

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ALBERTO R. GONZALES, :

4 ATTORNEY GENERAL, ET AL., :

5 Petitioners, :

6 v. : No. 04-1084

7 O CENTRO ESPIRITA BENEFICIENTE :

8 UNIAO DO VEGETAL, ET AL. :

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10 Washington, D.C.

11 Tuesday, November 1, 2005

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13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States at
15 11:05 a.m.

16 APPEARANCES:

17 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,
18 Department of Justice, Washington, D.C.; on behalf of
19 the Petitioners.

20 NANCY HOLLANDER, ESQ., Albuquerque, New Mexico; on behalf
21 of the Respondents.

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P R O C E E D I N G S

[11:05 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument next in Gonzales versus O Centro Espirita Beneficiente Uniao Do Vegetal.

Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER

ON BEHALF OF PETITIONERS

MR. KNEEDLER: Mr. Chief Justice, and may it please the Court:

The Court of Appeals decision in this case carves out an exception to the categorical prohibition for the Controlled Substances Act in order to permit respondents to import, distribute, and use a Schedule 1 controlled substance. The Court of Appeals believed this exception was justified by the Religious Freedom Restoration Act in order to enable respondents to use hoasca tea, which contains dimethyltryptamine, or DMT, in the substance, for religious purposes. The court of appeals was wrong. RFRA carries forward the compelling-interest test, as set forth in prior Federal court decisions.

JUSTICE O'CONNOR: May I address a preliminary inquiry that I have? Are we reviewing here the issuance of the injunction by the trial court?

1 MR. KNEEDLER: Yes, a preliminary injunction.

2 JUSTICE O'CONNOR: And we have to find that, for
3 the trial court to have issued it, it was an abuse of
4 discretion?

5 MR. KNEEDLER: Well, with respect to certain
6 aspects of the preliminary injunction question, yes. For
7 example, whether a preliminary injunction should -- is the
8 proper remedy if all the other criteria are satisfied.

9 JUSTICE O'CONNOR: You know --

10 MR. KNEEDLER: But --

11 JUSTICE O'CONNOR: -- the court found evidence
12 in equipoise and so on and so forth, so I just wondered,
13 at the bottom line, what our legal standard is here.

14 MR. KNEEDLER: Yes. We believe that the Court
15 of Appeals erred -- or District Court and Court of Appeals
16 erred, as a matter of law, in entering the injunction --

17 JUSTICE O'CONNOR: Abused its discretion.

18 MR. KNEEDLER: Well, abused -- a court always
19 abuses its discretion if it -- if it commits a legal
20 error. So, that is basically our position here.

21 JUSTICE KENNEDY: It seems to me your position
22 is that you must -- we must give controlling determinative
23 weight to the fact that it's listed in Schedule 1. And
24 the respondents say you don't give it any weight at all,
25 it's all on a case-by-case basis. Is there a middle

1 ground that there -- which I think would allow you to
2 prevail here -- that there is a presumption that there is
3 a compelling governmental interest when it's in Schedule
4 1? It's a rebuttable presumption, but it's a presumption
5 that, when it's in Schedule 1, it's a compelling interest.

6 MR. KNEEDLER: Well --

7 JUSTICE KENNEDY: The --

8 MR. KNEEDLER: -- first of all, our principal
9 submission is that Congress's designation in Schedule 1 is
10 sufficient unto itself. But we also do include a further
11 submission that, if the Court didn't disagree with that,
12 that Congress's -- Congress, in Schedule 1, has said that
13 any mixture containing any amount of a listed
14 hallucinogenic substance is barred. And there's no
15 question that this substance contains that. But if the
16 Court was going to look beyond that to the facts of this
17 case, there's also no question in this case that
18 respondents' use of the substance produces the very
19 effects that led Congress to put the substance on Schedule
20 1. So, to allow the -- to allow the substance to be used
21 would be in direct derogation of Congress's judgment.

22 The disagreement, such as there is, goes not to
23 the -- not to that question. And that's on page 214(a) of
24 the joint appendix -- or the petition appendix. The
25 District Court specifically found that those effects are

1 produced. Respondents' argument in the lower courts was
2 essentially that those effects shouldn't matter, or that
3 those effects should be ignored. But we think that that's
4 inconsistent with Congress's judgment. So, my point is,
5 if you go beyond the text of the statute, it shouldn't be
6 for anything more than to -- for the Court to assure
7 itself that the effects that caused Congress to list the
8 subject, in fact, occur, and --

9 JUSTICE GINSBURG: Mr. Kneedler --

10 JUSTICE KENNEDY: Well, but part of the statute
11 is Sherbert and Verner and the test that Congress says we
12 have to apply to its acts here.

13 MR. KNEEDLER: Right. But under -- the Act does
14 say carry forward the prior Federal court decisions. But,
15 prior to Smith, this Court, on a number of occasions, had
16 recognized the compelling interest in uniform enforcement
17 of important statutes that could not function under a
18 system of individualized religious --

19 JUSTICE GINSBURG: Mr. --

20 MR. KNEEDLER: -- exemptions.

21 JUSTICE GINSBURG: -- Mr. Kneedler, I think
22 everyone would concede that there is a compelling
23 interest, governmental interest, to have the Controlled
24 Substances Act on that level, yes. But then, Congress has
25 passed another statute that says all laws shall be subject

1 to RFRA -- shall be subject to RFRA. So, we can't just
2 look at "Is there a compelling State interest for the
3 controlled Substances Act?" in a vacuum. We have to take
4 what was a later statute, RFRA, to which the Controlled
5 Substances Act is made subject by Congress. And I thought
6 the argument was: Is there a compelling State interest in
7 that context? How can there be, given the situation with
8 peyote and, "We're just like the Native American Church in
9 that regard"?

10 MR. KNEEDLER: Well, the argument is not that
11 the Controlled Substances Act is not subject to RFRA. It
12 is subject to RFRA. But -- just as it was subject to the
13 First Amendment's Free Exercise Clause -- and, in this
14 Court's pre-Smith cases, in which the Court -- at least
15 Congress understood the Court to have been applying a
16 compelling-interest test, the Court was applying that
17 compelling-interest test to particular statutes under
18 which individualized religious exemptions would not be
19 feasible, and held, as a categorical matter, that they
20 were not required. The Social Security Act, the tax code,
21 the laws against polygamy, the Sunday closing laws, all
22 are -- all of those are ones in which the Court had
23 previously concluded that individualized exceptions were
24 not appropriate.

25 JUSTICE GINSBURG: I would understand that if

1 the Government had acted uniformly. But we do have two
2 situations that seem to be like -- the peyote and this
3 case. And if the Government must accommodate to one, why
4 not to the other?

5 MR. KNEEDLER: In the peyote exception, Congress
6 was acting under its distinct constitutionally recognized
7 authority with respect to Indian tribes. The Indian
8 Commerce Clause specifically authorizes Congress to
9 legislate with respect to Indian tribes --

10 JUSTICE SCALIA: It's --

11 MR. KNEEDLER: -- as --

12 JUSTICE SCALIA: But it still shows -- whatever
13 power they were -- they were proceeding under, it still
14 shows that it's not all that important that nobody be able
15 to use a substance banned by category 1. I mean --

16 MR. KNEEDLER: Well, I --

17 JUSTICE SCALIA: -- whatever power it was under,
18 it's a demonstration that you can make an exception
19 without the sky falling.

20 MR. KNEEDLER: Well, I, in no way, think that
21 Congress believed that by enacting the special provision
22 for Indian tribes, it was thereby opening the Controlled
23 Substances Act to individualized --

24 JUSTICE SOUTER: Well --

25 MR. KNEEDLER: -- religious exceptions.

1 JUSTICE SOUTER: -- maybe Congress didn't assume
2 that. They probably didn't think about it. But what's
3 wrong with the argument?

