QUESTION PRESENTED

This brief addresses the following question, which is fairly subsumed within the question presented in the Government's petition: Whether merely invoking treaty obligations provides a sufficient basis for demonstrating that a law challenged under the Religious Freedom Restoration Act is the least restrictive means of advancing a compelling state interest.

INTERESTS OF *AMICI CURIAE*[1]

International Academy for Freedom of Religion and Belief

The International Academy for Freedom of Religion and Belief is a Washington, D.C.-based nonprofit organization representing a broad cross-section of the international religious freedom community. Its purpose is to seek the full implementation of international standards for religious human rights on a global basis.

In *Gonzales*, the Academy, among other points, seeks to assure that the significance of treaty obligations is properly assessed under the standard of review covering federal action pursuant to the Religious Freedom Restoration Act. While the emphasis in this brief is on what this entails within the context of the legal system of the United States, the Academy notes the importance in applying this standard of taking into account the full range of treaty obligations assumed by the United States, not only under its drug treaties, but also under its subsequently assumed obligations to protect freedom of religion under the International Covenant on Civil and Political Rights.

International Commission on Freedom of Conscience

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[1] All parties have consented to the filing of this brief, and letters indicating their consent have been filed simultaneously with this brief. No counsel for any party authored this brief in whole or in part. Research assistance in preparation of this brief was provided by law students working for the International Center for Law and Religion Studies at Brigham Young University, as was some of the support for printing the brief, but in providing this support, neither the University nor the Center takes any position with respect to the brief. No other person or entity other than *amicus* and their members made any monetary contributions to the preparation or submission of this brief.

The International Commission on Freedom of Conscience was founded for the purpose of protecting the freedom of conscience of individuals regardless of where they live. The Commission is a nonprofit, non-governmental organization which has sponsored and co-sponsored numerous conferences, seminars and consultations both in the United States and abroad.

SUMMARY OF ARGUMENT

The Government contends that the presence of treaty obligations in this case adds a distinctive compelling state interest not present in the normal Religious Freedom Restoration Act ("RFRA") case. In making this argument, the government systematically misstates the implications of the treaty obligations in this case.

First, the government wrongly assumes that treaty obligations in the abstract automatically satisfy RFRA's requirement of demonstrating a compelling state interest furthered by the least restrictive means. Rather, RFRA requires individualized scrutiny of all federal laws, including treaties. Second, while the government is correct in asserting that statutes should be construed where possible to avoid inconsistency with treaty obligations, the fundamental point is that a later-adopted statute such as RFRA prevails where the intent to override is clear and where inconsistency remains. The scope provision of RFRA is very broad, and makes it clear that Congress intended to extend to "all Federal law, . . . statutory *or otherwise*." Thus, to the extent RFRA allows an exemption for religious use of *hoasca* not foreseen by the 1971 Convention on Psychotropic Substances, the statutory exemption takes precedence. Third, there are a number of reasons for thinking the treaty obligations in this case do not necessarily preclude granting

an exemption for religious use of *hoasca*. The 1971 Convention itself gives some latitude to implement a treaty with due regard for a country's "constitutional, legal and administrative systems." Moreover, some selective enforcement is inevitable and could be reasonably extended to cover the *hoasca* situation. Importantly, in assessing how compelling the government's interest is in enforcing a particular treaty, its interest in enforcing conflicting treaty obligations (in this case those emanating from human rights treaties) must be taken into account.

Fourth, in the present case, the supposed treaty obligations being asserted by the government, when properly interpreted, don't even apply. Finally, the obligation to defer to the political branches in foreign policy matters does not imply that the judiciary must abdicate oversight of domains clearly entrusted to it by Congress through RFRA. For all of these reasons, the government's attempt to invoke treaty obligations to cover its failure to comply with RFRA's demands is unavailing.

ARGUMENT

The fundamental question on appeal in this case is whether the Religious Freedom Restoration Act[2] ("RFRA"), enacted in

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[2] 42 U.S.C. § 2000bb-1 (2000). Since its passage, RFRA was struck down insofar as it applied to state law, but it continues to apply to federal law. *City of Boerne v. Flores*, 521 U.S. 507 (1997). The constitutionality of RFRA as it applies to federal law has not been challenged in this case, and has been consistently upheld by th e Courts of Appeal *O'Bryan v. Bureau of Prisons,* 349 F.3d 399, 401 (7th Cir. 2003) (Easterbrook, J.); *Guam* v. *Guerrero,* 290 F.3d 1210, 1221 (9th Cir. 2002) (O'Scannlain, J.); *Kikumura* v. *Hurley,* 242 F.3d 950, 959 (10th Cir. 2001); *Christians* v. *Crystal Evangelical Free Church (In re Young),* 141 F.3d 854, 860 (8th Cir.), *cert. denied,* 525 U.S. 811 (1998). The D.C. Circuit has also upheld the application of RFRA to federal law since *Boerne*. *Henderson* v. *Kennedy,* 265 F.3d 1072, 1073 (D.C. Cir. 2001). *See also E.E.O.C.* v. *Catholic Univ. of America,* 83 F.3d 455, 470 (D.C. Cir. 1996) (rejecting, prior to *Boerne,* constitutional challenges to application of RFRA to federal law based on lack of enumerated powers, Separation of Powers, and Establishment Clause).

