

No. 02-2323

The United States Court of Appeals

for the Tenth Circuit

**O CENTRO ESPIRITA BENEFICIENTE
UNIAO DO VEGETAL, ET AL.,
Plaintiffs-Appellees,**

v.

**JOHN ASHCROFT, ET AL.,
Defendants-Appellants.**

Appeal from the United States District Court
For the District of New Mexico

The Honorable James Parker
Chief District Judge
Dist. Ct. No. CV 00-1647

**BRIEF *AMICI CURIAE* OF THE CHRISTIAN LEGAL SOCIETY, THE
NATIONAL ASSOCIATION OF EVANGELICALS, CLIFTON
KIRKPATRICK AS THE STATED CLERK OF THE GENERAL
ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.), AND THE
QUEENS FEDERATION OF CHURCHES , IN SUPPORT OF
PLAINTIFFS-APPELLEES URGING AFFIRMANCE**

Gregory S. Baylor
Counsel of Record
Nathan A. Adams
Kimberlee W. Colby
Center for Law and Religious Freedom
Christian Legal Society
4208 Evergreen Lane
Suite 222
Annandale, Virginia 22003

(703) 642-1070

Corporate Disclosure

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici* state that they are incorporated as nonprofit corporations, they have no parent corporations, they have issued no publicly-held stock, and they are not trade associations.

Statement of Identity, Interest, and Authority to File of *Amici*

The four *amici*, which can be fairly said to represent millions of Americans, are deeply committed to the principle of genuine religious freedom for all. They believe that the Religious Freedom Restoration Act is a critical means of protecting this foundational freedom. They also believe that the proper interpretation and application of the Act is essential to its success.

A detailed statement of interest for each of the four *amici* is found in Appendix A to this brief.

Consent to file this brief has been obtained from counsel for both parties.

Table of Contents

Corporate Disclosure.....	i
Statement of Identity, Interest, and Authority to File of <i>Amici</i>	ii
Table of Contents	iii
Table of Authorities.....	v
Summary of Argument.....	1
Argument	3
I. The District Court Correctly Took Evidence on the Specific Question Whether the UDV’s Use of Hoasca Poses Sufficient Harm to Satisfy the Compelling Interest Standard.	3
II. The District Court Properly Held That the Government Had to Show More Than “Equipose” in the Evidence Concerning the Risk of Harm from the UDV’s Religious Use	13
A. The District Court’s Findings Concerning the Risk of Harm are Subject Only to Clear Error Review	14
B. The Government Must Show That a “Serious” or “Significant” Degree of Harm Would Follow from Exempting the UDV’s Religious Use.	16
III. The Statutory Exemption for Sacramental Peyote Use Supports, Rather Than Undercuts, the UDV’s RFRA Claim.....	19
Conclusion	21
Certificate of Compliance.....	22
Certificate of Service.....	23

Appendix A: Detailed Statements of Interest for *Amici Curiae*24

Table of Authorities

Cases

<i>Church of the Lukumi Babalu Aye v. City of Hialeah</i> 508 U.S. 520 (1993).....	17
<i>Employment Division v. Smith</i> 494 U.S. 872 (1990).....	8
<i>Gillette v. United States</i> 401 U.S. 437 (1971).....	20
<i>Kikumura v. Hurley</i> 242 F.3d 950 (10th Cir. 2001).....	5, 16
<i>Mosier v. Maynard</i> 937 F.2d 1521 (10th Cir. 1991).....	11
<i>Olsen v. Drug Enforcement Admin.</i> 878 F.2d 1458 (D.C. Cir. 1989).....	9
<i>Olsen v. State of Iowa</i> 808 F.2d 652 (8th Cir. 1986).....	9
<i>People v. Woody</i> 61 Cal. 2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964).....	9, 10
<i>Peyote Way Church of God v. Smith</i> 742 F.2d 193 (5th Cir. 1984).....	9, 20
<i>Sherbert v. Verner</i> 374 U.S. 398 (1963).....	12, 17, 19
<i>Smith v. Employment Division</i> 307 Or. 68, 763 P.2d 146 (1988).....	8
<i>State v. Whittingham</i>	

