NOTE

RELIGIOUS OR NOT RELIGIOUS? THAT IS NOT THE ESTABLISHMENT CLAUSE QUESTION

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INTRODUCTION

In August of 2015, Lindsay Miller entered the Massachusetts Registry of Motor Vehicles (RMV) wearing her traditional religious headwear: a spaghetti strainer.[1] Laughter followed from the RMV staff as Miller asked to renew her driver's license, but she was not joking.[2] Miller, who identifies as a Pastafarian, instead maintained that her carbohydrate-sifting headwear was a necessary symbol of her religious devotion to the Church of the Flying Spaghetti Monster.[3]

Unsurprisingly, Miller left the RMV empty handed, having been denied of the ability to wear the cookware in her license photo.[4] However, after a brief legal battle headed by an attorney from the American Humanist Association, the RMV relented.[5] And on November 12, 2015, Miller finally posed for her photograph wearing the metal strainer of her choosing.[6]

But why did the RMV give in so quickly to what many would consider a "ridiculous" request?[7] Indeed, even in the eyes of Miller's attorney, Pastafarianism is a "secular religion that uses parody to make certain points about a belief system."[8] Is a "parody" religion truly entitled to protection under the First Amendment, as Miller and her attorney argued?[9] While courts have rarely had the chance to consider whether Pastafarianism is truly a "religion,"[10] the RMV's response to why it ultimately granted Miller's request would probably

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1 *See* Steve Annear, *Woman Allowed to Wear Spaghetti Strainer in Mass. License Photo*, BOS. GLOBE (Nov. 13, 2015), https://www.bostonglobe.com/metro/2015/11/13/woman-allowed-wear-spaghetti-strainer-her-head-mass-license-photo/m8ADuh2oS2zk2jrc85o3FM/story.html [https://perma.cc/86NZ-2MFH].

2 *Id.*

3 *Id.*

4 *Id.*

5 Maggie Ardiente & David Niose, *Massachusetts Pastafarian Wins Right to Wear a Colander in Drivers License Photo, Thanks to Humanist Group*, AM. HUMANIST ASS'N (Nov. 13, 2015), https://americanhumanist.org/press-releases/2015-11-massachusetts-pastafarian-wins-right-to-wear-a-colan/ [https://perma.cc/FU3T-TRTR].

6 *Id.*

7 *See* Annear, *supra* note 1.

8 *Id.*

9 Ardiente & Niose, *supra* note 5.

10 *But see* Cavanaugh v. Bartelt, 178 F. Supp. 3d 819, 830 (D. Neb. 2016) (finding that the Church of the Flying Spaghetti Monster is not entitled to First Amendment protections because it is a parody religion).

sound familiar to most judges: "We do not get into the sincerity or the veracity of religious beliefs."[11]

This response echoes the rule set out in *United States v. Ballard*, which states that individuals "may not be put to the proof of their religious doctrines or beliefs" when raising a Free Exercise Clause challenge.[12] Thus, when courts evaluate a free exercise challenge, they may not inquire into the truth or plausibility of an individual's claimed beliefs.[13] Instead, they may only assess whether a claimant's alleged religious beliefs are sincerely held.[14] The *Ballard* rule has since been absorbed into the Supreme Court's broader "hands-off doctrine": a judicially created policy of restraint, reluctance, and sometimes even complete avoidance, in evaluating matters of religious practice and belief.[15] This doctrine's influence is particularly salient in the Free Exercise context, in which courts routinely refuse to question an individuals' claimed religious beliefs.[16]

While courts have scrupulously honored the mandates of the hands-off doctrine in the Free Exercise context, in the Establishment Clause context courts have not been so hesitant. Courts hearing Establishment Clause challenges routinely evaluate the veracity of claimants' beliefs regarding religion and the government's use of religious symbology. From holiday displays,[17] to invocations of God in mottos and on currency,[18] to

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11 Annear, *supra* note 1.

12 322 U.S. 78, 86 (1944).

13 *Id.* at 88; *see also* Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1196–97 (2017) ("In *United States v. Ballard*, the Court held that the Constitution forbids passing judgment on the accuracy of a religious accommodation claimant's beliefs, but not on the claimant's sincerity.").

14 *See Ballard*, 322 U.S. at 86–87.

15 *See* Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837, 837 (2009) (noting the argument that the Supreme Court had begun implementing such a policy); Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 COLUM. L. REV. 1843, 1844 (1998).

16 *See, e.g.*, Love v. Reed, 216 F.3d. 682, 686–87 (8th Cir. 2000) (finding that a prison's refusal to provide an inmate with peanut butter and bread on his Sunday sabbath was a violation of the prisoner's First Amendment rights, despite the fact that the prisoner's interpretations of the Old Testament conflicted with those of traditional religions); Howard v. United States, 864 F. Supp. 1019, 1022 (D. Colo. 1994) (holding that a prisoner was entitled to access to "candles, candle holders, incense, a gong, a black robe, a chalice, and a short wooden staff" under the First Amendment so that he could perform Satanic rituals pursuant to his religious beliefs).

17 *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 617 (1989) (declaring that a Christmas tree is "the preeminent secular symbol of the Christmas holiday season").

18 *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 818 (1983) (Brennan, J., dissenting) (suggesting that sayings such as "God save the United States and this

longstanding monuments featuring traditionally religious imagery,[19] both the Supreme Court and lower courts have exercised little restraint in dismissing Establishment Clause claims on the grounds that a particular government action is "secular" despite litigants' sincere beliefs to the contrary.[20]

For example, in *County of Allegheny v. American Civil Liberties Union*, the Court proclaimed that "both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society."[21] It further declared that the Christmas tree is "the preeminent secular symbol of the Christmas holiday season."[22] Similarly, in so-called "ceremonial deism" cases, the Court has upheld invocations of God in daily life—such as "In God We Trust" on national currency, "One Nation Under God" in the Pledge of Allegiance, and "God Save the United States" at the beginning of judicial proceedings—on the grounds that their religious content is "de minimis" and has lost any true religious significance.[23] Such proclamations essentially declare that an Establishment Clause claimant's beliefs—as well as numerous religious adherents' beliefs—are wrong as a matter of law by rejecting the notion that certain symbols or invocations of religion are in any sense "religious"; instead declaring them to be secular under all circumstances. This practice is not only inconsistent with the hands-off doctrine, but also hostile to believers and nonbelievers alike. By both discrediting the legitimate beliefs of Establishment Clause claimants and prescribing a secular meaning to objects and actions that have deep religious significance to many religious groups, courts denigrate the very religions that they are meant to protect.[24]

Honorable Court," "In God We Trust," "One Nation Under God," do not violate the Establishment Clause "because they have lost any true religious significance").

19 *See, e.g.*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2082 (2019) (recognizing that religious imagery, such as a cross, can serve a secular purpose—honoring fallen servicemembers).

20 *See infra* Part I.B.

21 492 U.S. at 616.

22 *Id.* at 617.

23 *See Marsh*, 463 U.S. at 818 (Brennan, J., dissenting); *see also* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 35 (2004) (O'Connor, J., concurring) ("I believe that although these references [to God in the Pledge of Allegiance] speak in the language of religious belief, they are more properly understood as employing the idiom for essentially secular purposes."); Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545, 1549 (2010) ("Ceremonial deism is a government invocation of God that the courts have found constitutional on the grounds that the practice is longstanding and its religious impact is minimal and nonsectarian.").

24 *See* Carolyn A. Deverich, *Establishment Clause Jurisprudence and the Free Exercise Dilemma: A Structural Unitary-Accommodationist Argument for the Consti-*

While the Supreme Court struggles to find solid footing for its Establishment Clause jurisprudence, it is rare that attention is given to this particular inconsistency. Instead, courts in the Establishment Clause context have done exactly what they condemn in the free-exercise context: evaluate the veracity of a claimant's sincere beliefs. This Note attempts to reconcile this conflict between the hands-off approach to the Free Exercise Clause and the hands-on approach to the Establishment Clause. Part I of this Note summarizes current Free Exercise and Establishment Clause jurisprudence, and, in doing so, highlights this point of conflict between the Clauses. Part II proposes a rule to reconcile these clauses by eliminating judicial consideration of the veracity of a claimant's beliefs in all First Amendment cases. Part III assesses the practical implications of this rule and how it stands up to scholarly criticisms of existing Supreme Court jurisprudence.

I
HANDS OFF FOR FREE EXERCISE; HANDS ON FOR NONESTABLISHMENT

Both of the First Amendment's Religion Clauses have been fraught with extensive litigation over the past half-century. The Free Exercise Clause faced years of tumultuous litigation after the Supreme Court's decision in *Employment Division v. Smith*[25] and the subsequent passage of the Religious Freedom Restoration Act (RFRA).[26] Even so, recent free-exercise jurisprudence has been more predictable than that of the Establishment Clause,[27] which is—and has been for nearly the past half-century—fractured, contradictory, and unpredictable.[28]

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tutionality of God in the Public Square, 2006 BYU L. REV. 211, 241 (2006) (noting that the Court's ceremonial-deist jurisprudential approach "forces the Court into the awkward position of arguing the secularity of activities that seem indisputably religious" (quoting FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE 63 (1995)).

25 494 U.S. 872 (1990).

26 42 U.S.C.A. §§ 2000bb to -4 (West).

27 At least when it is compared to the Establishment Clause, that is. *See First Amendment—Establishment Clause—Government Display of Religious Symbols—*American Legion v. American Humanist Ass'n, 133 HARV. L. REV. 262, 269 (2019) ("[C]ompared to the notoriously scattered Establishment Clause jurisprudence, the Court's free exercise doctrine has been relatively stable." (footnote omitted)) [hereinafter *Government Display of Religious Symbols*].

28 *See* Frederick Mark Gedicks, Lynch *and the Lunacy of Secularized Religion*, 12 NEV. L.J. 640, 640 (2012) (describing the opinion in *Lynch v. Donnelly*, 465 U.S. 668 (1984) as the "worst opinion ever" because it fails to provide useful Establishment Clause precedent to be applied by courts in future cases); Norman Dorsen & Charles Sims, *The Nativity Scene Case: An Error of Judgment*, 1985 U.

In an effort to ultimately resolve this issue by reconciling the two Clauses, this Part notes the points of dissonance between the Clauses in regard to evaluating the veracity of claimants' beliefs.

