ISKCON, the Minnesota Supreme Court did not take into account the fact that any such exemption cannot be meaningfully limited to ISKCON, and as applied to similarly situated groups would prevent the State from furthering its important concern with managing the flow of the crowd.

Likewise, in Lee, supra, the Court denied an Amish farmer's free exercise claim seeking exemption from the social security system because, if allowed, the government would have to accommodate "myriad exceptions flowing from a wide variety of religious beliefs." 455 U.S. at 260; contrast Pet. App. 150a, 152a (refusing

to consider the risk of "myriad claims for religious exceptions").[8]

The "anomalously case-specific nature of" the exemption that the court of appeals assumed RFRA would allow, Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 703 (1994), overlooks that "neutrality as among religions must be honored" in the accommodation process. Id. at 707; see McCreary County, slip op. 11. Indeed, the neutral accommodation command in RFRA, like the identically worded RLUIPA standard, ensures that accommodations will be available in a non-discriminatory fashion. Cutter, 125 S. Ct. at 2121.

For that reason, the government's compelling interest in uniform enforcement should have been assessed in light of its obligation of evenhanded treatment for all similarly situated religious adherents. At a minimum, an equivalent exemption will be

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[8] See also Hernandez, 490 U.S. at 700 (considering other religious exemptions from the tax system); Goldman v. Weinberger, 475 U.S. 503, 512 (1986) (Stevens, J., concurring) ("[W]e must test the validity of the Air Force's rule not merely as it applies to Captain Goldman but also as it applies to all service personnel who have sincere religious beliefs that may conflict with one or more military commands."); Bob Jones Univ. v. United States, 461 U.S. 574, 604 & n.30 (1983) (comprehensive prohibition on racial discrimination in education would be undercut by exempting all schools that are religiously motivated to engage in segregation); Braunfeld, 366 U.S. at 608-609 (opinion of Warren, C.J.) (rejecting exemption from Sunday closing law, in part because of the need for uniformity and the difficulties of exempting all persons "who, because of religious conviction, observe a day of rest other than Sunday"); United States v. Israel, 317 F.3d 768, 772 (7th Cir. 2003) ("Any judicial attempt to carve out a religious exemption in this situation would lead to significant administrative problems for the probation office and open the door to a weed-like proliferation of claims for religious exemptions.").

demanded by other religious groups that use ayahuasca, like the Santo Daime Church and the "many [other] sects and individuals who use the tea." J.A. 182; see Kiryas Joel, 512 U.S. at 715-716 (O'Connor, J., concurring in the judgment) ("A state law prohibiting the consumption of alcohol may exempt sacramental wines, but it may not exempt sacramental wine use by Catholics but not by Jews."). While the Santo Daime Church has more broadly opened its hoasca ceremonies to others, J.A. 178, 587, courts may consider differences in evangelistic theology to be a tenuous basis for selectivity in governmental accommodations. Courts might also be concerned that a selective accommodation would effectively give the UDV a competitive advantage over the Santo Daime church in the religious "marketplace of ideas." McCreary County, slip op. 3 (O'Connor, J., concurring).[9] Religious claimants seeking other hallucinogens (such as marijuana and LSD) will no doubt insist that they are similarly situated as well. See note 13, infra.

In short, when RFRA's compelling interest test is properly calibrated for the constitutional mandate (which is reflected in

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[9] See Sherbert, 374 U.S. at 409. In any event, the evangelistic differences between UDV and Santo Daime may not be that great. The UDV church in Brazil invited the rock star Sting to participate in one of its hoasca ceremonies, explaining that "[l]ike anyone else, he was invited to participate in a session. This doesn't mean that he committed himself to our religion." Katheryn Gallant, Tea Party <www.brazzil.com/pages/p23may95.htm> (visited July 6, 2005); see 10/22/01 Tr. 183 (UDV's leader "would love to see everybody in the UDV"). More importantly, nothing in the preliminary injunction limits hoasca use to UDV members.

RFRA's neutral text) that similarly situated religious claimants receive equal accommodations, the court of appeals' conclusion that the government's compelling interest in maintaining a comprehensive and closed system of drug distribution could co-exist with judicially implemented religious exemptions becomes a "contradiction in terms." Lee, 455 U.S. at 258.

Fourth, and relatedly, like the efforts to obtain medical or compassionate exemptions to Schedule I, claims for religious exemptions, once recognized, would proliferate.[10] Under the court of appeals' decision, the CSA's hitherto closed and uniform enforcement scheme would give way to the independent, case-by-case judgments of more than 700 district court judges in countless cases based on dueling experts, personal testimonials, record differentials, journal articles, and judicial assessments of whether a particular drug or its delivery system qualifies as a "street drug" or as "esoteric," Pet. App. 103a. But the CSA's

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[10] See note 13, infra. The DEA has received multiple requests for religious exemptions for hoasca, marijuana, and peyote use by non-tribal members. See also, e.g., Mot. by Santo Daime Church for leave to file amicus curiae brief in support of Pltf. Mot. for Prelim. Inj.; United States v. Shoemaker, No. 1:02-cr-00046-JEC-AJB (N.D. Ga.) (religious effort to import the plants to make ayahuasca); B. Rankin, Trial Ordered in Case of Hallucinogenic Tea, Atl. J. Const., Oct. 24, 2002, at F3; Church of the Living Tree: Denial of Application, 68 Fed. Reg. 17403 (2003); Genesis 1:29 Corporation: Denial of Application, 68 Fed. Reg. 15225 (2003); UDV Church decision and its impact on sacramental cannabis usage, <www.equalrights4all.org/religious/udvchurch03.htm>; <www.thc-ministry.org>; <www.christiansforcannabis.com>; <www.iamm.com>; Kiczenski v. Ashcroft, No. 2:03-cv-02305-MCE-GGH (E.D. Cal. filed Nov. 4, 2003).

design "leave[s] no doubt" that Congress did not want courts to create sub-tiers "of schedule I narcotics, with drugs in one tier more readily available than drugs in the other." Oakland Cannabis, 532 U.S. at 491, 492. Quite the opposite, Congress established an expert administrative scheme for deciding whether and when a Schedule I substance can be safely used. 21 U.S.C. 811.

District courts, operating within the constraints of case-bound litigation, do not have the requisite capacity to evaluate and comprehend fully the far-reaching implications for law enforcement that attend any decision to exempt a Schedule I substance from the CSA's rigorous controls. Indeed, an almost inevitable byproduct of court decisions under RFRA holding that Schedule I substances can be ingested safely enough in religious ceremonies is that the public will misread such rulings as indicating that a substance is not harmful, fueling an increase in its use. When fewer people believe a drug is harmful, illicit use of that drug expands.[11] The need to prevent such misperceptions underscores the imperative of preserving the CSA's closed system for Schedule I drugs.

