IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

O CENTRO ESPIRITA BENEFICIENTE
UNIAO DO VEGETAL, *et al.*,

Plaintiffs,

vs.

No. CV 00-1647 JP/RLP

JOHN ASHCROFT, *et al.*,

Defendants.

PLAINTIFFS' REPLY TO DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

The issue before this Court is whether the government's actions infringe the plaintiffs' fundamental right to practice their religion. The government rationalizes its action as no more than an unavoidable battle in its war on drugs. Its submission to this Court reveals, however, that the government lacks any substantial factual or legal basis to support its position. This is not the first time the government has sung this refrain in the courts of this district. In an opinion that the government entirely omits from its brief, Judge Juan Burciaga eloquently responded to it:

> THERE is a genius to our Constitution. Its genius is that it speaks to the freedoms of the individual. It is this genius that brings the present matter before the Court. More specifically, this matter concerns a freedom that was a natural idea whose genesis was in the Plymouth Charter, and finds its present form in the First Amendment to the United States Constitution--the freedom of religion.
>
> The Government's "war on drugs" has become a wildfire that threatens to consume those fundamental rights of the individual deliberately enshrined in our Constitution. Ironically, as we celebrate the 200th anniversary of the Bill of Rights, the tattered Fourth Amendment right to be free from unreasonable searches and seizures and the now frail Fifth Amendment right against self-incrimination or deprivation of liberty without due process have fallen as casualties in this "war on drugs." It was naive of this Court to hope that this erosion of constitutional protections would stop at the Fourth and Fifth Amendments. But today, the "war" targets one of the most deeply held fundamental rights--the First Amendment right to freely exercise one's religion.
>
> To us in the Southwest, this freedom of religion has singular significance because it affects diverse cultures. It is as much of us as the rain on our hair, the wind on the grass, and the sun on our faces. It is so naturally a part of us that when the joy of this beautiful freedom sings in our souls, we find it hard to conceive that it could ever be imperilled. Yet, today, in this land of bright blue skies and yellow grass, of dusty prairies and beautiful mesas, and vistas of red earth with walls of weathered rock, eroded by oceans of time, the free spirit of the individual once again is threatened by the arrogance of Government.

United States v. Boyll, 774 F. Supp. 1333, 1334 (D. N.M. 1991).

In addition to its overarching theme of drug hysteria, the government makes a series of factual assertions and legal arguments that plaintiffs will rebut below but, given the length of the parties' briefing, will not summarize in this introduction. As a prefatory matter, however, the plaintiffs

take exceptional issue with two of the many incorrect factual assertions in the government's brief. First, Plaintiff Jeffrey Bronfman did *not* tell the agents who seized the UDV's tea that "he knew what he was doing was against the law," as the government claims. Defendants' Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction, (Opp.) at 3. See 2d Declaration of Jeffrey Bronfman at ¶ 4. (Ex. P).[1] Second, the government repeatedly argues that the "peyote exemption" is only for "Native Americans [who] use peyote" (Opp. at 1) or "Native American tribal members" (Opp. at 2) when in fact, the exemption is for the Native American Church (NAC) which, as established infra at 40-41, is *not* composed solely of Native Americans. The NAC includes many non-Indians.

ARGUMENT

I. THE GOVERNMENT MISCHARACTERIZES THE BURDEN PLAINTIFFS MUST CARRY TO ESTABLISH THEIR RIGHT TO PRELIMINARY RELIEF

The government argues that this Court should deny plaintiffs' request for a preliminary injunction because plaintiffs have ostensibly failed to show that the government does not have a compelling interest in banning the religious use of hoasca and has not adopted the least restrictive means. Opp. at 27, 32. The government also argues a preliminary injunction is an "extraordinary remedy" to which plaintiffs are not entitled; that a preliminary injunction should not issue because it would "disturb the status quo," grant affirmative relief and afford the plaintiffs the full relief requested. Opp. at 5-6. The law and evidence are to the contrary. **First**, the burden is on the government to demonstrate its compelling interest and its adoption of the least restrictive means. **Second**, the evidence the government has brought forth is inadequate to sustain its burden. **Third,** whether a preliminary injunction in this context should or should not be characterized as an "extraordinary

[1]To avoid confusion with the exhibits to the plaintiffs' opening brief, the plaintiffs have numbered the exhibits to this reply beginning with Exhibit P and will continue to refer to the exhibits to their opening brief by their original letters.

remedy" is irrelevant to the consideration of an ongoing First Amendment violation. **Fourth,** the government mischaracterizes the "status quo" and the nature of the relief the plaintiffs seek.

A. The Government Mischaracterizes the Burdens of the Parties.

The government states plaintiffs have the burden of establishing that the government has no compelling interest and has not adopted the least restrictive means of serving that interest. Opp. at 27-32. The government is wrong. In the preliminary injunction context, courts have consistently placed these burdens where they belong–on the government. See Black Hawk v. Commonwealth of Pennsylvania, 114 F. Supp.2d 327, 332-33 (M.D. Pa. 2000) (issuing preliminary injunction after state failed to carry burden of justifying refusal to extend religious exemption); Torries v. Hebert, 111 F. Supp.2d 806, 815-16 (W.D. La. 2000) (for purposes of preliminary injunction, once plaintiff demonstrates government intended to interfere with First Amendment rights, burden shifts to government to justify its conduct); Pellegrino v. Satz, 1998 WL 1668786, *2 (S.D. Fla.) ("[I]f the defendant in a commercial speech case fails to meet its burden to justify the restrictions at issue, the plaintiff has necessarily satisfied the 'irreparable injury' prong of the preliminary injunction test, . . . and has also shown a substantial likelihood of success on the merits."); Books, Inc. v. Pottawattamie County, Iowa, 978 F. Supp. 1247, 1256 (S.D. Iowa 1997) (preliminary injunction appropriate because the court deemed it impossible to find that county government would be able to meet its burden at trial to justify suppression of speech). In evaluating whether a government interest is a compelling one, a court's inquiry

> necessarily consists of four parts: First, [it] must determine whether the government's articulated goal in enacting the law at issue...is appropriately considered a compelling interest under the governing case law; if so, [the court] must then set forth the standards under which to evaluate the government's evidence of compelling interest; *third, [the court] must decide whether the evidence presented by the government is sufficiently strong to meet its initial burden of demonstrating the compelling interest it has articulated*; and finally, [the court] must examine whether the challenging party has met its ultimate burden of rebutting the government's evidence such that the granting of summary judgment to either party is proper.

Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1164 (10th Cir. 2000) (emphasis added).

B. The Government's Reliance On Congressional Findings is Inadequate to Sustain Its Burden.

In its Opposition, the government attempts to carry its burden principally by reference to Congressional findings regarding drugs in general and to the Controlled Substances Act (CSA) itself, rather than by actual proof. Opp. at 7-15, 20-24, 27-28, 33. In another constitutional context—preferential hiring of minorities—the Supreme Court held that such an approach is no substitute for empirical evidence. After criticizing the district court's reliance on "highly conclusionary [sic] statements" regarding the need for a preferential hiring plan, the court added:

> The factfinding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary. But when a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals. A government actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists.

City of Richmond v. J.A. Croson Co, 488 U.S. 469, 500-501 (1989). See also this circuit's decision in Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1167 (10th Cir. 2000) ("The question that Croson requires us to ask is whether there is a strong basis in evidence to support the legislature's conclusion.").

C. The Government Is Incorrect That Plaintiffs Must Sustain A Heightened Burden To Establish Their Right to Relief.

1. No Heightened Burden Applies When The Government Violates The First Amendment.

Attempting to prevail without substantial evidence to support its position, the government also argues that the Court should raise the evidentiary bar for the plaintiffs. The government argues that the plaintiffs in this case, in contradistinction to plaintiffs in other First Amendment cases, face a heightened burden because they allegedly wish to disturb the status quo, obtain "mandatory" relief and obtain full relief at the outset of the litigation. Opp. at 5-6. According to the government, plaintiffs

must carry this heightened burden even if the status quo "involves a violation of the legal rights of the parties." Id. at 5. The government relies on a Tenth Circuit decision which held, in a commercial context, that a preliminary injunction providing such relief should not issue unless the traditional preliminary injunction factors weigh "heavily and compellingly" in favor of its issuance. Id. at 6, (citing SCFC ILC, Inc. v. VISA USA, Inc., 936 F.2d 1096, 1102 (10th Cir. 1991)). The government's substitution of the phrase "legal rights" for "First Amendment" or "constitutional" rights, and its use of a commercial case for support, is disingenuous. The Tenth Circuit has never suggested its analysis in SCFC ILC should extend into the realm of First Amendment jurisprudence, where governmental violations are customarily held to constitute irreparable injury and to be subject to emergent and preliminary relief. See Elrod v. Burns, 427 U.S. 347, 374 (1976) (where First Amendment violation "was both threatened and occurring at the time of" motion for preliminary injunction, district court should have issued preliminary injunction).

It is immaterial, however, whether the Tenth Circuit would hold that its SCFC analysis should extend to courts' protection of First Amendment rights, or whether it would merely hold that SCFC's prerequisites are met when a First Amendment violation is established. That court has made it clear it considers First Amendment violations to be amenable to preliminary relief. Elam Const., Inc. v. Regional Transp. Dist. 129 F.3d 1343, 1347 (10th Cir. 1997) (affirming district court's preliminary injunction to prevent "a chilling effect on plaintiffs' First Amendment rights, constituting an irreparable harm to their interests. [Defendant's] asserted interest...does not outweigh the harm asserted by plaintiffs. The public interest also favors plaintiffs' assertion of their First Amendment rights.").

2. A Preliminary Injunction May Be an "Extraordinary" Remedy, But It Is Always Appropriate When The Plaintiffs Demonstrate That The Government Is Violating Their First Amendment Rights.

The government's argument (Opp. at 5) that plaintiffs' motion should be denied because a preliminary injunction is an "extraordinary" remedy merely begs the questions before this Court. The

"extraordinariness" of preliminary injunctions does not limit the power of a court to grant one when a plaintiff establishes that his or her First Amendment rights, including its religion clauses, are being violated. "If preliminary injunctions were not available in cases brought to enforce the establishment clause, government might be able to erode the values that the clause protects with a flood of temporary or intermittent infringements." American Civil Liberties Union of Illinois v. City of St. Charles, 794 F.2d 265, 275 (7th Cir. 1986); see also Santa Fe Springs Realty Corp. v. City of Westminister, 906 F. Supp. 1341, 1353 (C.D. Cal. 1995) (court found that because case involved an alleged on-going First Amendment violation, time played a critical factor; therefore, abstention was inappropriate and immediate relief in the form of a preliminary injunction and restraining order was required). The reason for this, of course, is because "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." American Civil Liberties Union v. Reno, 217 F.3d 162, 180 (3rd Cir. 2000) (holding that preliminary injunction must issue to remedy ongoing First Amendment violation); see also Elrod, 427 U.S. at 373 (same).

