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

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

Plaintiffs,

vs.

No. CV 00-1647 JP/RLP

JANET RENO, *et al.*,

Defendants.

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Fed. R. Civ. P. 65(a), the plaintiffs respectfully move the Court for preliminary injunctive relief as described in the accompanying memorandum of law. The grounds for this motion are:

1. Plaintiffs' complaint, together with the exhibits attached to plaintiffs' memorandum in support of this motion establish that plaintiffs will probably succeed on the merits of their claims.

2. Plaintiffs are suffering actual and presumptive irreparable harm and will continue to suffer irreparable harm until the Court enjoins the defendants' unlawful conduct. The irreparable harm suffered by the plaintiffs includes the loss of their First Amendment rights to the free exercise of religion.

3. The harm to the plaintiffs outweighs any damage a preliminary injunction might cause to the defendants, and the balance of the equities in the Court's consideration of this motion weighs strongly in favor of the plaintiffs.

4. The preliminary injunction, if issued, will not be adverse to the public interest.

5. Plaintiffs incorporate by reference the allegations of their complaint, the matters set forth in their contemporaneously filed memorandum of law, and the exhibits appended thereto,

WHEREFORE, the plaintiffs respectfully request the Court to enter an order preliminarily enjoining the defendants from the conduct that plaintiffs have described in their accompanying memorandum of law and grant whatever other relief the Court deems appropriate.

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I hereby certify that a copy of the foregoing was sent via Federal Express to Elizabeth Goitein, Esq., United States Dept. of Justice, Civil Division, 901 E Street, N.W., Room 1032, Washington, D.C. 20004, this 22d day of December, 2000.

Nancy Hollander/JDL

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

This matter is before the Court on the plaintiffs' accompanying motion for preliminary injunction and supporting declarations. Plaintiffs are the Christian church, Centro Espirita Beneficente União do Vegetal ("UDV"), and its leadership in the United States, all of whom are members and faithful adherents. At the core of this dispute is whether the United States government can lawfully criminalize the strictly religious use of a sacramental tea known as "Hoasca."

The sacramental tea in question has been in religious use in South America for many centuries and is used by the plaintiffs only for sacramental, religious purposes within the strict structure of the UDV. The tea is not addictive, not harmful and not subject to abuse. Plaintiffs' use of the tea is protected by the First and Fifth Amendments to the United States Constitution and by the Religious Freedom Restoration Act ("RFRA"). Furthermore, neither the tea nor the plants from which it is derived are controlled substances, despite the fact that a small amount of dimethyltryptamine (DMT) occurs naturally in one of the plants. For the reasons set forth more fully below, plaintiffs are entitled to practice their religious faith through the use of Hoasca without risking prosecution, and are entitled to preliminary injunctive relief from the court.

FACTUAL BACKGROUND

A. Events Giving Rise to This Litigation.

Plaintiffs' complaint arises from events beginning on May 21, 1999, when agents of the United States Customs Service ("Customs") seized a shipment of a sacramental herbal tea, "Hoasca," that Brazilian church officials had shipped from Brazil to plaintiff Jeffrey Bronfman in Santa Fe, New Mexico. After seizing the tea, Customs agents obtained and executed a warrant to search plaintiff Bronfman's and the UDV's office in Santa Fe, New Mexico. See Declaration of Jeffrey Bronfman ¶¶

71-73, 79 ("Bronfman Decl.") (Ex. A);[1] see also Copy of Search Warrant and Affidavit of D. DeFago ("Search Warrant") (Ex. L). Pursuant to this search, defendants' agents seized additional consecrated Hoasca along with other items including plaintiff Bronfman's church and personal records. See Bronfman Decl. ¶ 71 (Ex. A).

Government officials contended at the time, and continue to contend, that plaintiffs' strictly religious, sacramental use of Hoasca is, or may be, a crime. According to the defendants, the Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801-904 (1994), forbids use or possession of Hoasca by anyone, whether or not the person's use is strictly religious, and without regard to the First Amendment's free exercise clause or the RFRA.

Over the past eighteen months, the government has conducted an extensive investigation but has not filed any criminal charges. However, defendants have informed plaintiffs that they continue to consider prosecution of one or more members who have possessed or used the sacramental tea in the past and have indicated they would prosecute anyone who possesses the tea in the future. See Bronfman Decl. ¶¶ 71-73, 79 (Ex. A). Because of the threat of prosecution for crimes that carry enormous criminal penalties, plaintiffs have ceased all use of Hoasca. The government's threat to prosecute has forced the plaintiffs to discontinue a religious practice which is central to the plaintiffs' religious faith and ritual.

Hoasca is the consecrated sacrament of the UDV, a material expression of the Divinity, much as for Roman Catholics the consecrated wafer is the Holy Eucharist embodying the Holy Spirit. As a result of the seizures and the defendants' apparent view that the exercise of the UDV religion violates the CSA, the UDV, which obeys the law, suspended its religious use of Hoasca in the United States on

[1]Some of the declarations attached to this memorandum reference attached exhibits which are not included but which have been provided to opposing counsel and will be provided to the Court, if requested.

May 22, 1999. Because Hoasca is essential to the practice of the UDV religion, the suspension has resulted in UDV members in the United States being unable to practice their faith.

The inability to practice their religion has caused, and continues to cause, severe hardship to UDV members. See Declarations of Jeffrey Bronfman (Ex. A); David Lenderts, M.D. (Ex. B); Maria Cristina N.C. de Barros Barreto (Ex. C); and Christine Ann Berman (Ex. D). Under controlling United States Supreme Court and Tenth Circuit precedent, the defendants' conduct is constitutionally and statutorily indefensible. For this reason, plaintiffs are entitled to an injunction preventing defendants from taking any adverse action against them for their past or future sacramental use of Hoasca and requiring that defendants return the Hoasca and other items seized from plaintiffs.[2]

B. The UDV

The UDV is a Christian religion, founded and headquartered in Brazil, and officially recognized by the Government of Brazil. The UDV has nearly 8,000 members in Brazil. Approximately 130 UDV members currently reside in the United States; thirty are of Brazilian origin, and almost all of those thirty are citizens of Brazil. A central component of the UDV's religious practice is the sacramental ingestion of the sacred tea, Hoasca, which is made from two plants indigenous to the Amazon basin in Brazil, *banisteriopsis caapi* and *psychotria viridis*, neither of which are currently available to the UDV in the United States.

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[2]This Court has the authority to enjoin the federal government from taking prosecutorial action against plaintiffs. The holding in Younger v. Harris, 401 U.S. 37 (1971), requiring courts to abstain from enjoining ongoing state prosecutions does not apply where federal prosecutions threaten First Amendment rights. See Juluke v. Hodel, 811 F.2d 1553, 1556 (D.C. Cir. 1987) ("Younger has never been applied by the Supreme Court or this court in a situation involving civil and criminal proceedings in separate federal court actions. It is a case mostly about considerations of federalism"). Moreover, Younger abstention is inapplicable even where injunctive relief is sought against a state where, as here, no indictment has been returned. See Wooley v. Maynard, 430 U.S. 705, 710–12 (1977) (Younger does not bar federal jurisdiction where plaintiffs are seeking prospective relief in the form of an injunction against prosecutions for future violations of state law). The same applies where injunctive relief is sought against future federal prosecutions for violations of federal law alleged to be unconstitutionally restrictive of First Amendment rights. Juluke v. Hodel, 811 F.2d at 1556-58.

For many centuries, the peoples of the Amazon basin have made ritual use of plant sacraments in their indigenous religions. See generally Declaration of Marlene Dobkin de Rios, Ph.D. ¶¶ 3-5 (Feb. 12, 2000) ("Dobkin de Rios Decl.") (Ex. E); see also Declaration of Charles S. Grob, M.D. (March 30, 2000) ("Grob Decl.") (Ex. F); Charles S. Grob *et al.*, Human Psychopharmacology of Hoasca, A Plant Hallucinogen Used in Ritual Context in Brazil, 184 J. Nervous & Mental Disease, Vol. 2, at 86 (1996) ("Human Psych. of Hoasca") (Ex. G). This religious use of Hoasca, also known as ayahuasca,[3] was adopted by several groups that melded indigenous beliefs and spiritual practices with the Christian theology introduced by the Europeans. See Dobkin de Rios Decl. ¶¶ 5-6, 8 (Ex. E).

The UDV is one of the syncretic religions that arose from the interaction between Christianity and indigenous beliefs and practices in South America.[4] See Dobkin de Rios Decl. ¶¶ 6, 9-12 (Ex. E). It was founded in Brazil, in Porto Velho, Rhodônia, in 1961, by José Gabriel Da Costa, a Brazilian, who had worked as a rubber tapper in the Western Amazon rainforests of Bolivia, and there had become familiar with the religious beliefs and ceremonial practices indigenous to the region, including the sacramental use of Hoasca. See id. ¶ 6. Mestre Gabriel (as he is called) espoused the religious use of Hoasca. See *Human Psych. of Hoasca* at 86; Bronfman Decl. ¶ 7 (Ex. A).

The UDV now has adherents throughout Brazil and that country's official recognition of the UDV as a religion under Brazilian law includes exemption of Hoasca for religious use from the

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[3]In this brief, the term "Hoasca" is used to refer specifically to the tea made by the UDV from the bark of *banisteriopsis caapi* and the leaves of *psychotria viridis*. The term "ayahuasca" refers generically to any combination of parts of *banisteriopsis caapi* and any of several other plants indigenous to the Amazon region.

[4]Such religious syncretism is common throughout history. According to Dr. Huston Smith, an international authority on the world's religions, "[t]his phenomenon of adapting and combining elements of different traditions and thereby creating a new religion is a common phenomenon in Central and South America and other parts of the world as well. At different times in human history this phenomenon has probably occurred on every continent of our planet." Declaration of Dr. Huston Smith ¶ 6 ("Smith Decl.") (Ex. H); see also Dobkin de Rios Decl. ¶ 9 (Ex. E). n Christianity itself has been described as a syncretic religion. For example, early Christianity incorporated holy days and doctrines that originated in other religions and bodies of thought. See Smith Decl. ¶ 7 (Ex. H).

Brazilian list of controlled substances. See *Human Psych of Hoasca* at 87 (Ex. G); Opinions of Brazil's Federal Narcotics Council ("CONFEN") (1986 & 1992) (Exs. I, J); Certification from Attorney General of Brazil, Dec. 20, 1999 (Ex. K).

The UDV was not organized to circumvent the U.S. drug laws. The founding of the UDV in 1961 and its sacramental use of Hoasca preceded by five years the first decision by the United States Government to schedule synthetic DMT as a controlled substance. DMT did not become a controlled substance in the United States until March 19, 1966. See 31 Fed. Reg. 4679 (1966).

