

Guide to
**RFRA and
Best Practices**
for Psychedelic Plant
Medicine Churches



chacruna
Institute for Psychedelic Plant Medicines



**Council for
the Protection
of Sacred Plants**

The Chacruna Institute for Psychedelic Plant Medicines is 501(c)(3) non-profit organization based in Northern California. It provides public education about psychedelic plant medicines and promotes a bridge between the ceremonial use of sacred plants and psychedelic science. As psychedelics go mainstream, Chacruna curates critical conversations about controversial and marginalized topics in the space. Chacruna also promotes access, inclusion, and diversity by uplifting the voices of women, queer people, Indigenous peoples, people of color, and the Global South in the field of psychedelic science.

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Summary:

This Guide gives churches using psychedelic plant medicines as sacrament in religious exercise in the United States the knowledge to understand the framework through which protection is offered under the Religious Freedom Restoration Act (RFRA). RFRA rights may be a claim or defense when burdened by the government and may become an affirmative legal right with an exemption from the Controlled Substances Act. The Guide also explains incorporation, tax-exempt status, pre-screening procedures, limiting liability, and other aspects of operation in this context. While RFRA automatically provides protection for sincere religious exercise, not every church using psychedelic plant medicines will be exempt from criminal prosecution solely on the basis of religious use. There is a balancing test under RFRA that will be applied where the whole of a church's religious beliefs and spiritual practices will be scrutinized – but scrutiny will be applied to the government's interests in prohibiting this use, as well. By understanding this RFRA test, the law, government criteria, and the history of previous court and government agency decisions and analysis, as detailed by this Guide, a church may make informed decisions in how it articulates its sincere beliefs and operates.

Keywords:

Religious Freedom, Sacred Plants, Psychedelic Churches, Plant Medicines, Best Practices, Harm Reduction, Ayahuasca

Disclaimer:

This Guide is for informational and educational purposes only and does not give legal advice nor legal opinion, and its existence, distribution, and transmittal does not intend to, shall not, and will not be deemed to create an attorney-client relationship. Any individual, religious organization, or practitioner should not act or rely on any information contained in this Guide without consulting with an attorney specializing in the laws and concepts discussed below to establish procedures and create legal documents tailored to their specific circumstances and in order to ensure compliance with applicable federal and state laws. Finally, this Guide does not encourage nor advise on the illegal use of any substances.

REVIEWS OF THE GUIDE TO RFRA AND BEST PRACTICES FOR PSYCHEDELIC PLANT MEDICINE CHURCHES

This Guide is written to simply explain the laws and basic information needed by a psychedelic plant medicine church to make informed decisions and understand its rights and risks by operating in the United States. We believe that information is power, and it is this Guide's intent to empower psychedelic plant medicine churches with sincerely held religious beliefs. An understanding of the law and legal decisions relating to RFRA gives crucial context to navigating the right to religious exercise. Our hope is to create a comprehensive and digestible resource with relevant legal analysis and operational considerations for both attorneys and religious practitioners.

Allison Hoots, Esq., Chacruna's Council for the Protection of Sacred Plants and Of Counsel, Plant Medicine Law Group LLP

There are hundreds of sincere and legitimate plant medicine communities operating in the United States living under uncertain conditions. The Religious Freedom Restoration Act (RFRA) provides no definition for "religion," thus courts have been left to develop their own criteria. This Guide teaches communities to learn about their rights, and how to better protect themselves. When we talk about religious "liberty," it does not mean we are aligned with libertarian views. Far from these conservative and formal meanings, we are interested in "freedom" in a broad sense, meaning the freedom to experience the full range of our potential, and the liberty to engage in psychedelic culture and to explore its possibilities within the social realm. It's also important to note that when we evoke "liberty," we are also talking about "responsibilities and obligations." If we have rights, we also have obligations! This Guide provides instructions on how to better follow legal requirements and protocols, including everything from the big picture to small details. It is a must-read for every single sincere practitioner in this country.

Bia Labate, Ph.D., Executive Director, Chacruna Institute for Psychedelic Plant Medicines

The psychedelic renaissance is expanding rapidly, but the law moves slowly. In the time it will take to fully decriminalize and ultimately legalize plant medicine, practitioners are at risk due to outdated, limited, and ignorant laws that criminalize natural medicines or sacraments. Chacruna's Guide to RFRA and Best Practices for Psychedelic Plant Medicine Churches is essential reading for those engaged in the spiritual use of entheogens. This Guide provides a primer for plant sacrament churches that will enrich their practices, save money by supplementing legal advice with educational information, and ultimately provide potential meaningful protection under state and federal laws. In my law practice, I see many people operating under urban myths around plant sacrament legality. This Guide provides a clear presentation of the actual legal issues around plant sacrament use. Anyone engaged in this work should read this Guide.

Sean McAllister, Esq., Chacruna's Board of Directors

This Guide provides a broad and in-depth overview that people can use to figure out how to best organize themselves and document their bona fides. It's also a good tool that Chacruna can use to engage people about these issues and refer them to informed lawyers when appropriate. It underscores Chacruna's commitment to empowering the wellbeing of the community.

Robert Heffernan, Program Director, Chacruna's Council for the Protection of Sacred Plants

It is essential for the safe and free religious practice of psychedelic plant medicine churches that they have access to reliable information on best practices for operating their communities as legal organizations in the United States. The Guide is an educational deep-dive into the legal case law that can show churches what they already are doing well, and what blind spots they may have about their organizational structure and operations.

Brian Anderson, M.D., Chacruna's Board of Directors

In the way that Chacruna consistently does everything, this Guide is a service to the community— practitioners and their counsel, alike—borne out of an authentic commitment to the medicine path, to reciprocity, and to healing.

Nicole Howell, Esq., Clark Howell LLP

Policy is only as good as the public's understanding of it. While the Religious Freedom and Restoration Act (RFRA) has existed since 1993, the emergence of the psychedelic renaissance in the last few years has renewed many citizens' questions around the law. Chacruna is truly doing a public service by providing the public with a clear and concise explanation of RFRA and its intricacies in the specific context of plant medicine churches. Covering topics that range from forming a church, opening a bank account, and seeking tax exempt status, this comprehensive Guide synthesizes the law into a roadmap for those interested in exploring plant medicine churches. I believe this document will not only allow citizens a deeper understanding of what this law means, but also provides advocates like myself a starting point to have discussions with our federal lawmakers about how we can improve RFRA to better serve US citizens.

Melissa Lavasani, Founder and Executive Director, Plant Medicine Coalition

This is a great educational and practical asset covering a topic of importance to many! The accessible guide format makes it a perfect fit with Chacruna's library of content that engages with complex topics in a digestible way for all those interested.

Leslie Booher, JD, MBA, Legal & Policy Associate, Multidisciplinary Association for Psychedelic Studies (MAPS)

Anyone interested in psychedelics policy will benefit from reading Chacruna's Guide. As more people turn to psychedelics to access mystical experiences, interest in religious liberty and exemptions to the federal Controlled Substances Act has increased. The Guide is a timely resource for students, attorneys, scholars, activists, and religious institutions. It clearly explains RFRA, how courts have interpreted the law, and how religious groups have organized themselves and their beliefs to best protect their members.

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Introduction

When the United States was formed, one of the foundational premises was the right encapsulated in the First Amendment to the U.S. Constitution: The Freedom of Religion. This freedom intended to prohibit government interference with religious liberty and was so important to the founders that it was the first guaranteed right provided in the Bill of Rights. The “Free Exercise Clause” states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...” So, not only did the First Amendment strictly preclude the government from promoting one religion over another, but it also prohibits the government from burdening religion and the exercise of religious beliefs.

But what is a religion? And aren’t there laws that do burden what individuals sincerely believe is the exercise of their religious beliefs? In the case of churches that use certain controlled substances in prayer, their sincerely held beliefs are curtailed by laws, such as the federal Controlled Substances Act (CSA) and its state analogs. Specifically, certain churches use psychedelic plant medicine—which not only allow, but are *necessary*, to commune and connect with the divine and have long and ancient lineages of use in spiritual rituals and contexts—that are substantially controlled, and effectively outlawed, by the CSA.

In terms of how to discuss psychoactive substances used in spiritual rituals, there is a history of writing using a diversity of terms, such as “entheogens,” “sacred plants,” “hallucinogens,” “teacher plants,” “psychedelic plant medicines,” and so on. All these terms have advantages and disadvantages, proponents and opponents. This Guide will be using “psychedelic plant medicine,” in alignment with the terminology of Chacruna. Churches that pray with psychedelic plant medicines¹ use them as sacraments, such as the Brazilian ayahuasca religions using Daime or Hoasca/Vegetal (ayahuasca). Although the term “medicine” is a commonplace, accepted term for the traditional and historical spiritual use of a psychoactive substance, plant medicine churches do not mean to imply the use is solely medicinal or therapeutic. That said, churches of every religion have pointed to the healing outcomes—physical and emotional—of participation in spiritual rituals and religious experiences.

Despite established lineages of religious rituals that use sacred plant medicines to connect with the divine, the U.S. government’s laws burden the free exercise of religion involving any such substances on the CSA: The use of psychedelic plant medicines can be the basis for criminal charges, and plant medicines are seized by governmental authorities and destroyed—which is sacrilegious to those with sincerely held beliefs. Even after it became clear through court decisions that U.S. laws did not sufficiently protect religious beliefs from otherwise generally applicable laws, and Congress passed the Religious Freedom Restoration Act (RFRA) in 1993, there remains substantial gray areas in the law.

¹ Note that cannabis, which is also used in spiritual ritual, is not strictly a psychedelic.

As a result, psychedelic plant medicine churches have largely remained underground because of the fear of prosecution under the CSA and its state analogs. The conflict between the prohibition of psychedelic plant medicines and RFRA—despite its proffered protection of the right to religious exercise—forces religious groups engaged in the use of plant medicines to make difficult choices and, if choosing to exercise their beliefs with controlled substances, they may be subject to criminal charges. There have, in fact, been seizures of sacrament and related criminal charges,² and those occurrences have increased.³

This Guide identifies the issues that churches and religious practitioners using psychedelic plant medicines may encounter and suggests best practices consistent with RFRA and related cases. This Guide is separated into two parts: Part I provides legal background to contextualize the best practices, such as laws and precedent, related to plant medicine churches; and Part II provides pragmatic and practical information regarding the operational processes, policies, and procedures for a plant medicine church to consider. However, psychedelic plant medicine churches operate in a legal gray area regarding their rights and potential liability or prosecution.

Ultimately, a person or entity exercising sincere religious beliefs has protection under RFRA *without* incorporating or engaging in best practices, but no psychedelic plant medicine church is immune from prosecution without an explicit exemption. Nevertheless, this Guide hopes to set out information that a plant medicine church with sincerely held religious beliefs can use to learn the framework through which their use of controlled substances will be analyzed, how to operate in a manner that may protect the spiritual purpose and the congregants of their church, and to be prepared to defend their freedom of religious exercise.

To be clear, this Guide is not providing legal advice, as any legal decisions and documents of a church in terms of incorporation, operation, medical screening form, ceremony participation waiver, procedures, etc., must be informed by its specific psychedelic plant medicine and practices, as well as applicable laws. This Guide also strongly discourages any group that does not have sincere religious beliefs and an experienced leader from considering that incorporating as a church and following best practices will allow circumvention of the CSA or other laws.

Chacruna Institute and Chacruna’s Council for the Protection of Sacred Plants has committed to providing information and support on the religious use of psychedelic plant medicines. However, for every aspect of a plant medicine church’s operation, it is highly recommended that a church

² See Chacruna Institute for Psychedelic Plant Medicines. (2018, October 6). Breaking news: The first two ayahuasca convictions in the United States. *Chacruna Institute for Psychedelic Plant Medicines*. <https://chacruna.net/breaking-news-the-first-two-ayahuasca-convictions-united-states/>

³ See McAllister, S. (2021, June 25). Ayahuasca FOIA requests reveal increased ayahuasca seizures, lack of due process and government secrecy. *Chacruna Institute for Psychedelic Plant Medicines*. https://chacruna.net/ayahuasca_religious_freedom_information_act_church_of_the_eagle_and_condor/

consults with an attorney who has an understanding of these issues and the laws of the state where the church will be incorporated and operating.

The Chacruna Institute recognizes there are many paradoxes in the law involving psychedelics. We advocate for the legalization and legitimization of non-religious uses of psychedelic plant medicines and other psychedelics, and we hope this Guide will help inform sincere religious practitioners of the protection available under existing laws.

This Guide refrains from delving into the complexities but crucial considerations of cultural appropriation and non-Indigenous churches' religious use of sacred plants. Chacruna defers to the voices of Indigenous people in general; in the case of peyote, please consider the National Council of Native American Churches and the Indigenous Peyote Conservation Initiative statements⁴. Any church using sacred plant medicines should the implications of such use and if there is an opportunity for reciprocity. Chacruna points towards our publications on such issues and the ability to donate to Chacruna's [Indigenous Reciprocity Initiative of the Americas](#).

⁴ See Indigenous Peyote Conservation Initiative (IPCI) Communication Committee. (2021, May 10). Open letter to the psychedelic movement regarding peyote in policy efforts and how to be an ally to Indigenous peoples of North America. *Chacruna Institute for Psychedelic Plant Medicines*. https://chacruna.net/ipci_open_letter Psychedelic movement peyote decriminalization/. See, also, National Council of Native American Churches and the Indigenous Peyote Conservation Initiative (IPCI). (2020, March 30). Native American statement regarding decriminalization of peyote. Chacruna Institute for Psychedelic Plant Medicines. <https://chacruna.net/native-american-statement-regarding-decriminalization-of-peyote/>



PART I

I. Definition of a religion and church

As will be discussed, religious exercise is protected by certain laws. Generally speaking, a religion is a particular set of spiritual beliefs and practices. Certain belief systems and practices are not religious, but secular; such as scientific inquiry, a philosophy, a way of life, or a cultural movement.

Religion is an ambiguous concept and uniquely understood and practiced. As a result, the laws that are intended to protect the exercise of religion intentionally avoid a rigid definition of religion. In fact, even RFRA does not define religion or church, which complicates analysis under the law despite its specific enactment to protect the freedom of religious exercise. Therefore, courts and governmental agencies have been required to create ways to evaluate religion and whether religious beliefs are sincerely held.

As a quick primer for those reading this Guide who are not attorneys, it is helpful to understand the difference between federal and state courts as well as the types of courts. Put simply, federal courts interpret federal laws and apply them to the facts of a case,⁵ whereas state courts interpret and apply state laws. The federal courts include:

- U.S. District Courts: the lowest courts that are called trial courts and hear the cases of the 94 judicial districts;
- U.S. Courts of Appeals, where an appeal of a federal district court decision would be heard – with the district courts separated into 13 circuits (for example, the Tenth Circuit Court has appellate jurisdiction over Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming); and
- U.S. Supreme Court, where both federal and state trial and appellate courts’ decisions are reviewed after a selection process.

State courts also have trial, appellate, and a highest court (which may or may not have the word “supreme” in its name, depending on the state). When a court makes a final decision, it creates a “holding” that is then referred to as “case law” and that all courts within that court system and jurisdiction must apply. For example, if the Tenth Circuit Court creates case law on a matter, any other trial or appellate cases in the same circuit with similar facts must use that holding to make its decision.

⁵ This is an oversimplification, as there are other cases that federal courts will hear, but they are irrelevant for the purpose of this Guide.

Case law has established that courts must engage in an individualized analysis of each set of beliefs and practices when making the determination whether beliefs and practices are religious. To do so, courts have adopted criteria to define religion, such as the test identified in *United States v. Meyers*,⁶ where the Tenth Circuit Court applied a five-factor test:⁷ (i) ultimate ideas; (ii) metaphysical beliefs; (iii) moral and ethical systems; (iv) comprehensiveness of beliefs; and (v) external signs or accouterments of religion.⁸ Although the *Meyers* court admitted that “the threshold for establishing the religious nature of [an individual’s] beliefs is low,” a set of beliefs cannot be solely “secular” in nature to constitute a religion.⁹ That said, case law is evolving, and courts have stated that the determination of religion and sincerity must be assessed with “judicial shyness.”¹⁰ In fact, aside from the threshold assessment of whether such beliefs are solely a ploy to avoid compliance with the law, the U.S. Supreme court has stated that the government has no role in questioning religious beliefs:

[I]t is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our “narrow function ... in this context is to determine” whether the line drawn reflects “an honest conviction.”¹¹

Separately, the Internal Revenue Service (IRS), the U.S. governmental agency that administers federal tax laws, has identified characteristics for evaluating what a “church” is under the Internal Revenue Code (IRC), but, again, religion is not specifically defined. The IRS uses these characteristics that are generally attributed to mainstream religions and used to evaluate if the IRS should approve an application for tax-exempt status as a church. They include:

- Distinct legal existence (e.g., a nonprofit corporation with a religious purpose, such as a church)
- Recognized creed and form of worship
- Definite and distinct ecclesiastical government
- Formal code of doctrine and discipline
- Distinct religious history
- Membership not associated with any other church or denomination
- Organization of ordained ministers
- Ordained ministers selected after completing prescribed courses of study
- Literature of its own
- Established places of worship
- Regular congregations

⁶ 95 F.3d 1475 (10th Cir. 1996)

⁷ Adding two more factors to the three-part test in *Africa v. Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981).

⁸ These factors will be explained more thoroughly later in this Guide.

⁹ *Meyers*, 95 F.3d at 1482-84.

¹⁰ *Tagore v. United States*, 735 F.3d 324, 328 (5th Cir. 2013) (quoting *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 262 (5th Cir.2010)).

¹¹ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (citing *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981))

- Regular religious services
- Sunday schools for the religious instruction of the young
- Schools for the preparation of its members

As noted, the characteristics above are likely based on mainstream religions' religious beliefs, practices, jargon, and structures; evaluating a church based on its "form of worship," "ordained ministers," and "regular religious services." To be clear, not all factors must be met for the IRS to determine the existence of a church and issue a favorable determination letter with respect to tax-exempt status. However, for sacred plant medicine churches, the term "church"—and some of the IRS' jargon or expectations of a religion—may be unappealing or frustrating, because the analysis remains firmly within a framework consistent with mainstream religions.

Ultimately, however, the IRS characteristics allow for a broad definition of "church." So, while a psychedelic plant medicine church may practice its religion differently than a mainstream religion, its religious beliefs and practices can fit the enumerated characteristics of a "church" and demonstrate sincere religious exercise.¹²

Although the jargon used to frame religion is not important, it is critical that any psychedelic plant medicine church be able to describe its beliefs and practices within the court-defined and IRS frameworks for interactions with governmental agencies and the court system and for tax purposes.

¹² This Guide recognizes that a church is not only the place of worship where religious groups gather to (with no lack of a better word: pray, perform rituals, have ceremonies) worship, but also the religious community itself. Although places of worship and religious communities have different names based on the particular religion, this Guide will use the term "church" for the place of worship and the community of a plant medicine church.



II. What is the Religious Freedom Restoration Act (RFRA)?

Congress passed RFRA in 1993 to reestablish¹³ the strict scrutiny test¹⁴—the highest level of scrutiny that courts apply—to evaluate whether the government met its legal burden to justify an infringement on a person’s religious freedom. RFRA was intended to protect individuals of all faiths when any law—whether explicit or in effect—burdens religious exercise. During the legislation signing ceremony, President Clinton stated that RFRA “reaffirms [the] 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.”¹⁵

Under RFRA, consistent with strict scrutiny, the government shall not substantially burden the exercise of religion, even if the burden results from a rule of general applicability, except when the law is in the furtherance of a compelling governmental interest and is the least restrictive means of doing so. A rule of general applicability means it is a law that is neutral and indiscriminate, not explicitly targeting religious beliefs or activities. This means that the government *can* burden religious exercise, but only in this limited way.