4 MR. KNEEDLER: Well, I think what's wrong with
5 the argument is that what Congress did with respect to
6 Indian tribes was take a look at that distinct context and
7 conclude that, for a variety of reasons -- and,
8 particularly, respecting the autonomous authority of an
9 independent Indian tribe to control its internal affairs
10 this exception applies only to members of recognized
11 Indian tribes -- that, in that context, balancing all of
12 the relevant considerations -- not the sort of balance
13 under RFRA --

14 JUSTICE SOUTER: But it --

15 MR. KNEEDLER: -- but balancing all the
16 considerations under the -- its Indian power, concluded
17 there was --

18 JUSTICE STEVENS: But Justice Scalia's point is,
19 no matter what the legal theory, the evidence, historical
20 evidence, seems to indicate that the sky didn't fall. And
21 if it didn't fall for the larger number of Native
22 Americans involved who use peyote, and the very small
23 number using this drug, can't we, kind of, think that at
24 least, "Well, maybe it's not all that compelling"?

25 MR. KNEEDLER: But that was -- that was a

1 specific judgment made by Congress itself, looking at --

2 JUSTICE GINSBURG: But, Mr. Kneedler, may I --

3 MR. KNEEDLER: -- all the factors.

4 JUSTICE GINSBURG: -- may I stop you --

5 MR. KNEEDLER: Yes.

6 JUSTICE GINSBURG: -- there? Because, correct
7 me if I'm wrong, but it was my impression that the DEA was
8 allowing an exemption for peyote use by the Native
9 American Church before Congress passed the law.

10 MR. KNEEDLER: That -- that's correct, but that
11 was understood at the -- at -- back in 1970, or back,
12 actually, in '65, when that was first adopted, to have
13 been consistent with Congress's original intent in passing
14 the statute, and the Controlled Substances Act, which
15 carried forward the schedules. But, in any event,
16 Congress has now addressed the subject by statute,
17 following the enactment of RFRA, following this Court's
18 decision in Smith, and which has brought things into quite
19 different focus.

20 JUSTICE GINSBURG: But if you take it that the
21 Government was right -- before Congress passed the law,
22 the Government was right to give the exemption to allow
23 that ceremonial use of peyote, then I don't see how you
24 get mileage from a congressional act that was passed later
25 than Congress's is saying, "Executive, we agree with you,

1 you did right." But it's not -- you -- I don't see how
2 you can rely on the congressional statute when the
3 Government was doing this even without a --

4 MR. KNEEDLER: Yes, and --

5 JUSTICE GINSBURG: -- congressional statute.

6 MR. KNEEDLER: -- the statute actually, you
7 know, now gives some firm statutory basis for that
8 exception, which may not really have existed so
9 comfortably after this Court's decision in Smith. And
10 there was, it's true, nothing specific in the statute
11 before. The critical point, though, to bear in mind for
12 the sort of claim that respondents are arguing for here is
13 that it would turn over to 700 district judges a
14 determination based on particular records, particular
15 credibility determinations, the judgment as to whether --

16 JUSTICE SOUTER: Yes, but --

17 MR. KNEEDLER: -- an exception --

18 JUSTICE SOUTER: -- isn't that exactly the --
19 what the Act does? That's --

20 MR. KNEEDLER: No --

21 JUSTICE SOUTER: -- why they passed it.

22 MR. KNEEDLER: With all respect --

23 JUSTICE SCALIA: And that's why we came out the
24 other way in Smith, by the way.

25 MR. KNEEDLER: But --

1 [Laughter.]

2 MR. KNEEDLER: -- but even when Congress went
3 back to pre-Smith, again Congress recognized that there
4 are certain statutes in -- that serve a compelling
5 interest that would be undermined by individualized
6 determinations, and the Controlled --

7 JUSTICE O'CONNOR: Well, it didn't --

8 MR. KNEEDLER: -- Substances Act --

9 JUSTICE O'CONNOR: -- say that, did it? I mean,
10 it did seem to indicate, after the passage of RFRA, courts
11 are supposed to examine, in each case, whether there is a
12 compelling State interest and whether it's closely enough
13 related.

14 MR. KNEEDLER: But it -- but that was the test
15 that the Court was applying, as Congress understood it,
16 prior to Smith, in which, I repeat, the Court said there
17 were certain statutes that categorical judgments could be
18 made about. And the Controlled Substances Act is such a
19 statute, as this Court recognized in Raich and in Oakland
20 Cannabis --

21 JUSTICE KENNEDY: I want you --

22 MR. KNEEDLER: -- where the Court --

23 JUSTICE KENNEDY: -- to stay on this point,
24 because it's important, but if this were a Schedule 2
25 substance, would your argument be the same?

1 MR. KNEEDLER: Our argument would be the same,
2 but for an additional reason there, and that is that even
3 where Congress has -- or even where a substance may be
4 distributed and used, it is only for medical purposes,
5 which is in furtherance of, not in derogation of, the
6 health and safety purposes of the statute. And even then,
7 it is done to very strict -- pursuant to very strict
8 controls that are really incompatible with sacramental use
9 of a substance. There is a requirement of prescription,
10 or dispensing by a physician under physician control, with
11 recordkeeping -- identifying the dosage, the amount of the
12 sacrament -- recordkeeping of the person who takes it.
13 There is -- there is an incompatibility and potential
14 entanglement problem in how to -- in trying to apply a
15 system like that, even under Schedule 2. But under
16 Schedule 1, what you have is contraband, as this Court
17 said --

18 JUSTICE BREYER: But suppose we --

19 MR. KNEEDLER: -- in Raich.

20 JUSTICE BREYER: -- I grant you that
21 administrative considerations are relevant. Of course
22 they're relevant. But that's far from saying they're
23 determinative. And then we're back to what Justice Souter
24 said, absolutely relevant in deciding the compelling
25 interest, but the fact that peyote seems to have been

1 administered without the sky falling in suggests that,
2 here, they're not determinative. That's all.

3 MR. KNEEDLER: Well, if I could go back to the
4 way the Controlled Substances Act operates, it does not
5 permit a rescheduling or use of a drug based on
6 individualized determinations made by individual Federal
7 District Courts making their own judgment about how
8 serious the risk is. If a substance is going to be moved
9 from Schedule 1 to Schedule 2, for example, to allow
10 medical use, that is done through a centralized
11 administrative determination involving coordination
12 between the Secretary of Health and Human Services and the
13 Attorney General, in which expert opinions are gotten and
14 a judgment is made, but the judgment is made only if there
15 is an accepted medical use. In other words, there has to
16 be not -- a consensus, not simply an -- a determination by
17 one religious group or one judge --

18 JUSTICE SCALIA: But --

19 MR. KNEEDLER: -- that something may be so.

20 JUSTICE SCALIA: -- RFRA overrides all that.

21 MR. KNEEDLER: No. I --

22 JUSTICE SCALIA: I understand RFRA to be -- to
23 say there can be an exception to all Federal statutes
24 where someone makes a religious objection to compliance
25 and, in the judgment of the court, there's not a

1 compelling State interest in the Government going ahead
2 with the statute. So, you know, whatever the scheme was
3 under the drug laws, it seems to me it's subject to this
4 new legislation.

5 MR. KNEEDLER: We're not saying it's not subject
6 to the legislation, but in deciding how the compelling
7 interest applies under the statute -- just as under the
8 First Amendment itself, before RFRA was passed, and the
9 one is to replicate the other -- the court -- there were
10 certain statutes, when the court looked at the way they
11 operated and what was necessary to their effectuation, the
12 court said that individualized exceptions would not be
13 feasible. And there's no reason to believe, and every
14 reason to disbelieve --

15 CHIEF JUSTICE ROBERTS: Well, when you talk
16 about --

17 MR. KNEEDLER: -- that Congress meant to put
18 that to one side.

19 CHIEF JUSTICE ROBERTS: -- reasons to believe
20 and disbelieve, we don't have to make a once-and-for-all
21 determination, do we? A lot of your concerns talk about
22 what's going to happen if this exception is granted. Now,
23 if some of those things come true, can't this issue be
24 revisited? I don't regard -- maybe I'm wrong, but, under
25 RFRA, you're not saying it's a compelling-interest test.

1 It may be -- may not be satisfied in this case, but if it
2 turns out there's a lot of diversion of the hallucinogen
3 or the membership of the church expands in a way that
4 leads you to believe it's being abused, I mean, then you'd
5 look at it again, right?