19 Ariz. App. 27, 504 P.2d 950 (1973).....	8, 9
<i>Thiry v. Carlson</i> 78 F.3d 1491 (10th Cir. 1996).....	15
<i>Tilton v. Richardson</i> 403 U.S. 672 (1971).....	13
<i>United States v. Bauer</i> 84 F.3d 1549 (9th Cir. 1996).....	11
<i>United States v. Hardman</i> 297 F.3d 1116 (10th Cir. 2002).....	passim
<i>United States v. Meyers</i> 95 F.3d 1475 (10th Cir. 1996).....	15, 16
<i>Werner v. McCotter</i> 49 F.3d 1476 (10th Cir. 1995).....	4, 12
<i>Whitehorn v. State</i> 561 P.2d 539 (Okla. Crim. App. 1977).....	8
<i>Wisconsin v. Yoder</i> 406 U.S. 205 (1972).....	passim
<u>Statutes and Legislative Materials</u>	
Religious Freedom Restoration Act, 42 U.S.C. § 2000bb <i>et seq.</i>	passim
<u>Other Authorities</u>	
Thomas C. Berg, <i>What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act</i> , 39 VILLANOVA L. REV. 1, 40 (1994).....	6
Douglas Laycock, <i>RFRA, Congress, and the Ratchet</i> , 56 MONT. L. REV. 145	

(1995)6

S. Rep. No. 103-111, *Religious Freedom Restoration Act of 1993*, 1993 U.S.
Code Cong. & Admin. News 18925

SUMMARY OF ARGUMENT

The Religious Freedom Restoration Act (RFRA) is designed to ensure that believers of all religious faiths may follow their conscience without unnecessary restriction from federal laws and regulations. When the federal government imposes a substantial burden on religious exercise, RFRA requires the government to prove that application of the burden furthers a compelling governmental interest and does so by the least restrictive means. In order for the statute to achieve its purpose, courts must hold the government to these standards of justification in each individual case. This requirement applies when, as here, the religious exercise is the use of a controlled substance as the central sacrament of a sincere religious ritual. It is unquestioned that in prohibiting the importation of hoasca tea and threatening members of the O Centre Espirita Beneficiente Uniao do Vegetal (UDV) with criminal prosecution, the government will be destroying the UDV's religious worship as it now exists – tantamount to banning the wine served at a Roman Catholic mass. The government should have to make a very strong showing of public necessity before RFRA countenances such a severe burden on religious practice.

In entering a preliminary injunction in favor of the UDV in this case, the

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

Most importantly, the district court properly required the government to establish a compelling interest not in prohibiting drugs in general, but in prohibiting the particular religious use in this case – the ingestion of hoasca by UDV members during their religious ritual. Accordingly, the district court properly took evidence on the harm that would be caused by ingesting this particular substance in this limited context. The government's argument that a court should simply defer to Congress's listing of hoasca as a controlled substance runs directly counter to RFRA. There is no exception to the statute's requirements for drug laws.

Assessing this evidence, the court found that it was "in equipoise" as to whether or not the UDV's sacramental use of hoasca would create serious risks of harm to the members or a significant risk of diversion to non-religious uses. This factual finding should be reviewed only for clear error, and it is sufficiently supported by the record. The court was also correct in requiring that the risks of harm to UDV members or diversion to non-religious uses be "serious" and "significant." Any less stringent standard would be inconsistent with the compelling

interest test and would severely undermine the effectiveness of RFRA.

ARGUMENT

The Religious Freedom Restoration Act provides that government may not impose a “substantial burden” on a person’s religious exercise unless the government 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 severity of the burden on religious practice here is unquestioned. In considering whether the government met its burden of demonstration, the district court followed the proper analysis, and the government’s attacks on the district court’s reasoning should be rejected.

I. The District Court Correctly Took Evidence on the Specific Question Whether the UDV’s Use of Hoasca Poses Sufficient Harm to Satisfy the Compelling Interest Standard.

The district court held a two-week trial and issued a carefully reasoned 60-page opinion concluding that the use of hoasca in UDV religious ceremonies was not sufficiently dangerous that prohibiting such use was the least restrictive means of furthering a compelling interest. The government contends that “the district court should have rejected plaintiffs’ RFRA claim as a matter of law, without the need to

conduct an evidentiary hearing to determine for itself whether plaintiffs' use of hoasca actually poses unacceptable risks." Br. for Appellants at 21. This position flies in the face of the text and the most fundamental premises of the statute.

