THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0171

State of New Hampshire

v.

Jeremy D. Mack

Appeal Pursuant to Rule 7 from Judgment
of the Coos County Superior Court

BRIEF FOR THE DEFENDANT

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TEXT OF RELEVANT AUTHORITY

New Hampshire Constitution, Part I, Article 5:

Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession, sentiments, or persuasion; provided he doth not disturb the public peace or disturb others in their religious worship.

June 2, 1784

QUESTION PRESENTED

Whether the court erred by denying Mack's motion to dismiss.

Issue preserved by Mack's motion to dismiss, A3*, the State's objection, A12, the parties' arguments at the hearing on the motion, H 1–24, the court's order denying Mack's motion, AD3, Mack's motion for reconsideration, A22, and the court's order denying that motion, AD7.

* Citations to the record are as follows:
"AD" refers to the appendix containing the appealed decisions;
"A" refers to the appendix containing documents other than the appealed decisions;
"H" refers to the transcript of the hearing on Mack's motion to dismiss on September 24, 2018;
"T" refers to the transcript of trial on November 14, 2018.

STATEMENT OF THE CASE

In April 2018, the State obtained from a Coos County grand jury one indictment charging Jeremy Mack with possession of psilocybin mushrooms, a controlled drug. A3. At the conclusion of a one-day trial on November 14, 2018, the jury found Mack guilty. T 158–59. On February 25, 2019, the court (Bornstein, J.) sentenced Mack to twelve months in the house of corrections, all deferred conditioned on drug treatment, and one year of probation. A28.

STATEMENT OF THE FACTS

Jeremy Mack joined the Army when he was seventeen years old and a devout Christian. T 69. He served in Iraq as a medic for an explosive-ordinance disposal team, where he led Bible Studies. T 69–70, 72. While in Iraq, Mack was the victim of three improvised explosive devices. T 70–71. He suffered a traumatic brain injury and a shoulder injury. T 70–71.

In 2009, Mack left active duty, joined the National Guard and enrolled in college, but suffered from post-traumatic stress disorder. T 70–71. In college, Mack studied other world religions and found that he felt most comfortable with shamanic, earth-based religion. T 72. In February 2017, while living with his mother in Colebrook, Mack joined the Oklevueha Native American Church. T 37, 47, 74.

Mack completed over 20 hours of training regarding the Church's sacraments and, after passing a series of tests, became a minister. T 75. Mack sometimes went by the name "Sitting Bear." T 112. The Church sent Mack a membership card and mushroom spores, from which he grew psilocybin mushrooms to take as a sacrament. T 73, 77.

Mack grew the mushrooms in a locked closet off his bathroom. T 32, 77. Once the mushrooms were mature, Mack stored them in a safe. T 77. Mack followed the Church's rules regarding the mushrooms. T 79. He

consumed the mushrooms alone, in seclusion. T 79. He did not operate vehicles or firearms after consuming the mushrooms. T 79.

On a daily basis, Mack consumed a "microdose" — one-tenth of one gram. T 81, 110–11. Less often — every week to every few weeks — Mack consumed a larger dose of 3.5 to 5 grams. T 111.

On November 9, 2019, a Connecticut court sent the New Hampshire State Police a protective order listing Mack as the defendant. T 20. Members of the State Police went to Mack's house to serve the order and remove any firearms, which was standard practice. T 20–21, 23, 47. Mack, who was in Connecticut attending the family court matters, spoke to them by phone and gave them the combination to the safe, where he also kept his guns. T 23, 47. When they opened the safe, they observed and seized the mushrooms. T 26–28, 48, 54. About a week later, Mack met with a detective in person, described his membership in the Church and detailed how he grew and consumed the mushrooms. T 29–34, 37–42.

SUMMARY OF THE ARGUMENT

This Court construes state constitutional provisions as they were understood by the voters who ratified them. Part I, Article 5 guarantees "[e]very individual [the] natural and unalienable right to worship God according to the dictates of his own conscience, and reason." It prohibits the government from prosecuting an individual "for worshipping God in the manner and season most agreeable to the dictates of his own conscience," except for conduct that "disturb[s] the public peace or disturb[s] others in their religious worship." Here, Mack used psilocybin mushrooms in his sincere worship of God. His conduct did not "disturb the public peace," as that phrase was understood by the voters who, in 1784, ratified New Hampshire's Bill of Rights. Thus, the prosecution of Mack violated Part I, Article 5.

I. PART I, ARTICLE 5 OF THE NEW HAMPSHIRE CONSTITUTION PROTECTS MACK'S CONDUCT.

Prior to trial, Mack moved to dismiss the indictment. A4. Mack noted that, since February 2017, he had been a minister with the Oklevueha Native American Church, A5, and that psilocybin mushrooms were a "sacrament[] as part of his religious practice." A8. He also noted the lack of evidence that "anybody was harmed" by his use of the mushrooms. A8.

Mack cited the Federal Constitution, but he also cited, as "[a] separate basis for dismissal," Part I, Article 5 of the New Hampshire Constitution. A4. He noted that Part I, Article 5 "is more detailed and stronger than the . . . First Amendment," and that its plain language protects the individual's right to "worship God according to the dictates of his own conscience." A8.

