2025

Free Exercise Challenges to Entheogen Prohibitions: Precedents, Principles, and Issues

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I. Entheogens: In and Out of *Smith*

Toto, I have a feeling we are not in *Smith* anymore—when it comes to challenging prohibitions on the use of entheogens, drugs which reliably induce religious experiences in their users.[1] *Emp. Div., Dep't of Hum. Res. Of Oregon v. Smith* held that these bans were not unconstitutional as abridging the Free Exercise of religion protected by the First Amendment.[2] The rationale given was:

> "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the state's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself'—contradicts both constitutional tradition and common sense."[3]

The *Sherbert v. Verner*[4] strict scrutiny test—which generally required the government, when faced with a challenge to a law which substantially burdened an individual's Free Exercise

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[1] Entheogens are defined in Washington D.C.'s de-criminalization initiative as "species of plants and fungi that contain ibogaine, dimethyltryptamine, mescaline, psilocybin, or psilocyn." Zachary LeCompte, *Not Groovy Man: Psilocybin's Long and Complicated History with the Law, and Its Potential to Treat the Growing Mental Health Crisis in America*, 90 U. CIN. L. REV. 1113, 1171 (2022) (Footnote 245). This categorical phrasing is in contrast to general terms, and thus limits the concept somewhat arbitrarily. Only *somewhat* because this definition constrains the category of entheogens to drugs which can be derived from nature using no or minimal knowledge of modern chemistry. This definition explicitly leaves out several other psychedelic drugs which are central to developments in the use of psychedelics for therapy, such as MDMA, LSD, and Ketamine. *See* Karen Luong, Esq. & Kimberly Chew, Esq., *Legal Developments in Psychedelic Therapeutics*, 34(5) THE HEALTH LAWYER 4 (June 2022). There is clearly some overlap between these two groups, with at least one (psilocybin) on the radar of both. Furthermore, collectively as a class of drugs, "[t]oday there is a consensus that psychedelics are agonists or partial agonists at brain serotonin 5-hydroxytryptamine 2A receptors." David E. Nichols, *Psychedelics*, 68 (2) PHARMACOLOGICAL REVIEWS 264–355 (2016). This finding and many other recent findings don't support strong distinctions between natural and unnatural psychedelic drugs, at the level of neurochemistry and phenomenology. If any distinction in drug profile is relevant, it is the distinction between tryptamines (e.g., LSD, DMT, psilocybin/psilocin) and phenethylamines (e.g., mescaline and MDMA); which is not one recognized by the legal system to date. *Hallucinogenic mushrooms drug profile*, European Monitoring Centre for Drugs and Drug Addiction, https://www.emcdda.europa.eu/publications/drug-profiles/hallucinogenic-mushrooms_en (last visited October 12, 2023). The natural/chemical distinction, along with the religion/therapy distinction in terms of use, is inherently blurry and fungible. The law may be forced to treat them all the same, because of the likelihood of each to produce profound religious experiences and the difficulty in enforcing distinctions. For these reasons, this paper does not consider these distinctions and treats all the psychedelic substances mentioned in this note the same, as (at least potential) entheogens.

[2] 494 U.S. 872 (1990).

[3] *Id.* at 885 (citing Reynolds v. United States, 98 U.S. 145, 167 (1878)).

[4] 374 U.S. 398 (1963).

of religion, to prove that its interest is compelling and its means for achieving it narrowly tailored—was circumscribed in *Smith*, to be applied only in instances "where the State has in place a system of individual exemptions" for non-religious reasons.[5] According to the *Smith* Court, *Sherbert* had "nothing to do with an across-the-board criminal prohibition on a particular form of conduct."[6] As long as burdening religion is not the objective of the prohibition, is only "incidental" to the ban, and as long as it applies across-the-board, generally and neutrally, it does not offend the Constitution.[7] Finding otherwise would in effect "permit every citizen to become a law unto himself."[8]

There was outcry after *Smith*, which led to Congress passing of the Religious Freedom Restoration Act (RFRA) in 1993.[9] RFRA's text reads as a rebuke to the Supreme Court, restoring the *Sherbert* compelling-interest test when a government law substantially burdens an individual's free exercise.[10] RFRA makes it clear that an unalienable right like Free Exercise cannot be substantially burdened without compelling justification, even when the laws are neutral.[11] This takes us back into the world of *Sherbert*, where "the guarantee of religious liberty embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accommodation to individual belief or disbelief."[12]

However, the Supreme Court had the last word on RFRA's scope, in *City of Boerne v.*

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[5] *Id.* In *Sherbert*, a claimant who lost their job due to not being able to work on Saturday, for religious reasons, filed an unemployment claim. 374 U.S. at 400. In order to collect unemployment, the claimant had to be available for work. *Id.* The state Employment Security Commission considered any claimant ineligible for benefits if they failed, without "good cause… to accept available suitable work." *Id.* The *Sherbert* Court found that this "good cause" exemption must be extended to sincere religious exercises, such as claimant's religiously-motivated compulsion to not work on Saturdays; in that case, strict scrutiny and neutrality principles necessitated accommodation. *Id.* at 406.
[6] 494 U.S. at 885.
[7] *Id.* at 878.
[8] *Id.* at 897*;* citing Reynolds v. United States, 98 U.S. 145, 166-167 (1978).
[9] 42 U.S.C. § 2000bb; *see* MICHAEL MCCONNELL, ET AL., RELIGION AND THE CONSTITUTION 146 (2022).
[10] 42 U.S.C. § 2000bb.
[11] *Id.* at §§ 2(a)(1)-(3).
[12] 374 U.S. at 415–16 (Stewart, J., concurring in the result).

Flores, which invalidated parts of RFRA that exceeded the powers granted to Congress by Section 5 of the Fourteenth Amendment.[13] RFRA simply did not serve the remedial purpose Section 5 was designed to, and Congress cannot create new rights through this clause.[14] RFRA was not "congruent and proportional" legislation to respond to or prevent unconstitutional behavior.[15] *Smith*'s holding that the Constitution generally does not require exemptions "sets the stage for *Boerne*'s conclusion that RFRA goes so far beyond the constitutional floor as to exceed Congress's powers."[16] Even though the *Smith* court claimed it was "leaving accommodation to the political process,"[17] *Boerne* made a sweeping decision regarding the structure of our federal system using Congressional power over the Free Exercise Clause as its substantial issue. *Boerne* certainly bespeaks some contradiction regarding the Court's stance on Free Exercise and judicial deference to Congress in general.

With this backdrop in mind, the aim of this paper is to analyze the recent Free Exercise caselaw with respect to the possibility of future challenges to entheogen bans. Section II examines the most important Supreme Court precedent in this arena, *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*,[18] and argues that under the framework mandated therein, courts are given the difficult task of evaluating the cost of the claimant's exemption against the state's interest in the general ban; including how the particular exemption would impact the effectiveness of the general regulatory scheme the ban is meant to serve. Section III explores how the Court arrived at the "exceptions" logic operative in *Gonzales*, by examining two recent precursor Free Exercise cases which established a "secular exceptions" principle: *Fraternal Ord. of Police*

[13] 521 U.S. 507 (1997)
[14] McConnell, *supra* note 9, at 148.
[15] *Id.*
[16] *Id.*
[17] 494 U.S. at 890.
[18] 546 U.S. 418 (2006).