The government concedes that it bears the burden of proof. RFRA defines "demonstrates" to mean "meets the burdens of going forward with the evidence and of persuasion." 42 U.S.C. § 2000bb-2(3). As this Court has held, "The government bears the burden of building a record that proves that the [regulation] in question is the least restrictive means of advancing the government's compelling interest."

United States v. Hardman, 297 F.3d 1116, 1131 (10th Cir. 2002) (en banc); accord *Werner v. McCotter*, 49 F.3d 1476, 1480 & n.2 (10th Cir. 1995).

Most importantly, the government must show the compelling interest not with respect to the law in general, but with respect to the particular religious conduct in question. As the district court said, the question was not "whether, in the abstract, the federal government has a compelling interest in protecting [h]ealth and safety" or prohibiting drugs; rather, the question is whether "applying the [drug law] to the UDV's consumption of hoasca *further*s" that general interest. App. at 91 n.8 (emphasis in original). The court correctly looked beyond Congress's designation of hoasca as a controlled substance and took evidence concerning the UDV's specific use.

RFRA explicitly requires that the “application of the burden to the person” must further the government’s compelling interest, 42 U.S.C. § 2000bb-1(b) – not merely that the law in general further that interest. In this Court’s words, “under RFRA, a court does not consider the [law] in its general application, but rather considers whether there is a compelling government reason, advanced in the least restrictive means, to apply the [law] to the individual claimant.” *Kikumura v. Hurley*, 242 F.3d 950, 962 (10th Cir. 2001). Likewise, in *Hardman*, this Court sitting en banc held under RFRA that exemption from the federal law prohibiting possession of eagle parts should extend beyond members of federally recognized Native American tribes to other persons who possessed eagle feathers as part of the sincere practice of Native American religion. The “crucial” question, the majority held, was “what the effect would be of expanding the register” of those eligible to possess eagle parts include these non-tribal claimants – or in other words, “to what degree excluding non-tribal members from the permitting scheme advances the government’s interest” *Id.* at 1133 n.21, 1133. The government lost because it had “failed to build an adequate record” on this specific question. *Id.* at 1133.¹

¹The legislative history confirms that the compelling interest standard “should be interpreted with regard to the relevant circumstances in each case.” S. Rep. No. 103-111, *Religious Freedom Restoration Act of 1993*, 1993 U.S. Code Cong. & Admin. News 1892, 1898.

This method of judging the government’s interest “at the margin”² – the need not for the law in general, but for applying it to the claimant in question – also follows from one of the two Supreme Court decisions that served as RFRA’s model, *Wisconsin v. Yoder*, 406 U.S. 205 (1972). See 42 U.S.C. § 2000bb(b)(1) (purpose of RFRA is “to restore the compelling interest test as set forth in [inter alia] *Yoder*”). In *Yoder*, where Amish parents objected to state law insofar as it required them to send their children to school after age 14, the Court accepted that education in general was a “paramount” state interest. 406 U.S. at 213. But it added that “[w]here fundamental claims of religious freedom are at stake, [w]e cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote, . . . and the impediment to those objectives that would flow from recognizing the claimed Amish exception.” *Id.* at 221. After examining the extensive trial record, the Court concluded that the evidence showed that requiring two more years of formal schooling for Amish teenagers “would do little to serve those [educational] interests.” *Id.* at 222; see *id.* at 236 (“it was incumbent on the State to show with

²See, e.g., Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 Mont. L. Rev. 145, 148 (1995); Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 Villanova L. Rev. 1, 40 (1994).

more particularity how its admittedly strong interest . . . would be adversely affected by granting an exemption to the Amish”).

Accordingly, the district court was absolutely correct to take evidence to determine whether applying the hoasca prohibition to the UDV’s particular use would sufficiently “further” the government’s interests (“advance” or “serve” them, as *Hardman* and *Yoder* put it). Under RFRA, a court may not simply defer to the legislature’s general treatment of a problem – not to Congress’s general scheduling of a controlled substance, any more than to the state’s judgment in *Yoder* that education is generally important, or the congressional judgment in *Hardman* that eagles generally need protection as an endangered species. The legislature’s determination that a law is generally important is not a determination that the law must be applied in this particular circumstance. In determining that DMT poses substantial dangers in general, Congress did not determine that the substance poses such dangers when used in the limited quantities and controlled circumstances of a UDV religious ritual. RFRA directs the court to answer that latter, more specific question; it thereby makes it possible, in the words of the statute, to “strik[e] sensible balances between religious liberty and competing prior governmental interests.” 42 U.S.C. § 2000bb(a)(5).

