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FREE EXERCISE AND THE DEFINITION OF RELIGION: CONFUSION IN THE FEDERAL COURTS

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ABSTRACT

The U.S. Supreme Court has discussed the constitutional protections afforded to the free exercise of religion but has refrained from offering a clear method of distinguishing between the religious and the nonreligious. Instead, the Court has only offered hints about what might not qualify. Regrettably, this lack of clarity has resulted in the adoption of conflicting approaches in the circuits, which means that particular beliefs and practices might qualify as religious in some circuits but not in others. Further, at least some of the circuits have adopted approaches that are inconsistent with what the Supreme Court has suggested should count as religious, which underscores the importance of the Court's offering clearer and more specific guidance in this area.

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I. INTRODUCTION

The U.S. Supreme Court has repeatedly stated that the Free Exercise Clause only protects religious practices, but has sent mixed messages about what constitutes religion for free exercise purposes.[1] Rather than explain how the differentiation between religion and nonreligion should be made, the Court has instead only offered hints about what does not qualify as religious.[2] The Court's failure to offer clear criteria has resulted in widely differing interpretations by the lower courts, leading to dissimilar treatment of similar cases.[3] Further, some of the circuit courts employ factors to determine what qualifies as religious that are much more restrictive than the factors employed by the Court.[4]

Part II of this Article discusses the developing Supreme Court jurisprudence with respect to the definition of religion, noting some of the ways in which that definition is much broader than is sometimes understood. Part III describes some of the differing approaches to defining religion offered in the circuits, noting that one of the approaches adopted across a few circuits not only mischaracterizes the Supreme Court's approach but has been applied in a way that demonstrates exactly why such an approach is wrongheaded and insufficiently respectful of religion. The Article concludes that the Court should correct the mistaken approach at its first opportunity to help assure greater consistency and fairness across the circuits and greater protection of minority religious views.

II. SUPREME COURT JURISPRUDENCE

The U.S. Supreme Court has consistently suggested that the Free Exercise Clause only protects *religious* beliefs and practices, thus underscoring the importance of the ability to distinguish between the religious and the nonreligious. At the same time,

1. *See infra* Part II.C (discussing *Frazee v. Illinois Department of Employment Security* and *Thomas v. Review Board*).

2. *See infra* Part II.B (discussing *Yoder v. Wisconsin*).

3. *See* Karen Sandrik, *Towards a Modern Definition of Religion*, 85 U. DET. MERCY L. REV. 561, 567–68 (2008).

4. *See infra* Part III.

however, the Court has consistently manifested ambivalence not only about what qualifies as religion but also about whether state officials are competent to determine which beliefs and practices are religious and which not.[5] The Court's implicit criteria include a much wider range of beliefs than would be included using a more conventional definition of religion.[6]

A. Institutional Competence?

In *Cantwell v. Connecticut*, the Court examined a Connecticut statute authorizing a state official to determine which groups were bona fide religious entities.[7] A group soliciting charitable donations without having first received approval from the secretary of the public welfare council would be subject to fine or imprisonment.[8] The Court noted that a state official was "empowered to determine whether the cause is a religious one, and that the issue of a certificate depends upon his affirmative action."[9] The decision whether to issue a certificate was not "merely ministerial";[10] on the contrary, the "decision to issue or refuse it involve[d] appraisal of facts, the exercise of judgment, and the formation of an opinion."[11] Because the secretary was "not to issue a certificate as a matter of course," he in effect had the power to determine whether some impoverished groups would even be able to survive—groups not deemed religious would be precluded from soliciting donations from nonmembers.[12] The Court explained that

> to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which

5. *See infra* Part II.A.

6. *See infra* Part II.C.

7. *See* Cantwell v. Connecticut, 310 U.S. 296, 301–02 (1940) ("No person shall solicit . . . for any alleged religious, charitable or philanthropic cause . . . unless such cause shall have been approved by the secretary of the public welfare council. . . . Any person violating any provision of this section shall be fined not more than one hundred dollars or imprisoned not more than thirty days or both." (quoting CONN. GEN. STAT. § 6294 (1930 & Supp. 1937))).

8. *Id.* at 302.

9. *Id.* at 305.

10. *Cf.* United States *ex rel.* Ness v. Fisher, 223 U.S. 683, 690 (1912) ("[T]he duty of determining whether the relator's application conformed to the statutory requirements was not merely ministerial, but involved the exercise of judgment and discretion . . . .").

11. *Cantwell*, 310 U.S. at 305.

12. *Id.* ("Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth."); *see also* Henry Mark Holzer, *Contradictions Will Out: Animal Rights vs. Animal Sacrifice in the Supreme Court*, 1 ANIMAL L. 83, 92 (1995) ("Such censorship could not be countenanced, said the Court, because it implicated the religion's very right to survive . . . .").

> rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.[13]

The *Cantwell* Court did not specify whether a similar analysis would be appropriate if the state official making the relevant decision were a judge.[14] If the Constitution precludes state authorities (including judges) from determining which causes are religious and which not,[15] then some other method will have to be used when deciding whether an individual is entitled to a free exercise exemption, e.g., sincerity of belief.[16]

Consider *United States v. Seeger*.[17] At issue was whether David Seeger was entitled to conscientious objector status.[18] Section 6(j) of the Universal Military Training and Service Act "exempt[ed] from combatant training and service in the armed forces of the United States those persons who by reason of their religious training and belief are conscientiously opposed to participation in war in any form."[19] The difficulty raised was not whether Seeger was sincerely opposed to war in any form,[20] but whether those beliefs had the necessary connection to a belief in a Supreme Being.[21] The Court suggested as a matter of statutory

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13. *Cantwell*, 310 U.S. at 307; *see* Donald L. Beschle, *Does a Broad Free Exercise Right Require a Narrow Definition of "Religion"?*, 39 HASTINGS CONST. L.Q. 357, 359 (2011) ("In *Cantwell v. Connecticut*, religious solicitors succeeded in challenging a local licensing system that permitted the administrator excessive discretion to label a cause as nonreligious."); Bradford J. Kelley, Comment, *Bad Moon Rising: The Sharia Law Bans*, 73 LA. L. REV. 601, 618 (2013) ("The Court determined that any law granting a public body the function of determining whether a cause is 'religious' violates the Free Exercise Clause.").

14. The Court has addressed that issue elsewhere. *See* Fowler v. Rhode Island, 345 U.S. 67, 70 (1953) ("[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment."); Gary L. Francione, *Experimentation and the Marketplace Theory of the First Amendment*, 136 U. PA. L. REV. 417, 479 n.220 (1987) ("[T]he Court has also recognized that the judiciary is 'ill equipped' to define 'religion' or to decide issues of scriptural interpretation." (citation omitted)).

15. *But see* Jared A. Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 528 (2005) ("[T]he Constitution cannot plausibly be construed simultaneously to require protection for religion while forbidding courts from making assessments of whether a doctrine or practice is religious.").

16. *Cf.* United States v. Ballard, 322 U.S. 78, 84–88 (1944) (suggesting that sincerity of belief could be left to a trier of fact while the truth or falsity of a religious belief could not).

17. United States v. Seeger, 380 U.S. 163 (1965).

18. *Id.* at 164.

19. *Id.* at 164–65 (citing 50 U.S.C. app. § 456(j) (1958)).

20. *Id.* at 166–67 ("His belief was found to be sincere, honest, and made in good faith; and his conscientious objection to be based upon individual training and belief, both of which included research in religious and cultural fields.").

21. *Id.* at 166 ("[H]e declared that he was conscientiously opposed to participation in war in any form by reason of his 'religious' belief; that he preferred to leave the question as to his belief in a Supreme Being open, 'rather than answer 'yes' or 'no" . . . ." (quoting Brief for Respondent, *Seeger*, 380 U.S. 163 (No. 50), 1964 WL 81249, at *10)).

construction that Congress had intended to accord conscientious objector status to anyone whose beliefs played a role analogous to the role played by a Supreme Being in more traditional religious approaches.[22]

Torcaso v. Watkins involved a Maryland requirement that individuals declare their belief in God before they could become state officials.[23] Striking down the requirement, the Court held that neither the state nor federal government "can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."[24] In a footnote, the Court noted, "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."[25]

The *Torcaso* Court did not provide any criteria to distinguish between religion and nonreligion,[26] which was unsurprising given its point that the U.S. Constitution prohibits both the state and federal governments from "aid[ing] all religions as against non-believers."[27] Nonetheless, *Torcaso* at least raises the question whether there is any context in which the state can distinguish between religion and nonreligion and, if so, how broadly religion must be defined.

