UP IN SMOKE: THE RELIGIOUS FREEDOM RESTORATION ACT AND FEDERAL MARIJUANA PROSECUTIONS

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I. INTRODUCTION

The Free Exercise and Establishment Clauses of the First Amendment guarantee that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] In 1993, Congress enacted the Religious Freedom Restoration Act (RFRA),[2] which, as a matter of statutory law, reestablished the analytical framework to adjudicate free-exercise rights under the First Amendment that the Supreme Court had discarded in the 1990 seminal case of *Employment Division v. Smith*.[3]

To gain First Amendment protection prior to *Smith*, a free-exercise claimant had to establish that the government substantially burdened the claimant's religious exercise without a compelling government interest and that the burden imposed was not the least restrictive manner of achieving the government's interest.[4] In *Smith*, the Supreme Court affirmatively abandoned this test and focused instead on whether the contested law was one of general applicability and neutral toward religion, in which case there would be no constitutional violation regardless of the law's effect on the particular claimant.[5] Dissatisfied, Congress responded by enacting RFRA, and a wide array of litigation

1. U.S. CONST. amend. I.

2. *See* Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb to bb-4 (2006), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

3. Emp't Div. v. Smith, 494 U.S. 872, 885 (1990), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* Sossaman v. Texas, 131 S. Ct. 1651, 1655–56 (2011).

4. Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) ("The free exercise inquiry asks whether the government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." (citations omitted)).

5. *Smith*, 494 U.S. at 879 ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." (citations omitted) (internal quotation marks omitted)).

followed.

RFRA defenses have been used in a variety of contexts, including a Quaker's failure to pay taxes,[6] a claim by a non-profit group prosecuted for concealing its support and promotion of an Islamic holy war,[7] Orthodox Jewish children's objection to testifying before a grand jury investigating their parent,[8] a Methodist minister's prosecution for unlawfully entering a naval installation,[9] bail determination for a Kalderasha defendant,[10] a Jehovah's Witness defendant's objection to providing an involuntary blood sample,[11] a supervisee's objection to providing blood samples for DNA testing,[12] and users of marijuana for religious purposes. This Article focuses on federal prosecutions of the latter, when RFRA defenses have largely failed.[13] Indeed, there has been little protection for claimed religious use of marijuana despite the great fanfare and shining rhetoric that ushered in RFRA.

II. STATUTORY BACKGROUND

The Supreme Court decided *Smith* on April 17, 1990.[14] The *Smith* plaintiffs were denied unemployment benefits after they had been fired from their jobs as a result of ingesting peyote, a controlled substance in Oregon, for religious purposes.[15] The Court held that the Free Exercise Clause did not bar the government from burdening the free exercise of religion when the law being challenged was a "valid and neutral law of

6. Packard v. United States, 7 F. Supp. 2d 143, 144, 146 (D. Conn. 1998).

7. United States v. Mubayyid, 476 F. Supp. 2d 46, 47, 51 (D. Mass. 2007).

8. *In re* Three Children, 24 F. Supp. 2d 389, 389–90 (D.N.J. 1998).

9. United States v. Acevedo-Delgado, 167 F. Supp. 2d 477, 478–79 (D.P.R. 2001).

10. United States v. Marks, 947 F. Supp. 858, 861 (E.D. Pa. 1996) (explaining that the Kalderasha is a subgroup "of the Romani–American or 'Rom' (commonly, and perhaps incorrectly, known as 'gypsies')").

11. United States v. Brown, 330 F.3d 1073, 1076 (8th Cir. 2003).

12. United States v. Zimmerman, 514 F.3d 851, 853 (9th Cir. 2007); United States v. Holmes, No. 2:02-CR-0349-DFL, 2007 U.S. Dist. LEXIS 11597, at *1 (E.D. Cal. Feb. 20, 2007).

13. RFRA defenses have been raised in a variety of other criminal contexts; for example, a significant number of Native American defendants have raised RFRA defenses to prosecutions for possessing animal parts (e.g., eagle feathers). But examination of RFRA's criminal jurisprudence in other contexts is beyond this Article's scope.

14. Emp't Div. v. Smith, 494 U.S. 872, 872 (1990), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* Sossaman v. Texas, 131 S. Ct. 1651, 1655–56 (2011).

15. *Id*. at 874.

general applicability."[16] In applying that standard, the Court ruled for the government and rejected the plaintiffs' free-exercise-infringement claim.[17] About three months later, in direct response to *Smith*'s outcome, Congress introduced RFRA.[18] The Supreme Court likewise traced RFRA's lineage: "[T]he very reason Congress enacted RFRA was to respond to a decision denying a claimed right to sacramental use of a controlled substance."[19]

When President Clinton signed RFRA on November 16, 1993, he informed, "[T]his act reverses the Supreme Court's decision [in *Employment Division v. Smith*] and reestablishes a standard that better protects all Americans of all faiths in the exercise of their religion."[20] In a related proclamation, President Clinton declared that RFRA "reaffirm[s] our solemn commitment to protect the first guarantee of our Bill of Rights. In the great tradition of our Nation's founders, this legislation embraces the abiding principle that our laws and institutions must neither impede nor hinder, but rather preserve and promote, religious liberty."[21]

III. RFRA—SECTION BY SECTION

A. RFRA's Findings and Purposes

The statute begins with Congressional Findings and Purposes:

> (a) Findings
>
> The Congress finds that—
>
> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
>
> (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious

16. *Id.* at 879 (citations omitted) (internal quotation marks omitted).
17. *Id.* at 890.
18. 136 CONG. REC. 19,769 (1990) (statement of Rep. Solarz).
19. Gonzales v. O Centro Espirita Beneficente, 546 U.S. 418, 436–37 (2006) (citing 42 U.S.C. § 2000bb(a)(4) (2000)).
20. *Religious Freedom Restoration Act Signing Ceremony*, Fed. News Serv. (Nov. 16, 1993).
21. Proclamation No. 6646, 59 Fed. Reg. 2925 (Jan. 14, 1994).

> exercise;
>
> (3) governments should not substantially burden religious exercise without compelling justification;
>
> (4) in Employment Division v. Smith, the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
>
> (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.
>
> (b) Purposes
>
> The purposes of this chapter are—
>
> (1) to restore the compelling interest test as set forth in Sherbert v. Verner, and Wisconsin v. Yoder, and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.[22]

In short, Congress directly repudiated the Supreme Court's free-exercise jurisprudence in *Smith*, and in its stead, revived *Sherbert* and *Yoder*, pre-*Smith* cases that collectively created the substantial-burden-and-compelling-interest test codified by RFRA. In that regard, RFRA contains "an unusual statutory incorporation of two decisions of the Supreme Court, to which Congress refers as guides to the purposes of the statute."[23]

Sherbert, an unemployment compensation case, was the first to apply the compelling interest test to a religious free-exercise claim.[24] The Court established, "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."[25] In *Yoder*, the Court

22. 42 U.S.C. § 2000bb (2006) (citations omitted).
23. United States v. Bauer, 84 F.3d 1549, 1558 (9th Cir. 1996).
24. *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963).
25. *Id.* at 406 (citations omitted) (internal quotation marks omitted).

equated compelling interests to those "of the highest order and those not otherwise served."[26] It is the compelling interests "not otherwise served" that trigger the balancing test's "least restrictive means" provision. With respect to proving the least restrictive means, the Supreme Court explained that "it would plainly be incumbent upon the [government] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[27]

B. RFRA's Substantial-Burden-and-Compelling-Interest Test

1. The Text

RFRA's operative substance is in § 2000bb-1 of the United States Code:

> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling government interest.
>
> (c) Judicial relief
>
> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense

26. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).
27. *Sherbert*, 374 U.S. at 407.

> under this section shall be governed by the general rules of standing under article III of the Constitution.[28]

RFRA thus imposes strict judicial scrutiny on laws—even generally applicable ones—when a claimant raises a free-exercise claim. This section codified the balancing test that federal courts had used previously: "[T]he compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[29] As one court explained,

> Under RFRA the government cannot "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless it demonstrates that "the burden to the person . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[30]

Further, the test focuses on the individual and the individualized religious exemption requested, not on generalized governmental concerns; in fact, the statute mentions "person" four times.[31] The Supreme Court confirmed this individualized focus in *Gonzales v. O Centro Espirita*, and found that "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."[32] The Court has "looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious

28. 42 U.S.C. § 2000bb-1 (2006).

29. *Id.* § 2000bb(a)(5).

30. United States v. Vasquez-Ramos, 531 F.3d 987, 990 (9th Cir. 2008) (alteration in original) (quoting 42 U.S.C. § 2000bb-1(a) to (b) (2000)).

31. 42 U.S.C. § 2000bb-1(a) ("Government shall not substantially burden a person's exercise of religion . . . ."); *Id.* § 2000bb-1(b) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person . . . ."); *Id.* § 2000bb-1(c) ("A person whose religious exercise has been burdened . . . .").

32. Gonzales v. O Centro Espirita Beneficente, 546 U.S. 418, 430–31 (2006) (citing 42 U.S.C. § 2000bb-1(b) (2000)).

claimants."[33] Put simply, the statutory language individualizes the inquiry.

2. The "Substantial Burden" Interpretation

Case law provides that the claimant must "demonstrate that the government's action was a (1) substantial burden on a (2) sincere (3) exercise of religion" to establish a prima facie violation of RFRA.[34] Upon this proof, the government must show its compelling interest is achieved "by the least restrictive means possible."[35] As detailed above, RFRA expressly provides for judicial relief, and a person whose religious practices are substantially burdened in violation of RFRA "may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief."[36]

In *Navajo Nation v. United States Forest Service*, the Ninth Circuit explained that

> a "substantial burden" is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit or [being] coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions. Any burden imposed on the exercise of religion short of that described by *Sherbert* and *Yoder* is not a "substantial burden" within the meaning of RFRA, and does not require the application of the compelling interest test set forth in those two cases.[37]

Indeed, a "substantial burden 'must be more than an inconvenience.'"[38] The Supreme Court has held that a burden is substantial if it has a "tendency to coerce individuals into acting contrary to their religious beliefs"[39] or if it exerts "substantial pressure on an adherent to modify his

33. *Id.* at 431.

34. United States v. Israel, 317 F.3d 768, 771 (7th Cir. 2003); *see also* United States v. Bauer, 84 F.3d 1549, 1558 (1996).

35. *Israel*, 317 F.3d at 771.

36. 42 U.S.C. § 2000bb-1(c) (2006).

37. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1070 (9th Cir. 2008) (citations omitted).

38. Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1121 (9th Cir. 2000) (citations omitted) (internal quotation marks omitted).

39. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988).

behavior and to violate his beliefs."[40]

3. The "Compelling Interest" Interpretation

If a claimant demonstrates a substantial burden on his or her religious freedom, the analysis progresses to the government's purported compelling interest for imposing such a burden: "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[41] Moreover, the compelling interest must be particularized to the individual. The government must "demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."[42] This extremely focused inquiry under RFRA is an express manifestation of Congress's desire to adopt the compelling-interest test from prior case law—invoking generalities "cannot carry the day."[43]

The *O Centro* case involved a "religious sect with origins in the Amazon Rainforest [that] receives communion by drinking a sacramental tea, brewed from plants unique to the region, that contains a hallucinogen

40. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981). *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 406 (1963) ("[T]o condition the availability of benefits upon [a] . . . willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.").

41. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

42. Gonzales v. O Centro Espirita Beneficente, 546 U.S. 418, 430–31 (2006) (citing 42 U.S.C. § 2000bb-1(b) (2000)).

43. *Id.* at 431–32.

> RFRA expressly adopted the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*. In each of those cases, this Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants. In *Yoder*, for example, we permitted an exemption for Amish children from a compulsory school attendance law. We recognized that the State had a paramount interest in education, but held that despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing *the claimed Amish exemption*. The Court explained that the State needed to show with more particularity how its admittedly strong interest . . . would be adversely affected by granting an exemption *to the Amish*.

Id. at 430–31 (alteration in original) (citations omitted) (internal quotation marks omitted).

regulated under the Controlled Substances Act by the Federal Government."[44] The government seized a shipment of *hoasca* (tea that contains a Schedule I substance) that had been shipped to O Centro, a church with roots in Brazil that used the tea in its rituals.[45] O Centro "filed suit against the Attorney General and other federal law enforcement officials, seeking declaratory and injunctive relief. The complaint alleged . . . that applying the Controlled Substances Act to [O Centro's] sacramental use of *hoasca* violate[d] RFRA."[46] The government argued that it had a compelling interest in the Controlled Substances Act, and its need for uniform enforcement justified the prohibition of the sacramental plant.[47] More specifically, the government asserted a compelling interest in preventing the importation of a Schedule I substance, which by definition has "a high potential for abuse, no currently accepted medical use, . . . and a lack of accepted safety for use . . . under medical supervision."[48]

The Court, however, emphasized that "[u]nder the more focused inquiry required by RFRA and the compelling interest test, the Government's mere invocation of the general characteristics of Schedule I substances . . . cannot carry the day."[49] Further, "there is no indication that Congress, in classifying [the hallucinogen], considered the harms posed by the particular use at issue here—the circumscribed, sacramental use of *hoasca* by [members of O Centro]."[50] The Court thus rejected the "slippery-slope concerns that could be invoked in response to any RFRA claim for an exception to a generally applicable law. The government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions."[51] But making exceptions is how RFRA works because it "mandate[s] consideration, under the compelling interest test, of exceptions to 'rule[s] of general applicability.'"[52] General government interests, therefore, are not categorically compelling.

44. *Id.* at 423.
45. *Id.* at 425.
46. *Id.* at 425–26.
47. *See id.* at 430.
48. *Id.* (second alteration in original) (citations omitted) (internal quotation marks omitted).
49. *Id.* at 432.
50. *Id.*
51. *Id.* at 435–36.
52. *Id.* at 436 (quoting 42 U.S.C. § 2000bb-1(a) (2000)).

C. RFRA's Definitions

RFRA's definition section, which follows the operative section, expressly defines necessary terms used in the substantial-burden-and-compelling-interest test:

> As used in this chapter—
>
> (1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or a covered entity;
>
> (2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;
>
> (3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and
>
> (4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.[53]

The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) defines religious exercise as "any exercise of religion, whether or not compelled by, or central to, a system of religious

53. 42 U.S.C. § 2000bb-2 (2006). Congress amended this section in 2000. In § 2000bb-2(1), it replaced "State, or a subdivision of a State" with "or of a covered entity." In § 2000bb-2(2), it struck out "term 'State' includes" and replaced it with "term 'covered entity' means." Finally, in § 2000bb-2(4), the section that states the definition for "exercise of religion," it struck out "the exercise of religion under the First Amendment to the Constitution" and replaced it with "religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000." Amendments to Religious Freedom Restoration Act, Pub. L. No. 106-274, § 7, 114 Stat. 803, 806 (2000) (codified at 42 U.S.C. § 2000bb-2 (2006)). Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) on September 22, 2000, to protect the free-exercise rights of institutionalized persons as well as to prohibit land use regulations that substantially burden free-exercise rights. Like RFRA, RLUIPA accomplished this by mandating a strict scrutiny test. *See* 42 U.S.C. §§ 2000cc to cc-1. The RLUIPA's definition of *religious exercise* is that the "term . . . includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief" thus ridding the definition of any First Amendment reference. 42 U.S.C. § 2000cc-5(7)(A). RLUIPA's amendments to RFRA were a response to the Supreme Court's decision in *Boerne*, in which the Court had ruled that Congress could not apply RFRA to the states via the Fourteenth Amendment. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

belief."[54] The Tenth Circuit adopted the synthesis and ultimate analysis of many decisions from one of its district courts,[55] and it considered the following factors as it evaluated what it deemed to be a low threshold:

> 1. *Ultimate Ideas*: Religious beliefs often address fundamental questions about life, purpose, and death. As one court has put it, "a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters."[56] These matters may include existential matters, such as man's sense of being; teleological matters, such as man's purpose in life; and cosmological matters, such as man's place in the universe.
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> 2. *Metaphysical Beliefs*: Religious beliefs often are "metaphysical," that is, they address a reality which transcends the physical and immediately apparent world. Adherents to many religions believe that there is another dimension, place, mode, or temporality, and they often believe that these places are inhabited by spirits, souls, forces, deities, and other sorts of inchoate or intangible entities.
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> 3. *Moral or Ethical System*: Religious beliefs often prescribe a particular manner of acting, or way of life, that is "moral" or "ethical." In other words, these beliefs often describe certain acts in normative terms, such as "right and wrong," "good and evil," or "just and unjust." The beliefs then proscribe those acts that are "wrong," "evil," or "unjust." A moral or ethical belief structure also may create duties—duties often imposed by some higher power, force, or spirit—that require the believer to abnegate elemental self-interest.
>
> 4. *Comprehensiveness of Beliefs*: Another hallmark of "religious" ideas is that they are comprehensive. More often than not, such beliefs provide a *telos*, an overreaching array of beliefs that coalesce to provide the believer with answers to many, if not

54. 42 U.S.C. § 2000cc-5(7)(A).

55. *See* United States v. Meyers (*Meyers II*), 95 F.3d 1475, 1482 n.2 (10th Cir. 1996) (citing the cases from which the district court had "gleaned" the factors for determining the religious nature of one's beliefs).

56. *Id.* at 1483 (quoting Africa v. Pennsylvania, 662 F.2d 1025, 1032 (3d Cir. 1981)).

most, of the problems and concerns that confront humans. In other words, religious beliefs generally are not confined to one question or a single teaching.

5. *Accoutrements of Religion*: By analogy to many of the established or recognized religions, the presence of the following external signs may indicate that a particular set of beliefs is "religious":

a. *Founder, Prophet, or Teacher*: Many religions have been wholly founded or significantly influenced by a deity, teacher, seer, or prophet who is considered to be divine, enlightened, gifted, or blessed.

b. *Important Writings*: Most religions embrace seminal, elemental, fundamental, or sacred writings. These writings often include creeds, tenets, precepts, parables, commandments, prayers, scriptures, catechisms, chants, rites, or mantras.

c. *Gathering Places*: Many religions designate particular structures or places as sacred, holy, or significant. These sites often serve as gathering places for believers. They include physical structures, such as churches, mosques, temples, pyramids, synagogues, or shrines; and natural places, such as springs, rivers, forests, plains, or mountains.

d. *Keepers of Knowledge*: Most religions have clergy, ministers, priests, reverends, monks, shamans, teachers, or sages. By virtue of their enlightenment, experience, education, or training, these people are keepers and purveyors of religious knowledge.

e. *Ceremonies and Rituals*: Most religions include some form of ceremony, ritual, liturgy, sacrament, or protocol. These acts, statements, and movements are prescribed by the religion and are imbued with transcendent significance.

f. *Structure or Organization*: Many religions have a congregation or group of believers who are led, supervised, or

counseled by a hierarchy of teachers, clergy, sages, priests, etc.

g. *Holidays*: As is etymologically evident, many religions celebrate, observe, or mark "holy," sacred, or important days, weeks, or months.

h. *Diet or Fasting*: Religions often prescribe or prohibit the eating of certain foods and the drinking of certain liquids on particular days or during particular times.

i. *Appearance and Clothing*: Some religions prescribe the manner in which believers should maintain their physical appearance, and other religions prescribe the type of clothing that believers should wear.

j. *Propagation*: Most religious groups, thinking that they have something worthwhile or essential to offer non-believers, attempt to propagate their views and persuade others of their correctness. This is sometimes called "mission work," "witnessing," "converting," or proselytizing.[57]

When the district court in *United States v. Meyers* applied these factors, it noted that "it cannot rely solely on established or recognized religions to guide it in determining whether a new and unique set of beliefs warrants inclusion."[58] Moreover, "the [c]ourt . . . emphasize[d] that no one of these factors is dispositive, and that the factors should be seen as criteria that, if *minimally* satisfied, counsel the inclusion of beliefs within the term 'religion.'"[59]

D. RFRA's Scope

Returning to the statutory language, § 2000bb-3 establishes RFRA's broad coverage:

(a) In general

57. *Id.* at 1482–84 (citing *Africa*, 662 F.2d at 1035 and United States v. Meyers (*Meyers I*), 906 F. Supp. 1494, 1502–03 (D. Wyo. 1995)).

58. *Meyers I*, 906 F. Supp. at 1503.

59. *Id.* (emphasis added).

> This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.
>
> (b) Rule of construction
>
> Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.
>
> (c) Religious belief unaffected
>
> Nothing in this chapter shall be construed to authorize any government to burden any religious belief.[60]

These sweeping statements expressly apply RFRA to all federal laws and acts under those laws, whether the laws were enacted before or after RFRA. The only exception is that Congress can "explicitly exclude[] such application [to future laws] by reference to" RFRA.[61]

E. RFRA Leaves the Establishment Clause Unaffected

Finally, RFRA explicitly preserves the Establishment Clause jurisprudence and focuses on reviving free-exercise rights without impacting the Establishment Clause.

> Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting," used with respect to government funding,

60. 42 U.S.C. § 2000bb-3 (2006). In 2000, Congress deleted "and State" following "Federal" in § 2000bb-3(a). Amendments to Religious Freedom Restoration Act, Pub. L. No. 106-274, § 7, 114 Stat. 803, 806 (2000) (codified at 42 U.S.C. § 2000bb-3(a)).

