these cases do not support the government's position. To the contrary, these cases prove that courts are "quite capable . . . of strik[ing] sensible balances between religious liberty and competing state interests" on a case-by-case basis. *Smith*, 494 U.S. at 902 (O'Connor, J., concurring in the judgment).

B. UDV's sacramental use of hoasca *does not violate the 1971 Convention.*

The government claims the preliminary injunction requires it to violate the 1971 Convention and that the government has a compelling interest in compliance. This is wrong because (1) the district court correctly found that *hoasca* is not covered by the Convention; and (2) even if the Convention otherwise applied, the language of the Convention itself and of other treaties to which the United States is a party permit the government to accommodate UDV's religion. Furthermore, the government made no effort to prove a treaty-related compelling interest in prohibiting UDV's exercise of religion.

1. The 1971 Convention does not apply to *hoasca*.

The district court correctly found "that the 1971 Convention on Psychotropic Substances does not apply to the hoasca tea used by the UDV" (Pet. App. 242a), since the 1971 Convention does not apply to plants or to decoctions, infusions, or beverages made from them. The government disagrees, pinning its entire argument on one decontextualized phrase of the 1971 Convention: "a preparation is subject to the same measures of control as the psychotropic substance which it contains." (Br. 41–42.) The government claims that the word "preparation" includes *hoasca* because *hoasca* contains DMT, which is prohibited by the 1971 Convention. As demonstrated below, however, DMT is *only* prohibited when it is or has been isolated as a distinct chemical, not when it is naturally present in a tea made from plants. The text of the Convention, its drafting history, the *1971 Commentary*, the 1988 Convention, the conduct of the United States regarding the export and use of peyote for religious purposes, the opinion of the executive

secretary to the International Narcotics Control Board (INCB) (which administers drug treaties), and the statement of a former member of the INCB establish that *hoasca* is not a "preparation" within the terms of the Convention and is not covered. Because neither of the plants used in making *hoasca* is covered by the Convention, and because DMT, which *is* covered, is not extracted, distilled, separated, or added as a distinct chemical substance in preparing *hoasca*, *hoasca* is not a "preparation."

The terminology of the treaty and related documents reflect its underlying policies. *Hoasca* is made by boiling two plants in water—a traditional, uncomplicated and unsophisticated process unrelated to refining or creating street drugs. The 1988 Convention illustrates why such mixtures are not covered: All actions taken in upholding the drug conventions "shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use." 1988 Convention, art. 14(2). The 1988 Convention thus evidences the desire to protect traditional practices, including UDV's *hoasca* use. UDV has existed as a legal entity since 1961 (J.A. 50), and the plants have been used religiously for thousands of years (J.A. 78, 342).

This is reflected in the Conventions and related documents. First, by its terms, the 1971 Convention does not apply to plants, since no plants or parts of plants are listed in any of its Schedules.[15] The *1971 Commentary* states that:

> Plants as such are not, and—it is submitted—are also not likely to be, listed in Schedule I, but only some products obtained from plants. Article 7 therefore does not apply to plants as such from which substances in Schedule I may be obtain nor does any other provision of the [1971]

[15] The 1971 Convention's explicit declination of applicability to *any* plants or parts of plants is a major change from the Single Convention on Narcotic Drugs, *done*, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 204 (1961 Convention), which expressly prohibits the cultivation of coca bushes, opium poppies, cannabis plants, and parts of those plants.

> Convention. Moreover, the cultivation of plants from which psychotropic substances may be obtained is not controlled by the [1971] Convention.

(Resp't Opp. App. 55.)[16] Commentaries are accepted aids to treaty interpretation. *See Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996) ("[W]e have traditionally considered as aids to its interpretation negotiating and drafting history (*travaux preparatoires*) and the postratification understanding of the contracting parties.") (internal citation omitted).

