Sincerity, Subjectivity & Religion: The Evolution of RFRA from a Constitutional Shield to a Political Sword*

I. Introduction

A class of American law students sitting unsuspectingly in their First Amendment class are met with a loaded question from the professor: "What is religion?" Answers range from specific requirements of "shared belief in a higher power," or "written scripture to guide morality," to general "faith-based community traditions." Despite any attempt at impartiality, the definitions invariably remain inclusive of Judeo-Christian tenets[1] while generally discounting the polytheistic, pagan, or otherwise secular. Definitions of "religion" are as ephemeral as they are myriad, but the theoretical preference shown to Christian beliefs is unsurprising in a nation dominated by its denominations.[2] Nevertheless, some individuals believe in other specific "God(s)" or nonspecific higher powers.[3] Others still, find religion in the belief systems established by philosophers and academics seeking to explain or explore the human condition.[4] Within each of these distinct belief systems, the personal experience of religion may garner unique definitions even within the same sect. Attempts to properly bound or define "religion" requires comparing these personal experiences to create inclusive

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1. *See generally*, Richard Lee, *Seven Principles of the Judeo-Christian Ethic*, SERMON CENT., https://www.sermoncentral.com/content/Richard-Lee-7-Principles-Judeo-Christian-Ethic (last visited Oct. 19, 2022).

2. *See, e.g.*, *The American Religious Landscape in 2020*, PRRI (July 8, 2021), https://www.prri.org/research/2020-census-of-american-religion/ ("Seven in ten Americans (70%) identify as Christian . . . .").

3. *See id.* (recognizing that 1% of the U.S. population is Buddhist and .5% is Hindu); *see also* United States v. Seeger, 380 U.S. 163, 191–93 (1965) (Douglas, J., concurring) (acknowledging perspectives of Hinduism and Buddhism as informing understanding of religion) .

4. *See, e.g.*, Fields v. Speaker of Penn. House of Rep's, 936 F.3d 142, 147 (3d Cir. 2019) (explaining philosophical belief system of Secular Humanists, Unitarian Universalists, and Freethinkers with respect to their First Amendment challenge to theistic prayer preference in public meetings).

definitions. The original authors of the Constitution inscribed the First Amendment's religious clauses to offer this comprehensive inclusion.[5]

Later statutory drafters expanded the First Amendment's religious clauses such as the Religious Freedom Restoration Act (RFRA),[6] Religious Land Use and Institutionalized Persons Act (RLUIPA),[7] and Title VII.[8] Combined, these create a powerful individual liberty, which allows exemption from laws or workplace policies that may burden the free exercise of one's religion.[9] Discourse involving religious exemptions, however, has seen a stark rise over the past few years; from wedding cakes,[10] to birth control,[11] to COVID-19 vaccine mandates.[12] But the rise in religious accommodation claims also coincides with the hyperpolarization of U.S. politics, as the line between "religious beliefs" and "political beliefs" has grown blurry.[13] Yet, the U.S. Supreme Court remains adamant that the Court is not an "arbiter[] of

5. In 1785, James Madison staked out this bold vision of religious inclusivity in his Memorial and Remonstrance Against Religious Assessments, arguing that: "The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." *Memorial and Remonstrance Against Religious Assessments, [ca. 20 June] 1785*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Madison/01-08-02-0163 (last visited Oct. 26, 2022). Justice Rutledge later linked Madison's Remonstrance to the First Amendment, asserting that "the Remonstrance is at once the most concise and the most accurate statement of the views of the First Amendment's author concerning what is 'an establishment of religion.'" Everson v. Bd. of Ed., 330 U.S. 1, 37 (1947) (Rutledge, J., dissenting) (quoting U.S. CONST. amend. I)).

6. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb.

7. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc.

8. 42 U.S.C. § 2000e-2.

9. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (holding under RFRA claim that claimants were exempt from the Affordable Care Act's contraceptive mandate because of the substantial burden on their exercise of religion); Holt v. Hobbs, 574 U.S. 352 (2015) (holding under RLUIPA claim that prison grooming policy forbidding Muslim prisoner to grow a half-inch beard substantially burdened prisoner's exercise of religion); Tabura v. Kellogg USA, 880 F.3d 544 (10th Cir. 2018) (holding that a genuine issue of material fact existed as to whether employer reasonably accommodated Seventh Day Adventist employees' sabbath work consistent with Title VII).

10. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018).

11. *See, e.g.*, *Hobby Lobby*, 573 U.S. 682; Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020).

12. *See, e.g.*, Resurrection Sch. v. Hertel, 11 F.4th 437, 455–56 (6th Cir. 2021), *appeal dismissed as moot*, 16 F.4th 1215 (6th Cir. 2022); Harris v. Univ. of Mass., Lowell, 557 F. Supp. 3d 304, 307 (D. Mass. Aug. 27, 2021), *appeal dismissed*, 43 F.4th 187 (1st Cir. 2022); Zalman Rothschild, *Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 YALE L.J. FORUM 1106, 1128–33 (2022).

13. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 440 (2d Cir. 1981).

scriptural interpretation,"[14] and has largely rejected serious inquiry into the definition of a "religious belief."[15] While questions of religious legitimacy and merit are understandably difficult, the Court's approach creates significant room for judicial discretion. As a result, many religious accommodation claims are evaluated on a case-by-case basis with no clear test, leaving modern courts with a complex and often inconsistent collection of First Amendment jurisprudence.[16]

The Supreme Court has consistently held that political, moral, and philosophical beliefs do not qualify for accommodations or exemptions through the First Amendment's religious clauses.[17] But, for many Americans, there is very little distinction between their political and religious beliefs, with each set of beliefs often informing the other.[18] While courts cannot inquire into the accuracy or legitimacy of an individual's asserted religious beliefs,[19] courts can evaluate whether the claimant *sincerely* holds the belief as a part of the their *religious practice*.[20] This analysis creates an immediate advantage for well-established religions because, barring any outlandish claims, these religious beliefs are generally assumed to be sincere. In contrast, the beliefs of minority religions and secular groups receive far more scrutiny as they diverge from more commonly practiced, largely Judeo-

14. Thomas v. Review Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 715–16 (1981).

15. *See generally* Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871) (discussing the Religious Question doctrine).

16. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that compulsory high school education of Amish students violated Free Exercise Clause); *see also* Sherbert v. Verner, 374 U.S. 398 (1963) (holding that application of South Carolina wage law to employee who did not work on Saturday for religious reasons violated Free Exercise Clause). *But see* Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 878–82 (1990) (holding that the Free Exercise Clause did not prohibit the application of Oregon's drug law to peyote used for religious purposes).

17. *See Thomas*, 450 U.S. at 713 (1981) ("A personal philosophical choice rather than a religious choice, does not rise to the level of a First Amendment claim." (internal citation omitted)); Callahan v. Woods, 658 F.2d 679, 684 (9th Cir. 1981) (questioning the religious nature of plaintiff's belief); *cf.* United States v. Seeger, 380 U.S. 163, 165 (1965) ("Congress, in using the expression 'Supreme Being' [in the Military Training and Service Act] rather than the designation 'God,' was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views.").

18. *How Americans' Politics Drives Their Religious Views*, NISKANEN CTR. (Nov. 8, 2018), https://www.niskanencenter.org/how-americans-politics-drives-their-religious-views/.

19. United States v. Ballard, 322 U.S. 78, 85–86 (1944) ("When the triers of fact undertake that task, they enter a forbidden domain.").

20. *Seeger*, 380 U.S. at 165–66 ("We believe that under this construction, the test of belief 'in a relation to a Supreme Being' is whether a given belief that is sincere . . . .").

Christian beliefs.[21] The "sincerity threshold" that majoritarian religions must meet is thus lower than the threshold applied to minority religions or secular groups.[22] Judges are therefore less likely to scrutinize religious beliefs that resemble their personal definitions of religion.

Given this lesser scrutiny and the eroding barrier between political and religious beliefs, majoritarian religions incorporate political beliefs into their religious accommodation claims in an attempt to extend First Amendment protections to the political beliefs of the Judeo-Christian majority.[23] Because a lower threshold of sincerity exists for well-established, monotheistic religious beliefs, the Court's jurisprudence creates more room for those religions to justify their political beliefs as religious ones. This disparate treatment disrupts the fragile balance between the First Amendment's Free Exercise and Establishment Clauses.

This Comment explores the disparity between majoritarian and minority religions in Free Exercise and RFRA claims. Specifically, this Comment dissects the sincerity inquiry and how religions familiar to the factfinders are held to a lower threshold than those that diverge from more commonly practiced religious beliefs. To understand how the disparate thresholds of sincerity have become routine in contemporary RFRA claims, Part II demonstrates a brief history of the First Amendment's Free Exercise Clause, the convoluted case law surrounding religious exemptions, and the subsequent statutory modifications. Part III provides a detailed breakdown of the Supreme Court's interpretation of a "sincere, religious belief" and deconstructs the often conflated elements of religious exemption claims, followed by an illustration of these elements and their preferential application to Judeo-Christian claimants. Finally, Part IV illustrates how RFRA claimants, on both sides of the political spectrum, have incorporated secular

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21. Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 954 (1989); *see also* United States v. Meyers, 95 F.3d 1475 (10th Cir. 1996) ("If he thinks that his beliefs are a religion, then so be it. . . . None of this, however, changes the fact that his beliefs do not constitute a 'religion' as that term is uneasily defined by law.") (internal citation omitted).

22. Adeel Mohammadi, Note, *Sincerity, Religious Questions, and the Accommodation Claims of Muslim Prisoners*, 129 YALE L.J. 1836, 1840 (2020) ("Today, sincerity is the touchstone and threshold inquiry in religious-exemption law . . . .").

23. One example of this principle at play is the Christian pastor in Oklahoma who offered religious exemptions for vaccines in exchange for church donations. *See* Sarah Pulliam Bailey, *This Pastor Will Sign a Religious Exemption for Vaccines if You Donate to His Church*, WASH. POST (Sept. 15, 2021, 6:31 AM EDT), https://www.washingtonpost.com/religion/2021/09/15/pastor-donate-vaccine-religious-exemption/.

beliefs into their asserted RFRA claim—a development that presents substantial concerns for the future of free exercise jurisprudence.

II. History of the First Amendment's Free Exercise Clause

A. The Interpretive Approach of Religious Free Exercise Jurisprudence in U.S. Courts

First Amendment jurisprudence involving the religious clauses is a bit unclear and has even been described by the Justices themselves as "unprincipled, incoherent, and unworkable."[24] Understandably, defining the boundaries of religious freedom is an arduous task because it requires the Court to make judgments as to what is and is not considered religion. The task goes beyond tangible evaluations of fact and law. The Court acknowledged an "internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause."[25] If the Court focuses its efforts on ensuring every individual's right to the free exercise of religion, it runs the risk of endorsing a single religion, thus encroaching on issues of religious establishment.[26] Conversely, a heavy focus on religious neutrality could cause the Court to impose burdens upon the free exercise of religion.[27]

Left with the nearly impossible endeavor of defining the boundaries of religion, the Court opted for a hands-off approach, referred to as the "Religious Question Doctrine," as well as the "no-orthodoxy principle."[28] The Religious Question Doctrine bars the government from taking a position or distributing benefits and burdens based on religious doctrine.[29] The doctrine first arose in *Watson v. Jones*, a church property dispute, where the Court held that state courts could not resolve property disputes that hinge upon the court's interpretation of a religious doctrine.[30] In effect, the judicial system would endorse the winning belief by merely interpreting religious doctrine, thereby violating the First Amendment's Establishment Clause.[31]

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24. Mary Ann Glendon, *Comment*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 95, 109 (1997).

