

Notes

“SOULS AREN’T SAVED JUST IN CHURCH BUILDINGS”: DEFINING “RELIGIOUS EXERCISE” UNDER THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

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ABSTRACT

Throughout its First Amendment jurisprudence, the Supreme Court has acknowledged the difficulty inherent in determining the scope of the multivalent term “religion.” The Court has repeatedly struggled to articulate workable definitions of religion, religious belief, and religious exercise. And the struggle is ongoing. The Religious Land Use and Institutionalized Persons Act (“RLUIPA”) protects “religious exercise” in the land-use context. If a claimant can prove that its religious exercise is substantially burdened by a land ordinance or zoning regulation, it may receive an exemption.

Although RLUIPA offers a definition of “religious exercise,” it remains unclear just what types of land uses and activities are protected by the statute’s broad scope. Surely RLUIPA protects formal worship uses, such as hosting a mass or offering Sunday School classes, but does it protect a homeless shelter on church grounds? Residential housing for synagogue staff? A Christian radio show?

This Note examines the current framework used to assess religious land-use claims under RLUIPA, arguing that this analysis not only leads to inconsistent outcomes but also impermissibly requires judges to involve themselves too deeply in questions of religious belief. Recognizing the danger in having judges act as the arbiters of religious belief, this Note proposes an alternative criterion for what uses ought to count as religious exercise: sincerity alone. If a land use is considered

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to be a sincere extension of a religious person or entity's religious belief it should qualify as religious exercise. This principle is supported by the Court's own First Amendment jurisprudence and the text and legislative history of RLUIPA.

[T]he Court leaves open the possibility a useful distinction might be drawn between laws that discriminate on the basis of religious status and religious use. Respectfully, I harbor doubts about the stability of such a line. Does a religious man say grace before dinner? Or does a man begin his meal in a religious manner? . . . [The Free Exercise] Clause guarantees the free exercise of religion, not just the right to inward belief (or status).¹

INTRODUCTION

Hand of Hope Pregnancy Resource Center (“Hand of Hope”), in Raleigh, North Carolina, is a Christian nonprofit that provides pro-life counseling to pregnant women.² In December 2015, Hand of Hope purchased an office location in a residential zone that permits “civic uses” of the property but does not permit “medical uses.”³ The property is adjacent to an abortion clinic, Preferred Women’s Health Center.⁴ Because Hand of Hope provides limited medical services, including nondiagnostic ultrasound imaging by licensed physicians, in addition to counseling and support services,⁵ the Raleigh City Council determined that Hand of Hope could not operate on its purchased property under the current zoning scheme.⁶ It also denied Hand of

1. *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2025–26 (2017) (Gorsuch, J., concurring in part) (citations omitted). Justice Gorsuch wrote to respond to the majority’s statement that the case could be distinguished from *Locke v. Davey*, 540 U.S. 712 (2004), because in *Locke*, “Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry. Here . . . Trinity Lutheran was denied a grant simply because of what it is—a church.” *Comer*, 137 S. Ct. at 2023 (emphasis added).

2. *About Us*, HAND OF HOPE PREGNANCY RESOURCE CTR. (2019), <https://www.handofhope.net/about-us/our-center> [<https://perma.cc/LN29-7RD8>] (“We exist solely to truly offer women and men who are experiencing an unexpected pregnancy a real choice in their decision making process.”).

3. *Hand of Hope Pregnancy Res. Ctr. v. City of Raleigh*, 332 F. Supp. 3d 983, 988 (E.D.N.C. 2018).

4. *Id.*

5. *About Us*, *supra* note 2 (“We seek to meet a physical need first through the following free services: physician-quality pregnancy testing, limited ultrasounds and NC Women’s Right to Know certification. . . . Life Coach counseling, Life Skills classes and post-abortion support Bible studies are also offered free of charge.”).

6. *Hand of Hope*, 332 F. Supp. 3d at 989.

Hope’s petition for rezoning and rejected its argument that its services fall under a permissible “civic use.”⁷

Hand of Hope filed suit against the City of Raleigh,⁸ arguing, *inter alia*, that the zoning ordinance imposed a substantial burden on its “religious exercise.”⁹ It contended that even though the particular parcel of land is not zoned for medical uses, the medical services it offers constitute its religious exercise and that it is therefore entitled to use the property for medical purposes¹⁰ under the Religious Land Use and Institutionalized Persons Act (“RLUIPA”).¹¹ RLUIPA provides:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.¹²

Although the question of whether Hand of Hope suffered a “substantial burden” surfaced in both plaintiff’s¹³ and defendant’s¹⁴

7. *Id.* at 989–90.

8. *See id.* at 992 (“Hand of Hope alleges that the City’s actions in denying it permission to provide free pregnancy support—including the use of limited obstetrical ultrasounds—at the Property violates the Religious Land Use and Institutionalized Persons Act (‘RLUIPA’) . . .”).

9. Complaint ¶¶ 106–13, *Hand of Hope*, 332 F. Supp. 3d 983 (No. 5:16-cv-00746); *see also id.* ¶ 110 (“Raleigh has imposed or implemented its land use regulations in a manner that has caused and continues to cause Hand of Hope delay, uncertainty, and expense in the exercise of their religiously motivated activities sufficient to constitute a substantial burden in the RLUIPA context.”). Hand of Hope also argued that the City of Raleigh violated its First Amendment rights to freedom of expression and free exercise. *Id.* ¶¶ 48–64, 96–105. It also claimed that the city unfairly discriminated against the Center in violation of the Equal Terms Provision of RLUIPA (42 U.S.C. § 2000cc(b)(1) (2018)). *Id.* ¶¶ 114–20. Finally, Hand of Hope stated causes of action for expecting mothers and religious organizations under the Fourteenth Amendment’s equal protection clause. *Id.* ¶¶ 65–89.

10. *Id.* ¶¶ 106–13.

11. Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc(a) (2018).

12. *Id.* § 2000cc(a)(1).

13. Complaint, *supra* note 9, ¶ 110.

14. Defendant’s Memorandum in Support of Motion for Summary Judgment at 7–14, 18, *Hand of Hope*, 332 F. Supp. 3d 983 (No. 5:16-cv-00746) [hereinafter Defendant’s Memorandum]. The City of Raleigh argued that even if the court found that the provision of medical services qualifies as religious exercise, that exercise had not been substantially burdened: Hand of Hope can “assemble, pray and communicate any type of spiritual message on the Property,” it can be “present, assemble and share [its] faith,” but simply cannot perform “medical uses” on the property. *Id.* at 2, 7. It argued that Hand of Hope “can still freely share its pro-life message at the Property . . . and can also use ultrasounds as a part of its ministry in any of the other districts that

arguments, the threshold issue¹⁵ to be decided was whether the institution's medical services, and specifically the provision of ultrasounds to pregnant women, qualified as "religious exercise" under the language of RLUIPA.¹⁶

Hand of Hope argued that its medical services, which it views as the manifestation of its Christian beliefs, should qualify as religious exercise.¹⁷ In its complaint against the City of Raleigh, Hand of Hope wrote that its "ministry of providing free pregnancy education and support services to and sharing the message of the Gospel with expectant mothers are religious expressive activities" that should be protected.¹⁸ Hand of Hope understands its services as a form of "ministry" that is "carried out by an active group of concerned Christians committed to providing . . . a message of hope and life affirming support."¹⁹ The provision of medical ultrasounds, which are used to show expecting mothers early images of their unborn children, is a tool that Hand of Hope believes is central to sharing a life-affirming Christian message.²⁰ Indeed, the self-described mission of Hand of

are zoned for commercial use." *Id.* at 9 (quotations omitted). This Note does not address the question of whether Hand of Hope would succeed under the substantial burden and compelling interest analysis but instead asks only whether the provision of medical services meets the threshold question of qualifying as religious exercise.

15. See *Africa v. Pennsylvania*, 662 F.2d 1025, 1029–30 (3d. Cir. 1981) ("[T]wo threshold requirements must be met before particular beliefs, alleged to be religious in nature, are accorded first amendment protection" are whether those beliefs are "(1) sincerely held, and (2) religious in nature, in the claimant's scheme of things. If either of these two requirements is not satisfied, the court need not reach the question . . . whether a legitimate and reasonably exercised state interest outweighs the proffered first amendment claim." (citations omitted)).

16. Defendant's Memorandum, *supra* note 14, at 14–16. The district court found that Hand of Hope was not entitled to a preliminary injunction against the City of Raleigh on its substantial burden claim because Hand of Hope "ha[d] not made a 'clear showing' of likelihood of success on the merits on its substantial burden claim," having failed to show that it had a reasonable expectation of using the property as a pregnancy resource center at the time of purchase. *Hand of Hope*, 332 F. Supp. 3d at 1005–06. But note that the court did not address the question of whether a medical clinic would qualify for RLUIPA protections as religious exercise. In doing so, the court seems to assume that Hand of Hope's conduct met the threshold determination of qualifying as "religious exercise" deserving of further substantial burden analysis. *Id.* at 1005.

17. Complaint, *supra* note 9, ¶¶ 109–10.

18. *Id.* ¶ 50.

19. *Id.* ¶ 97; see also *Mission Statement*, HAND OF HOPE PREGNANCY RESOURCE CTR. (2019) <https://www.handofhope.net/about-us/our-mission> [<https://perma.cc/83T5-8ZUJ>] ("As the Body of Christ in this community, we want to give the preborn a chance to live, we want to offer women life-affirming choices for their babies and post-abortive women and men a chance for healing and restoration. We accomplish this through our many client services.").

20. Complaint, *supra* note 9, ¶ 97 ("As a Christian center, we affirm the value of life from conception by compassionately sharing the gospel of Jesus Christ; and assisting individuals facing

Hope is to “affirm the value of life from conception by compassionately sharing the gospel of Jesus Christ; and assisting individuals facing the challenges of an unplanned pregnancy.”²¹ Hand of Hope looks to Christian Scripture to support its pro-life outreach.²² In short, Hand of Hope views all of its services, including those that are ostensibly “medical,” as the “outreach ministry of Jesus Christ through His church.”²³

The City of Raleigh rejected Hand of Hope’s position, arguing that medical services such as ultrasounds were not “religious exercise” but a decidedly secular activity and therefore deserved no special protection under RLUIPA.²⁴ The City stated: “RLUIPA does not protect *secular activities* like medical clinics” and thus, “[p]laintiff misplaces reliance on RLUIPA.”²⁵ In making this claim, the City of Raleigh made a distinction between the religious status of the property owner that performs the activity and the religious nature of the activity itself, noting “not every activity carried out by a religious entity or individual constitutes religious exercise ‘[R]eligious exercise’ does not encompass activities—even well-intentioned ones—that extend beyond the core missions of a church and are commonly performed by secular entities.”²⁶ In other words, according to the City, even though Hand of Hope is a religious nonprofit whose mission is to share the gospel through its pro-life services, its actions are not *necessarily* religious exercise simply because they are done by a religious actor; “[s]ecular means [] to religious end[s] . . . do not render the means religious.”²⁷

Hand of Hope’s case exemplifies a particular difficulty in the RLUIPA regime: defining and articulating the exact scope of the term “religious exercise” under that statute. Does RLUIPA presume a meaningful difference between what a religious organization *is*—its

the challenges of an unplanned pregnancy, to minister to the emotional and spiritual needs resulting from abortion to miscarriage and to promote sexual abstinence until marriage.”).

21. *Id.* ¶ 9.

22. *Id.* ¶¶ 10, 22 (citing Lamentations 2:19, James 2:16, Mark 16:15, and 1 Timothy 4:13 as scriptural support for its pro-life gospel message).

23. *Id.* ¶ 11. For further description of the center’s “ministry” and its specific activities, services, and provisions, see *id.* ¶¶ 13, 22–24. For the center’s assertion that God “called” it to purchase the property adjacent to the abortion clinic, see *id.* ¶¶ 19–20.

24. Defendant’s Memorandum, *supra* note 14, at 15–18.

25. *Id.* (emphasis added).

26. *Id.* at 15–16 (quotations omitted).

