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The Legal Definition of Religion: From Eating Cat Food to White Supremacy

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THE LEGAL DEFINITION OF RELIGION: FROM EATING CAT FOOD TO WHITE SUPREMACY

Jane M. Ritter¹

*Religion . . . shall mean for us the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine.*²

I. INTRODUCTION

No one could ever accuse Americans of being dull. Our political elections focus on everything but political issues. We execute people for crimes, yet battle fiercely over the “right to life”; and in some cities dogs have been given legal “companion” status over being mere “pets.” Yet, all this pales if one looks to court cases dealing with what constitutes “religion” for legal purposes. This paper will look at some of these “religious” beliefs —ranging from eating cat food to plain old-fashioned bigotry and everything in between. All deal with the infinitely

¹ J.D., 2004, University of Denver College of Law. The author’s undergraduate major in Comparative World Religions continues to fuel her interest in the role of religion in society. She would like to thank Professor Roberto Corrada at the University of Denver College of Law for his integral assistance in making this paper become a reality. Equally great thanks go to her parents and to her daughter, Chloe, who never ceased to find amusement in the notes around the computer about eating Kozy Kitten Cat Food.

² WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* 31-32 (First Modern Library ed. 1936) (1902).

deep and imponderable question: What constitutes a “religion?”³

The Constitution does not define “religion,” but mainstream and traditional religions —Buddhism, Christianity, Judaism, Islam, and Hinduism to name but a few of the larger — have been quickly recognized and accepted as religious belief systems deserving of protection under the First Amendment, as well as later laws prohibiting discrimination based on religion.⁴ Yet hundreds of thousands of people do not fit into those easily defined categories of religious beliefs. For decades, the Supreme Court and legal commentators have sought an acceptable test or set of criterion to determine when a set of beliefs rises to the level of “religion.”⁵

This paper seeks to shed light on the inherent difficulties

³ James Donovan notes, “All told, ‘religion’ and ‘religious’ are words which appear in 574 sections of the United States Code and 1,490 of the Code of Federal Regulations. James M. Donovan, *God Is as God Does: Law, Anthropology, and the Definition of “Religion,”* 6 SETON HALL CONST. L.J. 23, 26 (1995).

⁴ See Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (codified principally at 42 U.S.C. §§ 2000bb to 2000bb-4 (Supp. 1993)) (later struck down by the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997); Civil Rights Act of 1964, Title VII (codified at 42 U.S.C.A. § 2000e-2; 29 C.F.R. §1605.1 (1964)).

⁵ See generally Rebecca Redwood French, *From Yoder to Yoda: Models of Traditional, Modern, and Postmodern Religion in U.S. Constitutional Law*, 41 ARIZ. L. REV. 49 (1999); George C. Freeman, *The Misguided Search for the Constitutional Definition of “Religion,”* 71 GEO. L.J. 1519 (1983); C. John Sommerville, *Defining Religion and the Present Supreme Court*, 6 U. FLA. J.L. & PUB. POL’Y 167 (1994); James M. Donovan, *God is as God Does: Law, Anthropology, and the Definition of “Religion,”* 6 SETON HALL CONST. L.J. 23 (1995); Ben Clements, Note, *Defining “Religion” in the First Amendment: A Functional Approach*, 74 CORNELL L. REV. 532 (1989); M. Elisabeth Bergeron, *“New Age” or New Testament?: Toward a More Faithful Interpretation of “Religion,”* 65 ST. JOHN’S L. REV. 365 (1991).

and conflicts in such a task, particularly in the context of Title VII and religious discrimination in the employment setting. Section II presents a detailed look at a particularly troubling case, *Peterson v. Wilmur Communications, Inc.*⁶ There, the plaintiff argued that his white supremacist views constituted his religion.⁷ When analyzed using the various “tests” for religion, his racist belief system disturbingly passed muster for one court. Section III presents a brief overview of Title VII and Equal Employment Opportunity Commission (EEOC) guidelines to create a context for the remaining discussion.⁸ This is followed by a look at some of the different legal tests and criterion which various courts have developed to determine if a set of beliefs rises to the level of “religion,” beginning with the essential Supreme Court rulings on the issue, followed by two pivotal circuit court cases. Section IV assesses how some of the objective tests are working in practice in Title VII. Finally, Section V offers thoughts on the contradictions and confusion found in the cases and criterion being used by the courts to define “religion.”

II. *PETERSON v. WILMUR COMMUNICATIONS, INC.*: DEMONSTRATING THE DILEMMA

In *Peterson v. Wilmur Communications, Inc.*, the plaintiff,

⁶ See discussion *infra* Part II.

⁷ *Peterson v. Wilmur Communications, Inc.*, 205 F. Supp. 2d 1014, 1015-16 (E.D. Wis. 2002).

⁸ See discussion *infra* Part III.

Christopher Peterson, moved for and was granted summary judgment in a Title VII religious discrimination suit against his employer.⁹ Peterson argued that he had been demoted because of his religious beliefs after the local paper interviewed him about those beliefs and the interview, including a photograph, was published.¹⁰ Peterson is a member of a group called the World Church of the Creator. He follows a system of beliefs called “Creativity,” the central tenet of which is white supremacy and the belief that “what is good for white people is the ultimate good and what is bad for white people is the ultimate sin.”¹¹ The Creativity doctrine is found in two written texts, one of which is titled *The White Man’s Bible*.¹² The plaintiff held these beliefs and became a reverend in the World Church of the Creator in June 1998.¹³

At the time the newspaper article ran, the defendant, Wilbur Communications, employed Peterson in a supervisory role.¹⁴ Three of the eight people who reported to him were not white.¹⁵ The article ran on a Sunday and the next day, plaintiff was suspended without pay.¹⁶ Two days later, he received a letter

⁹ *Peterson*, 205 F. Supp. 2d at 1026.

¹⁰ *Id.* at 1016.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Peterson*, 205 F. Supp. 2d at 1016.

¹⁵ *Id.*

¹⁶ *Id.*

demoting him to a non-supervisory position.¹⁷ The letter tied his demotion to the exposure of his membership in the World Church of the Creator.¹⁸ Defendant quoted the article as stating Peterson was “a member of the World Church of the Creator, a White supremacist political organization.”¹⁹ Further, the letter expressly stated that, “[o]ur employees cannot have confidence in the objectivity of your training, evaluation, or supervision when you must compare Whites to non-Whites.”²⁰ Prior to his demotion, plaintiff had only one disciplinary action for a data entry error.²¹

In its analysis of the Title VII issues, the court noted the established principle that the plaintiff must first show that his or her beliefs constitute a religion within the meaning of Title VII by showing the belief at issue is “sincerely held.”²² The plaintiff must then show that his or her religion “played a motivating role in the adverse employment action.”²³ The burden then shifts to the employer to demonstrate whether or not it had made a reasonable accommodation or whether such an accommodation would result in an undue hardship for the employer.²⁴ If the employer can show that an accommodation would cause undue hardship, the employer is exempt from liability for adverse

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Peterson*, 205 F. Supp. 2d at 1016.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 1018.

²³ *Id.* at 1019.

²⁴ *Peterson*, 205 F. Supp. 2d at 1019.

employment actions.²⁵ The critical point for the court, however, is that “the accommodation clause of the definition applies only to ‘religious observance[s] or practice[s],’ not religious belief.”²⁶ The court defined the differences between religious observances, practices, and beliefs, noting that a religious belief does not require an act.²⁷ Thus, the court held that “under Title VII, an employer can avoid liability for failing to reasonably accommodate religiously-motivated acts, but cannot avoid liability for taking an adverse employment action based on the employee’s pure beliefs, unaccompanied by acts.”²⁸

The Supreme Court has provided some guidance for determining the definition of religion. For example, citing *Thomas v. Indiana Employment Security Division*,²⁹ the *Peterson* court acknowledged that determining what constitutes a religion or religious belief “is more often than not a difficult and delicate task.”³⁰ Various tests and criteria have evolved over the years. The court noted that the test which has emerged for purposes of Title VII claims is to ignore the content of the given beliefs and instead ask whether the belief “functions as religion in the life of

²⁵ *Id.* at 1020.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ 450 U.S. 707, 716-18 (1981) (holding that plaintiff discontinued his employment because of his religious convictions and thus the employer violated plaintiff’s constitutional rights when it denied him unemployment benefits).

³⁰ *Peterson*, 205 F. Supp. 2d at 1018.

the individual before the court.”³¹ The belief must be “religious” in the plaintiff’s own “scheme of things.”³² The Supreme Court has held that a belief system need not have a concept of a Supreme Being or afterlife.³³ Moreover, the Supreme Court has held that purely “ethical or moral” beliefs can be religious if held with the strength and fervor of religious convictions.³⁴

Finally, the *Peterson* court noted in each case, *United States v. Seeger*,³⁵ *Hobbie v. Unemployment Appeals Commission*,³⁶ and *Thomas*,³⁷ the truth, plausibility, or validity of a given belief was irrelevant to the determination of it as a religious belief.³⁸ “So long as the belief is sincerely held and is religious in the plaintiff’s scheme of things, the belief is religious

³¹ *Id.*; see also *Redmond v. GAF Corp.*, 574 F.2d 897, 901 n.12 (7th Cir. 1978) (holding that plaintiff’s employers failed to accommodate plaintiff’s religious needs, the court found that that plaintiff’s significant and long-time involvement with Bible study constituted religious activity).

