SEEKING RELIGIOUS VALIDITY FOR BODY PIERCINGS AND TATTOOS: HOW THE CHURCH OF BODY MODIFICATION SHOULD GAIN RECOGNITION AS A RELIGION IN THE MODERN ERA

Danielle Gold

INTRODUCTION

With religions such as Christianity, Judaism and Islam dominating the belief systems of the American population, it makes perfect sense that a majority of Americans fail to understand how a nose piercing relates to religion. Such is the case in Johnston County, North Carolina, where the school district suspended 14-year-old Ariana Iacono for violating the school dress code. This punishment rests on the school district's refusal to acknowledge Ariana's religious belief in wearing a nose stud as a member of the Church of Body Modification.

Prior to starting her freshman year at Clayton High School, Ariana joined the Church of Body Modification.[1] She was initiated into the Church by receiving a piercing in the left side of her nose, and sincerely believes this piercing is essential to the practice of her faith according to the Church's teachings.[2] The school administration became aware of Ariana's nose stud on the first day of the 2010 school year and informed her that because the school dress code policy prohibits facial piercings, she could be subject to in-school suspension if the stud was not removed.[3] Although Ariana's mother Nikki explained the religious significance of Ariana's nose stud by providing the principal with information from the Church's website, as well as their Reverend's contact information, the principal rejected Nikki's reasoning and stated the Iaconos would be treated differently if they "were Muslims or Hindus."[4]

On August 30, 2010, the school informed Ms. Iacono that it had determined that "the nose stud was not necessary for the practice

1. Memorandum of law in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction at 4, Iacono v. Croom, No. 5:10-CV-416-H (E.D.N.C. Oct. 6, 2010).

2. *Id.* at 5.

3. *Id.* at 7.

4. *Id.* at 7. Nikki Iacono joined the Church of Body Modification in August 2009. *Id*. at 4.

of the Iacono's religion," and Ariana could no longer wear the nose stud in school.[5] Still refusing to remove her nose stud, Ariana was ultimately suspended for ten days, and the school recommended that she be placed in an alternative program for the remainder of the school year.[6] Nikki Iacono attempted to defend her daughter at the final school board hearing, but was essentially forced to defend the validity of the Church of Body Modification as well as her and Ariana's religious beliefs.[7] Not convinced that wearing a nose stud is a valid religious belief, or that the Church of Body Modification deserves any recognition as a viable religion, the School Board ordered Ariana's removal from Clayton High School and placement in the alternative program.[8]

Ariana, represented by the American Civil Liberties Union (ACLU), sought a temporary restraining order and preliminary injunction against Johnston County School District.[9] To support this request for relief, the ACLU attacked the dress code on various grounds, including violations of the First Amendment and Equal Protection Clause.[10] On October 8, 2010, U.S. District Judge Malcolm J. Howard granted an emergency order permitting Ariana to return to Clayton High School, and prohibited the school district from disciplining her for wearing her nose stud until completion of the pending litigation.[11]

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5. *Id.* at 8.

6. Memorandum, *supra* note 1, at 11.

7. *Id.* at 12.

8. *See id.* at 12-13. Because the alternative program is part of the Johnston County School District, Ariana will therefore still be expected to abide by the dress code, and could face further suspension if she does not remove her nose stud. *Id.*

9. *Id.* at 2.

10. *Id*. The ACLU asserts four arguments in it's Memorandum of Law including:

> (1) On its face, Defendant's dress code's religious exemption disregards Supreme Court precedent by requiring school principals to determine whether religious practices are central to students' religious beliefs; (2) Defendants exploited this unconstitutional policy by requiring Ms. Iacono to justify in a hearing that her daughter's religious practices are in fact required by her religion; (3) Defendants violated their own policy by inherently determining Ariana's religion is invalid; and (4) The principal violated the Equal Protection Clause by concluding that Plaintiffs would be treated differently if they were Hindu or Muslim.

Id.

11. Press Release, Am. Civil Liberties Union, Court Allows Johnston County Honor Student to Return to Classes (Oct. 8, 2010) (on file with the Am. Civil Lib-

Addressing the arguments set forth by the Johnston County School Board, Part I briefly explains the implications of pursuing this claim in a school environment, where courts have routinely given deference to school boards so long as their actions are not arbitrary or capricious. Because Ariana contended she possessed both a sincere and valid religious belief, Part II examines how courts have come to distinguish valid religious views from personal views by testing the sincerity of beliefs held by the petitioner. Although implementation of the sincerity test was intended to protect non-conventional religious views, Part III argues that courts are still hesitant to acknowledge beliefs as religious if they are outrageous or violate public policy. While it may seem ridiculous that the foundation of the Church of Body Modification rests on an individual's belief in body alteration, Part IV argues that the Church should be recognized as a valid religion based on the Church's religious tenets, qualities that are similar to other religions, and the fact that the First Circuit has acknowledged the Church as a religion pursuant to a Title VII claim. Lastly, Part V discusses Ariana's most significant hurdle, overcoming the narrow interpretation of religious freedom set forth by the Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith*.[12] This section explains how Ariana would argue that her claim implicates a hybrid-rights exception, a right acknowledged by the Supreme Court in *Smith*, but lacks a great deal of clarity.