A. Hands Off: The Free Exercise Clause

The relevant section of the First Amendment comprising the Free Exercise Clause provides, "Congress shall make no law . . . prohibiting the free exercise [of religion]."[29] Interpreting this language in *Sherbert v. Verner*, the Supreme Court held that the government may not impose any incidental burden on an individual's free exercise of religion unless it demonstrates a "compelling state interest," thereby imposing strict scrutiny.[30] The *Sherbert* test has since become understood to require strict scrutiny in any instance in which the government substantially burdens an individual's free exercise of a sincerely held religious belief.[31]

Implicit in this threshold test are three requirements: religiosity, sincerity, and substantial burden.[32]

Religiosity is somewhat illusory because, pursuant to a rule from *United States v. Ballard*, courts may not evaluate the veracity or plausibility of a claimant's religious beliefs when faced with a free-exercise challenge.[33] The *Ballard* Court explained, "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs."[34] The Court further distanced itself from evaluations of religiosity

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ILL. L. REV. 837, 838 (1985) (observing, in 1985, that "no consensus exists within the Supreme Court or among commentators on the correct approach to establishment clause doctrine"); Carole F. Kagan, *Squeezing the Juice from* Lemon*: Toward a Consistent Test for the Establishment Clause*, 22 N. KY. L. REV. 621, 630 (1995) (noting that "the lack of consistent guidance from the Supreme Court leaves a void which should be filled").

29 U.S. CONST. amend. I.

30 374 U.S. 398, 403 (1963) (quoting NAACP v. Button, 371 U.S. 415, 438).

31 *See* Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 883 (1990); Ellen M. Halstead, *After* Zelman v. Simmons-Harris*, School Voucher Programs Can Exclude Religious Schools*, 54 SYRACUSE L. REV. 147, 181 (2004).

32 *See* Andy G. Olree, *The Continuing Threshold Test for Free Exercise Claims*, 17 WM. & MARY BILL RTS. J. 103, 115 (2008) ("The [*Sherbert*] Court first decided whether [Ms. Sherbert] had demonstrated a burden on her free exercise rights. This is the threshold test. It required a showing that Ms. Sherbert's conduct was motivated by religious beliefs, that those beliefs were sincerely held, and that the state had imposed a burden on the conduct").

33 322 U.S. 78, 86 (1944).

34 *Id.* The rationale behind this hands-off approach to adjudicating Free Exercise claims is that the beliefs of even widespread religions, such as Christianity, would be near impossible to prove the validity of. *Id.* at 87. As the *Ballard* Court wrote, "Many take their gospel from the New Testament. But it would hardly be

in *Thomas v. Review Board*, in which it proclaimed: "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[35]

These principles from *Ballard* and *Thomas* have been absorbed into a larger judicial mandate known as the "hands-off . . . doctrine."[36] This doctrine encompasses a general judicial commitment to avoid "entanglement in questions of religious doctrine, polity, and practice."[37] And while the principles of the hands-off doctrine have become a central component of the Supreme Court's Free Exercise jurisprudence,[38] the doctrine, in theory, is not exclusive to the Free Exercise Clause. In fact, the doctrine traces its origins not to a Free Exercise case, but a state-law-based property case in which the Court never even mentioned the First Amendment.[39] Since then, the Court has consistently avowed "that courts should refrain from trolling through a person's or institution's religious beliefs,"[40] giving particular salience to this commitment in the free-exercise sphere.[41]

The hands-off doctrine does not render the religiosity element of *Sherbert* entirely illusory, however. While courts may not evaluate the veracity, plausibility, or consistency of a claimant's religious beliefs,[42] and instead should defer to the claimant's assertions of what their religious beliefs are,[43] courts may evaluate whether a particular claim implicates *religion* at all. This distinction is necessary because the First Amendment only protects religious beliefs, not other ideological, philosophical, or political beliefs.[44] There must therefore

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supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations." *Id.*

35 450 U.S. 707, 714 (1981) (refusing to evaluate whether petitioner's religious practices were legitimate, despite being inconsistent with the practices of other members of petitioner's religious group); *see also* United States v. Seeger, 380 U.S. 163, 184 (1965) ("Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's 'Supreme Being' or the truth of his concepts. But these are inquiries foreclosed to Government.").

36 *See* Garnett, *supra* note15, at 837.

37 Jones v. Wolf, 443 U.S. 595, 603 (1979).

38 *See supra* Part I.A.

39 *See* Watson v. Jones, 80 U.S. 679, 733–34 (1872) (discussing the impropriety of a Court entangling itself in questions of religious doctrine).

40 Mitchell v. Helms, 530 U.S. 793, 828 (2000).

41 *See supra* sources cited note16.

42 *See supra* sources cited notes33–35and accompanying text.

43 *See* supra sources cited note 35

44 *See* Africa v. Commonwealth of Pa., 662 F.2d 1025, 1034 (3d Cir. 1981) ("An individual or group may adhere to and profess certain political, economic, or social doctrines, perhaps quite passionately. The first amendment, though, has

be some guiding principle to aid a court in determining whether a given set of beliefs falls within the First Amendment's protections.[45] For example, is atheism entitled to First Amendment protections?[46] What about communism, pacifism, or even Pastafarianism?

While developing a definition of religion goes beyond the scope of this Note, it is impossible to continue without first reconciling a court's practical need to define religion with the mandate that it not entangle itself in the resolution of religious questions. Thankfully, this is not as difficult a puzzle as it may seem: there is a difference between determining what constitutes a religion and determining what beliefs, actions, and symbols are true, plausible, or valid under that religion. The former is an objective question about whether the system underlying a claimant's beliefs is a protected religion under whatever definitional test a court may choose to adopt.[47] Conversely, the latter is a subjective question, requiring a court to entangle itself in deep and frequently unanswerable questions about the beliefs various faiths.[48]

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not been construed, at least as yet, to shelter strongly held ideologies of such a nature, however all-encompassing their scope."); Wisconsin v. Yoder, 406, U.S. 205, 215 (1972) ("A way of lift, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief."); *see also* Christopher B. Gilbert, *Harry Potter and the Curse of the First Amendment: Schools, Esoteric Religions, and the Christian Backlash*, 198 EDUC. L. REP. 399, 404–05 (2005) (discussing one court's struggles to determine whether a given belief system qualifies as a "religion"); Jeffrey Omar Usman, *Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology*, 83 N.D. L. REV. 123, 148 (2007) (discussing the need to have a definition of "religion" for First Amendment purposes).

45 *See* Dmitry N. Feofanov, *Defining Religion: An Immodest Proposal*, 23 HOFSTRA L. REV. 309, 311–19 (1994) (identifying several reasons why a legal definition of "religion" is necessary); *see also* Jeffrey L. Oldham, *Constitutional "Religion" A Survey of First Amendment Definitions of Religion*, 6 TEX. F. ON C.L. & C.R. 117, 123 (2001) ("The lack of a definition [of religion] seems to make policing the First Amendment all but impossible in marginal cases.").

46 According to the Seventh Circuit, it is. *See* Kaufman v. McCaughtry, 419 F.3d 678, 682 (7th Cir. 2005).

47 For example, the Seventh Circuit has adopted a test based on the Supreme Court's decision in *United States v. Seeger*, 380 U.S. 163, 184–88 (1975), that beliefs are religious when they deal "with issues of 'ultimate concern'" and "occupy a 'place parallel to that filled by God in traditionally religious persons,'" *Kaufman*, 419 at 681–82 (quoting Fleischfresser v. Dirs. of Sch. Dist. 200, 15 F.3d 680, 688 n. 5 (7th Cir. 1994)).

48 *See, e.g.*, United States v. Ballard, 322 U.S. 78, 87 (1944) ("Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the

Thomas is illustrative on this point: the claimant, a Jehovah's witness, alleged that his religious beliefs prevented him from manufacturing weapons.[49] However, the claimant's friend, another Jehovah's Witness, did not so believe.[50] Applying *Sherbert*'s principle that "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause,"[51] the Court found that the claimant's beliefs were protected because they stemmed from his Jehovah's Witness faith.[52] Thus, the Court first implicitly determined that the Jehovah's Witness faith was a bona fide religion entitled to First Amendment protections. However, once it had done so, it refused to assess the plausibility of the claimant's individual beliefs under that faith, even though they were inconsistent with those of other members of the faith.[53] The Court therefore drew a line: a court may assess whether beliefs are rooted in a genuine religion, but whether those beliefs are plausible or consistent with that claimed religion is not for a court to assess.

As another example, consider again the Pastafarians. In *Cavanaugh v. Bartelt*—the only published federal court case evaluating a Pastafarian's claims to religious protection—the District of Nebraska held that Pastafarianism was not a religion protected under the First Amendment.[54] However, in reaching this conclusion, the court took great pains to avoid "questioning the validity of [the claimant's] beliefs."[55] Instead, its disposition of the case was based solely on the fact that Pastafarianism, regardless of how sincerely a follower may believe its tenets, is not a religion for the purposes of the First Amendment.[56] Thus, a court may inquire into whether an underlying belief system—for instance, Pastafarianism—is a religion, but it may not inquire into whether a claimant's beliefs—

Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom").

49 Thomas v. Rev. Bd., 450 U.S. 707, 710–11 (1981).

50 *Id.* at 711.

51 *Id.* at 713–14 (citing Sherbert v. Verner, 374 U.S. 398 (1963)).

52 *Id.* at 717–18.

53 *Id.* at 714 ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

54 178 F. Supp. 3d 819, 830 (D. Neb. 2016) (concluding that Pastafarianism is not a "religion" protected by the First Amendment, because it is "plainly a work of satire, meant to entertain while making a pointed political statement").

55 *Id.*

56 *Id.*

like the requirement to wear spaghetti strainers and pirate clothing[57]—are legitimate under that belief system.

Once a court determines that a claimed belief implicates a protected religion,[58] rather than a secular ideology or set of personal preferences, it may go no further in questioning the veracity, plausibility, or consistency of that belief. However, this does not mean that a claimant has free reign to "veto" government actions simply because they conflict with an allegedly religious belief; the other two *Sherbert* factors serve as a backstop.

When faced with an alleged Free Exercise violation implicating a protected religion, a court may evaluate the second *Sherbert* factor: sincerity. This factor allows a court to question whether the claimant's alleged religious beliefs are "sincere[ ]" or "truly held."[59] Unlike religiosity, this is a fact-specific subjective test focusing on whether the claimant actually believes what they are claiming, regardless of whether it is true.[60] Such an inquiry was exactly the issue in *Ballard*, where the defendants were charged with mail fraud after soliciting large amounts of money by alleging that they had the power to cure

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57 *See* Peter Timms, *Pasta Strainers and Pirates: How the Church of the Flying Spaghetti Monster Was Born*, GUARDIAN (May 17, 2019), https://www.theguardian.com/world/2019/may/18/pasta-strainers-and-pirates-how-the-church-of-the-flying-spaghetti-monster-was-born [https://perma.cc/4MNV-4AFM].

