Psychedelic Policy, Religious Freedom, and Public Safety: An Overview

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ABSTRACT

Psychedelics are psychoactive sacraments (also known as entheogens) as well as medicines and recreational drugs. In the last few years, these substances have begun to be deprioritized, decriminalized, and legalized at the state and local levels. Some are also in the process of becoming FDA approved to be prescribed as part of psychedelic assisted psychotherapies. At the same time, the religious use of these substances, rooted in history, is becoming more destigmatized and religious organizations are increasingly willing to out themselves and engage with federal agencies related to their use of illegal drugs in a variety of ways. As a Graduate Tax Scholar at Georgetown University Law Center, I conducted research on approaches that these religious communities are taking with respect to their federal tax status. The key takeaway from that preliminary research was that due to these legal and cultural shifts, the number of religious communities utilizing psychedelics is significant and growing. From the perspective of the Drug Enforcement Administration (DEA), and the federal government, the religious use of psychedelics remains criminal absent a religious exemption. In response to a Supreme Court case in 2006, the DEA developed a constitutionally questionable religious exemption application process but has never voluntarily granted an exemption. Although there are a growing number of communities, many of which the government is fully aware of, only three communities currently have court ordered federal exemptions. The result of this is a

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lack of criminal law enforcement further frustrated by the religious freedom protections granted in the U.S. Constitution. This Article describes this current legal landscape at federal, state, and local levels, how we got here, and importantly, the impact of the current policy of nonenforcement on public safety. In conclusion, this Article proposes two possible policy solutions to shift the legal landscape from legal defensibility into legal protection, increasing safety for all involved and reducing unnecessary burdens on government agencies.

INTRODUCTION

The religious use sector of the psychedelic ecosystem is growing and remains without a clear pathway to widespread legal protection. Psychedelics as sacraments, also called entheogens, have been used as part of religious practice for all human history. Increasing interest in psychedelics has been catalyzed by a rapidly changing legal landscape. In the last six years, the FDA designated breakthrough status to a couple of psychedelics. In the last three years, two states have passed laws affecting the legal status of psychedelics. These legal changes and increasing reports of the medical potential of psychedelics have led to a seismic cultural shift towards acceptance of the use of these substances. Destigmatization has encouraged an already existing psychedelic religious movement to out themselves and expand rapidly. There are a variety of reasons why people engage with the religious use of psychedelics. Some people are just looking for an affordable way to provide and access psychedelics. Others are actively seeking a spiritual or religious home for their preexisting psychedelic practice. Sometimes people come for the substance and stay for the community.

This Article provides an overview of the legal landscape which these growing religious movements are found within and must navigate. The legal status of these communities can best be described as free to practice, but not free to practice safely. An unresolved conflict between criminal law enforcement and religious freedom law creates several harms and risks of harms to religious leaders and practitioners. Under the federal Religious Freedom Restoration Act ("RFRA,") and state analogs, many communities are legally defensible but not legally protected. The Drug Enforcement Agency ("DEA") has developed a process to petition for a religious exemption from the Controlled Substances Act ("CSA") but has never voluntarily granted one. Most entheogenic religious communities are left without an accessible option for confidently practicing their religion. The result is a decrease in public safety due to fears of utilizing emergency services and a lack of legal accountability, among other problems that will be described.

This Article proposes two possible solutions that would lessen the burden on religious communities and the DEA and further the constitutional protection of religious freedom while also promoting the government's interest in furthering public health. The first proposal links an IRS tax-exempt determination with a DEA exemption relying on the idea that the IRS is already the primary agency determining religious sincerity. The major critique I offer of this proposal is that religious communities are not required to apply to the IRS in order to be considered tax-exempt and so this proposal would increase the burden on communities and the IRS. The second proposal I offer is that the DEA should itself follow the IRS' approach to regulating religious communities and consider religious communities that utilize controlled substances automatically DEA exempt. Doing so would allow the DEA to issue regulations that would be applicable to all communities and focus its energy on its core mission of law enforcement and preventing drug diversion.

Psychedelic law is a new and dynamic area of law. Part one of this Article introduces the reader to the world of psychedelic policy. First, I offer a working definition and a bit of general information about psychedelics. Then, I provide a brief overview of the passed state and local psychedelic legislation, touching on the ways religious use falls within or without the state psychedelic programs and proposals. Moving on to federal law, I briefly describe the CSA and its history and note its deficiencies. To conclude talking about psychedelic policy more broadly, I touch on other developments relating to federal law including the creation of a congressional psychedelic caucus and introduction of federal legislation.

Part two of this Article provides an overview of the laws relating to religious freedom with a focus on the religious use of psychedelics. Before digging into legal history, I introduce a working definition of religious use in this context and a short summary of the history of religious use of psychedelics. Specifically, I define religious use to consist of a ceremonial setting and/or a theological mindset and the potential for sustained community-based integration. Then, I provide a brief history of free exercise jurisprudence leading to the landmark Supreme Court Case. *Employment Division v. Smith* which involved the religious use of psychedelics. After discussing Smith, I introduce the Religious Freedom Restoration Act (RFRA) and its application in another Supreme Court case involving the religious use of psychedelics, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal (UDV)*. The final subsection of part two describes the current legal landscape of psychedelic religious practices including the DEA petition process for a religious exemption, ongoing litigation, and the reality of a de facto policy of nonenforcement against religious communities.

The third section of this Article is focused on public safety. First, I introduce the framework of legally defensible versus legally protected, which results in the public safety risks that are described in the next section titled "Challenges." In the subsection titled "Possibilities," I describe the two policy proposals previously described that would shift the legal framework of religious use of psychedelics and reduce the burden on religious communities and the government, making the religious use of psychedelics safer. The final section of the body of my article, called "Risk Reduction as Harm Reduction" acknowledges that the approach to drug policy reflected through my proposals is one that does not seek to wait until more harm occurs to prevent it. It also proposes that broad drug decriminalization and the creation of safe supply are essential ingredients to drug policy that prioritizes public safety. Finally, the conclusion reasserts the core proposal that the best approach for policy related to religious exercise that furthers public safety is to reduce the burden on both religious practitioners and the government.

I. PSYCHEDELIC POLICY

A. *Psychedelics Defined*

What is a psychedelic? The word psychedelic was coined by psychiatric researcher Humphry Osmond and comes from the Greek words: psyche meaning "soul" or "mind" and delein meaning "to manifest."[1] The word psychedelic, or soul/mind manifesting describes a class of drugs that can catalyze "the emergence into conscious awareness…previously unconscious or repressed cognitions, perceptions, and emotions."[2] Which drugs fall into this category is debatable within the psychedelic ecosystem especially in conversations related to addiction. At the very least what is described by the use of the term "classic psychedelics" by researchers and users is a family of chemically similar drugs, called tryptamines that include psilocybin (the psychoactive component of so-called "magic mushrooms," lysergic acid diethylamide (LSD), dimethyltryptamine (DMT which is also a key component of ayahuasca), and mescaline (the psychoactive component of peyote.)[3] These classic psychedelics mimic serotonin and bind to a certain serotonin receptor that occurs through the brain and has been shown to be involved in mood regulation, facial emotion recognition, and memory, and are being researched for a variety of indications including Post-Traumatic Stress Disorder (PTSD,) anxiety, and depression.[4] In 2018-2019, the FDA granted Breakthrough-Therapy Designation for psilocybin-assisted therapy for treatment-resistant depression.[5] Microdosing, or taking a sub-perceptual dose of psilocybin and LSD has also become popular for ADHD, depression, as well as creativity.[6]

Beyond the classic psychedelics, there are other substances being researched that are also called psychedelics including Ketamine, Ibogaine, and MDMA.[7]

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[1] Dustin Marlan, Beyond Cannabis: Psychedelic Decriminalization and Social Justice, 23 LEWIS & CLARK L. REV. 851, 857 (2019)

[2] Id.

[3] Matthew Johnson, et al., Classic psychedelics: An integrative review of epidemiology, therapeutics, mystical experience, and brain network function, 197, PHARMACOLOGY & THERAPETUCIS 83 (2019). See also Gabe Allen, Classic Psychedelics Aren't Addictive, DISCOVER MAG. (Oct 30, 2021), https://www.discovermagazine.com/health/classic-psychedelics-arent-addictive [https://perma.cc/EF97-U9Y7].

[4] David E. Nichols, Psychedelics, 68 PHARMACOLOGICAL REV. 254–385 (2016).

[5] Megan Brooks, FDA Grants Psilocybin Second Breakthrough Therapy Designation for Resistant Depression, MEDSCAPE (Nov. 25, 2019), https://www.medscape.com/viewarticle/921789?form=fpf [https://perma.cc/M72B-PGTX].

[6] See AYELET WALDMAN, A REALLY GOOD DAY: HOW MICRODOSING MADE A MEGA DIFFERENCE IN MY MOOD, MY MARRIAGE, AND MY LIFE (2006).

[7] This is a non-exhaustive list. Other substances that get referenced as psychedelics include

Ketamine is schedule 2 in the Controlled Substances Act ("CSA") and has been approved as the main ingredient in Spravato (esketamine,) a treatment for depression.[8] Ketamine is classified as a dissociative and is addictive and abused more frequently than the classic psychedelics. Whether Ketamine is a psychedelic is an academic question with real life consequences. There are people that swear by Ketamine's ability to help with depression and there are others who see legal Ketamine assisted therapy as an opportunity to set up business infrastructure in preparation for when MDMA and Psilocybin assisted therapy is legal. It is possible to affirm that Ketamine is a medicine with many benefits while also acknowledging that it may not be a psychedelic because psychedelics are not generally addictive.[9]

Ibogaine is another naturally occurring plant described that is often described as a dissociative psychedelic and included in psychedelic related advocacy efforts. Ibogaine has been touted as a medicine helpful in combatting methamphetamine and other types of substance addiction.[10] 3,4-Methylenedioxymethamphetamine, better known as MDMA or Ecstasy, is a synthetically manufactured drug that is categorized as a euphoric empathogen with both psychedelic and amphetamine like effects.[11] MDMA was chosen by the pioneering psychedelic research non-profit the Multidisciplinary Association for Psychedelic Studies (MAPS) as the initial drug to focus on in its research because it is more reliably a positive experience as compared to the classic psychedelics. In 2017, the FDA granted "breakthrough therapy" status for MDMA assisted psychotherapy for PTSD.[12] MAPS has also researched MDMA therapy as a treatment for eating disorders, social anxiety in autistic adults, anxiety associated with life-threatening illness, and in healthy individuals as a control.[13] In May of 2021, Nature Medicine published results from MAPS' phase 3 trials for MDMA-assisted therapy which show statistically significant improvements in

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5MeO-DMT, 2C-B, and DOM. See Roger R., DOB and 2C-B; See The Controversial Legacy of Alexander Shulgin's Psychedelic Research, PSYCHEDELIC TIMES (Mar. 7, 2016), https://psychedelictimes.com/dob-and-2c-b-the-controversial-legacy-of-alexander-shulgins-psychedelic-research/ [https://perma.cc/TW6Q-G4X9].

