No. 02-2323

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGATAL, ET AL.,

Plaintiffs-Appellees,

v.

JOHN ASHCROFT, ET AL.,

Defendants-Appellants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
THE HONORABLE JAMES A. PARKER

PETITION FOR REHEARING EN BANC

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STATEMENT REQUIRED BY FED. R. APP. P. 35(b)

Pursuant to Fed. R. App. P. 35, Appellants John Ashcroft, et al., respectfully petition this Court to rehear this case *en banc*. In this case, a divided panel of this Court affirmed a preliminary injunction requiring the Government to permit the importation, distribution and possession of "hoasca" for use in religious ceremonies, notwithstanding the fact that hoasca contains a Schedule I hallucinogenic controlled substance prohibited by the Controlled Substances Act (CSA), 21 U.S.C. §§ 801-904. This case presents the following issues of exceptional importance:

1. Whether the panel erred in concluding that, for purposes of determining whether a party is entitled to injunctive relief, the "status quo" is the party's clandestine activity in violation of existing criminal laws.

2. Whether the panel erred in affirming an injunction that requires the United States to violate the 1971 United Nations Convention on Psychotropic Substances.

3. Whether the panel erred in holding, contrary to the considered judgments of Congress and the international community concerning the danger posed by hallucinogenic substances, that the Religious Freedom Restoration Act, (RFRA), 42 U.S.C. §§ 2000bb *et seq*., requires the Government to permit plaintiffs to import, distribute, and possess hoasca for ceremonial purposes.

In addition, the panel's decision conflicts with the following decision of this Court: *SCFC ILC, Inc.* v. *Visa USA, Inc.*, 936 F.2d 1096, 1099 (10th Cir. 1991).

INTRODUCTION

In this case, a divided panel of this Court affirmed a preliminary injunction that requires the Government to allow the plaintiffs to import, distribute, possess and use

"hoasca" for ceremonial purposes, notwithstanding the fact that hoasca contains a Schedule I hallucinogenic controlled substance prohibited by the Controlled Substances Act. The panel majority's unprecedented holding not only precludes the Government from enforcing that statute, but also places the United States in violation of an important international drug control treaty.

Rehearing en banc is warranted on three grounds. First, the panel majority has fundamentally altered the standard for adjudicating requests for injunctive relief in a manner that is both ill-conceived and contrary to this Court's precedent. The panel held that a party who violates a criminal statute – and takes steps to conceal the illegal activity from the authorities – does not seek to alter the "status quo" in requesting an injunction that would prohibit the Government from enforcing the criminal statute. The panel's remarkable holding that the covert violation of existing criminal law is the "status quo" finds no support in the law. Moreover, the panel majority's attempt to link the status quo to a party's ability to demonstrate a prima facie case under RFRA is (as the dissent pointed out) contrary to this Court's controlling precedent.

Second, the panel majority affirmed an injunction that requires the United States to violate an important international drug control treaty – the 1971 United Nations Convention on Psychotropic Substances, 32 U.S.T. 543, 1019 U.N.T.S. 175. Given the extraordinary nature of such a holding and the disruption of the Executive's ability to direct the conduct of foreign affairs, the panel majority's failure even to

consider the harm to the Government and to the public interest is an error that warrants the full Court's attention.

Finally, the panel majority erred in failing to accord sufficient weight to the Government's compelling interest in the uniform application of the Nation's drug laws and congressional findings regarding the health risks of hallucinogenic substances. In doing so, the panel contravened the intent of Congress in enacting RFRA by applying the compelling interest test more stringently than it had been applied prior to the Supreme Court's decision in *Employment Division, Dep't of Human Resources* v. *Smith*, 494 U.S. 872 (1990).