58 Or, instead, a court may simply assume without deciding that a claimed set of beliefs are religious. Courts frequently employ this practice to maintain consistency with the hands-off doctrine and avoid entangling themselves with religious questions. *See, e.g.*, Kunselman v. W. Rsrv. Loc. Sch. Dist., Bd. of Educ., 70 F.3d 931, 931 (6th Cir. 1995) (assuming without deciding that Satanism is a religion protected under the First Amendment and proceeding to the merits of the claim); McCorkle v. Johnson, 881 F.2d 993, 995 (11th Cir. 1989) (finding that the issue of whether Satanism is a religion need not be decided because, even if it were, the challenged policy still would not violate the First Amendment).

59 United States v. Seeger, 380 U.S. 163, 185 (1965). While *Seeger* held that the question of sincerity "must be resolved in every case," *id.*, many Supreme Court justices and scholars have cast doubt on whether the requirement is, in fact, necessary to inquire into in every case, *see* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 771 (2014) (Ginsburg, J., dissenting) ("There is an overriding interest, I believe, in keeping the courts 'out of the business of evaluating the relative merits of differing religious claims . . . .'" (quoting United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring))); Adeel Mohammadi, *Sincerity, Religious Questions, and the Accommodation Claims of Muslim Prisoners*, 129 YALE L.J. 1836, 1859–60 (2020) (noting that the *Ballard* decision is frequently credited "as the progenitor of the contemporary sincerity doctrine," but "*Ballard* simply found that it is within a court's *competency* to evaluate the sincerity (though not verity) of someone's religious beliefs" and says nothing about whether such an analysis is actually required).

60 *See Seeger*, 380 U.S. at 185; Chapman, *supra* note 13.

illness.[61] The court instructed the jury in the trial below that it could only evaluate whether the defendants knew their claims were false and not whether the claims were actually false.[62] The jury convicted the defendants on the basis that their religious beliefs were insincere.[63] Though the Supreme Court remanded the case for further proceedings, it confirmed that sincerity is an appropriate method to evaluate religious claims.[64] The Court thereby demonstrated that even protected religious claims are only protected to the extent that they are sincere.[65]

Finally, once a claimant has established that they sincerely hold a religious belief, they must satisfy the third *Sherbert* factor: substantial burden. A claimant can satisfy the substantial burden factor by demonstrating that the state action substantially burdens their sincerely held religious belief.[66] A substantial burden generally occurs when a state action places "substantial pressure on an adherent to modify his behavior and to violate his beliefs."[67]

Under the *Sherbert* test, once the claimant has successfully alleged a substantial burden to their sincerely held religious beliefs, a court should apply strict scrutiny and shift the burden onto the government to demonstrate a compelling interest that justifies the burden on the claimant.[68] However, the *Sherbert* strict scrutiny test was rejected by the Supreme Court in *Employment Division v. Smith*.[69] The *Smith* Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability'."[70] Therefore, under *Smith*, the *Sherbert* strict scrutiny rule does not apply even when a government action substantially burdens a religious exercise if that burden is the result of a generally applicable, neutral law.[71]

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61 United States v. Ballard, 322 U.S. 78, 79–80 (1944).

62 *Id.* at 81; *see also* Chapman, *supra* note 13, at 1203–04.

63 *See* Chapman, *supra* note 13, at 1204.

64 *Ballard*, 322 U.S. at 86–88.

65 *See id.*; *see also Seeger*, 380 U.S. at 185 (stating that a claimant raising a Free Exercise challenge bears the burden of establishing a sincerely held religious belief).

66 *See* Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 883 (1990) (citing Sherbert v. Verner, 374 U.S. 398, 403 (1963)).

67 Thomas v. Rev. Bd., 450 U.S. 707, 718 (1981).

68 *Sherbert*, 374 U.S. at 406.

69 *See Smith*, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

70 *Id.*

71 *Id.*

Smith prompted a wave of bipartisan outrage that resulted in the adoption of both the Religious Freedom Restoration Act (RFRA)[72] and the Religious Land Use and Institutionalized Persons Act (RLUIPA).[73] These acts codify the *Sherbert* strict scrutiny rule—perhaps even strengthening it—with respect to certain government actions. Rekindling *Sherbert*, they prevent officials "from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest."[74] With these statutory regulations in place, today both the *Smith* and *Sherbert* rules exist in harmony in their respective spheres: the statutory *Sherbert* (or *Sherbert* plus[75]) rule applies to federal laws, state prison and land use regulations, and non-generally applicable, neutral laws,[76] while the constitutionally based *Smith* rule applies to neutral state laws of general applicability.[77]

It is important to note that the principles of *Ballard* and the hands-off doctrine apply to both rules, and courts should, and generally do, avoid entangling themselves in questions of religiosity and veracity in the free-exercise context. This is evident from the purposes of RFRA and RLUIPA, which were primarily to recodify the *Sherbert* test and protect religious freedom from even inadvertent or indirect burdens resulting from state actions.[78] Therefore, cases arising under these statutes tend to

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72 42 U.S.C.A. § 2000bb to -4 (West).

73 42 U.S.C.A. § 2000cc (West).

74 Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 690–91 (2014). However, the Supreme Court held that RFRA was not enforceable against the states. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance").

75 Some scholars believe that RFRA and RLUIPA impose a rule that is stronger than that of *Sherbert*. *See, e.g.*, Marci A. Hamilton, *The Case for Evidence-Based Free Exercise Accommodation: Why the Religious Freedom Restoration Act Is Bad Public Policy*, 9 HARV. L. & POL'Y REV. 129, 139 (2015) (arguing that RFRA imposes a form of "super-strict scrutiny" that is much more stringent than that set out in prior Supreme Court precedent).

76 *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) (holding that "a law targeting religious beliefs . . . is never permissible").

77 However, many states have adopted their own versions of RFRA, recodifying the *Sherbert* rule within the state. *See* Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565, 565–66 (1999) (Noting that "several states have enacted their own versions of RFRA, and various other states, including California, are considering such enactments" (footnote omitted)).

78 *See* Armen Kharazian, *The Unstable Constitutional Ground of the Religious Freedom Restoration Act of 1993*, 67 FED. LAW. 17, 17 (2020).

be relatively forgiving of religious free exercise, and incorporate the *Sherbert* line of cases, including *Ballard* and *Thomas*.[79]

Cases under the constitutional common-law rule of *Smith* are perhaps even more consistent with the hands-off doctrine, as the *Smith* rule allows courts to avoid any inquiry into religiosity or sincerity at all. *Smith* does not invalidate or provide exemptions to valid and neutral laws of general applicability, even when those laws substantially burden a sincerely held religious belief.[80] Therefore, under the *Smith* line of cases it is frequently unnecessary for a court to reach the question of whether a claimed belief is religious at all. Because both *Smith* and the statutory models incorporate safeguards to protect the hands-off doctrine, the doctrine has been scrupulously honored in the free-exercise context.

B. Hands On: The Establishment Clause

Though the Free Exercise Clause has faced some complicated doctrinal developments stemming from the enactments of RFRA and RLUIPA,[81] its doctrinal struggles do not hold a candle to those of the Establishment Clause, which has been in a near-constant state of flux. The First Amendment's Free Exercise Clause provides, "Congress shall make no law respecting an establishment of religion."[82] Stymied by disagreement over what constitutes a law "respecting an establishment," the Supreme Court has developed myriad Establishment Clause tests over the past half-century.[83] It is still unclear which test will carry the day moving forward.[84]

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79 *See, e.g.*, Holt v. Hobbs, 574 U.S. 352, 361 (2015) (accepting the sincerity of petitioner's belief that his religious beliefs required him to grow a beard).

80 *See* Emp. Div., Dep't of Hum. Res., 494 U.S. 872, 890 (1990) (holding that it is preferable to accommodate no religions in the face of generally applicable, neutral laws rather than to employ a "system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs").

81 *See supra* sources cited notes 72–77and accompanying text.

82 U.S. CONST. amend. I.

83 *See* Eric D. Yordy & Elizabeth Brown, *Secondary Meaning and Religion: An Analysis of Religious Symbols in the Courts*, 28 WM. & MARY BILL RTS. J. 1025, 1026–33 (2020) (summarizing the Establishment Clause tests that the Supreme Court has developed over the past half-century).

84 Although the Supreme Court recently overruled the infamous "*Lemon* Test" in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2427–29 (2022), it is unclear how *Kennedy*'s new "historical practices and understandings" approach will apply to different sets of facts moving forward, *id.*; see *Woodring v. Jackson County*, 986 F.3d 979, 988 (7th Cir. 2021) (observing before Kennedy was decided that "[c]learly, no single test governs all Establishment Clause challenges.").

The Supreme Court's journey with the Establishment Clause did not truly begin until 1947 with the landmark case of *Everson v. Board of Education*.[85] In *Everson*, the Court confronted a taxpayer challenge to a New Jersey program that reimbursed parents for the costs of transporting their children to school—including parochial schools.[86] A 5–4 majority held that the challenged statute was not a violation under the Establishment Clause.[87] However, the importance of *Everson* stems not from its holding, but from the principle that all nine of the justices agreed upon: "the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"[88] This principle, which has since become known as the "separationist doctrine," encompasses both a general policy of separating religion and government, as well as a policy of strict government neutrality toward religion.[89]

Through *Everson*'s separationist lens, the Supreme Court set out to craft a one-size-fits-all test for evaluating Establishment Clause challenges. This culminated in *Lemon v. Kurtzman* and the development of the infamous "*Lemon* test."[90] The *Lemon* Court drew upon prior caselaw to hold that, in the face of an Establishment Clause challenge, a government action must satisfy three requirements. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion,[91] finally, the statute must not foster 'an excessive government entanglement with religion.'"[92] This approach represented the high-water mark of separationism in the Supreme Court.

The "*Lemon* test" has faced extensive criticism over its fifty-two-year life.[93] Critics claim that the test conflicts with free-

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85 330 U.S. 1 (1947); *see also* Daniel O. Conkle, *Toward A General Theory of the Establishment Clause*, 82 NW. U.L. REV. 1113, 1124 (1988) ("The [Establishment] clause emerged from obscurity only in 1947 in the seminal case of *Everson v. Board of Education*." (footnote omitted)).

86 *See* 330 U.S. at 3.

87 *Id.* at 18.

88 *Id.* at 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1879)).