1993, protects the right of a small religious group, O Centro Espirita Beneficiente Uniao do Vegetal ("UDV") to engage in the sacramental use of *hoasca*, a tea brewed from plants found in the Amazon basin. The tea in question contains dimethyltryptamine (DMT), a substance that is listed as a prohibited controlled substance under the United Nations Convention on Psychotropic Substances, 1971[3] (the "1971 Convention"), and the federal Controlled Substances Act[4] ("CSA"), as amended by the Psychotropic Substances Act of 1978, which was passed to implement that treaty. Psychotropic Substances Act of 1978, Pub. L. No. 95-633, Title I, _ 101, 92 Stat. 3768 (codified as amended at 21 U.S.C. _ 801a(2) (2000)). The government seeks to enforce the CSA's ban on DMT against UDV, thereby imposing a substantial burden on its religious practice.

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3 United Nations Convention on Psychotropic Substances, *opened for signature* Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175 [hereinafter Convention].

4 21 U.S.C. § 801 *et seq*.

One of the government's principal lines of argument is that the presence of treaty obligations in this case adds a distinctive compelling state interest not present in the normal RFRA case. The government's claim is that the need for generalized ce with treaty obligations creates a compelling interest in this case that satisfies RFRA's requirement that substantial burdens on religion are permissible only if the "government . . . demonstrates that application of the burden *to the person* . . . is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1 (emphasis added). In the government's view, no more particularized showing is needed to meet the RFRA test. In making this argument, the government systematically misunderstands the implications of the treaty obligations involved in this case and demands of RFRA. It is the aim of this brief to unravel these misunderstandings and to show that the treaty obligations of the United States, as important as they are, do not obviate the need for the government to meet RFRA's high standards for protecting religious freedom. As with other laws, so with treaties: RFRA requires that they be strictly scrutinized to make certain they are not applied in ways that violate religious freedom.

I. Treaty Obligations in the Abstract Do Not Automatically Satisfy RFRA's Requirement of Demonstrating a Compelling State Interest Furthered by the Least Restrictive Means

A. *RFRA Requires Individualized Scrutiny of the Application of "All Federal Laws," Including Treaties, that Impose Substantial Burdens on Religious Freedom*

The starting point for analyzing the relationship of treaty obligations and RFRA is the Supremacy Clause of Article VI of the Constitution, which declares the Constitution, the laws of the United States, and treaties to be "the supreme Law of the Land." It has long been held that treaties are law equal in authority to the

United States statutes, *Head Money Cases*, 112 U.S. 580 (1884); *Whitney v. Robertson*, 124 U.S. 190 (1888); *The Chinese Exclusion Case*, 130 U.S. 581, 599 (1889). "Treaties are part of the law of the land; they have no greater or lesser impact than other federal laws." *Ex parte Cooper*, 143 U.S. 472, 502 (1892). In particular, "[a]n act of Congress and a self-executing treaty of the United States . . . are of equal status in United States law. . . ."[5]

While courts may not apply non-self-executing treaties in the same direct way they apply self-executing treaties, both remain part of federal law. As Professor Henkin has stated,

> Whether a treaty is self-executing or not, it is legally binding on the United States. Whether it is self-executing or not, it is supreme law of the land. If it is not self-executing, Marshall said, it is not 'a rule for the Court'; . . . .[6]

Significantly, the scope provision of RFRA is very broad, and makes it clear that it was intended to apply to treaties and associated implementing legislation. It provides: "This chapter applies to *all* Federal law, and the implementation of that law, whether statutory *or otherwise*, and whether adopted before or after November 16, 1993."[7] (emphasis added) It is well settled that "Acts of Congress, treaties and other international agreements of the United States, and principles of customary international law, are all federal law." RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 115, cmt a. Thus, treaties clearly fall within the ambit of RFRA just as surely as legislation implementing them and any other federal law. And what RFRA requires, as recognized by the courts (and a majority of en banc judges) below, is an individualized analysis, taking into

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5 RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §115, cmt. a (1987).

6 LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 203 (2d. Ed. 1996).

7 42 U.S.C. _ 2000bb-3(a) (2000).

account the preeminent value of religious freedom, of whether the "application of the burden" to a specific "person" satisfies RFRA's compelling state interest/least restrictive alternative test.[8]

B. *To the Extent RFRA is Inconsistent with the 1971 Convention and the Controlled Substances Act, RFRA Overrides Because it Was Enacted Subsequently*

It is well settled that "'the provisions of an act of Congress, passed in the exercise of its constitutional authority, . . . if clear and explicit, must be upheld by the courts, even in contravention of express stipulations in an earlier treaty' with a foreign power." *United States v. Dion*, 476 U.S. 743, 738 (1986), *citing Fong Yue Ting v. United States*, 149 U.S. 698, 720 (1893). In case of inconsistency between "[a]n act of Congress and a self-executing treaty of the United States . . . the later in time prevails."[9] The situation with respect to inconsistencies is parallel but slightly different where non-self-executing treaties are involved. As Professor Henkin explains:

> Since a non-self-executing treaty is not law for the courts of its own accord, any inconsistency between such a treaty and an Act of Congress is, as regards domestic law, an inconsistency between the two statutes, between the statute implementing the treaty and another Act of Congress. Since both are the work of Congress, there is less doctrinal difficulty in insisting that the later repeals the earlier, even if one of the statutes is pursuant

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8 *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft* , 282 F. Supp. 2d 1236, 1254-55 (D.N.M. 2002), *aff'd*, 342 F.3d 1170, 1181-82 (10th Cir. 2003); *O Centro Espirita Beneficiente Uniao do Vegetal*, 389 F.3d 973, 1010-11, 1019-21 (10th Cir. 2004) (en banc) (opinions of Seymour, J. and McConnell, J.); *see Kikumura v. Hurley*, 242 F.3d 950, 962 (10th Cir. 2001).