[8] Press Release, FDA, FDA approves new nasal spray medication for treatment-resistant depression (Mar. 05, 2019) (available only at a certified doctor's office or clinic), https://www.fda.gov/news-events/press-announcements/fda-approves-new-nasal-spray-medication-treatment-resistant-depression-available-only-certified [https://perma.cc/WQ4U-MRXV].

[9] Doing so could allow the category of psychedelics to be more easily accepted and regulated as one group that share important qualities and levels of risk.

[10] Ibogaine, MULTIDISCIPLINARY ASS'N FOR PSYCHEDELIC STUD., https://maps.org/ibogaine/ [https://perma.cc/9JL9-GSFL] (last visited Feb. 25, 2024),

[11] MDMA, MULTIDISCIPLINARY ASS'N FOR PSYCHEDELIC STUD., https://maps.org/mdma/ [https://perma.cc/7TG6-S9NT] (last visited Feb. 25, 2024)

[12] Id.

[13] Id.

PTSD symptoms after three sessions.[14] MAPS expects full drug approval of MDMA assisted therapy in the next few years. Notably, these FDA studies would not approve the substance MDMA itself but rather the combination of MDMA and therapy. This regulation of the experiential aspect of the medicine makes psychedelics unique in the realm of FDA regulation of drugs.

Psychedelics that are used in sacramental or religious contexts are often called entheogens. The term entheogen was coined in 1979 by a group of ethnobotanists and scholars of mycology including R. Gordan Wasson who introduced magic mushrooms to a wide American audience for the first time in Life magazine in 1957. The term entheogen is rooted in two Greek words, entheos meaning "full of god" and genesthai meaning "to come into being." The scholars utilizing this language found that it was more appropriate than the term psychedelic which invokes images of psychosis. A few decades later, the term entheogen was also adopted by a group of religion scholars who formed the Council for Spiritual Practices based in Northern California around the turn of the millennium.[15] I was introduced to the term initially through a collection of essays published in 2000 by the Council for Spiritual Practices called Psychoactive Sacramentals: Essays on Entheogens and Religion[16] which lays out a history and future of religious based use of psychedelics. This term is being utilized by many movements and groups within the psychedelic ecosystem including the Association of Entheogenic Practitioners and the Decriminalize Nature movement.[17]

B. *State and Local Psychedelic Law Reforms*

Denver became the first city in the country to pass an ordinance evolving the legal status of a psychedelic substance. In the spring of 2019, voters passed ordinance 301, the Denver Psilocybin Mushroom Initiative, which prohibited the city from spending resources to arrest or prosecute people for possessing or using psilocybin mushrooms. Shortly after, two localities in California, Oakland, and Santa Cruz, passed resolutions making the enforcement of laws relating to the possession and use of a larger categories of substances called "entheogenic plants and fungi" the lowest law enforcement priority. Entheogenic plants and fungi was defined to include psilocybin mushrooms, the San Pedro and peyote cacti containing mescaline, the iboga plant containing ibogaine, and ayahuasca which is a

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[14] Jennifer Mitchell, et al., MDMA-assisted therapy for severe PTSD: a randomized, double-blind, placebo-controlled phase 3 study, 27 NAT. MED. 1025–1033 (2021).

[15] Some of whom were involved in the Marsh Chapel Experiment that took place at Boston University's divinity school in 1963.

[16] STANISLAV GROF ET AL., PSYCHOACTIVE SACRAMENTALS: ESSAYS ON ENTHEOGENS AND RELIGION (Thomas B. Roberts ed. 2001).

[17] ASS'N OF ENTHEOGENIC PRACTITIONERS, https://www.aep.community/ [https://perma.cc/TK62-GAJG].

combination of the shrub Psychotria virdis containing DMT and the vine Banisteropsis caapi used to intensify the effects of DMT.[18] Notably these resolutions did not include MDMA or LSD, two extremely popular but not naturally occurring psychedelics.[19]

Since 2019, over a dozen U.S. cities have passed similar measures across six states and Washington D.C.[20] The number of people arrested for psychedelics is not that significant as compared to other drugs, and local legislation cannot change state criminal law, so these efforts have been viewed as mostly symbolic. But symbols matter. Advocates that have pushed for these efforts followed the path that proved fruitful for marijuana, utilizing local wins to generate energy toward successful statewide advocacy and it is working. In 2020, Oregon passed the Psilocybin Services Act and in 2022, Colorado passed the Natural Medicine Health Act. In 2023, psychedelic legislation has been introduced in more than a dozen states.[21] Below, I will provide a brief overview of the laws passed in Oregon and Colorado with a specific focus on their impact on the religious use of psychedelics.

1. Oregon

In 2020, Oregon became the first state to pass a law creating a regulatory framework for the use of psychedelics and specifically psilocybin.[22] Measure 109, also called the Psilocybin Services Act, can best be described as a supported adult-use measure.[23] Although psilocybin services are regulated by the Oregon Health Authority (OHA), measure 109 as written was decidedly not a medical access bill. People do not need a medical diagnosis or doctor recommendation to access

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[18] Mason Marks, The Varieties of Psychedelic Law, 226 NEUROPHARMACOLOGY 1 (2022).

[19] A common debate in the psychedelic advocacy space is whether there is something inherently "better" about drugs that are naturally occurring or whether there is something more politically palatable about decriminalizing something that grows naturally as opposed to the challenges posed by people synthetizing their own drugs.

[20] States where localities have passed psychedelic measures include California, Colorado, Massachusetts, Michigan, and Washington. Psychedelics Legalization & Decriminalization Tracker, PSYCHEDELIC ALPHA (Oct. 13, 2023), https://psychedelicalpha.com/data/psychedelic-laws [https://perma.cc/B7K8-65MY].

[21] Kyle Jaeger, Psychedelics Bills Filed in Four More States as 2023 Reform Efforts Heath Up, MARIJUANA MOMENT (Feb 1, 2023), https://www.marijuanamoment.net/psychedelics-bills-filed-in-four-more-states-as-2023-reform-efforts-heat-up/ [https://perma.cc/N8A3-DVGX].

[22] During the same election, Oregon also passed Measure 110 which was a broader decriminalization and defelonization bill applicable to all drugs.

[23] In "The Varieties of Psychedelic Law," leading psychedelic law scholar Mason Marks proposes the first typology of state and local psychedelic legislation. Marks proposes five general categories: decriminalization, supported adult use, medical use, clinical research, and policy analysis. The number of bills that have been proposed and even passed has been increasing and changing so rapidly that this systematic approach for analysis is helpful. Marks, supra note 18.

psilocybin services and the law does not require that facilitators be medical professionals.[24] Unlike the adult-use cannabis programs many are familiar with which allow for retail sales of cannabis and off-site consumption, psilocybin will have to be consumed at a psilocybin service center under the supervision of a psilocybin services facilitator licensed by the state. Measure 109 was passed in the fall of 2020 with the last couple of years acting as an implementation period. The Oregon Health Authority published its final rules in November 2022 and the agency began accepting applications for five types of licenses in early 2023 and received much fewer applications than expected. Although the ballot proposal creating psilocybin services is less than three years old, the lawyers working on the ground in Oregon have already declared that the industry will be a bust due to the costs and challenges of operating a federally illegal business.[25]

During the rulemaking process, advocates in Oregon argued that spiritual and religious organizations should be able to have a distinct and parallel licensing track under Measure 109. Originally, a proposal titled the "Entheogenic Practitioner's Framework" was drafted that aimed both to create an affordable pathway for psilocybin services and create a pathway for religious exercise.[26] The framework evolved into a "community practitioner framework"[27] partially to respond to an Oregon Department of Justice memo which argued that different requirements for entheogenic practitioners would violate the establishment clause violations of both the Oregon and United States Constitution.[28] Although the entheogenic practitioner's framework was not ultimately adopted, there are no restrictions on a

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[24] Although the law explicitly does not require medical training, some facilitator programs are requiring applicants to have a healthcare background. At the same time, due to federal illegality, the regulations disallow a facilitator from operating a service center as the same location as their medical practice, meaning that facilitators must invest in a secondary location for their psilocybin services. All of these are barriers to the success of the rollout of Measure 109.

[25] Anthony Effinger, As a Business, Psilocybin Will Be a Bust, Law Firm Says, WILLAMETTE WEEK (July 1, 2023), https://www.wweek.com/news/state/2023/07/01/as-a-business-psilocybin-will-be-a-bust-law-firm-says/ [https://perma.cc/G26H-Q792].

[26] Jon Dennis, The Community Practitioner Framework for Psilocybin Services under the Oregon Psilocybin Services Act: A Primer, CHACRUNA (Nov. 8, 2022), https://chacruna.net/the-community-practitioner-framework-for-psilocybin-services-under-the-oregon-psilocybin-services-act-a-primer/ [https://perma.cc/JA6Z-88BJ].

[27] Jon Dennis, Proposed Privileges and Duties of Community Practitioners, CHACRUNA (https://chacruna.net/wp-content/uploads/2022/11/Regulations-Privileges-and-Duties-of-Community-Practitioners-v.12.pdf [https://perma.cc/8MAW-RHKB] (last visited Feb. 25, 2024).

[28] Memorandum from Oregon Dep't of Justice to Oregon Health Auth. re: Licensure and Regulatory Requirements for Religious/Entheogenic Psilocybin Practitioners (May 25, 2022), https://www.oregon.gov/oha/PH/PREVENTIONWELLNESS/Documents/Legal-Memorandum.pdf [https://perma.cc/6DDX-XZSQ].

religious community's ability to apply for a license from the OHA.[29] The regulations also do not impose any significant limitations on activities that can happen during an administration, leaving open the possibility of a wide range of ceremonial and religious practices.

2. Colorado

In 2022, Colorado became the first state to pass a broad psychedelic law when voters approved Proposition 122, creating the Natural Medicine Health Act (NMHA). The NMHA has two distinct aspects. On one hand, it immediately removed state criminal penalties for personal use and sharing of four natural medicines and contemplates a self-regulating community healing model. On the other hand, it put in motion a rulemaking process for the creation of a regulated natural medicine access program orchestrated by the Department of Regulatory Agencies (DORA.) On the regulated side, the only natural medicine that would be included until June 1, 2026, is psilocybin. On the decriminalization side, natural medicines include psychedelic plants and fungi that contain psilocybin, DMT, ibogaine, and mescaline (except peyote.[30]) In May 2023, the Colorado legislature passed legislation, SB 290, amending and implementing the Natural Medicine Health Act. A few of the most notable changes include fast tracking ibogaine for inclusion in the regulated side of the program, developing an advisory board, and delegating regulatory power to the state Department of Revenue. [31]

Relevant to the religious use of psychedelics on the decriminalization side is the definition of personal use. Individuals can personally possess, cultivate, and share "within the context of counseling, spiritual guidance, beneficial community-based use and healing, supported use, or related services."[32] Another relevant section

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[29] Although OHA does not limit religious organizations from applying for Psilocybin related licenses, a religious organization has faced challenges as related to the licensing requirements of the Oregon Higher Education Coordinating Commission (HECC). Anthony Effinger, Oregon Tries to Shut Down Mushroom Church's School, WILLAMETTE WEEK (July 27, 2023), https://www.wweek.com/news/state/2023/07/27/oregon-tries-to-shut-down-mushroom-churchs-school/ [https://perma.cc/M445-7H3Q].