89 *See* Conkle, *supra* note 85, at 1182; *see also* Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 150 (1992) (noting that "[s]trict separationists will take the position that any provision of financial or other assistance to religion is an endorsement.").

90 403 U.S. 602, 612–13 (1971).

91 *Id.* (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)).

92 *Id.* (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

93 And, as Justice Scalia observed, its repeated death. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2149 (1993) (Scalia, J.,

exercise jurisprudence,[94] results in inconsistent and near-irreconcilable decisions,[95] and fails to serve the underlying objectives of the Establishment Clause.[96] These criticisms have amplified over time as the Court and the national populace shift toward a new conception of the Establishment Clause: a more accommodating religious liberty-based approach.[97] This approach recognizes that the "the government may (and sometimes must) accommodate religious practices"[98] by acknowledging that "'there is room for play in the joints between' the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause."[99]

This new and more accommodating approach gave rise to two variants of the *Lemon* test: the endorsement and coercion tests. Both of these tests are understood to modify *Lemon*'s purpose and effects prongs.[100] Therefore, the endorsement test asks "whether an objective observer, acquainted with the text, legislative history, and implementation of the [government action], would perceive it as a state endorsement" of religion.[101] Similarly, but less stringently, the coercion test permits government accommodations of religion as long as they do not have the effect of coercing anyone to support or participate in

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concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again . . . .").

94 *See* Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 501 (2002).

95 *See* Wallace v. Jaffree, 472 U.S. 38, 109–11 (1985) (Rehnquist, J., dissenting) (providing numerous examples of seemingly contradictory applications of the *Lemon* test, which obtain different results despite similar facts); Choper, *supra* note 94, at 503 (observing that "application of the *Lemon* test generated ad hoc judgments incapable of being reconciled on any principled basis").

96 *See* Choper, *supra* note 94, at 502–03 (arguing that "non-entanglement is not a value the judiciary can or should secure through the Establishment Clause").

97 Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 482 (1994) (arguing that proponents of the coercion theory of the Establishment Clause "seek to abandon the separation principle, which has provided the theoretical foundation for the Court's Establishment Clause decisions since *Everson*, in favor of an Establishment Clause standard premised solely on the protection of religious liberty").

98 Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144–45 (1987); *see* Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L.J. 1691, 1691 (1988).

99 Cutter v. Wilkinson, 544 U.S. 709, 713–14 (2005) (quoting Locke v. Davey, 540 U.S. 712, 718 (2004)).

100 *See* Choper, *supra* note 94, at 505.

101 Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

religion.[102] It was under these *Lemon* test variants, particularly in the active and passive display contexts, that a strange division in Religion Clause jurisprudence occurred. The hands-off doctrine started crumbling in Establishment Clause cases.

Active and passive display cases confront instances in which the government uses religious words or symbols for ceremonial, celebratory, or commemorative purposes.[103] Courts in these cases frequently confront government-sanctioned holiday displays placed on public property that use religious symbols to celebrate the holiday season.[104] In this context, the Supreme Court frequently rejects Establishment Clause claims on the basis that the challenged displays are "secular" and therefore not an endorsement of religion in violation of the Establishment Clause, despite the claimant's sincere beliefs to the contrary.[105] The Court did exactly this in a particularly egregious case, *County of Allegheny v. American Civil Liberties Union*.[106]

In *County of Allegheny*, the Court confronted two distinct holiday displays that were erected on public property. The first was a crèche[107] surrounded by holiday greenery that was displayed on a county courthouse's grand staircase.[108] The second was a "Salute to Liberty" display erected outside of the City-County building that featured a 45-foot-tall Christmas tree and 18-foot-tall menorah.[109] The Court's opinion begins by giving a detailed and self-admittedly "needless" description

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102 Town of Greece v. Galloway, 572 U.S. 565, 586 (2014) ("It is an elemental First Amendment principle that government may not coerce its citizens 'to support or participate in any religion or its exercise.'" (quoting County of Allegheny v. ACLU, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring))).

103 *See, e.g.*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074 (2019) (evaluating the display of a thirty-two foot Latin cross on public property).

104 *See, e.g.*, *County of Allegheny*, 492 U.S. at 575.

105 *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 685 (1984) ("The crèche, like a painting, is passive; admittedly it is a reminder of the origins of Christmas. Even the traditional, purely secular displays extant at Christmas, with or without a crèche, would inevitably recall the religious nature of the Holiday. The display engenders a friendly community spirit of goodwill in keeping with the season.").

106 *County of Allegheny*, 492 U.S. at 575.

107 A "crèche" is also known as a nativity scene, which depicts the scene of Jesus's birth. *See Definition of Crèche*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/cr%C3%A8che [https://perma.cc/FGP9-UE3V] (last visited Mar. 15, 2022).

108 *See County of Allegheny*, 492 U.S. at 578.

109 *Id.* at 579–87.

of the origins of the Christmas and Chanukah holidays.[110] The Court then goes on to find that "Chanukah is observed by American Jews to an extent greater than its religious importance would indicate: in the hierarchy of Jewish holidays, Chanukah ranks fairly low in religious significance."[111] Drawing partially from this allegedly low religious significance of Chanukah, the Court proclaims the secularity of the "winter-holiday season."[112] As such, the Court upheld the menorah display, despite finding the crèche display unconstitutional.[113] The opinion is riddled with generalized appraisals of the religiosity of various religious symbolism, including conclusory statements such as "The Christmas tree, unlike the menorah, is not itself a religious symbol" made throughout.[114]

Recognizing the countless flaws inherent in the *Lemon* test and its variants, many justices hoped to finally kill and bury *Lemon* once and for all,[115] culminating in *Lemon*'s official overruling in *Kennedy v. Bremerton School District* in June of 2022.[116] However, in the years leading up to *Lemon*'s official demise, the Court's tendency to evaluate religiosity continued, even when it applied a different test: the "history and traditions" test. This test was first used in *Marsh v. Chambers* in 1983,[117] and it was traditionally applied to cases concerning legislative prayer.[118] Rather than using the three-pronged *Lemon* test, the history and traditions test mandates that challenged government actions be interpreted "by reference to historical practices and understandings."[119] Therefore, if a challenged government action has a longstanding history and tradition, it is presumptively constitutional,[120] and the only

110 *Id.* ("Christmas, we note perhaps needlessly, is the holiday when Christians celebrate the birth of Jesus of Nazareth, whom they believe to be the Messiah.").

111 *Id.* at 586–87.

112 *Id.* at 620.

113 *Id.* at 620–21.

114 *Id.* at 616.

115 *See supra* note93; *see also* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2097 (2019) (Thomas, J., concurring) ("I would take the logical next step and overrule the *Lemon* test in all contexts."); Woodring v. Jackson County, 986 F.3d 979, 992 (7th Cir. 2021) (observing that six Justices in *American Legion* cast doubt on the continued viability of the *Lemon* test).

116 142 S. Ct. 2407, 2427–29 (2022).

117 463 U.S. 783 (1983).

118 *See id.* at 787–88; Town of Greece v. Galloway, 572 U.S. 565, 576–77 (2014).

119 *Kennedy*, 142 S. Ct at 2428 (internal quotations omitted) (quoting *Town of Greece*, 572 U.S. at 576).

120 *Am. Legion*, 139 S. Ct. at 2087; *see Woodring*, 986 F.3d at 993 ("Other circuits have read *American Legion* to require a strong presumption of constitu-

way to overcome this presumption is "to demonstrate discriminatory intent in the decision to maintain a design or disrespect based on religion in the challenged design itself."[121]

Even applying this new history and traditions test, the Court has continued to make wide-sweeping appraisals of religiosity. For example, the Court has used the test to imply that invocations of God in day-to-day life have become devoid of any religious meaning. These include statements such as "under God" in the Pledge of Allegiance,[122] the national motto "in God we trust," and the statement "God save the United States" at the beginning of court hearings.[123] This undesirable practice has even seeped into the Court's oral arguments. In *Salazar v. Buono*, which contemplated the constitutionality of a Latin Cross memorial in a national preserve,[124] Justice Scalia disagreed with the petitioners' belief that the Latin cross was "the predominant symbol of Christianity" and "the most common symbol to honor Christians."[125] Interjecting, Justice Scalia stated that the Latin Cross is "the most common symbol of . . . the resting place of the dead."[126] Justice Scalia brushed off petitioner's belief that the cross is a Christian symbol, dismissing it as "an outrageous conclusion."[127]

The Court's tendency to appraise religiosity and claimants' religious beliefs in the Establishment Clause context—and its failure to provide a clear Establishment Clause test for so long—has undoubtedly influenced lower courts' dispositions of Establishment Clause cases. As the Second Circuit recognized in *Skoros v. City of New York*, government actors "confront a jurisprudence of minutiae that leaves them to rely on little more than intuition and a tape measure to ensure the constitutionality of public holiday displays."[128] But relying on intuition

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tionality for established, religiously expressive monuments, symbols, and practices." (internal quotations omitted)).

121 *Woodring*, 986 F.3d at 994 (quoting Freedom From Religion Found., Inc. v. County of Lehigh, 933 F.3d 275, 281 (3d Cir. 2019)).

122 *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 35 (2004) (O'Connor, J., concurring) ("I believe that although these references speak in the language of religious belief, they are more properly understood as employing the idiom for essentially secular purposes.").

123 *See Marsh*, 463 U.S. at 818 (suggesting that sayings such as "God save the United States and this Honorable Court," "In God We Trust," "One Nation Under God," do not violate the Establishment Clause "because they have lost any true religious significance").

124 559 U.S. 700, 700 (2010).

125 Transcript of Oral Argument at 38–39, *Buono*, 559 U.S. 700 (No. 08-472).

126 *Id.*

127 *Id.*

128 437 F.3d 1, 15 (2d Cir. 2006) (internal quotations omitted).

and tape measures allows courts to supplant their own beliefs about what is and is not religious for those of the claimants.

