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**Voting as a Genuinely Religious Act
in a World of Free Exercise
Maximalism**

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INTRODUCTION

The past several years have seen redoubled efforts by state legislatures to restrict voting rights,¹ successful efforts by religious freedom

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¹ See *State Voting Bills Tracker 2021*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/state-voting-bills-tracker-2021> (last updated May 28, 2021) [<https://perma.cc/L5PD-PYWV>].

advocates to expand the reach of constitutional and statutory protections for religious exercise,² and an increasingly polarized politics in which viewpoints have become rigid and fanatical and political expression has become a matter of deep personal and community identity.³ Each significant in its own respects, these currents collectively suggest an emerging reality in which voting can credibly be called — at least by some citizens — a form of religious exercise being substantially burdened by the state. Such claims may never take center stage, but it is increasingly difficult to deny their plausibility. This Essay takes a preliminary look at what voting-as-religious-exercise claims would look like, why they are plausible, and what they would mean for society.

I. FREE EXERCISE MAXIMALISM AND THE ERODED LINE BETWEEN POLITICS AND RELIGION

Although case law routinely parrots *Wisconsin v. Yoder*'s dichotomy between religious exercise and the exercise of “philosophical and personal” choices,⁴ political acts frequently complicate that dichotomy despite being in some sense “philosophical and personal.” In practice, the line between political and religious acts is far from clear. The federal Religious Freedom Restoration Act (“RFRA”) — on which many similar state-law provisions are modeled⁵ — provides no definition of religion

² See Ronald Brownstein, *The Supreme Court Is Colliding with a Less-Religious America*, THE ATLANTIC (Dec. 3, 2020, 12:45 PM EDT), <https://www.theatlantic.com/politics/archive/2020/12/how-supreme-court-champions-religious-liberty/617284/> [<https://perma.cc/HP5N-PWNW>]; Adam Liptak, *An Extraordinary Winning Streak for Religion at the Supreme Court*, N.Y. TIMES: SIDEBAR (Apr. 5, 2021), <https://www.nytimes.com/2021/04/05/us/politics/supreme-court-religion.html> [<https://perma.cc/G6J3-5YNT>].

³ See Lynn Vavreck, *A Measure of Identity: Are You Wedded to Your Party?*, N.Y. TIMES: THE UPSHOT (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/upshot/are-you-married-to-your-party.html> [<https://perma.cc/29UB-PZF4>]; Wendy Wang, *The Partisan Marriage Gap Is Bigger than Ever*, THE HILL (Oct. 27, 2020, 6:30 PM EDT), <https://thehill.com/opinion/white-house/522987-the-partisan-marriage-gap-is-bigger-than-ever> [<https://perma.cc/3RPK-B65M>].

⁴ *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972).

⁵ See, e.g., *Merced v. Kasson*, 577 F.3d 578, 587 (5th Cir. 2009) (finding that a Texas religious freedom statute “provides the same protections to religious free exercise envisioned by the framers of its federal counterpart, RFRA”); *Brush & Nib Studios, LC v. City of Phoenix*, 448 P.3d 890, 919 (Ariz. 2019) (“Because the text and requirements of FERA and RFRA are nearly identical, we rely on cases interpreting RFRA as persuasive authority in construing the requirements of FERA.”); *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1031 (Fla. 2004) (observing that Florida’s religious freedom statute “was modeled after the federal RFRA”); *In re Episcopal Church Prop. Litig.*, 76 Va. Cir. 873, 879 (2008) (looking to federal RFRA case law in interpreting “substantially similar” Virginia statute). See generally *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231,

and draws no dividing line between political and religious convictions. Moreover, several doctrinal developments have made it increasingly possible for litigants to use religious freedom claims to engage in what looks an awful lot like politics: i.e., to use their resources to shape public policies that bear little, if any, relationship to traditional religious worship and that often affect large numbers of third parties.

The first major development is the rise of so-called “complicity” religious freedom claims. “Complicity” claimants seek exemption from laws that, while not directly touching the claimants’ own personal religious practices, allegedly implicate the claimants’ religious exercise by requiring or strongly incenting them to participate in, condone, or otherwise feel complicit in conduct by *third parties* that the claimants find objectionable.⁶ As the famous leading example, of course, the craft store chain Hobby Lobby successfully argued that its pro-life corporate religiosity was offended by a requirement to provide birth control coverage in its employees’ health plans.⁷ Importantly, “the Court took Hobby Lobby at its word: the mere fact that Hobby Lobby *believed* that it would be complicit [in destroying embryos], no matter how idiosyncratic its belief, sufficed to qualify it for an exemption.”⁸

261-62 (3d Cir. 2008) (Scirica, C.J., concurring) (“Although there are differences among the various federal and state religious protection statutes, most contain, at their core, the same fundamental structure and purpose.”).

⁶ See Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2519, 2566 (2015) (“Complicity claims are faith claims about how to live in community with others who do not share the claimant’s beliefs, and whose lawful conduct the person of faith believes to be sinful. . . . [T]hese claims are explicitly oriented toward third parties. . . . Complicity-based conscience claims assert a relationship to third parties whose conduct the claimants view as sinful.”); Lauren Sudeall Lucas, *The Free Exercise of Religious Identity*, 64 UCLA L. REV. 54, 61 (2017) (“The only harm they suffer directly is to the aspect of their religious identity that offers a specific conception of how the world should be. And . . . they are attempting to avoid complicity not just by exempting themselves from such activity, but also by displacing the law as it relates to others. By asserting their religious freedom, they are attempting to impose their own worldview or framework of religious identity on others or the government, and thus to project identity into the sphere of law.”).

⁷ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 689-91 (2014); see also NeJaime & Siegel, *supra* note 6, at 2518.

⁸ Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby’s Wake*, 82 U. CHI. L. REV. 1897, 1899-1900 (2015) (“Hobby Lobby, a closely held for-profit corporation, claimed that it would be participating in a wrong merely by subsidizing insurance through which its employees *might* access contraception that *might* destroy embryos. The understanding of complicity underpinning this claim is vastly more expansive than that which standard legal doctrine or moral theory contemplates.”).