STATEMENT

1. The O Centro Espirita Beneficiente Uniao Do Vegetal (UDV) engages in religious ceremonies involving the ingestion of a tea-like mixture known as "hoasca." The tea is made by brewing together two indigenous Brazilian plants, one of which contains dimethyltryptamine (DMT), a hallucinogen listed under Schedule I of the Controlled Substances Act (CSA), 21U.S.C. §§ 801-904. A substance is included in Schedule I, the most restrictive schedule, if it "has a high potential for abuse," "has no currently accepted medical use in treatment in the United States," and has "a lack of accepted safety for use * * * under medical supervision." *Id*. § 812(b)(1)(A)-(C).

Because the plants do not grow in the United States, hoasca is prepared in Brazil by church officials and imported into the United States. In May 1999, agents

of the U.S. Customs Service seized a shipment of hoasca labeled "herbal tea extract" bound for the UDV.

2. The UDV and several of its members then brought this action, alleging, among other things, that the Government's refusal to allow them to import, distribute and possess hoasca for ceremonial purposes violates RFRA. Under RFRA, "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless "it demonstrates that application of the burden to the person -- (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. Plaintiffs sought a declaration that they could not be penalized for their activities relating to hoasca , and an injunction against any attempt to seize the hoasca or prosecute UDV members.

Plaintiffs moved for a preliminary injunction. The district court granted the motion, holding that plaintiffs had a substantial likelihood of success on their RFRA claim because the Government had not demonstrated that the prohibition on hoasca furthers a compelling interest under RFRA.

3. The Government appealed and sought a stay pending appeal. This Court granted the motion. *O Centro Espirita Beneficiente Uniao do Vegetal* v. *Ashcroft*, 314 F.3d 463 (10th Cir. 2002). The motions panel held that the status quo is the Government's enforcement of the CSA, and that "a stay will merely reinstate the

status quo." *Id*. at 467. The motions panel also held that the district court's holding that the 1971 U.N. Convention on Psychotropic Substances does not extend to hoasca "is in considerable tension with the language of that Convention," and that "the district court's factual findings are in considerable tension with (if not contrary to) the express findings in the CSA" regarding the health risks of DMT. *Ibid*.

4. After expedited briefing and oral argument, a divided panel of this Court affirmed the district court's injunction. The panel majority acknowledged that, where a party seeks a preliminary injunction that alters the status quo, the right to relief must be proven "heavily and compellingly." Slip op. 13. However, the panel held that the status quo here is "the time when the plaintiffs were exercising their religious freedoms before the government enforced the CSA against them," concluding that this was the last "uncontested" status between the parties. *Id*. at 16. Acknowledging that its interpretation of the status quo would apply to parties who engaged in "federally prohibited activity" on religious grounds, the panel majority held that a plaintiff who did not "pass the prima facie stage of RFRA * * * would not escape the heightened burden of proof for the four preliminary injunction factors." *Id*. at 17.

Applying the standard governing injunctions that preserve, rather than alter, the status quo, the panel majority held that the district court properly concluded that injunctive relief is appropriate. With respect to the health effects of hoasca, the panel majority agreed with the district court's conclusion that the evidence is "in equipoise"

and therefore that "the Government failed to satisfy its RFRA burden on the issue of health and safety risks of hoasca." *Id*. at 22. The panel majority reached a similar conclusion with respect to the risk of diversion. *Id*. at 26.

Turning to the contention that prohibiting hoasca use furthers the compelling interest of ensuring compliance with the 1971 Convention on Psychotropic Substances, the panel majority declined to address the district court's holding that the treaty does not cover hoasca. *Id*. at 27. Instead, the panel held that even if the Convention applies to hoasca, the Government did not demonstrate why compliance with the Convention represents the least restrictive means of furthering the Government's compelling interests. *Id*. at 28-29.

The panel majority then distinguished case law upholding enforcement of the CSA in the face of religious objections, reasoning that those cases involved different substances such as marijuana. *Id*. at 29-30. The panel also held that congressional findings that DMT poses an unacceptable risk to public health are "insufficient to satisfy RFRA." *Id*. at 31-32.

