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Religion as Disobedience

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Religion today offers plaintiffs a ready path to disobey laws without consequence. Examples of such disobedience abound. In the past few years alone, courts have enjoined vaccine mandates, invalidated stay-at-home orders, and set aside antidiscrimination laws protecting same-sex couples. During the 2021–2022 Term, plaintiffs relied once again on free exercise to subvert laws governing public education, capital punishment, and school prayer. Some hospitals have begun denying fertility treatment to LGBTQ employees on this same basis.

How did religion become a skeleton key for lawbreaking without repercussion? The conventional wisdom is that, after decades of neglect, the Supreme Court finally began to take seriously the government's burden in free exercise cases. When the Court now says that the government must prove its laws serve compelling interests and are narrowly tailored, it actually means it.

But that is just part of the story. Courts are not only making the government's job harder. They are also making the plaintiff's job easier. Before courts apply strict scrutiny, plaintiffs must show that their religious practices are sincere. Courts and scholars point to sincerity as serving an all-important

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gatekeeping function: letting in claims of genuine religious exercise and keeping out non-meritorious requests for accommodation.

Yet sincerity is in practice an empty requirement. A systematic review of nearly 350 federal appellate cases—the first such analysis of its kind—reveals that the Supreme Court has never, in the past thirty years, found a single plaintiff to be insincere. Federal appellate courts, likewise, have found plaintiffs sincere 93% of the time (compare that to employment discrimination and ADA cases, where plaintiffs carry their burden just 27% and 60% of the time, respectively). And who is insincere? Pro se plaintiffs. Per the data, parties proceeding pro se are almost 800% more likely to be found insincere than someone with counsel. The only population without a license for disobedience, it turns out, is the already marginalized.

These shortcomings matter. Without appropriate tools to discern genuine religious practice from opportunistic litigation, free exercise becomes an open invitation to true believers and make-believers alike to break the law. With religious exemptions becoming an increasingly visible part of state, federal, and international law, that comes with clear costs: to the rule of law, to the credibility of true believers, and to the public. To prevent religion as disobedience from running amok, it is time to start taking sincerity seriously.

INTRODUCTION

Religious free exercise today is our most powerful and effective means of civil disobedience. In the past two years alone, vaccine mandates[1] and public health orders[2] have been enjoined, antidiscrimination laws protecting same-sex couples have been set aside,[3] and the Affordable Care Act's contraceptive mandate has been eviscerated[4]—all in the name of religion.

During the 2021–2022 Term, the Supreme Court again reaffirmed religion's supremacy. In *Kennedy v. Bremerton School District*, it held that a high school football coach could not be placed on paid leave for transgressing a rule against public prayer—a rule he repeatedly and intentionally violated by praying to Christ at the fifty-yard line after games.[5] In *Carson v. Makin*, it determined that Maine was constitutionally *required* to subsidize private religious schools.[6] And in *Ramirez v. Collier*, it postponed the execution of an inmate who, at the eleventh hour, asked that his pastor lay hands on him during his final moments—even though, in an earlier stage of litigation, the

1. *See, e.g.*, Sambrano v. United Airlines, Inc., No. 21-11159, 2022 WL 486610, at *10 (5th Cir. Feb. 17, 2022) (challenge to employer vaccine mandate; reversing district court decision denying plaintiffs' injunctive relief from adverse employment decision).

2. *See, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294, 1297–98 (2021) (per curiam) (enjoining public health regulations and noting that "[t]his is the fifth time the Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise"); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 68–69 (2020) (per curiam) (enjoining similar regulations in New York).

3. *See, e.g.*, Fulton v. City of Phila., 141 S. Ct. 1868, 1874–75, 1882 (2021) (holding that Philadelphia's refusal to contract with Catholic Social Services for foster care services unless it certified same-sex couples as foster parents violated the First Amendment); *see also* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1727, 1732 (2018) (holding that the Colorado Civil Rights Commission violated the Free Exercise Clause's requirement of religion neutrality when it issued a cease and desist order over a cake shop's refusal to sell a wedding cake to a same-sex couple).

4. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 730–31 (2014) (exempting for-profit corporations from contraceptive mandate); Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2388 (2020) (Alito, J., concurring) (affirming the Department of Health and Human Services' rules extending exemption to nonprofit corporations); *id.* at 2388–89, 2389 n.4 (extending exemption to all "non-governmental employers").

5. 142 S. Ct. 2407, 2418–19, 2432–2433 (2022).

6. 142 S. Ct. 1987, 2002 (2022).

inmate had explicitly disclaimed this very same form of relief.[7] Some have even characterized *Dobbs v. Jackson Women's Health* and the way that physicians and pharmacists have subsequently responded to the decision as products of religious doctrine.[8] Indeed, buoyed by these decisions, Catholic hospital systems and various insurers have started denying fertility treatments to LGBTQ individuals,[9] and pharmacists have declined to provide birth control and abortion medications to customers, even where abortion remains legal.[10]

This trend has only continued in the Court's current term. In *Yeshiva University v. Yu Pride Alliance*, for example, an LGBTQ group asserted that Yeshiva University had violated New York's antidiscrimination law because it refused "to treat [the] LGBTQ student group similarly to other student groups in its student club recognition process."[11] After the student group prevailed in New York trial court, Yeshiva filed an emergency application for a stay. The Supreme Court denied this application, reasoning that further proceedings were necessary below, including appellate proceedings in state court.[12] But in dissent, Justice Alito and three other Justices made clear that "[a]t least four of us are likely to vote to grant certiorari if Yeshiva's First Amendment arguments are rejected on appeal, and Yeshiva would likely win if its case came before us."[13] In another case, *303 Creative v. Elenis*, commentators predict that the Court will rule in favor of a web designer who "describes herself as a Christian"[14] and thus refused—in contravention of state law—to offer websites for same-sex weddings.[15]

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7. 142 S. Ct. 1264, 1272–74, 1278 (2022).

8. Linda Greenhouse, *Religious Doctrine, Not the Constitution, Drove the* Dobbs *Decision*, N.Y. TIMES (July 22, 2022), https://www.nytimes.com/2022/07/22/opinion/abortion-religion-supreme-court.html [https://perma.cc/RN8M-4PYH]; *see also infra* Part V.C.

9. Shira Stein, *Hospital Chain Blocks Fertility Coverage for Its LGBTQ Employees*, BLOOMBERG L. (July 18, 2022), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/health-law-and-business/BNA%2000000181-d41a-da99-a1bb-f7fa94340001?bwid=00000181-d41a-da99-a1bb-f7fa94340001 [https://perma.cc/3XN7-K5CL].

10. Sara Edwards, *'Because of My Faith': Walgreens Employees Allegedly Denying Birth Control, Condom Sales*, USA TODAY (July 21, 2022, 1:59 PM), https://www.usatoday.com/story/money/retail/2022/07/21/walgreens-pharmacy-birth-control-condoms/10110827002/ [https://perma.cc/SVQ5-NQ5K].

11. 143 S. Ct. 1, 1 (2022).

12. *Id.*

13. *Id.* at 2.

14. 385 F. Supp. 3d 1147, 1150 (D. Colo 2019).

15. Amy Howe, *Conservative Justices Seem Poised to Side with Web Designer Who Opposes Same-Sex Marriage*, SCOTUSBLOG (Dec. 5, 2022, 7:18 PM), https://www.scotusblog.com/2022/12/conservative-justices-seem-poised-to-side-with-web-designer-who-opposes-same-sex-marriage/ [https://perma.cc/29AU-E3FV].

Most exercises of disobedience do not end this way. There are typically consequences for lawbreaking; Martin Luther King, Jr., after all, wrote his ode on civil disobedience inside a jail cell.[16] Nor does the refrain that religion is special—i.e., that the Constitution "singles religion out" for protection[17]—quite capture free exercise's recent ascendance. For many years, in fact, free exercise plaintiffs did not fare so well. From 1980 to 1990, federal appellate courts rejected requests for religious exemption 88% of the time.[18] But that calculus has flipped. Today, as I shall show, when an individual disobeys a law based on a purported conflict with their free exercise, they prevail around 70% of the time.[19]

How did religious free exercise become the ultimate get-out-of-jail-free card? As a doctrinal matter, plaintiffs must prove that their religious beliefs are sincerely held and substantially burdened by a government action.[20] If they succeed, the onus shifts to the government to establish that its law survives strict scrutiny.[21]

The common understanding is that free exercise plaintiffs win now because the Supreme Court has finally started taking the government's burden seriously.[22] Under this telling, although the Court extended strict scrutiny to religious exercise some sixty years ago,[23] it was not *really* applying it for much of that time. Beyond three decisions about unemployment benefits[24] and a single case on homeschooling,[25] the Court rejected every single religious exemption claim to come before it through the early 2000s.[26] Thus, while strict scrutiny might have

16. Martin Luther King Jr., *Martin Luther King Jr.'s 'Letter from Birmingham Jail'*, ATLANTIC, https://www.theatlantic.com/magazine/archive/2018/02/letter-from-a-birmingham-jail/552461/ (last visited Jan. 24, 2023) [https://perma.cc/6RDB-FZAZ].

17. *See, e.g.*, Christopher C. Lund, *Religion Is Special Enough*, 103 VA. L. REV. 481, 482 (2017).

18. James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1416–17 (1992).

19. *See infra* Part V.A; *see also* Caleb C. Wolanek & Heidi Liu, *Applying Strict Scrutiny: An Empirical Analysis of Free Exercise Cases*, 78 MONT. L. REV. 275, 304 (2017) (finding that "religious claimants win a significant number of their cases").

20. Ramirez v. Collier, 142 S. Ct. 1264, 1277 (2022).

21. *Id.*

22. *See* Lee Epstein & Eric Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 2021 SUP. CT. REV. 315, 316–22 (providing a historical account of Supreme Court religious jurisprudence from the 1960s to 2021); *see also infra* Part V.A.

23. Sherbert v. Verner, 374 U.S. 398, 403 (1963).

24. *See id.*; Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 720 (1981); Hobbie v. Unemp. Appeals Comm'n of Fla., 480 U.S. 136, 141, 146 (1986).

25. Wisconsin v. Yoder, 406 U.S. 205, 210–11 (1972).

26. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1110 (1990).

been "strict in theory and fatal in fact"[27] in other areas, it was "strict in theory but feeble in fact" where religious liberty was concerned.[28] Over the past decade, though, the Court has taken pains to emphasize that when it says strict scrutiny applies to religion, it means it.[29] As evidence of its seriousness, it has not hesitated to invalidate government action.[30]

What is missing from this story is that, if religious strict scrutiny is becoming harder to satisfy, then *getting* to strict scrutiny should be hard too. That is why in other areas courts have developed tools to cabin strict scrutiny's application.[31] Strict scrutiny applies, for instance, only to certain immutable characteristics[32]—like race,[33] nationality,[34] and alienage[35]—and only when state action intentionally targets these characteristics. A neutral law, even one with a disparate impact, is not given heightened review.[36] These constraints, though, do not fit well in free exercise cases. Religious affiliation is not immutable;[37] many free exercise claimants are in fact converts.[38] And "[b]ecause direct regulation of religious activity almost never occurs, [any] litigation

27. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (internal quotation marks omitted); Bernal v. Fainter, 467 U.S. 216, 219 n.6 (1984) (citing Gunther, *supra*).

28. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994).

29. *See, e.g.*, Holt v. Hobbs, 574 U.S. 352, 363–64 (2015) (emphasizing that "the compelling interest test" must be "satisfied through" a "more focused inquiry" and that "[t]he least-restrictive-means standard is exceptionally demanding" (internal quotation marks omitted) (quoting Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 726, 728 (2014))).

30. *Id.* (exemption to prison grooming policy); Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 439 (2006) (exemption to Controlled Substances Act); *Hobby Lobby*, 573 U.S. at 736 (enjoining contraceptive mandate).

31. *See* ANDREW COAN, RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISION-MAKING 27 (2019) ("The few exceptions are narrow, clear-cut, and subject to strict scrutiny, a form of rigorous review that the Court carefully cabins to [a] handful of exceptional cases.").

32. Love v. Beshear, 989 F. Supp. 2d 536, 545 (W.D. Ky. 2014).

33. Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

34. Clark v. Jeter, 486 U.S. 456, 461 (1988).

35. Graham v. Richardson, 403 U.S. 365, 372 (1971).

36. *See* Washington v. Davis, 426 U.S. 229 (1976) (finding that a law that was neutral on its face was not unconstitutional for having a racially disproportionate impact).

37. *See* G. Sidney Buchanan, *The Power of Government to Regulate Class Discrimination by Religious Entities: A Study in Conflicting Values*, 43 EMORY L.J. 1189, 1204 (1994) ("[R]eligion is not immutable. An adult person has a constitutionally protected right to choose his or her religious belief and affiliation.").

38. *See, e.g.*, Patel v. U.S. Bureau of Prisons, 515 F.3d 807, 810 (8th Cir. 2008) ("Patel converted to Islam while in prison and now believes that he must consume a *halal* . . . diet."); Whitfield v. Ill. Dep't of Corr., 237 F. App'x 93, 94 (7th Cir. 2007) ("His grievance stems from the food he received after converting from Islam to the African Hebrew Israelite faith . . . .").

surrounding free exercise addresses only incidental and inadvertent regulation of religious conduct."[39]

The law instead seeks to constrain free exercise by requiring claimants, before they get to strict scrutiny, to show that their religious beliefs are sincerely held. The prevailing academic wisdom is that "courts competently scrutiniz[e] asserted religious beliefs for sincerity,"[40] because they have "all the tools they need"[41] to "ferret out insincere religious claims"[42] and protect genuine religious exercise.

That understanding is wrong. In the first analysis of its kind, I reviewed every Religious Freedom Restoration Act ("RFRA") and Religious Land Use and Institutionalized Persons Act ("RLUIPA") case decided by the Supreme Court and federal appellate courts examining whether a plaintiff's religious views were sincerely held. As I demonstrate, in a dataset comprising approximately 350 cases, sincerity has become a meaningless requirement.

In the past thirty years, the Supreme Court has *never* found a plaintiff insincere.[43] In fact, no Justice has even questioned an

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39. William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RSRV. L. REV. 357, 357 (1989); *see also* Sherbert v. Verner, 374 U.S. 398, 423 (1963) (Harlan, J., dissenting) ("I cannot subscribe to the conclusion that the State is constitutionally compelled to carve out an exception to its general rule of eligibility in the present case. Those situations in which the Constitution may require special treatment on account of religion are, in my view, few and far between.").

40. Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After* Hobby Lobby, 67 STAN. L. REV. ONLINE 59, 59–60 (2014), http://www.stanfordlawreview.org/wp-content/uploads/sites/3/2014/11/67_Stan_L_Rev_Online_59_AdamsBarmore.pdf [https://perma.cc/6U5K-RX73].

41. Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1192 (2017).

42. Adams & Barmore, *supra* note 40, at 59; *see generally* Anna Su, *Judging Religious Sincerity*, 5 OXFORD J.L. & RELIGION 28, 38–41 (2016) (describing the "attractiveness of sincerity," including that "courts are confident that they are well equipped to confront such issues," that it "comports with the general liberal ideal of individual autonomy," and that it better embraces "dignity" and "tolerance" in "heterogenous, multicultural societies"); Kara Loewentheil & Elizabeth Reiner Platt, *In Defense of the Sincerity Test*, *in* RELIGIOUS EXEMPTIONS 247, 265 (Kevin Vallier & Michael Weber eds., 2018) ("[C]ourts are well-equipped to evaluate the sincerity of claimants without resorting to improper appraisals . . . ."); CHARLES MCCRARY, SINCERELY HELD: AMERICAN SECULARISM AND ITS BELIEVERS 261 (2022) (" 'Sincere' . . . is how courts (and others, including some scholars) recognize real religiosity."); Kevin L. Brady, Comment, *Religious Sincerity and Imperfection: Can Lapsing Prisoners Recover Under RFRA and RLUIPA*, 78 U. CHI. L. REV. 1431, 1433 (2011) ("[S]incerity should be the determinative inquiry when analyzing the claims of backsliding prisoners . . . . Courts should . . . apply[ ] a modified version of the sincerity test . . . [which] allows sincere but imperfect prisoners to exercise their beliefs but doesn't force prison officials to accommodate mendacity."); Adeel Mohammadi, *Sincerity, Religious Questions, and the Accommodation Claims of Muslim Prisoners*, 129 YALE L.J. 1836, 1863 (2020) ("[T]he sincerity doctrine's primary function should be understood—to borrow the Supreme Court's language from a different context—as an important mechanism for weeding out meritless claims." (internal quotation marks omitted)).

43. *See infra* Part II.B.

applicant's sincerity until this past Term, when Justice Thomas did so in dissent in *Ramirez v. Collier*.[44] This pattern holds true one level down. Among 291 cases heard by the federal appellate courts, claimants carry their sincerity burden 93% of the time.[45] That is exceedingly high compared to other areas of the law. Plaintiffs at trial carry their burdens about 60% of the time in ADA cases,[46] 27% of the time in employment discrimination matters,[47] and just 16% of the time in antitrust lawsuits.[48] Burdens are thus meaningful impediments for plaintiffs—unless those plaintiffs proceed under a religious free exercise track.

And who, for that matter, is insincere? Here again, the data is revealing. In the few cases where courts have held a plaintiff insincere, that plaintiff was almost always pro se.[49] If sincerity offers a license for disobedience, then the only people denied the license are the poor and the marginalized.

There are far-reaching consequences to sincerity's failure. For religious free exercise doctrine to work, it *must* be able to sort the true believer from the make-believer,[50] so that only genuine religious freedom is encouraged, and not opportunistic lawbreaking.[51] But

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44. Ramirez v. Collier, 142 S. Ct. 1264, 1297–98 (2022) (Thomas, J., dissenting).

45. *See infra* Part IV.A.1.

46. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 109 (1999) (analyzing statistics of 615 ADA cases terminated between 1992 and 1998, and finding that 92.7% of those cases were won by defendants, and of those, 38.7% were resolved on summary judgment).

47. Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 709–10 (2007) (observing that 73% of summary judgment motions in employment discrimination cases are granted, and that nearly all are in favor of defendants).

48. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 827–28 (2009).

49. *See infra* Part IV.A.

50. The specter of the make-believer has long been part of the fabric of law and religion scholarship. *See, e.g.*, Jonathan Weiss, *Privilege, Posture and Protection "Religion" in the Law*, 73 YALE L.J. 593, 602–03 (1964):

> Can a man legally sell drugs, claiming on the front of the label that they cure cancer, and on the back that God told him this? Can religion be used as a defense to a substantive crime? A man may defend by saying that God told him to murder, but is it sufficient if he announces the basis for his action only after the act?;

Richard B. Collins, *Too Strict?*, 13 FIRST AMEND. L. REV. 1, 2 (2014) ("[Even if] a court thinks a claim before it should be sustained, it will often sense a slippery slope problem."); Brady, *supra* note 42, at 1431 (examining whether a prisoner should receive accommodation if he does "not develop sincere beliefs" but "merely enjoyed [the] company and his relationships with other religious prisoners").

51. There is a tension between religious fraud and granting exemptions for genuine religious exercise and tolerating, given our nation's religious diversity, a number of exceptions to the rule of law. This Article does not directly address whether a doctrine that suitably recognizes the latter is normatively or legally defensible. I have my own reservations on this point. *See* Micah

instead, everyone—other than pro se plaintiffs—is sincere. And there is already evidence that lawbreaking by make-believers is happening. In *Hobby Lobby*, for instance, the Supreme Court began a decades-long assault against the Affordable Care Act's contraceptive mandate despite ample facts showing that the petitioners there were not sincere.[52] Sincerity has also migrated beyond religious protection statutes like RFRA and RLUIPA, appearing now in federal criminal, employment, and immigration law;[53] state law;[54] and international law.[55] The stakes for sincerity could not be higher, yet its application in practice could not be more broken. To create a workable free exercise doctrine—and to rein in the licensed disobedience permitted under current practice—courts must adopt a more meaningful sincerity analysis.

This Article proceeds in four Parts. Part I discusses the origins of sincerity, canvasses the relevant scholarship, and shows why this academic understanding is flawed. Part II summarizes my empirical analysis of RFRA and RLUIPA cases. Part III discusses the relationship between sincerity and disobedience. Finally, Part IV briefly hazards some avenues of reform.

I. THE SINCERITY "REQUIREMENT"

Religious disobedience is unlike every other form of lawbreaking. In the typical case, someone who breaks the law suffers consequences: fines, imprisonment, or other sanctions. But free exercise

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Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012). But my claims here are somewhat more modest: I am trying to show that the doctrine does not, as we have it, do a good job of distinguishing either.

