No. 04-1084

IN THE SUPREME COURT OF THE UNITED STATES

ALBERTO GONZALES, ATTORNEY GENERAL, ET AL.,
Petitioners,

v.

O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the district court abused its discretion by entering a preliminary injunction under the Religious Freedom Restoration Act after finding the government defendants had failed to demonstrate any compelling interest in enforcing the Controlled Substances Act against respondents' sacramental use of *hoasca*.

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 29.6, Respondent O Centro Espirita Beneficiente Uniao do Vegetal states that it is a nonprofit corporation under the laws of New Mexico, has tax exempt status pursuant to 26 U.S.C. § 501(c)(3), and is recognized as a church under 26 U.S.C. §§ 509(a)(1) and 170(b)(1)(A)(i).

TABLE OF CONTENTS

Page

APPENDIX:

TABLE OF AUTHORITIES

FEDERAL CASES

STATUTES AND TREATIES

STATUTES:

American Indian Religious Freedom Act:

Controlled Substances Act:

Internal Revenue Code:

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OPINIONS BELOW

The government defendants (government) omitted the district court's Memorandum Opinion and Order denying the government's motion to stay the preliminary injunction. App. 1-8. It is significant because it further explains the district court's conclusion that the 1971 Convention on Psychotropic Substances (Convention) does not apply to *hoasca.*

INTRODUCTION

After holding a lengthy evidentiary hearing, the district court preliminarily enjoined the government from interfering with UDV's sacramental use of *hoasca.* The district court did not hold that the Religious Freedom Restoration Act (RFRA) required this result. Rather, the district court held *only* that, *in this case, at this preliminary stage,* the government had failed to prove, as RFRA requires, that it has a compelling interest in criminalizing UDV's religious practice. The court of appeals affirmed twice, holding *only* that the district court did not abuse its discretion, in light of RFRA's mandate and the evidentiary record developed thus far. Therefore, the government's statement of the question presented–in which the government asks rhetorically whether RFRA intrinsically "requires" the result in this case–is incorrect.[1]

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[1] The government's statement of the question presented assumes that *hoasca* is unsafe for use even under medical supervision. The district court took testimony on this contention and rejected it. It also incorrectly treats as a given that the importation of *hoasca* would violate the Convention, and that Congress has found the substance at issue to be unsafe. Neither assumption is justified.

Because the district court and the court of appeals faithfully applied RFRA to the evidence in this case, because the district court's factual determinations and the court of appeals' review are entitled to deference, and because nothing in the decisions below militates in favor of an interlocutory writ of certiorari, this Court should deny the petition.

STATEMENT OF THE CASE

The government's statement of the case does not fairly summarize the facts. It includes fragments of evidence the district court found unpersuasive and omits the extensive lay and expert testimony–including the government's own–that showed UDV's sacramental use of *hoasca* causes no harm and is not likely to be diverted to non-religious use. It ignores the district court's detailed analysis of the conflicting evidence and the basis for its finding that the government has thus far failed to demonstrate the compelling interest RFRA requires. 227a, 236a, 243a. The government's statement of the case also affirmatively misstates evidence, as explained below.

Respondents are a Christian religious organization and several of its members, including its leadership (collectively UDV). UDV is the small American branch of a religion founded many years ago in Brazil and which the Brazilian government officially recognizes and exempts from its controlled substances laws. G/App. 176; S/App. 1598, 1600-03.[2] The American branch has some 130 American and Brazilian members. S/App. 676-77. UDV is well known in Brazil for its beneficial effects on the lives of its adherents and its extensive charitable activities. S/App. 1592.

A central and essential element of the UDV religion is its sacramental use of *hoasca,* an herbal tea that, under the

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[2] "S/App." and "G/App." refer to the appendices filed in the Tenth Circuit.

church's doctrine, must be made ritually from two plants that grow in the Amazon rain forest, *banisteriopsis caapi* and *psychotria viridis*. 180a. The tea, which UDV imported from Brazil for many years, contains a small amount of naturally-occurring dimethyltryptamine (DMT). The members of the UDV believe that *hoasca* is sacred, and that their sacramental use of *hoasca* connects them to God. S/App. 1599.

After the government seized the UDV's sacramental *hoasca* and threatened prosecution, UDV filed suit.[3] In response to UDV's motion for a preliminary injunction, the government alleged that its prohibition of UDV's exercise of religion served three compelling interests: (1) protecting the health and safety of UDV's members; (2) preventing diversion of *hoasca* to non-religious use, and; (3) adhering to the Convention. S/App. 814-29.

The parties submitted conflicting expert and lay declarations addressing the government's claimed compelling interests. The government did not claim below, as it now does, that the district court should not take any evidence, but should instead consider itself bound by pre-RFRA decisions against persons claiming their habitual use of marijuana was religious, and by the supposed finding Congress made regarding the dangers of *hoasca* when it placed DMT on Schedule I of the CSA.[4]

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[3] The government states that UDV imported *hoasca* surreptitiously. Pet. 5. But one set of shipping notices described the tea as "HOASCA," S/App. 658-662, and others described it as "Chacrona and Mariri," the common names of the plants in *hoasca,* to which a DEA witness admitted familiarity. S/App. 1712. Further, shipping forms stating that the tea contained DMT would have contravened DEA's regulation forbidding shipping containers to indicate the presence of controlled substances. *See* 21 C.F.R. § 1301.74(e).