In other words, as explained by the U.S. Supreme Court:

While the freedom to believe and profess whatever religious doctrines one desires is absolute, the freedom to act cannot be. “Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection.”¹⁶

¹³ RFRA was in response to a U.S. Supreme Court case that removed the ability to dispute a law that did not explicitly limit the exercise of religion. See 42 U.S.C. § 2000bb. (“In *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion”).

¹⁴ RFRA refers to this test as the “compelling interest test”. 42 U.S.C. § 2000bb(1). (“The purposes of this chapter are- [1] to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 [1963] and *Wisconsin v. Yoder*, 406 U.S. 205 [1972] 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.”)

¹⁵ Remarks on Signing the Religious Freedom Restoration Act of 1993, II Pub. Papers 2000 (Nov. 16, 1993).

¹⁶ *Meyers*, 95 F.3d at 1480 (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 [1940]) (citations omitted).

RFRA states that its protection extends to “persons,”¹⁷ but courts have also established that RFRA can be invoked by nonprofit corporations¹⁸ and for-profit, closely held corporations.¹⁹

There are three methods to protect the right of religious exercise pursuant to RFRA:

1. Filing a claim under RFRA in a judicial proceeding alleging that religious exercise has been burdened by the government;
2. Raising a defense under RFRA in a judicial proceeding that religious exercise justifies any act committed that allegedly violates and is burdened by the government’s laws; or
3. Filing an application for religious exemption from the CSA through the Drug Enforcement Agency (DEA).

With respect to the first and second approaches, a person or entity has their right to protection under RFRA evaluated by a court, whereas, in the third approach, this right is evaluated by the DEA. Only in a court case is it certain that RFRA protections will be analyzed using strict scrutiny; however, there first must be a substantial burden to file claim or raise a defense.

With respect to the third approach, the DEA has created an administrative process, where a plant medicine church that is using Schedule I substances as sacrament can apply for an exemption from the CSA without demonstrating substantial burden. Since many sacred plant medicines are Schedule I substances under the CSA, it seems that it is presumed that the law is burdensome. In 2009, the DEA published guidance that allows parties to petition the DEA for an exemption from the CSA (the “2009 DEA Exemption Guidance”).²⁰ The DEA is a federal law enforcement agency under the U.S. Department of Justice that enforces the CSA. It should be noted that the 2009 DEA Exemption Guidance refers to the RFRA strict scrutiny test but has not clearly applied this test in its determinations.²¹

A. Strict scrutiny test under RFRA

Under RFRA, to succeed with a claim, defense, or application for exemption, a plant medicine church would need to demonstrate that the application of the CSA’s prohibition on the use of its sacrament would: (i) substantially burden; (ii) their religious exercise; (iii) based on sincerely

¹⁷ 42 U.S.C. § 2000bb(2).

¹⁸ See *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006).

¹⁹ See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

²⁰ 2009 DEA Guidance Regarding Petitions for Religious Exemption from the Controlled Substances Act Pursuant to the Religious Freedom Restoration Act. [https://www.deadiversion.usdoj.gov/GDP/\(DEA-DC-5\)%20Guidance%20Regarding%20Petitions%20for%20Religious%20Exemptions.pdf](https://www.deadiversion.usdoj.gov/GDP/(DEA-DC-5)%20Guidance%20Regarding%20Petitions%20for%20Religious%20Exemptions.pdf)

(“In recent years, the Drug Enforcement Administration [DEA] has seen an increase in requests from parties requesting religious exemptions from the Controlled Substances Act [CSA] to permit the use of controlled substances... The guidelines that follow are an interim measure intended to provide guidance to parties who wish to petition for a religious exemption to the CSA.”)

²¹ See DEA Final Determination letter on Soul Quest’s exemption petition (2021). https://www.bialabate.net/wp-content/uploads/2021/06/DEA_Denial_Soul_Quest_Exemption_2021.pdf (where there is no discussion of least restrictive means).

held beliefs,²² and that the prohibition on their sacrament under the CSA does not further compelling governmental interests by the least restrictive means.²³

1. What does “substantially burden” mean?

A substantial burden analysis will explore (i) whether the restricted activity is central or important to the religious exercise, and (ii) whether there are feasible alternatives that would allow the religious exercise to continue, and therefore the burden on religious exercise would only be inconsequential.

To “substantially burden” means that the law or governmental action interferes with the exercise of religion in such a way that coerces an individual to act contrary to their religious beliefs due to the risk of a governmental action.²⁴ For example, the threat of criminal prosecution or seizure of sacramental ayahuasca would constitute substantial burden. In other words, “RFRA supplies a rule of decision in cases where a person finds himself in the unfortunate position of needing to choose between following his faith and following the law.”²⁵

Courts have explained that, to demonstrate this conflict, an individual or church will need to make a “showing that the affected practice is either central or important in their religious scheme,” and that there are no feasible alternatives to engage in the religious practice affected by the statute.²⁶ For example, the district court found this element of centrality was met in the Santo Daime case, where the ceremonial use of the Daime sacramental plant medicine, ayahuasca, was essential to the Santo Daime religion. The court explained:

To paraphrase the California Supreme Court’s observation about the role of peyote in the Native American Church, the ceremonial use of Daime tea is “the sine qua non of [plaintiffs’] faith. It is the sole means by which [plaintiffs] are able to experience their religion; without [Daime tea], [plaintiffs] cannot practice their faith.”²⁷

Consistently, when the Santo Daime, a Brazilian ayahuasca religion, was forced to choose between their faith and abiding by the law, the church held their ceremonies in secret while their case was considered by the court. This secrecy was considered to have demonstrated commitment to their religious exercise despite the threat of criminal prosecution and potential

²² See *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 423 (2006); *Meyers*, 95 F.3d at 1482.

²³ *O Centro*, 546 U.S. at 424.

²⁴ See *Levitan v. Ashcroft*, 281 F.3d 1313, 1320-21 (D.C. Cir. 2002); *Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001); *Oklevueha Native Am. Church of Haw., Inc. v. Lynch*, 828 F.3d 1012, 1015 (9th Cir. 2016); *United States v. Christie*, 825 F.3d 1048, 1055 (9th Cir. 2016).

²⁵ *Christie*, 825 F.3d at 1055.

²⁶ *Levitan*, 281 F.3d at 1321 (citing *Henderson*, 253 F.3d at 17).

²⁷ *Church of Holy Light of Queen v. Mukasey*, 615 F. Supp. 2d 1210, 18-19 (D. Or. 2009) citing *People v. Woody*, 61 Cal. 2d 716, 725, 40 Cal. Rptr. 69, 394 P.2d 813, 820 (1964).

loss of certain members' professional statuses if prosecuted.²⁸ The court found that the law substantially burdened the church's religious exercise.

As an example of where a court did not find existence of a substantial burden, in *Perkel v. U.S. DOJ*, the leader of the Church of Reality, the tenets of which were inspired by marijuana, admitted that the CSA's marijuana prohibition "would not coerce him or other church members to act contrary to their religious beliefs" because the religion could have developed without the plant medicine. The Ninth Circuit held that, "at most, Perkel describes a 'diminishment of spiritual fulfillment' which ... serious though it may be—is not a 'substantial burden' on the exercise of religion."²⁹

For plant medicine churches or individuals that use sacred plant medicines controlled by the CSA, and such use is a central aspect of their religious exercise, the conflicting choice of following their faith or compliance with the CSA could constitute a substantial burden. If a court or government agency, like the DEA, finds there are no feasible alternatives to the use of the plant medicine (the use is, in fact, central to religious exercise), then it could find that the burden is substantial.

a. Demonstrating "substantial burden" when using multiple psychedelic plant medicines as sacraments

Plant medicine churches work with a variety of substances, such as ayahuasca and psilocybin,³⁰ and some may use more than just one as sacrament. It is critical for demonstrating substantial burden that a psychedelic plant medicine church be able to describe its religious beliefs with a particular focus on the centrality³¹ of the church's use of each sacred plant medicine used in its rituals. The presence of multiple sacraments may undermine that any one sacrament is central or important to the religious exercise.

Therefore, if there are alternatives to one of the sacraments that fail to be articulated as central or important, then the CSA's prohibition of use is not substantially burdensome. For example, the Ninth Circuit in *Oklevueha Native Am. Church Of Hawaii, Inc. v. Lynch* found that prohibiting cannabis was not a substantial burden on religious exercise when it was only a substitute for peyote, which the plaintiffs admitted was their religion's primary sacrament.³² The court found that they had failed to provide evidence that denying them cannabis would force a choice

²⁸ "Plaintiffs' secrecy does not show a lack of sincerity. Instead, it shows that plaintiffs remained committed to practicing their religion despite the threat of criminal prosecution and loss of professional status." *Church of the Holy Light of the Queen v. Mukasey*, 615 F. Supp. 2d 1210, 1211 (D. Or. 2009).

²⁹ *Perkel v. United States DOJ*, 365 F. App'x 755, 756 (9th Cir. 2010).

³⁰ It should be noted that, at the time of the writing of this Guide, no church that uses psilocybin as sacrament has been granted an exemption under RFRA.

³¹ The burdened sacrament must be "central or important." *Leviton*, 281 F.3d at 1321 (citing *Henderson*, 253 F.3d at 17).

³² "Specifically, the[plaintiffs] state that 'Peyote is the significant sacrament' and that they consume cannabis 'in addition to and in the [sic] substitute for their primary entheogenic sacrament, Peyote.'" *Oklevueha Native Am. Church of Haw., Inc. v. Lynch*, 828 F.3d 1012, 1014 (9th Cir. 2016)

between religious obedience and government sanctions.³³ If there are multiple types of sacraments, how would denial of all but one force a choice between religious obedience and government sanctions? Plant medicine churches using multiple sacraments must contend with this question.

Looking to other religions, there are often several spiritual practices that are central and important; different prayers, rituals, meditations, chants, and pilgrimages that are all core aspects of their religious beliefs. However, for a plant medicine church, care must be taken to articulate—and even document—the way in which ceremony with, for example, ayahuasca is different from praying with psilocybin.

If an issue arises where a plant medicine church needs to defend its use of multiple sacraments, the church will need to argue how the law is burdening their free exercise of religion, and there is no alternative to their use of each sacrament. While use of multiple sacraments makes the arguments under RFRA more complex, it does not, and should not, preclude a church from exercising their religious beliefs.

2. What is “religious exercise”?

RFRA defines “religious exercise” as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”³⁴ This broad definition has left it up to the courts and governmental agencies to refine their unique tests to identify “religion” and, consequently, whether actions constitute exercise of religion entitled to protection under RFRA.

For example, the test articulated by the Tenth Circuit in *Meyers*³⁵ uses five factors to evaluate claims that a belief system constitutes a religion.³⁶ The *Meyers* court explained the five factors as follows:

1. Ultimate Ideas: Religious beliefs often address fundamental questions about life, purpose, and death, including existential matters, such a sense of being; teleological matters, such as purpose in life; and cosmological matters, such as humanity’s place in the universe.
2. Metaphysical Beliefs: Religious beliefs often are “metaphysical,” that is, they address a reality that transcends the physical and immediately apparent world. Adherents to many religions believe that there is another dimension, place, mode, or temporality, and they

³³ “They make no claim that peyote is unavailable or that cannabis serves a unique religious function... Put simply, nothing in the record demonstrates that a prohibition on cannabis forces [the church] to choose between obedience to their religion and criminal sanction, such that they are being ‘coerced to act contrary to their religious beliefs.’” *Oklevueha Native Am. Church of Haw., Inc. v. Lynch*, 828 F.3d 1012, 1016 (9th Cir. 2016) (citing *Navajo v. U.S.*, 535 F.3d 1058, 1070 (9th Cir. 2008).

³⁴ 42 U.S.C. § 2000cc-5. RFRA, in 42 U.S.C. § 2000bb-2, provides that “the term ‘exercise of religion’ means religious exercise, as defined in section 2000cc-5 of this title,” which is the Religious Land Use and Institutionalized Persons Act (RLUIPA).

³⁵ See *Meyers*, 95 F.3d at 1482-84.

³⁶ See also *U.S. v. Quaintance*, 471 F. Supp. 2d 1153 (D.N.M. 2006)

often believe that these places are inhabited by spirits, souls, forces, deities, and other sorts of inchoate or intangible entities.

3. **Moral or Ethical Systems:** 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:** Religious beliefs 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 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. **Accouterments 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.”

Generally, courts that use the *Meyers* factors will not rely solely on mainstream religions to guide their determination of whether a new and unique set of beliefs is a religion. No one factor will automatically decide the issue; instead, these factors are seen as criteria that only need to be minimally satisfied to find that the set of beliefs in question constitute a religion.

While it is difficult to answer what *is* a religion or religious, some courts believe it is clear what is not. As stated in *Meyers*, religious beliefs cannot be demonstrated by either a “philosophy or way of life,”³⁷ or with purely personal, political, ideological, or secular beliefs. Examples of secular beliefs include communism, veganism, utilitarianism, or nihilism.

Separately, as courts of different jurisdictions may establish their own tests, the Ninth Circuit has used a “generous functional (and even idiosyncratic)” definition of religion and religious beliefs in the free exercise context; the Court has explained that religious beliefs stem from a person’s “moral, ethical or religious beliefs about what is right and wrong” and are “held with the strength of traditional religious convictions.”³⁸ However, consistent with *Meyers*, there is no question a “purely secular philosophical concern” is not encompassed by the Free Exercise Clause.³⁹ Ultimately, the Ninth Circuit approach is more generous than the *Meyers*’ test, drawing on U.S. Supreme Court cases.⁴⁰ It broadly analyzes whether a set of beliefs are, in the believer’s “own scheme of things, religious.”⁴¹ Arguably, the Ninth Circuit test may be more inclusive in recognizing the religious beliefs of plant medicine churches, as opposed to other tests using various factors. Therefore, psychedelic plant medicine churches with the same facts may get differing results because of the application of the different tests to define religion.

However, in 2014, the U.S. Supreme Court, made clear that federal courts should not have the power to evaluate whether religious beliefs are “mistaken or insubstantial.”⁴² In *Burwell v. Hobby Lobby*, which was a case with a RFRA claim alleging that the mandate of providing birth control to employees substantially burdened the Christian religious beliefs of the family that ran the corporation, the U.S. Supreme court refused to question their religious beliefs. The Court seemed to chastise the government, stating that “the federal courts have no business

³⁷ *Meyers*, 95 F.3d at 1482.

³⁸ *U.S. v. Ward*, 989 F.2d 1015, 1018 (9th Cir. 1992); see also *United States v. Hoffman*, 436 F. Supp. 3d 1272, 1281 (D. Ariz. 2020).

³⁹ *Id.*

⁴⁰ See, e.g., *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965).

⁴¹ *Ward*, 989 F.2d at 1018.

⁴² *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014)

addressing... whether the religious belief asserted in a RFRA case is reasonable.”⁴³ The Court continued that its only role was to determine whether the RFRA claimants’ beliefs “reflects ‘an honest conviction...’”⁴⁴ To be clear, this case involved Christianity, which is a mainstream religion and is not subject to the same scrutiny that would likely be applied to a plant medicine church. A plant medicine church may not have this kind of ease in a RFRA analysis, but this case demonstrates an evolution of RFRA protection and, although the U.S. Supreme Court’s commentary was not its holding (and therefore not binding on other federal courts), it may have significant influence.

In the context of an application for an exemption from the CSA, the DEA did not articulate how it tests for religion in the 2009 DEA Exemption Guidelines; however, in a recent final determination, the DEA looked at:

- I. Use of a religious manifesto in a consistent manner,
- II. whether participants professed religious beliefs,
- III. whether use was purely religious or was more for therapy or “self-help,”
- IV. commercial benefits as opposed to not-for-profit religious purposes, and
- V. ease of access to sacrament, which indicates lack of “meaningful commitment to a coherently religious practice.”⁴⁵

Regardless of which test is applied, plant medicine churches must be able to articulate their set of religious beliefs, addressing spiritual or metaphysical concerns, ultimate life questions, morality and ethics, and practices and rituals; but, in particular, the central use of psychedelic plant medicine in prayer to connect with the divine.

3. What does “sincerely held” mean?

Under RFRA, a claimant or defendant must demonstrate that their religious beliefs are sincerely held. Courts will look to the facts and evidence of sincerity on a case-by-case basis. The sincerity of the RFRA claimant would be supported by facts and evidence to demonstrate good faith conviction in a set of religious beliefs.

⁴³ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014).

⁴⁴ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (citing *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981)).

⁴⁵ DEA Final Determination letter on Soul Quest’s exemption petition (2021). Pgs. 2–4. https://www.bialabate.net/wp-content/uploads/2021/06/DEA_Denial_Soul_Quest_Exemption_2021.pdf See also the DEA Final Determination letter on The Church of Reality’s exemption petition in 2008. This decision was previous to the 2009 DEA Exemption Guidelines. The 2008 Letter provided three guidelines, which appeared to be a condensed version of the *Meyers* test, used to evaluate an applicant’s alleged religious beliefs: 1. Religious beliefs involve fundamental and ultimate questions of life, purpose, or death. These questions concern deep and imponderable matters. These beliefs are also typically metaphysical, addressing a reality that transcends the physical and immediately apparent world (e.g., another dimension, realm, spirits, etc.), 2. Religious beliefs have moral or ethical systems that direct a particular manner of acting or living (e.g., what is good, evil, just or unjust), 3. Religious beliefs include certain structural and external characteristics: “formal, external or surface signs that may be analogized to accepted religions.” Such signs can include formal ceremonies or rituals, gathering places, clergy and/or prophets, organizational structures, important writings, observance of holidays, efforts at propagation, diet or fasting, prescribed clothing and appearance, and other similar manifestations associated with traditional religions.

Without a determination that beliefs are religious, sincerity is fruitless. In *Meyers*, the Tenth Circuit pointed out that,

While Meyers may sincerely believe that his beliefs are religious, this Court cannot rely on his sincerity to conclude that his beliefs rise to the level of a “religion” and therefore trigger RFRA’s protections.⁴⁶

Most courts have avoided making a determination on sincerity. The Fifth Circuit has stated that sincerity is established by credibility, but it declined to establish a judicial test:

The specific religious practice must be examined rather than the general scope of applicable religious tenets, and the plaintiff’s “sincerity” in espousing that practice is largely a matter of individual credibility. In fact, the sincerity of a plaintiff’s engagement in a particular religious practice is rarely challenged... “though the sincerity inquiry is important, it must be handled with a light touch, or ‘judicial shyness.’”⁴⁷

Pre-RFRA, in 1992, the Ninth Circuit also declined to scrutinize sincerity beyond credibility and dedication to beliefs:

Ward’s actions are evidence of the strength of his beliefs. He strongly professes innocence of the crimes charged, yet he preferred to risk conviction and incarceration rather than abandon his version of the oath... This is the sincerity of true religious conviction. We conclude that Ward professes beliefs that are protected by the First Amendment.⁴⁸

In 2020, subsequent to RFRA, the Ninth Circuit continued to look to the individual’s unique perspective to evaluate sincerity:

The proper standard to apply here is whether the beliefs professed are sincerely held and whether they are, in Defendants’ own scheme of things, religious.⁴⁹

As with the definition of “religion,” courts have had difficulty specifying what constitutes sincerity. What has been easier, instead, is identifying what is not sincere. In *United States v. Quaintance*,⁵⁰ a federal district court in New Mexico identified five separate circumstances that

⁴⁶ *Meyers*, 95 F.3d at 1484.

⁴⁷ *Tagore v. United States*, 735 F.3d 324, 328 (5th Cir. 2013) (internal citations omitted) (quoting *Moussazadeh v. Tex. Dept. of Criminal Justice*, 703 F.3d 781, 790–92 (5th Cir.2012) and *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 262 (5th Cir.2010)).