I. SIGNIFICANCE OF A PUBLIC SCHOOL ENVIRONMENT FOR RELIGIOUS CLAIMS

Aside from the hurdle of proving a valid Free Exercise claim, being a student in a public school—as opposed to an employee in the workplace—imposes further obstacles for Ariana. Although Chief Justice Burger famously proclaimed, "students… [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[13] courts seem to place greater reliance on his later statement: "the constitutional rights of students in public school are not automatically coextensive with the rights of adults

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erties Union), *available at* http://www.aclu.org/religion-belief/court-allows-johnston-county-honor-student-return-classes.

12. 494 U.S. 872 (1990).

13. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

in other settings."[14] In essence, there are "special" rules for schools. Since the early 1900s, courts have often given deference to the decisions of school boards unless the school board acted in an arbitrary, capricious, or unreasonable manner.[15] In terms of the levels of scrutiny, this standard is equivalent to the rational basis test, the most lenient standard of constitutionality, in which school boards must only prove their action is rationally related to a legitimate interest.[16]

Much of the foundation for a student's rights is derived from the infamous *Tinker v. Des Moines Independent Community School District* decision, where the Supreme Court decided that schools cannot regulate student expression without showing that such expression would "substantially interfere with the work of the school or impinge upon the rights of other students."[17] Despite what appeared to be a major win for student freedom of expression, this win was short-lived in light of *Bethel School District No. 403 v. Fraser*[18] and *Hazelwood School District v. Kuhlmeier*,[19] in which the Courts upheld the regulation of a student's freedom of speech.[20]

Courts have now seemingly taken the view that the need for school power outweighs the interest of an individual student's right to freedom of expression,[21] and these subsequent decisions are more in line with Justice Black's dissent in *Tinker*, where he emphasized giving judicial deference to schools in their pursuit of

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14. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

15. Todd A. DeMitchell, Richard Fossey & Casey Cobb, *Dress Codes in the Public Schools: Principals, Policies, and Precepts*, 29 J.L. & EDUC. 31, 32 (2000) (citing Pugsley v. Sellmeyer, 250 S.W. 538, 253 (Ark. 1923)).

16. *See* Andrew D.M. Miller, *Balancing School Authority and Student Expression,* 54 BAYLOR L. REV. 623, 632-33 (2002).

17. *Tinker*, 393 U.S. at 509. In this case, several students planned to wear black armbands to school in protest of the Vietnam War, but school officials became aware of their plans and adopted a policy subjecting students to suspension if they refused to remove the armband while in school. *Id.* at 504.

18. Fraser was suspended after delivering a speech at a school assembly nominating a fellow student for an elective office in which he described the candidate "in terms of an elaborate, graphic, and explicit sexual metaphor." *Fraser*, 478 U.S. at 677-78.

19. A high school principal removed two student articles that concerned teen pregnancy in the school and the impact of divorce on students prior to the publication of the school newspaper. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 263-64 (1988).

20. *See* Miller, *supra* note 16, at 640.

21. *Id.* at 646.

providing safe environments to educate students to become better citizens.[22]

Although Ariana's suit alleges the school district violated her right to freedom of religion as opposed to freedom of expression, Ariana's rights are limited as a student. Given the trend of deferring to school boards, the Eastern District of North Carolina could potentially uphold the Johnston County School Board's decision not to exempt Ariana from the dress code policy because it is a way of maintaining order and consistency in the school. Also to the advantage of the Board, is that other school boards across the country are routinely permitted to institute reasonable dress codes in public schools.[23]

While the constitutionality of dress codes have been debated for infringing upon a student's right to freedom of expression,[24] courts have routinely upheld these policies as serving a legitimate purpose. Specifically, dress codes reduce distractions in the school environment and enhance the educational experiences of students. More recently, public schools have even enforced mandatory uniform policies.[25] There are a variety of reasons for mandating uniforms, including, but not limited to, putting each student on a level playing field when not all students can afford "label" clothing.[26] Also, uniforms attempt to combat gang activity in the schools by preventing members from wearing certain colors or a certain style of clothing that affiliates the students with different gangs.[27]

Principals at all school levels generally respond favorably to maintaining dress code policies in their schools, with high school principals showing the most support.[28] However, the responses

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22. *See Tinker*, 393 U.S. at 524-25 (Black, J., dissenting).