³² *Peterson*, 205 F. Supp. 2d at 1018 (citing *Redmond*, 574 F.2d at 901 n.12.).

³³ *Welsh v. United States*, 398 U.S. 333, 340 (1970).

³⁴ *Id.*

³⁵ 380 U.S. 163, 165 (1965). *Seeger* was one of a series of conscientious objector cases to come before the Supreme Court. The debate in *Seeger* revolved around whether it is necessary for a person to include a “Supreme Being” in a system of beliefs for it to constitute a religion under Section 6(j) of the Universal Military Training and Service Act. *Id.*

³⁶ 480 U.S. 136, 144 n.9 (1987). After 2-1/2 years of employment, the plaintiff became a member of the Seventh-Day Adventist Church. She informed her employer that she would no longer be able to work on the Sabbath (Friday evening and Saturday) for religious reasons. She was subsequently terminated and filed for unemployment benefits. The State of Florida denied those benefits for “misconduct connected with her work.” The Supreme Court reversed, holding that Florida had violated the Free Exercise Clause of the First Amendment. *Id.* at 138-39.

³⁷ 450 U.S. at 716-18 (holding that plaintiff had discontinued his employment because of his religious convictions and thus the employer violated plaintiff’s constitutional rights when it denied plaintiff unemployment benefits).

regardless of whether it is 'acceptable, logical, consistent, or comprehensible to others.' ”³⁹

In *Peterson*, the court found that Creativity functioned as a religion for the plaintiff. The court found that Peterson’s stated sincerity of belief was adequate and thus found the belief to be “sincerely held.”⁴⁰ Moreover, the court gave “great weight” to Peterson’s testimony and found that his beliefs were religious in his scheme of things.⁴¹ Because Peterson had been a church minister for more than three years and had taken a religious oath in the Church, the court found that Creativity played a central role in his life.⁴² Taking all these factors together, the court concluded that Creativity “function[ed]” as a religion for the plaintiff.⁴³

The court explicitly rejected the defendant employer’s argument that because the World Church of the Creator held white supremacist views it was a political organization and therefore not a religion.⁴⁴ Defendant cited *Slater v. King Soopers*,⁴⁵ *Bellamy v. Mason’s Stores, Inc.*,⁴⁶ and *Augustine v.*

³⁸ *Peterson*, 205 F. Supp. 2d at 1018-19.

³⁹ *Id.* at 1019 (citing *Thomas*, 450 U.S. at 714).

⁴⁰ *Id.* at 1021.

⁴¹ *Id.* at 1022.

⁴² *Id.*

⁴³ *Peterson*, 205 F. Supp. 2d at 1022.

⁴⁴ *Id.*

⁴⁵ 809 F. Supp. 809 (D. Colo. 1992). The plaintiff in *Slater* was an active Ku Klux Klan member. He organized and participated in an Adolph Hitler Rally. After his termination from the grocery store chain, he claimed he had been fired because of his religious beliefs. The court, however, held that the KKK is

B'nai B'rith,⁴⁷ as examples of courts holding that political organizations do not constitute religions. In contrast, the *Peterson* court opined that simply because a set of beliefs can be characterized as political does not necessarily mean they cannot also be religious.⁴⁸ Most importantly, it noted that simply because certain white supremacist organizations have been found not to be religious, it does not logically follow that *this* white supremacist organization does not serve as a religion for *this* plaintiff.⁴⁹ “[T]he test for what is a religion turns in part on subjective factors.”⁵⁰

The court distinguished the Ku Klux Klan (KKK) cases of *Slater* and *Bellamy*, and the *Augustine* case because in those cases substantial evidence existed that the entities involved were political, and not religious. Neither *Slater* nor *Bellamy* provided adequate discussion on the point of what constitutes religion for

“political and social in nature” and therefore not a religion entitled to protection under Title VII. *Id.* at 810.

⁴⁶ 368 F. Supp. 1025 (E.D. Va. 1973). Similar to *Slater*, the plaintiff in *Bellamy* was a member of the United Klans of America. He was terminated from his job and claimed it was for religious reasons. The court held that the “racist and anti-Semitic ideology of the organization” lent itself more to a political organization than one consistent with the meaning of “religion” for Title VII. *Id.* at 1027-28.

⁴⁷ 249 N.W.2d 547 (Wis. 1977). The plaintiff in *Augustine* was employed by a radio station in Milwaukee. He was terminated after an incident on a talk show he emceed when several callers phoned in with racial and anti-Semitic epithets. Plaintiff failed to either push a “panic” button to delete objectionable material or to run the standard disclaimer after the program ended. The Wisconsin Supreme Court held that he failed to state a cause of action for religious discrimination. *Id.* at 549-550.

⁴⁸ *Peterson*, 205 F. Supp. 2d at 1023.

⁴⁹ *Id.*

⁵⁰ *Id.* at 1022.

the *Peterson* court to feel comfortable applying those holdings to the case at hand.⁵¹ The court cited a 1978 Equal Employment Opportunity Commission (EEOC) case involving the KKK as one of clear applicability.⁵² In that case, the plaintiff considered itself to be a political and fraternal organization and not a religion.⁵³ Similarly, in *Augustine*, the party did not believe itself to be a religion, so the court there held that the organization was political and not religious.⁵⁴ The plaintiff in *Peterson*, on the other hand, without doubt considered Creativity to be his religion.⁵⁵

The *Peterson* court also rejected defendant's argument that Creativity could not be a religion because its beliefs were immoral and unethical.⁵⁶ The court stated that neither the defendant's beliefs, nor the judge's for that matter, were material to the inquiry.⁵⁷ Regarding whether Creativity espouses notions of morality and ethics and supplies a means for distinguishing right from wrong, the court found Creativity had "these characteristics," in teaching that "followers should live their lives according to what will best foster the advancement of white

⁵¹ *Id.*

⁵² *Id.* See EEOC Dec. No. 79-06 26 Fair Empl. Prac. Cas. (BNA) 1758 (Oct. 6, 1978).

⁵³ *Peterson*, 205 F. Supp. 2d at 1022-23.

⁵⁴ *Augustine*, 249 N.W.2d at 552.

⁵⁵ *Peterson*, 205 F. Supp. 2d at 1022.

⁵⁶ *Id.* at 1023.

⁵⁷ *Id.*

people and the denigration of all others.”⁵⁸ The court noted that this tenet, although “simplistic and repugnant to the notions of equality that undergird the very non-discrimination statute at issue,” is in fact a philosophy to distinguish right from wrong.⁵⁹

III. LAYING THE GROUNDWORK FOR DEFINING “RELIGION”: STATUTORY GUIDELINES AND COURT-DEFINED TESTS

A. Title VII of the Civil Rights Act and the EEOC Guidelines: Protection Against Workplace Religious Discrimination

At the core of religious discrimination suits in the workplace is Title VII of the Civil Rights Act of 1964 and the 1972 amendment.⁶⁰ Title VII makes it an unlawful employment practice for employers to discriminate against employees or prospective employees on the basis of that individual’s “race, color, religion, sex, or national origin.”⁶¹ The statute includes the prohibition of discrimination in the areas of hiring (or refusal to hire), firing, promotion, compensation, or other terms of employment.⁶² The original act did not define the term “religion” or indicate the boundaries of what was and was not protected.⁶³

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See 42 U.S.C. § 2000e-2(a) and 42 U.S.C. § 2000e(j) (2001).

⁶¹ 42 U.S.C. § 2000e-2.

⁶² *Id.*

⁶³ 42 U.S.C. § 2000e, amended by 42 U.S.C. § 2000e(j) (1972).

The 1972 amendment, however, added the following definition: “The term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”⁶⁴ The threshold question to answer thus becomes whether a plaintiff’s beliefs constitute a “religion” under the meaning of Title VII; a difficult task given the lack of definitive guidelines in the statute. Similar threshold questions exist in laws dealing with religion in other contexts as well, and they have proven to be equally problematic for those courts, as the following cases will illustrate.

The EEOC guidelines on religious discrimination include much more than traditional religious observances. Under the EEOC guidelines, religious practices include “moral or ethical beliefs as to what is right and wrong and which are sincerely held with the strength of traditional religious views.”⁶⁵ Moreover, on their face, the EEOC guidelines allow for unique expressions of religion by individuals, regardless of whether they belong to an organized sect:

The fact that no religious group espouses such beliefs or the fact that the religious group to which

⁶⁴ 42 U.S.C. § 2000e(j). This paper does not address the issues of reasonable accommodation, undue hardship, or the distinction between religious observance and practice.

⁶⁵ 29 C.F.R. § 1605.1 (2004).

the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.⁶⁶

This point becomes crucial in several cases where the individual employee either does not belong to a specific group, or he or she interprets the doctrine of their sect differently than other members.

B. The Range of Court-Defined Legal Tests and Criterion for Determining “Religion”

Because of the general nature of the language of Title VII and the subsequent EEOC guidelines, the courts continue to struggle with a way to define religion. In the following section, I will review the main Supreme Court decisions on the issue, starting with two constitutional draft cases, followed by two constitutional employment cases. Section 2 will outline two of the more influential circuit court cases setting forth tests for determining religion.