Second, some courts have gone a step further and explicitly held what is implicit in *Hobby Lobby*'s outcome⁹: individuals or entities may have *mixed* motives — both religious conviction and a political desire for policy change — for the same conduct and still gain protection of that conduct as a form of religious exercise.¹⁰ That step is hardly surprising, given that many of the deepest “culture wars” in American politics have a religious dimension.¹¹

⁹ See Nejaime & Siegal, *supra* note 6, at 2542-44, 2553, 2556 (“Asserting a complicity-based conscience claim can serve larger law reform goals in ‘culture war’ conflicts. Many who join in cross-denominational coalition to assert complicity-based conscience claims endorse laws concerning abortion or same-sex marriage that would preserve traditional morality for the society as a whole. Some invoke complicity-based conscience claims when they cannot entrench traditional morality through laws of general application. As the conditions of conflict change and arguments rooted in traditional morality lose their ability to persuade, movement leaders have advocated shifting to religious liberty arguments for exemption as part of a long-term effort to shape community-wide norms. . . . Without change in numbers or belief, religious actors can shift from *speaking as a majority* seeking to enforce traditional morality to *speaking as a minority* seeking exemptions from laws that offend traditional morality. . . . [C]onscience provisions allow advocates to rework a traditional norm that was once enforced through the criminal law into a norm that is now enforced through a web of exemptions in the civil law. With the law’s authority, traditional and religious norms can be enforced against third parties outside the religious community.”); see also Kathleen A. Brady, *Religious Accommodations and Third-Party Harms: Constitutional Values and Limits*, 106 Ky. L.J. 717, 720 (2017) (“As the tide of the culture wars has turned against those with traditional views regarding marriage, family, and sexuality, religious believers have increasingly sought exemptions from laws reflecting new norms.”).

¹⁰ See, e.g., *United States v. Hoffman*, 436 F. Supp. 3d 1272, 1284 (D. Ariz. 2020) (“It is well established that sincere religious beliefs are no less deserving of protection merely because they may overlap with political or other secular beliefs.”); *Conner v. Tilton*, No. C 07-4965 MMC (PR), 2009 WL 4642392, at *11 (N.D. Cal. Dec. 2, 2009) (“A system of beliefs need not be based solely on religious concerns in order to merit First Amendment protection, however. Rather, beliefs entitled to protection under the Free Exercise Clause may be both secular and religious. In particular, as relevant here, even systems of belief that propound ideals of racial segregation and/or supremacy may be entitled to First Amendment protection when they are intertwined with, or stem from, religious beliefs.” (citations omitted)), *aff’d*, 430 F. App’x 617 (9th Cir. 2011); *Peterson v. Wilmur Commc’ns, Inc.*, 205 F. Supp. 2d 1014, 1023 (E.D. Wis. 2002) (“[T]he fact that plaintiff’s beliefs can be characterized as political does not mean they are not also religious.”).

¹¹ See Angela C. Carmella, *Catholic Institutions in Court: The Religion Clauses and Political-Legal Compromise*, 120 W. VA. L. REV. 1, 4 (2017) (“[T]he Church has been heavily involved in political advocacy and litigation, for itself on issues of religious freedom, as well as on a whole host of topics relevant to its moral and social teachings, such as immigration and refugees, marriage and family, poverty and the economy, abortion and contraception, and the death penalty and torture, to name a few.”); see also, e.g., Pamela Manson, *Whites-Only Group Gets Permit to Use Church in Tiny*

And third, litigants have had and continue to have immense latitude in defining their own “religion,” leaving ample room for them to frame seemingly political stances as somehow religiously motivated. Notably, parties claiming that the law burdens their religion: (1) can define “religion” subjectively and idiosyncratically — anything religious in their “own scheme of things”;¹² (2) need not espouse a belief in a deity;¹³ (3) need not belong to a faith community;¹⁴ (4) need not adhere fully or consistently to a set of religious principles (i.e., can be “heretics”);¹⁵

Minnesota Town, UNITED PRESS INT’L (Dec. 24, 2020, 6:01 AM), https://www.upi.com/Top_News/US/2020/12/24/Whites-only-group-gets-permit-to-use-church-in-tiny-Minnesota-town/1081608751094/ [<https://perma.cc/P8AT-HKVY>] (reporting on a city council that, because of religious freedom concerns, felt it must approve a permit for use of an abandoned church by the Asatru Folk Assembly, which the Southern Poverty Law Center characterizes as a hate group that “distorts pre-Christian Norse traditions and spirituality with ideas about White racial superiority and ethnocentrism”).

¹² See, e.g., *Maye v. Klee*, 915 F.3d 1076, 1083 (6th Cir. 2019); *Davis v. Fort Bend Cnty.*, 765 F.3d 480, 485 (5th Cir. 2014); *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 448 (7th Cir. 2013); *Moore-King v. Cnty. of Chesterfield*, 708 F.3d 560, 571 (4th Cir. 2013); *Hanna v. Sec’y of the Army*, 513 F.3d 4, 15 (1st Cir. 2008); *Watts v. Fla. Int’l Univ.*, 495 F.3d 1289, 1297 (11th Cir. 2007); *Ford v. McGinnis*, 352 F.3d 582, 588 (2d Cir. 2003).

¹³ See, e.g., *Kaufman v. Pugh*, 733 F.3d 692, 696 (7th Cir. 2013) (“[R]eligious beliefs . . . need not involve worship of a supreme being.”); *Coward v. Robinson*, 276 F. Supp. 3d 544, 567 (E.D. Va. 2017) (“That NGE adherents do not believe in a deity does not disqualify the group from RLUIPA [or RFRA] protection . . .”).

¹⁴ See, e.g., *Haight v. Thompson*, 763 F.3d 554, 566 (6th Cir. 2014) (“RLUIPA[,like RFRA,] protects a broad spectrum of sincerely held religious beliefs, including practices that non-adherents might consider unorthodox, unreasonable or not ‘central to’ a recognized belief system.”); *Hoffman*, 436 F. Supp. 3d at 1283 (“Importantly, the fact that Defendants do not profess belief in any particular established religion does not bar their RFRA claim.”).

¹⁵ See, e.g., *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981) (“[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”); *Ctr. for Inquiry, Inc. v. Marion Cir. Ct. Clerk*, 758 F.3d 869, 873 (7th Cir. 2014) (“Atheists don’t call their own stance a religion but are nonetheless entitled to the benefit of the First Amendment’s neutrality principle”); *Grayson v. Schuler*, 666 F.3d 450, 453 (7th Cir. 2012) (“Heretics have religious rights.”); *A.A. v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 261 (5th Cir. 2010) (“[W]e must refuse to dissect religious tenets just ‘because the believer admits that he is ‘struggling’ with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.” (quoting *Thomas*, 450 U.S. at 715)); *Morrison v. Garraghty*, 239 F.3d 648, 659 (4th Cir. 2001) (“Nor must religious observances be uniform to merit First Amendment protection. Differing beliefs and practices are not uncommon among followers of a particular creed.” (citations omitted)).