B. A More Restrictive Approach?

Torcaso's spirit of inclusiveness with respect to what counts as religious was implicitly undermined in *Wisconsin v. Yoder*.[28] At issue in *Yoder* was whether Amish parents could refrain from sending their fourteen- and fifteen-year-old children to high school

22. *Id*. at 187 ("We think it clear that the beliefs which prompted his objection occupy the same place in his life as the belief in a traditional deity holds in the lives of his friends, the Quakers.").

23. Torcaso v. Watkins, 367 U.S. 488, 489 (1961) ("Article 37 of the Declaration of Rights of the Maryland Constitution provides: '[N]o religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God . . . .' [T]he highest court of the State . . . [held] that the state constitutional provision is self-executing and requires declaration of belief in God as a qualification for office without need for implementing legislation." (first alteration in original)).

24. *Id.* at 495 (citations omitted).

25. *Id.* at 495 n.11.

26. George C. Freeman, III, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519, 1525 (1983) ("What the Court in *Torcaso* did not do was provide any guidelines for determining which beliefs and practices are rooted in religion.").

27. *Torcaso*, 367 U.S. at 495.

28. Wisconsin v. Yoder, 406 U.S. 205, 247–48 (1972).

in violation of local law.[29] The parents were afraid that their children would be taught values in high school that were incompatible with the values taught within their religious tradition.[30]

The change in tone with respect to the reach of the Free Exercise Clause was not in the Court's evaluation of the strength of those guarantees; on the contrary, the Court held that the Amish had to be exempted from the school attendance law.[31] Rather, the potentially confusing aspect of *Yoder* was in how the Court differentiated the religious from the nonreligious.

First, the Court made clear that religion has a special constitutional status—"to have the protection of the Religion Clauses, the claims must be rooted in religious belief."[32] The Constitution does not preclude the State from affording special protections to religious practices,[33] although a separate question involves the conditions under which religious practices must be exempted from the law.[34] The *Yoder* Court clearly worried about the implications of recognizing robust free exercise rights, cautioning that "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests."[35]

One might expect that a Court worried about the implications of recognizing robust free exercise rights would offer a clear and careful definition of religion to avoid some of the difficulties that might otherwise arise when an important term is ambiguous.[36]

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29. *Id.* at 207 ("Wisconsin's compulsory school-attendance law required them to cause their children to attend public or private school until reaching age 16 but the respondents declined to send their children, ages 14 and 15, to public school after they completed the eighth grade.").

30. *Id.* at 210–11 ("They object to the high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a 'worldly' influence in conflict with their beliefs.").

31. *Id.* at 234 ("[W]e hold, with the Supreme Court of Wisconsin, that the First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age 16.").

32. *Id.* at 215.

33. *See* Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 833 (1989) ("There is no doubt that '[o]nly beliefs rooted in religion are protected by the Free Exercise Clause.'" (alteration in original) (quoting Thomas v. Review Bd., 450 U.S. 707, 713 (1981))).

34. *See* Emp't Div. v. Smith, 494 U.S. 872, 879 (1990) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring))).

35. *Yoder*, 406 U.S. at 215–16.

36. *But see* John C. Knechtle, *If We Don't Know What It Is, How Do We Know if It's Established?*, 41 BRANDEIS L.J. 521, 523 (2003) ("Courts have endeavored to define religion

Regrettably, no such definition has been offered, perhaps because the Court realizes that the term is not readily defined.[37] For example, the *Yoder* Court admitted that "a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question,"[38] and instead illustrated what would *not* count as a religious belief. "[I]f the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis."[39] Without explaining how it arrived at the conclusion that Thoreau's beliefs were not religious,[40] the Court noted that "Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses."[41]

The suggestion that the philosophical was opposed to the religious was somewhat surprising in light of *Seeger*, given that his conscientious objector status had been conferred in part because Seeger's views had been based on the works of various philosophers—he had "cited such personages as Plato, Aristotle and Spinoza for support of his ethical belief in intellectual and moral integrity 'without belief in God, except in the remotest sense.'"[42] Yet, these contrasting views of whether philosophical views qualify as religious are reconcilable if the Court is instead

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for a number of years, yet a clear definition has evaded them."); O. Woelke Leithart, *Inextricably Linked? Rethinking the Supreme Court's Connection Between Religion and Violence*, 6 PHX. L. REV. 63, 66 (2012) ("[T]he Court does not have a clear idea of what religion is . . . ."); Jay D. Wexler, Note, *Of Pandas, People, and the First Amendment: The Constitutionality of Teaching Intelligent Design in the Public Schools*, 49 STAN. L. REV. 439, 458 (1997) ("The Supreme Court has not provided a clear, concrete, and consistently employed definition of religion in the First Amendment context . . . .").

37. *See* Daniel A. Spiro, *The Creation of a Free Marketplace of Religious Ideas: Revisiting the Establishment Clause After the Alabama Secular Humanism Decision*, 39 ALA. L. REV. 1, 33 (1987) ("[T]he current Supreme Court's definition is somewhat vague."); Laura S. Underkuffler, *"Discrimination" on the Basis of Religion: An Examination of Attempted Value Neutrality in Employment*, 30 WM. & MARY L. REV. 581, 600 (1989) ("The formulation of a workable definition of religion has presented an unparalleled conundrum for the courts.").

38. *Yoder*, 406 U.S. at 215.

39. *Id.* at 216.

40. *See* Freeman, *supra* note 26, at 1528 ("The Court simply asserted in *Yoder*, however, that Thoreau might be classified as a paradigm of the secular believer. The Court made no attempt either to explain or to justify this classification . . . .").

41. *Yoder*, 406 U.S. at 216.

42. United States v. Seeger, 380 U.S. 163, 166 (1965) (citing Brief for The American Civil Liberties Union as Amicus Curiae Supporting Respondent, *Seeger*, 380 U.S. 163 (Nos. 50, 51, 29), 1964 WL 81248, at *3); *see also* Beschle, *supra* note 13, at 368 ("Seeger rested his pacifism on his readings of philosophers such as Plato, Aristotle, and Spinoza . . . .").

suggesting that views that are "philosophical *and* personal"[43] may not qualify. Such a view implies that subjective, idiosyncratic views *may* not be protected by the Free Exercise Clause.[44]

The *Yoder* Court noted that "the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."[45] Here, the Court might be suggesting several criteria. The beliefs must not merely be personal, which might speak both to the depth of commitment and to views not being merely idiosyncratic[46]—the Court contrasted beliefs that were "merely a matter of personal preference [with those] of deep religious conviction."[47] In addition, the Amish were "an organized group," which also suggests that idiosyncratic beliefs are less likely to be classified as religious.[48] Finally, the Amish beliefs were "intimately related to daily living," suggesting that it was of some significance that religious beliefs and values played a role in how individuals lived their lives. [49]

The Court observed that Amish "religious beliefs and attitude toward life, family, and home have remained constant—perhaps some would say static—in a period of unparalleled progress in human knowledge generally and great changes in education."[50] Regrettably, no further commentary was offered to help clarify why this consistency mattered, e.g., as an indication that the beliefs were genuinely held or, perhaps, were not mere personal preferences readily discarded.

The *Yoder* Court's analysis can only be understood in light of further cases. For example, part of what was at issue in *Yoder* was the conflict between two competing sets of values—the values taught in high school were "in marked variance with Amish values and the Amish way of life."[51] The high school

> emphasize[s] intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of 'goodness,' rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation

43. *Yoder*, 406 U.S. at 216 (emphasis added).
44. *But see infra* notes 69–73 and accompanying text (discussing *Frazee*).
45. *Yoder*, 406 U.S at 216.
46. *See infra* notes 69–73 and accompanying text.
47. *Yoder*, 406 U.S. at 216.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 211.

> from, rather than integration with, contemporary worldly society.[52]

Suppose, however, that the conflict is not between secular values on the one hand and a uniform set of religious values on the other. Would views not shared by coreligionists also count as religious for purposes of the Free Exercise Clause?

C. Further Clarification

Thomas v. Review Board involved a challenge to a denial of unemployment compensation by Eddie Thomas, a Jehovah's Witness.[53] Thomas initially worked in a roll foundry making sheet steel for industrial use.[54] The foundry closed, and Thomas was transferred to a department making tank turrets.[55] However, he had religious objections to working on war weapons, so he checked to see whether he could transfer to a position that would not compromise his principles.[56] Because there were none, he asked to be laid off.[57] "When that request was denied, he quit . . . ."[58]

A friend, who was a fellow employee and also a Jehovah's Witness, told Thomas that working on weapons production was not "unscriptural."[59] But Thomas attributed that view to "a less strict reading" of his religious duty.[60] Thomas's application for unemployment compensation was denied.[61]

In upholding the denial of benefits, the Indiana Supreme Court reasoned that Thomas's refusal to work was a "personal philosophical choice rather than a religious choice."[62] The Indiana court appeared to have placed significant weight on the

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52. *Id.*

53. *See* Thomas v. Review Bd., 450 U.S. 707, 709–10 (1981) ("Thomas [was] a Jehovah's Witness . . . .").