6 MR. KNEEDLER: I have several responses to that.

7 That sort of approach, putting to the test basically a
8 congregation-by-congregation -- or denomination-by-
9 denomination, to use familiar terms -- test about whether
10 a -- an exception should be recognized for a particular
11 religion, itself, presents difficult questions. If you --
12 if you have a particular religious sect that believes that
13 it is -- that it is important to invite everyone to the
14 table -- not simply a closed group that has gone through
15 screening, but a -- but everyone to their table --

16 JUSTICE SCALIA: But that --

17 MR. KNEEDLER: -- that would be -- but that
18 would -- that -- the -- a court would be in a judgment
19 about -- in saying that that --

20 JUSTICE SCALIA: Couldn't have said it better.
21 And that's what we said in Smith. But Congress didn't
22 like Smith and has enacted this statute obviously to undo,
23 to the extent it can, the effect of our judgment in
24 Smith.

25 MR. KNEEDLER: No, what -- it did not seek,

1 under the judgment in Smith. What the Court was -- what
2 Congress was responding to was the -- what it understood
3 to the the test. It reinstated the compelling-interest
4 test, but specifically said it was not disagreeing with
5 the outcome of any particular case under that prior test.

6 And three of those cases -- Hernandez, concerning the tax
7 code; Lee, concerning the Social Security Act; and
8 Braunfeld, regarding the Sunday closing laws -- were all
9 ones that adopted the approach that I have suggested.

10 CHIEF JUSTICE ROBERTS: But your -- but your
11 approach is totally categorical. If you had a group that
12 had, once a year, one drop of the hallucinogen involved
13 here, per member, and it was rigorously policed, your
14 position would still be the same --

15 MR. KNEEDLER: Our --

16 CHIEF JUSTICE ROBERTS: -- even applying RFRA,
17 which sets forth a compelling-interest test.

18 MR. KNEEDLER: -- our principal position would
19 be the same. And I -- and I think that that approach is
20 consistent with Justice O'Connor's opinion in Smith, which
21 got a lot of prominence in the subsequent debate about
22 RFRA, because, in that -- in that opinion, even though the
23 compelling-interest test was applied, Justice O'Connor
24 concluded that that test was satisfied because --

25 JUSTICE O'CONNOR: But Congress disagreed,

1 ultimately. They allowed the use of peyote.

2 JUSTICE O'CONNOR: And that's an important
3 point. Congress doing it does not open the Controlled
4 Substances Act to the individualized determinations by 700
5 District Courts. It makes --

6 JUSTICE GINSBURG: Mr. Kneedler --

7 JUSTICE SOUTER: No, but in --

8 MR. KNEEDLER: -- a specialized judgment.

9 JUSTICE GINSBURG: -- may Congress, consistent
10 with the Establishment Clause, say that we will create an
11 exception for peyote, but not for this other church, which
12 has far fewer members, less risk of diversion, has been
13 found to be a genuine religion? The problem of preferring
14 one religious group over another, it seems to me, arises
15 once there is an exception for the Native American Church.

16 And I heard you say, "Well, the Indian tribes are
17 special," but is that -- that's it. It would have to be
18 --

19 MR. KNEEDLER: Well, we think that -- we think
20 that's critical, because what -- just as in this Court's
21 decision in Laurel, what Congress has done is to act to
22 respect the autonomous, independent institutions of the
23 tribe. That also meets certain law enforcement concerns,
24 because you have the tribal government, you have tribal
25 law enforcement personnel, you have tribal culture and

1 tradition that is independent simply of the religion. You
2 have -- you have the entire tribal cultural structure that
3 Congress could quite reasonably regard as being different.

4 And respecting that distinct political attribute of
5 tribes under this Court's decision in *Morton versus*
6 *Mancari*, we don't think, creates an Establishment Clause
7 problem. What --

8 JUSTICE GINSBURG: May I -- may I ask you one
9 question about the procedural posture of this case? This
10 is an appeal from a preliminary injunction. That's how it
11 got here. And we have been discussing, mostly, the case
12 just as though it had been a permanent injunction. The --
13 there are pieces of this case, like the Treaty and what it
14 allows and doesn't allow, that -- where the record is so
15 thin. Is there a way of dealing with this case so there
16 is the full airing that it never got, without resolving,
17 at this point, other issues --

18 MR. KNEEDLER: Well, I --

19 JUSTICE GINSBURG: -- you've been debating?

20 MR. KNEEDLER: -- I -- on that limited point, if
21 the Court applied the usual standards for the granting of
22 a preliminary injunction, I think that the Court could
23 quite readily reverse the preliminary injunction here,
24 because that requires a clear showing of a substantial
25 likelihood of success on the merits, plus that the other

1 factors be decided. And with respect to the application
2 of the Convention, that's really a question of law. And
3 the United States took the position before the District
4 Court in this case, that the Convention applied to the
5 tea. We think it's unquestionably a mixture, and,
6 therefore, a preparation within the meaning of the -- of
7 the Convention, and the -- and the District Court's
8 injunction really puts the United States in violation of
9 an international agreement that is critical to prohibiting
10 trafficking --

11 JUSTICE GINSBURG: But they were --

12 JUSTICE KENNEDY: Do --

13 MR. KNEEDLER: -- in drugs.

14 JUSTICE KENNEDY: -- do your briefs --

15 JUSTICE SOUTER: Well --

16 JUSTICE KENNEDY: -- indicate, or does the
17 record indicate, that the Government was foreclosed from
18 presenting any evidence it wanted to present? If you, for
19 some reason, go back, and this whole thing is done again,
20 whether they -- is there important additional evidence for
21 you to introduce, or do we essentially have the case in
22 front of us, so far as you're concerned?

23 MR. KNEEDLER: Well, in -- as far as our
24 position is concerned on our submission so far, we don't
25 think the Court needs any further evidence. On the

1 question of the application of the Convention, as we say,
2 we believe that is a question of law. This Court has long
3 deferred to the position of the executive branch on the
4 interpretation of Conventions. And --

5 CHIEF JUSTICE ROBERTS: Counsel, I was a little
6 unclear about your position on the Convention. I thought,
7 at some -- one point, you said that it didn't really add
8 much to your argument under the Controlled Substances Act,
9 which implemented the Convention. Is --

10 MR. KNEEDLER: No, it --

11 CHIEF JUSTICE ROBERTS: -- there an independent
12 --

13 MR. KNEEDLER: No, it --

14 CHIEF JUSTICE ROBERTS: -- argument?

15 MR. KNEEDLER: No, we believe that complying
16 with an international Convention designed to prohibit
17 trafficking in drugs is, itself, a compelling interest.
18 And the -- under this Court's decisions in --

19 JUSTICE SOUTER: How --

20 MR. KNEEDLER: -- that would be incorporated in
21 RFRA. And it -- a -- an order that puts the United States
22 in violation of that -- and the Court of Appeals didn't
23 really deny -- a majority of the judges, anyway -- deny
24 that this injunction requires the United States to violate
25 the Convention --

1 JUSTICE SOUTER: Well, it --

2 MR. KNEEDLER: -- by facilitating the
3 importation of drugs from outside the country.

4 JUSTICE SOUTER: Well, what do you -- here's the
5 problem that I have, particularly at the stage of the
6 preliminary injunction, with that argument. The --
7 they're -- the Convention also includes that provision
8 that its terms will be defined, enforced, and so on, in
9 harmony, or conformity, with the domestic law of the
10 signatory. Our domestic law includes RFRA. That would
11 seem to open the door for, in effect, a RFRA exception.

12 MR. KNEEDLER: No, that exception is --

13 JUSTICE SOUTER: Let me -- let me -- let me just
14 finish my -- let me get to my -- let me get to my question
15 --

16 MR. KNEEDLER: Sorry.

17 JUSTICE SOUTER: -- before you answer it.

18 [Laughter.]

19 JUSTICE SOUTER: My -- the particular concern I
20 have with that, at the preliminary injunction stage, is
21 not necessarily that that particular argument should, for
22 all times, be assessed correctly by the -- by the District
23 Court. But it seems to me that if the District Court at
24 least plausibly reads that exception to negate your
25 argument, isn't that good enough, at the preliminary

1 injunction stage, as a basis for the Court saying, "Look,
2 you haven't -- you, the Government -- haven't carried your
3 burden to show the affirmative defense here"?