⁴⁸ *Ward*, 989 F.2d at 1018-1019.

⁴⁹ *United States v. Hoffman*, 436 F. Supp. 3d 1272, 1281 (D. Ariz. 2020).

⁵⁰ *United States v. Quaintance*, 471 F.Supp.2d 1153 (D.N.M. 2006).

would undermine the sincerity of an individual's religious beliefs for purposes of their RFRA claim:

- 1) Ad hoc beliefs: Beliefs manufactured on an ad hoc basis to justify political, scientific, and social beliefs. In other words, enumerating religious beliefs before litigation raises the question of whether such beliefs are ad hoc.
- 2) Lack of ceremony and/or ritual: The absence of a ceremony or ritual associated with membership in the organization indicates insincere religious belief.
- 3) Quantity of the controlled substance: Large quantities of a controlled substance could suggest commercial, as opposed to religious, uses.
- 4) Other illegal substances: Admitting to the use or possession of other illegal substances indicates insincere religious belief.⁵¹
- 5) Evidence of commerce: Pursuit of financial gain indicates insincere religious belief.

Evidence of any of these circumstances could support a determination of pretext or strategy to circumvent the CSA in order to use controlled substances in a non-religious manner, and therefore would not be protected under RFRA.

a. Scrutiny of congregants' sincere religious beliefs in assessment of sincerity

In assessing the sincerity element under RFRA, not only will a church's religious beliefs be evaluated but also those of its church members. Case law has stated that church members should not pretend to believe in a church's tenets only to avoid the effect of a law's prohibition.⁵²

For example, Soul Quest, a plant medicine church in Florida, applied for a DEA exemption for religious use of ayahuasca. In the DEA's assessment of Soul Quest, the government noted that,

Soul Quest does not require individuals to profess belief in Soul Quest's Ayahuasca Manifesto [a document provided by Soul Quest as a religious text]... before participating in a Soul Quest ayahuasca retreat. Nor does Soul Quest require or expect individuals to have any continuing involvement with Soul Quest or membership in any congregation or other group of believers, and, in fact, individuals frequently participate only once in Soul Quest's ayahuasca retreats.⁵³

The DEA ultimately concluded that "membership in Soul Quest appears to be a purely pro forma matter to obtain access to ayahuasca, rather than an expression of sincere religious devotion."

⁵¹ In *Quaintance*, the defendants were found to have used cocaine recreationally: "The fact that the Quaintances have purchased and used cocaine recreationally undermines Defendants' assertion that they consume marijuana for religious, as opposed to secular, purposes." *U.S. v. Quaintance*, 471 F. Supp. 2d 1153, 1174 (D.N.M. 2006).

⁵² See, e.g., *Quaintance*, 471 F.Supp.2d at 1171-72.

⁵³ DEA Final Determination letter on Soul Quest's exemption petition (2021). Pg. 2. https://www.bialabate.net/wp-content/uploads/2021/06/DEA_Denial_Soul_Quest_Exemption_2021.pdf

The DEA used members' alleged failure to devote themselves to the religion and lack of involvement as evidence of the church's insincerity.

The DEA continued by distinguishing Soul Quest from a plant medicine church where sincerity was found because of members' devotion.⁵⁴

In contrast, an Oregon federal district court concluded... the Church of the Holy Light of the Queen (CHLQ), had established that ayahuasca use was a part of its sincere religious exercise in part because, "in its screening process, CHLQ attempts to select only those who are serious about the Santo Daime religion, and to turn away would-be recreational users or thrill-seekers."⁵⁵ Moreover, the district court observed that "CHLQ demands a serious commitment of time and energy from members, requiring attendance three or four times per month at services lasting several hours and sometimes almost all night."⁵⁶

Apparently, the government will scrutinize the relationship between members and the church, arguing that members who come to a plant medicine church solely for a ceremony, and who do not stay involved with the church thereafter, undermines the sincerity of religious exercise. Due to concern regarding use of plant medicines for recreational, non-religious purposes, a church's sincere religiosity may be compromised if congregants appear to be lacking the requisite religious intent at a church's prayer ceremony.

However, any church—whether mainstream or one that uses plant medicine—may have congregants with varying degrees of participation and devotion. There may be congregants who do not view themselves as members of the church yet, but rather are attending to see if they will connect with the church's religious teachings and practices. Yet, based on DEA analysis, a plant medicine church without a core group of congregants who attend ceremonies, or other offerings that are consistent with the religious purpose of the church, on a regular basis, and who may even consider themselves members, could call into question whether the operation is a religious congregation or more akin to a retreat center providing healing experiences with psychedelics.

Further, it may be noted that, with respect to regularity of attendance, the religious rituals of plant medicine churches are fundamentally different from other mainstream religions' rituals. The potency of the spiritual experience in a plant medicine church's ceremony is significant and may not necessitate consistent attendance at church functions to constitute a bona fide religious practice. A religious practice with plant medicines requires preparation for and integration after a prayer ceremony, depending on the church's beliefs. Therefore, despite the DEA's assumptions in the Final Determination letter to Soul Quest, a plant medicine church's rituals with sacrament may, in fact, preclude members' frequent and consistent attendance at regularly held

⁵⁴ Footnote 3 of the DEA Final Determination letter on Soul Quest's exemption petition (2021). https://www.bialabate.net/wp-content/uploads/2021/06/DEA_Denial_Soul_Quest_Exemption_2021.pdf

⁵⁵ *Mukasey*, 615 F. Supp. 2d at 1216, *vacated on other grounds sub nom. Church of Holy Light of Queen v. Holder*, 443 F. Appx 302 (9th Cir. 2011).

⁵⁶ *Id.* at 1216–17.

ceremonies, and there are numerous ways in which such a church can engage with its congregation outside sacramental ceremonies.

In consideration of the DEA's analysis of membership, a plant medicine church may decide to include a description of its religious beliefs to regular and occasional members, and it may ask that congregants review, understand, and, in some cases, affirm core beliefs in writing to ensure that participation in ceremony is for sincere religious purposes and to prevent any appearance of diversion.

b. Issue of sincerity with multiple sacraments and other substances controlled by CSA

Additionally, the government may allege and/or a court may find that sincerity is undermined when a plant medicine church uses multiple sacraments. Use of sacred plant medicines must be an essential aspect of a plant medicine church's beliefs and practices to succeed in any defenses or claims under RFRA. In *Quaintance*, the court stated that the presence of another illegal substance—which was cocaine and not claimed as sacrament—undermined the sincerity of religious exercise because it was purchased from the same person selling the marijuana that was claimed to be a sacrament.⁵⁷

c. Issue of sincerity for plant medicine churches when congregants pay for sacrament

Another issue that may undermine sincerity is receipt of payment for ceremonies. Ultimately, the government's concern for any diversion in connection with controlled substances controls all aspects of its analysis of plant medicine churches. If a plant medicine church looks in any way like it is distributing a substance for recreational purposes (in the manner of a drug dealer⁵⁸), the DEA or court will assume any professed religious beliefs are insincere and are a pretext. However, if the religious beliefs and practices are sincere, a congregant's payment to a plant medicine church for participation in a ceremony may be justified; this is similar to mainstream religious institutions charging fees for holiday services or religious prayer retreats.

4. What are “compelling government interests by the least restrictive means”?

Once a claimant demonstrates it has substantially burdened sincerely held religious beliefs to trigger protection under RFRA, the government must then prove that the government action, such as CSA prohibition, furthers a compelling government interest by the least restrictive means.

⁵⁷ See *U.S. v. Quaintance*, 608 F.3d 717, 723 (10th Cir. 2010)

⁵⁸ See DEA Final Determination letter for Soul Quest's exemption application, Pg. 2 (“...membership in Soul Quest appears to be a purely pro forma matter to obtain access to ayahuasca...”). See also *U.S. v. Quaintance*, 608 F.3d 717, 723 (10th Cir. 2010)

A compelling interest is a usually identified by the government and must be evaluated by the courts.⁵⁹ While there is little guidance from the U.S. Supreme Court,⁶⁰ compelling interests have been described as “only those interests of the highest order”⁶¹ and can be justified when “only the gravest abuses, endangering paramount interest, give occasion for permissible limitation” of rights under the law.⁶²

As with most aspects of strict scrutiny of burdening religious use, courts have also had a difficult time concluding a test for “least restrictive means,” but one commonly accepted test is that the government must “demonstrate that no alternative forms of regulation would [accomplish the governmental interest] without infringing First Amendment rights.”⁶³

a. Compelling government interests

The government has repeatedly cited two compelling government interests in RFRA cases involving the CSA and in response to applications for exemption from the CSA:

- I) Protecting the health and safety of the public; and
- II) Preventing diversion of controlled substances.

As a case that demonstrates the how the government presented evidence of these compelling interests, *Gonzales v. O Centro Espírita Beneficente União do Vegetal*⁶⁴ was a groundbreaking case for religious use of ayahuasca (or, as the church calls their sacred plant medicine, *hoasca*) by O Centro Espírita Beneficente União do Vegetal (UDV). In *O Centro*, the U.S. Supreme Court affirmed the Tenth Circuit’s decision that the government had not demonstrated that the CSA furthered compelling interests in the least restrictive means with respect to the UDV’s religious exercise.⁶⁵

In particular, the Court found that the commonly cited compelling interests— protection of health and safety and preventing diversion—were not furthered by least restrictive means because evidence from the government and from the UDV were “virtually balanced.”⁶⁶

I. Protection of health and safety

⁵⁹ See *U.S. v. Hardman*, 297 F.3d 1116, 1127 (10th Cir. 2002) (“Whether something qualifies as a compelling interest is a question of law. *Citizens Concerned About Our Children v. School Bd.*, 193 F.3d 1285, 1292 (11th Cir. 1999); *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994).)

⁶⁰ See *U.S. v. Hardman*, 297 F.3d 1116, 1127 (10th Cir. 2002)

⁶¹ *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)

⁶² *U.S. v. Hardman*, 297 F.3d 1116, 1127 (10th Cir. 2002) citing *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

⁶³ *U.S. v. Hardman*, 297 F.3d 1116, 1145 (10th Cir. 2002) citing *Sherbert v. Verner*, 374 U.S. at 407, 83 S.Ct. 1790.

⁶⁴ 546 U.S. 418 (2006).

⁶⁵ Also rejected was the government’s main argument that it had a compelling interest in applying the CSA uniformly.

⁶⁶ *O Centro*, 546 U.S. at 426-27. (“In the face of such an even showing, the court reasoned that the Government had failed to demonstrate a compelling interest justifying what it acknowledged was a substantial burden on the UDV’s sincere religious exercise.”)

The government has an established interest in promoting public health and safety, and Schedule I substances are categorically deemed to have a “high potential for abuse,” “no currently accepted medical use,” and a “lack of accepted safety for use.”⁶⁷ For example, in *O Centro*, the government argued that ayahuasca could cause psychotic reactions, irregularities, and adverse drug interactions. However, UDV provided evidence of studies documenting the safety of sacramental use of ayahuasca and how health risks can be minimized.⁶⁸ The U.S. Supreme Court also noted that Congressional determination of a controlled substance under Schedule I does not categorically relieve the government of its obligation to shoulder its burden under RFRA. The Court explained:

Under RFRA's more focused inquiry, the Government's mere invocation of the general characteristics of Schedule I substances cannot carry the day. Although Schedule I substances such as DMT are exceptionally dangerous, there is no indication that Congress, in classifying DMT, considered the harms posed by the particular use at issue.⁶⁹

This means that RFRA analysis requires a review of health and safety in the specific context of how a psychedelic plant medicine church operates and other circumstances. Any efforts by a church towards harm reduction may be used in the analysis.

Best practices for practitioners to protect the health and safety of congregants may include, but are not limited to:

- Health screening of congregants in advance of each ceremony;
 - Informed consent describing sacrament and any contraindications;
 - Emergency procedure, training, and equipment
 - Providing integrative spiritual support subsequent to the ceremony; and;
 - Experienced church leaders and assistants.
-

These best practices in response to the compelling interest of health and safety are explained throughout this Guide.

II. Prevention of diversion

The risk of diversion may be analyzed based on the principles and procedures of the church, such as the sacred nature of its plant medicine and how it is kept secure and away from recreational users, and the potential market and likelihood of recreational use and abuse.

⁶⁷ *O Centro* at 419.

⁶⁸ See *id.* at 431.

⁶⁹ *O Centro*, 546 U.S. at 420 (citations omitted).

In the Santo Daime case, the government raised concerns that the church would “allow the diversion of Daime tea to non-church members, including recreational users.”⁷⁰ The government pointed to the fact that there was more sacrament than was needed for the church members. However, the church believed that using its sacrament outside of a ceremony would violate the church doctrine. In addition, the detailed logs of sacrament maintained by the church, as well as only allowing access by three or four leaders, demonstrated that the Santo Daime ensured that its sacrament was kept securely and prevented diversion.

Further, the court concluded that there wasn’t any evidence presented by the government that there is a viable market for the Santo Daime’s sacrament, stating that: “DMT itself is not a common drug of abuse.”⁷¹

In the *O Centro* district court case, the government identified the potential for diversion based on the following factors: existence of an illicit market, presence of marketing or publicity, the form of the substance, cost and opportunity of diversion, the level of control placed on the substance, and the degree to which the substance is in movement from place to place.⁷² The UDV had testimony noting that the risk of diversion was greatly reduced by other more desirable DMT alternatives readily available in the U.S and other mitigation factors such as (i) importation of limited quantities; (ii) small market; (iii) bulky form; and (iv) motivations to prevent sacrilegious use of ayahuasca outside of ceremonies.⁷³

Best practices to prevent diversion of psychedelic plant medicines may include, but are not limited to:

- Ensuring sincerity of participants by providing religious beliefs of the church and asking for acknowledgment and, possibly, affirmation of such beliefs;
- Secure storage such as locks and security systems;
- Recordkeeping procedure for use only in ceremony rituals and accurate recordkeeping; and
- Limiting access to the sacrament to specific individuals of the congregation;
- Transparency with respect to shipment of sacrament (noting that the court in the Santo Daime case believed their secrecy demonstrated sincerity⁷⁴).

These and other best practices in response to the government’s compelling interest of diversion are explained throughout this Guide.

⁷⁰ *Church of Holy Light of Queen v. Mukasey*, 615 F. Supp. 2d 1210, 17 (D. Or. 2009)

⁷¹ *Church of Holy Light of Queen v. Mukasey*, 615 F. Supp. 2d 1210, 17 (D. Or. 2009)

⁷² *O Centro Espirita Beneficente União Do Vegetal v. Ashcroft*, 282 F. Supp. 2d 1236, 1262-66 (D.N.M. 2002), *aff’d*, 342 F.3d 1170 (10th Cir. 2003), *on reh’g en banc*, 389 F.3d 973 (10th Cir. 2004), *aff’d and remanded sub nom. Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006).

⁷³ *Id.*

⁷⁴ *Church of the Holy Light of the Queen v. Mukasey*, 615 F. Supp. 2d 1210, 1211 (D. Or. 2009).

III. Evolution of the government’s articulation of compelling interests

The government is still citing these compelling interests, as they comprise the basis of the DEA’s denial of Soul Quest’s application for an exemption from the CSA. In fact, in its Final Determination letter to Soul Quest, the DEA notes (in a subtle footnote) that, due to the substantial increase in the use of ayahuasca since the *O Centro* decision, the compelling interests of protecting the health and safety of church members and preventing diversion have increased:

Based on the record before it in 2006 in *O Centro*, the Supreme Court (reviewing the grant of a preliminary injunction) found little risk of diversion of the hoasca or ayahuasca tea into illicit channels because the UDV Church had fewer than 200 members in the United States and because the tea caused vomiting. Since that time, however, experimentation with and recreational and/or self-help use the tea has grown exponentially, both in the United States and around the world.⁷⁵

It should be noted that the use of multiple sacraments could be used to support the government’s compelling interest in preventing diversion. In the Ninth Circuit, the court stated that the government only needs to demonstrate a “realistic” risk of diversion, not that diversion has occurred.⁷⁶ With multiple sacraments that are controlled by the CSA, the argument that there is a risk of diversion has greater weight depending on the historical use, forms, manner of shipment, distribution, security, marketability, quantity, etc. of the other substances. However, an alleged risk of diversion can be rebutted with documentation of security protocols and systems, control of access, smaller quantities, and anything else to indicate that these substances are secured and solely used for ceremonial purposes.

Since the two compelling interests pertain to health and safety and diversion, plant medicine churches must make every effort to create safety for congregants and security for its sacrament; both while performing their religious rituals with sacred plant medicines and in establishing and executing operational procedures. By using best practices, including those pertaining to storage and recordkeeping of sacrament, a church may avoid implication of those compelling interests.

b. Least restrictive means

Even if the government has a compelling interest to restrict use of certain plant medicines, it must achieve this interest with the least restrictive means. This means: Is there an alternative to furthering a government interest that is less burdensome? The analysis will depend on the specific religious practices and sacrament.

⁷⁵ Footnote 6 of DEA Final Determination letter to Soul Quest.

⁷⁶ *Christie*, 825 F.3 at 1061.

The Ninth Circuit has explained that, in making a least restrictive means analysis, it will consider whether the government has “other potential options” in furthering its compelling interests; and, ultimately, asks, “Could the government achieve its compelling interest to the same degree while exempting [the person invoking RFRA] from complying in full with the CSA?”⁷⁷ plant medicine churches have argued that the complete prohibition of the use of plant medicines is not the least restrictive means of protecting public health and preventing diversion; instead, the government could achieve those interests by ensuring that the church engages in certain safety and security practices without completely prohibiting the use.

B. Types of remedies available under RFRA

As discussed previously, remedies pursuant to RFRA can be sought in three ways:

- 1) Filing a claim under RFRA;
- 2) raising a defense under RFRA; or
- 3) filing an application for religious exemption from the CSA through the DEA.

These approaches and how they have been utilized are explained below.

1. RFRA as a claim or defense

RFRA explicitly protects the right to religious freedoms, and this right and protection can be used as a claim or defense; a sword or a shield. One kind of claim may be seeking an injunction against the government to prevent it from burdening the right to religious freedom under RFRA. For example, in the *O Centro* case, the district court granted the preliminary injunction prohibiting the government from enforcing the CSA with respect to UDV’s importation and use of ayahuasca.⁷⁸ This was subsequently affirmed by the appellate court. Therefore, the DEA must refrain from enforcing the CSA on the UDV’s religious exercises involving ayahuasca. The case law from RFRA-based claims and defenses have set precedent for plant medicine churches that could protect their religious use of plant medicines.

To date, RFRA has not ensured that all psychedelic plant medicine churches can freely exercise their religious practices; only two ayahuasca churches have achieved recognition under the law; in both cases, as the result of protracted litigation. Rather, every plant medicine church would need to be evaluated under RFRA for legal recognition and protection of their use of sacred plant medicines.

Further, RFRA establishes a claimant’s ability to seek monetary damages, where appropriate, for RFRA violations. In addition, in *Tanvir*, a U.S. Supreme Court case decided in 2020, the Court affirmed that monetary damages under RFRA are permitted, not just against the federal

⁷⁷ *Christie*, 825 F.3 at 1061.

⁷⁸ *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006).

government, but also federal agents sued in their individual capacity.⁷⁹ Whether the DEA will be deterred by the decision in *Tanvir* from enforcing the CSA on plant medicine churches remains to be seen—particularly because *Tanvir* did not involve the use of a sacrament that was a controlled substance nor the breaking of the any law by the claimants.

Below are summaries of some cases with RFRA claims and defenses.

RFRA claims:

- *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006): The O Centro Espírita Beneficente União do Vegetal (UDV) is a church practicing a Christian Spiritist religion using *hoasca*, or ayahuasca, that originated in Brazil and has been authorized by the Brazilian government. In 2000, the UDV brought a RFRA claim against the U.S. government for seizing their plant medicine and threatening prosecution if the church continued to use it in religious rituals. The UDV sought a preliminary injunction to bar enforcement of CSA with respect to their ceremonial use of ayahuasca.