54. *Id.* at 710.

55. *Id.* ("Approximately a year later, the roll foundry closed, and Blaw-Knox transferred Thomas to a department that fabricated turrets for military tanks.").

56. *Id.* ("He checked the bulletin board where in-plant openings were listed, and discovered that all of the remaining departments at Blaw-Knox were engaged directly in the production of weapons. . . . [H]e could not work on weapons without violating the principles of his religion.").

57. *Id.* ("Since no transfer to another department would resolve his problem, he asked for a layoff.").

58. *Id.*

59. *Id.* at 711 ("[Thomas] consulted another Blaw-Knox employee—a friend and fellow Jehovah's Witness.").

60. *Id.*

61. *Id.* at 712 ("[Thomas] was held not entitled to benefits.").

62. *See id.* at 713 (quoting Thomas v. Review Bd., 391 N.E.2d 1127, 1131 (Ind. 1979)).

friend's advice that the work was not contrary to their religion.[63] However, rather than say that particular beliefs had to reflect the official religious position in order to count for free exercise purposes, the U.S. Supreme Court instead noted, "Intrafaith differences . . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses."[64] The Court did not say that any and every asserted religious belief would trigger free exercise guarantees. "One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause . . . ."[65] However, the belief at issue was not so extreme as to fail to qualify, and the Court expressly rejected that only beliefs held by everyone in the sect would qualify for protection.[66] Precisely because courts "are not arbiters of scriptural interpretation" and "it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith," Thomas's views had to be accepted as religious, triggering the relevant protections.[67] Because the State could not meet its burden of showing that its refusal to award unemployment compensation was narrowly tailored to promote compelling state interests,[68] the Indiana Supreme Court's affirmance of the denial of unemployment compensation was reversed.

Thomas establishes that there need not be unanimity among sect members about particular beliefs in order for those beliefs to trigger free exercise guarantees. *Frazee* establishes that an individual need not even be a member of a sect in order for his beliefs to be treated as religious for free exercise purposes.

Frazee v. Illinois Department of Employment Security was another case in which an individual was denied unemployment

63. *Id.* at 715 ("The Indiana court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was 'scripturally' acceptable.").

64. *Id.*

65. *Id.*

66. *Id.* at 715–16 ("[T]hat is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect.").

67. *Id.* at 716–18 ("Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.").

68. *Id.* at 719 ("[T]he interests advanced by the State do not justify the burden placed on free exercise of religion.").

compensation after his refusal to work for religious reasons.[69] William Frazee was not a member of a particular sect and his refusal to work on Sunday did not "result[] from a 'tenet, belief or teaching of an established religious body.'"[70] In analyzing whether the belief was religious for free exercise purposes, the Court expressly denied that "unless a claimant belongs to a sect that forbids what his job requires, his belief, however sincere, must be deemed a purely personal preference rather than a religious belief."[71] The Court again affirmed "the difficulty of distinguishing between religious and secular convictions and in determining whether a professed belief is sincerely held."[72] But the way to determine whether beliefs qualify as religious is not simply to see whether many people share those beliefs. While "membership in an organized religious denomination, especially one with a specific tenet forbidding members to work on Sunday, would simplify the problem of identifying sincerely held religious beliefs," the Court expressly "reject[ed] the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."[73]

The Supreme Court jurisprudence is rather forgiving with respect to which beliefs count as religious. They must be sincere and more than a matter of mere personal preference, i.e., the sincerely held beliefs must play an important role in the individual's life.[74] However, they do not need to have a particular content, e.g., a belief in God.[75] While one's belonging to a sect sharing similar beliefs will lend credibility to the claim that a

69. Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 830 (1989) ("Frazee . . . applied to the Illinois Department of Employment Security for unemployment benefits claiming that there was good cause for his refusal to work on Sunday. His application was denied.").

70. *Id.* at 831 (quoting Frazee v. Dep't of Emp't Sec., 512 N.E.2d 789, 791 (Ill. App. Ct. 1987)) ("Frazee was not a member of an established religious sect or church . . . .").

71. *Id.* at 833.

72. *Id.*

73. *Id.* at 834.

74. *Cf.* United States v. Seeger, 380 U.S. 163, 187 (1965) ("We think it clear that the beliefs which prompted his objection occupy the same place in his life as the belief in a traditional deity holds in the lives of his friends, the Quakers.").

75. *Cf.* Derek P. Apanovitch, Note, *Religion and Rehabilitation: The Requisition of God by the State*, 47 DUKE L.J. 785, 795 (1998) ("The constitutional definition of religion encompasses 'all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinated or upon which all else is ultimately dependent [and] which occupies in the life of its possessor a place parallel to that filled by [ ] God.'" (alterations in original) (quoting *Seeger*, 380 U.S. at 176)). While *Seeger* involved statutory interpretation, *see supra* notes 17–22 and accompanying text, it nonetheless has been influential in constitutional interpretation. *Cf.* Sandrik, *supra* note 3, at 563, 576–78 (discussing "the various definitions that lower courts currently use in their attempts to assess what constitutes 'religion' under the Constitution in accordance with the definition and two-part test the Court put forth in *United States v. Seeger*").

particular belief qualifies as religious, a belief held by only one individual may nonetheless qualify.

III. RELIGIOUS BELIEFS AND PRACTICES IN THE CIRCUITS

The circuits have followed the example set by the U.S. Supreme Court and have not settled on a particular definition to determine which beliefs and practices qualify as religious. Instead, the circuits have adopted various approaches, some being much more inclusive than others. One approach that has been gaining acceptance across the circuits seems much more restrictive than the approach implicitly adopted by the Supreme Court.

A. Malnak

Malnak v. Yogi, which involved an Establishment Clause challenge to teaching Transcendental Meditation in the public schools, provides the basis for the standard used in some of the circuits in free exercise cases.[76] The court stated some of the salient aspects of the case: Each student needed his or her own personal mantra, a "sound aid used while meditating."[77] The mantra was delivered to the student in a ceremony called a puja, which seemed religious in nature.[78] In addition, the textbook involved religious themes.[79] While the court found that Transcendental Meditation was a religion for Establishment Clause purposes,[80] the reason that *Malnak* has been influential was not its holding but the analysis offered in Judge Adams's concurring opinion.[81]

Judge Adams noted that there had been "a newer, more expansive reading of 'religion' that has been developed in the last

76. Malnak v. Yogi, 592 F.2d 197, 197–98 (3d Cir. 1979).

77. *Id.* at 198.

78. *Id.* ("To acquire his mantra, a meditator must attend a ceremony called a 'puja.' . . . A puja was performed by the teacher for each student individually; it was conducted off school premises on a Sunday; and the student was required to bring some fruit, flowers and a white handkerchief. During the puja the student stood or sat in front of a table while the teacher sang a chant and made offerings to a deified 'Guru Dev.' Each puja lasted between one and two hours.").

79. *Id.* ("The textbook used was developed by Maharishi Mahesh Yogi, the founder of the Science of Creative Intelligence. It teaches that 'pure creative intelligence' is the basis of life, and that through the process of Transcendental Meditation students can perceive the full potential of their lives.").

80. *See id.* at 199 (agreeing with the district court that the SCI/TM course involved religious activity).

81. *Cf.* David Young, Comment, *The Meaning of "Religion" in the First Amendment: Lexicography and Constitutional Policy*, 56 UMKC L. REV. 313, 326 (1988) ("In the past ten years, few jurists have given such systematic thought to the definition of 'religion' as Judge Adams of the Third Circuit.").

two decades in the context of free exercise and selective service cases," although he believed that *Yoder* may represent a retrenchment in the jurisprudence.[82] He described the "modern approach [as] look[ing] to the familiar religions as models in order to ascertain, by comparison, whether the new set of ideas or beliefs is confronting the same concerns, or serving the same purposes, as unquestioned and accepted 'religions.'"[83]

Judge Adams outlined three factors that he believed important to consider:

(1) "[We] must, at least to a degree, examine the content of the supposed religion, not to determine its truth or falsity, or whether it is schismatic or orthodox, but to determine whether the subject matter it comprehends is consistent with the assertion that it is, or is not, a religion."[84]

For example, he approvingly quoted "Dr. Paul Tillich, who expressed his view on the essence of religion in the phrase 'ultimate concern.'"[85] However, Judge Adams cautioned that addressing one very important issue may not suffice, noting that "[c]ertain isolated answers to 'ultimate' questions, however, are not necessarily 'religious' answers, because they lack the element of comprehensiveness, the second of the three indicia."[86]

Judge Adams's qualification that certain answers to ultimate questions may not qualify as religious helps explain the second factor:

(2) "A religion is not generally confined to one question or one moral teaching; it has a broader scope. It lays claim to an ultimate and comprehensive 'truth.'"[87]

Thus, he believes that religion may have to address more than one matter of ultimate concern to assure that the belief system has sufficient scope.