25. Tilton v. Richardson, 403 U.S. 672, 677 (1971).

26. Tanina Rostain, Note, *Permissible Accommodations of Religion: Reconsidering the New York* Get *Statute*, 96 YALE L.J. 1147, 1151 (1987).

27. *Id.*

28. Nathan Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1196–98 (2017).

29. *Id.* at 1198.

30. 80 U.S. (13 Wall.) 679 (1871); Chapman, *supra* note 28, at 1197.

31. Chapman, *supra* note 28, at 1198.

Thus, the Court opted to avoid such conflicts by adhering to the Religious Question Doctrine.[32]

B. Free Exercise Jurisprudence & Exemption Claims Pre-RFRA

Two looming questions remain: (1) What constitutes a religious belief that qualifies for protection by the First Amendment; and (2) how can the Court establish an objective test to evaluate religious exemption claims to laws of general applicability? The first step in evaluating religious accommodation and exemption claims requires a court to determine whether a burdened belief or practice is religious in nature.[33] The Court addressed aspects of this inquiry not by defining what religion is and, instead, defining what it is not.[34] Above all, the Court has recognized that the First Amendment's inclusion of religion does not include political or moral beliefs, regardless of how strongly held those beliefs may be.[35] A religious belief, however, need not be based on religious dogma to qualify for First Amendment protections,[36] nor is it necessary for all who practice a particular religion to share identical beliefs.[37] The First Amendment also prohibits the Court from favoring one group or religion, instead requiring that every religious belief be reviewed with equal scrutiny.[38] Yet the Court held that the "touchstone" of the First Amendment "mandates government neutrality . . . between religion and non-religion," thus requiring not only equal treatment of religious groups but among theists and nontheists alike.[39] The Court uses these as guidelines when evaluating alleged burdens on religious practice, but the subjectivity of religion makes an impartial review nearly impossible. Because the Court remains hesitant to inquire into the definition of religion, most exemption claims withstand this first step.

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32. *See id.* at 1198.

33. *See* Patrick v. LeFevre, 745 F.2d 153, 156 (2d Cir. 1984).

34. *See* C. John Sommerville, *Defining Religion and the Present Supreme Court*, 6 U. FLA. J.L. & PUB. POL'Y 167, 167–74 (1994).

35. *See* Wisconsin v. Yoder, 406 U.S 205, 215–16 (1972).

36. *See, e.g.*, Frazee v Ill. Dep't of Emp. Sec., 489 U.S. 829, 834–35 (1989).

37. Thomas v. Review Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 715–16 (1981) ("[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect.").

38. *See* Murdock v. Pennsylvania, 319 U.S. 105, 108–09 (1943) ("[Hand distribution of religious literature] has the same claim to protection as the more orthodox and conventional exercises of religion.").

39. McCreary County v. Am. C.L. Union of Ky., 545 U.S. 844, 860 (2005) (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

Once the Court determines a belief is sufficiently "religious," the next step of the inquiry looks to the sincerity of the individual's religious belief.[40] Judges and scholars alike seem to conflate the inquiry into sincerity with the belief's qualification as a religion, which is likely the result of the Court's attempt to tip-toe around theological definitions.[41] The Tenth Circuit stated that the sincerity prong serves to disqualify "clearly non[-]religious" beliefs,[42] which highlights this frequent conflation of religion and sincerity. While the question of sincerity naturally results from an inquiry into religious belief, the two are distinct steps of judicial review. Any individual can claim to hold a particular religious belief, but the Court requires that the individual sincerely hold that belief to qualify for religious protection under the First Amendment.[43] The belief must be not only religious and sincere but also a *sincerely held religious belief*.[44] It may *not* be a sincerely held political or moral belief disguised as a religious one to justify an accommodation or exemption for secular reasons.[45] A claimant's sincerity is evaluated by "extrinsic and objective evidence concerning [their] actions, statements, and demeanor" and whether the provided evidence is consistent with the claimant's asserted beliefs.[46] While this evidence cannot confirm sincerity per se, it can *suggest* the claimant may be insincere in their beliefs or driven by non-religious motives.[47] Ultimately, the inquiry into sincerity essentially serves as a filter to prevent frivolous or fraudulent claims from filling up court dockets,[48] but problems arise when this filter fails to screen all claims equally.

If the Court finds the claimant's beliefs to be nonreligious in nature, or, if the beliefs are religious and the claimant does not sincerely hold them, there

40. *See* United States v. Ballard, 322 U.S. 78, 85–88 (1944).

41. *See* Sommerville, *supra* note 34, at 169.

42. Kay v. Bemis, 500 F.3d 1214, 1219 (10th Cir. 2007). In assessing claims under RLUIPA, the Tenth Circuit is well noted for its emphasis on the sincerity analysis. Sarah B. Conley, Note, *Establishing a Right to Last Rites: Examining Death Row Inmates' Right to Clergy Presence in the Execution Chamber in* Gutierrez v. Saenz, 74 OKLA. L. REV. 503, 510 (2022) (citation omitted).

43. *See Ballard*, 322 U.S. at 88.

44. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 907 (1990) (O'Connor, J., concurring) (explaining that courts must inquire as to whether a claimant holds a "sincerely held religious belief" conflicting with the challenged law).

45. *See* Wisconsin v. Yoder, 406 U.S 205, 215–16 (1972).

46. Lupu, *supra* note 21, at 954.

47. *Id.*

48. Mohammadi, *supra* note 22, at 1852 ("Though sincerity is not textually required in either the Constitution or governing statutes, judges have read it into both as a tool of judicial management, so as to limit the flow of accommodation claims.").

is no burden on the claimant's free exercise of religion because there is no "religion" to be burdened.[49] However, where the claimant's beliefs are both religious and sincerely held, then the claimant bears the burden of establishing the government regulation places a *substantial* burden on the claimant's free exercise of religion.[50] A burden on religious exercise is substantial when it requires an individual to make a "Hobson's Choice," when one must choose between their religious beliefs and or a negative consequence.[51] Negative consequences maybe anything from the exclusion from governmental benefits to the threat of civil or criminal sanctions.[52]

The Supreme Court first defined a "substantial burden" in the 1963 case *Sherbert v. Verner*, where a member of the Seventh-day Adventist Church was fired from her job because she would not work on Saturdays—the Sabbath day in the Seventh-day Adventist Church.[53] After Sherbert's unsuccessful effort to find a job which would not require her to work on Saturdays she filed an unemployment claim through the South Carolina Unemployment Compensation Act but was denied because she did not accept "suitable work when offered."[54] The Court found the state's denial of Sherbert's unemployment benefits required that she either "choose between following the precepts of her religion and forfeiting benefits," or "abandoning one of the precepts of her religion in order to accept work."[55] Therefore, the denial of Sherbert's employment benefits imposed a substantial burden on her free exercise of religion.[56]

The *Sherbert* court also established the compelling interest test for Free Exercise claims, holding laws that burden the free exercise of religion, even if they are not directly targeted at a particular group of religious believers, must further a compelling state interest through the least restrictive means.[57]

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49. Chapman, *supra* note 28, at 1251.

50. *See* Sherbert v. Verner, 374 U.S. 398, 404 (1963); *see also* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1069–70 (9th Cir. 2008) (en banc) ("Under RFRA, a 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*).").

51. *Hobson's Choice (1)*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/Hobson%27s%20choice (last visited Oct. 6, 2022) ("A]n apparently free choice when there is no real alternative.").

52. *See Navajo Nation*, 535 F.3d at 1070.

53. 374 U.S. at 399–400.

54. *Id.* at 401.

55. *Id.* at 404.

56. *Id.*

57. *Id.* at 403.

If the burden is not substantial, and the government can justify this burden by showing the regulation is narrowly tailored to achieve a compelling interest, then courts have latitude to find that burden is a constitutional exercise of government authority.[58]

In *Employment Division, Department of Human Resources v. Smith*, however, the Court revised *Sherbert's* application of strict scrutiny for religious exemption and accommodation claims, holding that "neutral law[s] of general applicability" did not require a compelling government interest.[59] The Court determined that states *may* allow exemptions but are not constitutionally bound to do so for valid and neutral laws.[60] According to scholars, the Court worried that "any law would be vulnerable" to a person's interpretation of religion "with the only barrier being a subjective sincerity determination."[61] Thus, *Smith* "substantially decreased the likelihood of obtaining a free exercise accommodation for religious adherents," raising the standard beyond a mere burden..[62] *Smith* essentially gutted the power of the Free Exercise Clause to grant exemptions to neutral laws of general applicability. Yet its holding did not apply to targeted laws, so the First Amendment still prohibited laws or policies which single out a particular group for special harm.[63] But the era of *Smith* was short-lived, as its holding triggered backlash from both sides of the political spectrum.[64]

C. Congress Provides Statutory Clarity

In response to *Smith,* and to resolve the ambiguity surrounding religious accommodations and exemptions, Congress codified the sincerity inquiry in the Religious Freedom Restoration Act[65] and RLUIPA[66] In 1993, Congress

58. *See, e.g.*, United States v. Lee, 455 U.S. 252, 260 (1982) ("Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.").

59. 494 U.S. 872, 878–82 (1990).

60. *Id.* at 879.

61. Dorit Rubinstein Reiss & Madeline Thomas, *More Than a Mask: Stay-at-Home Orders and Religious Freedom*, 57 SAN DIEGO L. REV. 947, 954 (2020).

62. Tanner Bean, *"To the Person:" RFRA's Blueprint for a Sustainable Exemption Regime*, 2019 B.Y.U. L. REV. 1 (citing *Smith*, 494 U.S. at 879).

63. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993).

64. ELIZABETH REINER PLATT ET AL., L., RTS. & RELIGION PROJECT, COLUM. L. SCH., WHOSE FAITH MATTERS? THE FIGHT FOR RELIGIOUS LIBERTY BEYOND THE CHRISTIAN RIGHT 16 (2019), https://lawrightsreligion.law.columbia.edu/sites/default/files/content/Images/Whose%20Faith%20Matters%20Full%20Report%2012.12.19.pdf.

65. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb.

66. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc.

passed RFRA almost unanimously, reestablishing the procedural avenue to challenge government regulations that substantially burden a person's religious exercise.[67] The RFRA allowed challenges to regulations even if the regulation is substantively neutral, essentially codifying the *Sherbert* compelling interest test.[68] Congress found the *Sherbert* precedent, unlike that of *Smith*, accomplished "striking [a] sensible balance[] between religious liberty and competing prior governmental interests."[69] Thus, to establish a prima facie claim under RFRA, a plaintiff must prove (1) a "substantial burden" imposed by the federal government on a (2) sincere (3) "exercise of religion."[70] If the plaintiff can establish each of these elements, the burden shifts to the government to demonstrate that the "application of the burden to the [claimant]" is "in furtherance of a compelling governmental interest," and does so in the "least restrictive means."[71] The Court found that RFRA's application to the states was an overreach of congressional authority[72], and thus, many states have passed their own versions.[73]

RLUIPA came a few years later and largely mirrored RFRA's compelling interest test.[74] RLUIPA bars state and local governments from implementing land use regulations that may impose a substantial burden on an individual person or religious institutions.[75] The Act specifically defines the term "land use regulation" as a "'zoning or landmarking law' that limits the use or development of land."[76] RLUIPA also bars state and local governments that receive federal funding from imposing burdens upon the religious exercise of individuals "confined to an 'institution,'" including both correctional facilities as well as institutions for the mentally ill or disabled.[77] Like RFRA, the substantial burden, whether placed upon land use or within institutional

67. PLATT ET AL., *supra* note 64, at 16–18.

68. J. Thomas Sullivan, *Requiem for RFRA: A Philosophical and Political Response*, 20 U. ARK. LITTLE ROCK L.J. 795, 809 (1998) ("The problem with this analysis is that RFRA created no substantive rights; instead, it is a procedural vehicle for validating claims brought under the Free Exercise Clause.").

69. CONG. RSCH. SERV., IF11490, IN FOCUS: THE RELIGIOUS FREEDOM RESTORATION ACT: A PRIMER (2020).

70. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1068 (9th Cir. 2008) (en banc) (quoting 42 U.S.C. §§ 2000bb-1(a); Chapman, *supra* note 28, at 1215).

71. 42 U.S.C. §§ 2000bb-1(b).

72. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

73. CONG. RSCH. SERV., *supra* note 69.

74. *Id.*

75. *Id.*

76. *Id.* (quoting 42 U.S.C. § 2000cc-5).

77. *Id.* (quoting 42 U.S.C. § 2000cc-1).

confinement, requires the government to demonstrate a compelling state interest to justify the potential burden placed on one's religious practice.[78] In contrast to RFRA, however, RLUIPA does not extend to federal action.[79] Other statutory measures, like Title VII of the Civil Rights Act of 1964,[80] parallel the federal RFRA exemption analysis and offer a procedural avenue for validating Free Exercise claims.[81]

III. Development of a Sincerity Analysis in Religious Accommodation Claims

Both before and after the enactment of RFRA and RLUIPA, U.S. courts have issued a wide variety of jurisprudence addressing the evaluation of sincerity. These cases often involve either requests for affirmative accommodations or exemptions from laws, but there is very little factual overlap in many of the cases beyond the inquiry into religious beliefs and sincerity.

In general, courts engage in a four-step analysis for claims under RFRA or RLUIPA.[82] The first three steps are questions of fact, which the claimant bears the burden to establish.[83] The fourth step is a question of law that shifts the burden of proof to the government and applies strict scrutiny.[84] For steps one through three, the claimant must establish that: (1) the belief derives from religion;[85](2) the belief is sincere;[86] and (3) the government's action

78. *Compare* 42 U.S.C. §§ 2000cc(a)(1)(A), 2000cc-1(a)(1) *with* 42 U.S.C. § 2000bb-1(b).

79. *Compare* 42 U.S.C. § 2000bb-3(a) *with* 42 U.S.C. §§ 2000cc(a)(2), 2000cc–1(b).

80. 29 C.F.R. § 1605.2(b).

81. Sullivan, *supra* note 68, at 809 ("RFRA created no substantive rights; instead, it is a procedural vehicle for validating claims brought under the Free Exercise Clause.").

82. *See* Chapman, *supra* note 28, at 1215–16 (citing Holt v. Hobbs, 574 U.S. 352, 360–61 (2015); Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1; Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc); *cf.* Meredith Abrams, Note, *Empirical Analysis of Religious Freedom Restoration Act Cases in the Federal District Courts Since* Hobby Lobby, 4 COLUM. HUM. RTS. L. REV. ONLINE 55, 62 (2019) (providing a similar style of burden shifting analysis for RFRA claims).

83. Chapman, *supra* note 28, at 1223.

84. *Id.* at 1215; *see also Holt*, 574 U.S. at 360–61.

85. *Holt*, 574 U.S. at 360 ("Under RLUIPA, petitioner bore the initial burden of proving that the Department's grooming policy implicates his religious exercise.").

86. *See* United States v. Zimmerman, 514 F.3d 851, 853 (9th Cir. 2007) (explaining that a claimant "must prove that his beliefs are sincerely held").

substantially burdened the sincerely held religious belief.[87] If the claimant succeeds in steps one through three, the court moves to the fourth step—strict scrutiny. The burden shifts to the government to prove both that this policy furthered a compelling government interest and was the least restrictive means of achieving that interest.[88]

It is important to parse out each of these individual steps in order to understand how the court will analyze each element of a religious accommodation claim, as the common conflation of the first two steps tends to muddle the separate inquiries into "religion" and "sincerity."[89] Thus, to limit the scope of this Comment, it will primarily examine the first two steps of the religious exemption analysis.

A. Defining the Boundaries of a Sincere Religious Belief

1. The Inception of Sincerity Analysis in Religious Exemption Claims

In the 1944 case *United States v. Ballard*, the Supreme Court first defined the parameters in which a court can inquire into religious beliefs for the purposes of granting religious exemptions to generally applicable criminal laws.[90] Guy, Edna, and Donald Ballard were indicted and convicted of mail fraud after creating an alleged scheme to promote the "I Am" religious movement.[91] The Ballards presented themselves as "divine messengers" who could heal both curable and uncurable ailments by virtue of their supernatural abilities but at a monetary cost.[92] Through the alleged misrepresentation of their "curative power" on at least eighteen occasions, the Ballards profited significantly over the course of their scheme.[93]

The primary issue on appeal in *Ballard* involved specific jury instructions at the criminal trial.[94] At trial, the judge instructed the jury to disregard any

87. *Holt*, 574 U.S. at 361 ("[P]etitioner also bore the burden of proving that the Department's grooming policy substantially burdened that exercise of religion."); *Zimmerman*, 514 F.3d at 853 (explaining that claimant must "establish that the exercise of sincerely held religious belief is substantially burdened").

88. *Holt*, 574 U.S. at 362 ("[T]he burden shifted to the Department to show that its refusal to allow petitioner to grow a ½–inch beard '(1) [was] in furtherance of a compelling governmental interest; and (2) [was] the least restrictive means of furthering that compelling governmental interest.'" (quoting 42 U.S.C § 2000cc–1(a))); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 694–95 (quoting 42 U.S.C. § 20000bb-1(a)).

89. *See* Chapman, *supra* note 28, at 1225–26.

90. *See* 322 U.S. 78 (1944).

91. *Id.* at 79–80.

92. *Id.*

93. *See id.* at 80.

94. *Id.* at 81.

aspect of "truth" in the Ballards' asserted beliefs and, instead, determine whether the defendants "honestly and in good faith believe[d] those things."[95] The jury ultimately found the defendants' proclaimed religious beliefs insincere, and the Ballards were convicted.[96] Upon appeal, however, the Ninth Circuit reversed the conviction, holding that the restriction of the issue at the trial level was an "error," and that the government bore the burden to prove the Ballards' claims were both insincere *and* inaccurate.[97] After granting certiorari, the issue presented to the Court hinged on whether the veracity of one's religious beliefs could be subject to legal proceedings.[98]The Court in *Ballard* eventually set the standard for future inquiries into a claimant's religious beliefs by establishing a threshold of "sincerity."

The majority opinion asserted that the First Amendment's religious clauses embrace two concepts: the "freedom to believe and freedom to act."[99] The freedom to believe is absolute, and Douglas contended that the lower court's choice to withhold questions involving the "truth or falsity" from the jury protected the Ballards' freedom to believe, no matter how "incomprehensible to others" the beliefs may be.[100] The freedom to act has limitations, and these limitations allowed the Court to justify its authority to evaluate the Ballards' sincerity in their belief that they possessed supernatural powers. The Court made clear that no matter how outlandish or improbable the beliefs might be, any speculation into the "truth or falsity" of the Ballards' religious beliefs was beyond its judicial scope.[101] The Court could determine, however, whether the Ballards *sincerely* believed they were capable of conducting such divine miracles.[102] By analyzing the sincerity of a claimant's religious beliefs, the Court can evaluate whether the asserted belief is merely a pretense to further one's underlying secular interests. This sincerity question filters out potentially meritless claims from the court system while allowing the courts to avoid diving into religious orthodoxy.[103]

The powerful dissent in *Ballard* contended that, much like the inquiry into the accuracy of a belief, the inquiry into sincerity is beyond the reach of the Court.[104] Jackson asserted that the Court does not have the power to "separate

95. *Id.*
96. *Id.* at 81–83.
97. *Id.* at 83; *see also* Chapman, *supra* note 28, at 1119.
98. *Ballard*, 322 U.S. at 83–84; *see also* Chapman, *supra* note 28, at 1204.
99. *Ballard*, 322 U.S. at 86.
100. *Id.* at 86–87.
101. *Id.* at 87.
102. *Id.* at 85.
103. *See* Mohammadi, *supra* note 22, at 1852.
104. *Id.* at 92 (Jackson, J., dissenting).

an issue as to what is believed from considerations as to what is believable."[105] Religion inherently involves the belief in something of which "doubt is theoretically possible," therefore using doubt to challenge the sincerity of one's religious beliefs is antithetical to the concept of religion itself.[106] Without an individual's outright admission of disbelief, the Court cannot evaluate the sincerity of a belief with anything other than circumstantial evidence.[107] Thus, it is nearly impossible for the Court to evaluate the sincerity of a belief without implicating the veracity and merit of the religious claim itself.[108]

Additionally, Jackson highlights his concern with the latitude given to judges to evaluate the subjective experience of religion, specifically referencing "those whose field of consciousness does not include religious insight."[109] He contends that a nonbelieving judge would not be able to understand the claimant's religious experience.[110] The judge, therefore, is "almost certain not to believe him."[111] But this concern is also equally applicable to judges who bear their own religious beliefs, as each person's understanding of religion is based in their own faith.[112] The inquiry into a claimant's religious sincerity requires judges to use their own religion as a reference point; thus, the more familiar a judge may be with a particular religion, the more likely the judge will find the claim plausible.[113]