[30] There have been debates among advocates as to whether to include peyote derived mescaline in decriminalization efforts due to the view that peyote has become endangered. Many measures now specifically exclude peyote to try and encourage preservation. Mescaline can also be derived from the San Pedro cactus.

[31] For a more complete summary of the amended law, see Andrew Kenney, What to know about Colorado's psychedelic law, COLO. PUB. RADIO, (June 21, 2023), https://www.cpr.org/2023/06/21/colorado-psychedelic-law-for-psilocybin-mushrooms/ [https://perma.cc/GF6D-B5GM].

[32] "For the purpose of this article 170, 'personal use' means the personal ingestion or use of a natural medicine and includes the amount a person may cultivate or possess of natural medicine necessary to share natural medicines with other persons twenty-one years of age or older within the context of counseling, spiritual guidance, beneficial community-based use and healing, supported use,

adds that nothing in the personal use section allows for commercial activity but that does not preclude the "donation of natural medicine by a person twenty-one years of age or older, payment for bona fide harm reduction services, bona fide therapy services, or other bona fide support services, maintaining personal or professional websites related to natural medicine services, dissemination of educational materials related to natural medicine."[33] On its face, the law allows for donation or payment in exchange for support services and also for possession, cultivation, and sharing within a community or spiritually guided setting. Since the law passed in November 2022, several websites offering psychedelic ceremonies have already gone live with so far limited enforcement but what will be considered "bona fide" and who gets to decide could have big impact for operators. This is especially true as the regulated side rolls out and the state may find different incentives to crack down.[34]

Similarly, to the Oregon model, Colorado will license consumption sites and facilitators who will administer the substances onsite and serve as guides. Unlike Oregon, Colorado's centers are called "healing centers" implicating a medical use although the law does not mention anything about needing a doctor's diagnosis or recommendations.[35] As the rulemaking process unfolds in Colorado, requirements for facilitators will be promulgated and are permitted to be based on prior experience. It is possible that one tier of licenses could permit individuals who have guided religious psychedelic experiences to be licensed facilitators. On the regulated side, religion is mentioned in a section that defines a licensed facilitator and prohibits an individual from misrepresenting themselves as such. The statute says: "nothing in this section prohibits an individual from performing a bona fide religious, culturally traditional, or spiritual ceremony, if the individual informs an individual engaging in the ceremony that the individual is not a licensed facilitator, and is not

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or related services. 'Personal use' does not include the sale of natural medicines for renumeration." Natural Medicine Health Act of 2022, CO SB 23-290 § 12-170-109(8) (2022).

[33] The full relevant subsection reads: "Nothing in this section shall be construed or interpreted to permit a person to give away any amount of natural medicine as part of a business promotion or other commercial activity or to permit paid advertising related to natural medicine, sharing of natural medicine, or services intended to be used concurrently with a person's consumption of natural medicine. Such advertising may be considered evidence of commercial activity that is prohibited under this section. This provision does not preclude the donation of natural medicine by a person twenty-one years of age or older, payment for bona fide harm reduction services, bona fide therapy services, or other bona fide support services, maintaining personal or professional websites related to natural medicine services, dissemination of educational materials related to natural medicine, or limit the ability of a healing center to donate natural medicine or provide natural medicine at reduced cost consistent with department rules." Natural Medicine Health Act of 2022, CO SB 23-290 § 12-170-109(2) (2022).

[34] If cannabis legalization is any indication, there will be significant efforts to avoid regulation and possible taxation which may encourage enforcement against the decriminalized market.

[35] The NMHA does classify participant records collected and maintained by regulated entities as medical data and therefore not public records. Natural Medicine Health Act of 2022, CO SB 23-290 § 12-170-104(7) (2022)(enacted).

associated with commercial, business, or for-profit activity."[36] This section attempts to ensure that the law does not preclude religious activity but is a bit vague since nonprofit religious organizations are technically businesses. In sum, a lot remains to be seen in terms of what enforcement will look like on both the regulated and unregulated aspects of the Colorado psychedelic sector.

It is unknown how either Oregon or Colorado will be impacted by expected FDA approval of psychedelic assisted therapies or if it is expected that one day the state programs will become access points for the FDA therapies. One key difference may be that the FDA will regulate a specific synthetic formulation of a psychedelic substance while the state programs may stick with organic cultivation or propagation.

C. *Federal Law*

1. The Federal Controlled Substances Act

The federal legal landscape of psychedelic law is primarily defined by the federal Controlled Substances Act (CSA).[37] The CSA was the brainchild of the Nixon administration developed in reaction to a growing counter cultural movement. In a special message to Congress on July 14th, 1969, then President Richard Nixon promoted his new plan to combat the growing use of recreational drugs and the resulting harms.[38] Nixon promoted education about the potential harms of drugs claiming that "the possible danger to the health or well-being of even a casual user of drugs is too serious to allow ignorance to prevail or for this information gap to remain open[39]" In 1970, the CSA was passed and in 1971, Nixon declared a "war on drugs."[4041] Although a top Nixon aide later admitted that this criminalization was

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[36] Natural Medicine Health Act of 2022, CO SB 23-290 § 12-170-108(4) (2022).

[37] Under the Supremacy Clause, this federal law should supersede state drug law reforms. Given the precedent of federal nonenforcement set by changing cannabis laws, it appears that states have just presumed that they can also pass psychedelic law reform notwithstanding federal illegality. Many states also have their own version of a Controlled Substances Act which they amend through state drug law reforms.

[38] 7.13.1969 – President Nixon Confronts America's Drug Problem, RICHARD NIXON FOUND. (July 13, 2010), https://www.nixonfoundation.org/2010/07/7-13-1969-president-nixon-confronts-americas-drug-problem/ [https://perma.cc/59UY-EHRR] (last visited Feb. 25, 2024).

[39] Id.

[40] A Brief History of the Drug War, DRUG POL'Y ALL., https://drugpolicy.org/drug-war-history/ [https://perma.cc/2X6C-J75M].

[41] Contrary to repeated assertions by the government in case law that the CSA is a closed regulatory system, the regulations implementing the CSA and specifically 21 C.F.R. § 1307.31 exempt Native American Church members' use of Peyote from the CSA. Specifically, it says: "The listing of peyote as a controlled substance in Schedule 1 does not apply to a nondrug use of Peyote in bona fide

primarily motivated by racism and a desire to disrupt antiwar communities, the CSA is still in place 50 years later.[42][43]

The CSA classifies several substances, called controlled substances, into five categories based on their medical potential, safety profile, and potential for abuse. Substances classified as Schedule 1 are the most strictly regulated and the CSA imposes criminal penalties for even simple possession. Notably, two of the most dangerous and widely used drugs: Alcohol and Tobacco, are not scheduled at all. Additionally, marijuana[44] is currently Schedule 1, meaning it has no currently

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religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration." In a Justice department memo reviewing the exemption and addressing its constitutionality, Assistant Attorney General Theodore Olsen found that there was no indication in the legislative history that Congress intended to eliminate the exemption and in fact the House had received insurances from the predecessor to the DEA that the exemption would continue to be part of the new statute. This memo also establishes that failing to extend the exemption to other similarly situated groups would make it subject to establishment clause challenges because it would mean favoring some religion over others. download (justice.gov) Specifically, the memo says that "It is well accepted that the Establishment Clause prohibits a government from 'preferring' one religion over another." Everson v. Board of Ed., 330 U.S. 1, 15 (1947). See Cruz v. Beto, 405 U.S. 319 (1972) (prison must provide reasonable opportunity for Buddhist to pursue faith comparable to that provided prisoners of other religions); Fowler v. R.I., 345 U.S. 67 (1953) (Jehovah's Witness meeting may not be barred in public park open to other religious services). Under accepted principles, therefore, an exemption which discriminates among otherwise equally situated religions violates the Establishment Clause." That said, the memo also suggests that there would be no other similarly situated religious groups.

[42] Nixon's chief domestic advisor in 1971, John Ehrlichman has said: "You want to know what this was really all about?" he asked with the bluntness of a man who, after public disgrace and a stretch in federal prison, had little left to protect. "The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course, we did." Dan Baum, Legalize It All: How to Win the War on Drugs, HARPER'S MAG., (Apr. 2016), https://harpers.org/archive/2016/04/legalize-it-all/ [perma: https://perma.cc/96MD-FGEZ]. See also ACLU, THE WAR ON MARIJUANA IN BLACK AND WHITE (June 2013), https://www.aclu.org/report/report-war-marijuana-black-and-white [perma: https://perma.cc/659Q-SD8D]; MICHELLE ALEXANDER, THE NEW JIM CROW (2012).

[43] The CSA criminalizes use, possession, manufacture, importation, and distribution of certain scheduled substances. See Controlled Substances Act (Codified at 21 U.S.C. § § 801-904).

[44] As opposed to hemp which was removed from CSA with the 2018 Farm Bill and is defined: "the term 'hemp' means the plant Cannabis sativa L., and any part of that plant, including the seeds thereof and all derivative, extract, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a detra-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis," marijuana is defined as everything else. See Agricultural Improvement (Farm Bill) Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490, 4908 (codified at 7 U.S.C § 1639o).

accepted medical use,[45] even though the US government has had a patent on the medical benefits of cannabis since 1985[46] and there are 3 FDA approved drugs derived from cannabis.[47] Psychedelics are also all Schedule 1. Despite its Schedule 1 status and due to activism by medical patients, over the last few decades most states have legalized access to medical marijuana with many later also legalizing marijuana for general adult-use, sometimes also called recreational use. Although the federal government has, especially recently, taken a hands-off approach to enforcing federal drug laws, the federal illegality under the CSA remains a barrier for businesses.[48]

2. Expected FDA Approval of Psychedelic Assisted Psychotherapy

As previously mentioned, there are a few psychedelics that are in the FDA drug approval process. MDMA and Psilocybin assisted psychotherapies are both in phase three trials and expected to be the first psychedelic assisted therapies to be approved by the FDA in the next few years. If these substances are approved, they would no longer lack any "generally accepted medical use" and likely be rescheduled. Absent any broader federal legislation, the rescheduling of these substances triggered by FDA approval would be limited to the synthetic version prescribed with therapy and off-label use may be severely restricted. Consequently, FDA approval would not have broader impact on the federal status of either naturally occurring or synthetically derived psychedelics used in religious or other nonmedical contexts. It is also unclear what the interaction, if any, will be between the FDA regulation of psychedelic assisted psychotherapy and the administration of state legal facilitated

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[45] "Schedule I drugs, substances, or chemicals are defined as drugs with no currently accepted medical use and a high potential for abuse. Some examples of Schedule I drugs are: heroin, lysergic acid diethylamide (LSD), marijuana (cannabis), 3,4-methylenedioxymethamphetamine (ecstasy), methaqualone, and peyote." Schedule I also requires that "there is a lack of accepted safety for use of the drug or other substance under medical supervision." Controlled Substances Act 21 U.S.C.A. § 812(1) (West).

[46] United States Patent 6630507B1 is held by the US Department of Health and Human Services (HHS) on "the potential of non-psychoactive cannabinoids to protect the brain from damage or degermation caused by certain diseases, such as cirrhosis."