The UDV has had a presence in the United States since 1988, when plaintiff David Lenderts, M.D., who had encountered the religion while traveling in Brazil, invited two Brazilian UDV mestres (i.e., clergymen) to perform a ceremony in Norwood, Colorado. See Declaration of David Lenderts, M.D. ¶¶ 7-8 ("Lenderts Decl.") (Ex. B). In 1992 the UDV decided to found a branch of the church in the United States and in July 1993, the UDV's highest official, the General Representative Mestre, visited the U.S. and, in a formal ceremony, officially founded the church in the United States. Id. ¶ 15; Bronfman Decl. ¶ 20 (Ex. A). Jeffrey Bronfman is the current Representative Mestre for the UDV in the U.S.; he derives his religious authority from, and is under the supervision of, UDV headquarters in Brazil. Id. ¶¶ 20-21(Ex. A).

The nearly 8,000 members of the UDV in Brazil are spread among more than 80 congregations (called "nucleos") in almost every part of Brazil, each of which follow the administrative and doctrinal commands of the church headquarters in Brasilia. The UDV's branch in the United States is subordinate to the Brasilia headquarters, and reports to church leaders there in the same manner as does each of the Brazilian regional organizations. See Bronfman Decl. ¶¶ 11, 18-20 (Ex. A). The U.S. members are in five congregations. See Id. (Ex. A). One of these, in Santa Fe, New Mexico, has attained the status of a full "nucleo" and has approximately fifty members. See id. An authorized

congregation not yet of "nucleo" status in Norwood, Colorado has eighteen members; a similar congregation in Seattle, Washington has twenty-seven members; one in Marin County, California has twenty-seven members; and one in Plantation, Florida, has nine members. See id. All of these congregations are subject to the religious authority of Jeffrey Bronfman, who, in addition to being the Representative Mestre for the U.S. region, is also mestre of the Santa Fe nucleo. See id.

Growth of membership in the U.S. is extremely slow. The UDV does not proselytize for new members, and it requires that prospective members wait for a period of time, which can be as long as one to two years, before joining. Id. Therefore, future development in the U.S. will be limited. Only individuals eighteen years of age or older are allowed to join the UDV. See Bronfman Decl. ¶ 24 (Ex. A).

In Brazil and the U.S., the UDV performs significant work as a charitable organization. Based on such charitable work, in 1999 the Brazilian government granted the UDV the legal status of a "Utilidade Publica"--a federal designation for organizations of great public benefit. Thus far, members of the UDV in the United States have also performed significant charitable work, particularly in the area of environmental preservation. See Bronfman Decl. ¶ 31 (Ex. A).

The UDV sustains itself financially through the collection of tax-deductible membership dues and contributions and sends ten percent of the dues it receives to support the administrative needs of the church headquarters in Brazil. See Id. ¶ 30 (Ex. A).

In the U.S., the UDV is incorporated as a New Mexico nonprofit corporation and it has received tax exempt status as a section 501(c)(3) organization under the Internal Revenue Code. It is also recognized as a church under sections 509(a)(1) and 170(b)(1)(A)(i) of the Internal Revenue Code. The UDV is likewise incorporated in Colorado, Washington, and California. See Bronfman Decl. ¶¶ 28-29 (Ex. A).

ARGUMENT

I. PLAINTIFFS SATISFY THE REQUIREMENTS FOR INJUNCTIVE RELIEF

The Tenth Circuit has articulated the following four-prong standard for determining whether a plaintiff may obtain a preliminary injunction:

> The district court may grant a preliminary injunction if the party seeking it shows: (1) a substantial likelihood of prevailing on the merits; (2) irreparable harm in the absence of the injunction; (3) proof that the threatened harm outweighs any damage the injunction may cause to the party opposing it; and (4) that the injunction, if issued, will not be adverse to the public interest.

Autoskill Inc. v. Nat'l Educ. Support Sys., Inc., 994 F.2d 1476, 1487 (10th Cir. 1993); Resolution Trust Corp. v. Cruce, 972 F.2d 1195, 1198 (10th Cir.1992). The standard for meeting the "probability of success" prerequisite becomes more lenient when a party seeking a preliminary injunction satisfies the other three requirements. Id. at 1199. The movant need only show "questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation." Id. (quoting Otero Savings & Loan Ass'n v. Federal Reserve Bank, 665 F.2d 275, 278 (10th Cir.1981)).

The plaintiffs clearly meet this standard.

A. Plaintiffs are Likely to Prevail on the Merits Because Defendants' Actions Violate the United States Constitution, the Religious Freedom Restoration Act, and the Administrative Procedure Act

1. Defendants' Interference with Plaintiffs' Sacramental Use of Hoasca Violates Plaintiffs' Rights Under the Religious Freedom Restoration Act

a. RFRA, Generally

By depriving plaintiffs of their ability to partake in and possess their sacramental tea, defendants have burdened plaintiffs' exercise of their religion in a manner forbidden by the RFRA, Pub. L. No. 103-141, 107 Stat. 1488 (1993), codified at 42 U.S.C. §§ 2000bb-2000bb-4 (1994). This Act came about as a result of Employment Division, Dept. of Human Resources v. Smith, 494 U.S. 872 (1990),

in which the Supreme Court held that a law imposing a substantial burden on religion need not be justified by a compelling governmental interest if it is neutral and of general applicability. In reaction to the Supreme Court's decision in Smith, Congress affirmed its commitment to religious freedom by enacting RFRA. The Act's purposes are:

> (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb(b).

Section 2000bb-1 of the Act, entitled "Free exercise of religion protected," provides in subsection (a), entitled "In general":

> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

42 U.S.C. § 2000bb-1(a). The term "government" "includes a branch, department, agency, instrumentality, and official . . . of the United States." 42 U.S.C. § 2000bb-2(1). Subsection (b) of 2000bb-1, entitled "Exception," provides:

> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1(b). The statute "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." 42 U.S.C. § 2000bb-3(a).

The statutory prohibition established by § 2000bb-1(a) & (b) is judicially enforceable. See 42 U.S.C. § 2000bb-1(c). Moreover the Act applies to any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States," as well as to any "State, or . . . subdivision of a State." City of Boerne v. Flores, 521 U.S. 507, 516 (1997).[5]

b. The UDV Is a Religion

The Supreme Court has, in this century, defined "religion" broadly. See United States v. Seeger, 380 U.S. 163, 176 (1965) (religion, for purposes of Selective Service statute, encompasses any "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the [religious] exemption"). The UDV unquestionably is within this definition.

In considering the definition of "religion," the Tenth Circuit recently canvassed a large number of lower court decisions to arrive at a list of attributes that typically indicate religiosity, and the UDV possesses all these attributes. See United States v. Meyers, 95 F.3d 1475, 1482-84 (10th Cir. 1996). First, religions often address "fundamental questions about life, purpose, and death," id. at 1483, and the UDV does so. See Smith Decl. ¶ 3 (Ex. H). Second, religious beliefs often are "metaphysical" in that they "address a reality that transcends the physical and immediately apparent world," Id. ¶ 4 and UDV's beliefs are metaphysical in just this way. Third, religions "prescribe a particular manner of acting, or way of life, that is 'moral' or 'ethical.'" The UDV has its own code of conduct consistent

[5]Although the Supreme Court in City of Boerne v. Flores, 521 U.S. 507 (1997) held that RFRA is unconstitutional as applied to the states, RFRA's constitutionality as applied to the federal government was not at issue and was not decided. It is not disputed here that RFRA is constitutional as applied to the federal government. Indeed, the federal government has so stated in various forums. For example, in United States v. Sandia, 188 F.3d 1215, 1217 (10th Cir. 1999), the court noted that "[b]oth the government and defendant contend that the district court erred in finding RFRA inapplicable to the federal government."); see also United States v. Any & All Radio Station Transmission Equip., No. Civ. A. 99-2260, 1999 WL 718646, at *3 n.3 (E.D. Pa. Aug. 31, 1999). The U.S. Court of Appeals for the Tenth Circuit has yet to directly address the issue.

with these attributes. See id. ¶ 9; Bronfman Decl. ¶¶ 50-54 (Ex. A). Finally, the UDV's doctrine is also "comprehensive" in the manner defined by the Tenth Circuit. See United States v. Meyers, 95 F.3d at 1483; Bronfman Decl. ¶ 50-54 (Ex. A); Smith Decl. ¶ 9 (Ex. H).

Moreover, the UDV possesses all but one of the verifiable "[a]ccouterments of [r]eligion" the Tenth Circuit said "may indicate that a particular set of beliefs is 'religious.'" Meyers, 95 F.3d at 1483. It has a "[f]ounder, [p]rophet, or [t]eacher," (Mestre Gabriel), "[i]mportant [w]ritings" (e.g., the documents read aloud at the beginning of every ceremony), "[g]athering [p]laces" (dozens of temple buildings in Brazil and several in the U.S.), "[k]eepers of [k]nowledge" (the mestres and the Council for the Preservation of the Teachings of Mestre Gabriel), "[c]eremonies and [r]ituals" (the instructive ceremonies occurring twice a month and on certain other occasions), "[s]tructure or [o]rganization" (a well-defined hierarchy), "[h]olidays" (many of which correspond to mainstream Christian holidays), "[d]iet or [f]asting" (the ban on alcohol and drug use), and special "[a]ppearance and [c]lothing" (the mestre and congregants wear special clothing during ceremonies). Id.; see also Bronfman Decl. ¶¶ 32-45, 50-55 (Ex. A); Smith Decl. ¶ 9 (Ex. H). The sole "accouterment" listed by the Tenth Circuit that the UDV *does not* display, at least in the United States, is an "attempt to propagate their views and persuade others of their correctness."[6] Meyers 95 F.3d at 1484; see also Smith Decl. ¶ 9 (Ex. H).

c. Defendants' Interference with Plaintiffs' Sacramental Use of Hoasca Substantially Burdens Plaintiffs' Exercise of Religion

Compelling a party to forego a religious practice imposes a substantial burden on that party. See, e.g., Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 140-41 (1987); Horen v. Commonwealth, 479 S.E.2d 553, 558-59 (Va. 1997). "There can be no more 'direct' burden on free

[6] This fact, of course, sharply diminishes the government's interest in prohibiting the religious use of the Hoasca sacrament among existing UDV members.

exercise than an absolute criminal prohibition." Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. Chi. L. Rev. 1109, 1125 n.80 (1990).

In the UDV religion, no substitute exists for the Hoasca tea; its ingestion is necessary for a UDV ceremony to occur. See Bronfman Decl. ¶¶ 57-61 (Ex. A); Lenderts Decl. ¶ 12 (Ex. B).

The fundamental role of the Hoasca ceremony to the UDV religion is demonstrated by its very name – "Centro Espirita Beneficente União do Vegetal" – which refers to the union of the two plants, *banisteriopsis caapi* and *psychotria viridis*, in the Hoasca tea. See Bronfman Decl. ¶ 61 (Ex. A). Because the two plants are regarded as sacred, the UDV's doctrine does not permit substitution of any other plants or materials as sacraments during the church's ceremony, and does not permit the substitution of any other practice for the ingestion of the Hoasca. See Smith Decl. at ¶ 10 (Ex. H).