52. *See* Loewentheil & Platt, *supra* note 42, at 274–76. As Lowentheil and Platt outline, plaintiffs in *Hobby Lobby* had, in fact, previously covered for many years the very same contraceptive methods that had prompted them to file suit. They continued to invest, through the company's 401(k) accounts, in companies manufacturing these contraceptives throughout the suit. And they only brought suit *after* outreach from the Becket Fund. *Id.*

53. *See, e.g.*, EEOC, OFF. OF LEGAL COUNS., EEOC-CVG-2021-3, COMPLIANCE MANUAL ON RELIGIOUS DISCRIMINATION § 12-I.A.3 (2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination [https://perma.cc/2WQ5-FN7Q] (guidance on EEOC claims); Lie v. Att'y Gen. of U.S., 197 F. App'x 175, 179 (3d Cir. 2006) ("The [immigration judge] also expressed doubts about the sincerity of [the asylee's] religious beliefs. There is substantial evidence to support the IJ's adverse credibility finding."). *See generally* Chapman, *supra* note 41, at 1188 (providing additional examples).

54. *See, e.g.*, MISS. CODE ANN. § 11-62-3 (West 2022) (protecting believers with "sincerely held religious beliefs"); IND. CODE ANN. § 20-26-13-17 (West 2022) (protecting parents' sincerely held religious belief); LA. STAT. ANN. § 40:1061.2 (2022) (protecting medical providers and prospective employees who have sincerely held religious beliefs); MCCRARY, *supra* note 42, at 3 (discussing an Iowa bill about "bona fide religious purpose").

55. *See* Su, *supra* note 42, at 34 ("If we zoom out of the United States, it is not surprising to discover that there is a similar emerging trend in Canada and the European Union.").

flips this paradigm. When a law substantially burdens someone's sincere religious exercise, it is the law itself which suffers consequences, not the lawbreaker. The law becomes presumptively invalid, and the government must show why it cannot possibly be more narrowly tailored or modified.[56]

That sort of special solicitude is remarkable. The idea "that an individual has the right to disobey any law he determines to be [irreligious] is simply a more sophisticated way of saying that a man is entitled to take the law into his own hands."[57] Once that sort of unsanctioned disobedience gains a foothold, "its use and techniques tend inevitably to escalate [and] spread"[58]—if, after all, "I make an exception for you, I'll have to make one for everybody."[59]

The sincerity requirement is meant to guard against such abuses. If religion *must* be afforded special treatment, the law, so the thinking goes, should circumscribe this special treatment to only genuine exercises of religious liberty. This Part traces sincerity's history, (A) from its introduction in the conscientious objector cases, (B) to its troubled relationship with strict scrutiny, and finally (C) to its codification by statute in RFRA and RLUIPA. I then (D) discuss scholarly treatment on sincerity and show why the conventional academic view—that sincerity is a workable way to "weed out" frivolous claims[60]—is incorrect.

A. Sincerity and the Conscientious Objector Cases

The Supreme Court first analyzed sincerity in *United States v. Ballard*.[61] There, prosecutors charged leaders of a new, unconventional

56. *See* Ray v. Comm'r, Ala. Dep't of Corr., 915 F.3d 689, 698 (11th Cir. 2019) ("The law is . . . clear that the burden falls to the government, not to the challenger, to establish a compelling interest and narrow tailoring.").

57. Frank M. Johnson, Jr., *Civil Disobedience and the Law*, 22 VAND. L. REV. 1089, 1095 (1969).

58. Lewis F. Powell, Jr., President, Am. Bar Ass'n, Speech to Union Theological Seminary: Civil Disobedience vs. the Rule of Law, *in* WASH. & LEE UNIV. SCH. OF L. SCHOLARLY COMMONS, Oct. 11, 1965, at 7 https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1031&context=powellspeeches [https://perma.cc/UR6R-NK3A].

59. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 436 (2006). In context, this line from Chief Justice Roberts's opinion in *O Centro* is ridiculing the idea that exemptions for religious free exercise are some "slippery slope." *See id.* He claims that, in fact, congressional text and judicial precedent provides workable tools to prevent this from happening. *See id*. But, as I show, that assertion is not quite right—there are no such tools because the text and case law are, in practice, toothless.

60. *See, e.g.*, Mohammadi, *supra* note 42, at 1841.

61. 322 U.S. 78 (1944); *see also* Loewentheil & Platt, *supra* note 42, at 249 ("The sincerity test was first articulated in the 1944 criminal case *United States v. Ballard*."); Emp. Div., Dep't of

religious sect with mail fraud for promising medical cures in return for money.[62] At issue was whether the jury should decide "the truth of the representations concerning the respondent's religious doctrines or beliefs,"[63] or whether the jury should only consider if the defendants sincerely believed their representations—even if those representations were false.[64] *Ballard* held for the latter: "Men may believe what they cannot prove" and they could not, then, "be put to the proof of their religious doctrines or beliefs."[65]

Post-*Ballard*, sincerity questions began to surface with regularity in a series of conscientious objector cases.[66] The Selective Training and Service Act of 1940 exempted from military service "any person . . . who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."[67] At the time, the United States' war footing underscored the importance of being able to correctly separate those exercising sincere objections based on religious training and belief from those simply hoping to avoid military service.[68]

The process for obtaining conscientious objector status was demanding. Typically, an objector would have to complete a form outlining their religious beliefs in detail.[69] These responses would later be reviewed by a local draft board; at one time, there were more than six thousand such boards across the country.[70] These boards would interview the applicant, consulting and working with the Department

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Hum. Res. of Or. v. Smith, 494 U.S. 872, 903 (1990) (O'Connor, J., concurring) (discussing *Ballard* as origin of sincerity doctrine).

62. *Ballard*, 322 U.S. at 86–88.

63. *Id.* at 85–86.

64. *See* Mohammadi, *supra* note 42, at 1855 (explaining that *Ballard* established that "while the accuracy of religious beliefs is outside the judicial scope . . . the sincerity of those beliefs is not"); Chapman, *supra* note 41, at 1204 (explaining the Court held the government was foreclosed "from passing judgment on the accuracy of the defendants' religious belief").

65. *Ballard*, 322 U.S. at 86.

66. *See* Adams & Barmore, *supra* note 40, at 60 ("The sincere belief requirement has its roots in a long tradition of exempting conscientious objectors from conscripted military service."); Mohammadi, *supra* note 42, at 1860 ("The sincerity doctrine has its historical roots in the thorny issue of conscientious objection to military service.").

67. Selective Training and Service Act of 1940, Pub. L. No. 76-783, § 5(g), 54 Stat. 885, 889. The Act was reauthorized in 1951, as the Universal Military Training and Service Act, Pub. L. No. 82-51, 65 Stat. 75 (1951). Language around conscientious objection did not change. *See* 50 U.S.C. § 3806.

68. Mohammadi, *supra* note 42, at 1860 ("Conscientious objectors to deadly wars illustrate starkly the ultimate tension inherent in religious-exemption law . . . . One draftee's nonparticipation in the battlefield results in another servicemember's exposure.").

69. MCCRARY, *supra* note 42, at 116.

70. *Id.* at 117.

of Justice on matters.[71] If the local board rejected or failed to reach a conclusion regarding the applicant, there would be further investigation by the FBI and a hearing officer interview with the Department of Justice.[72] Unsuccessful applicants could take their cases to federal court, where they might retain experts, file briefs, and argue about their religious practices and beliefs in open court.[73] For those denied conscientious objector status, refusal to submit for induction could result in criminal charges.[74]

Decisions like *Witmer v. United States* capture the rigorous sincerity analysis undertaken in the past.[75] Phillip Witmer was a Jehovah's Witness who had been convicted for failure to submit to induction into the selective service.[76] In seeking classification as a conscientious objector, Mr. Witmer stated that his "training and belief in relation to a Supreme Being . . . required [him] to maintain neutrality in the combats of this world."[77] Mr. Witmer included "an affidavit from a local officer of the Jehovah's Witnesses that he had 'on many occasions' engaged in the 'preaching of the good news or gospel to others.' "[78] And, following an official interview, the FBI report described Mr. Witmer as "very religious and very sincere" in saying that it "was wrong to go to war."[79]

Even so, the local draft board denied Mr. Witmer conscientious objector status—a denial affirmed by the federal courts, including the U.S. Supreme Court. As the Court observed, Mr. Witmer had offered arguably conflicting evidence during the proceedings. In his initial form, for instance, Mr. Witmer did not seek classification as a religious minister but deferment as a farmer, so that he could help cultivate "a portion of his father's farm."[80] Mr. Witmer only later explicitly sought exemption on the basis of his religious beliefs.

Moreover, Mr. Witmer's motives were, in the Court's view, in conflict. He "promised to increase his farm production and contribute a

71. *See id.* ("Because the local draft board was not really trained to judge matters of sincerity and religiosity, the Department of Justice supplied boards with legal guides and sets of questions they might ask an objector.").

72. *Id.* at 117–18.

73. *See id.* at 117–21.

74. 50 U.S.C. § 3811(a) (providing for up to five years imprisonment or a fine of up to $10,000). For an additional discussion on the onerous examinations undertaken for conscientious objectors, see William P. Marshall, *Third-Party Burdens and Conscientious Objection to War*, 106 KY. L.J. 685, 692–700 (2018).

75. Witmer v. United States, 348 U.S. 375 (1955).

76. *Id.* at 376.

77. *Id.* at 378 (internal quotation marks omitted).

78. *Id.* at 379.

79. *Id.* at 380 (internal quotation marks omitted).

80. *Id.* at 378.

satisfactory amount for the war effort."[81] But he declined to "engage in" any other sort of designated "noncombatant service" because "he felt that 'the boy who makes the snow balls is just as responsible as the boy who throws them.' "[82] "These inconsistent statements in themselves cast considerable doubt on the sincerity of petitioner's claim."[83] Mr. Witmer also failed "to adduce evidence of any prior expression of his allegedly deeply felt religious convictions against participation in war."[84]

Witmer illustrates a thorough, careful review of sincerity at work. The Court did not take sincerity for granted. To the contrary, "*any* fact which casts doubt on the veracity of the registrant is relevant."[85] A meticulous review was necessary because to "expect" an "outright admission of deception" would be "pure naivety."[86] Post-*Witmer*, lower courts followed and applied the decision's rubric to several different types of religious exemption claims.[87]

B. Sincerity and Strict Scrutiny

1. *Sherbert* and *Yoder*

Sincerity, curiously enough, predates the establishment of contemporary free exercise doctrine. *Ballard* and *Witmer* were decided in 1944 and 1955, respectively; the Supreme Court did not formally extend strict scrutiny to religious free exercise until 1963, in *Sherbert v. Verner*.[88] In *Sherbert*, appellant Adell Sherbert was fired because she refused to work on Saturday, on account of her being a Seventh-day Adventist—a faith whose name makes clear that Saturday is the intended day of rest.[89] She subsequently sought unemployment benefits from the state.[90] The state denied Ms. Sherbert's request, a decision the

81. *Id.* at 382 (internal quotation marks omitted).

82. *Id.* at 380.

83. *Id.* at 382–83.

84. *Id.* at 383.

85. *Id.* at 381–82 (emphasis added).

86. *Id.* at 383.

87. *See* Brady, *supra* note 42, at 1452–54 (citing United States v. Abbott, 425 F.2d 910 (8th Cir. 1970); Hanna v. Sec'y of the Army, 513 F.3d 4 (1st Cir. 2008); United States v. Messinger, 413 F.2d 927 (2d Cir. 1969); Lovallo v. Resor, 443 F.2d 1262 (2d Cir. 1971); United States v. Deere, 428 F.2d 1119 (2d Cir. 1970); United States v. Rutherford, 437 F.2d 182 (8th Cir. 1972); and Salamy v. United States, 379 F.2d 838, 842 (10th Cir. 1967)).

88. 374 U.S. 398 (1963); *see also* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1412 (1990) (describing *Sherbert* as "the first and leading case in the Supreme Court's modern free exercise jurisprudence").

89. 374 U.S. at 399.

90. *Id.* at 399–400.

Court later reversed.[91] There was, in the Court's view, no "compelling state interest enforced in the eligibility provisions of the . . . statute [which] justifies the substantial infringement of appellant's First Amendment right[s]."[92]

Sherbert said little about sincerity, largely because it did not need to. "No question ha[d] been raised in th[e] case concerning the sincerity of appellant's religious beliefs"; there was no "doubt that the prohibition against Saturday labor [was] a basic tenet of the Seventh-day Adventist creed."[93] That said, *Sherbert* laid down the contours for the test that continues to (with some modifications) apply today: The government needs to prove a "compelling state interest" and narrow tailoring; the plaintiff needs to show sincerity of religious beliefs and a "substantial" burden upon these beliefs.[94]

A decade later, in *Wisconsin v. Yoder*, the Court held, again under the lens of strict scrutiny, that the state needed to offer Amish parents an exemption to a law requiring compulsory schooling—the state's reasons were considered insufficiently compelling.[95] As in *Sherbert*, there was little dispute in *Yoder* that "the Amish [plaintiffs] . . . ha[d] convincingly demonstrated the sincerity of their religious beliefs" and that an exemption was necessary to accommodate "the interrelationship of belief with their mode of life."[96] As the Court emphasized,

> [A]lmost 300 years of *consistent* practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education . . . would gravely endanger if not destroy the free exercise of respondents' religious beliefs.[97]

2. *Thomas*

Neither *Sherbert* nor *Yoder* had much to say about sincerity because both involved adherents exercising foundational tenets of their religion. That changed with *Thomas v. Review Board of Indiana*.[98] *Thomas* and *Witmer* share several remarkable similarities. Like Mr. Witmer, Eddie Thomas was a practitioner, but not a minister, of the Jehovah's Witnesses.[99] Mr. Thomas was hired originally to work at a

91. *Id.* at 401–02.
92. *Id.* at 406.
93. *Id.* at 399 n.1.
94. *Id.* at 406.
95. 406 U.S. 205, 210–11 (1972).
96. *Id.* at 235.
97. *Id.* at 219 (emphasis added).
98. Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707 (1981).
99. *Id.* at 710.

steelmaking plant; in his hiring application, he "listed his membership in the Jehovah's Witnesses," "noted that his hobbies were Bible study and Bible reading," but "placed no conditions on his employment" and "did not describe his religious tenets in any detail"—much like Mr. Witmer's description of himself as a farmer on his initial application without noting his opposition to war and armed conflict.[100]

A year after his hiring, Mr. Thomas was "transferred . . . to a department that fabricated turrets for military tanks."[101] Upon "realiz[ing] that the work he was doing was weapons related," Mr. Thomas quit, "asserting that he could not work on weapons without violating the principles of his religion."[102] Mr. Thomas subsequently sought, and was denied, unemployment benefits.

In a hearing to appeal this decision, Mr. Thomas explained that upon learning that his work would be used to make weapons, he consulted another employee, who was also a Jehovah's Witness. Mr. Thomas's co-worker "advised him that working on weapons parts . . . was not 'unscriptural.' "[103] Moreover, "[i]t [was] reasonable to assume that some of the sheet steel" that Mr. Thomas had processed during his first year of work "found its way into tanks or other weapons."[104] Following this conversation, Mr. Thomas "struggl[ed] with his beliefs," and "was not able to articulate [them] precisely."[105] Nevertheless, he "concluded that his friend's view was based upon a less strict reading of Witnesses' principles than his own."[106] In upholding the denial of unemployment benefits, the Indiana Supreme Court reasoned that "Thomas had quit voluntarily for personal reasons" rather than bona fide religious ones.[107]

The U.S. Supreme Court reversed. It acknowledged that "[t]he determination of what [constitutes] a 'religious' belief or practice is . . . a difficult and delicate task."[108] But its subsequent decision—which did not, strangely enough, cite *Witmer*—betrayed any actual effort to wrestle with such difficulties.

Instead, what is notable about *Thomas* is its listing of all the circumstances that lower courts should not consider when undertaking

100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 711.
104. *Id.* at 711 n.3.
105. *Id.* at 715 (internal quotation marks omitted).
106. *Id.* at 711.
107. *Id.* at 713; *see also id.* at 714 (noting that Mr. Thomas had exercised "[a] personal philosophical choice rather than a religious choice.").
108. *Id.* at 714.

a sincerity analysis. "[R]eligious beliefs need not," for instance, be "acceptable" or "logical" or "consistent" or even "comprehensible . . . in order to merit First Amendment protection."[109] "[T]he resolution of [any] question" on sincerity should not "turn upon a judicial perception of the particular belief or practice in question."[110] In a single line, the Court acknowledged that "an asserted claim [could be] so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause."[111] But it said no more about how to distinguish a "bizarre" belief from true religious practice. And as the Court has acknowledged elsewhere, "[t]he religious views espoused by [some] might seem incredible, if not preposterous, to most people."[112]

Still, set against this framework, the Court dismissed arguments that Mr. Thomas acted inconsistently—i.e., that he willingly made steel for weapons but could not make turrets.[113] What mattered was "that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one."[114] The Justices likewise disclaimed any attempt to scrutinize why Thomas was "struggling" with his beliefs. Even though another Jehovah's Witness had discredited Thomas's views, "[i]ntrafaith differences . . . [we]re not uncommon among followers of a particular creed," and "the judicial process [was] singularly ill equipped to resolve such differences."[115]

It is hard to read *Thomas* as anything less than a repudiation of *Witmer*.[116] Both cases involved Jehovah's Witnesses opposed to war. Both involved Jehovah's Witnesses drawing a line as to what their beliefs would and would not permit. If anything, Mr. Witmer's line was more plausible: Mr. Witmer would contribute food and agricultural production to feed the country but did not want to serve in combat or a

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109. *Id.*

110. *Id.*

111. *Id.* at 715.

112. United States v. Ballard, 322 U.S. 78, 87 (1944); *id.* at 86 ("Religious experiences which are as real as life to some may be incomprehensible to others."); Grant H. Morris & Ansar Haroun, *"God Told Me to Kill": Religion or Delusion?*, 38 SAN DIEGO L. REV. 973, 1035 (2001) ("Are religious beliefs bizarre delusions, nonbizarre delusions, or neither? The answer appears to be 'yes, yes, and yes.' "); *id.* at 991 ("Religious beliefs, however, are not logical. 'Faith,' remarked social critic H.L. Mencken, is 'an illogical belief in the occurrence of the improbable.' ").

113. *Thomas*, 450 U.S. at 715.

114. *Id.*

115. *Id.*

116. Two intervening decisions, *United States v. Seeger*, 380 U.S. 163 (1965), and *Welsh v. United States*, 398 U.S. 333 (1970), also eroded the sincerity requirement. *See* Marshall, *supra* note 74, at 704 n.365 ("*Seeger* and *Welch* had already expanded the religious training and belief requirement to include non-theistic objections."). My intent here is not to minimize those decisions but to make the overall point that sincerity analysis looked like one thing in the 1940s and 1950s and had changed dramatically by the 1980s.

branch related to combat.[117] Mr. Thomas's line was far blurrier—willing to forge the steel to make a weapon but unwilling to make the weapon itself. Moreover, while Mr. Witmer produced a supporting affidavit attesting to his faith,[118] Mr. Thomas did the opposite: he consulted another follower, who rejected his religious interpretation.[119]

And yet, in deciding Mr. Thomas's case, the Court forewent the sort of careful, rigorous analysis undertaken in *Witmer*. It instead gave a laundry list of what not to scrutinize when conducting a sincerity analysis. Indeed, while *Witmer* drew upon the petitioner's "inconsistent statements in themselves [to] cast considerable doubt on the sincerity of petitioner's claim," *Thomas* explicitly declared that "religious beliefs need not be . . . consistent . . . to others in order to merit First Amendment protection."[120] While *Witmer* held that "*any* fact which casts doubt on the veracity of the registrant is relevant,"[121] *Thomas* overlooked many such facts.

Although *Thomas* signaled a more relaxed view of sincerity, it still applied a sort of centrality test. Everyone agreed that Jehovah's Witnesses opposed military action; Mr. Thomas merely expressed those beliefs in a more idiosyncratic way. That examination resembled earlier cases. All knew, in *Sherbert*, that Seventh-day Adventists treated Saturday as the Sabbath, and in *Yoder*, that "objection to formal education beyond the eighth grade [was] firmly grounded in" the Amish's "central religious concepts."[122]

3. *Smith*

But even this shibboleth—centrality—would fall in *Employment Division v. Smith*.[123] There, two Native American plaintiffs sought an exemption to Oregon's drug laws in order to use peyote for ceremonial purposes. The Court denied the exemption.[124] In so doing, it formally abandoned strict scrutiny for most constitutional free exercise challenges.[125] To be sure, laws expressly discriminating against religion would remain subject to strict scrutiny.[126] But neutral, generally

117. Witmer v. United States, 348 U.S. 375, 380 (1955).

118. *Id.* at 379.