Newark Lodge No. 12 v. City of Newark[19] and *Holt v. Hobbs*[20]. Section IV describes how the Court has become even more pro-Free Exercise since *Gonzales*, delving into the "most favored nation" principle articulated in *Roman Cath. Diocese of Brooklyn v. Cuomo*[21] and *Tandon v. Newsom*[22] ("The Pandemic Cases"). Section V explores two open issues regarding Free Exercise challenges to entheogen bans: substitutability and individuality, arguing these are likely to be contentious and distinguishing in the future, but in ways that are still largely unpredictable and uncommented upon. Section VI uses three hypothetical Free Exercise challenges to entheogen bans to illustrate the ways in which these potential open issues could become activated. Section VII draws from these hypotheticals again in order to illustrate some of the challenges with applying *Gonzales* in light of the subsequent caselaw and open issues. The thesis of this paper is that the current standard requires predictive systems-theory and judicial policymaking. Section VIII briefly comments on the irony of this standard considering the Court's ideological leanings.

II. Entheogens: Into *Gonzales*

The paradigm RFRA case on challenges to entheogen prohibitions is *Gonzales,* in which a Brazilian Sect in New Mexico challenged the Controlled Substance Act's (CSA) ban on DMT, as applied to them, on Free Exercise grounds.[23] In an opinion by Chief Justice Roberts, the *Gonzales* Court unanimously found that (1) RFRA still applies to federal law in the wake of *Boerne*; and (2) under this RFRA/strict scrutiny standard, the government's interest in enforcing the ban was not compelling or narrowly tailored enough to warrant the substantial burden it placed on the Sect.[24] The rationale in *Gonzales* will likely be the starting point for any future holdings on the issue of

[19] 170 F.3d 359 (3d Cir. 1999).
[20] 135 S. Ct. 853 (2015).
[21] 141 S. Ct. 63 (2020).
[22] 141 S. Ct. 1294 (2021).
[23] 546 U.S. 418 (2006).
[24] *Id.* at 432.

entheogens under the Free Exercise Clause.

The Court rejected the Government's arguments through ten points which highlight the case-by-case nature of the inquiry:[25]

> (1) Congressional findings on DMT's harmfulness, combined with its theory of a necessary "closed system" for regulatory regimes,[26] were not enough to uphold the ban without further scrutiny.
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> (2) RFRA required demonstration of a compelling state interest weighed against the substantial burden "to the person"—"the particular claimant whose sincere exercise of religion is being substantially burdened."[27]
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> (3) Here, the government must show "with more particularity how its admittedly strong interest… would be adversely affected by granting an exemption."[28]
>
> (4) The CSA contains a provision authorizing the Attorney General to waive requirements for the "registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety," indicating the existence of exemptions within the CSA's structure and the lack of determinative say by Congress on them.[29]
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> (5) The CSA already allows a religious exemption to a Schedule 1 prohibition: all members of every recognized Indian Tribe are exempt from the prohibition on peyote use.[30] This exception "fatally undermines the government's broader contention that the CSA establishes a closed regulatory system" and will be "necessarily… undercut" if the Act is not uniformly applied.[31]
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> (6) Nothing in the supposedly "unique" relationship between the U.S. and the Tribes is relevant to the policy and interest-based analysis.[32]
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> (7) RFRA plainly contemplates judicially crafted exceptions to federal laws like the CSA.[33]
>
> (8) The Government can demonstrate a compelling interest in uniform application by offering evidence that granting the requested accommodations "would seriously compromise its ability to administer the program."[34] But "it would have been surprising to find that this was such a case, given the longstanding exemption from the [CSA] for

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[25] *Id.* at 424 (rejecting *Smith*'s majority opinion while relying on the logic of the concurrence); *see Smith,* 494 U.S. at 899 (O'Connor, J., concurring in judgment) (strict scrutiny "at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim").
[26] 546 U.S. at 419-420; citing Gonzales v. Raich, 545 U.S. 1, 13 (2005).
[27] 546 U.S. at 430–431.
[28] *Id.* at 431; applied in the Free Exercise Clause context by the Court in Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881 (2021).
[29] 546 U.S. at 420.
[30] *See* 21 CFR § 1307.31 (2005); *see* 42 U.S.C. § 1996a(b)(1).
[31] 546 U.S. at 434.
[32] *Id.* at 433-434.
[33] *Id.* at 434.
[34] *Id.* at 435.

religious use of peyote, and the fact that the very reason Congress enacted RFRA was to respond to the decision denying a claimed right to sacramental use of a controlled substance."[35]

(9) The slippery-slope argument that exceptions will multiply bureaucratic work is rejected—"the feasibility of case-by-case consideration of religious exemptions to generally applicable rules" was recently reaffirmed.[36]

(10) *Hoasca*, despite being "natural" and "plant-based, is covered by the United Nations Convention on Psychotropic Substances, which the U.S. is a signatory of. The Convention calls for the prohibition of hallucinogens, including the DMT in *hoasca*, brewing methods aside.[37] Yet, this does not automatically mean the Government has demonstrated a compelling interest in the prohibition; here, it did not even submit evidence addressing the international consequences of an exemption, thus it has not made a sufficient demonstration.[38]

The *Gonzales* Court ends with a recognition that the complex task courts have been given under RFRA "is not an easy one."[39] However, "Congress has determined that courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue."[40] The Court has crucially affirmed the principle from *Gonzales* which inverts the compelling-interest analysis in favor of claimants (point 3). Citing to Gonzales as authority nearly 15 years later, the Court in *Fulton* held that "[t]he question, then, is not whether the City has a compelling interest in enforcing its […] policies generally, but whether it has such an interest in denying an exception [in the particular instance]."[41] *Fulton* makes clear that the Court will not accept state interests "at a high level of generality" and that "the First Amendment demands a more precise analysis."[42]

Alongside this revolutionary inversion, it is worth noting the connection between the rule

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[35] *Id.* at 436-437.
[36] *Id.* at 436; relying on Cutter v. Wilkinson, 544 U.S. 709 (2005) (no problem applying compelling-interest test in RLUPIA context).
[37] 546 U.S. at 437.
[38] *Id.* at 438.
[39] *Id.* at 439.
[40] *Id.*
[41] 141 S. Ct. 1868, 1881 (2021). While *Gonzales* was a RFRA case, *Fulton* was a Free Exercise Clause decision which used the statutory analysis from *Gonzales* to inform its understanding of the Constitution.
[42] *Id.*

from *Smith*/*Sherbert* about individual exemptions and the finding in *Gonzales* that the statutory peyote exemption under the CSA "fatally undermines" the government's argument for regulatory uniformity. The reason *Smith* was consistent with *Sherbert* was because *Sherbert*'s individualized assessments for "good cause" made the law there not generally applicable, unlike the law (CSA) in *Smith.*[43] However, this was *before* the statutory exemption for Native American peyote use made the CSA *like* the law in *Sherbert*, with room for personalized exemptions.[44] What this indicates is that—RFRA aside—following statutory protection of peyote use for Native Americans, *all* challenges to federal entheogen bans would require strict scrutiny under *Sherbert/Smith*. In the end, it's immaterial where the standard comes from—RFRA because the laws are federal or *Sherbert/Smith* because the regulatory scheme allows for personalized exemptions—there is no longer any doubt that strict scrutiny applies.