The third category was not content-related but instead focused on the presence of more formal characteristics:

(3) Courts should examine "any formal, external, or surface signs that may be analogized to accepted religions. Such signs might include formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation,

82. *Malnak*, 592 F.2d at 200, 204 (Adams, J., concurring) ("[There is] some indication that the Court has, to some degree, drawn back from the broadest possible reading of these cases . . . ." (citing Wisconsin v. Yoder, 406 U.S. 205, 216 (1972))).

83. *Id.* at 207.

84. *Id.* at 208.

85. *Id.* (quoting PAUL TILLICH, DYNAMICS OF FAITH 1–2 (1958)).

86. *Id.* at 208–09.

87. *Id.* at 209.

observation of holidays and other similar manifestations associated with the traditional religions."[88]

Judge Adams noted that the third factor was not necessary—"a religion may exist without any of these signs."[89] Indeed, he noted that Seeger's beliefs qualified as religious, notwithstanding that those beliefs were not espoused by an institution, much less one associated with several elements of this formal structure.[90] Further, Seeger's beliefs would likely not qualify under Judge Adams's first criterion either, as Adams himself seemed to acknowledge.[91] If Seeger's beliefs did not involve a matter of "ultimate concern"[92] (the first factor), then they also did not involve the "broader scope" involved in the second factor.[93] But this means that Seeger's beliefs likely did not qualify under any of Judge Adams's factors. If the *Seeger* Court had employed Judge Adams's approach, Seeger's beliefs would likely not have been found religious, even though *Seeger* was allegedly one of the very cases upon which Judge Adams's approach was predicated.

While Judge Adams admitted that no one of the factors had to be met in order for beliefs to qualify as religious,[94] his formulation is at the very least problematic if it does not provide a good account of *Seeger*'s holding.[95] Judge Adams argued that "it is important to have some objective guidelines in order to avoid *ad hoc* justice."[96] While that is correct, it is also important not to use *incorrect* objective guidelines, and Judge Adams's factors do not account well for the Court's jurisprudence.[97]

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88. *Id.*

89. *Id.*

90. *See id.* at 209 n.43.

91. *See id.* ("[P]urely personal ideas, even if sincere, may not rise to a religious level." (citing Wisconsin v. Yoder, 406 U.S. 205, 216 (1972))).

92. *See supra* note 85 and accompanying text.

93. *See supra* note 87 and accompanying text.

94. *Malnak*, 592 F.2d at 210 (Adams, J., concurring) ("Although these indicia will be helpful, they should not be thought of as a final 'test' for religion.").

95. Craig A. Mason, Comment, *"Secular Humanism" and the Definition of Religion: Extending a Modified "Ultimate Concern" Test to* Mozert v. Hawkins County Public Schools *and* Smith v. Board of School Commissioners, 63 WASH. L. REV. 445, 450–51 (1988) ("Judge Adams' formulation illustrates the problems inherent in an analogical method of definition. This approach explicitly prefers 'traditional' religions, to the exclusion of less conventional beliefs. Additionally, Judge Adams' method grants preference to religions which have incubated in a leisured elite long enough to become 'comprehensive' in a systematic sense; in contrast to the less intellectually systematized passions . . . and of lower classes everywhere. Finally, the analogical method's views of 'fundamental' and 'ultimate' questions are severely ethnocentric . . . ."); Young, *supra* note 81, at 327 ("Adams' approach is subject to a number of criticisms . . . .").

96. *Malnak*, 592 F.2d at 210 (Adams, J., concurring).

97. Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1665 (1989) ("The Supreme Court has not defined religion for

While the discussion of Tillich and matters of ultimate concern comes from *Seeger*,[98] there are two distinct reasons to believe that the Court was not including matters of ultimate concern in its analysis in the way Judge Adams implied. First, Seeger's beliefs did not seem accurately characterized as involving matters of ultimate concern but, instead, as "largely personal,"[99] and his beliefs nonetheless qualified as religious. Second, and more importantly, the *Seeger* Court shied away from a discussion of content and instead explained that "the beliefs which prompted [Seeger's] objection occupy the same place in his life as the belief in a traditional deity holds in the lives of his friends, the Quakers."[100] By focusing on the role played by the beliefs *rather than* their content, the *Seeger* opinion suggests that Adams's focus on content is misconceived.[101]

An additional point might be made about the contents on which the courts might focus. Judge Adams suggests that the appropriate focus is on matters of "ultimate concern."[102] Yet, ironically, Judge Adams also claimed to have been guided by *Yoder*,[103] and *Yoder*'s focus was not on matters of ultimate concern but on matters "intimately related to daily living."[104] *Yoder* at the very least suggests that the acceptable religious contents are not nearly as limited as Judge Adams implies.[105]

The Third Circuit adopted Judge Adams's concurring view in *Africa v. Pennsylvania*, which involved Frank Africa, "a 'Naturalist Minister' for the MOVE organization."[106] He was incarcerated and claimed that "the state government is . . . required, under the religion clauses of the [F]irst

constitutional purposes, but decisions in other contexts reveal the steady expansion of the term 'religion' to meet needs arising in an increasingly complex and pluralistic society.").

98. *See* United States v. Seeger, 380 U.S. 163, 180, 187 (1965).

99. *See Malnak*, 592 F.2d at 209 n.43 (Adams, J., concurring).

100. *Seeger*, 380 U.S. at 187.

101. *See Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1612, 1625 (1987) ("Although neither *Seeger* nor *Welsh* directly addressed the meaning of 'religion' as used in the [F]irst [A]mendment, these cases indirectly support a subjective, functionalist approach to the definition of religion.").

102. *See Malnak*, 592 F.2d at 208 (Adams, J., concurring) (agreeing with Dr. Paul Tillich's view of ultimate concern, which means religion is intimately connected to concepts "that are of the greatest depth and utmost importance").

103. *See id.* at 204 n.20 (discussing *Yoder*'s "apparent retrenchment").

104. Wisconsin v. Yoder, 406 U.S 205, 216 (1972).

105. *See* Young, *supra* note 81, at 332–33 (explaining that Judge Adams's approach in defining religion is more restrictive than the approach incorporated by the Court in *Yoder*).

106. Africa v. Pennsylvania, 662 F.2d 1025, 1025 (3d Cir. 1981); *see also Developments in the Law—Religion and the State*, *supra* note 101, at 1626 (stating that the court's opinion in *Africa* focused on whether the belief was "religious in nature" and citing to Judge Adams's opinion in *Seeger*).

[A]mendment, to provide him with a special diet consisting entirely of raw foods."[107] His dietary needs were accommodated at one prison.[108]

MOVE had been founded "by John Africa, who serve[d] as the group's revered 'coordinator' and whose teachings Frank Africa and his fellow 'family' members follow[ed]."[109] Frank Africa had testified that "MOVE is a religion," and that "MOVE members participate in no distinct 'ceremonies' or 'rituals'; instead, every act of life itself is invested with religious meaning and significance."[110] An important element of MOVE teaching was its "conception of an unadulterated existence," which could only be attained through "MOVE's 'religious diet[,]' . . . comprised largely of raw vegetables and fruits."[111] The failure to observe the dietary restrictions "constitutes deviation from the 'direct, straight, and true' and results in 'confusion and disease.'"[112] When asked about the ethical obligations imposed by the religion, Africa responded that it would be impermissible to serve in the military.[113]

A different witness testified that Frank Africa was an ordained naturalist minister.[114] She also testified that "Africa's raw food diet is both a necessary 'part of' and a sincere 'reflection of' his religious commitment."[115]

The district court also heard testimony from Julius T. Cuyler, the Graterford prison superintendent, who testified that it would be very difficult for the prison to accommodate Africa's request any more than it already had, and its being ordered to do so might wreak havoc in the system.[116] The district court rejected that MOVE was a religion, characterizing it instead as "merely a quasi-back-to-nature social movement of limited proportion" that was "concerned solely with 'concepts of health and a return to

107. *Africa*, 662 F.2d at 1025.