119. *Thomas*, 450 U.S. at 711.

120. *Compare Witmer*, 348 U.S. at 382–83 (holding that veracity of the registrant is relevant), *with Thomas*, 450 U.S. at 714 (holding that First Amendment protections do not require that).

121. *Witmer*, 348 U.S. at 381–82 (emphasis added).

122. Wisconsin v. Yoder, 406 U.S. 205, 210 (1972).

123. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 887 (1990).

124. *Id.* at 890.

125. *Id.* at 877–82.

126. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

applicable laws—i.e., most laws[127]—would be analyzed under rational basis review, not heightened review. *Smith* is most remembered for this holding and the statutory response it triggered.[128]

But an overlooked aspect of the opinion is its rejection of centrality as a consideration in evaluating sincerity. Contra *Sherbert*, *Yoder*, and *Thomas*, *Smith* held that any attempt to tether "the 'centrality' of religious beliefs" to a free exercise analysis was unfounded.[129] As the Court observed, "[j]udging the centrality of different religious practices [was] unacceptable," because it was "not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."[130] That holding, then, left few definitive metrics for courts to ascertain sincerity and to distinguish the sincere from insincere. They could not, post-*Thomas*, examine consistency or community practice or comprehensibility, and they could no longer, post-*Smith*, evaluate centrality.[131]

Fortunately, though *Smith* removed yet another tool from the sincerity toolbox, it also significantly eased the government's burden. Even if plaintiffs were sincere whenever they said they were,[132] they still might not get far because "neutral laws of general applicability" would be upheld "even if they incidentally burden[ed] religion."[133] But that circumstance would soon change.

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127. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 861 (2006) (showing that, between 1990 and 2003, there were about four times as many requests for exemption from generally applicable laws as there were challenges based on discrimination).

128. *See generally* Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 232 (1991) ("*Smith* reaches a low point in modern constitutional protection under the Free Exercise Clause."); McConnell, *supra* note 26, at 1114–28 (arguing that *Smith* ran afoul of text, history, and precedent); James D. Gordon, III, *Free Exercise on the Mountaintop*, 79 CALIF. L. REV. 91, 91 (1991) ("[*Smith*] mistreated precedent, used shoddy reasoning, and . . . deprived the free exercise clause of any independent significance.").

129. *Smith*, 494 U.S. at 887.

130. *Id.*

131. To be sure, in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 457 (1988), decided two years before *Smith*, the Court first suggested that free exercise doctrine should move away from a "centrality" requirement. To the extent *Lyng* left the issue unresolved, *Smith* answered any remaining doubt.

132. *Cf.* Ann Pellegrini, *Sincerely Held; or, The Pastorate 2.0*, 129 SOC. TEXT 71, 73 (2016) (stating the religious sincerity test has been reduced to whether claimants "seem like they mean it").

133. Brady, *supra* note 42, at 1434.

C. Sincerity and the (Super)-Statute

Congress did not take kindly to *Smith*. To the contrary, the decision prompted it to pass, with widespread bipartisan support, the Religious Freedom Restoration Act ("RFRA").[134] RFRA's *Findings and Declaration of Purposes* observed that, in *Smith*, the Court "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."[135] Such a decision was unwarranted because "the compelling interest test as set forth in prior [f]ederal court rulings [was] a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[136] Consequently, RFRA would "restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*, and [ ] guarantee its application in all cases"—state or federal—"where free exercise of religion is substantially burdened."[137]

A few years after RFRA's passage, the Supreme Court held that RFRA could not apply to state actors, because it exceeded Congress's powers under the Fourteenth Amendment.[138] Congress enacted, in response, the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). Whereas RFRA drew on Congress's "remedial power[s] under . . . the Fourteenth Amendment," RLUIPA "relied on [Congress's] Spending and Commerce Clause authority"[139]—a reliance which, as courts would subsequently hold, passed constitutional muster. But unlike RFRA, which sought to apply to all state actors, RLUIPA was limited to actions brought by landowners and state prisoners.[140]

The practical implication of these statutes was to funnel religious free exercise litigants, who previously would have pursued constitutional relief for a free exercise claim, into seeking statutory relief.[141] By restoring the *Sherbert-Yoder* standard through legislation,

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134. *Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act: Hearing Before the Subcomm. on the Const. and Civ. Just., of the H. Comm. on the Judiciary*, 114th Cong. 8–11 (2015) (statement of Lori Windham, Senior Counsel, The Becket Fund for Religious Liberty) ("When RFRA was passed in 1993, the bill was supported by one of the broadest coalitions in . . . political history," with support from "66 religious and civil liberties groups . . . . RFRA passed with unanimous support in the House and virtually unanimous support in the Senate.").

135. 42 U.S.C. § 2000bb(a)(4).

136. *Id.* § 2000bb(a)(5).

137. *Id.* § 2000bb(b)(1) (internal citations omitted).

138. City of Boerne v. Flores, 521 U.S. 507, 537 (1997).

139. Madison v. Virginia, 474 F.3d 118, 124 (4th Cir. 2006).

140. 42 U.S.C. § 2000cc (landowners); 42 U.S.C. § 2000cc-1 (institutionalized persons).

141. For many years, lower courts held that damages were unavailable under RFRA and RLUIPA. *See, e.g.*, Webman v. Fed. Bureau of Prisons, 441 F.3d 1022, 1026 (D.C. Cir. 2006)

RFRA and RLUIPA sought "to ensure 'greater protection for religious exercise than [what was, post-*Smith*,] available under the First Amendment.' "[142] RFRA and RLUIPA, in fact, arguably went further than pre-*Smith* jurisprudence. The statutory text, for instance, expressly instructs courts to "construe[ ] [these statutes] in favor of a broad protection of religious exercise, to the maximum extent permitted."[143] The laws themselves, further, "operat[e] as a kind of super statute, displacing the normal operation" of other federal and state law.[144] When RFRA or RLUIPA conflicts with a federal or state law, RFRA and RLUIPA come out on top.

Both RFRA and RLUIPA carried over a sincerity requirement, albeit indirectly. The word "sincerity" appears in neither statute. But elements of the test—or, more precisely, the test as expressed in *Thomas* and *Smith*—are present. RFRA and RLUIPA, for example, define "religious exercise" as "includ[ing] any exercise of religion, [1] whether or not compelled by, [2] or central to, a system of religious belief."[145]

Such a definition incorporates aspects from *Thomas*, which made clear that neither religious compulsion nor consistency were prerequisites to free exercise protection. The definition also incorporates *Smith*'s untethering of centrality from sincerity. Consistent with this reading, the Supreme Court and every geographic federal court of appeals have applied a sincerity requirement to RFRA and RLUIPA claims.[146]

(RFRA); Sharp v. Johnson, 669 F.3d 144, 153–55 (3d Cir. 2012) (RLUIPA). That condition may have encouraged *some* plaintiffs to pursue or at least include First Amendment claims in their lawsuits. This circumstance remains the case for RLUIPA matters—in *Sossamon v. Texas*, the Supreme Court confirmed that money damages were unavailable for plaintiffs proceeding under this statute. 563 U.S. 277, 286 (2011). But in *Tanzin v. Tanvir*, the Supreme Court chose a different path for RFRA, "conclud[ing] that RFRA's express remedies provision permits litigants, when appropriate, to obtain money damages." 141 S. Ct. 486, 493 (2020). Thus, at least for those pursuing a claim under RFRA, there is no apparent advantage to pursuing a constitutional claim over a statutory one.

142. Ramirez v. Collier, 142 S. Ct. 1264, 1277 (2022) (quoting Holt v. Hobbs, 574 U.S. 352, 357 (2015)).

143. 42 U.S.C. § 2000cc-3(g) (RLUIPA). RFRA includes a similar rule of construction. *See id.* § 2000bb-3(c) ("Nothing in this chapter shall be construed to authorize any government to burden any religious belief.").

144. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

145. 42 U.S.C. § 2000cc-5(7)(A) (emphasis added); *id.* §§ 2000bb(b)(1), bb-2(4); *cf.* Mohammadi, *supra* note 42, at 1852 ("Though sincerity is not textually required in either the Constitution or governing statutes, judges have read it into both."); Brady, *supra* note 42, at 1433 (stating that for courts to answer the question of whether a burden on religious exercise exists, "courts must first know if [plaintiffs] hold sincere religious beliefs").

146. *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005) ("Although RLUIPA bars inquiry into whether a particular belief or practice is 'central' to a prisoner's religion, the Act does not preclude inquiry into the sincerity of a prisoner's professed religiosity."); Gonzales v. O Centro

D. Scholarly Treatment of Sincerity and Its Shortcomings

Sincerity guards against the "belief that 'religious liberty' protects hucksters."[147] Seen thus, most scholars regard the requirement as working most of the time. As Nathan Chapman puts it, "courts can, and should, adjudicate religious sincerity."[148] Courts have "all the tools they need to do just that."[149] Judges may readily evaluate "evidence of ulterior motives; evidence of whether the claim 'fits' with the claimant's religious biography; and evidence of whether the claim 'fits' with the beliefs of the claimant's religious community."[150]

Kara Loewentheil and Elizabeth Platt likewise suggest that "[c]ourts routinely question the religious sincerity of certain claimants," and "the sincerity test . . . is a sensible one based on neutral, objective factors."[151] Others, like Adeel Mohammadi, have asserted that sincerity is "justifiable on first principles."[152] Consistent with those principles, "[t]here is a long tradition of courts competently scrutinizing asserted religious beliefs for sincerity without delving into their validity or verity."[153] Sincerity plays a meaningful gatekeeping role by "weeding out meritless claims"[154] so that the government is not "taken by fakers."[155]

But this academic understanding suffers from a critical shortcoming: it is based on outdated precedent. Virtually every commentator, in defending sincerity, points to *Witmer* and the conscientious objector cases as a workable, sound means to sort sincere from insincere claims. Loewentheil and Platt, for instance, say that

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Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430–31 (2006) ("RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."). For federal appellate court examples of the sincerity requirement, see *Byrd v. Haas*, 17 F.4th 692, 699 (6th Cir. 2021); *Smith v. Owens*, 13 F.4th 1319, 1325 (11th Cir. 2021); *Jones v. Slade*, 23 F.4th 1124, 1145 (9th Cir. 2022); *Mbonyunkiza v. Beasley*, 956 F.3d 1048, 1053 (8th Cir. 2020); *Faver v. Clarke*, 24 F.4th 954, 957 (4th Cir. 2022); *Jones v. Carter*, 915 F.3d 1147, 1149 (7th Cir. 2019); *Tucker v. Collier*, 906 F.3d 295, 302–03 (5th Cir. 2018); *Yellow Bear v. Lampert*, 741 F.3d 48, 51 (10th Cir. 2014); *Williams v. Bitner*, 455 F.3d 186, 194 (3d Cir. 2006); *Tanvir v. Tanzin*, 894 F.3d 449, 452 (2d Cir. 2018), *aff'd*, 141 S. Ct. 486 (2020); *Perrier-Bilbo v. United States*, 954 F.3d 413, 430 (1st Cir. 2020); and *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008).

147. Chapman, *supra* note 41, at 1192.

148. *Id.* at 1191.

149. *Id.* at 1192.

150. *Id.*

151. Loewentheil & Platt, *supra* note 42, at 247.

152. Mohammadi, *supra* note 42, at 1840.

153. Adams & Barmore, *supra* note 40, at 59–60.

154. Mohammadi, *supra* note 42, at 1860.

155. John T. Noonan, Jr., *How Sincere Do You Have to Be to Be Religious?*, 1988 U. ILL. L. REV. 713, 723.

"[t]he general framework for the sincerity inquiry—whether under the Free Exercise Clause, RFRA, RLUIPA, or another statute—is best described by the Supreme Court opinion in *Witmer v. United States*."[156] Chapman similarly categorizes the "conscientious objector status" cases as "illustrative" of the sincerity analysis a court undertakes.[157] Kevin Brady describes "[t]he Supreme Court's *Witmer* approach [as] a practical method for excluding disingenuous applicants while accommodating sincere believers."[158] Others agree.[159]

That emphasis is misplaced. While *Witmer* and the conscientious objector cases *might* have offered a workable, serious frame for sifting sincere from insincere claims, the Court has retreated from such a rubric. There is no reasonable way to reconcile *Thomas* with *Witmer*—both cases involved a Jehovah's Witness who objected to the war effort. *Thomas* instead reflected a far more lax reading of sincerity, which *Smith* added to and which RFRA and RLUIPA formally codified.

Sincerity scholarship has not kept pace with these changes. It has implied as much. By all measures, RFRA was the most important religious free exercise statute passed in generations, if not ever. And yet "[i]n the [more than] 20 years since the RFRA was passed, surprisingly little scholarship has been produced surveying its effect."[160] At most, scholarship on the plaintiff's burden in free exercise cases tends to focus not on sincerity but on whether a plaintiff's beliefs are "substantially burden[ed]" by a law or regulation.[161] Ira Lupu, for instance, has blamed RFRA's shortcomings on judicial interpretation of

156. Loewentheil & Platt, *supra* note 42, at 250.

157. Chapman, *supra* note 41, at 1235.

158. Brady, *supra* note 42, at 1455.

159. *See, e.g.*, Adams & Barmore, *supra* note 40, at 59–60 ("There is a long tradition of courts competently scrutinizing asserted religious beliefs for sincerity without delving into their validity or verity."); Mohammadi, *supra* note 42, at 1860–61 (discussing sincerity as a "functional doctrine created by the courts to serve as a tool of judicial management"); MCCRARY, *supra* note 42, at 113 ("Scholars of religion have analyzed these Supreme Court cases . . . which turn[ ] on the sort of definitional questions (with actual stakes, winners, and losers) to which certain religion scholars gravitate.").

160. Kara Loewentheil, *When Free Exercise Is a Burden: Protecting "Third Parties" in Religious Accommodation Law*, 62 DRAKE L. REV. 433, 464 (2014); *cf.* Sherif Girgis, *Defining "Substantial Burdens" on Religion and Other Liberties*, 108 VA. L. REV. 1759, 1770 (2022) ("[T]he same questions (and lack of guidance) arose under the statutes Congress enacted when the Supreme Court in *Smith* scrapped the constitutional entitlement to exemptions.").

161. *See* Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 200–02 (1995) (discussing the inconsistent case law on what constitutes a substantial burden); Girgis, *supra* note 160 (focusing on defining substantial burdens); *see also* Frederick Mark Gedicks, *"Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 2017 GEO. WASH. L. REV. 94; Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771.

the substantial-burden element.[162] Others have done the same.[163] Yet, such a focus puts the cart before the horse. After all, sincerity is the *first* hurdle a free exercise claimant must get past, before a court can even examine whether a government practice substantially burdens the sincerely held belief or practice.[164]

The plaintiff is, further, the master of their own sincerity: they articulate which specific belief or practice they hold dear.[165] Thus, "if claimants say" that "their souls would be eternally damned if they act pursuant to what the law requires, it would not be easy for courts to say otherwise."[166] As Ann Pellegrini explains, "[t]he lay religious practitioner not only is the expert on what counts as religion but . . . also decides law's obligation to it."[167] Frame sincerity in a particular way and the substantial burden question answers itself.[168]

To underscore the gap between sincerity scholarship and sincerity doctrine, consider some of the methods scholars say courts use to evaluate sincerity. Chapman, Loewentheil, and Platt point to "community fit evidence": "[W]hether the claimant's alleged religious beliefs fit with the beliefs of the claimant's religious community"[169] or whether the claimant's beliefs are unclear.[170] But *Thomas* tells us that such evidence may *not* be considered. Disagreements with fellow followers are mere "[i]ntrafaith differences," and "the judicial process is singularly ill equipped to resolve such differences."[171] Post-*Thomas* cases confirm the point.[172]

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162. Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 576 (1998). These commentators may have focused on substantial burdens *because* sincerity has become such a toothless requirement.

163. *See, e.g.*, Girgis, *supra* note 160, at 1763–64.

164. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2421–22 (2022); *see* Carson v. Makin, 142 S. Ct. 1987 (2022) (discussing sincerity first).

165. *See* Su, *supra* note 42, at 38 (describing sincerity as taking a "subjective turn"); Pellegrini, *supra* note 132, at 73.

166. Su, *supra* note 42, at 45.

167. Pellegrini, *supra* note 132, at 75.

168. *See* WINNIFRED FALLERS SULLIVAN, CHURCH STATE CORPORATION: CONSTRUING RELIGION IN US LAW 167 (2020) (describing substantial burden inquiry as tautological because stating that "one's refusal to obey the law is founded in religious belief sufficiently proves the presence of religion and triggers the relevant protection, without further proof"); Samuel J. Levine, *The Supreme Court's Hands-Off Approach to Religious Question in the Era of Covid-19 and Beyond*, 24 J. CONST. L. 276, 284 (2022) ("Applying the hands-off approach to RFRA/RLUIPA may likewise mandate that judges defer to the claimant's characterization of the burden imposed on the claimant's exercise of religion as substantial.").

169. Chapman, *supra* note 41, at 1237.

170. Loewentheil & Platt, *supra* note 42, at 251.

171. Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 715 (1981).

172. Callahan v. Woods, 658 F.2d 679, 685 (9th Cir. 1981) ("[One's] interpretation of the scriptures may differ from the meaning members of his church generally find in that text, but such disagreement cannot itself invalidate his free exercise right."); DeHart v. Horn, 227 F.3d 47, 56

Mohammadi, similarly, encourages courts to "prob[e] into the content of religious teachings" as "an efficacious way of screening out insincere [religious] claims."[173] But again current doctrine forbids such an analysis. Courts are not supposed to examine whether a particular claim has a central basis in the religion itself.[174] To the contrary, "religious exercise" includes "*any* exercise of religion" regardless of "whether or not [it is] compelled by . . . a system of religious belief."[175] Thus, "[a] theme that runs through this area of the law is the state's incompetence to decide matters that relate to the interpretation of religious practice or belief."[176] A "secular court" cannot and—as a matter of current practice—does not "determine questions of religious doctrine."[177]

As a final example, several commentators recommend evaluating whether "claimants have stated or acted inconsistently with their alleged religious beliefs"[178] or whether there are "ulterior motives."[179] But that qualification fails as well. *Thomas* explicitly says that "religious beliefs need not be . . . consistent . . . to merit First Amendment protection."[180] Some religious beliefs, of course, may seem inherently contradictory or confusing, particularly as juxtaposed against secular belief systems. But *Thomas* (and its progeny) go further. They have collapsed any sort of distinction between consistent beliefs and consistency between belief and conduct. Accordingly, several courts have upheld sincerity even when it is "obvious" that the plaintiff "at times [ ] departed from the tenets of his faith."[181]

The Supreme Court's recent opinion in *Ramirez v. Collier* is instructive. There, Mr. Ramirez sought to stay his execution so that his "pastor be allowed to pray with him and lay hands on him" during his

(3d Cir. 2000) ("It would be inconsistent with a long line of Supreme Court precedent to accord less respect to a sincerely held religious belief solely because it is not held by others.").

173. Mohammadi, *supra* note 42, at 1883.

174. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 887 (1990).

175. 42 U.S.C. § 2000cc-5(7)(A) (emphasis added).

176. Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1836 (2009).

177. Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1844 (1998).

178. Chapman, *supra* note 41, at 1234; *accord* Loewentheil & Platt, *supra* note 42, at 252–54; Brady, *supra* note 42, at 1458 ("Inconsistent claims would be strong evidence of insincerity.").

179. Chapman, *supra* note 41, at 1232–33; Loewentheil & Platt, *supra* note 42, at 255; *cf.* Adams & Barmore, *supra* note 40, at 62–63 (emphasizing the importance of questioning the sincerity of religious belief claims in the aftermath of the Supreme Court decision in *Hobby Lobby*).

180. Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 714 (1981).