Because the tea is considered sacred and indispensable, the UDV carefully controls the cultivation and harvesting of the plants that comprise it and the preparation and shipment of the tea, itself. All the tea ingested at UDV ceremonies is made in Brazil by UDV members from the two plants that grow in the Amazon rainforest, in accordance with a prescribed method. When UDV members drink the tea at a UDV ceremony, they know they are drinking tea prepared by their church members in Brazil. That knowledge is indispensable to the spiritual state they seek to attain at a ceremony. Bronfman Decl. ¶¶ 62, 64 (Ex. A).

The sincerity with which plaintiffs hold these beliefs cannot be questioned. Indeed, the government may not make theological judgments about religious truth. See Seeger, 380 U.S. at 184 ("In such an intensely personal area . . . the claim of the registrant that his belief is an essential part of a religious faith must be given great weight"); see also id. at 185 (noting that "the 'truth' of a belief is not open to question"); Africa v. Pennsylvania, 662 F.2d 1025, 1030 (3d Cir. 1981) ("It is inappropriate for a reviewing court to attempt to assess the truth or falsity of an announced article of

faith. Judges are not oracles of theological verity."). Therefore, governmental decision-makers *must* view Hoasca as central and indispensable to the UDV's religious practice. If wine were added to Schedule I with no accommodation for religious use, it would be absolutely clear that the free exercise of Catholicism and Judaism was being substantially burdened. The same is true of the Hoasca tea and the UDV religion.[7]

Therefore, prohibition of the UDV's use of the tea "substantially burden[s]" the exercise of the UDV religion, within the meaning of RFRA, 42 U.S.C. § 2000bb-1(a). See e.g. United States v. Boyll, 774 F. Supp. 1333, 1341 (D.N.M. 1991) ("'believers who worship at the Native American Church cannot freely exercise their religious beliefs absent the use of peyote.' . . . 'There is no dispute that [the] criminal prohibition of peyote places a severe burden on the ability of [Defendant] to freely exercise [his] religion.'") (citations omitted); see also United States v. Warner, 595 F. Supp. 595, 598 (D.N.D. 1984) ("[T]he government concedes that the use of peyote is central to, and the cornerstone of, the religious practices of the NAC. Therefore, prosecution for the use of peyote in the bona fide religious practices of the NAC would create a burden on the free exercise of the religion of NAC members.").

d. The Government Does Not Have a Compelling Interest in Criminalizing Use of Hoasca Nor Has it Adopted the Least Restrictive Means to Secure its Interest

"Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C.

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[7] When in the 1920s the societal interest in prohibiting *all* use of alcohol was regarded as so compelling as to justify a constitutional amendment, Congress expressly exempted sacramental use of wine – without any suggestion that the use of wine in religious ceremonies would undermine the broader goals of Prohibition. See National Prohibition Act, Publ. L. No. 66, tit. II, § 6, 41 Stat. 305, 311 (1919), repealed by Act of Aug. 27, 1935, ch. 740, tit. I, § 1, 49 Stat. 872, 872. Even today, the prohibition of the sale of alcohol to Native Americans in "Indian country" specifically exempts alcohol sales for "sacramental . . . purposes." 18 U.S.C. § 1154(a) (1994).

§ 2000bb-1(b). "[T]he term 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion . . . ." 42 U.S.C. § 2000bb-2(3).

Thus, on all issues relating to whether complete suppression of the UDV's use of the tea serves a compelling governmental interest by the least restrictive means, the burden of going forward and the burden of persuasion rest with the government. Moreover, the compelling-interest test under RFRA is "the compelling interest test set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) . . . ." 42 U.S.C. § 2000b(b)(1).

In Yoder, the Court made it clear that the test, earlier set forth in Sherbert, is not whether the government has a compelling interest in a general objective (e.g., an educated citizenry, prevention of drug abuse), but whether it has a compelling interest in substantially burdening the specific religious practice of the particular individual or group at issue. The Court rejected "the State's broader contention that its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way." Id. at 221. It stated that, "despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and *the impediment to those objectives that would flow from recognizing the claimed Amish exemption.*" Id. (emphasis added). The Court held that "it was incumbent on the State to show *with more particularity* how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption *to the Amish.*" Id. at 236 (emphasis added). The Court found that "Wisconsin's interest in compelling the school attendance *of Amish children* to age 16 emerges as somewhat less substantial than requiring such attendance for children generally." Id. at 228-29 (emphasis added).

Similarly here, in conducting the compelling-interest analysis it is necessary to focus on the particular facts relating to the UDV and its tea, and to assess "the impediment to [the] objectives [of

the CSA] that would flow from," Id. at 221, granting the specific relief the UDV seeks here. No such compelling interest or "impediment" exists.

The government has two arguably compelling interests in controlling the use of the tea in UDV religious ceremonies: (1) protection of the members of the UDV from harm, and (2) prevention of diversion of the tea. Neither of these interests is compelling as applied to the circumstances of the UDV.

i. No Evidence Exists that Use of the Tea in the Religious Ceremonies of the UDV Is Likely To Harm UDV Members

The medical and scientific literature suggests the absence of harm resulting from the consumption of Hoasca. The practices of the UDV effectively limit the quantity ingested at any particular ceremony. Furthermore, ingestion of the tea by UDV members is infrequent, and the UDV doctrine precludes interaction between the tea and alcohol or any recreational drug. Use of Hoasca in such a controlled setting minimizes any potential for significant adverse effects. No evidence exists that use of the tea in UDV religious ceremonies (in the quantity and manner prescribed for such ceremonies) is addictive or is otherwise likely to harm the individuals participating in the ceremonies.

From a biochemical perspective, the tea's effect derives from a pharmacological interaction between its two plant components, the vine of *banisteriopsis caapi* and the leaves of *psychotria viridis*. Neither plant, on its own, produces the physiological effects produced by the plants combined together. Dr. David E. Nichols, a professor of medicinal chemistry and molecular pharmacology at Purdue University's School of Pharmacy, explains this interaction in detail in his attached declaration. See Declaration of David E. Nichols, Ph.D. ("Nichols Decl.") (Ex. M). *Psychotria viridis* contains natural alkaloids of DMT; however, following oral consumption this DMT would ordinarily be rendered inactive by the human body's natural enzymes, monoamine oxidase ("MAO") and aldehyde

dehydrogenase, which metabolize DMT quickly. See id. ¶ 6. This metabolic process occurs in all humans, because the human body naturally produces DMT under normal conditions. See id.

The harmala alkaloids contained in the other plant in the Hoasca tea, *banisteriopsis caapi*, however, act to inhibit the body's production of MAO, and thus permit the DMT to act on the nervous system. See id. ¶ 10. The DMT molecule is structurally similar to the natural neurotransmitter, serotonin; and it is believed that the DMT exerts its effect through the serotonin system.

The UDV has monitored and conducted scientific studies of Hoasca's safety in Brazil and concluded that the tea is unquestionably safe as used in the UDV ceremonies. See generally Declaration of Dr. Glacus de Souza Brito ("Brito Decl.") (Ex. N). Dr. Brito, a physician who is a Senior Epidemiologist in the Department of Health of the State of Sao Paulo, and who coordinates research projects for the World Health Organization, heads a standing Medical-Scientific Department staffed by health professionals. See id. ¶ 4.3. The UDV's Medical-Scientific Department promulgates rules and guidelines for the tea's safe sacramental use (for instance, a list of contraindicated substances), and collects and analyzes information about any adverse effects concurrent with Hoasca use. See id. ¶ II.3. In over a decade of carefully monitoring the tea's sacramental use by thousands of individual members in accordance with UDV ritual, the physicians and scientists at UDV headquarters have not discerned any pattern of adverse effects associated with use of the tea. See id. ¶¶ III.2, III.3.

Dr. Charles Grob studied Hoasca use among UDV members and concluded that "[i]ndications are . . . that given the presented data analyses, the long-term consumption of Hoasca within the structured UDV ceremonial setting does not appear to exert a deleterious effect on neuropsychological function." Human Psych. of Hoasca at 93 (Ex. G). Moreover, Dr. Nichols performed an extensive medical literature search back to 1965 and found no reported instance of an overdose death caused by

DMT in any of its forms, whether endogenous or synthetic. See Nichols Decl. ¶ 4 (Ex. M). In short, UDV members are not harmed by their ceremonial use of Hoasca.

ii. Use of the Hoasca Tea in the Religious Ceremonies of the UDV Would Not Open the Floodgates for Abuse of Controlled Substances

Drug abuse is a serious problem in the United States. Certainly the government has a compelling interest in avoiding an increase in drug abuse in any significant way. Permitting the U DV to use the Hoasca tea in its religious ceremonies, however, would not do so, just as the existing exemption for the Native American Church's use of peyote, 21 C.F.R. § 1307.31, does not.

The federal agency most intimately familiar with drug abuse patterns in the U.S. is the National Institute on Drug Abuse ("NIDA"), part of the National Institutes of Health. See Declaration of Charles Schuster, Ph.D. ("Schuster Decl.") (Ex. O). NIDA publishes a list of "commonly abused drugs," which includes over twenty substances. See Schuster Decl. ¶ 6 (Ex. O). The list does not include DMT, Hoasca or ayahuasca. See id.

The complete absence of reported state or federal cases involving Hoasca indicates that it is not a substance of widespread abuse, and that it is not associated with the commission of other criminal offenses. Even DMT, as scheduled in its synthetic form, also appears not to be frequently abused: only five reported federal or state court decisions nationwide in the last thirty years involve convictions relating to synthetic DMT, with the most recent twenty-two years ago.[8] There being no control problem in the United States with respect to the UDV's use of Hoasca, it is unlikely that the government will show any compelling interest in preventing its use in UDV ceremonies.

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[8] See United States v. Ling, 581 F.2d 1118 (4th Cir. 1978); United States v. Green, 548 F.2d 1261 (6th Cir. 1977); United States v. Noreikis, 481 F.2d 1177 (7th Cir. 1973); United States v. Moore, 452 F.2d 569 (6th Cir. 1971); Mason v. Maryland, 256 A.2d 773 (Md. Ct. Spec. App. 1969).

Moreover, 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 of drug abuse. The UDV's use of the tea in its religious ceremonies would be no more open-ended or liable to expansion than the permission granted more than thirty years ago for the NAC to use peyote in its religious ceremonies.

For these reasons, it is clear that defendants' treatment of plaintiffs' use and possession of the Hoasca tea as criminally impermissible acts under the CSA substantially burdens plaintiffs' exercise of their religion in a manner that is not justified by a compelling governmental interest carried out in the least restrictive manner. Accordingly, plaintiffs' rights under RFRA have been violated and are entitled to the injunctive relief set forth in their complaint that would permit them to freely exercise their religion.