9 RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES, _ 115, cmt. a (1987).

> to a treaty (giving rise to international obligations) and may even be constitutionally required of Congress.[10]

Stated differently, although non-self-executing treaties constitute obligations of the United States, they do not become laws of the United States enforceable by courts until duly implemented by Congressional enactments, and then it is the statute that takes effect and binds courts.

Significantly, the present case involves a non-self-executing treaty (the 1971 Convention),[11] implementing legislation (the Psychotropic Substances Act of 1978) that was incorporated into the CSA and became effective in 1980[12] and subsequent legislation adopted in 1993 that imposes constraints on application of the implementing legislation (RFRA). Thus, what is involved in this case is really the interaction between two statutes: RFRA and the CSA. The existence of the 1971 Convention obviously explains why the 1978 implementing legislation was adopted, and no doubt has significance as a basis for interpreting the CSA. *See I.N.S. v. Cardoza-Fonseca,* 480 U.S. 421, 432-33 (1987) (invoking

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10 LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 209 (2d ed. 1996). *Also see* RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES , § 115, cmt. a (1987).

11 That the 1971 Convention was non-self-executing was made clear in the Congressional Findings of the Psychotropic Substances Act of 1978 (the implementing legislation): "The Convention is not self-executing, and the obligations of the United States thereunder may be performed pursuant to appropriate legislation." 21 U.S.C. _ 801a(2).

12 This legislation, the Psychotropic Substances Act of 1978, incorporated the provisions of the 1971 Convention into the Controlled Substances Act. The provisions of the Psychotropic Substances Act of 1978, Pub. L. No. 95-633, Title I, § 101, 92 Stat. 3768 (codified as amended at 21 U.S.C. § 801a(2) (2000)), became effective on the same date as the 1971 Convention in 1980. The 1971 Treaty was amended in 1988, and the CSA was amended by corresponding implementing legislation that year. Chemical Diversion and Trafficking Act, Pub. L. 100-690, Title VI, 6051, 102 Stat. 4312 (1988) (codified as 21 U.S.C. § 802 (2000)). The changes made by the 1988 amendments are not relevant here, and in any event, RFRA was adopted after both the treaty and the corresponding statutory changes became effective.

actual treaty language to interpret implementing statute). But because the 1971 Convention was not self-executing, RFRA and the 1971 Convention operate from a judicial point of view on different interpretive planes. Statutes such as RFRA and CSA may be applied directly by courts in providing rules of decision in cases and controversies, as may self-executing treaties. In contrast, non-self- executing international norms provide at best a kind of negative interpretive guidance or gravitational influence that indirectly affects judicial interpretation of laws and self-executing treaties from which direct rules of decision are inferred.[13]

The case for recognizing that a later statute overrides or modifies an earlier treaty obligation is stronger with respect to non-self-executing as opposed to self-executing treaties, because it is assumed in this context that Congress has significant latitude in passing legislation. Moreover, Congress may elect to modify the precise terms of implementation from time to time. Note that in the present case, the effect of RFRA is not to repeal or nullify treaty obligations, but merely to assure that they are applied and implemented in a manner that takes the fundamental value of freedom of religion into account. In that sense, far from colliding with the government's compelling interests in implementing its treaty obligations, RFRA constitutes a refinement and reassessment of what those compelling interests are.

There is, of course, authority to the effect that Congress will not be presumed to have enacted legislation inconsistent with a treaty unless that intention is evident.[14] Significantly, the case law supporting this proposition deals for the most part with conflicts between self-executing treaties or Executive agreements and subsequent legislation. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *Chew Heong v. United States*, 112 U.S. 536, 539-40 (1884). Typically, the presumption that

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13 *See* Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1110, 1154, 1158-62 (1990).

14 RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES _114-15 (1987).

Congress did not intend to enact legislation inconsistent with its treaty obligations assumes a situation where Congress' subsequent legislation was inadvertently inconsistent with its prior treaty obligations. In *United States v. Dion*, 476 U.S. 734 (1986), which ironically the government cites for the proposition that a court should not lightly infer an "intention to abrogate or modify treaty" obligations, Pet'r Br. at 41, the Court in fact found such an intention was present in a setting where the intention was less obvious than in the RFRA setting. The clear intent to change the legal regulation of the conduct covered by the treaty (as opposed to clear reference to the treaty itself) was sufficient to rebut the presumption against overriding treaty obligations.

Congressional intent was if anything much more clear in passing RFRA. As noted above, Congress wished to subject "*all* Federal law, and the implementation of that law" to searching scrutiny. RFRA was designed to restore the compelling state interest test that had been articulated in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). 42 U.S.C._ 2000bb(b)(1). As a constitutional doctrine, this test applied to the full range of federal law, including treaties,[15] and RFRA was not intended to be narrower in scope. RFRA was adopted precisely because of the Congressional recognition that *any* law, treaty or statute, can potentially burden religious freedom, and it desired to address all such potential conflicts in a general fashion. Obviously, Congress did not envision every particular conflict that might arise. It was precisely because of the impossibility of foreseeing all such potential conflicts that Congress believed a statute requiring individualized scrutiny was necessary. In enacting RFRA, Congress thus required courts to subject "all federal law" including the "rules of general applicability" embodied in treaties, to strict and individualized scrutiny in order to make certain that the fundamental right to freedom of religion is given the fullest permissible protection consistent with the test RFRA establishes. The 1971 Convention

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15 *See, e.g.*, *Reid v. Covert*, 354 U.S. 1, 16 (1957) (plurality opinion) (treaties are not free from the restraints of the Constitution).

and its implementing legislation, enacted prior to the adoption of RFRA, cannot evade the review it mandates.