23.

> Local boards of education shall adopt policies not inconsistent with the provisions of the Constitutions of the United States and North Carolina, governing the conduct of students and establishing procedures to be followed by school officials in suspending or expelling any student, or in disciplining any student if the offensive behavior could result in suspension, expulsion, or the administration of corporal punishment. Local boards of education shall include a reasonable dress code for students in these policies.

N.C. GEN. STAT. § 115C-391(a) (West 2010).

24. DeMitchell, Fossey and Cobb, *supra* note 15, at 33.

25. *See* Miller, *supra* note 16, at 668-69.

26. *Id*. at 670.

27. *Id*. at 670-71.

28. DeMitchell, Fossey, and Cobb, *supra* note 15, at 40. Two hundred and forty principals completed a dress code policy questionnaire and responded to

concerning mandatory school uniforms resulted in greater variation amongst principals.[29] Whereas middle/junior high school principals supported mandatory uniforms, high school principals viewed a mandatory uniform policy the most negatively.[30]

"Student Dress and Appearance" policy, numbered Policy Code 4220,[31] was implemented by the Johnston County Board of Education. While the Board respects a student's right to choose his or her style of dress or appearance, students are expected to adhere to standards of cleanliness and dress that are compatible with the requirement of a good school environment.[32] For instance, dress or appearance that poses a threat to health or safety, or disrupts class or learning activities, will not be tolerated.[33] The portion of the dress code applicable to Ariana states: "there shall be no jewelry affixed to a student's nose, tongue, lips, cheek or eyebrow."[34]

Policy Code 4220 permits exemption from the dress code based on religious grounds:

> The principal or designee, as a reasonable accommodation, exempt a student from the requirements of the Student Dress Code and Appearance policy when compliance with those requirements would impose a substantial burden on the exercise of a sincerely held religious belief. In making determinations regarding exemptions to the Student Dress Code and Appearance policy, the principal or designee shall not attempt to determine whether the religious beliefs are valid but only whether they are central to religious doctrine and sincerely held. To assist in deciding whether an exemption is warranted, the principal or designee may request the parent to provide information in writing demonstrating (1) that the objection to the requirements of the Student Dress Code and Appearance policy is grounded in religious tenets rather than mere personal preference; (2) that the religious beliefs are sin-

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statements on a one to five scale. The scale ranged from one to five, a choice of one meaning that that the principals strongly disagreed with the statement, whereas choosing five meant a principal strongly agreed with the statement. For instance, two of the statements read, I believe that a dress code improves student behavior and I believe that dress codes are worth the trouble of enforcing. *Id*. at 38-39.

29. *Id*. at 41.

30. *Id*.

31. Memorandum, *supra* note 1, at 6.

32. Johnston County Schools – Policy Code: 4220 - Student Dress and Appearance, *available at* http://downloads.microscribepub.com/nc/johnston/printer/4220.pdf (last visited Dec. 20, 2011).

33. *Id.*

34. *Id.*

> cerely held and practiced; and (3) that compliance with the requirements of the Student Dress Code and Appearance policy truly will interfere with the exercise of those beliefs. [35]

Despite the language in the exemption, which prohibits school officials from determining the validity of religious beliefs, the ACLU stresses that Ariana was not exempted from the school dress policy because the Church of Body Modification is not considered a valid religion.[36] As such, the School Board determined that wearing a nose stud could, in no way, be a valid religious belief, let alone central to this "religion."[37]

Putting aside the Board's unwarranted determination that Ariana was not adhering to valid religious beliefs, the Board does not bear the burden of proving that Ariana's nose stud caused an actual disturbance in the school, and must only prove that it could substantially and materially interfere with the work of the school.[38] The ACLU seeks to attack this argument on the grounds that courts have recognized that concerns for disruption among school districts may be misplaced through the strict enforcement of dress codes.[39] To support this notion, the ACLU has cited *Bishop v. Colaw*.[40] In *Bishop*, a male student with long hair was technically in violation of the school's dress code. However, the Eighth Circuit concluded this did not constitute a valid distraction in the classroom because the school's fear of disruption was "based on the idea… that anything out of the ordinary attracts attention and therefore could be disruptive of the educational process."[41] Similar to *Bishop*, there is no indication that other students will be unable to concentrate because Ariana has a slightly different appearance.[42] As such, the Eastern District of North Carolina should not