4 MR. KNEEDLER: This is a -- the interpretation
5 of the Convention is a legal question, not a factual one.
6 And Article 22 refers --

7 JUSTICE SOUTER: It is, there's no question.
8 But we're still at the preliminary injunction stage.

9 MR. KNEEDLER: Right. But respondent would bear
10 the -- would bear the burden of --

11 JUSTICE SOUTER: Why does the respondent bear
12 the burden? You have the burden --

13 MR. KNEEDLER: Because this is to --

14 JUSTICE SOUTER: -- under the statute.

15 MR. KNEEDLER: -- this is a change of the status
16 quo. And to require the Government to allow the
17 importation of a substance is prohibited by the
18 Convention. But if I --

19 JUSTICE SOUTER: Well --

20 MR. KNEEDLER: -- if I could --

21 JUSTICE SOUTER: -- no, but I realize that --
22 could we pause on that for a second? Because you
23 apparently take the position -- the Government takes the
24 position that when -- under the governing law, the
25 Government would have an affirmative burden, ultimately,

1 to defend -- in this case, on compelling interest, least
2 restrictive, et cetera -- that, at the preliminary
3 injunction stage, the applicant for the injunction has the
4 burden to negate the probability that the Government will
5 carry its burden on the ultimate issue. And I don't see
6 why that should be so at all.

7 MR. KNEEDLER: Well, at least with respect to
8 the interpretation of a Convention, where the -- where the
9 Government has taken --

10 JUSTICE SOUTER: No, but let --

11 MR. KNEEDLER: No, I --

12 JUSTICE SOUTER: -- just --

13 MR. KNEEDLER: -- I under- --

14 JUSTICE SOUTER: -- go through --

15 MR. KNEEDLER: -- I understand the --

16 JUSTICE SOUTER: Get to the Convention --

17 JUSTICE KENNEDY: -- I understand the broader
18 point, but --

19 JUSTICE SOUTER: -- later. Get to the general
20 -- first get to the general issue. Does the applicant for
21 the injunction have the burden to negate the probability
22 that the Government will prevail in its affirmative
23 defense, ultimately?

24 MR. KNEEDLER: We --

25 JUSTICE SOUTER: Is that your position?

1 MR. KNEEDLER: Yes, that is our position, and we
2 cite cases in the -- in the brief that say that. But it
3 is not critical to the outcome of this case with respect
4 to the Convention issue and several other of the issues
5 that --

6 JUSTICE GINSBURG: Well --

7 MR. KNEEDLER: -- that I -- that I was going to
8 --

9 JUSTICE SOUTER: Well, the Convention --

10 JUSTICE GINSBURG: So --

11 JUSTICE SOUTER: -- issue goes directly to your
12 affirmative defense.

13 MR. KNEEDLER: It goes -- but it is a question
14 of law. And the article of the Convention that you're
15 referring to is -- concerns the penal provisions. In
16 other words, Article 7 of the Convention requires each
17 party to prohibit -- this is Article 7, on page 288(a) --
18 requires that -- each State to prohibit these substances.

19 Twenty-two simply goes to the criminal provisions that
20 each party's State will adopt internally to carry that
21 out. But it doesn't -- it doesn't detract from the --
22 from the categorical obligation under Article 7, which --

23 JUSTICE BREYER: Well, the --

24 MR. KNEEDLER: -- would prohibit it.

25 JUSTICE BREYER: -- part of the Treaty question

1 that I had is also -- this is a root that you are -- and
2 it contains DMT. And the Treaty doesn't ban everything
3 that contains DMT -- for example, pineapple and bananas.
4 The question is the ratio of the DMT to the entire plant.

5 MR. KNEEDLER: Well --

6 JUSTICE BREYER: And that sounds like a factual
7 question that ought to be developed.

8 MR. KNEEDLER: Well, I think where you have a
9 mixture that -- a mixture of two plants that are put
10 together for the specific purpose of using them for the
11 hallucinogenic purposes, that goes far beyond simply
12 whether a particular substance --

13 JUSTICE BREYER: Pineapples, we -- what about
14 those?

15 MR. KNEEDLER: Well --

16 JUSTICE BREYER: I drank pineapple --

17 MR. KNEEDLER: Plants --

18 JUSTICE BREYER: -- juice this morning.

19 [Laughter.]

20 MR. KNEEDLER: -- as such, are not covered. But
21 when you make a mixture of something for the specific
22 purpose of releasing its hallucinogenic purpose --
23 qualities, we think that that's clearly covered by the
24 Convention.

25 If I may reserve the --

1 JUSTICE SOUTER: What do you say -- I'm sorry.

2 MR. KNEEDLER: I was just going to reserve the

3 --

4 JUSTICE SOUTER: No, you want to reserve your

5 time. Okay.

6 CHIEF JUSTICE ROBERTS: Thank you, Mr. Kneedler.

7 Ms. Hollander.

8 ORAL ARGUMENT OF NANCY HOLLANDER

9 ON BEHALF OF RESPONDENTS

10 MS. HOLLANDER: Mr. Chief Justice, and may it

11 please the Court:

12 The Government's position here, that the Court
13 should completely defer to Congress's generalized finding
14 to wholly exempt Schedule 1 of Controlled Substances Act
15 from RFRA's mandate is fundamentally and structurally
16 incompatible with RFRA.

17 JUSTICE KENNEDY: But you seem to give the fact
18 that it's listed in Schedule 1 zero weight. It seems to
19 me, at the very least, there should be a presumption that
20 this is a compelling interest.

21 MS. HOLLANDER: Yes, Your Honor, and --

22 JUSTICE KENNEDY: And when the -- and when the
23 evidence is in equipoise, as the district judge thought it
24 would, that presumption, it seems to me, carries the day
25 for the Government.

1 MS. HOLLANDER: Your Honor, the District Court
2 -- we give it deference, as did the District Court. Judge
3 Parker specifically found, contrary to what the Government
4 says, that he began by looking at Schedule 1, and he
5 specifically says -- I believe it's on page 212(a) of the
6 petitioner's appendix -- that he had to begin there. And
7 he said, "This Court must give due regard for the fact
8 that Congress put DMT into Schedule 1." But then he
9 applied RFRA. And in applying RFRA, he went on to apply
10 RFRA and to specifically find that applying RFRA, which
11 requires not only a compelling interest, but a compelling
12 interest to the person, that the Government did not meet
13 its burden in this case of showing harm, any risk of harm,
14 to these members, or any risk of diversion.

15 And I'd like to go back, for a moment, to the
16 issue of peyote, because, first of all, if you look at the
17 congressional record in 1965, for what that's worth,
18 there's not one mention -- and it's on page -- starts on
19 page 480 of the joint appendix -- there's no mention of
20 Indian tribes, there's no mention of sovereign issues with
21 the Indian tribes. There's a mention of the Native
22 American Church and the First Amendment and why this
23 exemption has to be made. And, in fact, our record is --

24 JUSTICE SCALIA: Do we know whether you can be a
25 member of that church without being an Indian?

1 MS. HOLLANDER: Yes, sir, we do, Your Honor. We
2 know that. And it is throughout our brief. There's many
3 mentions of it, the fact that there have been non-Native-
4 American members since the beginning of the Native
5 American Church. I would direct the Court to the easiest
6 one, which is at the joint appendix at page 500, which is
7 a memo from a DEA legal counsel talking about this. And,
8 in fact, at the hearing in our case, on the very last day
9 -- it was on November 2nd, 2001, at page 1933 -- Mr. Adam
10 Zubin, representing the Government, specifically said, and
11 I quote, "The Federal Government places no restrictions on
12 who can participate in the Native American Church."

13 So, we have two things. We have the exemption
14 in 1965 --

15 CHIEF JUSTICE ROBERTS: So, your theory would be
16 if you had a religious group that -- whose doctrine was
17 that you should proselytize through hoasca, and they want
18 everybody to come, and they're aggressive in doing that,
19 and distributing hoasca, that the Government should be in
20 a position of saying, "This religious group can use it,
21 but that religious group can't"?

22 MS. HOLLANDER: Your Honor, it would depend,
23 again, on the facts of that case.

24 CHIEF JUSTICE ROBERTS: Yes, they're the kind of
25 the -- the ones I just gave you. In other words, if

1 there's going to be a greater threat of diversion to --
2 it's not limited to the members of a very cohesive and
3 limited group, but it's -- they're -- they aggressively
4 try to reach out, but it's all part of a sincere religious
5 belief, that we should, in applying RFRA, draw
6 distinctions between the group you represent and that
7 hypothetical group?

