UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FILED
UNITED STATES DISTRICT COURT

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CLERK

O CENTRO ESPIRITA BENEFICIENTE UNAIO DO VEGETAL, et al.,

Plaintiffs,

v.

JANET RENO, et al.,

Defendants.

No. CV 00-1647 JP/RLP

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

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Introduction

Plaintiffs, a group known as the Centro Espirita Beneficiente Unaio do Vegetal ("UDV") and its leaders, seek a preliminary injunction prohibiting the government from enforcing against UDV members the provisions of the Controlled Substances Act ("CSA" or "the Act") banning the importation, possession, and distribution of the hallucinogen dimethyltryptamine ("DMT"), a Schedule I substance under the Act. The injunction requested by Plaintiffs would also compel the government to return to Plaintiffs substantial quantities of this Schedule I substance that were seized pursuant to a valid search warrant. Plaintiffs claim that they use the hallucinogen, in the form of a tea ("ayahuasca") brewed from a plant that naturally contains DMT, as a central part of their religion.

Plaintiffs present the following main arguments: (1) because the hallucinogen comes in the form of a tea brewed from plants, it is not subject to the CSA; (2) the government's prohibition on Plaintiffs' use of ayahuasca substantially burdens their religious practice without any compelling justification and therefore violates the Religious Freedom Restoration Act ("RFRA"); (3) the prohibition on Plaintiffs' use of ayahuasca violates Plaintiffs' right to free exercise of their religion and cannot withstand heightened scrutiny under the First Amendment; (4) the government has violated the Equal Protection Clause by allowing Native Americans to use peyote in their religious ceremonies but forbidding the UDV to use DMT in theirs; and (5) because the UDV is headquartered in Brazil and because Brazil allows the religious use of ayahuasca, the prohibition on Plaintiffs' use of ayahuasca violates principles of international religious freedom and comity.

Plaintiffs are not entitled preliminary injunctive relief for several reasons. Foremost among these is that Plaintiffs have not established a likelihood of success on the merits. As discussed fully below, it is abundantly clear that the CSA, on its face, applies to ayahuasca. Plaintiffs do not have

a valid RFRA claim because the government has several compelling interests in banning the UDV's use of DMT, including its interest in maintaining compliance with international drug control treaties and protecting the public health and safety, which are already being furthered by the least restrictive means. Moreover, because the prohibition against DMT is a neutral and generally applicable one, it does not require heightened scrutiny under the First Amendment. Plaintiffs' Equal Protection argument fails in light of the many relevant differences between ayahuasca and peyote and between the UDV and Native American tribal members. Finally, the specific treaties cited by Plaintiffs make clear that valid public health laws do not constitute a violation of religious freedom, and the general principles of international law cited by Plaintiffs are inapplicable where, as here, the statute in question is unambiguous. Plaintiffs have also failed to establish the other prerequisites for preliminary injunctive relief: They have not shown that they will suffer irreparable harm in the absence of an injunction, and they ignore the serious harm to both the government's interests and the public interest that could result if the injunction is granted.

Factual Background

On May 12, 1999, United States Customs inspectors at Los Angeles International Airport examined a shipment of three drums of "Tea of Herb and Plate Wood" that had arrived in the United States from Brazil. The importer of record was "Centro Espirita," and the entry documents described the contents of the drums as "herbal tea extract." The United States Customs Laboratory tested the brown liquid contained within the drums and found that it contained dimethyltryptamine (DMT), a hallucinogen that is listed under Schedule I of the Controlled Substances Act. See Affidavit of Bend H. Reimann in Support of Application for Search Warrant (Plaintiffs' Exhibit L) at ¶¶ 4-6. Under 21 U.S.C. §§ 952(a) and 841(a)(1), unauthorized import and possession of a controlled substance

such as DMT is made subject to criminal penalties.

An investigation by United States Customs agents revealed that plaintiff Jeffrey Bronfman, writing on "Centro Espirita Beneficiente Unaio do Vegetal" letterhead, had requested the services of FXG International Customs Brokers to receive the shipment and arrange for the drums to be transferred to him. The letter stated, "You will be acting on our behalf to receive and then reship 180 liters of a liquid herbal tea made from two plants indigenous to the Brazilian Amazon. The two plants which are known as Mariri and Chacrona are used to make a tea which has numerous health benefits including improved mental concentration and purification of the organism. . . . It will be used only by members of the social religious organization as a health supplement . . . ." See Reimann Affidavit at ¶¶ 9-10. Further investigation revealed that the importer "Centro Espirita" had received approximately fourteen prior shipments of "herbal tea extract" between July 30, 1995 and December 23, 1998. See id. at ¶ 11.

On May 21, 1999, the United States Customs Service obtained a search warrant that would allow agents to search Jeffrey Bronfman's premises in the event that Mr. Bronfman accepted a controlled delivery of the tea shipments. The search warrant was executed that afternoon, and Customs agents seized approximately 30 gallons of tea. See id. at ¶ 21. When Mr. Bronfman explained that the tea was used in religious ceremonies at a church temple, Customs agents asked for the location of the temple. Mr. Bronfman refused to reveal its location. See id. at ¶ 22. According to agents who were present, Mr. Bronfman stated that he knew what he was doing was against the law. See id. DEA testing of the contents of the tea seized at Mr. Bronfman's residence revealed that it contained DMT.

It is now known that the tea seized by the U.S. Customs Service is the decoction known in

South America variously as "ayahuasca," "hoasca," "daime," "yaje," or "caapi" and used for centuries in healing rituals in Columbia, Ecuador, Brazil, and Peru. See generally Laurent Rivier & Jan-Erik Lindgren, "Ayahuasca," the South American Hallucinogenic Drug: An Ethnobotanical and Chemical Investigation, Economic Botany 26(2):101-129 (1972). Ayahuasca is prepared by crushing the stems or bark of the vine *banisteriopsis caapi* (also known as "mariri") together with the leaves of other DMT-containing plants, a common one being *psychotria viridis* (also known as "chacruna"). The result is a bitter-tasting, coffee-colored beverage that has hallucinogenic properties. See id.

The government has made no arrests and has neither prosecuted nor conveyed any intent to prosecute Jeffrey Bronfman (or any of the other named Plaintiffs) in connection with the above events. The government has, however, refused to provide the assurances repeatedly sought by Plaintiffs that it will not initiate prosecution for past, present, or future violations of the Controlled Substances Act by members of the UDV importing or distributing ayahuasca. The tea that was seized in May of 1999 remains in the possession of the United States Attorneys Office for the District of New Mexico.

Argument

A plaintiff is ordinarily entitled to a preliminary injunction if he or she shows (1) a substantial likelihood of prevailing on the merits, (2) irreparable harm in the absence of the injunction, (3) proof that this harm outweighs the harm that the other party will suffer if the injunction is granted, and (4) lack of harm to the public interest. See Autoskill Inc. v. Nat'l Educ. Support Sys., Inc., 994 F.2d 1476, 1487 (10th Cir. 1993). For the reasons set forth below, however, Plaintiffs in this case bear a somewhat higher burden.

A preliminary injunction "is an extraordinary remedy; it is the exception rather than the rule." GTE Corp. v. Williams, 731 F.2d 676. 678 (10th Cir. 1984). The purpose of a preliminary injunction "is simply to preserve the status quo pending the outcome of a case," in order to "preserve the power to render a meaningful decision on the merits." Tri-State Generation and Transmission Ass'n, Inc. v. Shoshone River Power, Inc., 805 F.2d 351, 355 (10th Cir. 1986); see also United States v. Camenisch, 451 U.S. 390, 395 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be had."). This is true even if the status quo involves a violation of the legal rights of the parties:

> The status quo is not defined by the parties' existing legal rights; it is defined by the reality of the existing status and relationships between the parties, regardless of whether the existing status and relationships may ultimately be found to be in accord or not in accord with the parties' legal rights.

SCFC ILC, Inc. v. VISA USA, Inc., 936 F.2d 1096, 1100 (10th Cir. 1991).

Given this underlying purpose, it is generally inappropriate for a preliminary injunction to disturb the status quo, require an affirmative action on the part of the non-movant, or provide the full relief that would be accorded if the movant were successful in a trial on the merits. See id. at 1098-99. Preliminary injunctions that seek such relief are "disfavored," id. at 1098, for the following reasons:

> A preliminary injunction that alters the status quo goes beyond the traditional purpose for preliminary injunctions, which is only to preserve the status quo until a trial on the merits can be had. Mandatory injunctions are more burdensome than prohibitory injunctions because they affirmatively require the nonmovant to act in a particular way, and as a result they place the issuing court in a position where it may have to provide ongoing supervision to assure that the nonmovant is abiding by the injunction. Finally, a preliminary injunction that awards the movant substantially all the relief he may be entitled to if he succeeds on the merits is similar to the "Sentence First – Verdict Afterwards" type of procedure parodied in Alice in Wonderland, which is anathema to our system of jurisprudence.

Id. at 1099 (internal citations and footnotes omitted). A plaintiff requesting an injunction that either disturbs the status quo, requires an affirmative act, or awards full relief must therefore overcome a higher hurdle than a plaintiff requesting the usual type of preliminary injunction. Such a plaintiff cannot simply show that the four factors listed above favor granting the injunction; he or she must meet a "heightened burden" of showing that these factors weigh "heavily and compellingly" in his or her favor. Id. at 1102.

In this case, Plaintiffs' proposed injunction includes all three forms of disfavored relief: It would disturb the status quo by ordering the government to remove its prohibition on Plaintiffs' use of DMT; it would require the government to perform the affirmative act of turning over the confiscated tea; and, with the exception of the declaratory judgment that Plaintiffs seek from the Court, it would afford the Plaintiffs the full relief requested in this litigation. See Complaint at 19-20. Plaintiffs therefore must show that the four prerequisites for granting a preliminary injunction weigh "heavily and compellingly" in their favor. This is an extremely high burden given that, even when a preliminary injunction is sought under ordinary circumstances, "the right to relief must be clear and unequivocal." Penn v. San Juan Hospital, Inc., 528 F.2d 1181, 1185 (10th Cir. 1975); see also Citizens Concerned for the Separation of Church and State v. City and County of Denver, 628 F.2d 1289, 1299 (10th Cir. 1980) (requiring a showing of "compelling circumstances" to justify the imposition of mandatory injunctive relief that disturbed the status quo). Plaintiffs manifestly have not met this burden.

I. Plaintiffs Have Not Demonstrated a Substantial Likelihood of Success on the Merits

A. Ayahuasca is Covered Under the Controlled Substances Act

Schedule I of the Controlled Substances Act applies to "any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances." 21 U.S.C. § 812. One such substance is dimethyltryptamine. Plaintiffs do not contest that ayahuasca contains dimethyltryptamine. Instead, they argue that what Congress meant by "dimethyltryptamine" is "dimethyltryptamine as produced by chemical synthesis rather than by extraction from plant material."

In support of this tortured construction, Plaintiffs marshal a litany of theories of statutory interpretation. They ignore, however, the cardinal rule of statutory interpretation: that the plain language of a statute controls unless that language is ambiguous. "It is a well-established law of statutory construction that, absent ambiguity or irrational result, the literal language of the statute controls." Edwards v. Valdez, 789 F.2d 1477, 1481 (10th Cir. 1986); see also Chickasaw Nation v. United States, 208 F.3d 871, 876 (10th Cir. 2000) ("If the terms of the statute are clear and unambiguous, they are controlling absent rare and exceptional circumstances."); Lindsay v. Thokol Corp., 112 F.3d 1068, 1070 (10th Cir. 1997) ("The exceptions to our obligation to interpret a statute according to its plain language are few and far between.").