The government tries to claim that the framework does not apply – that the

court should simply defer to Congress’s generalized judgment about hoasca – because this case involves a drug. See, e.g., Br. for Appellants at 20-21. But there is no exception in RFRA for drug cases. The compelling interest standard, with its focus on the specific harm caused by the claimant’s use, applies to “all cases where free exercise of religion is substantially burdened.” 42 U.S.C. § 2000bb(b)(1).

The lower court cases cited by the government (Br. for Appellants at 25, 38-44) are inapposite because they all involved the claimed religious use of marijuana, which as the district court recognized has “significant differences” in its characteristics from those of hoasca. App. at 88. The more relevant analogy to this case is the sacramental use of peyote, which is protected by statutory exemptions under both federal law and many state laws – and which a number of courts have declared to be constitutionally protected under the compelling interest test that governed Free Exercise Clause cases before *Employment Division v. Smith*, 494 U.S. 872 (1990).³ See *Smith v. Employment Division*, 307 Or. 68, 763 P.2d 146 (1988), rev’d, 494 U.S. 872; *Whitehorn v. State*, 561 P.2d 539 (Okla. Crim. App. 1977); *State v. Whittingham*, 19 Ariz. App. 27, 504 P.2d 950 (1973); *People v.*

³In *Smith*, which itself concerned Native American peyote use, the Supreme Court abandoned the compelling interest test for free exercise claims in general. As to federal laws, RFRA restores by statute the standard for religious freedom claims that *Smith* rejected.

Woody, 61 Cal. 2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964); see also *Peyote Way Church of God v. Smith*, 742 F.2d 193 (5th Cir. 1984) (reversing summary judgment that had approved applying peyote prohibition to the sacramental use of peyote).

These and other decisions have identified the differences that make marijuana exemptions unjustifiable, but peyote exemptions acceptable in some circumstances. First, while marijuana is addictive or often serves as the gateway to other addictive drugs, peyote seldom does. See *Whittingham*, 19 Ariz. App. at 30, 504 P.2d at 953; *Woody*, 61 Cal. 2d at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74. Second, there is extensive traffic in marijuana, but not in peyote. *Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458, 1463 (D.C. Cir. 1989) (R.B. Ginsburg, J.). Third, typically the religious groups using marijuana call for “continuous and public use” of the drug, *Olsen v. State of Iowa*, 808 F.2d 652, 653 (8th Cir. 1986); by contrast, peyote groups limit their use to a “precisely circumscribed ritual” (*Olsen v. DEA*, 878 F.2d at 1464), in small and carefully monitored amounts (*Whittingham*, 19 Ariz. App. at 30, 504 P.2d at 953; *Peyote Way Church of God*, 742 F.2d at 196), and prohibit its use outside the ceremony (*id.* at 196).

Given the uniformly recognized differences between marijuana and other drugs such as peyote, courts might appropriately reject marijuana exemptions under

RFRA as a matter of law, without inquiring into the circumstances of the particular religious use. But if that per se approach is appropriate at all, it should apply only in the narrow circumstances where an exemption has already been repeatedly and definitively rejected. If the per se approach were extended as the government calls for here – applying broadly to any case simply because it involves controlled substances – it would undercut RFRA’s fundamental premise that the government must justify “application of the burden to the [particular] person” (42 U.S.C. § 2000bb-1(b)).

Every one of the features distinguishing marijuana from peyote also figured in the district court’s conclusion that an exemption for the UDV’s use of hoasca would not create serious enough risks to satisfy the standards of RFRA. There was evidence to show that in the form of the hoasca tea, the DMT substance is not seriously harmful physically or psychologically (App. at 96-103); that hoasca lacks a significant potential for abuse because (like peyote) it is unpleasant to ingest (*id.* at 49-50); that the UDV carefully limits and monitors the use of hoasca, prohibits use outside the ceremony, and would likely cooperate in preventing diversion to other uses (*id.* at 37-38, 52); and that, like the peyote groups, the UDV has in fact increased the responsible behavior of its members. *Id.* at 34; see *Woody*, 61 Cal. 2d at 722-23, 394 P.2d at 818, 40 Cal. Rptr. at 74. Although there was also evidence

pointing the other way, these factors concerning hoasca clearly make it different from marijuana, and made it appropriate for the district court to examine in detail whether the UDV's particular use would pose serious harms.