For example, in a particularly problematic case, the District of Utah made numerous religious appraisals when confronted with the Utah Highway Patrol's efforts to erect Latin-cross-shaped roadside memorials to honor fallen state troopers.[129] The court began with an admirable goal: to avoid "declar[ing] that the stand alone Christian crosses that are the subject matter of this action are, as a matter of law, exclusively religious symbols" by examining the purpose and context of the displays in the specific case.[130] However, the opinion quickly devolves to take on a tone similar to that of the problematic Supreme Court precedent, making statements such as,

> Like the Christmas tree, which took on secular symbolism as Americans used the tree without subscribing to a particular religious belief, the cross has attained a secular status as Americans have used it to honor the place where fallen soldiers and citizens lay buried, or had fatal accidents, regardless of their religious belief.[131]

The court further suggests that the display could not violate the Establishment Clause because the Latin cross is not a symbol of Utah's majority religion, stating

> it is unpersuasive to suggest that a reasonable person would conclude that the government's allowing the use of the cross here is to promote the minority churches which do use the cross; and more, it is illogical to suggest it is to promote the majority church which does not use the cross.[132]

This reasoning treads dangerously close to that which the United States Supreme Court prohibited in *Thomas v. Review Board*—that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First

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129 *See* Am. Atheists, Inc. v. Duncan, 528 F. Supp. 2d 1245, 1250 (D. Utah 2007), *rev'd sub nom.* Am. Atheists, Inc. v. Davenport, 637 F.3d 1095 (10th Cir. 2010); *see also, e.g.*, Freedom from Religion Found., Inc. v. City of Warren, 873 F. Supp. 2d 850, 855, 869 (E.D. Mich. 2012), *aff'd*, 707 F.3d 686 (2013) (finding that a holiday display, which included a crèche, had an "overwhelmingly secular nature," because the display included "secular" items such as "ribbons, ornaments, 'Winter Welcome' sign, a 'Merry Christmas' sign, nutcrackers, elves, reindeer, a Santa's mailbox, snowmen, wreaths with lights, bushels of poinsettias, acnddy acnes, [and] wrapped gift boxes").

130 *Duncan*, 528 F. Supp. 2d at 1253 (internal quotations omitted); *see also id.* ("Plaintiffs cite a number of cases in which courts declared that publicly-displayed Latin crosses violated the Establishment Clause. Plaintiffs fail to state, however, that the courts in those cases examined the purpose and the context or use of the crosses before determining what the crosses communicated.").

131 *Id.* at 1258.

132 *Id.*

Amendment protection."[133] Moreover, this reasoning is problematic because it implies that the claimants' beliefs are unreasonable, unpersuasive, and "illogical." This practice of essentially telling claimants that their beliefs are wrong as a matter of law flagrantly contradicts free-exercise jurisprudence and the hands-off doctrine, and this contradiction may cause harm to litigants and nonparties alike.[134]

C. Why Appraisals of Religiosity and Veracity Are Cause for Concern

This tendency of courts to appraise religious beliefs and symbology flies in the face of the hands-off doctrine. Moreover, it arrives at the "worst of all possible outcomes" by harming majority religions, minority religions, and nonbelievers alike.[135]

The practice harms religious groups and individuals by espousing hostility towards religion.[136] Courts avoid confronting the religious implications of a government action head-on in myriad ways: by deeming that the religious content is "de minimis,"[137] finding that the religious content is "neutralized"[138] by other secular symbols, or, most problematically, declaring the action to be entirely "secular" by finding that no "reasonable person" could view the display or action to be religious at all.[139] This sends the message to religious groups that "religion must be tamed, cheapened, and secularized" before it can be accommodated.[140] Beyond this, by discrediting any religious significance or interpretation of government actions and

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133 Thomas v. Rev. Bd., 450 U.S. 707, 714 (1981).

134 *See infra* Part I.B.

135 *See* McConnell, *supra* note 89, at 127.

136 *Cf.* Deverich, *supra* note 24, at 241 (describing the theory of keeping a "wall of separation" between religion and the state to be a "philosophy of hostility to religion").

137 *See supra* sources cited note 23.

138 *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 635 (1989) (O'Connor, J., concurring); Freedom from Religion Found., Inc. v. City of Warren, 873 F. Supp. 2d 850, 869 (E.D. Mich. 2012), *aff'd*, 707 F.3d 686 (2013).

139 *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 36 (2004) (O'Connor, J., concurring) ("The reasonable observer . . . would not perceive these acknowledgments as signifying a government endorsement of any specific religion, or even of religion over nonreligion."); Am. Atheists, Inc. v. Duncan, 528 F. Supp. 2d 1245, 1260, (D. Utah 2007), *rev'd sub nom.* Am. Atheists, Inc. v. Davenport, 637 F.3d 1095 (10th Cir. 2010) ("While there may be some, like Plaintiffs, who interpret the symbols [in a religious] way, the court finds that given the context, this is not the response of a reasonable observer.").

140 *See* McConnell, *supra* note 8989, at 127.

instead labeling them as "secular," courts denigrate what are revered religious icons in the eyes of many religious observers.

Further, this practice of "secularizing" religious symbols frequently increases the dissemination and tolerance of majority religions' symbolism throughout the public sphere. Majority religions' symbols and practices are the most likely to be used, displayed, challenged, and finally, secularized.[141] Because these symbols and practices are therefore more commonly observed by the public than those of minority religions, courts are then more willing to find that they have taken on a secondary "secular meaning." The result is a vicious cycle: majority religions' revered practices and symbols are secularized by the court, then are thereby disseminated more widely, leading to even greater toleration by the courts and further secularization. This forms "an apparent union of religion and national culture," under which majority religions become intertwined within daily life, sponsored by the government, under the guise of secularity.[142]

The inverse of this effect may also occur. Because the practices and symbols of majority religions tend to be more commonly recognized, courts sometimes treat these practices and symbols as more "religious" than those of minority religions.[143] Therefore, courts may find that government use of minority religions' symbols and practices passes Establishment Clause muster while majority religious symbols fall by the wayside. In other words, because a court does not have a clear conception of what is "religious" in the eyes of minority religions, it is more likely to ignore the religious significance of minority religions' symbols or practices and therefore uphold them.[144] This sends a message to members of minority religions: their religions are less valid and therefore less cause for concern under the Establishment Clause.

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141 *See* Paula Abrams, *The Reasonable Believer: Faith, Formalism, and Endorsement of Religion*, 14 LEWIS & CLARK L. REV. 1537, 1550 (2010).

142 Frederick Mark Gedicks & Pasquale Annicchino, *Cross, Crucifix, Culture: An Approach to the Constitutional Meaning of Confessional Symbols*, 13 FIRST AMEND. L. REV. 71, 137 (2014).

143 Such is what occurred in *County of Allegheny*, in which the Court deemed that "Chanukah ranks fairly low in religious significance" and, in part based on that reasoning, upheld the display of the menorah as "secular" while invalidating a similar crèche display. *See* County of Allegheny v. ACLU, 492 U.S. 573, 587 (1989).

144 *See, e.g.*, *Duncan*, 528 F. Supp. 2d at 1258 (suggesting that a Latin cross roadside memorial could not violate the Establishment Clause because the majority religion of the state does not incorporate the Latin cross as part of its religious symbology).

Finally, the practice of making religious appraisals can directly harm the litigants in each case. By evaluating the veracity of a claimant's beliefs and making broad-sweeping declarations of religiosity that go beyond the facts of the case at bar, courts essentially tell litigants that their viewpoints are invalid and wrong as a matter of law.[145] Rather than acknowledging the viewpoints of the claimants and accepting that there may be, at least in the claimants' eyes, religious implications of a government action, courts repeatedly tell claimants that their viewpoints are "illogical" or "unreasonable," dub the action "secular," and call into question the veracity of the claimants' beliefs.[146] This ignores the teachings of the hands-off doctrine: it is not the province of the courts to tell litigants what they may and may not believe, and it is similarly not the province of the courts to tell litigants that their beliefs are "illogical" or "unreasonable."[147]

Thus, this tendency of the courts to evaluate the religiosity of government actions and symbols, and therefore the veracity of claimants' religious beliefs, in the Establishment Clause Context infringes on the individual liberties of religious adherents, nonadherents, and litigants alike. As such, it is also inconsistent with the purposes of the religion clauses: to protect individual liberties.[148] Instead of protecting individual liber-

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145 *See* Mark Strasser, *The Protection and Alienation of Religious Minorities: On the Evolution of the Endorsement Test*, 2008 MICH. ST. L. REV. 667, 707–08 (2008) ("[T]here is something fundamentally at odds with the spirit of the Endorsement Test to tell individuals who view a Christmas tree as representing a religious holiday that they are simply wrong as a matter of law.").

146 *See, e.g.*, *Duncan*, 528 F. Supp 2d at 1258 (stating that "it is illogical" to conclude that the use of a Latin cross would show support for the majority religion in the community); Kunselman v. W. Rsrv. Loc. Sch. Dist., Bd. of Educ., 70 F.3d 931, 933 (6th Cir. 1995) ("[T]he perception of the usage of the 'Blue Devil' mascot as an establishment of religion is not reasonable, and therefore this use does not violate the Establishment Clause."); Lambeth v. Bd. of Comm'rs, 407 F.3d 266, 270 (4th Cir. 2005) ("We have heretofore characterized the phrase, 'In God We Trust,' when used as the national motto on coins and currency, as a 'patriotic and ceremonial motto' with 'no theological or ritualistic impact.'" (quoting N.C. C.L. Union Legal Found. v. Constangy, 947 F.2d 1145, 1151 (4th Cir. 1991))).

147 *Cf.* notes 29–41and accompanying text (explaining that the hands-off doctrine mandates that courts not evaluate the veracity of an individual's religious beliefs).

148 While some scholars debate the original objectives of the religion clauses, *see, e.g.*, Deverich, *supra* note 24, at 233–35 (arguing that the religion clauses are meant to serve differing objectives) the majority of scholars seem to agree that both clauses were intended to preserve individual liberties, *see Government Display of Religious Symbols*, *supra* note 27, at 267–68 ("Even though identifying the precise original meaning of the religion clauses may be difficult, scholars have at least agreed that the two religion clauses are connected and serve a unified purpose. . . . The Founding generation understood the religion clauses as serving one

ties, the Court's current approach to Establishment Clause challenges allows it to discredit minority viewpoints while trampling over the revered religious icons of majority believers. But there is a solution, and that solution is leaning into the shared objectives of the Free Exercise Clause and Establishment Clause.

In the years leading up to the long-overdue demise of the *Lemon* test, many scholars have wondered "what comes next?" However, one consideration that seems to be frequently ignored is the possibility of resolving this dissonance between Free Exercise and Establishment Clause jurisprudence by bringing the two religion clauses into harmony through a consistent application of the hands-off doctrine. This Note proposes a rule to reconcile the inconsistencies between the two clauses and assure that courts are not evaluating the veracity, plausibility, or validity of religious beliefs, symbols, or practices—whether they be from the Christian Church or the Church of the Flying Spaghetti Monster.