[4] The legislative history of the initial scheduling of DMT in 1970 shows that the government was concerned with synthetic DMT, not with DMT found endogenously in plants. *See* Drug Abuse Control Amendments of 1968,

After considering the parties' conflicting declarations and memoranda, the district court scheduled an evidentiary hearing on UDV's motion for preliminary injunction and took evidence from twenty witnesses, including ten experts,[5] on three issues: health and safety, risk of diversion, and UDV's contention that it and the Native American Church (NAC) are similarly situated for purposes of equal protection. S/App. 809.

The district court's lengthy and detailed opinion summarizes its view of the evidence and its findings. 177a-246a. The court denied relief under the First Amendment and the Equal Protection Clause. 179a, 183a-197a, 246a. With respect to UDV's RFRA claim, however, the court found:

> The Government has not shown that applying the CSA's prohibition on DMT to the UDV's use of *hoasca* furthers a compelling interest. This Court cannot find, based on the evidence presented by the parties, that the Government has proven that *hoasca* poses a serious health risk to the members of the UDV in a ceremonial setting. Further, the Government has not shown that permitting members of the UDV to

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Hearings Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce, 90th Cong. 68, 76 (1968).

[5] The government argues that the testimony of UDV's "hired"expert witnesses is unworthy of belief. Pet. 13, 16. That suggestion is insulting to the district court, which credited their testimony, and to the eminent experts: Dr. David Nichols, Professor of Medicinal Chemistry and Molecular Pharmacology at Purdue University; Dr. Mark Kleiman, Professor of Policy Studies at the University of California and former Director of the Office of Policy and Management Analysis of the Criminal Division of the DOJ; Dr. Charles Grob, Professor of Psychiatry at the UCLA School of Medicine and Director of the Division of Child and Adolescent Psychiatry at Harbor-UCLA Medical Center.

> consume *hoasca* would lead to significant diversion of the substance to non-religious use.

212-13a. The district court also found that the Convention "does not apply to the hoasca tea used by the UDV." 242a. The court did not purport to finally resolve the parties' various factual disputes, but held that thus far, whatever its weight, the evidence as to health risks was, "essentially, in equipoise." 227a. The court made clear that its decision was preliminary and that it expected to hold a final merits hearing at a later date. 183a. Because the government had not demonstrated a compelling interest, the district court did not reach the"least restrictive means" prong of the RFRA test. 243a.

The parties and the district court then conferred at length regarding the form of the injunction. Although the government now complains that the injunction "imposed elaborate procedures," pet. 8, the government insisted that if UDV were to be permitted to import, store and distribute *hoasca* during its religious services, it should be required to comply with all the regulations covering the commercial importation of controlled substances.[6] UDV agreed to comply with reasonable regulatory requirements. The preliminary injunction permitted UDV and its members to exercise their religion, but accommodated the government's interest relating to shipping and storage controls. The evidence will show that UDV's importation and use of *hoasca* under the injunction has been uneventful.

The district court then denied the government's motion to stay the preliminary injunction, explaining its reasoning carefully. App. 1-8. The government obtained an emergency stay from a two-judge panel of the Tenth Circuit–which ruled

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[6]It is notable, however, that the government does not impose such controls on the transportation, storage and distribution of peyote by members of the NAC.

without benefit of the record and which consisted of two of the dissenters in the later *en banc* rehearing. 168a-174a.

A panel of the court of appeals, in a 2-1 decision, held that the district court had correctly decided the case under RFRA and affirmed the district court's preliminary injunction. 121a-167a. The Tenth Circuit granted the government's motion for rehearing *en banc* "to review the different standards by which [the Tenth Circuit] evaluates the grant of preliminary injunctions, and to decide how those standards should be applied in this case." 2a-3a.

The *en banc* court split on various grounds relating to generic preliminary injunction standards, but an 8-5 majority held that, whatever the applicable standard, the district court had not abused its discretion in granting the preliminary injunction to the UDV under RFRA. 3a. The government sought stays of the mandate pending review on certiorari, but the Tenth Circuit and this Court denied the requests to stay the mandate.

After the mandate took effect, UDV resumed its religious practices and requested that the district court proceed to try the merits. The government has opposed any further activity in the district court until this Court acts on the government's petition.[7] App. 40-46.

In addition to unfairly summarizing the evidence and ignoring all contradictory evidence, which the lower courts fully analyzed in their opinions, the government has misstated important facts and evidence:

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[7] Before the court of appeals and in its emergency application to this Court for a stay, the government complained that the district court had entered an unprecedented preliminary injunction on an incomplete record. Now, in an effort to make this case a candidate for certiorari, the government has done an about-face, arguing that this Court should ignore that the merits hearing is yet to be held and, instead, treat the record as complete. Pet. 24, 25.

1. The government misuses the House and Senate reports on RFRA to buttress its claim that Congress intended that post-RFRA courts must implement the results in pre-RFRA decisions involving other controlled substances. Pet. 16. But the authors of the House Report on which the government relies anticipated and rejected the government's argument here:

> [B]y enacting this legislation, the Committee neither approves nor disapproves of the result in any particular court decision involving the free exercise of religion, including those cited in this bill. This bill is *not* a codification of any prior free exercise decision but rather the restoration of the legal standard that was applied in those decisions. Therefore, the compelling governmental interest test should be applied to all cases where the exercise of religion is substantially burdened[.]

H.R. Rep. No. 103-88, at 5 (1993) (emphasis added); *see* S. Rep. No. 103-111, at 8 (1993).