27. *Id.* at 17. For a summary of the outcome of *Hand of Hope*, see *infra* note 207 and accompanying text.

status as a religiously affiliated entity—and what a religious organization *does*—that is, the actions that the religious entity performs? Consider a few examples: Does a religious organization perform religious exercise when it teaches liturgical dance classes, houses refugees or illegal immigrants, or hosts a soup kitchen for homeless persons? What if an institution operates a Christian radio show or constructs administrative offices for synagogue staff? What about a “mega-church” that runs a large multi-purpose facility that houses sports events, charity concerts, and fundraising dinners?²⁸

This Note contends that there is no meaningful difference between a religious organization’s status and conduct. Specifically, it argues that individual or organizational religious identity cannot be properly separated from the actions of the individual or organization. Like Justice Gorsuch in *Trinity Lutheran*, “I harbor doubts about the stability of such a line.”²⁹ Rather than impose a strict, artificial binary between religious and secular activity, this Note proposes that in order to count as “religious exercise” under RLUIPA, a proposed land use must be (1) a formal worship use; (2) a traditionally accepted “accessory use,” necessary and customarily incidental to the property’s function, but subordinate to the principal use; or (3) a use motivated by—and an extension of—a religious entity’s sincere religious beliefs. This proposed standard is intentionally broad and seeks to include any actions of the religious entity motivated by sincere religious belief. It advises courts to inquire only into the sincerity of the religious belief that motivates the claimant’s desired land use, rather than undertake the difficult task of arbitrarily deciding what does and does not fit within the confines of “religious activity.”

To make this argument, this Note proceeds in three parts. Part I traces RLUIPA’s substantial burden provision to the Supreme Court’s First Amendment jurisprudence and highlights the Court’s decision to use sincerity as the defining test for what counts as legitimate belief. It then examines the statutory text of RLUIPA’s substantial burden

28. See, e.g., Jennifer S. Evans-Cowley & Kenneth Pearlman, *Six Flags over Jesus: RLUIPA, Megachurches, and Zoning*, 4 TUL. ENVTL. L.J. 203, 208 (2008) (noting that lawsuits concerning the non-worship activities of megachurches are proliferating); Sara C. Galvan, Note, *Beyond Worship: The Religious Land Use and Institutionalized Persons Act of 2000 and Religious Institutions’ Auxiliary Uses*, 24 YALE L. & POL’Y REV. 207, 209–10 (2006) (“RLUIPA could help [a] megachurch avoid complying with zoning codes, city planning goals, historic preservation ordinances, traffic requirements, and aesthetic regulations—resulting in a greater impact on neighborhoods and towns than the law’s framers might have envisioned”).

29. *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2025–26 (2017).

provision and explores the statute’s legislative history to argue that RLUIPA’s drafters intended a broad understanding of “religious exercise.”³⁰ Part II reviews appellate and lower court decisions to analyze the reasoning deployed when determining what non-worship land uses are included within RLUIPA’s scope. Lastly, Part III articulates an original limiting principle for determining the bounds of what should count as religious exercise in the land use context. It then applies the proposed principle to the Hand of Hope case study, concluding that as the extension of its sincere Christian beliefs, Hand of Hope’s provision of medical services should constitute “religious exercise” under RLUIPA.

I. RLUIPA: BACKGROUND, TEXT, AND PURPOSE

To understand RLUIPA’s “religious exercise” provision, it is first necessary to understand the statute’s history, text, and purpose. This Part begins by placing the Act within the broader context of the Supreme Court’s First Amendment jurisprudence, demonstrating RLUIPA to be largely a reaction to the Court’s curtailment of free exercise rights in the early 1990s. Next, this Part presents the text of RLUIPA itself, noting its broad and generally undefined language. It finally seeks to reconcile and make sense of some of the statute’s ambiguity by articulating the legislative purpose behind RLUIPA.

A. *RLUIPA in Context*

This Section briefly examines the Supreme Court’s evolving attempts to define the term “religion” and situates the passage of RLUIPA within the context of this jurisprudence.³¹ Generally, in cases of religious accommodation, people or groups that object to generally applicable laws on religious grounds must seek an exemption from that law by showing that it substantially burdens their First Amendment right to free exercise of religion.³² In two central cases, *Sherbert v.*

30. See *infra* Part I.B.

31. One scholar has noted that on matters of religious freedom, “the courts’ doctrines and decisions . . . exhibit no intelligible or coherent pattern.” STEVEN D. SMITH, *THE DISENCHANTMENT OF SECULAR DISCOURSE* 109 (2010).

32. See Eugene Volokh, *A Brief Political History of Religious Exemptions*, *VOLOKH CONSPIRACY* (Jan. 21, 2015, 9:39 AM), <https://reason.com/2015/01/21/a-brief-political-history-of-r> [<https://perma.cc/4H4A-N8Y3>] (explaining that in order to create a “peaceful . . . coexistence” lawmakers “creat[ed] exemptions for specific groups, or for people who had specific beliefs”).

*Verner*³³ and *Wisconsin v. Yoder*,³⁴ the Supreme Court held that state actions that substantially burden a person's religious exercise must pass strict scrutiny analysis³⁵ or the objector will be granted a religious exemption.³⁶

Despite providing "specific rules" for how religion should be treated,³⁷ and despite many judicial opinions that articulate in detail what the strict scrutiny analysis entails, neither the First Amendment nor its subsequent jurisprudence³⁸ successfully defines the foundational term at the heart of the analysis: "religion."³⁹ Dean Eduardo Peñalver, at the time a student at Yale Law School, noted:

33. *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Sherbert*, the Court held that a state's denial of benefits to an employee who refused to work on the Sabbath substantially burdened the employee's free exercise right in the absence of a compelling state interest. *Id.* at 410.

34. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Yoder*, the Court held that a law requiring all children up to the age of sixteen to attend school substantially burdened the free exercise right of the Amish plaintiffs who objected to their children attending school past the age of fourteen on religious grounds. *Id.* at 234.

35. As Professor Volokh observed:

[T]he Court adopted what later came to be called the *Sherbert/Yoder* test: Religious objectors are presumptively constitutionally entitled to exemptions from federal, state, or local laws that substantially burden their religious practice—e.g., by requiring them to do something they view as religiously forbidden, by forbidding them from doing something they view as religiously required. . . . That presumption can be rebutted (and it often was), but only when denying an exemption was seen as necessary to serve a compelling government interest.

Volokh, *supra* note 32. Strict scrutiny mandates that "if a government action substantially burdens the exercise of religion . . . the government must demonstrate that imposing the burden serves a compelling public interest and does so by the least restrictive means." 146 CONG. REC. S7,774 (daily ed. July 27, 2000) (describing the reinstatement of the strict scrutiny standard with the passage of RLUIPA).

36. *Yoder*, 406 U.S. at 220 ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."); *Sherbert*, 374 U.S. at 406 ("We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right."). *Yoder* further explained: "The essence of all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." *Yoder*, 406 U.S. at 215.

37. Jonathan P. Kuhn, Note, *The Religious Difference: Equal Protection and the Accommodation of (Non)-Religion*, 94 WASH. U. L. REV. 191, 191 (2016).

38. Steven G. Gey, *Vestiges of the Establishment Clause*, 5 FIRST AMEND. L. REV. 1, 4 (2006) ("One of the few things constitutional scholars of every stripe seem to agree about is the proposition that the Court's Establishment Clause jurisprudence is an incoherent mess." (citation omitted)).

39. Eduardo Peñalver, Note, *The Concept of Religion*, 107 YALE L.J. 791, 791 (1997) ("Far less frequently, however, have the courts expressly considered the meaning of the concept that stands at the very heart of the Religion Clauses: religion.").

Religion is a commonly used and widely understood term in our everyday language, not some obscure term of art in need of technical definition. Indeed, when the Supreme Court discusses “religion,” most of the time it uses the word unreflectively as if it were completely self-defining.⁴⁰

Accordingly, “it simply does not appear there is any essence of religion, with which a belief becomes religious and without which a belief cannot be religious.”⁴¹

In some cases, however, the Court was unable to avoid this definitional question and tried to articulate a workable understanding of religion. For example, the Court in *Yoder* took a centrality approach and focused on the importance of the plaintiffs’ beliefs to their Amish religion.⁴² The Court made clear that “it would not carve out an exemption to Wisconsin’s compulsory school attendance laws for parents or children whose action *was not directly grounded in religious belief*.”⁴³ The Court also made a distinction between those actions that are “philosophical and personal rather than religious,”⁴⁴ comparing the Amish plaintiffs to philosopher Henry David Thoreau and stating that Thoreau’s inward spirituality did not amount to religious belief in the same way that the plaintiffs’ beliefs did.⁴⁵ Although the Court’s comparison attempted to explain the distinction between personal philosophies, political ideology, and religion, “it is not clear that such a distinction is actually possible.”⁴⁶ *Yoder* was not the first time, however, that the Court attempted to define the contours of religion.

40. *Id.*

41. Kuhn, *supra* note 37, at 192; *see also* Andrew Koppelman, *Religion’s Specialized Specialness*, 79 U. CHI. L. REV. DIALOGUE 71, 75 (2013) (“In American law, there is no set of necessary and sufficient conditions that will make something a ‘religion.’”).

42. *See* Wisconsin v. Yoder, 406 U.S. 205, 210 (1972) (“Amish communities today are characterized by a *fundamental belief* that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life aloof from the world and its values is *central to* their faith.” (emphasis added)).

43. H.N. Hirsch, *Let Them Eat Incidentals: RFRA, the Rehnquist Court, and Freedom of Religion*, in OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMMODATION IN PLURALIST DEMOCRACIES, *infra* note 51, at 280, 288 (citing *Yoder*, 406 U.S. at 210).

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

45. *Id.* (explaining that when Thoreau chose to “reject[] the social values of his time and isolate[] himself at Walden Pond,” his “belief [did] not rise to the demands of the Religion Clauses”).

46. Kuhn, *supra* note 37, at 192 (observing that Black’s Law Dictionary “qualifies every factor that it includes in its definition of religion, leaving nothing concrete in the concept”).

In the late nineteenth century, the Supreme Court articulated in *Davis v. Beason*⁴⁷ a “theistic”—that is, god-centered—definition of religion, stating that religious belief consists of “one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and his character and of obedience to his will.”⁴⁸ Similarly, in *United States v. Macintosh*,⁴⁹ Chief Justice Hughes wrote in dissent that an exemption should be made for those who hold a “belief in a relation to God involving duties superior to those arising from any human relation.”⁵⁰ This approach suggests that there are certain elements or “essences” that must be present for a system of beliefs to qualify as a religion.⁵¹ However, in *Torcaso v. Watkins*,⁵² the Court moved away from a purely theistic view of religion and recognized that the Free Exercise Clause also protects the practice of religions that are inwardly spiritual but which do not worship a personal god, including the practice of Buddhism, Taoism, and Secular

47. *Davis v. Beason*, 133 U.S. 333 (1890).

48. *Id.* at 342.

49. *United States v. Macintosh*, 283 U.S. 605 (1931).

50. *Id.* at 633–34 (Hughes, C.J. dissenting). The Court in *Macintosh* ultimately denied respondent’s petition for naturalization because he objected on grounds of religious conscience to participation in the war but was not awarded the exemption when he refused to follow the required terms of citizenship. *See id.* at 625–26.

51. Content-based definitions attempt to distill the concept of religion to a set of necessary requirements such as the worship of a deity, reliance on a holy text, submission to moral doctrines, adherence to traditional practices such as attending a weekly worship service or participating in sacraments, and the presence of “faith.” *See* Kent Greenawalt, *Five Questions About Religion Judges Are Afraid To Ask*, in *OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH* 196, 207 (Nancy L. Rosenblum ed., 2000) (cautioning that any judicial test that counts as religious only those systems of beliefs that meet certain factor tests such as reliance on a supreme being or belief in extra-temporal consequences is “worrisome,” and proposing instead an analogical approach to the definition). Critics of multi-factor “essence of religion” tests regard such definitions as dangerously limiting. *See, e.g.*, Peñalver, *supra* note 39, at 811. (“Because it spells out essential characteristics, a dictionary style definition of religion runs the risk that the use of religion in everyday language will broaden in the future . . . leaving the courts with a definition of religion that favors certain religions over others.”); *see also* Courtney Miller, Note, “*Spiritual But Not Religious*”: *Rethinking the Legal Definition of Religion*, 102 VA. L. REV. 833, 869 (2011) (“[B]y relying solely on specific language contained in certain opinions, the literalist approach does not explain how it reconciles or fleshes out the doctrine.”).

52. *Torcaso v. Watkins*, 367 U.S. 488 (1961).