The potential problems with applying this standard can be found in the concurring opinion from the appeals court in *Gonzales*, which distinguished the *hoasca* case from prior cases that rejected exemptions for drug laws by stating: "[T]he fact that *hoasca* is a relatively uncommon substance used almost exclusively as part of a well-defined religious service makes an exemption for bona fide religious purposes less subject to abuse than if the religion required constant consumption, or if the drug were a more widely used substance like marijuana or methamphetamine."[45] While this reasoning may have helped claimants at the appellate level there, it could be problematic to entitle religious groups to exemptions based on how "well defined" they

[43] 494 U.S. at 878, 885.
[44] "RFRA essentially enables the Court to take a wider field of vision as to what counts as an 'exception' and a 'rule.' The law forbidding DMT might be generally applicable, the Court seems to say, but the drug laws in general are not (because of the peyote exception Congress made for the Native American church). And so the UDV gets an exception." McConnell, *supra* note 9, at 195.
[45] Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft, 389 F.3d 973, 1023 (10th Cir. 2004) (en banc) (McConnell, J., concurring).

are or how "widely used" the substances involved are.[46] It seems quite contrary to the spirit of neutrality at the core of both Religion Clauses of the First Amendment for the government to allow a particular religious exercise only to the point of it becoming popular, then shutting it down for regulatory reasons due to its popularity. It seems likewise problematic to require judges to engage in predictive systems-theory to foretell the impact of their rulings on the efficacy of the overall regulatory programs their rulings touch. But the *Gonzales/Fulton* standard, which requires doing an impact analysis of a single exemption within the context of a grand regulatory scheme, welcomes the logic deployed by the appellate concurrence.[47] Simply put, this standard mandates speculative systems-analysis for judges going forward. That it is being promulgated by a supposedly conservative, textualist Supreme Court, one against judicial policymaking in principle, is emblematic of the counter-intuitive, often contradictory positions that have developed within U.S. Freedom of Religion Jurisprudence.

III. The "Secular Exceptions" Principle: A Slippery Beard

The "Secular Exceptions" principle is related to the general applicability principle, in that the secular exception makes the law under review "under-inclusive" for its purposes—not generally applicable—which triggers strict scrutiny. Citing the language from *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*,[48] it can be summarized: "a law that is underinclusive in the sense of failing to restrict certain 'nonreligious conduct that endangers' state interests, 'in a similar or greater degree' than the restricted religious conduct is not generally applicable, at least when the 'underinclusion is substantial, not inconsequential.'"[49] As noted by its critics, when applied in

[46] McConnell, *supra* note 9, at 196.
[47] This is true despite the Supreme Court in *Gonzales* deploying the exact same logic, working through the abovementioned points instead (refusing to do the Government's work of proving systematic-effects for it).
[48] 508 U.S. 520 (1993).
[49] Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise: Smith, Lukumi and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 867-868 (2001) ("[A] law burdening religious conduct is underinclusive,

practice, the principle seems "fatally unwieldy," requiring evaluations of substantiality and ending up with "ad hoc" rulings and discursive framings of government interests to include or exclude certain exceptions.[50] Furthermore, the principle is deceptively too strong. As forewarned by Colin Devine in 2015:

> If any underinclusiveness triggers strict scrutiny, and underinclusive laws are not narrowly tailored to the government's interest, courts will automatically grant religious exemptions from every law with secular exceptions that undermine the law's interest. In other words, under the secular exceptions principle, *secular exceptions both trigger strict scrutiny and cause the law to fail strict scrutiny.* And since nearly every law contains secular exceptions, many of which undermine the law's overall interest, the Constitution would compel religious exemptions from nearly every law.[51]

This prediction was based largely on the reasoning in *City of Newark*, which held that a beard-ban in the Newark police force triggered strict scrutiny because "the Department makes exemptions from its policy for secular reasons and has not offered any substantial justification for refusing to provide similar treatment for officers who are required to wear beards for religious reasons."[52] Justice Alito, writing for the Court, reframed the *Smith*/*Lukumi* rule on "individualized exemptions" as:

> [I]t is clear from those decisions that the Court's concern was the prospect of the government's deciding that secular motivations are more important than religious motivations… [T]his concern is further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection… Therefore, we conclude that the Department's decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny.[53]

By this stroke of the pen, the individualized-exemptions rule now included a secular-

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with respect to any particular government interest, if the law fails to pursue that interest uniformly against other conduct that causes similar damage to that government interest.").

[50] Colin A. Devine, *A Critique of the Secular Exceptions Approach to Religious Exemptions*, 62 UCLA L. REV. 1348, 1374-1375 (2015).

[51] *Id.* at 1374 (emphasis added).

[52] 170 F.3d at 360.

[53] *Id.* at 365.

exceptions rule within it: "when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny."[54]

The Third Circuit in *City of Newark* suggests the ultimately issue is whether the law is underinclusive—"that is, whether it applies to less than the entire universe of cases that pose the problem the law seeks to solve."[55] If so, strict scrutiny will apply. But as the abovementioned prediction warned, *in addition*, it may necessitate a *finding* that a law with secular exceptions is underinclusive, thus *not* narrowly tailored, and thus *cannot survive* heightened scrutiny; therefore, the law *must* allow for religious exceptions too. This is in explicit contrast to other appellate decisions around the same time that were holding that "under-inclusiveness is not in and of itself a talisman of constitutional infirmity… rather, it is significant only insofar as it indicates something more sinister."[56]

Devine's prediction proved accurate. For instance, in *Holt v. Hobbs,* the government interest in not allowing beards in prison is framed as the prevention of contraband. [57] The Court there found that the no-beard policy did substantially burden Holt's religious exercise and that the government's interest in security, while obviously compelling, did not justify the policy.[58] Citing *Burwell v. Hobby Lobby, Inc.*, the *Holt* Court reiterated that "the least-restrictive-means standard is exceptionally demanding" and requires the government to "sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion of the objecting part[y]."[59] Because *Holt* was already an RLUIPA case, with strict scrutiny applying, the

[54] *Id.* at 366.
[55] McConnell, *supra* note 9, at 158.
[56] Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692 (9th Cir. 1999).
[57] 135 S. Ct. 853 (2015). *Holt* applied strict scrutiny because it involved an institutionalized petitioner and thus fell under RLUIPA.
[58] *Id*. at 858.
[59] *Id.* at 353, citing 573 U.S. 682, 728 (2014).

Court there did *not* invoke the prison's medical exception for beards in order to trigger strict scrutiny. It instead mentions this medical exception as empirical evidence to challenge the government's position that the policy is narrowly tailored to its interest—"the Department failed to establish why the risk that a prisoner will shave a 1/2-inch beard to disguise himself is so great that 1/2-inch beards cannot be allowed, even though prisoners are allowed to grow …1/4-inch beard for medical reasons."[60] As Devine predicts, the Court essentially concludes that because the policy on beards is underinclusive, it is not narrowly tailored to its end.[61]

Fraternal Order of Police, *Holt*, and the "Secular-Exceptions" principle are collectively the foreword to the Court's decision in *Gonzales*, the backdrop against which the Court was able to give the Brazilian Sect its desired exemption from CSA.