The district court granted the injunction, finding that the seizure and threats constituted substantial burden and, “because the [UDV’s and U.S. Government’s] evidence on health risks and diversion was equally balanced, the Government had failed to demonstrate a compelling interest justifying the substantial burden on the UDV.” This decision, which prohibited the government from burdening the religious practice with ayahuasca by any church of the UDV in the United States, was affirmed by the Tenth Circuit and, later, by the U.S. Supreme Court, unanimously.

- *Church of the Holy Light of the Queen v. Mukasey*, 615 F. Supp. 2d 1210 (D. Or. 2009): Santo Daime is a syncretic religion, blending elements of Catholicism with indigenous Amazonian and African beliefs, authorized by the Brazilian government. The Santo Daime religion believes Daime tea, which is ayahuasca, is the blood of Christ, analogous to the use of wine in Catholic Communion. They also believe that Daime tea itself is a holy being of great power and is to be consumed during all Santo Daime services. The church stated it could not exercise its beliefs without the Daime tea. After the spiritual leader’s arrest, seizure of the Daime tea, and unsuccessful negotiation with the government for a religious exemption from the CSA, the three Santo Daime churches filed a claim for legal status under RFRA against the government.

The Santo Daime church established its RFRA claim, and U.S. District Court found that the government failed to show that its interests justified prohibiting the Daime tea outright. It is worth noting that, despite discovering marijuana in the church leader’s home (and a minority of members admitting they occasionally smoked marijuana), the district court declined to find that “a spiritual leader’s possible personal failings should... discredit the entire church.” Although

⁷⁹ *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020).

district court granted a broad injunction, on appeal, the U.S. Court of Appeals Ninth Circuit sent the case back to district court to narrow the scope of the injunction. The final decision of the district court legalized Santo Daime's use of ayahuasca and prohibited the government from outright banning the church's importation of the Daime tea to be used for ceremonies.

- *Perkel v. U.S. DOJ*, 365 F. App'x 755 (9th Cir. 2010): In October 2008, the DEA denied the Church of Reality's petition for religious exemption from the CSA to use marijuana. The U.S. Court of Appeals for the Ninth Circuit upheld the DEA's denial, on the grounds that "although Perkel claims the Church of Reality is 'marijuana inspired,' he admits church doctrine would have developed without the drug."
- *Oklevueha Native Am. Church of Haw., Inc. v. Lynch*, 828 F.3d 1012 (9th Cir. 2016): The church described their religion as "peyotism," but the leaders also used cannabis "in addition to and in the [sic] substitute for their primary entheogenic sacrament, Peyote." The church filed a claim for relief under RFRA against the government, alleging a member's cannabis had been seized and there was a threat of federal prosecution. The Ninth Circuit Court concluded that there was no substantial burden, where the church had "produced no evidence that denying them cannabis forces them to choose between religious obedience and government sanction, since they have stated in no uncertain terms that many other substances including peyote are capable of serving the exact same religious function as cannabis."
- *Arizona. Yage Assembly v. Barr*, No. 3:20-cv-03098-WHO (N.D. Cal. Sep. 21, 2020): The Arizona Yage Assembly church filed a claim under RFRA to prohibit the government from enforcing the CSA with respect to the use of ayahuasca and from carrying out alleged retaliatory criminal investigations. In addition, the church claimed that the DEA's alleged unwritten policy of denying visionary churches CSA exemptions was unconstitutionally discriminatory in violation of the First Amendment and due process principles and that the 2009 DEA Guidance violated an executive order that required agencies to rescind non-binding guidance documents or reaffirm them and publish them in a central index. Both injunctions were denied by the district court.

RFRA defenses:

- *United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996): Defendant raised RFRA as a defense to his criminal charges involving marijuana (e.g., distribution, possession with intent to distribute), alleging that his religion commanded him to use, grow and distribute cannabis. Meyers' beliefs pertain to marijuana's medical, therapeutic, and social effects, which the court deemed to be secular, not religious, even if Meyers sincerely believed his beliefs were "religious." The district court denied the motion to raise this defense because the beliefs constituted a philosophy, not a religion. The United States Court of Appeals for the Tenth Circuit agreed.

- *United States v. Bauer*, 84 F.3d 1549 (9th Cir. 1996): Defendants operated an importation and sales operation for marijuana. They raised RFRA as a defense to possession of marijuana but were denied and convicted. On appeal, the United States Court of Appeals Ninth Circuit vacated the conviction to allow defendants to interpose RFRA as a defense.
- *U.S. v. Quaintance*, 471 F. Supp. 2d 1153 (D.N.M. 2006): Defendants raised RFRA as a defense to his criminal charges involving marijuana (e.g., distribution, possession with intent to distribute). The court found his alleged religious beliefs to be insincere because (i) the beliefs were ad hoc, shifting from recreational reasons (such as, for focus, creativity, better understanding) to medicinal (such as, to treat chronic pancreatitis); (ii) the large quantity of marijuana; (iii) evidence of commerce by selling it; and (iv) lack of ceremony or ritual (e.g., lack of celebration of new church memberships). On appeal, the Tenth Circuit Court of Appeals agreed and denied him RFRA protection.

These examples are not exhaustive of RFRA case law pertaining to plant medicine churches and should not create any expectations. The strength and success of a RFRA claim or defense will depend on specific facts and circumstances, as well as the jurisdiction where the case is decided.

2. DEA religious exemption from the CSA pursuant to RFRA

As an apparent response to the *O Centro* case, the DEA published its “Guidance Regarding Petitions for Religious Exemption from the Controlled Substances Act Pursuant to the Religious Freedom Restoration Act” in January 2009 (the “2009 DEA Exemption Guidance”)⁸⁰ to serve as the “interim measure intended to provide guidance to parties who wish to petition for a religious exemption to the CSA.” Although the DEA suggests the exemption process is pursuant to RFRA, nothing in RFRA provides for such a petition. The 2009 DEA Exemption Guidance sets forth the requirements of a petition for religious exemption from the CSA by applying with the DEA and provides the RFRA strict scrutiny test. The 2009 Guidelines states that an application should provide:

- Information demonstrating that compliance with the CSA would (1) be a substantial burden on (2) their sincere (3) religious exercise, including but not limited to: (i) the nature of the religion; (ii) specific religious practice that involves the manufacture, distribution, dispensing, importation, exportation, use or possession of a controlled substance; (iii) the specific controlled substance that the party wishes to use; and (iv) the amounts, conditions, and locations of its anticipated manufacture, distribution, dispensing, importation, exportation, use, or possession;
- Signature under penalty of perjury; and
- No engagement with any activity prohibited under the CSA until the final determination.

⁸⁰ See the 2009 DEA Exemption Guidance here: [https://www.deadiversion.usdoj.gov/GDP/\(DEA-DC-5\)%20Guidance%20Regarding%20Petitions%20for%20Religious%20Exemptions.pdf](https://www.deadiversion.usdoj.gov/GDP/(DEA-DC-5)%20Guidance%20Regarding%20Petitions%20for%20Religious%20Exemptions.pdf)

a. 2009 DEA Exemption Guidance: Legal and functional issues

There are legal and functional issues with the 2009 DEA Exemption Guidance. Some argue the 2009 DEA Exemption Guidance lacks the force and effect of law;⁸¹ the 2009 DEA Exemption Guidance did not go through the formal notice and comment process required by the Administrative Procedures Act. However, government agencies have some discretion to develop internal guidance to implement their statutory mandates. In addition, the 2009 DEA Exemption Guidance does not articulate a clear legal framework by which applications will be analyzed, among other things.⁸²

With respect to risks to those who petition for an exemption pursuant to the 2009 DEA Exemption Guidance, there are no assurances that the information disclosed won't be used to incriminate the plant medicine church. The petition would include a declaration that a church is currently engaging, or has the intent to engage in, conduct that could be criminal (such as, the use, manufacture, or distribution of a controlled substance). The petitioner is required to sign the exemption application under penalty of perjury. Making false statements or representations to the government is punishable by up to five years in prison.⁸³ Whoever signs the petition must provide information honestly and will identify themselves as someone being involved in the manufacturing, distribution, and dispensation of controlled substances. Additionally, the petitioner and any church members must refrain from engaging in all activity prohibited by the CSA until the exemption application is granted. This suggests that non-compliance by any of the church members could put the petitioner at risk of a perjury charge.⁸⁴

Finally, the DEA had been slow to make a determination on a petition for exemption using the 2009 DEA Exemption Guidance's administrative process. This was demonstrated by the application by Soul Quest. Soul Quest's petition filed in August 2017 went unanswered for three years until the church filed suit against the DEA in August 2020 for its right to use ayahuasca in religious exercise. The DEA filed a stay with the court, which allowed it to resolve the matter with Soul Quest directly, ultimately denying the petition in April 2021. Despite a potentially lengthy delay, the petitioner must refrain from using their sacraments while the DEA reviews and makes a determination on an application.

⁸¹ There has been analysis disputing whether the DEA has this power; see Bartlett, B. (2019, July 16). The U.S. drug enforcement administration problematic process for religious exemption for use of prohibited psychoactive substances. *Chacruna Institute for Psychedelic Plant Medicines*. <https://chacruna.net/the-u-s-drug-enforcement-agencys-problematic-process-for-religious-exemption-for-use-of-prohibited-psychoactive-substances/>

⁸² See Hartney, M. (2020, October 13). *DEA and the religious exemption: A fox guarding the henhouse*. *Chacruna Institute for Psychedelic Plant Medicines*. <https://chacruna.net/dea-prohibition-religious-freedom-ayahuasca-ceremonies/>

⁸³ See 18 U.S.C. § 1001(a).

⁸⁴ It should be noted that if a plant medicine church were to file a claim in court to assert their RFRA rights, the same issues arise. There is no way to assert a right under RFRA without providing details of activities prohibited by the CSA.

In summary, the 2009 DEA Exemption Guidance requires a petitioner to provide potentially incriminating details about their religious exercise with a controlled substance, requires the petitioner to rely on receiving the exemption or being on the record for illegal activities and to be unable to engage in its religious rituals, and the application process is a protracted process. It is also worth noting that, as of this Guide, the DEA has yet to voluntarily grant an exemption; the DEA has only granted two exemptions, to the UDV and Santo Daime, as a direct result of litigation and a court requiring it.

In 2020, the DEA announced it is engaged in formal rulemaking procedures necessary to amend its regulations “to accommodate religious entities who see to apply for a DEA registration based on RFRA” for exemptions from the CSA.⁸⁵ The proposed regulations will not be available for public notice and comment until or after March 2022.

b. DEA’s final determinations of exemption applications

Prior to the 2009 DEA Exemption Guidance, the Church of Reality apparently filed with the DEA for a religious exemption from the CSA to use marijuana. The DEA denied the application in 2008,⁸⁶ and the Ninth Circuit upheld the DEA’s denial of their application.⁸⁷ Because the DEA’s guidance on how to apply for an exemption was subsequent to the Church of Reality’s determination, the content of the denial may not be relevant for future applications.

Soul Quest, another plant medicine church, also applied for exemption from the DEA in order to legally use ayahuasca as a sacrament in its exercise of religion. Although the DEA’s final determination denied the application, the analysis in its denial is profoundly informative to other plant medicine churches.⁸⁸ In making its determination, the DEA reviewed Soul Quest’s operations and submissions, along with its website, online videos, a Netflix special that featured the church, its advertisements, and interviews with leadership and attendees.

In April 2021, the DEA issued a final determination to deny Soul Quest’s exemption application.⁸⁹ The DEA found that “Soul Quest has not satisfied its burden under RFRA of demonstrating that its use of ayahuasca is pursuant to a religious exercise and based on a sincerely held religious belief.” To support its determination, the DEA noted:

- The evidence did not support Soul Quest’s religious sincerity, because Soul Quest primarily provides attendees with experiences that are “healing journeys and for wellness, as opposed to a religious experience... [because] in practice, Soul Quest... promotes ayahuasca to the public for self-help and therapeutic reasons, rather than

⁸⁵ See *Regulation Identifier Number 1117-AB66: “DEA registration for religious organizations under the Religious Freedom Restoration Act.”* Accessed at: <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=1117-AB66>

⁸⁶ https://www.bialabate.net/wp-content/uploads/2008/08/DEA_Rejection_Church_of_Reality.pdf

⁸⁷ *Perkel*, 365 F. App’x 755.

⁸⁸ See Hartney, M. (2021, June 21). DEA denies Soul Quest’s religious exemption: Impacts on the ayahuasca community. *Chacruna Institute for Psychedelic Plant Medicines*. <https://chacruna.net/dea-denies-soul-quest-religious-exemption-ayahuasca/>

⁸⁹ https://www.bialabate.net/wp-content/uploads/2021/06/DEA_Denial_Soul_Quest_Exemption_2021.pdf

solely to fellow believers for the religious ritual purposes described in [their religious manifesto].”

- Membership in Soul Quest “appears to be a purely pro forma matter to obtain access to ayahuasca rather than an expression of sincere religious devotion.”
- A senior minister and corporate officer described Soul Quest’s use of ayahuasca “not in religious terms” but as “integrative” medicine or therapy for trauma or mental health conditions like depression.
- Soul Quest’s legal filings, website, and public advertisements failed to support its assertion that it solely offered ayahuasca for religious purposes and to church members, noting that Soul Quest “sells ayahuasca as part of its for-profit secular offerings to the general public.” It was also noted that Soul Quest was legally doing business as (meaning, registered a DBA for) the “Soul Quest Ayahuasca Retreat and Wellness Center.”
- Soul Quest retreats consistently spoke to the psychosocial, medicinal, and therapeutic properties of the ayahuasca experience rather than of a religious experience.
- Soul Quest’s foundational text, the “Ayahuasca Manifesto: Ayahuasca and its Planetary Mission, in 2012” was mentioned only once in background materials and interviews with leaders and members.
- Soul Quest did not require individuals to profess belief in Soul Quest’s Ayahuasca Manifesto before participating in a retreat, nor does it expect individuals to have continuous involvement with the church.
- Soul Quest’s historical affiliation is with the Oklevueha Native American Church (“ONAC”), which does not consider the Ayahuasca Manifesto to be its foundational text. The DEA noted that Soul Quest’s affiliation with ONAC was to obtain legal coverage for the use of ayahuasca and other controlled substances.

Even if Soul Quest had demonstrated sincerely held religious beliefs, the DEA stated that the CSA was the least restrictive means of furthering the compelling interests of “the need to protect public health and safety from potentially dangerous substances, and the need to prevent diversion of controlled substances into the illicit market.” However, at no point does the DEA explicitly analyze how the CSA is least restrictive; it solely concludes that it is.

The DEA identified the importance of acquiring sacrament from a religious source. The DEA found that Soul Quest sourced the components of ayahuasca from a business in the Netherlands that sold these ingredients for purposes of “soap and candle making and ethnobotanical research” but not for human consumption. According to the DEA, use of plants not intended for human consumption poses potential risks of harm to human health and safety.

The DEA also stated that it would be “impossible” to track the shipments of the ayahuasca components to ensure that none was diverted into illicit markets. The shipments to Soul Quest were labeled as “aromatic herbs,” “samples,” and “packaging materials.” In addition, they were not sent through a closed system, as some shipments did not go directly to Soul Quest, but through intermediaries. Further, the DEA noted that Soul Quest “lacked adequate measures to safeguard either the imported plants in its custody or the tea,” without stating what appropriate security of the sacrament would be. While Soul Quest expressed willingness to improve its security, the DEA was not satisfied that it would, in practice, properly secure the plants or administer the ayahuasca tea at a reported fixed location, due to its lack of candor.

The key takeaways from Soul Quest’s petition for anyone considering filing a petition for religious exemption with the DEA are:

1. The courts may analyze religious sincerity with a greater preference for preserving the freedom of religion; however, this depends on the facts of the case and the state or jurisdiction where the court is located.
2. The DEA process can involve significant costs and losses (such as to hire an attorney, prepare the application, and be unable to generate income related to prayer ceremonies, if it abides by the 2009 DEA Exemption Guidelines and refrains from using its sacrament during the application process), and there is the possibility that a church must still appeal a denial of the application in court.
3. Inconsistency of facts will be construed as pretext for illegal use, distribution, or manufacture of controlled substances and will undermine sincerity of religious beliefs.
4. Any advertising or publicity that focuses on the medicinal or therapeutic uses (which may be incidental to religious uses) will undermine religious sincerity.
5. Sacrament must be secured and handled to avoid any appearance of diversion, a compelling government interest.
6. Careful screening and implementing policies and procedures that create safety measures demonstrates a church’s intent to protect public health and safety, another compelling governmental interest.
7. Sourcing sacrament should be done with caution and integrity; the source should be safe and, if possible, consistent with religious beliefs, and how it is shipped should be carefully considered.
8. The DEA may not thoroughly analyze least restrictive means.

9. Procedurally, there is a benefit to going through the DEA exemption application process, as opposed to bringing a claim or defending against an action in court. A church may have to wait for standing to file a claim, which means that there must first be a substantial burden, or to raise a defense under RFRA, where the case against the church is itself the substantial burden.

A plant medicine church that wants to apply for an exemption through the DEA should be aware that the agency is both the fact finder and judge in this administrative process, which may be a disadvantage with respect to a lack of impartial analysis. In addition, with the upcoming proposal to amend its regulations to accommodate religious entities and its application procedures, in approximately March 2020, it may be to a plant medicine church's benefit to wait to see what changes occur.

C. What is the difference between federal and state RFRA laws?

While RFRA applies to the federal government and its agents, RFRA does not apply to state laws and state actors.⁹⁰ In *Flores*, local authorities, relying on a zoning ordinance concerning historic landmarks and districts, denied a building permit to enlarge the church for the Catholic archbishop. The archbishop challenged the denial, seeking relief on the basis of RFRA, but lost because the court held that RFRA failed to maintain the separation of powers between the federal and state governments.

As a result, RFRA does not apply to state or local laws or agents, and therefore RFRA only applies to federal laws and federal agents (such as the DEA) and laws and agents in Washington, D.C., Puerto Rico, and any other U.S. territories or possessions. Whether a psychedelic plant medicine church's religious exercise will be protected using RFRA analysis from state or local government action depends on whether the state has adopted its own version of RFRA (charmingly referred to as "mini-RFRAs"). As a reaction to *Flores*, as of 2021, the following 22 states have passed mini-RFRAs (collectively, "RFRA States"):

- | | |
|----------------|--|
| 1. Alabama | Ala. Const. Art. I §3.01 |
| 2. Arizona | Ariz. Rev. Stat. §41-1493.01 |
| 3. Arkansas | 2015 SB 975, enacted April 2, 2015 |
| 4. Connecticut | Conn. Gen. Stat. §52-571b |
| 5. Florida | Fla. Stat. §76.01, et. seq. |
| 6. Idaho | Idaho Code §73-402 |
| 7. Illinois | Ill. Rev. Stat. Ch. 775, §35/1, et. seq. |
| 8. Indiana | 2015 SB 101, enacted 3/26/2015; 2015 SB 50, enacted 4/2/2015 |
| 9. Kansas | Kan. Stat. §60-5301, et. seq. |
| 10. Kentucky | Ky. Rev. Stat. §446.350 |
| 11. Louisiana | La. Rev. Stat. §13:5231, et. seq. |

⁹⁰ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

12. Mississippi	Miss. Code §11-61-1
13. Missouri	Mo. Rev. Stat. §1.302
14. Montana	SB 215, passed April 22, 2021
15. New Mexico	N.M. Stat. §28-22-1, et. seq.
16. Oklahoma	Okla. Stat. tit. 51, §251, et. seq.
17. Pennsylvania	Pa. Stat. tit. 71, §2403
18. Rhode Island	R.I. Gen. Laws §42-80.1-1, et. seq.
19. South Carolina	S.C. Code §1-32-10, et. seq.
20. Tennessee	Tenn. Code §4-1-407
21. Texas	Tex. Civ. Prac. & Remedies Code §110.001, et. seq.
22. Virginia	Va. Code §57-2.02

Some states have not enacted a mini-RFRA, but they have established RFRA protections through state court decisions: Alaska, Hawaii, Ohio, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, Washington, and Wisconsin.