1. *The Supreme Court and Religion: Desperately Seeking Solutions*

The Supreme Court has analyzed the question of religion in several key cases.⁶⁷ As the *Peterson* court noted, numerous

⁶⁶ *Id.*

⁶⁷ See generally *United States v. Seeger*, 380 U.S. 163, 165 (1965); *Welsh v. United States*, 398 U.S. 333, 339 (1970); *Thomas v. Indiana Employment Sec.*

tests have emerged to help courts determine if a given set of beliefs qualify as “religion.”⁶⁸ Although the Supreme Court’s holdings provide guidance, no one definition is conclusive, leaving the lower courts grappling with the question.

a. *Seeger and Welsh: The Constitutional Draft Cases*

One of the early constitutional draft cases, and certainly one of the most influential, was *United States v. Seeger*, decided in 1965.⁶⁹ *Seeger* was a consolidation of three draft exemption cases and was the first in this line of cases.⁷⁰ It dealt with the conscientious objector exemption under § 6(j) of the Universal Military Training and Service Act.⁷¹ Section 6(j) exempts from combat those persons who “by reason of [their] religious training and belief [are] conscientiously opposed to participation in war in any form.”⁷² The issue addressed by the Court was whether the term “Supreme Being” as used in the Act means “ ‘the orthodox God or the broader concept of a power or being, or a faith, ‘to which all else is subordinate or upon which all else is ultimately

Div., 450 U.S. 707, 714 (1981); *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 144 (1987).

⁶⁸ *Peterson v. Wilmur Communications, Inc.*, 205 F. Supp. 2d 1014, 1018 (E.D. Wis. 2002).

⁶⁹ 380 U.S. at 163 (holding that the test of religious belief under § 6(j) of the Universal Military Training and Service Act is if there is a sincere and meaningful belief “occupying in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption.”).

⁷⁰ *Id.* at 165.

⁷¹ *Id.* at 164-65; see 50 U.S.C. app. § 456(j) (2001).

dependent.’ ”⁷³ Seeger, the first plaintiff, declared he was conscientiously opposed to war in any form.⁷⁴ He refused to answer whether he believed in a Supreme Being, arguing that his opinion on the existence of such a Being did “not necessarily mean lack of faith in anything whatsoever.”⁷⁵ His belief was found to be “sincere, honest, and made in good faith”⁷⁶ but his claim was nonetheless denied by the lower court because of his lack of a “belief in a relation to a Supreme Being” as required by the Act.⁷⁷ The Court of Appeals reversed, and the Supreme Court affirmed.⁷⁸

The second plaintiff in *Seeger* stated unambiguously that he believed in a “Supreme Being” who was “ultimately responsible for the existence of man.”⁷⁹ He testified that he had come to his belief after much meditation and thought, and the resulting personal “most important religious law” included the belief that nothing justified one man sacrificing another man’s life as a means to any end.⁸⁰ The Hearing Board denied him conscientious objector status, finding that his claim was based upon a “personal moral code and that he was not sincere in his

⁷² 50 U.S.C. app. § 456(j).

⁷³ *Seeger*, 380 U.S. at 174 (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY (2d ed.)).

⁷⁴ *Id.* at 166.

⁷⁵ *Id.*

⁷⁶ *Id.* at 166-67.

⁷⁷ *Id.* at 167.

⁷⁸ *Seeger*, 380 U.S. at 187.

⁷⁹ *Id.* at 167.

⁸⁰ *Id.* at 168.

claim.”⁸¹ The Court of Appeals reversed, finding that his opposition to war was indeed related to a Supreme Being.⁸² The Supreme Court affirmed the decision of the Court of Appeals.⁸³

The final plaintiff denied being a member of any religious sect or organization and simply attached to the Selective Service form a quotation expressing opposition to the war and his agreement with that viewpoint.⁸⁴ He openly argued that participating in the war would be a “violation of his moral code to take human life” and that “he considered this belief superior to his obligation to the state.”⁸⁵ He was denied conscientious objector status and the Court of Appeals affirmed.⁸⁶ The Supreme Court reversed.⁸⁷

In its analysis, the Court reviewed the history of the Draft Act and the exemption for conscientious objection, beginning with its initial passage in 1917.⁸⁸ In its initial version, the exemption allowed persons associated with “a well-recognized religious sect or organization [then] organized and existing and whose existing creed or principles [forbade] its members to participate in war in any form.”⁸⁹ The Act was found to be

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Seeger*, 380 U.S. at 187.

⁸⁴ *Id.* at 169.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 188.

⁸⁸ *Seeger*, 380 U.S. at 169-73.

⁸⁹ *Id.* at 171.

constitutional by the Court in *Arver v. United States* in 1918.⁹⁰ Then, in 1940, Congress amended the language of the Act to extend the exemption to persons who might not belong to an organized church but might still be religious. Congress accepted the testimony of witnesses who noted that it was individual belief, not membership in a church or sect, which determined a person's religious duties to God in his or her everyday life.⁹¹ Finally, in 1948, Congress amended the Act one more time to further define the phrase "religious training and belief."⁹² The new language declared that "religious training and belief" does not include "essentially political, sociological, or philosophical views or a merely personal moral code."⁹³ The *Seeger* Court noted that Congress defined "religious training and belief" as a "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation."⁹⁴

Ultimately, the Court narrowed the issue by asking: "Does the term 'Supreme Being' as used in § 6(j) mean 'the orthodox God or the broader concept of a power or being, or a faith, to which all else is subordinate or upon which all else is ultimately dependent?'"⁹⁵ After a lengthy review of numerous religions and sects found in the United States, the Court held that

⁹⁰ 245 U.S. 366 (1918).

⁹¹ *Seeger*, 380 U.S. at 171-72.

⁹² *Id.* at 172.

⁹³ 50 U.S.C. app. § 456(j).

⁹⁴ *Seeger*, 380 U.S. at 173.

⁹⁵ *Id.* at 174 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed.)).

Congress deliberately broadened the concept by using the term “Supreme Being” instead of “God” so that it would not find itself (or courts) in the position of “picking and choosing among religious beliefs.”⁹⁶ The test which sprung forth from the *Seeger* Court was that a person need have “[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption.”⁹⁷ The Court expressly noted that its interpretation and construction of the Act “embraces the ever-broadening understanding of the modern religious community.”⁹⁸

Five years later in *Welsh v. United States*, the Court dealt again with a conscientious objector case and § 6(j) of the Universal Military Training and Service Act.⁹⁹ Similar to the *Seeger* case, the government conceded that the plaintiff’s beliefs were “ ‘held with the strength of more traditional religious convictions,’ ”¹⁰⁰ yet found nonetheless there was “no religious basis for the registrant’s beliefs, opinions, and convictions.”¹⁰¹ A key difference, however, between the two cases was that the plaintiff in *Welsh* explicitly denied his views were “religious” by striking out the words “my religious training” on his exemption

⁹⁶ *Id.* at 175.

⁹⁷ *Id.* at 176.

⁹⁸ *Id.* at 180.

⁹⁹ 50 U.S.C. app. § 456(j); *Welsh v. United States*, 398 U.S. 333 (1970).

¹⁰⁰ 398 U.S. at 337 (quoting *Welsh v. United States*, 404 F.2d 1078, 1081 (9th Cir. 1968)).

¹⁰¹ *Id.* at 338.

application.¹⁰² Section 6(j) excludes from the exemption persons whose beliefs are based on a “merely personal code.”¹⁰³ The *Seeger* Court addressed that issue but only in the context of how it related to a person’s belief (or disbelief) in a Supreme Being.¹⁰⁴ It noted that “[t]he use by Congress of the words ‘merely personal’ seems to us to restrict the exception to a moral code which is *not only* personal but which is the *sole basis* for the registrant’s belief and is in no way related to a Supreme Being.”¹⁰⁵

The *Welsh* Court took the *Seeger* test for religion one step further, holding that:

If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual “a place parallel to that filled by . . . God” in traditionally religious persons.¹⁰⁶

For the *Welsh* court, the more expansive test of a “deeply and sincerely held belief” is sufficient to meet the test for “religion.”¹⁰⁷ Moreover, it is not up to the individual to decide what is and is not “religious” as used in § 6(j), in part because

¹⁰² *Id.* at 337.

¹⁰³ 50 U.S.C. app. § 456(j).

¹⁰⁴ 380 U.S. at 165.

¹⁰⁵ *Id.* at 186 (emphasis added).

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

not all draft registrant's would be aware of the broad legal scope of the word "religious" as used in § 6(j).¹⁰⁸ The more expansive *Welsh* test for religion left only two groups excluded from § 6(j); those whose beliefs were not deeply held and those whose objection to war had no basis at all in moral, ethical, or religious principles.¹⁰⁹

Justice Harlan, in a concurring opinion, pointed out the slippery slope established by the Court's ruling.¹¹⁰ Concerned with the majority's statutory interpretation, Justice Harlan argued that they "performed a lobotomy and completely transformed the statute by reading out of it any distinction between religiously acquired beliefs and those deriving from 'essentially political, sociological, or philosophical views, or a merely personal moral code.'" ¹¹¹ For Justice Harlan, it was essential to leave intact the religious aspect or the door was opened wide to any views opposing the war.¹¹² Any other interpretation allowed a religious exemption to the very persons Congress sought to deny it to through explicit language in § 6(j).¹¹³

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 342-43.

¹¹⁰ *Id.* at 345 (Harlan, J., concurring).

¹¹¹ *Welsh*, 398 U.S. at 351 (Harlan, J., concurring) (quoting 50 U.S.C. app. § 456(j)).

¹¹² *Id.* at 352.