The State objected. A12. The State did not dispute that Mack used the mushrooms as part of his religious worship, nor did it argue that Mack's use of the mushrooms harmed or disturbed anyone. A13–A15. Instead, it noted that the United States Supreme Court held, in Employment Div., Ore. Dept. of Human Res. v. Smith, 494 U.S. 872 (1990), that the Federal Constitution does not prohibit the enforcement of "facially neutral, generally applicable laws that incidentally touch upon an individual's free exercise of religion." A16. It

then argued that, because this Court once cited Smith in determining a probationer's rights under Part I, Article 5 of the New Hampshire, it had "implicitly adopted" Smith under the State Constitution for all citizens. A16 (citing State v. Perfetto, 160 N.H. 675, 679 (2010)).

On September 24, 2018, the court conducted a hearing on Mack's motion. H 1–24. The State informed the court that it did not "contest the sincerity of [Mack's] religious beliefs." H 2. It agreed, for purposes of the motion to dismiss, that "Mack's use of the [p]silocybin [mushrooms] [was] for religious purposes." H 14–15.

Mack reiterated his argument that the language of Part I, Article 5 is "plain and unambiguous" — "if an individual is worshipping God . . . under the dictates of their own consc[ience], . . . the government isn't to interfere . . . in any way as long as they're not harming any other . . . part[y]." H 2–3. Breaking down Part I, Article 5 into its "elements," Mack noted that: (a) he is an individual, (b) "the State is in agreement" that he possessed the mushrooms as part of his worship of God, and (c) no one else was harmed. H 3. Mack argued that Perfetto was distinguishable, first because, unlike Perfetto, Mack was "not on probation," H 4, and second because, unlike here, the government did not directly interfere in Perfetto's worship of God, it merely prohibited him from having contact with children. H 5–6. The State

reiterated its argument that this Court "has, in essence, accepted and adopted the Smith standard," adding that "[i]t's a slippery slope" for courts to attempt to distinguish the degree to which the government has interfered with an individual's worship of God. H 18–20.

By written order, the court denied Mack's motion to dismiss. AD3. The court did not apply the plain language of Part I, Article 5. AD4–AD6. Instead, the court noted that this Court, in Perfetto, "referred to the Smith test" in construing the State Constitution's application to a probationer. AD5. Apparently concluding, based on this reference alone, that this Court adopted Smith under the New Hampshire Constitution, the court ruled that prosecuting Mack "does not violate either the federal or the state constitution." AD6.

Mack moved for reconsideration. A22. He noted that the court "never addresse[d]" his argument that "the plain and unambiguous language of [Part 1, Article 5 of the New Hampshire Constitution]" protected his conduct here. A23. He noted that the New Hampshire Constitution's Religious Freedom Clause is "nearly identical" to one in the Massachusetts Constitution, and that the Massachusetts Supreme Judicial Court has rejected Smith under the Massachusetts Constitution. A25–A26.

The court summarily denied Mack's motion to reconsider, ruling that it had "not overlooked or

misapprehended any point of fact or law." AD7. By denying Mack's motions to dismiss and reconsider, the court erred.

A. This Court construes the New Hampshire Constitution independently, pursuant to its original meaning.

"As the final arbiter of state constitutional disputes, [this Court] review[s] the trial court's construction of constitutional provisions de novo." HSBC Bank USA v. MacMillan, 160 N.H. 375, 376 (2010). "When State constitutional issues have been raised, this court has a responsibility to make an independent determination of the protections afforded in the New Hampshire Constitution." State v. Ball, 124 N.H. 226, 231 (1983). "If [courts] ignore this duty, [they] fail to live up to [their] oath to defend our constitution and [they] help to destroy the federalism that must be so carefully safeguarded by our people." Id.

"When required to interpret a provision of the constitution, [this Court] view[s] the language used in light of the circumstances surrounding its formulation." City of Concord v. State of N.H., 164 N.H. 130, 134 (2012). It will "give the words in question the meaning they must be presumed to have had to the electorate when the vote was cast." Id. "Reviewing the history of the constitution and its amendments is often instructive, and in so doing, it is the court's duty to place itself as nearly as possible in the situation of the parties at the time the instrument was made,

that it may gather their intention from the language used, viewed in light of the surrounding circumstances." State v. Addison, 165 N.H. 381, 565–66 (2013). "The language used by the people in the great paramount law which controls the legislature as well as the people, is to be always understood and explained in that sense in which it was used at the time when the constitution and the laws were adopted." Id. (brackets omitted); see also Gilman v. Lake Sunapee Props., 159 N.H. 26 (2009) (because "there was a right to a jury trial in partition actions in 1784," when the Constitution was adopted, that right exists today).

B. Part I, Article 5's plain language and history demonstrate that it was intended to protect conduct like Mack's.

Some constitutional provisions are phrased so generally that they require substantial judicial interpretation. But Part I, Article 5 is not one of them. It guarantees "[e]very individual . . . a natural and unalienable right to worship God according to the dictates of his own conscience . . . and reason." It implements this guarantee by a specific command: "[N]o subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession, sentiments, or persuasion; provided he doth not disturb the public peace or disturb others in their religious worship."