Fifth, implicit in the preliminary injunction's 36 separate provisions is a recognition that, because Schedule I drugs are

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[11] See L. Johnston, P. O'Malley, J. Bachman & J. Schulenberg, Monitoring the Future: National Results on Adolescent Drug Use -- Overview of Key Findings 2004 at 5, 10 (NIH Pub. No. 05-5726) (2005).

dangerous, religious exceptions to the CSA are infeasible unless the government closely regulates the activities of the religion and its adherents. The district court's effort to retrofit the pre-existing regulatory scheme to permit UDV's distribution of DMT fails, however, because it compels church officials to deliver court-directed warnings as part of the administration of a sacrament and forces the government to share its drug enforcement responsibilities with "persons of authority" within a designated church hierarchy, to imbue church officials with the authority to determine who may distribute, possess, and use a Schedule I controlled substance, to coordinate inspections of imports with UDV officials, to appoint a special liaison to UDV, and to engage in ongoing, burdensome, and complex interactions between law enforcement and UDV officials. Pet. App. 251a-259a.

Putting aside that those procedures fall far short of the rigorous protections needed to maintain a closed system of drug distribution, what is most relevant is that the government felt compelled by the imperative of public safety to seek and the district court felt obliged to impose measures that raise constitutional questions.[12] Rather than construing RFRA to generate

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[12] See Larkin v. Grendel's Den, Inc., 459 U.S. 116, 126 (1982) (government may not "enmesh[] churches in the exercise of substantial governmental powers"); id. at 127 ("The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions."); Kiryas Joel, 512 U.S. at 698 (government "may not delegate its civic authority to a group chosen according to a

constitutional doubts, see, e.g., McConnell v. FEC, 540 U.S. 93, 180 (2003), the court should have credited the United States' compelling interest in a comprehensive and closed system of uniform governmental regulation of Schedule I drugs because the proffered alternative of joint governmental-church regulation is unworkable. Cf. Widmar v. Vincent, 454 U.S. 263, 271 (1981) (complying with the Establishment Clause is a "compelling" interest).

Sixth, Congress enacted RFRA against a backdrop of decades of court decisions rejecting time and again religious claims to use Schedule I controlled substances, and "it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expect[s] its enactment to be interpreted in conformity with them." Cannon v. University of Chicago, 441 U.S. 677, 699 (1979).[13] The legislative record, in

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religious criterion"); Olsen v. DEA, 878 F.2d 1458, 1462 (D.C. Cir. 1989) (R.B. Ginsburg, J.) (free exercise precedent does not "compel[] government accommodation of religious practices when that accommodation requires burdensome and constant official supervision and management").

[13] See Smith, supra; United States v. Carlson, No. 90-10465, 1992 WL 64772 (9th Cir. Apr. 2, 1992) (unpub.), cert. denied, 505 U.S. 1227 (1992); Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991); United States v. Greene, 892 F.2d 453 (6th Cir. 1989), cert. denied, 495 U.S. 935 (1990); Olsen, supra; United States v. Simon, 842 F.2d 552 (1st Cir. 1988); Olsen v. Iowa, 808 F.2d 652 (8th Cir. 1986); United States v. Merkt, 794 F.2d 950 (5th Cir. 1986), cert. denied, 480 U.S. 946 (1987); Collins v. Smith, No. 83-5716, 1985 WL 12924 (6th Cir. Feb. 14, 1985) (unpub.); United States v. Rush, 738 F.2d 497 (1st Cir. 1984), cert. denied, 470 U.S. 1004 (1985); United States v.

fact, advised that "RFRA neither permits nor invites the violation of our criminal laws," 139 Cong. Rec. 26,193 (1993) (Sen. Hatch), and directed courts to "look to free exercise of religion cases

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Middleton, 690 F.2d 820 (11th Cir. 1982), cert. denied, 460 U.S. 1051 (1983); Golden Eagle v. Johnson, 493 F.2d 1179 (9th Cir. 1974), cert. denied, 419 U.S. 1105 (1975); Kennedy v. Bureau of Narcotics and Dangerous Drugs, 459 F.2d 415 (9th Cir. 1972), cert. denied, 409 U.S. 1115 (1973); United States v. Spears, 443 F.2d 895 (5th Cir. 1971), cert. denied, 404 U.S. 1020 (1972); United States v. Hudson, 431 F.2d 468 (5th Cir. 1970), cert. denied, 400 U.S. 1011 (1971); Herndon v. United States, 405 F.2d 882 (1st Cir. 1968); Leary v. United States, 383 F.2d 851 (5th Cir. 1967), rev'd on other grounds, 395 U.S. 6 (1969); Oliver v. Udall, 306 F.2d 819 (D.C. Cir. 1962), cert. denied, 372 U.S. 908 (1963); Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959); Indian Inmates of Neb. Penitentiary v. Grammar, 649 F. Supp. 1374 (D. Neb. 1986), aff'd, 831 F.2d 301 (8th Cir. 1987); United States v. Warner, 595 F. Supp. 595 (D.N.D. 1984); Randall v. Wyrick, 441 F. Supp. 312 (D. Mo. 1977); United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968); Rupert v. City of Portland, 605 A.2d 63 (Me. 1992); State v. Rocheleau, 451 A.2d 1144 (Vt. 1982); Town v. State ex rel. Reno, 377 So.2d 648 (Fla. 1979), cert. denied, 449 U.S. 803 (1980); Gaskin v. State, 490 S.W.2d 521 (Tenn.), appeal dismissed, 414 U.S. 886 (1973); State v. Bullard, 148 S.E.2d 565 (N.C. 1966), cert. denied, 386 U.S. 917 (1967); Rheuark v. State, 601 So.2d 135 (Ala. Ct. Crim. App. 1992); State v. Flesher, 585 N.E.2d 901 (Ohio Ct. App. 1990); State v. Venet, 797 P.2d 1055 (Or. Ct. App. 1990), cert. denied, 502 U.S. 865 (1991); State v. Peck, 422 N.W.2d 160 (Wis. Ct. App. 1988); Wahid v. State, 716 P.2d 678 (Okla. Ct. Crim. App.), cert. denied, 476 U.S. 1173 (1986); People v. Evans, 710 P.2d 1167 (Colo. Ct. App. 1985); State v. Blake, 695 P.2d 336 (Haw. Ct. App. 1985); Whyte v. United States, 471 A.2d 1018 (D.C. Ct. App. 1984); State v. Brashear, 593 P.2d 63 (N.M. Ct. App. 1979); People v. Mullins, 123 Cal. Rptr. 201 (Ct. App. 1975); State v. Soto, 537 P.2d 142 (Or. Ct. App. 1975), cert denied, 424 U.S. 955 (1976); People v. Crawford, 328 N.Y.S.2d 747 (Dist. Ct. 1972), aff'd, 340 N.Y.S.2d 848 (1973); People v. Werber, 97 Cal. Rptr. 150 (Ct. App. 1971); Lewellyn v. State, 489 P.2d 511 (Okla. Ct. Crim. App. 1971); People v. Collins, 78 Cal. Rptr. 151 (Ct. App. 1969); People v. Wright, 80 Cal. Rptr. 335 (Ct. App. 1969); People v. Mitchell, 52 Cal. Rptr. 884 (Ct. App. 1966); but cf. United States v. Boyll, 774 F. Supp. 1333 (D.N.M. 1991) (extending pre-existing regulatory exemption for peyote to non-Indians).