The government, however, claims that *hoasca* would be legal only if the United States had reserved for it when it ratified the 1971 Convention. (Br. 46–47.) But "the continued toleration of the use of hallucinogenic substances which the 1971 Conference had in mind *would not require a reservation* under paragraph 4 of Article 32," which, in case they are banned *in future*, allows countries to make reservations for certain plants traditionally used by particular religious groups.[17] (Resp't Opp. App. 58.) Just as plants are not covered by the convention and do not require a reservation, neither are infusions or beverages made from them. Paragraph 12 of the *1971 Commentary* to Article 32 points out:

> Schedule I does not list any of the natural hallucinogenic materials in question, but only chemical substances which

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[16] The *1971 Commentary* refers to the 1971 Convention as the "Vienna Convention." *See 1971 Commentary* vii. We have substituted "1971" to maintain consistency within this brief.

[17] The United States reserved for the use of peyote by NAC in the event peyote might be included in the treaty at some future time. *See* S. Exec. Rep. No. 96-29. Convention on Psychotropic Substances at 4 (1980) ("Since mescaline, a derivative of the peyote cactus, is included in Schedule I of the Convention, and since the inclusion of peyote itself as an hallucinogenic substance is possible in the future, . . . the instrument of ratification include[s] a reservation with respect to peyote harvested and distributed for use by the Native American Church in its religious rites."); (*see also* Pet. App. 240a.)

> constitute the active principles contained in them. The inclusion in Schedule I of the active principle of a substance does not mean that the substance itself is also included therein if it is a substance clearly distinct from the substance constituting its active principle...Neither the crown (fruit, mescal button) of the Peyote cactus nor the roots of the plant *Mimosa hostilis* [n.1227 "*An infusion of the roots is used*"] nor Psilocybe mushrooms [n.1228 "*Beverages made from such mushrooms are used.*"] themselves are included in Schedule I, but only their respective active principles, mescaline, DMT, and psilocybine (psilocine, psilotsin).

(Resp't Opp. App. 58) (emphasis added). The *1971 Commentary*'s footnotes, quoted verbatim in the text above, again show that *hoasca* is not covered. Out of the thousands of plant species that contain psychotropic alkaloids, one of the *Commentary*'s two examples of what the 1971 Convention *does not* prohibit is "an infusion of the roots" of "*mimosa hostilis,*" a plant from Brazil that, like *psychotria viridis,* contains DMT, and has been used to make a religious tea. (J.A. 357.) No logical reason exists to assume that similar infusions made from other unregulated plants, such as *psychotria viridis* and *banisteriopsis caapi*, the components of *hoasca*, would be treated differently.[18] A tea, of course, is created by infusion. *See Kendall Co. v. Tetley Tea Co.*, 189 F.2d 558, 560 (1st Cir. 1951) (tea bag is constructed to allow rapid infusion of tea).

The government's insistence that *hoasca* must be seen as a "preparation" and therefore must be covered is simply incorrect. Article 1(f) of the 1971 Convention defines "preparation" as "any solution or mixture, in whatever physical state, containing one or more psychotropic substances."

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[18] During a drafting plenary session, the Canadian representative noted that the Convention relates "only to chemical substances and not to natural materials." United Nations Conference for the Adoption of a Protocol on Psychotropic Substances, Official Records, vol. II, Vienna, Jan. 11–Feb. 19, 1971, Twenty-Fifth Plenary Meeting, ¶ 45 (statement of Canadian Representative, Mr. Chapman), U.N. Doc. E/CONF. 58/7/Add. 1 (1973).

However, the portion of the *1971 Commentary* quoted above, with its footnotes, excepts from "preparation" infusions and beverages made from plants. If any doubt remained about this, paragraph 3.18 of the *1988 Commentary* makes it clearer still. It defines "preparation" as "*the mixing of a . . . drug with one or more other substances* (buffers, diluents)." (Resp't Opp. App. 66) (emphasis added). UDV does not obtain DMT from any source, or mix it with buffers or diluents. It makes a traditional tea from plants, by infusing them in boiling water, and the resulting decoction is not covered.