This Court emphasized the need to adhere to fact-specific inquiry in *Mosier v. Maynard*, 937 F.2d 1521 (10th Cir. 1991), which reversed a summary judgment against a Native American prisoner who had challenged a state policy limiting his hair length. Previous decisions had upheld such limits as reasonably related to penological concerns (the test, far more deferential than RFRA, that governs challenges to state prison rules). Even under this test, this Court said: “[W]e recognize that prisoners have been singularly unsuccessful . . . in challenging grooming codes, . . . but this does not obviate the need for facts upon which to base a reasonableness determination.” *Id.* at 1525 n.2. All the more then, the courts’ rejection of marijuana exemptions “does not obviate the need for facts” to show that prohibiting other drugs in controlled religious settings meets the necessity standard of RFRA.⁴

⁴Indeed, even in a case involving marijuana possession, the Ninth Circuit reversed a grant of summary judgment for the government because the district court had wrongly “treated the existence of the marijuana laws as dispositive of the question whether the government had chosen the least restrictive means of preventing the sale and distribution of marijuana.” *United States v. Bauer*, 84 F.3d 1549, 1559 (9th Cir. 1996).

Precisely the same flaw infects the government’s claim that exempting the UDV’s religious use would “‘result in significant administrative problems . . . and open the door to a myriad of claims for religious exceptions.’” Br. for Appellants at 43 (quotation omitted). The government cannot satisfy its RFRA burden with such “[m]ere speculation” and “‘conclusory statements’” (*Hardman*, 297 F.3d at 1130 (quoting *Werner*, 49 F.3d at 1480)); it must offer convincing evidence in the light of the facts. In the other key Supreme Court decision that RFRA incorporates, *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court held that a person with religious objection to Saturday work could not be denied unemployment benefits, because the state had “suggest[ed] no more than a possibility” of future fraudulent claims and had not offered the necessary “proof . . . to warrant such fears.” *Id.* at 407. Again, the government’s cases (Br. for Appellants at 43) are inapposite because they involved claimants who continually smoked marijuana. Given that unrestricted behavior and the substantial traffic in marijuana, the government could rightly fear that the exemption would require continuous oversight and would be difficult to confine. But for the reasons given above, it may not simply be assumed that the same problems will arise from an exemption for a group that ingests hoasca (a far less pervasive drug) in a ritual that it circumscribes and monitors itself. As the Supreme Court has recognized in another context, “the necessity for intensive

government surveillance” depends on whether the conduct being regulated is pervasive or circumscribed. *Tilton v. Richardson*, 403 U.S. 672, 687 (1971) (need for government surveillance to prevent religious uses of state aid is “diminished” when recipient is not “pervasively sectarian”).⁵

Finally, the same principle applies to the government’s assertion that there is a “compelling interest [in] maintaining strict compliance with the 1971 Convention [on Psychotropic Substances].” Br. for Appellants at 19. As the government concedes, treaties are just as subject to the compelling interest test as are other federal laws. *Id.* at 27. Again, the issue is not whether the government has a compelling interest in complying with treaties in general, but whether permitting the UDV’s use in particular (even assuming that such permission violated the treaty) would sufficiently undermine a compelling interest. For the reasons set out in the

⁵The government’s warning that there is another religious group that “exercises relatively few controls over [its] use of” hoasca (Br. for Appellants at 44) has an obvious answer. If another group’s use differs so much from the UDV’s that this other use poses significant problems that the UDV’s does not, then the other group may be denied an exemption under the compelling interest test.

We also note, with the UDV, that the “reason the UDV is now subject to ‘official supervision’ is because *the defendants* successfully insisted below, over the UDV’s objection, that the court require the UDV to comply with various DEA commercial regulations.” Appellees’ Br. at 32 (emphasis in original). We agree that when the government insisted on regulations below, it should not be able to turn around on appeal and claim that those regulations are too burdensome on it.

UDV's brief (see Appellees' Br. at 37-40), *amici* do not believe that government has made such a showing on these facts.

II. The District Court Properly Held That the Government Had to Show More Than "Equipose" in the Evidence Concerning the Risk of Harm from the UDV's Religious Use.