decided prior to Smith for guidance" in applying RFRA, H.R. Rep. No. 88, 103d Cong., 1st Sess. 6-7 (1993). See 42 U.S.C. 2000bb(a)(5) and (b)(1); S. Rep. No. 111, supra, at 9 (the "compelling interest test generally should not be construed more stringently or more leniently than it was prior to Smith"); 136 Cong. Rec. 35,840 (1990) (Sen. Biden) (under RFRA, "Oregon could still keep native Americans from using peyote").

In sum, the compelling public health and safety interests advanced by the CSA, the necessity of a comprehensive and closed statutory scheme to control drug distribution, the complex and intractable character of the drug abuse and drug trafficking problem, and the infeasibility of strictly cabining religious exemptions or coordinating drug enforcement with religious officials categorically establish that the government has a compelling interest in prohibiting religious uses of Schedule I substances which cannot be served by any less restrictive means. Using RFRA to bypass Congress's prescribed standards for assessing safety in this area of uniquely complex scientific judgments and unparalleled law enforcement problems would thwart Congress's compelling interests, not advance them by a less restrictive means.

4. Tribal Use of Peyote is Distinct

Judge McConnell erroneously viewed (Pet. App. 100a-102a) the federal exemption for peyote, see 42 U.S.C. 1996a(b)(1) and (c)(1), as evidencing Schedule I's amenability to an array of religious

exemptions. In fact, the unique character of the peyote exemption proves the opposite. First, that exemption is fundamentally limited to and defined by the sui generis political status of Indian Tribes and the federal government's unique relationship with them. The statute permits ceremonial peyote use only by members of federally recognized Indian Tribes, which have a unique sovereign status within the United States. 42 U.S.C. 1996a(b)(1), (c)(1) and (2). It does not permit the use of peyote -- religious or otherwise -- by non-Native Americans or by Native Americans who are not members of federally recognized Indian Tribes.

That unique inter-sovereign accommodation is a direct outgrowth of the United States' historic trust obligation towards Indian Tribes and duty to preserve tribal culture. See 42 U.S.C. 1996a(a)(1) and (5), (c)(2) and (3); 25 U.S.C. 2901(1); Morton v. Mancari, 417 U.S. 535 (1974); Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1216 (5th Cir. 1991). The exemption's reliance on the Tribes and their unique sovereign status avoids the kind of religious entanglement envisioned by the District Court's order. Moreover, exemptions for the ancient cultural practices of federally recognized Tribes are necessarily self-limiting and do not raise the same concerns about sectarian discrimination. Peyote Way, 922 F.2d at 1217.

Second, Congress, not the courts, created the peyote exemption, and it did so on the basis of the type of extensive and

expert study of the medical and law-enforcement implications of a peyote exemption that the CSA prescribes, see, e.g., H.R. Rep. No. 675, 103d Cong., 2d Sess. 3, 4, 15 (1994), and nearly three decades of successful experience with federal and state regulatory exemptions for peyote, see 21 C.F.R. 166.3 (1966); 21 C.F.R.1307.31 (1993); Smith, 494 U.S. at 890. Even more tellingly, Congress enacted the peyote exemption just one year after the passage of RFRA. If RFRA already authorized religious exemptions from Schedule I, then there was no need for Congress, in the wake of RFRA and fully cognizant of its existence, 42 U.S.C. 1996a(b)(6), to enact the peyote exemption. Courts should not read statutory language "essentially as surplusage -- as words of no consequence," Ratzlaf v. United States, 510 U.S. 135, 140 (1994).[14]

Finally, because "the Constitution * * * singles Indians out as a proper subject for separate legislation," United States v. Antelope, 430 U.S. 641, 649 n.11 (1977) (quoting Mancari, 417 U.S. at 552), the existence of that specialized accommodation does not diminish Congress's otherwise categorical compelling interests in maintaining the closed, uniform, and comprehensive coverage of the CSA. The existence of a Native American hiring preference, upheld in Morton, supra, did not prevent the Court from finding a

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[14] The legislative history of the peyote exemption corroborates that RFRA does not provide the necessary protection. See H.R. Rep. No. 675, supra, at 6-7 ("H.R. 4230 remains necessary notwithstanding the recent enactment of the Religious Freedom Restoration Act.").

categorical compelling interest in not accommodating religiously based racial-segregation policies in Bob Jones, supra.[15]

5. Congress's Findings Merit Substantial Deference

a. Congress's judgment must be sustained because it is reasonable

RFRA does not require accommodations that imperil the health and safety of members of the public. Thus, even if RFRA requires some judicial examination of whether Congress's findings specifically preclude a requested religious exemption, the court of appeals fundamentally erred because, in making its predicate determinations about the safety and susceptibility to abuse and diversion of respondents' DMT preparation, the court failed to accord any significance, let alone substantial deference, to Congress's findings and judgment on those critical issues.

In Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994) (Turner I), the Court held that, in reviewing whether regulations run afoul of the Free Speech Clause, courts "must accord substantial deference to the predictive judgments of Congress" in evaluating empirically the need for regulation and the burdens that it imposes. Id. at 665. A reviewing court's "sole obligation is 'to assure that, in formulating its judgments,

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[15] Cf. Hernandez, 490 U.S. at 700 (pre-existing exemptions in the tax code do not undermine compelling interest in uniform enforcement of the tax law); Lee, 455 U.S. at 260-26a (a statutory exemption for the self-employed Amish did not undermine compelling interest in uniform participation in the social security program).

Congress has drawn reasonable inferences based on substantial evidence.'" Turner Broadcasting Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997) (Turner II). 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. That is because Congress "is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon" empirical questions. Turner I, 512 U.S. at 665.