IV. The "Most Favored Nation" Principle: From Strict Scrutiny to Automatic Answer

If the Secular-Exceptions principle is the foreword to *Gonzales*, the "Most Favored Nation" principle provides the afterword. The principle comes from the "COVID Cases": *Cuomo* and *Newsom.*

In *Cuomo*, the Catholic Diocese of Brooklyn challenged a New York Executive Order which limited non-essential gatherings (including religious gatherings in this category) to 10 or 25 persons, depending on the color-coded zone it took place in.[62] During COVID, avoiding unnecessary gatherings was undisputedly a compelling government interest. The issue, according to *Cuomo*, was that because the restrictions were not "neutral" and "generally applicable," they needed to satisfy strict scrutiny, and they could not.[63] The Court engaged in a demanding analysis

[60] *Id.* at 367.
[61] The Court also finds that periodically photographing prisoners as their beard lengths grow would be a less restrictive means. *Id.*
[62] 141 S. Ct. at 65–66.
[63] *Id.* at 67.

of the COVID-risks involved with religious gatherings *compared to* the risks with non-religious, but "essential" and thus authorized, gatherings.[64]

The *Cuomo* Court critiqued the label "essential" as not indicative of the actual category, which included acupuncturists, garages, bike stores, and manufacturing plants—and found it "hard to believe" that admitting more than 10 people to a 1,000-seat church or 400-seat synagogue "would create a more serious health risk than the many other activities that the State allows."[65] It credited the Diocese's "record in combatting the spread" as evidence that higher admissions at their churches would be manageable.[66] In the end, it concluded that "there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services," such as tying the maximum attendance according to the size of the facility.[67] Thus, *Cuomo* conducted an ad hoc predictive risk-assessment of how authorizing larger religious gatherings would impact the efficacy of the Governor's overall non-contagion policy, and found it would not harm that interest any more than authorized secular gatherings already do, and therefore the policy prohibiting religious gatherings offends the First Amendment, as it is not the least restrictive means for the Government to attain its compelling interest.

Gorsuch's concurrence in *Cuomo* is unequivocal about the Constitution's intolerance of making religious gatherings second-class societies, writing, "there is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques."[68] Mocking the Governor's choice of "essential" businesses, he writes, "[w]ho knew public health would so perfectly align with secular

[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.* at 72. (Gorsuch, J., Concurring)

convenience?"[69]

In *Newsom*, the Court re-articulated the *Cuomo* propositions. Even though the California regulation at issue (maximum three-families-in-a-home rule) applied to both religious and non-religious gatherings, the Court invalidated it, reasoning that California still impermissibly treated some comparable secular activities—like hair salons, retail stores, movie theaters, and restaurants—more favorably than at-home religious gatherings.[70] Like in *Cuomo*, the Court conducted a risk-assessment and found that the authorized secular activities had not been shown "to pose a lesser risk of transmission than the applicants' proposed religious exercise."[71]

Newsom solidifies three propositions from *Cuomo*: (1) regulations are not neutral and generally applicable, and therefore trigger strict scrutiny, "whenever they treat any comparable secular activity more favorably than religious exercise"[72]; (2) "comparability is concerned with the risks various activities pose, not the reasons why people gather"[73]; and (3) the burden is on the government to satisfy strict scrutiny and to do so in this context:

> "[I]t must do more than assert that certain risk factors 'are always present in worship, or always absent from the other secular activities' the government may allow. Instead, narrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID. Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too.[74]

Some have questioned this method of comparing only the risks, and not the relative benefits, of secular and religious exemptions.[75] After all, this is not a systematic balancing-test—

[69] *Id.* at 69. (Gorsuch, J., Concurring)
[70] 141 S. Ct. 1294, 1297 (2021).
[71] *Id.* at 1297.
[72] *Id.* at 1296.
[73] *Id.*
[74] *Id.* at 1296-1297 (internal citations omitted).
[75] McConnell, *supra* note 9, at 178.

involving historical and cost/benefit analysis, and a specification of the least restrictive means for the government to achieve its interest—like we often see conducted under strict scrutiny.[76]

Critiques notwithstanding, this rigid, somewhat automatic answer to the strict scrutiny, Free Exercise inquiry is current Supreme Court doctrine, known as the "Most Favored Nation" principle, and it *compels* judicial treatment of religion to be as favorable as the most favored secular activity of comparable riskiness. It is unclear how this test might apply to Free Exercise challenges involving comparable secular exceptions outside the context of COVID, such as those involving entheogens.[77] With the COVID Cases being "shadow docket" decisions—meaning, the decisions were issued outside the Court's normal procedures for deciding cases on the merits, without the benefits of full briefings and arguments—there is reason to wonder whether these cases will be treated with caution by lower and future courts.[78] Like *Bush v. Gore*,[79] the COVID Cases exist as "clouded precedents," introducing another "unnecessary level of uncertainty, confusion, and complexity" into the current Free Exercise Clause application.[80]

V. Entheogens: Future Issues – Substitutability and Individuality

a. Substitutability

In the context of drug-experiences, "substitutability" refers to the idea that one drug could be interchangeable with another or with some non-drug-induced experience. The Ninth Circuit has

[76] *See* Ramirez v. Collier, 142 S. Ct. 1264 (2022).
[77] Likewise, how would either the Secular Exceptions principle or the Most Favored Nation principle apply to challenges to *state* bans against entheogens, in states that permit medical research on potential therapeutic uses for entheogens?
[78] Alexander Gouzoules, *Clouded Precedent: Tandon v. Newsom and its Implications for the Shadow Docket*, 70 BUFF. L. REV. 87 (2022). The Court in *Fulton* had amply opportunity to cite *Tandon* and reiterate or clarify its most-favored-right approach, but the majority chose not to. *Id.* at 109.
[79] 531 U.S. 98 (2000).
[80] *Id.* at 93, 97. The author here is concerned with the general movement to critique the "shadow docket," which has come from members of the Supreme Court itself, such as the dissent in *Whole Woman's Health v. Jackson*. 141 S. Ct. 2494, 2495-96 (2021) ("this Court's shadow-docket decisionmaking… every day become more unreasoned, inconsistent, and impossible to defend").

extensively discussed the issue of substitutability in *Oklevueha Native American Church of Hawaii, Inc. v. Lynch*, finding it goes to the question of whether there exists a "substantial burden" on the claimant, prong one of the strict scrutiny inquiry.[81] The case involved a Native American tribe in Hawaii challenging CSA's marijuana prohibition, as applied to them, because it violated their free exercise of religion. According to *Oklevueha*, RFRA itself provides no explicit definition of "substantial burden," but based on caselaw it likely is satisfied "only when individuals are… coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions."[82]

Because the complainants in *Oklevueha* stated in "no uncertain terms" that "[p]eyote is the significant sacrament," and that they consume cannabis only "in addition to" and as "a substitute for their primary entheogenic sacrament, Peyote," the CSA's prohibition on marijuana did not offend their free exercise.[83] The complainants faced no threat of sanctions for peyote use and "have expressly told us that foregoing cannabis is not contrary to their religious beliefs."[84]

The complainants' "admission that cannabis is merely a substitute for peyote distinguishes their case from *Holt*."[85] In *Holt*, even though the inmate had access to "other forms of religious exercise," such as a prayer mat and the observation of holidays, the prison's refusal to allow him to grow his beard did in fact force him to choose between engaging in conduct that seriously violated his religious beliefs and facing disciplinary action.[86] This was in contrast to the complainants in *Oklevueha*, who "produced no evidence that denying them cannabis forces them

[81] 828 F.3d 1012 (9th Cir. 2016).
[82] *Id*. at 1016.; citing Navajo Nation v. U.S. Forest Service, 535 F.3d 1058, 1070 (2008).
[83] 828 F.3d at 1016-17.
[84] *Id.*
[85] *Id.* at 1017. A close reading suggests the Court's characterization of cannabis as "merely a substitute" for the complainants is likely a slight distortion for the sake of the opinion's clarity, ostensibly made possible by less-than-perfect lawyering. *Id.* at 1017 (9th Cir. 2016) ("their counsel at oral argument admitted on multiple occasions that no religious ceremonies engaged in by Mooney or Oklevueha actually require the use of cannabis, and that cannabis is simply a substitute for peyote").
[86] 828 F.3d at 1017.