2. The government falsely states that no DEA exemption for peyote predated RFRA. Pet. 26 n.3. The FDA exempted religious use of peyote in 1966. *See* 21 C.F.R. § 1307.31 ("The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church . . ."). This exemption remains in force. S/App. 1425-28.

3. In an attempt to alarm the Court, the government makes six misrepresentations about UDV's sacramental tea, including three false attributions to the district court. First, contrary to the government's statement, the district court did not find "that it is just as likely as not that *hoasca* will be diverted to the general public and that members of UDV will suffer harm from the consumption of hoasca." Pet. 12. The quote is from a dissenting judge's unfair characterization of the

district judge's conclusion that the government had not met its RFRA burden. The district judge did not write it.

Second, the district court never found that *hoasca* causes "permanent psychoses," pet. 27, nor was there any such evidence.

Third, the district court did not "recognize" that the injunction will cause members of the UDV to "put their physical and psychic well-being in serious jeopardy." Pet. 18. What the district court acknowledged was "that the Government has presented a great deal of evidence *suggesting* that hoasca *may* pose health risks to UDV members." 244a (emphasis added). The district court also noted the results of a preliminary study that found "there had been no injurious effects caused by [UDV members'] use of ayahuasca,"[8] 213a, and that "Government expert Dr. Genser stated. . . that he would be more troubled by a person drinking grapefruit juice while taking a contraindicated drug than by a UDV member taking hoasca in a ceremonial context." 223a.

Fourth, although the government claims that *hoasca* is "DMT-laden," pet. 3, the uncontroverted evidence is that "a typical dose of *hoasca* (200 mL) would contain 25 mg of DMT." Ex. 24. This means that *hoasca* is only 12 ten-thousandths of 1% DMT, and that a sixty-liter container of tea, like the one the government confiscated, would contain no more than one heaping teaspoon of DMT.

Fifth, without reference to the record, the government repeatedly refers to DMT as a narcotic. Pet. 23, 25. DMT is not a narcotic. It is classified as an hallucinogen, although the evidence was that actual hallucinations are rare and do not occur in the religious context. Tr. 1285-87 (Oct. 30, 2001).

Sixth, the government falsely claims that unless *hoasca* is imported, those who might desire to take DMT will be

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[8] *Ayahuasca* is the Spanish word for the *hoasca* tea.

unable to find it in the United States. Pet. 26. However, DMT is readily available in this country from many sources, including grasses the government recommends for the control of roadside erosion. 195a. The chemicals necessary to prepare synthetic DMT, which *hoasca* does not contain, are also readily available in the United States. Ex. 24.

REASONS FOR DENYING THE PETITION

I. THE TENTH CIRCUIT'S INTERLOCUTORY DECISION IS NOT RIPE FOR REVIEW.

The Court should deny the petition because the Tenth Circuit's interlocutory decision only affirmed a preliminary injunction and remanded the case to the district court for a trial on the merits. Absent extraordinary circumstances, the interlocutory status of a case is sufficient to justify denial of a petition for certiorari. *See Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in denial of petition) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) (denying petition as "not yet ripe for review" because circuit court remanded case to district after resolving various legal issues); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (concluding that the order "sought to be reviewed by certiorari . . . was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application"); *Am. Constr. Co. v. Jacksonville, Tampa and Key West Ry. Co.*, 148 U.S. 372, 384 (1893) (holding that certiorari to review unavailable for interlocutory decisions except to "prevent extraordinary inconvenience and embarrassment in the conduct of the cause"). Contrary to the government's

arguments, pet. 24-29, this case does not involve extraordinary circumstances that warrant certiorari review.

First, the record does not support the government's alarmist arguments that denial of the petition will result in physical or psychological harm to members of the UDV and diversion of *hoasca* for non-religious use. Pet. 27-29. Such arguments failed to convince the district court, a panel of the court of appeals, the court of appeals sitting *en banc,* and this Court when it refused to stay the preliminary injunction. Regardless of how often the government makes these arguments and misrepresents the record to support them, no evidence exists that anyone will suffer any harm if the 130 U.S. members of the UDV continue sacramental use of *hoasca* until the district court makes a final decision. S/App. 676-77.

Second, contrary to the government's assertion, the Tenth Circuit's decision affirming the entry of the preliminary injunction does not "rest[] solely on a premise as to the applicable rule of law." *Thornburgh v. Am. College of Obstetricians and Gynecologists*, 476 U.S. 747, 757 (1986), *overruled on other grounds by Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The government relies exclusively on cases in which the Court reviewed interlocutory decisions that presented legal issues of national importance. *See Ashcroft v. ACLU*, 124 S. Ct. 2783 (2004) (reviewing interlocutory decision preliminarily enjoining enforcement of federal statute lower court concluded was likely unconstitutional on its face); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001) (reviewing interlocutory decision enjoining enforcement of federal statute based on common law defense of debatable validity); *Legal Serv. Corp. v. Velazquez*, 531 U.S. 533 (2001) (reviewing interlocutory decision enjoining enforcement of federal statute lower court concluded was likely unconstitutional on its face); *Saenz v. Roe*, 526 U.S. 489 (1999) (reviewing clearly erroneous interlocutory decision enjoining implementation of state welfare statute lower court concluded

was unconstitutional on its face); *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (per curiam) (reviewing interlocutory decision enjoining state from implementing its statute and threatening to enjoin six other states from implementing similar statutes). But this case does not present legal issues with widespread ramifications. The parties do not dispute that RFRA's legal standards control. The pivotal issue here is whether the Tenth Circuit *correctly applied* those indisputable legal standards to *this* unique and incomplete record. Because the Tenth Circuit's fact-specific, interlocutory decision affects only the parties and only does so temporarily, its decision does not merit certiorari review. *See Hamilton-Brown Shoe Co.*, 240 U.S. at 258 (denying petition seeking review of interlocutory decision that was "important to the parties," but "involved no question of public interest and general importance").