Humanism.⁵³ The Court then announced in *United States v. Seeger*⁵⁴ that persons who possess “[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God” are owed religious accommodations.⁵⁵ There, the Court analyzed the issue of whether Seeger, a pacifist who objected to military service, was entitled to an exemption under the Universal Military Training and Service Act,⁵⁶ which excepted conscientious objectors from military service if their reasons for objection were grounded in belief in a “Supreme Being.”⁵⁷ Seeger admitted that he did not have a belief about the existence of God and in fact was ambivalent about the matter.⁵⁸ Instead, he argued that his objection should be recognized because it stemmed from religious study and faith, not merely his personal morals.⁵⁹ The Court held that under the statutory language of “religious belief,” Seeger was entitled to conscientious objector status despite the absence of an explicit belief in a “Supreme Being”—a term which the court acknowledged was difficult to define—because of his “unquestioned sincerity” in beliefs that occupied the same place in his life as belief in a God.⁶⁰

These cases illustrate that sincerity of belief, rather than the content of the beliefs themselves, is the lodestar in defining what constitutes bona fide religious belief and practice in the Court’s First Amendment jurisprudence.⁶¹ This “sincerity approach” has expanded

53. *Id.* at 495–96 (holding that the state cannot “aid those religions based on a belief in the existence of God as against those religions founded on different beliefs” such as “Buddhism, Taoism, Ethical Culture, Secular Humanism and others”). Later, in *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), the Court solidified this rule from *Torcaso*, holding that the State cannot prefer theistic religions over nontheistic ones without violating the Establishment Clause. *Id.* at 716 (“[I]t is clear that Thomas terminated his employment for religious reasons.”).

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

55. *Id.* at 176.

56. Military Selective Service Act, Pub. L. No. 759, ch. 625, 62 Stat. 604 (1948) (codified as amended at 50 U.S.C. § 3806 (2018)).

57. 50 U.S.C. § 3806(j).

58. *Seeger*, 380 U.S. at 166–67.

59. *Id.*

60. *Id.* at 177, 187.

61. In contrast to the sincerity approach, the Third Circuit proposed an analogical approach to defining “religion.” See *Africa v. Pennsylvania*, 662 F.2d 1025 (3d. Cir. 1981); *Malnak v. Yogi*, 592 F.2d 197, 198 (3d. Cir. 1979). An analogical approach is “a methodology for determining whether or not a specific belief system is a religion, rather than a definition in the dictionary sense.” Peñalver, *supra* note 39, at 794. Definition by analogy suggests setting criteria based on the characteristics of commonly accepted “religions,” such as whether the belief system concerns

the protections afforded to adherents seeking religious accommodation.⁶² Under the sincerity approach, it is not what is *believable* but rather what is sincerely *believed* that is the defining factor in determining whether a person's religious exercise has been substantially burdened.⁶³ Accordingly, courts are reluctant to inquire into the substance, coherency, or uniformity of religious belief.⁶⁴ In fact, "[r]eligious observances need not be uniform to merit the protection of the [F]irst [A]mendment . . . [because d]iffering beliefs and practices are not uncommon among followers of a particular creed."⁶⁵ Assessing the sincerity of a belief requires giving "due regard to the uncertainty that is often a part of religious conviction and to the possibility of a kind of cognitive dissonance that allows people to embrace propositions that are in severe tension with each other."⁶⁶ Thus, if the court determines that a petitioner sincerely holds a belief, there is no further inquiry into whether the belief is "sufficiently grounded in religious doctrine to deserve protection."⁶⁷

The sincerity approach tends to favor the plaintiff seeking accommodations for her religious exercise because it does not second-guess the importance of the belief to the claimant's religion. That favoritism for sincere religious believers shifted in 1990, however, in the landmark case *Employment Division v. Smith*,⁶⁸ where the Court made it much more difficult to succeed on a free exercise claim, even

itself with "fundamental problems of human existence" and claims a "comprehensive truth." Greenawalt, *supra* note 51, at 210; *see also* Miller, *supra* note 51, at 871–72.

62. The sincerity approach stems from the language of *Seeger*. There, the Court stated that "[the] task is to decide *whether the beliefs professed by a registrant are sincerely held* and whether they are, in his own scheme of things, religious." *Seeger*, 380 U.S. at 185 (emphasis added).

63. *See id.* at 185 ("[W]hile the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.'"); Andy G. Olree, *The Continuing Threshold Test for Free Exercise Claims*, 17 WM. & MARY BILL RTS. J. 103, 108 (2008) ("The test has never required claimants to prove their religious beliefs are true, only that they are religious in nature and sincerely held.").

64. *Emp't Div., Dept. of Human Res. of Or. v. Smith*, 494 U.S. 872, 886 (1990) (opining that judges should not "question the centrality of particular beliefs or practices to a faith or the validity of particular litigants' interpretation of [a particular denomination's] creeds" (quoting *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989))).

65. *Dettmer v. Landon*, 799 F.2d 929, 932 (4th Cir. 1986).

66. Greenawalt, *supra* note 51, at 205.

67. Miller, *supra* note 51, at 852; *see* *Thomas v. Review Bd., Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981) ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith.").

68. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

for sincere religious beliefs.⁶⁹ In *Smith*, members of the Native American Church sought exemption from a generally applicable statute that made drug use illegal, arguing that smoking peyote was part of their religious ritual.⁷⁰ In an opinion by Justice Scalia, the Court claimed that it had never held that “an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate”⁷¹ and that it was not an unconstitutional violation to deny church members their unemployment compensation when the denial resulted from their use of the drugs.⁷² Effectively overturning the use of the strict scrutiny standard for questions of religious accommodation, the Court instead relied on a rational basis test.⁷³ Accordingly, the opinion in *Smith* “ma[de] it seem that the rare victories for Free Exercise over the previous decades were to be obliterated entirely.”⁷⁴ In response, Congress passed RFRA⁷⁵ and RLUIPA⁷⁶ to effectively overturn *Smith* and reinstate the strict scrutiny analysis articulated in *Sherbert* and *Yoder*.⁷⁷

69. *See id.* at 890 (holding that the Free Exercise Clause does not require nondiscriminatory religious practice exemptions in state drug laws).

70. *Id.* at 874.

71. *Id.* at 878–79.

72. *Id.* at 890.

73. *Id.* at 883 (rejecting the claim that “religious exemption must be evaluated under the balancing test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) . . . [under which] governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest”).

74. Aviam Soifer, *The Fullness of Time*, in OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMMODATION IN PLURALIST DEMOCRACIES, *supra* note 51, at 245, 255.

75. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-41, 107 Stat. 1488 (codified as amended at 42 U.S.C. § 2000bb–2000bb-4 (2018)); *see also* 146 CONG. REC. 16,702 (2000) (explaining that *Smith* “largely eliminated the strict scrutiny test for free exercise cases. . . . [and] in direct response to the *Smith* decision, the 103rd Congress enacted the Religious Freedom and Restoration Act (RFRA), reapplying and extending the strict scrutiny test to all government actions” (emphasis added)).

76. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified as amended at 42 U.S.C. § 2000cc–2000cc-5 (2018)); *see also* *Yellowbear v. Lampert*, 741 F.3d 48, 52–53 (10th Cir. 2014) (“In RLUIPA Congress . . . (re)impose[d] *Sherbert*’s balancing test . . . in only two specific arenas, arenas in which Congress found the record of religious discrimination particularly clear and compelling[:] . . . in the land use context . . . [and] in the prison context . . .”).

77. Hirsch, *supra* note 43, at 283. RLUIPA has explicitly codified the strict scrutiny test:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—(A) is in furtherance of a *compelling*

B. RLUIPA's Broad Definition: Statutory Text and Interpretation

Despite Congress's desire to reestablish strong protections for free exercise and religious accommodation in RLUIPA by reinstating strict scrutiny and providing a specific definition of "religious exercise," the statute's language does not completely resolve the general ambiguity in this term.⁷⁸ Indeed, as the Court has noted, "[t]he determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task."⁷⁹ However, analyzing the statutory scheme shows that the statute does some work to guide courts on the application of its terms.⁸⁰

RLUIPA protects persons and institutions from land-use regulations that "impose[] a substantial burden on the religious exercise of a person, including a religious assembly or institution."⁸¹ Persons who feel that a land-use law has substantially burdened their religious exercise have a claim to accommodation or exemption under RLUIPA.⁸² To succeed in challenging a land-use regulation or zoning ordinance under RLUIPA, the plaintiff must meet a three-part test:

governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1) (emphasis added); *see also* World Outreach Conference Ctr. v. City of Chicago, 591 F.3d 531, 534 (7th Cir. 2009) ("If we're right that section 2000cc(a)(1) of RLUIPA codifies *Sherbert v. Verner* . . ."); Soifer, *supra* note 74, at 254 (noting that these statutes attempted to deploy "congressional power to remedy the deprivation of rights against a background of judicial failure to do so").

78. The question may be fairly raised as to what extent the Court's First Amendment jurisprudence regarding religious belief bears on the statutory definition of religious exercise provided in RLUIPA. When Congress passed RLUIPA, it intended to provide even broader protection than that offered by the Court's jurisprudence in *Sherbert* and *Yoder*. *See* Greene v. Solano Cty. Jail, 513 F.3d 982, 988 (9th Cir. 2008) (commenting that Congress "distinguish[ed] RLUIPA from traditional First Amendment jurisprudence . . . [by] expand[ing] the reach of the protection to include any 'religious exercise,' including 'any exercise of religion, whether or not compelled by or central to, a system of religious belief'" (quoting *Cutter v. Wilkinson*, 544 U.S. 709 (2005)); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 760 (7th Cir. 2003) ("Congress's intent to expand the concept of religious exercise [previously] contemplated . . . in traditional First Amendment jurisprudence.").

79. *Thomas v. Review Bd., Ind. Emp't Sec. Div.*, 450 U.S. 707, 715–16 (1981).

80. *See generally* 42 U.S.C. § 2000cc–2000cc-5 (providing definitions, rules of construction, and other guidelines).

81. 42 U.S.C. § 2000cc(a)(1).

82. The relevant part of the RLUIPA provides:

[G]overnment may avoid the preemptive force of any provision of this chapter by . . . retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

Id. § 2000cc-3(e).

the claimant must show that “he wishes to engage in (1) a religious exercise (2) motivated by a sincerely held belief, which exercise (3) is subject to a substantial burden imposed by the government.”⁸³ If a government action substantially burdens the plaintiff’s sincere exercise of religion, “the government must demonstrate that imposing the burden serves a compelling public interest and does so by the least restrictive means.”⁸⁴ The strict scrutiny test allows for a balance between protecting a broad scope of religious exercise and acknowledging that some governmental interests are important enough to outweigh even a substantial burden on that exercise. As a reaction against *Smith*, RLUIPA sought both to reinstate strict scrutiny and to “define[] ‘religious exercise’ capaciously.”⁸⁵ Indeed, both the plain text of RLUIPA and the legislative history behind the statute’s passage strongly suggest that the drafters intended a broad interpretation of the term “religious exercise.”⁸⁶

First, the text of RLUIPA reveals a broad interpretation of religious exercise. In the statute’s definition section, “religious exercise” is defined as “any exercise of religion.”⁸⁷ As the Fifth Circuit has noted, this “generous”⁸⁸ and “broad” definition “evinces Congress’s intent to expand the concept of religious exercise that was used by courts in identifying ‘exercise of religion’ in RFRA cases.”⁸⁹ “To remove any remaining doubt regarding how broadly Congress aimed to define religious exercise,”⁹⁰ the statute then expressly dictates broad construction: “This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.”⁹¹ The mandate of this provision is clear: when in doubt, err on the side of protecting more, not less, religious exercise.

83. *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1312 (10th Cir. 2010).

84. 146 CONG. REC. 16,698 (2000).

85. *Holt v. Hobbs*, 574 U.S. 352, 385 (2015).

86. See Galvan, *supra* note 28, at 208 (“Under RLUIPA, Congress wanted religious exercise to be broadly construed—‘to the maximum extent permitted by the terms of [the statute] and the Constitution.’” (alteration in original) (quoting 42 U.S.C. § 2000cc-3(g))). The statute’s language appears to “provide maximal protection of religious exercise.” Jason Z. Pesick, Note, *RLUIPA: What’s the Use?*, 17 MICH. J. RACE & L. 359, 367 (2012).

87. 42 U.S.C. § 2000cc-5(7)(A) (emphasis added).