The circumstances in *Ballard* demonstrate why it is necessary for courts to account for the nuances of religious belief and conduct because a blanket approach to religious exemptions would be impractical, if not outright unconstitutional. If all religious exemptions to neutral and generally applicable laws were denied, the free exercise of religion would be heavily burdened. But allowing all religious exemptions, regardless of evidence of insincerity, enables individuals to act in bad faith at the expense of others. Insincerity exploits the First Amendment as a shield to a criminal conviction. The Court's inquiry into sincerity, however, does not guarantee claimants any protection from potential biases and even poses the risk of creating its

105. *Id.*
106. *Id.* at 93–94.
107. Chapman, *supra* note 28, at 1206.
108. *Id.*
109. *Ballard*, 322 U.S. at 93 (Jackson, J., dissenting).
110. *Id.*
111. *Id.* at 93–94.
112. *See* Anna Su, *Judging Religious Sincerity*, 5 OXFORD J.L. & RELIGION 28, 41–42 (2016), https://academic.oup.com/ojlr/article-pdf/5/1/28/6843483/rwv050.pdf.
113. *Id.* at 41.

own First Amendment concerns.[114] *Ballard* allows the court to evaluate the merits of a religious claim by "uncovering alleged inconsistencies or contradictions in the claimant's religious convictions" to impeach the claimant.[115] Also, this highly discretionary approach poses the risk of blurring the lines between "sincerity" and "veracity."[116]

2. The Ambiguous and Subjective Confines of a "Sincerely Held Religious Belief"

While *Ballard* established the Court's limited scope of inquiry into religious beliefs, ambiguities remained as to what qualified as a "sincere, *religious* belief." Courts have held that "only beliefs rooted in religion are protected by the Free Exercise Clause."[117] Yet, this designation presents a considerable problem: judges cannot clearly distinguish between religious, moral, social, or political beliefs. A person's objection to a particular law may be sincere, but not rooted in religious beliefs, thus beyond the scope of the First Amendment.[118] Furthermore, not all religious beliefs fall within traditional categories of religion.[119] As time has gone on, the concept of religion has broadened, with some courts defining the "touchstone of religion" as the believer's "categorical[] 'disregard [of] elementary self-interest . . . in preference to transgressing [the religion's] tenets.'"[120] Concrete answers that expressly define religion do not exist. Yet, the Supreme Court has established an interpretive approach in a collection of cases, which involve conscientious objections to military conscription.[121]

Contemporaneous with *Ballard*, Congress promulgated the "conscientious objector exemption" from the Selective Service Act of 1940[122] (SSA), and its later iteration, the Universal Military Training and Service Act UMTSA

114. William P. Marshall, *Bad Statutes Make Bad Law:* Burwell v Hobby Lobby, 2014 SUP. CT. REV. 71, 99.

115. *Id.*

116. *Id.*

117. Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 713 (1981) (citations omitted).

118. Callahan v. Woods, 658 F.2d 679, 684 (9th Cir. 1981) ("[T]he court concluded that Callahan's objection to identification numbers, although sincere, was actually 'rooted in' secular and philosophical concerns.").

119. United States v. Allen, 760 F.2d 447, 449–50 (2d Cir. 1985).

120. Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 440 (2d Cir. 1981) (citing United States v. Kauten, 133 F.2d 703, 708 (2d Cir. 1943)).

121. *See Kauten*, 133 F.2d at 705; *see also* Welsh v. United States, 398 U.S. 333 (1970); Gillette v. United States, 401 U.S. 437 (1971).

122. Joseph T. Tinnelly, Notes and Comment, *The Conscientious Objector Under the Selective Service Act of 1940*, 15 ST. JOHN'S L. REV. 235 (1941).

(later renamed Military Selective Service Act)[123], which triggered a wave of free exercise claims.[124] In the 1943 case *United States v. Kauten*, the defendant, Mathias Kauten, challenged his conviction for neglecting to appear for induction into the United States Army as a conscientious objector to the war, arguing he was exempt from conscription based on his "religious training and belief."[125] The Second Circuit held that the SSA's conscientious objector exemption included beliefs which "may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse."[126] The court's ruling expanded the traditional notion of religion to include less established belief systems.[127] The court also asserted that those who might object to a particular war on philosophical or political grounds do not qualify as conscientious objectors.[128] The court found that while Kauten may be "entirely sincere in the ideas he expressed, his objections . . . were based on philosophical and political considerations applicable to the particular war in question rather than" a religious objection to participation in "any war under any circumstances."[129] His objections were, therefore, not within the confines of the statutory exemption.[130]

In *United States v. Seeger*, the Court reemphasized the Second Circuit's notion that the conscientious objector exemption extends only to religious beliefs, but not to beliefs that are political, sociological, or philosophical in nature.[131] Seeger and his co-defendants, Jakobson and Peter, were drafted to the Armed Forces, but refused to "submit to induction," and were convicted because of their refusal.[132] UMTSA exempts those who have a conscientious objection to participation in the war on the basis of their religious belief.[133] The Act excludes from the exemption those who oppose the war based on a "merely personal moral code," requiring that the religious belief have some

123. 50 U.S.C. § 456(j).

124. *See Kauten*, 133 F.2d at 705; *see also Welsh*, 398 U.S. at 335; *Gillette*, 401 U.S. at 438.

125. *Kauten*, 133 F.2d at 705.

126. *Id.* at 708; *see* Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1061 (1978).

127. *Kauten*, 133 F.2d at 708.

128. *Id.* at 707.

129. *Id.* at 707–08.

130. *See id.* at 708.

131. 380 U.S. 163, 165 (1965).

132. *Id.* at 166–69.

133. *Id.* at 165 (citing 50 U.S.C. 456(j)).

relation to a "Supreme Being" with duties "superior to those arising from any human relation."[134] None of the three defendants belonged to an established religion, but each shared the belief that taking another human life was morally wrong.[135] The Court found that if an expressed belief "occup[ies] the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption," then the belief qualifies as religious and receives First Amendment protection.[136] Essentially, if an individual has a belief in a "god," and expresses a qualm with the war that can be connected to this belief, the person has a conscientious objection to conscription.[137] If the reason for the objection cannot be connected to a "Supreme Being" in some capacity, even if the basic moral principles are identical, then the UMTSA's conscientious objector exemption does not apply.[138] Here, because the objectors' beliefs resembled that of an "orthodox belief in God," the Court found the beliefs qualified as religious pursuant to the UMTSA.[139]

The question in *Seeger* was not whether the objectors sincerely believed taking another human life to be wrong, but whether the objection resulted from a sincerely held belief rooted in religion.[140] The exact content of the beliefs themselves were nearly irrelevant to the Court's analysis. Instead, it was the source of the beliefs that became the central question of the case; a question that only the believer—subjectively—could truly answer. In this analysis, the Court assumed a bright line could be drawn between one's religious beliefs and their political, moral, or ethical beliefs.

This assumption, however, grossly oversimplified the complexity of religious beliefs. The relationship between religious, political, moral, and ethical beliefs is far more fluid than the Court acknowledged. To parse out the inner workings of a claimant's mind in order to "qualitatively

134. *Id.* at 166, 173 (quoting 50 U.S.C. 456(j)).

135. *Id.* at 166–69.

136. *Id.* at 184.

137. Lucien J. Dhooge, *The Equivalence of Religion and Conscience*, 31 NOTRE DAME J.L. ETHICS & PUB. POL'Y 253, 259–60 (2017) ("Deeply and sincerely held beliefs derived from purely ethical or moral sources were entitled to protection if they occupied 'a place parallel to that filled by God' in religious persons." (quoting *Seeger*, 380 U.S. at 176)).

138. *See id.* at 259; *Seeger*, 380 U.S. at 173.

139. *Seeger*, 380 U.S. at 166, 187.

140. *Id.* at 166–67 ("His belief was found to be sincere, honest, and made in good faith . . . .").

distinguish[]"[141] a religious belief from other belief systems requires clairvoyance—a skill beyond the scope of the courts and human capabilities. To force U.S. courts to take on a role of soothsayer into the subjective mind of the "believer" encroaches into subject matter barred by the Religious Question Doctrine and threatens the delicate balance between the First Amendment's Free Exercise and Establishment clauses.[142] Additionally, Justice Douglas fretted that the Court's narrow interpretation of the term "Supreme Being" favored the Judeo-Christian concept of "God," and failed to account for any polytheistic[143] religions.[144] In turn, the statutory exemption applied unequally on the basis of religion and essentially extended only to those beliefs derived from a singular, Abrahamic God.[145] Douglas, instead, construed the word "'Supreme Being,' to include the cosmos, as well as an anthropomorphic entity,"[146] which expanded the definition of religion to ensure members of polytheistic religions, such as Buddhism or Hinduism, equally qualified for exemption under the statute.[147]

Justice Douglas' worries did not fall on deaf ears when. Five years later, the Court expanded *Seeger* even further in *Welsh v. United States*.[148] Like Seeger, Elliott Ashton Welsh II was convicted for "refusing to submit to induction into the Armed Forces."[149] He contested on the basis that he was "by reason of religious training and belief . . . conscientiously opposed to participation in war in any form."[150] Similar to Seeger, Welsh "held deep conscientious scruples against taking part in wars where people were killed."[151] Also, Welsh did not "definitely affirm or deny that he believed in a 'Supreme Being,'"[152] but, in contrast to Seeger, he denied deriving any of

141. William P. Marshall, *Correspondence on Free Exercise Revisionism: In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 320 (1991) ("Importantly, religious belief cannot be qualitatively distinguished from other belief systems in a way that justifies special constitutional consideration.").

142. *See Seeger*, 380 U.S. at 188 (Douglas, J., concurring). Justice Douglas also raised concerns about the majorities' analysis preferring one religion over another in contravention of the Equal Protection Clause. *See id.*

143. For purposes of this Comment, the term polytheistic represents the antonym of monotheistic, to which Justice Douglas advocates in his concurrence in *Seeger*. *See id.*

144. *Id.* at 191.

145. *See id.* at 188–90.

146. *Id.* at 188.

147. *Id.* at 191–93.

148. 398 U.S. 333 (1970).

149. *Id.* at 335.

150. *Id.* (quoting 50 U.S.C. § 456(j)).

151. *Id.* at 337.

152. *Id.*

his beliefs from religion.[153] Instead, Welsh attributed his objection to military conscription to a category of beliefs—political, historical, and sociological—specifically excluded by section 6(j) of the UMTSA.[154] In a surprising shift, the Court determined Welsh held his asserted beliefs "with the strength of more traditional religious convictions," thus qualifying for exemption from the draft.[155] Ultimately, the *Welsh* Court expanded the definition of "religion" by holding the 6(j) exemption process covered people who held strong other-than-religious belief sufficient to occupy "a place parallel to that filled by . . . God in a traditionally religious persons."[156] This expanded definition was short-lived.