8 MS. HOLLANDER: The distinctions -- yes and no,
9 and let me explain, Your Honor -- Mr. Chief Justice -- the
10 distinction is that if the Government could meet a
11 compelling interest and actually show a risk of diversion
12 --

13 CHIEF JUSTICE ROBERTS: Well, I'm assuming they
14 show --

15 MS. HOLLANDER: -- that they --

16 CHIEF JUSTICE ROBERTS: -- that there is --

17 MS. HOLLANDER: -- showed it --

18 CHIEF JUSTICE ROBERTS: Yes.

19 MS. HOLLANDER: -- then they would have
20 different facts. And the different facts in that case
21 would mean that, in that case, the Government would win.

22 Now, I'd like to point out, although I realize
23 you've just presented me with a hypothetical -- however,
24 there are 250,000 members of the Native American Church,
25 and the record in our case is that there's never been any

1 evidence of any diversion. And, although the Government
2 has --

3 JUSTICE O'CONNOR: Well, if we --

4 JUSTICE STEVENS: May I just --

5 JUSTICE O'CONNOR: -- think that the Treaty --
6 the Convention entered into in 1971 -- makes clear that
7 hoasca is covered, then does that provide a compelling
8 interest for the Government, because it requires the
9 Government to prohibit the importation? If we think, as a
10 matter of law, the Convention covers hoasca.

11 MS. HOLLANDER: No, Your Honor, it doesn't,
12 because, again, the Government has -- we have to look at
13 the Treaty, just like we look at any other law -- RFRA
14 clearly says --

15 JUSTICE O'CONNOR: Well, if we conclude, looking
16 at the Treaty, that it prohibits hoasca, covers it, and
17 that it provides that nations that enter into the
18 Convention must avoid importation of it, then is that a
19 compelling interest under RFRA?

20 MS. HOLLANDER: It may -- yes, Your Honor --

21 JUSTICE O'CONNOR: It is?

22 MS. HOLLANDER: -- it may be a compelling
23 interest, but it still may not satisfy RFRA, because RFRA
24 specifically requires that it be a compelling interest to
25 the person. And we -- the Government would have to put on

1 evidence. And even though is a question of law, that
2 doesn't preclude the District Court hearing evidence which
3 he has not heard at -- to this point -- put on evidence
4 showing that the -- that the compelling interest the
5 Government has asserted in this case, which is that it
6 would lose its leadership position in the international
7 community, would really be a compelling interest, and that
8 it could not be accommodating.

9 JUSTICE BREYER: Well, that isn't the compelling
10 interest. The compelling interest is, we signed a Treaty,
11 and you follow it. Now, how can you say that the
12 Government wouldn't have a compelling interest in
13 following a Treaty where they -- where they promised to
14 ban the substance? I mean, they're not -- they're just
15 saying RFRA doesn't apply where that's at stake. Now,
16 what's the argument against that? You're saying the
17 argument against that is, maybe it really isn't a
18 compelling interest? Well, okay. Why not? I mean, it
19 sounds to me as if it would be. They have a Treaty. They
20 have to live up to their word, period. What's wrong with
21 that?

22 MS. HOLLANDER: There's nothing wrong with that,
23 Your Honor. The -- what's wrong with that is that RFRA
24 requires the Government to go further than that.

25 JUSTICE BREYER: It does? All right. That's an

1 issue, I guess. I'd have to decide: Is a compelling and
2 -- does it require the Government to go further? But you
3 concede that if it doesn't require the Government to go
4 further, you lose.

5 MS. HOLLANDER: If the Treaty does include
6 hoasca, which we believe that it doesn't.

7 JUSTICE BREYER: All right. So, that's a
8 different issue. Why doesn't it?

9 MS. HOLLANDER: Why doesn't it? It doesn't.
10 And the -- and, interestingly, the executive took the
11 reverse position that it's taking here throughout the
12 history of this Treaty until this litigation, and it
13 doesn't cover hoasca, because it doesn't cover plants, or
14 infusions from plants. And that is the position. And the
15 reason why the U.S. would not lose its leadership position
16 is that that's the position of Brazil, which allows
17 religious use --

18 JUSTICE SCALIA: I don't care whose position it
19 is. The language does not admit of that exception.
20 There's nothing in the language of it that would suggest
21 that exception at all. What language do you rely upon for
22 that exception?

23 MS. HOLLANDER: The Treaty -- we have to rely,
24 Your Honor, on the Treaty as a whole. And what --

25 JUSTICE SCALIA: As a whole, anywhere in it --

1 give me language anywhere in the whole Treaty that --

2 MS. HOLLANDER: What the --

3 JUSTICE SCALIA: -- suggests that exception.

4 MS. HOLLANDER: The Treaty that the -- the
5 language that suggests that exception is, first of all, in
6 Article 32, that talks about the traditional use of
7 plants. It is in the fact that plants are not covered.
8 And so, a --

9 JUSTICE SOUTER: No, but a --

10 MS. HOLLANDER: -- preparation --

11 JUSTICE SOUTER: -- solution that includes the
12 substance DMT is covered, by definition, as I understand
13 it. Tea is a solution, and it includes DMT. Isn't that
14 the end of the issue?

15 MS. HOLLANDER: No, Your Honor, it isn't. And
16 the reason it isn't is, if we look -- several places, one
17 is the conduct of our Treaty partners, none of whom agree
18 with that position -- we look at --

19 JUSTICE SOUTER: What's wrong -- can you tell
20 me, on the face of it, what's wrong with it? I mean, I --
21 if I have tea at 5 o'clock, I think I'm drinking a
22 solution that includes the little things that come out of
23 the tea leaves. And that's what we've got involved here.

24

25 JUSTICE SCALIA: Maybe our Treaty partners are

1 just violating the Treaty.

2 MS. HOLLANDER: Well, Your Honor, if they are,
3 then we are, also --

4 JUSTICE O'CONNOR: Well --

5 MS. HOLLANDER: -- because --

6 JUSTICE SOUTER: Tell me what's wrong with the
7 analysis of the solution?

8 MS. HOLLANDER: The --

9 JUSTICE BREYER: I have specific language from
10 the Treaty's commentary in front of me that supports you.
11 Are you not going to read that?

12 [Laughter.]

13 MS. HOLLANDER: I was --

14 JUSTICE SCALIA: She's not going to read it,
15 because I asked her for language in the --

16 MS. HOLLANDER: In the Treaty.

17 JUSTICE SCALIA: -- Treaty. In --

18 MS. HOLLANDER: I was --

19 JUSTICE SCALIA: -- the Treaty --

20 MS. HOLLANDER: I --

21 JUSTICE SCALIA: -- not in the legislative
22 history of the Treaty.

23 [Laughter.]

24 MS. HOLLANDER: I was -- I was trying to answer
25 Justice Scalia's question. But let me say this. And of

1 course I would read the language of the commentary and the
2 INCB and the opinion of our former ambassador, Herbert
3 Okun, in Brazil and France. But let me also say, if I
4 may, that the position of the executive, until this --
5 until this litigation, has been the same. And the reason
6 we know that is precisely what you said, Your Honor.
7 Mescaline is also covered by the Treaty. Peyote is not.
8 The Native --

9 CHIEF JUSTICE ROBERTS: Well, I --

10 MS. HOLLANDER: -- American --

11 CHIEF JUSTICE ROBERTS: -- thought that's
12 because we made a special reservation for peyote.

13 MS. HOLLANDER: No, Mr. Chief Justice. We did
14 make a special reservation, but it didn't matter yet,
15 because it's never been covered. That reservation, if you
16 go back and look at what the Senate said at the time, and
17 what -- there are no plants. They're just not listed in
18 the Treaty. The purpose of the reservation was, in an
19 abundance of caution, in case it would be -- in case it
20 would be added in the future, then plants, and solutions
21 from plants, would be covered. But as it stands now,
22 members of the Native American Church drink a tea
23 containing peyote and --

24 JUSTICE SOUTER: Well, are you --

25 MS. HOLLANDER: -- mescaline.

1 JUSTICE SOUTER: -- saying that there are --
2 there's basically an ambiguity in the Treaty, that
3 solutions derived from plants are not covered, but
4 solutions that include DMT are covered, and there --
5 therefore, there is a question?