C. *Treaty Obligations Are Not Necessarily Compelling or Narrowly Tailored*

The treaty obligations of the United States cover an incredibly broad range of subjects. Many if not most of these deal with mundane matters that do not rise to the level of "compelling state interests." Even those which do often address many non-compelling matters as well. Further, when compelling matters are addressed, there may be alternative ways they could be implemented to reduce adverse impacts on religious freedom. Independent of the content of any particular treaties, there is a general governmental interest in assuring that treaty obligations are respected.

But all of these interests need to be assessed in context. While they are important in the abstract, many factors may affect whether they are compelling in particular circumstances. The government has great flexibility in how it fulfils its treaty obligations, and also how it reconciles competing demands emanating from the totality of its treaty obligations. For a variety of reasons, whether with good justification or not, the government elects with some frequency not to implement or even to breach its treaty obligations.[16] This suggests that even from the

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[16] For example, the United States became a party to the Vienna Convention on Consular Relations (VCCR) over 40 years ago, but it has not implemented Article 36 the treaty. Article 36 protects the rights of citizens to consult with a consular official if they are arrested in a foreign country. While the United States refuses to implement the Article, the State Department complains when other countries fail to apply Article 36 to United States citizens. *See, e.g.*, United States v. Lombera-Camorlinga, 206 F.3d 882 (9th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 991 (2000). The United States also disregards the Treaty on the Limitation of Anti-Ballistic Missile Systems. European nations objected to a U.S. missile defense plan on grounds that it would violate the treaty, while Secretary of Defense Donald Rumsfeld referred to the treaty as "ancient history," even though it remained in force. *Rumsfeld Assures Europeans on Bush Missile Defense Plan*, Associated Press, Feb. 3, 2001. Finally, one of the most broad abrogations of treaty obligations in U.S. history is the United States' disregard for the 800 treaties it entered into with Indian nations. The United States has not ratified 430 of the treaties, and even though it has expected the Indian nations to honor the

government's perspective, adhering to treaty objectives is not always compelling. In short, the mere fact that treaty obligations are involved gives no assurance that the governmental interests involved are compelling, and if so, that those interests are pursued in the least restrictive manner.

Not surprisingly then, "the fact that an interest is recognized in international law does not automatically render that interest "compelling" for purposes of the First Amendment analysis." *Boos v. Barry*, 485 U.S. 312, 324 (1988). "Certainly the existence of a treaty does not by itself justify . . . violation[s] of the First Amendment." *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 512 (9th Cir. 1988). Since RFRA was intended to restore the compelling state interest test that had emerged in first amendment case law, the same can be said for its test.

The implications for the present case are obvious. No one doubts that drug treaties deal in general with interests that are of profound significance and a compelling nature. But in light of the foregoing considerations, it is clear that one cannot infer the particularized findings required by RFRA from the type of generalized findings advanced by the government in support of its position. Arguments that "faithful compliance with the treaty is 'essential,'" a "vital interest," and that the treaty addresses matters "vital to public health and safety," Pet'r Br. at 45, may be all true, but abstract assertions do not establish concrete conclusions. Ultimately, the government has failed to demonstrate that the state's interest in complying with its treaty obligations is sufficiently compelling to warrant depriving members of the O Centro Espirita religion of the right to sacramental use of *hoasca*, which is clearly a vital aspect of their faith.

In this respect, treaties are like other laws: the mere fact that they have been adopted does not automatically guarantee that they adequately respect religious freedom. It is for precisely this reason that Congress enacted RFRA, and that its demands for particularized strict scrutiny apply. Just as Congress did not

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treaties unilaterally, it has violated each of the 370 treaties that it did ratify. 138 Cong. Rec.S15422 (daily ed. Sept. 26, 1992) (statement of Sen. Daniel Inouye, Chairman, S. Comm. on Indian Affairs).

believe that mere passage of a neutral and general law guarantees that religious freedom protections will automatically be safeguarded and thus required the individualized assessment called for by RFRA, the presence of treaty obligations also does not guarantee that they respect religious freedom. Moreover, there is certainly no abstract assurance that the government has elected the least burdensome method of meeting its obligations. At a full hearing on the merits, it may well be able to meet such a burden, but it has not yet done so.

D. *The Government Does Not Have a Compelling Interest in Wooden Enforcement of Treaty Obligations*

The fact that Congress decides to adjust the legislation whereby it implements its treaty obligations does not in itself constitute a violation of treaty obligations. The 1971 Convention is a non-self-executing treaty. U.S. laws have been revised in the past to better implement these treaties. By its nature, RFRA was intended to impose an across-the-board legislative adjustment to assure appropriate respect for religious freedom. Congress could at any time amend the legislation that implements the 1971 Convention and RFRA's comprehensive attempt to adjust legislative enactments to make sure they are adequately sensitive to freedom of religion or belief functions the same as a specific amendment to the CSA.

The government must show that minor non-compliance will in fact jeopardize its leadership role and benefits of encouraging reciprocal compliance, that these benefits won't actually be encouraged by giving high compliance to protection of religious rights (i.e., making the exception to protect religious groups may actually do more to enhance leadership and reciprocity than wooden rejection of the exemption), and that these benefits cannot be achieved in some way that avoids the burden on religion. Congress could reasonably determine that these issues should be assessed to help assure that freedom of religion is adequately protected.

