The Impact of *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

By Amit Shah[1]

I. INTRODUCTION

In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,[2] the United States Supreme Court unanimously held[3] that members of a church, in the sincere practice of religion, may take communion by drinking a tea containing an illegal narcotic.[4] This note will analyze the case and its impact on the Religious Freedom Restoration Act (RFRA).[5] In addition, potential problems for religious groups and the government will be analyzed, along with a discussion on how those problems can be circumvented.

The RFRA has been in existence since 1993. Since its existence, religious organizations have used it to protect themselves from government interference in their religious practices.[6] For the first time, the Supreme Court in *Gonzales* has allowed a plaintiff to use the RFRA to circumvent national policy that is clearly intended for the safety of the United States and its citizens.[7]

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[1] J.D., Rutgers-University School of Law – Camden, 2008.
[2] 546 U.S. 418 (2006).
[3] Justice Roberts delivered the opinion of the Court. Samuel Alito took no part in the decision.
[4] *Gonzales*, 546 U.S. at 438.
[5] 42 U.S.C. §§ 2000bb – 2000bb-3 (2006).
[6] *See Gonzales*, 546 U.S. at 418; *Cutter v. Wilkinson*, 544 U.S. 709 (2005); *Tenn. v. Lane*, 541 U.S. 509 (2004); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Swanner v. Anchorage Equal Rights Comm'n*, 513 U.S. 979 (1994*); Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024 (9th Cir. 2007).
[7] *See* Controlled Substance Act, 21 U.S.C. § 812(c) (2006).

II. STATEMENT OF THE CASE

A. Facts

O Centro Espirita Beneficente Uniao do Vegetal ("UDV") is a Brazilian Christian Sect set in Brazil with a branch in the United States.[8] UDV members receive communion by drinking a tea containing *hoasca*.[9] *Hoasca* contains a hallucinogen[10] that is listed in Schedule I of the Controlled Substance Act.[11]

In 1993, the State of New Mexico recognized UDV as a non-profit religious organization.[12] In 1999, the United States Customs Inspectors intercepted a shipment to UDV containing three drums of *hoasca*.[13] The government threatened UDV with prosecution.[14] UDV filed suit against the Attorney General and other federal law enforcement officials based on the RFRA,[15] seeking declaratory and injunctive relief.[16]

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[8] Jason Miller, *Group's Use of Hallucinogenic Tea for Religious Services Upheld*, 8 No. 8 LAWYERS J. 2 (2006). The branch has about 130 members from the United States. *Gonzales*, 546 U.S. at 425.

[9] *Id*. *Hoasca* is pronounced ("wass-ca"). *Id*. "[*H*]*oasca* . . . [is] made from two plants unique to the Amazon region. One of the plants, *psychotria viridis*, contains dimethyltryptamine ("DMT"), a hallucinogen whose effects are enhanced by alkaloids from the other plant, *banisteriopsis caapi*." *Id.* DMT is the substance listed in Schedule I of the Controlled Substance Act. *Id*.

[10] *Id*. A hallucinogen is a "substance that produces psychological effects that are normally associated only with dreams, schizophrenia, or religious exaltation. It produces changes in perception, thought, and feeling, ranging from distortions of what is sensed (illusions) to sensing objects where none exist (hallucinations)." Encyclopedia Britannica, http://www.britannica.com/eb/article-9038956/hallucinogen (last visited Jan. 13, 2009).

[11] 21 U.S.C. § 812(c). The Controlled Substance Act places DMT with substances like LSD, psilocybin, and mescaline, in the most restrictive "schedule," Schedule I. *Id*. According to the Controlled Substance Act, Schedule I substances have no medical use, a high probability of abuse, and have a lack of accepted safety for use even under medical supervision. *Id*. § 812(b). *See also* Matthew D. Meyer, *Religious Freedom and United States Drug Laws: Notes on the UDV-USA Legal Case*, http://www.neip.info/downloads/Matthew%20UDV-USA%20case.pdf (last visited Jan. 13, 2009). Cocaine (Schedule II) and methamphetamines (Schedule III) are listed elsewhere because they have some medical use. *Id*.

[12] *Id*.

[13] *Gonzales*, 546 U.S at 425. A later investigation revealed that UDV had received fourteen prior shipments of *hoasca*. *Id*.

[14] *Id*.

[15] The RFRA was enacted by Congress in response to the Supreme Court's decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990) (the Free Exercise Clause of the First Amendment does not prohibit governments from burdening religious practices through generally applicable laws). Under the RFRA, the Federal Government may not substantially burden a person's exercise of religion, "even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1 (2006). The only exception in the statute requires the United States government to satisfy the compelling interest test: to "demonstrate that application of the burden to the person (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of

B. Procedural History

At a hearing in the District Court of New Mexico, the Government conceded that the use of *hoasca* by UDV was a sincere exercise of religion.[17] The District Court granted UDV's preliminary injunction.[18] Because the evidence presented by both sides was in "equipoise," the district court held that the Government failed to demonstrate a compelling government interest justifying a substantial burden on UDV's sincere practice of religion.[19] The Government unsuccessfully appealed to the Tenth Circuit Court of Appeals.[20] On rehearing en banc, the Tenth Circuit upheld the panel decision.[21]

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furthering that compelling governmental interest." *Id*. § 2000bb-1(b). A person whose religious practices are burdened in violation of RFRA "may assert that violation as a claim or defense in judicial proceedings and obtain appropriate relief." *Id*. § 2000bb-1(c).

[16] *Gonzales*, 546 U.S. at 425. "The complaint alleged, *inter alia*, that applying the Controlled Substance Act to the UDV's sacramental use of *hoasca* violates RFRA." *Id*. at 425-26.

[17] *See O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 282 F. Supp. 2d 1236, 1252 (D.N.M. 2002). Despite this concession, the Government argued that it:

> [D]id not violate RFRA, because applying the Controlled Substance Act in this case was the least restrictive means of. . .protecting the health and safety of UDV members, preventing the diversion of *hoasca* from the church to recreational users, and complying with the 1971 United Nations Convention of Psychotropic Substances, a treaty signed by the United States and implemented by the [Controlled Substance] Act.

Gonzales, 546 U.S. at 426.

[18] Specifically, the district court heard arguments about the health risks from both parties. *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 282 F. Supp. 2d at 1239. *See also Gonzales*, 546 U.S. at 427. The Government presented evidence that DMT can cause psychotic reactions, cardiac irregularities, and adverse drug reactions. *Id*. In response, the UDV cited studies showing the safety of DMT when used in hoasca for sacramental purposes. *Id*. at 426. The district court concluded that the health risks were in "equipoise" and that the evidence on diversion was "virtually balanced." *Id*.

[19] *Id*. at 426-27. "The injunction requires the church to import the tea pursuant to federal permits, to restrict control over the tea to persons of church authority, and to warn particularly susceptible UDV members of the dangers of *hoasca*." *Id*. at 427. Further, the injunction allows the government to apply to the court for an expedited determination of whether the *hoasca* has negatively affected the health of the members of the UDV church. *Id*.

[20] *See O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 342 F.3d 1170 (10th Cir. 2003). A three judge panel held that the district court did not err in its conclusion that the evidence about whether there were health risks involved in drinking *hoasca* was in "equipoise." Meyer, *supra* note 11. Further, the Tenth Circuit held the Government's mere recital of the policies behind the Controlled Substance Act is not enough to show a compelling government interest. *Id*.

[21] *See O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973 (10th Cir. 2004) (en banc). The court held,

> the government demonstrated only that there might be some adverse health consequences or risks of diversion resulting from UDV's use . . . but under RFRA, mere possibilities based on limited evidence supplemented by

C. Supreme Court's Analysis

In front of the Supreme Court, the Government did not challenge the district court's factual findings that the evidence submitted was evenly balanced.[22] Rather, the Government believed the evidentiary equipoise was insufficient to issue a preliminary injunction against the enforcement of the Controlled Substance Act.[23] However, the Court stated its own legal precedent,[24] which indicates that the burden is placed squarely on the Government, rather than UDV.[25] Therefore, if the evidence is in equipoise, the Court must grant the injunction for UDV.