As an example, in New Hampshire, there is no mini-RFRA; however, in *State v. Mack*, the court used a RFRA analysis for a claim under the state constitution’s Free Exercise provisions.⁹¹ The court stated that it found the decision in *O Centro* “instructive,” and that:

Other state supreme courts have also concluded that their state constitutions provide greater protection for the free exercise of religion than does the Free Exercise Clause of the Federal Constitution.⁹²

Other state courts may decide to use the RFRA framework, as well; however, in California, even though free exercise of religion is provided for in the state constitution, courts are undecided whether the strict scrutiny or rational basis test (a lower standard) is proper for its Free Exercise Clause.⁹³

Ultimately, plant medicine churches and their members may have more legal clarity regarding their rights and protection for their religious exercise in the RFRA States or in those states that have adopted RFRA analysis.

⁹¹ See *State v. Mack*, No. 2019-0171 (N.H. Dec. 22, 2020).

⁹² *Id.* at 20-21.

⁹³ See *Catholic Charities of Sacramento Inc., v. Superior Court*, 32 Cal. App. 4th 527 (Cal. 2004); *People v. Trippet*, 56 Cal. App. 4th 1532 (Cal. Ct. App. 1997).



III. Religious Land Use and Institutionalized Persons Act (RLUIPA)?

Plant medicine churches will likely need to rent or own real property to have a meeting place and/or engage in ceremonies. There may be zoning or other land use regulations that discriminate against churches or other religious institutions. The Religious Land Use and Institutionalized Persons Act (RLUIPA) protects land use from discrimination based on religious exercise and the religious exercise of institutionalized persons in prisons.⁹⁴ RLUIPA provides the same strict scrutiny test as in its sister statute, RFRA. This Guide will discuss RLUIPA's land use provisions and not the provisions pertaining to institutionalized persons.

Like the RFRA test, RLUIPA's land use provisions protect individuals, houses of worship, and other religious institutions from zoning and landmarking laws that are unduly burdensome or discriminatory, either as written or as applied, unless the imposition of the burden is the least restrictive means of furthering a compelling governmental interest.⁹⁵

Unlike RFRA, which is narrowly applied to federal government actors, RLUIPA not only applies to federal land use regulations, but also to state and local governments that receive federal funding. RLUIPA prohibits federal, state, and local land use laws from (i) treating churches or other religious institutions on less equal terms than nonreligious institutions; (ii) discriminating against assemblies or institutions on the basis of religion; (iii) totally excluding religious assemblies from an area; or (iv) unreasonably limit religious assemblies or institutions. RLUIPA does not apply to actions taken by federal agents.⁹⁶

Under RLUIPA, "land use regulation" is defined as "a zoning or landmarking law, or the application of such law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), and if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest."⁹⁷ Further, RLUIPA broadly defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," including "the use, building, or conversion of real property for the purpose of religious exercise."⁹⁸

⁹⁴ 42 U.S.C. §2000cc, et seq.

⁹⁵ See *Multi-Denominational Ministry of Cannabis & Rastafari, Inc. v. Gonzales*, 474 F. Supp. 2d 1133, 1143 (N.D. Cal. 2007), *aff'd sub nom. Multi-Denominational Ministry of Cannabis & Rastafari, Inc. v. Holder*, 365 F. App'x 817 (9th Cir. 2010).

⁹⁶ *Multi-Denominational Ministry of Cannabis & Rastafari, Inc. v. Holder*, 365 F. App'x 817, 819 (9th Cir. 2010).

⁹⁷ *Rastafari*, 474 F. Supp. 2d at 1143.

⁹⁸ 42 U.S.C. § 2000cc-5(7)(A).

Under RLUIPA, zoning regulations that exclude certain religious assemblies in areas permitted for secular purposes may be illegal; similarly, if the granting—or denial—of zoning permits through the individualized and discretionary process discriminates against religious uses, then the law as applied may be illegal.

For example, in 2009, the UDV applied to the local zoning board, the New Mexico Board of County Commissioners of Santa Fe County (“County Board”), to build an 11,000 square foot temple and other structures on 2.5 acres of land. The County Board “imposed additional requirements... that it did not apply to other community service facilities, including other churches” before the application would be considered. Over a year after the UDV submitted its application, the County Board added the additional requirements imposed on the UDV to the zoning law, and, in 2011, denied the permit. In 2012, the UDV sued the County Board alleging violations of RLUIPA in connection with the denial.⁹⁹ The parties settled and UDV got approval to build its temple.

To be clear, RLUIPA applies narrowly to government land-use regulations, such as zoning laws. The statute would not apply to laws that regulate use of controlled substances.¹⁰⁰ RLUIPA also would not be implicated if controlled substances were seized from a church by federal law enforcement.¹⁰¹

If a plant medicine church seeks, for example, a permit for a building or for use as a place of worship to hold ceremonies with plant medicines, the local zoning authorities cannot discriminately deny a permit unless it is the least restrictive means to further a compelling governmental interest.

⁹⁹ See United States of America’s Statement of Interest in Opposition to Defendant’s Motion to Dismiss for *O Centro Espírita Beneficente União do Vegetal vs Board of County Commissioners of Santa Fe County*, No. 12-cv-00105-MV-LFG, 2012. Accessed at: <https://www.rluipa-defense.com/wp-content/uploads/sites/9/2015/01/Santa-Fe-USA-DOJ-Brief.pdf>.

¹⁰⁰ *Rastafari*, 365 F. App’x at 819.

¹⁰¹ *Id.*



IV. Difference between legal and protected uses of psychedelic plant medicines

RFRA protects the right to religious exercise, and that right can only be burdened when there is a compelling interest furthered by the least restrictive means. However, without an exemption from the DEA or a court, there are legal risks to use plant medicines prohibited by the CSA, such as seizure of sacraments and criminal charges.¹⁰²

Only two churches have received exemptions from the CSA: the UDV and Santo Daime, both ayahuasca churches, may use their sacrament that is otherwise prohibited by the CSA. Another plant medicine church using the same sacrament may be subject to criminal charges for use or distribution or may have their sacrament seized; however, the church has the right to defend itself against any charges or file a claim for relief for the seizure of the sacrament pursuant to RFRA.

¹⁰² See Viridi, J. (2021, March 25). *Fighting for the legal use of ayahuasca as a religious sacrament with Martha Hartney.* Chacruna Institute for Psychedelic Plant Medicines. https://chacruna.net/religious_freedom_legal_ayahuasca_ceremonies/



PART II

I. What are best practices for psychedelic plant medicine churches?

Best practices for a plant medicine church's operations involve policies and procedures that best establish itself under RFRA, such as protecting the health and safety of congregants and actively minimizing the potential for diversion.¹⁰³ By following, and even improving on, the best practices provided within this Guide, sincere religious exercise that involves a central ritual using sacred plant medicines is protected under RFRA and the use of best practices will diminish implication of the government's compelling interests.

These plant medicine church policies and procedures include, but are not limited to:

- Incorporating as a religious nonprofit with the state and filing for federal tax-exempt status;¹⁰⁴
- Keeping records of all expenses used towards the purposes of the church;
- Maintaining a description of the church's purpose and beliefs;
- Storage of sacrament policy;
- Sacrament recordkeeping procedure;
- Anti-harassment and reporting policy;
- Emergency situation procedure;
- Church membership policy;
- Procedure of requesting in advance the completion of a medical disclosure form and an informed consent and liability release;
- Pre-screening procedure before a prayer ceremony;
- Follow-up integration support procedure;
- And so on.

This Guide would like to acknowledge and recommend reviewing Chacruna Institute's Ayahuasca Community Guide for the Awareness of Sexual Abuse, as may be found in 13 different translations: <https://chacruna.net/community/ayahuasca-community-guide-for-the-awareness-of-sexual-abuse/>

¹⁰³ See Heffernan, R. (2017, July 31) 7 Best practices for ayahuasca legal harm reduction. *Chacruna Institute for Psychedelic Plant Medicines*. <https://chacruna.net/ayahuasca-legal-harm-reduction/>

¹⁰⁴ Incorporation is not required in order for RFRA to offer protection to sincere religious exercise using psychedelic plant medicines. Incorporation is beneficial if there is an expectation to bring in large tax-deductible contributions, hold property, hire employees, limit liability exposures, etc.

Keeping written policies, procedures, records, and statements of beliefs will keep a church organized and prepared for the worst-case scenario of, for example, a health emergency, criminal charges, or civil lawsuits, allow review and improvement of these documents and processes, and can make a church feel more secure and supported with easily accessible guidance and, if need be, evidence.



II. Incorporation as a church, operation, and tax-exempt status

An incorporated church is an entity like any other nonprofit: it is an organization that is created by individuals to engage in its charitable purpose, such as for religious purposes, and be operated as a separate legal entity for tax benefits and liability reasons.

In addition, while it is optional for a plant medicine church, incorporation as a church by organizing under state law may bolster any claims, defenses, or applications for exemption under RFRA. When filing for incorporation, depending on the applicable state's allowance for certain information on the organizational document, a church must decide whether to disclose sacramental use of plant medicine or not. Disclosure may invite more scrutiny, but it can also provide some federal recognition of a plant medicine church's activity even if it's not required and create evidence that supports a RFRA analysis.

Incorporation establishes a legal entity that can hire employees, raise money, and be taxed (or exempt from tax) or sued. An incorporated church, by existing as a separate entity, provides a way to shield the church and its directors from liability for certain types of claims against the church, consistent with state laws, as will be explained further in this Guide.

A plant medicine church's transparency with respect to their organizational document, bylaws, or websites is a personal choice. If it is possible on the organizational document, dependent on state requirements, or on a website, a church may decide to reference their use of sacrament to establish the centrality of its ritual in their religious beliefs. Explicit references to a specific sacrament controlled by the CSA may trigger an investigation or even preclude access to bank accounts, payment services, or insurance coverage, as explained below. The decision to operate in secrecy was determined to demonstrate sincerity by a U.S. District Court of Oregon,¹⁰⁵ whereas candor has been viewed positively by the DEA. Each plant medicine church should decide how transparent they want to be based on the potential benefits and risks.

A. Formation

To incorporate as a church, an incorporator files the organizational document¹⁰⁶ in the state where the church will operate. The incorporator can be one or more individuals (natural persons who are 18 years of age or older) who may eventually be the founding board of directors; the incorporator may also be a business entity, like an existing LLC or corporation, depending on

¹⁰⁵ *Church of the Holy Light of the Queen v. Mukasey*, 615 F. Supp. 2d 1210, 1211 (D. Or. 2009).

¹⁰⁶ The organizational document may be called a "certificate of incorporation," "certificate of formation," "articles of incorporation," "articles of organization," or "charter," depending on the state.

state law. A plant medicine church should always consult with an attorney to determine what information needs to be in the organizational document, as it is determined on a state-by-state basis, and what is included in this document could have a significant effect on RFRA claims, defenses, or applications for exemption in the future.

Generally, an organizational document identifies the name of the church, the fact that the entity will be operated as a church, the individuals who will comprise the board of directors, and where the principal place of business is, as well as the name and address of the registered agent and their office, if applicable. An incorporated entity may choose to use a registered agent, which is a person who receives legal notices and papers through the mail or otherwise on behalf of an organization for a fee. An organization does not need a registered agent if they have a mailing address that they can use to receive legal notices and papers on a regular basis.

Certain states require that the organizational document include a statement of purpose. This is an opportunity for a plant medicine church to establish what the church purpose will be. The board of directors must align all actions of the church with this purpose, so it must be consistent with the applicable state's nonprofit laws and, if the church intends to apply for federal tax-exempt status, the Internal Revenue Code Section 501(c)(3). The statement of purpose may solely state that it intends to operate as a charity, consistent with Internal Revenue Code Section 501(c)(3).

The church may also include a description of the church's beliefs in its purpose. However, it is essential that, if a detailed description of church beliefs is provided, all information be consistent, clear, and true, as such a description may be referred back to if the church must defend itself or decides to file an action based on their free exercise of religion. Some churches may find this to be an opportunity to identify their use of a psychedelic plant medicine as sacrament as a central aspect of communing with the divine. As discussed above, depending on how explicit the discussion of sacrament, such disclosure could bar use of certain services or—although unlikely but not impossibly—criminal investigation.

If it is the intent of the church to be tax-exempt, the organizational document may also include a statement that the church will not engage in activities outside of the tax-exempt purpose of the church. Non-exempt activities include campaigning for or against political candidates or allowing its assets to be used to benefit any individual.

Finally, there must be a clause that provides that, if the church were to dissolve, the church must commit that all assets will be transferred to another nonprofit or other state approved dissolution procedure.

To file an organizational document, a church will need to send the original, fully signed certificate and the appropriate filing fee.

Once incorporated, the church should apply for an employer identification number (EIN) from the IRS website. Even if a church does not intend to hire employees, an EIN is required for opening a bank account, so keep a copy of the EIN letter issued by the IRS.

1. Name and trademark issues

Any incorporated entity will need a name that is 1) not used by an existing corporation, and 2) strategically avoids possible trademark infringement litigation:

1. Most states have a website where all names of existing entities can be searched. By searching the state database, a church can ensure availability of the desired name. If the church realizes that it may be a while before filing the organizational document, it is possible to reserve the name by filing a name reservation form with the state.
2. The U.S. Patent and Trademark Office also has a website where all protected trademarks are listed and searchable. This Trademark Electronic Search System, or TESS, indicates which trademarks are protected by the term “live” and which were once protected but no longer are by the term “dead.” A trademark is a “mark,” meaning a name or image that is used for commercial or business purposes and is owned by an individual or entity.

When filing for a trademark, the owner reserves the mark for specific categories, such as on or related to certain goods or for certain services (e.g., Microsoft). With respect to a church, any name that is already trademarked and used for religious purposes—or even educational or clothing categories or other services seemingly related to religious advancement—should be avoided. It is best to contact an attorney to conduct a thorough search to avoid infringement cases and to properly register a trademark.

It should also be noted that a business may have certain trademark rights that are unregistered on the TESS but have been established by use in commerce. A simple online search may identify marks that could cause problems for a church wanting to use a name that is substantially similar or creates confusion.

Another consideration when selecting a name is what issues have been identified by courts and government agencies as undermining religious sincerity: A plant medicine church may want to select a name composed of words that are primarily spiritual in nature and do not insinuate the church provides services that are solely secular, such as philosophical, medical, therapeutic, or social terms.¹⁰⁷ A church may want to avoid terms like “healing,” “therapies,” “recovery,” or even “medicine,” because these words have secular connotations, which may be problematic for establishing the religious beliefs of a psychedelic plant medicine church.

¹⁰⁷ *Meyers*, 95 F.3d at 1484.

The avoidance of these terms may be contrary to plant medicine church communities' commonly used jargon. Ayahuasca is frequently referred to as medicine, despite there being no medical aspects—from the perspective of Western medicine—to a prayer ceremony, and spiritual healing is an accepted concept in many mainstream religions. However, this Guide would be remiss not to identify that an analysis of religious sincerity could focus on how a plant medicine church's name insinuates therapeutic aspects of its operations, which could undermine RFRA protection.

For example, when the DEA denied the application for a religious exemption from the CSA to use ayahuasca by Soul Quest, the government looked at the legal names used by the incorporated church. Although incorporated as Soul Quest Church of Mother Earth, Inc., the entity had also registered the name "Soul Quest Ayahuasca Retreat and Wellness Center" with the state to use while operating its business. In a RFRA or free exercise of religion analysis, the government will look at the whole picture of a church and its operations, which may include its name, marketing, and advertising practices. So, the chosen name can bear some significant weight.

B. Acquiring a bank account and insurance policies

1. Opening a bank account

To apply for a bank account as an incorporated entity, a church representative, such as the president or the secretary, who are the church officers with authority to open an account (see the section on electing officers in this Guide), need to provide their government (state or county) approved organizational documents, adopted bylaws (to demonstrate who can open an account and sign on the church's behalf), and the employer identification number (EIN) to a bank. To be on the safe side, taking in a copy of the IRS letter with the EIN will ensure the bank will be able to confirm the church's EIN.

The possible consequence of a plant medicine church's openness about its sacramental use is that certain financial institutions and operations will refuse to provide their services. A plant medicine church's name may jeopardize its ability to open an account with any bank, even if the plant medicine that the church uses as sacrament is decriminalized or legalized in the state where incorporated. An entity with words explicitly indicating plant medicine use, like ayahuasca or psilocybin, or any implicit indication in its name may cause a bank to deny opening an account. Most banks must comply with many federal regulations, and therefore would be unable to legally open an account if it appears the account will be used for activities that are illegal under federal law. For example, even though cannabis is legalized in certain states, because it remains a scheduled substance on CSA, companies in the cannabis industry have been denied bank accounts.

This also applies to payment processing services. These companies performed due diligence and deemed as high risk the work of certain plant medicine churches' who were open about use of psychedelic plant medicines as sacraments and declined to offer services. For example,

according to existing plant medicine churches, this inability to use services has occurred with Stripe, TransferWise, and Square.

2. Insurance policies

There will be challenges for a plant medicine church to get insurance to fully cover their activities. A plant medicine church may try to obtain general and property liability insurance. If the church leases property, insurance may be required. General liability insurance covers basic claims involving bodily injuries (such as a slip and fall) and property damage to a third party. Property liability insurance covers claims to repair or replace any damaged, lost, or stolen property.

However, it is possible that insurance companies will not offer insurance coverage if they are aware there are substances on Schedule I of the CSA involved in the church's business, either by refusing to offer insurance or denying a claim. Insurance companies often include language in their policies that allow the denial of a claim if it determines that a claim stems from illegal conduct, such as the use of controlled substances. Therefore, without a granted DEA exemption or winning a case in court that provides a plant medicine church the right to use their sacrament as an exercise of religion, a church's sacramental use of a psychedelic plant medicine may be the basis for the denial of coverage.

As also discussed in the section on a board of directors, the risk of denying coverage may also apply to liability insurance to indemnify directors and officers (often referred to as "D&O insurance") for a plant medicine church. Assuming the church can get D&O insurance, even if there is a valid claim to cover a lawsuit against a director or officer, the church may have to fight with the insurance company to get coverage while simultaneously defending the lawsuit.

C. Tax-exempt status for a church

A church that has incorporated automatically has tax-exempt status as provided under Internal Revenue Code (IRC) Section 501(c)(3); however, the church is still required to meet the 501(c)(3) requirements to maintain its tax-exempt status.¹⁰⁸ This means that a church may, among other things, receive tax-deductible donations and avoid having its income taxed without applying for 501(c)(3) status and being officially recognized as having such status by the IRS. However, there are risks in not filing, as well as notable benefits to obtaining the IRS' favorable determination of being a 501(c)(3) organization.

A church that exists without IRS recognition has tax-exempt status under IRC Section 508(c)(1)(a) as a "faith-based organization" (FBO). IRC Sections 508(b) and (c) provide that there is a presumption that an organization is a private foundation *except* in the case of a

¹⁰⁸ IRS Tax Guide for Churches & Religious Organizations. IRS Publication 1828 (Rev. 8-2015). <https://www.irs.gov/pub/irs-pdf/p1828.pdf>.

church. Therefore, an FBO must be a church, which is analyzed under criteria identified by the IRS but not defined in the IRC,¹⁰⁹ that has a primary purpose and primarily engages in activities that are religious in nature. Section 508(c)(1)(a) solely exempts a church from filing for tax-exempt status with the IRS, but it does not exempt the FBO from compliance with 501(c)(3) provisions. Declining to apply to the IRS can have consequences. The Tax Court in *Jack Lane Taylor v. Commissioner* explains:

Section 508(c)(1) simply relieves churches from applying for a favorable determination letter regarding their exempt status as required by section 508(a). Nothing in section 508(c)(1) relieves a church from having to meet the requirements of section 501(c)(3)...