1. Not Every Failure of Strict Compliance with a Treaty Rises to the Level of a Breach of Treaty Obligations

There can be no doubt that the United States has a profound interest in general in adhering to its treaty obligations, both because those obligations reflect interests of United States policy, and because being a respected treaty partner enhances the ability of the United States to lead and to get others to follow that lead. But there are countless ways in which full enforcement does not occur. Every day, police, prosecutors and the courts enter into plea bargain agreements or elect not to prosecute particular cases. Such selective enforcement that in effect makes an exception to the requirements of the drug treaties is routine and understood, but not specifically contemplated as a reservation. Similarly, courts routinely determine whether defendants charged with drug crimes are entitled to defenses that negate culpability, such as duress, mistake, insanity, and the like. Defendants who establish such defenses are not convicted, and where it seems clear that such a defense applies, a wise prosecutor will not initiate proceedings in the first place. None of our treaty partners would be surprised or troubled by this. Indeed, selective enforcement may be addressed in Article 22(1)(a) of the 1971 Convention, which provides that enforcement will be carried out by member parties with due regard for their constitutional, legal and administrative systems. In a similar vein, a determination that UDV should be allowed to use *hoasca* can be understood as the functional equivalent of a defense that the United States' legal system allows pursuant to RFRA. As such, it is not a violation of the treaty obligations of the United States at all. And even if it were, it is a relatively minor deviation for which there would be understanding and respect from other countries. This is scarcely the kind of action that is likely to have significant repercussions with our partners to the 1971 Convention.

2. A State Interest to Implement Treaty Obligations May Be Lessened By Counterbalancing

Compelling State Interests Recognized by Other Treaties

The government insists that its obligation under the 1971 Convention creates a compelling state interest in this case under RFRA. The Executive branch does have an obligation to see that all valid treaties, including non-self-executing ones, are faithfully implemented.[17] With non-self-executing treaties, however, the obligations created by the treaty are limited to enacting a law to provide the benefits promised, limiting the scope of Executive responsibility and authority.[18] "[T]he independence of the legislative process (subject only to the Presidential veto as provided in the Constitution) has given Congress opportunities to interpret the need for implementation and to shape and limit it in important details."[19] Since the 1971 Convention has been implemented in the Controlled Substances Act, the Executive retains an interest in defending the legislation, which may or may not be greater than defending any other particular piece of legislation.[20]

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17 LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 200 (2d ed. 1996).

18 *Id.* at 200. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) ("But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court."), *overruled in part on other grounds by* United States v. Percheman, 32 U.S. 51 (1833).

19 LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 205 (2d ed. 1996).

20 *See* RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (h) (1987) ("it is the implementing legislation, rather than the agreement itself, that is given effect as law in the United States. That is true even when a non-self-executing agreement is 'enacted' by, or incorporated in, implementing legislation."). *See also* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 209 n.* (2d ed. 1996) (treating implementing legislation as merely a statute and not different from other statutes even though it was passed pursuant to a treaty "[s]ince both are the work of Congress").

To the extent the government has an independent interest in implementing and defending the 1971 Convention (which, like other non-self-executing treaties, is not a law for the courts of its own accord), it should be considered among other obligations that the government has to implement and defend other significant non-self-executing treaties. Treaty obligations should be construed in light of the totality of international law obligations, including other non-self-executing treaties. The religious freedom norms embodied in RFRA parallel those contained in other non-self-executing treaties, which deserve at least equal consideration in this case.

In particular, it is significant that the United States has ratified the International Covenant on Civil and Political Rights ("CCPR, Article 18 of which contains provisions protecting freedom of religion or belief.[21] Whereas the United States entered reservations with respect to Article 19, dealing with freedom of speech, it did not do so with respect to Article 18.[22] Article 18(3)'s requirement that limitations on manifestations must be necessary in furtherance of a limited class of enumerated state interests has been interpreted by the U.N. Human Rights Committee, the body officially charged with overseeing

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21 International Covenant on Civil and Political Rights, art. 18, *opened for signature* Dec. 12, 1966, 999 U.N.T.S. 171 ("1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.") Adopted and Opened for Signature by United Nations General Assembly Resolution 2200A (XXI) on Dec. 16, 1966; Entered into Force Mar. 23, 1976. Effective entry into force for United States in 1992, U.S. Senate Comm. On Foreign Relations, 102nd Cong., 2nd Sess., Report on International Covenant on Civil and Political Rights 2 (1992), reprinted in 31 I.L.M. 648, 649 (1992).

22 Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENT. 33, 43 (1997).

implementation of the Covenant, to require that [l]imitations may be applied only for those purposes for which they are prescribed and must be directly related and proportionate to the specific need on which they are predicated."[23] Proportionality in this context is generally understood to require that the limitation in question must be narrowly tailored to further a pressing social need, and while its requirements differ in detail from RFRAs compelling state interest/least restrictive alternative test, the parallel is obvious.[24] The point of referring to tl obligation of the United States. To the extent that the United States has a compelling interest in respecting its treaty obligations, there is a compelling interest in respecting this obligation just as much as there is in respecting the obligation under the 1971 Convention. Significantly, most of our treaty partners (the overwhelming majority of major nations on earth) have ratified the CCPR, and for a large percentage of them, the CCPR obligations are directly applicable in their domestic legal systems. Thus, most would understand the need to make accommodations to respect freedom of religion, or at least to assess on a case-by-case basis whether such accommodations were warranted. Indeed, it seems clear that any loss of international prestige and leadership that might flow from granting a limited exemption for use of *hoasca* in religious services pales by comparison to the loss the United States suffers in international human rights circles as a result of its decision to leave the CCPR in non-self-executing limbo. The point here is simply to emphasize that when assessing the implications of treaty obligations, it is necessary to take all of the country's treaty obligations into account, not just the particular interest that the government seeks to further in this particular case. Because of the complexity of these issues, RFRA rightly requires individualized

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23 U.N. Human Rights Committee, General Comment No. 22 (48), adopted by the U.N. Human Rights Committee on 20 July 1993, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993), *reprinted in* U.N. Doc. HRI/GEN/1/ Rev.1 at 35 (1994).