Next, the Government argued that the policies behind the Controlled Substance Act itself are enough of a compelling government interest.[26] The Court rejected that argument stating that Congress listing DMT under Schedule I does not provide a categorical answer that relieves the Government of the obligation to meet its burden under the RFRA.[27] Further, the Court states its reasoning is reinforced by the fact that the Attorney General is authorized to "waive the requirement for registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety."[28]

> speculation are insufficient to counterbalance the certain burden of religious practice caused by a flat prohibition on *hoasca*.

Meyer, *supra* note 11 (quoting *Ashcroft*, 389 F.3d at 973).

[22] *Gonzales*, 546 U.S. at 427-28.

[23] *Id*. at 428.

[24] *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (affirming preliminary injunction where the government had failed to show a likelihood of success under the compelling interest test).

[25] *Id*. Specifically, under the RFRA, UDV is deemed likely to prevail unless the Government can show that its actions (1) are required to promote a compelling government interest and (2) the methods used are least restrictive. *Id*. *See also supra* note 15. Here, the government does not reach the second prong because it failed to demonstrate it had a compelling government interest. *Gonzales*, 546 U.S. at 428-30.

[26] *Gonzales*, 546 U.S. at 430. Those policies, listed in the Controlled Substances Act, include findings that DMT has a high potential of abuse, no currently accepted medical use in treatment in the United States and there is a lack of accepted safety use of DMT under medical supervision. *Id*.

[27] *Id.* at 432.

[28] Controlled Substance Act, 21 U.S.C. § 822(d) (2006).

In fact, an exception has been made to Schedule I ban for religious use.[29] For thirty-five years, there has been a regulatory exemption for use of peyote (a Schedule I substance) by the Native American Church.[30] The Court believed that the exception contradicts the Government's assertion that the Controlled Substance Act, in itself, proves a compelling government interest.[31] Further, the Government argued that only Congress could create exceptions to the RFRA.[32] The Government stated the "regulatory regime established by the [Controlled Substance] Act itself . . . cannot function with its necessary rigor and comprehensiveness if subjected to judicial exemptions."[33] The Court, however, rejected this argument because the nature and substance of the RFRA indicates that judicially created exceptions were to be permitted.[34]

The Court also stated the peyote exception indicates that the Government's contention that the Controlled Substance Act cannot have exceptions because there is a need for uniformity in rejecting claims for religious exemptions.[35] The cases that reject claims in the name of uniformity scrutinized the asserted need, and explained why the denied exceptions could not be accommodated.[36] The Court believed that in this case, the Government's argument rests not with uniformity but with a slippery-slope argument that an exception for one person

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[29] *Gonzales*, 546 U.S. at 433.
[30] 21 C.F.R. § 1307.31. In 1994, Congress extended the exemption to all members of every recognized Indian tribe. 42 U.S.C. § 1996a(b)(1) (2006).
[31] *Gonzales*, 546 U.S. at 433-34. The Government responded by stating that a "unique relationship" exists between the United States and Native American tribes. *Id*. at 433. However, the Court rejected this argument because the Government never explained how that relates to the exception for a Schedule I substance. *Id*. at 434.
[32] *Id*.
[33] *Gonzales*, 546 U.S. at 430 (quoting *Gonzales* v. *Raich,* 545 U.S. 1, 13 (2005)). According to the Government's view, there would be no need to assess UDV's particular use or weigh the impact of an exemption for that specific use, because the Controlled Substance Act serves a compelling purpose and simply admits no exceptions. *Id*.
[34] *See* RFRA, 42 U.S.C. § 2000bb-1(c) ("A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim of defense in a judicial proceeding and obtain appropriate relief against a government.")
[35] *Gonzales*, 546 U.S. at 434.
[36] *See United States v. Lee*, 455 U.S. 252, 258 (1982) (rejecting a claimed exception to pay social security tax, noting that "mandatory participation is indispensable to the fiscal vitality of the social security system" and the "tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious beliefs."); *see also Hernandez v Comm'n*, 490 U.S. 680 (1989).

will result in having to make an exception for everyone.[37] The Court stated the RFRA operates to alleviate this worry with the compelling government interest test.[38]

The Court stated that a case-by-case consideration of religious exemptions is feasible and warranted in many situations.[39] Therefore, the Court held that an exemption for the use of *hoasca* was possible under the RFRA.[40] Because the district court already determined that the Government failed to meet its burden of proof, the Court affirmed the Tenth Circuit Court and district court's rulings.[41]

III. BACKGROUND OF THE RFRA

Congress enacted the RFRA in response to *Employment Div., Dept. of Human Res. of Oregon v. Smith*.[42] In *Smith*, Smith and Black were fired by a private drug rehabilitation organization because they ingested peyote, a hallucinogenic drug, used for sacramental purposes in the Native American Church.[43] Their applications for unemployment were denied by the State of Oregon because a state statute[44] prohibits unemployment compensation for individuals who are discharged due to work related misconduct.[45]

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[37] *Gonzales*, 546 U.S. at 435-36.
[38] *Id*. at 436.
[39] *Id*. *See Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005) (upholding the compelling interest test in the Religious Land Use and Institutionalized Persons Act of 2000 because there is "no cause to believe that RLUIPA would not be applied in an appropriately balanced way.").
[40] *Gonzales*, 546 U.S. at 438-39.
[41] *Id*. In that case, the Government also argued that one of its compelling governmental interests was to comply with the United Nations Convention on Psychotropic Substances. *Id*. at 1224. The Convention was signed by the United States and included a ban on DMT. 32 U.S.T. 543, T.I.A.S. No. 9725. The Supreme Court reversed the district court's finding that the Convention did not include *hoasca,* and therefore it did not apply to that case. *Gonzales*, 546 U.S. at 437-38. The Court held that the Convention includes DMT, which is used to prepare *hoasca*. *Id*. at 438. The Convention specially includes substances that are prepared by substances that are banned. *Id*. However, the government only provided two affidavits from State Department officials to show that it is in the interest of the government to comply with the Convention. *Id.* The Court believed this was insufficient evidence to prove a compelling government interest existed. *Id.*
[42] 494 U.S. 872 (1990).
[43] *Id*. at 874.
[44] OR. REV. STAT. § 475.992(4) (1987).
[45] *Smith*, 494 U.S. at 874.

On appeal, the Oregon Appeals Court and the Oregon Supreme Court reversed and held for Smith and Black.[46] The Oregon Attorney General appealed to the Supreme Court and the Supreme Court granted certiorari.[47] The Supreme Court reversed, holding that a facially neutral law that prevents an individual from practicing their religion would be constitutional. The Court also rejected the balancing test from *Sherbert*[48] that requires the government to show a compelling government interest.

The Court's holding that the Free Exercise Clause did not protect against neutral, generally applicable laws caused complaints from politicians, and religious and civil liberty organizations.[49] The groups claimed that the Court had always applied strict scrutiny to Free Exercise Claims before *Smith* and wanted Congress to restore the strict scrutiny test by enacting the Religious Freedom Restoration Act.[50] During the course of the next three years, Congress vehemently criticized the holding in *Smith*.[51] President Clinton also criticized the holding, stating:

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[46] The state court of appeals reversed the lower state court's decision because the court believed the denials violated the First Amendment free exercise rights. *Id*. at 874-75. The Oregon Supreme Court affirmed, reasoning:

> [T]hat the criminality of respondents' peyote use was irrelevant to resolution of their constitutional claim--since the purpose of the "misconduct" provision under which respondents had been disqualified was not to enforce the State's criminal laws but to preserve the financial integrity of the compensation fund, and since that purpose was inadequate to justify the burden that disqualification imposed on respondents' religious practice.

Id. at 875.

[47] 480 U.S. 916 (1987).

[48] *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963). The Court specifically rejected the argument based on the fact that an across the board use of the test would make it impossible for the government to prove a compelling government interest in criminal statutes. *Smith*, 494 U.S. at 872. Interestingly, this balancing test is the basis for the RFRA and applies across the board, even in criminal areas. *See infra* Part III; *see also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (allowing use of a substance banned by the Controlled Substance Act because the Government failed to show a compelling government interest in banning the substance while used for the sincere practice of a religion).