[47] MARINOL (dronabinol) capsules, for oral use, FDA (2017), https://www.accessdata.fda.gov/drugsatfda_docs/label/2017/018651s029lbl.pdf; SYNDROS (dronabinol) oral solution, CII, FDA (2017), https://www.accessdata.fda.gov/drugsatfda_docs/label/2017/205525s003lbl.pdf.

[48] See The Rohrabacher-Farr Amendment (H.Amdt. 332 to H.R. 2578, 114th Cong. (2016)), which prohibits the Justice Department from spending funds to interfere with state medical cannabis implementation. Due to federal illegality, investors are more wary of putting money into such a risky and unsettled industry, and all plant touching businesses are subject to Internal Revenue Code Section 280E which disallows deductions for ordinary and necessary businesses expenses that all other businesses can take. It is worth noting that licensees under Oregon's Psilocybin Services will also likely be subject to 280E.

psychedelic experiences.

3. Other Federal Activity Related to Psychedelics

In the summer of 2022, a letter became public which discussed the possibility of developing an interagency federal task force in preparation for FDA approval of psychedelic assisted psychotherapies. The letter was sent by a bipartisan group of House representatives to the Secretary of Health and Human Services asking for a taskforce to explore "the proper use and deployment of psychedelic medicine and therapy" that would be situated in the Office of the Assistant Secretary of Health [49] The goal of such a taskforce would be to establish national guidelines relating to best standards, provider training credentialing, state licensing, and safe and ethical use, in addition to creating pathways for federal funding to support these efforts.

In fall 2022, a new bipartisan psychedelic caucus was formed. The Congressional Psychedelic Advancing Clinical Treatments (PACT) Caucus was organized to advocate for making it easier to research psychedelics. On the same day the caucus was created, the Breakthrough Therapies Act was introduced in the Senate which would make it easier to study Schedule 1 substances like psychedelics and streamline the process of rescheduling substances once they have been deemed a "breakthrough therapy" by the FDA.[50] There have also been ongoing efforts through advocacy and litigation to create access to psychedelic medicines for terminal patients under the Federal Right to Try Act.[51] In the summer of 2023, lawmakers, led by representative Alexandria Ocasio Cortez, pushed through an amendment to the National Defense Authorization Act in the House of Representatives that would expand research into the benefits of psychedelic assisted therapies for PTSD in veterans.

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[49] Ken Jordan, Biden Administration Considers Psychedelic Therapies Task Force, LUCID NEWS (Sept. 20, 2022), https://www.lucid.news/biden-administration-psychedelic-task-force/ [https://perma.cc/D6Q5-3XAC].

[50] Breakthrough Therapies Act, S.5123, 117th Cong. SIL22C68.

[51] Psychedelics Advocates Put DEA Under Pressure Over Right to Try Laws, PSYCHEDELICNEWSWIRE (Aug. 17, 2022), https://www.psychedelicnewswire.com/psychedelics-advocates-put-dea-under-pressure-over-right-to-try-laws/ [https://perma.cc/9H4U-NEED].

II. RELIGIOUS FREEDOM

A. *Religious Use of Psychedelics*

1. Defined

Religion is not easily defined.[52] Theorists of religion have proposed that religion is a psychological tool, a tool for social organization, a relationship with the divine, and a political tool, among many other theories. Religion for me, and for many other sincere practitioners, is a lived experience that consists of community, shared belief, and ritual. Religion, at its best, can be a community of belonging that promotes shared values of inclusivity and justice. For others, religion is a term understandably connected with ideas of intolerance and discrimination and the phrase "organized religion" invokes trauma. Just like religion itself, the definition of the religious use of psychedelics is a debatable concept. Research into the varieties of psychedelic religious practices in the United States shows that the use of psychedelics as entheogens are not constrained to one type of tradition or approach to practice. Self-described psychedelic religious practices range from a pseudo dispensary to commercial ceremonies to holistic religious communities that happen to use psychedelics.[53]

Religions that utilize psychedelics can generally be sorted into three broader categories: indigenous traditions that use psychedelics, the integration of psychedelics into existing established religious traditions, and the creation of new religious groups that may be syncretistic or have limited ties to existing rituals or theologies. It is not a fruitful exercise for me, or frankly anyone else, to be in the position of evaluating relative sincerity or validity of different religious traditions. That said, it is useful to define, as much as I can, the broad category of activities that are included in my analysis and proposals related to the religious use of psychedelics.

The concept of "set and setting" is common nomenclature among psychedelic users and advocates.[54] It typically describes the two elements essential to consider before embarking on a psychedelic journey: the mindset and physical setting. Given the reality that these two factors significantly impact psychedelic experience, it makes sense to utilize that framework in defining the religious use of psychedelics.

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[52] My experience studying religion as an undergraduate and through my Master of Divinity at Union Theological Seminary, in addition to my own active participation in religious life, inform my understanding of religion as a concept and practice.

[53] The legal framework which communities navigate may itself, also shape how these communities develop. In many federal circuits, the use of psychedelic must be central, resulting in communities forming that place the entheogen at the center of their practice. It is unknown whether this would be the case absent this legal guidance.

[54] Ido Hartogsohn, Constructing drug effects: A history of set and setting, 3 DRUG SCI., POL'Y & L. 1–17 (2017).

The mindset aspect of the religious use of psychedelics typically involves a theology or cosmology rooted in belief or acknowledgement of the divine as a tool for understanding, reflection, and healing. The setting of religious use is typically ceremonial with ritual, religious imagery, and music, prayer, or meditation playing a central role.[55]

The model for psychedelic therapy typically includes three aspects: preparation, experience, and integration. Preparation includes getting comfortable with a therapist and setting intentions and expectations for the psychedelic experience. Integration is the work of discussing the experience, thoughts, and challenges which occurred during the experience and working to apply lessons learned moving forward. In the research setting participants get a set number of sessions in preparation of their psychedelic experience, a series of psychedelic (or placebo) sessions, and then a set number of integration sessions. One of the critiques of psychedelic research is that once a participant has finished the requisite integration sessions, they are left on their own with no provided long-term support. A critique of the psychedelic therapeutic model more broadly is that it is expected to be extremely cost prohibitive due to the number of hours with a therapist required. Religious use of psychedelics, at its best, has the potential to provide not just preparation and experiential support through regular ritual and community but also a sustained container for community-based integration. In fact, many religious communities are already designed to be a place where people can process challenging experiences such as the grief from losing a loved one. Through support groups, mourning rituals, and pastoral care, religious communities are well suited to help individuals process and integrate psychedelic experiences whether they happen in a therapeutic setting, a recreational setting, or within the religious community itself.

Religious use of psychedelics is often equated with indigenous practices. This is likely because globally indigenous communities have had the most sustaining entheogenic practice but as will be discussed in more detail below, there is significant evidence of widespread use of psychoactive sacramentals by all people all over the world. Therefore, it is useful to distinguish between the broader category of religious use of psychedelics and the narrower category of indigenous traditions relating to the use of psychedelics. History does not support the conclusion that all religious or spiritual use of psychedelics is appropriation of indigenous culture. That said, interest in plant medicines has resulted in exploitation and appropriation of indigenous cultures and resources. Indigenous cultures, which have a more relational world view, see the use of plant medicines, as an extension of humanity's relationship with all living things. Spending time learning from indigenous people's relationship with psychedelics illuminates that the relationship with plants is not just

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[55] Compare this with the set and setting of a psychedelic in a medical setting which may be more sterile, less rooted in ceremony, and likely to be done as an individual.

a religious practice,[56] but rather is an integrated aspect of cultural, ceremonial, and agricultural practices.

2. Brief History

There is significant archaeological evidence of the use of a wide variety of naturally occurring psychoactive substances in communal or religious settings from all over the world. Cave art involving psychedelics has been identified in Africa going back as far as 10,000 BCE.[57] Mushroom stones dating back to 3000 BCE have been found in ritual contexts in Mesoamerica with researchers concluding that the use of psychoactive substances was common among many groups of people in pre-Columbian societies.[58] One such group was the Mazatec people from the now Mexican state of Oaxaca whose ritual use of psychedelic mushrooms sustained into the twentieth century. One Mazatec curandera or shaman, Maria Sabina, shared these sacramental practices with R. Gordan Wasson, the American ethnomycologist in 1955. As previously mentioned, Wasson went on to introduce these so-called "magic mushrooms" to a broader American audience for the first time in Life magazine in 1957.

Curiosity into psilocybin mushrooms led to rigorous research including the Harvard Psilocybin Project. One notable study was the Marsh Chapel Experiment which was conducted on Good Friday at Boston University's Marsh Chapel in 1962. Spearheaded by divinity school students, the goal was to observe the link between psilocybin and sincere religious experience. In a 25-year follow up to the experiment, all the clergy and religious scholars given psilocybin continued to describe the experience as genuinely mystical and a high point of their spiritual life.[59] Research into the religious use of psychedelics has also been linked to the historical development of western religion, including Christianity.[60]

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[56] Especially since the concept of religion is itself a western invention.

[57] See Tassili n'Ajjer, UNESCO https://whc.unesco.org/en/list/179/ [https://perma.cc/24T9-5MKF] (last visited Feb. 25, 2024).

[58] F F.J. Carod-Artal, Hallucinogenic drugs in pre-Columbian Mesoamerican cultures, 30 NEUROLOGÍA 42, 49 (2015).

[59] Johns Hopkins and NYU also did a psilocybin study with religious leaders specifically looking at mystical experience. Kevin Loria, Researchers are giving religious leaders hallucinogenic drugs to understand mystical experiences, BUSINESS INSIDER (Jan 10, 2017), https://www.businessinsider.in/Researchers-are-giving-religious-leaders-hallucinogenic-drugs-to-understand-mystical-experiences/articleshow/56448556.cms [perma: https://perma.cc/VSQ8-N3GG].

[60] The book, The Sacred Mushroom and the Cross: A Study of the Nature and Origins of Christianity Within the Fertility Cults of the Ancient Near East, was published in 1970 and republished in 2009. Like "The Immortality Key," published in 2020, it links archaeological evidence to the use of psychedelics in early Christianity.

B. *Legal History of Religious Use of Psychedelics*

1. Brief History of Free Exercise Jurisprudence

The First Amendment of the Constitution protects five freedoms including the freedom of Religion. Together, what are called the Religion Clauses of the First Amendment consist of the Establishment Clause and the Free Exercise Clause. Congress cannot pass a law that establishes religion or limits the free exercise of religion.[61] It took almost one hundred years after the first amendment was ratified in 1791 for the Supreme Court to hear a religious liberties case interpreting these clauses. The first case, *Reynolds v. United States*, addressed a conflict between criminal law and a claim of religious exercise. George Reynolds, a member of the Mormon church, challenged his conviction under a federal law criminalizing polygamy, claiming the practice was encouraged and sometimes even mandated by his faith. The Court upheld Reynolds' conviction, distinguishing between religious thought and religious practice under the First Amendment and its Free Exercise Clause. Americans were free to believe whatever they wanted, but they were not free to practice their faith in ways deemed odious to the American sensibility and its English roots.[62] Allowing such free practice of religion, in the face of accepted criminal laws, would "in effect permit every citizen to become a law unto himself."[63] It would be another sixty years before the religion clauses were evaluated by the Supreme Court again. In *Cantwell v. Connecticut*, the Court reaffirmed the belief/practice dichotomy and officially incorporated the First Amendment making it applicable to the states.[64]

The protections of the First Amendment's Free Exercise Clause were reevaluated and broadened in the case *Sherbert v. Verner*.[65] In Sherbert, the Court held that a state could not deny unemployment benefits to a Seventh Day Adventist who would not work on their sabbath day. The case established a strict scrutiny standard for evaluating free exercise claims sometimes called the Sherbert Test. Evaluating a Free Exercise claim under the Sherbert Test requires identifying, the burden on religious freedom, and then the burden shift to the government to show that it has a compelling interest and that the law in question is narrowly tailored to achieve that compelling interest.