5. The dissent asserted that the panel had misapplied the standards governing preliminary injunctions, stating that "[t]he majority's conclusion that the status quo in this case is contingent on the merits of UDV's RFRA claim is clearly at odds with binding Tenth Circuit precedent." Dissent, at 2. Under the panel majority's ruling, "any party could establish the status quo by surreptitiously engaging in behavior that

violated a statute until discovered by law enforcement authorities and then claiming that it is the enforcement of existing law that amounts to a change in the status quo." *Id*. at 5 n.2.

The dissent then concluded that the UDV did not show that the balance of harms and the public interest "weigh heavily and compellingly in its favor." *Id*. at 6-7. The United States suffers irreparable injury when it is enjoined from enforcing its criminal laws, and that injury is exacerbated by the "burdensome and constant official supervision and oversight" of UDV's handling of hoasca. *Id*. at 7. Moreover, "Congress has specifically found that the importation and consumption of controlled substances is adverse to the public interest," and the district court itself stated that the evidence was in "equipoise." *Id*. at 7-8. The dissent also indicated that "the United States argues convincingly that a preliminary injunction requiring it to violate the Convention would seriously impede its ability to gain the cooperation of other nations in controlling the international flow of illegal drugs." *Id*. at 9.

ARGUMENT

I. THE PANEL MAJORITY'S HOLDING THAT THE REQUESTED INJUNCTION DOES NOT ALTER THE STATUS QUO IS INCORRECT AND INCONSISTENT WITH BINDING TENTH CIRCUIT PRECEDENT.

Because a preliminary injunction is an extraordinary remedy, the movant's right to relief must be "clear and unequivocal." *Kikumura* v. *Hurley*, 242 F.3d 950, 955

(10th Cir. 2001). However, a preliminary injunction that alters the status quo "goes beyond the traditional purpose for preliminary injunctions, which is only to preserve the status quo until a trial on the merits may be had." *SCFC ILC, Inc.* v. *Visa USA, Inc.*, 936 F.2d 1096, 1099 (10th Cir. 1991). A party seeking a preliminary injunction that "disturbs the status quo" therefore must show that the factors governing preliminary injunctions weigh "heavily and compellingly" in its favor. *Id*. at 1098-99.

This Court has held repeatedly that the status quo is the relationship between the parties immediately preceding the litigation. *See, e.g., Kikumura*, 242 F.3d at 955. Under that standard, the status quo is the Government's refusal to permit the UDV to import, distribute and possess the tea. The importation, distribution, possession, and use of hoasca clearly is prohibited under the CSA, and the UDV's request for injunctive relief seeks a religious exemption from the statute. *See O Centro I*, 314 F.3d at 466, 467.

The panel majority's holding that the status quo should be defined as the UDV's covert use of hoasca in violation of the CSA creates a new standard that is contrary to this Court's precedents. First, the panel majority erroneously held that the UDV's surreptitious use of hoasca is the last "uncontested" status between the parties, and that the Government altered the status quo when it discovered UDV's activity and attempted to put a stop to it. That conclusion is flawed because, as the dissent points out (at 5 n.3), "I fail to see how UDV's importation and use of *hoasca* can be called

'uncontested' when the government was not aware of the importation and consumption as a direct result of UDV's efforts to keep the matter secret." The notion that the law governing preliminary injunctions is designed to protect a party's clandestine activity in violation of existing criminal laws during ongoing litigation is unprecedented.

Under the panel majority's reasoning, a citizen can simply violate a criminal law in secret – whether the violation involves the possession of a controlled substance, the failure to pay taxes, or any other potential criminal act – and establish that violation as the "status quo." The panel majority forthrightly acknowledged this possibility, but sought to minimize it by holding that only parties who establish a prima facie case under RFRA benefit from its ruling, while a party who cannot meet that burden "would not escape the heightened burden of proof" required of a party who seeks to change the status quo. Slip op. 17. That holding, expressly tying the "status quo" to an aspect of the merits, is inconsistent with this Court's controlling precedent. In *SCFC*, this Court rejected the contention that the status quo should be interpreted with reference to the merits of the case, stating: "The status quo is not defined by the parties' existing *legal rights*; it is defined by the *reality* of the existing status and relationship between the parties, regardless of whether the existing status and relationship may ultimately be found to be in accord or not in accord with the parties' legal rights." 936 F.2d at 1100 (emphasis in original).