2. Defendants' Actions Also Violate Plaintiffs' First Amendment Rights

In addition to violating RFRA, the government's actions violate the First Amendment. The Free Exercise Clause of the First Amendment reflects the fundamental importance of religious liberty in American democracy: "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I.

In Employment Division, Dept. of Human Resources v. Smith, 494 U.S. 872 (1990), the Supreme Court, distinguishing prior case law, held that if a law is both "neutral" and "generally applicable," it may be applied to religiously motivated conduct without compelling justification. Id. at 872. However, a law that prescribes or permits individual exceptions is not "generally applicable"; a law that gives preferred treatment to secular interests as compared with religious interests or that gives preferred treatment to one religion as compared with another is not "neutral." Indeed, this Court has already expressly held that the DEA's NAC exemption in 21 C.F.R. § 1307.31 "unlike the statute

in Smith, is neither neutral nor generally applicable." United States v. Boyll, 774 F. Supp. at 1341; see also Church of Lukumi Babalu Aye, Inc. v. Hiaheah, 508 U.S. 520, 537-38 (1993); Smith, 494 U.S. at 884; Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 364-65 (3d Cir.), cert. denied, 120 S. Ct. 56 (1999); Rader v. Johnston, 924 F. Supp. 1540, 1551-55 (D. Neb. 1996).

When a law that is not generally applicable or not neutral interferes with the practice of religion, such interference must be justified by a compelling governmental interest and must be narrowly tailored (i.e., must survive "heightened scrutiny"). See Church of the Lukumi Babalu Aye, 508 U.S. at 531-32. Under Smith, "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." 494 U.S. at 884.

In 1993, the Supreme Court in Church of the Lukumi Babalu Aye applied the Smith framework to local animal-slaughter laws that were neither generally applicable nor neutral. The City of Hialeah, Florida, had enacted several ordinances that banned the ritual sacrifice of animals; these laws directly burdened the religious practice of local members of the Santeria religion, who challenged the laws in court. See id. at 525-28. The city sought refuge in Smith, but its position was undermined by the fact that the ordinances were not generally applicable, but rather contained express exceptions for animal slaughter for food and for hunting. See id. at 536-37. The Supreme Court applied Smith to hold that heightened scrutiny would apply to the local laws because they were neither generally applicable nor neutral. Id. at 546. A "law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." Id.

The import of Smith and Lukumi Babalu Aye is that, where a statutory scheme *does* make exceptions from the baseline regulatory or prohibitory regime, it cannot grant exceptions for secular

purposes but deny exceptions for religious purposes without compelling reasons for the denial. Although the Smith rule states that religion in general or a particular religion need not be specially *favored* under an otherwise generally applicable law, the converse is also true: religion must not be *disfavored* when the government grants exceptions to a statutory prohibition.

Two recent cases in the lower federal courts illustrate the application of this principle. The first involved a challenge under the Free Exercise Clause to the Newark, New Jersey Police Department's prohibition against officers wearing beards. See Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999), cert. denied, 120 S. Ct. 56 (1999). The plaintiff officers were Sunni Muslims whose religion imposes an obligation on adult males to wear beards. Their request for an exemption from the policy was denied; the department announced a 'zero-tolerance policy' for departures from the ban, except for those officers who received "medical clearance" to wear a beard. See id. at 361. The Third Circuit held that, because exceptions were made for those who needed to wear a beard for a secular (medical) reason, the compelling-interest test would govern the prohibition's application to claims for religious exemption. See id. at 366 ("[W]hen the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny."). Because the department offered no compelling reason for the policy, the court upheld the Free Exercise claim. See id. at 366-67.

Another court applied Smith similarly to uphold a college student's right to a religious exemption from the University of Nebraska's mandatory housing policy. See Rader v. Johnston, 924 F. Supp. 1540 (D. Neb. 1996). The university imposed a rule that all freshman live in on-campus dormitories. The university maintained three categorical exceptions for married students, older students, and students commuting from their parents' home; it also allowed for individualized exceptions for secular reasons such as familial responsibility, medical need, or emotional difficulties.

See id. at 1546-47. The university, however, refused to provide an exemption from the dormitory to Douglas Rader who sought such exemption on the basis of his fundamentalist Christian beliefs and lifestyle, which he claimed would be burdened by the permissive culture of the college housing. The district court found that the university's policy violated Rader's First Amendment rights, relying on Smith and Lukumi Babalu Aye and holding that, "[i]f a law or policy provides exemptions for certain reasons, such as medical treatment, then it should provide similar exemptions for religious purposes, unless the state can show an overriding compelling interest." Id. at 1555 (quotation omitted). Finding no compelling interest on the university's part, the court ruled in Rader's favor. See id. at 1558.

The CSA contains precisely the sort of "system of individual exemptions" for various secular uses of controlled substances (and for religious use by another religion) that Smith envisioned; therefore, the CSA is neither neutral nor of general applicability, and its application to the UDV must be justified by a compelling interest.

a. The CSA Is Neither Generally Applicable Nor Neutral

As explained above, this Court has already expressly held that the NAC exemption in 21 C.F.R. § 1307.31 is "neither neutral nor generally applicable." United States v. Boyll, 774 F. Supp. at 1341. Moreover, the entire statutory and regulatory scheme of the CSA is neither neutral nor generally applicable.

i. The CSA Is Not Generally Applicable

The CSA's text, and its administration and enforcement by defendants, establish precisely the type of "system of individual exceptions" that causes the statute not to be generally applicable to matters within its scope. The Act contains several broad exceptions that, upon individual approval by the DEA, allow the importation, production, distribution and use of controlled substances for a variety of secular purposes.

The CSA permits "the possession, distribution, and dispensing of controlled substances by persons engaged in research." 21 U.S.C. § 872(e). Because the term "research" is not defined or otherwise further particularized, the DEA has exercised broad discretion to grant exceptions from the CSA's prohibitions for the use of controlled substances in any kind of "research," including medical, behavioral, military, industrial, or other scientific research. Such persons "shall be exempt from State or Federal prosecution for possession, distribution, and dispensing . . . to the extent authorized" by the DEA. 21 U.S.C. § 872(e).

Moreover, the CSA explicitly permits the possession, manufacture, distribution and dispensing use of controlled substances in "medical, scientific, and industrial" contexts. 21 U.S.C. §§ 822(b) & 823(b)(1). Permission for such use is sometimes granted through a registration process, but even registration is not uniformly required. See 21 U.S.C. 822(d) ("The Attorney General may, by regulation, waive the requirement for registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety.").

Significantly, the Act goes so far as to compel the Attorney General to issue an applicant a registration to use controlled substances for these various secular purposes if the applicant satisfies a set of criteria. See 21 U.S.C. § 823(b) (Attorney General "shall register" an applicant to distribute a controlled substance "unless" he determines that such registration is inconsistent with the public interest). The extent to which controlled substance registration is institutionalized at the DEA is reflected in the extensive regulatory regime governing the process of applying for a registration to manufacture or use controlled substances. See 21 C.F.R. §§ 1301.01-1301.93 (2000). Persons may apply "at any time." 21 C.F.R. § 1301.13(a). If the Secretary determines that a research application is "meritorious" and the applicant is "qualified" and "competent," the DEA will issue a registration

permit unless it identifies another reason to deny registration. See id. Parties whose applications are denied can seek reconsideration and request a hearing before the DEA. See id.

Secular exceptions to the DEA's prohibitory scheme are so pervasive within the DEA that the CSA directs the DEA to issue production quotas for controlled substances "to provide for the estimated medical, scientific, research, and industrial needs of the United States." 21 U.S.C. § 826(a). The DEA sets the quotas every year in part based on applications by private individuals for "procurement quotas," 21 C.F.R. § 1303.12; and, in establishing the aggregate annual quotas, the DEA considers "[p]rojected demand for [a given controlled substance] as indicated by procurement quotas requested," 21 C.F.R. § 1303.11(4). The quotas for the year 2000 permit production of over 50 compounds from Schedule I alone, in an aggregate amount of over 11,000 kilograms. See 64 Fed. Reg. 72,686 (Dec. 28, 1999).

Even these domestic production quotas underrepresent the quantity of controlled substances lawfully used under the myriad exceptions. Where other criteria for an exception to the import ban are met, the CSA permits importation of "such amounts of any controlled substance . . . that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States . . . ." 21 U.S.C. § 952(a). This language — particularly the phrase "other legitimate needs" — is a very broad delegation to the DEA to make individualized exceptions to the CSA's prohibitions.

Parties seeking to import controlled substances apply individually for permission. Applications to import Schedule I and II substances are published in the Federal Register, and comments and objections to the applications may be filed with the DEA. See 21 C.F.R. § 1301.34. After a brief period for notice and comment, the DEA "shall" register an applicant to import a controlled substance if it determines that the importation is in the public interest. See 21 C.F.R. § 1301.34(b). A central

component of the public-interest inquiry is whether the applicant will maintain "effective controls against diversion" of the substance into "other than legitimate . . . channels"; however, the legitimate uses mentioned in the regulations are exclusively secular. See id. (noting "medical," "research," "industrial," "scientific," and "analytical" uses).[9]

In sum, in view of its pervasive scheme allowing registration for secular uses of controlled substances, the CSA is not generally applicable.

ii. The CSA Is Not Neutral

For similar reasons, the CSA is not "neutral" as between secular and religious interests. The Act, on the one hand, classifies as "legitimate" uses of controlled substances for secular "medical," "industrial," "research," and "scientific" purposes. See, e.g., 21 U.S.C. §§ 801a(1), 801(a)(1), 801a(3), 802(2); 21 U.S.C. 801(1). On the other hand, the CSA treats religious use of a controlled substance as illegitimate with the sole exception of the special status granted the Native American Church ("NAC"), which is permitted to use peyote, a Schedule 1 controlled substance. 21 C.F.R. § 1307.31 (2000).

The Free Exercise Clause prohibits governmental classification of secular claims for registration as "legitimate" and religious claims as "illicit." See Rader, 924 F. Supp. at 1555 ("If a law or policy provides exemptions for certain [secular] reasons . . . then it should provide similar exemptions for religious purposes, unless the state can show an overriding compelling interest". This principle is especially applicable where all variables other than the purpose of the proposed use (e.g.,

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[9]The criminal provisions of the CSA also reflect this system of exception by registration. Section 841 provides that, "*[e]xcept as authorized by this subchapter*, it shall be unlawful for any person . . . to manufacture, distribute, or dispense . . . a controlled substance," 21 U.S.C. § 841(a) (emphasis added). Elsewhere, the CSA states that it "shall be unlawful for any person . . . to possess a controlled substance *unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter.*" 21 U.S.C. § 844(a) (emphasis added).

minimal likelihood of diversion , lack of prior criminal record relating to controlled substances), are similar for both the secular and religious applicants.

Moreover, the CSA is not neutral among religions. As mentioned above, the DEA expressly permits one religion, the Native American Church, to use a Schedule I substance for sacramental purposes:

> The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration. Any person who manufactures peyote for or distributes peyote to the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of law.