¹¹³ *Id.*

b. *Thomas and Frazee: The Constitutional Employment Cases*

The Supreme Court addressed the issue of unemployment compensation benefits and religion in 1981 with *Thomas v. Indiana Employment Security Division*.¹¹⁴ Although the issue and holding of the case focused on the role of the Free Exercise Clause of the First Amendment, the Court made important statements about the role of the judiciary in deciding cases involving religion.¹¹⁵

The plaintiff in *Thomas* was a Jehovah's Witness who voluntarily terminated his employment with a foundry and machinery company when he was transferred to a division that produced turrets for military tanks.¹¹⁶ Plaintiff claimed his religious beliefs prevented him from participating on any level in the production of materials for the use in war, and there were no other in-plant openings that were not engaged directly in the production of weapons.¹¹⁷ The administrative hearing referee found that Thomas did in fact quit due to his religious convictions.¹¹⁸ However, his termination did not rise to the level of good cause required by the Indiana unemployment

¹¹⁴ 450 U.S. 707 (1981).

¹¹⁵ *Id.* at 714 (stating that "the resolution of [what is a religious belief or practice] is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

¹¹⁶ *Id.* at 709.

¹¹⁷ *Id.* at 710.

¹¹⁸ *Id.* at 711.

compensation statute and he was denied benefits.¹¹⁹ The Indiana Court of Appeals reversed, and the Supreme Court of Indiana vacated that court's decision.¹²⁰ The latter court held that Thomas had quit for "personal reasons" and therefore did not qualify for benefits.¹²¹ Elaborating on that point, the Indiana high court also stated that, " '[a] personal philosophical choice rather than a religious choice, does not rise to the level of a first amendment claim.' " ¹²²

Writing for the majority, Chief Justice Burger acknowledged that determining what is or is not "religious" is a "difficult and delicate task."¹²³ Importantly, "the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."¹²⁴

Applying that reasoning to the case at hand, the Court noted that "Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one."¹²⁵ The Court allowed that a claim must certainly exist that is "so bizarre, so clearly nonreligious in motivation" as to not be entitled to First

¹¹⁹ *Thomas*, 450 U.S. at 712.

¹²⁰ *Id.*

¹²¹ *Id.* at 713.

¹²² *Id.* (quoting *Thomas v. Indiana Employment Sec. Div.*, 391 N.E.2d 1127, 1131 (Ind. 1979)).

¹²³ *Id.* at 714.

¹²⁴ *Thomas*, 450 U.S. at 714.

¹²⁵ *Id.* at 715.

Amendment protection.¹²⁶ However, this was not such a case. The decision of the Indiana Supreme Court was reversed.¹²⁷

In *Frazee v. Illinois Department of Employment Security*, the Supreme Court held, in part, that only individuals who are affiliated with a specific organized religious denomination could claim First Amendment protections.¹²⁸ The plaintiff in *Frazee* refused a temporary retail position offered to him because the job would have required work on Sunday.¹²⁹ Mr. Frazee informed the temporary service that the job was unacceptable to him because he was a Christian and therefore could not work on the Lord's Day.¹³⁰ He then applied to the Illinois Department of Employment Security for unemployment benefits, and his application was denied.¹³¹ The Department's Board of Review also denied him on appeal, stating, "[w]hen a refusal of work is based on religious convictions, the refusal must be based upon some tenets or dogma accepted by the individual of some church, sect, or denomination, and such a refusal based solely on an individual's personal belief is personal and non-compelling."¹³² The District Court and Appellate Court of Illinois affirmed, and the Illinois Supreme Court denied Frazee leave to appeal.¹³³

¹²⁶ *Id.*

¹²⁷ *Id.* at 712.

¹²⁸ 489 U.S. 829, 834 (1989).

¹²⁹ *Id.* at 830.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Frazee*, 489 U.S. at 831.

The Supreme Court, in its analysis of the case, noted other cases it had considered involving unemployment benefits, including *Thomas*.¹³⁴ The Court rejected as irrelevant the defendant's argument that in the previous cases, the claimant was a member of a particular religious sect.¹³⁵ It noted that none of those decisions turned on that aspect of the facts.¹³⁶ Instead, those cases turned on the fact that the individual claimants had a sincere belief that prohibited him or her from doing the work in question.¹³⁷ Finally, the Court stated that although "purely secular views do not suffice" and that even though "membership in an organized religious denomination . . . would simplify the problem of identifying sincerely held religious beliefs,"¹³⁸ an individual need not "be responding to the commands of a particular religious organization" in order to claim the protection of the Free Exercise Clause.¹³⁹ The lower court's judgment was reversed and remanded.¹⁴⁰

¹³⁴ *Id.* at 831 (analyzing *Thomas*, 450 U.S. at 707, *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Hobbie*, 480 U.S. at 136 in making its decision).

¹³⁵ *Id.* at 832.

¹³⁶ *Id.* at 832-33.

¹³⁷ *Id.* at 833.

¹³⁸ *Frazee*, 489 U.S. at 833-34.

¹³⁹ *Id.* at 834.

¹⁴⁰ *Id.* at 835.

2. ***The Circuit Courts: Grappling With the Supreme Court's Directives to Create Objective Tests for "Religion"***

The lower courts are increasingly inundated with cases involving questions of "religion." Various circuits have stretched the Supreme Court holdings on religion to create "tests" and lists of criterion to help them decide if a given belief is a "religion" worthy of legal protection. In most instances, the sincerity of the belief is not in question. Rather, the issue is in knowing how to tell when a sincerely held belief is a religious belief as opposed to a personal creed.

a. ***Malnak v. Yogi: Judge Adams's concurring opinion gains widespread acceptance***

One of the most important cases of recent years is *Malnak v. Yogi*, primarily because of the concurring opinion.¹⁴¹ The issue in *Malnak* was whether the offering of an elective course called the Science of Creative Intelligence Transcendental Meditation (SCI/TM) at five high schools constituted an establishment of religion in violation of the First Amendment.¹⁴² The course was taught four or five days a week by teachers trained by the World Plan Executive Council of the United States, using the textbook developed by Maharishi Mahesh Yogi, founder of the Science of

¹⁴¹ 592 F.2d 197 (3d Cir. 1979).

¹⁴² *Id.* at 197-98.

Creative Intelligence.¹⁴³ Among other things, students were taught to meditate using a “mantra,” which they acquired in an off-school premises ceremony called a “puja.”¹⁴⁴

Plaintiff brought suit seeking to enjoin the teaching of the course.¹⁴⁵ Defendants asserted, among other things, that they themselves did not view their beliefs as religious in nature.¹⁴⁶ The district court found that the SCI/TM was a religious activity for purposes of the establishment clause.¹⁴⁷ After reviewing the textbook, the expert testimony received, and the uncontested facts regarding the puja, the Court of Appeals for the Third Circuit affirmed.¹⁴⁸

It is the concurring opinion of Judge Adams, however, that outlined three indicia of religion to help courts decide if a set of beliefs rises to the level of religion.¹⁴⁹ His indicia have since been adopted by five of the circuits and numerous district and state courts.¹⁵⁰ Adams began by noting that the last two decades saw the development of a “newer, more expansive reading of

¹⁴³ *Id.* at 198.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Malnak*, 592 F.2d at 199.

¹⁴⁷ *Id.* at 198.

¹⁴⁸ *Id.* at 199.

¹⁴⁹ *Id.* at 207-09 (Adams, J., concurring).

¹⁵⁰ *See Dettmer v. Landon*, 799 F.2d 929 (4th Cir. 1986) (adopting the three indicia of religion); *Alvarado v. City of San Jose*, 94 F.3d 1223 (9th Cir. 1996) (same); *United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996) (same); *DeHart v. Horn*, 227 F.3d 47 (3d Cir. 2000) (same); *Love v. Reed*, 216 F.3d 682 (8th Cir. 2000) (same).

‘religion’”¹⁵¹ which extends beyond a “relationship of man with his Creator.”¹⁵² Adams then sought to define three indicia of the more modern religions which, he pointed out, should not be viewed as a “test” for religion, but rather as objective guidelines to be applied on a case-by-case basis.¹⁵³ He described this as “definition by analogy” and the three indicia were but tools for use in making the analogy and justifying it.¹⁵⁴

The first indicia, and for Adams the most important, is the “nature of the ideas in question.”¹⁵⁵ This is not an examination of the truth or falsity of the beliefs, but rather “whether the subject matter it comprehends is consistent with the assertion that it is, or is not, a religion.”¹⁵⁶ Examples include the “deep[] and more imponderable questions” of the meaning of life, man’s role in the universe, moral issues of right and wrong, and other “ultimate concerns.”¹⁵⁷

The focus on “ultimate” concerns or questions cannot be limited, however, to a single or isolated topic or answer. In those cases, the beliefs would fail to meet the second indicia, which is the “element of comprehensiveness.”¹⁵⁸ By this, Adams suggested that a set of beliefs that rose to the level of “religion”

¹⁵¹ *Malnak*, 592 F.2d at 200 (Adams, J., concurring).

¹⁵² *Id.* at 207.

¹⁵³ *Id.* at 210.

¹⁵⁴ *Id.* at 207.

¹⁵⁵ *Id.* at 208.