The conscientious objector cases demonstrate the evolving confines of "religion," and ultimately establish a broader definition for individuals who may not bear traditional, religious beliefs, but whose beliefs take the same place as that of a "Supreme Being." Yet, half a century later, this definition of religion has become even more ambiguous, particularly after RFRA narrowed the holdings from *Seeger* and *Welsh*.[157] The Act defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[158] Unlike *Welsh*, modern RFRA claims often exclude secular philosophical concerns.[159] Courts instead interpret RFRA's definition of religion to include five elements: "(1) ultimate ideas regarding life, purpose, death, and other imponderable issues; (2) metaphysical beliefs that transcend the physical and observable world; (3) a moral and ethical system prescribing a particular manner of acting or way of life; (4) a comprehensive system of beliefs; and (5) the accoutrements of religion."[160]

In this analysis, no single element is dispositive, rather, the claimant bears the burden to demonstrate where their asserted belief intersects with these elements to qualify within the term "religion."[161] These elements help to further determine whether a religious belief exists, but they offer no

153. *Id.* at 341 ("Welsh was far more insistent and explicit than Seeger in denying that his views were religious.").

154. *Id.* at 340–41.

155. *Id.* at 343 (quoting Welsh v. United States, 404 F.2d 1078, 1081 (9th Cir. 1968), *rev'd*, 398 U.S. 333).

156. *Id.* at 340 (quoting United States v. Seeger, 380 U.S. 163, 176 (1965)).

157. *See* 42 U.S.C. § 2000cc-5(7)(A).

158. *Id.*

159. Dhooge, *supra* note 133, at 260–61 ("Secular philosophical concerns and a claimant's purely subjective views with respect to what constitutes religious practices are insufficient.").

160. *Id.* at 261.

161. *Id.*

assistance in uncovering the origin of a single person's religious, philosophical, political, or social beliefs. Both *Seeger* and *Welsh* establish that beliefs influenced by political, moral, or social philosophies, which lack a clear "Supreme Being," can still be considered religious.[162] These cases, however, did not find that an individual's political, moral, or social philosophies may hitch a ride with traditionally accepted religious beliefs in order to qualify for exemption from neutral laws of general applicability. Yet, as RFRA has evolved through the twenty-first century, there remains no way to clarify whether the entirety of one's asserted religious belief truly fills a "place parallel to that filled by . . . God."[163] This gap in legal theory creates a vehicle for the "traditionally religious" to attach political and moral beliefs to their religious ones.

B. Proving Sincerity & the Disparate Applications of Sincerity Analysis

As the Court established in the pre-RFRA cases, the first two steps in religious exemption claims require the claimant to prove their asserted belief is both sincerely held and derived from the claimant's religion.[164] These two steps serve to filter claims that are either obviously insincere or motivated by nonreligious beliefs prior to moving forward with any constitutional balancing.[165] Because the Court is constrained by the Religious Question Doctrine and cannot inquire into the validity of a religious belief, its evaluation of religious "sincerity is therefore 'limited to asking whether the claimant is (in essence) seeking to perpetrate a fraud on the court[.]'"[166] The inquiry into a claimant's sincerity usually includes evidence of secular incentives for the claimant to make an insincere religious claim and incongruities in the claimant's behavior, whether in comparison to their personal religious biography or within the greater religious community.[167] Each of these categories of evidence do not confirm sincerity but, instead, present information that could *suggest* the claimant may be insincere in their

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

163. *Welsh*, 398 U.S at 340 (quoting *Seeger*, 380 U.S. at 176).

164. *See* United States v. Ballard, 322 U.S. 78, 81 (1944); *Seeger*, 380 U.S. at 165.

165. Catherine A. Hardee, *Schrödinger's Corporation: The Paradox of Religious Sincerity in Heterogeneous Corporations*, 61 B.C. L. REV. 1763, 1774 (2020) ("Although the dangers of orthodoxy slipping into the courts' sincerity analysis should not be ignored, there are good reasons to take seriously the need to ferret out insincere religious claims.").

166. United States v. Hoffman, 436 F. Supp. 3d 1272, 1284 (D. Ariz. 2020) (alteration in original) (quoting Yellowbear v. Lampert, 741 F.3d 48, 54 (10th Cir. 2014)).

167. Chapman, *supra* note 28, at 1231 (citing Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1981)).

beliefs.[168] For example, the Ballards' asserted that they sincerely believed they retained supernatural powers.[169] Here, the Ballards *could* have sincerely believed they could heal the sick and injured, but it is more likely that they intentionally misrepresented their abilities for the purpose of making money, masquerading their act as a "religious belief" to circumvent criminal charges. Because there is no formal test to evaluate the sincerity of one's expressed religious belief, courts are entrusted to determine religious sincerity on a case-by-case basis.[170] With no mechanism to ensure a consistent evaluation of sincerity across courts, judges are left to gauge claims relative to their personal understandings of religion, a process that occurs both consciously and subconsciously.[171]

In most religious accommodation and exemption claims, U.S. courts follow one of two paths in their initial sincerity analysis: (a) the claimant's beliefs are initially assumed sincere without further factual inquiry or proof requested of the claimant,[172] *or* (b) the claimant's beliefs are initially assumed insincere and so the claimant must provide compelling evidence of their sincerity.[173] Because religious sincerity is the threshold question to move forward with a religious accommodation claim, a court's initial assumption of sincerity should be neutral to ensure the claimant's religious beliefs are evaluated fairly. Analogize, for example, this assumption of sincerity to the presumption of innocence in a criminal case.[174] When a criminal case begins,

168. *Id.*

169. *Ballard*, 322 U.S. at 80.

170. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 439 (2006) ("Congress has determined that courts should strike sensible balances . . . .").

171. Gregory C. Sisk et al., *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 614 (2004) ("[W]hen searching for the soul of judicial decisionmaking in the legal or political sense, empirical scholars must not neglect the presence and influence upon the judicial process of matters that affect the soul in the theological sense."); *see also* Gregory C. Sisk & Michael Heise, *Ideology "All the Way Down"? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201, 1244 (2012) ("If the subject is one as controversial, prominent, and subject to divergent opinion as the role of religion and religious influences in public life, the judge left to draw on nonlegal values will be hard-pressed not to trend toward his own personal views.").

172. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 717 (2014).

173. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1981).

174. For this hypothetical, ignore the burden shifting analysis. In a criminal case, the government would bear the burden of proof, whereas for a religious exemption claim, the claimant bears the burden until they prove there is a substantial burden on a sincere, religious

judges and, when applicable, jurors, are expected to presume the defendant's innocence until proven guilty, bearing no preemptive notions of culpability beyond what is presented as evidence at trial.[175] It thus follows logically that to ensure the fair and impartial exercise of justice, a claimant in a religious exemption case should be free from preemptive notions of religious insincerity. Yet, in practice, Christian claimant's religious beliefs are more often preemptively assumed sincere unless strong evidence is presented to the contrary. Claimants who are members of minority religions or secular organizations tend to be assumed insincere unless the claimant can present exceedingly strong evidence proving the sincerity of their religious beliefs.[176] One might hope a court's subconscious choice between these two paths is informed by an objective evaluation of the evidence. In practice, the chosen path instead correlates with judges' familiarity with the claimant's expressed religious beliefs.[177] According to Professor Ira Lupu, "the questioning of sincerity may operate invisibly and subconsciously against unknown or unpopular religions."[178] The further a religious belief or practice diverges from judges' personal notions of religion, the easier it is for a judge to find the claimants' beliefs insincere "on the basis of an unarticulated view that 'no one could really believe this.'"[179] Because of this potential bias in the sincerity analysis, Lupu further contends "those who need the protection of the Constitution will be those least likely to enjoy it."[180]

Disparate treatment of the sincerity analysis in religious exemption claims is quite subtle. It is revealed not by explicit statements in a court's analysis,

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belief. Under RLUIPA, the challenging party bears the initial burden of proving that his religious exercise is grounded in a sincerely held religious belief. *See Hobby Lobby*, 573 U.S. at 738 (Kennedy, J. concurring) ("On this record and as explained by the Court, the Government has not met its burden of showing that it cannot accommodate the plaintiffs' similar religious objections under this established framework."); *see also* Holt v. Hobbs, 574 U.S. 352, 352–53 (2015) (explaining burden shifting scheme under RLUIPA).

175. Coffin v. United States, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

176. Mark Tushnet, *"Of Church and State and the Supreme Court": Kurland Revisited*, 1989 S. CT. REV. 373, 382–83.

177. *See id.*; *see also* Sisk & Heise, *supra* note 171, at 1244 ("If the subject is one as controversial, prominent, and subject to divergent opinion as the role of religion and religious influences in public life, the judge left to draw on nonlegal values will be hard-pressed not to trend toward his own personal views.").

178. Lupu, *supra* note 21, at 954.

179. *Id.*

180. *Id.*

but rather the lack of a sincerity analysis for particular religious beliefs. In most religious accommodation and exemption claims made by Christians, the sincerity analysis is reduced to a single sentence in the opinion, where the Court regurgitates something along the lines of, "the sincerity of the claimant's religious beliefs is undisputed," or "the court does not question the claimant's sincerity."[181] Conversely, the assumption of sincerity is substantially less common for members of minority religions and secular organizations, where courts tend to conduct a far more dubious examination of a claimant's religious beliefs.[182] In an empirical predictive analysis of RFRA cases post-*Hobby Lobby*, Meredith Abrams conducted a binomial logistic regression analysis on 115 Tenth Circuit RFRA decisions. She found two variables had a predictive effect on case outcomes: (1) "whether a litigant

181. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 717 (2014) ("No one has disputed the sincerity of [the claimants'] religious beliefs."); *see also* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1930 (2021) ("The City has expressed its determination to put CSS to a choice: Give up your sincerely held religious beliefs or give up serving foster children and families."); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1728 (2018) ("[T]he baker was not unreasonable in deeming it lawful to decline to take an action that he understood to be an expression of support for their validity when that expression was contrary to his sincerely held religious beliefs."); 303 Creative LLC v. Elenis, 6 F.4th 1160, 1181 (10th Cir. 2021) ("To be clear, we, like the Dissent, do not question Appellants' 'sincere religious beliefs' or 'good faith.'" (quoting *id.* at 1190–91 (Tymkovich, C.J., dissenting)); Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2390 (2020) (Alito, J., concurring) ("It is undisputed that the Little Sisters have a sincere religious objection to the use of contraceptives and that they also have a sincere religious belief that utilizing the accommodation would make them complicit in this conduct. As in *Hobby Lobby*, 'it is not for us to say that their religious beliefs are mistaken or insubstantial.'" (quoting *Hobby Lobby*, 573 U.S. at 725)); Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829, 831 (1989) ("The court characterized Frazee's refusal to work as resting on his 'personal professed religious belief,' and made it clear that it did 'not question the sincerity of the plaintiff.'" (quoting Frazee v. Dep't of Emp. Sec., 512 N.E.2d 789, 791 (Ill. App. 1987), *rev'd*, 489 U.S. 829)); Korte v. Sebelius, 735 F.3d 654, 683 (7th Cir. 2013) ("No one questions their sincerity or the religiosity of [the claimant's] objection.").