Third, certiorari review is not "fundamental to the further conduct of the case," *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945), because RFRA is not challenged here. Unlike *General Motors*, where the issue involved a Takings Clause issue about which the circuit courts were divided, this case only raises questions about the proper application of established *statutory* legal standards to particular facts. In cases like this one, although certiorari review might have *some* impact on remand, it is unnecessary to grant the petition because that impact would not be "fundamental." *Id.*; *see also Thornburgh*, 476 U.S. at 757 n.8 (concluding that Court should deny petition when "the probability of success on the merits depends on facts that are likely to emerge at trial"). To conclude otherwise would transform nearly every interlocutory decision into an "extraordinary" one. *Hamilton-Brown Shoe Co.*, 240 U.S. at 258.

Fourth, like most interlocutory decisions, the decision below rests on a record that is inadequate for certiorari review. Unlike *Saenz* and *Thornburgh*, the record in this case is incomplete because factual disputes remain for the district court

to resolve at trial. *See Saenz*, 526 U.S. at 496-97 (noting that the state "did not challenge plaintiffs' evidence" and "relied squarely on [an] undisputed fact"); *Thornburgh*, 476 U.S. at 792 (noting "a full record . . . on the issues" presented). Here, the district court has made no final findings, only preliminary ones for the purpose of ruling on UDV's motion for temporary injunctive relief. 183a. Because the government failed to prove any compelling interest at the motion hearing, the district court has not made any findings with respect to the least restrictive means prong of the RFRA test. 243a. Under these circumstances, the Court should deny the petition.

II. THE TENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY OTHER FEDERAL DECISION.

According to the government, the Tenth Circuit's decision conflicts with holdings of other circuit courts that addressed "similar religion-based claims for exemptions from the Controlled Substances Act." Pet. 13-14. No such conflict exists. None of the cases on which the government relies is factually similar in any material respect to this case and, whether pre- or post-RFRA, the legal standards they apply are no different than those applied in this case. Each involved different controlled substances, in entirely different contexts, and their outcomes were fact-driven, just as this one is.

For example, *United States v. Israel*, 317 F.3d 768, 769, 772 (7th Cir. 2003), a post-RFRA case, involved a parolee forbidden to use controlled substances, required to hold a job and support his children. As a "Rastafarian," he claimed the right to smoke marijuana "every day all day" and, as a result, could neither hold a job nor support his children. *Id.* at 770. Similarly, in *Olsen v. DEA*, 878 F.2d 1458, 1464 (D.C. Cir. 1989) (Ginsburg, J.), the Court agreed that there should be no religious exemption for marijuana "smoked continually all day"

by members of the Ethiopian Zion Coptic Church and, significantly, distinguished the use of peyote in a controlled religious setting (which is akin to UDV's use of *hoasca*). *Olsen* fully supported the decision below.

The remaining cases the government cites, pet. 13-14, are similarly irrelevant to the lower courts' holdings in this case. They also involved frivolous attempts to throw a mantle of religion over unrestricted marijuana use or drug trafficking.[9] But even if their facts could be said to bring them close to this case, they would be of limited relevance because RFRA, on its face, *requires* individualized inquiry. *See* 42 U.S.C. 2000bb-1(b) (stating that government may "substantially burden" religious exercise "only if it demonstrates that application of the burden *to the person"* furthers a compelling interest) (emphasis added). Here, the government has stipulated that UDV's religion is *bona fide* and its members' beliefs sincere. Comparing UDV with defendants in criminal drug-trafficking cases who raised frivolous free exercise claims is unfair and unjustified. It is undisputed that UDV's members are law-abiding citizens. S/App. 686.

Both the district court and the Tenth Circuit correctly rejected the argument that the decisions the government cites comprise a body of contrary case law. 140a. ("The district court correctly distinguished, on two grounds, cases cited by the Government denying individuals' free exercise challenges to drug laws. First, the sincerity of the Uniao do Vegetal's faith and the substantial burden the CSA imposes on the practice of

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[9] *See United States v. Brown*, 1995 U.S. App. LEXIS 34750 (8th Cir. Dec. 12, 1995) (per curiam) (unpublished); *United States v. Greene*, 892 F.2d 453 (6th Cir. 1989); *Olsen v. Iowa*, 808 F.2d 652 (8th Cir. 1986) (per curiam); *United States v. Merkt*, 794 F.2d 950 (5th Cir. 1986); *United States v. Rush*, 738 F.2d 497 (1st Cir. 1984); *United States v. Middleton*, 690 F.2d 820 (11th Cir. 1982); *United States v. Spears*, 443 F.2d 895 (5th Cir. 1971) (per curiam).

the religion are uncontested. By contrast, Courts in the other RFRA cases cited by the Government have found the plaintiffs' beliefs are not religious, are not sincerely held, or are not substantially burdened by governmental action.");149a ("As the D.C. Circuit observed in acknowledging the legality of the Native American Church's use of peyote but refusing to grant a religious exemption to marijuana, Uniao do Vegetal's use of *hoasca* occurs in a 'traditional, precisely circumscribed ritual' where the drug 'itself is an object of worship' and using the sacrament outside the religious context is a sacrilege." (quoting *Olsen*, 878 F.2d at 1464 (Ginsburg, J.)). The Tenth Circuit emphasized that its ruling