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35. Memorandum, *supra* note 1, at 6.
36. *Id.* at 2.
37. *Id.* at 18.
38. *See* Miller, *supra* note 16, at 650 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)).
39. Memorandum, *supra* note 1, at 26.
40. *Id.*
41. *Id.* (citing Bishop v. Colaw, 450 F.2d 1069, 1070 (8th Cir. 1971)).
42. Memorandum, *supra* note 1, at 26. The ACLU explains that failure to grant exemptions from a dress code have been based upon the fear that student's will choose attire that promotes drug use or gang affiliation which are in fact distractions to a learning environment, whereas Ariana's nose stud promotes no harmful message. *Id*. at 26-27 (citing Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 467 (6th Cir. 2000); Long v. Bd. of Educ. of Jefferson Cnty. Ky., 121 F. Supp. 2d 621, 626 (W.D. Ky. 2000)).

interpret Ariana's out of the ordinary appearance for religious purposes as a substantial or material interference with school proceedings.

II. DISTINGUISHING RELIGIOUS AND PERSONAL BELIEFS

Inherent in our country's values, as set forth by James Madison, is the freedom to practice one's religion according to the dictates of his own conscience.[43] Although the First Amendment later codified his assertion, the term "conscience" was not incorporated into the Free Exercise Clause. By limiting the language to "*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,*"[44] perhaps the government was fearful that citizens would seek protection for their personal beliefs, as opposed to religious beliefs, under this provision. Without a clear explanation for the language chosen, the First Amendment leaves open the question: what exactly constitutes a religion?[45]

Courts have continuously struggled to interpret the scope of the Free Exercise Clause in a uniform fashion. Initially, only religious beliefs, as opposed to religious practices, were protected.[46] In *Reynolds v. United States*, a member of the Mormon faith asserted that his conviction for bigamy violated the Free Exercise Clause because male members of this Church have a duty to practice polygamy.[47] Rejecting this argument, the Court determined that polygamy has always been punishable under the law, and that religious beliefs can never justify a criminal act.[48]

Despite an effort to move away from this narrow interpretation, courts struggle to uphold the First Amendment, which abso-

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43. J. MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* THE WRITINGS OF JAMES MADISON, VOL. 2 (11783-1787), 184 (Gaillard Hunt ed., G.P. Putnam's Sons, 1901) (2010).

44. U.S. CONST. amend. I.

45. Reynolds v. United States, 98 U.S. 145, 162 (1879) ("[t]he word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted). *See also* United States v. Kuch, 288 F. Supp. 439, 443, 446 (1968) (explaining how the Supreme Court has provided little guidance in terms of how to define religion and that although the Framers of the Constitution sought to uphold religious beliefs at all costs, Congress should be left with the task of balancing this protection against the interests of society as a whole).

46. *See Reynolds*, 98 U.S. at 166.

47. *Id*. at 161-62.

48. *Id*. at 166-67.

lutely protects the freedom to believe,[49] and also defend "religious beliefs" that result in violation of the law. To alleviate the confusion of what constitutes a religion, courts are instructed to apply a "sincerity test," which entitles a person to First Amendment protection if his or her "religious belief is a belief, which the person would refuse to violate, no matter the cost," or, in other words, is sincere.[50]

The Supreme Court first utilized the "sincerity test" to determine a challenge to the Free Exercise Clause in *United States v. Ballard*.[51] Leaders of the "I am" sect filed a motion to quash their convictions for mail fraud, alleging that restricting the organization's ability to promote their movement through the mail violated the Free Exercise Clause.[52] Applying the sincerity test, the Supreme Court held that the jury would not be allowed to consider the truth or falsity of the religious beliefs of the "I Am" sect.[53] Furthermore, it was immaterial what the defendants preached, because people are entitled to believe what they cannot prove.[54] Although the Supreme Court agreed that the beliefs of this sect were preposterous and without reason, the true issue was whether these defendants honestly and in good faith believed what they preached.[55] If the beliefs were sincere, then the defendants must be acquitted.[56]

By awarding religion an expansive definition, even including "rank heresy," some commentators praise *Ballard* for the breadth of protection it offers to those of unorthodox faiths.[57] While this definition could be helpful in guiding future courts, other commen-

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49. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

50. James M. Donovan, *God is as God Does: Law, Anthropology, and the Definition of "Religion,"* 6 SETON HALL CONST. L.J. 25, 43 (1995).

51. *See* John Noonan, Jr., *How Sincere Do You Have to Be to Be Religious*, 1988 U. ILL. L. REV. 713, 713-14 (1988).