182. *See* Int'l Soc'y For Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1981) ("We can perform our duty diligently, however, if we carefully consider two factors: the sincerity of the devotees who practice sankirtan and the centrality of this practice to the Krishna Consciousness religion."); *see also* Theriault v. Carlson, 495 F.2d 390, 394 (5th Cir. 1974) ("The long list of court actions to which Theriault is a party . . . is strongly suggestive of the necessity of employing sharp and careful scrutiny of his activities, including his claim of religious sincerity."); Armstrong v. Jewell, 151 F. Supp. 3d 242, 249–50 (D.R.I. 2015) ("Although the Plaintiffs repeatedly assert that the religious use of marijuana, or cannabis, is 'deeply held, demonstrably sincere, and exquisitely supported by the standard Bible,' there is simply no mention of the specific location where such religious use must occur.").

was Christian; and (2) "whether a litigant was secular."[183] This data suggests that regardless of other factors present, a Christian litigant is more likely to win a RFRA case,[184] whereas a secular litigant is more likely to lose.[185] Abrams dubbed these findings "The Christian Advantage" and "The Secular Disadvantage," but implications of this disparity go beyond these two religious associations.[186]

According to Abrams, being Christian directly affects the likelihood of a claimant's success.[187] She found that the average win rate of Christian RFRA claims was 37%, while contraceptive mandate cases won 81% of the time.[188] This study accounts only for total success rates rather than examining individual steps within a court's application of RFRA.[189] The data additionally corroborates scholarly assertions that a claimant's religious affiliation, whether consciously or subconsciously, influences judicial determinations of religious exemption claims.[190] The sincerity analysis—and specifically the assumption of sincerity—which occurs more frequently with Christian religious exemption claims, further explains this disparity because of the religious demographics among judges across the United States. Throughout the history of the U.S. Supreme Court, 56.5% of Justices identified as members of a Protestant Christian denomination,[191] while 13% identified as Roman Catholic.[192] Of the remaining Justices, 7.8% and 7%

183. Abrams, *supra* note 82, at 69.

184. *Id.* (noting a statistical significance of .038).

185. *Id.* (noting a statistical significance of .006).

186. *Id.* at 69–72.

187. *Id.* at 69–70.

188. *Id.* at 71.

189. *See id.* at 61–62. Abrams' predictive analysis of the RFRA cases accounts for all variables of the accommodation process, rather than the singular inquiry into the claimants' sincerity. *See id.* at 63–67. Thus, there are likely more factors that contribute to this disparate success rates, such as a court's determination of a "substantial burden," or the balancing of interests when applying strict scrutiny, but this is beyond the scope of this Comment.

190. Sisk et al., *supra* note 171, at 614 ("In our study of religious freedom decisions, the single most prominent, salient, and consistent influence on judicial decision making was *religion*—religion in terms of affiliation of the claimant, the background of the judge, and the demographics of the community.").

191. *See* Rachel Wellford, *More than 2 Centuries of Supreme Court Justices, in 18 Numbers*, PBS NEWS HOUR (July 9, 2018, 5:15 PM EDT), https://www.pbs.org/newshour/nation/more-than-2-centuries-of-supreme-court-justices-in-18-numbers (highlighting demographic statistics of thirty-three Episcopalian, nineteen Presbyterian, and thirteen Protestant justices in the Court's history).

192. *See id.* The data on this website does not include Justices Kavanagh and Barrett, who are both Roman Catholic. Thus, I have added two to the thirteen Roman Catholics identified on the website, making up for fifteen Roman Catholics out of 115 total SCOTUS justices.

identified as Unitarian and Jewish, respectively.[193] Only one member, Justice David Davis, stipulated no religious affiliation.[194] Thus, including Justice Davis, 99% of Supreme Court Justices held Judeo-Christian beliefs, and an examination of lower courts shows similar results. As of 2017, Protestants and Catholics made up a combined 73.2%[195] of current judges across the thirteen courts of appeals, followed by 19% identifying as Jewish and 5.1% identifying as Mormon.[196] In comparing the religious makeup of the circuit courts to that of the U.S. population, Orthodox Christians, Jehovah's Witnesses, Muslims, Buddhists, Atheists, and Agnostics are not represented in the federal judiciary.[197] Yet nearly one in every ten Americans self-identify as a member of one of these six groups.[198] The underrepresentation of minority religions and overrepresentation of Judeo-Christians helps explain "The Christian Advantage" in RFRA cases. In describing the role of a judge, District Judge Edward Chen of the Northern District of California stated that "it is simply unrealistic to pretend that life experiences do not affect one's perceptions in the process of judging," and his "own life experiences inform [his] understanding and perceptions of the world as a judge."[199] Because the inquiry into sincerity lacks any concrete formula or test, RFRA claims are likely evaluated in comparison to a judge's personal understanding of religion, which as the data confirms, is likely rooted in Judeo-Christian beliefs.[200] Therefore, the threshold for sincerity of those with more traditional Judeo-Christian beliefs is lower than that of all other religions.

In contrast to the "Christian Advantage," a secular litigant is likely to find less success in RFRA claims due to the "Secular Disadvantage."[201] According to Abrams, the win rate for RFRA claims made by secular

193. *See id.* There is no authoritative database on religious composition of the Supreme Court. Thus, the statistics on religious composition of the Supreme Court and other federal judges reflect the most reliable secondary source data available at the time of publication.

194. *Id.*

195. Sepehr Shahshahani & Lawrence J. Liu, *Religion and Judging on the Federal Courts of Appeals*, 14 J. EMPIRICAL LEG. STUDIES 716, 724 (2017), https://onlinelibrary.wiley.com/doi/epdf/10.1111/jels.12162.

196. *Id.*

197. *See id.*

198. *Id.* at 724–25.

199. Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 CALIF. L. REV. 1109, 1119–20 (2003).

200. Su, *supra* note 112, at 41 ("Sincerity does not exist on its own but with a necessary reference to religion especially given the existing requirement that an act or belief be motivated by or have a nexus with religion.").

201. Abrams, *supra* note 82, at 72.

claimants was only 14%, whereas the win rate for most religions is around 50%.[202] She suggests that this disparity is the result of judges "intuitively controlling for religions that *feel* like traditional religions," despite the lack of a written component of RFRA that requires a belief in God.[203] In fact, while religions are entitled to a "special solitude," federal courts may not "favor religions over non-theistic groups that have moral stances that are equivalent to theistic ones."[204] Yet many judges seem skeptical, if not critical, of secular RFRA claims, which use language to refer to nontraditional or secular groups as "so-called religions which tend to mock established institutions," as well as "shams and absurdities whose members are patently devoid of religious sincerity."[205] The obvious bias towards nontraditional religions and secular groups is palpable, particularly in the sincerity analysis and the disparate threshold applied to secular and religious groups.

While Abrams found only the predictive effects of Christianity and secularism as statistically significant, the "Christian Advantage" similarly demonstrates the disparity of win rates between Christian RFRA claims and RFRA claims of all other religions, particularly those of religious minorities.[206] According to Professor William Marshall, minority belief systems "bear the brunt of the [religious] definition and the sincerity inquiries," as a court is "more likely to find that a religious belief is insincere when the belief in question is, by cultural norms, incredulous."[207] Consequently, religious claims involving beliefs that "closely parallel or directly relate to the culture's predominate religious traditions" are most likely to be recognized by judges.[208] It stands to reason that a particular judge's familiarity with a religious belief or practice, in reference to their own religion, makes these claims "easily cognizable and plausible."[209] A

202. *Id.*

203. *Id.* at 73.

204. March for Life v. Burwell, 128 F. Supp. 3d 116, 127 (D.D.C. 2015) (quoting Ctr. for Inquiry, Inc. v. Marion Cir. Ct. Clerk, 758 F.3d 869, 873 (7th Cir. 2014)); *see also* Kaufman v. McCaughtry, 419 F.3d 678, 684 (7th Cir. 2005) ("Atheism is Kaufman's religion, and the group that he wanted to start was religious in nature even though it expressly rejects a belief in a supreme being."); McCreary County v. Am. C.L. Union of Ky., 545 U.S. 844, 860 (2005) ("The touchstone of our analysis is the principle that the First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion." (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968))).

205. Theriault v. Carlson, 495 F.2d 390, 395 (5th Cir. 1974).

206. Abrams, *supra* note 82, at 69–70.

207. Marshall, *supra* note 141, at 311.

208. *Id.*

209. Su, *supra* note 112, at 41.

good example is the Supreme Court's description of the Santeria religion in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah.*[210] Here, the Court emphasized how the Yoruba people "absorbed significant elements of Roman Catholicism" into their "traditional African religion."[211] The Court explained that the Yoruba people worship the spirits "through the iconography of Catholic saints," and that Santeria religious practices use Catholic symbols and sacraments.[212] In *Church of Lukumi Babalu*, the Court laid out the mental steps judges make in rationalizing and evaluating a particular religious belief.[213] The process typically looms in the subtext of inquiries into religious sincerity, further demonstrating that it is easier to find a religious belief sincere if it is familiar.[214]

The lack of neutrality in the sincerity analysis created a higher threshold for members of secular groups and minority religions to meet in order to move forward with accommodation claims. This result is apparent in the lack of scrutiny applied to Judeo-Christian beliefs in RFRA claims,[215] despite there being an equal chance that the asserted belief does not derive from the religious belief itself. Just because a claimant's belief system is familiar to a judge or commonly practiced across the country does not mean the claimant bears no secular incentives. Courts regularly scrutinize claimants of nontraditional religions for using RFRA as a means of furthering secular goals, yet a Christian claimant can just as easily incorporate tangentially related political or social ideologies into their asserted "Christian" beliefs. This danger becomes more apparent when looking at how the Court uses Judeo-Christian beliefs as a reference point to determine whether the religious belief of a minority religion is sincere.[216] Because courts scrutinize certain religious beliefs far more than others, the beliefs receiving less scrutiny have more latitude to incorporate nonreligious goals into their religious exemption claims.

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210. 508 U.S. 520, 524–25 (1993).

211. *Id.*; *see also* Su, *supra* note 112, at 42.

212. *Church of the Lukumi Babalu Aye*, 508 U.S. at 524.

213. *See id.* at 531.

214. Su, *supra* note 112, at 42 ("[W]hat is often driving the determination that sincerity walls off any further inquiry into a person's conscience is the judge's own content-based appreciation of the religious claim. It is easy to believe that someone is sincere about a particular assertion of belief if such is intelligible to the court.").

215. *See* Abrams, *supra* note 82, at 69–70.

216. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 524.