The panel majority's holding also makes little practical sense. Under the panel's rationale, for instance, two parties could engage in the exact same conduct and seek the exact same relief, but receive different "status quo" holdings on the basis of their ability to demonstrate a prima facie case. The notion that the parties must litigate an aspect of the merits before deciding whether a requested injunction alters the status quo is both ill-conceived and incorrect.

If a preliminary injunction were designed merely to preserve the status quo, one would expect such an injunction to consist of a simple, negative prohibition on governmental conduct. Yet the injunction here imposes 36 unprecedented conditions on the delivery of hoasca and oversight of the UDV, requiring the Government to provide a license to the UDV outside the CSA's traditional framework. Far from merely preserving the "uncontested" status between the parties, the injunction here creates an entirely new relationship in which the Government is prohibited from enforcing the criminal law.

The panel majority's decision alters the basic framework governing requests for preliminary injunctions, and thus substantially affects a large number of cases. The decision also creates confusion with respect to requests for stays pending appeal (which are governed by identical standards). This Court now has issued two published opinions with opposite results on the status quo issue. *Compare* slip op.

13-17, *with O Centro I*, 314 F.3d at 466-67. Accordingly, the full Court should rehear this case and correct the panel's error.

II. THE PANEL MAJORITY ERRED IN AFFIRMING AN INJUNCTION THAT REQUIRES THE UNITED STATES TO VIOLATE THE 1971 UNITED NATIONS CONVENTION ON PSYCHOTROPIC SUBSTANCES.

The 1971 Convention requires signatory nations to "prohibit all use" of Schedule I substances (including DMT), except for limited scientific and medical purposes. Convention, Art. 7(a); App. 155. As the dissent recognized (at 10-13), the district court plainly erred in concluding that hoasca was not covered by the terms of the Convention. *See also O Centro I*, 314 F.2d at 466. The panel majority declined to address the district court's incorrect legal holding that the treaty does not apply to hoasca, but nevertheless concluded that the treaty does not provide a basis for prohibiting the UDV's ceremonial use of hoasca. That holding is incorrect.

First, to the extent the panel majority held that RFRA prevails in a "conflict" with the 1971 Convention, it was error to do so. Nothing in RFRA's text or legislative history suggests that the interests served by a treaty or another statute cannot be "compelling." *See, e.g.*, *Adams* v. *Commissioner of Internal Revenue*, 170 F.3d 173, 179 (3d Cir. 1999) (compelling interest in applying tax laws).

Second, the panel majority's holding that the Government failed to show that compliance with the treaty is the least restrictive means of advancing its interest

failed to take into account the fact that no one has suggested a less restrictive means by which the United States could further its compelling interest in complying with the Convention and nevertheless permit the UDV to import, distribute, possess and use hoasca. The unrebutted evidence demonstrated that a "reservation" is not possible (App. 167-68), and that seeking an amendment would damage the Government's ability to oppose amendments that undermine the war against international drug trafficking. App. 169-70.

The only "less restrictive" alternative is simply to violate the treaty. That, however, is not an option, given the fact that such a violation would weaken the United States' efforts to bring other countries into compliance with their obligations under the Convention. App. 168-69, 172-73. The panel majority's decision places an impossible standard upon the Government – requiring it to provide specific evidence negating less restrictive means that no one has identified.

Finally, as the dissent pointed out (at 9), the panel majority incorrectly limited the relevance of the treaty to the likelihood of success, ignoring its relevance to the third and fourth factors governing preliminary injunctions – the balance of harms and the public interest. An order requiring the Government to violate a treaty causes substantial harm to the United States, particularly where, as here, compliance with that treaty is essential to the United States' efforts to combat international drug trafficking. In light of the foreign policy implications and the traditional role of the

Executive in administering the Nation's agreements with foreign powers, a judicial edict requiring the United States to violate an important international treaty is truly extraordinary. The panel majority's failure even to consider the harm to the Government and to the public interest in these circumstances is an error that requires correction by the full Court.