II
SOLUTION: REMOVING EVALUATIONS OF RELIGIOUS VERACITY FROM THE ESTABLISHMENT CLAUSE ANALYSIS

Just as courts refuse to evaluate the veracity of claimants' asserted religious beliefs in the Free Exercise context,[149] courts should avoid evaluating the veracity of claimants' beliefs in the Establishment Clause context. This Note proposes a "no-veracity rule" similar to that set out in *Ballard* and *Thomas*:

purpose—to protect individual religious exercise—but in two different ways."). This understanding stems from the writings of James Madison and Thomas Jefferson at the nation's founding, which suggested that the Establishment Clause was intended to separate church and state. *See* James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 1 THE FOUNDERS' CONSTITUTION 82–84 (Philip B. Kurland & Ralph Lerner eds. 1987); Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) ("In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" (quoting Reynolds v. United States, 98 U.S. 145, 164 (1879))). And although some suggest that this wall has been weakened in the face of the Supreme Court's accommodationist approach, *see* William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on* Lynch v. Donnelly, 1984 DUKE L.J. 770, 771 (1984), even the most accommodating Justices seem to agree that the Establishment Clause is meant to stand in the way of the government's encroachments on religious liberty, *cf.* Town of Greece v. Galloway, 572 U.S. 565, 586 (2014) ("It is an elemental First Amendment principle that government may not coerce its citizens 'to support or participate in any religion or its exercise.'" (quoting *County of Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring))).

149 *See supra* notes 29–41and accompanying text.

courts may not evaluate the veracity or plausibility of claimants' sincerely held beliefs that government actions implicate religion when faced with Establishment Clause challenges.[150] In the abstract, this rule is discrete and simple; its implementation, however, may pose challenges. To bring this rule from the abstract into reality, this Part begins by exploring the rule's dimensions. This Part then evaluates the rule's feasibility by measuring its compatibility with the Supreme Court's current Establishment Clause jurisprudence.

A. The Contours of the No-Veracity Rule

Two elements of an Establishment Clause claim may be implicated by the no-veracity rule: religion and veracity. "Religion" in this context is a legal term of art. In order to merit First Amendment protections, the claimant's allegations must implicate a genuine religion, rather than political, philosophical, or other unprotected beliefs.[151] For example, imagine that a crèche display is erected on government property as part of a larger "winter holiday celebration" display.[152] An Establishment Clause claimant may sincerely believe that the crèche symbolizes the birth of Christ, and that the display therefore promotes Christianity. Under those circumstances, the claimant has made a threshold showing that the government action implicates a religion for Establishment Clause purposes because courts have repeatedly recognized Christianity as a protected religion.[153] Conversely, a claimant may instead believe that Jesus was a communist and the crèche display promotes communism. In that case, the claimant will not be able to make a threshold showing that the government action implicates religion for Establishment Clause purposes because communism—an economic ideology—is not a protected religion under the First Amendment.[154]

What qualifies as a "religion" entitled to First Amendment protection goes beyond the scope of this Note. But, regardless of the applicable definition of "religion," the no-veracity rule acknowledges that judicial determinations of religion are a necessary evil that allow courts to effectively adjudicate First Amendment disputes. Thus, under this proposed no-veracity

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150 *Cf.* notes 33–35and accompanying text (describing the *Ballard* and *Thomas* rules).

151 *See supra* notes 44–47and accompanying text.

152 This is a similar fact pattern to the facts of Lynch v. Donnelly, 465 U.S. 668 (1984).

153 *See, e.g.*, *Lynch*, 465 U.S. at 697–88.

154 *See* Gilbert, *supra* note 44, at 403–04.

rule, a court may and should evaluate whether a claimant's beliefs implicate a genuine religion protected by the First Amendment.

This necessary evil does not, however, allow a court to reach the other Establishment Clause element: veracity. This is the fundamental principle of the proposed no-veracity rule. Under the Free Exercise Clause's *Ballard* and *Thomas* rules, a claimant should not be "put to the proof of their religious doctrines or beliefs."[155] Instead, a reviewing court should accept the claimant's alleged beliefs as true for the purposes of deciding the case and determine whether the government action, in spite of those beliefs, violates the religion clauses based on the specific facts and circumstances of that case.[156] This is precisely what the Supreme Court did in *Smith*. In *Smith*, the Court held that a government action does not violate the Free Exercise Clause even if it places a substantial burden on a claimant's sincerely held religious beliefs provided that the action is religiously neutral.[157] In so holding, the Court did not appraise the veracity of the claimants' beliefs that peyote consumption was a necessary component of their religious exercise, and moreover assumed that those beliefs were true, but still upheld the government regulation prohibiting peyote consumption on the grounds that it was religiously neutral.[158]

Applying the *Smith* Court's decision-making process to the Establishment Clause context, once a reviewing court determines that a claimant sincerely believes that a government action implicates a genuine religion, it should go no further in evaluating the veracity of the claimant's beliefs. The claimant should not be "put to the proof of their" beliefs that a government action implicates religion.[159] In other words, a court should not tell a claimant that their beliefs are wrong as a matter of law.

To avoid violating this no-veracity rule, a court should not evaluate the generalized religiosity of allegedly religious texts, acts, or other symbols beyond the bounds of the specific set of facts in the case at bar. For example, a court should avoid broadly sweeping assertions such as that in *County of Allegheny* in which the Court proclaimed that the Christmas tree is

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155 United States v. Ballard, 322 U.S. 78, 86 (1944).

156 *Id.*

157 Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 878 (1990).

158 *Id.* at 890.

159 *Cf. Ballard*, 322 U.S. at 86.

"the preeminent secular symbol of the Christmas holiday."[160] Instead, the court should accept as true the claimant's beliefs that, at least in the claimant's eyes, the government action implicates religion in some way. The court may then evaluate whether, in spite of the claimant's subjective beliefs, the action or display implicates religion under the particularized facts or circumstances in a way that offends the Establishment Clause under the applicable Establishment Clause test.

To illustrate, imagine again the example of the crèche winter holiday celebration display. A claimant challenges the display because they sincerely believe that the crèche is a symbol of the birth of Christ, and that it is therefore a government promotion of Christianity. The claimant sincerely believes that the display implicates a recognized religion, so the court may not say that the claimant is wrong in *believing* that the display implicates Christianity, that crèches are not religious per se, or that the claimant is wrong as a matter of law for believing that crèches symbolize the birth of Christ. However, the court may accept as true that the claimant *believes* that the crèche display promotes Christianity, but still find that the use of the crèche under the particularized facts and circumstances of the specific case at bar does not implicate religion in a way that meaningfully offends the Establishment Clause. And, of course, whether the display "meaningfully offends the Establishment Clause," in turn, should be determined by applying one of the applicable Establishment Clause tests.

B. Applying the No-Veracity Rule to Existing Establishment Clause Jurisprudence

Although the Supreme Court's Establishment Clause jurisprudence is still in flux,[161] advocating for a particular test goes beyond the scope of this Note. Rather than interfering with or overriding existing Establishment Clause jurisprudence, this Note's no-veracity rule is designed to work in tandem with the Court's Establishment Clause tests.

When applying the applicable Establishment Clause test, a reviewing court should accept as true, without deciding, the claimant's beliefs that the government action implicates religion *at least in the claimant's eyes*. While accepting the claimant's beliefs as true may appear to provide claimants carte blanche to override any government actions that they may take

160 County. of Allegheny v. ACLU, 492 U.S. 573, 617 (1989).
161 *See supra* notes 82–84and accompanying text.

issue with, this presumption only requires the court to accept that one possible interpretation of the government action is religious, and not that the government action is, under each specific set of facts and circumstances, religious in a way that violates the Establishment Clause. Indeed, as the Supreme Court has stated, "Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."[162] One interpretation is not *the* interpretation. As an illustration, this section assesses the no-veracity rule in tandem with the Court's existing Establishment Clause tests.

To illustrate the no-veracity rule's application to the Court's Establishment Clause tests, this section builds upon the crèche hypothetical above.[163] Suppose an atheist walks by their local town hall and observes a "Salute to Liberty" display, denoted with a "Salute to Liberty" sign, that is located on public property.[164] The display features a 45-foot-tall Christmas tree erected next to an 18-foot-tall menorah. The atheist sincerely believes, despite the "Salute to Liberty" sign, that the display is a religious tribute to Christianity and Judaism, and therefore feels alienated by her community because she is not a believer. The county contends that the Christmas tree is "the preeminent secular symbol of the Christmas holiday" and that the display of the menorah is widely understood as a recognition of the secular "winter-holiday season."[165]

1. *The* Lemon *Test*

To survive an Establishment Clause challenge under the *Lemon* test, the County's display must: 1) have a secular legislative purpose; 2) have a principal or primary effect that neither advances nor inhibits religion; and 3) not foster an excessive government entanglement with religion.[166] Thus, the first step under this test will be for the County to demonstrate that it has a secular legislative purpose in maintaining the display.[167] The County has asserted the secular purpose of saluting liberty and bringing together the community by celebrating the secular holiday season. Without any evidence that this asserted

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162 Van Orden v. Perry, 545 U.S. 677, 690 (2005).

163 *See supra* note 152 and accompanying text. This fact pattern is based upon that at issue in *County of Allegheny*, 492 U.S. 573 (1989).

164 *See id.* at 581–87.

165 *Id.* at 616–18.

166 Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

167 *See id.*

secular purpose is pretextual,[168] this purpose is most likely permissible given the Supreme Court's decisions in *Lynch*[169] and *Allegheny*.[170]

Next, the County must show that the principal or primary effect of the display is neither to advance nor inhibit religion.[171] When coupled with the atheist's assertions, which the Court accepts as true, this is a more difficult proposition, as the court now is faced with at least one instance of a person who believes that the primary effect of the display is to promote religion. However, one individual's belief, though sincere, is not dispositive.[172] Essential for determining the influence of the atheist's belief is which variant of the effects prong applies.

If the court applies the coercion test, the display would near-definitely survive the second prong of the *Lemon* test. Under Justice Kennedy's formulation of the coercion test, a claimant must show that a government action placed a coercive pressure on them "to support or participate in any religion or its exercise."[173] Mere offense is insufficient.[174] However, the atheist in this example has not asserted that she felt coerced by the passive display into abandoning her religious beliefs; she has only claimed that she viewed the display to be an endorsement of religion. These claims of mere endorsement or offense would not suffice to satisfy the coercion test. Therefore, the atheist's claims would fail the effects prong of *Lemon*.