(5) need not use the label “religion” to describe their belief system;¹⁶ and (6) need not argue that their beliefs *command* the exercise they allege is burdened.¹⁷ The only requirement is that the belief be “sincere,” which essentially means not being a demonstrable fraud on the court.¹⁸ Thus, while adherents to the “church of marijuana” continue to struggle in court on suspicion that their religious claims are

¹⁶ See, e.g., *United States v. Ward*, 989 F.2d 1015, 1018-19 (9th Cir. 1992) (“Ward does not describe his beliefs in terms ordinarily used in discussions of theology or cosmology . . . , but he clearly attempts to express a moral or ethical sense of right and wrong. . . . We conclude that Ward professes beliefs that are protected by the First Amendment.”); *Coward*, 276 F. Supp. 3d at 567 (“NGE adherents’ opposition to the label ‘religion’ is not dispositive because neither the Free Exercise Clause nor RLUIPA ‘turn on mere semantic distinctions.’” (quoting *Marria v. Broaddus*, No. 97 CIV.8297 NRB, 2003 WL 21782633, at *11 (S.D.N.Y. July 31, 2003))); *Marria*, 2003 WL 21782633, at *11 (“While it is somewhat understandable that a group that refuses to describe itself as a ‘religion’ did not inspire immediate outreach from DOCS officials, the law of the Free Exercise Clause does not turn on mere semantic distinctions.”).

¹⁷ See, e.g., 42 U.S.C. § 2000cc-5 (2018) (“The term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”); *Levitan v. Ashcroft*, 281 F.3d 1313, 1319 (D.C. Cir. 2002) (“A requirement that a religious practice be mandatory to warrant First Amendment protection finds no support in the cases of the Supreme Court or of this court.”); *March for Life v. Burwell*, 128 F. Supp. 3d 116, 129 (D.D.C. 2015) (“It is not, of course, this Court’s role to determine what religious observance [plaintiffs’] faith commands . . .”).

¹⁸ See, e.g., *Davila v. Gladden*, 777 F.3d 1198, 1204 (11th Cir. 2015) (“A secular, civil court is a poor forum to litigate the sincerity of a person’s religious beliefs, particularly given that faith is, by definition, impossible to justify through reason.”); *Yellowbear v. Lampert*, 741 F.3d 48, 54 (10th Cir. 2014) (“When inquiring into a claimant’s *sincerity*, then, our task is instead a more modest one, limited to asking whether the claimant is (in essence) seeking to perpetrate a fraud on the court”); *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984) (“Sincerity analysis is exceedingly amorphous, requiring the factfinder to delve into the claimant’s most veiled motivations and vigilantly separate the issue of sincerity from the factfinder’s perception of the religious nature of the claimant’s beliefs. This need to dis sever is most acute where unorthodox beliefs are implicated.”); *Patterson v. Def. POW/MIA Acct. Agency*, 398 F. Supp. 3d 102, 121 (W.D. Tex. 2019) (“The sincerity of a religious belief is not often challenged, so it is generally presumed or easily established.”); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 239 F. Supp. 3d 77, 90 (D.D.C. 2017) (“Courts generally handle ‘the sincerity inquiry . . . with a light touch, or ‘judicial shyness.’” (quoting *Moussazadeh v. Tex. Dep’t of Crim. Just.*, 703 F.3d 781, 792 (5th Cir. 2012))); see also Frederick Mark Gedicks, “*Substantial* Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA,” 85 GEO. WASH. L. REV. 94, 98 (2017) [hereinafter Gedick, *Substantial Burdens*] (“Unsurprisingly, the government rarely contests sincerity and courts rarely adjudicate it.”); Aaron R. Petty, *Accommodating “Religion,”* 83 TENN. L. REV. 529, 553 (2016) (“[T]he most challenging issue is whether sincerity of beliefs can be evaluated without also evaluating the content of the underlying beliefs themselves.”).

fraudulent,¹⁹ courts have accepted a wide range of beliefs and conduct as “religious.”²⁰

Against that legal backdrop, one need not concede that “secular” convictions deserve legal parity with traditionally religious convictions — however persuasive that argument might be to some²¹ — to agree that many seemingly secular or political viewpoints have legally cognizable religious dimensions entitled to special treatment. Indeed, conservative activism cases like *Hobby Lobby* depend on exactly that premise. Moreover, progressive activists have increasingly followed suit. Plausible RFRA arguments have been advanced in support of

¹⁹ See *Armstrong v. Jewell*, 151 F. Supp. 3d 242, 250 (D.R.I. 2015); *United States v. Quaintance*, 471 F. Supp. 2d 1153, 1174 (D.N.M. 2006), *aff'd*, 608 F.3d 717 (10th Cir. 2010); Donald L. Beschle, *Does a Broad Free Exercise Right Require a Narrow Definition of “Religion”?*, 39 HASTINGS CONST. L.Q. 357, 375-76 (2012).

²⁰ See, e.g., *Ctr. for Inquiry*, 758 F.3d at 874 (extending First Amendment protection (which mirrors RFRA in this regard) to secular humanism); *Kaufman v. Pugh*, 733 F.3d 692, 697 (7th Cir. 2013) (treating atheism as a religion); *Ward*, 989 F.2d at 1017 (treating as religious a defendant’s “idiosyncratic” belief that “honesty is superior to truth”); *United States v. Hoffman*, 436 F. Supp. 3d 1272, 1277 (D. Ariz. 2020) (treating as religious the defendants’ conduct of driving into a restricted wildlife refuge to leave food and water for persons in need); *Equal Opportunity Emp. Comm’n v. United Health Programs of Am., Inc.*, 213 F. Supp. 3d 377, 398 (E.D.N.Y. 2016) (treating as religious the claimants’ rejection of their employers’ conflict resolution program called “Onionhead”); *Hickey v. State Univ. of N.Y. at Stony Brook Hosp.*, No. 10-CV-1282 JS AKT, 2012 WL 3064170, at *6 (E.D.N.Y. July 27, 2012) (“[T]here is evidence in the record to support the conclusion that Plaintiff believed that the ‘I - Jesus’ lanyard was a necessary expression of his religion.”); *In re Moses v. Bayport Bluepoint Union Free Sch. Dist.*, No. 05 CV 3808 DRH ARL, 2007 WL 526610, at *5-6 (E.D.N.Y. Feb. 13, 2007) (treating as religious the plaintiffs’ objections to vaccinating their children); *Peterson v. Wilmur Commc’ns, Inc.*, 205 F. Supp. 2d 1014, 1021-22 (E.D. Wis. 2002) (treating as religious a plaintiffs’ white-supremacist belief system called “Creativity”).