[49] *See* Marci A. Hamilton, *The Establishment Clause During the 2004 Term: Big Cases, Little Movement*, 2005 CATO SUP. CT. REV. 159 (2005); *see also* Brief for Amicus Curiae The Tort Claimants' Committee at 25-26, *Gonzales v. O Centro Espirita Beneficente Uniao* do *Vegetal*, No. 04-1084.

[50] Although the critics stated that strict scrutiny was always used before *Smith* in Free Exercise cases, this was incorrect. *See* Hamilton, *supra* note 49.

[51] RFRA's legislative history includes over 400 pages criticizing the *Smith* holding. *See* S. REP. No. 103-111 (1993) (Conf. Rep.); H.R. REP. No. 103-88 (1993) (Conf. Rep.).

> [T]his act reverses the Supreme Court's decision Employment Division against Smith and reestablishes a standard that better protects all Americans of all faiths in the exercise of their religion in a way that I am convinced is far more consistent with the intent of the Founders of this Nation than the Supreme Court decision.[52]

Finally, in 1993, Congress adopted the Religious Freedom Restoration Act.[53] The RFRA created a judicial standard of review that would be applicable to laws that burden religion.[54] The law required that any category of law passed by government[55] must satisfy a strict scrutiny test.[56]

Specifically, RFRA bars the government from applying its laws in a way that substantially burdens a person's religious conduct.[57] The only exception allowed under the RFRA is if the government can show that the law exists to further a compelling government interest and was the least restrictive means of accomplishing that interest.[58]

IV. THE CONTROLLED SUBSTANCE ACT

The Controlled Substance Act is important legislation in the war on drugs.[59] The statute has broad implications, allowing the Attorney General to classify new

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[52] William J. Clinton, *Remarks on Signing the Religious Freedom Restoration Act of 1993*, 29 Weekly Comp. Pres. Doc. 2377 (Nov. 16, 1993).
[53] 42 U.S.C. § 2000bb – 2000bb-3 (2006).
[54] Hamilton, *supra* note 49.
[55] "(1) [T]he term 'government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of 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 . . ." 42 U.S.C. § 2000bb-2(1)-(2) (2005). In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court held the RFRA does not apply to the states because the statute goes beyond the authority of § 5 of the 14th Amendment. U.S. CONST. amend. XIV, § 5.
[56] Hamilton, *supra* note 49.
[57] *Id*.
[58] *See* 42 U.S.C. § 2000bb – 2000bb-3 (2006).
[59] Robert C. Folland, *Austin v. United States: A Bulwark Against the Scourge of the Comprehensive Drug Abuse Prevention and Control Act of 1970*, 21 OHIO N.U.L. REV. 319 (1994).

drugs that may be addictive.[60] Drugs are classified by schedule.[61] Schedule I drugs are considered to have the highest potential for abuse and no accepted medical treatment, whereas Schedule V drugs have the lowest risk.[62]

The Controlled Substance Act is vital for the United States to maintain and continue its war on drugs.[63] The statute lists many commonly known drugs, such as cocaine, marijuana, and heroin.[64] Interestingly, DMT is classified as a Schedule I drug, which is according to the Controlled Substance Act, more dangerous than cocaine.[65]

The *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* Court held that the RFRA could, in certain circumstances, trump important legislation that was created for the protection and safety of the United States.[66] This ruling has clearly expanded the RFRA, if statutes like the Controlled Substance Act, which sets forth a very important policy, can be trumped when the government cannot meet its burden of proof under the RFRA.

V. THE RULINGS EFFECT ON THE RFRA

The *Gonzales* ruling could have a profound impact on how lower courts analyze and interpret the RFRA. Before the case was decided, many lower courts had difficulty in interpreting the RFRA.[67]

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[60] Controlled Substance Act, 21 U.S.C. § 811(a) (2006); Frank M. McClellan, *Tort Law Applicable to Sellers of Prescription Drugs*, SE01 A.L.I.-A.B.A. 265, 271 (1999) (the Attorney General has delegated that authority to the Food and Drug Administration and Drug Enforcement Agency).
[61] *See* 21 U.S.C. § 812(a).
[62] *Id*. at § 812(b). Schedule II, III, and IV drugs generally have some medical use but are still regulated, with Schedule II being more dangerous than Schedule IV. *Id*. Schedule II, III and IV drugs that are dispensed by a certified pharmacist for medical use contain the following federal warning: "Caution, Federal law prohibits the transfer of this drug to any person other than the patient for whom it was prescribed." 21 C.F.R. § 290.5 (2006).
[63] *See* 21 U.S.C. § 812 (2006).
[64] *Id*. Heroin and marijuana are classified as Schedule I drugs. *Id*. Cocaine is classified as a Schedule II drug. *Id*.
[65] *Id*.
[66] 546 U.S. 418 (2006).
[67] *See Statutory Exemptions,* 120 HARV. L. REV. 341 (2006) (lower courts were unsure whether RFRA was constitutional until *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* was decided); Frank Ducoat, *Clarifying the Religious Freedom Restoration Act: Gonzales v. O Centro*

A. Clarifying the Constitutionality of RFRA

Despite the fact that *Gonzales* was decided very recently, the constitutional impact of the decision on the RFRA is clear. In *City of Boerne v. Flores*,[68] the Supreme Court held the RFRA unconstitutional as applied to the states.[69] Congress relied on Section 5 of the Fourteenth Amendment to enact the RFRA against the states. However, the Court stated that Section 5 of the Fourteenth Amendment[70] allows Congress to enact remedial measures to protect a constitutional right, but not preventative measures.[71] Because the RFRA is preventative,[72] it is unconstitutional as applied to the states.[73] The *Boerne* court was silent about whether the RFRA was constitutional as applied to the federal government.[74]

Lower courts and commentators have struggled with whether the RFRA was constitutional as applied to the federal government before *Gonzales*.[75] In

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Espirita Beneficente Uniao do Vegetal, 126 S.Ct 1211, 8 RUTGERS J. LAW & RELIG. 6 (2006) (the Court clarified that the compelling interest test must be applied to the individual claimant and not society as a whole).

[68] 521 U.S. 507 (1997).

[69] *Id*. at 536.

[70] *City of Boerne v. Flores*, 521 U.S. 507, 524-26 (1997) (citing U.S. CONST. amend. XIV, § 5).

[71] *Id*. The Supreme Court held in *The Civil Rights Cases*, that § 5 of the Fourteenth Amendment did not include preventative measures. *The Civil Rights Cases*, 109 U.S. 3, 13-14 (1883); *see also United States v. Reese,* 92 U.S. 214, 218 (1875); *United States v. Harris,* 106 U.S. 629, 639 (1883); *James v. Bowman,* 190 U.S. 127, 129 (1903).

[72] Preventative measures can sometimes be appropriate so long as there is congruence and proportionality between the means used and the ends to be achieved. *Boerne*, 521 U.S. at 530. There, the Court rejected the argument that the RFRA was congruent and proportional. *Id*. at 532.

[73] *Id*.

[74] *Id*.

[75] *See Adams v. C.I.R.*, 170 F.3d 173, 175 n.1 (3d Cir. 1999) (citing *In re Young,* 141 F.3d 854 (8th Cir. 1998), *cert. denied,* 525 U.S. 811 (1998); *see also EEOC v. Catholic Univ. of America,* 83 F.3d 455, 468-70 (D.C. Cir. 1996) (finding RFRA constitutional as applied to Title VII, but relying on Fifth Circuit's decision in *Boerne*); *but see Boerne,* 521 U.S. at 534 (concurring, J. Stevens questioned the Establishment Clause implications of the RFRA); *Young*, 141 F.3d at 863-67 (Bogue, J., dissenting); *United States v. Grant,* 117 F.3d 788, 792 n.6 (5th Cir. 1997) (questioning RFRA's viability in the federal context); *In re Gates Cmty. Chapel,* 212 B.R. 220, 226 (Bankr. W.D.N.Y. 1997) (finding that *Boerne* overruled RFRA altogether). Some commentators have noted that RFRA may be unconstitutional as applied to federal law. *See* Marci Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period,* 1 U. PA. J. CONST. L. 1 (1998); Aurora R. Bearse*, RFRA: Is it Necessary? Is it Proper?,* 50 RUTGERS L. REV. 1045 (1998); Edward J.W. Blatnik, *Note, No RFRA Allowed: The Status of the Religious Freedom Restoration Act's Federal Application in the Wake of City of Boerne v. Flores,* 98 COLUM. L. REV.