There is nothing facially ambiguous about the term "dimethyltryptamine." It describes a specific chemical structure ($C_{12}H_{16}N_2$), and it does not carry any suggestion of how that chemical structure came into being. Indeed, one can scarcely imagine statutory language less ambiguous than the identification by name of a specific chemical compound. Any possibility that Congress could have meant "DMT as synthesized, and not as contained in/derived from plant material" is erased by

the introductory language to Schedule I, which states that the Schedule applies not only to the listed substances, but to "*any* material" that contains the substance. 21 U.S.C. § 812 Schedule I(c). The rules of statutory interpretation require that "material" be given its plain and ordinary meaning. See Chapman v. United States, 500 U.S. 453, 462 (1991). The plain, ordinary meaning of "material" is *not* "manipulations of the synthetic substance . . . but [not] manipulations of the plant," Plaintiffs' Motion at 35-36, but rather "matter that has qualities that give it individuality and by which it may be categorized." Webster's Ninth New Collegiate Dictionary at 733 (1990); see United States v. Roberts, 88 F.3d 872, 877 (10th Cir. 1996) (noting that the plain meaning of a term may be obtained by reference to a dictionary); see also Chapman, 500 U.S. at 462 (using dictionary to determine plain meaning of term). This definition clearly encompasses plant material as well as non-plant material.

The application of the Controlled Substances Act, as well as its plain language, demonstrates the fallacy of Plaintiffs' argument that Schedule I does not cover plants containing controlled substances. Schedule I lists psilocybin and psilocyn as prohibited hallucinogens. See 21 U.S.C. § 812 Schedule I(c). Both of these substances may be produced synthetically; in addition, there are various types of mushroom plants in which they occur naturally. The mushrooms, as distinct from psilocybin and psilocyn, are not listed under Schedule I. Nonetheless, in this Circuit and others, individuals have been convicted under the CSA for possession and distribution of psilocybin based solely on the possession and distribution of mushrooms in which psilocybin is contained. See United States v. Einspahr, 35 F.3d 505 (10th Cir. 1994); see also United States v. Allen, 990 F.2d 667 (1st Cir. 1993); United States v. Nagib, 56 F.3d 798 (7th Cir. 1995). If mushrooms containing psilocybin are prohibited under the CSA, so, clearly, is the plant containing DMT – *psychotria viridis* – that is used in the preparation of ayahuasca.

Morever, even if one could argue that Congress did not intend the term "material" to cover plants themselves, it is abundantly clear that the terms "mixture" and "preparation" apply to ayahuasca, the tea that is manufactured from the plants. In Chapman, the Supreme Court was called upon to interpret the term "mixture" as used in the Controlled Substances Act. The Court relied on the dictionary to determine that "mixture" means "two substances blended together so that the particles of one are diffused among the particles of the other." Chapman, 500 U.S. at 462 (citing 9 Oxford English Dictionary 921 (2d ed. 1989)). The Tenth Circuit, construing the term "mixture" in a different section of the CSA, adopted the Supreme Court's definition. Plaintiffs have explained that ayahuasca is comprised of two substances – *psychotria viridis* and *banisteriopsis caapi* – blended together so that the particles of one are diffused among the particles of the other (i.e., a liquid). It is therefore a "mixture" under the CSA. Similarly, a "preparation" is defined as "something that is prepared." Webster's Ninth New Collegiate Dictionary 929 (1987). Plaintiffs can hardly deny that ayahuasca is a preparation when the term used to describe the making of the tea is "preparo." See Bronfman Decl. ¶ 62.

Because ayahuasca is covered under the plain language of the statute, it is unnecessary to delve into other principles of statutory interpretation or the legislative history of the Act unless the plain-meaning interpretation leads to an "irrational result." Edwards, 789 F.2d at 1481. However, since Plaintiffs would likely advance their statutory analysis as evidence that the plain-meaning approach leads to an "irrational result," Defendants will address Plaintiffs' analysis here.

First, Plaintiffs claim that, where Congress wished to prohibit the use of a plant containing a controlled substance, Congress listed the plant in addition to the substance. For example, Congress listed not only mescaline, the hallucinogen contained in peyote, but peyote itself under Schedule I;

similarly, marijuana is listed under Schedule I along with THC, its active chemical component. Accordingly, Plaintiffs argue that interpreting the CSA to apply to a plant that contains DMT would violate two canons of statutory interpretation: (1) the principle that Congress is presumed to avoid superfluous drafting (i.e., Congress would not have listed certain plants separately if plants were already covered by the "any material" language), and (2) the doctrine of *expressio unius est exclusio alterius* ("the expression of one thing is the exclusion of another" – by listing some plants as covered, Congress meant to exclude from coverage those plants that it did not list).

Of course, this argument does not address the government's ban on ayahuasca itself. Ayahuasca is not a plant; it is a "material . . . mixture, or preparation" that contains plants as constituent ingredients. Thus, whether *psychotria viridis* is covered by the CSA is largely irrelevant; even if the plant were not covered, ayahuasca would be.

In any case, the fact that Congress listed some hallucinogen-containing plants cannot be taken as evidence that Congress meant for the term "any material" to exclude those plants not listed. It is far more likely that Congress listed those plants of which it was aware, and left the others for inclusion under the expansive language "any material." Plaintiffs attempt to demonstrate that Congress was aware of *psychotria viridis* by citing two items in the CSA's legislative record: a sentence in a medical journal article that refers to DMT's occurrence "in the seeds of a South American plant (*piptadenia peregrina*)" and a sentence in a law enforcement manual stating that DMT "is a natural constituent of the seeds of certain plants found in the West Indies and South America." Plaintiffs' Motion at 30. These two isolated statements, neither of which identifies *psychotria viridis* or was cited by any legislator during the proceedings, hardly constitute convincing evidence that Congress considered but rejected the idea of listing *psychotria viridis*, along with

DMT, under Schedule I. Another reason why some plants and not others might be listed separately under Schedule I is that the 1961 Single Convention on Narcotic Substances affirmatively required Congress to list certain plants. See United Nations Single Convention on Narcotic Drugs, 1961, opened for signature March 20, 1961, art. 1, 22, 23, 25-28 18 U.S.T. 1407, 520 U.N.T.S. 204.

Furthermore, the listing of plants in addition to the chemical hallucinogens contained in those plants would be superfluous only if Congress did not intend to cover the plants in the absence of the chemical hallucinogens. The opposite is the case: the plants listed under Schedule I are controlled regardless of whether they contain the chemical hallucinogens in question. See United States v. Coslet, 987 F.2d 1493, 1496 (10th Cir. 1993) ("[T]he presence of THC is not required for a plant to be considered a marijuana plant. . . . A plant may be rich or barren of THC, and still be counted under 21 U.S.C. 802(16)."). It is therefore not superfluous to list mescaline *and* peyote, since peyote would be illegal regardless of its mescaline content, and mescaline would be illegal regardless of whether it came in peyote form. If a hallucinogen-containing plant is not listed under Schedule I, on the other hand, it is prohibited only if it contains the controlled substance listed in the schedule – i.e., only if it is a "material . . . containing" the substance. This distinction demonstrates the correct application of *expressio unius est exclusio alterius* in this context: By making clear that it wished to control peyote and marijuana regardless of their hallucinogen content, Congress also made clear that it did *not* wish to cover *psychotria viridis* – or other unlisted plants – regardless of its hallucinogenic content. Unlike marijuana and peyote, *psychotria viridis* is covered only if it contains dimethyltryptamine. In that sense, it is indeed "excluded" from the statutory scheme that Congress envisioned for the plants that it listed under Schedule I.

Plaintiffs argue additionally that interpreting "material containing DMT" to include plants

would render ineffective the special exemption for peyote use, thereby violating the canon against constructions that contradict other parts of a statutory scheme. According to Plaintiffs, if Schedule I applies to plants containing controlled substances, the fact that the peyote exemption does not mention mescaline means that Native American users of peyote could still be prosecuted – not for use of peyote, but for use of "a plant that contains mescaline." Plaintiffs' Motion at 33. It is readily apparent that the conundrum Plaintiffs present is a false one. Native Americans could not be prosecuted for using "a plant that contains mescaline" if that plant were peyote, because the law specifically prohibits prosecution for legitimate Native American use of peyote. If the mescaline-containing plant were other than peyote, of course, Native Americans could be prosecuted.

A fourth canon cited by Plaintiffs is the doctrine of lenity. Under this doctrine, where language in a criminal statute is equally susceptible to two different readings, the less harsh alternative should be chosen. The doctrine of lenity is not applicable here, however. As the Supreme Court has stated, "[t]he rule of lenity . . . is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of the Act . . . such that even after a court has seized every thing from which aid can be derived, it is still left with an ambiguous statute." Chapman, 500 U.S. at 463 (internal quotations marks and citations omitted). This is not the case with the terms at issue here (e.g., "mixture," "dimethyltryptamine"), the meanings of which are far from "grievously ambiguous." Similarly, the fifth doctrine of statutory interpretation cited by Plaintiffs – the doctrine that courts should avoid interpretations that raise constitutional difficulties – does not allow a court to ignore the plain meaning of a statute. "The canon of construction that a court should strive to interpret a statute in a way that will avoid an unconstitutional construction is useful in close cases, but it is not a license for the judiciary to rewrite language enacted by the

legislature." Id. at 464 (internal quotation marks and citation omitted). Moreover, as discussed below, there is no constitutional difficulty raised by interpreting the CSA to cover ayahuasca. See Part I.C., infra.

It is Plaintiffs' interpretation of the language in question, and not Defendants', that violates principles of statutory interpretation. Plaintiffs interpret the introductory language of Schedule II, which specifies that the schedule covers all substances "whether produced directly or indirectly by extraction by substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis," to mean that Schedule I, which does not contain similar language, covers only substances produced by chemical synthesis. Plaintiffs' Motion at 36. This interpretation is utterly illogical. If the specification of a method of manufacture in Schedule II but not Schedule I is taken as evidence that Schedule I does not cover that method of manufacture, then Schedule I would not cover synthetic DMT either, since Schedule II specifies the inclusion of substances "produced . . . indirectly by means of chemical synthesis," while Schedule I does not. Schedule I would therefore cover neither substances produced synthetically nor substances produced by natural extraction – i.e., it would cover nothing whatsoever. This violates the principle that statutes should not be construed in a way that leads to absurd or nonsensical results. See Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.").

Moreover, Plaintiffs' interpretation of the differing introductory language in Schedules I and II suggests that Congress intended to be more comprehensive in its restriction of Schedule II substances (by restricting substances of plant origin) than in its restriction of Schedule I substances.

Such an interpretation flies in the face of the clear rationale behind Congress's scheduling scheme, under which Schedule I substances were those of the highest concern to Congress, Schedule II substances were of somewhat less concern, and so forth. See Part I.B.2., infra. The most basic rule of statutory interpretation is that statutes should be construed in a way that gives effect to, rather than contradicts, the intent of Congress. See, e.g., Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co., 464 U.S. 30, 36 (1983) (stating that statutes must be interpreted "in light of the purposes Congress sought to serve"); New York State Dep't of Social Servs. v. Dublino, 413 U.S. 405, 419-20 (1973) ("We cannot interpret federal statutes to negate their own stated purposes."); Complete Finance Corp. v. Commissioner of Internal Revenue, 766 F.2d 436, 439 (10th Cir. 1985) (rejecting an interpretation that would "undermine the intent of Congress"). In light of Congress's overriding concern about Schedule I substances, it would be incongruous for Congress to have placed lesser restrictions on them than on Schedule II substances. See Dublino, 413 U.S. at 419 (rejecting an interpretation under which Congress would be acting incongruously).[1]

Finally, Plaintiffs' interpretation runs counter to the doctrine that statutes pertaining to public health and safety should be construed liberally to protect the health or safety interest addressed by the statute. See, e.g., Whirlpool Corp. v. Marshall, 445 U.S. 1, 13 (1980) ("[S]afety legislation is to be liberally construed to effectuate the congressional purpose."); United States v. An Article of Drug . . . Bacto-Unidisk . . ., 394 U.S. 784, 798 (1969) (noting the "well-established principle that

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[1] The fact that Schedule II specifies the applicable methods for synthesis and/or extraction, whereas Schedule I does not, is easily explained by the fact that Schedule I covers substances in *any* form – i.e., in whatever material, compound, mixture, or preparation the substance may be found – while Schedule II covers only the substances themselves as syntheses or as extractions. This interpretation is commonsensical, and does not run afoul of any principles of statutory interpretation.

remedial legislation such as the Food, Drug, and Cosmetic Act is to be given a liberal construction consistent with the Act's overriding purpose to protect the public health"). In this case, public health considerations mandate against allowing the use of a hallucinogenic substance, particularly where Congress sought to ban at least some forms of the substance on public health grounds of the highest order. See Part I.B.2., infra.