2. Employment Division, Department of Human Resources of Oregon v. Smith and related history

The Sherbert Test was the law of the land for Free Exercise claims from 1963 until a major shift occurred in the 1990 case Employment Division, Department of

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61 U.S. Const. amend. I.
62 Reynolds v. United States, 98 U.S. 145, 164 (1878).
63 Id. at 167.
64 Cantwell v. State of Conn., 310 U.S. 296 (1940).
65 Sherbert v. Verner, 374 U.S. 398 (1963).

Human Resources of *Oregon v. Smith*. Much has been written about Smith and the case's impact on religious freedom law. The essential holding of Smith, which overruled the prior decades of jurisprudence, was that a "neutral and generally applicable law" which burdened religious freedom did not need to pass strict scrutiny under the Sherbert test. The new "neutral and generally applicable" threshold question introduced a significant additional burden for religious claimants making Free Exercise Claims. Even if a law burdens religious exercise, forcing an individual to choose between following the law or practicing their faith, if the law is deemed neutral and generally applicable then rational basis scrutiny applies. Under rational basis scrutiny, sometimes called no scrutiny at all, the burden is on the person bringing the claim to demonstrate that there is no rational relationship between a legitimate government interest and the law in question. Rational basis scrutiny is typically applied in situations when no fundamental right or protected class is implicated but Smith held that it should also apply in some religious freedom cases.

The book, "To an Unknown God," written by reporter and Professor Garrett Epps provides insight into the stories that shaped both Al Smith, the named plaintiff, and John Frohnmayer, the AG of Oregon who argued the Smith case at the Supreme Court. The history of government mistreatment of Native American religion began way before the case came to a head in Oregon. The westernization of the category of religion is a documented phenomenon in the discipline of religious studies with more modern approaches aware of the harm that comes from viewing the history of religion as one that progresses forward from savage to modern.[66] There was a systematic effort in this country to "Americanize" and "Christianize" Native Americans, supposedly for their own good, using boarding schools and worse.[67] The intolerance for Native practices forced aspects of Native tradition, such as the Sun Dance,[68] to be driven underground and many argue that this deprivation of culture has also resulted in an alcoholism epidemic among Native people.[69]

As a result of the alcoholism epidemic, the Bureau of Indian Affairs hired Al

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[66] See Letter from Henry Teller, U.S Dep't of Interior, on Rules Governing the Court of Indian Offenses to Hiram Price, U.S Off. of Indian Affs. (March 30, 1883), https://commons.und.edu/indigenous-gov-docs/131/ [perma: https://perma.cc/Y4WQ-UJWU]; GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL, (St. Martin's Press, 1st ed. 2001).

[67] The Issue of Native American Education System Failure, THE RED ROAD, https://theredroad.org/issues/native-american-education/ [https://perma.cc/6QXX-NN4J].

[68] There was a series of legislation through the 19th and 20th century impacting Native rights including the 1883 Code of Indian Offenses which criminalized Indian dances and feasts and subjected medicine men who practiced or encouraged others to practice to confinement and required evidence that he abandoned his beliefs in order to be released. Dennis Zotigh, Native Perspectives on the 40th Anniversary of the American Indian Religious Freedom Act, SMITHSONIAN MAG. (Nov. 30, 2018), https://www.smithsonianmag.com/blogs/national-museum-american-indian/2018/11/30/native-perspectives-american-indian-religious-freedom-act/ [https://perma.cc/EY8F-2AS7]. /

[69] Epps, supra note 66.

Smith, himself a Native American and former alcoholic, to assist with setting up several tribal drug addiction treatment centers. While employed as counselors at one of the centers, Al Smith and his coworker Galen Black ingested peyote as part of a Native American religious ceremony and were fired as a result. That Black and Smith could be employees at an alcohol addiction treatment center and engage with the religious use of peyote made sense. The research about the use of Peyote both as a religious sacrament and a tool utilized to combat alcoholism was available at the time and still.[70] "To this day, Al Smith remembers the message differently, I can't go to church? He remembers asking himself."[71]

When Smith and Black applied for unemployment compensation, both were denied due to an Oregon law which disallowed unemployment compensation when the termination was due to "work-related misconduct." Smith and Black appealed the denial and won at both the Oregon Court of Appeals and the Oregon Supreme Court. The state appealed to the United State Supreme Court maintaining that the denial of unemployment benefits was proper. On its face, Smith was about the application of an unemployment compensation law, not a drug law. In the first instance, the Supreme Court did not address the issue but instead remanded the case asking for Oregon to clearly articulate whether peyote was exempted at the state level (as it was at the Federal level.)[72] When the issue was heard again, the Oregon Supreme Court ruled that although the state did not have an exemption, the prohibition of sacramental peyote use violated the free exercise clause. The state appealed again to the Supreme Court who then took on the issue of whether the state could, in accordance with the free exercise clause, prohibit the use of peyote and deny unemployment benefits.

Instead of applying the Sherbert Test, evaluating the government's interest, and analyzing whether the law at issue was the least restrictive means, the Court, led by Scalia, radically veered from its own precedent. In *Smith*, Scalia wrote the majority opinion and presented all of his arguments for why *Sherbert* and its compelling interest test did not apply in this case: it is not a hybrid case, it is about a criminal law (even though the original dispute was about unemployment compensation), and that if this kind of balancing test was allowed, it would create a "private right to ignore generally applicable laws."[73] Scalia also poignantly argues that it would not

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[70] Id. at 138. (quoting Robert Bergman, the former Chief of mental-health programs for the federal Indian Health Service "There is no positive correlation between alcoholism and the use of peyote in a Native American Church ceremony. On the contrary, there is a great deal of evidence pointing the opposite way – that the use of peyote in ceremonies of the Native American Church helps the participants to control and overcome problems with alcohol.")

[71] Id. at 6.

[72] Emp. Div., Dep't. of Hum. Res. of Or. v. Smith, 485 U.S 660, 660 (1988).

[73] Ironically, the fall out of Smith has led to this kind of analysis. See Fulton v. City of Philadelphia, 593 U.S. 522 (2021); see also Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617 (2018).

be possible to only run the compelling interest test if the practice was central to a faith because that would involve the government evaluating religious sincerity which is constitutionally suspect. Ironically, this is exactly what psychedelic religious practitioners are now faced with when seeking legal protection from the DEA and courts.[74] Justice O'Connor's concurrence in *Smith* argued that the *Sherbert* test should have applied and if it had, Oregon surely has an interest to promote the health, safety and general welfare through drug laws because "drug abuse is "one of the greatest problems affecting the health and welfare of our population" and thus "one of the most serious problems confronting our society today."[75] In other words, there was no need to shift the legal landscape so drastically.

3. The Religious Freedom Restoration Act (RFRA) and Subsequent Case Law.

Religious people that utilized psychedelics were not the only people who were alarmed by the decision handed down in *Smith.* Congress and many religious groups advocated for the passage of the Religious Freedom Restoration Act (RFRA) which essentially reinstated the compelling interest test. The passage of RFRA in 1993 was almost unanimous with both liberal and conservative religious groups of a diverse number of faiths supporting it. RFRA provides that a person's exercise of religion may only be substantially burdened if the federal government can demonstrate that the application of the law to that person "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that interest."[76] RFRA allows both persons and churches to make claims or raise defenses. After the Court ruled that RFRA was not applicable to the states because it exceeded Congress' power under section five of the Fourteenth Amendment,[77]

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[74] Scalia essentially says this is not the job of the court but instead legislatures which is why it makes sense that many states already had peyote exemptions at the time. But even Scalia knew this wasn't without consequence. "It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs." Smith, 494 U.S. at 890 .

[75] Id. at 904.

[76] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb – 2000bb-4).

[77] City of Boerne v. Flores, 521 U.S. 507 (1997). After this case was decided, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA) which requires state and local government to enforce land use and prisoner regulations without substantially burdening religious activities.

many but not all states have passed their own version of RFRA. [7879]

Like the case that spurred the creation of RFRA, *Smith*, the first Supreme Court Case evaluating a claim under RFRA also involved the religious use of psychedelics. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal (UDV*) was the result of a 1999 raid of the UDV national headquarters in Santa Fe, New Mexico, by United States Customs agents. The UDV describes itself as a "Christian Spiritist" religion that originated in Brazil.[80] After a year and a half of unsuccessful settlement negotiations, the church sued in federal court against the DEA, the U.S. Customs Service, and the United States Department of Justice primarily seeking relief under RFRA.

In *UDV*, the government argued that the CSA was the least restrictive means of advancing three compelling government interests: protecting UDV members' health and safety, preventing diversion of ayahuasca from the Church to recreational users, and complying with the 1971 UN convention on psychotropic substances.[81] For the first argument, the government relied on Ayahuasca's Schedule 1 status which the Court said could not carry the day because RFRA required a more focused and specific compelling interest. Like in *Smith*, the government also focused on the uniformity of the CSA which precluded exemptions. In *UDV*, the court explored this argument and found that since Congress had built in discretion[82] for the AG to waive requirements,[83] Congress' findings with respect to Schedule 1 substances should not

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[78] For a list of states that have mini RFRAs, and their citations, see CHACRUNA INST. FOR PSYCHEDELIC PLANT MED. & ALISON HOOTS, GUIDE TO RFRA AND BEST PRACTICES FOR PSYCHEDELIC PLANT MEDICINE CHURCHES 1, 40 – 41 (2021). https://chacruna.net/chacruna_guide_rfra_best_practices_psychedelic_churches/ [https://perma.cc/DC3Y-H4LK].

[79] It remains an open question under what power Congress passed RFRA as applied to the federal government. Although I view RFRA as a net positive, I think it is possible that Congress' power to pass it could be challenged. In our federalist system, Congress may only act through granted powers, and it is unclear how RFRA falls within Congress' commerce clause, tax and spending clause, or necessary and proper clause as interpreted by the Supreme Court.

[80] FAQ CENTRO ESPÍRITA BENEFICENTE, UNIÃO DO VEGETAL IN THE U.S., https://udvusa.org/faq [https://perma.cc/YC3V-CFJ8].

[81] On this argument, the Court did not agree with the district court's opinion that the convention does not cover ayahuasca but argue that the government hadn't demonstrated their interest, specifically they failed to submit any evidence addressing any possible consequences of granting the UDV an exemption. Relying on only two affidavits from state department officials attesting to the general importance of honoring international obligation was insufficient to support specific harms for the RFRA analysis.