21 C.F.R. § 1307.31. By expressly singling out the NAC as the only religious entity allowed to enjoy protection from the sanctions of the CSA, the CSA creates an unlawful bias in favor of one religion over all others. The First Amendment does not permit such favoritism. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Larsen v. Valente, 456 U.S. 228, 244 (1982).

Thus, the CSA not only is not "generally applicable"; it also is not "neutral."

b. Application of the CSA in a Manner that Interferes with Plaintiffs' Sacramental Use of Hoasca Is Not Justified by a Compelling Governmental Interest Carried Out by the Least Restrictive Means

The compelling interest test applied in RFRA cases is the same test applied in First Amendment analysis when a law is found to be either not generally applicable or not neutral. As argued above, the defendants cannot show that the application of the CSA in a manner that interferes with the plaintiffs' sacramental use of Hoasca is justified by a compelling interest carried out by the least restrictive means.

3. Defendants' Treatment of Plaintiffs Violates Their Right to Equal Protection Under the Law

The Fifth Amendment requires the federal government accord all persons the equal protection of law; that it treat alike all persons similarly situated. "In order to assert a viable equal protection claim, plaintiffs must first 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) (footnotes, quotations, and ellipses omitted), cert. denied, 121 S. Ct. 68 (2000). The principle of equal protection of law forbids selective enforcement based upon an "unjustifiable standard such as race, religion, or other arbitrary classification." United States v. Batchelder, 442 U.S. 114, 125 n.9 (1979).

In the instant case, it is plain that defendants are selectively enforcing the CSA based on plaintiffs' religious classification. The UDV is similarly situated to the NAC in all significant respects. Both the UDV and the NAC are religious entities that use perception-altering substances in religious ceremonies. In both religions, that substance is a sacrament; and, in both, the ingestion of that substance is necessary to the proper conduct of religious ceremonies. See Smith Decl. ¶ 14 (Ex. H); Indian Inmates v. Grammer, 649 F. Supp. 1374, 1375-76 (D. Neb. 1986), aff'd without op., 831 F.2d 301 (8th Cir. 1987).[10]

The NAC holds no special quality or attribute that would justify defendants' more favorable treatment of it. Indeed, the NAC has some attributes that would make it a less favorable candidate for permission to use a perception-altering substance in religious ceremonies. For several reasons, the likelihood of diversion of peyote from NAC ceremonies to impermissible uses is greater than any likelihood that such diversion would take place with the UDV's ceremonial use of Hoasca. First, the

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[10]The Smith Declaration ¶14 (Ex. H) provides additional extensive analysis of the similarities of the UDV and NAC religion including the similarity of the religious significance of the ingestion of both the peyote and the tea as "holy communion" and the proscriptions both religions maintain against the use of the respective sacraments outside the religious ceremony and against the use of alcohol or other drugs by members at any time.

NAC, with its 250,000 members, is over a thousand times larger than the UDV in the United States. Far more people in the United States are already permitted to ingest peyote in ceremonies of the NAC than would be permitted to ingest the tea in ceremonies of the UDV. As the court observed in Peyote Way Church of God, Inc. v. Smith, 742 F.2d 193 (5th Cir. 1984), "In the absence of evidence, we cannot simply assume that the psychedelic is so baneful that its use must be prohibited to a group of less than 200 members but poses no equal threat when used by more than 250,000 members of the Native American Church." Id. at 201.

Second, the NAC is loosely organized. See, e.g., Boyll, 774 F. Supp. at 1336 ("[T]he [NAC] is a non-hierarchical church and has no central organization which dictates church policy. The [NAC] consists of a number of loosely affiliated local chapters."). The UDV, in contrast, is tightly organized in a hierarchical structure, which directs local congregations. Thus, the UDV is in a much better position to control the production, distribution and use of Hoasca than is the NAC with respect to the production, distribution and use of peyote.

Third, the UDV takes responsibility for producing Hoasca, whereas groups in the NAC obtain peyote from sources outside the church. See Boyll at 1337.

Moreover, although Native American tribes and tribal lands have a special status under the Constitution and other American law, that status is irrelevant to the NAC's peyote exemption under 21 C.F.R.§ 1307.31 and was not the basis for such exemption. The language of the exemption itself applies to all members of the NAC, not just Native American members. See 21 C.F.R. § 1307.31.[11]

The Food and Drug Administration ("FDA"), which created the exemption, 31 Fed. Reg. 4679 (1966), did not even consider the special legal status of Native Americans in framing the exemption.

[11]Significantly, the peyote exemption found in the New Mexico statutes, is not limited to Native American members of the NAC, nor to NAC members. Instead it applies to "the use of peyote in bona fide religious ceremonies by a bona fide religious organization, . . ." See NMSA § 30-31-6(D).

Instead, the FDA made it clear that it believed that the NAC's exemption was required by the First Amendment regardless of whether it was expressly promulgated in regulation. Letter from FDA Commissioner Larrick to Congress, 111 Cong. Rec. 15,978 (1965) ("We believe the constitutional guarantee of religious freedom fully safeguards the rights of the [NAC] and its communicants" regardless of whether the NAC is given an express legal exemption).[12]

Therefore, although the UDV and its members are similarly situated to the NAC and its members, defendants have failed and refused to treat them similarly. NAC members may freely exercise their religion and UDV members may not. The Fifth Amendment does not permit such conduct. See United States v. Armstrong, 517 U.S. 456, 464 (1996) ("One of these constraints, imposed by the equal protection component of the Due Process Clause of the Fifth Amendment, . . . is that the decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification, . . .") (citations omitted).

4. Even if Defendants Were Not Violating Plaintiffs' Rights Under RFRA and the Free Exercise and the Equal Protection Clauses, Their Actions Are Nevertheless Illegal Because Hoasca Is Not a Controlled Substance

In enacting the CSA, Congress specifically identified and defined a number of substances as "controlled substances" subject to strict regulation, and it listed the substances in specific schedules. See 21 U.S.C. § 812. In addition, Congress delegated to the Attorney General (who in turn has delegated to the DEA) the authority to designate additional substances as controlled, to transfer substances from one of the five schedules to another, and to remove substances from controlled status altogether. See 21 U.S.C. § 811(a).

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[12]Moreover, no different or additional rationale was expressed when the FDA originally promulgated the regulation. See 31 Fed. Reg. 565 (1966) (proposed rule; no exemption proposed or discussed); 31 Fed. Reg. 4679 (1966) (exemption included in final rule), when it was re-promulgated by the Bureau of Narcotics and Dangerous Drugs, see 36 Fed. Reg. 4928, 4950 (1971) (proposed rule); 36 Fed. Reg. 7776, 7802 (1971) (final rule), or when it was redesignated, see 38 Fed. Reg. 26,609 (1973).

Congress's establishment, and the DEA's administration, of this classification scheme reveal a clear distinction between chemical substances in laboratory form and plant materials that naturally contain a quantity of such substances. In instances where Congress and the DEA have sought to regulate production, distribution, and use of *both* a chemical substance *and* a plant that contains it, they have made clear by express definition that the scheduling includes the natural plant or they have scheduled the substance and the plant separately.

One of the plants that comprise Hoasca, *psychotria viridis*, is naturally composed, in very small part, of DMT. DMT is a naturally occurring chemical present in numerous plants "throughout the plant kingdom." Nichols Decl. ¶6 (Ex. M). Indeed. DMT is found naturally even in a normal human body. Id. However, neither *psychotria viridis* nor any other plant or plant material in which DMT is found is included in any definition of a controlled substance or in any schedule, either by statute or by regulation. Congress and the DEA have elected to schedule only the synthetic version of DMT, and not any plant material where it is found to be present. See 21 U.S.C. § 812(c), Schedule I(c)(6).

The legislative history of the original DMT scheduling decision shows that Congress and the DEA were concerned only about the abuse potential of *synthetic* DMT. Well-established principles of statutory construction mandate that this omission not be disregarded, and here its import is clear: synthetic DMT is currently a controlled substance, but plants in which DMT is found and a tea made from those plants are not.

Had Congress or the DEA intended to control both DMT and the plants in which DMT naturally exists, they could have expressly listed both the chemical substance and the plants containing it. Indeed, with respect to other controlled substances, they have done just that. For example, in the case of marijuana, the scheduled substance is not only the active constituent, tetrahydrocannabinol ("THC"), 21 U.S.C. § 812(c), Schedule I(C)(17); 21 C.F.R. § 1308.11(d)(27), but also "marihuana,"

21 U.S.C. § 812(c), Schedule I(c)(10); 21 C.F.R. § 1308.11(d)(19). The term "marihuana" is expressly defined as including the cannabis plant, which is the source of marijuana. The CSA defines "marihuana" as including "all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin." 21 U.S.C. § 802(16). Similarly, the chemical substance ibogaine is listed in 21 U.S.C. § 812(c), Schedule I(c)(8); 21 C.F.R. § 1308.11(d)(17); the schedule's listing of "trade and other names" for the substance separately includes "Tabernanthe iboga," the plant that naturally contains ibogaine.

Likewise, Schedule II includes various chemical forms of opium and a variety of "opiate" chemicals, 21 U.S.C. § 812(c), Schedule II(a)-(b); 21 C.F.R. § 1308.12(b)-(c) (e.g., raw opium, opium extracts, powdered opium, granulated opium, and tincture of opium); the schedule also, and separately, includes the plants "opium poppy" and "poppy straw," 21 U.S.C. § 812(c), Schedule II(a)(3); 21 C.F.R. § 1308.12(b)(3).

Still another example is Congress's treatment of cocaine. Schedule II expressly lists "cocaine" but also enumerates "coca leaves" and any "derivative or preparation of coca leaves." 21 U.S.C. § 812(c), Schedule II(a)(4); 21 C.F.R. § 1308.12(b)(4). Similarly, "mescaline" is listed in Schedule I; and separately listed is peyote, a plant that endogenously produces mescaline. 21 U.S.C. § 812(c), Schedule I(c)(11)-(12); 21 C.F.R. § 1308.11(d)(20) and (22).

The scheduling of DMT stands in stark contrast to these plant-substance pairings. Unlike the plants cannabis sativa, tabernanthe iboga, coca leaves, peyote, and opium poppy, neither *pyschotria viridis* nor any of the other plants in which endogenous DMT is found are referred to in any definition of a scheduled substance or in any list of "other names" of a scheduled substance. Thus, Congress and the DEA have chosen only to schedule synthetic DMT and nothing more.