181. Fromer v. Scully, 649 F. Supp. 512, 517 (S.D.N.Y. 1986); *accord* Reed v. Faulkner, 842 F.2d 960, 963 (7th Cir. 1988) ("[T]he fact that a person does not adhere steadfastly to every tenet of his faith does not mark him as insincere.").

final moments.[182] But that request was an about-face from his earlier litigation position. In 2020, when his execution was first pending, Mr. Ramirez filed suit seeking his pastor's presence during his final moments but explicitly stated his pastor "need not touch him at any time in the execution chamber."[183] After the State of Texas agreed to this initial request and rescheduled the execution, Mr. Ramirez backtracked: he requested the very relief (physical touch) he once disclaimed.[184]

It would be hard to find a more glaring example of inconsistency. When asked to explain himself, Mr. Ramirez merely said that he had made a mistake—his earlier "complaint was inaccurate."[185] Harkening back to the scholarship, there could, for Mr. Ramirez, also hardly be a clearer ulterior motive: delaying his own execution. Yet the Supreme Court, in an 8-1 opinion, dismissed such concerns. It insisted that there was "ample evidence" of Mr. Ramirez's sincerity, which "outweigh[ed]" whatever probative value his inconsistent behavior and ulterior motives might have offered.[186] What evidence was that? The Court did not, as Justice Thomas's dissent would note, bother to elaborate. I shall go into the back-and-forth between the *Ramirez* majority and dissent in greater detail below,[187] but for present purposes, my point is that the Court has, time and again, rejected the factors commentators believe undergird a robust sincerity analysis. These commentators might conceive of sincerity as an offshoot of the sort of analysis undertaken in *Witmer*, but sincerity today is in fact much more a creature of the religious question doctrine.

This doctrine, like the political question doctrine, tells courts to refrain from "adjudicating [a] dispute" that implicates "church policy and administration or [ ] religious doctrine and practice."[188] In the typical case, "once it becomes apparent that the resolution of a case would require a court to undertake examination of religious matters,

182. Ramirez v. Collier, 142 S. Ct. 1264, 1272 (2022).

183. *Id.* at 1273 (alteration omitted).

184. Brief for Respondents at 36, *Ramirez*, 142 S. Ct. 1264 (No. 21-5592), 2021 WL 4895734.

185. *Ramirez*, 142 S. Ct. at 1278.

186. *Id.*

187. *See infra* Part II.B.

188. Michael A. Helfand, *Litigating Religion*, 93 B.U. L. REV. 493, 494 (2013) (internal quotation marks omitted) (quoting Natal v. Christian & Missionary All., 878 F.2d 1575, 1576 (1st Cir. 1989); *see also* Levine, *supra* note 168, at 276 ("[T]he Court has repeatedly declared that judges are precluded from making decisions that require evaluating and determining the substance of religious doctrine."); Christopher C. Lund, *Rethinking the "Religious Question" Doctrine*, 41 PEPP. L. REV. 1013, 1013 (2014) ("The general idea is that, in our system of separated church and state, courts do not decide religious questions.").

the court has no choice but to dismiss the case."[189] Courts have thus "dismiss[ed] disputes in seemingly every area of litigation[:] consumer fraud, child custody and divorce, employment discrimination, torts, professional malpractice, and contracts."[190]

But dismissing a case is not the only way the principles behind the religious question doctrine might take shape. When a plaintiff brings a RFRA or RLUIPA claim, for instance, a court cannot simply dismiss it. But a court could, consistent with the principles undergirding the religious question doctrine, take a sort of "hands-off approach,"[191] exercising judicial deference (if not abdication) on questions of sincerity.[192] That is my hypothesis of how the doctrine actually operates in practice because, if *Thomas*, *Smith*, and *Ramirez* are to be read seriously, then sincerity should be an exceedingly easy threshold to meet. Federal courts do not, contrary to the scholarly consensus, have "all the tools they need"[193] to "ferret out insincere religious claims."[194] Instead, the Supreme Court has left the toolbox bare and rendered the requirement a nullity. The next Part, examining pertinent Supreme Court and federal appellate court cases, offers empirical support for this hypothesis.

II. TESTING SINCERITY

A. Study Design and Methodology

There has been no prior attempt to gather hard data on sincerity. Of the seminal empirical analyses into religious free exercise, none address sincerity.

James Ryan, for instance, studied circuit court free exercise opinions, finding that free exercise challenges were rejected 88% of the time between 1980 and 1990.[195] But his work did not look separately at sincerity. Adam Winkler subsequently examined Supreme Court, federal appellate court, and federal district court decisions from 1990 to about 2003.[196] The crux of Winkler's analysis was that, in the years following *Smith*, courts continued to deny most religious liberty claims:

189. Jared A. Goldstein, *Is There a "Religious Question" Doctrine?*, 54 CATH. U. L. REV. 497, 499 (2005).

190. *Id.* at 520.

191. Levine, *supra* note 168, at 276.

192. Helfand, *supra* note 188, at 495.

193. Chapman, *supra* note 41, at 1192.

194. Adams & Barmore, *supra* note 40, at 59.

195. Ryan, *supra* note 18, at 1416–17.

196. Winkler, *supra* note 127, at 795.

requests for exemption were denied 59% of the time.[197] But again, like Ryan's, Winkler's study did not look separately at the plaintiff's sincerity burden. Most recently, Caleb Wolanek and Heidi Liu examined free exercise cases from 1990 to 2015.[198] But their study, as well, did not separately examine sincerity.[199]

These foregoing analyses provide critical data on the tenor of judicial treatment towards religious liberty; I marshal their findings in earnest in Part III. But on sincerity, my study seeks to fill a gap in existing research. I have examined every RFRA and RLUIPA case decided by the U.S. Supreme Court or a federal appellate court addressing a litigant's sincerity.[200] I focus on this set of cases for three reasons.

First, RFRA and RLUIPA are of recent vintage. Both statutes were enacted within the past thirty years; examining the resulting case law gives a snapshot into contemporary practice. That contrasts with the existing literature, which—as I have noted—focuses largely on conscientious objector cases from seven decades ago.[201] Even when these scholars cite more recent opinions in their work, there is no way of knowing—absent a systematic analysis—whether these decisions are the norm or are exceptions to the rule. A comprehensive survey of RFRA and RLUIPA case law does that.

Second, sincerity questions come up in nearly every RFRA and RLUIPA case, by dint of their statutory text. While courts probe sincerity in other fields as well—such as immigration[202] and employment[203] proceedings—the requirement may not arise in the prototypical immigration or employment case. A lens into RFRA and RLUIPA case law, then, provides a critical overview into what courts do most of the time when religious free exercise is at stake.

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197. *Id.* at 861.

198. Wolanek & Liu, *supra* note 19, at 276.

199. *Id.* at 281–84.

200. Searches were performed using Westlaw. I identified all cases citing any section of RFRA, 42 U.S.C. § 2000bb to bb-4, or RLUIPA, 42 U.S.C. § 2000cc to cc-4. I then searched within this set for cases containing the term "sincer!," and narrowed the scope to U.S. Supreme Court and federal appellate court cases. Finally, I removed cases that mentioned sincerity without coming to a definitive holding because, for example, the case was resolved because of jurisdictional issues or another alternative ground.

201. *See supra* Part I.D.

202. Lie v. Att'y Gen. of the U.S., 197 F. App'x 175, 179 (3d Cir. 2006) ("The [Immigration Judge ("IJ")] also expressed doubts about the sincerity of [the asylee's] religious beliefs. There is substantial evidence to support the IJ's adverse credibility finding.").

203. *See, e.g.*, *Section 12: Religious Discrimination*, EEOC (Jan. 15, 2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination [https://perma.cc/3NWB-PX5V] (guidance on EEOC religious discrimination claims).

Third, limiting the analysis to Supreme Court and circuit court matters results in a dataset of around 350 cases. That number is large enough and over a significantly lengthy period to draw conclusions without being unmanageable. Similarly, by focusing on decisions by the U.S. Supreme Court and federal appellate courts, I capture precedential opinions or, in the case of unpublished opinions, persuasive guidance for lower courts. Federal district courts, of course, rule on questions of sincerity. But their decisions bind no other court.[204] And *how* they rule invariably draws from the reasoning of prior appellate court decisions. Thus, if the appellate courts offer few workable examples on how to distinguish the sincere from the insincere, then district courts would not have the available tools to do so either.

B. Sincerity at the Supreme Court

I start with every Supreme Court RFRA or RLUIPA case in which the Court or a Justice discussed sincerity in an opinion. Not every case in this dataset was a binding, precedential opinion from the Court's merits docket. Sometimes, a single Justice or group of Justices might have dissented from a denial of certiorari or concurred in an order granting, vacating, or remanding a case. There is significant disagreement over the weight that is and should be afforded to such non-merits statements.[205] Certainly, a lower court is not bound to follow or rely on a statement dissenting from the denial of certiorari. Still, I have included such non-merits statements (in a separate Table) for several reasons.

First, the Court itself often relies on its prior non-merits statements in subsequent cases.[206] Second, these statements offer a telling glimpse into how Justices view a particular issue. Perhaps the plaintiff in question did not obtain the desired result because of a

204. United States v. Articles of Drug Consisting of 203 Paper Bags, 818 F.2d 569, 572 (7th Cir. 1987) ("A single district court decision, however . . . . is not binding on the circuit, or even on other district judges in the same district.").

205. Alexander Gouzoules, *Clouded Precedent:* Tandon v. Newsom *and Its Implications for the Shadow Docket*, 70 BUFF. L. REV. 87, 107 (2022) ("The initial response to *Tandon* has been uneven and chaotic. Some have contended that the case now defines the appropriate standard for reviewing Free Exercise Clause challenges. Others have minimized its significance or simply grouped it together with the other COVID-19 cases decided on the Court's shadow docket."); Trevor McFadden & Vetan Kapoor, *Symposium: The Precedential Effects of Shadow Docket Stays*, SCOTUSBLOG (Oct. 28, 2020, 9:18 AM), https://www.scotusblog.com/2020/10/symposium-the-precedential-effects-of-shadow-docket-stays/ [https://perma.cc/U9LA-5UAW].

206. *E.g.*, Gateway City Church v. Newsom, 141 S. Ct. 1460, 1460 (2021) (citing S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021)) ("This outcome is clearly dictated by this Court's decision in *South Bay United Pentecostal Church v. Newsom*."); West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022) (citing Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2487 (2021)).

procedural roadblock, but at least one Justice has shown an appetite to tackle the substantive issue in the future.[207] Third, lower courts themselves cite non-merits statements all the time—even dissents from denials of certiorari.[208] Bearing these considerations in mind, my findings are summarized in Tables 1 and 2 below.

TABLE 1: SUPREME COURT RFRA AND RLUIPA MERITS OPINIONS

Case	Opinion Author	Litigant Sincere?	Requested Exemption
Cutter v. Wilkinson (2005)	Ginsburg	Yes[209]	Ceremonial items, dress, and literature in prison
Gonzales v. O Centro Espirita Benificente Uniao do Vegetal (2006)	Roberts	Yes[210]	Controlled Substances Act
Burwell v. Hobby Lobby Stores, Inc. (2014)	Alito	Yes[211]	Affordable Care Act contraceptive mandate
Holt v. Hobbs (2015)	Alito	Yes[212]	Prison grooming policy
Little Sisters of the Poor v. Pennsylvania (2020)	Thomas	Yes[213]	Affordable Care Act contraceptive mandate
Ramirez v. Collier (2022)	Roberts	Yes[214]	Religious official in execution chamber to pray and lay hands on individual

207. *See* JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10637, THE "SHADOW DOCKET": THE SUPREME COURT'S NON-MERITS ORDERS 5 (2021) ("Even if the Court's non-merits decisions are not directly binding in a particular case, observers may look to [them] in an attempt to divine how the Court might rule in similar cases.").

208. *E.g.*, Francis v. Keane, 888 F. Supp. 568, 572 n.5 (S.D.N.Y. 1995) ("And, as Justice Thomas explained in his dissent from the Supreme Court's denial of certiorari in *Swanner v. Anchorage Equal Rights Commission* . . . .").

209. Cutter v. Wilkinson, 544 U.S. 709, 713 (2005) ("[P]etitioners are members of bona fide religions and . . . they are sincere in their beliefs.").

210. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 427 (2006) ("[T]he Government had failed to demonstrate a compelling interest justifying what it acknowledged was a substantial burden on the UDV's sincere religious exercise.").

211. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 720 (2014) ("As we have noted, the Hahns and Greens have a sincere religious belief that life begins at conception.").

212. Holt v. Hobbs, 574 U.S. 352, 361 (2015) ("Here, the religious exercise at issue is the growing of a beard, which petitioner believes is a dictate of his religious faith, and the Department does not dispute the sincerity of petitioner's belief.").

213. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2377 (2020) ("They sincerely believed that human life begins at conception and that, because the challenged methods of contraception risked causing the death of a human embryo, providing those methods of contraception to employees would make the employers complicit in abortion.").

214. Ramirez v. Collier, 142 S. Ct. 1264, 1278 (2022) ("Under the facts of this case, however, we do not think the prior complaint—dismissed without prejudice and by agreement one week after it was filed—outweighs the ample evidence that Ramirez's beliefs are sincere.").

TABLE 2: SUPREME COURT RFRA AND RLUIPA NON-MERITS STATEMENTS

Case	Posture	Statement Author	Litigant Sincere?	Requested Exemption
Swanner v. Anchorage Equal Rights Commission (1994)	Dissenting from Denial of Certiorari	Thomas	Yes[215]	State and local antidiscrimination law
Wheaton College v. Burwell (2014)	Dissenting from Injunction	Sotomayor	Yes[216]	Affordable Care Act contraceptive mandate
Ben-Levi v. Brown (2016)	Dissenting from Denial of Certiorari	Alito	Yes[217]	Group prayer and study
Dunn v. Smith (2021)	Concurring in Denial to Vacate	Kagan	Yes[218]	Religious official in execution chamber
Mast v. Fillmore County (2021)	Concurring Statement to Remand Order	Gorsuch	Yes[219]	Municipal sanitation law
Austin v. U.S. Navy Seals 1–26 (2022)	Dissenting Statement	Alito	Yes[220]	Vaccination requirement

These Tables reflect two noteworthy trends: (1) the frequency of free exercise litigation and (2) the substantially uniform reasoning employed by the Court.

215. Swanner v. Anchorage Equal Rts. Comm'n, 513 U.S. 979, 979 (1994) (Thomas, J., dissenting from denial of certiorari).

216. Wheaton Coll. v. Burwell, 573 U.S. 958, 960 (2014) (Sotomayor, J., dissenting).

217. Ben-Levi v. Brown, 136 S. Ct. 930, 933 (2016) (Alito, J., dissenting from denial of certiorari) ("Respondent and the District Court have not questioned the sincerity of Petitioner's beliefs." (internal quotation marks omitted)).

218. Dunn v. Smith, 141 S. Ct. 725, 725 (2021) (Kagan, J., concurring) ("The sincerity of those religious beliefs is not in doubt . . . .").

219. Mast v. Fillmore Cnty., 141 S. Ct. 2430, 2433 (2021) (Gorsuch, J., concurring in decision to grant, vacate, and remand) ("RLUIPA prohibits governments from infringing sincerely held religious beliefs and practices except as a last resort. Despite that clear command, this dispute has staggered on in various forms for over six years.").

220. Austin v. U.S. Navy Seals 1–26, 142 S. Ct. 1301, 1304 (2022) (Alito, J., dissenting) ("Here, it is not disputed that compliance with the vaccination requirement would impose a substantial burden on respondents' free exercise of religion.").

1. Litigation Frequency

As to frequency, in the first decade following RFRA's passage (1993 to 2003), the Court addressed sincerity in only one RFRA matter—*Swanner v. Anchorage Equal Rights Commission*. And that was in a statement by a single Justice (Justice Thomas), dissenting from the denial of certiorari. *Swanner* involved a plaintiff who refused to "rent to an[ ] unmarried couple who intended to live together," based on a "sincere religious belief that such cohabitation is a sin."[221] In Justice Thomas's view, such beliefs merited statutory protection, and Alaska's "asserted interest in preventing discrimination on the basis of marital status" was not " 'compelling' enough" to pass strict scrutiny.[222] Because no other Justice joined Justice Thomas, there is no indication whether other Justices felt differently about sincerity.

Still, including statements like the one in *Swanner* serves the purposes outlined above. Lower courts have cited Justice Thomas's dissent.[223] More importantly, the germ of Justice Thomas's thesis—using RFRA to subvert antidiscrimination law—was later expressed in *Bostock v. Clayton County*, a merits opinion.[224]

Bostock is commonly remembered as the case in which the Court held that Title VII's protections apply to homosexual and transgender individuals.[225] But nestled at the end of the majority's opinion, Justice Gorsuch noted that Title VII might conceivably "require some employers to violate their religious convictions."[226] RFRA, though, would prevent such a scenario from unfolding: RFRA "prohibits the federal government from substantially burdening a person's exercise of religion unless it demonstrates that doing so" satisfies strict scrutiny.[227] Thus, it "operates as a kind of super statute, displacing the normal operation of other federal laws" to "supersede Title VII's commands in appropriate cases."[228]

Besides *Swanner*, no other RFRA or RLUIPA case about sincerity caught the Court's attention in the 1990s and early 2000s.

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221. Swanner v. Anchorage Equal Rts. Comm'n, 513 U.S. 979, 979 (1994) (Thomas, J., dissenting from denial of certiorari).

222. *Id.* at 981.

223. *See, e.g.*, Francis v. Keane, 888 F. Supp. 568, 572 n.5 (S.D.N.Y. 1995); Thomas v. Anchorage Equal Rts. Comm'n, 165 F.3d 692, 714 (9th Cir. 1999) (citing *Swanner* and stating that "Alaska's purported interest in preventing marital-status discrimination is simply not sufficiently 'paramount' to satisfy strict scrutiny"), *overruled on other grounds by* 220 F.3d 1134 (9th Cir. 2000).

224. 140 S. Ct. 1731 (2020).

225. *Id.* at 1754.

226. *Id.* at 1753.

227. *Id.* at 1754.

228. *Id.*

During the next decade (2004 to 2013), volume remained low. The Court decided two cases on sincerity in that time—*Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*[229] and *Cutter v. Wilkinson*.[230] In both, the government conceded or stipulated to sincerity.[231] Such concessions mark the start of a pattern, which I discuss more below, of the government declining to question the plaintiff's burden in religious liberty cases.

But returning to litigation frequency, in the most recent decade, the total number of RFRA and RLUIPA cases jumped dramatically. Since 2014, the Court has issued four merits opinions and five separate statements from its non-merits docket concerning sincerity under RFRA or RLUIPA. No doubt the Court, with its changing makeup, has a greater appetite today for tackling religious liberty questions.[232] That likely explains some of the rise.

There, however, lies another possible explanation. By making the sincerity requirement easy (and easier) to satisfy, the Court's actions could have had a cascading and corroborating effect by encouraging more RFRA and RLUIPA claims, from true believers and make-believers alike. Indeed, if anything, Tables 1 and 2 drastically understate the Court's recent embrace of free exercise. Neither Table includes some of the Court's most recent significant free exercise decisions, like *Fulton v. City of Philadelphia*,[233] *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,[234] *Carson v. Makin*,[235] and *Kennedy v. Bremerton School District*.[236] These matters fall outside RFRA and RLUIPA's purview because they concern state and local action—remember, RLUIPA applies only to state prisoner and land-use lawsuits. But these cases corroborate the hypothesis that more and more litigants are bringing free exercise claims and that, when it deigns

229. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 427 (2006).

230. Cutter v. Wilkinson, 544 U.S. 709, 713 (2005).

231. *O Centro*, 546 U.S. at 427; *Cutter*, 544 U.S. at 713.

232. *See, e.g.*, Andrew Koppelman, *The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty, Part I: The New Law of Free Exercise*, REASON: THE VOLOKH CONSPIRACY (Aug. 15, 2022, 8:01 AM), https://reason.com/volokh/2022/08/15/the-increasingly-dangerous-variants-of-the-most-favored-nation-theory-of-religious-liberty-part-i-the-new-law-of-free-exercise/ [https://perma.cc/6HPU-F8FU]; Ian Millhiser, *The Supreme Court Is Leading a Christian Conservative Revolution*, VOX (Jan. 30, 2022), https://www.vox.com/22889417/supreme-court-religious-liberty-christian-right-revolution-amy-coney-barrett [https://perma.cc/KLB6-GBHU]; Epstein & Posner, *supra* note 22, at 324 (showing that religion cases made up a significantly larger percentage of cases under the Roberts Court than under the Warren or Burger Courts).

233. Fulton v. City of Phila., 141 S. Ct. 1868, 1930 (2021) (Gorsuch, J., concurring).

234. Masterpiece Cakeshop v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1723 (2018).

235. Carson v. Makin, 142 S. Ct. 1987 (2022).

236. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

to weigh in on such claims, the Court has invariably determined that these litigants were sincere.