B. Prohibiting the UDV's Use of Ayahuasca Does Not Violate the Religious Freedom Restoration Act

In order to present a prima facie case under the Religious Freedom Restoration Act, a plaintiff must establish by a preponderance of the evidence that the governmental action being challenged (1) substantially burdens (2) a religious (not merely philosophical) belief that the plaintiff (3) sincerely holds. See United States v. Meyers, 95 F.3d 1475, 1482 (10th Cir. 1996). If the plaintiff meets this threshold requirement, the burden shifts to the government to demonstrate that the challenged action furthers a compelling state interest by the least restrictive means. See id.

For the purposes of this motion, Defendants assume that Plaintiffs are sincere adherents of a genuine religion, and that their exercise of this religion is substantially burdened by the government's prohibition on the importation, possession, and distribution of ayahuasca.[2] Even assuming that Plaintiffs have made a prima facie case, however, they have not shown that they are likely to succeed in their RFRA claim, as they must in order to obtain preliminary injunctive relief. The government has at least three compelling interests in prohibiting the importation and use of DMT-containing substances, all of which are implicated by the UDV's religious use of ayahuasca. A prohibition on the importation, possession, and distribution of ayahuasca is the least restrictive

[2] Defendants reserve the right to challenge the sufficiency of Plaintiffs' showing at a later stage in the litigation, after further information has been obtained through discovery.

means of furthering these interests.

1. The Government Has a Compelling Interest in Adhering to the 1971 Convention on Psychotropic Substances

A compelling governmental interest in prohibiting the UDV's use of ayahuasca is the government's interest in adhering to an important international treaty obligation. The treaty most directly implicated by the proposed exemption for ayahuasca[3] is the 1971 Convention on Psychotropic Substances, a treaty to which the United States, Brazil, and over 150 other countries are parties. See United Nations Convention on Psychotropic Substances, 1971, opened for signature February 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175 (Defendants' Exhibit A). Like the CSA, the Convention classifies substances into schedules according to the degree of safety and medical usefulness of those substances. The Convention lists dimethyltryptamine as a "Schedule I" substance. The primary significance of a Schedule I classification is the requirement that parties to the convention "[p]rohibit all use except for scientific and very limited medical purposes by duly authorized persons, in medical or scientific establishments which are directly under the control of their Governments or specifically approved by them." Art. 7(a). The Convention also prohibits the import and export of Schedule I substances without both import and export authorizations. See art. 7(f) and 12(1)(a). Moreover, the Convention provides that "a preparation is subject to the same measures of control as the substance which it contains," art. 3, ¶ 1, with "preparation" defined in relevant part as "[a]ny solution or mixture, in whatever physical state, containing one or more psychotropic substances." Art. 1.

The drafters of the 1971 Convention specifically considered the issue of religious uses of

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[3] Plaintiffs cite various international agreements regarding religious freedom generally. Defendants address these agreements in Part I.E., infra.

Schedule I substances. As a result, the Convention contains a limited exception to the "scientific and medical use" restrictions of article 7. That exception is as follows:

> A State on whose territory there are 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, may, at the time of signature, ratification or accession, make reservations concerning these plants, in respect of the provisions of article 7, except for provisions relating to international trade.

Art. 32, ¶ 4. This is the only provision for religious use of Schedule I substances in the Convention. The drafters thus chose not to allow a broad exception for any religious use of Schedule I substances, but instead to limit religious use of Schedule I substances to one very specifically delineated circumstance. Under the limited religious use exception, the United States made a reservation for Native American religious use of peyote. See Dalton Decl. ¶ 8 (Defendants' Exhibit B). The United States could not have made a reservation for religious use of the plants used to make ayahuasca, if only because those plants do not grow wild in this country. While Brazil might have been able to make such a reservation, it did not do so. Even if it had, this would not have enabled the United States, which would still be subject to the restrictions of article 7, to import and allow the use of ayahuasca.

If the United States were to allow religious use of ayahuasca by the UDV, it would be in clear violation of the 1971 Convention. See Dalton Decl. ¶ 11. That the United States intended its laws and practices in all cases to conform to the Convention is clear, not only from its signing of the Convention, but from implementing legislation. In anticipation of ratifying the Convention, Congress amended the CSA by the Psychotropic Substances Act of 1978 with the intent that the Act, "together with existing law, will enable the United States to meet all of its obligations under the

Convention and that no further legislation will be necessary for that purpose." 21 U.S.C. § 801a(2). Indeed, under the CSA, the only exception to the requirement that Congress make specified findings before scheduling a substance is if an international treaty requires the substance to be on a particular schedule. See 21 U.S.C. § 812(b). Congress thus evinced its intent that the United States comply with the terms of the Convention even where the Convention contemplated an outcome that Congress might not reach on its own.

The United States has a fundamental interest in the observance of its treaty obligations. See, e.g., Gibson v. Babbitt, 223 F.3d 1256 (11th Cir. 2000) (rejecting a RFRA challenge on the grounds that the government "has a compelling interest in fulfilling its treaty obligations with federally recognized Indian tribes"). The foundation of treaty law is the long-established principle of *pacta sunt servanda* ("agreements must be observed"). See Dalton Decl. ¶ 10. This principle is expressed in article 26 of the Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, T.S. No. 58 (1980), 1155 U.N.T.S. 331, which the United States considers as expressing customary international law on this point. See Dalton Decl. ¶ 10. Article 26 provides: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." The United States thus has a legal duty, as a matter of international law, to perform its treaty obligations.

That interest is particularly compelling where, as here, the treaty in question is vital to one of the government's most important interests. The 1971 Convention is a cornerstone of the government's ongoing effort to combat illicit international drug trafficking into the United States. See Sheridan Decl. ¶¶ 4-5 (Defendants' Exhibit C). The United States relies on the treaty to secure the cooperative efforts of other countries, particularly those countries that do not have comprehensive drug laws of their own. See id. In recognition of the treaty's importance, the United

States engages in diplomatic efforts to encourage compliance with the Convention by other countries. See Dalton Decl. ¶ 13. A failure by the United States to comply faithfully with the treaty would necessarily detract from its ability to influence other countries to comply. See id. ¶10. It would also entail serious diplomatic repercussions, and could conceivably lead to other countries becoming less willing to enter into international agreements with the United States. See id. ¶ 12.

Defendants note that this is not an issue of whether the 1971 Convention "trumps" RFRA or vice versa. To be sure, a later-enacted statute may override an inconsistent treaty obligation. Nonetheless, courts are loath to construe a subsequently enacted statute as abrogating a treaty obligation unless compelled to do so by statutory language. See Cook v. United States, 288 U.S. 102, 120 (1933) ("A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."); see also United States v. Dion, 476 U.S. 734, 739-40 (1986) ("[W]hat is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and the [treaty] on the other, and chose to resolve that conflict by abrogating the treaty."); Trans World Airlines, Inc. v. Franklin Mint Corp. et al., 466 U.S. 243, 253 (1983) (holding that, in the absence of any mention of the treaty in the legislative history or text of the later-enacted statute, "we are unwilling to impute to the political branches an intent to abrogate a treaty without following appropriate procedures set out in the Convention itself").

Moreover, a later-enacted statute abrogates a preexisting treaty obligation only if there is an irresolvable conflict between the two. It is incumbent upon this Court to read RFRA so that there is no such conflict. See, e.g., Vimar Seguros Y Reasegueros v. M/V Sky Reefer, 515 U.S. 528, 539 (1995) ("If the United States is to be able to gain the benefits of international accords and have a role

as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such a manner as to violate international agreements."); Warren Corp. v. Environmental Protection Agency, 159 F.3d 616 (D.C. Cir. 1998) (noting "the Supreme Court's instruction to avoid an interpretation that would put a law of the United States into conflict with a treaty obligation of the United States"); Restatement (Third) of Foreign Relations Law § 114 ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."). In this case, there is no conflict between RFRA and the 1971 Convention so long as adherence to the 1971 Convention is viewed as a compelling governmental interest. This reading is not only "fairly possible"; it is, as the government has argued above, the correct one.

2. The Government Has a Compelling Health and Safety Interest in Prohibiting the UDV's Use of Ayahuasca

The Supreme Court has observed that drug abuse is "one of the greatest problems affecting the health and welfare of our population," and therefore "one of the most serious problems confronting our society today." Treasury Employees v. Von Raab, 489 U.S. 656, 668, 674 (1989). The Controlled Substances Act is Congress's response to this great and serious problem. The depth of Congress's concern regarding the use of controlled substances is reflected in all aspects of the Controlled Substances Act.

The language of the Act begins with Congress's finding that "[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." 21 U.S.C. § 801(2). The legislative history underscores Congress's conclusion that "[d]rug abuse in

the United States is a problem of ever-increasing concern, and appears to be approaching epidemic proportions." H.R. Rep. No. 91-1444, 91st Cong., 2d Sess., reprinted in U.S.C.C.A.N. 4566. Congress was concerned not only with the social and/or law enforcement problems associated with drug use, but with the health and welfare of individual drug users; the legislative history of the Act notes that "the consensus among the medical profession is to the effect that the abuse of drugs by individuals has adverse effects upon the physical or mental health of the abusers," and that "all of the drugs covered can create psychological dependence in the abuser." Id. As a result of these concerns, Congress concluded that "the illegal traffic in drugs should be attacked with the full power of the federal government." Id. The result was, in part, a framework of penalties for drug manufacture or sale that Congress itself acknowledged as "severe." Id. "[B]oth the fact of legislation and the severity of the penalties provided in statutes such as [the CSA] clearly evidence 'the grave concern of Congress' in controlling the use of drugs." United States v. Middleton, 690 F.2d 820, 825 (11th Cir. 1982).

While thus identifying all controlled substances as a matter of high concern, Congress recognized that some controlled substances were of more concern than others. Accordingly, Congress classified controlled substances under five separate schedules according to their potential for abuse, current medical use, and safety. See 21 U.S.C. § 812. Congress made clear that "a drug or other substance *may not* be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance." 21 U.S.C. § 812(b) (emphasis added).

The schedule subject to the highest level of control and the severest penalties for violation is Schedule I. The findings that must be made in order for a substance to be placed on Schedule I are as follows: "(A) The drug or other substance has a high potential for abuse. (B) The drug or

other substance has no currently accepted medical use in treatment in the United States. (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision." 21 U.S.C. § 812(b)(1). The governmental interests in prohibiting the possession and distribution of a Schedule I substance "are of the highest order," because use of these substances "poses a substantial threat to public health, safety, and welfare." United States v. Warner, 595 F. Supp. 595, 598 (D. North Dakota 1984) (discussing peyote). The government has a clearly compelling interest in prohibiting the possession and distribution of controlled substances that have a high potential for abuse and that lack any safe medical application. See Employment Division, Dep't of Human Resources v. Smith, 494 U.S. 872, 904 (1990) (O'Connor, J., concurring) ("In light of our recent decisions holding that the governmental interests in the collection of income tax, a comprehensive Social Security system, and military conscription are compelling, respondents do not seriously dispute that [the government] has a compelling interest in prohibiting the possession of [a Schedule I substance] by its citizens.") (internal citations omitted); see also Warner, 595 F. Supp. at 599 ("Courts have recognized that Congress has a compelling interest in controlling the use of drugs that it determines to be dangerous.").