to choose between religious obedience and government sanction, since they have stated in no uncertain terms that many other substances including peyote are capable of serving the exact same religious function as cannabis."[87]

To the charge that this kind of "substitution" inquiry is forbidden by *Hobby Lobby*,[88] *Oklevueha* responds with the assertion that it is not conducting a "plausibility" analysis with regard to complainants' beliefs or "tell[ing] the plaintiffs that their beliefs are flawed."[89] Instead, "we simply conclude that the evidence is inadequate to support the finding of a substantial burden."[90] For some critics, this simple substitutability analysis leaves something to be desired, in that it does not fully respect religious exercise as a "natural category of action" that was "secured—not created by—the First Amendment," as RFRA intended.[91] According to at least one law review article, the ordinary meaning of "substantial burden"—an inquiry into whether "the government has made it considerably harder for RFRA claimants to perform the action in question"—should have controlled *Oklevehua*'s holding.[92] This is because, according to *Holt*, "RLUIPA's 'substantial burden' inquiry asks whether the government has substantially burdened religious exercise (here, the growing of a halfinch beard), not whether the RLUIPA claimant is able to engage in other forms of religious exercise."[93] According to the article, if that ordinary meaning did control, the Court would have found that the claimants there had a substantial burden, as they faced a strong enough pain of criminal sanction, due to their religiously motivated marijuana use, "to make a

[87] *Id.*
[88] 573 U.S. 682 at 724 ("a court must not decide the plausibility of a religious claim").
[89] 828 F.3d at 1016-17; citing *Hobby Lobby,* 573 U.S. at 724.
[90] 828 F.3d at 1017.
[91] Tiernan Kane, *Right by Precedent, Wrong by RFRA: The "Substantial Burden" Inquiry in Oklevueha Native American Church of Hawaii, Inc. v. Lynch, 828 F.3d 1012 (9th Cir. 2016)*, 40 HARV. J.L. & PUB. POL'Y 793, 799 (2017)
[92] *Id.* at 806–07.
[93] *Id.* at 808 (Footnote 101).

Holmesian bad man sweat."[94]

The jurisprudence on substitutability, in the context of deciding the "substantial burden" threshold for challenges to entheogen bans on Free Exercise grounds, is yet to be fully fleshed out. If the argument goes that the use of entheogens is for the attainment of a sort of religious ecstasy, then does the availability of other practices which historically have been used to attain the same indicate that a challenge will likely fail because there is no "substantial burden" where there exist substitutable alternatives?[95]

This argument is problematic on two levels. First, as a matter of neurochemistry and phenomenology, high-dose—known as "heroic-dose" or "breakthrough" dose—entheogen experiences have yet to find a "sober" correlate, at least according to their users, who go to great

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[94] *Id.* at 807-808.

[95] In Hinduism, yogis can attain *samadhi,* a stage of which is *sananda* (ecstasy). Sarasvati Buhrman, The Stages of Samadhi According to the Ashtanga Yoga Tradition, YOGA INTERNATIONAL, https://yogainternational.com/article/view/the-stages-of-samadhi-according-to-the-ashtanga-yoga-tradition/ (last visited Nov. 27, 2023). In Buddhism, practitioners can experience ecstatic meditative experiences through absorption. *See generally* MAHATHERA HENEPOLA GUNARATANA, THE JHANAS IN THERAVADA BUDDHIST MEDITATION (1998). In the ancient cult of Dionysus, participants engaged in dance, music, and rites, *and imbibed meticulously brewed intoxicants*, to experience ecstasy in the form of social cohesion. *See generally* William Cassidy, *Dionysos, Ecstasy, and The Forbidden,* 17(1) HISTORICAL REFLECTIONS 23–44 (Winter 1991). In medieval Christianity, devoted women engaged in an extreme version of fasting called *anorexia mirabilis* (holy anorexia), to experience religious ecstasy; the most famous example of which is St. Catherine Siena, who died from her practice. *See* Dr. Julia Martins, *'Holy Anorexia': The Fascinating Connection between Religious Women and Fasting*, SECRETS OF WOMEN (Dec. 14, 2022), https://juliamartins.co.uk/holy-anorexia-the-fascinating-connection-between-religious-women-and-fasting; *See generally* ULRIK WIETHAUS, MAPS OF FLESH AND LIGHT: THE RELIGIOUS EXPERIENCE OF MEDIEVAL WOMEN MYSTICS (1993); Even in contemporary Christianity, *anorexia mirabilis* is still practiced by some. Amelia A. Davis & Mathew Nguyen, *A Case Study of Anorexia Nervosa Driven by Religious Sacrifice*, CASE REP PSYCHIATRY (published online July 6, 2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4106065/. In Islam, Sufis have entire manuals devoted to inducing specific ecstatic states. *See generally* Nathan E. Fisher, *Flavors of Ecstasy: States of Absorption in Islamic and Jewish Contemplative Traditions*, 13 RELIGIONS 935. In Judaism, there exists a school of "Ecstatic Kabbalah" devoted to states of concentration. *Id.* Furthermore, there are cross-cultural and trans-historical spiritual practices—such as the adoption of certain body postures—for inducing altered states of consciousness, including ecstatic trance states. Michele Walters, *Postural Techniques of Ecstasy – Ecstatic Trance*, CUYAMUNGUE: THE FELICITAS D GOODMAN INSTITUTE, https://www.cuyamungueinstitute.com/articles-and-news/postural-techniques-of-ecstasy (last visited Nov. 27, 2023). All of this points to the availability of alternative, legal substitutes for entheogen use, to attain religious ecstasy and union with God. However, the only binding authority to take up the "substitutability" argument so far was the Ninth Circuit in *Oklevueha*, and the court there based its reasoning on the availability of a permissible *drug* substitute, peyote. Perhaps this argument will not be extended beyond substitute *entheogens* to include substitute *practices* like the ones mentioned above, because it is quite difficult to prove substitutability with regard to ineffable experiences, unless counsel makes an unforced error (*supra* note 85). However, the rationale for limiting Free Exercise challenges based on substitutability is nonetheless out there in the legal ether.

lengths and incur great risks to find their preferred entheogens, despite these supposedly readily available substitutes.[96] Second, despite *Oklevuaha*'s contestations to the contrary, it does compel courts to plumb the depths of a claimant's religious beliefs to assess the centrality of the entheogen's use to the claimant's religious practices, a judicial philosophy and method at odds with the notion of religious individuality set in stone in *Thomas v. Review Bd. of Ind. Emp. Sec. Div*.[97]

b. Individuality

Another issue ripe for re-consideration is whether or not it matters if the claimant challenging the entheogen prohibition on Free Exercise grounds is claiming an individual or a group belief.[98]

On the one hand, principles derived from *Thomas, Smith*, and *Hobby Lobby* suggest that it is a distinction without a difference in the eyes of the Clause. *Thomas* held that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[99] That a claimant has a difficult time precisely articulating his belief is of no consequence; as long as he "drew a line… it is not for [courts] to say the line he drew was

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[96] The argument that *entheogen* experiences are not substitutable with any religious or secular practice is demonstrated in the description of what breakthrough dose's phenomenology. While the abovementioned (*supra* note 95) religious practices probably have some neurological similitude with low or medium-dose entheogens, none of them involve the fully immersive hallucinations found in high-doses of substances such as DMT, which involve astoundingly colorful fractal patterns, complex conversations with distinctly corporeal alien entities, and full-bodied sensations of ego-death and physical transcendence through spacetime. Markham Heid, *What It's Like to Trip on DMT,* VICE (June 14, 2023), https://www.vice.com/en/article/93bn97/a-beginners-guide-to-dmt-the-most-mysterious-psychedelic-hallucinogenic-drug-of-them-all; *see generally* Roland Griffiths, et al., *Survey of subjective "God encounter experiences": Comparisons among naturally occurring experiences and those occasioned by the classical psychedelics psilocybin, LSD, ayahuasca, or DMT,* 14(4) PLOS ONE (April 23, 2019), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0214377.