Gonzales, the Court analyzed the RFRA, with respect to the violation claimed by the UDV, without regard to analyzing whether the RFRA was constitutional as applied to the federal government.[76] The Court's silence on this issue indicates that it believes the RFRA to be constitutional as applied to the federal government.[77]

Recently courts have cited *Gonzales* for the proposition that the RFRA is constitutional as applied to the Federal Government. For example, in *U.S. v. Winddancer*,[78] the court declared, without much discussion, that the RFRA was constitutional.[79] This allowed the court to focus on whether the case involved a sincere practice of religion and whether the Government proved its compelling interest by using the least restrictive means.[80] The court held that the defendant was unable to show the government violated its Constitutional rights protected by the RFRA.[81]

In a strikingly similar case, *U.S. v. Tawahongva*,[82] the court dismissed a defendant's motion to dismiss based on a RFRA challenge.[83] In that case, the

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1410 (1998); *but see* Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation,* 20 U. ARK. LITTLE ROCK L. REV. 715, 716 (1998) (arguing that RFRA is constitutional as applied to the federal government).

[76] *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 419 (2006). The Court did, however, mention that the RFRA was deemed unconstitutional as applied to the states. *Id*. at 424 n.1.

[77] *See* Ducoat, *supra* note 67; *Statutory Exemptions,* 120 HARV. L. REV. 341 (2006).

[78] 435 F. Supp. 2d 687 (M.D. Tenn. 2006).

[79] *Id*. at 692 n.1.

[80] In *Winddancer*, the defendant was charged with six separate counts relating to having eagle feathers in violation of federal statutes. *Id*. at 689-90. The defendant's defense was based on the RFRA. *Id.* at 690. The defendant claimed he was a Native American and that the Government was infringing upon his religious beliefs. *Id*. The United States does allow Native Americans an exemption for their religious practices in keeping eagle feathers, but the defendant was not part of a recognized Native American tribe. *Id*. The defendant's motion to dismiss his indictment was denied because he was unable to show that the statutes that he was charged with burdened his practice of religion. *Id*. at 701.

[81] *Winddancer*, 435 F. Supp. 2d at 687.

[82] 456 F. Supp. 2d 1120 (D. Ariz. 2006).

[83] *Id*. at 1121. This case is strikingly similar to *U.S. v. Winddancer* because it also involves a Defendant who claimed to be Native American and was charged with possessing Golden Eagles. *Id*. at 1122. Here, the defendant's motion was also denied because he did not have standing to bring such a claim. *Id*. at 1137.

judge did not find it necessary to spend time discussing the constitutionality of the RFRA.[84] Rather, the judge immediately began with the RFRA analysis.[85]

B. Clarifying the *in the person* test

The next important aspect of the *Gonzales* ruling was the clarification of the *in the person* test. In *Gonzales*, the Government argued that the Controlled Substance Act itself is the compelling government interest.[86] The Court rejected that argument, stating that generalized policies are not sufficient to meet the strict scrutiny test mandated by the RFRA.[87] Rather, the Government must prove that the individual claimant's sincere practice of religion is being burdened by a compelling government interest.[88]

The *Gonzales* Court cited previous cases to point out that the Government cannot rely solely on broadly formulated interests justifying general applicability.[89] Rather, the courts must scrutinize the asserted harm and grant exemptions where appropriate.[90] The Court specifically indicated that the Government must show with specific particularity how even strong governmental interests would be harmed by allowing an exemption.[91]

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[84] *Id*.
[85] *Id*. at 1129-30.
[86] *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 426 (2006).
[87] *Id.* at 430-31.
[88] Specifically, "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." *Id.* at 419-20 (internal quotations omitted) (emphasis added).
[89] *Id.* The Court noted that in *Wisconsin v. Yoder*, the Court permitted an exception for Amish school children from compulsory school attendance law. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The *Yoder* Court recognized that the State had a paramount interest in education, but held "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*." *Id.* at 213, 221 (emphasis added).
[90] *Gonzales*, 546 U.S. at 430-31.
[91] The *Yoder* 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*." *Yoder*, 406 U.S. at 236 (emphasis added).

For example, in *Sherbert v. Verner*,[92] the Supreme Court upheld a particular claim by a person who was denied unemployment benefits from the State because he refused to work on Saturdays due to his religious beliefs.[93] The Court specifically explained, however, that it was not announcing a constitutional right to unemployment benefits to all persons who refuse to work due to religious reasons.[94]

A few lower courts have cited *Gonzales* as authority for the proposition that the specific exemptions should be given out by courts if the Government cannot prove that the exemption will cause significant harm to a governmental interest.[95]

For example, in *Redhead v. Conference of the Seventh- Day Adventists*, the court stated that *Gonzales* made it clear that judicially crafted exemptions were to be created where the RFRA is at issue if they are warranted.[96] In *Redhead*, a woman was dismissed from a private school because she was pregnant and not married.[97] The school stated its employment agreement with the woman was based on following the guidelines of the church, which included possible termination if an employee was found to fornicate outside of marriage.[98] The plaintiff filed a Title VII action against the defendant-school.[99] The school argued that Title VII should not apply to them under RFRA.[100] The court, stating that judicial exemptions were recognized in *Gonzales*, found that the ministerial exception[101] to Title VII is applicable because Title VII's broad reach would substantially

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[92] *Sherbert v. Verner*, 374 U.S. 398 (1963).
[93] *Id.*
[94] *Id.* The Court distinguished cases where a person's religious beliefs make them an unproductive member of society. *Id.* at 410; *See also Employment Div., Dept. of Human Res. v. Smith,* 494 U.S. 872, 899.
[95] *See Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211 (E.D.N.Y 2006).
[96] *Id.* at 219 ("[The] RFRA . . . plainly contemplates that *courts* would recognize exceptions--that is how the law works . . . . [The] RFRA makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress.") (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 435 (2006)).
[97] *Redhead*, 440 F. Supp. 2d at 215-16.
[98] *Id.*
[99] *Id.* at 216.
[100] *Id.* at 219-20.
[101] The Court found the ministerial exception did not apply to this case, because the activities were not religious in nature but educational. *Id.* at 221.

burden many religious practices.[102] Therefore, the judicial exemption was analyzed in this RFRA claim because *Gonzales* clearly stated that such exemptions would be applicable to the RFRA analysis.

C. Eliminating the Slippery Slope Argument

Another major impact on the RFRA after the *Gonzales* decision was the elimination of the Government's slippery slope argument. The party that does not wish change to occur often uses the slippery slope argument in constitutional cases.[103] A slippery slope argument is an argument that claims that if a certain exception to a law is granted for a certain party then other future parties may be afforded an exception to the point where the law is worthless.[104] Slippery slope arguments are used quite often in constitutional cases in the United States.[105]

In *Gonzales*, the Court rejected the idea of a slippery slope argument being used by the Government as a reason for not granting a judicial exemption to parties where the Government cannot prove a compelling governmental interest in the least restrictive means.[106]

Other courts have followed *Gonzales*'s lead. For example, in *U.S. v. Friday*,[107] the defendant was charged with taking one Bald Eagle without asking permission from the Secretary of the Interior.[108] The defendant claimed that because he was a Native American, he was exempt from the charges, and even if the Bureau of

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[102] *Id.* at 220.
[103] *See*, *e.g.*, *Gonzales v. O'Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), *Van Orden v. Perry*, 545 U.S. 677 (2005), *Washington v. Glucksberg*, 521 U.S. 702 (1997).
[104] *Id. See also Belt v. Marion Cmty. Unit Sch. Dist.*, 2006 WL 839434 (S.D. Ill. 2006) ("A working definition of the slippery slope is one that covers all situations where decision A, which [one] might find appealing, ends up materially increasing the probability that others will bring about decision B, which [one] oppose[s].") (internal quotations omitted); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).
[105] "Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom." Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 169 (1990), *cited in*, *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 195 n.16 (1999).
[106] *Gonzales*, 546 U.S. at 435.
[107] 2006 WL 3592952 (D. Wyo. Oct. 13, 2006).
[108] *Id.* at *1.