Since the effective date of the Controlled Substances Act (May 1, 1971), DMT has been listed as a Schedule I substance. In accordance with 21 U.S.C. § 812(b)(1), the listing of DMT as a Schedule I substance represents an implicit finding by Congress that materials containing DMT have a high potential for abuse, no accepted medical uses in this country, and a lack of safety for use even under medical supervision. In other words, in a statutory regime dealing with an issue of utmost concern to Congress, Congress placed DMT at the very highest level of concern. Moreover, Congress made clear that its concern about Schedule I substances, including DMT, extended to "any

material, compound, mixture, or preparation containing" those substances. 21 U.S.C. § 812 Schedule I(c). Congress's assessment of DMT's lack of safety is thus equally applicable to ayahuasca as a material, compound, mixture, or preparation containing DMT. See Part I.A., supra.

Plaintiffs argue that Congress's assessment of DMT's inherent lack of safety was erroneous, in that "[t]he medical and scientific literature suggests the absence of harm resulting from the consumption of Hoasca." Plaintiffs' Motion at 14. Plaintiffs thereby invite this Court to reject the findings made by Congress in scheduling materials that contain DMT under Schedule I, and to engage in a judicial reclassification of ayahuasca. Such an act is not the province of courts in the first instance, but of Congress or the Attorney General. The CSA provides that "any interested party" may petition the Attorney General to initiate a rulemaking proceeding if he or she believes that medical, scientific, or other relevant data warrant deleting a substance from the CSA or transferring it to a less restrictive schedule. See 21 U.S.C. § 811(a). Courts have uniformly held that this statutory rescheduling process is the exclusive means for challenging Congress's scheduling of a controlled substance. See United States v. Burton, 894 F.2d 188, 192 (6th Cir. 1990) ("[I]t has repeatedly been determined, and correctly so, that reclassification is clearly a task for the legislature and the attorney general and not a judicial one."); see also United States v. Wables, 731 F.2d 440, 450 (7th Cir. 1984); Middleton, 690 F.2d at 823. If the Attorney General were to reject a rescheduling petition by Plaintiffs, Plaintiffs could challenge this decision in the Tenth Circuit Court of Appeals. See, e.g., United States v. Lafoon, 978 F.2d 1183 (10th Cir. 1992) (reviewing Attorney General's rescheduling decision). Until such time, however, Congress's assessment of the safety or lack of safety of DMT-containing materials must control.

Furthermore, even if it were the province of the courts to determine in the first instance the

appropriate classifications of controlled substances, what Plaintiffs call "the medical and scientific literature" ostensibly refuting Congress's findings is scant and unreliable. The first set of evidence to which Plaintiffs refer – the "careful[] monitoring" by "the physicians and scientists at UDV headquarters" – is nothing more than anecdotal evidence collected by the church itself. See Plaintiffs' Motion at 15; see also Brito Decl. (Plaintiffs' Exhibit N). Anecdotal evidence, even carefully collected anecdotal evidence, does not constitute scientific proof; it cannot substitute for a well-designed, controlled study. The Drug Enforcement Administration, the agency to which the Attorney General has delegated the authority to rule on petitions for re-scheduling of controlled substances (see 28 C.F.R. § 0.100), has accordingly emphasized that "[l]ay testimonials, impressions of physicians, isolated case studies, random clinical experience . . . and all other forms of anecdotal proof" do not provide a sufficiently reliable basis under the CSA for assessing the safety of a drug. 57 Fed. Reg. 10,505 (Mar. 26, 1992); see also Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1137 (D.C. Cir. 1994) (holding that DEA can reasonably insist on "rigorous scientific proof over anecdotal evidence, even when reported by respected physicians"). This is all the more true where, as here, the source of the anecdotal proof is a non-neutral party with a vested interest in a particular outcome.

The second set of evidence – the testimony of Dr. Charles Grob based on his own studies – does not support Plaintiffs' unequivocal assertion that "UDV members are not harmed by their ceremonial use of Hoasca." Plaintiffs' Motion at 16. In fact, the article featuring Dr. Grob's study on the effects of long-term ayahuasca use begins by acknowledging a dearth of serious "medical and scientific literature" on the effects of ayahuasca use. The article states that "the psychological phenomenon induced by hoasca has been subjected to virtually no rigorous study," Charles S. Grob,

et al., Human Pyschopharmacology of Hoasca, a Plant Hallucinogen Used in Ritual Context in Brazil, J. Nervous & Mental Disease, Vol. 184, No. 2 at 87 (1996); that "medical and psychiatric researchers have up to now failed to address the question of what are the effects of this highly unusual psychoactive botanical," id. at 93; and that the study of Dr. Grob, et al. is accordingly "a first attempt to study the phenomenon of hoasca use from a biomedical perspective." Id. at 92. Dr. Grob, et al.'s study of long-term effects – consisting of psychiatric diagnostic assessments administered to fifteen long-term UDV members and fifteen non-ayahuasca users – suffered from self-acknowledged critical limitations such as insufficient sample size and lack of any "baseline" data (i.e., data for the ayahuasca users prior to beginning ayahuasca use). See Genser Decl. ¶ 6 (Defendants' Exhibit D). Accordingly, the study makes no claims to have established that ayahuasca is harmless. While the study found no adverse effects among the fifteen long-term users, it concluded that "[t]here is clearly a need to pursue rigorous and comprehensive follow-up studies to the preliminary explorations reported here," and that "[i]t will be imperative to carefully delineate the potential for adverse effects as well as to establish the optimal safety parameters within which hoasca might be taken." Id. at 93.

The other evidence cited in Plaintiffs' Motion is the testimony of David E. Nichols. Dr. Nichols' declaration essentially reviews the existing literature on DMT and beta-carbolines (the other psychoactive substance present in ayahuasca). Notably, the bibliography appended to his declaration lists only five articles that focus on ayahuasca itself. The first article is the 1996 study of Grob, et al., discussed above. Three other articles – Laurent Rivier & Jan-Eril Lindgren, "Ayahuasca," the South American Hallucinogenic Drug: An Ethnobotanical and Chemical Investigation, Economic Botany 26: 101-129 (1972); Cory S. Freedland & Robert S. Mansbach, Behavioral Profile of

Constituents in Ayahuasca, an Amazonian Psychoactive Plant Mixture, Drug & Alcohol Dependence 54: 183-94 (1999); and Callaway et al., Pharmacokinetics of Hoasca Alkaloids in Healthy Humans, J. Ethnopharmacology 65: 243-56 (1999) – include descriptions of, or hypotheses regarding the mechanisms of, ayahuasca's immediate effects; none of them purport to assess the potential harmfulness of the substance. The fifth article, a study examining the biochemical profile of human subjects under the effects of ayahuasca, concludes that "the hallucinogenic compounds detected in the healthy subjects' (post-Hoasca, but not before) urine samples are the same as those found in samples from acute psychotic unmedicated patients." Alicia B. Pomilio et al., Ayahoasca: An Experimental Psychosis that Mirrors the Transmethylation Hypothesis of Schizophrenia, J. Ethnopharmacology 65: 29-51 (1999).

The overall lack of scientific evidence cannot, in this case, give rise to a default presumption that ayahuasca is harmless. Although there is little scientific evidence regarding ayahuasca itself, there is ample evidence regarding the effects of other compounds that are similar to DMT in their ability to produce hallucinogenic effects. This information is sufficient to raise serious concerns that must be resolved through scientific research before ayahuasca can be considered safe. See Genser Decl. ¶¶ 16-18. For example, LSD, which also has hallucinogenic properties, is known to have serious adverse effects, including long-lasting psychosis resulting from devastating psychological experiences and "persisting perceptual disorder," or "flashbacks." Genser Decl. ¶¶ 16-17. Hallucinogens in general have been known to cause any of the following mental health problems: schizophreniform and/or prolonged psychotic reactions, acute anxiety/panic reactions, paranoid reactions, precipitation of violence, suicidal ideation/attempts, personality changes, and chronic anxiety and depressive states. Genser Decl. ¶ 18; see also J. Thomas Ungerleider & Robert N.

Pechnick, Hallucinogens, in Marc Galanter & Herbert D. Kleber, Textbook of Substance Abuse Treatment 141-47 (American Psychiatric Press 1994). The existence of these effects in other hallucinogens raises flags regarding the potential for these effects with ayahuasca use. These flags cannot be ignored; they necessitate scientific inquiry that has yet to be conducted. Until scientific inquiry has resolved these concerns, ayahuasca cannot be considered safe outside controlled research settings. Genser Decl. ¶ 20.

Furthermore, there is reliable scientific evidence that one component of ayahuasca – the enzyme inhibitors, known as MAOIs, that are necessary to prevent the stomach's enzymes from rendering the DMT inactive – can, in conjunction with other chemicals, be extremely harmful. MAOIs are known to have serious and potentially deadly interactions with several common prescription medications, including Prozac, Zoloft, Paxil, and Celexa, as well as some over-the-counter medications like St. John's Wort. See Genser Decl. ¶ 9. Plaintiffs' expert, Dr. Grob, notes that this is "a serious concern." Grob Decl. ¶ 10. In addition, MAOIs are known to have an adverse reaction with certain foods that contain tyramine, including cheese, sour cream, chianti wine, beer, bananas, raspberries, avocados, chocolate, and yogurt. See Genser Decl. ¶ 11. The interaction of MAOIs with tyramine causes an increase in blood pressure that can be fatal in some individuals. See id. Dr. Nichols notes the adverse effect of combining tyramine with the type of MAOIs found in antidepressants, and acknowledges that "[a] similar toxicity might occur in patients who had ingested beta-carbolines [contained in ayahuasca] and then ingested tyramine-containing foodstuffs." Nichols Decl. ¶ 16.

In short, Plaintiffs have presented no evidence that even purports to establish the safety of ayahuasca with any degree of scientific certainty. On the other hand, Congress has made an

affirmative statutory declaration that materials containing DMT – materials such as ayahuasca – are unsafe. In addition, it is known that substances chemically related to ayahuasca's components can have serious adverse effects on mental health, and that ayahuasca contains a substance that can have fatal interactions with several common foods and medicines. The available evidence thus demonstrates a compelling health and safety interest in prohibiting the use of ayahuasca.

3. The Government Has a Compelling Interest in Preventing the Diversion of Ayahuasca to Non-Religious Use

Plaintiffs acknowledge that "[c]ertainly the government has a compelling interest in avoiding an increase in drug abuse in any significant way." Plaintiffs' Motion at 16. Plaintiffs argue, however, that ayahuasca "is not a substance of widespread abuse," id., and that the government therefore lacks any compelling interest in preventing the diversion of ayahuasca to non-religious use.

Once again, the findings of Congress are dispositive. In listing DMT under Schedule I of the CSA, Congress made a specific determination that DMT and materials containing DMT have "a high potential for abuse." 21 U.S.C. § 812(b)(1)(A). It is not the province of the courts to overturn this finding. If Plaintiffs have contrary evidence, they may present that evidence in a rescheduling petition as provided by the statute. See 21 U.S.C. § 811(a); see also Part I.B.2, supra.

Moreover, regardless of whether ayahuasca is currently the subject of widespread abuse, Congress's concern was for "potential" for abuse. Actual abuse of ayahuasca is minimized in part by the fact that the importation of the tea is illegal under the CSA due to its DMT content, see 21 U.S.C. § 952(a), and the ingredients for making the tea are unavailable in the United States. Allowing importation of the tea, thereby introducing into the United States a substance that would otherwise be unavailable, would obviously increase the probability that the substance's "potential

for abuse" would be realized. Surely neither the CSA nor RFRA requires the government to wait until it has a full-blown drug epidemic on its hands before it may belatedly attempt to stem the tide of usage.