108. *Id.* at 1026 ("While at Holmesburg, Africa requested and received a special diet of uncooked vegetables and fruits.").

109. *Id.*

110. *Id.* at 1027.

111. *Id.*

112. *Id.* at 1028.

113. *Id.*

114. *Id.* ("Johnson testified that her 'brother' was 'ordained' as a naturalist minister of MOVE by John Africa, and that he is an ardent follower of his religion and its mandates.").

115. *Id.*

116. *Id.* at 1028–29 ("Cuyler contended that the prison's cafeteria already made available to inmates a number of raw foods, such as bananas, apples, and oranges. There were practical reasons, he explained, why Graterford could not be any more accommodating in this regard . . . . In short, according to Cuyler, providing Africa with a raw food diet 'could be the straw that could break the camel's back.'").

simplistic living' . . . more akin to a 'social philosophy' than to a religion."[117]

The Third Circuit described its "task [a]s to decide whether the beliefs avowed are (1) sincerely held, and (2) religious in nature, in the claimant's scheme of things."[118] The court did not question Africa's sincerity,[119] which meant that the important issue was whether MOVE constituted a religion. But courts are at a disadvantage when asked to decide which sets of beliefs are religious: "Judges are ill-equipped to examine the breadth and content of an avowed religion; [they] must avoid any predisposition toward conventional religions so that unfamiliar faiths are not branded mere secular beliefs."[120] Such a task is all the more difficult because the "Supreme Court has never announced a comprehensive definition of religion."[121] Nonetheless, the court reasoned that "the modern analysis consists of a 'definition by analogy' approach [which] is at once a refinement and an extension of the 'parallel'-belief course first charged by the Supreme Court in *Seeger*."[122]

The parallel belief approach would seem to have supported Africa's claim that MOVE was a religion. In *Seeger*, the Court was concerned with whether Seeger's beliefs played a role in his life comparable to how religious beliefs played a role in others' lives.[123] Given the testimony that MOVE "encompasses every aspect of MOVE members' lives[,] there is nothing that is left out,"[124] one might have expected that MOVE would be paradigmatic of what would qualify. Further, the *Yoder* Court had been concerned with aspects of daily living,[125] and MOVE seemed to qualify on that score as well.[126]

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117. *Id.* at 1029 ("Africa had failed to establish that MOVE is 'a religion within the purview and definition of the [F]irst [A]mendment.'").

118. *Id.* at 1030 (citing United States v. Seeger, 380 U.S. 163, 185 (1965)).

119. *Id.* ("The requirement of sincerity poses no obstacle to Africa in this case.").

120. *Id.* at 1031.

121. *Id.*

122. *Id.* at 1032.

123. *Cf.* United States v. Ward, 989 F.2d 1015, 1018 (9th Cir. 1992) ("'Religious' beliefs, then, are those that stem from a person's 'moral, ethical, or religious beliefs about what is right and wrong' and are 'held with the strength of traditional religious convictions.'" (quoting Welsh v. United States, 398 U.S. 333, 340 (1970))).

124. *Africa*, 662 F.2d at 1028.

125. *See supra* note 45 and accompanying text; *see also* Wisconsin v. Yoder, 406 U.S. 205, 216 (1972) (emphasizing that the "traditional way of life" rather than the subjective rejection of the values accepted by the majority is important when evaluating whether a claim rests on a religious basis).

126. *Cf.* Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 776 (1984) ("The result in this borderline case is partly the product of Judge Adams' emphasis on fundamental questions and comprehensiveness, elements that seem

Lessons from *Seeger* and *Yoder* notwithstanding,[127] the *Africa* court rejected that MOVE was a religion because of its apparent failure to "satisfy the 'ultimate' ideas criterion."[128] In addition, MOVE "recognize[d] no Supreme Being and refer[red] to no transcendental or all-controlling force,"[129] even though the Supreme Court has never imposed such a requirement.[130] The *Africa* court concluded that "the concerns addressed by MOVE, even assuming they are 'ultimate' in nature, are more akin to Thoreau's rejection of 'the contemporary secular values accepted by the majority' than to the 'deep religious conviction[s]' of the Amish."[131]

Even if MOVE were a religion, the prison would not have had to accede to Africa's request if indeed that refusal was narrowly tailored to promote a compelling state interest.[132] However, the *Africa* court was not convinced that it would have been so difficult for the prison to have acceded to Africa's request, given that a different prison had done so.[133] Perhaps the *Africa* court feared other implications that would have followed were it to have held

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more important in the setting of a course in transcendental meditation than in this context.").

127. *But see* Ari J. Diaconis, Note, *The Religion of Alcoholics Anonymous (AA): Applying the Clergy Privilege to Certain AA Communications*, 99 CORNELL L. REV. 1185, 1214 (2014) ("[T]he Third Circuit analyzed over 100 years of Supreme Court precedent and ultimately concluded that MOVE was not a religion under the Free Exercise or Establishment Clauses."); Stephanie R. Tumbiolo, Note, *"Intimately Linked": Examining Religious Protection for Student Expressions of Sexual Abstinence*, 48 J. CATH. LEGAL STUD. 117, 131 (2009) ("Ten years later, in *Africa v. Commonwealth of Pennsylvania*, the Third Circuit, synthesizing Supreme Court jurisprudence, applied a three-part analysis for qualifying a belief system as religious . . . .").

128. *Africa*, 662 F.2d at 1033.

129. *Id.*

130. *See supra* notes 23–27 and accompanying text (discussing *Torcaso* and its holding that no state entity can constitutionally aid religions that believe in the existence of a deity against those religions that do not); *see also* Welsh v. United States, 398 U.S. 333, 343 (1970) (recognizing conscientious objector status for avowed atheist).

131. *Africa*, 662 F.2d at 1035 (alteration in original); *see also* Mason Blake Binkley, *A Loss for Words: "Religion" in the First Amendment*, 88 U. DET. MERCY L. REV. 185, 209 (2010) ("In sum, MOVE did not resemble Judge Adams's paradigm of religion closely enough to qualify as a religion under the First Amendment."); Erez Reuveni, Note, *On Boy Scouts and Anti-Discrimination Law: The Associational Rights of Quasi-Religious Organizations*, 86 B.U. L. REV. 109, 147 (2006) ("The court applied a three-part analysis, holding that MOVE was not concerned with religious principles, failed to embody a comprehensive, multi-faceted theology, and lacked the defining structural characteristics of a traditional religion.").

132. *Africa*, 662 F.2d at 1030 (stating that balancing a state interest against a First Amendment claim is part of the analysis).

133. *Id.* at 1037 ("Especially in light of the apparent willingness of Graterford officials to accede to the dietary requirements of other prisoners, both for religious and for medical reasons, it is not clear from the record why special accommodations cannot be made in this instance for a prisoner who obviously cares deeply about what food he eats.").

that MOVE was a religion, either because the State might then have a sharp increase in the number of individuals requesting dietary accommodations or because other avowedly religious groups would seek other kinds of accommodations.[134]

The Tenth Circuit followed a modified form of the *Africa* approach in determining whether a particular set of beliefs qualified as religious.[135] At issue in *United States v. Meyers* was the prosecution of David Meyers, who "testified that he is the founder and Reverend of the Church of Marijuana and that it is his sincere belief that his religion commands him to use, possess, grow and distribute marijuana for the good of mankind and the planet earth."[136] The court examined the protections afforded under the Free Exercise Clause and under the Religious Freedom Restoration Act (RFRA).[137]

The *Meyers* district court held that the definition of religion in RFRA mirrored the definition of religion for First Amendment purposes,[138] a view endorsed by the Tenth Circuit.[139] A separate issue is whether that is correct,[140] although that issue need not be addressed since the focus of concern here is the definition of religion for free exercise purposes, which is what the *Meyers* court addresses.

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134. John S. Hilbert, Comment, *God in a Cage: Religion, Intent, and Criminal Law*, 36 BUFF. L. REV. 701, 717 (1987) ("The answer may well be based less on the court's assurance as to its competency to identify religion as on its concerns as to the possible consequences of so deciding. The prison superintendent had testified that recognizing MOVE as a religion would possibly lead to 'a proliferation of other groups' requesting special diets and MOVE attracting new 'sympathizers.'" (quoting *Africa*, 662 F.2d at 1028)).

135. *See* United States v. Meyers, 95 F.3d 1475, 1483 (10th Cir. 1996) (citing *Africa* when affirming the factors used by the district court in denying that the belief system qualified as religious); *see also* Donna D. Page, Comment, *Veganism and Sincerely Held "Religious" Beliefs in the Workplace: No Protection Without Definition*, 7 U. PA. J. LAB. & EMP. L. 363, 382 (2005) ("In *United States v. Meyers*, the Tenth Circuit developed an approach for defining religion similar to Judge Adams's three-indicia approach.").