88. *Adkins v. Caspar*, 393 F.3d 559, 568 (5th Cir. 2009).

89. *Id.* at 567.

90. *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 347 (2d Cir. 2007).

91. 42 U.S.C. § 2000cc-3(g) (2018).

Looking to the context of its passage, it is clear that RLUIPA was designed to reinstate the broad protections for religious liberty that were diluted after the *Smith* decision and even to correct courts' misapplication of a preceding statute, RFRA.⁹² Under RFRA, many courts had held that a petitioner's conduct would qualify as religious exercise only if it was central to the person's religious belief.⁹³ RLUIPA's drafters felt that this was a mistake and did not want the same misunderstanding of the statute's intended scope to occur in cases brought under RLUIPA. Accordingly, the drafters provided the express negation of a centrality requirement.⁹⁴ And after RLUIPA's passage, RFRA was actually amended to incorporate the same definition for "religious exercise" that is now provided in RLUIPA to prevent future misapplication of RFRA.⁹⁵

92. Congress first tried to pass a bill entitled the Religious Liberty Protection Act of 1998 ("RLPA"), but the bill was not enacted into law because of various issues with the statute's language, including the concern that the statute would override certain civil rights laws. 146 CONG. REC. S7778 (2000). This precursor to RLUIPA was a direct reaction against both *Employment Division v. Smith*, 494 U.S. 872 (1990), and *City of Boerne v. Flores*, 521 U.S. 507 (1997), the latter of which invalidated RFRA as an unconstitutional exercise of Congress's power under Section 5 of the Fourteenth Amendment, and is therefore instructive for thinking about the breadth of protection that Congress would have considered as it drafted the narrower RLUIPA statute. See H.R. REP. NO. 106-219, at 40 (1999) (stating that "[t]he Supreme Court's Decision in *Smith* set a truly dangerous precedent" and describing the need for RLPA to reinstate broad protections for religious liberty); see also H.R. REP. NO. 106-1048, at 272 (2000) (commenting that RLUIPA's passage would ensure the "level of protection" expected of a "society that values religious liberty").

93. See e.g., *Abdur-Rahman v. Mich. Dep't of Corrections*, 65 F.3d 489, 492 (6th Cir. 1995) (holding that the religious services denied to the plaintiff were not "fundamental to [his] religion" and thus this denial did not substantially burden his free exercise rights); *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995) (holding that the religious activities prevented by the government must be "mandated by the . . . religion" for the interference to constitute a substantial burden on a person's free exercise rights); *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995) (holding that governmental action must inhibit some "central tenet" of a person's religious beliefs to constitute a substantial burden on his free exercise rights).

94. 146 CONG. REC. 19,124 (2000) (extension of remarks of Rep. Canady) (observing that while the absence of a centrality requirement was "consistent with RFRA's legislative history . . . much unnecessary litigation resulted from the failure to resolve this question in statutory text"); see also *Elsinore Christian Ctr. v. City of Lake Elsinore*, 291 F. Supp. 2d 1083, 1091 (C.D. Cal. 2003) (stating that although courts analyzing RFRA claims regularly asked whether the burden was on a belief that was central to religious doctrine, "RLUIPA was intended to and does upset this test"), *rev'd on other grounds*, 197 F. App'x 718 (9th Cir. 2006).

95. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274 § 7, 114 Stat. 803 (codified as amended at 42 U.S.C. § 2000cc-5 (2018)) (amending Section 5 of the Religious Freedom Restoration Act of 1993, "in paragraph (4), by striking all after 'means' and inserting 'religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000'"). Previously, RFRA had defined the "exercise of religion"

The definition section of RLUIPA likewise articulates a broad rule for defining the term “religious exercise.”⁹⁶ The provision reads: “The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.”⁹⁷ Admittedly, this is a strangely worded provision that seems almost tautological, using the term “religious exercise” to define “religious exercise.”

Attempting to clarify, the Department of Justice, which has the authority to investigate RLUIPA violations and enforce the statute by bringing lawsuits against alleged violators on behalf of the United States,⁹⁸ interprets this provision in the following way: “[§ 2000cc-5(7)(B)] makes clear that religious exercise under RLUIPA includes construction or expansion of places of worship and other properties used for religious exercise.”⁹⁹ For example, if “[a] church is denied a permit to build an addition to accommodate more Sunday school classes, which it believes it needs to carry out its religious mission[, t]his may violate RLUIPA if the town cannot show a compelling reason for the denial.”¹⁰⁰ And in fact, many courts have affirmed that the construction of a church or the expansion of an existing church facility qualifies as religious exercise under this provision.¹⁰¹ One district court

as “the exercise of religion under the First Amendment to the Constitution.” Pub. L. No. 103-141, 107 Stat. 1489 (1993).

96. *Id.* § 2000cc-5.

97. *Id.* § 2000cc-5(7)(B).

98. *Religious Land Use and Institutionalized Persons Act*, U.S. DEP’T OF JUSTICE: CIVIL RIGHTS DIV. (Nov. 7, 2018), <https://www.justice.gov/crt/religious-land-use-and-institutionalized-persons-act> [<https://perma.cc/EU32-3R63>].

99. U.S. DEP’T OF JUSTICE: CIVIL RIGHTS DIV., STATEMENT OF THE DEP’T OF JUSTICE ON THE LAND USE PROVISIONS OF RLUIPA 4 (June 13, 2018), <https://www.justice.gov/crt/page/file/1071251/download> [<https://perma.cc/9J6H-2RKZ>].

100. U.S. DEP’T OF JUSTICE: CIVIL RIGHTS DIV., INFORMATION ABOUT: FEDERAL RELIGIOUS LAND USE PROTECTIONS, <https://www.justice.gov/crt/page/file/1070736/download> [<https://perma.cc/GNA8-96CG>].

101. BRIAN W. BLAESSER & ALAN C. WEINSTEIN, *FEDERAL LAND USE LAW & LITIGATION* § 7:28 (2019 ed.); *see also* *Rocky Mountain Christian Church v. Bd. of Cty. Comm’rs of Boulder Cty.*, 612 F. Supp. 2d 1163, 1170 (D. Colo. 2009) (holding that the “denial of a church’s expansion proposal can constitute a substantial burden” on religious exercise); *Mintz v. Roman Catholic Bishop of Springfield*, 424 F. Supp. 2d 309, 319 (D. Mass. 2006) (finding that the Catholic Church’s application for permit to construct parish center was a protected “extension” of the church’s “religious exercise” when the center would be used for a religious education office, a meeting place for parish council, and other church gatherings).

has gone as far as to state that this provision “definitionally equat[es] land use with ‘religious exercise.’”¹⁰²

Though RLUIPA protects only those exercises “motivated by religious faith” and not “every act born of personal conscience or philosophical conviction,”¹⁰³ the statute rejects the idea that a specific land use must be mandated by or central to the claimant’s asserted religion.¹⁰⁴ In fact, it expressly does away with a centrality requirement.¹⁰⁵ This was an intentional decision by RLUIPA’s drafters to correct the existing practice by courts to consider the centrality of the specific exercise to the adherent’s faith.¹⁰⁶ In fact before RLUIPA:

[Z]oning regulations and decisions . . . have not generally been held . . . to impose a substantial burden on religious exercise. Clearly, RLUIPA was intended to and does upset this test. By explicitly prescribing that the centrality of a religious belief is immaterial . . . RLUIPA establishes an entirely new and different standard than that employed in prior Free Exercise Clause jurisprudence.¹⁰⁷

Instead, RLUIPA expressly provides that “any exercise of religion” counts as religious exercise “whether or not compelled by, or central to, a system of religious belief.”¹⁰⁸

The express negation of the centrality requirement effectively means that a religious person’s beliefs will not be subject to judicial scrutiny about whether their beliefs are fundamental tenets of the religion and thus justify the statute’s protection.¹⁰⁹ In other words,

102. *Elsinore Christian Ctr. v. City of Lake Elsinore*, 291 F. Supp. 2d 1083, 1091 (C.D. Cal. 2003), *rev’d on other grounds*, 197 F. App’x 718 (9th Cir. 2006).

103. *Yellowbear v. Lampert*, 741 F.3d 48, 53 (10th Cir. 2014); *see also* John J. Dvorske, Annotation, *Validity, Construction, and Operation of Religious Land Use and Institutionalized Persons Act of 2000* (42 U.S.C.A. §§ 2000cc et seq.), 181 A.L.R. FED. 247 § 8 (2002) (“[T]he claim must be rooted in religious belief and not purely secular philosophical concerns.”).

104. 42 U.S.C. § 2000cc-5(7)(A) (2018).

105. *Pesick*, *supra* note 86, at 367 (“RLUIPA eliminates a centrality-of-belief test that would have courts inquire into how central an activity is to a system of religious belief before deciding if the activity qualifies as religious exercise.”).

106. *Men of Destiny Ministries, Inc. v. Osceola Cty.*, No. 6:06-cv-624, 2006 WL 3219321, at *4 (M.D. Fla. Nov. 6, 2006) (“Prior to the passage of RLUIPA, courts considering whether government activity imposed a substantial burden on religious exercise . . . generally considered whether the religious exercise implicated by zoning decisions was integral to a believer’s faith.”).

107. *Elsinore Christian Ctr. v. City of Lake Elsinore*, 291 F. Supp. 2d 1083, 1090–91 (C.D. Cal. 2003) (citations omitted).

108. 42 U.S.C. § 2000cc-5(7)(A) (2018).

109. *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005) (“RLUIPA bars inquiry into whether a particular belief or practice is ‘central’ to a . . . religion.”).

“when a sincere religious claimant draws a line ruling in or out a particular religious exercise, it is not for a court to say that the line he drew was an unreasonable one.”¹¹⁰ The Supreme Court has rejected on more than one occasion the idea that its members should probe religious doctrine, stating that “the resolution [of what counts as religious belief and practice] is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”¹¹¹ Accordingly, RLUIPA explicitly articulates that it is not the role of courts to question how a secular land use fits into a belief system; instead, the claimant must show only the sincerity of the beliefs that give rise to the desired use.

Sincerity then is a different element than *centrality*.¹¹² RLUIPA “does not offer refuge to canny operators who seek through subterfuge to avoid laws they’d prefer to ignore. . . . But [instead] ask[s] whether a claimant truly holds a religious belief,” which “isn’t to suggest we may decide whether the claimant’s religious belief is true.”¹¹³ Accordingly, then-Judge Gorsuch noted that while “trying to separate the sacred from the secular can be a tricky business . . . at least one feature of the statute’s ‘religiosity’ requirement often proves relatively unintrusive in its application and not infrequently dispositive: the question of sincere belief.”¹¹⁴

110. *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014).

111. *Thomas v. Review Bd., Ind. Emp’t Sec. Div.*, 450 U.S. 707, 714 (1981); *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) (“[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment.”); *Yellowbear*, 741 F.3d at 54 (“Just as civil courts lack any warrant to decide the truth of a religion, in RLUIPA Congress made plain that we also lack any license to decide the relative value of a particular exercise to a religion.”).

112. *See, e.g., Sossaman v. Lone Star State of Tex.*, 560 F.3d 316, 332 (5th Cir. 2009) (“The practice burdened need not be central to the adherent’s belief system, but the adherent must have an honest belief that the practice is important to his free exercise of religion.”); *Kay v. Bemis*, 500 F.3d 1214, 1220 (10th Cir. 2007) (“Sincerely held is different from central, and courts have rightly shied away from attempting to gauge how central a sincerely held belief is to the believer’s religion.”); *see also Dvorske, supra* note 103, § 8 (“Although Religious Land Use and Institutionalized Persons Act (RLUIPA) bars inquiry into whether a particular belief or practice is central to a . . . religion, the RLUIPA does not preclude inquiry into the sincerity of a prisoner’s professed religiosity.”).

113. *Yellowbear*, 741 F.3d at 54.