61. 42 U.S.C. § 2000bb-3(b).

benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.[62]

IV. MARIJUANA PROSECUTIONS

A. United States v. Bauer

The Ninth Circuit was the first federal appellate court to review RFRA in a published opinion. In *United States v. Bauer*, three defendants appealed their convictions for conspiracy to manufacture and distribute marijuana, distribution of marijuana, and a simple possession charge.[63] The trial began on October 3, 1993, over a month before President Clinton signed RFRA on November 16, 1993.[64] Prior to RFRA's enactment, one of the defendants had requested funds from the district court to hire a physician and a theologian to testify about the religious and medicinal nature of his marijuana use, but the district court denied the motion.[65] Citing *Smith*, the district court precluded any evidence and testimony about the defendants' religion as a legal defense to the use or possession of marijuana.[66]

After President Clinton signed RFRA into law, the three defendants moved to reverse the court's prior First-Amendment-defense order and requested a jury instruction regarding the *Sherbert* and *Yoder* balancing test, which had been incorporated into RFRA.[67] The defendants claimed to be Rastafarians, and they raised a RFRA defense to their marijuana crimes,[68] but the court again refused these requests.[69] Following their convictions, the defendants raised a Rule 29 motion because the court had excluded their RFRA defense.[70] In ruling on the motion, the district court found that the defendants' free exercise of Rastafarianism had been substantially burdened by the changed law but ultimately denied the motion because "the government ha[d] an overriding interest in regulating marijuana."[71]

62. *Id.* § 2000bb-4.
63. United States v. Bauer, 84 F.3d 1549, 1553 (9th Cir. 1996).
64. *Id.* at 1556.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 1557.
70. *See id.*
71. *Id.* (internal quotation marks omitted).

On appeal, the Ninth Circuit first noted that RFRA "is new and so far has not been construed by any appellate court in a case involving the religious use of marijuana."[72] In reviewing RFRA, the court quoted Congress's determination that "'the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion'" in the *Smith* decision.[73] The Ninth Circuit then reviewed RFRA's component parts and summarized its seven features. First, RFRA is not a constitutional interpretation but a federal law supplanting a constitutional interpretation.[74] Second, RFRA "goes beyond the constitutional language that forbids the 'prohibiting' of the free exercise of religion and uses the" more relaxed standard of "burden."[75] Third, RFRA statutorily incorporates *Sherbert* and *Yoder* to guide the statute's purposes.[76] Fourth, the First Amendment is to define the free exercise of religion within the statute.[77] Fifth, if the claimant establishes a substantial burden on his or her exercise of religion, the government must justify that burden through a compelling interest that it has applied in the least restrictive manner.[78] Sixth, RFRA obligates the government to meet its burden through "evidence and persuasion."[79] Seventh, RFRA expressly obligates the United States and its officers to meet these burdens.[80]

Characterizing RFRA's effects as "widespread," the Ninth Circuit recognized that Congress has used its power "to provide federal protection in addition to that accorded by the great guarantees of the Bill of Rights . . . in other contexts."[81] With respect to the marijuana possession count in the case before it, the court concluded that the government had failed to demonstrate the law's application in the least restrictive manner and ordered the defendants to be retried on those counts.[82] At the same time, the court found that RFRA did not apply to the distribution charge and conspiracy to distribute because "[n]othing before [it] suggest[ed] that Rastafarianism would require [that]

72. *Id.*
73. *Id.* (quoting 42 U.S.C. § 2000bb(a)(4) (1994)).
74. *Id.* at 1558.
75. *Id.*
76. *See id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* (citations omitted).
82. *Id.* at 1559.

conduct."[83] On remand, the court emphasized that the government could contest the sincerity of the defendants' religious claims: "It is not enough in order to enjoy the protections of the Religious Freedom Restoration Act to claim the name of a religion as a protective cloak. Neither the government nor the court has to accept the defendants' mere say-so."[84] If the defendants "show[ed] that they [were] in fact Rastafarians and that the use of marijuana [was] a part of the religious practice of Rastafarians," then the government could attempt to negate the defense at trial.[85]

B. United States v. Brown

In *United States v. Brown*, an Arkansas district court flatly rejected a defendant's RFRA defense after law enforcement had seized 435 marijuana plants and 3 peyote plants from his property and indicted him for manufacturing marijuana and manufacturing peyote.[86] Brown had deeded 40 acres of his property to "Our Church" and "informed law enforcement officials and the media" that church members would use the property to grow and distribute marijuana; in fact, after Brown had donated the land, he and his church members performed a "public marijuana planting ceremony" on it.[87] At trial, the government filed a motion in limine to preclude a RFRA defense and exclude any reference to Brown's argument that his religion legally justified marijuana or peyote growth or distribution.[88] At the motion hearing, Brown and other members of Our Church testified about marijuana's role in their church, saying that supplying marijuana to the sick was a religious tenet, and that the church permitted supplying marijuana "to anyone who wanted to join [their] spiritual quest."[89] The district court gave deference to Brown's

83. *Id.*
84. *Id.*
85. *Id.* The court also provided guidance for a review of Meeks's original request for a theology expert. *Id.* If Meeks demonstrated that she was a Rastafarian, then the district court would have to determine, under the governing standard, "whether a reasonable attorney would engage the services of a theology expert for Meeks if she had the independent financial means to pay for them." *Id.*
86. United States v. Brown, No. 95-1616, 1995 WL 732803, at *1 (8th Cir. Dec. 29, 1995). While *Brown* technically was the first case to address RFRA as a defense to marijuana use, the case was unpublished.
87. *Id.*
88. *Id.*
89. *Id.*

claim that he was practicing a religion and that the "indictment was a burden on his free exercise of that religion."[90] However, the court concluded that the government possessed a compelling interest to regulate marijuana and other drugs and such application of that interest was narrowly tailored in this case.[91] Accordingly, the court granted the government's motion in limine.[92]

On appeal to the Eighth Circuit, the judges focused on Our Church's "broad use" of marijuana and agreed that, based on that use, "the government could not have tailored the restriction to accommodate Our Church and still protected against the kinds of misuses it sought to prevent."[93] The Eighth Circuit thus affirmed the defendant's conviction and rejected the RFRA defense.[94]

C. United States v. Meyers

In *United States v. Meyers*, the Tenth Circuit reviewed whether the defendant's "Church of Marijuana" was a protected religion under RFRA.[95] The government had charged David Meyers with conspiracy to possess with intent to distribute, distribution of marijuana, and aiding and abetting possession with intent to distribute marijuana.[96] Before the case went before the Tenth Circuit, a district court of Wyoming had thoroughly reviewed RFRA's applicability to the case and its plausibility as a defense for Meyers. RFRA's constitutionality, however, was not before the district court, so it presumed RFRA to be constitutional.[97] The district court began by examining whether Meyers's particular beliefs constituted a religion because "Meyers [could] trigger RFRA's protections only if he demonstrate[d] that 'The Church of Marijuana' [was] a bona fide religion for RFRA purposes."[98] To resolve that issue, the court had to "decide a threshold issue that arises under RFRA and which no other courts have addressed: Whether Congress defined 'religion' under RFRA in the same way that federal courts have defined

90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at *2 (citing United States v. Maki, 794 F.2d 950, 956–57 (5th Cir. 1986).
94. *Id.*
95. *Meyers II*, 95 F.3d 1475, 1480 (1996).
96. *Id.* at 1479.
97. *Meyers I*, 906 F. Supp. 1494, 1498 (D. Wyo. 1995).
98. *Id.*

'religion' for First Amendment purposes."[99] Congress had not defined religion in RFRA's definition section,[100] but because Congress had invoked the compelling interest test from *Sherbert* and *Yoder* to define statutory rights under RFRA, the district court reasoned that religion, as referenced in RFRA, was to be defined by First Amendment jurisprudence.[101] While the court noted that "the Supreme Court has done little to identify positively what 'religion' is for First Amendment purposes," the district court credited the Court for providing some analytical guidelines: "[C]ourts may not consider whether the party's purportedly religious beliefs are true or false," and "courts cannot rely on their perhaps biased and traditional ideas about what constitutes a religion."[102]

Working within these caveats, the district court concluded that, although difficult, an analytical structure was necessary to define religion in order to prevent "the predilections of a particular court" from determining what constitutes a religion.[103] Accordingly, the district court "canvassed the cases on religion and catalogued the many factors that the courts have used to determine whether a set of beliefs is 'religious' for First Amendment purposes."[104] The court opined that if Meyers's beliefs satisfied the factors, it would indicate "that his beliefs are religious";[105] however, if his beliefs did not fit into the factors, that would not necessarily mean his beliefs were not religious.[106] In the words of the court, "[b]luntly stated, there is no absolute causal link between the fact that Meyers'[s] beliefs do not fit the criteria and the conclusion that his

99. *Id.* at 1499.

100. *Id.* While the court's observation is technically true, Congress did define "exercise of religion" as "exercise of religion under the First Amendment to the Constitution" when it enacted RFRA in 1993. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 5, 107 Stat. 1488, 1489 (1993). That definition changed in 2000 when Congress amended RFRA as part of the Religious Land Use and Institutionalized Persons Act: "'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." Religious Land Use and Institutionalized Persons Act, Pub. L. No. 106-274, § 8, 114 Stat. 803, 807 (2006) (codified at 42 U.S.C. § 2000cc-5(7)(A) (2006)).

101. *See Meyers I*, 906 F. Supp. at 1499. *Accord* United States v. Bauer, 84 F.3d 1549, 1558 (9th Cir. 1996).

102. *Meyers I*, 906 F. Supp. at 1500 (citing United States v. Ballard, 322 U.S. 78, 92 (1944)).

103. *Id.* at 1501.

104. *Id.*

105. *Id.*

106. *Id.* at 1502.

beliefs are not religious."[107] After synthesizing these factors, the district court noted that "no one of these factors is dispositive, and the factors should be seen as criteria that, if minimally satisfied, counsel the inclusion of beliefs within the term 'religion.'"[108]

The court then examined Meyers's "Church of Marijuana" beliefs under this framework. Meyers founded the church in 1973, and he alleged that it had 800 members.[109] The church had no formal clergy, but it did have 20 "teachers," although Meyers failed to explain what the teachers did. The church had no governing body or hierarchy and it carried on no propagation efforts. The church's "bible" was entitled, *Hemp & the Marijuana Conspiracy: The Emperor Wears No Clothes—The Authoritative Historical Record of the Cannabis Plant, Marijuana Prohibition, & How Hemp Can Still Save the World*.[110] Meyers also testified that he prayed to the marijuana plant, the church's religious ceremony was to smoke and pass marijuana joints, and there were no formal services.[111] However, Meyers identified himself as a Christian and stated that his "ultimate ideas" were Christian.[112]

Consequently, the district court "was unable to discern anything ultimate, profound, or imponderable about Meyers'[s] beliefs."[113] The court also concluded there was nothing metaphysical about his beliefs—everything was physical and the objective of his beliefs was simply to smoke marijuana.[114] Similarly, the court found there was no ethical or moral system attendant to the beliefs, there was nothing comprehensive about the beliefs, and there were very few religious accoutrements or externalities that symbolize a religion.[115] Under these and other observations, the court concluded that "Meyers'[s] beliefs [did] not rise to the level of a statutorily protected religion."[116] Instead, the court opined that "Meyers'[s] professed beliefs have an ad hoc quality that neatly justif[ies] his desire to smoke marijuana," and it considered these beliefs to be secular with "almost none of the criteria that are the