> in no way calls into question cases refusing to grant an exemption from the CSA for Marijuana, LSD, Heroin or any other controlled substances. UDV's position is distinct and as RFRA requires we have looked at the specific circumstances of Uniao Do Vegetal's ceremonial *hoasca* use and assessed the Government's asserted compelling interests. While we need not consider the CSA in a vacuum, the bald assertion of a torrent of religious exemptions does not satisfy the Government's RFRA burden. Moreover, we leave open the possibility that future evidence of the health effects and diversion potential may allow the Government to prove a compelling interest in enforcing of the CSA against *hoasca's* sacramental use.

152a-153a.

In short, the differences in outcomes of those cases and this case are fact-specific, and none reflects even trivial differences in the legal standards applied. Accordingly, there is no conflict among the circuits. *See Wisconsin Elec. Co. v. Dumore Co.*, 282 U.S. 813 (1931) (dismissing writ of certiorari

as "improvidently granted" where it appeared "that the asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law").

Finally, it is significant that in its effort to focus this Court on other courts' treatment of other substances in other contexts involving frivolous claims for religious exemptions from the CSA, the government assiduously avoids the NAC's officially-approved sacramental use of peyote, also a Schedule I controlled substance. The government has never attempted to explain how it can ask the courts to ignore the NAC's possession, distribution and ritual use of peyote while claiming that UDV's similar use of *hoasca* must be conclusively presumed to be a menace to society and to UDV's members, simply because it (like peyote) is on Schedule I of the CSA.[10] *Cf. Bd. of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 747 (1994) (Scalia, J., dissenting, joined by Rehnquist, C.J., and Thomas, J.) ("[N]ot every religion uses peyote in its services, but we have suggested that legislation which exempts the sacramental use of peyote from generally applicable drug laws is not only permissible, but desirable, without any suggestion that some 'up front' legislative guarantee of equal treatment for sacramental substances used by other sects must be provided. The record is clear that the necessary guarantee can and will be provided, after the fact, *by the courts*."(Citations omitted; emphasis in original.)).

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[10] The exemption in the CSA, 21 C.F.R. § 1307.31, and the more recent exemption through American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996a (2000), both permit pregnant women and children to consume peyote. S/App. 1471-2, 1714, 1245.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE PRELIMINARY INJUNCTION.

The Court should deny the petition because the lower courts correctly applied RFRA to the unique facts of this case. In its petition, the government fails to identify and address the legal standards that apply to an appeal of a preliminary injunction issued under RFRA. Those standards illuminate the correctness of the decisions by the lower courts. If there were any error below, it was on the part of the seven judges of the court of appeals who held that UDV's application for preliminary relief must meet a higher standard than RFRA permits. Because this was to the government's advantage, it does not support the government's petition.

The grant or denial of a preliminary injunction is reviewed for an abuse of discretion. *Ashcroft*, 124 S. Ct. at 2790. A district court abuses its discretion in granting a preliminary injunction if it applies an incorrect legal standard or its preliminary fact findings are clearly erroneous. *Star Fuel Marts, LLC v. Sam's E., Inc.*, 362 F.3d 639, 645 (10th Cir. 2004); *see also United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 508 (1974) ("The findings and conclusions of the District Court are . . . governed by the 'clearly erroneous' standard of Fed. R. Civ. P. 52 (a)" in the Supreme Court.)

The government, however, fails to confront the evidence below and explain why the district court's findings are "clearly erroneous." This is likely due to this Court's traditional reluctance to re-examine a factual record that two lower courts have addressed. Under the "two-court rule," this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co., Inc. v. Linde Air Prod. Co.*, 336 U.S. 271, 275 (1949); *see United States v. Ceccolini*, 435 U.S. 268, 273 (1978) (refusing to

revisit district court's factual finding after appellate court concluded that the record supported it because of "traditional deference" to the two-court rule). The rule applies here.

The government's attack on the evidence is largely limited to its complaint that if the evidence was "in equipoise" as the district court found, then the government should have won. Pet. 20-21. This is incorrect. The district court found that the government failed to carry its burden. When evidence is "evenly balanced," the party with the burden of proof "must lose." *Dir., Office of Workers' Comp. Programs v. Greenwich Colleries Dir.*, 512 U.S. 267, 281 (1994). Even if the UDV were to concede (which it does not) that the district court's finding of "equipoise" means that the government almost proved a compelling interest (which it did not), the government would still have no basis for the writ. In *Ashcroft*, 124 S. Ct. at 2791, this Court, applying strict scrutiny, addressed the proper appellate treatment of a preliminary injunction and held that, even where the "question is close," this Court "should uphold the [preliminary] injunction and remand for trial on the merits."

The district court's faithful adherence to RFRA is reflected in its extensive and careful analysis of the evidence, which consumes twenty-nine pages of the government's appendix, 207a-236a, and was based on thousands of pages of transcripts and exhibits. It applied RFRA to the evidence and its findings of fact just as the text of RFRA requires.