6 MS. HOLLANDER: The -- yes, the ambiguity arises
7 because what the Treaty means is that if you were to
8 extract the DMT and then add it to something, which can't
9 be done here and could have no religious meaning for the
10 UDV, and we're not even sure if -- chemically, if it's
11 possible. If you were to extract it and then add it, then
12 you would have a solution containing DMT. And that's --

13 JUSTICE SOUTER: But solution is defined by the
14 number of steps in the process that gets the substance
15 into the water? Is that --

16 MS. HOLLANDER: Well --

17 JUSTICE SOUTER: -- correct?

18 MS. HOLLANDER: -- Your Honor, I didn't write
19 this Treaty, and I -- and I must say --

20 [Laughter.]

21 JUSTICE SOUTER: Oh, I'm not blaming you --

22 MS. HOLLANDER: -- that it --

23 JUSTICE SOUTER: -- for it --

24 MS. HOLLANDER: -- that it --

25 JUSTICE SOUTER: -- but I --

1 MS. HOLLANDER: -- that it --

2 [Laughter.]

3 MS. HOLLANDER: It's not the clear -- the
4 clearest writing, but we know -- we know what its meaning
5 is, and we do have to look at the travaux, which goes into
6 long detail about why they even mention plants, because of
7 their fear, in the future, that plants might be covered.
8 Now, other plants are covered --

9 JUSTICE SCALIA: Can --

10 MS. HOLLANDER: -- in a different Treaty. But
11 --

12 JUSTICE SCALIA: Can I make a suggestion as to
13 why, even if it is covered by the Treaty, it may not be a
14 compelling State interest to comply with the Treaty?

15 JUSTICE SOUTER: Say yes. Let me him make that
16 --

17 MS. HOLLANDER: Yes.

18 [Laughter.]

19 MS. HOLLANDER: I'm just waiting.

20 [Laughter.]

21 CHIEF JUSTICE ROBERTS: It was the right answer.

22 MS. HOLLANDER: I'm just trying --

23 JUSTICE SCALIA: Because I haven't --

24 MS. HOLLANDER: -- to be polite.

25 JUSTICE SCALIA: -- it made. I -- I mean, isn't

1 it well-established that statutes trump treaties, that if
2 Congress decides, in a subsequent statute, to ignore a
3 Treaty, it may do so? Now, if this RFRA can trump a
4 statute, it would seem to me, a fortiori, it can trump a
5 Treaty.

6 MS. HOLLANDER: Yes, it can, Your Honor. It can
7 trump the Treaty, and that -- and that is --

8 JUSTICE SCALIA: So, compliance --

9 MS. HOLLANDER: -- correct.

10 JUSTICE SCALIA: -- with a Treaty is not
11 necessarily a compelling State interest.

12 MS. HOLLANDER: It is not. And -- but we don't
13 even have to go that far, because, if we do the RFRA
14 analysis, the Government must show a compelling interest
15 to the person and, in addition --

16 JUSTICE KENNEDY: But, surely --

17 MS. HOLLANDER: -- the --

18 JUSTICE KENNEDY: -- surely RFRA doesn't say
19 that you disregard treaties or you disregard statutes in
20 determining what's a compelling interest.

21 MS. HOLLANDER: No. You don't disregard them,
22 Your Honor, but --

23 JUSTICE KENNEDY: And getting back to the first
24 question that Justice Breyer asked -- and then we got off
25 on what the Treaty really means -- but assuming that the

1 Treaty does prohibit the importation of this substance --
2 assuming that -- is there any evidence that the District
3 Court thought that this was a compelling interest?

4 MS. HOLLANDER: Well, the -- no, the District
5 Court --

6 JUSTICE KENNEDY: None at all.

7 MS. HOLLANDER: -- analyzed the Treaty
8 differently, and analyzed the Treaty to not apply to
9 hoasca, for all the reasons that are -- that are in his
10 opinion in our brief. And, therefore --

11 JUSTICE KENNEDY: So, if we disagree with you on
12 the Treaty, then the appellate court's opinion doesn't
13 really even address the point whether or not this and/or
14 the statute, together, can be a compelling interest.

15 MS. HOLLANDER: That's correct. If you disagree
16 with the District Court on that, then the case should be
17 remanded for it to -- for additional --

18 JUSTICE BREYER: I don't know if there isn't a
19 factual question here. I mean, I thought Justice Scalia,
20 if it were to be up to him, did take into account official
21 commentaries to treaties. But maybe he doesn't. Anyway,
22 I take them into account. And I -- and in respect to
23 that, I read this as saying, specifically, that the plants
24 -- it doesn't include the substance if it is a substance
25 clearly distinguished from the substance constituting its

1 active principal -- and the example they give is mimosa
2 root, which contains DMT.

3 MS. HOLLANDER: That's true. And --

4 JUSTICE BREYER: And then, that's also true of
5 the bananas and pineapples, et cetera. And there's a
6 court holding that hoasca's out of it, in France and one
7 in the Netherlands, all of which I think was relevant to a
8 Treaty. All right? Now, the Government has come in with
9 a counterargument and said it clearly does cover, I guess,
10 even mimosa roots, where they are imported solely for the
11 purpose of extracting DMT. Now, what's the response to
12 that?

13 MS. HOLLANDER: The response to that, Your
14 Honor, is that there is no DMT extracted in this case.
15 Although the Government said that in their brief, there is
16 no evidence of that, and it is contrary to the evidence --

17 CHIEF JUSTICE ROBERTS: Well, it has to be
18 extracted at some point to be -- to get into -- I'm right
19 here -- to get into the tea, right? It's extracted by the
20 preparation of the tea.

21 MS. HOLLANDER: No, Mr. Chief --

22 CHIEF JUSTICE ROBERTS: The plants are not --
23 the plants are not imported, right? Just the tea.

24 MS. HOLLANDER: The tea is imported. But the --

25 CHIEF JUSTICE ROBERTS: Okay.

1 MS. HOLLANDER: -- but the tea is made just like
2 you would make tea if you mixed chamomile and mint, and
3 then --

4 CHIEF JUSTICE ROBERTS: Right.

5 MS. HOLLANDER: -- and then you took the leaves
6 out. What you have --

7 CHIEF JUSTICE ROBERTS: Right.

8 MS. HOLLANDER: -- in that tea is a collection
9 of a tremendous number of alkaloids. And what the
10 commentary is saying is that you would have to pull this
11 alkaloid out. And that would be a chemical process.
12 There's further -- there's further --

13 CHIEF JUSTICE ROBERTS: I guess I -- if I could
14 just go back to the point. You're emphasizing that the
15 Treaty doesn't cover the importation of plants. But
16 you're not importing plants, you're --

17 MS. HOLLANDER: That --

18 CHIEF JUSTICE ROBERTS: -- importing a mixture
19 that must contain the covered hallucinogen or it doesn't
20 have its effect.

21 MS. HOLLANDER: That's correct. However, under
22 the Treaty, it's not -- it's not covered by the Treaty,
23 because it is not separate. If DMT were separated, then
24 it would be covered by the Treaty. And, actually, if you
25 look at the 1988 Treaty, going even farther, and its

1 commentary, the commentary in the 1988 Treaty, which has
2 to be read in connection with the 1971 Treaty,
3 specifically defines preparation as the extraction --

4 CHIEF JUSTICE ROBERTS: So, under your --

5 MS. HOLLANDER: -- of the drug.

6 CHIEF JUSTICE ROBERTS: -- theory, a marijuana
7 tea would not be covered by the Treaty.

8 MS. HOLLANDER: Not by this Treaty. But that --
9 marijuana, coca leaves and poppies are specifically
10 covered by the 1961 Treaty.

11 CHIEF JUSTICE ROBERTS: Yes, but they're not
12 being imported, they're transformed into this tea. And
13 you -- saying the active substance isn't there
14 independently, so it's not covered. And that seems to me
15 to be a -- an erroneous reading of the Treaty.