²¹ See, e.g., Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555, 571 (1998); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 319 (1991); Micah Schwartzman, *Religion as a Legal Proxy*, 51 SAN DIEGO L. REV. 1085, 1086 (2014) (“Given the diversity of religious and philosophical perspectives that have developed within our society, the inequality between religious and nonreligious views implied by the constitutional text is morally indefensible.”); Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1355 (2012); Rodney K. Smith, *Converting the Religious Equality Amendment into a Statute with a Little “Conscience”*, 1996 B.Y.U. L. REV. 645, 649; Nelson Tebbe, *Reply: Conscience and Equality*, 31 J. C.R. & ECON. DEV. 1, 18 (2018); Jonathan P. Kuhn, Note, *The Religious Difference: Equal Protection and the Accommodation of (Non)-Religion*, 94 WASH. U. L. REV. 191, 192-95 (2016); Courtney Miller, Note, *“Spiritual but Not Religious”: Rethinking the Legal Definition of Religion*, 102 VA. L. REV. 833, 839 (2016); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1075 (1978) (“[F]idelity to the purposes of the free exercise clause demands that any concern deemed ultimate be protected, regardless of how ‘secular’ that concern might seem to be.”).

causes such as protecting sanctuary churches,²² preventing border wall construction,²³ permitting individuals to provide aid to undocumented immigrants,²⁴ providing services to the homeless in violation of zoning rules,²⁵ preventing oil and gas pipeline development,²⁶ installing solar panels in violation of local regulations,²⁷ performing same-sex marriages,²⁸ and allowing gay men to donate blood.²⁹

Although politically tinged religious freedom claims of that sort are not always successful in court, especially when the claimed religious exercise is an affirmative act that the state is allegedly burdening (as opposed to religious exercise in the form of refraining from an act, such as military service, that the state is compelling), many claims have succeeded.³⁰ And once one accepts the premise that individuals may sincerely feel persuaded by their religious beliefs to perform certain acts³¹ — and that courts should usually not second-guess such feelings — there is no valid basis under RFRA to treat affirmative religious exercise as categorically different from negative religious exercise.³² For

²² See Angela C. Carmella, *Progressive Religion and Free Exercise Exemptions*, 68 U. KAN. L. REV. 535, 577-78 (2020); Thomas Scott-Railton, Note, *A Legal Sanctuary: How the Religious Freedom Restoration Act Could Protect Sanctuary Churches*, 128 YALE L.J. 408 (2018).

²³ See Carmella, *supra* note 22, at 594-97.

²⁴ See *id.* at 600-02.

²⁵ See *id.* at 578-80; see also *City Walk-Urban Mission Inc. v. Wakulla Cnty. Fla.*, 471 F. Supp. 3d 1268, 1282-83 (N.D. Fla. 2020).

²⁶ *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 3d 77, 90 (D.D.C. 2017); Carmella, *supra* note 22, at 605-08; Diana Stanley, Note, *Prayers and Pipelines: RFRA's Possible Role in Environmental Litigation*, 30 B.U. PUB. INT. L.J. 89 (2021).

²⁷ See Carmella, *supra* note 22, at 603-05.

²⁸ See *id.* at 576-77.

²⁹ See Brian Soucek, *The Case of the Religious Gay Blood Donor*, 60 WM. & MARY L. REV. 1893 (2019).

³⁰ See Carmella, *supra* note 22, at 573-78, 609-15.

³¹ Indeed, RFRA does not even require that an act be compelled by one's religion; one need only show that the inability to perform the act would constitute a substantial burden on one's religious exercise. See 42 U.S.C. § 2000bb-2(4) (2018) (citing 42 U.S.C. § 2000cc-5(7)(A) (“‘[R]eligious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”)).

³² Carmella, *supra* note 22, at 601 (“[R]efusal claims are determined by what the law requires, while affirmative claims are determined by what the religion teaches. Though affirmative claims and refusal claims arise from different faith-law interactions, the conflict between faith and law for affirmative claims is no less direct than for refusal claims.”).

their part, conservative activists have advanced,³³ and achieved success with, affirmative religious exercise claims — gaining, for example, rights to conduct large religious services in violation of public health regulations³⁴ and rights to discriminate.³⁵

II. THE INCREASINGLY INESCAPABLE CONNECTION TO VOTING

In all likelihood, judges confronted with claims that voting is religious exercise would, in many cases, retreat to the refrain that religious exercise simply cannot be a function of personal “philosophy.” But the expanding scope of free exercise protections, combined with the increasingly central role that politics plays in citizens’ identities and communities, has made and will continue to make it harder for judges to ignore the connection and dismiss such claims out of hand.

Finding good company among the political-religious blending discussed above, voting can be characterized as a form of religious exercise more convincingly than one might expect. Efforts to define “religion” are notoriously difficult,³⁶ and, again, the legal definition

³³ See, e.g., Complaint at ¶¶ 277, 287, *Updegrove v. Herring*, No. 1:20-cv-01141 TSE JFA, (E.D. Va. Sept. 28, 2020), ECF No. 1 (“The First Amendment’s Free Exercise Clause protects Plaintiffs’ right to operate their business, to create expression, to not create expression, to participate in religious exercises, to not participate in religious exercises, to speak, to not speak, to associate, and to not associate in accordance with their religious beliefs. . . . Plaintiffs have not and will not engage in certain religiously motivated conduct because of the [defendants].”).

³⁴ *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901 (W.D. Ky. 2020).