107. *Id.*
108. *Id.* at 1503.
109. *Id.* at 1504.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 1505.
114. *Id.*
115. *Id.* at 1505–06.
116. *Id.* at 1509.

hallmarks of religious belief."[117] The court ultimately refused to permit Meyers to present a RFRA defense at trial,[118] and it convicted Meyers.[119]

Following his conviction, Meyers appealed to the Tenth Circuit where he argued that the trial court erred in "refusing to recognize his interpretation of his own religion and in refusing to give his beliefs" religious status.[120] The appellate court focused on whether Meyers's beliefs were religious "rather than a philosophy or way of life."[121] The court reviewed the factors detailed by the district court and agreed with its holding: "Under the district court's thorough analysis of the indicia of religion, which we adopt, we hold that Meyers'[s] beliefs more accurately espouse a philosophy and/or way of life rather than a 'religion.'"[122] The Tenth Circuit affirmed the district court's refusal to permit a RFRA defense.[123]

D. United States v. Valrey

Guided by the Ninth Circuit's decision in *Bauer*, the court in *United States v. Valrey* examined a RFRA defense asserted by a Rastafarian who used sacramental marijuana while on supervised release.[124] Raynard Valrey had previously pled guilty to possession of an unregistered firearm and consequently served a 30-month prison sentence.[125] Within two months of beginning his supervised release term, he admitted to using, and tested positive for, marijuana five times, and the court convened a hearing to determine whether to revoke Valrey's supervised release.[126] Prior to the hearing, Valrey petitioned the district court to modify the conditions of his supervised release.[127] The government and Valrey stipulated that Rastafarianism is a religion, which emphasizes the use of marijuana as a sacrament, and that Valrey is a sincere and

117. *Id.*
118. *Id.*
119. *Meyers II*, 95 F.3d 1475, 1480 (10th Cir. 1996).
120. *See id.* at 1481.
121. *Id.* at 1482.
122. *Id.* at 1484.
123. *Id.*
124. United States v. Valrey, No. CR96-549Z, 2000 U.S. Dist. LEXIS 22390, at *4–5 (W.D. Wash. Feb. 22, 2000).
125. *Id.* at *1.
126. *Id.* at *1–2.
127. *See id.* at *2–3.

practicing Rastafarian.[128] Valrey also indicated that his marijuana use was in the context of practicing Rastafarianism, and the government had no information to the contrary.[129]

The district court first established that RFRA applied to supervised release, reasoning that Congress applied RFRA to prisons and thus intended it to apply to supervised release as well.[130] After noting that "RFRA is still applicable to federal laws,"[131] the court turned to the Ninth Circuit's decision in *Bauer* for analytical guidance.[132] The parties stipulated to Valrey's initial threshold burdens—that Rastafarianism is a religion to which he belongs and his marijuana use is part of that religion's practice.[133] The court relied on the parties' stipulations to find a substantial burden on Valrey's free exercise of Rastafarianism: "In *Bauer*, the Ninth Circuit impliedly found that prohibition of this sacrament was a substantial burden when it held that the prosecution of a Rastafarian for the personal possession and use of marijuana gives rise to a valid, religious-exercise defense under RFRA."[134]

The court then examined whether the marijuana restriction furthered a compelling government interest in the least restrictive manner.[135] The government invoked the blanket prohibition against drug use as a condition of supervised release under 18 U.S.C. § 3583, but the court rejected this argument because it stated that § 3583 is a law of general application and is not intended to limit religious practice.[136] While the government did not argue that it used the least restrictive means, it did argue that the general prohibition justified the restriction when combined with the ultimate goal of rehabilitating Valrey.[137] The court noted that "Valrey was convicted of the illegal possession of a firearm, not of

128. *Id.*
129. *Id.* at *3.
130. *Id.* at *4–5 (citing Bryant v. Gomez, 46 F.3d 948, 949 & n.1 (9th Cir. 1995), *superseded by statute*, Religious Land Use and Institutionalized Persons Act, Pub. L. No. 106-274, § 3, 114 Stat. 803, 804 (2000) (codified at 42 U.S.C. § 2000cc-1 (2006)); Stefanow v. McFadden, 103 F.3d 1466, 1471 (9th Cir. 1996), *superseded by statute*, Religious Land Use and Institutionalized Persons Act, Pub. L. No. 106-274, § 3, 114 Stat. 803, 804 (2000) (codified at 42 U.S.C. § 2000cc-1 (2006))).
131. *Id.* at *5 (citing Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 832 (9th Cir. 1999)).
132. *Id.* (citing United States v. Bauer, 84 F.3d 1549, 1559 (9th Cir. 1996)).
133. *Id.* at *5–6.
134. *Id.* at *6 (citations omitted).
135. *See id.* at *7–8 (citations omitted).
136. *Id.* at *7 (citations omitted).
137. *Id.* at *8.

transportation and possession of controlled substances for sale," and ultimately reasoned that the government offered no proof that Valrey's marijuana use enhanced his possibility of recidivism.[138] In fact, the court suggested that Valrey's devout religious practice may actually promote rehabilitation.[139] In the end, the court accepted the RFRA defense and permitted

> Valrey's personal use and possession of marijuana exclusively in connection with his practice of his religion. Mr. Valrey [was required to] (1) self-report his marijuana use (affirming that such use is in the context of his continuing participation in the Rast[a]farian religion), (2) undergo regular urine-testing for controlled substances, (3) report monthly, (4) submit to periodic criminal history checks, and (5) comply with all of the other conditions of supervision.[140]

E. Guam v. Guerrero

The Ninth Circuit revisited RFRA's application in federal marijuana prosecutions in 2002. In *Guam v. Guerrero*, the court waded through a complex maze of statutory law before holding that RFRA did not permit the importation of marijuana into Guam.[141] In this case, police officers arrested Benny Guerrero "at the Guam International Airport after they [had] found five ounces of marijuana and ten grams of marijuana seeds in his belongings."[142] The Territory of Guam indicted Guerrero under Guam statutes that prohibit the importation of controlled substances.[143] Guerrero argued that the prosecution violated his right to freely exercise Rastafarianism in violation of RFRA and the Organic Act of Guam.[144] The Supreme Court of Guam ruled that the Organic Act incorporated RFRA and held that the prosecution violated Guerrero's free exercise of religion.[145]

Before it addressed Gurerro's RFRA defense, the Ninth Circuit had

138. *Id.* at *9–10.
139. *Id.*
140. *Id.* at *10–11.
141. Guam v. Guerrero, 290 F.3d 1210, 1223 (9th Cir. 2002).
142. *Id.* at 1212.
143. *Id.*
144. *Id.* (citing the Organic Act of Guam, 48 U.S.C. § 1421b(a) (2006)).
145. *Id.* at 1213 (citations omitted).

to first determine whether RFRA applied to prosecutions in Guam. Reviewing de novo, the Ninth Circuit overviewed Guam's history and status as an unincorporated territory of the United States and concluded that Congress must expressly act to extend constitutional rights to the inhabitants of Guam.[146] The Ninth Circuit also reviewed the fact that Congress included language virtually identical to the First Amendment's Free Exercise Clause in its Organic Act of Guam, but it concluded that the Supreme Court of Guam relied upon the Organic Act to enhance free exercise rights beyond what had been permitted under the *Smith* decision.[147] Consequently, for the Ninth Circuit,

> [t]he thorny question [it had to] decide [was] whether [the Organic Act of Guam was] analogous to the free exercise provisions found in many state constitutions that state supreme courts are free to interpret as providing more protection than that given by the federal constitution. . . . Therefore, [it had to] decide whether the rights established in the federal Constitution [were] a ceiling beyond which the Supreme Court of Guam [could] not exceed when it is interpreting its "Bill of Rights."[148]

The court ruled: "[A] territorial court lacks the authority to interpret a federal statute or federal constitutional provision contrary to the interpretation the U.S. Supreme Court has given it."[149]

The issue then became whether RFRA's expansion of free-exercise rights constitutionally applied to Guam.[150] Recognizing that Congress governs Guam pursuant to Article I of the Constitution and not pursuant to the Fourteenth Amendment, the Ninth Circuit deemed *Boerne* inapplicable to Guam since that case held that Congress could not apply RFRA to the states via the Fourteenth Amendment.[151] Noting that the Eighth and Tenth Circuits had previously affirmed Congress's power to enact RFRA and directed its application federally, the Ninth Circuit rejected the government's argument that RFRA violated the separation of powers doctrine.[152] The court summarized: "Congress can provide more

146. *Id.* at 1214 (citations omitted).
147. *Id.*
148. *Id.* at 1215.
149. *Id.* at 1217–18.
150. *Id.* at 1218.
151. *Id.* at 1219 (citations omitted).
152. *Id.* at 1221 (citations omitted).

individual liberties in the federal realm than the Constitution requires without violating vital separation of powers principles," and "we now join our sister circuits in holding RFRA constitutional as applied in the federal realm."[153] Given Congress's plenary authority over Guam, the court concluded that RFRA applied to Guam.[154]

Applying RFRA, the court established that "[a] statute burdens the free exercise of religion if it 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs,'[155] including when, if enforced, it 'results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.'"[156] However, this burden "must be more than an inconvenience" to the individual.[157] Guam argued that prohibiting the *possession* of marijuana may substantially burden Guerrero's religious practice of Rastafarianism but statutorily prohibiting the *importation* of marijuana would not.[158] The Ninth Circuit agreed, reasoning that "Rastafarianism does not require *importation* of a controlled substance."[159] The court held that the statute did not substantially burden Guerrero, thus RFRA did not provide Guerrero any defense.[160]

F. United States v. Israel

The next year, in the context of revoking a defendant's supervised release, the Seventh Circuit's opinion in *United States v. Israel* addressed the application of RFRA.[161] Israel had been sentenced to a 70-month prison sentence for being a felon in possession of a firearm, and he became a Rastafarian while he was incarcerated.[162] After Israel began his term of supervised release on February 15, 2001, he tested positive for marijuana over a dozen times between April and October 2001.[163] Israel

153. *Id.* (citing United States v. Bauer, 84 F.3d 1549, 1558 (9th Cir. 1996)).
154. *Id.* at 1221–22.
155. *Id.* at 1222 (second alteration in original) (quoting Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981)).
156. *Id.* (quoting Braunfield v. Brown, 366 U.S. 599, 605 (1961)).
157. *Id.* (citing Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1121 (9th Cir. 2000)) (internal quotation marks omitted).
158. *Id.*
159. *Id.* at 1223.
160. *Id.*
161. United States v. Israel, 317 F.3d 768, 769 (7th Cir. 2003).
162. *Id.*
163. *Id.*

claimed a right to use marijuana under RFRA, but his supervised release was revoked.[164]