3. The Government Mischaracterizes the "Status Quo" for Purposes of Preliminary Relief And The Nature of the Relief The Plaintiffs Seek.

The government argues that this Court should define the "status quo" only by reference to the government's *present* possession of the plaintiffs' sacramental tea, the plaintiffs' *present* inability to practice their religion and the Justice Department's *present* freedom to prosecute any or all of the plaintiffs. Opp. at 4, 6. The government's position is without legal support. Circuit courts define the "status quo" not as what exists now, as a result of the unilateral, coercive conduct of the government, but what existed *before* the government elected to engage in its coercive conduct.

> The traditional function of the preliminary injunction is to preserve the status quo, so that the court may retain its ability to render a meaningful decision on the merits. The status quo is the "last uncontested status which preceded the pending controversy,"
>
> ....
>
> If the *currently existing* status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury, either by returning to the last

> uncontested status quo between the parties, ... by the issuance of a mandatory injunction, ... or by allowing the parties to take proposed action that the court finds will minimize the irreparable injury. The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo.

Crowley v. Local No. 82, 679 F.2d 978, 995-96 (1st Cir. 1982), (rev'd on other grounds, 467 U.S. 526 (citations omitted; emphasis added)). See also Ferry-Morse Seed Co. v. Food Corn, Inc., 729 F.2d 589, 593 (8th Cir. 1984) (where the status quo is a condition not of rest, but of action, and the condition of rest...will cause irreparable harm, a mandatory preliminary injunction is proper). Thus, the term "status quo" for purposes of injunctive relief refers to "status quo *ante*." See Valdez v. Applegate, 616 F.2d 570, 572 (10th Cir. 1980) (noting that purpose of preliminary injunction is to preserve the "status quo ante litem until the merits of a serious controversy can be fully considered by a trial court"); see also Los Angeles Memorial Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1200 (9th Cir. 1980) (purpose of preliminary injunction is to preserve status quo ante litem pending determination on the merits).

Finally, the government argues that plaintiffs seek "mandatory" relief and relief that would "afford the Plaintiffs the full relief requested in this litigation," and accordingly, that plaintiffs must face a far higher burden than if they were seeking the "usual type of preliminary injunction." Opp. at 6. These assertions are ludicrous. The only arguably mandatory relief plaintiffs seek is the return of their sacramental tea, and it is doubtful whether an order requiring the return of seized property qualifies as such. See Saber v. FinanceAmerica Credit Corp, 843 F.2d 697, 702 (3rd Cir. 1988) (order enforcing agreement in case involving return of seized funds not a "mandatory injunction" for purposes of interlocutory appeal). Other than that, plaintiffs seek relief that will allow them to practice their religion *pendente lite*, without fear of prosecution or interference, and that will forbid the government from obstructing the importation of the UDV's sacramental tea. Such temporary relief would not afford the plaintiffs "the full relief requested"; only a permanent injunction would do so.

The government has conceded for purposes of this motion that the UDV is a religion entitled to First Amendment protection, that plaintiffs are sincere adherents, and that the government's conduct has substantially burdened the plaintiffs' religion. Opp. at 15. Plaintiffs are therefore suffering irreparable harm as a matter of law. Elrod, 427 U.S. at 373. Given what the government has conceded, the only issue (other than the legal issue of whether hoasca[2] is a controlled substance *at all*) is whether the government has demonstrated–*factually*–that it has a compelling interest in criminalizing the use of hoasca and that the least restrictive means to serve that interest requires that the sacramental use of hoasca be prohibited. See Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction (Br.) at 12-17.

II. PLAINTIFFS HAVE DEMONSTRATED A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

A. The Government's Interference with Plaintiffs' Sacramental Use of Hoasca Violates the Religious Freedom Restoration Act (RFRA) And the First Amendment

RFRA requires that a governmental burden on religion be justified by a compelling governmental interest and that the government adopt the least restrictive means to serve its compelling interest. Br. at 8. The First Amendment requires the same analysis if the burden stems from a law that is not neutral or not generally applicable. Employment Division of Human Resources of Oregon v. Smith, 485 U.S. 660 (1988). In this section, plaintiffs will address the government's claim that the CSA's ostensible ban on the plaintiffs' religious use of hoasca is justified by a compelling governmental interest in banning DMT in general and that the least restrictive means of serving the government's interest in banning DMT requires that the sacramental use of hoasca be banned as well. For the reasons set forth below, the government's arguments do not withstand scrutiny.

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[2]In this brief, as in plaintiffs' opening brief, the term "hoasca" is used to refer specifically to the sacramental tea ritually produced by the UDV from the bark of *banisteriopsis caapi* and the leaves of *psychotria viridis*. The term "ayahuasca" refers generically to any combination of parts of *banisteriopsis caapi* and any of several other plants indigenous to the Amazon region.

B. The Government Has Not Shown Any Compelling Interest In Adhering to the 1971 Convention on Psychotropic Substances, Nor Would Its Accommodation of UDV's Religion Require It to Violate the Convention.

The government's principal justification for its decision to suppress the UDV's sacramental use of hoasca is its alleged compelling interest in adhering to the 1971 Convention on Psychotropic Substances. Opp. at 16. The government cannot sustain this argument. First, hoasca is not covered by the Convention. Second, even if it were covered, the United States cannot credibly maintain that the First Amendment must take a back seat. Third, the United States regularly disregards treaties when its national interest so requires and, accordingly, it cannot credibly assert that it *must* comply.

1. The 1971 Convention on Psychotropic Substances Does Not Apply to the Religious Use of Hoasca By the UDV.

The government argues that if it were to permit the UDV to import and use its sacramental hoasca tea in UDV religious rituals, the United States would violate its obligations under the United Nations Convention on Psychotropic Substances, 1971, opened for signature February 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175 (1971 Convention) (Ex. A to Opp.). Opp. at 17. The government is wrong because the Convention does not apply to hoasca as used as a sacrament by the UDV.

In 1976, the United Nations published the official Commentary (Com.) on the 1971 Convention to aid in its interpretation.[3] As ¶ 12 of the Commentary to Article 32 (Ex. Q) makes abundantly clear:

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[3] As the Supreme Court stated in Zicherman v. Korean Airlines Co., Ltd, 516 U.S. 217, 226 (1996), "Because a treaty ratified by the United States is not only the law of this land [citation omitted], 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." The Commentary on the Convention on Psychotropic Substances negotiated under the auspices of the United Nations "was prepared as a project of the United Nations Fund for Drug Abuse Control . . . . It was written by Mr. Adolf Lande, former Secretary of the Permanent Central Narcotics Board and Drug Supervisory Body, under the responsibility of the United Nations Office of Legal Affairs." Commentary, Forward, at v. As such it should be considered as the official drafting history of the Convention. Moreover, in its "statement of policy" with respect to 51 F.R. 17476 (1986), relating to the rescheduling of a controlled substance under the Convention, the government acknowledges that the official Commentary on the Convention "provides guidance to parties in meeting [their] obligation [under the Convention] consistent with national laws and policies."

> [A]t the time of this writing [1976] the continued toleration of the use of hallucinogenic substances which the 1971 Conference had in mind would not require a reservation under paragraph 4 [of Article 32]....

Com. at 387. (Ex. Q). Paragraph 4 of Article 32 is the section stating that countries may reserve for "plants growing wild which contain psychotropic substances from among those in Schedule I and which are *traditionally used by certain small, clearly determined groups in magical or religious rites....*" The Convention clearly does not apply to the religious use of plant materials by such small and clearly determined groups. The United States did elect to 'reserve' for the use of peyote by the NAC, but only out of an abundance of caution in the event peyote might be included in the treaty at some future time. See S. Exec. Rep. No. 96-29, Convention on Psychotropic Substances, 96th Cong., 2d Sess. 4 (1980).[4] See also argument infra at 16 describing the reinforcement of this obvious concern for protection of fundamental rights in Article 14(2) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, (March 1989) 28 I.L.M. 493 1988 (1988 Convention) ("The measures adopted shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use,..."). (Ex. R). No reservation was necessary for hoasca because its traditional use as a religious sacrament is not prohibited by the treaty.

2. 1971 Convention Does Not Apply to Plants.

Paragraph 5 of the official Commentary, also interpreting Article 32, states, in pertinent part:

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[4]The report of the Senate Committee on Foreign Relations, recommending that the Senate advise and consent to the Convention's ratification by the United States with a reservation pursuant to Art. 32(4) states:

> Since mescaline, a derivative of the peyote cactus, is included in Schedule I of the Convention, and *since the inclusion of peyote itself as an hallucinogenic substance is possible in the future*, the Committee accepted the Administration's recommendation that the instrument of ratification include a reservation with respect to peyote harvested and distributed for use by the Native American Church in its religious rites. (Emphasis added.)

> Plants as such are not, and – it is submitted – are also not likely to be, listed in Schedule I, but only some products obtained from plants. Article 7[5] therefore does not apply to plants as such from which substances in Schedule I may be obtained, nor does any other provision of the [1971] Convention. Moreover, the cultivation of plants from which psychotropic substances may be obtained is not controlled by the [1971] Convention.

Com. at 385. (Ex. Q).

The fact that the 1971 Convention explicitly declined to cover *any* plants or parts of plants is a major change from the 1961 United Nations Single Convention on Narcotic Drugs, (Single Convention) opened for signature March 20, 1961, 18 U.S.T. 1407, 520 U.N.S.T. 204 as amended.[6] The Single Convention expressly prohibits the cultivation of coca bushes, opium poppies, and cannabis plants. Art. 22. See also ¶ 4 of General Comments to Article 1 at 3, and ¶ 1 of Com. to Art. 1(j) of 1971 Convention at 25 (Ex. Q). Moreover, the Single Convention not only subjects those plants to the mandated controls, but also subjects specific parts of those plants to controls – *i.e.,* coca leaves (Art. 2(6)), poppy straw (Art. 2(7)), and cannabis leaves (Art. 2(7)).

Ayahuasca has been made for centuries by merely crushing the bark of *banisteriopsis caapi* with the leaves of *psychotria viridis* and boiling the crushed bark and leaves in water. See Opp. at 4. Neither these plants nor parts of these plants are listed in any of the four Schedules of psychotropic substances under the 1971 Convention even though it is well known that the leaves of *psychotria viridis* contain DMT.

3. 1971 Convention Does Not Apply to "Infusions" and "Beverages" Made from Plants.

As ¶ 12 of the Commentary to Article 32 (Ex. Q) points out, in addition to the language quoted supra at 10:

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[5] The principal article of the Convention regulating the Parties' duties with respect to the use, possession, distribution, and import and export of Schedule I substances.