The same rule applies under the First Amendment's Religion Clauses. In Jacobson v. Massachusetts, 197 U.S. 11 (1905), a case seeking a religious exemption from vaccinations, this Court took the opposite tack of the district court here. While Jacobson sought to introduce medical experts who would testify in opposition to the necessity or wisdom of vaccination in his individual case, id. at 23, 30, this Court held that "[i]t would not have been competent to introduce the medical history of individual cases," id. at 23, to attempt to impugn the scientific conclusions on which "legislatures and courts have acted upon * * * with general unanimity," id. at 24. Such "expert testimony * * * could not have changed the result" because "[i]t would not have justified the court in holding that the legislature had transcended its power in enacting this statute on their judgment of what the welfare of the people demands." Ibid. Rather, resolution of "opposing theories"

of medicine "was for the legislative department to determine in the light of all the information it had or could obtain."[16]

That deference in constitutional cases extends, a fortiori, to an effort to use one congressional enactment to authorize judicial re-evaluation of the factual premises underlying another congressional act. And it applies with particular force when, as here, medical and scientific judgments are made. "When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation." Marshall v. United States, 414 U.S. 417, 427 (1974).[17]

Here, however, the court set aside Congress's judgment that "any" DMT preparation was unsafe for use even under medical supervision and highly susceptible to abuse, 21 U.S.C. 812(b)(1)(A) and (C), based entirely on the limited record before it, without

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[16] See also Board of Educ. v. Mergens, 496 U.S. 226, 251 (1990) (in Establishment Clause case, "[g]iven the deference due the duly enacted and carefully considered decision of a coequal and representative branch of our government, * * * we do not lightly second-guess such legislative judgments, particularly where the judgments are based in part on empirical determinations.").

[17] See Jones v. United States, 463 U.S. 354, 365 n.13 (1983) ("[I]n the face of this [medical] uncertainty, * * * courts should pay particular deference to reasonable legislative judgments."); Jacobson, 197 U.S. at 35 (where Congress's judgment has a reasonable basis in the medical evidence and finds "strong support in the experience of this and other countries, no court, much less a jury is justified in disregarding the action of the legislature simply because in its or their opinion that particular method was -- perhaps, or possibly -- not the best"); Lambert v. Yellowley, 272 U.S. 581, 594-595 (1926).

paying any discernible heed to Congress's findings. The court was explicit that the evidentiary "equipoise" (Pet. App. 227a) it found in the "virtually balanced" (id. at 236a) record concerned only the "evidence presented by the parties" (id. at 237a), and did not factor in Congress's independent judgment. But, under Turner and Jacobson, Congress's findings and judgment on the specific questions before the court -- the dangerousness of a DMT preparation and the law-enforcement feasibility of individualized exemptions -- should, at a minimum, have been the equipoise tie-breaker.

Furthermore, evidentiary "equipoise," Pet. App. 227a, is substantial evidence corroborating Congress's judgment that importation, distribution, and use of "any" DMT preparation -- to include hoasca -- poses an unacceptable risk of harm to public health and safety, and thus that a compelling interest in denying an exemption exists. "Substantial evidence" does not mean proof by a preponderance. To the contrary, it is a "standard more deferential than [the Court] accord[s] to judgments of an administrative agency," Turner II, 520 U.S. at 195, and is even "somewhat less strict" than the clearly erroneous standard, Dickinson v. Zurko, 527 U.S. 150, 162 (1999). "[T]he possibility of drawing two inconsistent conclusions from the evidence" -- the very essence of evidentiary equipoise -- "does not prevent * * * [a] finding from being supported by substantial evidence." Turner

II, 520 U.S. at 211. It is enough if "a reasonable mind might accept" the record "as adequate to support a conclusion," Zurko, 527 U.S. at 162, and Congress's judgment can be overridden only if a "reasonable factfinder would have to conclude" that hoasca can be used safely in a religious ceremony without risk of abuse or diversion, INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992) (emphasis added). Respondents fell far short of that showing.

b. Congress's judgments concerning DMT and its preparations are amply supported

The evidence amply corroborated Congress's findings that "any" DMT preparation -- including a DMT tea like hoasca -- "has a high potential for abuse" and has "a lack of accepted safety for use * * * [even] under medical supervision." 21 U.S.C. 812(b)(1)(A) and (C). And those findings establish a compelling public safety interest in denying an accommodation under RFRA.

(1) Hoasca's harmfulness: The district court acknowledged that the government provided a "great deal of evidence suggesting that hoasca may pose health risks to UDV members." Pet. App. 244a. DMT is a mind-altering hallucinogen with pharmacological properties similar to LSD. Id. at 218a. Respondents ingest hoasca at least 34 times a year, id. at 213a, and administer the same tea to children and pregnant women. J.A. 130 ("The drugs in ayahuasca cross the placental barrier and reach the developing fetal brain."); id. at 458-462, 580-581; Gov't C.A. App. 268. Hoasca delivers DMT to the brain in an amount sufficient to produce a

"significantly altered state of consciousness." Pet. App. 214a. More than half of the subjects in a hoasca study suffered cardiac irregularities. Id. at 226a. Hoasca also causes "alterations in the sensation of breathing or heartbeat, intestinal cramps, vomiting, diarrhea, an unsteady gait, or[] even [causes] fainting or falling down." Gov't C.A. App. 244.

"[P]sychosis is definitely of most concern." Pet. App. 224a. Respondents' own experts acknowledged that hallucinogens as a class can precipitate psychoses and other adverse psychological reactions. J.A. 657-659, 869. The Medical-Scientific Department of the Brazilian UDV has acknowledged that hoasca poses "a possible risk of worsening a psychotic condition," Gov't C.A. App. 250, and has documented numerous instances in which hoasca caused or contributed to psychotic episodes.[18] UDV's leader, respondent

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[18] See J.A. 193-194 (hoasca "may have been a contributing factor" in worsening individual's obsessive-compulsive disorder and paranoia); id. at 195-196, 198 (after ingesting hoasca, individual "displayed a major behavioral change" and "appeared confused and restless," becoming "delirious and inarticulate"; "Hoasca tea could have acted as a[] triggering factor for the psychotic episode"); id. at 211-212 ("Hoasca tea was a predisposing factor" for the member's schizophrenia); id. at 228 ("Hoasca tea was a factor in renewing the acuteness of" the member's "non-organic psychotic disorder"); id. at 230-232 (during hoasca session, individual "appeared agitated" and began "talking incessantly and claiming to be someone else"; "He spent the entire next day saying that there was [a]n obsessive spirit beside him"; "Hoasca tea was the factor which triggered" the dissociative disorder); id. at 245-246 (Hoasca led to a "renewed acuteness" of schizophrenia); id. at 252-253 (Hoasca "was a factor in renewal of acuteness" of schizophrenia); id. at 254, 257 (Hoasca "contributed as a predisposing factor in the psychotic episode," where the individual had "aggressive reactions and [a] state of mental confusion," and began eating

Bronfman, describes ayahuasca as creating a "tremendous potential for fragmentation of the psyche" and producing "horrible and terrifying experiences." J.A. 179, 182. Respondents' expert too has recognized that hoasca ingestion can produce "nightmarish visionary experience[s]" and "turbulent states of consciousness." J.A. 92, 93. In addition, as respondents themselves acknowledge, hoasca poses a significant risk of dangerous adverse drug interactions, Pet. App. 221a, with what UDV Brazil describes as potentially "hazardous effects to the health," Gov't C.A. App. 250.