24 *See* Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENT. 43-44, 49-50 (1997).

assessment of the burdens (and protections) that come into play when considering a particular persons religious freedom rights.

E. *RFRA Mandated Exemptions in Areas Where the 1971 Convention Recognized the Need for Reservations are Particularly Unlikely to be Outweighed by Compelling State Interests*

The 1971 Convention permits state parties to make reservations, among other things, with respect to: "the use of wild plants by small groups in magical or religious rites," Art. 32. While it is true that reservations must be made "at the time of signature, ratification or accession," Art. 32.2, the mere fact that the Convention permits parties reservations in certain areas reflects a recognition among the parties that these aspects of treaty enforcement are less urgent or compelling than others. Thus, allowing reservations for "use of wild plants . . . in religious rites" demonstrates that in the view of the parties to the 1971 Convention, limited exemptions for such purposes were tolerable and that the need for rigid enforcement in this area was not so compelling as to outweigh sincere religious beliefs and practices.

The government makes much of the fact that the specific practices of UDV do not fit neatly into the 1971 Convention structure, particularly since the United States did not make a reservation for *hoasca* and the need for transborder access was not foreseen. While true, these objections miss the point, placing wooden adherence to statutory structure ahead of sensitivity to genuine religious needs. The fact that a reservation was not made is a reflection solely of the fact that no one had anticipated a problem. With respect to the issue that had surfaced–use of peyote by the Native American Church–a reservation was taken.[25] But the fact that a reservation would have been possible had the problem been recognized shows that the governmental interest in avoiding the exemption was less than compelling.

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[25] *Convention on Psychotropic Substances, 1971, "Status as of Sept. 5, 2005,"* at www.unodc.org/pdf/treaty_adherence_convention_1971.pdf, at 14.

The risk of this type of overregulation or under-accommodation due to ignorance of religious need is one of the primary reasons for RFRA's enactment. As demonstrated above, as subsequent legislation, RFRA overrides the earlier 1971 Convention and its implementing legislation to the extent inconsistency of conflicting provisions cannot be resolved. RFRA does not abrogate or deny the earlier treaty. It simply requires that its application be tempered to assure that sincere religious claimants are not unnecessarily trapped in unforeseen Procrustean beds, where more flexible accommodations can be found. The question under RFRA is not whether a reservation was made or whether an exemption fits within the treaty and statutory structure, but whether the governmental interests furthered thereby are compelling and attainable in no less restrictive way. The fact that a reservation was possible, whether taken or not, answers both questions in the negative.

II. The Government Also Fails to Show a Compelling Interest in Enforcing the 1971 Treaty in this Case Because the Lower Courts Correctly Held that it Does Not Apply to Hoasca

A. *The United Nations Body Charged with Administering the Treaty Recognizes that It Does Not Apply to Hoasca*

Prior to 1999, UDV imported *hoasca* tea from Brazil. Like most teas, *hoasca* is an infusion of plants in water, and UDV imported the *hoasca* in this liquid form. The plants used to make *hoasca*, *banistereopsis caapi* and *psychotria viridis*, are grown in Brazil, where indigenous people have used the tea in religious rites for hundreds of years.[26]

The district court found that the 1971 Convention did not apply to the *hoasca* tea imported by the UDV.[27] The government attempts to rebut the District Court's finding by (1) discrediting the United Nations Official Commentary on the 1971 Convention as "post-enactment commentary questioning whether the Convention applies to plants," and (2) arguing that *hoasca* tea is not distinct from the controlled substance DMT.[28] Both of these arguments lack merit.

First, the United Nations regularly produces commentary for the international agreements it administers. These commentaries provide guidance to the signatory states for the domestic

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[26] J.A. at 530.

[27] O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft, 282 F. Supp. 2d 1236, 1268-69 (D.N.M. 2002). A majority of the en banc court then affirmed the district court's decision. O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft, 342 F.3d 1183 (10th Cir. 2003).

[28] Pet'r Br., at 42.

implementation of treaties.[29] The Official Commentary on the 1971 Convention was drafted under the direction of the United Nations Office of Legal Affairs and the United Nations Fund for Drug Abuse Control.[30] The government wrongly implies that the Commentary does not offer authoritative guidance.

Moreover, the fact that the United Nations does not consider plants a controlled substance under the Convention is not irrelevant to the instant case.[31] If the component plants are not restricted under the Convention, the process of creating *hoasca* tea does not involve the controlled substances covered by the Convention. This is the case even under the Convention's use of the term "preparation." At best, the term "preparation" as used in the Convention is ambiguous. The Official Commentary observes that the term does not include beverages or infusions made from non-

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29 *See e.g.*, U.N. Econ. & Soc. Council [ECOSOC], *Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988,* U.N. Doc. E/CN.7/590 (Dec. 20, 1988); U.N. Fund for Drug Abuse Control, *Commentary on the Protocol Amending the Single Convention on Narcotic Drugs*, 1961, U.N. Doc. E/CN. 7/588 (Mar. 25, 1972) (*written by* Adolf Lande); U.N. Econ. & Soc. Council [ECOSOC], *Commentary on the Single Convention on Narcotic Drugs, 1961*, U.N. Doc. E.73.XI.1 (Aug. 3, 1962) (*written by* Adolf Lande).