Native Americans did not recognize him, the charges should still be dismissed because he was defending his actions based on the RFRA.[109]

The Court analyzed the RFRA claim and cited *Gonzales*, specifically noting:

> The Government may be able to meet [the compelling interest burden], as the Tenth Circuit considered the protection of bald eagles to be [a compelling interest]. Nonetheless, the RFRA test is not satisfied by *generalized assertions*. Nor is the Supreme Court impressed by "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."[110]

D. Conclusion on the Impact on RFRA

The *Gonzales* ruling has significantly impacted the RFRA and how lower courts will now interpret the RFRA. First, the Court made clear that the RFRA is federally constitutional by ruling on the case without questioning its constitutionality.[111] This was important because certain lower courts questioned the constitutionality of the RFRA.[112]

Second, the Court clarified the *in the person* test.[113] This made clear to the Government and the lower courts that the RFRA is to be applied looking at the particular person's burden, not by looking at the burden on society.[114]

Finally, the Court also made clear that the slippery slope argument would no longer be enough to show a compelling government interest.[115] Therefore, the RFRA is subject to special judicial exemptions if they are warranted, reasonable,

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[109] *Id.* at *1-2.
[110] *Id.* at *9.
[111] *See supra*, Part V.0.
[112] *See supra*, note 75.
[113] *See supra,* Part V.0.
[114] *Id.*
[115] *See supra*, Part V.0.

and the Government has failed to show that granting the exemptions would harm the specific governmental interest being protected.[116]

VI. Impact on the Controlled Substance Act

The *Gonzales* ruling also will have an effect on the Controlled Substance Act. The Controlled Substance Act is a vitally important statute on the war on drugs for the Federal Government.[117] By allowing a religious exemption to a Schedule I drug,[118] the Court may have expanded the ability of many individuals to be exempt from prosecution for drug crimes, especially with the Court making it more difficult for the Government to prove "a compelling government interest."[119]

A. Broader Exemptions for Drug Use

The *Gonzales* Court stated that the Controlled Substance Act and the very strong policies behind the Act were not sufficient, in themselves, to show a compelling government interest.[120] The Court made clear that because Congress chose to exempt Native American use of peyote, which also contains a Schedule I drug, other judicial exemptions could be created.[121] The firm holding that judicial exemptions can be created for the Controlled Substance Act under the RFRA, coupled with the emphasis on the *in the person* test,[122] could profoundly increase the exemptions granted by the courts under the RFRA.

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[116] *Id.*
[117] Controlled Substance Act, 21 U.S.C. § 801 *et. seq*. (2006); *see also Gonzales v. O'Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433-437 (2006) (indicating that the policies implemented by the Controlled Substance Act are important to the national interest of this country).
[118] Schedule I drugs are considered the most dangerous drugs available, with no medical use currently available and a high potential for abuse. 21 U.S.C. § 812(b)(1).
[119] The government's burden of proof is more difficult after *Gonzales* because it can no longer rely on the slippery slope argument and must prove that exemptions to the individual claimants will not harm the governmental interest. *See supra* Part V.0.
[120] *Gonzales*, 546 U.S. at 431-435.
[121] *Id.* at 433-35.
[122] For a discussion of the *in the person* test, s*ee supra* Part V.0.

For example, in *Guam v. Guerrero*,[123] a pre-*Gonzales* case, the Ninth Circuit Court of Appeals disallowed a claim by the defendant that the statute in Guam, criminalizing importation of marijuana, was a burden on his sincere practice of religion.[124] The court rejected the defendant's argument because it believed that importation was not necessary for the defendant to practice his religion.[125] Rather, the court believed the RFRA only protected simple possession because exempting importation would make it harder for Guam to control illegal substances.[126]

Although it is impossible to know for sure, the Ninth Circuit may have been more willing to find for the defendant after reading *Gonzales*. *Gonzales* stressed looking at the *in the person* test and looking at factors relating to the individual's practice of religion.[127] In *Guam*, the Ninth Circuit decided importation was not exempted because it would be difficult for Guam to control the importation and distribution to others on the island.[128] After *Gonzales*, the Ninth Circuit would have been unable to use an argument that Guam would have difficulty in controlling illegal substances if an exemption is made because the *in the person* test would require only looking at the effect on the particular individual claimant.[129]

B. Intensive Fact by Fact Analysis

Another consequence of the *Gonzales* Court broadening the judicial exemptions for courts would be the necessity of additional fact-by-fact analysis on whether a person's claimed sincere practice of religion is truly a sincere practice of religion. For example, in *United States v. Jefferson*,[130] the Court held that the government

[123] 290 F.3d 1210 (9th Cir. 2002).
[124] *Id.* at 1213-14. The Court's analysis first determined that the RFRA was constitutional as applied to Guam. *Id.*
[125] *Id.* at 1223.
[126] *Id.*
[127] *See supra* Part V.0.
[128] *Guam*, 290 F.3d at 1223.
[129] *Id.*; *Gonzales*, 546 U.S. at 433-435.
[130] 175 F. Supp. 2d 1123 (N.D. Ind. 2003), aff'd *United States v. Israel*, 317 F.3d 768 (7th Cir. 2003).

has a compelling government interest under the RFRA to revoke a parolee's right to freedom, where the parolee smokes marijuana while released, even though the drug use is based on a sincere religious belief.[131] The Government was able to show that the compelling government interest existed in part because of the health and welfare of the people.[132]

Interestingly, all the arguments that were sufficient in *Jefferson* to allow for the government to prove its case were the same arguments presented by the Government in *Gonzales*, however the government failed in *Gonzales*.[133]

The Courts will have to make a more detailed analysis of the individual claimant, in addition to determining whether the claimed religious practice is sincere.[134]

C. Conclusion

The *Gonzales* court will cause significant increase in litigation based on the Controlled Substance Act and RFRA claims as defenses. Courts will have to increase their analysis and analyze the specific facts of each into the individual claimants to figure out whether the claims are valid. It may come in the form of

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[131] *Id*.

[132] *Jefferson*, 175 F. Supp. 2d at 1130. The court listed the evidence, stating that it was sufficient to show the government had a compelling interest:

> Specifically, § 801(2) is a Congressional finding stating that "[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." The Government also points out that marijuana is a Schedule I controlled substance under the Act and has been classified as such because of the rationale provided in 21 U.S.C. § 812(b)(1)(a)-(c), that is, that the drug has a high potential for abuse, has no currently accepted medical use, and there is a lack of safety for use of the drug. Finally, the Government notes that 21 U.S.C. § 841 and § 844 prohibit the possession of marijuana in addition to the manufacturing, distribution, and dispensing controlled substances. Thus, the Government's position is that there is a compelling government interest in enforcing all the drug laws in a uniform manner and in regulating the distribution of illegal drugs to protect the health and safety of United States citizens.

Id.

[133] *See Gonzales*, 546 U.S. at 433-34. *But see United States v. Jefferson*, 175 F. Supp. 2d 1123 (N.D.Ind. 2001).