[6] The drug conventions can be found at the International Narcotics Control Board website, which is www.incb.org.

> Schedule I does not list any of the natural hallucinogenic materials in question, but only chemical substances which constitute the active principles contained in them. *The 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.* This view is in accordance with the traditional understanding of that question in the field of international drug control. Neither the crown (fruit, mescal button) of the Peyote cactus nor the roots of the plant *Mimosa hostilis*[7] nor Psilocybe mushrooms[8] themselves are included in Schedule I, but only their respective active principles, mescaline, DMT, and psilocybine (psilocine, psilotsin).

Com. at 387 (emphasis added) (Ex. Q). In addition, as the footnotes to the above excerpt make clear, neither an "infusion" made from the roots of the *mimosa hostilis* nor "beverages" made from psilocybe mushrooms are contained in any of the Schedules of psychotropic substances which the Convention seeks to control. The *mimosa hostilis* is a DMT-containing shrub found in Brazil that may also contain some form of MAO inhibitor, because certain native tribes add water to make an infusion from its roots and drink the resulting preparation. See 2d Nichols Declaration at ¶ 9 (Ex. S); see also The Plant Kingdom and Hallucinogens (Parts II and III), United Nations Bulletin on Narcotics, 1969 & 1970, found at http://www.undcp.org.

The negotiators of the 1971 Convention did not intend to regulate infusions and beverages made from *mimosa hostilis*, and no evidence exists to believe they intended to regulate an infusion made from *psychotria viridis* and *banisteropsis caapi* that does not require chemical processing or separation of the active principle. Accordingly, even if those countries where hoasca was openly used had been aware of, or focused on, its religious use when depositing their instruments of ratification, they would not have been required to 'reserve' to permit the continued religious use of hoasca.

Indeed, the only reason for a country in which *psychotria viridis* grows naturally to have made a reservation under Article 32(4) which covers use within that country, or under Article 32(3) which

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[7] "An infusion of the roots is used." n.1227.

[8] "Beverages made from such mushrooms are used." n.1228.

5. Hoasca is Not "Manufactured" as Defined by the 1971 Convention.

According to the Commentary to Article 1(i), the primary meaning of the term "manufacture" is the synthesis of psychotropic substances from chemicals and "the *separation* of [such] substances from the plants from which they are obtained." ¶ 1 at 20 (emphasis added).[11] (Ex. Q). See also ¶ 14 at 24. (Ex. Q). The process of making hoasca tea from the bark of the *banisteriopsis caapi* and the leaves of *psychotria viridis* does *not* entail a chemical separation of psychotropic substances from the plants. As the government concedes, hoasca is made by merely crushing stems and/or bark with leaves. Opp. at 4. The crushing of the plants and subsequent boiling processes do not separate DMT from the other alkaloids and materials contained within the plant.

6. The Leadership Role of United States Would Not Be Undermined By Permitting Controlled Importation and Use of the UDV's Sacramental Hoasca For Religious Use.

The government contends that the United States has a compelling interest in adhering to its interpretation of the 1971 Convention despite the possible conflict between the Convention and the First Amendment or between the Convention and RFRA, which was passed thirteen years after the United States ratified the 1971 Convention with respect to the use of hoasca in the traditional religious rites of the UDV. The government concedes, as it must, that where a statute is enacted after the United States becomes a party to a treaty with which the statute is in conflict, the statute prevails over the provisions of the treaty with which it is in conflict. Opp. at 19. The UDV also maintains that, as applied to its use of hoasca in its traditional religious rites, the Convention is in conflict with its members' First and Fifth Amendment rights. The Convention, of course, cannot limit or modify constitutional rights. See Boos v. Barry, 485 U.S. 312, 324 (1988); Reid v. Covert, 354 U.S. 1, 15-17

[11] Article 1(i) also provides that "[manufacture] also includes the making of preparations other than those made on prescription in pharmacies." As discussed above, because hoasca is not a preparation as defined by the Convention, it cannot be the product of manufacturing as defined by the Convention.

(1957) (plurality opinion) (holding that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."). Nonetheless the government bases its contention on the claim that the failure of the United States to adhere to the letter of the Convention would undermine this country's leadership role in combating international drug trafficking and would make it difficult for the United States to insist that other countries comply with their obligations under the Convention. See, e.g., Dalton Decl. (Opp. Ex. B). This is incorrect for a number of reasons.

7. Lack of Objection by Other Parties to Canadian Reservation Regarding Importation of Peyote.

Article 32(4) of the 1971 Convention authorizes countries in which plants containing Schedule I psychotropic substances grow wild and in which such plants are traditionally used by certain groups in magical or religious rites, to make reservations "at the time of signature, ratification or accession" with respect to the manufacture, possession, distribution and use of such plants, but not as to the export or import of such plants. Certain groups in Canada have traditionally used peyote in their religious rites, and Canada wished to make a reservation to assure their ability to continue to do so in the event peyote became a scheduled substance. However, peyote does not grow in Canada and must be imported. Therefore, Canada could not make a reservation pursuant to Article 32(4), and was forced to make a reservation pursuant to Article 32(3) – a provision that permits other countries to object to reservations made under it.

Despite the ability of other countries to object to the Canadian reservation, none, including the United States, did so.[12] See Note 17 to United Nations list of declarations and reservations with respect

[12] Interestingly, neither of the countries in which peyote grows naturally, the United States or Mexico, made a reservation pursuant to Art. 32(3) to permit them *to export* peyote to Canada for use in religious rites. Therefore, if peyote were to become a scheduled substance under the Convention, they would be in violation of their obligations under the Convention. The United States currently exports peyote to Canada. See Tex. Admin. Code tit. 37, §§ 13.81-87, (2000) and partial list of registered users. Ex. T.

to the Convention.[13] Consequently, no other party to the Convention is likely to view the statutorily and/or constitutionally mandated, limited, controlled importation of hoasca into the United States for use in religious rites of a "small, clearly determined group[]" to be of any significance.

8. The 1988 Convention Requires Respect for Fundamental Human Rights and Traditional Licit Uses.

The United States ratified the 1988 Convention dealing with the illicit cultivation of narcotic and psychotropic substances. That treaty reinforced and supplemented the 1961 Single Convention, as amended, and the 1971 Convention. See preamble to the 1988 Convention. (Ex. R) Article 14(2) of the 1988 Convention provides:

> Each Party shall take appropriate measures to prevent illicit cultivation of and to eradicate plants containing narcotic or psychotropic substances, such as opium poppy, coca bush and cannabis plants, cultivated illicitly in its territory. *The measures adopted shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use,* as well as the protection of the environment. (Emphasis added.)

Id. at 300. This provision of the 1988 Convention clearly evidences the United Nations members' concern that the enforcement provisions of that Convention and the previous United Nations drug conventions not infringe on fundamental human rights. See also Br. at 41, referencing Article 18 (1) of the United Nations International Covenant on Civil and Political Rights (ICCPR), ratified by the United States in 1992 ("Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include freedom . . . to *manifest* his religion or belief in worship, observance, practice, and teaching.").

Article 18 of the Universal Declaration of Human Rights, which the United States endorsed as a member of the United Nations in 1948, contains a similar affirmation of the fundamental human right of freedom of religious observance and practice. See U.N. Universal Declaration of Human Rights,

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[13] A complete list of reservations can be found at http://untreaty.un.org.

GA res. 217A, Dec. 10, 1948. The ICCPR and the Universal Declaration protect both "belief" in the abstract, and the right to "manifest" that belief through practice. As the United Nations Human Rights Committee explained, "[t]he freedom to manifest religion . . . in worship, observance, practice and teaching encompasses a broad range of acts" including "ceremonial acts" and "participation in rituals." See U.N. Hum. Rts. Comm., General Comment No. 22, at 4 (1993).

The ceremonial use of hoasca by UDV existed a full decade before the 1971 Convention was opened for signature. Accordingly, this sacrament plainly qualifies as a traditional licit use for which there is historic evidence. In view of the concern of United Nations member countries of the importance of protecting such historically documented traditional licit use of natural substances containing psychotropics, coupled with the complete lack of objection to the Canadian reservation to the 1971 Convention, no doubt exists that the Court's granting the instant preliminary injunction would not undermine the leadership role of the United States in combating international drug trafficking or its ability to insist on compliance with the fundamental provisions of the Convention by other parties.

9. Honoring and Enforcing Treaty Commitments is Not a Foremost Consideration of United States In Conducting Its Foreign Policy.

Under the constitutions or laws of virtually all countries whose legal systems are based on the Napoleonic Code, treaties and generally recognized principles of customary international law take precedence over inconsistent provisions of domestic law. In those countries international law occupies a preeminent position in the hierarchy of legal norms, and trumps domestic law. Treaties and principles of customary international law have no such preeminent role in the United States. Under United States law, principles of customary international law are binding only "in the absence of any treaty or other public act of [the United States] government in relation to the matter." The Paquete Habana, 175 U.S. 677, 708 (1900). As the U.S. Court of Appeals for the District of Columbia more recently held:

> Our duty is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law. See U.S. CONST.

> Art. VI. As we said in Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929 (D.C. Cir. 1988): "Statutes inconsistent with principles of customary international law may well lead to international law violations. But within the domestic legal realm, that inconsistent statute simply modifies or supersedes customary international law to the extent of the inconsistency." Id. at 938. See also Federal Trade Comm'n. v. Compagnie de Saint-Gobain-Pont-a- Mousson, 636 F.2d 1300, 1323 (D.C. Cir. 1980) (U.S. courts "obligated to give effect to an unambiguous exercise by Congress of its jurisdiction to prescribe even if such an exercise would exceed the limitations imposed by international law").

United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991). In addition, contrary to the government's assertion that this Court must view the 1971 Convention as a compelling governmental interest to avoid a conflict with RFRA (Opp. at 16), the Supreme Court has held that when a provision of a United States statute is inconsistent with a provision of an earlier treaty, the statutory provision effectively modifies the obligations of the United States under the treaty. Breard v. Greene, 523 U.S. 371 (1998); Reid v. Covert, 354 U.S. 1, 18 (1957) (plurality opinion); Whitney v. Robertson, 124 U.S. 190, 194 (1888) (holding that if a treaty and a federal statute conflict, "the one last in date will control the other").

Accordingly, it is clear that as a matter of law and foreign policy in the United States, our treaty commitments are accorded a considerably lesser role than in the laws and foreign policy of most European and Latin American countries. Moreover, the Executive Branch of the United States government has not hesitated, when it believed it in the best interests of the United States, to simply disregard or fail to implement its treaty obligations, as shown below.