52. United States v. Ballard, 322 U.S. 78, 79-81 (1944). The Ballard's were charged with mail fraud and conspiracy to commit mail fraud for sending mailings that indicated that through communication with spiritual entities, the "I Am" sect could cure injuries and incurable diseases. Donovan, *supra* note 50, at 40.

53. Steven D. Collier, *Comment: Beyond Seeger/Welsh: Redefining Religion Under the Constitution,* 31 EMORY L.J. 973, 979 (1982).

54. *Ballard*, 322 U.S. at 81, 86.

55. *Id.* at 81, 87.

56. *Id.* at 81. Although the Ballard's argued that the truth of their religious doctrines should have gone to the jury, the Supreme Court held that the District Court properly ruled when it withheld this question from the jury. *Id*. at 85, 88.

57. *See* Collier, *supra* note 53, at 979.

tators, such as John T. Noonan, feel that implementing a standard of "sincerity" will only create more problems because there is no decisive way for a court to measure sincerity.[58] Religion arguably consists of principles that can be interpreted either literally or symbolically.[59] For instance, if an individual claims a sincere belief in Santa Claus, Noonan questions if a jury could look beyond the symbolic nature of this being to determine if the individual possesses a literal and sincere belief.[60] A better example posited by Noonan is the situation of a religious leader losing his faith.[61] Can this leader be guilty of fraud if he continues to perform the usual religious rituals and preaches to the public?[62] Using the rationale in *Ballard,* it appears that the answer would be yes because the religious leader no longer sincerely believes in the religion. Although it is unlikely that any minister or preacher of a well-known religion would be indicted for fraud, courts will likely be wary of new religions because sincerity is more questionable.[63]

The Supreme Court was faced with the difficulty of implementing the sincerity test when American citizens sought exemption from the military draft in *United States v. Seeger*.[64] Men were eligible for exemption from the draft if they conscientiously opposed participation in the war based on their religious training and beliefs.[65] Pursuant to § 6 (j) of the Universal Military Training and

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58. *See* Noonan, *supra* note 51, at 718. Faith is faith because it cannot be demonstrated; a degree of doubt is always possible. *See Ballard*, 322 U.S. at 93-94 (Jackson, J., dissenting).

59. Noonan, *supra* note 51, at 719. Justice Jackson references the dichotomy between a literal and symbolic interpretation of a biblical reading: "[s]ome who profess belief in Bible read literally what others read as allegory or metaphor, as they read Aesop's fables." *Ballard*, 322 U.S. at 94 (Jackson, J., dissenting).

60. Noonan, *supra* note 51, at 719.

61. *Id*.

62. *Id*.

63. *Id*. at 722-23. Noonan suggests that religious movements specifically seeking tax exemptions will be under greater scrutiny if the "sincerity" test is implemented. *Id*. at 723. Noonan concludes his article by suggesting that religion should be measured in terms of the advice given by Gamaliel to the council of Pharisees. *Id.* at 724. "For is this idea of theirs or its execution is of human origin, it will collapse; but if it is from God, you will never be able to put them down." *Id*.

64. *See* United States v. Seeger, 380 U.S. 163, 164-65 (1965). This case involved the consolidation of three defendants seeking to be exempted from the military draft. *Id.* at 164. Although Seeger proved the sincerity of his beliefs to the District Court, he was convicted for refusal to submit to induction in the armed forces because his beliefs were not in relation to a Supreme Being as required by the statute. *Id*. at 166-67.

65. *Id.* at 165.

Service Act, religious training and belief is defined as "an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code."[66] The main issue the Supreme Court was forced to address was whether the term "Supreme Being" in the statute referred to the orthodox God or the broader concept of a power, a being, or a faith "to which all else is subordinate," and decisions made are dependent upon this belief, such as objection to the draft.[67] Choosing the broader definition, the Supreme Court applied a sincerity test to the statute, and explained that if a registrant can demonstrate a sincere and meaningful belief that occupies his life, which is similar to someone whose life is filled by belief in an orthodox God, exemption from the draft should be granted.[68] Because none of the defendants suggested that their objections to the war were based on a personal or moral code, the Supreme Court held true to the principle set forth in *Ballard* and did not attempt to determine the truth of the beliefs asserted.[69] Rather, the Court concluded that the beliefs were truly held within the meaning of the sincerity test, thereby exempting the registrants from the draft.[70]

The Supreme Court in *Seeger* also held that courts must decide whether the beliefs professed by a registrant are religious within his own scheme of things, or religious in nature.[71] This principle was explained further in *Welsh v. United States*, and the Supreme Court noted that reference to "own scheme of things" was intended to mean that the primary consideration in determining whether a registrant's beliefs are religious is whether those beliefs play the role of religion and function as the religion in the registrant's life.[72]

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66. *Id.*

67. *Id.* at 174.