[134] *See United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996); *Guam v. Guerrero*, 290 F.3d 1210 (9th Cir. 2002) *Jefferson*, 175 F. Supp. 2d at 1123, *aff'd*, *United States v. Israel*, 317 F.3d 768 (7th Cir. 2003).

broadening the Controlled Substance Act judicial exemptions, where the courts will have to look at the policy reasons behind allowing such exemptions.[135] It could also come in the form where courts have to do a detailed fact analysis of each individual claimant's situation to determine if they fit within the scope of the RFRA.[136]

VII. Impact on the Government

The *Gonzales* Court's decision will impact the government and federal courts applying the RFRA to individual claimants in a profound way. The decision changes the way the RFRA test is applied, causing a change in the approach the government and federal courts must take to defend and approach RFRA claims made by individual claimants.[137]

A. Impact for the United States Government

The government is always a party in an RFRA claim because the RFRA only allows for "appropriate relief" against the federal government.[138] Although the *Gonzales* decision did directly address damages allowed under the RFRA, the types of damages allowed are important to fully understand the possible impact of the change in application of the RFRA for the government. The term "appropriate relief," as used by Congress, has caused some confusion on the extent of the relief allowed under the Act, whether it is monetary damages or other types of equitable relief.[139] Under the RFRA, the trend by the courts has been to hold that Congress'

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[135] *See supra* Part VI.0.
[136] *See supra* Part VI.0.
[137] *See supra* Part V.0. The *Gonzales* Court clarified the *in the person* test, changing significantly how the government must present evidence to prove a "compelling government interest." *Id. See also infra* Part VII.0.
[138] Controlled Substance Act, 42 U.S.C. § 2000bb-1(c) (2006); *see also Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022 (D.C. Cir. 2006). As originally enacted, the RFRA also applied to state governments but the Court later held the law inapplicable to State governments. *See City of Boerne v. Flores*, 521 U.S. 507, 524-26 (1997). The Court subsequently upheld the law as applied to the Federal Government. *See discussion of Gonzales, supra* Part V.0.
[139] The term "appropriate relief" has been held to waive the Government's sovereign immunity and thereby allowing monetary damages in contexts outside the RFRA. *West v. Gibson,* 527 U.S. 212, 222-23 (1999) (Title VII's reference to "appropriate remedies" contemplates compensatory damages where a statutory cross-reference explicitly authorizes them).

use of appropriate relief in the statute did not waive the government's sovereign immunity.[140]

The *Gonzales* Court's clarification of the *in the person* test will make it significantly harder for the Government to defend against RFRA claims made by individual claimants.[141] After *Gonzales*, the Government cannot simply rely on generalized policy statements to prove that a compelling government interest exists.[142] Rather, the Government must prove that the individual claimant's sincere practice of religion should be burdened to promote the compelling government interest.[143] This will require the Government to investigate and disprove individual claims by claimants, making a defense to an RFRA significantly harder.[144]

For example, in *United States v. Jefferson*,[145] a pre-*Gonzales* case, the government presented almost identical evidence that it presented in *Gonzales* to prove a compelling government interest.[146] In *Jefferson*, the defendant's supervised release was revoked because he smoked marijuana.[147] The Court and Government admitted that he smoked marijuana as part of his sincere practice of

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[140] *Webman*, 441 F.3d at 1026 n.2 (citing *Lepp v. Gonzales,* 2005 WL 1867723, at *8 (N.D. Cal. Aug. 2, 2005); *Pineda-Morales v. De Rosa,* 2005 WL 1607276, at *13 (D.N.J. July 6, 2005); *Jama v. INS,* 343 F. Supp. 2d 338, 372-73 (D.N.J. 2004); *Tinsley,* 952 F. Supp. at 389; *Meyer v. Fed. Bureau of Prisons,* 929 F. Supp. 10, 13-14 (D.D.C. 1996); *cf. Commack Self-Serv. Kosher Meats Inc. v. New York,* 954 F. Supp. 65, 68-70 (E.D.N.Y. 1997); *Rust v. Clarke,* 851 F. Supp. 377, 380-81 (D. Neb. 1994); *see also Mack v. O'Leary,* 80 F.3d 1175, 1177 (7th Cir. 1996) (dictum) (referencing the "appropriate relief" language and mentioning that "there is no indication of congressional intent to abrogate the states' Eleventh Amendment immunity from suit"), *vacated sub nom. O'Leary v. Mack,* 522 U.S. 801 (1997)).

[141] *See supra* Part V.0.

[142] *See Gonzales*, 546 U.S. at 433 (finding that generalized policies are not sufficient to meet the strict scrutiny test mandated by the RFRA).

[143] *Id.* at 429-30.

[144] For a discussion of possible example that the government's burden of proof is more difficult post-*Gonzales*, s*ee infra*, Part VII. B.

[145] 175 F. Supp. 2d 1123 (N.D. Ind. 2003).

[146] *Id*. In both *Gonzales* and *Jefferson*, the Government attempted to prove it had a compelling government interest by presenting evidence of a congressional finding and generalized public policy statements that the illegal importation, manufacture and distribution of controlled substances have a substantial and detrimental effect on the health and general welfare of the United States. *Id*. at 1130; *Gonzales*, 546 U.S. at 432-33. The other evidence presented by the government in both cases is also almost identical. *Id*.

[147] *Jefferson*, 175 F. Supp. 2d. at 1125-26.

religion.[148] Nonetheless the court found the government had a compelling government interest in *Jefferson*.[149] The evidence in *Jefferson* that allowed the government to successfully defend against an RFRA claim was the "broadly formulated interests justifying general applicability"[150] that was specifically rendered insufficient in *Gonzales*.[151]

Jefferson and *Gonzales* suggest the possibility that after *Gonzales*, the burden of proof on the Government has actually increased because it must prove that the compelling government interest does not burden the individualized practice of religion.

Along with an increased burden of proof, the *Gonzales* Court essentially eliminates the use of slippery slope arguments by the Government to help prove a compelling government interest.[152] A slippery slope argument is "one that covers all situations where decision A, which [one] might find appealing, ends up materially increasing the probability that others will bring about decision B, which [one oppose[s]."[153] The party that does not want an exception or change to occur often uses these arguments in constitutional cases.[154] Because the Government is the party that would not want an exception to the RFRA, it would use a slippery slope argument to defend against RFRA actions. However, the *Gonzales* Court took this argument away, making the Government's burden of proof harder.

A. Impact on the Federal Courts

Because the *Gonzales* Court requires a case-by-case analysis under the *in the person* test,[155] courts are put in a more difficult position than before the *Gonzales* decision. For example, in *Multi Denominational Ministry of Cannabis and*

[148] *Id*. at 1126.
[149] *Id*. at 1132.
[150] *See supra* note 83.
[151] *Gonzales*, 546 U.S. 433-34.
[152] *See supra* Part V.0.
[153] *Belt v. Marion Cmty. Unit Sch. Dist.*, 2006 WL 839434 (S.D. Ill. 2006); *see also supra* note 99.
[154] *See Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211 (E.D.N.Y 2006).
[155] *See supra* Part VI.0.

Rastafari, Inc. v. Gonzales,[156] a religious non-profit corporation brought a declaratory judgment action against federal, state and local authorities for confiscating marijuana plants grown on their property.[157] The Government moved to dismiss the action based on a *res judicata*.[158] However, the *res judicata* defense is extinguished if there has been intervening change in law.[159] The Court in *Multi Denominational* stated that an intervening change in the RFRA has occurred due to the *Gonzales* decision, "shifted the legal terrain surrounding [the] plaintiffs' suit."[160] According to the *Multi Denominational* court, the intervening change created by the *Gonzales* decision was the requirement of a case-by-case inquiry, rather than a generalized review.[161]

The court noted that the RFRA "forces courts into the awkward position of assessing the sincerity of a group's religious beliefs and then carving out exceptions to federal statutes in order to accommodate these beliefs."[162] Further, the Court believed

> the stringent standard provided by the RFRA suggests that in delegating to the judicial branch the job of ensuring that federal law accommodates religion, Congress underestimated both the diversity of America's religious practices and the resourcefulness of its practitioners (and their