[In addition, if the tax commissioner] determines that an organization is not entitled to an exemption as a church... its contributors must prove the church's right to an exemption under section 501(c)(3) in order to be entitled to a deduction for their contributions.¹¹⁰

So, an FBO still must ensure compliance with all 501(c)(3) requirements with respect to operation, recordkeeping, etc., and it may also put a burden on donors who are audited to prove the church's tax-exempt status. This uncertainty may make it difficult to solicit donations, as it is a risk for donors to the FBO. The church, too, may have to defend itself in an audit with the same information to be provided in the 501(c)(3) application anyway.

Generally, an FBO that meets IRC Section 501(c)(3) requirements does not have to file tax returns, may treat all income as tax-exempt, and can receive donations that will be treated as a deduction for the donor. However, a favorable determination letter from the IRS provides assurances to donors of tax-exempt status, compliance with federal nonprofit requirements, and transparency.

D. Incorporation and its benefits

By incorporating, a church can be an FBO and have tax-exempt status under 501(c)(3) by abiding by the requirements and without applying to the IRS for recognition. Beyond the tax benefits, there are corporate benefits to incorporating as a church (such as being able to get a bank account and insurance policies for its activities) and limiting liability for individuals running the church (because the church—not the individuals—would bear responsibility, except in particular circumstances¹¹¹).

¹⁰⁹ <https://www.irs.gov/charities-non-profits/churches-religious-organizations/churches-defined>

¹¹⁰ *Taylor v. Commissioner*, No. 14021-98, T.C. Memo. 2000-17.

¹¹¹ An individual can be held liable for acts outside the performance of duties for the organization, breach of a duty, like duty of care, or negligence, as examples.

In addition, and most importantly for a church that uses plant medicines as an integral aspect of prayer, incorporation may demonstrate to a court or government agency that the church has an officially acknowledged religious purpose.

While any church's exercise of its religious beliefs is protected under RFRA, individuals who practice a religion with plant medicines without forming a church are also protected under RFRA. However, by incorporating as a church and adopting bylaws, the entity is empowered to self-govern. Further, this formality establishes a willingness to have the religious beliefs of the church evaluated and to operate as intended for a nonprofit church, and it demonstrates forethought and organization of a church for religious exercise as understood by the relevant government agencies.

1. What to do after incorporating

Once incorporated, the church needs operate according to state and federal laws, which may include the following:

- Hold annual meetings where financial statements are reviewed and ensure all activities of the church are consistent with its stated and legally required purpose;
- Keeping minutes of all board meetings;
- Adopt the bylaws at the first meeting;
- Amend the bylaws, when necessary;
- If the organizational document does not identify the initial board of directors, elect and establish the board and any committees;
- Elect officers, such as president, secretary, and treasurer;
- Replace or reinstate directors on the board and officers when their term has expired;
- Approve the corporate seal (if any);
- Authorize applications for federal and state tax-exempt status;
- Set an accounting period and tax year;
- Keep records of all income and expenditures and the reasons for such activities to ensure no taxes are owed (despite being tax exempt, as discussed below, if there are activities that are unrelated to the church purpose, then any income as a result of those activities would not be exempt);
- Keep records of all donations that are deemed tax-deductible and provide those records to the individuals who donated;
- Retain all records of the church for a period of seven (7) years;¹¹²
- For a member-driven nonprofit, approve the issuance of memberships, membership certificates, and, if applicable, set and schedule membership dues or assessments; and

¹¹² Although the IRS Tax Guide for Churches & Religious Organizations states that four (4) years of record retention is appropriate, some states have requirements that nonprofits retain records for up to seven (7) years, so it may be in the church's best interests, if feasible, to maintain records for the longer period. See *IRS Publication 1828 (Rev. 8-2015)*. <https://www.irs.gov/pub/irs-pdf/p1828.pdf>.

- Approve the initial transactions of the nonprofit, such as opening bank accounts, and any transactions that may require approval by the board, which may be any that exceed a certain amount as provided in the bylaws.

The secretary of the church needs to create minutes that accurately record the actions taken by the incorporator or, if applicable, the board, and keep a file—whether electronic or on paper—where those minutes are stored.

2. Bylaws

Generally, bylaws set out the governance rules of a nonprofit corporation, or in this case, an incorporated plant medicine church, and they would contain provisions relating to the business of the church, the conduct of its affairs, or the rights or powers of the nonprofit and its directors and officers. Typical areas covered by bylaws include, but are not limited to:

- The procedures for the meetings of directors (including notice and voting);
- Standards of conduct of directors and officers;
- Terms/time periods for serving as directors;
- The officers and committees of the nonprofit;
- Indemnification and indemnification insurance;
- Conflict-of-interest policy and procedure;
- Voting procedures, such as how much notice is required for a meeting to hold a vote, how many votes are necessary to pass an action, and if such meetings can be held electronically;
- Oversight of board of directors' procedure;
- Procedures for the management and conduct of ordinary business affairs during natural disasters and other similar emergencies where normal procedures cannot be followed;
- A maximum amount of money that officers can spend without a vote from the board of directors;
- Definition of a “member,” if applicable;
- Compensation for directors and officers, if applicable (however review the following section on directors and applicable laws); and
- Procedures for the dissolution of the church.

A nonprofit is not for investment purposes where one can get equity and a return on investment. While a nonprofit can pay salaries, borrow money, and own assets, any and all assets will go to other nonprofits upon dissolution.

The meetings of the board of directors will be a key aspect of operating a nonprofit. Generally, because of the likelihood of needing an urgent meeting, a church can draft into their bylaws that meetings and votes can be held electronically, such as through a digital meeting or by email. The voting mechanisms should be provided in the bylaws, such as what constitutes a quorum (how many directors are necessary to vote for different corporate matters), number of votes for certain types of decisions, one vote per director, etc.

Each state requires different provisions to be included in the bylaws. Engaging with an attorney who can give legal advice in the state where the church is incorporated is necessary so that bylaws are drafted compliant with applicable laws.

Ultimately, the bylaws are a comprehensive document that not only gives powers to the board of directors and officers but also restricts actions in certain ways, often requiring votes for such actions. The bylaws must be consistent with their organizational document and state law, because if there are any inconsistencies, state law will control. All aspects of the bylaws must be drafted consistent with state laws and should be reviewed by an attorney.

As with the organizational documents, a plant medicine church may decide it is beneficial to have some language in the bylaws, when describing the church's purpose, that describes the church's work with plant medicine, even if language about the kind of medicine(s) is vague, like "sacrament" or "plant teachers" or "plant medicine." Any time a church states the church's purpose in state and federal filings, and there is discussion of use of sacrament, the sincere necessity of the church's use of its sacrament in order to perform its rituals should be articulated.

a. Conflict-of-interest policy and procedure

Generally speaking, a conflict of interest is present where an "interested person," which is defined by state law and is usually a director, trustee, officer, employee, or volunteer, or a relative of any of such persons, will receive a benefit that competes with the interests of a tax-exempt organization, like a church, as a result of a transaction or contract.

Conflict-of-interest transactions are not strictly prohibited. A transaction that involves a conflict of interest may nevertheless be in the best interests of the nonprofit and would be permissible if due diligence is exercised and appropriate voting procedures are followed. Due diligence would require that the transaction is examined to ensure it is truly fair, reasonable, and in the nonprofit's best interests. This will require full disclosure of any actual or perceived conflicts of interests by an interested person.

A nonprofit should have a conflict-of-interest policy with a procedure providing how to evaluate and manage such a conflict. This policy should be in the bylaws or referenced by the bylaws. The conflict-of-interest policy must provide clear direction to the nonprofit's directors, officers, employees, and volunteers on the following:

- What constitutes a conflict of interest
- How to disclose a potential, actual, or perceived conflict of interest
- How to handle and resolve a potential, actual, or perceived conflict of interest:
 - Determining if a conflict of interest actually exists

- Procedure of due diligence, such as reviewing alternative transactions or contracts and determining fair market value of the product or services, for example
 - It may be strategic to have the involvement of unbiased third-party for any evaluation of value or a contract
- Requiring a vote on the situation causing the conflict of interest that excludes any interested persons
- What to do if there is a violation of the conflict-of-interest policy, such as canceling the transaction or contract

A nonprofit entity, such as an incorporated plant medicine church, must use caution when handling potential conflicts of interest. State laws may have consequences for a nonprofit's violation of the conflict-of-interest policy; for example, in New York, as a result of a failure to comply with a conflict-of-interest policy, the Attorney General may bring a legal action that voids the contract or transaction, seeks restitution from the benefitting party, or removes any responsible members of the nonprofit's board of directors. IRC Section 501(c)(3) nonprofits are also prohibited from benefitting private interests, and in the case of a failure to properly manage a conflict of interest, the IRS may revoke the nonprofit's tax-exempt status.

As an example, although the details will depend on state law, if a piece of property owned by a director on the board is being considered by the church to be rented as the place of worship, then the director would be an interested person, there is a conflict of interest and the procedure must be followed. The interested person, which in this case would be the director who owns the property, cannot be involved in any considerations of and voting on the transaction involving a conflict of interest. The rest of the board of directors may consider the property and vote whether to enter into the lease. To perform due diligence, the board would review the property along with other potential properties, ensure that any rental cost is the fair market value (by looking at comparable properties and, perhaps, consulting with local realtors), and may determine that the rental is fair and the best option for the church. Finally, the board of directors would hold a vote—excluding the director owning the property—to decide on renting the property.

A conflict-of-interest policy and its procedure can be daunting, but it is helpful by ensuring that, when a conflict of interest arises, the board can handle the conflict in a manner that protects the church against charges of impropriety and feelings of unfairness among the members of the board, officers, and church members. It also minimizes the risk that the church's assets are misused.

An attorney will be able to provide a conflict-of-interest policy and procedure that is compliant with state law and to instruct the board on how to legally perform such procedure.

3. The board of directors, their fiduciary duties, and indemnification

A nonprofit must have a board of directors or trustees, which are the same thing, although referred to as one or the other depending on state law. (This Guide will refer to these individuals as directors.) Directors may be the individuals who incorporate the church or are selected after incorporation. The number of directors is dependent on state law and, in some states, the kind of church being incorporated. Some states require that directors be at least 18 years old, natural persons (as opposed to an entity), and/or comprised of a majority of state residents. The length of time that a director may hold the position can be one year or more, depending on the state laws.

a. Fiduciary duties

The responsibilities and the duties of the board of directors are set forth in the bylaws, which are the rules and regulations to govern the nonprofit corporation. The board of directors is responsible for monitoring and approving use of the church's assets, such as reviewing financial statements on a regular basis, setting the budget, and ensuring that the church is being operated consistent with its purpose. In satisfying their obligations as members of the board of directors, directors also have fiduciary duties that they owe to the church. Fiduciary duties require directors to act in the interest of the church and a director's conduct and decisions are measured against legal standards. The fiduciary duties include:

- *Duty of care:* Directors must act in good faith, using diligence, care, and skill of a reasonable person.
- *Duty of loyalty:* Directors must always act faithfully to and for the best interests of the church. No director should ever use their position for personal gain, however, as long as a conflict-of-interest policy and procedure is followed, a director may receive payment in connection with a transaction or contract.
- *Duty of obedience:* Directors must ensure that all acts by and on behalf of the church carry out the purpose of the church.

When choosing the board of directors, a church may choose individuals who understand and are committed to the church's spiritual beliefs and, if possible, have skills that can help operate a church, which is essentially a nonprofit organization. This includes individuals who: have previously operated a business, and it is a bonus if they have experience with a nonprofit; have financial or accounting experience; have the ability to fundraise or attract donors, or have a specialized understanding of relevant laws or are an attorney. It should be noted that any attorney who serves as a director has the additional burdens of being held to a higher standard of care and they are required to use any relevant professional expertise and skills in their role as a director.

These fiduciary duties apply to all board of directors' activities. For example, the board of directors will need to satisfy its fiduciary duties in choosing and maintaining the board and officers who can satisfy the duties and responsibilities owed. If an existing or potential director or officer is vetted and it is discovered that they have a history of fraud or money laundering, it may be a violation of the board's fiduciary duties to appoint such a person.

A board of directors must be available for the required and necessary corporate church activities, such as attending annual and regular meetings as set forth in the bylaws. A church is required to have annual meetings on or around the same date, but a board may also have regular or special meetings if an issue were to arise where board action is urgent, such as a vote on a financial decision or having to replace the individual who serves as an officer.

b. Terms and removal of directors

Under most state laws, the bylaws must specify the term that directors may hold their positions on the board. However, a director may voluntarily or involuntarily end their service earlier than the term. Directors may be removed from the board for “cause,” which may be defined and included in the bylaws to include, for example: 1) breach of fiduciary duties or 2) engagement in activities while acting as the church that are not authorized by the board. In addition, the board may remove a director without cause by a vote by the board; a church may decide to provide for this specific voting procedure in the bylaws as requiring a certain percentage of votes. Finally, a director may choose to leave for any reason; however, the bylaws may request notice.

When a director leaves at the end of a term or sooner, the board will be required to find a replacement director, nominate the director (according to any procedure in the bylaws, if applicable), and elect them by a vote.

If the church is required to have a certain number of directors, then, once a director leaves or is removed, the board would need to appoint and elect a new director to replace them.

c. Director indemnification and limitation of liability

There is always a risk that directors may be sued for their actions, or inactions, with respect to the church. However, there are significant protections under state law to limit a director’s liability. Some state laws provide that a director is not personally liable, meaning cannot be sued and personally owe for damages, as long as certain conditions are met. While it depends on the state, those conditions often require that the director was:

- I) Serving in their position receiving no or less than a certain amount of compensation;
- II) Complying with their fiduciary duties in their capacity as director; and
- III) Not intentionally, willfully, recklessly, or grossly negligent when engaging in conduct that caused damages or failed to engage in conduct that would have prevented damages.

Indemnification is commonly provided by a nonprofit to the board of directors. To indemnify means to promise to advance or reimburse for all expenses and losses as the result of a lawsuit in connection with the performance of services. A church may include indemnification provisions in their bylaws or in a separate agreement. Without any contractual promise of indemnification, a church may still be required by state law or a court to compensate a director for lawsuit

expenses or losses. Before indemnifying the board of directors, the church must be prepared to pay these expenses or damages or acquire D&O insurance.

However, certain states prevent the indemnification of a director who acted, or failed to act, in bad faith or was intentionally dishonest in their capacity as a director. In addition, indemnification established by state law may be limited because the church's use of plant medicines is deemed illegal. There is no precedent that this Guide is aware of but it is a possibility.

A church may also elect, without the indemnification provisions, to cover any costs a director may incur in the exercise of their duties. Conversely, a director may sue for reimbursement in the absence of indemnification provisions.

4. Officers and their responsibilities

Officer positions generally include a president, a secretary, and a treasurer. State law often requires these three officers. The board of directors must elect or appoint the officers of a nonprofit church to run the day-to-day operations. Officer positions may also include one or more vice-presidents and any other officers it may choose, according to the bylaws. Directors on the board can hold the positions of officers, which is convenient for holding meetings.

Officers may have a variety of responsibilities, such as the president presiding over meetings, the treasurer organizing and summarizing financial records, and the secretary recording the minutes during board meetings and being responsible for signing checks.

Like directors, officers have fiduciary duties, can be sued, and can be indemnified. Officers may face the same limitations for indemnification as the board of directors.



III. Obtaining IRS recognition of a church's tax-exempt status under 501(c)(3)

A church can apply for recognition of tax-exempt status under IRC Section 501(c)(3) using Form 1023. The IRS may review the application and contact the organization with questions before issuing a favorable determination or denial. If sufficient criteria are met, the church will receive a favorable determination letter from the IRS.

The recognition by the IRS as a church under federal law might be helpful in establishing a RFRA claim or defense. While IRS recognition may not cause a court or agency to decide the applicability of RFRA, it may be a persuasive.

A. Tax-exempt 501(c)(3) status requirements

The IRS requires that any 501(c)(3) organization be organized and operated exclusively for an exempt purpose, such as for a religious purpose. The term “exclusively” means that activities must primarily be accomplished consistent with the underlying exempt purpose. In the case of a church, this means the church cannot conduct more than insubstantial activities that are unrelated to its religious purpose.

As a church subject to IRC Section 501(c)(3)—whether or not exempt status is applied for—certain rules must be abided by. The church must not:

- Cause net earnings to inure to any private shareholder or individual;
- Provide a substantial benefit to private interests;
- Devote a substantial part of their activities to attempting to influence legislation;
- Participate in, or intervene in, any political campaign on behalf of (or in opposition to) any candidate for public office; and
- Be involved with purposes and activities that are illegal or violate fundamental public policy.¹¹³

The IRS states that, with respect to a 501(c)(3) church:

Since 501(c)(3) of the Code requires that organizations must be organized and operated exclusively for one or more exempt purposes, religious organizations may be disqualified

¹¹³ IRC Section 501(c)(3). Also see IRS Publication 1828: Tax Guide for Churches & Religious Organizations. <https://www.irs.gov/pub/irs-pdf/p1828.pdf>

if they promote a substantial nonexempt purpose. For example, religious organizations conducting primarily the following activities have been held **not** to be exempt under 501(c)(3):

- Publishing literature having little connection to the religious beliefs of the organization and for-profit motives; and
- Operating a religious retreat facility where religious activities are not required and only incidental to recreational and social activities.

For further information on any of these rules, please review IRS Publication 1828.

This Guide encourages any plant medicine church to engage an attorney familiar with church and nonprofit organization requirements to assist with operation of the church to ensure that its tax-exempt status is maintained.

B. Applying for 501(c)(3) status

A plant medicine church that wants to apply for tax-exempt status under IRC Section 501(c)(3) must file IRS Form 1023, including Schedule A that is required for any entity that is a church, along with the appropriate fee. Churches may not use Form 1023-EZ, which is the short form version of Form 1023. As of January 31, 2020, nonprofits must complete and submit their Form 1023 and payment electronically through pay.gov.

In Schedule A, there will be opportunity to describe the principles and practices of the church's religion. Again, the IRS definition of "church" is based on factors, as follows:

- Distinct legal existence (e.g., a nonprofit corporation with a religious purpose, such as a church)
- Recognized creed and form of worship
- Definite and distinct ecclesiastical government
- Formal code of doctrine and discipline
- Distinct religious history
- Membership not associated with any other church or denomination
- Organization of ordained ministers
- Ordained ministers selected after completing prescribed courses of study
- Literature of its own
- Established places of worship
- Regular congregations
- Regular religious services
- Sunday schools for the religious instruction of the young
- Schools

An applicant will be able to provide written descriptions to demonstrate how some of these factors are satisfied, for example: a statement of faith or summary of beliefs, a code of doctrine

and discipline, religious hierarchy of persons who have influence or authority over the church, whether it is part of a group of churches with similar beliefs, form of worship, how worship is performed, and if there is an established place of worship.

One important question is in Line 9, where Form 1023 asks if the church has an “established congregation” or “other religious membership group.” The instructions for Form 1023 clarify that such a congregation or membership group includes “individuals who regularly attend and take part in the religious services of [the church] at an established location...” but “generally doesn’t include members of only one family.” Without being able to state there is an established congregation or other religious membership, the IRS will likely not grant a favorable determination letter on 501(c)(3) status.