136. *Meyers*, 95 F.3d at 1479.

137. *See id.* at 1481–84 ("Meyers' challenge to his convictions under the Free Exercise Clause must fail. . . . [W]e hold that Meyers' challenge fails for the same reasons as the respondents challenge in *Smith* failed, i.e., the right to free exercise of religion under the Free Exercise Clause of the First Amendment does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law incidentally affects religious practice.").

138. *See* United States v. Meyers, 906 F. Supp. 1494, 1499 (D. Wyo. 1995), *aff'd*, 95 F.3d 1475 (10th Cir. 1996) ("'[R]eligion' under RFRA is the same as 'religion' under the First Amendment . . . .").

139. *See Meyers*, 95 F.3d at 1484 ("We agree with the district court. Under the district court's thorough analysis of the indicia of religion, which we adopt, we hold that Meyers' beliefs more accurately espouse a philosophy and/or way of life rather than a 'religion.'").

140. It may be that religion itself is broader under RFRA than under the Free Exercise Clause, or it may be that the exercise of religion is broader under RFRA than under the Free Exercise Clause. *Cf.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2772 (2014) ("It is simply not possible to read these provisions as restricting the concept of the 'exercise of religion' to those practices specifically addressed in our pre-*Smith* decisions.").

The district court considered several elements in its analysis of whether Meyers's beliefs were religious, including whether they (1) involved "Ultimate Ideas"; (2) were "Metaphysical"; (3) involved a "Moral or Ethical System"; and (4) were sufficiently "Comprehensive."[141] In addition, the court considered various "Accoutrements of Religion," which included whether there existed: (a) a founder, prophet or teacher; (b) important writings; (c) an official gathering place; (d) clergy; (e) ceremonies or rituals; (f) a structure or organization; (g) holidays; (h) fast days or days involving special dieting; (i) rules about clothing or appearance; and (j) an attempt to teach the beliefs to nonbelievers.[142] The Tenth Circuit adopted these criteria.[143]

The *Meyers* district court rejected that Meyers's sincere belief that his views were religious established that they in fact were.[144] That is fair enough as a general matter—the *Thomas* Court discussed the possibility of "an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause."[145] However, the *Thomas* Court implied that its test was not at all demanding, because a claim would have to be quite "bizarre"[146] to fail to trigger the relevant guarantees, whereas the *Meyers* court employed a test that was much less forgiving.

Meyers's claim was not so bizarre as to be beyond the pale, as the court itself made clear when considering other religious groups' practices involving the sacramental use of illicit drugs. Indeed, the *Meyers* court was forced to engage in careful line-drawing to justify its differentiation between Meyers's allegedly nonreligious practices and other drug practices that the

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141. *Meyers*, 95 F.3d at 1483; *see also Meyers*, 906 F. Supp. at 1502 (citing Africa v. Pennsylvania, 662 F.2d 1025, 1035 (3d Cir. 1981)).

142. *Meyers*, 95 F.3d at 1483–84; *see also Meyers*, 906 F. Supp. at 1502–03.

143. *See Meyers*, 95 F.3d at 1484 ("[W]e agree with . . . the district court's thorough analysis of the indicia of religion . . . ."). Professor Beschle writes, "*Meyers* shows that courts have been able to reject some free exercise claims as nonreligious, despite the broad language of the Supreme Court draft cases." Beschle, *supra* note 13, at 376. However, Professor Beschle does not seem to appreciate that the *Meyers* court was not applying the test suggested by the U.S. Supreme Court. *See Meyers*, 95 F.3d at 1491 (Brorby, J., dissenting) ("By applying a broad factor-driven test as advocated by the majority opinion, the subjective perceptions of the court are necessarily invoked in evaluating whether what the individual claims to be religious is indeed religious. It also requires the court to judge the practices of the individual to see if they are indeed 'religious.' This test clearly violates the spirit, if not the intent, of the First Amendment.").

144. *See Meyers*, 95 F.3d at 1484 (majority opinion) ("If he thinks that his beliefs are a religion, then so be it. No one can restrict his beliefs, and no one should begrudge him those beliefs. None of this, however, changes the fact that his beliefs do not constitute a 'religion' as that term is uneasily defined by law." (quoting *Meyers*, 906 F Supp. at 1508)).

145. Thomas v. Review Bd., 450 U.S. 707, 715 (1981).

146. *Id.*

court admitted were religious.[147] In certain "religions, such as Native American religions, ancient Mexican religions, and primitive tribal religions, mind-altering plants are sacred."[148] However, those groups use the drugs "to attain a state of religious, spiritual, or revelatory awareness," whereas Meyers's drug use merely "results in a 'peaceful awareness.'"[149] But the difference between revelatory and peaceful awareness simply is not enough to make the former but not the latter sufficiently bizarre to fall outside the reach of free exercise guarantees.[150]

There were other respects in which the Church of Marijuana seemed to qualify as a religion in light of the district court's criteria. The district court noted that Meyers was the founder of the church, and that there were "allegedly . . . 800 members and one designated meeting spot."[151] The church had "teachers," although no formal clergy members.[152] Apparently, the court believed that a factor counseling against recognizing the group as religious was that the "church does not attempt to propagate its beliefs in any way, and does not assert that everyone should smoke marijuana," although "part of the 'religion' is to work towards the legalization of marijuana."[153] Yet, individuals or groups can have religious beliefs even if they do not attempt to convert nonbelievers.[154]

An additional factor apparently militating against recognition was that in "response to questioning from the Court about the church's teachings, if any, on 'ultimate ideas' such as life, death, and purpose, Meyers essentially stated that his views on these issues are Christian."[155] The court noted that all members of the church were Christians for whom "the marijuana plant is the center of attention."[156] Yet, Meyers had claimed to have a

147. *See Meyers*, 906 F. Supp. at 1506.

148. *Id.*

149. *Id.*

150. A separate question is whether the court was implicitly suggesting that this difference undercut the sincerity of Meyers's claim that his beliefs were in fact religious. *See infra* notes 161–63 and accompanying text.

151. *Meyers*, 906 F. Supp. at 1504 ("Meyers founded the 'Church of Marijuana' in 1973.").

152. *Id.* ("The church does not have a formal clergy, but does have approximately 20 'teachers.'").

153. *Id.*

154. *See* Ruti Teitel, *When Separate Is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools*, 81 NW. U. L. REV. 174, 178 (1986); Matthew L. Sandgren, Comment, *Extending Religious Freedoms Abroad: Difficulties Experienced by Minority Religions*, 9 TULSA J. COMP. & INT'L L. 251, 254 (2001) ("[S]ome religions do not feel it necessary to proselytize . . . .").

155. *Meyers*, 906 F. Supp. at 1504.

156. *Id.* at 1505 ("Meyers said that all church members are Christians . . . .").

stand-alone church rather than that his views were essentially Christian with the addition of a particular belief in the importance of marijuana.[157] The court suggested that the Church of Marijuana could not be recognized as a separate religion, although the beliefs would likely have been credited as religious if Meyers had testified that he was a leader of a Christian sect.[158]

One does not know how the district court would in fact have ruled had Meyers claimed to have been the leader of a Christian sect. Perhaps those beliefs would not have qualified as religious either—Meyers was criticized for mentioning that he was a Christian without tying his beliefs in marijuana to Christian theology to the court's satisfaction.[159] The *Meyers* court seemed to require a more consistent doctrinal underpinning before it would recognize beliefs as religious,[160] although such a requirement flies in the face of the *Thomas* Court's warning that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[161]

The *Meyers* district court may simply have believed that Meyers did not have a sincere religious belief, although the court claimed to have "given Meyers the benefit of the doubt by not scrutinizing the sincerity of his beliefs."[162] Yet, a court giving an individual the benefit of the doubt would likely not have expressly stated that the individual was "astute enough to know that by calling his beliefs 'religious,' the First Amendment or RFRA might immunize him from prosecution," or that his "professed beliefs have an ad hoc quality that neatly justify his desire to smoke marijuana."[163]

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157. *Id.* at 1508 ("Meyers presented the Church of Marijuana as a 'stand alone' religion. . . . He did not claim that any of his beliefs were based on Christianity, or that any of his beliefs were related to Christianity.").

158. *Id.* ("Had Meyers asserted that the Church of Marijuana was a Christian sect, and that his beliefs were related to Christianity, this Court probably would have been compelled to conclude that his beliefs were religious.").