III. THE PANEL MAJORITY ERRED IN REJECTING THE GOVERNMENT'S INTEREST IN THE UNIFORM ENFORCEMENT OF THE CONTROLLED SUBSTANCES ACT AND IN DECLINING TO FOLLOW CASE LAW MANDATING DEFERENCE TO CONGRESSIONAL FINDINGS.

Congress enacted RFRA to restore the compelling interest standard that existed under First Amendment law prior to the Supreme Court's decision in *Employment Division, Dep't of Human Resources* v. *Smith*, 494 U.S. 872 (1990). *See* 42 U.S.C. § 2000bb(b)(1). While Congress was not necessarily restoring "the actual outcomes" of pre-*Smith* case law, it indicated that "the compelling interest test generally should not be construed more stringently or more leniently than it was prior to *Smith*" and that courts should "look to free exercise cases decided prior to *Smith*" in applying RFRA. S. Rep. No. 103-111, 103d Cong., 1st Sess. 9, *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898.

The panel majority here acted contrary to congressional intent by applying the test far more stringently than it was applied prior to *Smith*. Specifically, the panel majority acted contrary to the teaching of the uniform pre-*Smith* case law that the

compelling interest test does not permit the courts to second-guess the determination of Congress that possession and use of a controlled substance will harm the public health and welfare. *See, e.g.*, *United States* v. *Rush*, 738 F.2d 497, 512 (1st Cir. 1984); *United States* v. *Middleton*, 690 F.2d 820 (11th Cir.1982); *Leary* v. *United States*, 383 F.2d 851, 860-61 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969); *United States* v. *Kuch*, 288 F. Supp. 439, 448 (D.D.C. 1968); *Randall* v. *Wyrick*, 441 F. Supp. 312, 316 n.2 (W.D. Mo. 1977); *see also O Centro I*, 314 F.3d at 466-67. The fact that these cases involve other controlled substances (slip op. 30, 33) does not detract from this central premise. Consistent with pre-*Smith* case law, RFRA's compelling interest standard is not a basis for dismissing the combined judgment of Congress and the international community as deserving of no more value than that of a few hired experts. The panel majority's holding to the contrary misapplied RFRA by applying a standard that cannot be squared with pre-*Smith* case law.

In addition, the panel majority erred in rejecting (slip op. 33) the Government's compelling interest in uniform application of the CSA. As Justice O'Connor explained in her concurring opinion in *Smith*,"uniform application" of the prohibition of controlled substances is "essential to accomplish" the Government's "overriding interest in preventing the physical harm caused by the use of a Schedule I controlled substance," and "is essential to the effectiveness" of "preventing trafficking in

controlled substances." 494 U.S. at 905 (O'Connor, J., concurring). Because the "health effects caused by the use of controlled substances exist regardless of the motivation of the user, the use of such substances, even for religious purposes, violates the very purpose of the laws that prohibit them." *Ibid.* Congress indicated when it enacted RFRA that Justice O'Connor's concurrence in *Smith* was based upon "the Court's established jurisprudence" that continues to apply under RFRA. H.R. Rep. No. 103-88, 103d Cong., 1st Sess. 4 n.10 (1993). Thus, contrary to the panel majority's holding, RFRA does not preclude courts applying the compelling interest test from considering the potential for harm that would flow from additional claims for religious exemptions. *See United States* v. *Israel*, 317 F.3d 768, 771 (7th Cir. 2003); *United States* v. *Oliver*, 255 F.3d 588, 589 (8th Cir. 2001).

CONCLUSION

For the foregoing reasons, this Court should vacate the panel's decision and rehear this case *en banc*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2003, I served the foregoing Petition for Rehearing En Banc upon counsel of record by causing two copies to be mailed, by overnight delivery, to:

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ADDENDUM

Panel Opinion

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