114. *Id.* at 53–55; *see also Williams v. Wilkinson*, 645 F. App’x 692, 699 (10th Cir. 2016) (“To survive a motion to dismiss, therefore, [the plaintiff] was required to allege only that his request [for accommodation] was motivated by a sincerely held religious belief and that his exercise of that belief has been substantially burdened by the government.”); *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574 (2d Cir. 2002) (“An individual claiming violation of free

Determining whether a claimed religious belief is sincere or not should require minimal inquiry into the belief itself.¹¹⁵ “Th[e] inquiry is specific to [the plaintiff’s] subjective beliefs: ‘[T]he issue is not whether the lack of [an accommodation] substantially burdens the religious exercise of any [] practitioner, but whether it substantially burdens [the plaintiff’s] own exercise of his sincerely held religious beliefs.’”¹¹⁶ An action motivated by sincerely held religious beliefs is protected “even when it is not a recognized tenet of [an actor’s] religion or consistent with the beliefs of others who practice his faith.”¹¹⁷ Judge Gorsuch described the test to determine whether an exercise is sincere this way:

When inquiring into a claimant’s sincerity, then, [a court’s] task is instead a more modest one, limited to asking whether the claimant is (in essence) seeking to perpetrate a fraud on the court—whether he actually holds the beliefs he claims to hold—a comparatively familiar task for secular courts that are regularly called on to make credibility assessments—and an important task, too, for ensuring the integrity of any judicial proceeding.¹¹⁸

Sincerity concerns itself primarily with excluding fraudulent claims. The limits on RLUIPA’s scope are mainly defined by excluding only those land uses that falsely claim to be religiously motivated in order to avoid legitimate zoning regulations. In the absence of fraud, any conduct or land use motivated by sincere religious belief will—and should—always be protected as religious exercise, regardless of its connection to a formal worship use.

This interpretation supports the argument that even land uses that appear “secular” at first glance, but which actually are motivated by the religious person or entity’s sincere religious belief, should be

exercise rights need only demonstrate that the beliefs professed are ‘sincerely held’ and in the individual’s ‘own scheme of things, religious.’” (quoting *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984)).

115. However, though inquiry into the sincerity of belief is largely deferential to plaintiffs, some “beliefs” are so ridiculous that courts refuse to accept them as legitimately religious. *See Dvorske*, *supra* note 103, § 8 (observing that requests for accommodations by believers of a “divine flying spaghetti monster,” for example, have gone unacknowledged).

116. *Wilkinson*, 645 F. Appx at 699–700 (quoting *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1314 (10th Cir. 2010)).

117. *Id.* at 699.

118. *Yellowbear*, 741 F.3d at 54 (emphasis omitted); *see also LaPlante v. Mass. Dep’t of Corr.*, 89 F. Supp. 3d 235, 241–42 (D. Mass. 2015) (holding that though a prisoner need not show that his desired practice is compelled by or central to his religion, he must show that that the belief that motivates that practice is sincere).

included within RLUIPA’s scope. For example, a church that seeks to house homeless persons in its facility in a nonresidential zone might be thought of as doing a civic good—a secular service that any nonprofit or nonreligious institution could provide. But when the religious institution’s decision to shelter the homeless is actually the concrete manifestation of its Christian beliefs, the service becomes the church’s ministry and should be protected as a sincere religious exercise.

The legislative history further confirms that Congress intended an expansive definition of religious exercise that includes more than formal worship. For example, during the Senate hearings, the bill’s sponsors, Senators Orrin Hatch and Ted Kennedy, stated that “[s]ection 2(b)(3) [of RLUIPA] enforces the right to assemble for *worship* or *other religious exercise* under the Free Exercise Clause.”¹¹⁹ That Congress distinguished “worship” from “other” uses, but nonetheless stated that both are “religious exercise,” suggests that more than worship uses are protected. In articulating possible types of land use that might be considered religious exercise, senators listed a number of nontraditional, non-worship examples, including constructing a Jewish temple,¹²⁰ operating a homeless shelter,¹²¹ providing meals for the homeless and working poor,¹²² hosting a radio ministry in a mobile home,¹²³ offering mental counseling, holding a music concert, hosting a crisis hotline, renting a storefront,¹²⁴ parking on days other than Sunday,¹²⁵ holding weddings and funerals on a Saturday,¹²⁶ and instituting “job training and transitional housing programs for homeless and abused women” run by nuns.¹²⁷

119. 146 CONG. REC. 16,700 (2000) (joint statement of Sens. Hatch and Kennedy) (emphasis added).

120. *Id.* at 14,284 (statement of Sen. Kennedy).

121. *Id.*

122. 146 CONG. REC. S6689 (daily ed. July 13, 2000) (statement of Sen. Hatch).

123. 146 CONG. REC. 19,125–26 (extension of remarks of Rep. Hyde) (saying that this was an improper use of the county’s “discretion to determine what constitutes a legitimate ministry of [the] church”).

124. *Id.* (commenting that refusal to grant a church a permit to rent a storefront in effect “punish[ed] the church for asserting a nontraditional model of worship and outreach”).

125. *Id.* (determining that this “inhibit[ed] the religious exercise of minority groups who worship on other days”).

126. *Id.* at 19,126 (“The City of Jacksonville granted First Presbyterian Church a permit . . . only if the church met certain conditions. The church would be . . . forbidden to hold weddings or funerals on Saturdays.”).

127. *Id.* at 19,127.

What these examples show is that the understanding of religious exercise of the bill's sponsors went beyond protecting formal worship uses only and included any exercise, even if "nontraditional," that is motivated by sincere religious belief. It is telling that in response to these examples, and evidence that zoning authorities frequently placed substantial burdens on institutions' religious exercise, Congress unanimously passed RLUIPA.¹²⁸ The unanimous vote of Congress in both chambers suggests that while Congress rarely speaks with one voice, with regard to RLUIPA, there was a shared understanding on both sides that religious liberty deserved greater protection than it was afforded post-*Smith*.

II. NON-WORSHIP USES UNDER RLUIPA: A REVIEW OF LOWER COURT DECISIONS

This Part reviews appellate, federal district court, and lower state court decisions that have analyzed and applied RLUIPA.¹²⁹ When determining if a use qualifies as religious exercise, courts consider the type of activity, rather than the type of organization engaging in the activity.¹³⁰ That is, "[c]ourts generally ignore the relationship between the proposed land use and the religious character of the institution making the use, and instead inquire whether each particular proposed land use is 'for a religious purpose'"¹³¹ Thus, "the *nature of the activity*, and *not the character of the actor*, makes an exercise

128. *Actions Overview, S2869 Religious Land Use and Institutionalized Persons Act of 2000*, CONGRESS.GOV, <https://www.congress.gov/bill/106th-congress/senate-bill/2869/actions?q=%7B%22search%22%3A%5B%22s2869%22%5D%7D&r=11&s=1> [<https://perma.cc/AVE7-9PZW>] (describing how RLUIPA was passed in both the Senate and the House of Representatives without objection and with unanimous consent).

129. Although these courts have not been entirely consistent in their application of RLUIPA's definition of "religious exercise," analysis of their reasoning is still illuminative in revealing what kinds of non-worship land uses have consistently been deemed worthy of statutory protection.

130. Adam J. MacLeod, *A Non-Fatal Collision: Interpreting RLUIPA Where Religious Land Uses and Community Interests Meet*, 42 URB. LAW. 41, 51 (2010).

131. *Id.* (citation omitted); see 146 CONG. REC. 16,700 (2000) (joint statement of Sen. Hatch and Sen. Kennedy) ("While recognizing that these activities or facilities may be owned, sponsored or operated by a religious institution . . . this alone does not automatically bring these activities or facilities within [RLUIPA's] definition or 'religious exercise.'"); see also *Scottish Rite Cathedral Ass'n of Los Angeles v. City of Los Angeles*, 67 Cal. Rptr. 3d 207, 216 (Cal. Ct. App. 2007) ("[N]ot every activity carried out by a religious entity or individual constitutes 'religious exercise.'" (quoting 146 CONG. REC. 16,700)). But see Shelley Ross Saxer, *Faith in Action: Religious Accessory Uses and Land Use Regulation*, 2008 UTAH L. REV. 593, 614 ("The mere fact that an accessory use is connected to a religious organization does not mean that it should be protected under RLUIPA, or does it?" (emphasis added)).

religious.”¹³² “By focusing on the activity rather than the actor in this way, courts constrain the reach of section (2)(a). A religious landowner engaging in a land use in which secular landowners routinely engage will not necessarily qualify for . . . protection.”¹³³ Thus, whereas formal worship uses, like hosting a Mass or participating in the sacraments, usually receive protection without debate, not all auxiliary uses have been included.¹³⁴ Outside of “traditional” religious activities, it remains unclear what other religious exercises garner RLUIPA protection.

Difficult-to-categorize activities and services are usually outside the scope of formal worship, prayer, or traditional congregational activities.¹³⁵ These forms of non-worship land uses are commonly called “accessory uses.” These accessory uses create land-use problems because it is unclear if they ought to be “protected against restriction by zoning ordinances because they are associated with the free exercise of religion”¹³⁶ or if they are simply too remote from the religious land use to qualify. Accessory uses come in two types. One type has been regularly protected under land-use law prior to the enactment of RLUIPA and includes those uses that are not inherently religious but instead serve a necessary function that supports the principal religious land use.¹³⁷ Though not religious themselves, these uses are within the scope of the religious entity’s expected activities.¹³⁸ Examples of uses falling under this category include expanding parking space,¹³⁹

132. MacLeod, *supra* note 130, at 52 (emphasis added).

133. *Id.*

134. See Galvan, *supra* note 28, at 208 (“The worship uses of religious institutions have long been granted special protections by the government of the United States. . . . In the religious land use context, however, no [clear] line has been drawn.” (emphasis omitted)).

135. Accessory uses are defined as “non-worship uses that are affiliated with a religious institution” such as hospitals, health maintenance, transportation, retail and merchandise, residences, and cafes, as well as education services, and charities run by religious institutions. *Id.* at 207.

136. Saxer, *supra* note 131, at 594–95.

137. *Id.* at 596–98.

138. *Id.* at 615.

139. BLAESSER & WEINSTEIN, *supra* note 101, § 7:28 (“A parking lot may be necessary for the use and enjoyment of a church and the refusal to grant permission for such a parking lot can be determined to be a free exercise violation.”); see, e.g., Daley v. Zoning Hearing Bd., 770 A.2d 815, 816 (Pa. Commw. Ct. 2001) (affirming a zoning board’s decision to allow church to expand parking lot “to better accommodate parking needs of its members”); Keeling v. Bd. of Zoning Appeals of City of Indianapolis, 69 N.E.2d 613, 618 (Ind. App. Ct. 1946) (holding that parking lots are permitted accessory uses as they are necessary and useful to the “modern church”). Note, however, that courts have not always ruled in favor of accessory uses such as parking lots because the denial of a permit to build or expand a parking lot fails on the substantial burden prong. See, e.g., Castle Hills First Baptist Church v. City of Castle Hills, No. SA-01-CA-1149, 2004 WL

expanding educational facilities,¹⁴⁰ building playgrounds or recreational sports fields,¹⁴¹ holding fundraising concerts,¹⁴² and providing residential housing synagogue staff and members.¹⁴³ “In this regard, a place of religious worship includes not only the sanctuary, but also those grounds and structures surrounding the sanctuary that is necessary for the use and enjoyment of the church” or other religious facility.¹⁴⁴

A second type of “accessory use” is one that is more customarily tied to the religious landowner’s belief system or mission, such as offering marital counseling or sheltering and feeding the homeless. Ultimately, this kind of accessory use includes activities that could be accomplished by a nonreligious actor but, when performed by a religious one, constitute “faith in action”—an unbroken extension of the group’s sincere religious beliefs. As one source notes, “[f]or religious groups, faith in practice often consists of much more than formal worship. . . . Institutions may also seek to provide individuals with spiritual nourishment that can include education, recreation, and the opportunity to serve others by providing social services for the poor and needy.”¹⁴⁵ But questions of interpretation often arise because religious institutions and religiously affiliated property owners regularly desire to use their property for more than just worship and expand uses into traditionally “secular” activities.¹⁴⁶

546792, at *12 (W.D. Tex. Mar. 17, 2004) (“In this case, however, physical access is not precluded; rather the parties dispute how much physical access—in the form of parking—is necessary.”).

140. See, e.g., *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 347–53 (2d Cir. 2007) (explaining that the renovation of a religious school was protected under RLUIPA when the remodeled rooms were determined to serve a religious purpose).

141. See, e.g., *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Ashton*, 448 P.2d 185, 192 (Id. 1968) (finding that building a recreational sports field is a permissible accessory use).

142. See, e.g., *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 701 (E.D. Mich. 2004) (finding that a church’s fundraising concert series constituted religious exercise).