[82] It is worth noting that the Court has already acknowledged that there is discretion in application of the CSA. In Fulton v. City of Philadelphia, which applies Smith, the court found that a law which had discretion in its applicability, in that case discretion of a social services agency, is not neutral and generally applicable and, therefore, strict scrutiny applies. Fulton, 593 U.S. at 522.

[83] CSA authorized the AG to "waive the requirement of registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety." 21 U.S.C. §822(d).

carry determinative weight for RFRA purposes. The court also added that the fact that the federal government, at the time the CSA was passed, included an exemption for peyote for Native Americans meant that the CSA was never uniform and there was no basis not to extend the exemption to additional sincere religious practice. In terms of diversion, the sticking point was that there was not a huge black market for Ayahuasca, an analysis that would likely look very different today.

The Santo Daime, which is the other group besides UDV to have an exemption, was granted it after litigation.[84] Like UDV, Santo Daime is a Brazilian based syncretic religion that incorporates elements of Christianity and spiritism, in addition to indigenous practices.[85] The Santo Daime church began experiencing problems with seizure of their sacrament by the federal government around the same time as *UDV*. While the *UDV* case was ongoing, the Santo Daime church decided to practice in secret. After the Supreme Court's decision, the church decided to bring their practices above ground. When the case was filed in district court, the fact that they had gone below ground was used as evidence by the government that the practice wasn't sincere, but the court wasn't persuaded. The government asserted similar interests as it had in *UDV*, protecting the health of those who use the sacrament and preventing diversion to recreational users.[86] It also argued that the government had an interest in "protecting the integrity of the DEA's process for regulating controlled substances." The court found that these interests did not justify prohibiting the use of entheogenic tea, and that prohibition was not the least restrictive means of furthering public health. The court also relied on additional research done since *UDV* that supported a conclusion that the use of a psychedelic sacrament in the religious setting was safe. In conclusion, the court found that an exemption from the CSA and some amount of government oversight in terms of testing and storage would be the least restrictive means of furthering the government's interests.

C. *Current Legal Landscape of Religious Use of Psychedelics*

1. DEA Petition Process

In 2009 after losing both the UDV and Santo Daime lawsuits, the Drug

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[84] In both the UDV and Santo Daime cases, the government did not contest that the practices were sincerely religious.

[85] Church of the Holy Light of the Queen v. Mukasey, 615 F. Supp. 2d 1210, 1212 (D. Or. 2009).

[86] Id. at 1220, vacated sub nom; Church of Holy Light of Queen v. Holder, 443 F. App'x 302 (9th Cir. 2011) (The injunction of the district court was vacated, and the case is remanded with instructions for the district court to fashion an injunction limited in scope to its conclusion that the government failed to show that its interests justify prohibiting outright the Church's importation of Daime tea solely for use at Church ceremonies. In other words, the injunction should not reach more conduct than that which the district court held violated RFRA.").

Enforcement Agency (DEA) posted guidance online for religious communities seeking exemptions from the CSA pursuant to RFRA.[87] The guidelines lay out a process which communities are, in theory, supposed to follow to be granted a religious exemption. Petitioners are instructed to include both a written statement and supporting documents in response to several questions. The petitioner must demonstrate, through this submitted evidence, that an application of the CSA would be a substantial burden on sincere religious practice. The petitioner must also submit detailed information about the religion's history, beliefs, practices, policies, rituals, holidays, organization and leadership and specific details about the use of a controlled substance as part of religious practices.[88] The guidance also says that while a petitioner is waiting for a final response from the DEA, they must not engage in any of the disclosed activity. In the over decade since the guidance was published, the DEA has yet to grant a single petition through the process. Frequently the DEA will not address the application, leaving religious practitioners with no protection or guidance besides the expectation that they must stop their religious practice until it is exempted. Consequently, most practitioners are not advised to petition for a DEA exemption because the process is essentially futile. Due to the requirements to disclose all activities then cease doing them until the DEA responds, petitioning for an exemption also puts the community at a higher risk for criminal enforcement. [89] One group, Soul Quest, filed a petition for exemption under the DEA's guidelines. After waiting three years and not getting a response, Soul Quest filed a claim against the DEA. Finally, the DEA issued a final decision, denying Soul Quest an exemption on the basis that they were not a sincere religion and did not adequately follow health and safety procedures.[90] The DEA's letter to Soul Quest also focused on aspects of Soul Quest's language and advertising that allude to healing or medicine as indicative of religious insincerity. [91]

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[87] DRUG ENF'T ADMIN., GUIDANCE REGARDING PETITIONS FOR RELIGIOUS EXEMPTION FROM THE CONTROLLED SUBSTANCES ACT PURSUANT TO THE RELIGIOUS FREEDOM RESTORATION ACT, DRUG ENF'T ADMIN. (2020) https://www.deadiversion.usdoj.gov/GDP/(DEA-DC-5)(EO-DEA-007)(Version2)RFRA_Guidance_(Final)_11-20-2020.pdf) [https://perma.cc/2W9J-PH2V].

[88] The view of many courts and the DEA seems to be that for the burden on religious exercise to be substantial enough to warrant a religious exemption, the use of psychedelics must be central to religious practice. This is a problematic double standard as compared to religious communities that use other drugs and has the negative impact of resulting in the development of new religious communities who organize themselves to be substance centric as opposed to community centric to remain as legally defensible as possible.

[89] See Chacruna Inst., supra note 78, at 36-37..

[90] Letter of Denial from DEA to Soul Quest Church of Mother Earth, DEA (Apr. 14, 2021) https://www.bialabate.net/wp-content/uploads/2021/06/DEA_Denial_Soul_Quest_Exemption_2021.pdf [https://perma.cc/GWS8-Q7MY].

[91] Some of the guidance that has come out of the Soul Quest letter include that "any advertising or publicity that focuses on the medicinal or therapeutic uses (which may be incidental to religious

In recent discussions with legal practitioners advising religious communities, there appears to be at least a small shift in the DEA's approach to the petitions, at least in some areas of the country. Given the broader legal shifts particularly in the Pacific Northwest and Colorado, some DEA regional offices have become flooded with applications and have begun responding to petitions and doing site visits. As of August 1, 2023, the DEA has still not voluntarily granted an exemption, but it appears that at least some regional employees of the DEA seem to think DEA licenses for religious practitioners are warranted. In these site visits, the focus is not on evaluating religious sincerity, something the DEA is not equipped to do, and the agents are not interested in doing. Rather, the focus is ensuring safety. While lawyers are still not generally advising communities to apply, many religious practitioners are engaging with the process without the advice of counsel. Or are only seeking counsel after being contacted by the DEA about a site visit. The safety expectations are high and compliance with DEA requirements is expensive. Petitioners must demonstrate that they are doing everything within their power to prevent diversion of the controlled substance. In practice, this looks like multiple levels of alarms, with backup battery alarms and safes that are bolted to the ground with internal hinges. There is also the expectation of a developed record-keeping system.

2. Ongoing Litigation

There are a few ongoing federal lawsuits related to the religious use of psychedelics.[92] One involves a psilocybin church in Oakland, California, Zidedoor, which was raided by local law enforcement and consequently filed a civil rights action against the city under RFRA.[93] Two communities in Arizona have also filed suit in federal district court. One, involving the Church of the Eagle and Condor, is like the UDV and Santo Daime cases but involves a domestically formed religion as compared to the Brazilian ones. After the church had their sacrament seized by the Department of Homeland Security, they filed a RFRA lawsuit seeking a court ordered religious exemption for their community. Another community, the Arizona Yage Assembly (AYA), filed a claim challenging the constitutionality of the DEA exemption process and claiming the agency did not follow the proper Administrative Procedures Act process.[94] This aspect of the case was dismissed due to lack of standing but was refiled relying only on RFRA.[95] In one of the motions related to

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uses) will undermine religious sincerity" and that "DEA may not thoroughly analyze the least restrictive means if it doubts religious sincerity." For more details and analysis see Chacruna Inst.,supra note 78, at 39 – 40.

[92] The most notable lawsuit at the state level is State v. Mack, 173 N.H. 793 (2020).

[93] Church of Ambrosia v. City of Oakland, 4:22-cv-4655-YGR (N.D. Cal. Jul. 24, 2023).

[95] See Ariz. Yage Assembly v. Garland, 595 F.Supp.3d 869 (D. Ariz., 2022). Specifically, the court said it could not grant "relief because they have failed to allege a 'concrete plan' to violate the

the AYA case, the DEA announced that they would be initiating a final rulemaking procedure to adopt regulations governing the religious exempt process. Initially, it was announced that the new rules would be proposed by March 2022, but they have yet to be proposed.

There is also ongoing litigation initiated by a psychedelic religious community against the Internal Revenue Service (IRS). Religious communities, legally called churches, are automatically considered tax exempt under section 501(c)(3) of the Internal Revenue Code (IRC).[96] Churches do not have to apply to be tax-exempt, but many churches do because a determination letter can be necessary in opening a bank account, renting property, and soliciting tax deductible charitable donations. The IRS' official policy is that a tax-exempt organization cannot be organized for an illegal purpose.[97] If a religious community submits a form 1023 to the IRS and discloses their illegal activities, they are almost certainly going to be denied tax exempt status. The Iowaska Church based in Iowa applied, disclosed their psychedelic sacrament use, got an adverse determination letter, and has now brought an action against the IRS' commissioner Rettig under RFRA claiming that denial of tax-exempt status burdens the community's religious freedom.

3. Increasing Number of Communities and General Lack of Enforcement of Federal Criminal Law Resulting in Risks of Harm and Harms

As a Graduate Tax Scholar at Georgetown University Law Center, I conducted research on approaches that psychedelic religious communities are taking with respect to their federal tax status which range from state level incorporation to denial of tax-exempt status and everything in between. The key takeaway from that preliminary research is that due to the increasing efforts to decriminalize and legalize psychedelics that have been described above and the accompanying cultural acceptance of them, the number of religious communities utilizing psychedelics is significant and growing. Since religious communities are exempt from filing requirements under IRC section 508(c)(1)(A), there are dozens of communities that claim this status. Many of these communities are outwardly practicing, publicizing

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CSA. The Ninth Circuit has held a 'concrete plan' requires more than a 'general intent to violate a statute at some unknown date in the future.'" Of course, a concrete plan would also subject the community to criminal prosecution for practicing their faith. For more information see also Griffen Thorne, How the DEA is Interfering with Religious Use of Psychedelics, JURIST (Oct. 12, 2020) https://www.jurist.org/commentary/2020/10/griffen-thorne-dea-religion/ [https://perma.cc/2R5G-BRN4].

[96] This exemption is memorialized in IRC Section 508(c)(1)(A). Whether religious communities file to have their tax-exempt status recognized or not, they are subject to all the rules applicable to other 501(c)(s) organizations including that they must be organized substantially for charitable purposes.