Respondents submitted evidence that their particular religious setting "optimized safety and minimized the likelihood of adverse consequences." Pet. App. 220a. But, while a ceremonial setting may make DMT ingestion less dangerous than recreational use, it does not make it safe. The setting does not and cannot change the underlying biochemistry of the person or the pharmacology of the drug. Indeed, the Brazilian UDV documented 24 psychotic incidents during ceremonial hoasca usage. Id. at 223a. Moreover, the vast majority of those incidents appeared in individuals with pre-existing mental illnesses, id. at 223a, 225a, which belies any suggestion that respondents can effectively screen out vulnerable participants.[29] Beyond that, nothing in the preliminary injunction

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"lawn grass" and drinking "swamp water").

[29] See also J.A. 88 (out of fifteen members of the UDV church tested, "five * * * had prior formal alcohol abuse disorders, two had past major depressive disorders, and three had past phobic

requires such pre-screening or constrains the distribution of hoasca to persons with a history of mental illness or drug abuse. The court ordered only that UDV write to "current and prospective members," advising them that, "if they have a history of psychosis or psychotic episodes they may be particularly susceptible to an adverse reaction in using hoasca" and "encourage" them to seek the advice of a health care professional. Id. at 259a. Such self-policing, especially by persons with a history of mental illness or disease, is grossly inadequate to protect health and safety. The similar requirement that "current and prospective members" be provided a list of prescription drugs that may adversely interact with hoasca and be "encourage[d]" to notify a health care professional if they experience such a reaction is no better.

Nor does the fact that the DMT is ingested in a tea justify the district court "replac[ing] Congress' factual predictions" about the preparation's dangerousness or susceptibility to diversion "with [the court's] own." Turner I, 512 U.S. at 666. As to Schedule I, Congress found danger in "any * * * preparation which contains any" DMT. 21 U.S.C. 812(c), schedule I(c). That the mind-altering effects of DMT have a slower onset when ingested in the form of tea, Pet. App. 219a, 229a, makes no difference. The

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anxiety disorders"); id. at 91 ("[m]any" of the fifteen had "pervasive dysfunctional behaviors," including aggression, incarceration for violent crimes, alcohol and drug abuse (cocaine, methamphetamines) and addictions).

same occurs with marijuana tea.[30] Even in the form of tea, the DMT remains "fully hallucinogenic," J.A. 127, and its effects actually last longer, Pet. App. 229a.

(2) Hoasca's potential for abuse and diversion: Government experts explained that hoasca's hallucinogenic visions and euphoric effects create "a significant potential for abuse." J.A. 148; see id. at 152; Pet. App. 229a.[31] First, DMT was a drug of abuse in the 1960s, and there has been a marked "resurgence in the abuse of hallucinogenic substances," with the illicit use of hallucinogens rising by 92% in the 1990s. J.A. 161. Nearly 35 million persons have tried hallucinogens, including more than 10% of high school seniors.[32] Respondents admit that there is "great interest" and "a tremendous amount of curiosity about 'ayahuasca' here in the United States," J.A. 187, 188; see Gov't C.A. App. 332 ("a new and very American 'culture of curiousity' is forming"). In addition, there is a "network of modern-day Shaman 'therapists'" in the United States who promote and use "psychedelic plant preparations," including ayahuasca, J.A. 161, as respondents acknowledge:

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[30] See <http://www.usdoj.gov/ndic/pubs3/3593/index.htm#How>; <http://www.marijuana-tea.com/>.

[31] While hoasca may also produce nausea and vomiting, that is a common feature of most illicit drugs, which continue to be abused because the euphoric effects outweigh that negative, J.A. 152-153.

[32] See <http://www.whitehousedrugpolicy.gov/drugfact/hallucinogens/index.html>.

> Many people [from the United States] will be coming to Brazil looking for a Ayahuasca experience and hoping to receive training as an 'Ayahuasca Shaman.' The competition among transpersonal psychologists in this country is very great and people are looking for new approaches and therapies to distinguish themselves. Currently there are therapists in this country who have access to vegetal [ayahuasca] and have made up their own rituals where they distribute it.

J.A. 183-184.[33]

In addition, "[h]oasca use in Europe, often a helpful indicator for determining the possibility of the diversion in the United States, has risen substantially in recent years." Pet. App. 231a (emphasis added). "Ayahuasca is not an isolated phenomenon" any more -- "enthusiasm for these plants, their uses and the ways of life that go with them is growing fast within the Western world." Observatoire Geopolitique des Drogues, "Ayahuasca: From the Amazon to the Urban Jungle," The World Geopolitics of Drug 1998/1999 Annual Report 106 (Apr. 2000). The Internet also documents expanding interest in the drug, Pet. App. 231a, with countless websites offering tourism packages to Brazil to

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[33] According to respondents, within the United States "[t]here are many people with little or no experience experimenting with hoasca as a tool for personal growth and spiritual transformation within the psychotherapeutic model. There are many people seeking out groups and individuals who work with the tea to 'get an experience' or to somehow find a source of vegetal that they can use in their own work." J.A. 187; id. at 188 (expressing concern that "possibly 1000 psychologists, therapists and healers from the U.S. * * * [are] seeking contact with groups that use hoasca"); id. at 179 ("Within our culture there is a phenomena that you never find in any indigenous society of self-appointed 'instant shamans' who go through no formal training and are accountable to no one.").

participate in ayahuasca ceremonies, marketing and selling the substance or ingredients for making it, and extolling the hallucinogenic experiences provided by the tea.[34]

Second, the process of importing hoasca, which cannot be made domestically, opens up multiple avenues of diversion. "Controlled substances shipped in international commerce are particularly vulnerable to diversion, whether through theft, loss, or fraud." Pet. App. 232a. "International transport is the most complex environment for the handling of a substance with abuse potential," in part because of the "many handlers of the shipment, and multiple

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[34] "The influence of the Internet [on interest in ayahuasca] cannot be over-estimated. The last few years of the old millennium saw a proliferation of Web sites, private subscription lists, entheo-tourism companies, supply houses for essential ingredients for home-cooking, "trip report" and recipe databases and announcements for international conferences." Diana Trimble, "Disarming the Dream Police The Case of the Santo Daime," <http://www.cesnur.org/2003/vil2003_trimble.htm>. See also, e.g., Gov't C.A. App. 306-313; D. Lattin, The Plant that Moves Their Souls, San Francisco Chronicle, Mar. 26, 2000; <http://www.biopark.org/peru/sqcost.html>; <http://www.bluemorphotours.com/shamanic_tour_sample_itinerary.asp>; <http://www.wasai.com/ayahuasca.htm>; <http://www.perucuzco.com/mystical_tours>; <http://www.biopark.org/peru/ayarecipe-02.html>; <http://www.erowid.org/chemicals/ayahuasca; http://www.shamanic-extracts.com/resources/27/ethnobotanicals270.html>; <http://www.shamansden.com/home.php>; <http://www.herbalfire.com/>; <http://www.ethnobotanysource.com/viridis.htm>; <http://www.ayahuasca.com/drupal/taxonomy/page/or/29>; <http://groups.yahoo.com/group/ayahuasca/messages/1>; <http://psychoactiveherbs.com/catalog/faq.php#H27>; <http://www.shamansden.com/home.php> (ayahuasca is #1 "best seller").

inspections at numerous checkpoints -- each of which is an opportunity for diversion." J.A. 164.