In 1986, the government, pursuant to the recommendation of the Food and Drug Administration, moved a preparation containing Dronabinol, a synthetic form of Tetrahydrocannibinol (an active ingredient in marijuana) from Schedule I to Schedule II of the CSA, to permit it to be used in the treatment of nausea associated with chemotherapy. 51 F.R. 17476 (May 13, 1986). Dronabinol, however, remained a Schedule I substance under the 1971 Convention until 1991. See, WHO Expert Committee on Drug Dependence Twenty-seventh Report, 1991 at 12. The government's motive for

rescheduling Dronabinol for this purpose was plainly salutary. Nevertheless, it also plainly disregarded Articles 2, 3 and 7 of the 1971 Convention.

Thus, when it has suited its purposes, the government has felt free to disregard the plain terms of the 1971 Convention, and has done so apparently without objection from any other party to the Convention. Moreover, the government's violation of the 1971 Convention does not appear to have undermined its leadership in combating transnational drug trafficking as evinced by its leadership role in the negotiation of the 1988 Convention, which was opened for signature two and one-half years after the government unilaterally rescheduled Dronabinol. Even assuming the use of the UDV's sacramental tea is controlled by the 1971 Convention, which the plaintiffs vehemently argue it is not, the United States clearly has nothing to fear from its treaty partners by disregarding it to protect the fundamental religious rights of its citizens and the citizens of Brazil who practice their religion in the United States.

In the more than thirty years it has been a party to the Vienna Convention on Consular Relations, opened for signature April 24, 1963, T.I.A.S. 7502, 23 U.S.T. 3227, the United States has failed to take the measures necessary to properly implement Article 36 of the Convention. This Article requires law enforcement of a party to the Convention to advise an arrested national of another party of his right, "without delay," to have law enforcement inform the appropriate consulate of his arrest and of his or her right to consult with an officer of that consulate. The United States' continuing failure has led to its universal condemnation by the Inter-American Court of Human Rights (IACHR), and is likely to lead to condemnation by the ICJ in the near future. See "The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law," IACHR Advisory Opinion OC-16/99 (Oct. 1, 1999) (unanimous decision pointing out that the United States position before the IACHR was precisely the opposite of its position twenty years earlier before the ICJ in United States

v. Iran, at ¶ 75)[14]. Indeed, the State Department has continued to actively oppose the federal courts taking the necessary measures to assure the proper implementation of Article 36 of the VCCR, while complaining loudly when other countries disregard the rights of United States citizens under Article 36. See, e.g., United States v. Lombera-Camorlinga, 206 F.3d 882 (9th Cir.) (en banc), cert denied, 121 S. Ct. 481 (2000).[15]

A particularly egregious example of the government's attitude towards the treaties it has signed is its disgraceful failure to abide by the hundreds of treaties it entered into with the Indian Nations.

As stated by Senator Daniel Inouye, the Chairman of the Select Committee on Indian Affairs:

> The Indian nations entered into 800 treaties with the United States. These were solemn and sacred documents that promised the Indians that "as long as the rivers flow, and the Sun rises in the east", the lands and the resources that had been secured to them would be protected in perpetuity. . . . The Indian people lived up to the commitments they made in those treaties. . . . However, those 800 treaties were only honored unilaterally. The U.S. Senate refused to ratify 430 of them, even though the Government charged the Indians with living up to the terms of those treaties. Even more tragically, of the 370 treaties that were ratified, the United States proceeded to violate provisions in every single one.

138 Cong. Rec., 102d Cong., 2d Sess. S15422 (Sept.26, 1992).

In light of these examples of the United States' frequent and serious disregard of its obligations under international law, its contention that for this country to maintain a strong leadership role in combating transnational drug trafficking it is imperative that the United States faithfully and fully observe its obligations to all treaties to which it is a party is less than convincing. Moreover, this history

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[14] The request for the Advisory Opinion was made by Mexico and joined in by Costa Rica, Dominican Republic, El Salvador, Honduras and Paraguay. The opinion can be found at http://corteidh-oea.nu.or.cr/ci/HOME_ING.HTM. See also, Germany v. United States, Order for Provisional Measures (ICJ Mar. 3, 1999), found at www.icj-cij.org.

[15] The United States has recently announced its intention to disregard the ABM Treaty by establishing a limited missile defense system for this country. See, e.g., "Rumsfeld Assures Europeans on Bush Missile Defense Plan," A.P. (Feb. 3, 2001) (stating that European countries oppose the United States missile defense plan "on grounds that it would violate the 1972 Anti-Ballistic Missile treaty with the former Soviet Union, a pact [Donald] Rumsfeld [Secretary of Defense] has called 'ancient history'").

of disregard for its treaty commitments has not deterred other countries from continuing to enter into bilateral treaties with the United States or welcoming its participation in the negotiation of multilateral conventions and becoming a party to them. Finally, this contention is totally divorced from the realities of this case as described below.[16]

Plaintiff does not note these incidents to quibble with the government regarding its practice of selectively disregarding treaties. The decision to disregard a treaty is a matter that can be driven by enlightened self-interest. What is disingenuous is the government's argument that the sky will fall if the United States disregards a treaty to preserve the religious freedom of its citizens. This argument is really academic, however, as the treaty in question by no means requires the United States to prohibit plaintiffs' ritual use of hoasca.

C. The Government has Not Shown a Compelling Health and Safety Interest in Prohibiting the UDV's Use of its Sacramental Tea And Has Not Adopted The Least Restrictive Means

The government argues that DMT is harmful and that, accordingly, hoasca must be suppressed, even if it is confined to strictly delimited sacramental use. Opp. at 34. The government fails to carry its burden to substantiate its position. **First**, it relies on generalities and references to Congressional findings that do not support the government's position and are in any event insufficient to sustain the government's burden. **Second**, the government has failed to demonstrate that the use of hoasca by the UDV creates a danger of diversion. **Third,** even if this Court were to conclude that the government has a compelling interest in suppressing DMT, the government has failed to demonstrate that the least restrictive means to accomplish its purpose necessarily requires that the UDV's sacramental use of hoasca be suppressed.

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[16] The UDV, of course, maintains that because its sacramental hoasca is not a scheduled substance under the 1971 Convention, its importation into the United States and use in the UDV's religious rituals is not in violation of the Convention nor a matter of concern to other Parties to the Convention.

D. The Government's Evidence Is Inadequate to Demonstrate A Compelling Interest.

The government has presented no evidence that the sacramental use of hoasca harms UDV members. The government's sweeping generalities do not satisfy the burden it must carry. See argument, supra at ¶ I.B. While no one doubts that drug abuse is a serious matter,[17] it is wrong to claim that "all of the drugs covered [by the CSA] can create psychological dependence in the abuser," (Opp. at 21) without further explaining that the House Report that is the source of the statement also reports that the consequences of drug abuse are quite varied depending upon the type of drug abused, the personality of the abuser and the characteristics of the drugs themselves. H.R. Rep. NO. 91-1444, 91st Cong. 2d Sess., reprinted in U.S.C.C.A.N. 4566.

Indeed, even the government admits that all drugs are not the same (Opp. at 21). Neither hoasca nor ayahuasca is a drug of abuse in the United States; even synthetic DMT is not a commonly abused drug. Dr. Charles Schuster, a former Director of NIDA, states that in over six years there he was unaware of a single reported episode of drug abuse in the U.S. involving ayahuasca, hoasca, or any form of orally-ingested DMT. See Schuster Declaration, Ex O to Br. at ¶ 5.

The Substance Abuse and Mental Health Services Administration (SAMHSA) also monitors drug abuse in the U.S. and annually publishes reports of the Drug Abuse Warning Network (DAWN) that quantify the abuse frequency of various drugs. See Id. at ¶¶ 7-9. According to data that DAWN collected in 1998, medical examiners around the country reported 10,123 drug-abuse deaths that year; not one of those reports even mentioned use of hoasca, ayahuasca, or any form of DMT. See id. ¶ 8. Likewise, over thirty-six substances were listed by name as having been associated with emergency room visits in 1998, but neither hoasca, ayahuasca nor DMT were listed. See id. ¶ 9.

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[17] The UDV forbids the use of illegal drugs by its members, and actively discourages the use of legal non-medicinal drugs, such as alcohol. See 1st Bronfman Decl. at ¶¶ 51-52 (Ex. A).

Too, Congress has not made any finding that DMT has a high potential for abuse.[18] Opp. at 22. As Dr. Mark Kleiman, a foremost drug policy expert, explains, the placement of a drug in Schedule I does not imply that it has been adjudged to have high abuse potential; rather, it reflects that no judgment has been made about the extent (as opposed to the existence) of its abuse potential, or about its lack of safety for supervised use. Those judgments would only need to be made were the drug to be proposed for rescheduling, which would require evidence of its medical utility.[19] Kleiman Declaration ¶ 6 (Ex. U). Additionally, the government's argument that Congress implicitly included "materials containing DMT" (Opp. at 22) in Schedule I is illogical. If this were true, the possession and use of the human brain would be in violation of Schedule I of the CSA as it is a "material containing DMT." 1st Nichols Decl. at ¶ 6 (Ex. M). Furthermore, numerous plants that contain DMT grow wild throughout the United States or can be purchased in nurseries and would be illegal under the government's theory.[20]

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[18]See argument supra at 4 that Congressional findings on this issue are inadequate to sustain the government's evidentiary burden.

[19]In the initial scheduling of synthetic DMT three decades ago, there was no congressional or DEA finding that plant decoctions organically containing DMT have any abuse potential. The legislative history of the congressional scheduling of DMT in 1970 makes clear that Congress and the FDA (DEA's predecessor in enforcing the controlled substances laws) were concerned only with synthetic DMT, not with DMT found endogenously in plants. See Drug Abuse Control Amendments of 1968, Hearings Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce, 90th Cong. 68, 76 (1968) (testimony of FDA Commissioner James Goddard) (advocating scheduling of DMT, citing a number of "laboratory seizures" of DMT, and describing "intramuscular" delivery and "inhalation," but not oral ingestion).

[20]DMT-containing plants are found in Europe, Asia, South America, North America, and Australia. See Ostrem, Liv, Studies in Genetic Variations in Reed Canary Grass, phalaris arundinacea L. I. Alkaloid type and concentration, 107 Hereditas 235, (1987); Fitzgerald, Smith, Terrence, Tryptamine and Related Compounds in Plants, 16 Phytochemistry 171 (1977). More specifically, reed canary grass (Phalaris arundinacea), harding grass (Phalaris aquatica), Illinois bundleflower/prairie mimosa (Desmanthus illinoiensis) all contain DMT and can be found in abundance in the United States. See Wetland Plants and Plant Communities of Minnesota and Wisconsin, www.npwrc.usgs.gov/resource/1998/mnplant/fresh.htm ; Thompson, Alicia C. et al. Indolealkylamines of Desmanthus illinoiensis and Their Growth Inhibition Activity, 35 J. Agric. Food Chem., 361, 363 (1987).