In this regard, Defendants note that there is growing domestic interest in, if not yet abuse of, ayahuasca. In the introduction to their 1996 study, Dr. Grob, et al. note that "interest in the exotic Amazonian traditions and effects of hoasca have sparked a steady stream of North American tourists, often attracted by articles and advertisements in popular and New Age magazines." Grob, et al., Human Psychopharmacology of Hoasca at 87. The January 15, 2001 edition of Time Magazine contained an article entitled "Recreational Pharmaceuticals"; the article noted that "[t]oday's popular party drugs are derived from ancient medicinal herbs," and that "[r]ecent additions to the U.S. market include ayahuasco, a plant long used in religious ceremonies in Brazil for its mind-manipulating qualities." John Cloud, Recreational Pharmaceuticals, Time Magazine, Jan. 15, 2001, at 100. As recently as December 27, 2000, the plants used to make ayahuasca – *psychotria viridis* and the *banisteriopsis caapi* – were advertised by an Arizona source for auction on the Ebay internet site.[4] The internet contains several web sites devoted to ayahuasca, and the "Ayahuasca Home Page" hosts a lively discussion forum. The "preparation forum" listed 1,744 posts as of January 16, 2001. See http://forums.ayahuasca.com.[5] Finally, a salient measure of the potential interest in this country is

[4] The advertisement contained the following disclaimer: "These vine and leaves are for scientific study only... I in no way imply that they should be brewed, nor do I give directions on how to do so... I take absolutely no responsibility for the actions taken by the winner of this auction."

[5] The forum contains the following disclaimer: "This is an informational forum to learn how one theoretically could brew ayahuasca. Please keep it legal, this is for informational purposes only."

the interest in European countries, and this interest is burgeoning. See Jordi Riba & Manel J. Barbanoj, A Pharmacological Study of Ayahuasca in Healthy Volunteers, Bulletin of the Multidisciplinary Association for Psychedelic Studies, Vol. 8, No. 3 (Autumn 1998) at 12 ("There can be few natural psychoactive preparations whose consumption has increased so spectacularly as has that of Ayahuasca in Europe over the last decade."). In short, there are signs that ayahuasca's potential for abuse is ripe for realization.

Plaintiffs' expert, Dr. Grob, attempts to distinguish the potential for abuse of ayahuasca from the potential for abuse of synthetic DMT on the basis of the negative side effects of ayahuasca. Unlike smoked or injected DMT, ayahuasca can produce vomiting and diarrhea; Dr. Grob concludes that these effects would prevent ayahuasca from being consumed "in a maladaptive abuse context." Grob Decl. ¶ 9. This is far from clear. It is not uncommon for recreational drug users to put themselves through temporary physical discomfort in order to achieve the desired psychological effect. See Sheridan Decl. ¶ 9 (noting the example of heroin users inserting syringes under their eyelids). Moreover, the purging effect of the ayahuasca may be considered "part of the experience" by serious users. As reported on one ayahuasca website: "[Vomiting] is intertwined with the ayahuasca experience. If you can learn to accept it and flow with it it can ironically be enjoyable. It is a release and purification. After it is all through you will feel very good, very clean and pure." http://ayahuasca.com/cgi-bin/faq.pl. The site also notes that "[t]here are steps you can take to reduce nausea such as drinking ginger tea and gel-capping it." Id. In any case, even if the brew itself were less susceptible to abuse than pure DMT, DMT in its smokeable or injectable form is easily extracted from ayahuasca; indeed, it is easier to extract DMT from ayahuasca than to synthesize it. See Declaration of Natalia P. Urtiew ¶¶ 5-6 (Defendants' Exhibit E). Any action that increases the

potential for diversion of ayahuasca therefore increases the potential for abuse of DMT in any form.

Plaintiffs argue that "the UDV's use of the tea is legally indistinguishable from the Native American Church's use of peyote, and the exemption for the NAC did not open the floodgates for drug abuse." Plaintiffs' Motion at 17. Without accepting Plaintiffs' assertion that an ayahuasca exemption would be legally indistinguishable from the peyote exemption (see Equal Protection analysis, Part I.D., infra), Defendants note that a substance's potential for abuse is a factual matter, not a legal one. Ayahuasca is factually distinguishable from peyote in one highly relevant respect: Unlike peyote, the plants comprising ayahuasca do not grow in the United States, and the tea (or the plants) must therefore be imported. When the source of a controlled substance is a foreign country, the risk that the substance will flow into illegitimate channels is higher than when the source is domestic. See Sheridan Decl. ¶¶ 6-7. This is because foreign countries often lack the regulatory framework for controlled substances that is found in the United States. See id. at ¶ 6. The buying, selling, and distribution of peyote, which in this country grows only in Texas, is strictly regulated under Texas law. See 37 Tex. Admin. Code Pt. 1, Ch. 13, Subchptr. E ("Peyote"). As Brazil does not consider ayahuasca to be a controlled substance, there is no analogue in Brazil to this added measure of supervision and control imposed by the locality where the substance grows. See Sheridan Decl. ¶ 7; see also Plaintiffs' Exhibit I. Absent this additional layer of control at the point of origin, the potential for diversion and abuse is correspondingly higher for ayahuasca than for peyote.[6]

[6] Ayahuasca presents particular challenges for Customs officials at the border because field tests indicate the presence of DMT by turning a certain color, which may be distorted by the natural color of the tea. See Urtiew Decl. ¶ 7.

4. The Prohibition on Ayahuasca is the Least Restrictive Means of Furthering the Government's Compelling Interests

Because Plaintiffs reject the idea that the government has a compelling interest in prohibiting ayahuasca use, they do not address what they believe would be the least restrictive means for effectuating any such interest. Defendants can conceive of no means, short of the prohibition currently in place, for effectuating the governmental interests involved.

The government's compelling interest in adhering to the 1971 Convention on Psychotropic Substances can be accomplished through no other means than those specified by the treaty, namely, a total prohibition on the import and use of all preparations containing DMT other than for limited medical and scientific purposes. See 1971 Convention art. 7. The Convention contains a section that allows signatories to seek amendments to the treaty. See id. art. 30. However, it could easily take ten years to implement an amendment to a treaty of this kind, see Dalton Decl. ¶ 12, and there is no guarantee that the other signatories would approve the amendment. The head of the Department of State's Treaty Affairs Office has opined that even seeking to amend such a widely-accepted and stable multilateral convention "would entail enormous diplomatic and political costs for any country seeking such an amendment." Id. Moreover, seeking to amend the treaty would undermine, albeit to a lesser degree, the same compelling interest that the government has in not violating the treaty: the interest in preventing a general "chipping away" at the protections of a treaty that has not been amended in the 25 years that it has been in force. See id. If the United States conveys a belief that the treaty is subject to ready amendment, other countries may seek amendments of their own. See id. Since the nature of these proposed amendments might well be objectionable, the United States would then be in the difficult diplomatic position of appearing to advocate

amendments when they pertain to the United States but oppose them when they pertain to other parties. See id.

With regard to the government's health and safety concerns, Congress has statutorily declared that "[t]here is a lack of accepted safety for use of [DMT] *under medical supervision*." 21 U.S.C. § 812(b)(1)(C) (emphasis added). This finding is not subject to judicial review unless and until the UDV has petitioned the Attorney General for a rescheduling. See Part I.B.2., supra. Therefore, even if the UDV were willing to accept the controlled administration of limited dosages in a carefully monitored setting, perhaps even under medical supervision, such a plan would be insufficient to resolve the safety concerns expressed by Congress in the scheduling of DMT. Where Schedule I substances are concerned, the least restrictive means for Congress to effectuate its health and safety interests are the means Congress has already put in place. See Smith, 494 U.S. at 905 (O'Connor, J., concurring) ("Because the health effects caused by the use of controlled substances exist regardless of the motivation of the user, the use of such substances, even for religious purposes, violates the very purpose of the laws that prohibit them."). Furthermore, even if Congress had found that Schedule I substances could be used safely under sufficiently controlled circumstances, the lack of knowledge regarding the specific dangers of ayahuasca (see Part I.B.2., supra) would make it extremely difficult to ascertain what controls might be necessary and appropriate.

As for the government's concern regarding the diversion of ayahuasca to non-religious uses, the UDV would likely propose government monitoring and/or control of the chain of custody of the ayahuasca. The government should not be required to undertake the significant burden that this would entail. In Olsen v. Drug Enforcement Administration, 878 F.2d 1458 (D.C. Cir. 1989), a member of the Ethiopian Zion Coptic Church argued that, even if the government had a compelling

interest in controlling the use of marijuana, the government "can and must accommodate to the time-and-place-specific use" he proposed. Olsen, 878 F.2d at 1462. The Court rejected this argument. Noting that the plaintiff's proposition would impose a significant monitoring burden on the government, the court concluded, "We are unaware of any 'free exercise' precedent for compelling government accommodation of religious practices when that accommodation requires burdensome and constant official supervision and management." Olsen, 878 F.2d at 1462. While Olsen dealt with the First Amendment rather than RFRA, and therefore applied a "narrowly tailored" test rather than a "least restrictive means" test, the principle that the government need not assume affirmative administrative burdens in order to accommodate religious practices is logically applicable to both. In any case, no monitoring system would be infallible. The only reliable means of preventing the diversion of controlled substances is to prohibit their possession in the first place. See, e.g., Smith, 494 U.S. at 905 (O'Connor, J., concurring) (noting that "uniform application of the criminal prohibition at issue is essential to the effectiveness" of that prohibition); Sheridan Decl. ¶ 8 ("Given the desire of many individuals to use and abuse hallucinogenic substances, it is my opinion that if *any* group were allowed to import a Schedule I hallucinogenic substance, the potential for diversion and use and abuse of that substance would be greater than if the substance were never imported.").

C. Prohibiting the UDV's Use of Ayahuasca Use Does Not Violate the First Amendment

Because the government has compelling interests in prohibiting the UDV's use of ayahuasca that are being furthered by the least restrictive means, the prohibition on the UDV's use of ayahuasca would survive heightened scrutiny under the First Amendment. However, the correct First Amendment analysis in this case is not one of heightened scrutiny. Under well-established First

Amendment jurisprudence, a neutral, generally applicable law may be applied to religiously motivated conduct without compelling justification. See Employment Division, Dep't of Human Resources v. Smith, 494 U.S. 872 (1990); Thiry v. Carlson, 78 F.3d 1491, 1496 (10th Cir. 1996). As demonstrated below, that is there case here.

First and foremost, this Circuit has already determined that the Controlled Substances Act is a neutral law of general applicability. In United States v. Meyers, 95 F.3d 1475 (10th Cir. 1996), a member of the "Church of Marijuana" challenged the CSA's ban on marijuana as applied to his allegedly religious use. The Tenth Circuit held as follows:

> Meyers' challenge to his convictions under the First Amendment must fail. First, as in Smith, Meyers challenges the application of valid and neutral laws of general applicability on the grounds that they prohibit conduct that is required by his religion. Therefore, we hold that Meyers' challenge fails for the same reasons as the respondent's challenge in Smith failed, i.e., the right to free exercise of religion under the Free Exercise Clause of the First Amendment does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law incidentally affects religious practice. . . .[W]hen, as here, the challenge is to a valid neutral law of general applicability, the law need not be justified by a compelling governmental interest.

Meyers, 95 F.3d at 1481. The Tenth Circuit having thus found that the Controlled Substances Act is a neutral law of general applicability, this Court is bound by its determination.