In rejecting Congress's judgment that this DMT preparation "has a high potential for abuse," 21 U.S.C. 812(b)(1)(A), the district court noted testimony about the alleged "thinness" of the market for DMT tea. Pet. App. 235a. But respondent Bronfman's own words prove otherwise: "Because of the great interest in 'ayahuasca' here," there are "financial rewards involved in having a supply to distribute." J.A. 188.

> People in the United States and Europe are willing to pay between $200-$450 for a glass of vegetal [ayahuasca]. I know a man who gets vegetal from Peru and conducts groups of about 20 every Saturday night. He makes about $5,000 per group. I am almost positive that there will be people returning from Brazil * * * who will later advertise themselves as shamanic counselors trained by a shaman in the Amazon jungle. They will be doing this to earn money distributing vegetal.

J.A. 184.[35] The district court also noted testimony about "the availability of substitutes for hoasca." Pet. App. 233a. That is debatable, since respondent Bronfman is of the view that "there are no analogs to hoasca." J.A. 184. But more to the point, the

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[35] See J.A. 188 ("There are psychologists in this country distributing vegetal that they have either bought * * * or have acquired through different sources in Peru, Bolivia and Brazil. Often they're selling session[s] for $200-$400 a cup."); ibid. ("[T]here was a woman in Telluride who after participating in 5 sessions * * * designated herself as a Mestre and is selling sessions for $300 an experience."); see also J. Bone, "James Bone's New York," Times (UK) 16 (Jan. 10, 1998) ("New York's latest drug of choice is a psychotropic substance of the Andean Indians known as ayahuasca, or the Rope of Death. New Agers are paying $300 (Pounds 187) apiece to sip [it]."), available at 1998 WLNR 6118510.

reality of the drug culture is that drug abusers and profiteers routinely seek to divert their supplies from legitimate channels even where illicit substitutes exist, because of ease of accessibility, reduced cost, and enhanced product control. See 10/31/01 Tr. 1415-16; Raich, 125 S. Ct. at 2213-2214.

The district court also noted testimony (Pet. App. 234a-235a) that the volume imported would be relatively small. But that assumes that only UDV would be permitted to import and distribute hoasca, when in fact RFRA's protection would have to be extended to all similarly situated groups. See, supra, at 23-26. Furthermore, the court presumed that the number of participants in UDV ceremonies would not expand and that UDV would engage in the bare minimum number of hoasca ceremonies, when in fact members of UDV Brazil "often" use hoasca "as frequently as several times per week," J.A. 82, and UDV's leader testified that "I would love to see everybody in the UDV," 10/22/01 Tr. 183. The preliminary injunction, moreover, prohibits the government from limiting the amount of hoasca imported and imposes no limits on the amount or frequency of distributions and ingestion or on the concentration of DMT in the hoasca. Pet. App. 254a.[36]

Finally, both the district court and Judge McConnell suggested that the use of tea as a delivery system made it less likely to be

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[36] The DMT content in hoasca can "vary significantly from batch to batch" due to the chemical composition of the plants. J.A. 124.

diverted, because of its "bulky form," Pet. App. 235a, and its purportedly "esoteric" character which, Judge McConnell reasoned, distinguishes hoasca from "street drugs," id. at 103a. But there is nothing "esoteric" about DMT, which has a long history of abuse in this Country, and "is back in favor as a 'party drug,' used as a short-acting alternative to LSD."[37] While DMT -- which has been labeled "the businessman's trip" -- may be abused as much on Wall Street as on more pedestrian streets, that distinction cannot reasonably justify judicial descheduling under RFRA.[38] And, as the illegal smuggling of aliens and firearms attests, bulkiness is no hindrance to illicit trafficking. It certainly did not prevent UDV from bringing at least fourteen shipments of hoasca into the United States before the Customs Service discovered its true nature. See Pltf. Mot. for Prelim. Inj., Exh. L. Indeed, tea is a known delivery system for many controlled substances, from marijuana, to

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[37] Richard Seymour, The Lunch-Hour Psychedelic: A Thirty Minute Trip, Psychopharmacology Update, Apr. 1, 1999; see "New Drug Threat 'Off the Scale,' Experts Warn," The Daily Telegraph (Australia) at 18 (May 8, 1998); Rocky Barker, "Powerful Hallucinogen Found in Drug Bust," Idaho Statesman, Oct. 19, 2004, available at 2004 WLNR 16659416.

[38] See <http://www.usdoj.gov/dea/concern/psilocybin.html> ("Dimethyltryptamine (DMT) has a long history of use. * * * Because the effects last only about an hour, the experience has been referred to as a "businessman's trip."); R. Strassman, DMT: The Spirit Drug (2001); Rebecca Fowler, "A Quick Fix for the Executive Tripper," Sunday Times (London) at News Review 5 (Feb. 9, 2003).

cocaine, to opium.[39] No one would suggest that marijuana tea or coca tea is too "bulky" or "esoteric" to create diversion concerns that warrant the strictest regulation by Congress, and it makes no sense to conclude otherwise with respect to DMT.[40]

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

"It has been a maxim of statutory construction since the decision in Murray v. The Charming Betsy, 2 Cranch 64 * * * (1804), that 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains.'" Weinberger v. Rossi, 456 U.S. 25, 32 (1982). While RFRA plainly applies to "Federal law," 42 U.S.C. 2000bb-3(a), the statute at no

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[39] See <http://cocaine.org/cocatea.htm.; http://opioids.com/poppytea>.

[40] There also is no principled reason why the existence of a compelling interest should turn on the current popularity of a drug. DMT's dangerousness does not depend on the number of people ingesting it and, in any event, a central goal of the CSA is to prevent dangerous drugs from being abused at high levels by the general population in the first place. Indeed, the fact that hoasca must be imported and has not yet gained broad acceptance as a staple in the illicit drug market underscores the serious and irreparable harm that attends court-sanctioned importation and usage, with their attendant risks of diversion, of increasing public familiarity with hoasca as a delivery system for DMT, of generating public misperceptions about the safety of DMT tea, and of fueling the development of a market for hoasca. RFRA does not compel the government to sit on the sidelines until DMT tea becomes as widely abused as LSD and its illicit marketing system as well entrenched. "[I]t 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).

point "clear[ly] evidence[s]" "an intention to abrogate or modify [] treaty" obligations, United States v. Dion, 476 U.S. 734, 739, 740 (1986). Because "treaty rights [and obligations] are too fundamental to be easily cast aside," id. at 739, courts "should be most cautious before interpreting" RFRA "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).