[97] 450 U.S. 707 (1981). Though, again, if counsel simply admits to the court that the practice is not central or necessary (*supra* note 85), the Court will not need to do this intrusive and unconstitutional analysis of internal religious decisions and motivations, on either the individual or institutional levels. But failing such an admission, the Court may be called upon to conduct a reasonable plausibility analysis, a question "federal courts have no business addressing."

[98] *See* McConnell, *supra* note 9, at 687 ("Individualism and Institutionalism").

[99] 450 U.S. at 714.

an unreasonable one… [or] dissect religious beliefs because the believer admits that he is 'struggling' with his position."[100] Likewise, "intrafaith differences" do nothing to undermine a Free Exercise claim, as "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect…[and] [c]ourts are not arbiters of scriptural interpretation."[101] *Smith* reiterated that *Thomas* held "courts must not presume to determine…the plausibility of a religious claim."[102] *Hobby Lobby* reaffirmed these principles—all that is needed is "an honest conviction"[103]— and went even further, implying that a *previous* claimant's sincere religious belief could serve as evidence that the *present* claimant's same belief is also sincere.[104] This type of piggybacking has rather obvious consequences for entheogen laws, particularly if there is no rule against sole claimants; that is, no requirement for group or institutional membership. In 1989, these principles animate the *Frazee v. Illinois Dep't of Employment Security* holding, which states, "we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."[105]

On the other hand, the sincerity question aside, are there really no limitations *at all* on the individuality of a religious practice or belief seeking First Amendment protection? *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.* stands for the proposition that "internal church decisions" are to be given more deference than "outward physical acts,"[106] seeming to grant specific privilege to religious institutions as such while denying rights to individual actions as such. But what about an internal church decision involving the outward physical acts of

[100] *Id.* at 715.
[101] *Id.* at 716.
[102] 494 U.S. at 887.
[103] 573 U.S. at 686.
[104] Id. at 682 (Footnote 33). !
[105] 489 U.S. 829, 834 (1989).
[106] 565 U.S. 171, 190 (2021).

individuals, such as the use of entheogens?[107] And what about an "internal" individual decision involving the same? Would those seeking protection be treated the same regardless of whether they are a church composed of sixty million members or a single individual? One way the numerosity of those involved, and historicity of the practice, could become relevant is in the complainant's attempt to establish the "bona fide religious uses" of their entheogen of choice.[108] It is obviously easier to prove the "bona fides" of a religious practice if that practice has been institutionalized and ritualized by a recognized religion for hundreds of years. However, this concept of "bona fide religious practice" seems to have disappeared from the opinions as of late; unsurprising as it is inconsistent with the rulings from *Thomas*, *Smith,* and *Hobby Lobby.*

Examining this caselaw it appears that the individuality of the claim is not *directly* relevant to the Free Exercise analysis. But as of this writing, there has yet to be an entheogen-claimant to arrive at the Supreme Court or any Circuit Courts asserting no current institutional support for their religious practice. What that might look like, how the assessment of their religious sincerity would occur, is anybody's guess. The remainder of this paper fashions such a guess.

VI. A Hypothetical: Who Fairs Better—Mack, Muraresku, or Lone John Doe?

Jeremy Mack is an an army veteran, who served in Iraq and suffered a traumatic brain

[107] In the employment context, the Court has shown a willingness to allow the singling out of religious groups for Free Exercise exemptions, without necessarily extending those exemptions to individuals. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 338 (1987) (holding the Court "has never indicated that statutes that give special consideration to religious groups are *per se* invalid"). In that case, Justice Brennan's concurrence went the furthest in laying out the "confrontation between the rights of religious organizations and those of individuals" and deciding for the former. Id. at 340 (Brennan, J., concurring in judgment). However, this "confrontation" between rights does *not* tell us much about how the Court will handle different claims (group v. individual) when *not* in confrontation or outside the employment context.

[108] This concept of "bona fide religious uses" appears more prevalently in pre-2000s Free Exercise jurisprudence. *See, e.g.*, In Re Grady 61 Cal. 2d 887(1964) (defendant had not proved that his asserted belief was a bona fide one, that he was not seeking to "wear the mantle of religious immunity merely as a cloak for illegal activities"); State v. Ballard, 267 N.C. 599 (1996) (defendant's claim that he used peyote and marijuana in his practices as a member of the Neo-American church "not bona fide"); Horen v. Commonwealth, 479 S.E.2d 553, 557 (Va. Ct. App. 1997) (finding the claimant's use of owl feathers for their Iroquois religion to be a "bona fide religious use").

injury there due to an improvised explosive device (IED), which caused him PTSD as well.[109] Though he was a devout Christian upon entering the army, while in college after his deployment he found himself most comfortable with shamanic, earth-based religions.[110] After college, Mack joined the Oklevueha Native American Church (ONAC)[111].[112] He trained for 20 hours regarding the Church's sacraments, passed a series of tests, and became a minister.[113] The Church sent him a membership card and spores for psilocybin mushrooms, from which he grew his sacrament.[114] Once grown, he kept the mushrooms in a safe, consumed them alone, and did not operate vehicles or firearms afterwards.[115] He consumed a "microdose" daily and a larger dose every few weeks.[116]

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[109] State of N.H. v. Jeremy D. Mack, 173 N.H. 793 (N.H. 2019); 2019 WL 13112495 9 (Brief for the Defendant).
[110] *Id.*
[111] ONAC is an effort to prevent the extermination of Indigenous Native American religious culture, which "uses plants and herbs along with ceremonies to heal body, mind, and spirit, and assist with the transitions of life that we all experience." *Who We Are and What We Do,* OKLEVUEHA NATIVE AMERICAN CHURCH, https://oklevuehanac.com/who-we-are-and-what-we-do/ (last visited Nov. 27, 2023). They place their way of healing in contradistinction with "most of the pharmaceutical medicines which are financially unavailable to many, and can create dependency, overwhelming side-effects, and the use of medical technology that invades and disrespects our bodies." *Id.* ONAC is "blessed and built upon by the Lakota Sioux and Seminole Religious Cultures" and the fundamental premises revolve around respecting Grandmother Earth and Grandfather Sky and all our relations, as well as to honoring elders and ancestors. *Id.* Referring to its ceremonies, ONAC claims on its site that in the U.S., "these ceremonies and sacraments (plants and herbs) are protected by constitutional law from legal interference under the 2nd Amendment (sic) regarding freedom of religion." *Id.* ONAC invites website visitors to apply for membership. *Id.* They state on their site that ONAC card holders are granted protections under the First Amendment and RLUIPA "even if one is NOT of American native Heritage," citing U.S. v. Boyll (10th Cir. 1990). *Legal Information,* OKLEVUEHA NATIVE AMERICAN CHURCH, https://oklevuehanac.com/legal-information/ (last visited Nov. 27, 2023). ONAC also points to a unanimous opinion from the Supreme Court of Utah allowing them to "admit people of any racial make up around its sacred fires." *Who We Are and What We Do* (last visited Nov. 27, 2023). ONAC's website has an entire section devoted to ONAC's legal standing, including resources for dealing with law enforcement, relevant precedents (Utah and Federal), settlements with federal authorities, and contacts for a legal defense fund. *Legal Information* (last visited Nov. 27, 2023). There is a euro-centric tendency to treat Native American traditions as somehow timeless or eternal, when they are neither; the Native American Church is a relatively new institution and religion, dating back to the ritual consumption of peyote among Indigenous Americans formed on the reservations of southwestern Indian Territory, present-day Oklahoma. *The Encyclopedia of Oklahoma History and Culture – Native American Church*, OKLAHOMA HISTORICAL SOCIETY, https://www.okhistory.org/publications/enc/entry.php?entry=NA015 (last visited Nov. 27, 2023). ONAC's basic creed is a "reverence for universal nature and the tenets of "faith, hope, love and charity." *Id.* It is a "religion of diffusion that accommodates a wide range of local traditions and practices," and as such, "[c]congregations and even individual members incorporate differing degrees of Christian theology and Indian symbolism" in their practices. *Id.*
[112] 173 N.H. at 797.
[113] *Mack*, 2019 WL 13112495 at 12.
[114] Id.
[115] Id. at 12-13.
[116] Id. at 13.