After hearing two weeks of testimony, the district court devoted 26 pages of its opinion to a painstaking review of the evidence whether the UDV's sacramental use of hoasca would create risks of harm to UDV members or diversion to non-religious uses. The court concluded that the evidence was "in equipoise" on whether the UDV's use would or would not create these harms. App. at 103-104, 111. It then held that when the evidence is balanced and inconclusive in this way, the government fails to meet its "onerous" and "difficult" burden under RFRA. *Id.* These conclusions should be upheld.

A. The District Court's Findings Concerning the Risk of Harm are Subject Only to Clear Error Review.

Amici leave it to the parties to provide a detailed review of the district court's findings concerning the risks of harm posed by the UDV's religious use of hoasca and its finding that the evidence was in equipoise. Those findings are supported by the record, and because they are findings of fact, the issue on appeal is only whether they are clearly erroneous. See Fed. R. Civ. P. 52(a). It is true, as the government

says, that “[w]hether something qualifies as a compelling interest is a question of law” reviewed *de novo*. *Hardman*, 297 F.3d at 1127; see Br. for Appellants at 23.

But the question to what extent the UDV’s use would actually undercut the government’s generalized interest is plainly a question of fact. For example, this Court in *Hardman* required the government to show that granting the claimed exemption for possession of eagle parts would sufficiently undercut the government’s interests – precisely the question involved in this case – and the Court repeatedly referred to that question as turning on “factual findings” (297 F.3d at 1135) and “hard evidence” (*id.* at 1132, 1133).

In RFRA cases (as in appeals generally), this Court has said that “[a]s to historical and other underlying factual determinations we defer to the district court, reversing only if the court’s findings are clearly erroneous.” *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996); *United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996). Whether the UDV’s hoasca use will cause physical or psychological harm or be diverted to other uses are quintessential “historical [and] underlying fact[s].” As the district court’s opinion shows, these questions turn heavily on the interpretation of studies and other data and the evaluation of witnesses’ credibility, especially the conflicting expert witnesses who testified. Such matters are left primarily to the district court, and there is no reason to

overturn the careful findings that the court made here.

To be sure, the next and ultimate question is whether this “virtually balanced” evidence actually met the legal standard of justification that RFRA demands of the government. The district court held that such inconclusive evidence did not satisfy the government’s “onerous” and “difficult” burden. App. at 104, 111. *Amici* agree that this determination – whether or not evenly balanced evidence meets the RFRA standard – is a question of law reviewed *de novo*. See *Meyers*, 95 F.3d at 1482 (*de novo* review for “the meaning of the RFRA” and for “the ultimate determination as to whether the RFRA has been violated”). But as we now discuss, the court was absolutely correct to put this level of burden on the government.

B. The Government Must Show That a “Serious” or “Significant” Degree of Harm Would Follow from Exempting the UDV’s Religious Use.

Holding that an equipoise of evidence was not enough to satisfy RFRA, the court required the government to prove more than just a possibility that hoasca would harm UDV members or be diverted to non-religious uses. The court required the government to prove that hoasca use in the sacramental setting “poses a *serious* health risk to the members of the UDV” and that allowing such use “would lead to *significant* diversion of the substance to non-religious use.” App. at 91 (emphases added). The court was absolutely correct to adopt this strong standard.

As noted earlier, the question under RFRA is whether “application of the burden to th[is] person” meets the compelling interest standard: the court “considers whether there is a compelling government reason . . . to apply the [r]egulation to the individual claimant.” *Kikumura*, 242 F.3d at 962. If exempting the individual claimant(s) in question has merely a small impact on the effectiveness of the relevant law, then the reason for applying the statute to the claimant(s) is not compelling. The negative impact on the government’s interests must be of a higher degree. The district court’s terms are entirely appropriate in this context: the harm to the government’s interests must be “serious” or “significant.” Otherwise, as the court held, the application of the burden to the claimant does not sufficiently “further[]” the government’s interests within the meaning of the statute.⁶

Such a stringent principle is demanded by the compelling interest test, which the Supreme Court has described as “the most rigorous of scrutiny.” *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993). The decisions that RFRA incorporates specifically speak of the government’s need to prove “some *substantial* threat to public safety, peace, or order.” *Yoder*, 406 U.S. at 230