³⁵ See, e.g., *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) (holding that teachers at a Catholic School qualified for the ministerial exception and, thus, their employment discrimination claims were not subject to judicial review); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018) (holding that a state civil rights commission violated the Free Exercise Clause because the commission ruled that a baker who refused to bake a wedding cake for a same-sex couple on account of his religious beliefs violated state antidiscrimination law). Whether antidiscrimination law requires an affirmative act, or instead merely prohibits one, is largely a function of framing that is of dubious legal significance: is the state forcing you to hire/serve LGBTQ folks or simply prohibiting you from drawing distinctions in whom you hire/serve?

³⁶ See, e.g., Barbra Barnett, *Twentieth Century Approaches to Defining Religion: Clifford Geertz and the First Amendment*, 7 U. MD. L.J. RACE RELIGION GENDER & CLASS 93 (2007) (“Not only judges and legal scholars have difficulty settling upon a definition of religion. Even experts in the field of religious studies continue to debate what religion is and whether it is definable.”); Beschle, *supra* note 19, at 377 (“[T]he issue of classifying a belief system as a religion will not lead to quick and clear answers.”); Mason Blake Binkley, *A Loss for Words: “Religion” in the First Amendment*, 88 U. DET. MERCY L. REV. 185, 201 (2010) (“One will find no shortage of judges and scholars who argue that

ultimately comes down to individuals' idiosyncratic conceptions of what is religious in their "own scheme of things."³⁷ In that sense, then, there is ample doctrinal room for voting-as-religious-exercise claimants: they would need only to assert that they conceive of voting as a religious act and somehow *make that assertion credible*.³⁸

More concretely, such claimants would likely need to gain credibility — as other RFRA claimants have — by drawing factual analogies between their assertedly religious principles and the acts and beliefs typical of conventional religions.³⁹ Individuals' lists of factors would vary based on their circumstances, but one can envision possibilities for where such analogies could be drawn. First and foremost, for many, voting is at least as much an expression of identity, family upbringing, community belonging, and group solidarity as it is an act of rational

religion lacks an essence and that any definition of religion is thus destined to prove inadequate."); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 753 (1984) ("[C]ourts should decide whether something is religious by comparison with the indisputably religious, in light of the particular legal problem involved. No single characteristic should be regarded as essential to religiousness."); Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 843 (1995) ("Religious beliefs, expressions, or values are intrinsically interwoven in the lives of human beings and in the cultures and governments that human beings create. The Court's attempted separation of the religious and the secular, in the terms it has evolved, is in fact an impossible task . . ."); Petty, *supra* note 18; Mark Strasser, *Free Exercise and the Definition of Religion: Confusion in the Federal Courts*, 53 HOUS. L. REV. 909, 909 (2016) ("[A]t least some of the circuits have adopted approaches that are inconsistent with what the Supreme Court has suggested should count as religious . . .").

³⁷ See *supra* note 12.

³⁸ For the same reason, nothing in principle would prevent a claimant from claiming a sincere religious belief in the need to assist others to vote — a belief burdened by rules such as the "line warming" restrictions enacted in Georgia and Florida. See Nick Corasaniti & Reid J. Epstein, *What Georgia's Voting Law Really Does*, N.Y. TIMES (Apr. 2, 2021), [nytimes.com/2021/04/02/us/politics/georgia-voting-law-annotated.html](https://www.nytimes.com/2021/04/02/us/politics/georgia-voting-law-annotated.html) [<https://perma.cc/2S7G-S9SV>]; Max Greenwood, *Florida Lawmakers Weigh Bill Banning Handing out Food, Water Within 150 Feet of Polling Place*, THE HILL (Mar. 29, 2021, 1:54 PM), <https://thehill.com/homenews/state-watch/545410-florida-lawmakers-weigh-bill-banning-handing-out-food-water-within-150> [<https://perma.cc/3SCW-B5MT>].

³⁹ See, e.g., *Sutton v. Rasheed*, 323 F.3d 236, 251 n.30 (3d Cir. 2003) (listing as "indicia" of religion "(1) an attempt to address 'fundamental and ultimate' questions involving 'deep and imponderable matters'; (2) a comprehensive belief system; and (3) the presence of formal and external signs like clergy and observance of holidays"); *Hubbard v. J Message Grp. Corp.*, 325 F. Supp. 3d 1198, 1210-11 (D.N.M. 2018) (listing as "indicia of religion," none of which is dispositive, "ultimate ideas, metaphysical beliefs, moral or ethical system, comprehensiveness of beliefs, and accoutrements of religion; i.e., founder, prophet, teacher; important writings; gathering places; ceremonies and rituals; structure or organization; holidays; diet or fasting; appearance and clothing; and propagation").

calculation;⁴⁰ indeed, in strict economic terms, voting is irrational.⁴¹ Second, voting is of course a crucial means by which to ensure that policies that are abhorrent to one's religious beliefs — and that might in some way imply complicity in abhorrent acts — are not enacted. That could manifest in a pro-life individual who votes in response to profound concern for the sanctity of unborn lives and, thus, the composition of Supreme Court; or, conversely, in a death penalty opponent who votes out of concern for the sanctity of all lives; and so on — each individual's motivation could be different. Third, some voters attribute near-cosmological significance to the outcomes of elections and are driven to vote by dogmatic views lacking a basis in empirical evidence; take, for example, the adherents of QAnon.⁴² Fourth, the solemnity and protocol of voting — at once private and public in certain regards — parallels the solemn, ritualized nature of much religious exercise. Fifth, many feel strongly that Election Day should be a holiday to allow observance of the solemn act.⁴³ And sixth,

⁴⁰ See *supra* note 3; Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 374 (2013) (describing predominant view that voting and party identification are “tribal,” “pre-political,” and driven by “[o]ne’s parents, most importantly, and later one’s friends and social cohort”).

⁴¹ See Timothy J. Feddersen, *Rational Choice Theory and the Paradox of Not Voting*, 18 J. ECON. PERSP. 99 (2004).