Under the plain language of the provision, there are three issues in any claimed violation. First, has the government "hurt, molested, or restrained" a "subject" "in his person, liberty, or estate"? Second, if so, has the government done so "for worshipping God in the manner and season most agreeable to the dictates of [the subject's] own conscience; or for his religious profession, sentiments, or persuasion"? If the answers to the first two question are "Yes," then the government action is unconstitutional unless the subject "disturb[ed] the public peace or disturb[ed] others in their religious worship."

Here, the government criminally prosecuted Mack. This prosecution "hurt, molested, or restrained" Mack "in his person [or] liberty." The government has never claimed otherwise.

The government initiated this prosecution because Mack "worshipped God in the manner and season most agreeable to the dictates of his own conscience," namely, by consuming psilocybin mushrooms. Again, the government has never claimed otherwise, and in fact conceded that Mack's religious belief was sincere. H 2.

Finally, Mack's possession and consumption of psilocybin mushrooms did not "disturb the public peace," nor did it "disturb others in their religious worship." The

government has never claimed that Mack's conduct disturbed or adversely affected anyone else in any way.

In light of these undisputed facts, the plain language of Part I, Article 5 protects Mack's conduct here.

Part I, Article 5 has remained unaltered since the New Hampshire Constitution was ratified in 1784. Constitution, as Adopted, 1784, in IX Provincial and State Papers 896, 898 (N. Bouton ed., 1875). The history of its ratification supports this simple, plain-language interpretation.

In the Eighteenth Century, there was a fundamental disagreement between those who supported broad free-exercise rights and their opponents. Part I, Article 5 was a compromise between these competing views.

To proponents of broad free-exercise rights, "duty to God precede[d] the claims of civil society." Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1446 (1990). "From the religious perspective, the scope of free exercise cannot be defined, in the first instance, by asking what matters the public is rightly concerned about. Religion involves itself in many matters of importance to the public. Free exercise must be defined, in the first instance, by what matters God is concerned about, according to the conscientious belief of the individual." Id.

To opponents of broad free-exercise rights, this view "was tantamount to anarchy." Id. at 1447. "If conscience must be respected, and if conscience can be defined in no way other than by the individual believer, then doesn't liberty of conscience give believers a license to violate laws vital to social order?" Id.

Proponents responded with a concession; they did not advocate "the notion that liberty of conscience would justify crimes such as murder or tax evasion." Id. at 1448. They agreed that, "[w]hen a believer's 'practice is opposed to good law, he is to be punished.'" Id. (quoting John Leland, The Yankee Spy, in The Writings of The Late Elder John Leland 213, 218 (L. Greene ed. 1845)). But, they maintained, "this did not mean that believers could be required to obey all laws." Id. Thus, the disagreement centered around the question of which laws believers had a duty to obey.

Proponents sought to define such laws narrowly. In the 1776 debate over Virginia's Bill of Rights, for instance, James Madison proposed that free exercise be protected "unless under color of religion the preservation of equal liberty and the existence of the State are manifestly endangered," id. at 1463 (quoting Sanford H. Cobb, The Rise of Religious Liberty in America 492 (1902)), "a standard that only the most critical acts of government can satisfy," id.

Opponents sought to define such laws broadly. In the same debate, George Mason proposed that free-exercise rights yield if "under color of religion any man disturb the peace, the happiness, or safety of society." Id. at 1462 (quoting Cobb, supra, at 491). Due to the inclusion of the word "happiness," this "standard . . . would encompass virtually all legitimate forms of legislation." Id. at 1463.

Almost all state constitutions reflected a compromise between these two views, "limit[ing] the [free-exercise] right by particular, defined state interests." Id. at 1461. "Nine of the states limited the free exercise right to actions that were 'peaceable' or that would not disturb the 'peace' or 'safety' of the state. Four of these also expressly disallowed acts of licentiousness or immorality; two forbade acts that would interfere with the religious practices of others; one forbade the 'civil injury or outward disturbance of others'; one added acts contrary to 'good order'; and one disallowed acts contrary to the 'happiness,' as well as the peace and safety, of society." Id. at 1461–62 (quoting Federal and State Constitutions, Colonia Charters, and Other Organic Laws of the United States (B. Poore ed., 2d ed. 1878)).

In New Hampshire, proponents of broad free-exercise rights secured a compromise relatively favorable to their view. Part I, Article 5 begins by guaranteeing "[e]very individual . . . a natural and unalienable right to worship God according to

the dictates of his own conscience, and reason." The President of the 1781 constitutional convention, at which the language of Part I, Article 5 was originally proposed, explained:

> We have distinguished betwixt the alienable and unalienable rights; for the former of which men may receive an equivalent; for the latter, of the rights of Conscience, they can receive none; The world itself being wholly inadequate to the purchase. "For what is a man profited, though he should gain the whole world, and lose his own soul?"
>
> The various modes of worship among mankind, are founded in their various sentiments and beliefs concerning the Great Object of all religious worship and adoration. Therefore to him alone and not to man, are they accountable for them.

An Address of the Convention, in IX Provincial and State Papers 845, 851.