This scheduling decision was made notwithstanding awareness on the part of Congress and the DEA that DMT is found naturally in some plants. DMT was first listed under the controlled-substances laws by the FDA in 1966. See 31 Fed. Reg. 4679 (Mar. 19, 1966). Soon thereafter, in considering amendments to those laws, Congress heard testimony about a number of hallucinogenic substances. An article from the Journal of the American Medical Association, placed in the record, stated that "DMT, *a synthetic indole*, [is] also found in the seeds of a South American plant (*piptadenia peregrina*)." (Emphasis added). See Drug Abuse Control Amendments of 1968, Hearings Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce, 90th Cong. 197 (1968) ("1968 Hearings"). The legislative record also includes a booklet that discusses DMT and states that "[a]lthough prepared synthetically, it is a natural constituent of the seeds of certain plants found in the West Indies and South America." See Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 91st Cong. 842 (1969) (Ex. 42, "Drug Abuse: A manual for law enforcement officers," at 14). As enacted, however, the CSA scheduled only "Dimethyltryptamine," 21 U.S.C. § 812(c), Schedule I(c)(6). The initial implementing regulations listed only "Dimethyltryptamine" and "[s]ome trade or other names: DMT." 21 C.F.R. § 1308.11 (1974). That regulation is the same today. Compare id. with 21 C.F.R. § 1308.11(d)(16) 2000. Plants in which DMT is found have never been scheduled, by statute or regulation.

That Congress and the DEA did not schedule any plants in which DMT can be found when they chose to schedule the synthetic substance (as they contemporaneously did, for example, by scheduling "peyote" in addition to "mescaline"), is explained by the fact that the focus of concern was the abuse potential only of synthetic DMT. This is clearly reflected in the legislative history of the CSA. In 1968 the FDA Commissioner testified about the dangers of hallucinogens, including DMT.

He provided a chart listing "laboratory seizures" of DMT and LSD. See 1968 Hearings, at 68 (testimony of Commissioner James Goddard). His description of the DMT "dosage form" is consistent with synthetic DMT: he mentioned "intramuscular" (*i.e.*, injected) delivery and "inhalation," but not oral ingestion in any plant form. Id. at 76. DMT was described elsewhere in the legislative history as "a relatively new *synthetic*." Id. at 197 (JAMA article) (emphasis added). By omitting any DMT-containing plant or plant substance from the list of controlled substances, while expressly including other plants containing other chemical substances, Congress and the DEA have made their intent clear. Plants in which DMT naturally occurs are not controlled substances and the reference to "Dimethyltryptamine" in Schedule I should be read as a reference solely to synthetic DMT.

Congress has acted similarly with respect to other hallucinogenic substances. For example, the CSA lists lysergic acid amide ("LSA") as a controlled substance. See 21 U.S.C. § 812(c), Schedule III(b)(4). LSA is contained in the ubiquitous seeds of the morning glory flower. These seeds can be legally purchased in supermarkets, hardware stores, and nurseries throughout the country. The seeds are commonly consumed by recreational users throughout the country. In fact, numerous web sites devoted to those seeking a "psychedelic" experience from morning glory seeds tout the legality of the seeds. See e.g., www.totse.com/en/drugs/psychedelics/morngly.html. It is beyond dispute that neither Congress nor the DEA has listed the morning glory seeds as controlled substances.

The fact that a plant material contains a controlled substance simply does not mean that the plant should be considered to be a controlled substance. To conclude to the contrary -- that "DMT" somehow encompasses plants that naturally contain the substance -- would violate several established rules of statutory construction, to say nothing of criminalizing numerous plants and animals, including humans, whose bodies contain the same naturally occurring substance. See Nichols Decl. ¶ 6.

First, Congress is presumed to avoid superfluous drafting. See, e.g., Gustafson v. Alloyd Co., 513 U.S. 561, 574 (1995) ("Court will avoid a reading which renders some words altogether redundant"); Fuller v. Norton, 86 F.3d 1016, 1024 (10th Cir. 1996) ("We avoid interpreting statutes in a manner that makes any part superfluous."). If the listing of a controlled substance is broadly construed to encompass all plants that contain the substance, the separate and independent plant listings described above would be superfluous. Indeed, the government has argued and the courts have agreed that the scheduling of plants separate from the chemicals they contain is meaningful and not superfluous. For example, the government has disputed the notion that *cannibis* (marijuana) plants that are void of THC are not scheduled controlled substances. See United States v. Coslet, 987 F.2d 1493, 1496 (10th Cir. 1993) ("21 U.S.C. § 802(16) defines marijuana as 'all parts of the plant *Cannabis sativa L* . . . ' Under this definition, the 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. [§] 841."); United States v. Northrop, 972 F. Supp. 158, 163 (W.D.N.Y. 1997) ("The presence of THC is not required for a plant to be considered marijuana under 21 U.S.C. [§] 802(16)"). Given that the scheduling of plants separately from the related chemical substance has meaning and is not surplus verbage, the failure of Congress and the DEA to list any plant that contains DMT necessarily establishes that neither sought to prohibit the use, possession, importation, or distribution of *psychotria viridis* or Hoasca.

Second, an interpretation that would read "DMT" broadly to include all plants that contain the substance would, if applied consistently, render ineffective the special exemption for peyote use by members of the Native American Church. See 21 C.F.R. § 1307.31. That result would violate the canon against constructions that contradict or eviscerate other parts of a statutory scheme. See, e.g.,

United Sav. Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988); Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, (1992).

The NAC exemption specifically permits the use of "peyote," not the use of "mescaline" which is separately listed in Schedule 1. 21 U.S.C. 821(c), Schedule I(c) (11); 21 C.F.R. § 1308.11(d)(20). But peyote naturally contains mescaline, just as *psychotria viridis* naturally contains DMT. If the listing of a substance encompasses all plants that contain the substance, then the exemption for peyote alone is meaningless: the NAC would violate the CSA at each of its ceremonies by using a plant that contains "mescaline." Under this method of interpreting the CSA, a meaningful exemption would need to authorize the NAC's use of peyote *and* mescaline. No one — not Congress, nor the DEA, nor the courts, nor the NAC — interprets the CSA and the regulations this way; and to do so would violate the canon against interpretations that contradict other parts of a statutory scheme. But that is precisely the reading one must adopt to regard both *psychotria viridis* and a tea made from it as controlled substances simply because the chemical DMT is scheduled.

Third, in accordance with the canon of *expressio unius est exclusio alterius*, the fact that Congress has utilized a system of detailed definitions and listings for giving notice of the substances that are scheduled warrants the conclusion that natural substances that are *not* listed are *not* scheduled. See, e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) (overturning Fifth Circuit's imposition of a heightened pleading standard for § 1983 actions because "the Federal Rules [of Civil Procedure] do address . . . the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. *Expressio unius est exclusio alterius.*"). "A statute listing the things it does cover exempts, by omission, the things it does not list. As to the items omitted, it is a mistake to say that Congress has been silent. Congress has spoken – these are matters outside the

scope of the statute." Original Honey Baked Ham Co. v. Glickman, 172 F.3d 885, 887 (D.C. Cir. 1999). To hold otherwise would offend what the Supreme Court has called the "one, cardinal canon before all others" – namely "that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (citations and quotation omitted). When Congress and the DEA specifically enumerated "dimethyltryptamine . . . trade or other names: DMT" as a Schedule I substance, they meant what they said, and no more.

Fourth, where Congress has scheduled other plants but not *psychotria viridis*, to find that the latter is implicitly bound up in the listing for "DMT" would violate the rule of lenity. This maxim provides that penal statutes should be narrowly construed, and that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." See United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-22 (1952). The CSA is a penal statute with severe criminal penalties for using, distributing, manufacturing, or importing controlled substances without authorization. See 21 U.S.C. § 841. However, the rule of lenity dictates that a person should not suffer a criminal penalty if the application of a criminal statute to his conduct is doubtful. A person is "not to be subjected to a penalty unless the words of the statute plainly impose it," United States v. Campos-Serrano, 404 U.S. 293, 297 (1971) (quotation omitted). Here, far from "plainly impos[ing]" liability, the conspicuous absence of any plants containing DMT from the schedules of controlled substances suggests just the opposite: that the plants and a tea made from the plants are not controlled substances at all.

Fifth, the treatment of *psychotria viridis* and Hoasca as controlled substances raises significant constitutional questions because of the burden that such treatment imposes on the UDV's practice of religion. The CSA does not expressly cover this plant or this tea. In the absence of a clearly expressed congressional intent to the contrary, a statute should be construed to avoid constitutional difficulties. See NLRB v. Catholic Bishop of Chicago, 440 U.S. 490. 500 (1979) (requiring that "the affirmative intention of Congress [be] clearly expressed" before a statute would be construed as possibly encroaching on First Amendment rights) (quotation omitted); see also Pub. Citizen v. United States Dep't. of Justice, 491 U.S. 440, 465-66 (1989); Edward J. DeBartolo Corp. v. Fl. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). Because the context does not clearly require it, the CSA should not be given an interpretation that creates serious constitutional difficulties.

The introductory language in 21 U.S.C. § 812(c), Schedule I(c) and 21 C.F.R. § 1308.11(d) – "any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances" – should not be interpreted as reaching a plant that naturally contains a substance whose synthetic form is scheduled. Such an interpretation would be contrary to all five of the rules of construction just discussed. Plainly, in drafting this introductory language Congress intended the Act to cover any human manipulation of a scheduled substance. Only such an interpretation is consistent with the purpose of the Act and the rules of statutory construction. Thus, where a plant is scheduled, any material, compound, mixture or preparation that contains any quantity of any part of the plant would be covered. Similarly, where a synthetic substance is scheduled, any material, compound, mixture or preparation that contains any quantity of the synthetic substance would be covered. However, where, as in the case of DMT, the synthetic form of a substance is scheduled but a plant that naturally contains the substance is not scheduled, then manipulations of the synthetic substance (and the synthetic substance, itself) are covered, but manipulations of the plant

(and the plant, itself) are not. Where that result is unsatisfactory, the obvious and readily available remedy is to schedule the plant (if the statutory requirements for scheduling are met). Under the CSA, such scheduling can be accomplished by administrative action, without going back to Congress. 21 U.S.C. § 811(a).

This interpretation of the introductory language is reinforced by the contrast between that language and the parallel language in Schedule II. The relevant text in Schedule I(c) is:

> Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances . . . .

21 U.S.C. § 812(c), Schedule I(c); 21 C.F.R. § 1308.11(d).[13] The parallel text in Schedule II(a) is:

> Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis . . . .

21 U.S.C. § 812(c), Schedule II(a); 21 C.F.R. § 1308.12(b). The text of Schedule II expressly focuses on extraction of a substance from plants ("substances of vegetable origin"). Thus, in drafting Schedule II(a), Congress made clear its intent, as a matter of general policy, to reach the scheduled substances not only when they are chemically synthesized but also when they are extracted from plants. That intent is not reflected in the parallel language in Schedule I(c).

Consequently, in the absence of a relevant specific exception (or listing in another schedule), the listing of a substance in Schedule II(a) includes the substance both as synthesized and as extracted from a plant. Under the language of Schedule I(c), however, in the absence of a relevant specific

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[13] The same language appears in 21 U.S.C. § 812(c), Schedule III(a) and (b); 21 C.F.R. §§ 1308.13(b), (c), 1308.15(d). Variations on this language appear in 21 U.S.C. § 812(c), Schedule III(d) and Schedule V; and in 21 C.F.R. §§ 1308.13(e), 1308.15(b), (c).

exception (or listing in another schedule), a listed substance may be solely a synthesized substance or solely a natural substance or both if expressly stated.