16 MS. HOLLANDER: Well, the difference, for
17 example, with marijuana, is that if you look at the 1961
18 Treaty, it says "the plant, all parts of the plant,
19 everything from the plant." It's all covered. What the
20 1971 Treaty did was different. And if you read the 1971
21 Treaty and the 1988 Treaty and their commentaries, if I
22 can rely on their commentaries, and the International
23 Narcotics Control Board, what they are expressing is a
24 concern for the traditional religious and mystical use of
25 plants in religion, and that's what they were concerned

1 about, and that's why they didn't put this in, and that's
2 why they specifically have, in the commentary, that the
3 example of mimosa -- and they also have an example of
4 peyote in the same paragraph 12, where they --

5 JUSTICE SCALIA: About commentary or travaux, I
6 don't mind using them for treaties, so long as they don't
7 contradict the Treaty. Do we have any case where we use
8 the -- les travaux preparatoires to actually contradict
9 the language of the Treaty?

10 MS. HOLLANDER: Not to my --

11 JUSTICE SCALIA: And that's what, it seems to
12 me, is going on here.

13 MS. HOLLANDER: No, Your Honor, it's not
14 contradicting the Treaty, because the Government is taking
15 this one sentence preparation, and the Government has a
16 definition of it, for this litigation only, that is
17 contrary to the definition in the Treaty the way it is
18 interpreted by the travaux and by the commentary, and by
19 this executive, which means that the executive's position
20 here is really entitled to no deference; because,
21 otherwise, the tea drunk by the Native American Church,
22 the peyote tea, would also be covered.

23 JUSTICE BREYER: But, as -- I understand the
24 Treaty. What the Treaty says is, you can't import
25 substances listed in Schedule 1. Then you look at

1 Schedule 1, and it doesn't say hoasca.

2 MS. HOLLANDER: That's --

3 JUSTICE BREYER: It says "DMT." And then it has
4 another -- and, interpreting that, it says the fact, if
5 you look at that list and it says "DMT," means what it
6 says: You can't import DMT. It's a drug importation
7 statute, and it doesn't cover plants that contain the
8 substance DMT. Otherwise, we'd have -- throw out bananas
9 and -- or mimosa, anyway. And we're not looking to intent
10 on that. Now, that's a possible interpretation that
11 doesn't contradict anything. And --

12 CHIEF JUSTICE ROBERTS: Well, except that you
13 don't import the plants, right?

14 MS. HOLLANDER: That's correct. And we don't
15 import DMT. We import a tea that contains an enormous
16 number of alkaloids. And it was clear in --

17 JUSTICE BREYER: You're in trouble. That's
18 harder, then, if it's --

19 MS. HOLLANDER: It was -- it's clear --

20 JUSTICE STEVENS: But, of course, the reason you
21 import it is because it contains this particular
22 substance.

23 [Laughter.]

24 MS. HOLLANDER: That's correct, Your Honor.

25 That is correct. However, the Treaty wanted to be -- the

1 Treaty writers were very careful to not impinge on
2 traditional religious use. And RFRA -- and there's one
3 more thing that I've been trying to say, and that is that
4 RFRA requires not just a compelling interest, but a
5 compelling interest to the person, and it requires least-
6 restrictive means.

7 JUSTICE SCALIA: I don't know what you mean by
8 that. You said that before, too.

9 MS. HOLLANDER: Least --

10 JUSTICE STEVENS: Could you explain that again?

11 You said a compelling interest to the -- what person?

12 CHIEF JUSTICE ROBERTS: To the person. To what
13 person?

14 MS. HOLLANDER: To the aggrieved person. To
15 this particular --

16 JUSTICE SOUTER: Isn't the compelling interest
17 in enforcing it against the aggrieved person. Isn't that
18 what you mean?

19 JUSTICE SCALIA: Right.

20 MS. HOLLANDER: That's right. That's correct.

21 But --

22 JUSTICE SCALIA: Oh, okay.

23 MS. HOLLANDER: -- but RFRA also requires that
24 the Government prove, if it proves a compelling interest,
25 to enforce it against the person, and if it gets there, it

1 also must prove that it is furthering that compelling
2 interest by the least restrictive means. Now --

3 JUSTICE GINSBURG: But if the interest is
4 defined, as Mr. Kneeder did -- that is, these drugs are
5 "No, absolutely prohibited." -- then how can you have any
6 less restrictive means? It seems to me that you can -- I
7 understand your argument about a compelling State interest
8 has to be judged in context -- to the person, to this
9 church. But if Mr. Kneeder is correct that the
10 compelling State interest is that this is a proscribed
11 drug, then there can't be any least restrictive means.

12 MS. HOLLANDER: Well, I disagree, Your Honor.
13 For example, other countries that have domestic policies
14 have found ways to accommodate that have not violated the
15 Treaty. For example, Switzerland provides needles and
16 heroin to its -- to its drug users. And the United States
17 has not objected that this is a violation of the Treaty.

18 JUSTICE SCALIA: What about --

19 MS. HOLLANDER: And --

20 JUSTICE SCALIA: I worry about the general
21 proposition we would be adopting if we say, you know, one
22 narrow exception is not a -- doesn't contravene a
23 compelling State interest. What about -- I assume there
24 is still a Federal law against bigamy that applies in
25 Federal territories. Now, what if, you know, a small

1 religious group comes forward and said, you know, "We --
2 our religion requires bigamy. There are not a whole lot
3 of us. We're just a little tiny group. So, we demand,
4 under RFRA, an exemption from this absolute law. Why does
5 it have to be absolute? It's just a little tiny
6 exception, only a few of us."

7 MS. HOLLANDER: Well --

8 JUSTICE SCALIA: At least for now.

9 [Laughter.]

10 MS. HOLLANDER: Until they reproduce.

11 [Laughter.]

12 MS. HOLLANDER: Your Honor, the analysis would
13 be the same. First, that religion would have to prove it
14 was a sincere religion and meet that burden. And then the
15 Government could come forward with a compelling interest
16 that -- and the -- and perhaps find the same thing that
17 was found in Reynolds, which was not a strict scrutiny
18 case, but may come out the same way -- the sanctity of
19 marriage, the other issues. And those would be issues of
20 fact for a district judge to decide, under his discretion.
21 And it -- all RFRA does is give every religious
22 organization, the minority ones and the majority ones, the
23 opportunity to go into court as an aggrieved person and
24 make their claim and see whether the Government can meet
25 its burden.

1 JUSTICE STEVENS: May I ask you a question --
2 tangential just a little, but going back to the Chief
3 Justice's question earlier about diversion? And his
4 suggestion was, if they're -- proselyte the religion, you
5 get all sorts of converts who will just use it in the same
6 way as the small number use it now. Would that be
7 diversion, or would it be diversion -- diverting it to
8 some people who are not members of the religion?

9 MS. HOLLANDER: Well --

10 JUSTICE STEVENS: What does the word "diversion"
11 mean in this context?

12 MS. HOLLANDER: "Diversion," Your Honor, is a
13 term of art here. And I thought I answered it that way,
14 but maybe I was unclear. It means diversion from licit
15 use to illicit use. So, it's --

16 JUSTICE STEVENS: Well, but then, getting more
17 members to -- converted to the religion would not be
18 diversion.

19 MS. HOLLANDER: No, it would not be diversion.
20 There would only be a problem if the Government, for
21 example, showed --

22 JUSTICE STEVENS: Okay.

23 MS. HOLLANDER: -- that there was some diversion
24 outside. And that's why I used the example of the Native
25 American Church; there's never been any diversion.

1 I'd like to go back to one other issue that
2 perhaps I didn't make clear. What the -- it's true that
3 the UDV does not import the plants. But it's those plants
4 that are sacred to the UDV. It can't substitute them.
5 Not only is DMT in bananas and pineapple, but Phalaris
6 grass, for example, that -- and there's a picture of one
7 in our joint appendix at page 518, I believe -- grows in
8 this country. A recreational user could just go and, you
9 know, mix the Phalaris --

10 JUSTICE BREYER: Yes, but --

11 MS. HOLLANDER: -- grass.

12 JUSTICE BREYER: -- I don't see -- I mean, I see
13 I was not right. You do import drums of tea. And they
14 say, in the Treaty, that a preparation is a solution or
15 mixture containing a substance. And it would seem to be a
16 solution or a mixture containing DMT. And the commentary
17 that I thought helped you does concern plants, but you're
18 not importing plants. So, now I'm rather troubled to see
19 if there is any way that this Treaty is interpreted in a
20 manner that allows you to win. What is it?