[156] 474 F. Supp. 2d 1133 (N.D. Cal. 2007).
[157] *Id.* DEA agents and local authorities confiscated thousands of plants from Linda Senti and Charles Lepp's home, husband and wife. Linda and Charles formed the Multi Denominational Ministry of Cannabis and Rastafari and sued under the RFRA, First Amendment Free Exercise Clause and Establishment Clause, the Religious Land Use and Institutionalized Persons Act and the California Compassionate Use Act of 1996. *Id.*
[158] *Id.* at 1142. "*Res judicata* bars re-litigation of all grounds of recovery that were asserted, or could have been asserted, in a previous action between the parties, where the previous action was resolved on the merits." *Tahoe Sierra Pres. Council Inc. v. Tahoe Reg'l Planning Agency,* 322 F.3d 1064, 1078 (9th Cir. 2003). "It is immaterial whether the claims asserted subsequent to the judgment were actually pursued in the action that led to the judgment; rather, the relevant inquiry is whether they could have been brought." *Id.*
[159] *Clifton v. Att'y Gen.,* 997 F.2d 660, 663 (9th Cir. 1993) (citing *State Farm v. Duel,* 324 U.S. 154, 162, (1945)).
[160] *Multi Denominational*, 474 F. Supp. 2d at 1143.
[161] *Id.* at 1145.
[162] *Id.*

attorneys). The present case thus serves as a prelude to the litigation to come.[163]

The concern stated by the *Multi Denominational* court can result is serious problems for courts that are already overworked.[164] One judge has observed the "reality is that today there is a mad rush to the federal courts."[165]

Further, as the Court warns, the diversity of America and the religions practiced by the people of the United States could result in special rules for certain groups of people, leaving the court and law enforcement to make appropriate distinctions with very little guidance.[166] Despite these concerns, the *Multi Denominational* court dismissed the RFRA claims because there complaint failed to make a prima facie case.[167]

VIII. Impact on Religious Groups

A. Increased Judicial Scrutiny on Claimant's Prima Facie Case

The largest impact on the religious groups will be that courts are likely to scrutinize more closely the prima facie showing by a particular claimant before shifting the burden of proof to the government because the *Gonzales* case has made the government's burden much higher.[168] Courts will do this to prevent

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[163] *Id.*
[164] Charles Alan Wright et al., *Jurisdiction and Related Matters* 13 FEDERAL PRACTICE AND PROCEDURE: JURIS. 2d. § 3510 (3d ed. 2006).
[165] *Id*. at n.2. "The federal judicial system is in a state of gridlock as 837 federal trial judges attempt to process the civil actions of a nation of over 200 million inordinately litigious citizens while adjudicating the criminal trials of a nation at war against drugs and violent crime." Williams, *Help Wanted—Federal Judges: Judicial Gridlock; Solving an Immediate Problem and Averting a Future Crisis*, 24 LOY. U. CHI. L.J. 1 (1992).
[166] *See Multi Denominational Ministry of Cannabis and Rastafari, Inc. v. Gonzales*, 474 F. Supp. 2d 1133 (N.D. Cal. 2007).
[167] *Multi Denominational*, 474 F. Supp. 2d at 1146. Specifically, the Court noted that even though the courts have recognized the plaintiff's use of marijuana as the sincere practice of religion, the protection of the RFRA does not extend to uses that are beyond what is needed to practice one's religion. *Id.* at 1144-45. In that case, the plaintiffs had thousands of marijuana plants, which was too excessive to be used for the simple practice of religion. *Id*. at 1146-47. Therefore, the court dismissed the plaintiff's motion. *Id.*
[168] *See supra* Part VII.0.

sham religions from using the RFRA as a defense against actions taken against it by the Government.[169]

Under the RFRA, the claimant must establish, by a preponderance of the evidence, three requirements to state a prima facie case.[170] The three requirements are the governmental action must:

1. substantially burden,
2. a religious belief rather than a philosophy or way of life,
3. which belief is sincerely held by a plaintiff.[171]

The government need only accommodate the exercise of actual religious convictions.[172] Once a plaintiff establishes the three requirements, the burden of proof shifts to the Government to demonstrate that the regulation furthers a compelling government interest in the least restrictive manner.[173]

Often, the regulatory rule or law essentially disallows the practice of the alleged religious belief.[174] Therefore, the substantial belief prong is met with relative ease. Further, whether the belief is sincerely held by the plaintiff can be determined by the trial through testimony and affidavits of the plaintiff.[175] Hence, the prong that courts will often scrutinize the most is whether the alleged belief is religious or a philosophy or way of life.

One court has summarized the factors used to determine whether an alleged practice is, in fact, a religious belief.[176] The factors were compiled from many

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[169] *See, e.g.*, *United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996).
[170] *See Id*. at 1482; *Thiry v. Carlson,* 78 F.3d 1491, 1494 (10th Cir. 1996).
[171] *See Meyers*, 95 F.3d at 1482, *Thiry*, 78 F.3d at 1494.
[172] *Werner v. McCotter,* 49 F.3d 1476, 1479 n.1 (10th Cir. 1995) (citing *Wis. v. Yoder,* 406 U.S. 205, 215-19 (1972); *Thomas v. Review Bd.,* 450 U.S. 707, 713-18 (1981)), *cert. denied,* 515 U.S. 1166 (1995).
[173] *Werner*, 49 F.3d at 1480 n.2 (citing Controlled Substance Act, 42 U.S.C. § 2000bb-1(b) (2006)).
[174] *See, e.g., Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *Meyers*, 95 F.3d at 1475; *United States v. Jefferson,* 175 F. Supp. 2d 1123 (N.D. Ind. 2003).
[175] *See Meyers*, 95 F.3d at 1475.
[176] *United States v. Meyers*, 906 F. Supp. 1494, 1501 (D. Wyo. 1995).

cases.[177] The court summarized the factors used in analyzing an alleged religious belief.[178] Generally, religious organizations exhibit: ultimate ideas,[179] metaphysical beliefs,[180] a moral or ethical system,[181] comprehensiveness of beliefs,[182] and accoutrements of religion.[183] Accoutrements of religion are established by analogy from recognized religions and include: founder, prophet, or teacher, important writings, gathering places, keepers of knowledge, ceremonies and rituals, structure or organization, holidays, diet or fasting, appearance and clothing, and propagation.[184] The courts are quick to point out that no one factor is dispositive and that factors should be seen as criteria, meaning if they are minimally satisfied, the practice should be considered religious.[185]

While the courts often state that they are to be deferential to religious practices,[186] the *Gonzales* decision will likely heighten the court's analysis and reduce the court's deference to the religious belief claims.

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[177] *Meyers*, 95 F.3d at 1482 n.2 (citing *Africa v. Pa.,* 662 F.2d 1025 (3d Cir. 1981), *cert. denied,* 456 U.S. 908 (1982); *Malnak v. Yogi,* 592 F.2d 197 (3d Cir. 1979); *United States v. Sun Myung Moon,* 718 F.2d 1210 (2d Cir. 1983), *cert. denied,* 466 U.S. 971 (1984); *Founding Church of Scientology v. United States,* 409 F.2d 1146 (D.C. Cir.), *cert. denied,* 396 U.S. 963 (1969); *Wash. Ethical Soc. v. Dist. of Columbia,* 249 F.2d 127 (D.C. Cir. 1957); *United States v. Kauten,* 133 F.2d 703 (2d Cir. 1943); *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81 (E.D.N.Y. 1987); *Jacques v. Hilton,* 569 F. Supp. 730 (D.N.J. 1983), *aff'd,* 738 F.2d 422 (3d Cir. 1984); *Church of the Chosen People v. United States,* 548 F. Supp. 1247 (D. Minn. 1982); *Womens Services v. Thone,* 483 F. Supp. 1022 (D. Neb. 1979), *aff'd,* 636 F.2d 206 (8th Cir. 1980), *vacated,* 452 U.S. 911 (1981); *Stevens v. Berger,* 428 F. Supp. 896 (E.D.N.Y. 1977); *Remmers v. Brewer,* 361 F. Supp. 537 (S.D. Iowa 1973), *aff'd,* 494 F.2d 1277, *cert. denied,* 419 U.S. 1012 (1974); *United States v. Kuch,* 288 F. Supp. 439 (D.D.C. 1968); *Fellowship of Humanity v. Alameda* County, 315 P.2d 394 (Cal. App. 1957)).

[178] *Meyers*, 95 F.3d at 1482.

[179] *Id.* at 1483. Religious ideas generally address issues about the fundamental questions of life, purpose, and death. They could also include matters such as a man's sense of being, purpose of life, and cosmological matters. *Id*.