Accordingly, as the district court recognized and as the Tenth Circuit held some years ago, once a plaintiff shows by a preponderance of the evidence that the government has substantially burdened the plaintiff's sincere exercise of religion (as UDV established by stipulation), "the burden shifts to the government to demonstrate that the challenged regulation furthers a compelling [governmental] interest in the least restrictive manner." 207a (citing *United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996)). This Court recently held the same, in the analogous circumstance of an appeal from a

preliminary injunction that blocked enforcement of an anti-pornography statute: "As the Government bears the burden of proof on the ultimate question of [the statute's] constitutionality, respondents must be deemed likely to prevail," unless the Government carries its burden. *Ashcroft*, 124 S. Ct. at 2791-2792. Under RFRA, the government's burden is a heavy one. *See City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) (noting that compelling interest test is "the most demanding test known to constitutional law").

The district court methodically considered the evidence and applied it to RFRA's standards. 205a-245a. Below, as here, the government argued that Congress's inclusion of DMT on Schedule I of the CSA was sufficient proof of a compelling interest. 211a. After stating that it would not ignore Congress's inclusion of DMT on Schedule I, the district court nevertheless pointed out that RFRA "mandated that a court may not limit its inquiry to [Congress's] general observations[.]" 211a. Rather, under RFRA, "a court is to consider whether the '*application* of the burden' to the claimant 'is in furtherance of a compelling governmental interest' and 'is the least restrictive means of furthering that compelling governmental interest.'" 211a-12a. As Judge McConnell explained, "Congress' general conclusion that DMT is dangerous in the abstract does not establish that the government has a compelling interest in prohibiting the consumption of hoasca under the conditions presented in this case." 95a.

Moreover, the government insists that Congress found that DMT had a high potential for abuse, but Congress did not. Nor is the government correct that UDV's remedy is to seek rescheduling. Pet. 3. The DEA characterizes Schedule I as essentially a catch-all:

> [W]hen it comes to a drug that is currently listed in schedule I, if it is undisputed that such drug has no currently accepted medical use. . . and a lack of accepted safety for use under medical supervision, and

> it is further undisputed that the drug has at least *some* potential for abuse sufficient to warrant control under the CSA, the drug must remain in schedule I.

Notice of Denial of Petition, 66 Fed. Reg. 20038, 20039 (2001) (emphasis added). Therefore, a petition to reschedule DMT based on low abuse potential and safety for supervised use would get nowhere. And RFRA provides that a person whose religion is burdened by a law is to seek relief in a federal court, not administrative agencies or Congress. *See* 42 U.S.C. 2000bb-1(c). Peyote and mescaline are Schedule I drugs, but neither has been reclassified even though both have been considered safe for religious use since at least 1966. *See* 21 C.F.R. § 1307.31; 42 U.S.C. § 1996a.

The government also argued below, as it argues here, that the district court should have dispensed with RFRA's facial requirement of individual consideration of free exercise claims and simply followed the decisions of other federal courts that concluded there should be no religious exemption for marijuana, which is also on Schedule I. The results in those cases cannot supply the missing evidence here, where the government failed to show that UDV's members are harmed by *hoasca*, that society is harmed by their sacramental use of *hoasca*, and where no evidence exists that any of UDV's members are anything but upright, law-abiding citizens who simply wish to practice the religion they believe brings them closer to God.

The government's position seems to be that general congressional findings regarding the harmfulness of drug abuse are sufficient to prove a compelling interest. But Congress made RFRA apply to "all Federal law" and the implementation of that law, "whether statutory or otherwise," 42 U.S.C. 2000bb-3(a), and Congress passed RFRA to legislatively reverse this Court's holding in *Employment Div. v. Smith*, 494 U.S. 872 (1990), which involved the sacramental use of Schedule I controlled substances. Moreover, the DEA (and

before it, the FDA), adopted regulations exempting the religious use of peyote, a Schedule I controlled substance, by the NAC. *See* 21 C.F.R. § 1307.31. Congress more recently passed the AIRFA, 42 U.S.C. § 1996a, which precludes state and federal governments from interfering with NAC's sacramental use of peyote. Thus it is not correct to argue that Congress considered its placement of a substance on Schedule I to be conclusive of its dangers in religious contexts. Pet. 17. In addition, in passing RFRA, Congress required courts to look behind general legislative findings to determine whether the application of a particular law to the particular person is justified by a compelling interest. *See* 42 U.S.C. 2000bb-1(b).[11]

After its careful analysis of the evidence, the district court found:

> The Government has not shown that applying the CSA's prohibition on DMT to the UDV's use of hoasca furthers a compelling interest. This Court cannot find, based on the evidence presented by the parties, that the Government has proven that hoasca poses a serious

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[11] The government's reliance on *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) [*Turner I*] and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) [*Turner II*] is entirely misplaced. Both involved First Amendment challenges to the facial validity of federal "must-carry" provisions that apply to cable providers. Applying *intermediate scrutiny*–rather than the strict scrutiny Congress has prescribed under RFRA–the Court afforded some deference to the *general* predictive judgments Congress made to justify the need for the must-carry provisions, but not to any specific legislative findings about application of those provisions to a specific cable carrier. Although *Turner I* and *Turner II* might require a court ruling on a facial challenge to the CSA to give significant deference to Congress's findings about the societal problems associated with drugs, they would not require a court to defer to Congress when determining whether the government has demonstrated a compelling interest in burdening a particular religious group's conduct. On the contrary, RFRA *requires* a searching, fact-specific inquiry, and Congress has made no specific findings about the need to criminalize the sacramental *hoasca* use at issue.

> health risk to the members of the UDV in a ceremonial setting. Further, the Government has not shown that permitting members of the UDV to consume hoasca would lead to significant diversion of the substance to non-religious use.