Other interpretive evidence supports the conclusion that the 1971 Convention does not cover *hoasca*. During the evidentiary hearing, UDV offered the written opinion of Mr. Herbert Schaepe, the executive secretary of the INCB, which he sent to the Ministry of Health of the Netherlands in response to a specific request regarding the legal status under the 1971 Convention of a similar tea used by a different religious group in the Netherlands. (Resp't Opp. App. 51–52.) Mr. Schaepe's opinion was clear: "No plants (natural materials) containing DMT are at present controlled under the 1971 Convention on Psychotropic Substances. Consequently, preparations (e.g. decoctions) made of these plants, including ayahuasca are not under international control and, therefore, not subject to any of the articles of the 1971 Convention." (*Id.*)

The government objected to this evidence, arguing that because it related to the Convention, it was "for another day." (J.A. 769.) Although the district court initially excluded the evidence, it eventually found, based on the analysis described earlier, that the 1971 Convention did not include UDV's sacramental *hoasca* tea because it is made by boiling the parts of two plants and does not involve a chemical or physical separation of DMT. (Pet. App. 242a.) The district court relied on the 1971 Convention itself, the *1971 Commentary*, the statements of Congress that plants are not covered by the treaty but may be included in the future, and evidence that peyote is exported to Canada even though peyote contains mescaline,

which is controlled under the Convention, and which the United States did not reserve to export. (Pet. App. 241a.)[19]

After the district court granted the preliminary injunction, the government sought a stay and, in support, submitted a declaration from a State Department lawyer. (J.A. 15.) The district court denied the stay, finding the declaration was only the State Department's litigation position. (Resp't Opp. App. 4.) The district court found that the INCB executive secretary's letter (*Id.* at 51–52) provided additional support for the conclusion that the Convention did not control *hoasca* (*id.* at 4). Accordingly, by the time the government took its appeal, the district court had before it the commentaries, the Senate Report regarding the reservation for peyote, the United States's practices in relation to peyote, and the letter from INCB Secretary Schaepe.

When the government sought a stay from the court of appeals, it submitted two more declarations from State Department lawyers and one from the DEA. (*See* J.A. 1; Pet. App. 261–71.) In response, UDV submitted the declaration of Ambassador Herbert Okun, an American diplomat who was a member of the INCB for over ten years. (Resp't Opp. App. 48.) Ambassador Okun confirmed that the Convention does not cover *hoasca*, explaining that the *1971 Commentary* "is the principal written instruction" regarding the interpretation of the Convention and is "an official document" that "provides authoritative guidance to Parties in meeting their obligations under the Conventions, consistent with national laws and policies." (*Id.*)

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[19] Although the government now claims it did not condone this exportation, (Br. 43 n.31) the Index and Mailing List of the Texas Department of Public Safety, listing the Canadian churches authorized to receive peyote from the peyote fields in Texas, was a government exhibit (J.A. 105–15). Peyote does not grow in Canada and therefore, like *hoasca*, must be imported. There is no evidence that, during nearly forty years of this practice, any treaty signatories have complained or that the United States's "leadership" role has suffered. (Br. 46.)

While the government now finally acknowledges that "the Commentary . . . protects a plant substance" such as *hoasca*, "if it is 'clearly distinct from the substance constituting its active principle'" (Br. 42), it completely changes the facts by arguing that *hoasca* is "[m]ade by the *extraction* and *synthesis* of the active principle DMT with the active principle of another plant to create an oral delivery system for DMT that activates its hallucinogenic properties, [so] hoasca is not 'distinct' from the regulated DMT." (Br. 42) (emphasis added). *No citation appears for this statement because there is none. The statement is patently false.* No evidence exists that DMT is separately extracted[20] or synthesized.[21] nor could such evidence exist because that is *not* how this sacramental tea is made. (J.A. 529.)

The government also misrepresents the evidence when it cites to the panel decision to support its assertion that "ingestion of the chemicals *distilled* by the brewing process allows DMT to reach the brain." (Br. 5) (emphasis added). Nothing is "distilled"[22] when the two plants are boiled together, nor did the panel say so.[23] The process of making *hoasca* tea from the bark of the *banisteriopsis caapi* and the leaves of *psychotria viridis* does *not* entail any chemical separation of

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[20] The *1988 Commentary* defines extraction as "the separation and collection of one or more substances from a mixture by whatever means: physical, chemical or a combination thereof." (Resp't App. Opp. 65.)