⁴² Marc-André Argentino, *In the Name of the Father, Son, and Q: Why It’s Important to See QAnon as a ‘Hyper-Real’ Religion*, RELIGION DISPATCHES (May 28, 2020), <https://religiondispatches.org/in-the-name-of-the-father-son-and-q-why-its-important-to-see-qanon-as-a-hyper-real-religion/> [https://perma.cc/7LVZ-NBE2]; Kerry Howley, *QAnon and the Bright Rise of Belief*, N.Y. MAG. (Jan. 29, 2021), <https://nymag.com/intelligencer/article/qanon-capitol-riot-bright-rise-belief.html> [https://perma.cc/V9RN-PL6N]; Candida Moss, *How a New Religion Could Rise from the Ashes of QAnon*, DAILY BEAST (Jan. 21, 2021, 4:57 AM), <https://www.thedailybeast.com/how-a-new-religion-could-rise-from-the-ashes-of-qanon?ref=scroll> [https://perma.cc/SVP7-YD58]; Caroline Mimbs Nyce, *QAnon Is a New American Religion*, THE ATLANTIC (May 14, 2020), <https://www.theatlantic.com/newsletters/archive/2020/05/qanon-q-pro-trump-conspiracy/611722/> [https://perma.cc/M2YF-EA6S]; *QAnon Conspiracy Theory Has Taken a ‘Religious Tone’ Says Sociologist*, CBC (Oct. 30, 2020, 9:13 PM), <https://www.cbc.ca/radio/tapestry/qanon-and-busking-for-hope-1.5783675/qanon-conspiracy-theory-has-taken-a-religious-tone-says-sociologist-1.5784100> [https://perma.cc/37C9-MJQX]. See generally L. Scott Smith, *Constitutional Meanings of “Religion” Past and Present: Explorations in Definition and Theory*, 14 TEMP. POL. & C.R. L. REV. 89, 139 (2004) (“[R]eligion, as distinguished from philosophy, is transcendent trust in a path of life, embraced as one’s hope of redemption or salvation and expressed through symbols and myths, either literally or figuratively understood, which assume historic, communal, and cosmic significance.”).

⁴³ Abigail Johnson Hess, *Democrats Want to Make Election Day a National Holiday—Here’s Why*, CNBC (Feb. 5, 2019, 4:07 PM), <https://www.cnbc.com/2019/02/05/>

voting is the culmination of a process that often entails shows of loyalty to political leaders, demagogic rallies akin to megachurches, and “cancellation” of politicians guilty of blasphemous speech contrary to certain communities’ dogma.⁴⁴

And then there are the more direct connections to conventional religion. As a doctrinal matter, religious devotion to voting need not be clothed in traditional church structures to receive protection,⁴⁵ but to the extent that connection to traditional churches helps to assure courts of the believer’s sincerity, such connections exist. Popular “Souls to the Polls” initiatives are a highly visible manifestation of how faith communities in the United States view voting as not only an act of political significance, but also of significance to the faith communities themselves and the values they uphold.⁴⁶ And religious intellectual movements such as liberation theology demonstrate how political activism — of which voting is an important part — is a deeply rooted component of many faiths.⁴⁷ Indeed, many of the progressive policies referenced above were driven by traditional church communities.⁴⁸

III. IMPLICATIONS

What would the world look like if citizens could pursue religious liberty claims with respect to their right to vote? If nothing else, pressing such claims could force the Supreme Court to refine — and likely narrow — its expansive free exercise jurisprudence, which many would view as a welcome development. Suppose, however, that the

democrats-want-to-make-election-day-a-national-holidayheres-why.html [https://perma.cc/2549-XVV3].

⁴⁴ See Andrew Koppelman, *The Great Awakening and Overlapping Consensus*, PUB. DISCOURSE (Dec. 9, 2020), <https://www.thepublicdiscourse.com/2020/12/73109/> [https://perma.cc/8N8N-ETMT]; Shaul Magid, ‘Cancel Culture’ Is as Old as Religion, and It’s Only a Thing Because of Who’s Doing the Cancelling, RELIGION DISPATCHES (July 23, 2020), <https://religiondispatches.org/cancel-culture-is-as-old-as-religion-and-its-only-a-thing-because-of-whos-doing-the-cancelling/> [https://perma.cc/PF67-W4R6]; Peter Nicholas, *Trump Rallies Were a Preview of the Capitol Attack*, THE ATLANTIC (Jan. 10, 2021), <https://www.theatlantic.com/politics/archive/2021/01/trump-rally-capitol-attack/617624/> [https://perma.cc/PAW3-33QJ].

⁴⁵ See *supra* note 18.

⁴⁶ Nicole Hemmer, *Souls to the Polls: Black Churches and the Election*, THE CONVERSATION (Oct. 28, 2012, 2:05 PM), <https://theconversation.com/souls-to-the-polls-black-churches-and-the-election-10373> [https://perma.cc/GK8M-FHFE].

⁴⁷ See Eric C. Miller, *The Radical Rise of Liberation Theology: An Interview with Lilian Calles Barger*, RELIGION & POLS. (Sept. 25, 2018), <https://religionandpolitics.org/2018/09/25/the-radical-rise-of-liberation-theology-an-interview-with-lilian-calles-barger/> [https://perma.cc/M4YU-QPFG].

⁴⁸ See *supra* notes 26–33 and accompanying text.

courts permitted such claims, or at least a subset of claims, submitted by parties with the strongest records backing up the sincerity of the claims.

As with progressive religious freedom claims made in other policy domains,⁴⁹ voting restrictions to which sincerely at-least-partly-religious objections might be raised could come in many shapes and sizes, depending on individuals' specific belief systems. Some might fit a familiar negative-rights mold: for example, religious beliefs or traditions might conflict with a requirement to obtain photo identification or, as relevant to Native American voters, a requirement to provide an address that corresponds to individually owned property.⁵⁰ Other restrictions, like the much-publicized new laws in Florida and Georgia,⁵¹ strike instead at the affirmative religious right to vote explored in this Essay by making it significantly more burdensome to exercise that right. And for some restrictions, such as the elimination of Sunday voting options upon which Souls to the Polls efforts rely,⁵² the connection to religious exercise would be especially hard to deny.

Bringing religious freedom claims into voting rights litigation would have important doctrinal implications. For one, protections under religious freedom statutes would be stronger in some respects than the First Amendment's free speech and association guarantees or the Voting Rights Act's provisions. If voting is a form of religious exercise covered by RFRA and state-law equivalents, governments would have to defend ballot access restrictions against citizen class actions⁵³ by demonstrating

⁴⁹ See *id.*

⁵⁰ See Matt Vasilogambros, *For Some Native Americans, No Home Address Might Mean No Voting*, PEW (Oct. 4, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/10/04/for-some-native-americans-no-home-address-might-mean-no-voting> [https://perma.cc/9N9J-PUS7].