2. A Pro Forma Sincerity Analysis

The Supreme Court cases from Tables 1 and 2 employ a common, pro forma approach to sincerity. There is, unsurprisingly, sparse analysis in cases from the non-merits docket. The authoring Justice typically avers, in a single sentence, that a claimant's beliefs are sincere, without challenge or comment from any other Justice.[237]

But what is perhaps more surprising is the cursory treatment in the Court's six merits cases. In *Little Sisters of the Poor v. Pennsylvania,* the majority flatly stated that the petitioner was sincere without additional discussion and with no dissent on the point.[238] In another three merits cases, the government conceded sincerity without challenge.[239] In only two matters was sincerity discussed in more than a single paragraph—*Hobby Lobby v. Burwell* and *Ramirez v. Collier*.

Petitioners in *Hobby Lobby* included both corporations and their individual owners. Of note, no opinion from the Court—not the majority opinion, not Justice Kennedy's concurrence, and not Justice Ginsburg's dissent—questioned whether the individual owners held sincere religious beliefs opposing contraception.[240] Justice Ginsburg, to this point, explicitly acknowledged that the plaintiffs' "religious convictions regarding contraception [were] sincerely held."[241] Her challenge to the plaintiffs' burden rested instead on whether their convictions were substantially burdened.[242] But, as I have argued, such a focus puts the cart before the horse. By professing a sufficiently specific "sincere" belief, a litigant can all but ensure the government action at issue is a substantial burden to that tailored belief. That is exactly what happened in *Hobby Lobby*: the plaintiffs insisted that complying with

237. Ben-Levi v. Brown, 136 S. Ct. 930, 933 (2016) (Alito, J., dissenting from denial of certiorari); Dunn v. Smith, 141 S. Ct. 725, 725 (2021) (Kagan, J., concurring); Mast v. Fillmore Cnty., 141 S. Ct. 2430, 2433 (2021) (Gorsuch, J., concurring in decision to grant, vacate, and remand); Austin v. U.S. Navy Seals 1–26, 142 S. Ct. 1301, 1304 (2022) (Alito, J., dissenting); Swanner v. Anchorage Equal Rts. Comm'n, 513 U.S. 979, 979 (1994) (Thomas, J., dissenting from denial of certiorari); Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2808 (2014) (Sotomayor, J., dissenting).

238. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2377 (2020).

239. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 427 (2006); Cutter v. Wilkinson, 544 U.S. 709, 713 (2005); Holt v. Hobbs, 574 U.S. 352, 361 (2015).

240. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 720 (2014).

241. *Id.* at 758 (Ginsburg, J., dissenting).

242. *Id.* at 759–61.

the contraceptive mandate, in any form, would be an unacceptable degree of complicity.[243]

The crux of the dispute in *Hobby Lobby*, then, was whether the sincere beliefs of the individual plaintiffs could carry over and apply to their closely held corporate entities. Here, the principal opinion focused not on sincerity per se but on whether RFRA's text, as well as pre-*Smith* precedent, went beyond covering just individuals or groups of individuals.[244] Upon finding that it did, the Court assumed that the individual plaintiffs' sincerity would be imputed to the entity.[245]

That leaves a final matter, *Ramirez*, from this past Term. Pre-*Ramirez*, no Justice had ever questioned a litigant's sincerity in a RFRA or RLUIPA case—not even in a dissenting or concurring opinion. Many times, the opposing party did not even challenge the element. Unlike these earlier cases, though, the State of Texas did dispute Mr. Ramirez's sincerity. It noted that Mr. Ramirez had produced little evidence of his sincerely held beliefs; at most, he relied on an affidavit from his pastor—which can only reflect the pastor's beliefs, not Mr. Ramirez's.[246] Mr. Ramirez had also been plainly inconsistent: wanting now what he had said earlier he did not want.[247] These shifting tactics fit within a decades-long effort to delay and postpone his execution.[248]

Chief Justice Roberts brushed aside these shortcomings, asserting that there was "ample evidence" of Mr. Ramirez's sincerity.[249] The Chief Justice pointed, on this score, to statements from Mr. Ramirez's pastor (which, again, do not go to Mr. Ramirez's beliefs)[250] and statements from Mr. Ramirez himself, who claimed that his prior complaint was "inaccurate."[251]

Though these statements convinced eight Justices, they were not enough for Justice Thomas. Echoing Texas, Justice Thomas explained that Mr. Ramirez's current "RLUIPA suit [was] but the latest

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243. *Cf.* Kara Loewentheil, *The Satanic Temple, Scott Walker, and Contraception: A Partial Account of* Hobby Lobby*'s Implications for State Law*, 9 HARV. L. & POL'Y REV. 89, 99–101 (2015):

> [I]f the definition of "abortion" can be based on religious belief, there is nothing to stop a religious employer from choosing to define "abortion" for the purposes of a religious exemption clause as anything that prevents conception, which would broaden the potential conflation and allow it to swallow the protection of contraceptive equity statutes whole.

244. *Burwell*, 573 U.S. at 718–19.

245. *Id.* at 720.

246. *See* Brief for Respondents at 33–34, Ramirez v. Collier, 142 S. Ct. 1264 (2022) (No. 21-5592), 2021 WL 4895734.

247. *Ramirez*, 142 S. Ct. at 1273 (2022).

248. Brief for Respondents, *supra* note 246, at 36.

249. *Ramirez*, 142 S. Ct. at 1278.

250. *Id.* at 1277.

251. *Id.* at 1278.

iteration in an 18-year pattern of evasion."[252] Throughout this period, "none of" Mr. Ramirez's prior postconviction and habeas claims "merited even a single certificate of appealability, let alone relief."[253] Moreover, in the present case, Mr. Ramirez "executed a bait and switch."[254] That bait and switch, if anything, offered ample evidence of insincerity. After all, to be sincere, a plaintiff must "actually believe[ ]" that a particular practice is "part of his faith."[255] But in a complaint filed just a year before, Mr. Ramirez plainly did *not* believe that physical touch was necessary.[256] That reflected the difference between Mr. Ramirez's purported and actual beliefs.

Stepping back from the specific case, Justice Thomas warned of religious free exercise's slippery slope. Individuals, "ably represented by the death penalty defense bar, [would soon] propose new accommodations tailored to elicit an objection from the State."[257] "From the outset, many district courts will find that RLUIPA demands an accommodation. They will then put the State to a stark choice: capitulate to the court-ordered accommodation that it thinks is dangerous, or litigate and delay the execution."[258] Subsequent litigation would "result . . . [in] months or years of federally imposed stasis."[259] Thus, although RLUIPA was "a potent tool with which prisoners can protect their sincerely held religious beliefs," it, "like any tool, . . . can be wielded abusively."[260] To curb such abuse, RLUIPA "requir[es] a prisoner to demonstrate sincerity"—a requirement that "the Court" had "shrug[ged] off."[261]

It is unclear, given the decision's recency, whether Justice Thomas's dissent represents a watershed moment in sincerity jurisprudence. On the one hand, both his dissent and the majority opinion discuss sincerity at length, the first RFRA or RLUIPA case before the Supreme Court to do so. On the other hand, no other Justice joined Justice Thomas. And, more tellingly, in two non-RFRA/RLUIPA free exercise cases from this past Term—*Kennedy v. Bremerton* and *Carson v. Malkin*—the Court once again conducted a pro forma

252. *Id.* at 1293 (Thomas, J., dissenting).

253. *Id.* at 1293–94.

254. *Id.* at 1296.

255. *Id.* at 1298 (emphasis and alteration omitted).

256. *See id.* at 1273 (majority opinion) ("Ramirez's complaint focused on prayer and explained that his pastor 'need not touch him at any time in the execution chamber.' " (alterations omitted)).

257. *Id.* at 1297 (Thomas, J., dissenting).

258. *Id.*

259. *Id.*

260. *Id.* at 1301.

261. *Id.*

sincerity review, concluding after sparse analysis that plaintiffs were sincere.[262]

C. Sincerity at the Federal Appellate Courts

A singular focus on Supreme Court jurisprudence, however, provides only a partial (and potentially blinkered) glimpse into how sincerity might operate. The Court exercises discretionary, rather than mandatory, review over much of its docket.[263] Consequently, "[o]f the 7,000 to 8,000 cert. petitions filed each term, the court grants cert. and hears oral argument in only about 80."[264] Since sincerity is a threshold inquiry, often turning on issues of fact,[265] the Justices might well be reluctant to grant review to a possibly insincere plaintiff. The Court's analysis in such a case would be limited to a single prong of the strict scrutiny analysis, rather than a more thorough examination into the nature of the plaintiff's burden and the government action. Such matters would be poor vehicles for discretionary review; the Court could always deny review to an insincere plaintiff, waiting for a sincere plaintiff to come along to challenge the same law or regulation.

This sort of discretionary posture does not apply at the federal appellate courts. Much of the time, "their jurisdiction is mandatory—a civil litigant or criminal defendant that loses in district court can seek review before their regional circuit court of appeal as a matter of right, and the circuit court must thereafter issue a decision."[266] Thus, a comprehensive review of circuit court precedent would provide a broader and more revealing window into how sincerity is being examined in the typical federal case—not just the few cases that garner Supreme Court review.

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262. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2422 (2022) ("That Mr. Kennedy has discharged his burdens is effectively undisputed. No one questions that he seeks to engage in a sincerely motivated religious exercise."); Carson v. Makin, 142 S. Ct. 1987, 1994–95 (2022).

263. Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1244 (2012) ("Congress [has] passed legislation . . . remov[ing] virtually all of the Court's mandatory jurisdiction, leaving Justices free to select the cases they wish[ ] to hear.").

264. *Supreme Court Procedure*, SCOTUSBLOG, https://www.scotusblog.com/reference/educational-resources/supreme-court-procedure/ (last visited Jan. 18, 2023) [https://perma.cc/E6Q5-SQFF].

265. *See* Loewentheil & Platt, *supra* note 42, at 258 (describing sincerity as typically "a question of fact").

266. Xiao Wang, *In Defense of (Circuit) Court-Packing*, 119 MICH. L. REV. ONLINE 32, 33 (2020), https://repository.law.umich.edu/mlr_online/vol119/iss1/4/ [https://perma.cc/2M9V-CCBJ].

1. Who is Sincere?

My analysis revealed 291 cases in which courts conducted a sincerity analysis, spread across every geographic circuit and spanning 1994 (the year after RFRA's passage) through June 2022.[267] Out of these 291 cases, the plaintiff was considered sincere in 270 of them—a remarkable 93% rate. What is more, as summarized below, some courts of appeal have *never* found a RFRA or RLUIPA plaintiff to be insincere.

TABLE 3: SINCERITY BY CIRCUIT COURT

Circuit	No. of Cases	Sincere	Insincere	% Litigant Deemed Sincere
1	6	6	0	100%
2	32	32	0	100%
3	29	27	2	93%
4	26	26	0	100%
5	17	16	1	94%
6	25	22	3	88%
7	26	24	2	92%
8	28	28	0	100%
9	39	38	1	97%
10	38	34	4	89%
11	31	25	6	81%
D.C.	10	8	2	80%
Total	**291**	**270**	**21**	**93%**

As Table 3 reflects, no RFRA or RLUIPA plaintiff has ever been found to be insincere before the U.S. Courts of Appeals for the First, Second, Fourth, and Eighth Circuits. In several other circuits—the Third, Fifth, Seventh, Ninth, and D.C.—a litigant was considered insincere in only one or two cases. *No* circuit had a sincerity rate lower than 80% (circuits with a relatively higher incidence of insincerity are discussed in the next Subsection). Overall, before federal courts of appeal, plaintiffs overwhelmingly satisfied sincerity.

267. *See supra* note 200.

These percentages are remarkable when compared against other areas. Religious free exercise is not the only area of the law that uses a burden-shifting framework. Employment discrimination cases, for example, are governed by the *McDonnell-Douglas* framework. Under step one of this framework, a plaintiff must "establish a prima facie case" by showing that they "engaged in protected activity," and that the employer took "adverse action" as a result.[268] "The burden then shifts to the" employer to "show that its" action was for a "legitimate" reason.[269] Somewhat similarly, in antitrust cases, plaintiffs proceeding under the rule of reason "must show a significant anticompetitive effect."[270] Only upon such a showing does the burden shift to the defendant to compare anticompetitive costs against procompetitive or pro-consumer benefits.[271] Further, in Americans with Disabilities Act ("ADA") cases, plaintiffs must prove a particularized evidentiary burden before the focus shifts on defendants as to liability.[272]

To be clear, these contexts do not offer perfect comparators to religious free exercise, and the available data below are generally taken from trial rather than appellate court decisions. I am not trying to draw an equivalence between a religious free exercise claim and an ADA claim. But still, examining these other fields explores, at least at a high level, how plaintiffs' burdens are addressed elsewhere. That insight is reflected in Table 4.

268. Foster v. Univ. of Md.-E. Shore, 787 F.3d 243, 250 (4th Cir. 2015).

269. *Id.*

270. Carrier, *supra* note 48, at 827.

271. *Id.* at 827–28.

272. Colker, *supra* note 46, at 109.

TABLE 4: PLAINTIFFS' BURDENS—RELIGIOUS FREE EXERCISE VS. OTHER AREAS OF THE LAW

Area of Law	**Plaintiffs' Burden**	**% of Time Met**
Antitrust (Sherman Act)	Showing anticompetitive effect	~3% to 16%[273]
Employment Discrimination (*McDonnell-Douglas*)	Prima facie case at summary judgment	~27%[274]
Disability (ADA)	Initial evidentiary burden	~60%[275]
Religious Free Exercise (RFRA and RLUIPA)	Sincerity	93%

Religious free exercise plaintiffs clear their burden at a significantly higher rate than antitrust, employment discrimination, and disability plaintiffs. Even the higher percentage in ADA cases is less sanguine when considered in context: if an ADA matter survives summary judgment, defendants still prevail 93% of the time.[276] That win rate contrasts sharply with free exercise cases, where the defendant must satisfy strict scrutiny, widely considered the most demanding test in the law.[277]

Given these circumstances—an exceedingly lenient plaintiffs' burden and an incredibly demanding government burden—it is hardly surprising that RFRA and RLUIPA claims would proliferate. There are strong incentives for prospective plaintiffs to bring a claim. As I have covered, the Supreme Court's docket reflects that proliferation—from one case in RFRA's first decade, to two in the second, to nine in the third. This same trend holds true for the federal appellate courts, as illustrated in Table 5.[278]

273. Carrier, *supra* note 48, at 827–28 (analysis of 495 rule of reason cases from 1999 to 2009).

274. Schneider, *supra* note 47, at 709–10 ("[S]eventy-three percent of summary judgment motions in employment discrimination cases are granted—the highest of any type of federal civil case.").

275. Colker, *supra* note 46, at 109.

276. *Id.*

277. Winkler, *supra* note 127, at 806–07 (citing sources).

278. Because RFRA was passed during the back half of 1993, Table 5 treats the years 1993 to 2003 as a single decade.

TABLE 5: RFRA AND RLUIPA CIRCUIT COURT CASES BY DECADE

	1993 to 2003	**2004 to 2013**	**2014 to Present**
Total Number of Cases	53	98	140
Average Number of Cases / Year	5.3	9.8	15.6

The number of RFRA and RLUIPA cases addressing sincerity has tripled. In the first years after RFRA's passage, federal appellate courts heard about five such cases per year. That number dipped slightly between 1998 and 2000, after the Court decided *Boerne*[279] (thus invalidating RFRA as applied to state governmental action) and before the passage of RLUIPA.

But volume ticked up measurably in the next decade, to about ten cases per year. That trend has continued into the past decade, with still another significant increase. Indeed, if case counts from 2020 and 2021 are excluded (federal appellate caseloads were down across the board, given the pandemic),[280] as well as 2022 (since the data remains incomplete), the average number of cases would be even higher.

In short, with each passing year, more and more RFRA and RLUIPA cases get filed. More and more plaintiffs (virtually all of them, for that matter) satisfy their evidentiary burden in these cases, forcing the government to defend its laws and policies against strict scrutiny. When those defenses are found wanting, then the asserted policy must bend—permitting religion as disobedience to come to fruition.

One final note on the federal appellate courts: in many matters before the Supreme Court, the state or federal government did not dispute sincerity; often, they conceded it without challenge.[281] Even when they did not concede outright, the Court's resulting sincerity discussion was cursory. It is possible, as I have outlined, that the Court eschewed a more in-depth analysis by denying review to petitions presenting more complex sincerity questions. But a review of circuit court cases undercuts that explanation. The most common refrain, when taking up sincerity, was that a plaintiff's "sincerity . . . has not

279. City of Boerne v. Flores, 521 U.S. 507, 537 (1997).

280. U.S. CTS, ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, at tbl.2.1 (2021), https://www.uscourts.gov/sites/default/files/data_tables/jff_2.1_0930.2021.pdf [https://perma.cc/D5SR-MGWB].

281. *See supra* Section I.B.2.

been disputed by the state"[282] or that the reviewing court did not "doubt the sincerity of [the plaintiff]'s religious convictions."[283]

At first glance, this seems a puzzling result. Strict scrutiny is an incredibly demanding threshold for the government to meet. Why would it, then, repeatedly concede on a key component of the plaintiff's burden, all but shifting the heavy onus onto itself in judicial proceedings? Some observers have posited that it is because sincerity is a question of fact,[284] and government officials might thus be reluctant to spend significant resources challenging a particular claimant's "credibility."[285] Complex factual and evidentiary questions are, under this narrative, less likely to be resolved in pretrial motions, such as a motion to dismiss or a motion for summary judgment.[286]

But that narrative does not hold up on closer review. To begin, federal courts regularly evaluate demeanor and credibility—including outside formal trial proceedings. Most immigration proceedings involve a credibility finding,[287] and judges evaluate demeanor evidence routinely in criminal matters.[288]

Governments are also plainly not averse to engaging in detailed evidentiary analyses even in free exercise cases. After all, to survive strict scrutiny, the government must establish that its interests are sufficiently compelling *as applied* to the plaintiff, rather than compelling as a general matter.[289] That undeniably requires some factual examination into both the plaintiff's motivations and the government's policy rationales. Moreover, to show that it is complying with the "exceptionally demanding" least restrictive means requirement,[290] the government must demonstrate that its policies are

282. *See, e.g.*, Bader v. Wrenn, 675 F.3d 95, 100 (1st Cir. 2012); *see also* Jova v. Smith, 346 F. App'x 741, 744 (2d Cir. 2009); Goodall by Goodall v. Stafford Cnty. Sch. Bd., 60 F.3d 168, 171 (4th Cir. 1995).

283. *See, e.g.*, Jenkins v. C.I.R., 483 F.3d 90, 92 (2d Cir. 2007); *see also* Lovelace v. Lee, 473 F.3d 174, 187 n.2 (4th Cir. 2006); Easterling v. Pollard, 528 F. App'x 653, 655 (7th Cir. 2013).

284. *See* Mosier v. Maryland, 937 F.2d 1521, 1526 (10th Cir. 1991).

285. *See, e.g.*, Loewentheil & Platt, *supra* note 42, at 259; Mohammadi, *supra* note 42, at 1864.

286. *See* Thomas v. Cnty. of Riverside, 763 F.3d 1167, 1170 (9th Cir. 2014) (existence of "genuine factual dispute" is generally "sufficient to survive summary judgment").

287. *See generally* Garland v. Ming Dai, 141 S. Ct. 1669, 1676–77 (2021) (explaining judicial review of immigration proceedings).

288. *See* Xiao Wang, *From the Bird's Eye: The Sixth Circuit's Efforts to Breathe Life into Substantive Reasonableness Review*, 33 FED. SENT'G REP. 221, 222 (2020) (describing demeanor determinations at sentencing hearings).

289. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 431–32 (2006); Wolanek & Liu, *supra* note 19, at 288 ("But it is not enough to cite a general interest. The government must instead demonstrate how its interest would be furthered *in that instance*.").

290. Holt v. Hobbs, 574 U.S. 352, 364 (2015).

not underinclusive and that any alternative options are infeasible[291]—tasks which are ineluctably tied to matters of fact. Such a showing often requires the government to sift through and produce volumes of record evidence.

If anything, government defendants should, so far as complex evidentiary inquiries go, be *more* willing to challenge a plaintiff's sincerity as compared to any other prong of the strict scrutiny analysis. That is because sincerity is the *plaintiff's* burden. The responsibility lies on the plaintiff to show sincerity, not the government to discredit it.