159. *Id.* ("[H]e mentioned that he was a Christian. After asserting that other church members also were Christians and that they believed in God, Meyers never mentioned Christianity again. He did not claim that any of his beliefs were based on Christianity, or that any of his beliefs were related to Christianity.").

160. *Id.* at 1509 ("Meyers did not cite any Christian texts, refer to any Christian doctrines, or discuss any Christian teachings in support of his beliefs. The Court cannot, therefore, conclude that his marijuana smoking is rooted, let alone 'deeply rooted,' in Christian religious belief." (quoting Teterud v. Burns, 522 F.2d 357, 360 (8th Cir. 1975))).

161. Thomas v. Review Bd., 450 U.S. 707, 714 (1981).

162. *Meyers*, 906 F. Supp. at 1509.

163. *Id.* The Circuit Court might also have suspected that Meyers did not sincerely hold the religious beliefs that he claimed to have. *See* United States v. Meyers, 95 F.3d 1475, 1484 (10th Cir. 1996) (expressly noting the district court's observation that Meyers's beliefs had an "ad hoc quality" that justified the desire to smoke marijuana).

If the decision were really based on a finding that Meyers's beliefs were not sincerely held,[164] then it would have been better to have said so. The First Amendment does not bar a court from assessing sincerity,[165] so that would be a permissible basis upon which to deny an exemption.[166] However, the U.S. Supreme Court has not required individuals to offer theological defenses of their positions.[167] Nor does an individual have to belong to a sect to enjoy free exercise protections—Frazee, for example, did not belong to a particular sect[168] and was not a member of an organized church.[169] Further, he did not provide the kind of religious analysis that had been demanded of Meyers.[170]

The *Meyers* court feared that if it were to have "recognize[d] Meyers' beliefs as religious, it might soon find itself on a slippery slope where anyone who was cured of an ailment by a 'medicine' that had pleasant side-effects could claim that they had founded a constitutionally or statutorily protected religion based on the beneficial 'medicine.'"[171] Yet, even that slippery slope rationale was not particularly persuasive, once the court admitted that Meyers "would have been able to purchase 'religious' status for his beliefs by coattailing on Christianity."[172] Thus, the *Meyers* court held that Meyers's beliefs were not religious but also seemed to provide a blueprint for those wishing to constitutionally immunize their "beneficial 'medicine.'"[173]

The U.S. Supreme Court considered a case in which individuals had unusual religious beliefs that inured to their particular benefit. In *Ballard v. United States*, the Court reviewed a fraud conviction of individuals who claimed to have the power to

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164. *See, e.g.*, David Garrett, Note, *Vine of the Dead: Reviving Equal Protection Rites for Religious Drug Use*, 31 AM. INDIAN L. REV. 143, 160–61 (2007) (suggesting that Meyers did not have a sincere religious belief concerning marijuana use).

165. *See* United States v. Ballard, 322 U.S. 78, 86–87 (1944).

166. *See* Luckette v. Lewis, 883 F. Supp. 471, 478 (D. Ariz. 1995) ("Courts must be able to sort out the insincere and illegitimate prisoner Free Exercise claims from the legitimate ones . . . ."); *see also* Soc'y of Separationists, Inc. v. Herman, 939 F.2d 1207, 1219 (5th Cir. 1991), *aff'd on reh'g*, 959 F.2d 1283 (5th Cir. 1992) ("Beliefs may be rejected only if they are patently insincere, bizarre, or not related to the free exercise of religion.").

167. *See* Thomas v. Review Bd., 450 U.S. 707, 714 (1981).

168. Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 834 (1989) ("Frazee asserted that he was a Christian, but did not claim to be a member of a particular Christian sect.").

169. *Id.* at 831 ("Frazee was not a member of an established religious sect or church . . . .").

170. *Id.* ("[N]or did he claim that his refusal to work resulted from a 'tenet, belief or teaching of an established religious body.'" (quoting Frazee v. Dep't of Emp't Sec., 512 N.E.2d 789, 791 (Ill. App. Ct. 1987))).

171. United States v. Meyers, 906 F. Supp. 1494, 1508 (D. Wyo. 1995).

172. *Id.*

173. *Id.*

cure the incurable.[174] They believed that they had "by reason of supernatural attainments, the power to heal persons of ailments and diseases and to make well persons afflicted with any diseases, injuries, or ailments."[175] Such a belief might have been thought to "have an ad hoc quality"[176] that allowed them to seek donations from those afflicted with "diseases which are ordinarily classified by the medical profession as being incurable."[177] Ad hoc nature notwithstanding, the *Ballard* Court accepted that these beliefs were religious, noting that "[r]eligious experiences which are as real as life to some may be incomprehensible to others."[178] The only question that could be put to the test by the trier of fact was whether the asserted beliefs were sincerely held.[179]

In his *Meyers* dissent, Judge Brorby rejected that "it is the proper role of the court to establish a factor-driven test to be used to define what a religion is."[180] He noted that the *Yoder* Court "held that religious beliefs are distinct from philosophical and personal choices but failed to provide a test or a definition against which lower courts could hold the religious claims of petitioners to determine whether the claims warrant constitutional protection."[181] Judge Brorby cited the *Thomas* Court's admonition that "religious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit First Amendment protection,"[182] and, further, the Court's express declaration that "it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment."[183] Indeed, the U.S. Supreme Court seemed to disavow the very approach used by the Tenth Circuit when the Court rejected the inapplicability of First Amendment protections to a group merely because its "religious service [wa]s less ritualistic, more unorthodox, less formal than some."[184] Judge Brorby feared that the *Meyers* majority had "essentially gutted the

174. United States v. Ballard, 322 U.S. 78, 80 (1944).

175. *Id.*

176. *Meyers*, 906 F. Supp. at 1509.

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

178. *Id.* at 86.

179. *Id.* at 81, 88 ("The court . . . confined the issues on this phase of the case to the question of the good faith of respondents. . . . [T]he District Court ruled properly when it withheld from the jury all questions concerning the truth or falsity of the religious beliefs or doctrines of respondents.").

180. United States v. Meyers, 95 F.3d 1475, 1489 (Brorby, J., dissenting).

181. *Id.*

182. *Id.* at 1491 (quoting Thomas v. Review Bd., 450 U.S. 707, 714 (1981)).

183. *Id.* (quoting Fowler v. Rhode Island, 345 U.S. 67, 70 (1953)).

184. *Fowler*, 345 U.S. at 69.

Free Exercise Clause of its meaning"[185] and had "ignor[ed] the Supreme Court's cautionary words that a person's views can be 'incomprehensible' to the court and still be religious in his or her 'own scheme of things.'"[186]

The *Meyers* court's approach is worrisome for an additional reason if Meyers might indeed have been successful if only his claims had been framed differently.[187] That worry was addressed in *Gillette v. United States* in which the U.S. Supreme Court was deciding whether individuals with religious objections to the Vietnam War in particular should be accorded conscientious objector status: "There is a danger that as between two would-be objectors, both having the same complaint against a war, that objector would succeed who is more articulate, better educated, or better counseled."[188] The *Meyers* approach is at the very least open to that kind of manipulation.[189]

Consider two individuals or groups seeking exemptions for their (relevantly similar) sincere religious beliefs and practices. One but not the other might succeed because of an ability to offer a more coherent theology or, perhaps, because he is sufficiently prudent to claim to be a sect rather than an independent church. But free exercise guarantees should not only protect those whose arguments are particularly well-crafted.[190]

B. A More Subjective Approach

Some circuits have eschewed the factor approach and instead have offered analyses that more closely capture the prevailing Supreme Court jurisprudence. Nonetheless, these approaches also need to be honed.

1. The Second Circuit. In *Patrick v. LeFevre*, the Second Circuit noted that "the judiciary is singularly ill-equipped to sit in judgment on the verity of an adherent's religious beliefs."[191] However, rather than follow the Third Circuit's lead and perform the very task that the court has admitted it is ill-equipped to

185. *Meyers*, 95 F.3d at 1490 (Brorby, J., dissenting).

186. *Id.* (quoting United States v. Seeger, 380 U.S. 163, 185 (1965)).

187. *See supra* note 158 and accompanying text.

188. Gillette v. United States, 401 U.S. 437, 457 (1971).

189. Sincerity evaluations are also subject to abuse. *See infra* note 210 and accompanying text.

190. *But see* Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222, 259 (2003) ("Religion Clause litigants obviously would be wise to frame their claims, whenever possible, as establishment rather than free exercise issues.").