21 MS. HOLLANDER: Well, the -- what the commentary
22 says is that it is not a covered preparation, that an
23 infusion or tea made from the roots of a plant is not a
24 covered preparation, and that --

25 JUSTICE GINSBURG: Ms. Hollander, may I just, on

1 this point -- it's the same question I raised with Mr.
2 Kneedler. We're talking about a preliminary injunction.
3 Your side, I think, said, "Go for the permanent
4 injunction. We have a lot more to put in." The
5 presentation on the Treaty was rather thin, below. I take
6 it from Mr. Kneedler's argument that he's saying the
7 preliminary injunction, or not, is really the thing. If
8 the Government wins, no preliminary injunction. There's
9 not going to be any show for a permanent injunction. But,
10 on your side of it, what more would you be putting in?
11 Let's say you prevail at the preliminary injunction stage.
12 Would you then say, "See, Judge, now you can enter a
13 permanent injunction"? Or you -- would you be putting in
14 more evidence? And if so, what kind?

15 MS. HOLLANDER: Well, we certainly have a great
16 deal of more evidence, Your Honor, that we can put in. We
17 have substantial evidence on the Treaty, and evidence we
18 haven't even talked about here, proving that this hoasca
19 is not covered by the Treaty. We have additional health
20 and safety evidence. We have additional evidence to show
21 lack of diversion. We have additional evidence that Judge
22 Parker talks about to show targeting of the religion and
23 selective prosecution. We have a great deal more evidence
24 we can put on. But, of course, it depends on what the
25 Government puts on. Because, at this point, the

1 Government has not met any of its burdens.

2 Now, you're correct about the Treaty. None of
3 that has gone on. The Government resisted any evidence
4 about the Treaty, resisted the very best evidence, which
5 was the International Narcotics Control Board's opinion
6 that hoasca is not covered by the Treaty. And we now have
7 -- we now have more that we would put on.

8 And, you know, what the church and its members
9 seek is just the right to practice their religious faith,
10 as Congress guaranteed them in RFRA. Because Congress
11 guaranteed and recognized that religious liberty is a core
12 value in this country. Two courts below found, on a
13 lengthy factual record, that the Government had not met
14 the burdens Congress imposed. This Court should do --
15 even if this Court believes that it's a close question --
16 should do then what it did in *Ashcroft v. ACLU*, affirm the
17 preliminary injunction, remand this case for a trial on
18 the merits.

19 If this Court were to do anything less than
20 that, it's really to deny Congress's intent and Congress's
21 policy here, because Congress's policy is that religious
22 freedom, religious liberty, shall not be burdened unless,
23 and until, the Government meets its burdens. The District
24 Court clearly found, and said, that the Government did not
25 show a risk of harm, did not show a risk of diversion;

1 and, therefore, he found that the Government did not meet
2 its compelling interests in this case. And we would ask
3 the Court to affirm the preliminary injunction, remand
4 this case to the District Court.

5 Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you, Ms.
7 Hollander.

8 Mr. Kneedler, you have 4 minutes left.

9 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

10 ON BEHALF OF PETITIONERS

11 MR. KNEEDLER: Thank you, Mr. Chief Justice.

12 If I may focus first on the question of
13 importation, no country in the world would permit the
14 exportation and importation of preparations that contain a
15 substance listed under the Convention, because the express
16 words of the -- of the Convention prohibit it. And the
17 commentary that is cited does -- all it says is that
18 plants, as such, are not covered. The plants themselves
19 are not included in the schedule. It then has footnotes
20 describing how the plants may be used, how -- in a mixture
21 or a solution that contain the DMT or some other subject.

22 And that's precisely the sort of thing that the
23 Convention was designed to prohibit. And --

24 CHIEF JUSTICE ROBERTS: But what -- but what
25 does that benefit you? I mean -- I guess this is Justice

1 Scalia's question he asked earlier -- the Treaty is -- it
2 seems to me if you're willing to override a duly enacted
3 statute, the Treaty shouldn't have any greater status.

4 MR. KNEEDLER: Well, I don't think RFRA does
5 override it. What RFRA does is take the compelling
6 interests that the Government already has in enacted laws
7 or treaties, as they are, and then you apply -- you apply
8 RFRA to them. And that's --

9 CHIEF JUSTICE ROBERTS: You think the Treaty
10 gives you a more compelling governmental interest than the
11 Controlled Substances Act?

12 MR. KNEEDLER: I certainly do. And the two
13 together, I think, are doubly compelling, because the
14 Government -- the United States has a compelling interest
15 in encouraging this, and section 801(a) --

16 JUSTICE SCALIA: More than doubly. It has to be
17 doubly, plus a little, if you said that one is even more
18 than the other.

19 [Laughter.]

20 JUSTICE SCALIA: But that's okay.

21 MR. KNEEDLER: But Congress itself, in the
22 statute implementing this Convention, said it is essential
23 to have international cooperation in the protection of the
24 -- of the drugs covered by the statute. So, you have a
25 statutory determination that this is critical, anyway.

1 CHIEF JUSTICE ROBERTS: So, we have to agree
2 with you, though, that our Treaty partners in this area
3 have, sort of, a zero-tolerance approach to enforcing the
4 Treaty.

5 MR. KNEEDLER: No, not at all. First, the
6 United -- as a general matter, of course, the United
7 States has a compelling interest in living up to its
8 treaties. But, under this Treaty, in particular, the
9 United States has to be in a position to go to other
10 countries, maybe countries that are dragging their feet
11 about whether to take enforcement measures, and say, "You
12 have an obligation to strictly construe this Convention."
13 And if they are able to come back and say that you have -
14 - you, yourselves, have not been doing that, that
15 undermines the ability of the United States in enforcing a
16 Treaty designed to prohibit international trafficking in
17 controlled substances. And nothing in this Court's First
18 Amendment cases would have suggested that there is a free-
19 exercise right --

20 JUSTICE BREYER: Well, that's actually why I've
21 been looking. I'm bothered by it, because it -- if the
22 Treaty is absolute, we reserve for peyote, which would
23 mean the religious use of peyote by the Native American
24 tribes is exempt, but other people who have identical
25 religions, use identical substances, they're stuck. And

1 that, it seems to me, is a rather rough problem under the
2 First Amendment.

3 MR. KNEEDLER: Well --

4 JUSTICE BREYER: One religion singled out. And,
5 therefore, I'm looking for some way in this Treaty not to
6 reach that conclusion --

7 MR. KNEEDLER: Well, with --

8 JUSTICE BREYER: -- for the constitutional
9 reason.

10 MR. KNEEDLER: -- with respect to peyote, the
11 Convention does not allow the importation or exportation
12 or international trafficking in any substance that there
13 is a reservation taken for. It is a reservation only for
14 the domestic use of plants that are native to that
15 country. So, peyote cannot be exported or imported under
16 this -- under this Convention. And so, the idea -- so,
17 there's nothing inconsistent with respect to the
18 fundamental threshold question of importation, but, even
19 so, we think, in Congress's specific Indian power, that
20 that -- that that could be different.

21 JUSTICE GINSBURG: Mr. --

22 MR. KNEEDLER: The --

23 JUSTICE GINSBURG: -- Kneedler, if you prevail,
24 would there be anything left over to be argued about in
25 the -- for permanent injunction?

1 MR. KNEEDLER: No. In our view, on the -- on
2 the legal -- now, on our principal submission, no, there
3 would not be anything further, because under -- in our
4 view, there's a categorical prohibition against Schedule 1
5 substances. That is the compelling interest. The
6 question, then, is whether -- as this Court said in Lee,
7 and as Justice O'Connor said in her concurring opinion in
8 Smith, the question is whether an exception would unduly
9 interfere with carrying out that interest, or whether it
10 would be a least effective -- less effective means, in
11 terms of being less effective. And we think there's no
12 question that any exception to a categorical bar would
13 violate that standard.

14 CHIEF JUSTICE ROBERTS: Thank you, Mr. Kneedler.

15 The case is submitted.

16 [Whereupon, at 12:04 p.m., the case in the
17 above-entitled matter was submitted.]

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