¹⁵⁶ *Malnak*, 592 F.2d at 208 (Adams, J., concurring).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 209.

was not confined to an isolated question or moral teaching; rather they should have a broader scope and offer a “systematic series of answers.”¹⁵⁹

The third and final indicia, outlined by Judge Adams in his concurring opinion, was any “formal, external, or surface signs that may be analogized to accepted religions.”¹⁶⁰ This can include formal services, ceremonies, holidays, structure or organization, written texts, efforts at propagation, or other similarities to established and traditional religions.¹⁶¹ He notes, however, that a religion can exist without these external trappings, but the presence of such signs “can be helpful in supporting a conclusion of religious status.”¹⁶²

b. *United States v. Meyers*: Factors to consider versus the three indicia

In a criminal drug case, the Tenth Circuit developed an extensive set of factors to consider in determining whether a given set of beliefs was a religion in *United States v. Meyers*.¹⁶³ The defendant in *Meyers* was convicted of a conspiracy to possess

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Malnak*, 592 F.2d at 209 (Adams, J., concurring).

¹⁶² *Id.*

¹⁶³ 95 F.3d 1475 (10th Cir. 1996).

with intent to distribute marijuana.¹⁶⁴ The defendant, David

¹⁶⁴ *Id.* at 1479. Numerous individuals have attempted to use freedom of religion to shield themselves from criminal drug charges. The cases run the gamut from difficult questions of sacramental peyote use by Native Americans to easier, at least on the surface, and almost ludicrous cases where it appears a group of individuals are blatantly trying to manipulate the law. *See* *United States v. Kuch*, 288 F. Supp. 439 (D.D.C. 1968) (involving marijuana and LSD); *Leary v. United States*, 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1979) (involving marijuana); *United States v. Middleton*, 690 F.2d 820 (11th Cir. 1982) (same); *United States v. Rush*, 738 F.2d 497 (1st Cir. 1984) (same); *Meyers*, 95 F.3d at 1475 (same).

In most of these cases, a “religion” is created that in many respects mirrors key elements of mainstream established religions, making the application of any “test” difficult. One of the “religion’s” central tenets in these cases invariably involves the usages, and often the sale and distribution of, illegal drugs. *Kuch* is a prime example of the latter. The defendant in *Kuch* claimed she was an ordained minister of the Neo-American Church. *Kuch*, 288 F. Supp. at 442. She was indicted on several counts of the possession, sale, and delivery of marijuana and LSD. *Id.* In her defense, she argued that the criminal laws behind the indictments impinged on her constitutional right to the free exercise of her religion, the Neo-American Church. *Id.* The Neo-American Church carried with it numerous external trappings of other mainstream, established religions: it was incorporated as a non-profit in 1965 and three years later had a nationwide membership of about 20,000; it utilized a hierarchy of personnel analogous to priests and bishops up to the top ranking official (of which there were 300 in the country), referred to as the “Chief Boo Hoo”; the ingestion of psychedelic drugs as the “true Host” was considered a sacramental duty; and there existed a written “Catechism and Handbook” detailing the Church’s tenets and theology. *Id.* at 443. Members were required to subscribe to three key principles: “(1) Everyone has a right to expand his consciousness . . . by whatever means he considers desirable . . . without interference. . . ; (2) The psychedelic substances, such as LSD, are the true Host of the Church, not drugs . . . ; (3) We do not encourage the ingestion of psychedelics by those who are unprepared.” *Id.* Furthermore, the Catechism and Handbook stated that the Church has “the *right* to practice our religion, even if we are a bunch of filthy, drunken bums.” *Id.*

In its analysis of the case, the court makes a brief acknowledgement of the difficulty in defining “religion,” and noting that “[r]eligions now accepted were persecuted, unpopular and condemned at their inception.” *Id.* However, it moves quickly on to comment that this difficult task should not stop the inquiry when a party may be merely “adopting religious nomenclature and cynically using it as a shield.” *Id.* The court grants that some members of the Neo-American Church might well have mystical or religious experiences as a result of their use of psychedelic drugs, and that there are similarities there

Meyers, filed several motions, including a motion to dismiss based on religious freedoms under the First Amendment and the Religious Freedom Restoration Act (RFRA).¹⁶⁵ To that end, Meyers testified that he was the “founder and Reverend of the Church of Marijuana” and that it was his “sincere belief that his religion commands him to use, possess, grow and distribute marijuana for the good of mankind and the planet earth.”¹⁶⁶ The district court found that his beliefs did not qualify as a religion

to rituals used in some ancient and modern religions. Despite this and the existence of the external trappings noted above, the court states that what the defendant failed to provide as proof of the Neo-American Church as a bona fide religion was “any solid evidence of a belief in a supreme being, a religious discipline, a ritual, or tenets to guide one’s daily existence.” *Id.* at 444.

The crux of the court’s problem with the Neo-American Church as a religion is perhaps captured more accurately in the next paragraph of the opinion:

Reading the so-called “Catechism and Handbook” of the Church containing the pronouncements of the Chief Boo Hoo, one gains the inescapable impression that the membership is mocking established institutions, playing with words and totally irreverent in any sense of the term. Each member carries a “martyrdom record” to reflect his arrests. The Church symbol is a three-eyed toad. . . . The Church key is, of course the bottle opener. The official songs are “Puff, the Magic Dragon” and “Row, Row, Row Your Boat.” In short, the ‘Catechism and Handbook’ is full of goofy nonsense, contradictions, and irreverent expressions.

Id. The court continues to detail what it considers to be examples of “mocking” despite an earlier caution that courts must be “careful not to permit their own moral and ethical standards to determine the religious implications of beliefs and practices of others.” *Id.* at 443. Ultimately, the court found that the defendant failed to establish her alleged religious beliefs and therefore she failed on that aspect of her motion to dismiss. *Id.* at 445.

¹⁶⁵ *Meyers*, 95 F.3d at 1479.

¹⁶⁶ *Id.*

under the RFRA and therefore denied his RFRA defense.¹⁶⁷ To establish a *prima facie* free exercise claim under the RFRA the “governmental action must (1) substantially burden, (2) a religious belief rather than a philosophy or way of life, (3) which belief is sincerely held by the plaintiff.”¹⁶⁸ The government is only required to accommodate the exercise of “actual” religious convictions.¹⁶⁹

The district court found, and the Tenth Circuit affirmed, that there was no dispute that Meyers’ beliefs were sincerely held and were substantially burdened by the governmental action of enforcing drug laws.¹⁷⁰ What was in question, however, was whether these sincerely held beliefs were “religious beliefs” or simply a “philosophy or way of life.”¹⁷¹

The district court reviewed numerous cases which sought to answer the question of “what is religion.”¹⁷² From those cases,

¹⁶⁷ *United States v. Meyers*, 906 F. Supp. 1494, 1508 (D. Wyo. 1995).

¹⁶⁸ *Meyers*, 95 F.3d at 1482.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Meyers*, 906 F. Supp. at 1501; see *United States v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943) (holding that religion is unnecessary to define because “the content of the term is found in history of the human race and is incapable of compression into a few words”); *Fellowship of Humanity v. Alameda County*, 315 P.2d 394, 401 (1957) (providing definitions of religion from various dictionaries); *Kuch*, 288 F. Supp. at 446 (determining whether a religion is valid requires a case-by-case analysis); *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1160 (D.C. Cir. 1969) (holding that scientology is a religion because it is incorporated as a religion in the District of Columbia, it has licensed ministers, and “[i]ts fundamental writings contain a general account of man and his nature comparable in scope, if not in content, to those of some recognized religions”); *Remmers v. Brewer*, 361 F. Supp. 537, 540 (S.D. Iowa 1973) (holding that the definition of religion must be broad enough and given

it developed a list of five factors, and several additional sub-factors, which the Tenth Circuit subsequently approved and adopted.¹⁷³ Although lengthy, I set forth below in detail the Tenth Circuit's list of factors to consider:

1. *Ultimate Ideas*: Religious beliefs often address fundamental questions about life, purpose, and death. . . . “[U]ltimate questions having to do with deep and imponderable matters.” These matters may include . . . man’s sense of being . . . man’s purpose in life . . . and . . . man’s place in the universe.
2. *Metaphysical Beliefs*: Religious beliefs often are “metaphysical,” that is, they address a reality which transcends the physical and immediately apparent world. Adherents to many religions believe that there is another dimension, place, mode, or temporality.
3. *Moral or Ethical System*: Religious beliefs

wide latitude so that state approval or social acceptance does not become a prerequisite to practice of a religion recognized by the First Amendment); *Stevens v. Berger*, 428 F. Supp. 896, 899-905 (E.D.N.Y. 1977) (discussing religious beliefs and the exercise of those beliefs); *Malnak*, 592 F.2d at 199 (determining what is religion, courts “must look to the prior interpretations of the constitutional provisions for guidance as to the substantive characteristics of theories or practices which have been found to constitute “religion” under the first amendment”); *Africa v. Pennsylvania*, 662 F.2d 1025, 1030 (3d Cir. 1981) (holding that a particular belief will be considered a religion, and hence entitled to first amendment protection, if the “beliefs avowed are (1) sincerely held, and (2) religious in nature, in the claimant’s scheme of things”); *Church of the Chosen People v. United States*, 548 F. Supp. 1247, 1252-53 (D. Minn. 1982) (discussing different definitions of religion); *United States v. Sun Myung Moon*, 718 F.2d 1210, 1227 (2d Cir. 1983) (defining religion as “the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine”) (quoting WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* 31 (1910)); *Jacques v. Hilton*, 569 F. Supp. 730, 734 (D.N.J. 1983) (holding that self-determination of one’s own beliefs cannot constitute religion).