143. See, e.g., *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 280 F. Supp. 3d 426, 479 (S.D.N.Y. 2017) (finding that a congregation’s construction of multifamily housing for a rabbinical college was religious exercise), *aff’d in part, rev’d in part*, Nos. 18-0869-cv(L), 18-1062-cv(XAP), 2019 WL 6975126 (2d Cir. 2019); cf. *Beit Havurah v. Zoning Bd. of Appeals of Norfolk*, 418 A.2d 82, 89 (Conn. 1979) (holding that providing overnight sleeping accommodations to the synagogue’s members was essential to the “religious fellowship” of the temple and thus was a protected accessory use for state zoning exception).

144. *BLAESSER & WEINSTEIN*, *supra* note 101, § 7:28.

145. *Id.*

146. *Saxer*, *supra* note 131, at 593.

Courts have determined that for an accessory use to qualify as religious exercise, the nature of the use need not necessarily be religious in and of itself,¹⁴⁷ but it must either be integrally connected to or support the principal religious land use, without amounting to a principal use itself.¹⁴⁸ Another way to state this rule is that an “accessory use should not be subject to a primary test of whether it is a religious use, but instead should be subject to a lesser inquiry into whether it is reasonably necessary to accomplish the religious organization’s purpose . . . [and] whether a particular accessory use is sufficiently integral to, and within the scope of, a religious organization’s activities so as to be protected as a religious use.”¹⁴⁹ As one court has provided, “RLUIPA requires inquiring ‘whether the facilities to be constructed [are] to be devoted to a religious purpose.’ . . . [But s]uch religious purpose need not implicate ‘core religious practice,’ or ‘an integral part of one’s faith.’”¹⁵⁰ Examples of these uses include sheltering the homeless on church property,¹⁵¹ running local food pantries,¹⁵² and offering substance-abuse rehabilitation programs.¹⁵³

147. Land uses that are indisputably religious are usually afforded RLUIPA’s protection. *See Galvan, supra* note 28, at 208 (“Under RLUIPA, Congress wanted religious exercise to be broadly construed—‘to the maximum extent permitted by the terms of [RLUIPA] and the Constitution.’” (citation omitted)). But accessory uses may not be so easily categorized as such. *Saxer, supra* note 131, at 615. Thus, “it is important to distinguish whether [an] accessory use is deserving of special treatment under RLUIPA because it is a religious use [itself] or because it is accessory to a religious [land] use.” *Id.*

148. *Saxer, supra* note 131, at 597. In order to qualify as a true accessory use, the activity must be “necessary and convenient” to the principal use. *Id.* at 594. That is, it must be “a subordinate use, customarily incident to the principal use, and so necessary or commonly to be expected in conjunction therewith that it cannot be supposed that an ordinance was intended to prevent it.” *Id.* at 597 (quoting 83 AM. JUR. 2d *Zoning and Planning* § 168 (2003)).

149. *Id.* at 615.

150. *Fortress Bible Church v. Feiner*, 734 F. Supp. 2d 409, 499 (S.D.N.Y. 2010) (first quoting *Westchester Day Sch. v. Vill. of Mamaroneck*, 386 F.3d 183, 190 n.4 (2d Cir. 2004); then quoting *Guru Nanak Sikh Soc. of Yuba v. Cty. of Sutter*, 326 F. Supp. 2d 1140, 1151 (E.D. Cal. 2003); and then quoting *Living Water Church of God v. Charter Twp. of Meridian*, 384 F. Supp. 2d 1123, 1129 (W.D. Mich. 2005)) (alteration in original).

151. *See, e.g., Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574–75 (2d Cir. 2002) (finding that operating a homeless shelter counts as religious exercise); *Jesus Ctr. v. Farmington Hills Zoning Bd. of Appeals*, 544 N.W.2d 698, 703–04 (Mich. Ct. App. 1996) (holding that operating a homeless shelter was a protected accessory use under RFRA because sheltering the needy is a customary part of the Christian tradition).

152. *See, e.g., Jirtle v. Bd. of Adjustment, Town of Biscoe*, 622 S.E.2d 713, 717 (N.C. Ct. App. 2005).

153. *See, e.g., Men of Destiny Ministries, Inc. v. Osceola Cty.*, No. 6:06-cv-624, 2006 WL 3219321, at *4 (M.D. Fla. Nov. 6, 2006).

It does not matter that these activities are not within the scope of traditionally recognized formal worship uses.¹⁵⁴ As one court stated, “many religions offer services beyond traditional worship services as part of their religious offerings. . . . [T]he fact the [plaintiff’s] activities exceed its worship services makes them no less a part of Plaintiff’s religious exercise.”¹⁵⁵ Accordingly, appellate courts have repeatedly found that providing charitable and social welfare services—like feeding, housing, and clothing the needy—is legitimate religious exercise.¹⁵⁶ For example, when the church organization “World Outreach” was prevented from occupying a community center for use as a recreational facility to house charitable activities in a poor area of Chicago’s south side, its activities were protected under RLUIPA, even though the “building is not a church as such.”¹⁵⁷ In an opinion by Judge Posner, the Seventh Circuit reasoned: “[T]here is no doubt that even the recreational and other nonreligious services provided at the community center are integral to the World Outreach’s religious mission . . . Souls aren’t saved just in church buildings.”¹⁵⁸

Though both types of accessory use have received accommodation as “religious exercise” in many RLUIPA cases,¹⁵⁹ broad construction of that term has not been consistent, and lower court decisions often contradict one another.¹⁶⁰ For example, several courts have held that recreational facilities owned and operated by religious entities qualify

154. See *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 701 (E.D. Mich. 2004) (noting that the “acts themselves” need not be “religious in nature”).

155. *Id.*

156. See, e.g., *Fifth Ave. Presbyterian Church*, 293 F.3d at 575 (observing that allowing homeless persons to sleep outside a church at night would likely constitute religious exercise).

157. *World Outreach Conference Ctr. v. City of Chicago*, 591 F.3d 531, 535 (7th Cir. 2009).

158. *Id.*

159. See, e.g., *Fortress Bible Church v. Feiner*, 734 F. Supp. 2d 409, 501 (S.D.N.Y. 2010) (holding that a proposed facility that included offices, library, kitchen, classrooms, and a gymnasium constituted religious exercise); *Episcopal Student Found.*, 341 F. Supp. 2d at 693, 701 (finding that a religiously affiliated student organization, which sponsored social events to provide students with an alternative to the usual college “party scene,” was exercising its religion).

160. Pesick, *supra* note 86, at 361 (“[C]ourts have not followed a consistent framework in interpreting religious exercise . . .”). Compare *Men of Destiny Ministries, Inc. v. Osceola Cty.*, No. 6:06-cv-624, 2006 WL 3219321, at *4 (M.D. Fla. Nov. 6, 2006) (holding that a religiously affiliated men’s substance abuse program counts as religious exercise), with *Glenside Ctr., Inc. v. Abington Twp. Zoning Hearing Bd.*, 973 A.2d 10, 17 (Pa. Commw. Ct. 2009) (holding that Alcoholics Anonymous meetings are not religious exercise, despite the fact that the program relies on appeals to a recognition of a higher power, because the purpose of the meetings is to combat addiction and not to promote a religious message).

for accommodation,¹⁶¹ but other courts have held the opposite, finding that certain facilities do not primarily serve, or are not reasonably necessary to serve, a religious purpose. The operation of a commercial fitness center¹⁶² and hosting a daycare for children with mental and emotional disabilities¹⁶³ have also been excluded from protection in certain instances. Even if the entity claiming protection was itself religious, the specific activity or land use was too minimally connected to the religious purpose of the organization to count as religious exercise.

Despite divergent opinions, a general principle about religious exercise can be derived from these lower court holdings. When determining if an accessory use qualifies as religious exercise, courts generally find either that the activity itself is religious in nature—that it has “intelligible value only as a religious activity,”¹⁶⁴ such as a facility used primarily for traditional worship, prayer, or sacramental rites like communion and wedding ceremonies—or that it is an accessory use—an activity that either is incidental and necessary to the organization’s religious operations, such as a parking lot, or supports a religious purpose or mission,¹⁶⁵ such as a church-operated soup kitchen.

The problem with the current analysis is that it ascribes protection based on the religious purpose or nature of the use—which is a troublingly subjective inquiry. Focusing on the religious purpose the activity serves, lower courts often assess whether there is “a purpose that objective observers generally take to be religious in nature.”¹⁶⁶ Even the judgment in *World Outreach*, a case that interpreted the scope of RLUIPA’s protection broadly, depended on the judge asking whether the charitable activities were sufficiently connected to the

161. See, e.g., *Fortress Bible Church*, 734 F. Supp. 2d at 501 (holding that a proposed facility that included a gymnasium constituted religious exercise); see also *Chabad Lubavitch of Litchfield Cty., Inc. v. Borough of Litchfield*, 796 F. Supp. 2d 333, 343 (D. Conn. 2011) (denying defendant’s motion to dismiss and rejecting the claim that the refusal to allow a Jewish Orthodox group permission to expand its meeting location would not be a substantial burden on religious exercise), *aff’d in part, vacated in part*, 768 F.3d 183 (2d Cir. 2014).

162. *New Life Worship Ctr. v. Town of Smithfield Zoning Bd. of Review*, C.A. No. 09–0924, slip op. at 25 (R.I. Super. Ct. July 7, 2010) (holding that commercial fitness center and dance facility that was open to the public but was located in a religious high school does not qualify as part of the high school’s religious exercise).

163. *Calvary Christian Ctr. v. City of Fredericksburg*, 832 F. Supp. 2d 635, 642 (E.D. Va. 2011).

164. MacLeod, *supra* note 130, at 53.

165. *Id.* (suggesting that an activity that has “intelligible value in service to ends that are not exclusively religious . . . can be a religious exercise only if performed for what is generally understood to be a religious purpose”).

166. MacLeod, *supra* note 130, at 50.

religious mission of the church to be included.¹⁶⁷ The language of many other cases suggests that judicial inquiry into the connection of an activity to a religious purpose or mission is a regular occurrence.¹⁶⁸ Though incidental accessory uses, like parking lots, are usually protected, other land uses—both accessory and not—are placed under increased judicial scrutiny that requires judges to decide whether a subordinate use sufficiently supports a principal religious purpose.¹⁶⁹ If the use is not subordinate, the court must determine whether it nonetheless can be considered “religious” in its own right.¹⁷⁰

Additionally, it is clear from these decisions that merely because an organization is religious does not mean that *every* action it takes will be considered religious exercise. The existing analysis thus implicates the issue of whether there is a meaningful distinction between a religious organization’s *status* and its *conduct*. The next Part critiques this distinction, arguing that rather than accepting the adherent’s sincerity as the defining factor for what ought to count as religious exercise, the current analysis wrongfully requires courts to inquire into the degree to which the land use supports the organization’s religious purpose—an inquiry that inevitably asks courts to wade into the murky territory of deciding what is and is not required by a religious claimant’s belief system.

III. CONSTRUCTING A NEW DEFINITION OF “RELIGIOUS EXERCISE”

This Part argues that courts make a mistake when they distinguish between status and conduct, as if the two are distinct elements that bear

167. See *supra* notes 157–58 and accompanying text.

168. See, e.g., *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574–75 (2d Cir. 2002) (reasoning that sheltering the homeless “forms an integral part of [the church’s] religious mission . . . to care for the least, the lost, and the lonely of this world. . . . There is perhaps no higher act of worship for a Christian.”(quotations omitted)); see also *supra* notes 151, 159–60 and accompanying text.

169. Saxer, *supra* note 131, at 617 (“[A]ccessory uses that were not considered customary and incidental to the traditional house of worship were evaluated with regard to the religious tenets of the permitted religious use.”); see also *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 348 (2d Cir. 2007) (“Courts ought to consider whether the proposed facilities were for a religious purpose rather than simply whether the [organization] was religiously-affiliated.”); *Mintz v. Roman Catholic Bishop of Springfield*, 424 F. Supp. 2d 309, 318 (D. Mass. 2006) (finding that although not every building will be protected under RLUIPA, a parish center that was integral to the church’s religious mission was a permitted accessory use).