Plaintiffs' argument to the contrary rests on a misreading of the Supreme Court's holding in Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993). Plaintiffs cite Lukumi to support their contention that the CSA is non-neutral and not generally applicable by virtue of its exemptions for medical, scientific, industrial, and research uses of scheduled substances and for religious use of peyote by Native Americans. Plaintiffs' Motion at 17-20. In Lukumi, the Court held that a city could not selectively prohibit the slaughtering of animals in such a way that slaughter for

secular purposes was acceptable while slaughter for religious sacrifice was not. Lukumi, however, did not hold that a statute can make no distinctions whatsoever without losing its status as a generally applicable law. Indeed, the Lukumi Court was careful to acknowledge that "[a]ll laws are selective to some extent." Lukumi, 508 U.S. at 542. What concerned the Court was not the fact of selectivity itself, but the "categories of selection." Id. The Court defined the principle of general applicability as "[t]he principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens *only* on conduct motivated by religious belief." Id. at 543 (emphasis added). The Court found that the City of Hialeah's ordinances were not generally applicable, not because the ordinances made distinctions between permissible and impermissible types of animal slaughter, but because "the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice." Id. In concluding its analysis of the ordinances' general applicability, the Court stated,

> We conclude, in sum, that each of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief. The ordinances ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshipers] but not upon itself. *This precise evil is what the requirement of general applicability is designed to prevent.*

Id. at 545-46 (emphasis added) (internal quotation marks and citation omitted). In other words, in order to be considered "generally applicable" for First Amendment purposes, a statute cannot draw distinctions in such a way that the statute's effect is divided along religious/secular lines.

The CSA cannot be characterized as an act that disproportionately burdens religion without any commensurate burden on secular usage. The CSA prohibits all secular use of scheduled substances, except for research, medical, scientific, and industrial uses. Plaintiffs attempt to portray these exceptions as so sweeping that they nearly eviscerate the ban on secular use of drugs, see Plaintiffs' Motion at 20-23, but this attempt is disingenuous. While the drafting of Hialeah's

ordinances makes clear that the city had no serious intention of targeting the non-religious killing of animals, the drafting of the CSA makes clear that Congress's primary target was a secular one: the recreational use of controlled substances. Cf. Lukumi, 508 U.S. at 535-40 (reviewing the drafting of the ordinances) with H.R. Rep. No. 91-1444, 91st Cong., 2d Sess., reprinted in U.S.C.C.A.N. 4566. This is not "a prohibition that society is prepared to impose upon [religious worshipers] but not upon itself." Lukumi, 508 U.S. at 545. It accordingly does not violate the principle of general applicability.

For the same reasons, Plaintiffs are incorrect in arguing that the Controlled Substances Act is not neutral. In Lukumi, the Court defined neutrality as follows: "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." Id. at 533. A statute is non-neutral on its face "if it refers to a religious practice without a secular meaning discernable from the language or context." Id. If the language of the statute is neutral, a more careful statutory interpretation may still be necessary to determine the drafters' intent, since "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." Id. at 534. In all cases, however, the purpose of the inquiry is to determine whether the legislature intended to target religion. Thus, the Court in Lukumi found that the Hialeah ordinances were non-neutral because "[t]he record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances." Id. at 534; see also id. at 540 (holding that Hialeah ordinances "were enacted because of, not merely in spite of, their suppression of Santeria religious practice") (internal quotation marks and citation omitted). Plaintiffs cannot seriously argue, nor have they done so, that suppression of the religious conduct of the UDV (or any other religion) was the object of the

Controlled Substances Act. The Act is therefore neutral from the standpoint of a First Amendment analysis.

In addition to Lukumi, Plaintiffs rely on Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999). In Fraternal Order of Police, the Third Circuit held that a police department policy which prohibited police officers from wearing beards was not neutral or generally applicable because it contained an exception for medical necessity. Again, however, the court did not hold that any exception for a secular purpose automatically subjects the statute to heightened scrutiny. The court was careful to note that another exception contained in the policy, the exception for undercover officers, did *not* render the policy non-neutral or not generally applicable. The difference between the exceptions was that the city's interest in prohibiting beards among police officers – the interest in uniformity of appearance – was not applicable in the case of undercover officers. The lesson of Fraternal Order of Police, then, is that a law loses its neutrality and general applicability only if the secular exemption granted by the government implicates the same governmental interest as would the religious exemption not granted by the government.[7] In making this distinction, the court specifically analogized the undercover exemption to the exemption contained in Oregon's Controlled Substances Act (the legislation at issue in Smith) for prescription medications. The exemption for prescription medication, the Third Circuit observed, "[did] not

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[7] This principle explains why the other case cited by Plaintiffs, Rader v. Johnston, 924 F. Supp. 1540 (D. Nebraska 1996), provides no guidance here. In Rader, the University of Nebraska required freshmen to live in dormitories in order to promote academic success, diversity, tolerance, and the financial viability of the residence hall program. Yet, the University granted exemptions for secular reasons to more than a third of the freshman class, even though these exemptions would ostensibly detract from those very goals. Rader therefore did not address a situation in which the interests that would be implicated by the requested religious exemption were not implicated by the secular exemptions being granted.

necessarily undermine Oregon's interest in curbing the unregulated use of dangerous drugs" as did the requested exemption for peyote use by Native Americans. Fraternal Order of Police, 170 F.3d at 366. The Third Circuit thus recognized that medical exceptions to a prohibition on the use of controlled substances would not subject that prohibition to strict scrutiny in the context of a free exercise claim.

Indeed, Smith itself effectively answers Plaintiffs' claim that the medical, scientific, industrial, and research exemptions contained in the Controlled Substances Act render the Act non-neutral and not generally applicable. Oregon's Controlled Substances Act contains exemptions for all of these purposes. See 37 Or. Rev. Stat. Chptr. 475. Nonetheless, the Smith decision, in which the Supreme Court held that the First Amendment did not require an exemption for the religious use of peyote, established Oregon's Controlled Substances Act as the prototypical neutral law of general applicability. The only sense in which the applicable provisions of the federal Controlled Substances Act as it exists today are different from those of the Oregon Controlled Substances Act as it existed in 1990 is the federal exemption for religious use of peyote by members of federally recognized Indian tribes.[8] However, Plaintiffs are not requesting an exemption from the prohibition against peyote use; they are requesting an exemption from the prohibition against the use of dimethyltryptamine, for which there is no Native American exemption. The government's prohibition against the use of dimethyltryptamine is subject only to those exemptions that were present in the Oregon Controlled Substances Act: medical, scientific, industrial, and research uses that do not implicate the governmental interests at issue here. Whether the government's prohibition

[8] This exemption to the statutory scheme of the CSA is actually not contained within the Act, but within the American Indian Religious Freedom Act Amendments of 1994. See 42 U.S.C. § 1996a.

on the use of peyote is neutral and generally applicable, given the exemption for religious use by members of federally recognized Indian tribes, is a question not raised by this litigation.[9] In any case, the single exemption for peyote use by Indian tribal members – particularly in light of the sui generis legal status of Native Americans (see Part I.D., infra), and the differing concerns that are accordingly involved – does not render the entire statutory scheme of the CSA non-neutral and not generally applicable.

In sum, even under heightened scrutiny, the government's prohibition on the UDV's use of ayahuasca would be permissible under the First Amendment. Heightened scrutiny does not apply, however, due to the CSA's recognized status as a neutral law of general applicability. It is therefore abundantly clear that the government may constitutionally prohibit the UDV's use of ayahuasca.

D. The Government's Differential Treatment of Peyote Use By Native Americans and Ayahuasca Use By the UDV Does Not Violate the Equal Protection Clause

Plaintiffs argue that the government's differential treatment of peyote use by Native Americans and ayahuasca use by the UDV violates the Equal Protection Clause. Plaintiffs

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[9] This distinction also answers Plaintiffs' argument that "the CSA is not neutral among religions" because it singles out the Native American Church for preferential treatment over other religions. Plaintiffs' Motion at 24. The CSA's prohibition against the use of dimethyltryptamine does not allow *any* religious use, by the Native American Church or any other religious group.

Moreover, even if Plaintiffs were seeking to use peyote instead of DMT, the Native American exemption would not demonstrate that the prohibition against peyote use "is not neutral among religions." As discussed in Defendants' Equal Protection analysis (see Part I.D., infra), the exemption for religious use of peyote by members of Indian tribes is grounded, not in religious considerations, but in secular concerns regarding the government's unique obligation to preserve Native American culture. Because the peyote exemption does not represent a religious classification, there is no preference among religions and no violation of the Establishment Clause. Cf. Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1217 (5th Cir. 1991) ("The unique guardian-ward relationship between the federal government and Native American tribes precludes the degree of separation of church and state ordinarily required by the First Amendment.").

acknowledge that the Equal Protection Clause is implicated only if they can "make a threshold showing that they were treated differently from others who were similarly situated to them." Campbell v. Buckley, 203 F.3d 738, 747 (10th Cir. 2000). They argue that "[t]he UDV is similarly situated to the [Native American Church] in all significant respects." Plaintiffs' Motion at 25.

Plaintiffs do not mention the most obvious difference between their situation and that of the Native Americans who use peyote: that Plaintiffs are seeking permission to use a different substance. See United States v. Rush, 738 F.2d 497, 513 (1st Cir. 1984) (noting the fact that "[m]arijuana is not covered by the peyote exemption" as relevant to the equal protection claims of non-Indians seeking to use marijuana). Not all controlled substances present identical concerns. In McBride v. Shawnee County, Kansas Court Servs., 71 F.Supp.2d 1098 (D. Kansas 1999), Rastafarian Church members argued that their religious marijuana use rendered them similarly situated to Native American Church members. The court rejected this claim, noting:

> [T]he religious exemption in question is for peyote[,] not marijuana. Although both drugs are classified as a schedule I controlled substance, peyote and marijuana are not the same drug, a point which is overlooked by petitioners. There are over one hundred types of controlled substances listed in schedule I, including heroin, codeine methyl bromide, and morphine methyl bromide. Not all drugs listed in schedule I pose the same threat to the individual or to society.

McBride, 71 F. Supp. at 1101 (internal citation omitted). Plaintiffs here, like the petitioners in McBride, have overlooked the fact that the substance at issue is not the same drug as peyote. Indeed, their Equal Protection analysis does not even mention this basic distinction. See Plaintiffs' Motion at 25-27.

Ayahuasca presents health concerns that are not present with peyote. As discussed above, the tea contains certain enzyme inhibitors known as MAOIs that may have a severe and potentially

deadly interaction with certain common foods and prescription drugs. See Part I.B.2., supra. This is a significant health risk that is not present in the case of peyote. Ayahuasca also differs from peyote in that, while peyote grows in this country, the plants that comprise ayahuasca do not. As discussed above, while peyote is tightly controlled at its point of origin by Texas regulation, no such controls are in place for ayahuasca in Brazil. See Part I.B.3., supra. The potential for illegal trafficking into the substance abuse market is correspondingly greater for ayahuasca than for peyote. See id.

Another crucial difference between Plaintiffs' situation and that of Native American peyote users lies in the unique relationship between the federal government and Indian tribes. In Morton v. Mancari, 417 U.S. 535 (1974), the Supreme Court, in determining that employment preferences for Native Americans within the Bureau of Indian Affairs did not constitute racial discrimination, noted the import of this special relationship:

> Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a "guardian-ward" status, to legislate on behalf of federally recognized Indian tribes. The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, § 8, cl. 3, provides Congress with the power to "regulate Commerce . . . with the Indian tribes," and thus, to this extent, singles out Indians as a proper subject for separate legislation.

Morton, 417 U.S. at 551-52. The Morton Court went on to describe "the origin and nature" of the special relationship by citing to the following passage from an earlier Court decision:

> In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent,

qualified members of the modern body politic.

Board of County Comm'rs v. Seber, 318 U.S. 705, 715 (1943) (quoted in Morton, 417 U.S. at 552). The Court concluded: "On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment. *As long as the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians, such legislative judgments will not be disturbed.*" Morton, 417 U.S. at 555 (emphasis added).