⁶Precisely the same approach and result follow under the “least restrictive means” prong of RFRA. If a limited exemption from the law for religious uses will not seriously or significantly increase the harms that the government fears, then applying the law generally but exempting the religious user is the “least restrictive

(emphasis added) (quoting *Sherbert v. Verner*, 374 U.S. 398, 403 (1963)). The principle is also reflected in *Hardman*. There the government argued that broadening the category of persons who could seek permits to possess eagle body parts would result in longer waits for permits, thereby encouraging poaching and endangering Native American tribes' access to parts. But this Court found a lack of evidence "that increased waits will result in *sufficient* poaching to frustrate the government's interest in protecting eagle populations," or that "there are *substantial* numbers of [additional] individuals" who would become eligible for permits and would produce "an increased wait *substantial enough* to endanger Native American cultures." 297 F.3d at 1132, 1133 (emphases added).

A strong standard is also particularly appropriate here given the severity of the threatened burden on the UDV: the loss of the ability to engage in a ritual act of worship that is central to its faith. As already noted, the purpose of RFRA is to "stri[k]e sensible balances between religious liberty and . . . governmental interests" (42 U.S.C. § 2000bb(a)(5)); accordingly, a severe burden such as this demands a strong showing to justify it.

Finally, such a strong standard is crucial to the effectiveness of RFRA in general. Exempting the claimant(s) in question will almost always produce some

means of furthering [the] governmental interest." 42 U.S.C. § 2000bb-1(b).

increased risk of the harm that the government fears; if any increased risk is deemed sufficient to implicate a compelling government interest, the statute will be stripped of any force. RFRA must be interpreted as the district court did, to require a serious or significant risk of harm from exempting the claimant(s) in question.⁷

III. The Statutory Exemption for Sacramental Peyote Use Supports, Rather Than Undercuts, the UDV's RFRA Claim.

Finally, *amici* believe it important to point out one other argument in the government's brief that is deeply flawed and would be destructive of accommodations for religious freedom. The government claims that the exemption of sacramental peyote use in the American Indian Religious Freedom Act (42 U.S.C. § 1996a) implies that this and similar uses are not protected by RFRA. Br. for Appellants at 39 (“[the specific exemption] would not have been necessary if Congress believed that RFRA alone afforded religious adherents an exemption”). This argument stands the case law on its head. Numerous decisions hold that the existence of a specific statutory exemption indicates that the government *lacks* a

⁷There are cases, of course, in which the act being regulated inherently implicates a compelling interest, because it directly harms another, non-consenting person. But *Yoder* indicates that when the religious act in question does not involve such direct harm to another person – as is the case with the circumscribed use of a drug in a religious ritual – courts must “searchingly examine” whether the threat to public safety or order from the particular act is “substantial.” 406 U.S. at 221, 230.

compelling interest in regulating analogous conduct. See, e.g., *Yoder*, 406 U.S. at 236 & n.23 (other states' recognition of Amish vocational schools showed that state could "serve its interests without impinging on [Amish] free exercise"); *Sherbert*, 374 U.S. at 407-08 n.7 (Sabbatarian's free exercise claim for unemployment benefits was bolstered by fact that numerous states already provided benefits in such cases); *Peyote Way Church of God*, 742 F.2d at 201 (federal and state exemptions for Native American peyote use tend "to negate the existence of a compelling state interest in denying the same use to [a similar group]"). Because there are similarities between peyote and hoasca use in circumscribed religious rituals, the fact that the peyote exemptions have not produced serious consequences is plainly evidence that a similar exemption for the UDV's use would not undermine a compelling interest. And as the UDV argues (Appellees' Br. at 35), Congress could have had numerous reasons for exempting peyote use that do not reflect negatively on RFRA protection for comparable religious activity.

Accepting the government's argument would have terrible consequences. Adherents of a particular faith, or proponents of religious freedom in general, might be discouraged from seeking a particular federal or state statutory exemption, for fear that it would be taken to mean that similar conduct fell outside of RFRA or a

counterpart to RFRA enacted in another state.⁸ The government’s argument must be explicitly rejected because it would undermine “our happy tradition” of “accommodat[ing] free exercise values” through statutory exemptions (*Gillette v. United States*, 401 U.S. 437, 453 (1971)).⁹

CONCLUSION

The district court’s judgment entering a preliminary injunction rests on sound legal reasoning and is supported by the factual record. It should be affirmed.