[21] *Hawley's Condensed Chemical Dictionary* 161 (13th ed. 1997), defines synthesis as "[c]reation of a substance that either duplicates a natural product or is a unique material not found in nature, by means of one or more chemical reactions. . . ."

[22] *Hawley's Condensed Chemical Dictionary* 418–19 (13th ed. 1997), defines distillation as "[a] separation process in which a liquid is converted to vapor and the vapor then condensed to a liquid."

[23] Contrary to the government's assertion, the correct citation to the panel decision is that "[i]ngestion of the *combination of plants* allows DMT to reach the brain." (Pet. App. 127a) (emphasis added).

any psychotropic substances from the plants.[24]

If simply boiling the plant substances with water were an "extraction" that rendered the tea not "clearly distinct" from its active principle, the Convention would also require the United States to forbid NAC's sacramental peyote tea, because the United States took no reservation for the active principle, mescaline. Government exhibits and expert testimony established that NAC uses peyote as a sacrament by eating the buttons of the plant and by making a tea (J.A. 501, 925, 944) from parts of the plant containing mescaline, which is listed in Schedule I of the Convention. If the treaty applies to a tea from *psychotria viridis*, a non-covered plant that contains DMT (a covered chemical), it must also apply to peyote, a non-covered plant that contains mescaline (a covered chemical). But, just as *hoasca* tea is clearly distinct from DMT, peyote tea is clearly distinct from mescaline.[25]

Notwithstanding the text of the two conventions and their official commentaries, the government continues to argue that the district court should have deferred to the government's lawyer's contrary interpretation.[26] Courts, however, first look

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[24] Moreover, expert evidence established that extraction of the DMT alkaloid alone from the other alkaloids in the plants would involve a very difficult, time-consuming, and expensive chemical process. (J.A. 353–54.) It would also not yield a substance of any sacramental interest to UDV because it is the plants that are sacred. (J.A. 317, 541.)

[25] The government's unsupported and specious comparison to marijuana tea (Br. 42) is merely inflammatory rhetoric. Unlike *pyschotria viridis*, the *plant* marijuana and the leaves of the marijuana plant are specifically prohibited in Schedule I of the CSA and the 1961 Convention.

[26] One court noted the government's frequent inconsistency regarding commentaries to treaties: "For all of its efforts to downplay the persuasive value of the commentary when invoked by [the opposing party], the government itself has cited to the Commentary when favorable to its position." *United States v. Noriega*, 808 F. Supp. 791, 795 n.6 (S.D. Fla. 1992) (regarding commentary to the Geneva Convention). In its statement of policy in Rescheduling of Synthetic Dronabinol, 51 Fed. Reg. 17,476

to the language of a treaty for its interpretation. *See Olympic Airways v. Husain*, 540 U.S. 644, 649 (2004). It is also appropriate for courts to "look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Air France v. Saks*, 470 U.S. 392, 396 (1985); *see, e.g., El Al Israel Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 172–74 (1999) (citing statements made by delegates to the Warsaw Conference and the differences among the various drafts of the convention); *Zicherman*, 516 U.S. at 226–27 (citing committee reports). In this case, the Convention unambiguously does *not* cover *hoasca*, notwithstanding the one passage, taken out of context, on which the government attempts to focus this Court's attention.

The Executive Department's official positions regarding treaty interpretation are entitled to great, but not conclusive, weight, "provided they are not inconsistent with or outside the scope of the treaty" or do not conflict with the interpretation by another signatory to the treaty. *Air Canada v. U.S. Dep't of Transp.*, 843 F.2d 1483, 1487 (D.C. Cir. 1988).[27] A litigation position taken by the Executive, however, is not entitled to deference. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (explaining that the Court has never accorded deference to the Executive's "litigating positions that are wholly unsupported by regulations, rulings, or [prior] administrative practice"). Here, first, the district court found correctly that the government's declarations reflected only the government's litigation position. (Resp't Opp. App. 4.)

(May 13, 1986), relating to a controlled substance under the 1971 Convention, the DEA stated that the *Commentary* "provides guidance to parties in meeting [their] obligation [under the Convention]." *Id.* at 17,477.