Finally, when the government has refused to concede sincerity and has opted to proceed to trial on the question, it has prevailed. In *Grace United Methodist Church v. City of Cheyenne*, for example, Grace United sought a license to operate a daycare facility on land the City had designated as "low-density residential."[292] The City denied a RLUIPA exemption, explaining that Grace United's request was not based on a sincerely held religious belief.[293] At trial, a jury confirmed "that Grace United had failed to prove the proposed operation of the daycare center was a sincere exercise of religion under RLUIPA, and it concluded that the daycare center would be in violation of the covenants of the neighborhood."[294] The Tenth Circuit affirmed this decision on appeal.[295] The Seventh Circuit, in *Andreola v. Doyle*, likewise affirmed a jury finding of insincerity.[296]

Considering these circumstances—i.e., that courts regularly examine complex evidentiary questions, that governments already litigate these sorts of questions in free exercise cases, and that plaintiffs bear the evidentiary burden in any event—the fact-based nature of sincerity cannot explain away why sincerity is undisputed in so many cases. I posit, instead, a more distressing answer: Governments do not put up more of a fight on sincerity because they generally do not have the tools to do so. If they, for instance, wanted to issue interrogatories or depose a plaintiff, what would they ask? Under *Thomas*, asking whether the plaintiff's beliefs are logical, consistent, or comprehensible would be irrelevant.[297] Under *Smith*, asking whether certain practices are central to one's religion is not germane.[298] And under RFRA and

291. *E.g.*, Williams v. Annucci, 895 F.3d 180, 192–93 (2d Cir. 2018); Ackerman v. Washington, 16 F.4th 170, 191 (6th Cir. 2021).

292. Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 647–48 (10th Cir. 2006).

293. *Id.* at 648.

294. *Id.*

295. *Id.* at 660–64.

296. Andreola v. Doyle, 260 F. App'x 935, 935 (7th Cir. 2008).

297. Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 711–15 (1981).

298. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 887–92 (1990).

RLUIPA, asking whether these practices are compelled by one's religion is verboten.[299] The doctrine and statutory text tie the hands of government officials. Sincerity is not challenged because it cannot, under the current regime, meaningfully be challenged.

2. Who is Insincere?

Proponents of religious liberty would likely contest this dire assessment. They might, based on the data in Tables 1 to 5, contend that, even though sincerity is a low threshold, it still works.[300] After all, about 7% of the time, federal appellate courts found an applicant insincere. RFRA and RLUIPA are doing what they are supposed to do: providing maximum protection for religious liberty while rooting out the most frivolous claims. This Subsection aims to challenge this hypothesis.

To begin, it is unclear whether all of these "insincere" cases reached the correct legal result, as far as current doctrine is concerned. Two cases, both from the D.C. Circuit, held a plaintiff to be insincere but referred to a "centrality" and a "compulsion" requirement in their reasonings.[301] These were the only instances in which plaintiffs in the D.C. Circuit were found to be insincere. Yet, even including these cases, the data on *who* has been deemed insincere is jarring.

Consider that the doctrine has made sincerity an easy bar to clear, so long as plaintiffs strategically structure their complaint. Under the current rubric, plaintiffs who can afford counsel should therefore carry a significant advantage. Even bare-bones legal representation is likely to fashion factual allegations that survive pretrial motions, clearing the hurdle to proceed to strict scrutiny. On the other hand, plaintiffs proceeding pro se would risk dismissal, not necessarily because their claims are insincere but because they are unfamiliar with the keywords or terms they should invoke. Table 6, which compares the nature of "sincere" and "insincere" claims among the federal appellate courts, validates this idea. Supreme Court cases were excluded from Table 6, as all parties were represented in those proceedings (and all plaintiffs were considered sincere).

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299. 42 U.S.C. §§ 2000bb(b)(1), bb-2(4), cc-5(7)(A).

300. Loewentheil, *supra* note 243, at 119 n.148 ("It seems unlikely to me that many blatantly insincere religious exemptions will be advanced.").

301. Archdiocese of Wash. v. Wash. Metro. Area Transit Auth., 897 F.3d 314, 333 (D.C. Cir. 2018) ("[T]he Archdiocese has not alleged that its religion *requires* displaying advertisements on WMATA's buses." (emphasis added)); Henderson v. Kennedy, 253 F.3d 12, 16 (D.C. Cir. 2001) ("Plaintiffs do not claim [that practice] is *central to* the exercise of their religion." (emphasis added)).

TABLE 6: THE (REPRESENTED) SINCERE AND (PRO SE) INSINCERE PLAINTIFF

	Plaintiff Insincere No. of Cases	**Plaintiff Sincere No. of Cases**	**Percentage Insincere**
Total / Average	21	270	7.2%
Represented	5	202	2.4%
Pro Se	16	68	19.0%

As reflected, the ability to afford representation was a significant marker of sincerity: represented plaintiffs were insincere just 2.4% of the time; while unrepresented plaintiffs had a figure *eight* times as much, at 19.0%. Thus, although more overall plaintiffs were represented than pro se (202 vs. 68), far more of the insincere plaintiffs were pro se (16 vs. 5).

The reasoning that courts use when finding an individual insincere hammers home the point. Courts rarely relied on a detailed examination of a weighty record. They seldom fleshed out their rationale in a published, binding opinion. Rather, in case after case, courts held in unpublished dispositions that a plaintiff's allegations were "conclusory" or failed to make the required threshold assertion.[302] In *Parks v. Brooks*, the Ninth Circuit reversed an adverse sincerity determination against a pro se plaintiff, pointing out that the district court had too quickly dismissed the complaint because the plaintiff did not "specify [the details behind] a RLUIPA claim in his complaint."[303] But *Parks* is an exception; many circuit courts affirm, rather than scrutinize and reverse, district court determinations on this score.

Finding a plaintiff insincere in these situations is all the harsher because such decisions appear most often in prisoner litigation cases. The Prison Litigation Reform Act imposes a "three-strikes rule," which "prevents a prisoner from bringing suit . . . without first paying the filing fee—if he has had three or more prior suits dismissed on the grounds that they were frivolous, malicious, or failed to state a claim upon which relief may be granted."[304] A dismissal based on failure to state a claim—even when the dismissal is without prejudice—counts as

302. *See, e.g.*, Spearman v. Whitmer, No. 21-1182, 2021 WL 7162075, at *3 (6th Cir. Nov. 10, 2021) ("The district court ruled that Spearman's assertion of Nuwaubian beliefs on this point were conclusory. Because Spearman does not challenge this ruling, we decline to examine the issue further."); Barhite v. Caruso, 377 F. App'x 508, 511 (6th Cir. 2010) ("In the present case, Barhite has failed to assert this initial element . . . because he does not allege . . . .").

303. 302 F. App'x 611, 612 (9th Cir. 2008) (per curiam).

304. Lomax v. Ortiz-Marquez, 140 S. Ct. 1721, 1723 (2020) (alterations, internal quotation marks, and citation omitted); 28 U.S.C. § 1915(g).

a strike.[305] Hence, courts find insincerity more often for plaintiffs who are unrepresented and poor; when they do so, such a finding can hamper an incarcerated plaintiff from bringing future lawsuits, even if their claims are meritorious.

Last, I examined whether an applicant's religious identification affected sincerity. The academic literature has long suggested that free exercise law is more accommodating to mainstream faiths; followers of minor religions receive less solicitude.[306] But this assertion has rarely faced empirical study. Gregory Sisk and Michael Heise found, in a 2012 article, that Muslim claimants won fewer cases in the years immediately following 9/11.[307] Another study, more than twenty years ago, suggested that "high-tension faiths (i.e., religions holding a high level of separation, antagonism, and distinctiveness with the surrounding sociocultural environment) were more likely . . . to receive unfavorable rulings."[308] But there are shortcomings to both analyses. One focused on the judicial response to a high-profile terrorism event; the other studied cases that largely predated RFRA and RLUIPA. In an attempt to offer additional data, Tables 7 and 8 review treatment of sincerity between mainstream and nonmainstream faiths. For Table 8, I have grouped Christianity, Judaism, and Islam as the major Abrahamic faiths.

TABLE 7: SINCERITY IN CHRISTIANITY VS. OTHER FAITHS

	Plaintiff Insincere No. of Cases	**Plaintiff Sincere No. of Cases**	**Percentage Insincere**
Total	21	270	7.2%
Christianity	5	79	6.0%
All Other Faiths	16	191	7.7%

305. *Lomax*, 140 S. Ct. at 1723.

306. *See, e.g.*, Girgis, *supra* note 160, at 1764; Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222, 224 (2003) ("[T]he First Amendment often has failed to provide equal liberty to religious minorities."); Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571, 596 ("[O]ne might also give religion judicial protection because one regards it as handicapped in the lawmaking process, perhaps because minority religions are likely to be the object of prejudice."); Loewentheil & Platt, *supra* note 42, at 260–62.

307. Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 IOWA L. REV. 231, 251–52 (2012).

308. John Wybraniec & Roger Finke, *Religious Regulation and the Courts: The Judiciary's Changing Role in Protecting Minority Religions from Majoritarian Rule*, 40 J. FOR SCI. STUDY RELIGION 427, 441 (2001).

TABLE 8: SINCERITY IN THE ABRAHAMIC RELIGIONS (CHRISTIANITY, JUDAISM, ISLAM) VS. OTHER FAITHS

	Plaintiff Insincere No. of Cases	**Plaintiff Sincere No. of Cases**	**Percentage Insincere**
Total	21	270	7.2%
Major Abrahamic Faiths	12	172	6.5%
All Other Faiths	9	98	8.4%

A few caveats. First, unlike attorney representation, which is a more binary selection, categorizing claimants based on their faith runs into inevitable definitional concerns. One might legitimately debate whether the Nation of Islam is a part of mainstream Islam or a separate religious movement. Such definitional questions are compounded by a limited sample size. If I had classified Mormonism as a separate sect from Christianity, the percentages would have been essentially identical in both Tables: incidence of insincerity would be equal among "All Other Faiths" as among Christianity or the major Abrahamic faiths. Additionally, my dataset examines only RFRA and RLUIPA cases—matters where plaintiffs seek accommodation from generally applicable and neutral laws.[309] Plaintiffs seeking relief from laws which discriminate against a particular religion would bring constitutional, rather than statutory, claims.[310] It is possible these sorts of laws more likely single out minority faiths.

Bearing these considerations in mind, the available data does not suggest that sincerity discriminates based on a plaintiff's faith. Followers of major and minor religions receive relatively even-handed treatment. There also is no pronounced difference between Christianity and the other major Abrahamic faiths; neither registered statistical significance.

In suggesting minority religions receive less protection than mainstream faiths, scholars often invoke familiarity. Judges and juries are more familiar with Christianity and Judaism and, the thinking goes, are more likely to extend protection to adherents of these faiths; conversely, "by relying on concepts drawn from mainstream religions, courts . . . harm[ ] religious minorities."[311]

309. PAUL HORWITZ, THE AGNOSTIC AGE 193 (2011).

310. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

311. Girgis, *supra* note 160, at 1764; Loewentheil & Platt, *supra* note 42, at 263.

But this frame of thinking could readily work the other way. Sincerity doctrine instructs factfinders not to closely examine the content, consistency, and logic behind a claimant's faith. Presented with such a command, and with little outside knowledge of a minority religion, a judge or juror might well be willing to accept as sincere a follower of a less mainstream faith. On the other hand, judges and juries likely have some personal knowledge of mainstream faiths. A judge, for instance, might know the basic rules governing Ramadan, the practices one should refrain from exercising on the Sabbath, or how and in what manner an Evangelical Christian should proselytize. This knowledge might seep its way subconsciously into an opinion or a verdict, with a judge or juror imposing a sort of Overton window on what he or she would consider a sincere belief. So, even if a Jewish or Christian plaintiff insisted on building a daycare center on a particular site,[312] or ministering in a particular area,[313] or advertising in a particular manner,[314] a judge or jury could still reject such a claim.

In sum, over the past thirty years, when the Supreme Court has addressed a RFRA or RLUIPA plaintiff's sincerity, it has *always* found the plaintiff sincere. No Justice, except Justice Thomas, has cast doubt on any individual litigant's sincerity. Those trends apply a level down, as well. When circuit courts look at sincerity, they find RFRA and RLUIPA plaintiffs sincere 93% of the time.[315] Sincerity is hardly even contested. The government, likely hamstrung by the case law and statutory text, often concedes it as a matter of course. Any analysis that is undertaken tends to be brief and cursory; reciting the elements and concluding that the plaintiff has satisfied them. Finally, insincerity is—at least judging from the reasoning in court opinions—not necessarily a marker for actual religious belief but a marker of financial means and access to counsel. Underprivileged and incarcerated individuals are disproportionately found insincere.

III. SINCERITY AND DISOBEDIENCE

When (just about) everyone is sincere, then sincerity becomes a license for disobedience. I explore that relationship—religion, sincerity, and disobedience—in this Part. One motif that undergirds this discussion is the distinction between the true believer and the make-

312. Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 647–48 (10th Cir. 2006).

313. Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 263, 274 (3d Cir. 2007).

314. Henderson v. Kennedy, 253 F.3d 12, 16 (D.C. Cir. 2001).

315. *See supra* Table 3.

believer. Religious free exercise law is supposed to protect the former, not the latter. Under this traditional conception, when someone's genuine religious practice is affected—even by a generally applicable, neutral law—then an exemption or accommodation is necessary to protect religious free exercise.

But the sincerity requirement has, in practice, parted ways from the traditional conception. Instead, as sincerity works today, whenever someone *says* that they are burdened by a law, they are deemed sincere. And anyone can *say* that they have been burdened. Once that condition is met, the exemption and accommodation door opens wide for any opportunistic plaintiff—i.e., any make-believer—to walk through.

A. Taking Strict Scrutiny Seriously

The make-believer has long preoccupied law and religion scholarship.[316] As one commentator puts it, "Behind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe."[317] That endless chain would cause courts to "be overwhelmed by litigants demanding religious exemptions to every law that might inadvertently interfere with the great diversity of Americans' religious practices."[318]

For better or worse, though, religious free exercise law for many years protected neither the true believer nor the make-believer. It was an open secret that "free exercise doctrine was more talk than substance."[319] Although "[i]n its language[ ] it was highly protective of religious liberty," in practice "the Supreme Court only rarely sided with the free exercise claimant."[320] Besides *Sherbert*, *Thomas*, and *Yoder*, the Court held for the plaintiff in only one other case. And that case, *Hobbie v. Unemployment Appeals Commission*, was essentially a facsimile of *Sherbert* and *Thomas*.[321] Thus, "[e]ven the Justices committed to the

316. *See, e.g.*, Weiss, *supra* note 50, at 602–03; Chapman, *supra* note 41, at 1192.

317. Ira C. Lupu, *Where Rights Begin: The Problems of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 947 (1989).

318. Winkler, *supra* note 127, at 862.

319. McConnell, *supra* note 26, at 1109; *see also* Ryan, *supra* note 18, at 1413–14 ("It is widely recognized in academic literature that free exercise claimants, even prior to *Smith*, did not fare well in the Supreme Court. A sharp divergence existed between the apparent protection afforded by the compelling interest test and the actual success of the free exercise claimant."); *id.* at 1413 n.38, 1414 n.39 (citing Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299; William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 310 n.9 (1991); McConnell, *supra* note 26, at 1110; and Lupu, *supra* note 317).

320. McConnell, *supra* note 26, at 1109–10.

321. Hobbie v. Unemp. Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987) ("We see no meaningful distinction among the situations of *Sherbert*, *Thomas*, and *Hobbie*.").

doctrine of free exercise exemptions . . . in fact applied a far more relaxed" test.[322] Maybe the Court *said* it was applying strict scrutiny, but it was not really doing so in any sense of the word.

The data corroborates this understanding. Indeed, "[t]he win-loss ratio of free exercise claims brought in the federal courts of appeals in the ten years preceding *Smith* [was] even more lopsided than that in Supreme Court cases."[323] During this period—1980 to 1990—James Ryan found that federal appellate courts rejected eighty-five out of ninety-seven free exercise claims.[324] Challenged laws or policies went unaffected in 88% of cases;[325] a clear illustration of a "standard of review" that was "strict in theory, but ever-so-gentle in fact."[326]

There was a sense, though, that this tide began to shift with *Smith*. That decision triggered a strong reaction from an "unusually broad-based coalition,"[327] ultimately leading to passage of RFRA and RLUIPA. Both RFRA and RLUIPA rejected *Smith*; these statutes included the express admonition that they "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted."[328] Given this language, some corners claimed that RFRA "had the potential, if read literally, to be much more restrictive than anything the Court had insisted upon in its pre-*Smith* jurisprudence."[329]

About a decade after RFRA's passage (and a few years following RLUIPA's enactment), Adam Winkler conducted a follow-up study to Ryan's, with two important modifications. First, Winkler studied a more expansive dataset, including federal district court, federal appellate court, and U.S. Supreme Court decisions from 1990 to 2003.[330] Second, and more importantly, Winkler sought to compare multiple areas of the law against one another. He collected decisions across five doctrines: free speech, religious liberty, suspect class discrimination, fundamental rights, and freedom of association.[331] In so doing, Winkler could juxtapose religious liberty strict scrutiny against strict scrutiny in other disciplines.

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322. McConnell, *supra* note 26, at 1127.

323. Ryan, *supra* note 18, at 1416–17.

324. *Id.* at 1417.

325. *Id.*

326. Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756 (1992).

327. McConnell, *supra* note 26, at 1111.

328. 42 U.S.C. § 2000cc-3(g).

329. Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 YALE L.J.F. 416, 429 (2016).

330. Winkler, *supra* note 127, at 809–10.

331. *Id.* at 810.

By way of shorthand, Winkler used "survival rate" to measure when a government policy survived strict scrutiny even though, in exemption and accommodation cases, challenged policies typically remain in place except as to a particular plaintiff.[332] His findings are presented in Table 9 below.

TABLE 9: STRICT SCRUTINY BETWEEN 1990 AND 2003[333]

Right	Survival Rate	No. of Cases
Religious Liberty	59%	73
Freedom of Association	33%	33
Suspect Class Discrimination	27%	85
Fundamental Rights	24%	46
Freedom of Speech	22%	222
Total	**30%**	**459**

Winkler found that strict scrutiny for religious exercise was "apparently becoming *more fatal*" post-*Smith*.[334] Predictions that RFRA and RLUIPA would revitalize protections were, to a degree, borne out. Still, religious liberty continued to have "the highest survival rate of any area of law in which strict scrutiny applies," one that was "more than double the mean of the other doctrinal categories."[335] At the time, Winkler suggested that this gap might have been due to the differential treatment of statutory versus constitutional strict scrutiny.[336] This was, though, only a hypothesis, since the Court had, through 2003, not heard a single merits case on either statute.[337]

As I have chronicled, that changed in the mid-2000s. The Court started taking RFRA and RLUIPA cases on its merits docket, started ruling for plaintiffs (often reversing lower courts), and started to emphasize the difficult standard of review set forth by RFRA and RLUIPA. The Court described RLUIPA and RFRA's "least restrictive means" analysis as "exceptionally demanding."[338] It also observed that "[t]he compelling interest standard" of RFRA and RLUIPA was the same as "the compelling interest standard that the Court employs when

332. *Id.* at 812–13.

333. *Id.* at 815.

334. *See id.* at 825 (emphasis added) (describing how strict scrutiny as a whole has become more difficult to overcome in the last decade).

335. *Id.* at 857–58.

336. *Id.* at 858.

337. *See supra* Part II.A.

338. Holt v. Hobbs, 574 U.S. 352, 353 (2015) (citing Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 728 (2014)); *accord* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2394 (2020) (Alito, J., concurring).

applying strict scrutiny to examine . . . limitations on . . . [other] constitutional rights."[339]

In light of this direction, Caleb Wolanek and Heidi Liu updated Winkler's analysis by surveying federal district court, federal appellate court, and U.S. Supreme Court cases from 1990 to 2015. Wolanek and Liu found 264 such cases in which courts applied strict scrutiny.[340] In these 264 cases, the "survival rate" had dropped, from 59% (from Winkler's study) to 33%.[341] That is a stunning decline. Assuming the survival rate in the other categories (free speech, suspect class discrimination, etc.) held steady from Winkler's earlier analysis, a 33% religious free exercise survival rate would be well within the range of the other rights subject to strict scrutiny.[342] No longer was religious free exercise an outlier; as Wolanek and Liu observe, "strict scrutiny [now] at least appears to be strict."[343] Their "data tells a different story" from Winkler's study: "[R]eligious claimants [now] win much more often."[344]

As a final measure, I segregated from my dataset circuit court cases decided from 2016 to 2022, where the court undertook a compelling interest and least restrictive means analysis. There were nineteen cases in this subset. I did not include every case in which the court found in favor of sincerity; in many of these matters, the court remanded to the district court to review in the first instance whether the government had satisfied strict scrutiny. My subset largely affirms Wolanek and Liu's conclusion. In only six cases did the government action survive strict scrutiny, for a survival rate of 32%.