191. Patrick v. LeFevre, 745 F.2d 153, 157 (2d Cir. 1984).

perform,[192] the *Patrick* court instead suggested that the judiciary's focus should be elsewhere, because its "competence properly extends to determining 'whether the beliefs professed by a [claimant] are sincerely held and whether they are, in his own scheme of things, religious.'"[193] The court explained that "[s]incerity analysis seeks to determine an adherent's good faith in the expression of his religious belief."[194] This test can help "differentiat[e] between those beliefs that are held as a matter of conscience and those that are animated by motives of deception and fraud."[195] Thus, the court is permitted to assess whether an individual sincerely holds the beliefs that she claims to hold.

A separate issue is whether the individual's sincerely held beliefs are religious, and the court can "examine[] an individual's inward attitudes towards a particular belief system."[196] The Second Circuit explained that "[i]mpulses prompted by dictates of conscience as well as those engendered by divine commands are therefore safeguarded against secular intervention, so long as the claimant conceives of the beliefs as religious in nature."[197] However, the factfinder must be careful not to permit judgment about either sincerity or religiosity to be based on "the factfinder's perception of what a religion should resemble."[198]

While the Second Circuit avoided some of the pitfalls associated with evaluating the contents of beliefs, the court's requirement that "the claimant conceives of the beliefs as religious in nature"[199] requires further explication. An individual may not categorize her own beliefs as religious if she is using a narrow, conventional definition of religion even though her beliefs operate in a way that satisfies the Free Exercise Clause's broader definition of religion. The *Welsh* Court explained, "The Court's statement in *Seeger* that a registrant's characterization of his own belief as 'religious' should carry great weight, does not imply that

192. *See supra* notes 120–21 and accompanying text (noting the Third Circuit's admission that courts are ill-suited to determine which beliefs are religious).

193. *Patrick*, 745 F.2d at 157 (alteration in original) (quoting United States v. Seeger, 380 U.S. 163, 185 (1965)); *see also* United States v. Ward, 989 F.2d 1015, 1018 (9th Cir. 1992) ("In determining whether Ward's own peculiar notions are protected as religious beliefs, '[the] task is to decide whether the beliefs professed . . . are sincerely held and whether they are, in [Ward's] own scheme of things, religious.'" (alteration in original) (quoting *Seeger*, 380 U.S. at 185)).

194. *Patrick*, 745 F.2d at 157 (citing Int'l Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1981)).

195. *Id.*

196. *Id.* (citing Thomas v. Review Bd., 450 U.S. 707, 713–15 (1981)).

197. *Id.* at 158.

198. *Id.* at 157.

199. *Id.* at 158.

his declaration that his views are nonreligious should be treated similarly."[200] When an individual describes his own beliefs as religious, "that information is highly relevant to the question of the function his beliefs have in his life."[201] However, because an individual may not be "fully aware of the broad scope of the word 'religious,'" a "statement that his beliefs are nonreligious is a highly unreliable guide."[202] Further exploration is required before a conclusion can be reached with respect to whether the beliefs at issue are religious for free exercise purposes, so a court should not reject a claim merely because an individual testified at trial that his beliefs were not religious (in the conventional sense of that term).

2. The Seventh Circuit. The Seventh Circuit explained in *Kaufman v. McCaughtry* that the U.S. Supreme Court "has adopted a broad definition of 'religion' that includes non-theistic and atheistic beliefs, as well as theistic ones." [203] Kaufman had argued that "his atheist beliefs play[ed] a central role in his life, and the defendants d[id] not dispute that his beliefs [we]re deeply and sincerely held."[204] The Seventh Circuit reasoned that because atheism is "a school of thought that takes a position on religion, the existence and importance of a supreme being, and a code of ethics," it qualified as a religion for First Amendment purposes.[205]

The Seventh Circuit is clearly correct that religions need not incorporate a belief in God.[206] Yet, a "position on religion" need not itself be religious.[207] Further, one need not take a position on God's existence in order for one's beliefs to qualify as religious. For example, Seeger, whose beliefs were characterized as religious, expressly stated that he "preferred to leave the question as to his belief in a Supreme Being open."[208]

The approaches taken in the circuits differ dramatically. Some seek to assess content while others limit their inquiries to

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200. Welsh v. United States, 398 U.S. 333, 341 (1970) (citation omitted) (citing United States v. Seeger, 380 U.S. 163, 184 (1965)).

201. *Id.*

202. *Id.*

203. Kaufman v. McCaughtry, 419 F.3d 678, 682 (7th Cir. 2005).

204. *Id.*

205. *Id.* ("[W]e are satisfied that it qualifies as Kaufman's religion for purposes of the First Amendment claims he is attempting to raise.").

206. *See* Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961).

207. *Cf.* Leslie Griffin, *"We Do Not Preach. We Teach." Religion Professors and the First Amendment*, 19 QLR 1, 9 (2000) ("[R]eligious studies is teaching about religion; theology is teaching of religion.").

208. United States v. Seeger, 380 U.S. 163, 166, 187 (1965) ("Seeger professed 'religious belief' and 'religious faith.'").

assessments of sincerity and whether the beliefs at issue play an appropriate role. The sincerity/role approach is a much closer approximation of what the U.S. Supreme Court has said than is an approach in which (nonbizarre)[209] content is examined to see whether it is of sufficient religiosity to qualify.

Yet, it should not be thought that the sincerity/role approach is free from difficulty. Sincerity is notoriously difficult to assess.[210] Further, the degree to which the beliefs must play a role in a person's life has not been defined. Individuals may be more or less devout.[211] But those who are less devout still have religious (rather than nonreligious) beliefs,[212] which means that the degree to which beliefs must play an "important" role in an individual's life in order to be classified as religious is itself controversial.

IV. CONCLUSION

Although the Religion Clauses only protect religious beliefs and practices, the U.S. Supreme Court has never defined religion. Instead, it has only offered comments about what religion is not, without affording helpful examples to guide the lower courts. Nonetheless, a consistent position can be constructed from the various cases decided—religious beliefs must be sincerely held and of some importance to the belief holder. An individual does not have to be a member of an organized religious group in order to have beliefs that count as religious; nor does she have to offer a coherent theology in order to trigger free exercise protections.

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209. While the *Thomas* Court noted that bizarre beliefs are beyond the reach of free exercise protections, *see* Thomas v. Review Bd., 450 U.S. 707, 715–16 (1981), the Court nowhere specified a criterion for determining which beliefs are so bizarre as to fall outside of free exercise protection. For example, the beliefs at issue in *Ballard*, namely, that the Ballards had the power to cure any and all diseases, *see supra* note 175 and accompanying text, were not so bizarre as to be unprotected.

210. *See* United States v. Nugent, 346 U.S. 1, 10 (1953) ("It is always difficult to devise procedures which will be adequate to do justice in cases where the sincerity of another's religious convictions is the ultimate factual issue."); Kevin L. Brady, Comment, *Religious Sincerity and Imperfection: Can Lapsing Prisoners Recover Under RFRA and RLUIPA?*, 78 U. CHI. L. REV. 1431, 1451 (2011) ("[R]eligious sincerity is difficult to prove.").

211. *Cf.* 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, 579 (2004) (comparing the voting patterns of those who are more devout with those who are less devout).

212. *Cf.* Edward P. Abbott, Comment, *Atheism and the Religious Liberty Protection Act: A Place for Everyone or Everyone in Their Place*, 2 RUTGERS J.L. & RELIGION, no. 4, 2000, http://lawandreligion.com/sites/lawandreligion.com/files/Abbott.pdf (discussing beliefs that remain religious regardless of how deeply held they are); Eric C. Freed, Note, *Secular Humanism, the Establishment Clause, and Public Education*, 61 N.Y.U. L. REV. 1149, 1166 (1986) ("A belief should not be able to escape establishment clause strictures merely because its adherents place other concerns above their religion, or even because the adherents have doubts about the truth of their belief.").

While courts can examine the contents of beliefs to assure that they are not so bizarre as to fall beyond the pale, courts must be careful not to permit their own religious views to color their views about whether others' views count as religious.

Some of the circuits have limited their analyses of which beliefs are religious to determinations of sincerity and determinations of whether the beliefs are mere preferences or instead play a more important role in the individual's life. However, some circuits have adopted criteria that are much too restrictive and much too amenable to misapplication.

At its first opportunity, the Court should make clear the kinds of judgments that courts are permitted to make when deciding whether particular beliefs count as religious. The current disparity across the circuits means that beliefs construed as religious in one circuit may well be treated as secular and not triggering free exercise guarantees in another. Further, the kinds of judgments that certain circuits are making are exactly the kinds of judgments that the Court has repeatedly stated should not be made by courts. Minority religious views deserve better treatment and more protection, and the Court must act to assure that the promise of the Religion Clauses extends to minority religious views, too.