The district court denied the Israel's RFRA claim for several reasons. The district court concluded that the standard supervised release condition that prohibited Israel's marijuana use substantially burdened his religious practice of Rastafarianism.[165] However, the court ruled that the government offered a compelling interest to warrant the burden: "[T]he uniform enforcement of the drug laws to prevent the harm to the public health and safety envisioned by Congress [was] clearly a compelling government interest,"[166] and "there [was] a compelling government interest in the uniform application of conditions of supervised release to all defendants."[167] Turning to Israel specifically, the court reasoned that

> Congress'[s] specific findings that illegal drug use, distribution, etc., [have] an adverse impact on the health, safety, and welfare of the public, directed the court [to] conclude[] that there exists a compelling government interest in ensuring the safety and well-being of its citizens sufficient to justify burdening Israel's practice of the Rastafarian religion.[168]

Because Israel's marijuana use required him to engage others in drug dealing and perpetuate drug distribution, Israel's activities affected the government's compelling interest "on a broader level than just Israel's personal consumption."[169] Moreover, the district court found the supervised-release condition to be the least restrictive means "of accomplishing the objective of enforcing the drug laws."[170] In fact, "[a]ny judicial attempt to carve out a religious exception [would] result in significant administrative problems for the probation office and open the door to a myriad of claims for religious exceptions."[171] Based on these conclusions, the district court revoked Israel's supervised

164. *Id.*
165. United States v. Jefferson, 175 F. Supp. 2d 1123, 1129 (N.D. Ind. 2001).
166. *Id.* at 1130.
167. *Id.*
168. *Id.* at 1131.
169. *Id.*
170. *Id.* at 1132.
171. *Id.* (citing United States v. Oliver, 255 F.3d 588, 589 (8th Cir. 2001)).

release.[172]

Israel appealed to the Seventh Circuit, which summarized the district court's holding:

> The district court found that the government demonstrated its compelling interest in (1) the uniform enforcement of drug laws to prevent harm to the public health and safety, and (2) the uniform application of conditions of supervised release to all defendants. The court also found that the parole conditions were the least restrictive means for accomplishing these objectives because of the significant administrative problems that would result if religious exceptions would be carved out in these types of cases.[173]

Because "the government did not contest RFRA's constitutionality, [the Seventh Circuit] likewise assume[d] in this case only that it [was] constitutional for the purposes of [the] appeal."[174] The court accepted the district court's finding that the supervised release condition substantially burdened Israel's sincere belief and the government's stipulation that Israel was exercising his religious belief.[175] Thus, "the sole issue on appeal [was] whether the district court erred in ruling that the government had established that it had a compelling interest that was protected by the least restrictive means possible."[176]

Echoing the district court, the Seventh Circuit relied on general considerations to "conclude that the government [had] a proper and compelling interest in forbidding the use of marijuana."[177] The court also reiterated Congress's belief that marijuana "is a serious threat to the public health and safety," and it cited medical evidence that suggested excessive marijuana use often serves as a gateway drug to harder drugs "such as heroin and crack cocaine."[178] Relying on pre-*Smith* case law to bolster its conclusion, the court found that "[t]here [was] substantial

172. *Id.*

173. United States v. Israel, 317 F.3d 768, 771 (7th Cir. 2003) (internal quotation marks omitted).

174. *Id.*

175. *See id.*

176. *Id.*

177. *Id.* at 772.

178. *Id.* at 771 (citing Fernando A. Wagner & James C. Anthony, *Into the World of Illegal Drug Use: Exposure Opportunity and Other Mechanisms Linking the Use of Alcohol, Tobacco, Marijuana, and Cocaine*, 155 AM. J. EPIDEMIOLOGY 918, 920 (2002)).

authority to support the conclusion that even under [a] more demanding standard, courts have properly refused to allow exceptions for marijuana use."[179] Indeed, the court agreed with the district court that a general prohibition against marijuana use while on supervised release was "a legitimately restrictive means for safeguarding [the government's] interest. Any judicial attempt to carve out a religious exemption in this situation would lead to significant administrative problems for the probation office and open the door to a weed-like proliferation of claims for religious exemptions."[180] Finally, the court identified another generalized interest in rejecting Israel's RFRA claim:

> [P]ermitting probationers to smoke pot presents a potential liability problem for the public and the government, including the probation department—*e.g.*, a person on parole who is under the influence of marijuana may wander into the street or even operate a motor vehicle or some other mechanical equipment and may very well injure himself or some innocent bystander.[181]

G. United States v. Forchion

In *United States v. Forchion*, a district court judge reviewed the convictions and sentences of Patrick Duff and Edward Forchion for marijuana possession.[182] Duff and Forchion were Rastafarians who, along with other people, gathered at the Liberty Bell Center in Philadelphia on three separate days to publically smoke marijuana at 4:20 p.m.[183] Among other violations, park rangers cited Duff and Forchion for possession of controlled substances on three separate days.[184] Rejecting the claim that RFRA permitted their marijuana use, a magistrate judge convicted Duff and Forchion for possession of

179. *Id.* at 772 (citing Olsen v. Drug Enforcement Admin., 878 F.2d 1458, 1464–65 (D.C. Cir. 1989); United States v. Middleton, 690 F.2d 820, 825–26 (11th Cir. 1982); United States v. Rush, 738 F.2d 479, 512–13 (1st Cir. 1984)).

180. *Id.* (citing United States v. Oliver, 255 F.3d 588, 589 (8th Cir. 2001)).

181. *Id.* (citing Weissich v. United States, 4 F.3d 810, 813 (9th Cir. 1993)) (discussing applicability of the discretionary function exception when there is a reasonably foreseeable risk posed to specific third parties who may be in danger of physical or financial harm).

182. *See* United States v. Forchion, No. 04-949-ALL, 2005 WL 2989604, at *1 (E.D. Pa. July 22, 2005).

183. *Id.*

184. *Id.*

controlled substances and sentenced them to probation, which included conditions prohibiting the possession or use of controlled substances.[185]

The defendants appealed their convictions and conditions of probation.[186] The district court judge assumed that RFRA applied to the federal government because the parties did not raise the issue.[187] Looking to pre-*Smith* case law, as the Third Circuit had done,[188] the district court reasoned that "the government substantially burdens religion when it 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs' or requires an individual to choose between 'either abandoning his religious principle or facing criminal prosecution.'"[189] The court did not question that Rastafarianism is a religion in which marijuana "operates as a sacrament with the power to raise the partakers above the mundane and to enhance their spiritual unity."[190]

Focusing on the substantial burden analysis, the district court judge quoted the magistrate judge's opinion: "To suggest that somehow your religion is seriously impeded because you can't do it at Independence Park is simply an argument without any basis as far as [the court is] concerned."[191] Reviewing this statement as a factual finding subject to reversal only for clear error, the district court judge affirmed the magistrate judge's ruling that the regulation prohibiting possession of controlled substances did "not forbid Forchion and Duff from possessing marijuana outside of national parks, [and] it create[d] no impediment to the free exercise of their faith in their homes, their houses of worship, or other non-federal locations."[192] The court concluded: "While some Rastafarians eventually may establish a RFRA defense to a charge of marijuana possession in a national park, Forchion and Duff have failed to do so in this case because they did not prove that the Regulation substantially burdens the exercise of Rastafarianism."[193]

The court next analyzed the argument that the defendants' probation conditions violated RFRA and the First Amendment. Specifically, the defendants objected to the following conditions: (1) prohibiting

185. *Id.* at *1–2.
186. *Id.* at *2.
187. *Id.* at *3 n.10 (citations omitted).
188. *Id.* at *3 (citing Adams v. Comm'r, 170 F.3d 173, 176–78 (3d Cir. 1999)).
189. *Id.* (quoting Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981) and Braunfeld v. Brown, 366 U.S. 599, 605 (1961)).
190. *Id.* at *1 n.1 (quoting Steele v. Blackman, 236 F.3d 130, 132 n.2 (3d Cir. 2001)).
191. *Id.* at *3 (citations omitted) (internal quotation marks omitted).
192. *Id.* at *4.
193. *Id*. at *5.

possession or use of controlled substances; (2) forbidding them from frequenting places where such substances are illegally used; (3) prohibiting their association with people engaged in criminal activity or with convicted felons (without permission from a probation officer); (4) permitting probation officers to visit their homes to seize plain-view contraband; (5) requiring substance abuse testing; and (6) requiring substance abuse treatment.[194]

Because the magistrate did not consider RFRA or free-exercise objections with regard to the probation conditions, the district court judge remanded for review of those "thorny constitutional and statutory questions."[195] In doing so, the court provided some guidance by distinguishing between mandatory conditions of release and discretionary case- and defendant-specific conditions.[196] Mandatory conditions are, in the parlance of *Smith*, neutral laws of general applicability under 18 U.S.C. § 3563(a), and must be imposed subject to the limitations of RFRA.[197] Conversely, discretionary conditions involve individualized decision making "so long as his decision would not be an abuse of discretion."[198] In the end, the defendants failed to use RFRA as a successful defense to their public marijuana use.[199]

H. United States v. Lepp

Two years later, in *United States v. Lepp*, a district court rejected the defendant's motion to dismiss search warrants for violating RFRA.[200] After agents of the Drug Enforcement Agency seized more than 32,000 marijuana plants from properties owned by Charles Lepp, the government indicted Lepp for possession of marijuana with intent to distribute and manufacture marijuana and for maintaining a place to distribute and manufacture marijuana.[201] Following the search of four

194. *Id.* at *6.
195. *Id.*
196. *Id.* at *6 n.21 (citing 18 U.S.C. § 3563(a) (2000)).
197. *Id.* (citations omitted).
198. *See id.* (citations omitted).
199. *See generally* United States v. Forchion, 215 Fed. App'x 194 (3d Cir. 2007) (rejecting Forchion's appeal from his controlled substance conviction because he failed to file a timely notice of appeal of his conviction to the district court).
200. United States v. Lepp, No. CR 04-0317 MHP, 2007 U.S. Dist. LEXIS 66311, at *3 (N.D. Cal. Sept. 7, 2007).
201. *Id.* at *2 ("At a search of four of Lepp's properties on August 18, 2004, [DEA] officers seized more than 32,000 marijuana plants as well as a loaded Beretta .32

other properties owned by Lepp and the seizure of 6,437 additional marijuana plants and approximately 50 pounds of dried (or partially dried) marijuana, the government added four more counts of conspiracy to manufacture through a superseding indictment.[202]

Lepp sought to suppress the additional evidence by arguing that the search and seizure warrants violated RFRA.[203] Specifically, Lepp argued "that the manner in which the government obtained and executed the search warrants" violated RFRA because "the government's error in not informing the magistrate of the religious nature of his marijuana possession necessitate[d] a *Franks* hearing."[204] Lepp proffered "that he [was] the founder and minister of Eddy's Medicinal Gardens and Ministry of Cannabis and Rastafari . . . [and] that he [was] an ordained minister in the Rastafari Ministry."[205] Despite its skepticism that the large amount of marijuana seized was solely sacramental, the court assumed for purposes of the suppression motion that RFRA protected Rastafarianism and Lepp's espoused beliefs were genuine.[206]

The court recognized that other courts have applied RFRA to searches, specifically to religious objections to taking blood samples.[207] Noting that "[t]he 'substantial burden' language appears no less than four times in the text of the statute,"[208] the court focused on the defendant's burden to meet that threshold in the context of an application for a search warrant.[209] The court explained that Lepp failed to prove the substantial

semiautomatic pistol and items related to the packaging, processing, and weighing of marijuana and hash.").