The United States' unique obligation to Native Americans extends to the preservation of Native American culture. See 25 U.S.C. § 2901(1) ("[T]he status of the cultures and languages of Native Americans is unique and the United States has the responsibility to act together with Native Americans to ensure the survival of these unique cultures and languages."). Plaintiffs argue that the exemption for Native American religious use of peyote is rooted, not in Congress's obligation to preserve Native American culture, but rather in considerations of religious freedom generally, which would not justify differential treatment of the Native American Church and any other religious group. See Plaintiffs' Motion at 26. Their conclusion is based in part on the fact that "[t]he language of the exemption itself applies to all members of the NAC, not just Native American members." Id. Plaintiffs refer to the regulatory exemption, 21 C.F.R. § 1307.31, that was established by the FDA in 1965. Plaintiffs' Motion at 26-27. In the American Indian Religious Freedom Act Amendments of 1994, however, Congress redefined the contours of the peyote exemption. The exemption as framed by Congress is for "the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion." 42 U.S.C. § 1996a(b)(1). The statute defines "Indian" as any member of a federally recognized Indian tribe. See 42 U.S.C. § 1996a(c)(1)-(2). Non-tribal members,

regardless of their religious affiliation, are not encompassed in the exemption.

Plaintiffs also argue that the FDA "did not even consider the special legal status of Native Americans" in framing the original regulatory exemption for the NAC's use of peyote. Plaintiffs' Motion at 26. Again, regardless of what the FDA considered in 1965, Congress has made clear that the peyote exemption as it stands today is grounded in Congress's unique obligation to preserve the integrity of Native American tribal culture. The Congressional findings preceding the 1994 statutory peyote exemption include the following language:

> The Congress finds and declares that –
> (1) for many Indian people, the traditional ceremonial use of the peyote cactus as a religious sacrament has for centuries been integral to a way of life, and significant in perpetuating Indian tribes and cultures;
> . . .
> (5) the lack of adequate and clear legal protection for the religious use of peyote by Indians may serve to stigmatize and marginalize Indian tribes and cultures, and increase the risk that they will be exposed to discriminatory treatment.

42 U.S.C. § 1996a(a). While the statute thus contains language expressly attributing the exemption to the need to protect Indian tribes, cultures, and way of life, it contains no language indicating that the exemption is based in general considerations of religious freedom.

Courts have upheld the peyote exemption against Equal Protection challenges by other religious groups on the grounds that the peyote exemption is rooted in the special obligations of the United States toward Native Americans. In Rush, for example, the First Circuit stated:

> [T]he peyote exemption is uniquely supported by the legislative history and congressional findings underlying the American Indian Religious Freedom Act, which declares a federal policy of "protect[ing] and preserv[ing] for American Indians their inherent right of freedom to believe, express and exercise the[ir] traditional religions . . ., including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." . . . In light of the sui generis legal status of American Indians, and the express policy of the American Indian Religious Freedom Act . . . we think the

> Ethiopian Zion Coptic Church cannot be deemed similarly situated to the Native American Church for equal protection purposes.

Rush, 738 F.2d at 513 (internal citations omitted). Similarly, in holding that the government did not violate the Equal Protection Clause by allowing peyote use by the Native American Church but prohibiting peyote use by a non-Indian religious group ("Peyote Way"), the Fifth Circuit stated:

> We hold that the federal NAC exemption allowing tribal Native Americans to continue their centuries-old tradition of peyote use is rationally related to the legitimate governmental objective of preserving Native American culture. Such preservation is fundamental to the federal government's trust relationship with tribal Native Americans. Under Morton, Peyote Way's members are not similarly situated to those of the NAC for purposes of cultural preservation and thus, the federal government may exempt NAC members from statutes prohibiting peyote exemption without extending the exemption to Peyote Way's membership.

Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1216 (5th Cir. 1991). See also McBride, 71 F. Supp. at 1102 (holding that the NAC and the Rastafarian Church were not similarly situated because of "the sui generis legal status of Native Americans" and because "[u]nder the doctrine of trust responsibility, the federal government is required to promote tribal self-government and cultural integrity of Native Americans"); Warner, 595 F. Supp. at 601 (D.N.D. 1984) (holding that "[t]he United States is following the policy of preserving the Indians' dependent nation and culture by granting an exemption to Indians for the use of peyote in the religious ceremonies of the NAC"). Like the Ethiopian Zion Coptic Church in Rush, the Peyote Way in Peyote Way, and the Rastafarian Church in McBride, the UDV is not "similarly situated" to Native American peyote users because its members do not share the same trust relationship with the United States, and are not beneficiaries of a unique obligation on the part of the United States to help preserve and foster their culture.

The UDV is not similarly situated to Native American peyote users in one more important

respect. Plaintiffs note that "the NAC, with its 250,000 members, is over a thousand times larger than the UDV in the United States." Plaintiffs' Motion at 25-26. While the population of Indian tribal members eligible for the peyote exemption is undeniably much larger than the UDV, the peyote exemption is in one sense more narrow, in that the group in question – tribal Native American peyote users – is self-limiting. See Rush, 738 F.2d at 513 (noting that "[the peyote] exemption is properly viewed as a government effort toward accommodation for a *readily identifiable*, narrow category which has minimal impact on the enforcement of the laws in question") (emphasis added); see also United States v. Lee, 455 U.S. 252, 261 (1982) (supporting Congress's limitation of a religious accommodation to "a narrow category which was readily identifiable"). Because a person must be a member of a federally recognized Indian tribe to take advantage of the peyote exemption, there is a natural ceiling on how widespread the use of peyote can become.[10] The UDV has no criteria for membership other than "medical history . . . maturity, responsibility, mental and emotional stability, and intentions." See Bronfman Declaration ¶ 25. Jeffrey Bronfman has declared that he intends to limit the growth of the church to "ten to twenty percent annually over the next five years." Id. ¶ 26. There is no indication that the religion itself requires any such limitation, however, and no assurances regarding the growth of the church in the long term. Additionally, granting the exemption to the UDV would open the door to granting religious exemptions for other similarly situated religions of indeterminate membership.

In sum, there are several important distinctions between peyote and ayahuasca and between the UDV and the Native American Church that justify treating a peyote exemption for Native

[10] Defendants also note that Plaintiffs' portrayal of the Native American Church as an essentially unstructured organization (Plaintiffs' Motion at 26) is inaccurate. See generally Omer C. Stewart, Peyote Religion: A History 225-25, 239-48 (U. Oklahoma Press 1987).

Americans differently than an ayahuasca exemption for UDV members. Because the Native American Church members and the UDV members are not "similarly situated" in these critical respects, Plaintiffs' cannot make out a prima facie case of an Equal Protection violation.[11]

E. International Law and Treaties Do Not Mandate an Exemption from the CSA for the UDV's Religious Use of Ayahuasca

Plaintiffs cite "the international law doctrine of comity" as supporting an exemption for the UDV's religious use of ayahuasca. Comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). In this case, Plaintiffs argue, the doctrine of comity requires the United States to permit the UDV's use of ayahuasca "because Brazil, the nation with by far the greatest experience with and knowledge of the UDV, permits the UDV's religious use of Hoasca." Plaintiffs' Motion at 40.

Plaintiffs' argument is without merit. The doctrine of comity does not require the United States to excuse an action that violates federal law, or to alter that law so as to permit the action, on the grounds that the action would not violate another country's law. Unlike domestic law, comity is not "a matter of absolute obligation," Hilton, 159 U.S. at 163; it is a non-binding principle that will yield in all cases to clear domestic legislation. See, e.g., Commodity Futures Trading Comm'n v. Nahas, 738 F.2d 487, 495 (D.C. Cir. 1984) ("Federal courts must give effect to a valid,

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[11] Even if Plaintiffs were similarly situated to members of Indian tribes, they could not prevail on their Equal Protection claim. Morton makes clear that the correct test for statutes that single out Indian tribes for special treatment is rational basis review. See Morton, 417 U.S. at 555. Congress has stated that the purpose of the peyote exemption is to protect the culture of Indian tribes and to prevent stigmatization of that culture. See 42 U.S.C. § 1996a(a). Undeniably, the exemption for religious peyote use by tribal members is rationally related to that purpose.

unambiguous congressional mandate, even if such effect would conflict with another nation's laws or violate international law."); see also Restatement (Third) of Foreign Relations Law § 115, comment a ("An act of Congress will . . . be given effect as domestic law in the face of . . . a preexisting rule of customary international law."). Accordingly, where domestic legislation is involved, comity is most accurately viewed as a principle of statutory construction that becomes relevant only if a statutory provision is susceptible of more than one interpretation. See Plaintiffs' Motion at 40 (citing cases in which general principles of international law are framed as doctrines of statutory construction). As discussed at length above, Congress's prohibition of "any material, compound, mixture, or preparation containing any amount of . . . dimethyltryptamine" is not susceptible of an interpretation that would allow the use of ayahuasca, a preparation containing dimethyltryptamine. See Part I.A.., supra. Therefore, neither comity nor any other general principle of international law requires such an outcome.

Plaintiffs argue that the applicability of the doctrine of comity is "strengthened" by the "affirmation of the primacy of religious belief" contained in the United Nations International Covenant on Civil and Political Rights ("ICCPR"), 138 Cong. Rec. S4781-84 (1992), and the Universal Declaration of Human Rights ("Universal Declaration"), GA res. 217A, Dec. 10, 1948. See Plaintiffs' Motion at 41-42. Defendants in no way dispute the proposition contained in these agreements that religious freedom is a basic human right. However, the United States has always recognized that, "[w]hile the freedom to believe and profess whatever religious doctrine one desires is absolute, the freedom to act cannot be." Meyers, 95 F.3d at 1480. Thus, "activities of individuals, even when religiously motivated, are often subject to regulation . . . in the exercise of [the government's] undoubted power to promote the health, safety, and general welfare." Wisconsin v.

Yoder, 406 U.S. 205, 220 (1972). The international agreements to which Plaintiffs refer also recognize this principle. The ICCPR provides that "[f]reedom to manifest one's religion or beliefs may be subject to . . . such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." ICCPR art. 18. The Universal Declaration similarly provides that people, in the exercise of their rights and freedoms, are subject to "such limitations as are determined by law . . . for the purpose of securing due recognition and respect for the rights and freedoms of others and meeting the just requirements of morality, public order and the general welfare in a democratic society." Universal Declaration art. 29 ¶ 3.

That the signatories to the ICCPR and the Universal Declaration did not intend to require countries to permit all religious ingestion of controlled substances is made clear by the fact that a large number of the signatories to these agreements were also signatories to the 1971 Convention on Psychotropic Substances. The 1971 Convention unambiguously requires signatory nations to restrict the religious use of preparations containing Schedule I substances (like DMT) to the use of indigenous plants by small, clearly determined groups, and requires signatories to make a reservation with respect to any such plant "at the time of signature, ratification or accession." 1971 Convention art. 32 ¶ 4. No other religious use of Schedule I substances is permitted. When the general provisions of the ICCPR and the Universal Declaration, subject as they are to laws designed to promote public health and welfare, are read in conjunction with the specific provisions of the 1971 Convention (a treaty explicitly concerned with "public health" and "welfare," see Preamble) prohibiting all but a single, narrow religious use of Schedule I controlled substances, it is clear that the former agreements do not bar countries from acting either individually or in concert to prohibit

the use, including the religious use, of controlled substances.

Finally, Plaintiffs argue that their comity argument is strengthened by this country's International Religious Freedom Act ("IRFA"), Pub. L. No. 105-292, 112 Stat. 2787 (1998) (codified at 22 U.S.C. §§ 6401-6481). Plaintiffs' Motion at 42-44. The Act affirms the United States' policy "to condemn violations of religious freedom, and to promote, and to assist other governments in the promotion of, the fundamental right to religious freedom," 22 U.S.C. § 6401(b)(1), and "[t]o work with foreign governments that affirm and protect religious freedom, in order to develop multilateral documents and initiatives to combat violations of religious freedom and promote the right to religious freedom abroad." 22 U.S.C. § 6401(b)(4). The Act does not suggest, however, that every governmental action that restricts a person's ability to practice his or her religion is a violation of religious freedom. The Act specifically defines "violations of religious freedom" as follows:

> The term "violations of religious freedom" means violations of the internationally recognized right to freedom of religion and religious belief and practice, as set forth in the international instruments referred to in section 2(a)(2) and as described in section 2(a)(3), including violations such as –
> (A) arbitrary prohibitions on, restrictions of, or punishment for –
> (i) assembling for peaceful religious activities such as worship, preaching, and prayer, including arbitrary registration requirements;
> (ii) speaking freely about one's religious beliefs;
> (iii) changing one's religious beliefs and affiliation;
> (iv) possession and distribution of religious literature, including Bibles; or
> (v) raising one's children in the religious teachings and practices of one's choice; or
> (B) any of the following acts if committed on account of an individual's religious belief or practice: detention, interrogation, imposition of an onerous financial penalty, forced labor, forced mass resettlement, imprisonment, forced religious conversion, beating, torture, mutilation, rape, enslavement, murder, and execution.