170. MacLeod, *supra* note 130, at 52; see also *Fortress Bible Church v. Feiner*, 734 F. Supp. 2d 409, 499 (S.D.N.Y. 2010) (“RLUIPA requires inquiring ‘whether the facilities to be constructed [are] to be devoted to a religious purpose.’” (alteration in original) (quoting *Westchester Day Sch. v. Vill. of Mamaroneck*, 386 F.3d 183, 189 (2d Cir. 2004))).

no relation to one another.¹⁷¹ Rather than view status and conduct as distinct aspects of religious beliefs that can be separated, this Part posits that any time a religious entity acts upon its religious conscience and convictions, those actions are an extension of religious belief and are thus deserving of protection under RLUIPA as “faith in action.” To that end, courts should adopt a refined definition of “religious exercise” under RLUIPA that encompasses any sincere act of religious exercise but that excludes fraudulent, insincere claims meant only to circumvent legitimate zoning ordinances.

A. *Articulating a Limiting Principle*

As has been articulated, the current analysis of “religious exercise” under RLUIPA offers protection to land uses that support—but are subordinate and incidental to—the principal worship use. However, it excludes from protection seemingly “secular” land uses that are not subordinate or incidental but rather amount to a principal use themselves. In some cases, this “secular” use may not even obviously appear to support a religious purpose. Hand of Hope’s medical services provide an example. Hand of Hope’s medical services were labeled “secular” rather than “religious”¹⁷²—as if the two are mutually exclusive¹⁷³—and thus the defendant questioned whether they deserved accommodation.¹⁷⁴

171. Cf. *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2026 (2017) (Gorsuch, J., concurring) (“I don’t see why it should matter whether we describe [the] benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use). It is free exercise either way.”).

172. See Defendant’s Memorandum, *supra* note 14, at 16 (“[R]eligious exercise’ does not encompass activities—even well-intentioned ones—that extend beyond the core missions of a church and are commonly performed by secular entities.”).

173. See SMITH, *supra* note 31, at 129 (describing the secular as “a comprehensive view of life and the world—a view in which the ‘spiritual’ or the ‘holy’ or ‘supernatural’ are denied, subordinated, or at least reduced to this-worldly terms”). The idea that the religious and the secular are diametrically opposed harkens to the strict “wall of separation” metaphor, usually attributed to Thomas Jefferson, used to describe the separation of church and state. See Letter from Thomas Jefferson to Danbury Baptist Association (Jan. 1, 1802), <https://www.loc.gov/loc/lcib/9806/danpre.html> [perma.cc/6LZA-RWJL] (“I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between Church & State.”).

174. See Thomas C. Berg, *Partly Acculturated Religious Activity: A Case for Accommodating Religious Non-Profits*, 91 NOTRE DAME L. REV. 1341, 1348 (2016) (“[C]ritics of accommodation [in these cases] argue that once an organization reaches out to—and thereby affects—others, it must follow every government rule no matter how great a burden the rule imposes on religion.”).

Religious entities that refuse to restrict their activities to the private realm and instead “reach out to provide services to the broader public” tend to provoke “controversy.”¹⁷⁵ One author has observed that religious groups that “straddle the perceived boundary of the public versus private,” involving themselves in activities which seem “secular” but are in fact the product of religious commitments, lead to “[m]any of today’s most vexing problems concerning the accommodation of religious conscience.”¹⁷⁶ In fact, some have argued that “it is plainly improper to make any accommodation for religious freedom” once an organization involves itself in the public realm.¹⁷⁷ Thus, where a religious organization acts in the public realm, some might be inclined to call that action “secular” because of the hesitancy to accept religious involvement in this space as legitimate.¹⁷⁸ This is not surprising since ideology of secularism is “reductive”—it “means basically, ‘not religious.’”¹⁷⁹ But attempts to distinguish the “secular” actions of the religious person from her “religious” motivations must fail if it is true that “in some measure, at least, it is [her] own moral and religious perspective that leads [her] to articulate the ethic of the citizen in a liberal democracy as [she] do[es]. . . . [W]e cannot leap out of our perspectives.”¹⁸⁰ Although the public–private divide is strongly rooted in our modern cultural mindset,¹⁸¹ it is a fallacy to assume that

175. *Id.* at 1341.

176. *Id.* When a religious adherent engages his convictions and beliefs and manifests them as action in his daily life, the point at which “religion” ends and “politics” begins is not so clear. Indeed, the two often overlap and blur into one another. See Michael W. McConnell, *Believers as Equal Citizens*, in OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMMODATION IN PLURALIST DEMOCRACIES *supra* note 51, at 90, 94 (“[T]he very boundary between sacred and secular is a point of contention on which persons of various religious and secular persuasions will inevitably disagree.”).

177. Berg, *supra* note 174, at 1342.

178. McConnell, *supra* note 176, at 100 (arguing that the ideology of secularism allows “[r]eligious exercise [to be] protected, so long as it is confined to the private sphere of home and church” and that “[t]he assumption underlying this model is that the secular public philosophy of the society is ‘neutral’ toward religion”).

179. SMITH, *supra* note 31, at 129–30. Interestingly, the idea that the two spheres of private belief and public action should be completely separate is a relatively modern viewpoint. *Id.* at 114. Historically, “[t]he secular” was, in fact, originally a religious concept, a product of traditional religious epistemological frameworks. The concept of the secular always served the function of distinguishing religious from nonreligious domains. But nonreligious domains did not, in the premodern view, exist outside the religious epistemological framework.” *Id.* (citation omitted).

180. Nicholas Wolterstorff, *The Role of Religion in Political Issues*, in RELIGION IN THE PUBLIC SQUARE: THE PLACE OF RELIGIOUS CONVICTIONS IN THE POLITICAL DEBATE 113 (Robert Audi & Nicholas Wolterstorff eds., 1997) (emphasis omitted).

181. Peñalver, *supra* note 39, at 813 (“In its current form, the word ‘religion’ suggests a strong distinction between the domain of religion and the domain of the secular.”).

the actions of a religious adherent are somehow bracketed off from her religious convictions when she acts in seemingly “secular” ways.¹⁸² In effect, the current approach of defining accessory uses according only to the subordinate support they provide to recognized religious purposes—in other words, formal worship uses—relies on a false dichotomy between status and conduct and risks erroneously excluding principal land uses that seem secular in nature but actually bear witness to the religious adherent’s system of belief, albeit in nontraditional ways.

Further, this approach, which asks whether or not a use supports a religious purpose, mistakenly requires courts to inquire beyond sincerity into the centrality of a belief and its connection to the proposed land use. Both the Supreme Court¹⁸³ and Congress¹⁸⁴ have expressly rejected the notion that courts should question the uniformity, centrality, or consistency of belief systems.¹⁸⁵ As then-Judge Gorsuch opined, “judges are hardly fit arbiters of the world’s religions.”¹⁸⁶ The particular tenets of religious faith are not a matter for judicial examination. “Indeed, it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria.”¹⁸⁷ Thus, courts should get out of the business of assessing what role land uses play in the wider religious purpose and instead largely defer to the adherent’s claim that the desired use is an extension of religious

182. Consider a religious organization’s advocacy on political issues that it sincerely believes implicate its values and beliefs. For example, religious groups could support the living wage campaign, provide asylum for refugees, and advocate for “dying with dignity” laws and compassionate immigration policies.

183. See *supra* note 64 and accompanying text (noting the Court’s opinion that judges should not “question the centrality of particular beliefs or practices to a faith”).

184. *Yellowbear v. Lampert*, 741 F.3d 48, 54–55 (10th Cir. 2014) (“Under this standard, it isn’t for judges to decide whether a claimant who seeks to pursue a particular religious exercise has ‘correctly perceived the commands of [his] faith’ or to become ‘arbiters of scriptural interpretation.’” (alteration in original) (quoting *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 716 (1981))); see also *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 714–15 (1976) (“Indeed, it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria.” (footnote omitted)).

185. See *Soifer, supra* note 74, at 27 (arguing that courts that question the centrality of an action or belief to the actor’s religion are likely to count as religious only that which the majority accepts as appropriate religious activity).

186. *Yellowbear*, 741 F.3d at 54.

187. *Milivojevich*, 426 U.S. at 714–15.

beliefs.¹⁸⁸ As long as that claim and those beliefs are sincere, then the use should qualify as religious exercise.¹⁸⁹ Under this proposal, RLUIPA would support a definition of “religious exercise” that includes both actions that are necessary and incidental to accomplishment of the principal land use *and* actions that are extensions of the actor’s sincere religious beliefs, regardless of whether the actions are subordinate or constitute the principal land use itself.

This proposal recognizes that a religious entity may sometimes act in ways that are *not* derived from its religious beliefs; that is, a religious organization may use its land for certain purposes that have no connection at all to its religious viewpoint. Accordingly, some activities of a religious organization are *so unrelated* to the religious mission that they cannot qualify as religious exercise. To claim the contrary would be to interpret RLUIPA so expansively as to include every single action taken by a religious entity regardless of its bearing on or connection to its belief system, opening the floodgates to religious-land-use litigation.¹⁹⁰ Therefore, it is not suggested here that religious entities should receive a *carte blanche* for any and all activities performed that have *absolutely no connection* to that entity’s religious belief.¹⁹¹ Although this may seem difficult to reconcile with the above

188. Sometimes courts seem to conflate the religious exercise and substantial burden questions and allow the degree of impact that a law has on a given activity, or the existence of similar alternatives to that activity, to weigh on the determination of whether or not that activity is in fact “religious exercise.” See *Ridley Park United Methodist Church v. Zoning Hearing Bd. Ridley Park Borough*, 920 A.2d 953, 960 (Pa. Commw. Ct. 2007) (determining that denying the church permission to host daycare had a *de minimis* impact on the church’s opportunity to engage in religious activities because the church’s other activities like Sunday school, regular church services, and counseling all provided opportunity for religious instruction).

189. See Nancy L. Rosenblum, *Introduction: Pluralism, Integralism, and Political Theories of Religious Accommodation*, in *OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMMODATION IN PLURALIST DEMOCRACIES* 3, 27 (Nancy L. Rosenblum ed., 2000) (arguing that courts should not doubt an adherent’s claim that his actions are rooted in sincere religious beliefs, unless these beliefs pose a “manifest danger to the state”).

190. See, e.g., Evans-Cowley & Pearlman, *supra* note 28, at 208 (noting that lawsuits concerning the non-worship activities of megachurches are proliferating); Galvan, *supra* note 28, at 209–10 (“RLUIPA could help [a] megachurch avoid complying with zoning codes, city planning goals, historic preservation ordinances, traffic requirements, and aesthetic regulations—resulting in a greater impact on neighborhoods and towns than the law’s framers might have envisioned.”).

191. Several scholars have debunked the concern that RLUIPA’s substantial burden provision, including the interpretation of the term “religious exercise,” would be dangerously overbroad. Rather, courts have uniformly adopted a narrow interpretation of the provision—in some cases, perhaps too narrowly—such that two commentators have called RLUIPA “under enforced.” Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 *FORDHAM URBAN L.J.* 1021, 1048 (2012); see also *id.* at 1025 (finding that “RLUIPA

discussion, it is possible to argue that not *every* action taken by a religious entity is religious exercise and at the same time recognize that many actions that do not look religious on their face, or that could equally be performed by a secular organization, are in fact direct extensions of the beliefs of the organization. Of course, accepting these two arguments as consistent requires a level of confidence that organizations will neither bring fraudulent claims based on insincere belief in order to circumvent zoning regulations nor assert exemptions for land uses that have no connection at all to its belief system.

Admittedly, this principle does require a minimal level of inquiry not only into the sincerity of the adherent’s claim but also into the threshold question of whether the activity is related to a religious belief *at all*. Still, this minimal inquiry into the substance of the belief pales in comparison to the current RLUIPA analysis, which tasks judges with determining what is and is not conduct mandated by a claimant’s religious beliefs. There will, of course, be difficult cases when a religious organization acts in a way that it views as an extension of its sincere beliefs, but to the outside observer, the action seems unrelated to the religion at all. For example, as Justice Gorsuch proposes, to ask whether a religious man says grace before dinner or whether a man begins his meal in a religious manner rests upon a false dichotomy between status and conduct.¹⁹² Surely, a religious man’s activity of prayer follows from his inner belief in a relationship with a higher power. But it may be necessary to ask whether the religious man’s act of brushing his teeth is an extension of his religious beliefs or whether this conduct carries no religious meaning despite his having internal religious convictions.¹⁹³

To summarize, for a land use to count as “religious exercise” under RLUIPA, an entity’s actions must (1) constitute a formal worship use; (2) qualify as a traditionally recognized “accessory use,” one that is subordinate, necessary, and customarily incidental to the property’s principal use; or (3) amount to an extension of the religious entity’s sincere religious belief, regardless of whether it is subordinate

does not give churches *carte blanche* to ignore zoning regulations” and is needed to combat religious discrimination in the land use context).