202. *Id.* at *2–3.

203. *Id.* at *3.

204. *Id.* A *Franks* hearing, named after *Franks v. Delaware*, reviews a defendant's claim that law enforcement relied on false material and either deliberately made false statements or recklessly disregarded the truth in order to obtain a search warrant. Franks v. Delaware, 438 U.S. 154, 171–72 (1978).

205. *Lepp*, 2007 U.S. Dist. LEXIS 66311, at *5 (citations omitted) (internal quotation marks omitted).

206. *Id.*

207. *See id.* at *6 (citing United States v. Brown, 330 F.3d 1073, 1077 (8th Cir. 2003) (applying RFRA to determine whether it was plain error for the district court to allow the DNA blood-test results of a Jehovah's Witness); Roe v. Marcotte, 193 F.3d 72, 79 (2d Cir. 1999) (holding that the "special needs doctrine" supports a lower threshold of probable cause for a blood sample); Jones v. Murray, 962 F.2d 302, 307 (4th Cir. 1992) (holding that the intrusion of a blood sample was "outweighed by Virginia's interest" in ascertaining inmates' identities)).

208. *See id.* (citing 42 U.S.C. §§ 2000bb(a), bb(b), bb-1(a), bb-1(b) (2006)).

209. *Id.* at *6–7.

burden necessary under the test.[210] Even though he had shown the officers knew about "the religious nature of the activities on his property" and yet still omitted this information from the warrant application, he still failed to show how this lack of information proved to be a substantial burden on his religious freedom.[211]

The court then addressed the seizure of the marijuana plants as a RFRA violation. First, it noted the government's interest in enforcing drug laws by executing search warrants.[212] In light of *O Centro*, the court specifically considered Lepp and agreed with the government that adopting his proposal would result in an unworkable system that required magistrates reviewing warrant applications to constantly be on the lookout for "possible indications of religious exercise."[213] The court then invoked *O Centro*: "[T]he government can demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the required religious accommodation would seriously compromise its ability to administer the program."[214] The court reasoned that "[i]t [was] clear that the government had no more narrowly tailored alternative for executing a search warrant and enforcing the criminal laws than to seize the marijuana plants on both occasions."[215]

Finally, in dicta, the court rejected Lepp's argument for suppressing the evidence under the exclusionary rule because the suppression of evidence was not encompassed within RFRA's "appropriate relief" provision.[216] In the end, while the court noted that Lepp could raise RFRA as an affirmative defense at trial through motions in limine,[217] the court denied Lepp's request for a *Franks* hearing because any religious omissions from the warrant applications did not invalidate the warrants.[218]

210. *Id.* at *8.
211. *Id.*
212. *Id.* at *9.
213. *Id.* at *9–10.
214. *Id.* at *10 (alteration in original) (citing Gonzales v. O Centro Espirita Beneficente, 546 U.S. 418, 435 (2000)).
215. *Id.*
216. *Id.* at *11 (citing 42 U.S.C. § 2000bb-1(c) (2006)).
217. *Id.* at *12.
218. *Id.* at *13.

I. United States v. Quaintance

In *United States v. Quaintance*, the court reviewed the defendants' RFRA claims that their founding membership in the Church of Cognizance precluded prosecution for conspiracy and possession with intent to distribute marijuana.[219] Following the arrest of a co-conspirator, Daniel and Mary Quaintance devised a plan with a third individual, Mr. Kripner, for all three to obtain marijuana from Mexican "backpack runners" in New Mexico and deliver it, for a fee, to raise bail money for the arrested co-conspirator.[220] Before Kripner and the Quaintances could leave the site where they had received the marijuana from the "backpack runners," Border Patrol agents stopped them and seized 172 pounds of marijuana.[221] Indictments for possession with intent to distribute marijuana and conspiracy to distribute followed.[222] The Quaintances moved to dismiss under RFRA, arguing that they were members of the Church of Cognizance, which Mr. Quaintance had founded in 1991.[223] They professed to sincerely believe that possession and use of marijuana was essential to the Church of Cognizance, which taught that marijuana was a deity and sacrament.[224]

The government conceded that punishing the Quaintances for the crimes charged amounted to a substantial burden,[225] but the government contested the sincerity of the defendants' claimed religious beliefs.[226] After the parties had briefed the issues and had been afforded approximately three days of testimony and argument, the district court ruled that the defendants' beliefs were neither sincere nor religious.[227] However, even if the district court had deemed the Quaintances' beliefs religious, the Quaintances "couldn't show that they sincerely held their professed religious beliefs, rather than simply used them as cover for secular drug activities."[228] The district court thus refused to dismiss the

219. United States v. Quaintance (*Quaintance III*), 608 F.3d 717, 718 (10th Cir. 2010).
220. *Id.* at 719.
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.* at 720.
226. *Id.*
227. *Id.* To determine religiousness, the district court followed the methodology reviewed in *Meyers II*, 95 F.3d 1475, 1483–84 (10th Cir. 1996).
228. Q*uaintance III*, 608 F.3d at 720 (citing United States v. Quaintance (*Quaintance I*), 471 F. Supp. 2d 1153, 1170 (D.N.M. 2006)).

prosecution under RFRA.[229] The Quaintances filed an interlocutory appeal, but it was dismissed by the court of appeals.[230] Following a guilty plea, conditioned on the right to appeal RFRA rulings and entry of final judgment, the Quaintances appealed their convictions.[231]

The appellate court reviewed for clear error: "Under our precedents, sincerity of religious beliefs 'is a factual matter,' and so, 'as with historical and other underlying factual determinations, we defer to the district court's findings, reversing only if those findings are clearly erroneous.'"[232] Concluding that the district court's "sincerity" holding was not a reversible error, the Tenth Circuit affirmed the decision and did not reach the question of whether the defendants' beliefs were religious.[233] The Quaintances contested the clear error standard of review, but the court responded that the district court's "sincerity" finding was persuasive under either a de novo or clearly erroneous review.[234] In the court's opinion that followed, it relied on Mr. Kripner's testimony that the Quaintances "considered themselves in the marijuana business," which he detailed for the district court.[235] Moreover, the court noted that when they were arrested, the Quaintances were in the midst of a marijuana deal for the purpose of raising money to bail out another co-conspirator.[236] Such circumstances evidenced "a powerful motive 'to undertake a large drug transaction for monetary, as opposed to religious, purposes.'"[237] In short, the Tenth Circuit noted that "the very transaction at issue here was part of a lucrative scheme to raise money for a secular purpose."[238]

Moreover, Mr. Kripner testified that, along with selling the Quaintances marijuana, he had also sold them cocaine, and the appellate court agreed with the district court that the recreational use of cocaine discredited the Quaintances' religious marijuana claim.[239] Mr. Kripner also testified that he had declined previous solicitations to join the church

229. *See id.*
230. United States v. Quaintance (*Quaintance II*), 532 F.3d 1144, 1145 (10th Cir. 2008).
231. *Quaintance III*, 608 F.3d at 720.
232. *Id.* (citations omitted).
233. *Id.* at 720–21.
234. *Id.* at 721–22 n.3.
235. *Id.* at 722 (citation omitted) (internal quotation marks omitted).
236. *Id.*
237. *Id.* (quoting *Quaintance I*, 471 F. Supp. 2d 1153, 1173 (2006)).
238. *Id.*
239. *Id.* at 723 (citations omitted).

even though Mr. Quaintance promised that it would legalize his marijuana use.[240] The night before his arrest, however, Mr. Kripner joined the church, "signing a church membership pledge and receiving a certificate designating him an authorized church courier."[241] Mr. Kripner testified that he did not consider marijuana a deity and "testified that he joined [the church] so he could 'do the load'" the next day.[242] Accordingly, the Tenth Circuit rejected the Quaintances' religion claims:

> The timing and circumstances of all this, the district court found, tended to suggest that the Quaintances, too, "were acting for the sake of convenience, *i.e.*, because they believed the church would cloak Mr. Kripner with the protection of the law." That is, they inducted Mr. Kripner because they thought it might insulate their drug transactions from confiscation, "not because they had a sincere religious belief that marijuana is a sacrament and deity."[243]

The district court had provided other evidentiary bases for its conclusions, and the court of appeals ultimately considered the evidence to "convincingly support the district court's finding that the Quaintances' professed beliefs were not sincerely held."[244]

J. United States v. Lafley

In 2011, a convicted methamphetamine dealer claimed that he should be permitted to use marijuana under RFRA while on supervised release because marijuana was the sacrament for Montana Cannabis Ministries, a religion to which he belonged as a minister.[245] Lafley pled guilty to conspiracy to manufacture and possession with intent to distribute methamphetamine, served a 110-month prison sentence, and was serving a supervised release term of 60 months when the district court revoked his supervised release for consuming alcohol, refusing to participate in substance abuse treatment, driving with a suspended license, and

240. *Id.* at 722.
241. *Id.*
242. *Id.*
243. *Id.* at 722–23 (quoting *Quaintance I*, 471 F. Supp. 2d at 1174).
244. *Id.* (footnote omitted).
245. United States v. Lafley, 656 F.3d 936, 936–37 (9th Cir. 2011).

possessing marijuana.[246] After he pled guilty to the latter two violations of state law in state court proceedings, the federal court convened a revocation hearing where Lafley admitted his violations.[247] The district court postponed imposition of the sentence for four months.[248]

At the dispositional hearing four months later, Lafley informed the court that he had recently joined the Montana Cannabis Ministries and argued that his free-exercise rights permitted his religious use of marijuana during supervised release.[249] In support, he presented two witnesses, the leader of Montana Cannabis Ministries and its spiritual advisor, who detailed the organization's religious use of marijuana as a sacrament.[250] The district court refused to apply RFRA to the supervised release conditions, revoked Lafley's supervision, and ordered three months of imprisonment followed by 57 months of supervision, which included standard conditions that prohibited marijuana possession and use.[251] In reaching its holding, the court did not decide whether Lafley sincerely believed his religion; instead, it concluded that the government presented a compelling interest for substantially burdening Lafley's claimed religious free exercise.[252]

On appeal, the Ninth Circuit began its analysis with its conclusion: "The government has a compelling interest in denying a convicted drug felon a religious exemption that would permit him to use drugs while serving his term of supervised release."[253] The court then acknowledged that Congress instructed sentencing courts to consider the particular defendant's criminal history and characteristics to tailor conditions in an attempt to prevent recidivism and promote rehabilitation when imposing