22 U.S.C. § 6402(13). The "international instruments" referred to in this passage are the ICCPR, the Universal Declaration, the Helsinki Accords, the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, the United Nations Charter, and the

European Convention for the Protection of Human Rights and Fundamental Freedoms. See 22 U.S.C. § 6401(a)(2). None of these agreements prohibits countries from passing laws regulating conduct to protect the public health and welfare. As defined by the Act, therefore, there is no violation of religious freedom involved in restricting the ingestion of substances that are controlled under valid public health legislation.

Moreover, while IRFA might counsel in favor of the United States "grant[ing] the same rights to an officially recognized Brazilian religion to practice in this country that we would hope and expect Brazil or any other foreign country to grant for the practice of an American religion in its territory," Plaintiffs' Motion at 44, IRFA does not require other countries to provide *more* freedoms to American religions than the freedoms that the United States itself would provide. The United States restricts the use of controlled substances by American religions as well as non-American ones. See, e.g., Peyote Way, 922 F.2d at 1210. Because the United States would not ask Brazil to allow American religions the freedom to use psychotropic substances, there is no breach of "mutual expectations" in denying Brazilian religions the same freedom.

To summarize, considerations of international law do not suggest that the United States should allow the UDV to use a preparation containing DMT. The general doctrine of international comity cannot be used to override a clear domestic statute, and the international agreements cited by Plaintiffs recognize that the freedom to manifest one's religious beliefs is subject to domestic law respecting public health, order, and welfare. Indeed, international law considerations counsel strongly *against* allowing the UDV's use of ayahuasca, in that the 1971 Convention specifically requires signatories to outlaw the use of any preparation containing DMT except for scientific and medical purposes and a limited religious use to which the UDV's use does not conform.

F. The Government's Actions Do Not Violate the Fourth and Fifth Amendments or the Administrative Procedure Act

Plaintiffs offer two derivative arguments based on the arguments discussed thus far. First, Plaintiffs argue that the government's search of the residence of the UDV's leader, Jeffrey Bronfman, and its seizure of Plaintiffs' ayahuasca and other items were violations of the Fourth Amendment's protection against unreasonable search and seizure, as well as the Fifth Amendment's protection against deprivation of property without due process. This argument is premised wholly on the notions that (1) the CSA's prohibition on materials containing DMT does not apply to ayahuasca, and (2) even if it did, RFRA would protect Plaintiffs' use of the tea. Because the UDV's use of ayahuasca is not illegal, Plaintiffs argue, Defendants lacked probable cause to believe that "an offense has been or is being committed," and therefore were not entitled to search Mr. Bronfman's residence or confiscate the tea. Plaintiffs' Motion at 47. However, as discussed above, ayahuasca is covered by the CSA, and its use is not protected under RFRA. See Parts I.A.&B., supra. Therefore, Defendants were justified in their belief that Plaintiffs "possessed or were to receive a controlled substance" in violation of the CSA, Plaintiffs' Motion at 47, and the ensuing search and seizure were permissible under the Fourth and Fifth Amendments.

Second, Plaintiffs argue that Defendants' actions violate the Administrative Procedure Act because these actions "are arbitrary and capricious, inconsistent with the plain language of the CSA and RFRA, in violation of plaintiffs' free exercise rights under the First Amendment, contrary to the Fourth Amendment's guarantee against unlawful search and seizure, and in violation of Plaintiffs' equal protection rights under the Fifth Amendment to the U.S. Constitution." Plaintiffs' Motion at 37. Each of these claims is discussed and refuted above. Moreover, Plaintiffs acknowledge that,

under the APA, agencies are entitled to substantial deference in their interpretation of the statutes they are charged with enforcing. See Plaintiffs' Motion at 37. Plaintiffs argue that such deference is not appropriate here because Defendants "have promulgated no regulation addressing either the religious use of controlled substances or whether plants in which the same substances naturally occur should be considered controlled substances even if not separately listed." Plaintiffs' Motion at 37-38. No such regulations are required, however, given that these issues are clearly resolved by the statutory language itself. See Part I.A., supra. Defendants are therefore entitled to the customary high level of deference accorded agencies in their interpretation of statutes.

II. Plaintiffs Have Not Shown That They Will Suffer Irreparable Harm in the Absence of an Injunction

In addition to showing a substantial likelihood of success on the merits of their claim, Plaintiffs must show that they will suffer irreparable harm in the absence of the requested injunction. See Autoskill, 994 F.2d at 1487. Plaintiffs argue that they will suffer irreparable harm because the government's prohibition on their use of ayahuasca is a violation of their rights under the First Amendment, and "violation of constitutional rights constitutes irreparable harm as a matter of law." Cohen v. Coahoma County, Miss., 805 F. Supp. 398, 406 (N.D. Miss. 1992) (quoted in Plaintiffs' Motion at 45). However, as discussed in detail above, the government's prohibition on Plaintiffs' use of ayahuasca is not a violation of Plaintiffs' First Amendment rights. See Part I.C., supra. Therefore, there is no *per se* irreparable harm in Plaintiffs' being denied the use of ayahuasca.

The only relevant harm is the "emotional and spiritual strain" that Plaintiffs have allegedly experienced. Plaintiffs' Motion at 45. Emotional harm is not *per se* irreparable. See, e.g., Novellis v. Kelley, 135 F.3d 58, 64 (1st Cir. 1998) (refusing to enjoin an employer's transfer of an employee

and stating that "the fact that an employee may be psychologically troubled by an adverse job action does not usually constitute irreparable injury warranting injunctive relief"). Moreover, Plaintiffs have already suffered the emotional and spiritual strain resulting from their inability to consume ayahuasca. See Plaintiffs' Exhibits A, B, & C. A preliminary injunction is inappropriate form of relief when the harm in question has already been incurred. See Thournir v. Buchanan, 710 F.2d 1461, 1463 n.2 (10th Cir. 1983) ("If the event sought to be enjoined has occurred, the applicant has already suffered the harm that she sought to forestall. At that point, an injunction cannot provide a remedy.").

Furthermore, no injunction is warranted where the allegedly irreparable harm will continue even if the injunction is issued. The threat of prosecution by Defendants is not the only barrier to Plaintiffs' use of ayahuasca. The State of New Mexico has enacted its own controlled substances legislation, under which DMT is placed under the most restrictive schedule and its possession and use are prohibited. See N.M. Stat. Ann. § 30-31-6. If this Court ultimately determines that Defendants' actions violate the First Amendment, of course, the determination will apply equally to New Mexico under the Fourteenth Amendment. However, a preliminary injunction is not a final determination of the merits. See Penn, 528 F.2d at 1185 (noting that the purpose served by a preliminary injunction "is quite different from finally determining the cause itself"). The Court's issuance of a preliminary injunction here would not render New Mexico's prohibition of DMT use unconstitutional. Plaintiffs have asserted that the UDV "obeys the law," Plaintiffs' Motion at 2, and therefore its members have not been consuming ayahuasca pending a decision in this case. If it is indeed true that the UDV "obeys the law," and if this applies to state law as well as federal law, then even if this Court were to enjoin Defendants from interfering with Plaintiffs' use of ayahuasca,

Plaintiffs would not be able to consume ayahuasca and would continue to suffer the harm of which they complain. In other words, the injunction would not prevent the harm in question – a basic prerequisite for the issuance of a preliminary injunction.

III. Plaintiffs Have Not Established that the Balance of Harms Weighs Heavily and Compellingly In Their Favor

In order for Plaintiffs to obtain a preliminary injunction, they must show that the harm they will suffer in the absence of an injunction is greater than the harm that Defendants will suffer if the injunction is granted. See Autoskill, 994 F.2d at 1487. Due to the fact that Plaintiffs seek a preliminary injunction that would alter the status quo and would require action by Defendants, Plaintiffs must demonstrate that this factor, as well as the other three factors that the Court must consider in determining whether to grant injunctive relief, weighs "heavily and compellingly" in their favor. See SCFC ILC, 936 F.2d at 1102. It is important to recognize that the relevant harm to Plaintiffs is not the harm that they would suffer from being forced to forego ayahuasca permanently, but the harm that they would suffer if required to continue from abstaining from ayahuasca use between now and when this Court renders a final decision on the merits.

Plaintiffs argue that Defendant will suffer essentially no harm if the injunction is granted, because "there is little chance of harm to plaintiffs or diversion of Hoasca to those other than UDV adherents." Plaintiffs' Motion at 46. As discussed at length above, Congress has found that the use of materials containing DMT is unsafe even under medical supervision. See 21 U.S.C. § 812(b)(1)(C). Moreover, the presence of MAOIs in ayahuasca presents a severe danger to UDV members who use certain prescription medications or who ingest certain common foods before or after drinking the tea. See Part I.B.2., supra. The chance of harm from ingestion of ayahuasca is

therefore both real and significant. Congress has also found that materials containing DMT have a "high potential for abuse." 21 U.S.C. § 812(b)(1)(A). That potential will greatly increase if a DMT-containing substance that is currently unavailable in this country is made available through the requested injunction. See Part I.B.3., supra.

Furthermore, if this Court grants the requested injunction, the United States will immediately be in violation of its obligations under the 1971 Convention on Psychotropic Substances. This will impinge upon the ability of the United States "to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors." Vimar Seguros, 515 U.S. at 539. This is a severe and incalculable harm. When combined with the serious public health concerns mentioned above, this harm to the government easily surpasses the harm Plaintiffs will experience if required to wait for a full hearing on the merits before resuming their consumption of ayahuasca.

IV. Plaintiffs Have Not Shown That Granting the Injunction Will Not Be Adverse to the Public Interest

The fourth and final showing Plaintiffs must make is that "the injunction, if issued, will not be adverse to the public interest." Autoskill, 994 F.2d at 1487. Unlike the consideration of the harm to Defendants, the consideration of the public interest does not involve a balancing test. If the requested injunction is adverse to the public interest – even if the harm to the public interest can somehow be seen as less severe than the harm to Plaintiffs in the absence of an injunction – the injunction cannot issue. Congress has found that the use of controlled substances outside of the framework specified in the CSA has "a substantial and detrimental effect on the health and general welfare of the American people." 21 U.S.C. § 801(2). Indeed, all of the compelling interests of the government discussed above – the interest in adhering to international drug trafficking agreements,

the interest in the health and safety of the public, and the interest in preventing diversion to non-religious use – are compelling precisely because of their serious implications for the public interest. Because the public interest is at the heart of the government's prohibition on the use of ayahuasca, the preliminary injunction must be denied.

Conclusion

For the reasons set forth above, Defendants respectfully request that the Court deny Plaintiffs' Motion for a Preliminary Injunction.

Dated: January 25, 2001

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction was served this 25th day of January, 2001, by first-class mail, upon counsel for the plaintiffs as follows:

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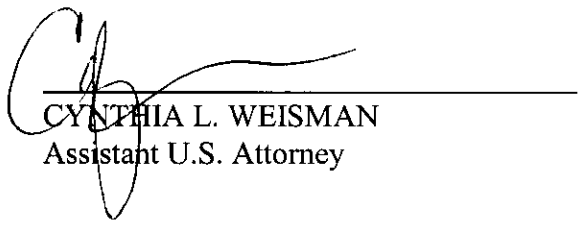

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