IV. The Intersection of Secular and Religious Beliefs in the Evaluation of Sincerity

With the subjective boundaries of religion constantly in flux, it has become increasingly difficult to differentiate a person's religious beliefs from their philosophical, moral, political, or even economic beliefs. Courts, therefore, must recognize that religion is not insular. As described by Professor William Marshall, religion is "a powerful social and political force that competes with other forms of belief in the shaping of the mores and values of the society which, in turn, become part of the society's political landscape."[217] Courts should not evaluate religious beliefs in isolation, but rather as a subpart in a person's greater belief system, particularly when they inquire into RFRA claims that present significant overlap with political beliefs and ideologies. There have been an increasing number of RFRA claims that fall along partisan lines, prompting concerns that certain religious groups will receive statutory and constitutional protections for their purely political beliefs.[218]

A. The Religious Right's Strategic Use of the "Christian Advantage"

While political discourse involving religious exemptions from neutral laws of general applicability has always existed, there has been a dramatic uptick over the past decade in successful litigation under exemption laws.[219] Pre-RFRA accommodations and exemptions tend to involve more unconventional religious beliefs, while modern RFRA litigation is saturated with Christian faith-based claims, where evangelical conservatives lead the charge.[220] While these cases address different subject matter, many have one thing in common—using federal RFRA or state-level equivalent statutes to legally protect the ability to discriminate under the shroud of "religious belief."[221] Recently, litigants attempted to use RFRA to push back against

217. Marshall, *supra* note 141, at 321.

218. *See* United States v. Hoffman, 436 F. Supp. 3d 1272, 1284 (D. Ariz. 2020) ("The Government's sole argument as to insincerity is that Defendants have merely 'recited' religious beliefs 'for the purpose of draping religious garb over their political activity.'"); *see also* PLATT ET AL., *supra* note 64, at 6 ("Together, advocates, legislators, courts, and journalists have contributed to a climate in which only the religious liberty claims of conservative people of faith 'count' as religious, while the claims and rights of progressive people of faith are dismissed or ignored as 'merely' political in nature.").

219. PLATT ET AL., *supra* note 64, at 19.

220. *Id.* at 6.

221. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1728 (2018); 303 Creative LLC v. Elenis, 6 F.4th 1160, 1170 (10th Cir. 2021); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1876 (2021).

public health mandates during the COVID-19 pandemic.[222] But the RFRA challenges to the Affordable Care Act (ACA) and, specifically, the contraceptive provision, have found the greatest success in contemporary free exercise jurisprudence.[223]

Since its passage in 2010, the ACA has become a particularly politicized subject among Americans.[224] Most debate has centered on the constitutionality of the ACA's individual mandate under the Commerce and Taxing and Spending Clauses[225] and its more specific provisions requiring private employers to provide health insurance plans covering "female-controlled" contraception without cost sharing or out-of-pocket costs to the patient.[226] Accordingly, it was no surprise when the ACA triggered a wave of RFRA claims,[227] including claims brought by private companies and organizations who asserted the contraceptive mandate "substantially burdened" their "sincere exercise of religion."[228] While these early RFRA claims met mixed success among lower courts, the Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*, held not only that the ACA's contraceptive mandate for employers could be subject to religious exemptions but also that closely held, for-profit corporations are entitled to religious exemptions

222. *See* Harris v. Univ. of Mass., Lowell, 557 F. Supp. 3d 304, 314 (D. Mass. 2021) (holding that RFRA did not apply to UMass, as a state entity, in its action denying a student's religious exemption claim to a COVID-19 vaccine requirement).

223. *See* Abrams, *supra* note 82, at 66, 70.

224. Ashley Kirzinger et al., *5 Charts About Public Opinion on the Affordable Care Act*, KFF (Apr. 14, 2022), https://www.kff.org/health-reform/poll-finding/5-charts-about-public-opinion-on-the-affordable-care-act-and-the-supreme-court/.

225. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (2012) ("[T]he individual mandate cannot be upheld as an exercise of Congress's power under the Commerce Clause. . . . [But] [s]uch legislation is within Congress's power to tax.").

226. 42 U.S.C § 300gg; *see also Insurance Coverage of Contraceptives*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/insurance-coverage-contraceptives [https://perma.cc/E8Y8-FTX4] (last updated Oct. 1, 2022).

227. *See, e.g.*, Univ. of Notre Dame v. Sebelius, 743 F.3d 547 (7th Cir. 2014) (analyzing University of Notre Dame's claim that requirements to sign and mail forms to health insurers, which provide contraceptive coverage under the ACA, violates Notre Dame's rights under RFRA), *cert. granted, judgment vacated sub nom.*, Univ. of Notre Dame v. Burwell, 575 U.S. 901 (2015); Wheaton Coll. v. Burwell, 573 U.S. 958, 960 (2014) (Sotomayor, J., dissenting) (analyzing Wheaton's claim that the ACA's contraceptive provision violates Wheaton's rights under RFRA).

228. Cath. Benefits Ass'n LCA v. Sebelius, 24 F. Supp. 3d 1094, 1103–04 (W.D. Okla. 2014); *see also* Korte v. Sebelius, 528 F. App'x 583, 586 (7th Cir. 2012) ("The Kortes contend that the contraception mandate substantially burdens their exercise of religion . . . .").

ordinarily extended only to individuals and religious organizations.[229] The Green and Hahn families, owners of three closely held for-profit corporations,[230] sued Health and Human Services (HHS) under RFRA, seeking to enjoin the application of the ACA's contraceptive mandate with regard to four contraceptives at issue.[231] The families contended that, by complying with the mandate and providing health insurance coverage for contraceptives that *may* operate after the fertilization of the egg, their sincere religious belief that life began at conception would be substantially burdened.[232] The families believed they would be complicit in facilitating third-party use of the designated contraceptives.[233]

The majority opinion asserted that the contraceptive provision, as applied to closely held corporations, violated RFRA because it substantially burdened the claimants' free exercise of religion and the government failed to prove the ACA's coverage was tailored to the least restrictive means of achieving the government objective.[234] Justice Alito, however, paid little attention to the evaluation of the claimants' sincerity, reciting the phrase seen across many cases involving Christian claimants that "no one has disputed the sincerity of [the claimants'] religious beliefs."[235] While the Green and Hahn families provided plentiful evidence they were, indeed, devout Christians who believed life began at conception,[236] it is important to separate their general religious affiliation from the asserted belief within their RFRA claim. Both families asserted it was immoral for them to provide coverage that "*may* result in the destruction of the embryo."[237] They provided no further evidence beyond that assertion, nor did the Court inquire. In fact,

229. 573 U.S. 682, 736 (2014); *see also* CAROLYN J. DAVIS ET AL., CTR. FOR AM. PROGRESS, RESTORING THE BALANCE: A PROGRESSIVE VISION OF RELIGIOUS LIBERTY PRESERVES THE RIGHTS AND FREEDOMS OF ALL AMERICANS 2 (2015), https://www.americanprogress.org/wp-content/uploads/2015/10/HobbyLobby2-reportB.pdf.

230. *Hobby Lobby*, 573 U.S. at 700–02 (explaining that the Hahn family owned Conestoga Wood Specialties and the Green family owned Hobby Lobby and Mardel).

231. *Id.* at 703–04.

232. *Id.* at 720.

233. *Id.* at 701–03 ("The Hahns argued that 'it is immoral and sinful for [them] to intentionally participate in, pay for, facilitate, or otherwise support these drugs.'" (alteration in original) (quoting Conestoga Wood Specialties Corp. v. Sebelius, 724 F.3d 377, 382 (3d Cir. 2013), *vacated sub nom.*, *Hobby Lobby*, 573 U.S. 682)).

234. *Id.* at 728, 736 ("HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases.").

235. *Id.* at 717; *see also* Su, *supra* note 112, at 34.

236. *Hobby Lobby*, 573 U.S. at 700–03.

237. *Id.* at 720 (emphasis added).

despite Justice Ginsburg's dissent, which contended the relationship between the families' religious objections and the contraceptive coverage requirement was too attenuated,[238] the majority failed to inquire into the connection between the asserted belief and the claimants' religious practice.

Alito erroneously framed the inquiry into the claimants' belief as a violation of the Religious Question Doctrine because it would implicate "a difficult and important question of religion and moral philosophy."[239] He thus made the common mistake of conflating the first two steps of the RFRA analysis.[240] The majority's analysis did not comport with Court precedent in individually determining that: (1) the appellants' asserted beliefs were derived from religion; and (2) they sincerely believed the asserted belief was a part of their religious doctrine.[241] The majority's analysis failed to ensure the asserted belief was not a political, social, moral, or economic interest. Justice Alito ultimately failed to account for the fact these two elements are distinct from one another. Merely being a devout Christian does not necessarily imply the belief in question is a byproduct of the claimant's Christian belief system and, thus, should be evaluated independently as to ensure the asserted claim is not a political or economic belief "cloaked as religious practice."[242]

The *Hobby Lobby* opinion further showcased the "Christian Advantage" at play, particularly, the Court's lack of skepticism, or even inquiry into, any potential secular incentives the claimants may have. Not once did the Court question any "non-religious incentives" that lurk behind the claim, nor did the Court explore any potential inconsistencies within the claimants' religious beliefs and among their religious community.[243] An obvious financial incentive was obscured by the claimants' persistent religious objections. According to data collected by the Actuarial Research Corporation in 2011, the estimated cost of providing contraceptives was

238. *Id.* at 760 (Ginsburg, J., dissenting).

239. *Id.* at 724 (majority opinion).

240. Chapman, *supra* note 28, at 1247.

241. *See, e.g.*, United States v. Ballard, 322 U.S. 78, 81 (1944); United States v. Seeger, 380 U.S. 163, 165 (1965).

242. *Hobby Lobby*, 573 U.S. at 733.

243. *See* Chapman, *supra* note 28, at 1231–32, 1247 (citing Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1981)) (explaining how courts should engage in a robust three category sincerity analysis and then later reasoning that the *Hobby Lobby* majority failed to engage in this analysis).

twenty-six dollars per enrolled female per year.[244] Of those contraceptives, long-acting reversible contraceptives such as IUDs, which are two of the four contraceptives the claimants object to, bear one of the highest costs of all contraceptive options.[245] Of the three businesses owned by the claimants, Hobby Lobby alone employs around 43,000 employees nationwide,[246] bringing the annual cost of contraceptives based on this figure to an estimated $686,452.[247] While an annual expense of well over half a million dollars may seem insignificant to a large corporation's yearly profit, it seems substantial enough, at the very least, to consider when evaluating sincerity. Nevertheless, Justice Alito made no mention of the potential savings that would result from the Court ruling in favor of the claimants' RFRA challenge to the contraceptive provision. Despite this oversight, he spent an entire section of the opinion discussing the economic toll violating the provision would have on the claimants because the ACA places a "substantial burden" on religious exercise.[248] The Court's strategically selective evaluation of the elements of a RFRA claim further illustrates the advantage a Christian claimant bears when seeking a religious exemption from a neutral law of general applicability.

The Court's approach in *Hobby Lobby* presents a stark contrast to any inquiry into the sincerity of a non-Christian claimant. For example, Muslim prisoners are regularly subjected to a higher burden of proof when asserting claims under RLUIPA.[249] Similar to Christianity, Islam represents a commonly practiced religion with a "highly doctrinally developed religious tradition."[250] Yet, as litigants, Muslim prisoners often must "corroborate evidence from the Islamic doctrinal corpus to justify the accommodation

244. *The Cost of Covering Contraceptives Through Health Insurance*, ASPE: U.S. DEP'T OF HEALTH & HUM. SERVS. (Feb. 9, 2012), https://aspe.hhs.gov/reports/cost-covering-contraceptives-through-health-insurance#_ftn9 (issue brief) (citation omitted).