The United States Department of Agriculture recommends harding grass as a short term erosion control plant. Seeding for Erosion Control on Slopes, http://www.crcd.org/seedlit.html.

Plaintiffs have presented uncontroverted evidence of the lack of hoasca's harm to UDV members. See 2d Grob Decl. at ¶ 12 (Ex. V) ("I have concluded after extensive study of the field that the use of ayahuasca by the UDV in Brazil has been conducted in an optimally safe and responsible manner."). The government's arrogantly dismissive assertion that the evidence of the safety of hoasca is nothing more than "anecdotal evidence collected by the church itself," (Opp. at 24), ignores the obvious. Dr. Grob explains that "the UDV, a church with an approximate membership of over 8,000 in Brazil, who participate at least twice monthly in religious ceremonies employing ayahuasca as a psychoactive sacrament, has reported no episodes of serotonin syndromes caused by this mechanism. Therefore, in the course of one year, a safe context has been provided for UDV members who drink their sacramental tea approximately 200,000 times. This should demonstrate that it is possible to effectively protect people who take ayahuasca from potentially dangerous SSRI interactions." 2d Grob Decl. at ¶ 5 (Ex. V); see also Lendert Decl. at ¶ 17 (Ex. B) ("It would be safe to say that the level of experience with this tea is in the range of several million.").

The government's argument regarding MAO inhibitors is both spurious and misleading. No evidence exists that the reversible MAO inhibitors found in hoasca cause "potentially deadly interactions" with any medications, or cause "increases in blood pressure that can be fatal in some individuals." Opp. at 27. The only MAO inhibitors that have these potentially deadly interactions are the "irreversible" varieties *not* at issue here, as the government readily concedes. See Genser Decl. at ¶¶ 10-12 (Opp. Ex. D). See also, 2nd Nichols Decl. at ¶ 12 (Ex. S); 2nd Grob Declaration at ¶ 6 (Ex. V). Also, many other plants have MAO inhibitors, e.g. Syrian Rue. See n. 22 infra.

Moreover, all of the government's speculations regarding harm from hoasca apply equally to the sacramental use of peyote. Peyote and its active principle mescaline are Schedule I substances. Mescaline is longer acting and stronger than DMT. See 2d Grob Decl. at ¶ 10 (Ex. V). Yet the government has exempted the religious use of peyote for over forty years by men, women (including

those of child-bearing age and those who are pregnant) and children without making the demands it makes here.

E. The Government Has Not Shown That The Use of the Hoasca in UDV Religious Ceremonies Would Result in Its Diversion to Illicit Use.

The government has presented no evidence that plaintiffs' sacramental hoasca has been or is likely to be diverted to channels of illegal use. The government's hyperbole and exaggeration– "full-blown drug epidemic"– (Opp. at 29) cannot substitute for evidence that actually meets the government's burden.

In the more than eleven years the UDV has been active in the United States, church leaders are not aware of any instance in which even one drop of the sacramental tea has been sold, given to anyone, or consumed outside the religious ceremonial context, see 1st Bronfman Decl. at ¶ 78 (Ex. A), nor has the government identified any such diversion. Until the seizure by the government in 1999, the UDV's sacramental tea was securely under the control of a few trained leaders from the moment of its importation, through its receipt by the UDV, and until the moment of its sacramental use. See id. at ¶¶ 74-78. Before each shipment of tea from Manaus, Brazil, the UDV in the U.S. received a facsimile of an exact description of the number of containers to be shipped and the quantity of tea they contained. After clearing customs and any other U.S. Government inspections, an authorized customs broker, carrying a letter of authorization from the UDV, picked up the tea. See id.

No UDV member–other than the select few entrusted with responsibility for receipt–was permitted to possess the tea, and no one was permitted to give or sell the tea to any outside individual or group. See id. at ¶ 77. The sacramental use of the tea occurred only in the authorized religious ceremonies and even in that context, the mestre or designated leader controlled the ritual use of the tea. See id. Therefore, without any requirement from the government, the UDV has meticulously protected

its sacrament from any diversion. Obviously, it is willing to follow whatever reasonable controls the government would require to insure the continuation of these rigorous practices.

The government also argues that there is "growing domestic interest" in ayahuasca, although the sole evidence upon which it relies is an article in Time Magazine. Opp. at 29. Yet, even though approximately 250,000 members of the NAC openly use peyote in their religion, and seventeen states specifically provide exemptions for the use of peyote in religious services, (see Ex. X) both peyote and mescaline remain low on the list of abused drugs in this country. See Kleiman Decl. at ¶ 30 (Ex. U). Although, as Dr. Kleiman notes, publicity about the UDV may have some effect on the numbers who try ayahuasca, no reason exists to believe those numbers will be large. Id. at ¶ 29. Furthermore, Kleiman finds the "experience with legal permission for the use of peyote in ceremonies of the Native American Church . . . reassuring on this point." Id. at ¶ 30.

In yet another attempt to engage this Court in the hysteria of the war on drugs, the government attempts to equate DMT with heroin. Opp. at 29. As one of its authorities notes, however, "repeated administration of DMT does not lead to tolerance of the subjective effects, or at least has not done so in studies carried out to date." Jordi Riba & Manel J. Barbanoj, A Pharmacological Study of Ayahuasca in Health Volunteers, Bulletin of the Multidisciplinary Association for Psychedelic Studies, Vol. 8, No. 3 (Autumn 1998). See Opp. at 30. Comparing a non-addictive psychotropic to a highly-addictive opiate is both misleading and scientifically unsupportable. The government is relying on a DEA agent who apparently has no expertise in chemistry, psychopharmacology, medicine or drug policy,[21] and claims that heroin *addicts* will go to great lengths to get their drug, but it cites nothing to

[21]In an e-mail message dated February 9, 2001, counsel for the government advised that, as to DEA chemist, Natalia Urtiew (Opp. Ex. E) and DEA special agent, Gary Sheridan, (Ex. C to Opp.), the government is not proffering them as experts, "but as employees of DEA who have first-hand knowledge through their job experience." Even if the rules of evidence do not officially apply at this stage of the proceedings, see University of Tex. v. Camenisch, 451 U.S. 390 (1981), the policies upon which the rules are based still make sense. If these are lay witnesses, they should not be permitted to state opinions. See Fed. R. Evid. 602. If these witnesses are not being proffered as experts, this Court should give minimal, if any, weight to the conclusions they have reached. See Kumho Tire Co., Ltd. v. Carmichael, 119

support its proposition that this somehow applies equally to DMT or sacramental hoasca. It does not. See Kleiman Decl. at ¶ 22 (Ex. U). (The research literature shows "a much smaller proportion of hallucinogen users than of opiate users would be so strongly driven to seek out the drug experience as to neglect the presence of side-effects."); see also 2d Grob Decl. at ¶¶ 9-10 (Ex. V) (noting that the comparison of hoasca to LSD also is not supported by the scientific literature because LSD is stronger than hoasca and hoasca is not known to cause flashbacks).

The government's next argument is likewise misleading. Although it is possible to extract DMT from hoasca, as described in the government's declaration by Natalia Urtiew, it would not be in a "smokeable or injectable form," (Opp. at 30), but Ms. Urtiew's declaration does not so state. See Urtiew Decl. (Opp. Ex. E). The assumptions the government draws from Urtiew's unsubstantiated conclusions are ridiculous. As Dr. Nichols explains:

> Because the hoasca represents the total plant extract, a simple basification of the hoasca, followed by organic solvent extraction, as Urtiew suggests, will lead to an extract containing the entire alkaloidal content of the hoasca tea. . . . The problem with the government's claim is the simple fact that it is unlikely that an individual would be able efficiently to smoke, and thus pyrolyze, 803 mg of a complex plant extract that would probably be physically characterized as a brown, sticky, gum-like material.

2d Nichols Decl. at ¶ 4. (Ex. S).

> The total alkaloid extract from hoasca tea could not be directly injected because it would not be water soluble. The crude alkaloidal extract would first have to be acidified, probably with hydrochloric acid, in order to attempt to obtain water soluble material. Even supposing that acidification gave complete water solubility, the amount of material that would have to be injected would be quite large. Given intramuscularly, the bolus injection of 600-800 mg of a mixture of crude plant alkaloid salts necessary to receive an effective dose of DMT would have to be put into a very large volume of water to prevent intense pain and tissue necrosis upon injection.

Id. at ¶ 8.

S. Ct. 1167 (1999) (trial court's gatekeeping obligation to determine the reliability of testimony applies to technical and other specialized knowledge).

Furthermore, DMT can be produced in a laboratory from unscheduled chemicals that are readily available. See 2d Nichols Decl. at ¶¶ 6-7 (Ex. S); see also http://hyperlab.org/gallery/chemy/structures/dmt.html (explaining in detail how to make DMT from chemicals in a laboratory). And if one were intent on such an experiment, and did not want to go to the trouble of mixing readily available chemicals, one need only pick some phalaris grass, mix it with the readily available Syrian rue[22] and have at it. See Kleiman Decl. at ¶ 20 (Ex. U). The government's parade of horribles has no basis in history, fact or science.

Why the government believes that a substance that does not grow in the United States is more likely to "flow into illegitimate channels" (Opp. at 31) than plant substances which proliferate naturally throughout the United States is unclear, and the government does not explain its theory. In any event, the example the government uses–peyote–also grows in Mexico. See argument, infra, at 39. Furthermore, as mentioned above, ayahuasca analogues can readily be made from plants native to the United States and uncontrolled.

F. The Prohibition on Hoasca is Not the Least Restrictive Means of Furthering the Government's Compelling Interest, Assuming Such Interest Exists

As plaintiffs have demonstrated at Point II.B, the government's "treaty" argument does not hold up to scrutiny. Every argument the government makes regarding Schedule I substances (Opp. at 33) applies equally to peyote, the religious use of which is permitted for all members of the NAC (see Boyll; 21 C.F.R. §1307.31, (2000)) and for Indians who practice other peyotist religions. See AIRFA, 42 U.S.C. 1996 (2000). Furthermore, the government has no basis for its argument that hoasca presents significant risks not present in the use of peyote due to the presence of MAO inhibitors because the government presents no scientific studies of peyote. See 2nd Nichols Decl. at ¶ 12 (Ex. S) ("There are

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[22]Syrian Rue (P. harmala) contains beta-carbolines. See Airaksinen, M.M. & Kari, I., Beta-Carbolines, Psychoactive Compounds in the Mammalian Body, 59 Medical Biology 21, 23-25. It is available for purchase over the internet. See Peganum harmala, http://nepenthes.lycaeum.org/Plants/Peganum/harmala.html (lists nine web sites that sell the plant and also recommends shopping at local middle-eastern grocery stores).

a number of isoquinoline alkaloids present in peyote which chemically are similar to the beta-carbolines and are produced in the plant by similar biochemical reactions. It is indeed possible that some of the chemical constituents present in the whole peyote plant possess the ability to inhibit monoamine oxidase A. The fact that none of the related isoquinolines present in peyote has been examined for ability to inhibit monoamine oxidase A does not prove that none of them has this activity.").