¹⁷³ *Meyers*, 906 F. Supp. at 1502-03, *aff’d*, *Meyers*, 95 F.3d at 1483-84.

often prescribe a particular manner of acting, or way of life, that is “moral” or “ethical.” . . . The beliefs then proscribe those acts that are “wrong,” “evil,” or “unjust.” A moral or ethical belief structure also may create duties —duties often imposed by some higher power, force, or spirit —that require the believer to abnegate elemental self-interest.

4. *Comprehensiveness of Belief*: Another hallmark of “religious” ideas is that they are comprehensive. More often than not, such beliefs provide a telos, an overreaching array of beliefs that coalesce to provide the believer with answers to many, if not most, of the problems and concerns that confront humans. In other words, religious beliefs generally are not confined to one question or a single teaching.

5. *Accoutrements of Religion*: By analogy to many of the established or recognized religions, the presence of the following external signs may indicate that a particular set of beliefs is “religious”:

a. *Founder, Prophet, or Teacher*: [Some religions are wholly founded or significantly influenced by a deity, teacher, etc., who is considered to be divine, enlightened, etc.]

b. *Important Writing*: [Some religions embrace a seminal, elemental, fundamental, or sacred writing, including creeds, tenets, commandments, chants, mantras, etc.]

c. *Gathering Places*: [Some religions designate particular structures or places as sacred, holy, or significant. Do these places serve as gathering places for believers? The places can include physical structures or natural places, such as springs, mountains, et cetera.]

d. *Keepers of Knowledge*: [Some religions have a keeper of knowledge, such as a minister,

priest, monk, shaman, or sage.]

e. *Ceremonies and Rituals*: [Some religions include some form of ceremony, ritual, sacrament, or protocol. These acts, statements, and movements are prescribed by the religion and imbued with transcendent significance.]

f. *Structure or Organization*: [Some religions have a congregation or group of believers who are led, supervised, or counseled by a hierarchy or teachers, clergy, sages, or priests.]

g. *Holidays*: [Some religions celebrate, observe, or mark “holy,” sacred, or important days, weeks, or months.]

h. *Diet or Fasting*: [Some religions prescribe or prohibit the eating of certain foods and the drinking of certain liquids on particular days or during particular times.]

i. *Appearance and Clothing*: [Some religions prescribe the manner in which believers should maintain their physical appearance.]

j. *Propagation*: [Some religions, thinking that they have something worthwhile or essential to offer non-believers, attempt to propagate their views and persuade others of their correctness.]¹⁷⁴

Both the district court and the Tenth Circuit emphasized that no one factor is dispositive.¹⁷⁵ Instead, the factors should be viewed as criteria that, “if minimally satisfied” would suggest a set of beliefs is a “religion.”¹⁷⁶ Moreover, the district court noted, that “[p]urely personal, political, ideological, or secular beliefs probably would not satisfy enough criteria for inclusion”

¹⁷⁴ *Meyers*, 95 F.3d at 1483-84.

¹⁷⁵ *Meyers*, 906 F. Supp. at 1503; *Meyers*, 95 F.3d at 1484.

¹⁷⁶ *Meyers*, 95 F.3d at 1484.

as a religion.¹⁷⁷ Ultimately, the Tenth Circuit agreed with the district court, holding that Meyers's beliefs were better described as a "philosophy and/or way of life" rather than a "religion."¹⁷⁸

Importantly, however, Justice Brorby's dissent in *Meyers* argued that it is not the court's place to create a factor-driven test to help define religion.¹⁷⁹ To do so places too much power and control over religion in the court's hands because "the ability to define religion is the power to deny freedom of religion."¹⁸⁰ For the dissent, the free exercise of religion guaranteed by the First Amendment must necessarily include the "rights of individuals to define their own religion."¹⁸¹ Any other interpretation would be ignoring the Supreme Court's holding in *Seeger* that a set of beliefs can be "incomprehensible" to the court and still be religious in the individual's "own scheme of things."¹⁸² The dissent sought to capture the "inherently elusive, spiritual and personal nature of religion"¹⁸³ and looked to the renowned philosopher and student of religion, William James, and his *The Varieties of Religious Experience* for assistance.¹⁸⁴ Central to James's definition is the ability of the individual to define for

¹⁷⁷ *Meyers*, 906 F. Supp. at 1504.

¹⁷⁸ *Meyers*, 95 F.3d at 1484.

¹⁷⁹ *Id.* at 1489 (Brorby, J., dissenting).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 1490.

¹⁸² *Id.* (citing *United States v. Seeger*, 380 U.S. 163, 184-85 (1965)).

¹⁸³ *Meyers*, 95 F.3d at 1491.

¹⁸⁴ *Id.* (citing WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* 31 (1910)). Mr. James is quoted at the beginning of this paper.

himself or herself what constitutes “divine.”¹⁸⁵ Justice Brorby concluded by noting this definition would not promote a “slippery slope” effect because the law has never been such that the government is unable to regulate criminal or harmful actions regardless of an individual’s religious beliefs.¹⁸⁶

IV. TITLE VII CASES: PUTTING THE CIRCUIT COURT TESTS TO WORK

A. Political Title VII Cases: Bigotry in Action

In addition to the *Peterson* case discussed above, a handful of cases have addressed whether white supremacist organizations like the Ku Klux Klan or the National Socialist White People’s Party constitute religion.¹⁸⁷ In *Slater v. King*

¹⁸⁵ *Id.* (citing *United States v. Moon*, 718 F.2d 1210, 1227 (2d Cir. 1983)).

¹⁸⁶ *Meyers*, 95 F.3d at 1492.

¹⁸⁷ *See Bellamy v. Mason’s Stores, Inc.*, 368 F. Supp. 1025, 1028 (E.D. Va. 1973) (holding that the KKK constitutes a political organization, not a religion); *Augustine v. B’nai B’rith*, 249 N.W.2d 547, 552 (Wis. 1977) (holding that the plaintiffs were not involved in a religious philosophy); *Slater v. King Soopers*, 809 F. Supp. 809, 810 (D. Colo. 1992) (holding that the KKK is not a religion for purposes of Title VII, rather it is political and social in nature); EEOC Dec. 79-06, 26 Fair Empl. Prac. Cas. (BNA) 1758 (Oct. 6, 1978) (same). Other cases involving questions of political beliefs versus religious beliefs include *Wallace v. Brewer*, 315 F. Supp. 431 (N.D. Ala. 1970) and *Theriault v. Carlson*, 495 F.2d 390 (5th Cir. 1974). *Wallace* involved a Black Muslim group. Plaintiffs, who had begun to purchase large quantities of land in St. Clair County, openly declared themselves as Black Muslims and members of the “Lost Found Nation of Islam.” 315 F. Supp. at 450. In response, the citizens of St. Clair County began to organize a series of activities, “both legal and extralegal,” to prevent the plaintiffs from pursuing their stated goal of creating large farms on the purchased land. *Id.* at 436. Defendants in the case argued that the Black Muslim organization was a political group, not a religion and its sole advocacy was “violence and black

racism” and its purpose in the county was “to establish . . . a separate nation of its own.” *Id.* at 449. The court found that the defendants had failed to provide adequate evidence to establish that the Black Muslims were in fact “a foreign or separate nation.” *Id.* at 450. The court then noted that other courts which had addressed cases involving Black Muslims and Jehovah’s Witnesses had found that despite being politically active, the Black Muslim organization was “sufficiently religious in nature” for its members to seek protection under the First Amendment. *See also* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding that Jehovah’s Witnesses are entitled to protection under the First Amendment); Marsh v. Alabama, 326 U.S. 501 (1946) (same); Long v. Parker, 390 F.2d 816 (3d Cir. 1968) (holding that Black Muslims are entitled to protection under the First Amendment); Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969) (same). Therefore, the District Court in this case found that the Black Muslim plaintiffs could seek protection of first amendment freedom of religion rights. *Wallace*, 313 F. Supp. at 450.

In *Theriault*, the Fifth Circuit addressed the issue of whether the “Church of the New Song,” founded by prison inmate Harry Theriault, was a bona fide religion entitled to First Amendment protections or, as the government argued, merely a anti-authoritarian political movement. Three lower court cases led to the appeal. The District Court in the *Theriault I* ordered prison officials to grant plaintiffs the right to freely exercise their religion. *Theriault*, 495 F.2d at 393. In *Theriault II*, the District Court dismissed plaintiff’s petition alleging that he had been subjected to segregated confinement for punitive reasons and in violation of the orders in *Theriault I*. *Id.* Finally, in *Theriault III*, the lower court found the prison directors to be in contempt of its orders in *Theriault I*. *Id.* at 394. Theriault acknowledged that he began the Church of the New Song as a “game” but later became more sincere “when he realized he was affecting other people’s feelings.” *Id.* at 392, 392 n.3. The Church of the New Song, with membership exclusively of prison inmates around the country, included a hierarchy of personnel, including Theriault as founder, organizer, bishop, prophet and spiritual leader, and another inmate, Jerry Dorrough, as “First Revelation Minister. *Id.* at 392. At trial on direct examination, the latter explained one of the Church’s basic tenets was “to destroy the Nicolaitians which we believe are the repressive rulers and the powercrats of the system. That means . . . the prison system, the people in the prison system, the people in the parole system, [and] the people in government in general.” *Id.* at 394.