Conversely, if the court applies the endorsement test, it could find that this display fails as it has the effect of promoting religion in the eyes of the atheist.[175] However, this is not necessarily the case. The court may also choose to employ the

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168 *See* McCreary County v. ACLU, 545 U.S. 844, 860–70 (2005) (analyzing the government's stated purpose for displaying the Ten Commandments and determining that the government's purpose was illegitimate and being used as pretext to hide the government's religious motive).

169 Lynch v. Donnelly, 465 U.S. 668, 681 (1984) (stating that a city's desire to celebrate Christmas and depict its origins is a "legitimate secular purpose").

170 *County of Allegheny*, 492 U.S. at 620 (accepting "recognition of different traditions for celebrating the winter-holiday season" as a constitutional government purpose).

171 *See Lemon*, 403 U.S. at 612–13.

172 *See* Van Orden v. Perry, 545 U.S. 677, 690 (2005) ("Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.").

173 Town of Greece v. Galloway, 572 U.S. 565, 586 (2014) (quoting *County of Allegheny*, 492 U.S. at 659).

174 *Id.* at 589.

175 *Cf.* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (stating that a government action is a violation under the endorsement test if it sends a message of "government endorsement or disapproval of religion").

endorsement test's objective observer, thereby considering the effect that the display has on a person whose ideals are reflective of the community and who has knowledge of the history of the display and the applicable First Amendment laws.[176] While this may seem like an end run around the proposed rule, the court in employing the objective observer test would still be constrained by the fact that it must accept as true the atheist's belief that the action, at least in her eyes, implicates religion. Thus, the objective observer should not be used as an end-run around the rule to proclaim that an "objective observer" who is merely a proxy for the court's opinion[177] would believe that the atheist's beliefs are wrong as a matter of law.

Additionally, the objective observer should not be confused with the "reasonable observer." While this may seem like a matter of mere semantics,[178] the semantic distinction has palpable effects.[179] The objective observer is not simply any "reasonable person," but "a personification of a community ideal of reasonable behavior,'"[180] endowed with a vast array of knowledge regarding "the text, legislative history, and implementation of the [government action]."[181] By referring to this objective observer as a "reasonable observer," the court implicitly tells a claimant that their beliefs are unreasonable, which is inconsistent with *Thomas*'s mandate that "religious beliefs need not be acceptable, logical, consistent" or, likewise, reasonable.[182]

Using the objective observer to evaluate this set of facts under the endorsement test, the outcome would depend on the community's norms, the display's history, and the context in which the display appears. Although this indeterminate result

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176 Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

177 *See supra* note 169 and accompanying text.

178 And indeed, the terms have been used interchangeably since the test's inception, including by Justice O'Connor (the creator of the test) herself. *See* Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring) ("No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief.").

179 *See supra* notes 138–148and accompanying text.

180 Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 779–80 (1995) (O'Connor, J., concurring) (quoting W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON LAW OF TORTS 175 (5th ed. 1984)).

181 *Wallace*, 472 U.S. at 76 (O'Connor, J., concurring).

182 Thomas v. Rev. Bd., 450 U.S. 707, 714 (1981) (refusing to evaluate whether petitioner's religious practices were legitimate, despite being inconsistent with the practices of other members of petitioner's religious group); *see also* United States v. Seeger, 380 U.S. 163, 184 (1965) ("Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's 'Supreme Being' or the truth of his concepts. But these are inquiries foreclosed to Government.").

may be undesirable to some, it is a fault with the *Lemon* test itself, and not with the no-veracity rule.[183]

Finally, under the *Lemon* test, the county must show that the display does not foster an excessive entanglement with religion.[184] Traditionally, passive displays do not involve a substantial entanglement with religious questions.[185] However, some courts have also found that the political divisions arising from a display may also foster excessive entanglement.[186] While there is no evidence in this set of facts that this display is causing a high degree of tension within the community, it is possible that the display would be invalidated if the reviewing court finds that the display generates a high probability of political division.

Overall, the *Lemon* test demands a fact-specific inquiry that is very unpredictable, even when applied alongside the no-veracity rule. However, the no-veracity rule at least assures that a court does not discount a claimant's beliefs when evaluating allegedly religious displays and may force courts to confront the religious implications of government actions more head-on.

2. *The American Legion History and Traditions Approach*

Under *American Legion*'s formulation of the history and traditions approach,[187] the assessment is a bit more straightforward. Under this approach, the inquiry will turn upon whether there is a longstanding history or tradition of the holiday display.[188] Assuming that the community has a longstanding history of erecting Salute to Liberty displays, the court will presume that the longstanding display is constitutional unless the atheist can show that there is a specific history of animus or discriminatory intent underlying the

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183 *See generally* Gary J. Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 908–35 (1987) (outlining the problems with the *Lemon* test and proposing solutions to remedy them).

184 *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

185 *See* Bauchman v. W. High Sch., 132 F.3d 542, 556 (10th Cir. 1997) ("The entanglement analysis typically is applied to circumstances in which the state is involving itself with a recognized religious activity or institution.").

186 *See* Lynch v. Donnelly, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring) (suggesting that political divisiveness in some circumstances could foster such an entanglement between government and religion that it renders a government action invalid).

187 Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2089 (2019).

188 *Id.*

display.[189] Because there is no evidence of animus in the facts here, the display would likely be upheld despite the atheist's sincere beliefs. Conversely, if there is no longstanding history of Salute to Liberty displays in the community, then the history and traditions test would not apply, and the court would need to apply a different test.[190]

3. *The* Van Orden/McCreary County *Historical, Purpose-Based Approach*

In a few circumstances, most notably *Van Orden v. Perry*[191] and *McCreary County v. ACLU*,[192] the Supreme Court has used a purpose-based approach for assessing Establishment Clause challenges.[193] In these cases, the Court acknowledges head-on that a given monument, such as that featuring the Ten Commandments in *Van Orden*, or the Latin cross in *American Legion*, have a religious meaning, but still uphold the displays because they did not offend the purposes that the Establishment Clause is meant to protect.[194] Yet in the same year as *Van Orden*, the Court held in *McCreary County* that a similar display of the Ten Commandments violated the Establishment Clause based on the clear government purpose to promote religion.[195] Thus, this approach allows a government's religious display, despite its religious content, if it does not demonstrate religious animus or an impermissible, religious or antireligious motive.[196]

Under this approach, the atheist's challenge would likely be rejected. Fitting comfortably with the no-veracity rule, this approach allows the reviewing court to acknowledge that, in the atheist's eyes, the display promotes Christianity and Judaism. Nevertheless, the court may hold that it does not offend the Establishment Clause because it was erected pursuant to a religiously neutral purpose with no evidence of religious animus.

These examples make clear that it is entirely possible for a court to acknowledge the religiosity inherent in a given govern-

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189 *See id.*

190 *See, e.g.*, Woodring v. Jackson County, 986 F.3d 979, 994–95 (7th Cir. 2021) (stating that, in the absence of a longstanding history of a given display, a court should apply the historical, purpose-based approach).

191 545 U.S. 677 (2005).

192 545 U.S. 844 (2005).

193 *See Van Orden*, 545 U.S. at 690.

194 *Id.* at 690–92; *Am. Legion*, 139 S. Ct. at 2089–91.

195 *See Van Orden*, 545 U.S. at 881.

196 Woodring v. Jackson County, 986 F.3d 979, 995 (7th Cir. 2021).

ment action, or at least assume without deciding that a claimant's beliefs are true, yet evaluate the action objectively based on a case's particular facts. Thus, the proposed no-veracity rule is likely a workable addition to Establishment Clause jurisprudence and can be adapted to meet the demands of any new tests that may be developed. However, the important takeaway is that regardless of which test applies, the focus should be on the particularized facts and circumstances of the case at bar, and that due regard should be given to the fact that at least one person sincerely believes that the government action implicates religion, even if the court ultimately finds that it does not violate the Establishment Clause.

III
WHY THE NO-VERACITY RULE IS A VIABLE SOLUTION

A. The No-Veracity Rule's Potential Benefits

1. *The Individual Liberty of Conscience Rationale*

One of the primary benefits of the no-veracity rule, and, of course, the very object of this Note, is that it prevents courts from being the arbiters of individuals' religious beliefs. The rule renders judicial determinations of the general religiosity of allegedly religious government actions outside of the bounds of a case's facts irrelevant. It is therefore more respectful to the beliefs of the claimant—preventing a court from telling the claimant that their beliefs are incorrect, unreasonable, or implausible as a matter of law.

Additionally, this rule refocuses a reviewing court's inquiry by shifting the focus from the court's beliefs about what is or is not religious and onto the claimant's own beliefs and the harm the government action causes to the claimant. As the Establishment Clause is intended to protect individual liberties,[197] including the freedom to believe or not believe, it is important to focus the inquiry on the impact that the government action has on the claimant and others similarly situated. In refocusing this way, this formulation responds to some of the criticisms of existing Establishment Clause jurisprudence by adding a subjective element to Establishment Clause challenges: forcing a court to acknowledge the claimant's beliefs head-on and review them in the context of the case at bar.[198]

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197 *See supra* note 148 and accompanying text.

198 *See* Dorsen & Sims, *supra* note 28, at 861 (advocating for evaluating Establishment Clause claims from the "viewpoint of those who reasonably claim to have

This subjective element may remedy some of the critiques previously directed at the *Lemon* test's objective observer, who is "'not to be identified with any ordinary individual, who might occasionally do unreasonable things,' but is 'rather a personification of a community ideal of reasonable behavior, determined by the collective social judgment.'"[199] Viewing this objective observer as a proxy for furthering the viewpoints of the religious majority,[200] many critics have called for the Supreme Court to instead evaluate Establishment Clause claims from the perspective of a "reasonable religious outsider,"[201] of "those who reasonably claim to have been harmed,"[202] or of the "reasonable nonadherent."[203] By adding a subjective component and forcing the reviewing court to accept the claimant's beliefs as true, this rule prevents a court from supplanting its religious beliefs for the claimant's. Further, this approach is simply more logical. If the Establishment Clause is truly meant to protect individuals from being made to feel like outsiders,[204] why should a court be able to tell a Muslim that they are not harmed by the presence of a crèche on public property just because some illusory "objective observer" would not believe that it is religious?

2. *The Legitimacy Rationale*

In addition to the wide-sweeping benefits that the no-veracity rule provides to individual liberties, this rule is simply more honest. When a court makes a determination that a given governmental action, for instance the statement "God save the United States," does not implicate religion in the face of an Establishment Clause challenge, it must go through great

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been harmed"); *see also infra* note 200 (detailing the critiques of the objective observer test).

199 Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 779–80 (1995) (O'Connor, J., concurring) (quoting W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON LAW OF TORTS 175 (5th ed. 1984)).