30 U.N. Fund for Drug Abuse Control, *Commentary on the Convention on Psychotropic Substances,* at v. U.N. Doc. E/CN.7/589 (1976) (*written by* Adolf Lande). [hereinafter *Commentary*] "Because a treaty ratified by the United States is not only the law of this land, but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation negotiating and drafting history (*travaux preparatoires*) and the postratification understanding of the contracting parties." Zicherman v. Korean Airlines Co., 516 U.S. 217, 226 (1996) (internal citation omitted).

31 *Psychotria viridis* contains DMT, but the plant itself is not listed on any of the Schedules of Controlled Psychotropic Substances attached to the 1971 Convention. The Convention applies only to the "psychotropic substances" listed in the Schedules and to "preparations" of those substances. As the UDV Church's brief more fully explains, Pet'r Br. at 30-41, the United Nations Official Commentary on the 1971 Convention does not apply to plants or beverages made from those plants, even if the plant or beverage contains DMT. *Commentary*, *supra* note 31, at 384, 387 (discussing plants and beverages).

controlled plants. Specifically, it notes that two plants that are ingested in a beverage state similar to that of *hoasca* tea, are not prohibited under the Convention: an "infusion of roots is used" to consume *mimosa hostilis* and "beverages" are used to consume psilocybe mushrooms,[32] but "neither the roots of the plant *mimosa hostilis* nor psilocybe mushrooms themselves are included in Schedule I . . . only their respective active principles." It would be incongruous to assume that the United Nations, which administers the Convention, would observe in its Official Commentary that it does not consider *mimosa hostilis* as included in Schedule I, even if its active component is DMT, while including *psychotria viridis*, which also contains DMT.

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32 *Commentary, supra* note 31, at 387

Furthermore, UDV did not rely solely on the United Nations Official Commentary for its conclusion that *hoasca* tea is not covered by the 1971 Convention. Indeed, UDV provided evidence to the district court that the International Narcotics Control Board (INCB), which is the regulatory and enforcement body for the three major United Nations drug treaties, opined that "ayahuasca [teas] are not under international control and, therefore, not subject to any articles of the 1971 Convention." J.A. 990-91 (quoting Letter from Herbert Schaepe, Secretary, International Narcotics Control Board, to Mr. Lousberg, Chief, Ministry of Public Health - The Netherlands, (Jan. 17, 2001)).

The government's second argument, that the Convention applies to *hoasca* tea because the tea is not distinct from DMT but is merely an "oral delivery method" for a controlled substance, is equally unavailing, for the same reasons described above. Hoasca tea is distinct from DMT because the plants used to make *hoasca* tea are distinct from DMT. The government argues that UDV has not offered evidence that other parties to the Convention consider the beverage distinct from the component controlled substance. Given the express language of the United Nations Official Commentary to the Convention, such evidence is not critical. The government also asserts that the Convention applies to *hoasca* tea because one country, Brazil, regulates the tea as it does the controlled substance DMT. This suggestion is misleading. The Convention requires that state parties "prohibit all use except for scientific and very limited medical purposes . . ."[33] Brazil does not prohibit the use of *hoasca* tea.[34]

Under the government's construction of the Convention, if Brazil considered *hoasca* tea a controlled substance or preparation under the Convention, Brazil would either prohibit the use of the tea for religious purposes, or it would have made a reservation to the Convention to allow its indigenous religious groups to use the tea. Since Brazil did not make any reservations with respect to indigenous religious use of DMT, plants that contain DMT, or

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[33] Convention, *supra* note 3, art. 7(a).

[34] See Pet'r Br. at 31-35 for a full analysis of this issue.

hoasca tea, either Brazil is in violation of its treaty obligations, or Brazil does not apply the Convention to *hoasca* tea.

1. A Treaty Calling for the Imposition of Criminal Penalties Must Be Strictly Construed

We also note that the implementing legislation of the 1971 Convention–the Psychotropic Substances Act of 1978, which amended the CSA–is criminal law. Criminal statutes are construed strictly, with any ambiguity resolved in favor of lenity.[35] This rule of statutory construction "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered."[36]

Both the Convention[37] and the CSA list DMT as a Schedule I controlled substance.[38] They also regulate any preparation (defined in the Convention as solution or mixture, and in the CSA as a compound, solution, or mixture) of DMT as if it were a Schedule I controlled substance. The CSA does not list the plants that contain DMT on any of the Schedules. It does, however, list both peyote (a cactus plant) and its active hallucinogenic ingredient, mescaline, on Schedule I. Given this discrepancy, it is logical to conclude that *hoasca* tea is not restricted under the CSA, because the leaves and bark used to make the tea are not included. It is not clear that *hoasca* tea is considered a mixture or preparation of DMT under the statute; the best case scenario for the government is that the statute is ambiguous with respect to *hoasca* tea. This ambiguity should, under the general rule, be construed in favor of UDV, provided that it does not defeat the intention of the legislature in enacting the CSA. The determination that the CSA

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35 Scheidler v. Nat'l Org. for Women, Inc., 573 U.S. 393, 408-409 (2003) (citing United States v. Enmons, 410 U.S. 396, 406, n.16 (1973)).

36 United States v. Lanier, 520 U.S. 259, 266 (1997).

37 Convention, *supra* note 3, at Schedule I.

38 21 U.S.C. § 812(c) (2000).

does not cover *hoasca* tea does not defeat the purpose of the legislature for two reasons. First, the purpose of the CSA is to implement the 1971 Convention.[39] If the Convention does not apply to *hoasca*, then the implementation purpose of the CSA is not frustrated. Second, the CSA not only prohibits the use of certain pscyhotropic substances, but it regulates legitimate uses as well.[40]

The fact that DMT can be abused and that it should be used responsibly is not lost on the UDV. But whether the 1971 Convention applies to *hoasca* tea, even if it contains DMT, is a different question. According to the plain language of the Convention, the United Nations Official Commentary, and the INCB, the most authoritative answer to this must be "no". The 1971 Convention regulates DMT, but not the sacramental *hoasca* tea imported by the UDV. The government cannot have a compelling interest in fostering compliance with a treaty with regard to a substance to which the treaty does not apply.