[97] Iowaska Church of Healing v. Rettig, No. 1:2021cv02475 – Doc. 32 (D.D.C. 2023).

their use of controlled substances on their websites and social media, and even discussing their federally criminal behavior with the news media.[98]

Even in situations where a community has been raided by local law enforcement or denied by the DEA, the communities are continuing to practice without any law enforcement against them.[99] This is the case even after a death occurred at Soul Quest.[100] The point is acknowledging is not that these activities should be criminalized. Rather it is to point out that despite the DEA's position that absent an exemption, a community cannot engage in religious exercise with controlled substances, there are several religious communities actively utilizing these substances and not always safely. There are those in the community of scholars, advocates, and practitioners who would rather ignore, or at least refrain from acknowledging that harms have occurred during psychedelic religious practice because doing so would put a target on the back of all communities. These voices also assert that these "bad apples" do not reflect the best of psychedelic religion. But it is necessary to acknowledge the harm that has occurred and to develop policy that lessens these risks.

III. PUBLIC SAFETY

A. *Legally Defensible v. Legally Protected*

In the introduction of this Article, I summarized the legal status of psychedelic religious communities as functionally free to practice, but not free to practice safely. This characterization stems from the radically different views held by religious practitioners as compared to the government and because of the lack of criminal law enforcement described above. From the perspective of the United States government, entheogens are illegal drugs scheduled under the Federal CSA. There is a federal legal exemption for peyote use by Native American Religious Practitioners which has existed prior to the CSA and was codified in the American

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[98] It has been my practice in writing about the religious use of psychedelics not to specifically name or otherwise "out" any religious community that is not already public facing. Historically, I have interpreted that to mean involved in active litigation. In the last year or two, there has been an increase in media written about psychedelic religious communities that I now consider that to be a form of "outing." See Manisha Krishnan, Ex-Mormons Are Running a Magic Mushroom Church, AP NEWS (Feb. 15, 2023), https://www.vice.com/en/article/akexaa/magic-mushroom-mormon-church-utah [https://perma.cc/27PF-UN7B].

[99] Oaklands Church of Entheogenic Plants, ZIDE DOOR (2023), https://zidedoor.com/ [https://perma.cc/AF5V-G6SN] (last visited Feb. 25, 2024); Spiritual Retreat Center In Orlando, SOUL QUEST AYAHUASCA CHURCH OF MOTHER EARTH, https://www.ayahuascachurches.org/ [https://perma.cc/F7Q7-5HSZ] (last visited Feb. 25, 2024).

[100] Karla Ray, No charges filed after death at ayahuasca church, WFTV NEWS (Oct. 14, 2018), https://www.wftv.com/news/9-investigates/no-charges-after-death-investigation-at-ayahuasca-church/852255976/ [https://perma.cc/TZF5-AT2N].

Indian Religious Freedom Act.[101] As previously mentioned, after a community referred to as UDV had their ayahuasca seized and challenged the government under RFRA, they won a DEA exemption from the CSA and the Santo Daime followed suit. All other religious use of psychedelics outside of these exemptions is technically criminal. Absent a DEA given exemption from the CSA, religious communities have no legal protection.

From the perspective of religious practitioners, any practice that is sincerely religious and safe should be constitutionally protected and considered the noncriminal religious use of otherwise illegal drugs. Since the DEA's petition process is challenging and oftentimes futile, communities that consider their activity constitutionally protected are left in a position where they must settle for the idea of being legally defensible. The framework of "sincere and safe" is derived from the *UDV* decision and reflected in the Court's analysis and DEA exemption process but is not otherwise codified. Religious communities are advised to organize themselves in such a way, including drafting doctrine and putting in place security measures, that in the event they had any criminal law issues, they would be able to mount a strong defense against criminal charges.

If a religious community or individuals associated with one are charged with a crime related to their psychedelic use, there are a few different factors that determine what kind of defense could be raised. The federal RFRA is a defense but is only applicable to federal actors. If a church is importing sacrament through an international border and has their psychedelics seized, such as occurred in the *UDV* case, then using RFRA as a defense is possible. But a great majority of drug law enforcement happens at the state level so the more likely first line of defense would be a state level RFRA analog. But not all states have RFRA. In states that do not have RFRA, practitioners can utilize the state constitution or the federal constitution. Up until recently, both options proved mostly futile due to the *Smith* case. In 2021, the Supreme Court decided the case *Fulton v. City of Philadelphia* which further interpreted when a law is "neutral and generally applicable" and opened another possible defense for psychedelic religious practitioners. In *Fulton*, the Court found that a law which had discretion in its applicability, in that case discretion of a social services agency policy, was not neutral and generally applicable and therefore subject to strict scrutiny. Since it has already been acknowledged in the *UDV* case that the AG has discretion in applying the CSA, this is a helpful additional argument in situations where federal RFRA does not apply and there is no state analog. Regardless of the approach, a religious community that utilizes psychedelics must be prepared to defend their activity in court should anything happen. Litigation is costly and lengthy and the desire to avoid it results in public safety risks. Litigation against federal agencies also comes with a whole host of other challenges. This section of the Article which discusses these risks exists because of the gulf between the small number of communities that are legally protected and the larger amount of

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[101] American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C § 1996).

activity that is considered legally or constitutionally defensible.

B. *Concerns*

Psychedelics, as a category, are not the most inherently dangerous substances. There is no lethal dose of psychedelics, something that cannot be said about several pharmaceuticals and alcohol which are available much more easily. There is also no inherent danger in the religious use of psychedelics, especially when communities implement best practices related to medical screening of participants and substance storage. In the Santo Daime case, the 9th Circuit Court of Appeals even acknowledged that there is increased safety of psychedelic use in religious containers.[102] What makes psychedelics used in religious contexts most dangerous is the fact that they remain illegal.

The result of the broad illegality of the religious use of psychedelics is that in the rare event that an individual needs emergency services, a community is less likely to call 911 due to fear of criminal law enforcement.[103] The fear of criminal prosecution at both the communal and individual level also increases the risks of harm that can occur during psychedelic religious activity, that are unrelated to psychedelic use, or are not unique to psychedelic use, such as sexual or financial abuses.[104] When a victim suffers a harm that occurred during the course of illegal activity, they are way less likely to seek any legal recourse. Due to federal illegality, religious practitioners are unable to get insurance to cover their activities which only exacerbates the challenges victims face. Illegality also limits the ability for individuals to publicly share information about positive or negative experiences without fears of legal risk.

Any involvement with illegal drug related activities also puts all government benefits and processes at risk of being tainted. This risk extends from domestic relations issues to government background checks and employment, to housing, professional licensing, and educational funding. Individuals, many of whom truly view their religious practice involving psychedelics as sincere, are at high risk of losing out on benefits and being penalized because of their religious practices. In terms of safety, the status quo contributes to harm because religious practitioners are

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[102] Church of Holy Light of Queen v. Holder, 443 F. App'x 302 (9th Cir. 2011).

[103] Calling emergency services has also been used by the DEA has proof that a community is not following its screening procedures instead of acknowledging that even with screening, sometimes there can still be harms. Martha Hartney, DEA Denies Soul Quest's Religious Exemption: Impacts on the Ayahuasca Community, CHACRUNA (June 21, 2021), https://chacruna.net/dea_denies_soul_quest_religious_exemption_ayahuasca/ [https://perma.cc/SN8N-FXF3].

[104] Evidence of abuse also prevalent in psychedelic therapy research. Although sexual and gender violence can occur in other therapeutic and religious settings, the vulnerability created using psychedelics only increases the risks of abuse. Olivia Goldhill, Psychedelic Therapy has a sexual abuse problem, QUARTZ (Mar. 3, 2020), https://qz.com/1809184/psychedelic-therapy-has-a-sexual-abuse-problem-3 [https://perma.cc/X69Q-LETN].

afraid of being viewed as medical providers and seen as insincere. In the DEA's recent denial of Soul Quest's exemption, the DEA interrogated everything from Soul Quest's name, including its DBA, to its offerings. It is worth noting that outside of the psychedelic religious world, it is commonly accepted that religious and spiritual belief and experience are aspects of healing.[105]

The general lack of enforcement of laws against religious communities that utilize psychedelics is not necessarily a bad thing. But when charges are dropped, such as occurred with a community in Colorado, then it eliminates the ability for the creation of new precedent.[106] Law enforcement, by the IRS, DEA, and state law enforcement agencies, puts religious communities and practitioners in a position where they can practice but not benefit fully from legal status. Another significant challenge that results from continued illegality is the lack of sureness about safe supply of substances and lack of clear pathway to ensure safe supply.

C. *Possibilities*

This Article has laid out the legal landscape which shapes the religious use of psychedelics. With changing state laws and FDA approval of psychedelic assisted psychotherapies on the horizon, interest in access to psychedelics is increasing, and religious use is increasing. Even in states where there are legal frameworks, such as Oregon and Colorado, a religious community does not have a clear pathway to federal legal protection. Similarly to cannabis legalization, the state-based legalization of a substance does not remove all federal barriers. Inevitably, there will need to be a reconciliation between federal and state law with psychedelics (and cannabis) more generally and specifically for religious practitioners. All the safety and personal concerns outlined only increase the urgency of a clear pathway forward. To determine what the possibilities are for the future of entheogenic religious freedom policy, a few questions need to be considered. What is the appropriate amount of government intervention for religious use of drugs? How should religion be defined in the eyes of the law? Should the definition of religion be different when it comes to the religious use of controlled substances? And finally, who in the government, and specifically which agency or agencies, should be regulating religion? It is impossible to answer all these questions, but they are helpful lenses to think about policy solutions and will be addressed throughout this section. To initiate a necessary conversation about psychedelic religious freedom drug policy reform, I offer a few possible policy solutions, understanding that the matter at issue is extraordinarily complex.

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[105] The best evidence of this is the role of chaplains who support spiritual/religious healing in medical frameworks.

[106] Marie Scarci, Charges Dropped Against Sacred Tribe's Psychedelic Spiritual Leader, CHRONIC MAG. (Dec. 13, 2022), https://www.thechronicmagazine.com/post/charges-dropped-against-sacred-tribe-s-psychedelic-spiritual-leader [https://perma.cc/3K6M-CAZ8].

1. Proposal One: Linking 501(c)(3) Status to DEA Exemption

One way to encourage transparency and safety in the relationship between entheogenic religious communities and the Government would be to link a positive IRS 501(c)(3) determination with a DEA exemption. In April 2023, a decision came down from the U.S. District Court for the District of Columbia in the previously mentioned Iowaska Church case agreeing with the IRS' position that the UDV case law did not create a blanket exemption for psychedelic churches but rather stands for the principle that a religious exemption is possible. The court also reasoned that there was no connection between granting the church its 501(c)(3) status and deeming their activities legal. Consequently, the court found that the church lacked standing to bring the claim because the injury of not being able to use their sacrament Ayahuasca was not traceable to the IRS denial but rather resulted from inaction by the DEA. The court argues that these two agency determinations have no relation, but this Article posits that it would make sense for these determinations to be connected.