200 Critics have referred to the objective observer as the "reasonable Christian man," Dorsen & Sims, *supra* note 28, at 860, "ultrareasonable observer," *Pinette*, 515 U.S. at 807 (Stevens, J., dissenting) (arguing that Justice O'Connor's conception of an objective observer is essentially an "'ultrareasonable observer' who understands the vagaries of [the Supreme] Court's First Amendment jurisprudence"), and a "a stand-in for the judge and her personal predilections," B. Jessie Hill, *Anatomy of the Reasonable Observer*, 79 BROOK. L. REV. 1407, 1409 (2014).

201 Corbin, *supra* note 23, at 1545.

202 Dorsen & Sims, *supra* note 28, at 861.

203 Hill, *supra* note 200, at 1441.

204 *See* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

pains to secularize the reference.[205] Of course, the reference to God on some level is religious, and there is something disingenuous about the Court claiming that it is not even when claimants passionately argue to the contrary. In going through a series of mental gymnastics to declare a given action secular, the Court threatens its own legitimacy by making a conclusion that is so contrary to common sense. Conversely, under the no-veracity rule, while many of the religious references a court considers will still be upheld under the applicable Establishment Clause tests, the Court can maintain its honesty and legitimacy by acknowledging the potential religiosity of a government action and evaluating it based on the values that the religion clauses are meant to uphold.

3. *The Reconciliation Rationale*

Finally, the no-veracity rule reconciles the religion clauses by pointing them both toward the same objective: the promotion of individual liberties and the protection of religious sanctity.[206] By allowing courts to acknowledge that a given action may implicate religion, yet still uphold the action when the circumstances allow, this rule supports the idea that there is "room for play in the joints" between the Establishment and Free Exercise Clauses, and that government may accommodate religion beyond the accommodation mandated by the Free Exercise Clause.[207]

Further, to the extent that the no-veracity rule does not resolve all of the criticisms of existing Establishment Clause jurisprudence, and to the extent that this rule raises new problems of its own, the rule may highlight the inadequacies of Free Exercise jurisprudence. While the Free Exercise Clause has, compared to the Establishment Clause, enjoyed much more consistency in its doctrinal tests in recent years,[208] there are still areas in which it could be more fully developed. By reconciling the two clauses, this rule may allow the doctrine of both clauses to be developed at the same time, rather than the

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205 *See* Marsh v. Chambers, 463 U.S. 783, 818 (1983) (Brennan, J., dissenting) (arguing that sayings such as "God save the United States and this Honorable Court," "In God We Trust," "One Nation Under God," "have lost any true religious significance" and therefore do not violate the Establishment Clause).

206 *See supra* note 148 and accompanying text.

207 *See* Cutter v. Wilkinson, 544 U.S. 709, 713 (2005) ("'[T]here is room for play in the joints between' the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause." (quoting Locke v. Davey, 540 U.S. 712, 718 (2004)).

208 *See supra* note 27 and accompanying text.

inconsistent doctrinal developments that are currently observed.

B. The No-Veracity Rule Survives Potential Criticisms

A strong case can be made that the no-veracity rule makes large advancements for individual liberties. Despite this, some counterarguments may still be posed against it. This section explores and responds to two of the strongest counterarguments that may exist against this rule.

1. *Will This Proposed Formulation Make a Difference?*

One potential counterargument against the no-veracity rule is that it creates a distinction without a difference. Indeed, many of the critiques of current jurisprudence highlighted in this Note focus on the framing of court opinions and the word choice they use. It is quite possible, however, that the implementation of the no-veracity rule would not change the ultimate disposition of many Establishment Clause cases. By allowing courts to uphold a government action in spite of a claimant's sincere beliefs, does this really resolve any problems that currently plague the Establishment Clause?

It is certainly true that case dispositions may ultimately be similar even when the Establishment Clause tests are applied in tandem with this rule. Indeed, as outlined in Part II.B, despite a claimant's sincere beliefs, government actions implicating religion will likely continue to be upheld in the majority of cases. While this may be a flaw inherent in the existing Establishment Clause tests, it is not the concern that this Note seeks to address. Rather, the focus of this Note is simply to address the problem that arises when courts evaluate a claimant's sincere beliefs in the first place, regardless of the outcome of the case.

A court's generalized evaluations of religious symbolism are harmful for all involved.[209] From the perspective of the non-conforming observer, it is no consolation to be told that a display is "secular" when it, in their mind, violates their beliefs, endorses another religion, or conveys to them that their religion is not supported or welcome.[210] It simply makes no difference for a court to tell a claimant that a display should not

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209 *See supra* Part I.C.

210 *See* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.").

offend them because Santa Claus and two plastic reindeers are "never" religious symbols when their children begin asking why they have to celebrate Chanukah instead of Christmas. A no-veracity rule is therefore more considerate to majority and minority religions alike, allowing a court to acknowledge the religiosity of a government action and the impact that it may have in the eyes of some individuals, and then assess it accordingly, rather than telling members of minority religions to "brush it off" because their beliefs about a government action are wrong as a matter of law.

Additionally, the non-conforming observer is not the only one that is harmed by religious evaluations. Indeed, those that share the beliefs of the religion being endorsed or otherwise supported by the government action are also harmed by a court's valuation of their religious symbolism. In determining that a given holiday, symbol, or action is "secular," a court denigrates it and relegates it to mere secular status, thereby telling those that revere it that it is not special.[211] A no-veracity rule therefore prevents the "religion of secularism" that jurists and scholars alike have warned against; when courts denigrate given acts or symbols to mere secular status, they also espouse a level of hostility towards religion and the values they stand for.[212] The process of secularizing religious symbols sends a message to religious observers that accommodation is not possible. However, under this formulation of the no-veracity rule, a court may acknowledge the religious implications of a given act, and yet still uphold it through the lens of accommodationism.

Thus, while this formulation may not go far enough in preventing the suppression of minority viewpoints, it takes a unique approach to target this problem from a different angle while the Supreme Court continues to redevelop its Establishment Clause jurisprudence.

2. *Will the No-Veracity Rule Give Rise to False Claims?*

One fear that is expressed quite frequently in Establishment Clause literature is the fear of giving individuals a "heckler's veto" to shut down any government action or practice that they disagree with.[213] One can certainly imagine scenarios in which this problem might arise. For instance, the rainbow has

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211 *See* McConnell, *supra* note 89, at 127.

212 *See* Feofanov, *supra* note 45, at 344.

213 *See* Strasser, *supra* note 145, at 717.

significance in many religions, including Christianity.[214] Imagine that a town, in a celebration of LGBTQ+ pride, Earth Day, or even just a show of whimsy, decided to display a rainbow in a public space. If a claimant challenges the display, is the display likely to be struck down under the Establishment Clause?

While this scenario surely sounds concerning, these fears are most likely overblown. Of course, a person could attempt to challenge the rainbow display, but the Supreme Court's Establishment Clause tests are fully equipped to prevent any hecklers' vetoes from condemning it. Although a court must accept as true that one claimant believes that the display implicates religion, the court may still employ all of the Establishment Clause tests to evaluate the display. Thus, if the Court applied a test similar to that of the previously controlling coercion test, the claimant would need to be able to show that they are actually coerced by the rainbow display into abandoning their own religious (or nonreligious) convictions.[215] And, even under the much lower standard of the endorsement test, it seems unlikely that the individual would be able to establish that they sincerely believed the rainbow display was a government endorsement of religion that communicates to them that they are an outsider.[216] Beyond this, the endorsement test may still be measured from the perspective of the objective observer, which takes into account not only the beliefs of the claimant, but also those of the community and community values, history, and traditions.[217] Therefore, a singular "heckler" claimant generally will not overcome the endorsement test.

The individual would likely similarly struggle to establish an Establishment Clause claim under the more recent Establishment Clause tests, which may inquire into the context, purpose, history, and traditions of the display to determine whether it is permissible, despite the claimant's religious interpretation. As the Court acknowledged in *Van Orden* and *American Legion*, it is permissible for a reviewing court to accept that a display does implicate religion on some level, but still uphold the display based on the facts of a given case.[218] And, if the claim survives all of these tests, then it is likely a success of the

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214 Robert Hampshire, *What Is the Meaning of the Rainbow in the Bible?*, CHRISTIANITY (Aug. 28, 2020), https://www.christianity.com/wiki/bible/what-is-the-meaning-of-the-rainbow-in-the-bible.html [https://perma.cc/QMX8-M6WN].

215 *See supra* note 102 and accompanying text.

216 *See supra* note 102 and accompanying text.

217 *See supra* note 101 and accompanying text.

218 *See supra* notes 192–195and accompanying text.

rule in acknowledging minority viewpoints, and should not be viewed as a failure simply because majority religions may not ascribe to the same viewpoint.

Similarly, some have expressed fear of the possibility that "sham" religions may gain traction under the auspices of these protections for minority religions.[219] However, there are two reasons why this is unlikely. First, courts have repeatedly shown that they are well-equipped to ferret out the sham religions from the bona fide.[220] Second, and relatedly, while the no-veracity rule does not allow a court to inquire into the veracity of a claimant's beliefs, it does allow a court to determine whether the action implicates a protected religion at all.[221] Such is a necessary evil in determining whether the First Amendment's protections apply in the first place, and therefore does not implicate the no-veracity rule. Beyond this, though the court must acknowledge that at least one observer believes that the government action implicates religion, it can still determine that under the specific facts and circumstances of the case, that it does not implicate religion in a way that meaningfully offends the Establishment Clause.

CONCLUSION

While courts and scholars alike continue to grapple with how to evaluate Establishment Clause claims in the wake of *Lemon*'s demise, it is important to assure that the hands-off doctrine does not go by the wayside. Though recent years have observed the Supreme Court's tendency to evaluate the veracity of claims of religiosity in government actions under the Establishment Clause, these evaluations are not a necessary evil of our judicial system and should not be tolerated. Instead, keeping in mind the ultimate goal of preserving religious liberties, courts should learn from the Free Exercise Clause and refuse to evaluate the veracity of claimant's beliefs in both the Free Exercise and Establishment Clause contexts. Doing so will allow for a more honest, logical, and considerate approach to Establishment Clause jurisprudence in the future and assure that minority religions are respected and religious symbols are not denigrated.

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219 *See* Courtney Miller, *"Spiritual but Not Religious": Rethinking the Legal Definition of Religion*, 102 VA. L. REV. 833, 874 (2016).

220 *See* Gilbert, *supra* note 44, at 403.

221 *See supra* notes 151–154and accompanying text.