192. *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2025–26 (2017) (Gorsuch, J., concurring in part).

193. *See Miller, supra* note 51, at 879 (“Many claims are so clearly secular that they are often dismissed through common sense reasoning. For example, the government does not establish a religion of ‘nuclearism’ simply by promoting pronuclear policies or seeking to protect nuclear armaments from vandalism.” (footnote omitted)).

to the principal use. Importantly, land uses that have a negligible connection to the entity's religious beliefs will be excluded from protection. And of course, "sham" belief systems fraudulently invoked to avoid zoning regulations will not be recognized.¹⁹⁴ Additional examples of actions that would fall outside the scope of the new definition might include, for example, a church's Fourth of July fireworks celebration that violates a local noise ordinance, an attempt to build a chapel tower that exceeds a height restriction, or the installation of purely aesthetic landscaping.¹⁹⁵ As is likely apparent at this point, the line is a thin one, and in many cases, it will be necessary to put trust in the honesty of religious organizations to avoid insincere claims and in judges to abstain from making improper value judgments about religious beliefs. Ultimately, this proposal seeks a balance between the broad protections that Congress intended when it enacted in RLUIPA and the recognition that fraudulent claims must be excluded from protection to avoid a flood of frivolous litigation.

B. Applying the Principle: Hand of Hope

It is instructive to return to the introductory case study and apply the proposed limiting principle to Hand of Hope's provision of medical services to pregnant women.¹⁹⁶ Recall from the above discussion that traditional accessory uses must be both "necessary and convenient" to a religious institution's principal land use and also "subordinate" and "incidental" to that use.¹⁹⁷ Hand of Hope's services do not fit within

194. For example, a college fraternity once sought a religious exemption from a maximum occupancy law by rejecting the label of "fraternity," calling themselves instead, "the Apostles of Peace and Unity." Michelle Boorstein, *'Apostles' Ordered To Abide by Zoning Laws*, WASH. POST (Nov. 23, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/22/AR2006112201924.html?noredirect=on> [<https://perma.cc/NPQ2-9U2F>].

195. Harder cases that still might not meet the test include a megachurch's operation of a multipurpose facility that houses sports events, an organization's on site coffee shop whose proceeds support a religious charity, the construction of a pool open for a fee to public use, and other similar commercial enterprises. See 146 CONG. REC. 16,700 (joint statement of Sens. Hatch & Kennedy) ("[A] burden on a commercial building, which is connected to religious exercise primarily by the fact that the proceeds from the building's operation would be used to support religious exercise, is not a substantial burden on 'religious exercise.'"); see also *Scottish Rite Cathedral Ass'n of Los Angeles v. City of Los Angeles*, 67 Cal. Rptr. 3d 207, 216 (Cal. App. 2007) ("[A] burden on a commercial enterprise used to fund a religious organization does not constitute a substantial burden on 'religious exercise' within the meaning of RLUIPA.").

196. See *supra* Introduction (explaining Hand of Hope's services).

197. See *supra* note 148 and accompanying text (explaining that an accessory land use must be both "necessary and convenient" and "subordinate and customarily incidental" to the principal land use).

this definition of an “accessory” use because they are not “subordinate” or “incidental” to the organization’s principal purpose. Nor are Hand of Hope’s medical services necessary for the use and enjoyment of the property in the way that a parking lot is. But the Center’s services are also not like the homeless shelter, which obviously supports a religious mission but still remains subordinate and secondary to the principal land use. Instead, Hand of Hope’s medical services amount to the principal land use themselves.¹⁹⁸ As primarily a pregnancy resource center, it would be difficult to argue that these services are merely accessory to a principal land use. Because its land use is not protected as a traditional accessory use, or even a subordinate one that supports a religious purpose, the question thus arises whether Hand of Hope’s activity qualifies as an intelligible extension of its sincere religious beliefs.

Deferring to Hand of Hope’s own view of the relation of its services to its religious mission,¹⁹⁹ it is clear that these medical services do not merely support religious belief; they are integrally related to the religious mission of the nonprofit. Indeed, the provision of these services constitutes that mission itself, such that they should be recognized as sincere extensions of Hand of Hope’s Christian convictions and should qualify as religious exercise.

Ultrasounds and medical services are of course not on their face “religious.” A nonreligious, secular entity could perform these services for any number of reasons, not all of which will be influenced by any religious beliefs, moral values, or even ethical guidelines.²⁰⁰ For example, it may be that a hospital provides these services simply because a patient needs them for the maintenance of her health. In such a case, the services would of course not qualify for special protection under RLUIPA, RFRA, or the First Amendment.²⁰¹

198. *See supra* note 18 and accompanying text.

199. *See supra* note 23 and accompanying text (describing Hand of Hope’s view of all of its services as medical).

200. *Cf. Welsh v. United States*, 398 U.S. 333, 339, 344 (1970) (protecting beliefs which “play the role of a religion and function as a religion in [the believer’s] life” because they are “spurred by deeply held moral, ethical, or religious beliefs”).

201. Relatedly, it is now the regular practice of states to exempt religiously affiliated hospitals from providing women with abortions or other contraceptive services when the health care facility objects on religious grounds. *See generally Refusing To Provide Health Services*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services> [<https://perma.cc/MTX8-LU74>] (“Almost every state has adopted similar policies related to abortion, and, in many instances, policies regarding sterilization or other contraceptive services . . .”). The Supreme Court decided that commercial, for-profit entities also had a valid exemption from providing

However, when a religious entity performs these services, the inextricable connection between the religious character of the nonprofit and the actions that are motivated by its character cannot be devalued or forgotten.²⁰² For example, a nonreligious charity could operate a homeless shelter out of moral convictions or as a civic good to improve the community. A similar shelter, however, might constitute a church's religious exercise if it can be shown to be an extension of the church's religious tenets of charity, neighbor love, and the common good. By the same token, medical services, which are not *prima facie* religious, take on a religious character when performed by a religious entity that sincerely believes that those services will not only advance its religious mission and calling but are also integral to them.²⁰³

Hand of Hope, as a Christian nonprofit, seeks to spread its understanding of the gospel by reaching out to and providing medical services to expecting women.²⁰⁴ In doing so, Hand of Hope also seeks to effect a particular outcome: that after seeing the ultrasound images, these women will choose not to have an abortion.²⁰⁵ Despite not

contraceptives to female employees, as was required by the Affordable Care Act, if the owners of the entity had a religious objection to doing so. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

202. These conflicts and problems are likely to continue in the current context of political participation as church leaders and prominent political theologians advocate for symbiosis between religious values and the potential for fruitful church participation in the contemporary context. See e.g., LUKE BRETHERTON, *CHRISTIANITY AND CONTEMPORARY POLITICS: THE CONDITIONS AND POSSIBILITIES OF FAITHFUL WITNESS* 220 (2010) (arguing that there can be mutual support between the obligations of citizenship and demands of faith, a relationship wherein the "congregation and the *demos* are echoes of each other," partners in pursuit of the common good and a politics that is faithful and just); Cornel West, *The Crisis of Christian Identity in America*, in *THE ETHICS OF CITIZENSHIP: LIBERAL DEMOCRACY AND RELIGIOUS CONVICTIONS* 293, 304 (J. Caleb Clanton ed., 2009) (warning that if society holds onto the myopic view of personal motivations for political participation, it may "fail[] to appreciate the moral progress, political breakthroughs, and spiritual freedoms forged by the heroic efforts of modern citizens of religious and secular traditions"); see also LUKE BRETHERTON, *CHRIST AND THE COMMON LIFE: POLITICAL THEOLOGY AND THE CASE FOR DEMOCRACY* 38 (2019) ("Political theology refuses this separation [between moral and religious questions and political and economic ones], seeing political and economic judgments as always already moral judgments and political life as inherently sacred and secular.").

203. Cf. Paul Marshall, *Politicizing Religion*, HUDSON INST. (May 27, 2019), <https://www.hudson.org/research/14598-politicizing-religion> [<https://perma.cc/W99H-3A5S>] ("Religion nearly always affects politics . . . by shaping hearts and minds, hopes and dreams. Our ultimate faiths and beliefs influence our views of history, justice, law, mercy, power, human nature, and evil.").

204. See *supra* Introduction (noting various ways that Hand of Hope explains its mission and services).

205. Hand of Hope purchased this particular parcel of land because of its location neighboring an abortion clinic, Women's Preferred Health. Hand of Hope argued that God called on them to

looking like traditional worship activities, these “medical” uses constitute the principal land use of Hand of Hope’s property, are “faith in action,”²⁰⁶ and should qualify as religious exercise within the meaning of RLUIPA.²⁰⁷

CONCLUSION

The First Amendment has long been interpreted to protect not only the inner beliefs of a person but also the performance of those beliefs in the believer’s daily actions.²⁰⁸ And the Court has consistently shown it is unwilling to assess critically the types of beliefs an individual holds, determining it improper to analyze the contours of a chosen belief system. The choice to abstain from substantive judgment is upset by RLUIPA, however, where the current analysis for what constitutes “religious exercise” allows courts to pass judgment on an individual’s claimed religious land use. That form of analysis is wrong not only in light of the Court’s own admission that it is not a fit arbiter of religious belief and practice but also because it presumes that religious persons

locate their practice there to offer expecting mothers an accessible pro-life option. *See supra* note 4 and accompanying text (“The property is adjacent to an abortion clinic”); *supra* note 23 and accompanying text (“Hand of Hope views all of its services, including those that are ‘medical,’ as the ‘outreach ministry of Jesus Christ through His church.’” (quoting Complaint, *supra* note 9, ¶ 11)).

206. Saxer, *supra* note 131.

207. In May 2019, the District Court of North Carolina denied the City of Raleigh’s request for summary judgment on the Hand of Hope’s RLUIPA-based “equal terms” claim (which was not addressed in this Note). *Hand of Hope Pregnancy Res. Ctr. v. City of Raleigh*, 386 F. Supp. 3d 618, 628 (E.D.N.C. 2019). The District Court granted the defendant’s motion for summary judgment on the plaintiff’s substantial burden claim. *Id.* The court dismissed the claim because it found that Raleigh’s prohibition of the provision of pregnancy tests and ultrasound imaging did “not amount to a substantial burden on religious exercise, even assuming the provision of ultrasounds and pregnancy tests in this context constitutes religious exercise.” *Id.* at 625. As to the plaintiff’s remaining RLUIPA claims, the parties reached a settlement at a court-hosted settlement conference on September 27, 2019. *Hand of Hope Pregnancy Res. Ctr. v. City of Raleigh*, No. 5:16-CV-00746 (E.D.N.C. Sept. 30, 2019).

208. *See Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990) (“[T]he ‘exercise of religion’ often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation.”); Frederick Gedicks & Michael McConnell, *Common Interpretation: The Free Exercise Clause*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/265> [https://perma.cc/Q2TE-GEYT] (“In drafting the [Free Exercise] Clause, Congress considered several formulations, but ultimately settled on protecting the ‘free exercise of religion.’ This phrase makes plain the protection of actions as well as beliefs, but only those in some way connected to religion.”).

or groups can bracket off their beliefs and convictions, such that their conduct can be easily labeled either religious or nonreligious.

The true test for what constitutes a valid “religious exercise” should instead be sincerity. When the primary land use by a religious entity is motivated by a sincere religious belief, that activity should count as “religious exercise.” It can then receive further scrutiny under the existing free-exercise, substantial-burden analysis. Activities that seem nonreligious or even secular at first glance may very well be sincere “faith in action.” Hand of Hope surely believes that its medical provisions are part of its Christian ministry. As the sincere exercise of its religious beliefs, courts should recognize Hand of Hope’s provision of pregnancy services as religious exercise. Sincerity alone as the defining criterion of “religious exercise” most properly allows religious entities to claim RLUIPA protection for more than just traditional and obvious religious uses. It appropriately recognizes that some land uses, though not ostensibly religious, are nonetheless inspired by sincere religious belief and deserve protection as “faith in action.” After all, as Judge Posner wrote, “[s]ouls aren’t saved just in church buildings.”²⁰⁹

209. *World Outreach Conference Ctr. v. City of Chicago*, 591 F.3d 531, 535 (7th Cir. 2009).