246. *Id.* at 936–37.
247. *Id.* at 937.
248. *Id.*
249. *Id.* at 937–38.
250. *Id.* at 938 & n.6. The government later prosecuted both witnesses. The government convicted the leader, Randy Leibenguth, of manufacturing marijuana and money laundering, and he received a sentence of three months in prison, followed by nine months of monitoring during a three-year term of supervised release. *See* United States v. Leibenguth, No. 2:12-cr-00006-DLC (D. Mont. Mar. 22, 2012) Lucas Wyman Mulvaugh, the spiritual advisor, was convicted of conspiracy to maintain a drug-involved premises; he received a sentence of 45 days in custody followed by three years of supervised probation. *Belgrade Man Sentenced on Marijuana Charges*, BOZEMAN DAILY CHRON., Jan. 8, 2013, http://www.bozemandailychronicle.com/news/crime/article_6cebbb06-5958-11e2-b454-001a4bcf887a.html.
251. *Lafley*, 656 F.3d at 938.
252. *Id.* at 939.
253. *Id.* at 940.

conditions of supervision.[254] It noted that the standard conditions challenged by Lafley were required for *all* defendants—mandatory conditions that reflect congressional judgment regarding the "health and general welfare of the American people" and the prevention of drug abuse by those under supervision.[255]

The court next focused on Lafley in particular and noted that he was a convicted methamphetamine dealer with multiple violations of his supervised release.[256] As such, the court found that his marijuana prohibition was "rationally related to his conviction," and thus the government's interest was found to be compelling because Lafley was a convicted drug dealer with a criminal history.[257]

Finally, the court examined whether Lafley's condition was applied in the least restrictive manner. The court first rejected the notion that the condition was over-inclusive: "The standard condition is no broader than the interest the government has put forward. . . . No less restrictive condition could feasibly and adequately prohibit Lafley from using marijuana."[258] The court then rejected Lafley's argument that his sacramental use of marijuana could be supervised and distinguished from recreational marijuana use because "[r]equiring continuous monitoring of Lafley's marijuana use to determine whether the use was recreational or religious would place an unreasonable burden on a probation office."[259]

V. ANALYSIS

A. Credibility of Marijuana Religions

Since RFRA's enactment, federal marijuana defendants have invoked it as a defense with limited success, which appears reasonable at first glance because many defendants have raised seemingly fanciful explanations for their religious marijuana use. From a judge's perspective, a RFRA defense often appears merely a belated cover for recreational marijuana use or for a criminal enterprise, as was manifested in *Meyers*, *Quaintance*, and perhaps *Lafley*. Accordingly, in its initial published opinion concerning RFRA as a defense, the Ninth Circuit

254. *Id.* (citing 18 U.S.C. § 3583(c) (2006)).
255. *Id.* (citing 21 U.S.C. § 801(2) (2006)).
256. *Id.*
257. *Id.*
258. *Id.* at 941.
259. *Id.* at 941–42.

instructed that more than "the defendants' mere say-so" was necessary to gain the protections of RFRA.[260]

To address the need for more than just the defendants' say-so, the *Meyers* district court masterfully overviewed factors it deemed indicative of religion.[261] The Tenth Circuit not only agreed with these factors, but used them to affirm the district court, holding that "Meyers'[s] beliefs more accurately espouse a philosophy and/or way of life rather than a religion."[262] A quip by the *Meyers* district court summarized the judicial skepticism of some RFRA defenses: "Meyers'[s] professed beliefs have an ad hoc quality that neatly justif[ies] his desire to smoke marijuana."[263] The "Church of Cognizance" in *Quaintance* received the same judicial skepticism, and the court there likewise concluded that the claimed religious beliefs were "simply used . . . as cover for secular drug activities."[264]

Lafley presented the same ad hoc appearance of convenience because Lafley joined the Montana Cannabis Ministries after he had pled guilty in state court to possessing marijuana while on federal supervised release.[265] While the Ninth Circuit did not decide whether Lafley sincerely believed in his religion, because it assumed sincerity for the purpose of examining whether the government presented a compelling interest for substantially burdening Lafley's claimed religious exercise,[266] judicial skepticism predominated in the district court.[267]

B. Rastafarianism

By contrast, Rastafarians possessing marijuana for personal use have successfully used RFRA as a defense. *Bauer* recognized the opportunity

260. United States v. Bauer, 84 F.3d 1549, 1559 (9th Cir. 1996).

261. *Meyers I*, 906 F. Supp. 1494, 1502–03 (D. Wyo. 1995).

262. *Meyers II*, 95 F.3d 1475, 1484 (10th Cir. 1996) (internal quotation marks omitted).

263. *Meyers I*, 906 F. Supp. at 1509.

264. *See Quaintance III*, 608 F.3d 717, 720 (10th Cir. 2010) (citations omitted).

265. United States v. Lafley, 656 F.3d 936, 937 (9th Cir. 2011).

266. *Id.* at 940; *see also* United States v. Lepp, No. CR 04-0317 MHP, 2007 U.S. Dist. LEXIS 66311, at *5 (N.D. Cal. Sept. 7, 2007) (deeming the claimed religion at issue protected by RFRA, despite skeptical view of "Eddy's Medicinal Gardens and Ministry of Cannabis and Rastafari").

267. The parties filed the district court's transcript with the Ninth Circuit as part of the Excerpts of Record. Excerpts of Record of Appellee, United States v. Lafley, 656 F.3d 936 (9th Cir. 2011) (No. 10-30132); Excerpts of Record of Appellant, United States v. Lafley, 656 F.3d 936 (9th Cir. 2011) (No. 10-30132).

for this defense when the Ninth Circuit remanded the determination as to whether Bauer was in fact a Rastafarian and whether marijuana use was in fact a part of the Rastafarian religious practice.[268] Even the government in *Valrey* conceded that a condition banning the use of marijuana during supervised release substantially burdened the defendant's free exercise of Rastafarianism because Rastafarianism was a religion with marijuana as its sacrament.[269] Noting that the defendant had been convicted of a firearm offense rather than a drug offense, the court permitted the defendant to personally use marijuana exclusively for his religious practice of Rastafarianism under several strict conditions.[270] Not every court, however, has indulged Rastafarianism to the same extent.

Like the defendant in *Valrey*, Israel was convicted of a firearm offense rather than a drug offense;[271] however, like the defendant in *Lafley*, he became a Rastafarian only after he had been arrested.[272] Although the court in *Israel* found the standard supervised release condition prohibiting marijuana use to be a substantial burden on Israel's religious practice of Rastafarianism, it ruled that the government had a compelling interest in prohibiting Israel's marijuana use and the prohibition was the least restrictive means of enforcing general drug laws.[273] This justification, however, ignores RFRA's text, later dissected in *O Centro*, which rejects such generalized reasoning and instead mandates scrutiny of the harm inflicted on the individual religious claimant.[274] Indeed, the court specifically focused on the generalized interest of the government and the probation office in preventing probationers from smoking marijuana,[275] which completely ignores the congressional directive to focus on the person—the individual.

In any event, even the courts that have permitted Rastafarians a RFRA defense have sharply drawn the line between personal use of

268. United States v. Bauer, 84 F.3d 1549, 1559 (9th Cir. 1996).

269. United States v. Valrey, No. CR96-549Z, 2000 U.S. Dist. LEXIS 22390, at *6–7 (W.D. Wash. Feb. 22, 2000).

270. *Id.* at *9–11.

271. *Compare Valrey*, 2000 U.S. Dist. LEXIS 22390, at *1, *with* United States v. Israel, 317 F.3d 768, 769 (7th Cir. 2003).

272. *Compare* United States v. Lafley, 656 F.3d 936, 937 (9th Cir. 2011), *with Israel*, 317 F.3d at 769.

273. United States v. Jefferson, 175 F. Supp. 2d 1123, 1129, 1131 (N.D. Ind. 2001); *see also Israel*, 317 F.3d at 772.

274. Gonzales v. O Centro Espirita Beneficente, 546 U.S. 418, 431 (2006).

275. *Israel*, 317 F.3d at 772.

marijuana and a criminal marijuana enterprise. This distinction was also initiated in *Bauer* when the court refused to apply RFRA to the defendant's distribution of marijuana: "Nothing before us suggests that Rastafarianism would require this conduct."[276] The Ninth Circuit made a similar distinction in *Guerrero* when it noted that "Rastafarianism does not require *importation* of a controlled substance."[277] Furthermore, the court in *Forchion* solidified this dividing line for Rastafarians when it rejected the claim that RFRA protected Rastafarians' right to personally use marijuana in a public park: "To suggest that somehow your religion is seriously impeded because you can't do it at Independence Park is simply an argument without any basis as far as [the court is] concerned."[278] The court justified its limitation on personal use of marijuana because marijuana prohibition in national parks "creates no impediment to the free exercise of their faith in their homes, their houses of worship, or other non-federal locations."[279] At the same time, the court in *Forchion* recognized that the application of RFRA to probation conditions creates "thorny constitutional and statutory questions."[280] Thus, RFRA protects a Rastafarian's right to personally use marijuana only under limited circumstances.

C. Religion Respected

1. Definition of "Religion"

Despite the fact that federal courts have rejected a RFRA defense to personal marijuana use, more often than not, courts have been receptive

276. United States v. Bauer, 84 F.3d 1549, 1559 (9th Cir. 1996); *see also* Multi-Denominational Ministry of Cannabis & Rastafari, Inc. v. Holder, 365 F. App'x 817, 820 (9th Cir. 2010) ("RFRA does not permit the unlimited production or distribution of marijuana.").

277. Guam v. Guerrero, 290 F.3d 1210, 1223 (9th Cir. 2002); *see also* Martin v. United States, No. 95-81165, 2008 U.S. Dist. Lexis 24837, at *10 (E.D. Mich. Mar. 27, 2008) ("[T]here is no case law authority whatsoever—and Petitioner has not identified any—for the proposition that the federal criminal prohibitions against distribution or possession with the intent to distribute marijuana substantially burden the exercise of the Rastafari religion."). In *Martin*, "trial counsel succeeded in obtaining a jury instruction stating that the use of marijuana for religious purposes was a constitutionally protected right." *Martin*, 2007 U.S. Dist. LEXIS 97579, at *47.

278. United States v. Forchion, No. 04-949-ALL, 2005 U.S. Dist. LEXIS 14791, at *12 (E.D. Pa. July 22, 2005).

279. *Id.* at *14.

280. *Id.* at *21.

to finding a substantial burden on various religions when marijuana use is proscribed. The courts' willingness to recognize a substantial burden on one's free exercise reflects a low threshold for the beginning of the analysis. Under RFRA, the term "exercise of religion" includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[281] As the Supreme Court has stated, "[t]he starting point for interpretation of a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."[282] Indeed, the Ninth Circuit has recognized that Congress intended for RFRA to have "widespread" effect by establishing statutory protection for the free exercise of religion that exceeds "the great guarantees of the Bill of Rights."[283]

The Ninth Circuit made this observation before Congress had amended the definition of religious exercise under RFRA through the RLUIPA, which now directs that "'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[284] Given this amendment, the "RFRA now protects a broader range of religious conduct than the Supreme Court's interpretation of 'exercise of religion' under the First Amendment."[285] But RFRA has always exceeded the First Amendment's text—the latter only forbids "prohibiting" the free exercise of religion, while RFRA

281. 42 U.S.C. § 2000bb-2(4) (2006); 42 U.S.C. § 2000cc-5(7)(A) (2006). *See supra* text accompanying note 53 (discussing, among other things, the amendment of RFRA's definition of "religious exercise" to conform to the definition as set forth in RLUIPA).

282. Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 835 (1990) (citation omitted) (internal quotation marks omitted).

283. United States v. Bauer, 84 F.3d 1549, 1558 (9th Cir. 1996).

284. 42 U.S.C. § 2000cc-5(7)(A).

285. Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1033 (9th Cir. 2007); *see also* Guam v. Guerrero, 290 F.3d 1210, 1218 (9th Cir. 2002) (RFRA "provides a level of protection to religious exercise beyond that which the First Amendment requires"). Indeed, RFRA's expanded application to "all cases" negated Supreme Court decisions that had exempted entire categories of free-exercise cases from the compelling interest test. *See* 42 U.S.C. § 2000bb; *see also* O'Lone v. Estate of Shabazz, 482 U.S. 340, 349 (1987) (upholding prison regulation as reasonably related to legitimate penological interest); Bowen v. Roy, 476 U.S. 693, 707 (1986) ("Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden . . . ."); Goldman v. Weinberger, 475 U.S. 503, 506–07 (1986) (rejecting application of *Sherbert* with military regulations); Emp't Div. v. Smith, 494 U.S. 872, 883 (1990) (suggesting compelling interest test did not apply beyond *Sherbert* context involving state unemployment benefits).

forbids any "substantial burden."[286] Nonetheless, the amendment's expansion of protected activity contrasts with RFRA's original language, which led courts to the First Amendment to determine the free exercise of religion.[287]

2. Sincerity of Individual Belief

The Supreme Court has long stressed the sanctity of individual religious beliefs: "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[288] In the cases reviewed, the defendants typically claimed marijuana as their sacrament. A sacrament, by definition, is an exercise of religion. The dictionary defines sacrament as "a Christian rite (as baptism or the Eucharist) that is believed to have been ordained by Christ and that is held to be a means of divine grace or to be a sign or symbol of a spiritual reality; a religious rite or observance comparable to a Christian sacrament."[289] In *Davis v. Beason*, the Court defined religion and focused on the importance of the individual's beliefs: "The term 'religion' has reference to one's view of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[290] The Court further explained that religious exercise

> was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper.[291]

Furthermore, in *United States v. Ballard*, the Supreme Court ruled that the freedom to exercise religious beliefs could not be made contingent on the objective truth of such beliefs.[292] There, the Court explained that

286. United States v. Bauer, 84 F.3d 1549, 1558 (9th Cir. 1996).
287. *Id.*
288. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (citing Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 714 (1981)).
289. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1094 (11th ed. 2004).
290. Davis v. Beason, 133 U.S. 333, 342 (1890), *overruled on other grounds by* Brandenburg v. Ohio, 395 U.S. 444 (1969).
291. *Id.*
292. United States v. Ballard, 322 U.S. 78, 87 (1944).

courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs.[293] Yet this is precisely what the court suggested in *Meyers* when it examined the defendant's beliefs based on the "criteria that are the hallmarks of religious belief."[294]

After all, "the determination of what is a religious belief or practice . . . . is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[295] Moreover, the government may not punish the expression of religious doctrines it believes to be false or a "cover."[296] If the free-exercise right were dependent on one's ability to establish the truth of one's beliefs, then religious protections for anyone would likely be rendered illusory, including mainstream Christianity.[297] Finally, the Supreme Court has also rejected the notion that an individual "must be responding to the commands of a particular organization" to claim the protection of the Free Exercise Clause.[298] Instead, religious beliefs are accorded protection even if they are unorthodox, and United States citizens are accorded the right "to explore diverse religious beliefs in accordance with the dictates of their conscience."[299] While RFRA explicitly indulges religious beliefs beyond First Amendment jurisprudence, it is clear that the courts still resort to First Amendment

293. *Id*. (stating that religious beliefs "might seem incredible, if not preposterous, to most people").

294. *Meyers I*, 906 F. Supp. 1494, 1509 (D. Wyo. 1995).

295. Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 714 (1981).

296. *Ballard*, 322 U.S. at 86–88. *But see Meyers I*, 906 F. Supp. at 1509 (noting that use of the word "religion" in RFRA and in the First Amendment is, in itself, limiting and could cause some "new and developing forms of religion" to be cast aside).

297. *See Ballard*, 322 U.S. at 87.

298. Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 834 & n.2 (1989).

299. Patrick v. LeFevre, 745 F.2d 153, 157 (2d Cir. 1984). As an example, Satanists' views and beliefs involving witchcraft and animal sacrifice are protected by the right to free exercise of religion. *See* Cutter v. Wilkinson, 544 U.S. 709, 723–24 (2005) ("RLUIPA does not differentiate among bona fide faiths. . . . It confers no privileged status on any particular religious sect, and singles out no bona fide faith for disadvantageous treatment."); Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531 (1993) ("Although the practice of animal sacrifice may seem abhorrent to some, ... [g]iven the historical association between animal sacrifice and religious worship, petitioners' assertion that animal sacrifice is an integral part of their religion cannot be deemed bizarre or incredible." (citations omitted) (internal quotation marks omitted)). Furthermore, the First Amendment right to the free exercise of religion will be upheld even if "the tenets of one man may seem the rankest error to his neighbor." Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

principles.

D. The "Least Restrictive Means" Battleground

Instead of getting bogged down in the definitional contours of "exercise of religion," the courts have been willing to recognize, or at least accept for the sake of analysis, that religious exercise in most RFRA cases has been substantially burdened by federal marijuana prohibitions. Consequently, the "least restrictive means" test is RFRA's battleground because it has become "the critical aspect of the free exercise analysis."[300] This focus requires the courts to evaluate a regulation by "ascertaining the marginal benefit of applying it to all individuals, rather than to all individuals except those holding a conflicting religious conviction."[301] If the regulation's goal can be achieved despite exempting the claimant, then the regulation is not the least restrictive means of furthering the government's interest.[302]

RFRA requires the government to explore alternatives and consider exceptions to its broad policies, and it does not allow the government to stand on regulatory ceremony to evade any and all alternatives and exceptions.[303] Indeed, RFRA "plainly contemplates that *courts* [will] recognize exceptions—that is how the law works."[304] The entire purpose and focus of RFRA requires exceptions to be made and lesser-restrictive alternatives to be considered.[305] Yet, in *Lafley*, the court found that "[t]he government has a compelling interest in denying a convicted drug felon a religious exemption that would permit him to use drugs while serving his

300. Callahan v. Woods, 736 F.2d 1269, 1272 (9th Cir. 1984).

301. *Id.*

302. *Id.* at 1272–73.

303. *See* Gonzales v. O Centro Espirita Beneficente, 546 U.S. 418, 431–32 (2006).

304. *Id*. at 434 (citing 42 U.S.C. § 2000bb-1(c) (2000)) ("A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.").

305. *See* United States v. Sales, 476 F.3d 732, 735 (9th Cir. 2007) (holding that a "condition [of supervised release] . . . must involve no greater deprivation of liberty than is reasonably necessary for the purposes of supervised release—that is, to achieve deterrence, public protection, or offender rehabilitation") (citation omitted); *see also* State v. Nelson, 2008 MT 359, ¶ 33, 195 P.3d 826, 833 (permitting medical marijuana use while on supervision but emphasizing "this is not to say that there can be no restrictions on lawful medical marijuana use"). "A sentencing court is free to impose limitations on the place of use . . . . Moreover, just as a sentencing court may impose a condition that prohibits a defendant from abusing lawfully-obtained prescription drugs, so may a court prohibit a defendant from abusing medical marijuana." *Id.*

term of supervised release."[306] The court did not even address the fact that "[f]or the past 35 years, there has been a regulatory exemption for use of peyote—a Schedule I substance—by the Native American Church."[307] "Congress'[s] role in the peyote exemption—and the Executive's—confirms that the findings in the Controlled Substances Act do not preclude exceptions altogether; RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress."[308]

Yet, courts appear to avoid these exceptions, radiating the belief that if there are few exceptions made, it would "open the door to a weed-like proliferation of claims for religious exemptions."[309] The court in *Lepp*, when it ruled against the defendant's RFRA defense, noted that the Attorney General had not granted religious exemptions for use of "marijuana or similar drugs."[310] But this point sidesteps the fact that the Controlled Substances Act "itself contemplates . . . exempting certain people from its requirements."[311] Further, peyote use by Indians within the Native American Church is "an exception [that] has been made to the Schedule I ban for religious use."[312] The least restrictive means test demands an inquiry into the appropriateness of such an exception. "If the compelling state goal can be accomplished despite the exemption of a particular individual, then a regulation which denies an exemption is not the least restrictive means of furthering the state interest."[313] RFRA requires the courts to adjudicate this distinction; yet, despite this requirement, defendants rarely prevail under RFRA.

306. United States v. Lafley, 656 F.3d 936, 940 (9th Cir. 2011).
307. *O Centro*, 546 U.S. at 433 (citation omitted).
308. *Id.* at 434 (citations omitted). *Accord* United States v. Valrey, No. CR96-549Z, 2000 U.S. Dist. LEXIS 22390, at *6–9, *11 (W.D. Wash. Feb. 22, 2000) (applying RFRA to permit religious marijuana use to supervisee with conditions to assure use is "exclusively in connection with his practice of his religion") (citations omitted).
309. United States v. Israel, 317 F.3d 768, 772 (7th Cir. 2003).
310. United States v. Lepp, No. CR 04-0317 MHP, 2007 U.S. Dist. LEXIS 66311, at *10–11 (N.D. Cal. Sept. 7, 2007).
311. *O Centro*, 546 U.S. at 432–33 (citation omitted).
312. *Id.* at 433 (citations omitted).
313. Callahan v. Woods, 736 F.2d 1269, 1272–73 (9th Cir. 1984).

VI. CONCLUSION

Other than Rastafarians using marijuana personally and privately, the courts have repeatedly rejected RFRA defenses in federal marijuana prosecutions. Sometimes, the defendants' religious beliefs are rejected as unconvincing, thus courts conclude there is no substantial burden on religious beliefs. While courts are willing to recognize that a religious belief has been substantially burdened—even if the court takes a jaundiced view of the belief's legitimacy—they have largely concluded that the government convincingly presents a compelling interest in prohibiting an exception for a defendant's use of marijuana. Such a determination is made despite the fact RFRA explicitly demands the courts to evaluate—not categorically reject—the exemption for the *particular individual* under the least restrictive means test. RFRA requires the courts to adjudicate this distinction, yet defendants using marijuana for religious purposes have rarely prevailed under RFRA because the courts have taken a dim view of marijuana as a lawful religious activity.