⁵¹ See Corasaniti & Epstein, *supra* note 38; Adeel Hassan, *What's in Florida's New Voting Law?*, N.Y. TIMES (May 10, 2021), <https://www.nytimes.com/article/florida-voting-law.html> [https://perma.cc/HJL3-76UU].

⁵² Hemmer, *supra* note 46.

⁵³ Litigants have succeeded in meeting Fed. R. Civ. P. 23's rules for class certification with respect to RFRA claims and claims under the similar RLUIPA statute. See, e.g., *Clark v. City of New York*, 18 Civ. 2334 (AT) (KHP), 2021 WL 603046, at *3-4 (S.D.N.Y. Feb. 16, 2021) (certifying a class of people across multiple religions who were required to remove religious head coverings when taking post-arrest police photographs); *Vita Nuova, Inc. v. Azar*, No. 4:19-cv-00532-O, 2020 WL 8271942, at *4 (N.D. Tex. Dec. 2, 2020) (certifying a class of present and future health care providers in the United States that oppose abortion for religious reasons); *DeOtte v. Azar*, 332 F.R.D. 188, 198-99 (N.D. Tex. 2019) (certifying a class of self-employed individuals and self-insured employers who objected to the Affordable Care Act's contraception mandate); *Ruiz-Diaz v. United States*, No. C07-1881RSL, 2008 WL 2645495, at *1

that the restrictions either (a) do not substantially burden religious beliefs — a standard that is typically deferential to a person’s own weighing of the burden⁵⁴ — or (b) further a compelling interest using the least restrictive means.⁵⁵ Any demographic could participate in such class actions. In contrast, under the Supreme Court’s free speech doctrine, voting restrictions are closely scrutinized only if they are deemed “severe.”⁵⁶ And a Voting Rights Act challenge requires showing that voting laws either are racially motivated or “result[] in a denial or abridgement of the right . . . to vote on account of race or color.”⁵⁷ This Term’s decision in *Brnovich v. Democratic National Committee*, which applies that standard to some in the latest round of state-enacted voting restrictions, has set a high and unpredictable bar for plaintiffs. In weighing the “totality of the circumstances” to uphold Arizona’s restrictions, the Court downplayed the importance of racially disparate impacts and instead was deferential to Arizona’s stated interests when balancing them against the plaintiffs’ interests.⁵⁸ It remains to be seen exactly how much bite the Voting Rights Act will have after *Brnovich*, but one thing is certain: it will fall far short of the strict scrutiny standard applied in religious freedom cases.

(W.D. Wash. June 30, 2008) (certifying class of special immigrant workers who filed I-360 petitions for immigration based on religious work); *Gartrell v. Ashcroft*, 191 F. Supp. 2d 23, 24, 40 (D.D.C. 2002) (ruling in favor of a class of prisoners whose religious beliefs prohibited them from cutting their hair).

⁵⁴ See *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 911 (W.D. Ky. 2020) (“It is not the role of a court to tell religious believers what is and isn’t important to their religion”); Gedicks, *Substantial Burdens*, *supra* note 18, at 98 (“[T]he substantiality of a claimed religious burden under RFRA is effectively established by the claimant’s mere say-so.”).

⁵⁵ See 42 U.S.C. § 2000bb-1(b).

⁵⁶ *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); see, e.g., *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1355 (11th Cir. 2009) (“Because the burden of producing photo identification is not severe, the statute need not be narrowly drawn or the least restrictive alternative.”); see also Armand Derfner & J. Gerald Hebert, *Voting Is Speech*, 34 YALE L. & POL’Y REV. 471, 490-91 (2016) (decrying the *Burdick* standard).

⁵⁷ Voting Rights Act of 1965 § 2 (codified as amended at 52 U.S.C. § 10301); see also *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (“The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality”); *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 1012 (9th Cir. 2020) (applying *Gingles* to vote denial case); *Veasey v. Abbott*, 830 F.3d 216, 243-44 (5th Cir. 2016) (same); *Frank v. Walker*, 768 F.3d 744, 753-55 (7th Cir. 2014) (same).

⁵⁸ See *Brnovich v. Democratic Nat’l Comm.*, No. 19-1257, 2021 WL 2690267, at *12-14 (U.S. July 1, 2021).

To be sure, the federal RFRA does not reach state election laws,⁵⁹ and not all states have their own RFRA. Even among the many states with RFRA, state legislatures of course have the power to amend the statutes to create carveouts. But many electorally significant states, such as Florida, Arizona, Virginia, and Texas, do have robust religious freedom statutes.⁶¹ And at least in the short term, enacting carveouts to preclude voting-as-religious-exercise claims would likely be achievable only in states controlled entirely by Republicans, though the optics of such an amendment might be unappealing to some number of Republican officials in those states.

Moreover, federal constitutional law, which generally *does* restrict state election law, may be growing closer to RFRA in some respects. Then-Judge Amy Coney Barrett joined a notable Seventh Circuit opinion laying out a theory that the First Amendment’s free speech guarantees apply with extra force to religious speech.⁶² And ongoing battles over *Employment Division v. Smith* — a precedent under which neutral, generally applicable laws need not accommodate religious exercise — suggest a significant expansion of the corollary principle from *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* that the Free Exercise Clause prohibits government from targeting disfavored forms of religious exercise.⁶³ Under the expanded *Lukumi* neutrality principle, which erodes *Smith*’s hands-off approach to free exercise, even “subtle” or anecdotal evidence of the government’s “targeting . . .

⁵⁹ See generally *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that, as applied to state law, the federal RFRA exceeds Congress’s constitutional power).

⁶⁰ In Georgia, for example, the lack of a state religious freedom statute has meant that groups such as the AME Church and the Concerned Black Clergy of Metropolitan Atlanta — which might otherwise have compelling RFRA claims — have instead needed to rely on related claims that come with doctrinal downsides, such as the “severe” standard from *Burdick*. See, e.g., Complaint at 53-62, *Concerned Black Clergy of Metro. Atlanta, Inc. v. Raffensperger*, No. 1:21-cv-01728 (N.D. Ga. Apr. 27, 2021), ECF No. 1 (arguing that Georgia’s new voting restrictions place “severe” burdens on the right to vote, in violation of the U.S. Constitution); Complaint at 79-84, *Sixth Dist. Afr. Methodist Episcopal Church v. Kemp*, No. 1:21-cv-02184 (N.D. Ga. Mar. 29, 2021), ECF No. 1 (same).

⁶¹ See *supra* note 5.