As it stands, the IRS is the primary federal agency that is both regulating religious activity and setting out the expectations of what a church is in the eyes of the law. Much could be said about the shortcomings of the IRS' church factors and the IRS' regulation of religious communities. That said, the IRS has a clear process for evaluating whether a religious community is organized in such a way that it can be legally designated as a church, and many states defer to the federal determination. As evidenced by the Iowaska case, current IRS policy is that 501(c)(3)s cannot be organized for illegal activities so this proposal would require a shift of IRS policy and likely the issuance of additional guidance for entheogenic communities. Churches are also not currently required to file an application with the IRS to be recognized as a church so this proposal would put an additional burden on psychedelic religious communities by requiring them to file. But unlike the status quo, where the DEA routinely does not answer and is not experienced in evaluating whether a community is legally a church, the IRS is already doing this.[107]

Practically, this proposal would look like adding a question on Form 1023 that a community could check notifying the IRS that if approved, they would want an exemption from the DEA to utilize a controlled substance. Ideally, the review of Form 1023 would be done without the reviewing agent being aware that the community was also applying for a DEA exemption as to not taint the review. If the IRS approved the community, the approval would automatically get sent to the DEA who could then request information, schedule a site visit, or issue a DEA number depending on the type of substance but this determination would create a presumption of religious sincerity. This would also allow existing 501(c)(3) religious communities to avail themselves of getting a DEA exemption. Although this proposal does shift the decision about religious sincerity from the DEA to the

[107] This proposal presumes that generally the same standards for defining a religion should apply whether the substance used by the community is currently federally illegal or not.

IRS and does reduce the burden on religious communities (because the IRS approval process is much more streamlined than the DEA petition process,) it still puts a government agency in the position of arbitrarily deciding religious sincerity and increases the administrative burden of the IRS.

2. Proposal Two: Presume All Activity is DEA Exempt

There is another option for streamlining the DEA exemption process that reduces the burden on the Government and religious communities and promotes religious liberties and public safety to the greatest extent possible. The easiest pathway forward would be for the DEA to deem all religious communities that utilize controlled substances as automatically DEA exempt. This policy would mirror the IRS' approach to religious communities: they are presumed to be exempt, but the IRS retains the right to investigate churches if it believes they are violating IRS policy including operating primarily for commercial purposes. The DEA could still require registration, especially in situations where the activity is interstate or international and involves international importation. The DEA could issue guidelines and expectations about how a religious community should safely secure their sacrament and prevent diversion and would be able to address noncompliance. But the burden on the DEA to evaluate religious sincerity would be completely removed and importantly, the burden on religious communities to provide evidence of religious sincerity would be completely removed. It is worth emphasizing that as a law enforcement agency, the DEA is best suited to enforce regulation.

The automatic-DEA exemption framework and guidelines could also be used as guidance for state licensing programs such as in Colorado and Oregon. This burden shift would have massive implications for all the challenges introduced in the prior section. If the activity was presumed exempt, people would be less afraid of seeking emergency services if they are needed. Activity not presumed to be illegal could not be used in the same way to penalize individuals during other legal proceedings or benefit applications. Ultimately oversight and recourse on the side of participants is essential and by shifting the activity from legally defensible to legally protected, participants would gain freedom to speak more about their experiences.

3. Outstanding Questions for these Policy Proposals

The prior proposals are big picture policy changes that have the potential to radically shift the legal landscape psychedelic religious practitioners must face. But even if either proposal was enacted through the passage of federal legislation, there are still many details that would have to be determined.

One category of outstanding questions has to do with the granular details of the regulation of psychedelics. Psychedelics is a word used to describe a larger category of drugs that are not homogenous. What substances should be included in these exemptions and how would the regulations account for different risk profiles? What

kind of additional or different regulations would apply to sacrament that is home grown vs sacrament that is imported? What about synthetic sacraments? Once the FDA does approve some psychedelic assisted psychotherapies, how would these likely synthetic psychedelics interact with these religious practitioners? How would the federal regulations that DEA issues interact with state regulations, especially in terms of rules related to cultivation or manufacture? The DEA has been delaying rulemaking on the DEA petition process for religious communities because it is ill equipped to determine how to evaluate religious sincerity. Addressing the questions listed in this paragraph would be a much better use of DEA resources and will necessarily need to be determined eventually.

Another category of questions involves concerns about religious sincerity. There are many in the world of religious use of drugs, and beyond, who doubt the religious sincerity of some who claim to be religious. Separate from the religious use of drugs, many believe, and maybe with some merit, that individuals form religious communities to be able to take advantage of the tax benefits of doing so. In the context of entheogens, many believe, again perhaps with some merit, that individuals are forming sham religious communities with the hopes of lessening the risk of law enforcement against them. As previously mentioned, judging religious sincerity is a fraught exercise oftentimes rooted in limited conceptions of what religion is or can be. From the perspective of increasing safety, if individuals want to form a community, declare shared values, and utilize psychoactive substances, these proposals presume that they should be able to do so. Complying with IRS regulations, especially those limiting personal gain, noncharitable activity, and political activity, is not easy for communities which would likely deter those more interested in profit or protection than building communities. It is likely that DEA regulations for safe keeping and preventing diversion would only increase the burden on communities, again deterring those that are unserious, but providing clear guidance for those who want to engage in their religious practice safely and with limited legal risk.

Another related concern that has been expressed is considering the sincerity not just of the community, as evidenced through its doctrine and ritual, but of the individuals who join the community. In short, in making it easier for psychedelic churches to practice legally, would we be just opening the door for individuals who have no faith but want to access psychedelics? Primarily, it is important to acknowledge that this is already happening. Many people all over the country are accessing psychedelics through religious landscapes, these proposals would just aim to make it safer for these individuals. Secondarily, it is difficult but necessary to imagine a future for psychedelic religious practice that is not shaped by the court's centrality analysis, requiring that the sacrament use be central to the church's practice to make the burden sufficient for a religious exemption. At its best, a religious community that utilizes psychedelics does not have to organize their entire community around the substance but rather can utilize the sacrament as part of ritual just as other communities utilize wine or communion wafers. Shifting the legal landscape for these religious communities would necessitate decentering the

substance in the legal analysis. It is impossible to evaluate whether each individual member of a community ascribes to the theology or practices of the community. We certainly do not expect or ask that every member of a church or synagogue prove that they have read or regularly read the Bible or Torah or that they declare that they believe in God as conceived by their religious tradition. Members of religious communities that are not forced by legal structure to make sacrament the most central aspect are drawn to religious communities for a variety of reasons. When psychedelics are fully integrated into the American religious landscape, some members may join communities to have safer access to psychedelics. But they will be just as likely to join in the community itself: the support groups, the fellowship, the relationships, and the rituals.

D. *Risk Reduction as Harm Reduction*

One reaction that has been received in response to these proposals to make all current religious communities utilizing controlled substances DEA exempt, is that doing so would increase the number of communities which would be a net harm.[108] It is up for debate whether increasing engagement with religious community would be a good or bad thing, but this concern implicates a larger policy issue. Prohibition of a substance or activity does not change the fact that people will continue doing the activity or consuming the substance, the illegality just makes it more dangerous. As has been demonstrated through this Article, psychedelic policy is shifting with interest in accessing these substances increasing. The central question is not whether they should be legal. The question is how every single pathway for access can be made safer.

The concept of harm reduction or risk of harm reduction is common in debates around drug policy reform and is useful to introduce here. The idea is that it is not necessary to wait until harm occurs to take active measures to prevent it. The reality is that American's implement risk reduction all the time by wearing seatbelts, sunscreen, shoes, and sometimes masks and using umbrellas. It is not necessary to wait until a car accident or sunburn occurs before preventative measures are taken to ensure safety. Shifting all existing religious activity involving controlled substances into a presumed DEA exempt framework would be a form of risk reduction. Doing so would reduce the burden on all involved and shift away from reactionary law making through litigation towards preventative policy. Instead of being afraid of being caught for any activity at all, communities would be motivated to set themselves up to be as safe as possible knowing that doing so would maintain their legal protection.

Applying the concept of risk reduction to drugs more broadly would serve to reduce the largest harms related to drugs. Drug overdose is one of the leading causes

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[108] As someone who finds significant value through participation in religious community, I can acknowledge that not all religion is created equal. There is certainly religion used for good and religion used for harm. But this is why it is so crucial to have oversight, accreditation, and legal protection.

of death in our country and one of the leading causes of overdose is unsafe supply.[109] Many individuals die not because they are taking drugs but because they do not know exactly the drugs they are taking. Prohibition or tight regulation as exists does not prevent drug overdose; we have decades of evidence which supports this. If the true concern of drug policy is public health, and reducing deaths caused by drugs, then all drugs should be decriminalized and regulated for safe supply. Broad scale decriminalization would also help in the religious freedom context by removing any burden on the government to evaluate religious sincerity and any establishment clause concerns.

At the very least, in the context of the religious use of controlled substances, a pathway to get regulated synthetic sacrament should be created.[110] Many religious communities want to cultivate and import their own sacrament, and testing should be made available to them. But not all communities have the capability or desire to do so and will want to access a safe supply of controlled substances, as they do with wine. As the laws continue to shift at the state and federal level related to cannabis and psilocybin, religious communities may not necessitate a DEA exemption from the CSA but may need to secure an exemption from other state or federal regulations. Once the FDA approves psychedelic assisted therapies, the intended use regulations of the FDA will become more relevant in evaluating potential off-label use of psychedelics in therapeutic or ceremonial frameworks. One idea I have proposed is to create a new FDA nondrug entheogen designation[111] for an FDA approved psychedelic drug to be used in religious settings. This could be linked to the previously mentioned IRS or DEA approaches and could allow a recognized religious 501(c)(3) to partner with a GMP certified psychedelic drug developer to provide tax-exempt safe sacrament. Obviously, this is a longer-term goal, but it is an extension of the broader discussion on how to shift psychedelic policy to increase public safety in all pathways for access and specifically religious communities.

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[109] Andrew Ivsins et al., Tackling the overdose crisis: The role of safe supply, 80 INT'L J. DRUG POL'Y (2020).

[110] Some argue that there is something more religious or divine about naturally occurring psychedelics. But even the scientist who synthesized LSD regarded it as a spiritual tool. Thomas Roberts, LSD as a Spiritual Aid, REALITY SANDWICH (June 7, 2012), https://realitysandwich.com/lsd_spiritual_aid/ {https://perma.cc/LZ22-JFH8].

[111] The inspiration for a nondrug FDA designation comes from the language proposed in the States Reform Act related to cannabis which would create a nondrug designation for state based medical cannabis. It's possible that nondrug is not the right term here, because this is presuming FDA drug approval, but the idea is a separate designation that would permit outward off-label use for religious communities of quality synthetic sacrament. States Reform Act, H.R. 5977, 117th Cong. (2021).

CONCLUSION

This Article has provided an overview of the recent changes in psychedelic law and policy and described the legal landscape that religious communities that use psychedelics must navigate. The goal in doing so is to illuminate a growing area where criminal law is failing to be enforced, perhaps even for the good reason of not wanting to encroach on sincere religious practice, and the result is increased harms and risks of harm to individuals and decreased public safety. I propose solutions which would reduce the burden on communities and the DEA while also promoting increased public safety. Given the unique treatment of religion in the eyes of American law, the concerns related to an increasing number of people utilizing psychedelics for religious purposes need to be approached differently than the psychedelic movement more broadly. But it is not necessary to reinvent the wheel when it comes to government regulation of religion. Although there are distinctions between drug regulation and tax status, and there are plenty of critiques that could be made of the IRS' regulation of religious communities, policy around regulating religious use should start from the same place: a reduced burden on both religious communities and the government.