While this Guide has noted the value of transparency in a RFRA analysis by the DEA¹¹⁴ and the importance of highlighting the centrality of a sacrament¹¹⁵ in the exercise of the religion, explicitly disclosing use of a controlled substance as sacrament could compromise the church’s tax-exempt status. In the instructions of Form 1023, the IRS provides that “the practices and rituals associated with your religious beliefs or creed must not be illegal or contrary to public policy.” A church may want to consult with an attorney to strategize language included in the Form 1023 and consider the possible risks.

For example, in September 2021, a psychedelic plant medicine church, the lowaska Church of Healing, was denied its tax-exempt status, and was denied again on appeal, because the IRS had determined, according to the church’s court filing, lowaska had “an illegal purpose and its distribution of a controlled substance to individuals is an illegal activity.”¹¹⁶ The church has filed a claim for relief, alleging violations of RFRA among other things, in the US District Court for the District of Columbia.¹¹⁷

If tax-exempt status is granted, the IRS will send a favorable determination letter that the nonprofit can use to prove its status and keep it in a file with all other organizational documents. This Guide strongly recommends consulting with an attorney familiar with nonprofit issues and RFRA to assist a plant medicine church completing Form 1023 to apply for 501(c)(3) status.

C. Tax benefits of tax-exempt churches

Some of the benefits of a federal nonprofit 501(c)(3) status are: (i) exemption from federal tax income; (ii) tax-deductible contributions; (iii) possible exemption from state income, sales, and employment taxes; (iv) reduced postal rates; (v) exemption from federal unemployment tax; and (vi) tax-exempt financing.

¹¹⁴ Conversely, courts have acknowledged the justification of a church praying with sacrament in secret. See *Church of the Holy Light of the Queen v. Mukasey*, 615 F. Supp. 2d 1210, 1211 (D. Or. 2009)

¹¹⁵ *Levitan*, 281 F.3d at 1321 (citing *Henderson*, 253 F.3d at 17).

¹¹⁶ <https://www.bialabate.net/wp-content/uploads/2021/11/lowaska-Church-vs-IRS-Original-Complaint.pdf>

¹¹⁷ *lowaska Church of Healing v. Rettig*, Case No. 1:2021cv2475. September 22, 2021.

There are also some grants that are only available to 501(c)(3) organizations.

D. The Unrelated Business Income Tax (UBIT)

Not all income generated by a 501(c)(3) organization is tax-exempt. Any unrelated business income generated is subject to the unrelated business income tax (UBIT). The IRS Tax Guide for Churches & Religious Organizations defines UBIT and provides the following conditions and exemptions:

Churches and religious organizations, like other tax-exempt organizations, may engage in income-producing activities unrelated to their tax-exempt purposes, as long as the unrelated activities aren't a substantial part of the organization's activities. However, the net income from these activities will be subject to the UBIT if the following three conditions are met:

- The activity constitutes a trade or business,
- The trade or business is regularly carried on, and
- The trade or business is not substantially related to the organization's exempt purpose.¹¹⁸

The fact that the organization uses the income to further its charitable or religious purposes does not make the activity substantially related to its exempt purposes.

1. Exceptions to UBIT

Even if income is considered UBIT, the income may still be tax-exempt if it meets one of the following exceptions:

- a) Substantially all the work in operating the trade or business is performed by volunteers,
- b) the activity is conducted by the organization primarily for the convenience of its members, or
- c) the trade or business involves the selling of merchandise substantially all of which was donated.

In general, rents from real property, royalties, capital gains, and interest and dividends aren't subject to the unrelated business income tax unless financed with borrowed money.

¹¹⁸ Examples of trade or business that are not substantially related to the organization's exempt purpose include, without limitation, selling T-shirts, consulting work with other churches, and selling ceramics or pottery.

While the income generated by churches is tax-exempt, it should be noted that a church's payments to church leaders, identified by the IRS as ministers, or assistants, etc., are taxable income. Please see further discussion of this issue later in the Guide.

E. Risks to a psychedelic plant medicine church after incorporation and IRS recognition

Even after incorporation as a plant medicine church under state law and federal recognition as a nonprofit church, a church still bears the risk of federal or state authorities burdening religious exercise, such as by seizing sacrament or arresting or prosecuting the church or its members in a court of law. Without a court decision or an exemption that explicitly exempts a church from the prohibitions of the CSA, the church's use of plant medicines, even in a religious context, may be subject to criminal prosecution.



IV. Best practices for a prayer ceremony

There are many best practices that can be implemented to prepare for a prayer ceremony. The church can implement policies and procedures that will protect the health and welfare of participants and diminish risk of diversion, as well as limit the liability of the church.

These suggestions are based on the analysis in the cases in Part I of this Guide and are only a baseline from which a psychedelic plant medicine church should begin and must be tailored to its unique religious beliefs and practices. It is advisable that a plant medicine church do its own research and engage an attorney to develop these concepts into contracts, procedures, and policies that are practical and consistent with the law.

A. Creating an emergency situation procedure

A plant medicine church may create an emergency situation procedure that is applicable to the rituals and characteristics of its sacrament. Church leaders and any assistants or helpers should memorize this procedure, but it could also be printed out and accessible.

The procedure may include information like the location of the first aid kit (which may include an EpiPen and defibrillator), fire extinguishers, and a phone to use in case of an emergency to call for emergency services, and provide other safety measures to be used during a prayer ceremony.

Due to the intense spiritual nature of a prayer ceremony, an experienced and skilled church leader will be able to assess when a congregant is experiencing a disorientation or overwhelm, as opposed to a health emergency. There may be ways to assist the disoriented or overwhelmed congregant, such as receiving a cleansing spiritual prayer or helping the congregant to leave the space. However, as soon as it is even possibly an emergency, a congregant should get immediate medical assistance. The emergency situation procedure may include a list of symptoms that indicate an emergency to alert any assistants or helpers. Never hesitate to call emergency services because of concerns about the church's criminal or civil liability.

The emergency procedure should also provide how to deal with any congregant that indicates or attempts self-harm or harm to others during a ceremony; church leaders and helpers should be prepared to deal with this situation promptly and appropriately.

B. Informed consent, liability release, and medical disclosure forms

Prayer ceremonies are spiritual experiences that may beneficially affect all aspects of a congregants' life, so it can feel uncomfortable and incongruously formal to require congregants to sign legal documents and complete medical disclosure forms. But the U.S. court system is filled with claims by litigious individuals, whether justified or not.

Prayer ceremonies have inherent risks due to a sacramental medicine's known—and unknown—contraindications with certain prescribed medications, recreational drugs, herbs, and foods, as well as the potency of the medicine on an individual's life in spiritual, emotional, and physical ways. The mental and physical health of each individual is so unique that there are the expected and unexpected effects of a prayer ceremony. It is not only for liability reasons, but also for supportive reasons, that knowing more about all congregants' backgrounds makes a church leader better prepared to guide the ceremony for all involved.

For all these reasons, the medical disclosure form, informed consent, and liability release are helpful for providing a congregant with spiritual guidance and to best protect the church from liability. As stated, each individual is unique, and a church must prepare for the unexpected, including a congregant having a difficult experience or a medical emergency. In a worst-case scenario, a congregant or the family of a congregant who is severely injured or dies may be compelled to file a lawsuit against the church, so demonstrating care and caution and ensuring that both the congregant and its "estate" is bound to any release of claims may protect the church.

It is strategic that the medical disclosure, informed consent, and liability release be comprehensive; for example, these legal documents should be tailored to the sacred plant medicine and church's rituals and drafted by an attorney for compliance with applicable laws.

Every congregant should be required to complete the medical disclosure form and sign the release for every prayer ceremony since details change from ceremony to ceremony. Details that change are as basic as the date or location of the ceremony or as complicated as the congregant's mental health or other activities during a prayer ceremony retreat (sweat lodges, etc.) that could affect the health of a congregant.

1. Best practice of providing informed consent, liability release, and medical disclosure form in advance

A best practice for using any medical disclosure form, informed consent, and liability release is to send these documents to congregants, and request them to be returned, in advance of each ceremony, for two reasons:

- To allow the church enough time to review and, if necessary, contact the congregant to discuss any answers that raise health concerns or may require them to reschedule due to those answers; and

- To allow the congregant enough time to read any legal documents and sign it knowingly and voluntarily. Otherwise, the agreement could be deemed unenforceable due to duress, meaning illegal pressure to sign the contract.

a. Sufficient time to review and discuss health issues

A plant medicine church, by reviewing a medical disclosure form in advance and being able to identify congregants with health issues, may weaken any compelling government interest in protecting the health and welfare of individuals. The government and court systems have identified that having a screening procedure demonstrates active harm reduction. In the Santo Daime case, the court noted that the church attempted to “screen persons who might be too weak physically, or too unstable mentally, to drink Daime tea safely”; therefore, although their “process is not perfect, [it did not detract from the fact that] their track record indicates it has worked well enough.”¹¹⁹

Not only must there be a procedure for medical screening, but it must be followed. In the DEA Final Determination letter to Soul Quest, the government explained that the church’s alleged failures to follow their own screening procedure reinforced that the DEA had a compelling interest in denying their application for exemption from the CSA:

Soul Quest described detailed screening procedures for participants, as well as monitoring of ayahuasca consumption by trained health care professionals. However, DEA’s investigation revealed troubling allegations that Soul Quest has failed to follow its own procedures.

While the examples given by the DEA are more about delays in medical aid, it is clear that both a procedure and the thorough execution of such a procedure will be evaluated.

b. Sufficient time to sign legal documents knowingly and voluntarily

A plant medicine church requiring the informed consent and liability release be signed in order to participate must provide the release with enough time for a congregant to understand, consider, and even consult with an attorney, in order to avoid the release of liability being rendered unenforceable. Any pressure to sign a release that may be coercive, such as handing it to a congregant and requiring a signature right before the ceremony, could be deemed to be duress.

2. Examples of information to include in an informed consent and liability release

An informed consent and liability release form for a prayer ceremony (a “Ceremony Release”) may provide, for example, sufficient information for a congregant to give consent after being

¹¹⁹ *Church of Holy Light of Queen v. Mukasey*, 615 F. Supp. 2d 1210, 13 (D. Or. 2009).

informed of the nature of a prayer ceremony and the risks. It may also require a congregant to agree to abide by certain conditions, and, for the sake of the plant medicine church's viability, release the church from liability where there is the unavoidable possibility that such risks could be realized and result in injury.

a. Informed consent

To get informed consent, the psychedelic plant medicine church should explain its sacrament and the experience of a prayer ceremony so congregants know what to expect—as much as possible. Once informed, a church may require, in advance, that congregants consent to participate in the spiritual ritual. Informed consent means provide enough detail for a congregant to make an informed decision about whether to attend the prayer ceremony.

Particularly for a ceremony with sacrament, a plant medicine church accomplishes informed consent by fully describing the church's sacrament, such as the scientific name for it and that it is ingested with the religious intent to produce a non-ordinary state of consciousness and for spiritual connection with higher powers.

b. Risks and assumption of risks

A Ceremony Release needs to define any and all risks of attending a ceremony in order to have the congregant knowingly assume the risks. Assumption of risk means that an individual, having voluntarily exposed themselves to the known risks, is barred from recovering damages for an injury sustained in the course of the described activities. If the congregants assume the risks, then the congregants may not be owed a legal duty that would be the basis of a successful lawsuit.

In explaining the risks to congregants, the church needs to include in the Ceremony Release that, for example, a ceremony can involve physical, financial, property, emotional, and other damages, losses, or personal injury, including, but not limited to, illness, disability, or death, to the congregant or other congregants, which can be caused or complicated by the congregant's mental, physical, or emotional health or conditions, during the ceremony. It is best to be as thorough as possible, even if it seems lengthy, because the church only has one opportunity for the congregants to consent and, by assuming all risks, release their right to any legal claims against the church.

The location of the ceremony should be explicitly described, such as the address and a description of the premises; for example, there may be a description of its natural features, presence of domestic or wild animals, and use of campfires and candles. The Ceremony Release may refer to the fact that congregants are "invitees" to the premises and the church's efforts to satisfy the appropriate duty of care owed to invitees, such as reasonable care to discover and prevent hazards that could cause injury. However, it may be noted that there are hazards that are undiscoverable and unpreventable and that the congregant should accept the risks of those hazards.

With respect to the sacramental use of a plant medicine, there are inherent risks in its psychoactive effects and the spiritual objectives of its use in the ceremony.

In addition to the sacrament, the ceremony, and any activities during the retreat, may cause congregants to be exposed to other substances with their own risks; for example, food and drink for meals, other herbs if they are smoked or burned as incense, and smoke from a campfire. Congregants may assume the risks of—and take responsibility of avoiding—any substances that they are allergic to, along with a confirmation that they have disclosed all allergies in the medical disclosure form (assuming that they do).

After detailing the risks of participation, and noting there may be unknown risks, the congregant would be able to agree to assume any and all risks.

c. Affirmation of sincere spiritual beliefs

As discussed throughout this Guide, a religion is comprised of organized and sincere spiritual beliefs. If a plant medicine church is required to defend itself or decides to file a claim under RFRA, it may be helpful for the Ceremony Release to provide a short but thorough description of the church's religious tenets and to ask congregants to agree that they intend are attending the ceremony to engage in prayer in the sacred way of the church to connect with the divine.

A plant medicine church may decide to require congregants affirm that either 1) they are members of the church and share the church's religious beliefs, or 2) they are exploring the church's religious beliefs and want to engage in prayer to determine if they want to become a member.

With a plant medicine that is a controlled substance, the issue of diversion as a compelling interest does create additional considerations with respect to congregants' intent and access to a church's sacrament. In mainstream religions, it is not unusual for a person to attend the services of several churches before becoming a member, if at all. However, in the Final Determination letter to Soul Quest, the DEA did scrutinize congregants who seemingly just wanted access to ayahuasca, as opposed to sincerely engaging in religious rituals.

d. Ability to participate

The Ceremony Release may require that congregants confirm that they are physically and emotionally able to participate in the ceremony and have no medical, physical, or psychological conditions that would endanger themselves or others by participating in the ceremony. Congregants may be asked to acknowledge and agree it is for their own safety and the safety of others that they fully disclose all information requested of them on the medical disclosure form.

Congregants may be asked to agree that, if they use any medications, herbs, and supplements, whether contraindicated or not, from when they completed the medical disclosure form to the date of the ceremony, they inform a representative of the church.

There may also be language acknowledging that use of prescription medications or recreational drugs (for a period of time the church deems necessary, dependent on the sacrament and the potentially or actually contraindicated substances) prior and subsequent to a ceremony may adversely affect a congregant's mental and physical health, and a congregant should agree to avoid such usage and not engage in it without first discussing it with a church representative.

e. Conditions of participation

In order to participate in the ceremony, a plant medicine church may ask that a congregant agree to certain conditions that are for the safety of all congregants. These conditions may include but are not limited to, the congregant agreeing to:

- Follow the rules of the ritual and abide by directions by church representatives, such as:
 - Being limited as to how much sacrament may be ingested, or not being permitted to ingest sacrament, due to certain circumstances,
 - Being required to stay in a certain location or position, and
 - Receiving and/or being taken for medical attention, as necessary, to be determined in the sole discretion of the church.
- Stay on the premises until the conclusion of the ceremony;
- Accept responsibility for the costs of any medical attention or services that the congregant may need;
- Accept responsibility for transportation to and from the ceremony;
- Authorize the church to speak with the congregant's emergency contact under certain circumstances, such as if the congregant states intentions to cause harm to themselves or others or exhibits manic or otherwise concerning behavior;
- A policy of zero tolerance for sexual, emotional, physical harassment or violence, as well as agreeing to report such harassment or violence;
- A policy prohibiting behavior based in racism, sexism, xenophobia, and other forms of discrimination, as well as agreeing to report any such behavior;
- A diet for a period of time prior to and after the ceremony that avoids any contraindicated herbs, prescribed medications, recreational drugs, and foods that are inconsistent with the sacrament and/or church's religious beliefs, if applicable;
- Self-care and integration (as organized or directed by the church or otherwise) subsequent to a ceremony;
- Contact a church representative or mental health therapist if the congregant has any feelings of destabilization or inclinations towards self-harm;
- Avoid making any major life decisions for the period of time after the conclusion of the ceremony; and

- Maintain confidentiality with respect to the ceremony (such as the location or other aspects) and the privacy of individuals (both organizing and attending), without compromising any legal obligations or the need to speak to a mental health professional, due to the sacred container of the prayer ceremony. This confidentiality may include agreeing to not take and post photos on social media, etc., and consenting to turning off and placing cellular phones in a secure location during the ceremony.

f. Release of claims and indemnification

The Ceremony Release may require that all congregants be over the age of 18 and confirm they are legally competent and that they knowingly and voluntarily intend to sign the Ceremony Release. This allows the congregant to release, waive, and discharge the church of any and all rights and claims to seek or receive compensation in the case of damages. The church may also require that a congregant defend, indemnify, and hold harmless the church and its authorized representatives for any claims, liabilities, demands and/or costs.

The Ceremony Release may not only bind the congregant but also any spouse, children, agents, assignees, heirs, executors, administrators, beneficiaries, trustees, or legal representatives for the reasons previously discussed.

Further, due to the gray area of the law where a plant medicine church operates, the Ceremony Release may state that every provision is independent of any other provision and may be enforced even if other provisions are not enforceable.

The section where the congregant releases the church from claims can be very complex and, as with all parts of the Ceremony Release, it is important to use an attorney's guidance and legal skills in drafting it.

g. Other optional considerations for a release

The Ceremony Release may require the congregants to acknowledge that a prayer ceremony is not a substitute for physical or mental health therapy. According to case law and DEA analysis, any promise of therapeutic treatment undermines the sincerity of religious beliefs. Relatedly, a Ceremony Release may state, and ask for acknowledgement, that a spiritual experience during a ceremony is personal and what may occur for one person may not necessarily lead to the same experience for others.

The Ceremony Release may also ask congregants to consent to the church's policy to hold in a secure location all car keys until it is safe to return them, which would be a significant amount of time subsequent to when the effects of the sacrament subside. Depending on the sacrament, the effects may last 6–12 hours, and it is unsafe for a congregant to operate a vehicle while still feeling the effects. It may be necessary to require that congregants spend the night to ensure the safety of congregants after their use of plant medicine during the prayer ceremony.

3. Issues with enforceability of a release

Due to the legal status of most sacramental medicines, portions or the entirety of any release signed by a congregant may not be enforceable; however, the likelihood of enforceability may increase if it is a properly drafted release, consistent with the practices of the specific church and applicable state law.

Another issue with a prayer ceremony with a sacred plant medicine is that a claim may be filed by a congregant or their family stating that the use of sacrament is extraordinarily dangerous and, thus, the church should be subject to “strict liability” for any resulting harm and damages. Strict liability means that, even when reasonable care was exercised, there will be a finding of liability even if the defendant isn’t at fault. An activity triggers strict liability when it is uncommon and inherently dangerous, and therefore the serious risk of harm cannot be eliminated by the exercise of the utmost care.

For example, if a resident in a neighborhood owns a wild animal, like a tiger, that injures someone, it won’t matter that they had a cage and very strong leash because this dangerous activity will result in the application of strict liability. Other examples include making and storing explosives. Whether a prayer ceremony will be considered such a dangerous activity that it triggers strict scrutiny depends on the court’s analysis, however it should be noted that, if strict scrutiny is applied, a liability release may not provide protection.

4. Pre-screening for a prayer ceremony with medical disclosure form

Pre-screening congregants before a prayer ceremony means requiring all congregants to complete a medical disclosure form that asks questions about the congregant’s physical and mental health. Before inviting a potential congregant to their first prayer ceremony with the church, a church leader may conduct a personal interview where their physical and mental history, experience with plant medicines, and intentions are discussed. If there are any red flags, such as lack of sincerity, a perspective that the plant medicine ceremony is a recreational experience, head trauma, severe emotional trauma, or certain contraindicated medications, a church leader should not hesitate to delay the invitation to attend a prayer ceremony.