No evidentiary basis exists for concluding that UDV's religious use of the tea will harm UDV members, and therefore no support exists for the government's claim that prohibiting use of the tea serves a compelling governmental interest in protecting the health of UDV members.[23] Additionally, the UDV has been importing hoasca for over ten years and the government cannot point to a single instance of diversion.

Finally, the government argues that it would be too burdensome for them to require "government monitoring and/or control of the chain of custody of the ayahuasca." Opp. at 33. The government's reliance on Olsen v. Drug Enforcement Administration, 878 F. 2d 1458 (D.C. Cir. 1989) is misplaced because in that case the petitioners had a history of endorsing daily use of marijuana and of delivering marijuana to non-believers. The more appropriate example is peyote distribution to the NAC which has long been accomplished through a detailed system of controls by the Texas Department of Public Safety that includes active participation by the DEA. See H. R. Rep. 103-675, 103d Cong., 2d Sess, 1994, 1994 U.S.C.C.A.N. 2404 1994 ("The distribution of peyote is strictly controlled by

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[23]The CSA permits research on controlled substances in humans, including substances in Schedule I. Such research is not entirely free from risk. Thus, absolute safety is not required for authorized use of a controlled substance under the CSA.

Moreover, under the First Amendment and RFRA, the government may not discriminate against religious use of a substance by deeming a risk justified by a research interest but not by a religious benefit. See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 532, 538 ("Thus religious practice is being singled out for discriminatory treatment."). With respect to protection of health, a law that is substantially underinclusive because it protects only against risk to health resulting from the exercise of religion but not against similar risk resulting from secular activities cannot be justified under the Free Exercise Clause as advancing a compelling governmental interest in protecting against risk to health. See id. at 546-47.

Federal regulations, and by the laws and regulations of the State of Texas, the only State in which the sacrament grows in significant quantities").

The question for this Court is whether the government has sustained its burden of demonstrating that there is no less restrictive means to suppress the manufacture and/or distribution of DMT or substances containing DMT than the suppression of all substances that contain it, including those that are central to a religious faith. Other than speculation, the government has offered no evidence on this subject. While such speculation might have some superficial appeal in light of undifferentiated official concern regarding the spread of drugs, it loses that appeal once one considers the government's experience with peyote, which it apparently has had no difficulty in controlling in the context of sacramental use by approximately 250,000 members of a similarly-situated religion.

G. Prohibiting the UDV's Use of Hoasca Violates the First Amendment And the Equal Protection Clause.

In their opening brief, the plaintiffs demonstrated that the CSA, by its terms, does not include hoasca or, alternatively, that the CSA's ambiguity in this regard must be interpreted in plaintiffs' favor. Plaintiffs argued that the government's insistence on interpreting the CSA to criminalize plaintiffs' use of hoasca, or the Act's actual criminalization of plaintiffs' use of hoasca, violates the First Amendment, RFRA and the Equal Protection Clause of the Fourteenth Amendment. Br. at 7-27. Plaintiffs principally rely on their opening brief with respect to these matters. Some of the government's arguments on this subject require response, however. In this section, plaintiffs will rebut the government's argument that the CSA is a neutral law of general applicability and therefor does not trigger a "compelling state interest/least restrictive means" analysis under the First Amendment. In addition, plaintiffs will demonstrate that an analysis of the Supreme Court's recent, relevant decisions shows that the Supreme Court would either apply heightened scrutiny to the ban on hoasca or would simply exempt the UDV's sacramental use of hoasca from the CSA in light of the exemption for the

similarly-situated Native American Church's sacramental use of peyote. Finally, Plaintiffs will rebut the government's argument that the NAC and UDV are not similarly situated in their sacramental use of peyote and hoasca, respectively.

1. The Controlled Substances Act Is Not A Neutral Law of General Applicability.

In their opening brief, plaintiffs have demonstrated that because the CSA provides a wide variety of exceptions, exemptions and licenses permitting the use of controlled substances in non-religious settings, it cannot be characterized as a neutral law of general applicability. In addition, the CSA's exemption to the NAC for its members' use of peyote, in light of the government's opposition to an exemption for UDV's sacramental use of hoasca, is a governmental preference for one religion over another. Br. at 17-27.

In response to these facts the government argues first that the Tenth Circuit has directly held, and the Supreme Court has inferentially held, that the CSA is a neutral law of general applicability, citing United States v. Meyers, 95 F.3d 1475 (10th Cir. 1996) and Employment Div., Dept. Of Human Resources v. Smith, 494 U.S. 872 (1990). Opp. at 35-37, 39. Second, the government argues that to be found *not* "generally applicable" or *not* "neutral," the statute itself must target religion, or, if it has exceptions or exemptions, they must be such as to suggest the same goal. Opp. at 36-40. The government is wrong.

The Court in Meyers did characterize the CSA as a neutral law of general applicability, as the government claims. See 95 F.3d at 1481. The issue of CSA's neutrality and general applicability, however, was not before that court. Apparently misunderstanding the Supreme Court's holding in Smith, appellant Meyers argued that under the First Amendment "a neutral law of general applicability that burdens a religious practice must be justified by a compelling governmental interest." Id. The Circuit properly rejected this argument and, in so doing, treated the CSA's neutrality and general

applicability as a given, without analysis or any apparent argument to the contrary by Meyers. Id. Importantly, that court held that Meyers' self-described "Church of Marijuana" was not a religion at all and Meyers therefore could not claim the protection of RFRA. Id. at 1481-1485.

The government also argues that because the Supreme Court in Smith characterized as neutral and generally applicable the Oregon statute banning the use of peyote, and because that statute contains a research exemption (See Or. Rev. Stat. § 475.135 (1999)), the same exemption within the CSA does not undermine its neutrality or general applicability. Opp. at 39. The Court in Smith, however, like the Tenth Circuit in Meyers had no cause to analyze the Oregon statute and simply treated it as a given that the statute was an "across the board" ban on use of peyote. 494 U.S. at 884.

Accordingly, neither court even considered whether the exemptions under the CSA affect its neutrality or general applicability. In the end, however, it is the government's position that if it permits chemists, psychologists and college professors to distribute hoasca or DMT to students or other participants in the course of their research studies, the CSA's "general applicability" is unaffected as to a religion's distribution of the same substance under what are probably at least as rigorously controlled circumstances.[24] In support of its argument that the CSA is neutral and generally applicable in relevant respects, the government relies extensively, but quite selectively, on the Supreme Court's decision in Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993). According to the government, that decision established that a law or regulation burdening a religious practice is *only* unconstitutional if its terms disclose an intent to burden a religious practice or if such an intent may be discerned extrinsically. Opp. at 35-37. Thus, the government infers incorrectly that, if the authors of

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[24] See, e.g., description of experiments with DMT at the University of New Mexico in Strassman RJ, Qualls CR, Uhlenhuth E, Kellner R. 1994. Dose-response study of N,N-dimethyltryptamine in humans. II. Subjective effects and preliminary results of a new rating scale. Arch Gen Psychiat. 51: 98-108; Strassman RJ, Qualls CR. 1994. Dose-response study of N,N-dimethyltryptamine in humans. I. Neuroendocrine, autonomic and cardiovascular effects. Arch Gen Psychiat. 51: 85-97.

CSA's prohibition of DMT did not intend to burden religion, there can be no First Amendment challenge.

The government misreads Lukumi. There, the Court concluded because the Hialeah ordinance was intended to target a religious practice, the free exercise clause "*at a minimum*" forbids such a law. Id. at 532 (emphasis added). The government argues, however, that this Court should compare any claimed vices of the CSA with the vices of the Hialeah ordinances identified in Lukumi and decide, in effect, whether the CSA suffers from similarly obvious constitutional flaws. The Court in Lukumi, however, made it clear that laws far more benign than Hialeah's ordinances could violate free exercise: "[W]e need not define with precision the standard used to evaluate whether a prohibition is of general application, *for these ordinances fall well below the minimum standard necessary to protect First Amendment rights.*" Id. at 543. (Emphasis added.) The government suggests again and again that Lukumi holds free exercise is offended only if the law selectively *targets* religion. Opp. at 35-37. This is simply incorrect. While the Court had no difficulty in concluding that a law that targets a religious practice is unconstitutional, the Court emphasized in the statement of which the government selected only the first half, (Opp. at 36) that "[a]ll laws are selective to some extent, *but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice.*" 505 U.S. at 542. (Emphasis added.)

Again quoting selectively from Lukumi, the government argues that the CSA's medical, research, scientific and industrial use exemptions do not establish non-general applicability or non-neutrality. Opp. at 35. Yet the Court in Lukumi explicitly identified the Hialeah ordinances' exceptions, including one for animal slaughter "in the interest of medical science," as establishing the statute's non-general applicability. 505 U.S. at 544.[25] Contrary to the government's reading of

[25] Note also that Justice Souter, in a concurring opinion, wrote that under applicable law, a blanket prohibition of alcoholic beverages, without an exception for religious use "may fail the test of religion neutrality." 508 U.S. at 561.

Lukumi, what the Court specifically held was "in circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of 'religious hardship' without compelling reason.'" 508 U.S. at 537, quoting Smith, 494 U.S. at 884.

In the case at bar, the CSA not only provides exemptions for medical, research, science and industrial uses (the first three of which contemplate the ingestion by humans, and corresponding potential for abuse and diversion), but also provides an exemption to a preferred religion in its use of a substance that is for purposes of equal protection indistinguishable from hoasca. Compare People v. Woody, 394 P.2d 813, 817 (Cal. 1964) (holding that California had failed to demonstrate a compelling need to suppress the peyote religion).

In addition, plaintiffs have demonstrated that DMT, the psychoactive substance in hoasca, is found commonly not only in all healthy humans, but in plants that grow profusely throughout this and other countries. See 2d Nichols Decl. at ¶ 10 (Ex. S); Kleiman Decl. at ¶¶ 17-20 (Ex. U); 1st Nichols Decl. at ¶ 6 (Ex. M). Such substances are used recreationally in the United States and the government has apparently taken no steps to suppress those plants or to prosecute those who use them. Even though those other plants contain DMT, the government has singled out hoasca for suppression and has singled out the adherents of the UDV for threat of criminal prosecution. It has also adopted doubtful and strained interpretations of CSA's Schedule 1 and the 1971 Convention to justify its conduct. These facts suggest that the same government motivations that doomed the Hialeah ordinances are at play in this case.