68. *See id.* at 176. Donovan notes that the Supreme Court in *Seeger* seems to identify religion with the psychological state of the believer as opposed to identifiable content of the beliefs. *See* Donovan, *supra* note 50, at 32.

69. *See Seeger,* 322 U.S. at 185-86.

70. *Id.* at 186-88.

71. *Id.* at 185.

72. Welsh v. United States, 398 U.S. 333, 339 (1970). Welsh did not belong to any organized religious group and could not affirm or deny that he believed in a "Supreme Being." *Id.* at 336-37. However, Welsh affirmed on his application that he held deep, conscientious scruples against partaking in wars where people were killed and that this objection to participating in war came from a voice so loud

Although the Supreme Court added a "functional" component to the sincerity test in an effort to include untraditional beliefs asserted by the registrants in *Seeger* and *Welsh,* scholars differ as to its actual effectiveness.[73] As discussed by the Harvard Law Review Association, these scholars assert that the functional definition of religion protects an individual's choice of identity, and promotes voluntarism, which is an individual's ability to be free from constraint and compulsion in the exercise of his or her religion.[74] To qualify as a religion under the functional definition, the belief needs to have a normative component or needs to compel the believer to act in a certain way on moral grounds.[75] Secondly, the belief must be fundamental to the believer's identity and an ultimate concern that "gives meaning and orientation to the person's whole life."[76] However, as John C. Knechtle points out, these components still force the courts to use a subjective analysis when confronted with religious freedoms claims.[77] Because a person can assert virtually any belief as a moral and ultimate concern in his or her life,[78] courts are likely to disagree over what beliefs make for a "moral" way of life, and further confuse the analysis of religion in free exercise cases.

Without an objective method for courts to use, it is possible for a court to conclude that the beliefs embedded in the Church of Body Modification do meet the standards of a "functional religion." Pursuant to the components of religion discussed by the Harvard Law Review Association, Ariana's belief will lack merit if she cannot prove that her belief in the Church of Body Modification has morally determined how she intends to live her life. Although

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and insistent that he would have preferred to go to jail rather than serve in the Armed Forces. *Id.* at 337.

73. *See* Karen Sandrik, *Towards a Modern Definition of Religion*, 85 U. DET. MERCY L. REV. 561, 567 (2008). Because religion remains undefined, Sandrik questions how courts will be able to determine the role of religion and how it functions. *Id*. She proposes a modern definition of religion based on the philosophy of Henry Louis Mencken, and argues that courts should interpret religion to be sincerely held beliefs "where one can access the powers that control her fate and condition such powers to react positively to her." *Id*. at 576.

74. Harvard Law Review Association, *Reinterpreting the Religion Clauses: Constitutional Construction and Conceptions of the Self*, 97 HARV. L. REV. 1468, 1469-70, 1475 (1984).

75. *Id.* at 1476.

76. *Id.* at 1477.

77. John C. Knechtle, *If We Don't Know What It Is, How Do We Know If It's Established?*, 41 BRANDEIS L.J. 521, 527 (2003).

78. *Id.*

Ariana testified to the sincerity of her belief in needing to wear her nose stud at all times to accord with Church practices,[79] the Eastern District of North Carolina may have difficulty understanding the moral and religious reasoning behind her choice due to the popularity of piercing and tattoos for fashionable or artistic purposes in America. Since the Church of Body Modification is relatively new and unknown, and because most Americans would cover body ornaments in the workplace without dispute, the Eastern District of North Carolina could further be tempted to regard Ariana's belief in wearing her nose stud at all times as merely personal, rather than religious in nature.

III. DESPITE SINCERITY, CONTENT OF BELIEF MAY DISSUADE A COURT FROM CONCLUDING THAT A BELIEF IS "RELIGIOUS."

"Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[80] Despite this statement from the Supreme Court, if the belief itself violates public policy or is purely outrageous, courts remain hesitant to acknowledge the belief as religious. In analyzing beliefs, it seems impossible for justices not to pass personal judgment[81] or make moral judgments.[82] For instance, Collier proposes that religion be defined by a four-function test, including an element of mortality.[83] However, based on an analysis of *United States v. Kuch*, "religions" centered on the use of illegal drugs will not satisfy the morality component according to Collier.[84] In *Kuch*, an ordained minister of the Neo-American Church argued she was improperly convicted on drug charges because use of marijuana

79. Memorandum, *supra* note 1, at 5.

80. Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707, 714 (1981).

81. Jane M. Ritter, *The Legal Definition of Religion: From Eating Cat Food to White Supremacy*, 20 TOURO L. REV. 751, 797 (2004).