Table 10 summarizes the survival rate across Ryan, Winkler, Wolanek and Liu, and my study.

339. Ramirez v. Collier, 142 S. Ct. 1264, 1286 (2022) (Kavanaugh, J., concurring).

340. Wolanek & Liu, *supra* note 19, at 291.

341. *Id.* at 295 tbl.6; Winkler, *supra* note 127, at 815 tbl.1.

342. *See* Winkler, *supra* note 127, at 815 tbl.1.

343. Wolanek & Liu, *supra* note 19, at 303.

344. *Id.* at 303 n.136.

TABLE 10: RELIGIOUS FREE EXERCISE STRICT SCRUTINY SURVIVAL RATE, 1990 TO 2022

Author	Time Frame	Dataset	No. of Cases	Survival Rate
Ryan	1980 to 1990	• Federal Appellate Court Cases • Constitutional Cases Only	97	88%
Winkler	1990 to 2003	• U.S. Supreme Court, Federal Appellate Court, Federal District Court • Constitutional, RFRA, and RLUIPA Cases	73	59%
Wolanek & Liu	1990 to 2015	• U.S. Supreme Court, Federal Appellate Court, Federal District Court • Constitutional, RFRA, and RLUIPA Cases	264	33%
Wang	2016 to 2022	• Federal Appellate Court Cases • RFRA and RLUIPA Cases Only	19	32%

To be clear, this Table is meant only to provide general guidance. None of these studies give an apples-to-apples comparison to one another. Some, like Winkler, and Wolanek and Liu, look at cases from all parts of the federal judiciary; others focus on a single level. My analysis hews solely to RFRA and RLUIPA, without—as every other study has done—accounting for constitutional or other challenges. All the same, there is an undeniable trend towards more demanding strict scrutiny review for religious free exercise. Strict scrutiny for religious free exercise is no longer the exception to the rule; at a 32% survival rate, it is fully in line with other rights subject to strict scrutiny.

The upshot to such a finding is that sincerity matters more than ever. Drawing the line between the true believer and the make-

believer—which sincerity is supposed to do[345]—is no longer merely academic. How sincerity works (and if it works) matters a great deal. If, as the data reflect, sincerity is not a barrier to plaintiffs, particularly if those plaintiffs can afford legal counsel, then sincerity becomes a license for disobedience. By filing a complaint alleging, without more, that a particular government action or regulation infringes on one's sincere beliefs, plaintiffs can take the express lane to strict scrutiny review. Once there, any lawbreaking will be accommodated or insulated from consequence far more often than not.

B. Sincerity's Migration

A secondary trend amplifying sincerity's importance is the requirement's migration to other parts of the law. Already, sincerity's place in RFRA and RLUIPA gives it a broad reach: these are, as discussed, "super statute[s]" that "displace[ ]" state and federal law when appropriate.[346]

But sincerity shows up in more than just RFRA and RLUIPA matters. While federal employment laws do not mention sincerity, for instance, courts nonetheless ask many employment-discrimination plaintiffs to show that their beliefs are sincerely held.[347] As a reflection of this practice, the EEOC recently issued guidance discussing the sincerity requirement.[348]

Likewise, neither federal immigration statutes nor international refugee law mention sincerity. Yet circuits have imposed sincerity requirements on asylum seekers fleeing religious-based persecution.[349] Many individuals have been denied immigration relief because of a lack of perceived sincerity.[350] This finding, though anecdotal, supports the view that one's economic status, rather than genuine religious faith,

345. Korte v. Sibelius, 735 F.3d 654, 683 (7th Cir. 2013) ("Checking for sincerity and religiosity is important to weed out sham claims."); *see* Mohammadi, *supra* note 42, at 1859–60 ("[T]he sincerity doctrine's primary function [is] that of weeding out meritless claims.").

346. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

347. *See, e.g.*, Davis v. Fort Bend Cnty., 765 F.3d 480, 485–87 (5th Cir. 2014) (describing how to conduct the threshold inquiry of determining the sincerity of a person's religious belief); Susannah P. Mroz, Note, *True Believers?: Problems of Definition in Title VII Religious Discrimination Jurisprudence*, 39 IND. L. REV. 145, 153–58 (2005) (providing an account of the sincerity inquiry in past religious discrimination cases).

348. *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, EEOC, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#L (last updated July 12, 2022) [https://perma.cc/C7MB-S4GD].

349. *See* Jiang v. Holder, 341 F. App'x 126 (6th Cir. 2009) (finding that the applicant failed to present evidence corroborating her Falun Gong practice and so relief under the Convention Against Torture Act was properly denied); *accord* Chen v. Holder, 742 F.3d 171, 178 (4th Cir. 2014).

350. *See, e.g.*, Hovhannisyan v. Gonzales, 217 F. App'x 722, 723 (9th Cir. 2007).

determines whether an individual is or is not sincere.[351] Other fields, such as criminal law, also incorporate a sincerity requirement.[352]

Beyond federal law, sincerity has also migrated into state religious free exercise law. Several state RFRAs expressly refer to sincerity.[353] Even when a state RFRA does not expressly mention sincerity, plaintiffs themselves often bring state RFRA claims alongside their federal RFRA and RLUIPA claims. From my review, federal appellate courts will, in addressing an ancillary or supplemental state law claim, carry over their RFRA or RLUIPA sincerity analysis.[354]

Finally, sincerity has begun transforming international law. As Anna Su points out, countries have long looked to the United States for guidance on how to address law and religion questions.[355] Consonant with that tradition, sincerity requirements are now part of Canadian and E.U. law. In *Syndicat Northcrest v. Amselem*, the Supreme Court of Canada ("SCC") held that the sincerity of a religious belief was the determining factor in accommodation claims.[356] It also emphasized that sincerity did not hinge on objective proof, such as an official religious text or doctrine stating that it was a matter of religious obligation for one to engage in a particular practice. Leaning on both *Thomas* and a leading U.S. constitutional law treatise, the SCC explained that "the very rights ostensibly protected by [ ] free exercise [law] might well be jeopardized by any but the most minimal inquiry into sincerity."[357] *Amselem* was affirmed in another SCC case two years later.[358]

Somewhat similarly, in *Eweida and Others v. the United Kingdom*, the European Court of Human Rights—citing *Amselem*—

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351. *Id.* at 722 (proceeding pro se); *see also* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 75–76 (2015) (showing that as few as "10% of detained immigrants in small cities obtained counsel," but that the odds were, in aggregate, "five-and-a-half times greater" that an immigrant with representation obtained relief).

352. *See generally* Chapman, *supra* note 41, at 1188 ("Courts and government officials adjudicate religious sincerity in a wide variety of contexts: fraud; immigration; employment discrimination; prisoner religious accommodations; conscientious objection from service in the armed forces; and statutory accommodations from general laws." (citations omitted)).

353. *See, e.g.*, MISS. CODE ANN. § 11-62-3 (2016) (protecting believers with "sincerely held religious beliefs"); IND. CODE § 20-26-13-17 (2020) (protecting parents' sincerely held religious belief); LA. STAT. ANN. § 1061.20 (2022) (protecting medical providers and prospective employees who have sincerely held religious beliefs); MCCRARY, *supra* note 42, at 3 (discussing Iowa bill).

354. *See* Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610 (6th Cir. 2020); Warner v. City of Boca Raton, 267 F.3d 1223 (11th Cir. 2001).

355. Su, *supra* note 42, at 34 ("[I]t is not surprising to discover that there is a similar emerging trend in Canada and the European Union. Constitutional convergence, especially when it comes to rights, is largely driven by cross-national networks of constitutional judges as well as globalizing economic processes.").

356. Syndicat Northcrest v. Amselem, [2004] S.C.R. 47, para. 46 (Can.).

357. *Id.* at paras. 45, 52 (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1245–46 (2d ed. 1988)).

358. Multani v. Comm'n Scolaire Marguerite-Bourgeoys, [2006] S.C.R. 6 (Can.).

embraced aspects of a sincerity requirement.[359] As it explained, "as long as the act or manifestation ha[s] a connection with religion and the claimant sincerely believes such, it [is] not up for the courts to determine its centrality to afford it legal protection."[360]

Sincerity's transjurisdictional nature only further underscores the requirement's importance. A toothless requirement affects the law on at least two separate axes: first, through an ever-more-demanding government burden and second, through the proliferation of legal challenges across state, federal, and international law. No law is insulated from the make-believer.

C. Sincerity as Licensed Disobedience

In *Smith*, the Supreme Court noted that the Free Exercise Clause should not be treated as a "private right to ignore generally applicable laws."[361] *Smith* sought to shut that prospect down by abandoning strict scrutiny for most constitutional free exercise cases.[362] But RFRA and RLUIPA revived the prospect—a possibility that, as Justice Thomas has noted, the sincerity requirement was supposed to guard against.[363] Yet sincerity has failed miserably on this score. The bare treatment courts give sincerity makes it somewhat challenging to catalog all of the cases when a make-believer might have prevailed. But numerically, the dramatic and steady escalation in RFRA and RLUIPA cases on the federal docket dovetails with opportunistic litigants treating RFRA and RLUIPA as licenses for disobedience.[364]

In addition, several matters stand out as highlighting the facile nature of sincerity. As I have covered above, the Supreme Court's recent *Ramirez* decision makes little sense. Even without delving into Mr. Ramirez's actual beliefs, his inconsistent litigation posture and late filing of his claims tip unambiguously towards insincerity.[365]

Consider also the *Hobby Lobby* litigation. There, the individual plaintiffs purportedly had "a sincere religious belief that life begins at conception" and "therefore object[ed] on religious grounds to providing

359. Su, *supra* note 42, at 36 (discussing Eweida v. U.K., App. Nos. 48420/10, 59842/10, 51671/10 & 36516/10 (Jan. 15, 2013), https://hudoc.echr.coe.int/eng?i=001-115881 [https://perma.cc/GKR4-K66J]).

360. *Id.* at 36 (discussing case).

361. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 886 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 2, 107 Stat. 1488, 1488, *as recognized in* Cutter v. Wilkinson, 544 U.S. 709, 714–15 (2005).

362. *Id.* at 886–88.

363. Ramirez v. Collier, 142 S. Ct. 1264, 1297–98 (2022) (Thomas, J., dissenting).

364. *See supra* Part II.

365. *See supra* Part IV.

health insurance that covers methods of birth control" because doing so might "result in the destruction of an embryo."[366] Setting aside the dubious science undergirding such a claim,[367] there was a more serious sincerity issue: their prior actions belied any such beliefs.

Just before Hobby Lobby filed suit, its employee retirement plan held more than $70 million in funds and investments in companies that produced "contraceptive pills, intrauterine devices, and drugs commonly used in abortions."[368] The company made significant matching contributions to the plan.[369] What is more, prior to the Affordable Care Act's passage, the Hobby Lobby *voluntary* health insurance plan "covered the[ ] forms of contraception" to which it purportedly objected in the Act.[370] These sorts of inconsistent actions, coupled with Hobby Lobby placing—in its own stores—displays that read "USA VOTE TRUMP,"[371] let slip the plaintiffs' actual intentions: to derail implementation of a signature Democratic policy achievement.

Most recently, insurance companies and hospital systems have drawn on their religious beliefs to "only cover fertility treatment for workers in opposite-sex marriages."[372] One healthcare plan, for instance, says that it "supports means of assisting married opposite sex spouses to conceive" because doing so "respect[s] the life and dignity of any individuals conceived as well as the spouses themselves."[373] Thousands of employees are affected; legal challenges have not yet resulted in a reversal of the policy.

And although *Dobbs v. Jackson Women's Health* was decided just a few short months ago, there is a near guarantee that access to birth control and abortion medication will become another free exercise battleground.[374] Some groups have cited their religion as a basis to deny individual access to abortion medication, even where such medication

366. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 720 (2014).

367. Molly Redden, *Hobby Lobby's Hypocrisy: The Company's Retirement Plan Invests in Contraception Manufacturers*, MOTHER JONES (Apr. 1, 2014), https://www.motherjones.com/politics/2014/04/hobby-lobby-retirement-plan-invested-emergency-contraception-and-abortion-drug-makers/ [https://perma.cc/P6VD-P7D8].

368. *Id.*

369. *Id.*

370. Loewentheil & Platt, *supra* note 42, at 274.

371. Storm Gifford, *Protestors Call for Boycott After 'Vote Trump' Display at Hobby Lobby Store*, N.Y. DAILY NEWS (Sept. 8, 2020, 12:10 AM), https://www.nydailynews.com/news/national/ny-hobby-lobby-vote-trump-20200909-rbqvpakccbez3gii7juxxbbwcq-story.html [https://perma.cc/9EHG-RNM5].

372. Stein, *supra* note 9.

373. *Id.*

374. *See, e.g.*, Madeleine Carlisle & Abigail Abrams, *Does Religious Freedom Protect a Right to an Abortion? One Rabbi's Mission to Find Out*, TIME (July 7, 2022, 6:51 PM), https://time.com/6194804/abortion-religious-freedom-judaism-florida/ [https://perma.cc/TM6G-4ABB].

is legal.[375] Other groups have said their religion "requires the mother to abort [a] pregnancy if there is a risk to her health or emotional well being," even where abortion may be banned.[376] For its part, the federal government has issued guidance instructing that refusal to provide medication access violates the Emergency Medical Treatment and Labor Act ("EMTALA").[377] But that guidance is almost entirely self-defeating—RFRA, after all, is a super statute, expressly designed to supersede laws like EMTALA when a religious conflict arises.[378] In the end, an empty sincerity requirement means that millions of women could face, post-*Dobbs*, an even more arbitrary and indeterminate legal framework for their reproductive rights.

The *Yeshiva University* litigation is likewise telling.[379] There, the University claimed that it held certain sincere religious beliefs, which prevented it from recognizing the Pride Alliance, in contravention of New York antidiscrimination law.[380] In recent years, Yeshiva had received "more than $230 million in public funds."[381]

As the New York Supreme Court's Appellate Division recently determined in a ruling against Yeshiva University, the University could not have it both ways. In the late 1960s, the University "amended its charter to become incorporated under the Education Law" and "to drop Hebrew Literature and Religious Education degrees."[382] Doing so "clari[fied] the corporate status of the University as a non-denominational institution of higher learning."[383] Yet though it was willing to drop its denominational status to qualify for state funding, Yeshiva nonetheless insisted on reviving religious free exercise

375. Carrie Feibel, *Pharmacies May Violate Civil Rights If They Refuse Meds Linked to Abortion, Feds Warn*, NPR (July 13, 2022, 4:13 PM), https://www.npr.org/sections/health-shots/2022/07/13/1111348722/pharmacies-may-violate-civil-rights-if-they-refuse-meds-linked-to-abortion-feds- [https://perma.cc/G8W4-DF59].

376. Jeannie Suk Gersen, Comment, *The Supreme Court's Conservatives Have Asserted Their Power*, NEW YORKER (July 3, 2022), https://www.newyorker.com/magazine/2022/07/11/the-supreme-courts-conservatives-have-asserted-their-power [https://perma.cc/78AU-P6Z7] (internal quotation marks omitted).

377. Karen L. Tritz & David R. Wright, *Memorandum Re: Reinforcement of EMTALA Obligations Specific to Patients Who Are Pregnant or Are Experiencing Pregnancy Loss*, CTR. FOR MEDICAID & MEDICARE SERVS. (Aug. 25, 2022), https://www.cms.gov/files/document/qso-22-22-hospitals.pdf [https://perma.cc/8YM9-Y86D].

378. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

379. YU Pride All. V. Yeshiva Univ., 211 A.D.3d 562 (N.Y. App. Div. 2022).

380. *See id.* At 564–65.

381. Liam Stack, *Was Yeshiva University Entitled to $230 Million in Public Funds*, N.Y. TIMES (Jan. 12, 2023), https://www.nytimes.com/2023/01/11/nyregion/yeshiva-university-lgbtq-club.html [https://perma.cc/WV4U-2Q3L].

382. *Yeshiva University*, 211 A.D.3d at 562.

383. *Id.* At 562–63 (internal quotation marks omittied).

arguments to violate state antidiscrimination law.[384] Distressingly, though Yeshiva has lost at every turn in the lower courts, four Justices have held that "Yeshiva would likely win if its case came before us."[385] Commentators agree.[386]

Finally, challenges to COVID-19 vaccine mandates illustrate the high stakes of free exercise litigation and the ineffectual character of sincerity. In *U.S. Navy Seals 1–26 v. Biden*, a federal district court enjoined the U.S. military's vaccination requirement, and the Fifth Circuit denied the government's motion for a stay.[387] Similarly, in *Sambrano v. United Airlines, Inc.*, the Fifth Circuit determined that United Airlines' vaccine mandate posed a substantial likelihood of coercion against plaintiffs' religious convictions.[388] Plaintiffs in both cases objected to the use of fetal tissue in the development and testing of COVID-19 vaccines claiming that such use infringed on their Christian beliefs.[389]

But such a stance skirts both religious doctrine and common sense. The overwhelming majority of Christian bodies and denominations do not oppose such vaccines on religious grounds.[390] The Vatican in fact endorsed vaccination as not only religiously acceptable but morally obligatory.[391] The U.S. Conference of Catholic Bishops largely echoed this endorsement.[392]

And it is near implausible to imagine that plaintiffs in these cases acted consistently. They have, indeed, all but admitted that they have not. As Judge Jerry Smith noted, in dissent in *Sambrano*, plaintiffs had originally proposed a COVID testing accommodation.[393] Yet "there's a problem: Antibody tests would violate the plaintiffs'

384. *See id.* At 564.

385. Yeshiva Univ. v. Yu Pride All., 143 S. Ct. 1, 2 (2022) (Alito, J., dissenting).

386. Stack, *supra* note 381 ("Katherine Franke, the founder of the Law, Rights and Religion Project at Columbia University Law School, said the Supreme Court would likely view the case differently.").

387. U.S. Navy Seals 1–26 v. Biden, 27 F.4th 336, 339 (5th Cir. 2022).

388. Sambrano v. United Airlines, Inc., No. 21-11159, 2022 WL 486610, at *7–9 (5th Cir. Feb. 17, 2022).

389. *Id.* At *33 n.60 (Smith, J., dissenting); *U.S. Navy Seals*, 27 F.4th at 342 n.4.

390. *See* Mark E. Wojcik, *Sincerely Held or Suddenly Held Religious Exemptions to Vaccination?*, ABA (July 5, 2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/sincerely-held-or-suddenly-held/ [https://perma.cc/XSP8-XASL].

391. *On COVID Vaccinations, Pope Says Health Care Is a 'Moral Obligation,'* NPR (Jan. 10, 2022, 7:26 AM), https://www.npr.org/2022/01/10/1071785531/on-covid-vaccinations-pope-says-health-care-is-a-moral-obligation [https://perma.cc/4D9J-BUE9].

392. Kevin C. Rhoades & Joseph F. Naumann, *Moral Considerations Regarding the New COVID-19 Vaccines*, U.S. CONF. OF CATH. BISHOPS 4–5 (Dec. 11, 2020), https://www.usccb.org/moral-considerations-covid-vaccines [https://perma.cc/ART8-GWHZ].

393. *Sambrano*, 2022 WL 486610, at *12 (Smith, J., dissenting).

religious beliefs" since these "tests were developed using the same stem-cell line."[394] Once "confronted with that fact," the plaintiffs retreated, now rejecting testing as an accommodation—in short, disclaiming the very exemption they proposed.[395] Even holding aside this moment of high hypocrisy, for plaintiffs in *Sambrano* and *U.S. Navy Seals* to act consistent with their beliefs, they would have had to refrain from using Tylenol, ibuprofen, aspirin, Benadryl, Pepto Bismol, Tums, Claritin, Maalox, Preparation H, and most hypertension medication—all developed using stem cell lines.[396] In other words, unless these plaintiffs disclaimed wholesale the use of modern medicine in every aspect of their lives, they were—put charitably—acting inconsistently. Put uncharitably, they used free exercise as a Trojan horse to undermine a policy they personally disagreed with.