In its attempt to brush aside the exemption for the NAC, the government's argument falls of its own weight. Regardless of whether the exemption for the NAC's use of peyote makes the law "not of general applicability" or "not neutral" or whether it creates an equal protection violation, the

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(Souter, J., concurring in part and concurring in the judgment).

government has no legitimate argument that the UDV is not entitled to a similar exemption. The government's efforts at distinguishing the UDV's use of hoasca from the NAC's use of peyote are factually incorrect and are based upon arbitrary, invidious and capricious distinctions between religions, races and the two substances. See discussion at 38 infra. In addition, pronouncements by various justices of the Supreme Court and recent case law establish that the government's effort to justify these distinctions will not succeed. See discussion of "Equal Protection," infra at 40.

2. The Supreme Court Would Hold That The UDV Is Entitled to An Exemption.

In Smith, five justices, led by Justice Scalia, agreed that government need not demonstrate a compelling state interest to justify an incidental burden on religion, so long as it was imposed by a neutral law of general application. 494 U.S. at 885-86. Four justices, however, would have continued to apply a compelling state interest test to any law - neutral or otherwise - that burdened religion. 494 U.S. at 903 (O'Connor, J., concurring); 494 U.S. at 921 (Blackman, Brennan and Marshall, dissenting). In Board of Education v. Grumet, 512 U.S. 687 (1994), decided after Smith and Lukumi, the Court struck down a special statute passed in New York that created a school district tailored to fit the boundaries of a Satmar Jewish community. The holding is not germane to this case except insofar as Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, all of whom were in the majority in Smith, spoke in dissent. They argued that the creation of a unique district was no more than a proper accommodation of religion, and that if the result were that other religions suffered disparate treatment, *it would simply fall to the courts, pursuant to their constitutional duties, to remedy the situation:*

> Not every religion uses wine in its sacraments, but that does not make an exemption from Prohibition for sacramental wine use impermissible, accord, Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S., at 561, n.2, 113 S. Ct., at 2241, n. 2 (SOUTER, J., concurring in judgment), nor does it require the State granting such an exemption to explain in advance how it will treat every other claim for dispensation from its controlled-substances laws. Likewise, not 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, see Employment Div., Dept of Human Resources of Ore. v. Smith,

> 494 U.S. 872, 890, 110 S. Ct. 1595, 1606, 108 L.Ed.2d 876 (1990), 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. See, e.g., Olsen v. Drug Enforcement Admin., supra (rejecting claim that peyote exemption requires marijuana exemption for Ethiopian Zion Coptic Church); Olsen v. Iowa, 808 F.2d 652 (CA8 1986) (same); Kennedy v. Bureau of Narcotics and Dangerous Drugs, 459 F.2d 415 (CA9 1972) (*accepting claim that peyote exemption for Native American Church requires peyote exemption for other religions that use that substance in their sacraments*).

Id. at 747 (emphasis added). One can extract from Justice Scalia's dissent in Grumet his view (in which Justices Rehnquist and Thomas joined) that an exemption for peyote is "desirable" and that it would be the duty of the courts to assure that other religions that use peyote receive a similar exemption. If one religion receives an exemption, and a similarly-situated religion does not, it will fall to the courts to accommodate other religions, such as the UDV. Justice Souter, concurring in Lukumi said the same, although his constitutional threshold might be somewhat lower than Justice Scalia's:

> A secular law, applicable to all, that prohibits consumption of alcohol, for example, will affect members of religions that require the use of wine differently from members of other religions and nonbelievers, disproportionately burdening the practice of, say, Catholicism or Judaism. Without an exemption for sacramental wine, Prohibition may fail the test of religion neutrality.*
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> ....
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> [*f.n.2] Our cases make clear, to look at this from a different perspective, that an exemption for sacramental wine use would not deprive Prohibition of neutrality. Rather, "[s]uch an accommodation [would] 'reflec[t] nothing more than the governmental obligation of neutrality in the face of religious differences.' "

508 U.S. at 561, 561 n.2 (Souter, J., concurring) (brackets in original). What these statements, and the decision in Smith, establish is that the Supreme Court would either insist on application of the "compelling state interest test," or would require that the courts ensure equal treatment of similarly situated religions that use similar substances, or both. In addition, because the government concedes the applicability of RFRA to the federal government, no doubt exists that this court must apply a compelling state interest/least restrictive means test.

H. The Government's Differential Treatment of Peyote Use By the NAC And The Use of Hoasca By The UDV Violates the Equal Protection Clause

1. Equal Protection Requires Equal Treatment for Similarly Situated Religions.

The question before this Court is whether the UDV and NAC are similarly situated, and whether refusing an exemption for the UDV's use of hoasca violates equal protection. A basic tenet of our First Amendment jurisprudence is that no religion be favored over another. "We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." Zorach v. Clauson, 343 U.S. 306, 313 (1952). See also, Walz v. Tax Commission of City of New York, 397 U.S. 664, 668 (1970) (requiring governmental neutrality in dealing with religions). This is still the law: "[T]he same accommodation must be made for all religions that are in the same position. What is reasonable will vary, and what religions are similarly situated is a judgment capable of no precise calculation." Hyde v. Texas Dept. of Criminal Justice, 948 F. Supp. 625, 626 (S.D. Tex. 1996).

The government appears to concede that this Court must apply an equal protection analysis in determining whether the NAC's peyote exemption should be extended to the UDV's use of hoasca. Opp. at 40-47, *passim.* The government argues, however, that as a *factual* matter the two religions are not similarly situated, the two controlled substances are not similar and that, accordingly, the equal protection clause should be of no help to the UDV. The government's principal arguments boil down to this: The UDV religion is not an American Indian religion and is therefore not similarly situated to the NAC, and hoasca is not peyote. Id. According to the government, these differences require the Court to reject the UDV's equal protection claim. As demonstrated below and elsewhere in this brief, the government has not substantiated these assertions.

2. The Government Has Failed To Identify Any Significant Basis For Legally Distinguishing Between the UDV and NAC, or Between Hoasca and Peyote.

The government argues that plaintiffs are not similarly situated because they "are seeking permission to use a different substance." Opp. at 41. Yet rather than compare the peyote the NAC uses with the "different substance" at issue here–hoasca–the government chooses to compare peyote with marijuana–a substance not at issue in this case. As the government admits, "[n]ot all controlled substances present identical concerns." Id. For starters, hoasca has no history of abuse; marijuana has a substantial history of abuse. The rationale for permitting the UDV's use of hoasca would not apply to marijuana, and the cases on which the government relies to establish the contrary: United States v. Rush, 738 F.2d 497 (1st Cir. 1984), McBride v. Shawnee County, Kans. Court Serv's, 71 F. Supp.2d 1098 (D. Kan. 1999) and Peyote Way Church of God v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991), are of little or no help to the government's position. For example, McBride and Rush dealt with claims that marijuana "exemptions" should be extended to members of groups that advocated its "religious" use.

The distinctions between marijuana and peyote (and hoasca) within the context of controlled substances as a whole are addressed below, and plaintiffs are fully prepared to prove that the UDV is similarly situated with the NAC and that hoasca is similarly situated with peyote. Indeed, the decision in McBride which sets forth the factual distinctions between marijuana and peyote that make those two substances *not* similar, eloquently demonstrates why hoasca and peyote *are* similarly situated for purposes of equal protection. At issue in McBride was a claim by members of the "Rastafarian Faith" that use of marijuana was central to their religion and that it violated equal protection for the State of Kansas to exempt the NAC from its controlled substances act and not the Rastafarians for their use of marijuana. The Court found that neither the substances nor the religions were similarly situated. It found, *as a matter of fact*, that the frequency of use, and quantity of use of the two substances between the two religions varied enormously; that the two substances have substantially different effects on society; that peyote is tightly controlled by the NAC while marijuana use is uncontrolled; that peyote is

used in elaborate and tightly-controlled ceremonies while the marijuana "religion" uses the substance "whenever the mood strikes." 71 F. Supp. at 101. The Court held that there was an "overwhelming difference" between the two substances which explained why society could accommodate the religious use of one but not the other. Id. at 1101-1102; see also United States v. Rush, 738 F.2d 497 (1st Cir. 1984), in which the court commented that "accommodation of religious freedom is practically impossible with respect to the marijuana laws . . . ." 738 F.2d at 513; State v. Olsen, 315 N.W. 2d (Iowa 1982) in which the court characterized marijuana as "'perhaps the drug most readily accessible to and widely used by young people,'" Id. at 8 (quoting Iowa Drug Abuse Study Comm. Final Report, 64th G.A. 1 (1971)). No such evidence exists for hoasca.

The government next claims that "ayahuasca presents health concerns not present with peyote" Opp. at 41. Yet the government provides this Court with no studies of the health and safety of peyote, nor does it provide any evidence that partaking of hoasca in a religious setting is unsafe, nor that hoasca presents any risk not found in peyote. The government next argues that "peyote is tightly controlled at its point of origin by Texas regulation" and that "no such controls are in place for ayahuasca in Brazil." Opp. at 42. Therefore the government opines that ayahuasca presents a greater "potential" for illegal trafficking than does peyote. The government fails to mention, however, that once the peyote leaves Texas and travels to other states and Canada, no controls exist on peyote use or distribution. Also, as the government must know, but failed to state, peyote is available not only in Texas, but northern Mexico as well. United States v. Boyll, 774 F. Supp. 1333, 1335 & 1337 (D. N.M. 1991) (stating that peyote is grown in northern Mexico and Texas); United States v. Spears, 443 F.2d 895 (5th Cir. 1971) (defendant convicted of smuggling peyote into Texas from Mexico). In fact, the religious use of peyote originated in Mexico. Employment Division of Human Resources of Oregon v. Smith, 485 U.S. 660, 668 ("Peyotism spread from Mexico to the United States and Canada"); see also People v. Woody, 394 P.2d 813, 817 (referencing appearances in Spanish historical sources to the religious use of peyote in Mexico

as early as 1560). Moreover, even ten years ago it was noted that the peyote inventory in the United States is "considerably depleted." Id.; Omer C. Stewart, Peyote Religion 334-35 (1987). Thus, it is expected that those seeking peyote will increasingly rely on Mexico for access. Indeed, pilgrimages to Mexico by members of the NAC are "an integral part" of the Church's practices. Boyll, 774 F. Supp. at 1341.

The government also fails to mention that any ayahuasca coming from Brazil would come through United States Customs which also provides tight controls. Even more significantly, the government ignores the fact that in the ten-plus years the UDV has been importing its sacramental tea without any externally-required controls, not one drop of it has found its way to an illicit user. See 1st Bronfman Decl. at ¶ 78 (Ex. A).