82. *See* Knechtle, *supra* note 77, at 527. This is problematic due to the subjective nature of morality. *Id.*

83. Collier, *supra* note 53, at 998. Collier proposes that the constitutional definition of religion should include four elements: morality, cosmology, practices, and organization. *Id.* If a belief system satisfies all four of these factors, he argues that a court should conclude that this religion is valid and worthy of First Amendment protections. *Id*. at 999.

84. *Id*. at 1005-06. "Although [the Neo-American Church] is an organization that provides its members with arguable cosmological beliefs, the beliefs do not appear to include moral aspects and members do not engage in any specific practices based on Church beliefs beyond the indiscriminate use of drugs." *Id.*

and LSD was a religious duty of each member of the church.[85] Despite the defendant's argument that ingestion of psychedelic drugs brings about a religious awareness, the Court determined that regardless of a "religious" experience, this organization was formed based on personal choices to engage in drug use.[86] In addition, "the court indicated that even if a legitimate religion were involved, substantial state interests in prohibiting the use of LSD and marijuana would outweigh the defendant's religious liberty."[87] With the beliefs and practices in clear violation of narcotics law,[88] it seems nearly impossible for the Court to afford religious protection to Kuch in light of the consequences to public policy.

Similarly in *United States v. Meyers*, the defendant alleged that, as the founder and Reverend of the Church of Marijuana, he sincerely believed that this religion commands him to "use, possess, grow and distribute marijuana for the good of mankind and the planet earth."[89] Acknowledging that Meyers held a sincere belief, the religious nature of this belief failed under the Tenth Circuit's five-factor test for defining religion: (1) ultimate ideas; (2) metaphysical beliefs; (3) moral or ethical system; (4) comprehensiveness of beliefs; and (5) accoutrements of religion.[90] Furthermore, the Tenth Circuit agreed with the District Court's fear that recognition of these types of beliefs as religious would create a

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85. United States v. Kuch, 288 F. Supp. 439, 442-43 (1968) Literature regarding the Neo-American Church asserts that members "have the right to practice our religion, even if we are a bunch of filthy, drunken bums." *Id.* at 443. Furthermore, the Church symbol is a three-eyed toad, the Church key is a bottle opener, and the official songs are "Puff, the Magic Dragon," and "Row, Row, Row Your Boat." *Id*. at 444.

86. *See id*.

87. Collier, *supra* note 53, at 1005.

88. *Kuch*, 288 F. Supp. At 442. Kuch was indicted under the Marihuana Tax Act of 1937. *Id.*

89. United States v. Meyers, 95 F.3d 1475, 1479 (10th Cir. 1996). David Meyers was found guilty of conspiracy to possess with intent to distribute marijuana as well as aiding and abetting possession with intent to distribute marijuana. *Id*.

90. *Id.* at 1482-84. The District Court adamantly explained that it would not rely solely on established religions to guide it in determining if a new or unique set of beliefs necessitates inclusion within the definition of religion. *Id*. at 1484. Furthermore, no one factor is dispositive; the test only requires minimum satisfaction for the beliefs to be religious in nature. *Id.* However, the dissent disagreed with the imposition of a court established factor-driven test to help define religion. *Id*. at 1489 (Brorby, J., dissenting). Judge Brorby explains that a factor-driven test that defines religion essentially guts the Free Exercise Clause of it's meaning and denies freedom of religion." *Id.*

slippery slope where anyone who used illegal drugs could seek constitutional protection for the pleasant side-effects felt while using this "medicine."[91] Even if Meyer's beliefs minimally satisfied the five factors defining religion, the court would have been hard-pressed to grant constitutional protection to a religion requiring the use of marijuana, a drug strictly regulated by the government. However, despite the public policy implications, Sandrik would argue that marijuana use, if incorporated with other sincere beliefs, would satisfy her proposed definition of religion because "the powers which control one's future can be manipulated … by one's personal course of action," namely by use of this drug.[92]

Aside from rejecting "religious" beliefs that incorporate illegal substances, courts are also hesitant to interpret outrageous beliefs as religious. Although not argued in the First Amendment context, a Florida District Court addressed the sincerity of a plaintiff's belief in eating Kozy Kitten Cat Food in a Title VII case.[93] The plaintiff argued that eating cat food was his "personal religious creed," increased his energy, and significantly contributed to his state of well-being and overall work performance.[94] The District Court examined the religiousness of this belief based on three-factor test utilized by the Fifth Circuit: "whether the belief is based on a theory of 'man's nature of his place in the Universe,' which is not merely a personal preference but has an institutional quality about it, and which is sincere."[95] Without blatantly stating that the plaintiff's belief was ridiculous, the court simply determined that eating cat food was merely a personal preference, therefore not falling within the Fifth's Circuit concept of religion.[96] As per this example, courts are reluctant to grant protection to beliefs that are extremely out of the ordinary. However, Knechtle suggests that the ruling in *Brown* would have been different if the plaintiff's argument involved a food better known to have a religious significance.[97] For example, if the plaintiff had argued that he possessed a sincere, religious belief in eating kosher food because it increased his energy, the court would probably accept this assertion because it is not so outlandish. However, this belief would not satisfy San-