Consistent with this sentiment, the compromise reflected in Part I, Article 5 entailed relatively narrow exceptions and correspondingly broad free-exercise rights. The only limit it placed on free exercise was that the acts must "not disturb the public peace or disturb others in their religious worship." Unlike the constitutional provisions in many other states, it did not curtail free-exercise rights in the

face of laws concerning "safety," "licentiousness," "immorality," "good order" or "happiness."

The 1784 electorate would have regarded modern drug laws as bizarrely paternalistic. Under the liberal political theory prevalent in the late Eighteenth Century, "government is not charged with promotion of the good life for its citizens." McConnell, supra at 1465. "[L]iberal theory would find the assertion of governmental power over religion illegitimate, except to the extent necessary for the protection of others." Id.

Intoxicating and hallucinogenic substances, including psilocybin mushrooms, were known to Europeans since before the eighteenth century. See John Parkinson, Theatrum Botanicum 1321 (London, 1640) (referring to "the foolish or the fooles mushrome."). But nothing analogous to drug prohibition existed when Part I, Article 5 was ratified in 1784. In fact, for the majority of the time since Part I, Article 5 was ratified, drug possession has been legal. See Laws 1947, 258:3, :4 (prohibiting, for the first time, the simple possession of narcotics, including cocaine, opiates, and marijuana); see also State v. Desmarais, 81 N.H. 199, 202 (1924) (even during Prohibition, New Hampshire did not prohibit the simple possession of alcohol).

In light of this history, Part I, Article 5 cannot be viewed as a "simple restatement[] of unbridled governmental

supremacy in a clash with religious precepts." McConnell, supra, at 1466. By excepting only conduct that "disturb[s] the public peace," or "disturb[s] others in their religious worship," provisions like Part 1, Article 5 "give no warrant to paternalistic legislation touching on religious concerns." Id. at 1464. "Where the rights of others are not involved . . . the free exercise right prevails." Id. The 1784 electorate would have rejected the notion that the government could restrict a citizen's religious worship by prohibiting him from possessing and consuming a disfavored type of mushroom.

C. This Court has not adopted Smith under Part I, Article 5.

In rejecting Mack's challenge under Part I, Article 5, the trial court did not analyze the plain language of the provision, nor did it examine its history. Instead, the court noted that in Perfetto, this Court "referred to the Smith test." AD5. The court then ruled that, because the prosecution here does not run afoul of Smith, it "does not violate . . . the state constitution." AD6. Thus, the court apparently concluded that this Court adopted the Smith test under the State Constitution merely by referring to it. This was error.

In Ball, this Court held that, "[w]hen a defendant . . . has invoked the protections of the New Hampshire Constitution," it will conduct "an independent interpretation of State constitutional guarantees." Ball, 124 N.H. at 231.

Although "counsel and courts often will refer to federal decisions, or to commentary based on such decisions, even in debating an undecided issue under state law," this Court "never ha[s] considered [itself] bound to adopt the federal interpretations." Id. at 233. Thus, it set forth the following instruction: "We hereby make clear that when this court cites federal or other State court opinions in construing provisions of the New Hampshire Constitution or statutes, we rely on those precedents merely for guidance and do not consider our results bound by those decisions." Id.

In Perfetto, the defendant challenged a condition of his suspended sentence under both Part I, Article 5 of the New Hampshire Constitution and the First Amendment of the Federal Constitution. Perfetto, 160 N.H. at 677. This Court began by stating, "[W]e first address the defendant's religious freedom argument under the State Constitution, citing federal opinions for guidance only. See State v. Ball, 124 N.H. 226, 231–33, 471 A.2d 347 (1983)." In the course of its opinion rejecting the challenge, the Court cited Smith with a "cf." signal. See The Bluebook: A Uniform System of Citation R. 1.2, at 55 (Columbia Law revew Ass'n et al. eds., 19th ed. 2010) (the "cf." signal means that "[c]ited authority supports a proposition different from the main proposition but sufficiently analogous to lend support. Literally, 'cf.' means

'compare.'"). At no point in the opinion did this Court purport to adopt Smith under the State Constitution.

Perfetto, moreover, is readily distinguishable. In Perfetto, the defendant pleaded guilty to sixty counts of child pornography. Perfetto, 160 N.H. at 676. The defendant was sentenced to multiple State Prison terms, one of which he served, and four of which were suspended. Id. One of the conditions was that he have no contact with minors under the age of seventeen. Id. at 676–77. The defendant moved to amend the condition, arguing that he was unable to attend meetings at his chosen church because children are regularly present. Id. at 677.

Although the defendant was not on probation, the parties "agree[d] that the analytical framework governing restrictions on probationers applie[d]." Id. As the Court noted, "[P]robationers, like parolees and prisoners, properly are subject to limitations from which ordinary persons are free." Id. at 678. The defendant, however, argued that if a probation condition affects a probationer's fundamental rights, it must serve "a compelling interest" and be "the least restrictive alternative available." Id. This Court rejected that argument, holding that, "even if" a probation condition "implicate[s] fundamental rights," it need only be "reasonably related to the ends of rehabilitation and protection of the public from recidivism." Id.