3. The Fact That NAC Has Its Origins Among Native Americans Is Irrelevant To the Equal Protection Analysis.

The government's reliance on the Supreme Court's analysis in Morton v. Mancari, 417 U.S. 535 (1974), of the unique relationship between the federal government and Indian tribes, is also misplaced in this context. Although the government repeatedly frames the issue as the difference between the UDV and "Native Americans who use peyote." see, e.g., Opp. at. 41, the appropriate distinction is between two religions: the UDV and the NAC. The membership in the NAC is not confined to Indians. As Judge Burciaga found in United States v. Boyll, 774 F. Supp. 1333, 1341 (D. N.M. 1991):

> Historically, the [NAC] has been hospitable to and, in fact, has proselytized non-Indians. The vast majority of Native American Church congregations, like most conventional congregations, [maintain] an "open door" policy and [do] not exclude persons on the basis of their race. Racial restrictions as to membership have never been a general part of Peyote Religion or of the Native American Church.

Id. at 1336. See also Native American Church of New York v. United States, 468 F. Supp. 1247 (S.D. N.Y. 1979), aff'd, 633 F.2d 205 (2d Cir. 1980) (membership of Native American Church of New York comprised primarily of non-Native Americans); State v. Whittingham, 19 Ariz. App. 27, 28, 504 P.2d 950, 951 (1973) (Native American Church includes Indians and non-Indians); Declaration of NAC

Roadman Alden Naranjo (Ex. W) ("Many non-Indians in my experience are and continue to be full legitimate members of the Native American Church."); Omer C. Stewart, Peyote Religion 334 (1987) ("The ruling of the NAC of NA [North America] that only Indians should be enrolled in the Native American Church is new and is not shared by most peyotists. The NAC of NA does not speak for all peyotists, as much as it would like to do so. All peyotists consider themselves members of the Native American Church, but most are not affiliated with the NAC of NA. Each congregation makes its own rules, just as each meeting is conducted by its own roadman.").[26]

The government is correct that both the McBride and Peyote Way courts emphasized the significance of the United States' trust responsibility toward Indian tribes as forming a legitimate basis to find that the NAC was not "similarly situated" with other religions. McBride, 71 F. Supp. 2d at 1102-1103, Peyote Way, 922 F.2d at 1216.[27] While the two decisions may have presented a convenient way to discriminate between non-Indian and Indian religions in order to dismantle the equal protection arguments of non-Indian religions, the government's argument cannot withstand scrutiny. The Fourth Circuit, in a more recent case, has spoken directly to this issue. In Morrison v. Garraghty, 2001 WL 101507 (4th Cir. 2001), the court addressed the claim of a prison inmate who was denied the right to possess some accouterments of a native-American religion because he was not native-American. In concluding that the distinction violated the equal protection clause, the court came to a series of conclusions that apply equally to this case as well: First, the court noted that when government classifies on the basis of race or national origin, special concerns are implicated because those factors "are 'seldom

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[26] Seventeen states have enacted statutes to protect the right to use peyote in religious services, See Ex X for the complete list. Only two of them, Idaho and Texas, limit their exemptions to those of Indian descent. See IDAHO CODE § 37-2732A; TEX. HEALTH & SAFETY CODE § 481.111(a).

[27] Another case the government cites in support of its argument that the NAC is only an Indian religion is United States v. Warner, 595 F. Supp. 595 (D. N.D. 1984). Although the court denied the non-Indian defendants' pre-trial motions to dismiss the indictment, the jury found the Warners not guilty, because "they were able to prove that although they were not Indians, nevertheless they were members in good standing of the local congregation of peyotists." Stewart, Peyote Religion at 333.

relevant to the achievement of any legitimate state interest' and, therefore, 'are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others.'" Id at *3. Second, the court noted that it is settled that classifications based on race or national origin "are subjected to stricter scrutiny, sustained only if they are narrowly tailored to serve a compelling state interest." The court concluded:

> [G]iven defendants' failure to substantiate a claim that the sincerity of one's belief in Native American theology is determined by the color of his skin or the origin of his birth, and the concomitant failure to articulate a rational connection between an inmate's race and his propensity to misuse the items requested, it is patently impermissible to control the number of dangerous items by instituting a policy which arbitrarily makes race or heritage the threshold requirement for according an inmate the privilege of obtaining them.

Id. at *11. See also Combs v. Corrections Corp. of America, 977 F. Supp. 799, 802 (W.D. La. 1997) (striking down rule confining practice of Native American religion to Native Americans; rule found to be "akin to a requirement that practicing Catholics prove an Italian ancestry, or that Muslims trace their roots to Mohammed"). As plaintiffs have demonstrated in the instant case, many non-Indians are members of the NAC. Accordingly, the refusal to accord equal protection to the similarly-situated UDV is doubly discriminatory because it not only discriminates in favor of Native Americans, it discriminates in favor of non-Native Americans who choose to align themselves spiritually with a particular religion.

In another astonishing leap, the government argues, without citation to any authority, that "Congress redefined contours of the peyote exemption" [21 C.F.R. 1307.31], for the Native American Church when it passed the American Indian Religious Freedom Act Amendments, 42 U.S.C. § 1996 (AIRFA). Opp. at 43. The regulatory exemption, is provided in the rules by which the DEA implements the CSA. AIRFA was Congress's attempt, in reaction to Smith, to insure that *all* Indians could use peyote in a religious context without fear of prosecution, even in those states, such as Oregon, that had not enacted laws in conformance with the federal regulation. 42 U.S.C. § 1996(3)(a)(3).[28] AIRFA may

[28]Oregon now has such an exemption. See Ex. X.

well be based on Morton v. Mancari, 417 U.S. 535 (1974), but the federal exemption is not. Indeed, Congress could not redefine the exemption in the CSA, without dictating who could join the NAC, an act clearly violative of the First Amendment. "To exclude individuals of a particular race from being members of a recognized religious faith is offensive to the very heart of the First Amendment." Boyll, 774 F. Supp. at 1340.

Having failed to offer any proof that the NAC is restricted to Indians, the government's argument that the NAC's 250,000 members are a "readily identifiable, narrow" (Opp. at 46) population must also fail. Even one of the authorities on which the government relies, Omer Stewart, contradicts this proposition. See Stewart at 334.[29]

The government's final argument in this section is truly remarkable. "[G]ranting the exemption to the UDV would open the door to granting religious exemptions for other similarly situated religions of indeterminate membership." Opp. at 46. Indeed, is this not the essence of the First Amendment? "We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary." Zorach v. Clauson, 343 U.S. 306, 313 (1952). If other religions can satisfy the requirements necessary to fit within the free exercise clause, they should be free to do so. The prevention of the proliferation of religions is not a legitimate interest of government, much less a compelling one.

Given the facts of this case (that hoasca is similar to peyote; that it is not abused in the religious context; that it is tightly controlled by the UDV; that its use is in a religious setting; that the UDV is a genuine religion and its adherents sincere), the UDV, too, should have an exemption.

I. Plaintiffs Have Sustained Their Burden to Qualify For Preliminary Relief.

The government argues that this Court should deny preliminary relief because the type of harm the plaintiffs are suffering does not merit preliminary relief. Opp. at 53-54.

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[29] Although the government claims the plaintiffs portray the NAC as "an essentially unstructured organization, (Opp. at 46, n.10), the plaintiffs actually wrote that the NAC was "loosely organized," (Br. at 46.), which it is. See Stewart at 334.

The government's first argument on this point is that the loss of UDV members' right to freely practice their religion should not be considered irreparable harm. Id. This trivializes and shows utter disrespect toward plaintiffs' religion and, inferentially, toward all religions. Coming from the Justice Department, the argument is shameful. In addition, it ignores the controlling and inflexible holdings of the Supreme Court that in this country religious freedom is of primary legal importance and is central to our national soul:

> "Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle."

Girouard v. U.S., 328 U.S. 61, 68 (1946). See also, 1st Bronfman Decl. at ¶ 87 (Ex. A):

> I have also seen other, less dramatic but still significant, suffering within the communities I have served as a mestre. I have seen people whose quality of life has significantly diminished due to our inability to hold our religious services; less harmony, less happiness, less peace, less of everything that makes life worth living. Our living and sacred connection to the Divine has been severed.

Id. For the government to dismiss the harm caused by the government's actions as of no greater significance than an adverse job action that "psychologically troubles" an employee (Opp. at 54) signals yet another casualty of the war on drugs–the federal government's respect for the fundamental human rights of its citizens. Even local school boards know enough to stop short of taking such a position in court. See, e.g., Brewer v. West Irondequoit Cent. School Dist., 212 F.3d 738, 744 (2d Cir. 2000) (in which school district conceded that any First Amendment violation "is viewed of such qualitative importance as to be irremediable by any subsequent relief," and in which court held that same irreparable harm analysis applied to other constitutional guarantees, including right to equal protection of law). The government would not have made this argument if the plaintiffs adhered to Catholicism, Protestantism, Judaism, Islam or any other "accepted" religion and had complained that a government agency was actively prohibiting the exercise of their faith. Cf. Engel v. Vitale, 320 U.S. 421, 429-430 (1962)

(explaining that the genesis of the First Amendment lay in the belief that, without it, governments would favor certain religions over others).

The government also argues that because the plaintiffs' harm "has already been incurred" no injunctive relief is appropriate. Opp. at 54. This argument collapses under the weight of all the precedents cited throughout the parties' briefs, in which courts have held interference with First Amendment rights to constitute irreparable harm. The government's throw-away argument relies on a Tenth Circuit case in which the plaintiff had failed to be placed on the ballot, Thournir v. Buchanan, 710 F.2d 1461, 1463, n.2 (10th Cir. 1983). There, the Court decided that because the election had already occurred, no relief could be provided. The plaintiffs' freedom of religion, their desire to practice their religion, and their right to do so cannot be turned out like a light. It is repugnant for the government to claim that because it has effectively prohibited and threatened to criminalize the practice of the UDV religion, the harm is complete and any remedy would come too late.

Finally, the government argues that because New Mexico law does not include an exemption for hoasca, any relief would be illusory. Opp. at 54. Again, the government is wrong. First of all, the State of New Mexico has not threatened to prosecute the plaintiffs. Only the federal government has. Second, the State of New Mexico has passed its own religious freedom act, NMSA § 28-22-1 et seq. (2000), which plaintiffs believe will adequately protect them from similar conduct by this state should any branch of state law enforcement undertake to suppress the UDV.

CONCLUSION

For the reasons set forth above and from the plaintiffs' brief-in-chief, plaintiffs respectfully request that the Court enter a preliminary injunction for the relief requested in the plaintiff's brief-in-chief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading was hand-delivered this 13th day of February, 2001 to:

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