Although a prayer ceremony is a religious ritual, pre-screening of a congregant is advisable due to the potentially intense effects of psychedelic plant medicines. A prayer ceremony that involves a plant medicine that may alter the congregant’s state of mind may be intended to be spiritual in nature, but it may also cause a negative interaction if the congregant has certain mental or physical health issues or takes certain prescribed medications, herbs, supplements, or recreational drugs. It is the responsibility of the church to support all congregants on their spiritual path as best it can, and that means asking questions that may make some congregants uncomfortable.

a. Medical screening form information and procedure

The questions to be included in the medical disclosure form are dependent on the kind of plant medicine that the church uses for prayer ceremonies. Certain plant medicines are contraindicated with certain health conditions and foods, herbs, prescribed medications, or recreational drugs, meaning that it is inadvisable to allow them to interact as it could cause a serious health issue.

After reviewing a medical disclosure form, the church should not hesitate to contact a congregant to discuss a contraindicated health condition or substance. A church may insist that a congregant attend a different prayer ceremony when such contraindicated substance is no longer in the congregant's system.

In the Santo Daime case, the court considered the importance of asking certain questions about a congregant's health condition depending on a church's rituals and practices:

Plaintiffs give applicants detailed medical questionnaires to determine whether an applicant has a medical condition or is taking drugs, such as antidepressants, that might conflict with drinking Daime tea. CHLQ has prepared a seven-page list of drugs that might cause problems in combination with Daime tea. CHLQ periodically updates the list. CHLQ also advises members to avoid certain foods, such as aged cheese, and drink, such as red wine, before drinking Daime tea.

Plaintiffs ask applicants about psychiatric histories, criminal records, and drug and alcohol abuse. Goldman testified that if an applicant has a history of psychiatric problems, plaintiffs try to determine whether person might benefit from the Daime tea. If a screener determines that an applicant needs the type of attention or environment that the church cannot provide, the screener will turn the applicant away no matter how enthusiastic the applicant is.

[The government] criticize[d] plaintiffs for not conducting a more formal interviewing process. [The court notes] that the Native American Church does not request medical information before allowing new applicants to participate in services, even though the peyote consumed during NAC religious ceremonies contains mescaline, a hallucinogen comparable in strength to the DMT in Daime tea. The application form for membership in the Native American Church seeks only name, address, phone number, tribe, and tribal enrollment.¹²⁰

A plant medicine church should do its due diligence to determine what health conditions and substances to ask about in the context of its sacrament and any potentially dangerous interactions.

¹²⁰ *Church of Holy Light of Queen v. Mukasey*, 615 F. Supp. 2d 1210, 13-14 (D. Or. 2009)

In addition to questions about potential medical issues, requesting an emergency contact who is aware of a congregant's plan to attend a prayer ceremony ensures that there is a person that the church can comfortably reach out to in the case of a physical, psychological, or emotional emergency during the ceremony and if a congregant provides any seriously concerning information that clearly indicates the intent to self-harm or harm another person. It is not necessary to request contact information of a therapist or doctor because a plant medicine church should not have to make a purely medical decision about when to contact a congregant's medical professionals. In the event there is an urgent medical emergency, emergency services would be called, not a congregant's doctor or therapist.

As discussed, the medical disclosure form should be sent in advance and with enough time to be completed beforehand so it can be reviewed by the church before a prayer ceremony. The form should also be completed before every prayer ceremony, as the physical or mental health of the congregant may have changed since the last time they completed the form. Creating a short form that only includes questions that congregants may answer differently over time, such as what herbs, prescribed medications, or recreational drugs the congregant has recently taken and the state of their mental health, can simplify the form used for each attendance.

b. Confidentiality of medical disclosure forms

In any context, individuals are very protective of their medical and personal information. Assurances that the medical disclosure form will be kept confidential and even stored in a secure location may ease the concerns of congregants. If a congregant declines to complete a medical disclosure form, then it is up to the church to determine if there is an alternative that makes sense. However, there may be significant liability risks to the church if it cannot demonstrate having done its due diligence pre-screening a congregant prior to a prayer ceremony documented in writing.

Although a church is not subject to the rules about confidentiality and recordkeeping under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), it may be comforting to congregants to know that the records containing their sensitive information in the medical disclosure forms are kept in a secure manner. Many churches have decided to comply with the HIPAA recordkeeping rules with respect to medical information.

Despite having completed medical disclosure forms, at the start of a prayer ceremony, congregants should be encouraged to inform church leaders and assistants of any changes in their emotional state or physical health—and whether they have taken any other substances—since completing the form.

Regardless of assurances and security mechanisms for storing any medical forms, a church must be aware that a subpoena from a government agency or court, requiring disclosure of such forms, is a possibility.

C. Safety during a prayer ceremony

While much of the preparatory work, such as medical screening and having an emergency situation procedure, will establish safety measures, working with an experienced church leader will further minimize safety concerns during a prayer ceremony. Church leaders are the center of the universe for a religious community. They become like family to congregants, aside from being spiritual guides. There is a reliance and trust inherent in their role as church leader.¹²¹ A church leader working with plant medicines has the additional burden of being particularly knowledgeable in order to determine how much sacrament to offer during a prayer ceremony to minimize the risk of an emergency and when a congregant's behavior during a ceremony indicates there is an emergency. Due to the potential depth, vulnerability, and intensity of a prayer ceremony, a church leader has a grave responsibility.

In addition, a church leader who has learned to lead significant experience participating and leading prayer ceremonies, particularly under the wing of another experienced church leader, and who has sincerely developed religious beliefs, will have a better claim or defense under RFRA than a church leader who has simply begun leading ceremonies without such a background.

In the *Santo Daime* case, the court noted the safety precautions created and taken by the leaders and assistants:

The church designates experienced church members as “guardians” to monitor the congregation during services and tend to members, particular new ones, who are suffering from nausea, diarrhea, or other discomforts. The spiritual leader conducting the ceremony circulates among the congregation to counsel those who appear anxious or upset. Three church members are physicians and two are registered nurses, so a person with medical training is often present during services.¹²²

A church holding prayer ceremonies should require helpers and assistants be prepared to guide the spiritual experience and create safe conditions for congregants. Assistants during a prayer ceremony should be fully prepared for difficult spiritual experiences and health emergencies, such as knowing where health saving equipment is kept and how to access a phone to call for medical assistance when such use is necessary. Having someone who is trained in CPR would be a benefit; however, at the very least, helpers should have basic knowledge regarding how to respond to an emergency, such as knowing the emergency situation procedure of the church. A sufficient number of helpers should be on hand based on the number of ceremony participants.

¹²¹ Note that some churches may be organized with councils of elders and experienced people rather than a singular leader.

¹²² *Church of Holy Light of Queen v. Mukasey*, 615 F. Supp. 2d 1210, 14-15 (D. Or. 2009).

A church may have certain rules for the ritual of the prayer ceremony that considers the physical and emotional safety of their participants, such as:

- Requiring congregants to sit up from time to time (to check on their condition, avoid choking, etc.);
- discuss importance of consent to be touched in any way during the ceremony (both by helpers and other congregants);
- prohibiting any sexual conduct during the ceremony;
- never allowing any congregants to leave the space alone (a helper or church leader should be available to accompany a congregant who may need some time away from the ceremony, if it is appropriate);
- requiring all congregants to remain at the location of the prayer ceremony until the church leader closes the ritual.

The location of the prayer ceremony is also important. It should be secluded enough for privacy (but not so far that emergency services would take a dangerously long time to arrive) and a safe space in terms of places where a congregant could slip and fall, etc.

D. Integration after a prayer ceremony

Due to the potentially deep spiritual experience of a prayer ceremony with psychedelic plant medicine, a plant medicine church may find that it is consistent with their beliefs to support congregants with integration, such as:

- Checking in with participants at the close of the ceremony to determine their state of mind;
- by holding sharing circles the next morning;
- following up a few days later; and
- offering other integration support.

Continued support subsequent to a prayer ceremony may be viewed as protecting the health and safety of participants.

However, a plant medicine church is not a licensed medical professional, particularly with respect to mental health. Unless any aspect of integration is led by a licensed therapist or psychiatrist, the church should not hold itself out as providing any mental health therapy or psychotherapy.

When there are significantly concerning circumstances of a congregant proclaiming that they have intentions to cause harm to themselves or others, or exhibits manic or otherwise concerning behavior, a church leader may speak with that congregant's emergency contact; if the church intends to do this, the release should authorize the church to talk to the congregant's emergency contact. If any other issue arises during an integration session, the church may

advise a congregant to seek professional help, however it may be a risk to recommend the services of a particular professional.



V. Other issues

A. Compensation for leadership and assistants

1. Payment for services

It is important to consider that payment to a church leader or assistant for each ceremony could be perceived as payment for recreational experience. A salary that is paid annually or monthly may dissuade a governmental agency or court reviewing church records of any implications of diversion. If a church is concerned about being able to pay the salaried compensation to a church leader or assistant due to financial constraints, a provision in the employment agreement that allows waiver of payment can be drafted by an attorney, ensuring compliance with state and federal laws.

2. Tax issues for payments

There are special tax rules for the payment of church leaders, or “ministers.” The IRS Tax Guide for Churches & Religious Organizations provides:

Unlike other exempt organizations or businesses, a church is not required to withhold income tax from the compensation it pays to its duly ordained, commissioned or licensed ministers for performing services in the exercise of their ministry. An employee minister may, however, enter into a voluntary withholding agreement with the church by completing IRS Form W-4.¹²³

A church would need to report compensation of a church leader/minister, assistant, and any other individual classified as employees on IRS Form W-2, and church leader/minister, visiting religious practitioner, assistant, or any other individual classified as an independent contractor on IRS Form 1099-MISC. There may be significant penalties for misclassifying an employee as an independent contractor, so it is helpful to consult with an attorney familiar with the laws in the state to determine the appropriate status and have an employment or independent contractor agreement drafted.

Finally, there are special exclusions from income for church leaders, such as the fair rental value of a home or housing allowance provided by the church as part of its compensation for services. There are very specific conditions for how to calculate the amount of the home or

¹²³ IRS Tax Guide for Churches & Religious Organizations. IRS Publication 1828 (Rev. 8-2015). <https://www.irs.gov/pub/irs-pdf/p1828.pdf>.

housing allowance to be excluded from income. It is recommended that a church find an accountant familiar with these issues.¹²⁴

B. Place of worship: Property ownership and rental

A plant medicine church may consider purchasing or renting a property to be their place of worship. There are liability reasons for a plant medicine church to have legal control over a property because then it is the church, rather than an individual, who owes all legal duties to congregants who attend a prayer ceremony and may be held civilly or criminally liable. If a prayer ceremony takes place on property owned or leased by the church and an issue arises, the church can defend its religious exercise under RFRA to the fullest extent permitted by law.

If the plant medicine church is using a rented property for a short-term period and an individual who is not the church leader, president, or secretary, or other person without authority under the church has their name on the rental agreement, that person could be held liable as opposed to the church.

It is a complex matter for a church to purchase a property and use it for religious purposes. In order for any church to purchase or rent a property, the board of directors will need to vote affirmatively on such a transaction. Certain states may also require a church to get approval from the state to acquire a mortgage, etc. Also, there may be significant zoning issues, such as parking or septic requirements. However, RLUIPA may provide relief if such zoning issues are caused by discrimination on the basis of religion.

C. Membership and donations

Many churches suggest that individuals who attend their prayer meetings, services, or other activities eventually become members of the church. In exchange for a monthly or annual membership fee, members may receive early access or discounts to church organized events. A church can organize membership in whatever way makes sense to its operations and consistent with its religious beliefs.

While it is clear that a plant medicine church should not actively encourage or allow diversion, as it is a compelling government interest, it is also important to consider how church operations may give an appearance diversion. How a church is paid for prayer ceremonies could be construed as engaging in the profiteering from the distribution of psychedelic plant medicines or condoning recreational use. In other words, a church accepting payments may be scrutinized. A church may decide that payment for attendance at a prayer ceremony does not include any costs associated with the plant medicine. Instead, a church can ask for a suggested donation that helps the church cover other costs, such as for the place of worship and its utilities, food

¹²⁴ See also IRS Tax Guide for Churches & Religious Organizations and IRS Publication 517, Social Security and Other Information for Members of the Clergy and Religious Workers.

provided, candles, and toilet paper. A church may also ask for annual or monthly dues to cover church services, excluding the psychedelic plant medicines themselves from ceremonies.

However, it is notable that the costs of cultivating, procuring, and preparing a sacramental medicine is considerable, and asking that congregants contribute to those costs may be defensible under RFRA.

It may be incentivizing for the church to inform its congregants that any donations are tax-deductible to the extent allowable by law. The church must keep track of all donations throughout the year and then provide to each person a total amount donated so they may use the documentation for their tax filing. The IRS provides that

A donor cannot claim a tax deduction for any single contribution of \$250 or more unless the donor obtains a contemporaneous, written acknowledgment of the contribution from the recipient organization.¹²⁵

Generally, this acknowledgement must describe goods and services in exchange for a contribution of \$250 or more, unless the goods and services fall under an exception; such as, if the donation is made in exchange for “intangible religious benefits” that includes admission to a religious ceremony, then there is an exception to the requirement that the acknowledgment provide a description or value of such benefits. Relatedly, any contributions to a church that are made partly for goods or services provided to the donor and exceed \$75 must be identified in a written disclosure statement and filed with the IRS, unless the “intangible religious benefits” exception is met. The church should send any required acknowledgement to a donor no later than January 31 of the year following the donation.

The issues and requirements around tax-exempt donations described above are not exhaustive. A plant medicine church must ensure that it does its research and consults with an accountant to ensure it is compliant with all applicable laws to continue to receive all available tax benefits for the church and its donors.

D. Advertising

There is a risk in advertising prayer ceremonies with sacraments that are controlled substances, because such advertisements may bring legal scrutiny to a plant medicine church. Advertising may include social media presence and posts, actual advertisements, and websites. A plant medicine church may consider if there is sufficient evidence to support their sincere religious exercise before such public engagements. Depending on the advertising and preparedness of demonstrating RFRA elements of sincere religious beliefs, this public information within advertisements could support or hurt the church’s RFRA claim.

¹²⁵ IRS Publication 1771 (Rev. 3-2016) “Charitable Contributions: Substantiation and Disclosure Requirements.” <https://www.irs.gov/pub/irs-pdf/p1771.pdf>

As is discussed throughout this Guide, the DEA and courts will take all evidence into consideration if a legal issue ever arises, and advertising by a plant medicine church would be part of that evidence. Prior to doing any advertising, a medicine church should consult with a qualified attorney to review best practices in this area.

E. Psychedelic plant medicine storage, security, recordkeeping, and importation

As explained above, the DEA and court decisions relating to churches using psychedelic plant medicines have focused on the issue of diversion: that a church's sacrament could be used for recreational purposes rather than solely in religious rituals. Therefore, a common concern raised is how the sacrament is stored. The DEA and courts have stated that it expects the sacrament to be stored securely and have indicated that two levels of locks be used. One way of doing this could be storing the church's sacrament in a secure location, such as in a locked refrigerator, cabinet, or closet or in a locked outside storage facility. Additional safeguards like an alarm system and other security equipment are optional considerations. A plant medicine church may need to be prepared to negotiate with the DEA on these safety measures.

Additionally, a record of use of the sacrament ensures that a church can demonstrate when it was used in prayer ceremonies. A simple spreadsheet may be used with the following information provided:

- When sacrament is received and how much.
- When sacrament is used and how much, as follows:
 - The date of the ceremony;
 - How much—in weight or amount—was in the secure location before the ceremony and how much remained afterwards;
 - Who accessed the sacrament; and this should be only authorized persons within the church's corporate structure, like a church leader or a trusted core member;
 - From which container the sacrament was taken (e.g., labeling containers of the sacrament and noting which container was used for a ceremony);
 - Which church leader(s) facilitated the prayer ceremony;
 - The number of congregants in the prayer ceremony; and
 - Any relevant notes, such as if there was any spillage.

Sacrament recordkeeping should be accurate and completed contemporaneously; meaning, at the time that the sacrament is used and data can be entered.

In the Santo Daime case, the court noted that “access to the Daime tea is limited to three or four church leaders.”¹²⁶ A psychedelic plant medicine church may decide to identify in its procedure very specific individuals within the church who can access their sacrament for rituals.

In addition, the court considered the way in which the Santo Daime church protected the health and safety and prevented diversion by limiting use of sacrament to the setting of a ceremony. The church noted church leaders only permitting congregants to “drink Daime tea only in a controlled and supportive religious ceremony... The spiritual leader who conducts the service dispenses Daime tea individually to each worshiper. Consumption of Daime tea outside of the church is a serious sacrilege.”¹²⁷

Sourcing sacrament is a complicated issue for many plant medicine churches. Some import it and some make it within the United States. Both ways create legal risks for the church. It is difficult, if not nearly impossible, to get a license for importation of controlled substances required unless a RFRA exemption has been granted, due to the CSA and Customs and Borders Protection policies. Therefore, most plant medicine churches do so without the license. Those who have a RFRA exemption are an approved importer registered with the DEA. There are risks for those who do not have an exemption and import their sacrament, such as the seizure and destruction of their sacrament and criminal charges.

In the DEA’s denial of Soul Quest’s application for an exemption, the DEA scrutinized the source of Soul Quest’s plant material, including whether it was a domestic or international source, and the chain of custody upon importation. For example, the DEA pointed to the fact that the plant material came from a non-religious source:

[The source of their sacrament is not] directly from co-religionists in South America... Instead, Soul Quest obtains the plants from which the ayahuasca tea is made... from a business in the Netherlands.¹²⁸

Further complicating Soul Quest’s application was the fact that the source in the Netherlands stated that its products were “not for human consumption.”¹²⁹ It appeared that the lack of religious connection between the sources for the materials to make Soul Quest’s sacrament was problematic. The DEA seemed to be treating the substances imported (that are used to make, but were not yet, ayahuasca) as a substance controlled by the CSA. It should also be noted that any individual or company sending a psychedelic plant medicine, or its components, to a church would also need an exemption.

¹²⁶ *Church of Holy Light of Queen v. Mukasey*, 615 F. Supp. 2d 1210, 14 (D. Or. 2009)

¹²⁷ *Id.*

¹²⁸ DEA Final Determination letter on Soul Quest’s exemption petition (2021). Pg. 5. https://www.bialabate.net/wp-content/uploads/2021/06/DEA_Denial_Soul_Quest_Exemption_2021.pdf

¹²⁹ *Id.*

Continuing in its analysis of Soul Quest’s importation of its sacrament, the DEA raised concerns of candor and honesty with respect to its shipments; Soul Quest had allegedly used the addresses of two unrelated parties—an individual and business—instead of the church’s name and address.

A plant medicine church may seriously consider the source of its sacrament and to whom, and the address where, the sacrament is shipped. In the case of relief under RFRA, it may also want to be prepared to commit to the lawful importation or acquisition of sacrament, assuming such legal access is available.

Conclusion

Despite the intentions of RFRA to protect religious exercise, this area is rife with legal risks. The law is constantly evolving. There are no assurances that use of the information in this Guide will result in remedies under RFRA. With the increase of psychedelic plant medicine use in the U.S., it is impossible to know if the laws, court decisions, or government agencies will adjust their approach to religious use; whether there will be an effort to respect and allow plant medicine churches to use their sacraments safely and responsibly or to burden religious use by seizing sacrament and prosecuting individuals for possessing it.

While this Guide articulates baseline best practices for psychedelic plant medicine churches based on the existing applicable laws and related cases, it is strongly encouraged that all procedures and legal documents be developed based on a church's specific practices and with the assistance of an attorney.



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