This Court upheld the condition because "[t]he record amply support[ed]" the trial court's resolution of "[t]he dispositive question" — whether the condition "is reasonably related to the rehabilitation or supervision of the defendant." Id. at 680. Only in passing did this Court "note" that the condition "[wa]s facially neutral" and "d[id] not directly infringe on the defendant's free exercise of his religion," citing Smith.

Unlike the defendant in Perfetto, Mack was an "ordinary person[]," id. at 678; he had not been convicted of any crime and was not under the supervision of any court. Thus, the government had no interest in his "rehabilitation or supervision" or in "protecti[ng] . . . the public from recidivism."

For these reasons, Perfetto offers no support for the proposition that "facially neutral" laws are immune from challenge under Part I, Article 5. This Court referred to Smith in Perfetto "for guidance only," and the trial court erred in concluding that this Court adopted Smith under the State Constitution.

D. This Court should not adopt Smith under Part I, Article 5.

The First Amendment was ratified in 1791, over seven years after Part I, Article 5. In comparison to Part I, Article 5, its protection of free exercise was brief: "Congress shall make

no law respecting an establishment of religion, or prohibiting the free exercise thereof." Unlike most state constitutions, it did not set forth a compromise between Madison's and Mason's views about which laws believers had a duty to obey.

The New Hampshire delegation had proposed different language: "Congress shall make no laws touching religion, or to infringe the rights of conscience," which was briefly adopted by the House of Representatives, but later rejected. Journal of the Proceedings of the Convention of the State of New Hampshire which Adopted the Federal Constitution 1788, in X Provincial and State Papers 17 (1877); McConnell, supra, at 1481. As one commentator has noted, New Hampshire's proposal is inconsistent with Smith, "since the second clause would have little, if any, application unless secular, generally applicable laws (laws not 'touching religion') could violate the rights of conscience." McConnell, supra, at 1481.

At the time of its ratification and throughout most of its history, the federal Bill of Rights applied only to the federal government. Barron v. Baltimore, 32 U.S. 243 (1833). It would be over 75 years before the Fourteenth Amendment was ratified, and almost 150 years before the Supreme Court held that the Fourteenth Amendment's Due-Process clause incorporated the First Amendment's Free-Exercise clause

against the states. See Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

Following incorporation, the Supreme Court held that states could not substantially burden an individual's exercise of religion, even in a facially neutral, generally applicable law, unless the law furthered a compelling interest and was narrowly tailored. See Wisconsin v. Yoder, 406 U.S. 205, 213–36 (1972) (state could not compel Amish and Mennonite parents to send children to school after the eighth grade); Sherbert v. Verner, 374 U.S. 398, 402–10 (1963) (state could not deny unemployment benefits to Seventh-day Adventist because she declined to work on Saturdays). But in 1990, a five-to-four majority in Smith rejected this principle and held that the enforcement of "generally applicable laws" cannot violate the free-exercise clause. Smith, 494 U.S. at 878.

Smith was "a much criticized opinion." Attorney General v. Desilets, 636 N.E.2d 233, 236 (Mass. 1994); see also City of Boerne v. Flores, 521 U.S. 507, 515 (1997) (acknowledging that "[m]any criticized the Court's reasoning"). Numerous commentators believed that the Supreme Court was "allowing the Free Exercise Clause to disappear." Stephen Carter, The Resurrection of Religious Freedom?, 107 Harv. L. Rev. 118, 118 (1993). In 1993, Congress found that in Smith, "the Supreme Court virtually eliminated the requirement that the government justify burdens on religious

exercise imposed by laws neutral toward religion," and enacted the Religious Freedom Restoration Act to restore pre-Smith protections. Religious Freedom Restoration Act, Pub. L. No 103-141, § 2(a)(4), 107 Stat. 1488, 1488 (1993).

As originally enacted, the Religious Freedom Restoration Act applied not only to the Federal Government, but to the states as well. Id. § 5(1). In Boerne, however, the Supreme Court ruled that, by applying the Religious Freedom Restoration Act to the states, Congress exceeded its constitutional power. Boerne, 521 U.S. at 536. To a large extent, Smith and Boerne turned the clock back to before 1940, when free-exercise rights were primarily protected by state constitutions rather than the Federal Constitution.

In light of this history, there is no reason to assume that Smith's interpretation of the Federal Constitution applies to Part I, Article 5 of New Hampshire's Constitution. The two provisions were ratified at different times, by different electorates, to serve different functions.

They also use different language, and Smith is incompatible with the language set forth in Part I, Article 5. There are three parts of New Hampshire's free-exercise clause. The first part sets forth the right at issue: "Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason." The second part enforces this right by specifically limiting the

power of the government: "no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession, sentiments, or persuasion." Finally, the third part provides specific exceptions to this limitation: "provided he doth not disturb the public peace or disturb others in their religious worship."

This language "strongly suggests that . . . it was generally accepted that the right to free exercise required, where possible, accommodation of religious practice." Boerne, 521 U.S. at 554 (O'Connor, J. dissenting). The specific textual exceptions set forth in the third part "make sense only if the right to free exercise was viewed as generally superior to ordinary legislation." Id. at 555. If the enforcement of facially neutral laws, by definition, could never violate the right to free exercise, then it wouldn't matter whether the individual's conduct "distub[s] the public peace," or "disturb[s] others in their religious worship." "Such . . . proviso[s] would have been superfluous." Id.