For all of the forgoing reasons, it is clear that the CSA cannot be read to list *psychotria viridis, banisteriopsis caapi,* or Hoasca tea as controlled substances. This Court should so declare.

5. Defendants' Interpretation of the CSA to Interfere with Plaintiffs' Religious Use of Hoasca Is Arbitrary and Capricious and In Violation of the Administrative Procedure Act

The Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, bestows a right of judicial review and equitable relief to persons adversely affected by agency action. Pursuant to this statute, this Court may declare unlawful and set aside agency action that is inter alia 1) "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law:" 2) unconstitutional; 3) taken without statutory authority; or 4) taken without following required procedure. 5 U.S.C. § 706(2)(A), (B), (C), & (D).

This Court should set aside and declare unlawful defendants' decisions to deny plaintiffs protection from criminal prosecution, search plaintiffs' premises and seize sacramental *Hoasca* tea without probable cause, and to consider the Hoasca tea and the plants from which it is derived to be controlled substances under the CSA. This is so because these decisions, as explained above, 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.

While deference is owed by courts reviewing statutes, no such deference is owed to an agency's statutory interpretation that was not reached through proper rulemaking procedures. Mission Group Kansas, Inc. v. Riley, 146 F.3d 775, 781 n.4 (10th Cir. 1998). 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. Thus defendants' action at issue in this case is owed no deference. Moreover, even if defendants had properly promulgated such a regulation, this court should give it no weight because it would be "plainly erroneous" and unconstitutional. See id.

Thus, this Court has the authority and duty under the APA to execute an order setting aside defendants' decisions that the Hoasca tea and the plants from which it is derived are controlled substances under the CSA, and that plaintiffs are not entitled to protection from prosecution for the use, possession, distribution, and importation of the Hoasca tea for religious purposes. Moreover, this Court has the authority and duty under the APA to order defendants to return to plaintiffs the Hoasca tea and other items seized from plaintiff Jeffrey Bronfman.

6. International Law and Treaties Also Prohibit Defendants' Interference with Plaintiffs' Religious Use of Hoasca

An additional reason to permit the UDV to use the Hoasca tea for sacramental purposes arises from the international law doctrine of comity, which requires that U.S. tribunals give consideration to the decisions of foreign governments when applying U.S. law in areas that implicate international interests. See, e.g., Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

Brazil, an important treaty partner of the United States,[14] has granted official government recognition to the UDV and permits its use of Hoasca for sacramental purposes. Several members of the UDV in the United States are citizens of Brazil. See Bronfman Decl. ¶ 23 (Ex. A); see also Barreto

[14]Brazil and the United States are party to more than ninety bilateral treaties. See U.S. Dept. of State, Treaties in Force 29-32 (1999). Brazil ranks second to the United States in the Western Hemisphere in population. See U.S. Census Bureau, International Data Compilation (1999). Brazil's volume of trade with the United States is twice that of any other country in South America. See Office of Trade & Economic Analysis, U.S. Dept. of Commerce, Web Site (3/10/00). More than 135,000 individuals of Brazilian national origin reside within the United States. See U.S. Census Bureau, *International Population of United States*, Table I (1997).

Decl. ¶ 3 (Ex. C). The applicability of the principle of comity is strengthened in the area of *religious* practice by Congress's recent actions of ratifying a treaty and enacting a statute to protect transnational religious freedom and to advance international reciprocity in the protection of religious freedom. Finally, the fact that the Government of Brazil has officially recognized the UDV distinguishes this case from other imaginable cases involving asserted religious use of a controlled substance, and therefore strengthens the RFRA and constitutional arguments presented here.

In the oft-quoted definition the U.S. Supreme Court provided over a century ago, comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." Hilton, 159 U.S. at 163-64. The comity doctrine "refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." Société Nationale Industrielle Aerospatiale v. United States Dist. Court, 482 U.S. 522, 544 n.27 (1987); see also id. at 555 (Blackmun, J., concurring in part and dissenting in part) (comity is "a principle under which judicial decisions reflect the systemic value of reciprocal tolerance and goodwill"). The deference to foreign legal and political judgments embodied in the comity principle "fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations." Spatola v. United States, 925 F.2d 615, 618 (2d Cir. 1991).

Although comity is often invoked in resolving differences between *judicial* tribunals at home and abroad, the principle applies equally to "legislative" and "executive" acts of foreign governments. See Hilton; see also Phila. Gear Corp. v. Phila. Gear de Mexico, S.A., 44 F.3d 187, 191 (3d Cir. 1994) ("Under the principle of international comity, a domestic court normally will give effect to *executive, legislative, and judicial acts* of a foreign nation." (quotation omitted) (emphasis added)).

One way in which courts and administrative agencies frequently apply comity is through the canon of statutory construction that, where reasonably possible, statutes should be construed and applied so as not to offend the norms of international law, including the principle of comity. See Hilton, 159 U.S. at 164-66; see also United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945) (L. Hand, J.) (describing comity as a "limitation[ ] customarily observed by nations upon the exercise of their powers" and holding that "we are not to read general words [in a statute] without regard" to such norms). Such international law is "part of our law." Hilton, 159 U.S. at 163. As Chief Justice Marshall explained long ago, a statute "ought never to be construed to violate the law of nations if any other possible construction remains." Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); see also Grunfeder v. Heckler, 748 F.2d 503, 509 (9th Cir. 1984) (en banc) ("Absent an expression of congressional intent to the contrary, considerations of courtesy and mutuality require our courts to construe domestic legislation in a way that minimizes interference with the purpose or effect of foreign law."); 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."). The principle of comity is squarely applicable to this case because Brazil, the nation with by far the greatest experience with and knowledge of the UDV, permits the UDV's religious use of Hoasca.

Brazil is also the home country of the UDV, and the location of thousands of UDV adherents. Brazil has made a considered judgment in favor of the legitimacy of the UDV and its sacramental use of Hoasca. Neither of the two plants that comprise Hoasca had ever been listed as an illegal substance by the Brazilian drug control authorities until 1985. However, in June 1985, the Brazilian Ministry of Health (DIMED) added one of the two plants, *banisteriopsis caapi*, to the prohibited list. Because such a listing would have rendered its religious ceremony illegal, the UDV immediately petitioned

Brazil's Federal Board of Narcotics ("CONFEN") to reevaluate the decision to prohibit use of *banisteriopsis caapi*. In 1986 a working group within CONFEN after months of study, concluded that Hoasca and ayahuasca had been used for "many decades without having caused any known social damage," and recommended that *banisteriopsis caapi* be removed from DIMED's list of proscribed drugs. See Brazil's CONFEN Resolution 06/86 (Ex. I). By 1992, CONFEN further determined that those who used Hoasca or ayahuasca were "able to implement its controls in a fully adequate manner, without any interference from the State," and therefore no government restriction was necessary. See Official Record of Brazil's Justice Ministry (1992) (Ex. J); see also Brazil's Federal Public Ministry Certification (1999) (Ex. K). This formal determination by the Government of Brazil should be respected.

Adding support to this argument, in 1992, the U.S. Congress ratified the United Nations International Covenant on Civil and Political Rights ("ICCPR"). See 138 Cong. Rec. S4781-84 (1992). Article 18(1) of that treaty provides:

> Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in the community of others and in public or private, to *manifest* his religion or belief in worship, observance, practice, and teaching.

U.N. International Covenant of Civil and Political Rights, Dec. 16, 1966 (emphasis added). This congressional action strengthens the applicability of the general doctrine of comity in a case such as this involving international religious freedom.

A similar affirmation of the primacy of religious belief is embodied in Article 18 of the Universal Declaration of Human Rights, which the United States endorsed as a member of the United Nations in 1948. See U.N. Universal Declaration of Human Rights, GA res. 217A, Dec. 10, 1948. The ICCPR and the Universal Declaration protect not just "belief" in the abstract, but the right to

"manifest" that belief through practice. As the United Nations Human Rights Committee, the principal international body that oversees implementation of the ICCPR, has explained, "[t]he freedom to manifest religion . . . in worship, observance, practice and teaching encompasses a broad range of acts" including "ceremonial acts" and "participation in rituals." See U.N. Hum. Rts. Comm., General Comment No. 22, at 4 (1993).

The UDV's ceremonial use of Hoasca falls squarely within this concept of "manifesting" religious belief, and so is precisely the type of practice that Congress intended to protect worldwide by ratifying the ICCPR and, earlier, the Universal Declaration. The obligations under these documents are not merely ones of neutral non-interference. By ratifying the ICCPR, the United States agreed "to take the necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present covenant." An injunction preventing criminal prosecution of UDV members for their use of Hoasca in their religious ceremonies is just such a "measure" that is "necessary to give effect to" the rights enshrined in the ICCPR and the Universal Declaration. These treaty obligations reinforce the government's duty to permit the free exercise of religion that the Free Exercise Clause and RFRA already impose.[15]

Congress's recent enactment of the International Religious Freedom Act ("IRFA"), Pub. L. No. 105-292, 112 Stat. 2788 (1998) (codified at 22 U.S.C. §§ 6401-6481 (Supp. IV 1998)), further reflects its commitment to enhancing religious freedom across national boundaries, and further supports the comity rationale for permitting the UDV to make sacramental use of Hoasca in the United States. In

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[15] It is unlikely that these treaties impose a higher standard of protection of religious freedom than that under the First Amendment and RFRA. However, because the ICCPR has been ratified by Congress and is the law of the land, and because it permits intrusion on religious practice only where "necessary" (a version of the compelling interest standard), at least one commentator has suggested that RFRA's imposition of the compelling-interest test, which was enacted shortly after ratification of the ICCPR, was required to conform the federal government's conduct to the standard it had agreed to in the ICCPR. See Gerald L. Neuman, The Globalinves Dimension of RFRA, 14 Const. Comment 33 (1997).

the IRFA, Congress described religious freedom as "a fundamental right" and a "pillar of our Nation," and noted that the United States has "honored this heritage by standing for religious freedom and offering refuge" to those from abroad who sought to practice their religion in the United States. 22 U.S.C. § 6401(a). The IRFA was needed, Congress found, because over half the world's population lives under governments that "restrict or prohibit the freedom . . . to . . . believe, observe, and freely practice the religious faith of their choice." Id. Congress established "the policy of the United States" to "promote . . . freedom of religion," and to "work with foreign governments that affirm and protect religious freedom, in order to develop multilateral . . . initiatives to . . . promote the right to religious freedom abroad." 22 U.S.C. § 6401(b).