The District Court refused to allow the Government to present evidence to establish that the Church of the New Song was merely a “disruptive, anti-authoritarian political movement” and not a bona fide religion. *Id.* Given the direct testimony of Theriault and Dorrough about starting the “religion” as a “game” and other testimony about the freedom-seeking nature of the group’s tenets in a prison context, the Fifth Circuit found the District Court in error by refusing to allow the government to provide

Soopers, the plaintiff asserted he was fired because of his political and religious beliefs.¹⁸⁸ Plaintiff was shown to be an active member of the KKK who had organized and participated in an Adolph Hitler Rally.¹⁸⁹ The defendant employer argued that Title VII did not protect membership and participation in such an organization.¹⁹⁰ Citing *Seeger*, *Bellamy*, and the underlying EEOC decision, the District Court found that the KKK is “political and social in nature” and therefore not a religion for purposes of Title VII.¹⁹¹ Therefore, the court held that plaintiff had failed to state a claim for religious discrimination under Title VII.¹⁹²

In *Bellamy*, the plaintiff was fired after five months of employment and told the reason for his discharge was his membership in the United Klans of America.¹⁹³ The district court noted that “the proclaimed racist and anti-semitic ideology of the organization . . . takes on . . . a narrow, temporal and political

additional evidence on this front. *Id.* The court noted that “First Amendment freedoms are not absolute” and that it is difficult for courts to establish precise standards by which to judge the presence of a religion. *Id.* It went on to further state that despite it being such a difficult task, there is no reason to not deny First Amendment protection to “so-called religions which tend to mock established institutions and are obviously shams and absurdities and whose members are patently devoid of religious sincerity.” *Id.* at 395. The case was remanded to allow the Government to present its evidence regarding the nature of the plaintiffs’ alleged religion.

¹⁸⁸ 809 F. Supp. at 810.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 809.

¹⁹¹ *Id.* at 810.

¹⁹² *Id.*

¹⁹³ *Bellamy*, 368 F. Supp. at 1026.

character inconsistent with the meaning of ‘religion’ as used in § 2000e.”¹⁹⁴ The court does not, however, elaborate on why this is so, nor does it make any attempt to analyze the definition of “religion” for Title VII purposes.¹⁹⁵ Because the plaintiff failed to make a timely motion to amend his complaint, the Fourth Circuit, on appeal, declined to address the plaintiff’s new argument that because Klan meetings are full of “religious pomp and ceremony” it was a not only a patriotic organization but also a religion.¹⁹⁶

B. Employment, Food, and Title VII: An Unsettled Mix

It is not uncommon for religions to include food restrictions or requirements as part of their teachings. Indeed, one of the sub-factors in the five-factor *Meyers* test was directly related to “Diet or Fasting” and the prescription or prohibition of certain food or drink on particular days or times.¹⁹⁷ A couple of cases highlight the difficulty in using an external trapping such as diet to define religion.

Friedman v. Southern California Permanente Medical Group involved a California plaintiff who sought to have veganism declared a religion to support a claim of religious creed.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Bellamy v. Mason’s Stores, Inc.*, 508 F.2d 504, 505 (4th Cir. 1974).

¹⁹⁷ *Meyers*, 95 F.3d at 1483.

discrimination and retaliation under the Fair Employment and Housing Act (FEHA).¹⁹⁸ The California Court of Appeals, Second District, declined to do so.¹⁹⁹

The facts of the case are straightforward. Plaintiff worked at the defendants' pharmaceutical warehouse as a temporary employee.²⁰⁰ He had no patient contact, nor was it anticipated that he ever would have such contact.²⁰¹ When the defendants offered him a permanent position, the plaintiff learned that a condition of becoming a permanent employee was to receive a mumps vaccine.²⁰² He refused, noting that the mumps vaccine is grown in chicken embryos. Plaintiff alleged that receiving a vaccination of this type would "violate [his] system of beliefs and would be considered immoral by [him]."²⁰³ Upon Plaintiff's refusal to receive the mumps vaccination, the defendants withdrew their offer of employment and the plaintiff subsequently brought suit.²⁰⁴

FEHA has a slightly different definition of "religious creed" than the one found in Title VII for "religion." The regulations define "religious creed" as including "any traditionally recognized religion as well as beliefs, observations, or practices which an individual sincerely holds and which

¹⁹⁸ 125 Cal. Rptr. 2d 663, 665 (Cal. Ct. App. 2002).

¹⁹⁹ *Id.* at 665.

²⁰⁰ *Id.* at 666.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Friedman*, 125 Cal. Rptr. 2d at 666.

occupy in his or her life a place of importance parallel to that of traditionally recognized religions.”²⁰⁵ This definition incorporates the holdings from *Seeger* and *Welsh*, discussed earlier. At trial, Plaintiff argued that his firm commitment to veganism, which includes the belief that it is immoral and unethical for humans to kill animals for food, clothing, or even product safety testing, occupied a place of importance in his life that could be considered parallel to that of beliefs in traditional religions.²⁰⁶

The opinion in *Friedman* included a lengthy and detailed analysis of other Supreme Court and federal cases that have grappled with the problem of defining religion.²⁰⁷ In particular, the court focused on the concurring opinion by Judge Adams in *Malnak*, which has been adopted by several circuits.²⁰⁸ As discussed in Section B.2.a., Judge Adams set forth three indicia to evaluate the existence of a “religion.” The *Friedman* court

²⁰⁴ *Id.*

²⁰⁵ CAL. CODE REGS. tit. 2, § 7293.1 (2004).

²⁰⁶ *Friedman*, 125 Cal. Rptr. 2d at 665.

²⁰⁷ *Id.* at 670-84. The court discussed *United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Peterson v. Wilmur Communications, Inc.*, 205 F. Supp. 2d 1014 (E.D. Wis. 2002); *Malnak v. Yogi*, 592 F.2d 197 (3rd Cir. 1979); *Africa v. Pennsylvania*, 662 F.2d 1025 (3rd Cir. 1981); *Wiggins v. Sargent*, 753 F.2d 663 (8th Cir. 1985); *Alvarado v. City of San Jose*, 94 F.3d 1223 (9th Cir. 1996); *United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996) and *Spies v. Voinovich*, 173 F.3d 398 (6th Cir. 1999).

²⁰⁸ *Id.* at 677 (citing as examples *DeHart v. Horn*, 227 F.3d 47, 52 n.3 (3d Cir. 2000) and quoting the concurring opinion in *Malnak* and using that language as a standard to determine the meaning of “religion”; *Love v. Reed*, 216 F.3d 682, 687 (8th Cir. 2000) adopting analysis based on Third Circuit ruling premised on Judge Adams’ concurring opinion in *Malnak*; *Grove v. Mead Sch. Dist.*, 753 F.2d 1528, 1534 (9th Cir. 1985) using *Malnak* to hold that a novel did not represent a comprehensive belief system supported by a formal group).

adopted that test with this opinion.²⁰⁹ It further noted that the best way to determine if an FEHA claimant's beliefs or practices rise to the level of "religion" or hold a "place of importance parallel to that of traditionally recognized religions," was to apply the objective analysis adopted by the Third, Ninth, Eighth, and Tenth Circuits in several cases.²¹⁰ Those guidelines are:

"First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs."²¹¹

In applying this analysis to the case at hand, the court first concluded that there was no allegation or evidence that the plaintiff's belief system addressed fundamental or ultimate questions.²¹² The court stated there was "no claim that veganism speaks to: the meaning of human existence; the purpose of life; theories of humankind's nature or its place in the universe; matters of human life and death; or the exercise of faith."²¹³ Rather, the court noted, the plaintiff's belief in veganism is but a "moral and ethical creed limited to the single subject of highly valuing *animal* life and ordering one's life based on that

²⁰⁹ *Id.* at 682.

²¹⁰ *Id.* at 685.

²¹¹ *Friedman*, 125 Cal. Rptr. 2d at 685 (quoting *Africa*, 662 F.2d at 1032).

²¹² *Id.*

²¹³ *Id.*

perspective.”²¹⁴ Therefore, on the first prong of the three-part test the court concluded that the plaintiff’s beliefs reflect a “moral and secular, rather than religious, philosophy.”²¹⁵

Regarding the second prong of comprehensiveness, the court acknowledged that the plaintiff’s belief system governed nearly every aspect of his life, yet nonetheless concluded that it was “not sufficiently comprehensive” because it does not derive from a supreme being or faith “upon which all else depends.”²¹⁶ Lastly, in a brief statement about the third and final prong, the court noted that “though not determinative,” veganism had no “formal or external signs of a religion,” such as leaders, ceremonies, organization, articles of faith, or holidays.²¹⁷ Therefore, the court held that the plaintiff’s veganism was not a religious creed for the purposes of the FEHA.²¹⁸

One of the more well-known and memorable cases to surface in recent decades is *Brown v. Pena*.²¹⁹ The plaintiff in *Brown* asserted that he had been fired from his job as a result of religious discrimination.²²⁰ The EEOC dismissed plaintiff’s charges after determining that he “failed to establish a religious belief generally accepted as a religion” for purposes of Title

²¹⁴ *Id.* (emphasis added).

²¹⁵ *Id.*

²¹⁶ *Friedman*, 125 Cal. Rptr. 2d at 685.

²¹⁷ *Id.* at 685-86.

²¹⁸ *Id.* at 686.

²¹⁹ 441 F. Supp. 1382 (S.D. Fla. 1977).

²²⁰ *Id.* at 1383.