Respectfully submitted,

Gregory S. Baylor
Counsel for *Amici Curiae*

⁸See, e.g., New Mexico Religious Freedom Restoration Act, N.M.S.A. §§ 28-22-1 to 28-22-5 (applying compelling interest/least restrictive means test to state laws and regulations).

⁹The approving reference to this argument in the stay panel opinion (see *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 314 F.3d 463, 467 (10th Cir. 2002)) makes it all the more important that this Court, in its full consideration, clearly state that the argument should be rejected.

Certificate of Compliance

Please complete one of the sections:

Section 1. Word count

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 4,903 words.

Complete one of the following:

Ü I relied on my word processor to obtain the count and it is [Microsoft Word 2000]: 4,903 words.

I counted five characters per word, counting all characters including citations and numerals.

Section 2. Line count

My brief was prepared in a monospaced typeface and contains _____ lines of text.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

[Signature of attorney or pro se party]

Certificate of Service

The undersigned hereby certifies that he caused two true and accurate copies of the foregoing Brief *Amici Curiae* of Christian Legal Society, *et al.*, in Support of Appellees Urging Affirmance to be served both by United States Mail, postage prepaid, and by electronic mail, on February 21, 2003 upon:

Nancy Hollander
John W. Boyd
Freedman Boyd Daniels Hollander
Goldberg & Cline P.A.
20 First Plaza, Suite 700
Albuquerque, NM 87102

Matthew M. Collete, Esq.
Michael J. Singer, Esq.
Department of Justice
Civil Division, Appellate Staff
Room 9008 PHB
601 "D" Street, N.W.
Washington, D.C. 20530-0001

Gregory S. Baylor

Detailed Statements of Interest of *Amici Curiae*

The Christian Legal Society, founded in 1961, is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at over 140 accredited law schools. Since 1975, the Society's legal advocacy and information division, the Center for Law and Religious Freedom, has worked for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in the Supreme Court of the United States and in state and federal courts throughout this nation.

The Center strives to preserve religious freedom in order that men and women might be free to do God's will. Using a network of volunteer attorneys and law professors, the Center provides information to the public and the political branches of government concerning the interrelation of law and religion. Since 1980, the Center has filed briefs *amicus curiae* in defense of individuals, Christian and non-Christian, and on behalf of religious organizations in virtually every case before the Supreme Court involving church/state relations.

The Society is committed to religious liberty because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely

endowed with rights that no government may abridge nor any citizen waive, Declaration of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a “constitutional right,” but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our Nation’s charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers’ notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom, is “Congress shall make no law...”

The Christian Legal Society’s national membership, years of experience, and available professional resources enable it to speak with authority upon religious freedom matters before this Court.

The National Association of Evangelicals (NAE) is a non-profit association

of evangelical Christian denominations, churches, organizations, institutions and individuals that includes more than 50,000 churches from 74 denominations and serves a constituency of approximately 20 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of American heritage.

Clifton Kirkpatrick, as the Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the **Presbyterian Church (U.S.A.)**. The Presbyterian Church (U.S.A.) is the largest Presbyterian denomination in the United States, with approximately 2,500,000 active members in 11,500 congregations organized into 171 presbyteries under the jurisdiction of 16 synods.

The General Assembly does not claim to speak for all Presbyterians, nor are its deliverances and policy statements binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members.

The Presbyterian Church (U.S.A.) has, since the effective date of the

Religious Freedom and Restoration Act, vigorously supported the protections of religious freedom afforded by the act. It urges this Court to continue to protect religious freedom in the United States by applying the Religious Freedom Restoration Act requirement that the government prove that application of a substantial burden on religious exercise furthers a compelling governmental interest and does so by the least restrictive means. The Stated Clerk does not make any claim to determine whether or not the facts in this case furthers a compelling governmental interest and does so by the least restrictive means.

The Queens Federation of Churches, Inc., was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a Board of Directors composed of equal number of clergy and lay members elected by the delegates of member congregations at an annual assembly meeting. Over 360 local churches representing every major Christian denomination and many independent Christian congregations participate in the Federation's ministry. The Queens Federation of Churches has appeared as *amici curiae* previously in a variety of actions for the purpose of defending religious liberty. The Queens Federation of Churches and its member congregations are vitally concerned for the protection of the principle and practice

of religious liberty, believing that RFRA property guards against governmental indifference or hostility to religious sacramental practice.