212-13a. While the government quarrels with the district court's findings, and complains that the district court and court of appeals should have deferred to the scheduling of DMT as a controlled substance, there is no doubt that the record supports the foregoing finding, and that the district court was correct, under both RFRA *and* under this Court's pre-*Smith* decisions, whose legal standards Congress incorporated in RFRA. *See* 42 U.S.C. 2000bb(b)(1).

The government's insistence on deference to legislative findings is contrary not only to the text and legislative history of RFRA, but to decisions of this Court, which has repeatedly explained that:

> Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.
>
> . . .
>
> A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution. Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.

Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 844 (1978); *accord Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989); *FCC v. League of Women*

Voters of California, 468 U.S. 364, 388 n.18 (1984). In *Landmark Communications*, 434 U.S. at 844, the Court held that it was therefore "incumbent" on the state appellate court "to go behind the legislative determination and examine for itself" the particular facts of the controversy before it, just as the Tenth Circuit did here, and just as RFRA requires.[12]

As *amici*[13] eloquently argued below, the government's arguments must be rejected if RFRA is to have any meaning:

> In entering a preliminary injunction in favor of the UDV in this case, the district court faithfully followed the dictates of RFRA, guided by the statute's text, its purposes and background, and the clear precedents of this Court. The government's arguments on appeal, if accepted, would seriously undercut RFRA's purpose of protecting the religious conscience of all faiths.

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[12] The government focuses its argument on the voices of the Tenth Circuit's dissenting judges. The reason the Court of Appeals reheard this case *en banc*, however, was principally because of the Tenth Circuit's own view–not shared by other circuits, as explained in Judge Seymour's opinion, 56a–that a party moving for a preliminary injunction that "disturbs the status quo" should bear a heightened burden. A bare majority of the court held that an application for a preliminary injunction that would disturb the status quo should be "more closely scrutinized to assure that the exigencies of the case" support its issuance. 13a. This heightened standard is difficult to square with RFRA, except as to a plaintiff's prima facie case. It is also difficult to square with *Ashcroft*, 124 S. Ct. at 2794, in which this Court assigned the government the burden of proving its justification for a restriction on speech. Whatever the merits of the Tenth Circuit's internal debate, it redounded to the benefit of the government, not UDV, and it is no basis for granting the petition.

[13] *Amici* included the Christian Legal Society, the National Association of Evangelicals, Clifton Kirkpatrick, as the Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.) and the Queens Federation of Churches, collectively representing millions of Christian Americans.

App. 9-36.

IV. THE PRELIMINARY INJUNCTION DOES NOT COMPEL THE GOVERNMENT TO VIOLATE THE 1971 CONVENTION.

The government asserts that the preliminary injunction requires it to violate the Convention. Pet. 13, 21-24. The government is wrong because (1) the district court correctly found that the Convention does not apply to *hoasca*; (2) even if the Convention does apply to *hoasca*, the government has not carried its burden under RFRA of establishing a compelling interest in enforcing it against UDV; and (3) even if the Convention otherwise applied, the language of the Convention and other treaties permits the government to accommodate UDV's religion.

Although the district court did not include compliance with the Convention as one of the issues on which it would take evidence at the hearing, the court considered some evidence that had either been attached to pleadings, referenced within them, or presented at the hearing for other purposes. This evidence included a declaration from Robert Dalton, an Assistant Legal Advisor for Treaty Affairs at the State Department, some of the Convention's legislative history where discussion was had that peyote, as a plant, was not covered but might be in the future, 239a-240a; the Official Commentaries to the Convention, App. 53-59; the Official Commentaries of the 1988 Convention On Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which amended the 1971 Convention, App. 60-66; evidence of the practice of the United States in permitting the export of peyote to Canada even though peyote contains mescaline which is controlled under the Convention, 241a; and evidence from the government's experts that the NAC uses peyote as a sacrament by eating the buttons of the

plant *and* by making a tea from parts of the plant containing mescaline and water, S/App. 1715, 1717, 1718.

The only "evidence" before the district court that the Convention applies to *hoasca* was the Dalton declaration, 265a-271a, which the court rejected, finding that "[t]here is no indication in this case that the State Department's interpretation is anything but an agency's litigation position," App. 4. The remainder of the evidence the court reviewed supported its conclusion that the Convention did not apply to *hoasca*. 242a.

The government asserts incorrectly that no dispute exists that *hoasca* is a "solution" or "mixture" within the meaning of the Convention. Pet. 21. The dispute regarding the applicability of the Convention centers precisely on its coverage of "preparations," which it defines only as "solutions or mixtures, in whatever state, containing one or more psychotropic substances." 52a. Yet, as the district court states, the Official Commentary to that section explains that "[t]he inclusion in Schedule I of the active principle of a substance does not mean that the substance itself is also included therein if it is a substance clearly distinct from the substance constituting its active principle." App. 58. The Commentary even gives examples: "Neither the crown (fruit, mescal button) of the Peyote cactus nor the roots of the plant Mimosa hostilis nor Psilocybe mushrooms themselves are included in Schedule I, but only their respective active principles, mescaline, DMT, and psilocybine (psilocine, psilotsin)." (Footnotes omitted). *Id.* The Official Commentary to the 1988 Convention buttresses this conclusion by defining "preparation" as "the mixing of a given quantity of a *drug* with one or more other substances (buffers, diluents)." App. 56 (emphasis added). Thus *hoasca* is not within the definition of "preparation" because the "preparation" of *hoasca* is not created by mixing DMT with anything else.