VII.²²¹ Mr. Brown's affidavit filed with the court showed that the charges were based on the plaintiff's "personal religious creed that [eating] Kozy Kitten People/Cat Food . . . contribut[es] significantly to [his] state of well being . . . [and therefore] to [his] overall work performance by increasing his energy."²²² In determining the validity of plaintiff's motion to proceed *in forma pauperis*, the District Court noted the case could be dismissed either if the allegation of poverty was untrue or if the court was "satisfied that the action is frivolous or malicious."²²³

The court focused its brief attention on whether or not plaintiff's claim was "frivolous," stating it had adopted the rational argument test used by the Ninth Circuit.²²⁴ Under the test, a complaint or appeal " 'is frivolous only if the applicant can make no rational argument on the law or facts in support of his claim for relief.' "²²⁵

The District Court then cited the Supreme Court decisions of *Wisconsin v. Yoder*²²⁶ and *United States v. Seeger*²²⁷ to highlight the exclusion of "merely personal moral codes" from the current characterization of "religion." The *Brown* court further noted that the Fifth Circuit had developed a three-factor

²²¹ *Id.* at 1384.

²²² *Id.*

²²³ *Id.*

²²⁴ *Brown*, 441 F. Supp. at 1384.

²²⁵ *Id.* (quoting *Dillingham v. Wainwright*, 422 F. Supp. 259, 261 (S.D. Fla. 1976)).

²²⁶ 406 U.S. 205 (1972).

²²⁷ 380 U.S. 163 (1965).

test to help determine whether or not something qualifies as a religion:

the “religious” nature of a belief depends on (1) whether the belief is based on a theory of “man’s nature or his place in the Universe,” (2) which is not merely a personal preference but has an institutional quality about it, and (3) which is sincere.²²⁸

Based on that test and the Supreme Court exclusions of “merely personal moral codes” and “personal preferences,” the District Court breezed to a quick conclusion without further analysis that the plaintiff’s “personal religious creed” regarding eating Kozy Kitten People/Cat Food “can only be described as such a mere personal preference,” not a religion; and therefore denied the plaintiff protection under Title VII.²²⁹

V. DO WE HAVE A CONSENSUS? ANALYZING THE COURTS’ DECISIONS

At the end of the day, it is difficult to find any more clarity now in defining what makes a given set of beliefs special enough to allow it to rise to the level of “religion” for legal purposes than before the Court decided *Seeger*. On the one hand, we have the Supreme Court’s *Seeger-Welsh* test requiring only that a person have a sincere and meaningful belief which occupies

²²⁸ 441 F. Supp. at 1385 (quoting *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310, 324 (5th Cir. 1977)).

in the life of the individual a place parallel to that filled by “God” in “traditionally religious persons.”²³⁰ Furthermore, in *Thomas*, the Supreme Court emphasized that it was not the judiciary’s role to decide whether a given belief or set of beliefs is “acceptable, logical, consistent, or comprehensible to others.”²³¹

In the lower courts, however, the legal waters become murky. Some courts, when presented with cases involving questionable “religions,” opt to punt on the issue with little, if any discussion. In *Brown v. Pena*, discussed above, the court made a show of discussing why “personal moral codes” are not granted protection under Title VII, but then leapt to the conclusion that the plaintiff’s beliefs were a “mere personal preference” without any discussion of what made them so.²³² Similarly, in the *Bellamy* and *Slater* cases discussed above, the courts classify the plaintiffs’ beliefs as “political and social in nature”²³³ and having a “narrow, temporal, and political character inconsistent with the meaning of ‘religion.’”²³⁴ Neither court elaborates on what makes the difference. That lack of discussion comes back to haunt us later in *Peterson*, when that court declines to use those cases as precedent precisely because they failed to express their rationale for making the distinction. Thus results

²²⁹ *Id.*

²³⁰ *Welsh*, 398 U.S. at 340.

²³¹ 450 U.S. at 714.

²³² 441 F. Supp. at 1385.

²³³ *Slater*, 809 F. Supp. at 810.

²³⁴ *Bellamy*, 368 F. Supp. at 1026.

the disturbing irony of a white supremacist garnering protection under an anti-discrimination statute.²³⁵ It is interesting to question whether the plaintiff's argument in *Bellamy* about the "religious pomp and ceremony" of Klan meetings would have made a difference to the court if he had made them in a timely manner.²³⁶ Given the emphasis of some tests on the external trappings of religions, perhaps the outcome would have been different simply because the KKK holds ceremonies full of pomp and circumstance.

In other instances, the courts decide that the set of beliefs are just too bizarre to merit discussion. While lip service is paid to the *Thomas* holding that it is not up to the judiciary to decide whether a belief is logical or comprehensible to others, which is frequently what occurs. In one respect, the *Thomas* Court opened this door when it stated that a claim must certainly exist that is "so bizarre, so clearly nonreligious in motivation" as to not be considered a religion.²³⁷ Yet how can one determine when that claim exists without placing personal judgment on it on some level? In *Theriault*, the court decried "so-called religions which tend to mock established institutions and are obvious shams," but

²³⁵ *Peterson v. Wilmur Communications, Inc.*, 205 F. Supp. 2d 1014, 1022 (E.D. Wis. 2002).

²³⁶ The Fourth Circuit did not address that argument because the plaintiff had not made a timely motion to amend his complaint to include it. *See supra* note 196 and accompanying text.

²³⁷ *Thomas*, 450 U.S. at 715.

makes no attempt to tell us how to recognize such a sham.²³⁸ Do the beliefs of the plaintiffs in *Theriault* or in *Kuch* (the Neo-American Church) seem any more ludicrous than the white supremacist views held by the plaintiff in *Peterson*?

Finally, some courts have developed, and adhere to, multi-factored and detailed tests or criterion, which give the appearance of objectivity. A good example of this is Judge Adams's concurring opinion in *Malnak*,²³⁹ which sets forth three indicia of a religion and has been adopted by five of the circuits and multiple district and state courts. Another example is the Tenth Circuit's five-factor test set forth in *Meyers*.²⁴⁰

These tests, despite clear attempts to avoid it, unfortunately result in blueprints for established and traditional religions. In *Meyers*, for example, the court claims it is only analogizing to established religion in the fifth factor ("Accoutrements of Religion"), but, in fact, does not each of the other factors accomplish the same thing?²⁴¹ The court openly states that "[p]urely personal, political, ideological, or secular" beliefs would not suffice to establish a "religion," which suggests that *only* something which looks like an established, traditional

²³⁸ *Theriault*, 495 F.2d at 395.

²³⁹ *Malnak*, 592 F.2d at 207-10 (Adams, J., concurring).

²⁴⁰ *Meyers*, 95 F.3d at 1483-84.

²⁴¹ *Id.* The court laid out the five factors as being: 1) ultimate ideas; 2) metaphysical beliefs; 3) moral or ethical system; 4) comprehensiveness of belief; 5) accoutrements of religion. *Id.*

religion will suffice.²⁴²

The *Friedman* case, involving the plaintiff who had been devoted to a vegan lifestyle and philosophy for several years, presented some of the clearest problems with trying to apply any of the existing tests. As discussed earlier, that court used Judge Adams's three indicia to make its decision.²⁴³ When assessing the first indicia —do the individual's beliefs deal with ultimate and imponderable questions —the court found first that because the plaintiff's beliefs did not focus on questions involving *human* life and ordering his life around those questions, his beliefs did not address ultimate and imponderable questions.²⁴⁴ Yet the plaintiff's testimony emphasized how he structured every aspect of his life around the question of the value of animal life and death.²⁴⁵ Furthermore, the court found that veganism lacked proof of any "exercise of faith."²⁴⁶ Looking for the existence of faith to prove or disprove the existence of faith results in a fully circular argument lacking merit. Regarding the second indicia —Comprehensiveness —the court's reasoning is almost agonizing. It acknowledges that veganism affects the plaintiff in nearly every aspect of his life, but because the belief system does not derive from a "supreme being" it is "not sufficiently comprehensive" to

²⁴² *Id.* at 1484.

²⁴³ *Friedman*, 125 Cal. Rptr. 2d at 682.

²⁴⁴ *Id.* at 685.

²⁴⁵ *Id.* at 665.

²⁴⁶ *Id.* at 685.

qualify as a religion.²⁴⁷ The court neglects to explain, however, how the presence of a Supreme Being in the creation of a belief system renders it more or less comprehensive than another set of beliefs. Once again, it seems likely that the comparison is being made to traditional religions and their form of comprehensiveness. Finally, the court applies the third indicia — External Signs —but fails to heed the original statements in Judge Adams’s opinion that the lack of such signs is not determinative.²⁴⁸ Because veganism is a mere philosophy without any of the external trappings of a more traditional religion, the court reads this negatively.²⁴⁹

VI. CONCLUSION

Somehow, in the end, it becomes simpler for the courts to allow systems of beliefs like Creativity, which has all the external trappings and institutional qualities of a traditional religion but propagates hate and discrimination, to pass the “religion” test than for those “mere personal codes,” which might provide an individual with a moral compass with which to guide his or her life. The courts have far to go on this issue given the important public policy considerations at stake — freedom of religion versus the legitimate goals of employers. So far, tests to define “religion” have fallen short of the task, frequently yielding legal precedent

²⁴⁷ *Id.*

²⁴⁸ *Friedman*, 125 Cal. Rptr. 2d at 685-86.

²⁴⁹ *Id.* at 686.

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that is worse than no answer at all. Until an adequate definition can be found, it will be necessary for the Supreme Court to continue to review the question on a case-by-case basis.

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