1. The Convention Bans Hoasca

The district court paid no heed to the United States' interest in complying with the Convention because it held that the Convention does not apply to hoasca. Pet. App. 242a. The Convention's plain language says otherwise. It expressly lists DMT as a Schedule I substance, see Convention, Appended Schedules, and provides that "a preparation is subject to the same measures of control as the psychotropic substance which it contains," id. Art. 3, para. 1. A "preparation" is defined as "any solution or mixture, in whatever physical state, containing one or more psychotropic substances." Id. Art. 1(f)(i) (emphasis added). The text could not be clearer. Indeed, it parallels the definition in the CSA that the district court unhesitatingly read to "clearly cover[] hoasca." Pet. App. 198a.

The district court's contrary conclusion turned entirely upon post-enactment commentary questioning the Convention's application to plants. Pet. App. 239a-242a; see Commentary on the Convention

on Psychotropic Substances, U.N. Doc. E/CN.7/589, at p. 387 (1976) (Commentary). As an initial matter, resort to such extra-textual evidence is appropriate only if the treaty's text is ambiguous, which it is not. See Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134 (1989). And even if it were, the Executive Branch's interpretation of the Convention merits "great weight." Kolovrat v. Oregon, 366 U.S. 187, 194 (1961); see El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 168 (1999).

In any event, that post hoc commentary concerning plants is beside the point. Respondents do not seek to import, distribute, or ingest plants; they seek to import, distribute, and ingest a chemical solution or mixture that contains DMT. The commentary, at most, protects a plant substance if it is "clearly distinct from the substance constituting its active principle." Commentary, supra, at 387. Made by the extraction and synthesis of the active principle DMT with the active principle of another plant to create an oral delivery system for DMT that activates its hallucinogenic properties, hoasca is not "distinct" from the regulated DMT. Indeed, respondents offer no evidence that any of the 176 Parties to the Convention has broadly permitted the import and export of marijuana tea as a substance distinct from the regulated active

principle tetrahydrocannabinol, and there is no reason Parties would accord DMT tea a preferred status.[41]

In fact, the head of the Brazilian law enforcement agency charged with enforcing Brazil's controlled substance laws has advised the State Department that:

> Any and all substance, liquid or solid, examined the by [sic] Brazilian authorities which contains in its composition the substance DMT, is considered illegal and constitutes crime, being prohibited its * * * trade, exportation, importation. * * * If the product seized in the United States contains, in its composition, the substance DMT, that product was prohibited from being exported from Brazilian territory, because it was an illicit drug. The Brazilian legislation, in this case, considers the fact a crime, because DMT is present in its composition. (It does not matter whether it was mixed with Ayhuasca tea, Santo Daime tea, herbal tea, or chamomile tea. What is necessary, therefore, is the presence of the illicit substance DMT in its composition. The assessment is carried out on a case-by-case basis). * * * [T]he Ayhuasca Tea shall only be considered illegal if the presence of the substance DMT is proven [to be] in its composition.

Letter from Ronaldo Urbano, General Coordinator, Drug Enforcement and Prevention Police, Brazil, to Mark Hoffman, United States

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[41] The district court (Pet. App. 240a-241a), echoed by Judge McConnell (id. at 106a), wrongly assumed that the United States "apparently permits" (id. at 241a) the export of peyote to Canada. The United States has never authorized the export of peyote to Canada or any other country. See J.A. 898, 909. The district court cited only Texas administrative provisions that say nothing about exporting peyote, and a "list of the Native American Churches recognized by the Texas Department of Public Safety," Pet. App. 241a (citing Pltf. Reply, Exh. T). But what States might permit and the federal government actually allows under the CSA are two very different things. See Raich, supra.

Embassy, Brazil, July 8, 2005. Likewise, Brazil's National Antidrug Council has stated, in an official resolution, that

> Religious groups are aware that it is illegal to export 'ayahuasca tea' * * *; they understand its use is to be limited exclusively for rituals -- a regional cultural and religious custom unique to Brazil -- and of the restrictions imposed by Brazilian law and international agreements to which Brazil is a signatory.

Brazilian National Antidrug Council (CONAD), Decision No. 26, Dec. 31, 2002, Official Gazette No. 1 (Jan. 1, 2003).[42]

2. Compliance with the Convention is a Compelling Interest that Cannot Be Advanced by any Less Restrictive Means

"Matters relating 'to the conduct of foreign relations . . . 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)). Here, the

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[42] To be clear, the view of Brazilian officials conveyed to the State Department is not that "hoasca" and "ayahuasca" as such are regulated as controlled substances in their own right. There apparently is "a lack of a legal framework" for those particular substances. Letter from Ronaldo Urbano, General Coordinator, Drug Enforcement and Prevention Police, Brazil, to Mark Hoffman, United States Embassy, Brazil, July 7, 2005. In fact, the domestic regulation of hoasca has been a matter of evolving policy and continued study within Brazil. See, e.g., J.A. 183; CONAD Dec. No. 26, supra (establishing a commission to study ayahuasca tea). The State Department's understanding, based on these communications, is that Brazilian law focuses exclusively on the presence vel non of DMT. While these materials were not considered by the lower courts, they reflect the current understanding of Brazilian law to the extent relevant to the Court's analysis. English translations of the relevant letters and the CONAD resolution are reproduced in an addendum to this brief.

Senate, by its advice and consent, and the President, by his ratification, have exercised the treaty power, and the full Congress has concluded that faithful compliance with the Convention is "essential," 21 U.S.C. 801a(1), to the United States foreign policy interests and its protection of domestic public health and safety. Thus, the United States has a vital interest in abiding by this international obligation and in "gain[ing] the benefits of international accords and hav[ing] a role as a trusted partner in multilateral endeavors" designed to combat international drug trafficking. Vimar Seguros, 515 U.S. at 539. Moreover, that combined judgment pertains to the admission at the United States' borders of a dangerous foreign substance, a matter over which the Political Branches have long exercised plenary control.[43]

In addition, preserving the government's ability to work cooperatively with other Nations in tackling problems as complex and vital to public health and safety as transnational trafficking in controlled substances is an interest of the highest order. The abuse of psychotropic substances is "not confined to national borders," 21 U.S.C. 801a(1), and because closely complying with