Although the IRFA was aimed at abuses of religious freedom occurring outside the United States, through IRFA Congress has expressed a strong view of the necessity of international tolerance of religious practice. In enacting the IRFA and establishing the position of Ambassador at Large for International Religious Freedom, see 22 U.S.C. § 6411(a), Congress was acutely concerned about the way other nations treated religious practices of Americans abroad, and about their treatment of foreign adherents of religions that are important to Americans. A representative of American missionaries told a Senate committee that "over 170,000 Americans, representing over 800 denominational and nondenominational agencies, are involved in some type of religious work overseas" and that these individuals "have an enormous stake in" the IRFA because of obstacles they face abroad. See *International Religious Freedom Act of 1998, Hearings on S-1868 Before Senate Foreign Rel. Comm.*, 105th Cong., 2d Sess., 1998 WL 375933 (F.D.C.H.) (statement of Rev. John N. Akers) [hereinafter "IRFA Hearings"].[16] Clearly, then, the IRFA represents Congress's strong statement that other

[16]The IRFA Hearings are replete with references to the need to prevent religious persecution of Americans abroad. See, e.g., IRFA Hearings, May 12, 1998, 1998 WL 241656 (F.D.C.H.) (statement of Sen. Lieberman) (emphasizing the need to address the "serious violence against Christians" overseas and the "terrorization . . . [of] minority faiths, particularly Christians"); IRFA Hearings, June 17, 1998, 1998 WL 325457 (F.D.C.H.) (statement of

nations should permit the free exercise of *all* religions within their borders. Satisfaction of "mutual expectations" – or, in simpler words, practicing what we preach – should lead the United States to grant 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. Any other position by the U.S. Government would undermine its moral authority to urge, and thus its practical ability to persuade, other nations to respect non-indigenous religions within their own borders. See IRFA Hearings, May 12, 1998, 1998 WL 265196 (F.D.C.H.) (statement of Hon. John Shattuck, Asst. Sec. of State for Democracy, Human Rights and Labor) (quoting Secretary of State Madeleine Albright's opinion that "our commitment to religious freedom is . . . a fundamental source of our strength in the world. We simply could not lead without it. We would be naive to think that we could advance our interests without it.").

The Brazilian Government's recognition of the UDV after an extensive investigation provides a unique assurance that the UDV is a bona fide religion. The participation of the Brazilian drug control agency, CONFEN, in that recognition provides a unique assurance that granting permission to the UDV to use Hoasca does not undermine the overall drug-control regime. The willingness of the United States to give credence to this Brazilian experience and decent respect for the Brazilian decision to recognize the UDV will not only show comity to, and enhance our relations with, that country, but will also demonstrate our government's willingness to give appropriate respect to a multi-cultural international community generally.

Felice Gaer, Dir. of Jacob Blaustein Institute, American Jewish Committee) (testifying about the need for IRFA to address antisemitism abroad); 144 Cong. Rec. S11331 (1998) (statement of Sen. Nickles) (report documenting abuses against minority religions of uniquely American origin, such as The Church of Jesus Christ of Latter-day Saints (Mormons), Jehovah's Witnesses, and Scientologists).

B. Plaintiffs Will Suffer Irreparable Harm If They Are Not Provided the Injunctive Relief Requested

The irreparable harm plaintiffs will suffer if they are not granted an injunction allowing them to practice their religion is plain. The Supreme Court has held that loss of constitutional guarantees "unquestionably" constitutes irreparable harm. See, e.g., Elrod v. Burns, 427 U.S. 347, 373 (1976); see also American Civil Liberties Union v. Johnson, 194 F.3d 1149 (10th Cir. 1999) (curtailment of First Amendment rights constitutes irreparable injury); Covino v. Patrissi, 967 F.2d 73, 77 (2d Cir. 1992) (Fourth Amendment violations found to constitute irreparable injury); East High School Prism Club v. Seidel, 95 F. Supp.2d 1239, 1251 (D. Utah 2000) (First Amendment); Bauchman By and Through Bauchman v. West High School, 900 F. Supp. 248, 251 (D. Utah 1995) (First Amendment); Cohen v. Coahoma County, Miss., 805 F. Supp. 398, 406 (N.D. Miss. 1992) ("It has repeatedly been recognized by the federal courts at all levels that violation of constitutional rights constitutes irreparable harm as a matter of law.") (citing cases). See generally 11A Wright, Miller & Kane § 2944, at 94.

In this case, plaintiffs have shown that the law overwhelmingly establishes that defendants' interference with plaintiffs' sacramental use of Hoasca violates plaintiffs' constitutional rights under the First and Fifth Amendments, as explained above, and the Fourth Amendment as explained below.

Moreover, plaintiffs' declarations establish in detail just how defendants' interference with their ability to partake in their sacrament is causing plaintiffs spiritual and emotional strain and preventing plaintiffs from practicing their religion. See Bronfman Decl. ¶¶ 79-87 (Ex. A); (Ex. B); Barreto Decl. ¶ 8 (Ex. C). Without an injunction preventing defendants from enforcing the CSA against plaintiffs in a manner interfering with plaintiffs' right to possess and consume Hoasca for religious, sacramental purposes, plaintiffs will never be able to practice their religion in this country.

C. Any Potential Damage Resulting from the Injunction Is Outweighed By the Harm Caused to Plaintiffs

As discussed above, if plaintiffs are permitted to possess and use Hoasca within the doctrinal practices of their faith, there is little chance of harm to plaintiffs or of diversion of Hoasca to those other than UDV adherents. In contrast, however, it is certain beyond a doubt that if plaintiffs continue to be prevented from engaging in the sacramental use of Hoasca, their religion will wither and they will not be able to exercise their faith. Under these circumstances, this balancing test weighs heavily in favor of plaintiffs' right to partake in Hoasca.

D. The Requested Injunction Is Not Adverse to the Public Interest

As plaintiffs have explained above, permitting them to partake in Hoasca will not open the floodgates to use of illegal drugs in the United States. The public will not be harmed by allowing plaintiffs to engage in their ritual consumption of Hoasca.

To the contrary, the public will be served by this Court's assurance that the integrity of the constitutional rights of citizens and residents of this country are maintained. The vindication of constitutional rights is in the public interest. Elam Const. Inc. v. Regional Transp. Dist., 129 F.3d 1343, 1347 (10th Cir. 1997), cert. denied, 523 U.S. 1047 (1998) ("The public interest...favors plaintiffs' assertion of their First Amendment rights"). Moreover, the public has an interest in seeing that the government obeys the law. Reuters Ltd. v. F.C.C., 781 F.2d 946, 950-51 (D.D.C. 1986) ("[a]d hoc departures from rules . . . cannot be sanctioned . . . for therein lies the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action").

For all of these reasons, plaintiffs are entitled to a preliminary injunction permitting their sacramental use of Hoasca.

IV PLAINTIFFS ARE ENTITLED TO THE RETURN OF THEIR SEIZED PROPERTY INCLUDING THE HOASCA TEA

The warrants executed in this case permitting the interception of the Hoasca tea shipment and the search of Plaintiff Bronfman's office were based upon the belief that plaintiffs possessed or were to receive a controlled substance as that term is defined under the CSA. See Search Warrant and Affidavit (Ex. L). Probable cause for a search exists only where there exists facts sufficient to reasonably believe that "an offense has been or is being committed." United States v. Mesa-Rincon, 911 F.2d 1433, 1439 (10th Cir. 1990) (quoting Brinegar v. United States, 338 U.S. 160 (1949)). As explained above, Hoasca is not a controlled substance and even if it were, plaintiffs' use of Hoasca is protected by the U.S. Constitution and RFRA unless and until the government satisfies the Court that it has a compelling interest in preventing the sacramental use of Hoasca and that it has adopted the least restrictive means to serve its compelling interest. Accordingly, defendants had no probable cause to conduct the search of Plaintiff Bronfman's office, to intercept the Hoasca shipment, or to seize the Hoasca from Plaintiff Bronfman's office. It was not reasonable to believe that an offense had been or was being committed because the "offense" suspected by defendants, possession of the Hoasca tea, is no offense at all. These searches and seizures were conducted in violation of plaintiffs' Fourth Amendment rights.

Moreover, inasmuch as the Hoasca tea and other seized items are not contraband or evidence of a crime, the seizure of plaintiffs' property was carried out in violation of their Fifth Amendment due process rights to be provided notice and hearing. See United States v. James Daniel Good Real Property, 510 U.S. 43, 52 (1993). Where the government seizes property to assert ownership and control of it, rather than to preserve it as evidence of criminal wrongdoing, its action must comply with the Due Process Clause of the Fifth Amendment and it must provide the owners of the property notice and hearing. See id. The Hoasca tea and other seized property cannot serve as evidence of a crime

because the possession of Hoasca is not a crime. Thus, defendants' seizure of the property was improper inasmuch as they provided plaintiffs no notice or hearing prior to or after the seizure. Such action violates plaintiffs' Fifth Amendment due process rights.

For these reasons, this Court should issue an order requiring that Defendants return to Plaintiffs the unlawfully seized Hoasca and other items.

CONCLUSION

On the basis of the facts and law set forth in plaintiffs' motion for preliminary injunction and in this memorandum in support thereof, plaintiffs have established their entitlement to a preliminarily injunction 1) preventing defendants from unlawfully threatening to take or taking any criminal or any other adverse action against plaintiffs for their sacramental use of Hoasca; 2) preventing defendants from interfering with plaintiffs' religious, sacramental possession and use of Hoasca; and 3) requiring defendants to return the seized Hoasca tea and other seized items to plaintiff Bronfman. Plaintiffs respectfully request that the Court enter such an order forthwith.

Respectfully submitted,

FREEDMAN, BOYD, DANIELS,
HOLLANDER, GOLDBERG & CLINE, P.A.

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I hereby certify that a copy of the foregoing was sent via Federal Express to Elizabeth Goitein, Esq., United States Dept. of Justice, Civil Division, 901 E Street, N.W., Room 1032, Washington, D.C. 20004, this 22d day of December, 2000.

Nancy Hollander/JDL

EXHIBITS TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

A Jeffrey Bronfman Declaration

B David Lee Lenderts, M.D. Declaration

C Maria Cristina N.C. de Barros Barreto Declaration

D Christine Anne Berman Declaration

E Marlene Dobkin de Rios, Ph.D. Declaration

F Charles S. Grob, M.D. Declaration

G Published article titled *Human Psychopharmocology of Hoasca, a Plant Hallucinogen Used in Ritual Context in Brazil* by Charles S. Grob, et al.

H Huston Smith, Ph.D. Declaration (withdrawn by 5/30/01 Order)

I Resolution 06/86 of Federal Narcotics Board of Brazil [English translation attached]

J Entry from Official Diary of Brazil, Aug. 24, 1992 [English translation attached]

K Certification from Attorney General of Brazil, Dec. 20, 1999 [English translation attached]

L Affidavit and Search Warrant, May 21, 1999

M David E. Nichols, Ph.D. Declaration

N Dr. Glacus de Souza Brito, M.D. Declaration [English translation attached]

O Charles Schuster, Ph.D. Declaration