245. Brief of The Guttmacher Institute & Professor Sara Rosenbaum as Amici Curiae Supporting the Government at 16, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) ("The average wholesale cost of these devices ranges from $718 to $844, exclusive of costs relating to the insertion procedure, and the total cost of initiating one of these long-acting methods generally exceeds $1,000."), *aff'd sub nom.*, *Hobby Lobby*, 573 U.S. 682.

246. *Hobby Lobby Statistics and Demographics*, ZIPPIA, https://www.zippia.com/hobby-lobby-careers-26333/demographics/ (last visited Oct. 19, 2022).

247. This is an estimated number based upon the average cost for contraceptive coverage multiplied by the number of Hobby Lobby employees nationwide.

248. *See* Hobby Lobby, 573 U.S. at 720 ("If the Hahns and Greens and their companies do not yield to this demand, the economic consequences will be severe.").

249. Mohammadi, *supra* note 22, at 1866–71.

250. *Id.* at 1166.

sought."[251] In *Hudson v. Maloney*, a district court rejected a Muslim prisoner's request for a full-sized prayer rug instead of a prison-issued towel because the "plaintiffs point to no tenet of the Muslim faith that requires that the prayer ritual be performed on a prayer rug as opposed to a prayer towel."[252] This consistent skepticism of the claims of non-Christian litigants directly contradicts the Court's reluctance to inquire into Christian faith-based tenets. Compare the evidence required in Hudson to the Hahn and Green families' burden of proof regarding contraceptives within the doctrinal tenants of Christianity. Rather than requiring the families to present the specific tenants of Christianity, which supported their religious objection to the contraceptives in question, Justice Alito found the claimants' choice to "operate in a professional environment founded upon the highest ethical, moral, and Christian principles" or their decision to remain closed on Sundays sufficient to support their asserted RFRA claim.[253] Ultimately, the deciding factor in *Hobby Lobby* was not whether the Hahns and Greens sincerely believed that providing insurance for the four contraceptives in question violated their religious beliefs. Rather, the decisive move was the inconsistency with which the courts choose to dissect the religious beliefs. To use the words of the Supreme Court, Christians, "like the Jehovah's Witnesses, are not above the law."[254]

B. A Mirrored Approach for Progressive Activism

In the wake of the *Hobby Lobby* decision, conservative political groups found substantial momentum in their strategic use of RFRA claims to further political and economic interests.[255] Meanwhile, as courts continue to expand RFRA's reach, politically progressive groups began to utilize a similar approach on the opposing side of the partisan divide. Throughout free exercise jurisprudence, courts rejected more politically "liberal" assertions of religious belief, most commonly drug decriminalization, on the basis that

251. *Id.* at 1171.

252. 326 F. Supp. 2d 206, 209 n.2 (D. Mass. 2004).

253. *Hobby Lobby*, 573 U.S. at 701, 704 (citation omitted).

254. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 447 (2d Cir. 1981) ("The Krishnas, however, like the Jehovah's Witnesses, are not above the law." (citing Murdock v. Pennsylvania, 319 U.S. 105, 116 (1943))).

255. *See, e.g.*, Wheaton Coll. v. Burwell, 134 S. Ct. 2806 (2014) (granting Wheaton College an emergency injunction from notice procedures generally required for religious accommodations).

the claimants were motivated by commercial or secular reasons.[256] Within the past decade, however, progressive activists began to make some headway using RFRA to challenge immigration laws.[257] These activists utilize RFRA to legitimize and offer legal protections to sanctuary churches because "a place of worship can hardly provide sanctuary if law enforcement can simply come in and arrest those inside."[258] RFRA was also the basis used for some groups to challenge President Donald Trump's Executive Order that barred immigration from six predominantly Muslim countries.[259] But, ultimately, this aspect was not at issue when the Court reviewed the Order in *Trump v. Hawaii*.[260] Yet a Unitarian Universalist organization has carved out a new path for progressive activism legally shielded by RFRA.

Both *United States v. Warren*[261] and *United States v. Hoffman*[262] mark a new era of religious exemptions that stray from the unbalanced tradition of RFRA claims to advance the interests of right-wing conservatives. These cases involved the work of an organization known as, "No More Deaths/No Más Muertes," a "faith-based humanitarian aid organization" and "ministry of the Unitarian Universalist Church of Tucson."[263] Since its founding in 1999, the organization has aimed to provide water, food, and medical care to immigrants in the desert.[264] Volunteers of the organization, including defendants Natalie Hoffman, Oona Holcomb, Madeline Huse, and Zaachila

256. *See* United States v. Quaintance, 608 F.3d 717, 722 (10th Cir. 2010) (rejecting defendant's RFRA claim for religious accomodation for their belief that that marijuana is a deity and a sacrament under sincerity analysis) ("As the district court noted, numerous pieces of evidence in this case strongly suggest that the Quaintances' marijuana dealings were motivated by commercial or secular motives rather than sincere religious conviction.").

257. *See, e.g.*, United States v. Warren, No. CR-18-00223-001, 2018 WL 4403753, at *2 (D. Ariz. Sept. 17, 2018) (reviewing motion to dismiss indictments on RFRA grounds arising out of defendant's assistance of migrants in avoiding immigration detention); United States v. Hoffman, 436 F. Supp. 3d 1272, 1289 (2020) ("Defendants met their burden of establishing that their activities [of entering restricted land and providing nourishment to migrants] were exercises of their sincere religious beliefs, and the Government failed to demonstrate that application of the regulations against Defendants is the least restrictive means of accomplishing a compelling interest.").

258. Thomas Scott-Railton, Note, *A Legal Sanctuary: How the Religious Freedom Restoration Act Could Protect Sanctuary Churches*, 128 YALE L.J. 408, 451 (2018) (citing Fifth Ave. Presbyterian Church v. City of New York, 293 F.3d 570, 575 (2d Cir. 2002)).

259. Hawaii v. Trump, 265 F. Supp. 3d 1140, 1147 n.8 (D. Haw. 2017), *aff'd in part, rev'd in part*, 878 F.3d 662, 702 (9th Cir. 2017), *rev'd*, 138 S. Ct. 2392 (2018).

260. 138 S. Ct. 2392 (2018).

261. 2018 WL 4403753.

262. 436 F. Supp. 3d 1272.

263. *Id.* at 1277.

264. *Id.* at 1276–77.

Orozco-McCormick, left food and water in the southern Arizona desert for unauthorized migrants crossing the United States border, as the extreme weather conditions made the trek an often deadly venture.[265] In addition to leaving water, "No More Deaths" volunteer Scott Warren offered two undocumented migrants food and shelter at a humanitarian aid station over the span of three days.[266] Warren was subsequently indicted on two counts of harboring an alien and one count of conspiracy.[267] In a separate case, Hoffman, Holcomb, Huse, and Orozco-McCormick faced criminal charges for entering the Cabeza Prieta National Wildlife Refuge without a permit and for abandoning property.[268]

The volunteers utilized the RFRA to defend their respective charges on the basis that their humanitarian aid was an exercise of their "sincerely held religious beliefs in the necessity to provide emergency aid to fellow human beings in need."[269] To the surprise of RFRA supporters and critics alike, the *Hoffman* court ruled in favor of the defendants, finding that the "No More Deaths" volunteers successfully established their activities were an exercise of their sincere religious beliefs.[270] Because the regulations substantially burdened the defendants' exercise of religion, and the government failed to prove the regulations were narrowly tailored, the application of the regulations to the defendants violated RFRA.[271] The *Hoffman* holding may have benefited from the "Christian Advantage," as the Unitarian Universalist Church is a progressive offshoot of Christianity that bears similar core values.[272] Still the court's recognition of the "No More Deaths" volunteers' RFRA defense suggests that, like the strategy of the religious right,

265. *Id.* at 1277 ("According to the Pima County Medical Examiner, 2,816 sets of 'undocumented border crosser remains' were recovered in Arizona between the years 2000 and 2017." (citation omitted)).

266. *Warren*, 2018 WL 4403753, at *1; *see also* Ryan Devereaux, *Humanitarian Volunteer Scott Warren Reflects on the Borderlands and Two Years of Government Persecution*, INTERCEPT (Nov. 23, 2019, 10:30 AM), https://theintercept.com/2019/11/23/scott-warren-verdict-immigration-border/.

267. *Warren*, 2018 WL 4403753, at *1 (citing 8 U.S.C. §§ 1324(a)(1)(A)(ii)-(v)(1)).

268. *Hoffman*, 436 F. Supp. 3d at 1277–78 (citing 50 C.F.R. § 26.22(b) and 50 C.F.R. § 27.93).

269. *Warren*, 2018 WL 4403753, at *3; *see also Hoffman*, 436 F. Supp. 3d at 1277.

270. *Hoffman*, 436 F. Supp. 3d at 1289. The *Warren* court denied defendant's motion to dismiss under RFRA, leaving open further unresolved questions of fact for an affirmative defense at trial. 2018 WL 4403753, at *5.

271. *Hoffman*, 436 F. Supp. 3d at 1289.

272. *See About the Unitarian Universalist Association*, UNITARIAN UNIVERSALIST ASS'N, https://www.uua.org/about (last visited Oct. 19, 2022).

progressive social and political activism can be advanced through statutory avenues like RFRA.

V. Conclusion

Societal definitions of "religion" are subjective and ever-changing, which is why courts have remained hesitant to create formalistic guidelines or constitutional tests for those seeking religious exemptions. Claimants test their religious rights first through the First Amendment's Free Exercise Clause and now, through statutory avenues like RFRA,[273] RLUIPA,[274] and Title VII.[275] The lack of a formal procedure, however, grants judges a substantial amount of discretion in determining what asserted claims contain "sincerely held, religious beliefs." Because religion is an inherently subjective concept, judges will likely use their own religious understandings as a springboard to analyze the elements of a claim.[276] Yet, the overrepresentation of Judeo-Christian judges in federal courts favors claimants whose beliefs resemble those of more commonly held monotheistic religions.[277] This advantage has resulted in certain religious beliefs receiving less scrutiny than others because those beliefs are assumed sincere, in contrast to minority religions and secular groups whose beliefs are often assumed insincere. The assumption of sincerity typically bestowed upon Judeo-Christian claimants provides them with more leeway to incorporate secular beliefs in their religious claims. If this pattern continues, certain religious groups will gain powerful protection of not only their religious beliefs but also their social, political, and economic beliefs as well, enabling a "super liberty" for some but not other religious groups.

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273. 42 U.S.C. § 2000bb.
274. 42 U.S.C. § 2000cc.
275. 42 U.S.C. § 2000e-2.
276. See *supra* notes 195–199 and accompanying text.
277. See *supra* notes 187–199 and accompanying text.