Adopting Smith under the State Constitution would also ignore the fact that these specific exceptions were a compromise between the views exemplified by Mason and Madison. After all, "the debate would have been irrelevant if either had thought the right to free exercise did not include a

right to be exempt from certain generally applicable laws." Id. at 556–57. Adopting Smith would nullify the compromise and substitute words to the effect of "unless the law is generally applicable" — a broad exception that the framers never proposed, and, as history suggests, the electorate would not have agreed to. This Court "will not redraft the [state] constitution in an attempt to make it conform to an intent not fairly expressed in it." State v. Johanson (In re State), 156 N.H. 148, 154 (2007).

Further historical evidence suggests that Smith is incompatible with the original understanding of Part I, Article 5. Smith is based on the view that "equality of treatment" is a "constitutional norm[]." Smith, 494 U.S. at 886. "It would doubtless be unconstitutional," the Court proclaimed, for a state "to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display." Id. at 877. And just as a law's discriminatory nature indicates its unconstitutionality, the Court suggested, so too does a law's non-discriminatory nature indicate its constitutionality. Id. at 877–89.

The problem, however, is that in the late Eighteenth Century, "New Hampshire did not believe in religious equality." Charles B. Kinney, Jr., Church & State: The Struggle for Separation in New Hampshire 81 (1955). The

historical record — before, during and after ratification of Part I, Article 5 — is replete with examples demonstrating New Hampshire's opposition to "equality of treatment."

Prior to the Revolution, a series of royal commissions to New Hampshire provincial governors commanded them "to permit liberty of conscience to all persons except Papists." Commission of Gov. Samuel Allen (1692), in I Laws of New Hampshire 501, 510 (A. Batchellor ed., 1904); Commission of Gov. Joseph Dudley (1702), in II Laws of New Hampshire 4, 21 (1913); Commission of Gov. Samuel Shute (May 10, 1716), in II Laws of New Hampshire 210, 229; Commission of Gov. William Burnet (June 15, 1716), in II Laws of New Hampshire 410, 433; Commission of Gov. Jonathan Belcher (1729), in II Laws of New Hampshire 459, 482; Commission of Gov. Benning Wentworth (1741), in II Laws of New Hampshire, 608, 626; Second Commission of Gov. Benning Wentworth (1761), in III Laws of New Hampshire, 241, 273; Commission of Gov. John Wentworth (1766), in III Laws of New Hampshire, 411, 445 (H. Metcalf ed., 1915). This Protestant bias persisted after the Revolution. In 1779, delegates proposed a constitution that provided, "The future Legislature of this State, shall make no Laws . . . against the Protestant Religion." A Declaration of Rights and Plan of Government for the State of New Hampshire, Declaration, art. 5, in XI Provincial and State Papers App'x (I. Hammond ed., 1882).

Another provision provided that only Protestants could vote or hold elected office. Id., Plan, art. 8. "Although this constitution was rejected by the people, it well expressed the religious outlook of the populace." Kinney, supra, at 121.

The proposed constitution of 1781 was the first in New Hampshire to set forth the language later ratified as Part I, Article 5. Proposed Constitution of 1781, pt. 1, art. 5, in IX Provincial and State Papers 853. Part I, Article 6 authorized towns to establish, and use public funds to support, "Protestant teachers of piety, religion and morality." Id. It provided that only "Christians" were "equally under the protection of the law." Id. Part II provided that "no person shall be capable of being elected" a senator, representative or governor unless he is "of the Protestant Religion." Id. at 863, 864, 867. Although that constitution was rejected as well, "[t]here is . . . no evidence to show that the religious clauses were at all questioned." Kinney, supra, at 125. In fact, the constitution ratified in 1784 "had not tampered in any way with the religious clauses, either in the Bill of Rights or in the 'Form of Government.'" Id.; Constitution, as Adopted, 1784, pt. I, art. 6, pt. 2 in IX Provincial and State Papers 896, 898–99, 906, 908, 909. "The [framers] made two things clear: (1) the state intended to continue its long-established practice of authorizing the separate towns to maintain Protestant ministries, and (2) the state, while it did not support a

particular sect, asserted that all public officials should be professed Protestants." Id. at 126.

In the following decades, several efforts were made to rid the constitution of its Protestant bias and introduce religious equality. Id. at 128–36. That these efforts resulted in failure "represent[s] fairly well the thinking of the times." Id. at 129. It was not until 1876, over 90 years after the religious clauses were ratified, that an amendment eliminating Part II's religious test for public office "narrowly squeaked through." Id. at 137. But Part I, Article 6 retained its "evangelical" and "Protestant" bias. Id. at 139.

In 1889, proponents of equality bemoaned, "Ours is the last State in the Union that retains any such article in its Bill of Rights, and . . . it should be changed so as to give everybody equality in the matter of religion." Journal of the Constitutional Convention 226 (1889). Yet efforts then and later failed to eliminate the bias and introduce a guarantee of religious equality. Kinney, supra, at 139–43. It was not until 1968 that Part I, Article 6 was amended to remove the references to "evangelical" and "Protestant" sects. Manual for the General Court 799–800 (1969).