⁶² *Ill. Republican Party v. Pritzker*, 973 F.3d 760, 764 (7th Cir. 2020) (“[S]peech that accompanies religious exercise has a privileged position under the First Amendment . . .”).

⁶³ See *Emp. Div. v. Smith*, 494 U.S. 872, 879 (1990); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 538 (1993); Frank S. Ravitch, *Complicity and Discrimination*, 69 SYRACUSE L. REV. 491, 493-94 (2019) (“[T]he Court is expanding the neutrality exception to the test from *Employment Division v. Smith*. That exception, first announced in the *Church of Lukumi Babalu Aye v. City of Hialeah*, was expanded in *Trinity Lutheran v. Comer*, and then again in *Masterpiece Cakeshop*.”).

a faith-based practice” for differential treatment can be enough for plaintiffs to survive summary judgment.⁶⁴ What is more, the Court has now gone even further this Term in *Fulton v. Philadelphia*, holding that “[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable” — and thus requires the policy to survive “strict scrutiny” — “regardless whether any exceptions have been given.”⁶⁵ To survive strict scrutiny, the government must articulate a compelling interest not merely in enforcing its policies generally, but rather a compelling interest specifically “in denying an exception” to free exercise claimants.⁶⁶

If the erosion of *Smith* continues, one could imagine, for example, a claim that practices such as *Souls to the Polls* have been impermissibly “targeted” by state legislators who have at some point criticized the role that Black churches play in elections. Or imagine a claim that, if a voting regulation permits any exceptions whatsoever (such as based on age, disability, or military status), the government must either permit religious exceptions or else prove that the lack of a religious exception is a narrowly tailored means of advancing a compelling interest. Thus, even where state RFRA are not in force, the religious dimension of voting could shape challenges to voting restrictions.

Some of the less direct implications of voting-as-religious-exercise claims are concerning but not terribly so. Similar claims could conceivably be made about political contributions or lobbying, but the Court’s cases have already gutted campaign finance and anticorruption laws, leaving little left to undermine beyond what has already survived heightened scrutiny.⁶⁷ Laws prohibiting religious discrimination by private actors could create liability if such actors discriminated against somebody for the manner in which they voted;⁶⁸ such a shift would

⁶⁴ See, e.g., *Meriwether v. Hartop*, 992 F.3d 492, 514 (6th Cir. 2021) (“The Free Exercise Clause forbids subtle departures from neutrality. . . . Thus, courts have an obligation to meticulously scrutinize irregularities to determine whether a law is being used to suppress religious beliefs.” (quotation marks omitted)); *Country Mill Farms, LLC v. City of East Lansing*, 280 F. Supp. 3d 1029, 1049 (W.D. Mich. 2017) (finding evidence of “targeting” to be ambiguous and therefore denying both sides’ summary judgment motions on this issue).

⁶⁵ *Fulton v. Phila.*, No. 19-123, 2021 WL 2459253, at *7 (U.S. June 17, 2021).

⁶⁶ *Id.* at *8.

⁶⁷ See, e.g., *McDonnell v. United States*, 136 S. Ct. 2355, 2371 (2016); *Citizens United v. FEC*, 558 U.S. 310, 385 (2010).

⁶⁸ See *Equal Opportunity Emp. Comm’n v. United Health Programs of Am., Inc.*, 213 F. Supp. 3d 377, 394 (E.D.N.Y. 2016) (“A court’s limited role in determining whether a belief is ‘religious’ is the same under Title VII as it is under the Free Exercise Clause of the First Amendment.” (quoting *Eatman v. United Parcel Serv.*, 194 F. Supp. 2d 256, 268 (S.D.N.Y. 2002))); *Peterson v. Wilmur Commc’ns, Inc.*, 205 F. Supp. 2d

hardly be remarkable, though, given that multiple jurisdictions already treat political affiliation, activity, or similar categories as protected classifications.⁶⁹ Or a plaintiff could challenge civics education, voting outreach programs, or other state-sponsored activities as forms of religious establishment in violation of the Establishment Clause, but such a challenge would likely fail in most instances. RFRA and the Free Exercise Clause are designed to reach the subjective, idiosyncratic elements of religion in a way that the Establishment Clause is not; recognizing the idiosyncratic connections that certain *individuals* perceive between their politics and their religion does not make political activities religious at the societal level that the Establishment Clause addresses.⁷⁰ So, for example, the mere fact that public schools teach subject matter that certain individuals perceive as religious — politics and voting — would not necessarily mean that the public schools themselves are engaged in impermissible religious endorsement within the meaning of the Establishment Clause.

CONCLUSION

Innovative approaches are needed to protect voting rights against ongoing attacks, but the notion that voting is for many a religious act is not simply conjured out of thin air to meet the challenge. American political culture and free exercise jurisprudence have jointly reached a point where one can no longer draw a remotely clear line between political activism and religious exercise or reject voting-as-religious-exercise claims out of hand. This new reality comes with drawbacks,

1014, 1024-25 (E.D. Wis. 2002) (concluding that an employee proved he was demoted from a supervisory position because of his white supremacist “religious” beliefs, in violation of Title VII).

⁶⁹ See *Retaliation for Political Activity – State Laws*, WORKPLACE FAIRNESS, <https://www.workplacefairness.org/retaliation-political-activity-state-laws> (last visited Mar. 17, 2021) [<https://perma.cc/3EGA-7RV8>].

⁷⁰ See Troy L. Boohar, *Finding Religion for the First Amendment*, 38 J. MARSHALL L. REV. 469, 471 (2004) (“[T]he Free Exercise Clause seems to require a more expansive definition [of religion] than the Establishment Clause.”); Jeffrey Omar Usman, *Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology*, 83 N.D. L. REV. 123, 149-54 (2007) (acknowledging practical consequences of overly broad or narrow definitions of religion); cf. Andrew Rotstein, Note, *Good Faith? Religious-Secular Parallelism and the Establishment Clause*, 93 COLUM. L. REV. 1763, 1805 (1993) (arguing that, because “American public values . . . are not entirely distinguishable from fundamental moral concerns that religion also addresses,” it is unsurprising — and should not be viewed as an Establishment Clause violation — when “governmental use of religious language or symbols merely recognizes the support of religious traditions for consensual secular values, rather than the reverse”).

but it also presents a crucial opportunity to test the sincerity of the courts' professed desire to avoid defining religion narrowly.