"Mack used psilocybin mushrooms in his sincere worship of God."[117] Upon an indictment for possession of an illegal substance—due to a search of his safe for an unrelated reason—Mack claimed a Free Exercise right.[118] The New Hampshire Supreme Court found that his use was due Free Exercise protections under their State Constitution, which guarantees "[e]very individual [the] natural and unalienable right to worship God according to the dictates of his own conscience and reason," except for conduct that "disturb[s] the public peace or disturb[s] others in their religious worship."[119] The government conceded Mack's religious beliefs to be sincere, rejected applying the logic from *Smith*, and found that "when religious practices violate a generally applicable law, our State Constitution… demands there be a balancing of [the] competing interests."[120] Accordingly, Mack's case was remanded for further proceedings consistent with the application of strict scrutiny.[121]

Brian Muraresku is a Catholic, Georgetown-trained attorney who practiced law internationally for fifteen years.[122] He attended Brown University as an undergraduate, attaining degrees in Latin, Greek, and Sanskrit.[123] His debut book, *The Immortality Key*, was a New York Times bestseller.[124] In this book, Muraresku uses scholarly and scientific research to articulate his theory that an entheogen brew was the original Eucharist.[125] To do this, he toured the ruins of

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[117] Id. at 14.
[118] 173 N.H. at 798.
[119] *Id.* (citing Part I, Art. 5 of New Hampshire Constitution). This basically applies John Stuart Mill's 'harm principle.'
[120] *Id.* at 815.
[121] *Id.* at 818.
[122] Muraresku would not be new to novel legal situations and challenges. He is the founding executive director of Doctors for Cannabis Regulation and represented the first professional athlete to seek a therapeutic use exemption for cannabis in arbitration with the NFL. *About the Author – Brian Muraresku*, MACMILLAN PUBLISHERS, https://us.macmillan.com/author/briancmuraresku (last visited Nov. 27, 2023).
[123] *Id.*
[124] *The Immortality Key*, BRIAN MURARESKU, https://www.brianmuraresku.com/ (last visited Nov. 27, 2023).
[125] Muraresku provides an extensive survey of religious practices using entheogens throughout Classical Antiquity, beginning with an analysis of the Eleusinian Mysteries, in which elaborate rites involving psychedelic "beer" led initiates to the brink of death. BRIAN MURARESKU, THE IMMORTALITY KEY (2020) (book jacket). Interestingly, a trope or hallmark of the psychedelic and/or entheogenic experience is ego-dissolution (alternatively, "ego-death") in

Ancient Greece with archeologists, accessed hidden collections of the Louvre Museum to show the continuity from pagan to Christian wine, decoded Ancient Greek from the New Testament, deciphered symbols from Christianity's oldest monuments, explored the Vatican's secret archives to unearth transcripts never translated into English, and worked with archeological chemists.[126] To Muraresku, "[e]ver since Paul yelled at the Corinthians for consuming a lethal potion, the entire history of Christianity has been one epic battle over the Eucharist."[127] Muraresku desires the right to explore the field of entheogens—that is, to try them *all*—in search of a near analog of the original Eucharist.

Lone John Doe is not an army veteran or lawyer.[128] He was not wounded in battle, nor did he establish an institute on drug policy reform. John works at a warehouse. He is unaffiliated with any church or religious institution—he is not a Catholic, nor a trained member of ONAC. He did not research psychedelics, entheogens, religion, or history, before consuming LSD at a party when he was twenty years old. Despite lacking prior interest in the above, the ingestion of LSD had a profound spiritual impact on John, and caused him to not only believe that Christ existed, but that he himself was a living version of Christ.[129] This led him to consuming doses of LSD daily for a year, which maintained and deepened his belief.

Mack certainly has standing, as he is facing a criminal charge.[130] Additionally, Muraresku

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order to feel oneness with God and/or the universe. It is of no wonder then why Muraresku opens his book with the following saying among the ancient Greeks: "If you die before you die, You won't die when you die." *Id.* at ix. In other words, ego-death is eternal life. This, for Muraresku, is "the religion with no name."

[126] THE IMMORTALITY KEY (book jacket).

[127] *Id.* at 373.

[128] Lonely John Doe is based on a person the author of this paper briefly met years ago.

[129] Some might just call this Christ-ianity. This "messianic feeling" ("experiences in which one glimpses their own personal salvific role in effecting systems change") is not an uncommon experience when taking high-dose entheogens. Doug Johnson, *When Acid Makes You Feel Like Jesus*, DOUBLE BLIND MAGAZINE (Mar. 5, 2021), https://doubleblindmag.com/when-acid-makes-you-feel-like-jesus; Ed Prideauz, *The worldview-changing drugs poised to go mainstream*, BBC (Feb. 24, 2022), https://www.bbc.com/future/article/20210906-what-if-everyone-took-psychedelics.

[130] Like the Defendant in *Gonzales*.

and Doe likely have *pre-enforcement* Article III standing to challenge CSA's prohibitions, and any associated state bans, related to their entheogen use. All three claimants face criminal penalties for possessing their respective entheogens, due to these laws. To have standing, a plaintiff has the burden of demonstrating (1) that they have suffered an injury, (2) "fairly traceable to the defendant's allegedly unlawful conduct," which is (3) "likely to be redressed by the requested relief."[131] The injury must be "concrete and particularized" and "actual or imminent."[132] While only Mack's prosecution may be actual, the imminence of the threat of prosecution to Muraresku and Doe give them standing as well.[133]

Given all three have standing, who fares best with their claim? If the court decides to revive the "bona fide religious practice" distinction to parse the claimants, what is more bona-fide: (1) being a lifelong member of a two-thousand-year-old religion, (perhaps heretically) trying to revive an ancient entheogenic practice unrecognized as legitimate by current Church leadership, *or* (2) being a recent member of a religion formed just 120 years ago— by an ethnicity not one's own, but which recognizes one's membership—that is largely based on the educated, responsible use of entheogens, *or* (3) being an individual unaffiliated with any religion, but who nonetheless daily engages in entheogen use to feel closer to Christ, or God, or Eternity, to the point of having messianic beliefs?