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[43] See, e.g., United States v. Flores-Montano, 541 U.S. 149, 152 (2004) ("The Government's interest in preventing the entry of unwanted * * * effects is at its zenith at the international border."); Brolan v. United States, 236 U.S. 216, 218 (1915) (power to ban opium imports); Buttfield v. Stranahan, 192 U.S. 470, 492 (1904) (restriction on admission of teas upheld because, "from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries").

strict international controls on psychotropic substances is critical to the success of domestic efforts to combat drug abuse, Congress 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). Congress determined that complying with the Convention's terms -- which necessarily included 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" and promoting the United States' "credibility" and "strengthen[ing] our leadership in international drug abuse control." S. Rep. No. 959, 95th Cong., 2d Sess. 16 (1978).[44]

Three judges below concluded (Pet. App. 75a) that compliance with the Convention was not a compelling interest because the

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[44] See S. Rep. No. 959, supra, at 19; H.R. Rep. No. 1193, 95th Cong., 2d Sess. 4 (1978) ("[R]atification is necessary to strengthen the hand of the United States in convincing other countries to control narcotic producing plants."); see also Pet. App. 271a (the United States "engages in active diplomatic efforts to promote compliance with the provisions of the" Convention; "[t]o continue in its strong position of international leadership on this issue, the United States must continue to observe faithfully its treaty obligations"); id. at 261a-264a (the United States, "relies on the adherence to these treaties by other countries in supporting international cooperative efforts to prevent the illegal exportation, importation, and distribution of substances that are controlled under these treaties"; there are "situations in which DEA has cited to the obligations that a signatory nation has under the international drug and extradition treaties to support a request for assistance in drug enforcement operations").

Convention permits reservations for substances derived from native-grown plants that are "traditionally used by certain small, clearly determined groups in magical or religious rites." Convention, Art. 32, para. 4. Putting aside that hoasca has not been "traditionally used" in the United States and that UDV itself did not exist until 1961, Pet. App. 181a, by the terms of the Convention any reservation by the United States could only have been taken at the time the United States ratified the Convention in 1980, Convention, Art. 32. Moreover, by the terms of the Convention, any reservation could have been made only for the purely domestic use of native-grown plants, and would not excuse compliance with the Convention's "provisions relating to international trade." Ibid.

Indeed, far from helping respondents, the existence of that limited reservation provision proves that, in negotiating the Convention, the interests of religious claimants were given the type of careful, balanced consideration that RFRA requires -- consideration carried forward domestically in Congress's amendment of the CSA to conform to the Convention. The reservation provision's strict limitations embody a broad international consensus that international trafficking in drugs raises distinct problems from the accommodation of domestic uses by indigenous groups, and that any further retraction in the Convention's prohibitions would undercut efforts to combat international trafficking in psychotropic substances.

Judge McConnell reasoned (Pet. App. 106a) that RFRA obligates the United States to seek an "acceptable accommodation" under the Convention, even though the only avenue for "accommodation" at this juncture would be an amendment. But RFRA is a balance, not a trump card, and it certainly is not a license for judicial oversight of international treaty negotiations. Directing the Executive Branch to unravel a 176-party treaty that has never been amended in its 34-year history and that serves as a centerpiece of international efforts to address one of the most pressing and intractable law enforcement problems of the time would jettison rather than "sensibl[y] balance[]," 42 U.S.C. 2000bb(a)(5), the government's equally compelling interests in public health, safety, effective transnational cooperation in combating illicit drug trafficking, and abiding by international treaty obligations.[45] The "always * * * delicate" balancing of interests required by the Free Exercise Clause precedent on which RFRA is modeled, Prince v. Massachusetts, 321 U.S. 158, 165 (1944), did not require Congress to amend the Social Security Act to accommodate Amish farmers in Lee, supra, nor did it require Congress to amend the tax code to accommodate religious adherents in Hernandez, supra. Even less so should RFRA's statutory standard be construed as transferring to

[45] The United States also has a distinct interest in not being charged with violations by other Parties to the Convention, which could result, inter alia, in a suit in the International Court of Justice. See Convention, art. 31; see also id. at art. 19.

the judiciary responsibility for gauging the portentous diplomatic costs and foreign policy interests implicated by opening treaties to renegotiation by 176 Parties and eroding the comprehensiveness of a longstanding ban on transnational trafficking in dangerous psychotropic substances. "The 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).

Judge McConnell's proposal is as unworkable as it is wrong. In light of the Convention's specific and deliberate limitation of reservations to the domestic use of native-grown plants, there is little reason to believe that a different balance would be struck at this point. In fact, the international trend is to the contrary, with the export ban in Brazil, ayahuasca abuse on the rise in Europe, and arrests for ayahuasca in Italy, Australia, Germany, and the Netherlands.[46] In addition, the French government recently amended its law to make clear that its DMT prohibition extends to hoasca. France, Ministry for Solidarities, Health and

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[46] See Droga: Te' Del Santo Daime', 24 Ordinanze Custodia, ANSA General News 19:14:00, Mar. 18, 2005; Santo Daime Italy in Jail, available at <http://forums.ayahuasca.com/phpbb/viewtopic.php?t=7867>; Australia Dragoons Bust, available at <http://forums.ayahuasca.com/phpbb/viewtopic.php?t=6929>; Geopolitics of Drugs, supra, at 103.

the Family, Order of April 20, 2005, J.O., May 3, 2005, p. 7636, Text 18.[47]

Beyond that, much clearer congressional direction than the mere codification of a legal standard under which claims like respondents' consistently lost should be required before RFRA is read to empower every individual district court judge in the Country to confound international cooperation and superintend the United States' foreign relations.[48] In particular, "[b]ecause foreign relations are specifically committed by the Constitution to the political branches, Art. II, § 2, cl. 2," courts should not "justify a truly discretionary ruling," like the issuance of a preliminary injunction, "by making the assumption that it will induce the Government to adopt legislation with international

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[47] An official English translation of the law is reproduced in an addendum to this brief.

[48] See F. Hoffman-La Roche Ltd. v. Empagran, S.A., 124 S. Ct. 2359, 2366 (2004) (courts must "assume that legislators take account of the legitimate sovereign interests of other nations"); Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."); cf. Spector v. Norwegian Cruise Line Ltd., 125 S. Ct. 2169, 2178, 2180 (2005) (requiring a "clear statement" before broad statutory language will be interpreted to interfere with aspects of foreign-flagged vessels that are governed by international treaties).

implications," "to seek international agreements, in order to mitigate the burdens that the ruling would otherwise impose," or "to adopt policies in relation to other nations." United States v. Balsys, 524 U.S. 666, 696-697 (1998). That has never been the province of a preliminary injunction, and its issuance in this case on the basis of an evidentiary record left in equipoise by the court's disregard of congressional findings and the judgment of 176 Parties to the Convention concerning the dangerousness of DMT preparations was an abuse of discretion.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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ADDENDUM