[27] *See also Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 133–34 (1989) (rejecting the interpretation of the treaty set forth by the United States as amicus curiae); *Perkins v. Elg*, 307 U.S. 325, 328, 337, 342 (1939) (declining to adopt Executive's treaty interpretation).

Second, the government's interpretation, for the reasons set forth above, conflicts with the text of the Conventions and their stated purpose of protecting traditional religious uses, and conflicts with the official commentaries and authoritative interpretations. Third, as the Schaepe letter shows, the Executive's litigation position in this case is in conflict with the official position of the INCB, the Conventions' principal authority, and at least two treaty partners, France (Resp't Opp. App. 48, 67–97) and Brazil (Pet. App. 126a–27a; J.A. 766, 890, 903).[28]

Ambassador Okun's opinion, affirming the position stated in the INCB executive secretary's letter—that the Convention does *not* cover preparations like *hoasca*—undeniably carries more weight than the speculative testimony of a State Department lawyer, which cannot satisfy RFRA. (*See* Pet. App. 107a) (McConnell, J., concurring) ("[W]hile some level of deference to Congressional and Executive findings is appropriate in the context of foreign relations, this affidavit does not provide any information specific enough to be relevant in assessing the damage that would flow from an exemption for the UDV.").

Moreover, that the INCB executive secretary and the former American member of the agency in charge of monitoring and implementing the Convention interpret the 1971 Convention as inapplicable to *hoasca* fatally undercuts the government's argument that the United States's "leadership" role (Br. 46) will

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[28] The cases cited in support of the government's claim that the political branches have long exercised plenary control over what may enter this country's borders (Br. 45 n.33) stand for nothing more than the unremarkable proposition that Congress has plenary power over foreign commerce, subject to constitutional limitations. *See, e.g.*, *Brolan v. United States*, 236 U.S. 216, 218 (1915) ("The power to regulate commerce with foreign nations is expressly conferred upon Congress . . . acknowledging no limitations other than those prescribed in the Constitution."). It follows that Congress, through RFRA, may modify its own statutory enactments relating to the importation of particular goods.

be jeopardized if it ignores its supposed treaty obligations.[29] As Judge McConnell aptly noted:

> Presumably that lawyer [for the State Department] did not mean to say that all violations, from the smallest infraction to blatant disregard for the treaty as a whole, are equally damaging to the diplomatic interests of the United States. He made no mention of whether the International Narcotics Control Board deems hoasca to be within the Convention or whether there may be ways to comply with the Convention without a total ban.[30]

2. The 1971 Convention must defer to RFRA.

The government invokes *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), to argue that this Court should conform the interpretation of RFRA with the

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[29] Although the government asserts, through non-record hearsay evidence attached to its opening brief, that Brazil forbids the export of *hoasca*, this is contrary to the record evidence that Brazil does not control *hoasca*. (Pet. App. 126a–27a; J.A. 766, 890, 903.) Furthermore, after the Brazilian police officer wrote the letters attached to the government's brief, DEA and Brazilian authorities coordinated the fourth internationally licensed shipment of *hoasca* from Brazil to UDV in compliance with the preliminary injunction, both parties having full knowledge that the *hoasca* contains DMT. UDV is prepared to prove these non-record facts at trial and state them here only because they are necessary in response to the government's non-record evidence.

[30] Other treaty partners have successfully accommodated the treaty and domestic law. For example, "Dutch enforcement guidelines... indicate that 'possession of less than 30 grams of cannabis products [is] placed on the lowest priority level, meaning that no active criminal investigation or prosecution [is] undertaken.'" Taylor W. French, Note: *Free Trade and Illegal Drugs: Will NAFTA Transform the United States into the Netherlands?* 38 Vand. J. Transnat'l L. 501, 516 (2005); *see also id.* at 519 ("The [Swiss] government provides the heroin as well as the needles needed for injection in an effort to prevent addicts from acquiring diseases or resorting to crime to find their drugs."). Brazil has accommodated religious *hoasca* use for many years (*see* Pet. App. 126a–27a; J.A. 164, 766, 890, 903) without complaint by any treaty partners.