If it is to be upheld that "courts must not presume to determine…the plausibility of a religious claim"[134] and if it is true that the individuality (the lack of group-belief or group-

[131] DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342, (2006).
[132] Lujan v. Defs. Of Wildlife, 504 U.S. 555, 560 (1992). A general fear of prosecution "cannot substitute for the presence of an imminent, non-speculative irreparable injury." Google, Inc. v. Hood, 822 F.3d 212, 228 (5th Cir. 2016). Standing was granted for the declaratory and injunctive relief in *Gonzales* after U.S. Customs seized UDV's incoming shipment of *hoasca* and threatened prosecution. 546 U.S. at 418.
[133] The threat of coercive force certainly grants standing considering the Supreme Court "has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment." Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988).
[134] *Hobby Lobby*, 573 U.S. 682 at 724 ("a court must not decide the plausibility of a religious claim").

consensus) of a claimant is irrelevant, then none of the above distinctions in hypotheticals should matter. All three have sincere religious beliefs around their use of entheogens, albeit embedded in disparate social and institutional contexts. So, how to distinguish if not the "sincerity prong"? Unfortunately, one must conduct a *Gonzales*-like analysis, though the exact contours and distinctions of this analysis would depend on the ideological predilections of the Court making it.

VII. Applied *Gonzales* Analysis: Unpredictability Reigns

Gonzales makes clear that strict scrutiny in a Free Exercise context "at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim."[135] Applying the *Gonzales* framework to the hypotheticals, it is altogether uncertain which claim, if any, survives strict scrutiny. Congressional findings on the social harms of the respective entheogens at issue are not determinative.[136] The Government must show with particularity how its interest would be adversely affected by granting the exemption[137] and slippery-slope arguments will not suffice.[138] Because the CSA is infused with exemptions,[139] it is difficult for the Government to demonstrate how their regulatory system will be "necessarily undercut" or "seriously compromise[d]" if the CSA is not applied uniformly in these types of cases.[140] In addition, "RFRA plainly contemplates judicially crafted exceptions to federal laws like the CSA."[141]

So how to distinguish between the hypotheticals? *Gonazales* notes it would be "surprising

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[135] 546 U.S. at 424 (rejecting *Smith*'s majority opinion while relying on the logic of the concurrence); *see Smith*, 494 U.S. at 899 (O'Connor, J., concurring in judgment) (strict scrutiny "at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim").
[136] 546 U.S. at 419-420 (citing *Raich*, 545 U.S. at 13).
[137] 546 U.S at 431; applied in the Free Exercise Clause context by the Court in *Fulton*, 141 S. Ct. at 1881 (2021).
[138] 546 U.S at 436; relying on *Cutter,* 544 U.S. at 709 (no problem applying compelling-interest test in RLUPIA context).
[139] 546 U.S. at 420, 434; *see* 21 CFR § 1307.31 (2005); *see* 42 U.S.C. § 1996a(b)(1).
[140] 546 U.S at 431, 435.
[141] *Id.* at 434.

to find" that CSA was "seriously compromised" by allowing a DMT exemption for UDV, considering Congress already exempted religious use of peyote from CSA and enacted RFRA in response to a claimed right to sacramental use of a controlled substance.[142] *Fulton* affirmed the revolutionary principle from *Gonzales*—that the government must demonstrate a compelling interest *in not allowing the exemption*, not just a compelling interest in the overall scheme—which places a huge burden on the government in these hypotheticals, considering the difficulty in practically proving how any single exemption could undermine any grand regulatory scheme.[143] But *Gonzales* leaves open the possibility that exempting other substances, in other contexts, could have international consequences jeopardizing U.S. compliance with the U.N. Convention on Psychotropic Substances.[144] This rationale, along with the kind of systems-logic articulated by the Appellate Court concurrence in *Gonzales,*[145] will likely be redeployed in future opinions. This rationale allows somewhat arbitrary discretion for the judges, along the "compelling interest" and "least restrictive means" prongs, in analyzing how an exemption could impact a regulatory scheme.

If the strict scrutiny inquiry in this context indeed comes down to which exemptions "seriously compromise" a given regulatory scheme, including an international one, and which do not, one can only broadly speculate how these hypotheticals would be adjudicated. Is the general prohibition on the use of psilocybin seriously compromised, or are U.S. international commitments seriously jeopardized, by allowing an exemption to Mack and other new members of ONAC for their use of psilocybin? More or less so than an exemption to a practicing Catholic in order to search for the Eucharist among all existing entheogens? More or less than an exemption for a single unaffiliated individual to use LSD to maintain his messianic feeling? Arguably, the larger

[142] *Id.* at 436-437.
[143] 141 S. Ct. 1868, 1881 (2021).
[144] 546 U.S. at 437.
[145] 389 F.3d at 1023 (10th Cir. 2004) (en banc) (McConnell, J., concurring).

the *potential* population of people seeking the exemption, the greater the likelihood that granting it will "seriously compromise" a regulatory scheme. But what is the potential population of individuals joining ONAC or the potential population of individuals taking LSD to experience divinity? It is, of course, the entire population. And what is the potential population of individual Catholics who could claim the right to search for the original Eucharist? It is, of course, all 1.4 billion Catholics worldwide, 61 million of whom reside in the United States. Allowing exemptions in any of these cases *might* "seriously compromise" the CSA's regulatory regime, or international commitments, depending on a host of unstated subjective presumptions and theories, meaning, depending on the Court's contingent ideology and partisan makeup. This determination is impossible to make in advance, precisely because the *Gonzales* standard invites judicial policymaking, which is contrary to the current Court's textualist pretensions, exposing tensions that will likely need resolution in future opinions.

VIII. Discussion

In a sense, these questions will soon become moot in certain places, as some cities are now moving to legalize entheogens, on both religious and therapeutic grounds.[146] Furthermore, some scholars are calling for a de-scheduling of psilocybin altogether and an amendment to CSA to put health officials, rather than law enforcement, in charge of U.S. Drug regulation.[147] However, in reality, only the most liberal American cities and states will be legalizing entheogens via statute anytime soon and deeper reform could easily elude a divided Congress indefinitely. Meanwhile,

[146] "Movements to decriminalize psychedelics and other drugs in the United States have been underway for decades, but the last three years have seen significant movement in the passing of legislation. In May 2019, Denver, Colorado, became the first city in the United States to decriminalize psilocybin. Similar legislation has passed, both for psilocybin and other entheogenic substances, in Oregon (statewide); Arcata, Oakland, and Santa Cruz, California; Port Townsend and Seattle, Washington; Ann Arbor, Detroit, and Hazel Park, Michigan; Somerville, Cambridge, Easthampton, and Northampton, Massachusetts; and Washington DC." Karen Luong, Esq. & Kimberly Chew, Esq., *Legal Developments in Psychedelic Therapeutics*, 34(5) The HEALTH LAWYER 4, 8 (June 2022).
[147] Mason M. Marks, *Controlled Substance Regulation for the Covid-19 Mental Health Crisis*, 72 ADMIN. L. REV. 649, 711-717 (Fall 2020).

the culture and illicit use of entheogens will continue to grow nationwide, making it more likely that we will see Free Exercise challenges rise through the federal courts. For the reasons noted above, what agent or institution ends up making its way to the Supreme Court on the issue is unpredictable. Regardless, it would be an irony of history if the conservative movement which started the indiscriminate War on Drugs is the same movement that leads to its denouement by constructing a robust and accommodationist Free Exercise Clause.

For Dr. Roland Griffiths, who passed away on October 17, 2023.[148]

[148] Dr. Griffiths was a pioneering research psychopharmacologist at Johns Hopkins School of Medine, who worked for decades on these issues. *See* Roland Griffiths, *Psilocybin Can Occasion Mystical-Type Experiences Having Substantial and Sustained Personal Meaning and Spiritual Significance*, 187(3) PSYCHOPHARMACOLOGY 268 (2006).