2. Various Features of the Convention Allow States Flexibility in its Enforcement

Articles 21 of the 1971 Convention notes that states are to combat illicit drug trafficking with "due regard to their constitutional, legal and administrative systems." Article 22 provides that a state shall treat the violation of the Convention as a criminal offense, "subject to its constitutional limitations." The Convention does not require that states make reservations with respect to these constitutional limitations or that they inform the INCB or other states of their limitations. Thus, the plain language of the Convention recognizes state autonomy in developing trafficking laws and criminalizing the use of drugs. It anticipates that when applying the Convention to the international drug trafficking, states will engage in the type of balancing required under RFRA.

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39 *Id.* § 801a(2).

40 *Id.* § 801a(1).

III. The Obligation to Defer to the Political Branches in the Domain of Foreign Policy is Not an Obligation to Abdicate Judicial Responsibility

A. General Foreign Policy Interests Do Not Compel Complete Deference to the Executive Branch, Particularly Where Congress has Established the Oversight Requirement

The government argues that the courts below erred in following RFRA because "foreign relations are specifically committed by the Constitution to the political branches . . ." (Pet't Br. 49-50, citing *United States v. Balsys,* 524 U.S. 666, 696-697 (1998)). The government further claims that fully implementing Congress's mandate in RFRA would "empower every individual district court judge in the Country to confound international cooperation and superintend the United States' foreign relations." (Pet't Br. 49). Such "confounding" is no more likely to happen in the context of evaluating individual religious claims, as Congress has required under RFRA, than in the context of the countless (and vastly more numerous cases) in which judges approve plea bargains or the relevance of any number of criminal defences in drug cases.

While the courts generally defer to the political branches on foreign relations, the government inflates this deference in an attempt to bypass the will of Congress and establish a compelling state interest in this case. The Executive Branch has often claimed power under the scope of its foreign relations that courts have refused to grant and this court has made it clear that the judiciary retains its traditional role, even in matters affecting foreign relations.[41]

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41 *See, e.g.*, Rasul v. Bush, 542 U.S. 466 (2004) (rejecting Executive claim that classification of foreign nationals as enemies was a "quintessential political question," Brief for Respondents in Opposition, Rasul v. Bush and Al Odah v. United States, Nos. 03-334 and 03-343, *19 (filed Oct 2003)); Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (rejecting Executive claim that judicial adjudication of international common law torts under the Alien Tort Statute usurped the Executive's foreign affairs power); Republic of Austria v. Altmann,

The cases the government cites only establish that courts do not have unlimited power to dictate singlehandedly U.S. foreign policy, not that the courts have absolutely no role in reviewing matters related to foreign relations. In fact, there are countless contexts in which the judiciary retains an important role in this sphere. *See generally* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION (2d. ed. 1996). Both Congress and the Judiciary have significant roles to play in matters connected with foreign relations, which roles cannot be abrogated.[42] In this case, the judicial role UDV is asking the court to fulfil is mandated by Congress under RFRA. Fulfilling this role is a matter of deference to Congress, not judicial activism. Congress intended that RFRA apply to statutes and other legislative norms (see discussion in Section I.A, *supra*), including those created by legislation implementing non-self-executing treaties.[43] Because this role was created by Congress, Congress retains ultimate control and can amend RFRA if it finds that it is detrimental to an effective foreign policy. Since the Executive Branch chose to make the 1971 Convention a non-self-executing treaty, it realized that Congress would have significant latitude in the implementation of the treaty.[44] It is too late in the day for the government to claim that Congressional legislation affecting the implementation of the 1971 Convention is unwarranted intrusion into Executive authority in foreign relations.

The government's assertion that judicial enforcement of RFRA to the benefit of the respondents would be tantamount to "judicial

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541 U.S. 677 (2004) (rejecting Executive claim that judicial retroactive denial of sovereign immunity under the Foreign Sovereign Immunities Act "may have serious consequences for the United States' conduct of its foreign relations," Brief of the United States as Amicus Curiae Supporting Petitioners, Republic of Austria v. Altmann, No. 03-13, *29 (filed Nov. 2003)).

42 RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES __ 111(2-3)-112(2) (1986).

43 *See supra* note 7.

44 RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES _111(4) cmt. h (1986).

oversight of international treaty negotiations"[45] is patently false. While it is undoubtedly true that much deference has traditionally been given by the judiciary to the political branches in the negotiation and enforcement of international treaties, the proper enforcement of the respondents' claims under the laws of the United States by this Court presents no serious threat of judicial usurpation of executive or legislative functions. This Court is not being asked by the respondents to renegotiate or invalidate an existing treaty, nor is it asked to meddle in the powers of the political branches to conduct foreign affairs. Rather it is the obligation of the government in this case, under RFRA, to demonstrate that its interest in upholding a particular interpretation of the Convention is so compelling that it outweighs the rights of the UDV to freely exercise their religion.

Respectfully submitted,

LEE BOOTHBY
Counsel of Record
DEREK DAVIS
ROBERT A. DESTRO
W. COLE DURHAM, JR.
INTERNATIONAL ACADEMY
FOR FREEDOM OF RELIGION
AND BELIEF
1717 K Street, N.W.
Washington, D.C. 20006
(202) 363-1773

September 9, 2005 *Counsel for Amicus Curiae*

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45 Pet'r Br. 47.