Just as the Smith majority viewed "equality of treatment" as a "constitutional norm[]," it also viewed "a private right to ignore generally applicable laws" as "a constitutional anomaly." Smith, 494 U.S. at 886. But again,

New Hampshire's 1784 electorate did not subscribe to this modern view. The history of this era is replete with examples of religious exceptions to "generally applicable laws."

"The oath requirement was the principal means of ensuring honest testimony and of solemnizing obligations." McConnell, supra, at 1467. "Quakers and certain other Protestant sects, however, conscientiously refused to take oaths." Id. New Hampshire provincial authorities in 1741 passed a law relieving Quakers of the generally applicable laws that required swearing oaths. An Act in Addition to an Act Entitled an Act to Ease People that are Scrupulous in Swearing, in II Laws of New Hampshire 584. "By 1789, virtually all of the states had enacted oath exemptions." McConnell, supra, at 1468.

Quakers also refused, on religious grounds, to bear arms. Id. In 1759, authorities in New Hampshire joined several other colonies in exempting Quakers from military conscription. An Act for the More Speedy Levying One Thousand or at Least Eight Hundred Men Inclusive of Officers to be Employd in his Majestys Service in the Current Year, in III Laws of New Hampshire 196, 198. The Continental Congress later exempted Quakers from military conscription as well. Resolution of July 18, 1775, in II Journals of the Continental Congress 1774–1789 187, 189 (1905).

In the late eighteenth century, most towns in New Hampshire had an established church supported by public funds. Kinney, supra, at 78–80. This did not change during the Revolution. Id. at 83. But "[f]rom 1692 on, New Hampshire exempted [from paying taxes to their town's official church] anyone who could prove in a contested proceeding that he was 'conscientiously' of 'a different persuasion,' attended services of his own faith regularly . . ., and made financial contributions toward its support." McConnell, supra, at 1469; An Act of Maintenance & Suppley of the Ministrey [and Schools] Within this Province, in I Laws of New Hampshire 560. "New Hampshire also exempted Quakers who served as constables from the duty of collecting the assessments of others." McConnell, supra, at 1469; An Act to Exempt Those People Called Quakers from Gathering the Rates for the Ministers of Other Perswations within the Province of New Hampshire, in II Laws of New Hampshire 530.

While Part I, Article 5 is substantially different from the First Amendment of the United States Constitution, it is virtually identical to Part I, Article 2 of the the Massachusetts Constitution. As the Massachusetts Supreme Judicial Court has recognized, this provision "has no precise parallel in the Constitution of the United States," and federal cases interpreting the First Amendment, including Smith, do not

apply to it. Desilets, 636 N.E.2d at 241. The provision "plainly contemplates broad protection for religious worship." Soc'y of Jesus v. Bos. Landmarks Com., 564 N.E.2d 571, 573 (1990). Its "specific language . . . guarantees freedom of religious belief and religious practice subject only to the conditions that the public peace not be disturbed and the religious worship of others not be obstructed." Id. "If neither exception applies, by its terms, art. 2 gives absolute protection to the manner in which one worships God." Desilets, 636 N.E.2d at 242. "No balancing of interests, the worshiper's, on the one hand, and the government's, on the other, is called for when neither exception applies." Id.

For these reasons, Smith's interpretation of the Federal Constitution does not apply to Part I, Article 5 of the New Hampshire Constitution. The view expressed in Smith "is incompatible with [the State Constitution's] plain meaning and unlikely to have been commonly understood by the electorate" that ratified it. Bd. of Trs., N.H. Judicial Ret. Plan v. Sec'y of State, 161 N.H. 49, 57 (2010).

E. The meaning of Part I, Article 5 has not changed since it was ratified.

It is true that the Massachusetts Supreme Judicial Court has adopted an all-inclusive interpretation of the phrase, "disturb the public peace." "[A]ll offenses," the court held in Commonwealth v. Nissenbaum, 536 N.E.2d 592

(Mass. 1989), "are breaches of the public peace." Id. at 596. The Court later expanded the definition even further, holding that any "violation of a State statute would disturb the peace." Desilets, 636 N.E.2d at 242. This does not support affirmance, for three reasons.

First, this Court reviews issues only as they have "ha[ve] been developed and presented to [it]." State v. Folds, ___ N.H. ___ (Aug. 8, 2019). If the parties "did not contest" an issue below and the trial court thus did not address that issue, this Court will not consider it on appeal, even at the appellee's urging. Id. Here, the State never argued that Mack's possession of mushrooms disturbed the public peace, and the trial court never addressed the issue. Thus, this Court will not consider it.