The court would have had additional evidence that the Convention did not apply to *hoasca* had the government not

successfully objected to some of the UDV's evidence on the ground that the treaty was not a subject of the hearing. 104a. The evidence the UDV offered was a letter from the Executive Secretary of the International Narcotics Control Board (INCB) to the Ministry of Health of the Netherlands in response to a specific request regarding the legal status under the Convention of the same tea used by religious groups in the Netherlands. His opinion was clear: "No plants (natural materials) containing DMT are at present controlled under the 1971 Convention on Psychotropic Substances. Consequently, preparations (*e.g.* decoctions) made of these plants, including *ayahuasca* are not under international control and, therefore, not subject to any of the articles of the 1971 Convention." App. 51-52.

The government filed a motion to stay the injunction in the district court and attached a new declaration from another assistant legal adviser in the State Department. In response, the UDV attached the excluded letter from the Executive Secretary of the INCB. The court denied the motion to stay and found that the INCB letter provided additional support for its conclusion that the Convention was not applicable to *hoasca*. App. 2-4.

In its next attempt to stay the injunction before the Tenth Circuit, the government attached three declarations–two from State Department legal advisors and one from a DEA Agent. In response, the UDV attached a declaration from Ambassador Herbert Okun, the diplomat who was for many years responsible for representing the United States' position on this treaty on the INCB, who is also of the opinion that the Convention does not cover *hoasca.* App. 48.

Ignoring this evidence, and having presented no evidence that any other country has interpreted the 1971 Convention to include *hoasca*, the government misrepresents to this Court that "the 160 Nations," pet. 16, that are parties to the 1971 Convention share the government's view that the Convention applies to *hoasca.* In fact, the record is devoid of

evidence to support that contention and–even at this stage–contains evidence that flatly contradicts it. For example, Brazil–the country where *hoasca* originates and an original party to the 1971 Convention–has long permitted the use of *hoasca* for religious purposes. G/App. 176. Additionally, the Court of Appeals in Paris, France recently ruled that the Convention does not prohibit the religious use of *ayahuasca*. App. 67-97. *See, e.g., Nielsen v. Johnson*, 279 U.S. 47, 52 (1929) ("When [a treaty provision's] meaning is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter and to their own practical construction of it.").

If the government has evidence that other countries share its position that the Convention applies to *hoasca*, it will have ample opportunity to present that evidence at trial.[14] But the existing record evidence is to the contrary. *See United States v. Stuart*, 489 U.S. 353, 369 (1989) ("The practice of treaty signatories counts as evidence of the treaty's proper interpretation, since their conduct generally evinces their understanding of the agreement they signed."); *Air France v. Saks*, 470 U.S. 392, 400 (1985) (explaining that Court's interpretation "is consistent with the negotiating history of the Convention, the conduct of the parties to the convention, and the weight of precedent in foreign and American courts"); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 259-60 (1984) ("In determining whether the Executive Branch's domestic interpretation of the Convention is consistent with the Convention's terms, our task is to construe a 'contract' among nations. The conduct of the contracting

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[14] If the government now informs the district court (as it has not yet) that it wishes to prove that the Convention applies and that it needs to enforce it as to UDV, UDV will call Ambassador Okun and other eminent experts to testify respecting the Convention's coverage and the government's claim that our international relations will suffer if UDV is permitted to practice its religion.

parties in implementing that contract in the first 50 years of its operation cannot be ignored.").

The government next misrepresents the panel's decision, claiming that "the panel majority held only that the government had not demonstrated that compliance with the Convention was the least restrictive means of furthering the government's compelling interest in adhering to international obligations." Pet. 9. This is incorrect. The panel concluded that the government failed to meet even its *first* burden of showing a compelling interest. "Based on the record before us, we cannot conclude the government has demonstrated that 'application of the burden to the [UDV] (1) is in furtherance of a compelling government interest' . . ." 147a (quoting 42 U.S.C §2000bb-1(b)). Because the panel so found, it did not reach the issue of whether the Convention applied to *hoasca*.

Even if a court were to decide that the 1971 Convention applies to *hoasca*, but that RFRA requires a particular religious use to be excepted, the Convention anticipates and accommodates such exceptions. The plain language of the treaty–on which the government claims the courts must rely–could not be clearer: Its provisions are "[s]ubject to the constitutional limitations of a Party, its legal system and domestic law." 306a. In other words, if RFRA otherwise requires our government to accommodate UDV's exercise of religion, there is no violation of the Convention even if it were interpreted to apply to *hoasca*.

The government would limit this Court's consideration of the Convention to the three or four words in its text the government claims make it applicable to *hoasca*. Even if this were a defensible position, the United States must uphold other treaties. As the panel found, "even if the Convention does apply to *hoasca,* the United States has obligations under its laws and other international treaties to protect religious freedom. . . . 'The freedom to manifest religion . . . in worship, observance, practice and teaching encompasses a broad range

of acts . . . ' *U.N. Hum. Rts. Comm., General Comment No. 22,* at 4 (1993)." 146a. *See also* United Nations International Covenant on Civil and Political Rights, Article 18 (ratified by the U.S. in 1992) ("Everyone shall have the right to freedom of...religion. This right shall include freedom...to manifest his religion or belief in worship, observance, practice and teaching."); 1988 Convention On Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, art. 14(2), 28 I.L.M. 493 (The measures taken "shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use.").

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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