In any event, in both cases—*Sambrano* and *U.S. Navy Seals*—the Fifth Circuit determined plaintiffs to be sincere, against minimal government challenge.[397] Hindered by the doctrine, the government did not require plaintiffs to show consistency of action with belief, nor did it question the apparent insincerity of their proposed alternatives, nor did it make light of the disconnect between the plaintiffs' purported "religious" views and the views of central religious authorities.

Defenders of free exercise often insist that fears of religious liberty spinning out of control are overblown. As Christopher Lund says, "No academic or judicial discussion of the compelling-interest test ever seems complete without some reference to a likely parade of horribles."[398] "But such hypothetical claims seem less scary when one realizes that they are rarely brought and do not win."[399]

It is hard to keep track of how many things are wrong with this statement. Such cases *are* brought—in fact, they are brought at almost three times the rate now than in the 1990s.[400] And plaintiffs in these cases *do* win—they win, today, around 67% of the time.[401] Finally, as

394. *Id.* at *33 n.60.

395. *Id.*

396. *Myths & Facts About the Vax*, TRICARE NEWSROOM (Sept. 23, 2021), https://newsroom.tricare.mil/Articles/Article/2786518/myths-and-facts-about-the-vax-debunking-common-covid-19-vaccine-myths [https://perma.cc/6QVY-X32U]; Priyanka Runwal, *Here Are the Facts About Fetal Cell Lines and COVID-19 Vaccines*, NAT'L GEOGRAPHIC (Nov. 19, 2021), https://www.nationalgeographic.com/science/article/here-are-the-facts-about-fetal-cell-lines-and-covid-19-vaccines [https://perma.cc/L5Y6-MA7E].

397. *Sambrano*, 2022 WL 486610, at *7; U.S. Navy Seals 1–26 v. Biden, 27 F.4th 336, 342 (5th Cir. 2022).

398. Christopher C. Lund, *Keeping* Hobby Lobby *in Perspective*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 285, 298 (Micah Schwartzman, Chad Flanders & Zoe Robinson eds., 2016).

399. *Id.*

400. *See supra* Table 5.

401. *See, e.g.*, *supra* Table 10.

reflected in the vaccine mandate cases, these "wins" carry significant consequences. In *U.S. Navy Seals*, the Supreme Court intervened, staying the federal district court's injunction pending further development in the case.[402] That mitigates the damage, for now. But for United Airlines, the Fifth Circuit's opinion was dispositive. In the weeks before the company's vaccine mandate was put into place, "more than one United employee . . . per week was dying from COVID."[403] After the mandate was implemented, the company went "eight straight weeks with zero COVID-related deaths among . . . vaccinated employees."[404] Yet the Fifth Circuit's decision gave United Airlines few outs. Even a middle ground, such as frequent testing, was ruled out-of-bounds.[405] Less than a month after the Fifth Circuit's ruling, United permanently abandoned its vaccine mandate.[406]

IV. TOWARDS DISOBEDIENCE'S END

Sincerity is broken. But it did not fall apart all at once. Its integrity eroded gradually, through case law and statutory text. There are, by the same token, no quick fixes. A workable approach will likely be multimodal, requiring coordination across different branches and different actors. I conclude with an overview of some potential solutions.

A. Legislative Reforms

One possible avenue is for Congress to amend RFRA and RLUIPA, which it could do in three primary ways: (1) by exempting other laws from RFRA and RLUIPA's reach, (2) by lightening the government's burden, or (3) by tightening the plaintiff's burden.

First, Congress has shown its willingness to extend special protections to certain groups; RLUIPA singles out state prisoners and local landowners for protection. Congress could just as easily do the reverse by carving out certain laws or fields from the reach of statutory

402. Austin v. U.S. Navy Seals 1–26, 142 S. Ct. 1301 (2022).

403. Oriana Gonzalez, *United Airlines: Employee Deaths Dropped to Zero After Vaccine Mandate*, AXIOS (Jan. 11, 2022) (emphasis omitted), https://www.axios.com/2022/01/11/united-airlines-ceo-covid-vaccine-mandate [https://perma.cc/QZ45-TXX4].

404. *Id.*

405. Sambrano v. United Airlines, Inc., No. 21-11159, 2022 WL 486610, at *33 n.60 (5th Cir. Feb. 17, 2022) ("Antibody tests would violate the plaintiffs' religious beliefs. The plaintiffs object that a fetal stem-cell line was used to develop the coronavirus vaccines, but antibody tests were developed using the same stem-cell line. When confronted with that fact, both [plaintiffs] admitted that they would not accept antibody testing as an accommodation.").

406. *See* Alison Sider, *United Airlines to Let Unvaccinated Workers Return*, WALL ST. J., https://www.wsj.com/articles/united-airlines-to-let-unvaccinated-workers-return-11646869723 (last updated Mar. 9, 2022, 8:31 PM) [https://perma.cc/YCN4-JV9C].

protection. To eschew strict scrutiny of vaccination requirements, for instance, it could exclude public health laws and regulations from RFRA's purview.

Such an approach, though superficially appealing, might in the end be both under- and overinclusive. At least insofar as state and local laws are concerned, plaintiffs could simply bring suit under state RFRAs, which would not be subject to the same carve out.[407] Moreover, should Congress cast the carve-out net too wide, the Supreme Court might see Congress's action as trying to effectively neuter RFRA and RLUIPA by putting back into place the rational basis standard in *Employment Division v. Smith*.[408] If such a scenario were to pass, the Court could use other tools to reach the same substantive result. Witness its decision to stay OSHA's vaccination mandate for private employers.[409] The ruling, though effectively reaching the same substantive result as *Sambrano* and *U.S. Navy Seals*, was not made on RFRA or religious liberty grounds but on the basis of administrative law.[410] Or the Court might simply overturn *Smith* and restore strict scrutiny through constitutional interpretation, rather than statute. Five current Justices have already suggested that *Smith* was wrongly decided.[411]

Second, Congress could lighten the government's burden by ratcheting down strict scrutiny to something closer to intermediate scrutiny. Thus, when plaintiffs are invariably found to be sincere, government action would be held to a less rigorous standard of review. Such an approach fits with actual historical practice,[412] where most free exercise challenges were rejected. Supreme Court precedent also arguably supports such an approach. Even pre-*Smith*, the Court made clear that it would apply a less rigorous form of scrutiny for lawsuits brought by prisoners[413] and cases pertaining to the military.[414]

Third, Congress might explicitly make sincerity a tougher threshold. As it stands, RFRA and RLUIPA protect "any exercise of

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407. *See U.S. States with Religious Freedom of Restoration Acts and/or Legislation Similar to Indiana's as March 2015*, ABC NEWS, https://abcnews.go.com/Politics/fullpage/us-states-religious-freedom-restoration-acts-andor-legislation-30019519 (last visited Apr. 26, 2023) [https://perma.cc/VBA5-5JKL].

408. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 886 (1990).

409. NFIB v. OSHA, 142 S. Ct. 661, 666–67 (2022).

410. *Id.*

411. Fulton v. City of Phila., 141 S. Ct. 1868, 1882 (Barrett, J., concurring, joined by Kavanaugh, J.); *id.* at 1883 (Alito, J., concurring, joined by Thomas & Gorsuch, JJ.).

412. *See, e.g.*, Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1500 n.106 (1999) (providing a list of sources that demonstrate the variety of applications of strict scrutiny approaches).

413. Turner v. Safley, 482 U.S. 78, 81 (1987).

414. Goldman v. Weinberger, 475 U.S. 503, 507 (1986).

religion, whether or not compelled by, or central to, a system of religious belief."[415] It could narrow this definition by reimposing a centrality or compulsion requirement. Alternatively, it could keep the original language untouched but make clear that *any* inconsistency between one's professed beliefs and one's actual practice is grounds for denial of relief.

Such a proposal may seem harsh in some corners; as some jurists have argued, sincerity should "not require perfect adherence to beliefs expressed by the inmate, and even the most sincere practitioner may stray from time to time."[416] Yet these sorts of arguments suffer their own shortcomings.

Of course not every religious practitioner is steadfast in their beliefs and practices. But not every religious practitioner should be afforded an express pass to strict scrutiny review either. That sort of review is, as the Supreme Court itself has acknowledged, "exceptionally demanding."[417] And the remedy for religious disobedience is, as I have shown, a remarkable one. It is not the lawbreaker who suffers consequences but the law itself—by bending to and accommodating the lawbreaker. Narrowly circumscribing this sort of lawbreaking to the true believer through an equally "exceptionally demanding" consistency analysis does not seem too much to ask.

Moreover, courts have ample experience judging narrative consistency. Circuit courts regularly hear immigration appeals; they comprise around 10% of the federal appellate court docket today.[418] In the early 2000s, this number was even higher. In 2004, for instance, immigration appeals constituted about 40% of the Second Circuit's docket.[419] Both judges and scholars decried this situation as

415. *E.g.*, 42 U.S.C. § 2000cc-5(7)(A).

416. Moussazzdeh v. Tex. Dep't of Crim. Just., 703 F.3d 781, 791 (5th Cir. 2012); *accord* Grayson v. Schuler, 666 F.3d 450, 454 (7th Cir. 2012) ("[A] sincere religious believer doesn't forfeit his religious rights merely because he is not scrupulous in his observance."); Brady, *supra* note 42, at 1461.

417. Holt v. Hobbs, 574 U.S. 352, 364 (2015).

418. In 2020, out of 50,258 total appeals, 6,356 were from appeals of administrative agencies. Of those 6,356, 86% were from the Board of Immigration Appeals. *See Federal Judicial Caseload Statistics 2020*, U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020 (last visited Jan. 15, 2022) [https://perma.cc/3X24-KYMM].

419. COM. & FED. LITIG. SECTION OF THE N.Y. STATE BAR ASS'N, THE CONTINUING SURGE IN IMMIGRATION APPEALS IN THE SECOND CIRCUIT: THE PAST, THE PRESENT AND THE FUTURE 1, 10 (2010), https://nysba.org/app/uploads/2020/02/ImmigrationAppealsinthe2dCircuitFinalReport1-29-10.pdf [https://perma.cc/Z2HU-NKV2].

unsustainable.[420] In an effort to bring down the volume of such cases, Congress enacted, in 2005, the REAL ID Act.[421]

This Act included a provision stating that "a trier of fact may base a credibility determination"—adverse or otherwise—on "*any inaccuracies or falsehoods* in" an immigrant's statements "*without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim*, or any other relevant factor."[422] Prior to REAL ID, several circuits had held that immigration judges could only "deny asylum on an adverse credibility determination" for reasons that "go to the heart of [the individual's] claim."[423]

REAL ID significantly reshaped immigration law, and federal courts reacted accordingly. As one soon observed, "Under the REAL ID Act, the [Immigration Judge] may consider *any* inconsistency or omission, *whether major or minor*, in determining whether an applicant is credible"—an unequivocal tightening of the prior regime.[424] That tightening had the desired effect: reducing the immigration caseload upon the federal courts by pruning the tree of potential litigants to only those who were consistent in all substantial respects.[425] I do not mean to suggest that REAL ID necessarily promoted a more just immigration system; there are compelling reasons that, for some applicants, it did the opposite. But rather, the analogy to immigration demonstrates that legislatures *can* impose a more demanding consistency requirement and courts *can* apply the requirement to check unfettered religious disobedience. And given the steep and consistent rise in such claims, Congress need not wait until the situation becomes untenable to do so.

B. Judicial Guidance

Federal courts also have a role to play in sharpening sincerity. I canvass here two avenues: (1) the formal codification and use of

420. *See, e.g.*, Jon O. Newman, *The Second Circuit's Expedited Adjudication of Asylum Cases: A Case Study of a Judicial Response to an Unprecedented Problem of Caseload Management*, 74 BROOK. L. REV. 429, 429 (2009) ("The flood of asylum claims that came to the Second Circuit from 2002 through 2004 presented an unprecedented challenge of case management."); Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1113 (2011) (describing circuits "flooded by tens of thousands of appeals for the federal immigration agency").

421. Pub. L. 109-13, 119 Stat. 302 (2005) (codified as amended in scattered sections of 8 U.S.C. and 49 U.S.C.).

422. 8 U.S.C. § 1158(b)(1)(B)(iii) (emphasis added).

423. Desta v. Ashcroft, 365 F.3d 741, 745 (9th Cir. 2004); *accord* Secaida-Rosales v. INS, 331 F.3d 297, 308 (2d Cir. 2003).

424. Xia Lin v. Holder, 481 F. App'x 924, 925 (5th Cir. 2012) (emphasis added); *accord* Krishnapillai v. Holder, 563 F.3d 606, 616–17 (7th Cir. 2009).

425. Even under REAL ID, courts generally will overlook "an utterly trivial inconsistency, such as a typographical error." Shrestha v. Holder, 590 F.3d 1034, 1043 (9th Cir. 2010).

circumstantial evidence, and (2) the piercing of the religious question doctrine.

First, in a callback to the conscientious objector cases, courts could take a longer, more detailed look at the circumstances underlying a plaintiff's claim. That could include a careful and deliberate review of examples of inconsistency, as Justice Thomas undertook in *Ramirez*.[426] Rather than waiting for Congress to impose a consistency requirement, courts might codify one on their own. As *Witmer* outlines, "any fact which casts doubt on the veracity" of a plaintiff is "relevant," because to expect the plaintiff to admit insincerity is "pure naivety."[427]

Alternatively, judges might evaluate, for instance, whether a plaintiff has an incentive to be insincere—i.e., would the requested accommodation "give the accommodated party a benefit that would be attractive to everyone (or even to most people)."[428] That, too, would have cut against Mr. Ramirez since his litigation tactics resulted in a long delay to his execution.[429] But it would likely still afford relief to prisoners who request vegetarian meals, the use of prayer oils, or access to certain religious texts; none of these accommodations would likely attract opprobrium from fellow inmates.

Some commentators, lastly, have suggested that courts more seriously evaluate the demeanor of plaintiffs through in-person credibility determinations. Doing so on this front would track what district courts do every day in other criminal and civil matters.[430] Such a move would largely remove sincerity determinations from the purview of appellate courts, giving district judges the predominant opportunity to make such findings.

At best, though, these demeanor determinations only serve as one part of a broader solution for a critical reason. Prisoners bring a large proportion of RFRA and RLUIPA claims.[431] But prisoners proceed

426. Ramirez v. Collier, 142 S. Ct. 1264, 1293–94 (2022) (Thomas, J., dissenting).

427. Witmer v. United States, 348 U.S. 375, 381–83 (1955).

428. Chapman, *supra* note 41, at 1232; *accord* Loewentheil & Platt, *supra* note 42, at 255.

429. *Ramirez*, 142 S. Ct. at 1293 (Thomas, J., dissenting).

430. *See* Chapman, *supra* note 41, at 1228 (noting the common-law system's reliance on witness testimony, the credibility of which is "easier to judge in person"); Loewentheil & Platt, *supra* note 42, at 258; *see also* Patrick v. LeFevre, 745 F.2d 153, 157 (2d Cir. 1984) ("assessing a claimant's sincerity of belief demands . . . the opportunity for the factfinder to observe the claimant's demeanor during direct and cross-examination").

431. That is in part because "[i]ncarcerated people . . . enjoy more substantial protection for religious liberty" than in other areas of prison law. Aaron Littman, *Free-World Law Behind Bars*, 131 YALE L.J. 1385, 1389 n.7 (2022); *see also* Barrick Bollman, Note, *Deference and Prisoner Accommodations Post-*Holt*: Moving RLUIPA Toward "Strict in Theory, Strict in Fact*," 112 NW. U. L. REV. 839, 858–62 (2018); Dep't of Just. Civ. Rts. Spec. Litig. Sec., Statement of the Department of Justice on the Institutional Persons Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA), https://www.justice.gov/crt/page/file/974661/ [https://perma.cc/PKV9-F2X6].

pro se about 90% of the time.[432] With very rare exceptions, federal courts do not offer pro se prisoners an opportunity to appear and argue their cases in open court.[433] At most, federal law permits a district court, in its discretion, to issue a writ of habeas corpus ad testificandum to bring a prisoner "into court to testify or for trial."[434] But applications for such a writ are very infrequently granted,[435] a procedural practice unlikely to change.

Second, courts could pare back the religious question doctrine. Some scholars might reflexively balk at such a suggestion.[436] But my proposal does not require courts to pore through tomes of religious text to ascertain whether a plaintiff is a true believer. Consider the relationship, in science, between precision and accuracy. Precision is "how close [certain] values are to" one another.[437] Accuracy is "how close a [certain] value is to the true value."[438] On a dart board, a cluster of darts around one particular is precise, but not necessarily accurate if they are not clustered around the bullseye. Darts scattered around the board might be accurate (since, on average, they come close to the bullseye), but not precise.

By looking at circumstantial evidence behind a plaintiff's personal religious practice, courts are focusing on precision. There must, for instance, be a consistently close fit between a plaintiff's own actual actions and the nature of their requested accommodation. The Seventh-day Adventist in *Sherbert v. Verner*, for example, would not have received an exemption from working the Sabbath if she, in every prior job, willingly worked on that day.

But courts could also lightly delve into the fit between a plaintiff's personal religious practice and the conventional, commonly

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432. *Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019*, U.S. CTS., at fig.5 (Feb. 11, 2021), https://www.uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019 [https://perma.cc/4BXF-5ZNL].

433. *See, e.g.*, Davidson v. Desai, 964 F.3d 122, 129 (2d Cir. 2020) (discussing prisoners and parolees and observing that "[a] litigant has 'no constitutional right to be present, or to testify, at his own civil trial.' " (quoting *Latiolais v. Whitley*, 93 F.3d 205, 208 (5th Cir. 1996))).

434. 28 U.S.C. § 2241(c)(5).

435. *E.g.*, *Davidson*, 964 F.3d at 129–31.

436. *See, e.g.*, Chapman, *supra* note 41, at 1192–98 ("Some argue that the constitutional risks of adjudicating religious sincerity should lead courts to err on the side of caution."); Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837, 839 (2009) ("Most of us probably think that for the civil magistrate to inquire into—to even imagine the right or competence to inquire into—the 'truth or falsity' of religious claims and doctrines is, as the Supreme Court put it in *United States v. Ballard*, to enter a 'forbidden domain.' " (footnote omitted)); EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES 901–10 (4th ed. 2011).

437. *Precision vs. Accuracy*, ST. OLAF COLL., https://wp.stolaf.edu/it/gis-precision-accuracy/ (last visited Jan. 24, 2023) [https://perma.cc/N5TD-D6CD].

438. *Id.*

understood demands of their religion. Imagine if Ms. Sherbert, under her interpretation of Seventh-day Adventism, believed that to properly observe the Sabbath she must also take off the two days before and after the day itself. She insists that this is what she has always done, so there is no precision problem. Yet there is undeniably an accuracy issue. Most likely no other Seventh-day Adventist believes that practitioners should be exempt from work five days a week; no official doctrine says as much. There is no reason to adopt such an inflexible version of the religious question doctrine that would categorically prohibit such inquiries.

Nor need courts substitute their own judgments, experiences, or knowledge of a particular religion. The plaintiff, remember, carries the burden of showing sincerity. They would be expected to produce supporting evidence through the testimony of religious officials, the calling of experts, the use of foundational religious texts, and other means. If a plaintiff cannot provide any such evidence, that would be a compelling indication that, rather than practicing any sort of religion, they are seeking "to become a law unto [themselves]."[439] That result deserves no protection; no one has an unchecked right to choose the laws that they want to follow.[440]

CONCLUSION

What I have sought to provide here is a sketch of potential reforms; my aim is not to be comprehensive or overly prescriptive. There are certainly other measures Congress or the courts could take. Congress might limit litigants found to be insincere from bringing subsequent RFRA or RLUIPA litigation. Courts might repudiate outright *Thomas* and *Smith*. But the critical point is that *something* needs to be done about sincerity, because *nothing* is being done now.

To the contrary, the doctrine and the data alike show that sincerity is an empty requirement which just about any plaintiff—true believer or make-believer—can satisfy. The sole exception, it seems, is for those who cannot afford representation. That does real damage to many actors: it hurts the credibility of true believers, it imposes costs of compliance to the public, and it compromises the government's interest in the rule of law. It is a damage that is metastasizing because courts have tightened the government's burden in free exercise cases and because sincerity has proliferated across state, federal, and international law. Its tentacles are all around us—in questions of public

439. Reynolds v. United States, 98 U.S. 145, 167 (1878).

440. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 886 (1990).

health, criminal law, immigration, drug policy, and institutional conduct.

Legislatures and courts must take active steps to address this shortcoming in order to prevent the continued use of religion as an imprimatur for licensed disobedience. The suggestions here are a first, but not final, effort to step out of this thicket. A sensible religious free exercise framework demands no less.