Second, unlike this Court, the Massachusetts Supreme Judicial Court, when construing its State Constitution, does not "place itself as nearly as possible in the situation of the parties at the time the instrument was made, that it may gather their intention," nor does it construe constitutional language according to "that sense in which it was used at the time when the constitution and the laws were adopted." Addison, 165 N.H. at 565–66. In Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003), for instance, the Massachusetts Supreme Judicial Court held that Part I, Article 1 of the Massachusetts Constitution grants the right to

same-sex marriage, even though no one disputed that "when [A]rt[icle] 1 was revised by the people in 1976, it was not then intended to be relied on to approve same-sex marriage." Id. at 974, n.6 (Greaney, J. concurring). According to a concurring justice, "The provisions of [the Massachusetts] Constitution are, and must be, adaptable to changing circumstances and new societal phenomena," id., a view never espoused by this Court about the New Hampshire Constitution.

Third, this Court should reject the notion that the legislature has the power to alter the meaning of the constitutional phrase, "disturb the public peace." "The interpretation of our constitution is a traditional function of the judiciary and is not within the competence of the other two branches." Smith v. State, 118 N.H. 764, 768 (1978). The Bill of Rights was ratified to prevent the legislature from passing laws that infringe the inalienable rights of citizens. The idea that "legislative enactments can amend the Constitution . . . [s]urely . . . stands constitutional analysis on its head." Nissenbaum, 536 N.E.2d at 600 (Liacos, J. dissenting).

Long-established precedent establishes that, in New Hampshire, subsequent legislative enactments cannot alter the meaning of state constitutional language. The Constitution of 1784 protected the right to "trial by jury."

Constitution, as Adopted, 1784, pt. I, arts. 16, 20, 21, in IX Provincial and State Papers 896, 900–01. Although the constitution did not define the word "jury," the term was understood in 1784 to mean "a body of twelve men . . . who . . . must return their unanimous verdict." Opinion of the Justices, 41 N.H. 550, 551 (1859). Seventy-five years later, the legislature asked this Court whether it had the power to redefine "jury" as a body of less than twelve members, or as an entity that could return a non-unanimous verdict. Id. at 550. This Court's response was clear: "[N]o body of less than twelve men, though they should be by law denominated a jury, would be a jury within the meaning of the constitution; nor would a trial by such a body, though called a trial by jury, be such, within the meaning of that instrument." Id. at 552. One hundred twenty-one years after that, the legislature again asked this Court if it could redefine "jury" to mean less than twelve members; this Court's answer was the same. Opinion of the Justices, 121 N.H. 480 (1981). Just as legislative enactments cannot alter the meaning of the constitutional phrase "trial by jury," they cannot alter the meaning of the constitutional phrase "disturb the public peace."

If it were true that all statutory violations, by definition, disturb the public peace, then it would have been meaningless for the framers to use that phrase to define

which laws override free-exercise rights. Like the United States Supreme Court's approach in Smith, the Massachusetts Supreme Judicial Court's interpretation of "disturb the public peace" would nullify the compromise that produced Part I, Article 5.

In the 1780s, to "disturb the public peace" required, at the very least, "that there be a victim." Nissenbaum, 536 N.E.2d at 601 (Liacos, J. dissenting). As a delegate to Massachusetts's 1788 federal constitutional convention stated, "[E]very person has an unalienable right to act in all religious affairs according to the full persuasion of his own mind, where others are not injured thereby." Isaac Backus, A Declaration of Rights, of the Inhabitants of the State of Massachusetts-Bay, in Isaac Backus on Church, State, and Calvinism 487 (W. McLoughlin ed., 1968). Here, Mack's possession of mushrooms injured no others, and thus, it could not have "disturb[ed] the public peace," as that phrase was understood in 1784.

It "has been frequently stated by this Court . . . that the language of the Constitution is to be understood in the sense in which it was used when the Constitution was adopted in June, 1784." Attorney General v. Morin, 93 N.H. 40, 42 (1943). This Court most recently followed this originalist approach in Addison. There, the defendant argued that capital punishment violated the Part I, Article 33 of the New

Hampshire Constitution, which prohibits "cruel or unusual punishments." Addison, 165 N.H. at 565. This Court resolved the challenge by examining the circumstances under which the provision was ratified, in 1784. Id. at 565–66. It found that, "at the time the State Constitution was adopted, capital punishment was a sanctioned penalty for specified crimes." Id. at 566. Thus, it concluded, "the framers could not have considered capital punishment to be 'cruel or unusual.'" Id.

If original meaning serves as the benchmark by which the meaning of the State Constitution is interpreted, then it must serve as that benchmark regardless of whether it supports or refutes the government's current position. Original meaning cannot control when it would support the State's prosecution of its citizens, yet somehow become irrelevant when it would preclude such prosecution.

The State prosecuted Mack because he used the wrong type of mushroom in his worship of God. The voters who ratified Part I, Article 5 would have regarded this prosecution as an afront to the right to religious freedom. If the State believes that its current priorities justify altering this "inalienable" right, it is free to ask the people to amend this provision. Absent such an amendment, the prosecution here was unconstitutional, and this Court must reverse.

CONCLUSION

WHEREFORE, Jeremy D. Mack respectfully requests that this Court reverse.

Undersigned counsel requests 15 minutes oral argument.

The appealed decisions are in writing and are set forth in a separate appendix with no other documents.

This brief complies with the applicable word limitation and contains 7,290 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to the Criminal Bureau of the New Hampshire Attorney General's Office through the electronic filing system's electronic service.

/s/Thomas Barnard
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