[180] *Id.* Religious beliefs are often metaphysical, meaning they often address reality, which transcends the physical or immediate apparent world. *Id*.

[181] *Id.* Religious beliefs usually proscribe a way of acting or a way of life. They describe things as right and wrong or good and evil. *Id*.

[182] *Id.* Generally, religious beliefs are not confined to a single teaching or one question. *Id*.

[183] *Id.*

[184] *Id.* Most religions have these characteristics and they are indicative of whether an alleged religious belief is in fact sincere. *Id*.

[185] *United States v. Meyers*, 906 F. Supp. 1494, 1503 (D. Wyo. 1995).

[186] *See supra* note 179.

B. Increase in Religious Freedom

The *Gonzales* decision will likely have some impact on increasing the free exercise of religion in the United States. As of 2004, there were an estimated 1200 different religions practiced in the United States.[187] Further, new religions are continuously introduced into America, both through additions of never before practiced in the United States and variations on previously established religions.[188] These religions will obviously have their own unique practices, rituals and methodologies that may conflict with current federal regulations or law.[189] Because the Court has now clarified the *in the person* test,[190] by requiring the Government to show more than just generalized assertions of policy or Congressional findings to prove a compelling government interest,[191] minority religious practices are more likely to succeed in RFRA litigation.[192]

The minority religions will succeed more often because they will affect a relatively small amount of people and will allow courts to put limits on conditions on the use of the alleged wrongful activity.[193] For example, in *Gonzales*, the district court granted UDV's injunction but imposed conditions.

> The injunction requires the church to import the tea pursuant to federal permits, to restrict control over the tea to persons of church authority, and to warn particularly susceptible UDV members of the dangers of *hoasca* . . . . The injunction also provides that if [the Government] believe[s] that evidence exists that *hoasca* has negatively affected the health of UDV members, or that a shipment of *hoasca* contain[s] particularly dangerous levels of DMT, [the Government] may apply to the Court for an expedited determination of whether the evidence

[187] James E. Beattie Jr., *Taking Liberalism and Religious Liberty Seriously: Shifting Our Notion of Toleration from Locke to Mill*, 43 CATH. LAW. 367, 408 (2004).
[188] Samuel L. Levine, *Toward a Religious Minority Voice: A Look at Free Exercise Law Through A Religious Minority Perspective*, 5 WM & MARY BILL RTS. J. 153, 160 (1996).
[189] *See, e.g., Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).
[190] *See supra* Part V.0.
[191] *Id.*
[192] *See Gonzales*, 546 U.S. 418 (2006).
[193] *Id.*

> warrants suspension or revocation of [the UDV's authority to use *hoasca*].[194]

These conditional injunctions will make it more likely that minority religions will be able to practice their religions without government interference.

IX. Conclusion

The *Gonzales* decision will impact the RFRA, the Controlled Substance Act, the government and religious organizations and groups in many ways that have yet to be seen through case law.[195] Although the decision is still young at the time of this writing (less than one year old), the case has been cited by courts a number of times as precedent.[196]

This paper first introduced the case and described the factual and procedural background of the *Gonzales* case.[197] Next the paper discussed the background of the RFRA and Controlled Substance Act.[198] Specifically, the RFRA had an interesting road to inception because of the interplay between the Supreme Court and Congress leading up to and following the enactment of the RFRA.[199]

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[194] O *Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft,* 282 F. Supp. 2d 1236, 1252 (D.N.M. 2002).
[195] *See supra* Part V-VIII.
[196] *See, e.g., Webman v. Fed. Buerua of Prisons*, 441 F.3d 1022 (D.C. Cir. 2006); *Borzych v. Frank*, 439 F.3d 388 (7th Cir. 2006); *United States v. Holmes*, 2007 WL 529830 (E.D. Cal. 2007); *Multi Denominational Ministry of Cannabis v. Gonzales*, 2007 WL 404788 (N.D. Cal. 2007); *United States v. Friday*, 2006 WL 3592952 (D. Wyo. 2006); *Bilal v. Lehman*, 2006 WL 3626781 (W.D. Wash. 2006); *United States v. Tawahongva*, 456 F. Supp. 2d 1120 (D. Ariz. 2006*); Redhead v. Conference of Seventh Day Adventists*, 440 F. Supp. 2d 211 (E.D.N.Y. 2006); *Loop v. United States*, 2006 WL 1851140 (D. Minn. 2006); *United States v. Winddancer*, 435 F. Supp. 2d 687 (M.D. Tenn. 2006).
[197] *See supra* Part II. In *Gonzales*, the court decided whether a small church could, under the RFRA, practice their religion despite breaking the Controlled Substance Act. *Gonzales*, 546 U.S. 418 (2006).
[198] *See supra* Part III, IV.
[199] *See supra* Part III. The RFRA was enacted in response to *Employment Div. v. Smith*, 494 U.S. 872 (1990), where the Court upheld a generally applicable law that burdened the use of sacramental peyote during the sincere practice of religion. *Id*. The RFRA reversed this ruling by requiring the government to show a compelling government interest. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb – 2000bb-3 (2006). Subsequently, the Supreme Court held the RFRA inapplicable to the states because the law reached beyond Congress' Section 5 powers of the 14th Amendment. *City of Boerne v. Flores*, 521 U.S. 507, 524-26 (1997).

The paper then discussed the impact of the ruling on the RFRA. The RFRA was impacted three important ways. First, the ruling clarified the constitutionality of the RFRA.[200] Previously, the Court had held the RFRA unconstitutional as applied to the states but left open the constitutionality of the RFRA as applied to the federal government.[201] The *Gonzales* Court did not discuss whether the RFRA is constitutional as applied to the federal government but its analysis under that statute in the case suggests that the Act is constitutional as applied to the federal government.[202] Second, the *Gonzales* Court clarified the *in the person* test.[203] The Court made clear that generalized policy statements are not sufficient for the Government to prove a compelling government interest.[204] Rather, the Government must prove that the individual claimant's sincere practice of religion should be burdened due to the compelling government interest.[205] Finally, the ruling also eliminated the use of any slippery slope argument by the Government to help prove a compelling government interest.[206]

Next, the paper discussed the impact of the ruling on the Controlled Substance Act.[207] First, because judicially created exception under the RFRA can be implemented, it is likely that the number of exemptions for the Controlled Substance Act will increase, especially because the new *in the person* test requires a more individualized analysis.[208] The paper also discussed how a more fact by fact or case by case analysis will occur in the courts due to the more individualized facts being asserted at trial and the possibly of sham defenses by groups or individuals that claim to be religious but in fact are just drug users.[209]

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[200] *See supra* Part V.0.
[201] *See supra* n.199; *Boerne*, 521 U.S. at 524-26.
[202] *See* discussion of *Gonzales supra* (making no mention that RFRA is unconstitutional but analyzing the claims of the claimant under the RFRA).
[203] *See supra* Part V.0.
[204] *Id*.
[205] *Id*.
[206] *See supra* Part V.0.
[207] *See supra* Part VI.0.
[208] *Id*.
[209] *See supra* Part VI.0.

Next, the impact on the government was discussed. The United States Government will find it harder to defend claims under the RFRA because it can no longer rely on generalized policy statements or congressional findings.[210] Rather, the Government must "delve into the facts" of each case and show that it has a compelling government interest to restrict the person's practice of religion.[211] Further, because of the case-by-case approach, there will be an increase in the number of cases filed and litigated throughout the United States in the federal courts, burdening them with further litigation.[212]

Finally, the paper discussed the impact of the *Gonzales* decision on religious groups in the United States.[213] The court will more closely scrutinize whether an alleged practice of religion is in fact sincere to prevent fraud on the courts and misuse of the RFRA.[214] The reason for the increased scrutiny will be because it is now more difficult for the government to prove a compelling government interest.[215] Second, the ruling will likely increase the religious freedom in this country by allowing the many new religions and variations of religions to practice their religion without the government substantially burdening their practice.[216]

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[210] *See supra* Part VII.0.
[211] *Id.*
[212] *See supra* Part VII.0.
[213] *See supra* Part VIII.
[214] *Id.*
[215] *Id.*
[216] *See supra* Part VIII.0.