91. *See id*. at 1484.
92. *See* Sandrik, *supra* note 73, at 578.
93. Brown v. Pena, 441 F. Supp. 1382, 1384 (S.D. Fla. 1977).
94. *Id.*
95. *Id.* at 1385.
96. *See id.*
97. Knechtle, *supra* note 77, at 527.

drik's definition of religion because Brown, in no way, claims that eating cat food manipulates a higher power that controls him, nor does this action control his destiny or future.[98]

While body modification does not seem to violate public policy in this country, courts may nevertheless fail to comprehend the meaning of piercings, tattoos and suspensions in a person's life. Although eating cat food would seem more peculiar than slight body modifications to the average person, there is no guarantee that the Eastern District of North Carolina will determine body modifications reach beyond mere personal preference. Because the tenets of the Church of Body Modification do not conform to a majority of societal norms, a court is more likely to deem its beliefs as non-religious.

Interestingly, the Third Circuit has previously factored formal and external elements of other "traditional" religions, such as formal services or ceremonies, existence of a clergy, structure of the organization, and observation of certain holidays, into it's analysis of religion.[99] In *Africa v. Pennsylvania*, the Third Circuit used these factors to analyze a prisoner's alleged religious belief in only consuming raw foods as a member of the MOVE organization.[100] Although the Third Circuit determined that Africa possessed sincere beliefs, it was unwilling to conclude that these beliefs were religious in nature.[101] In reaching this decision, the Third Circuit compared the MOVE organization's structural characteristics to those of accepted religions and[102] determined that the MOVE or-

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98. Sandrik, *supra* note 73, at 584-85.

99. *See* Andrew W. Austin, *Faith and the Constitutional Definition of Religion*, 22 CUMB. L. REV. 1, 21 (1991) (citing Malnak v. Yogi, 592 F.2d 197, 209 (3d Cir. 1979)).

100. Africa v. Pennsylvania, 662 F.2d 1026 (3d Cir. 1981). Africa testified that MOVE is a revolutionary movement absolutely opposed to all that is wrong. *Id.* at 1026. The goals of the organization are to bring absolute peace, stop violence, and stop corruption. *Id.* Members of the organization must live in harmony with what is natural or untainted, and therefore cannot eat any foods that have been processed or cooked. *Id.* at 1027-28.

101. *Id*. at 1030-31, 1036.

102. *Id*. at 1036. Aside from examining the organization's structural characteristics, the Third Circuit also questioned if the MOVE organization addressed fundamental and ultimate questions having to do with deep and imponderable matters, as well as if the movement consisted of a belief system as opposed to an isolated teaching. *Id*. at 1032. Because the Third Circuit's decision was not solely derived from comparing the organization to other recognized religions, the District Court in *Meyers* would approve of this method of analysis. *See* United States v. Meyers, 95 F.3d 1475, 1484 (10th Cir. 1996).

ganization lacked "almost all of the formal identifying characteristics" possessed by most religions.[103] Notably, because Africa testified that "every day of the year can be considered a religious holiday," or that no one day is more important than another,[104] the Third Circuit determined Africa's viewpoints were personal as opposed to religious in nature.[105]

Sandrik argues that while the MOVE organization lacked specific ceremonies or holidays, the organization did possess a hierarchy structure because Africa considered himself a Naturalist Minister despite all members being considered equal.[106] Similarly, if the Eastern District of North Carolina were to examine the structure of the Church of Body Modification, it would find four ministers in the United States.[107] Although the Church lacks formal holidays and ceremonies, the hierarchal structure and documentation of the religious tenets listed on the Church's website should qualify the Church as a recognized religion if formal characteristics are examined.

IV. SHOULD THE CHURCH OF BODY MODIFICATION BE RECOGNIZED AS A RELIGION?

The Church of Body Modification was established in 1999[108] and possesses approximately 3,500 practicing members.[109] Members of the Church engage in ancient and modern body modification rites such as piercing, scarring, tattooing, and suspensions.[110] Followers of this faith believe these rituals will unify their minds, bodies, and souls, and allow them to connect with a higher power.[111] Body modification helps individuals grow and learn about who they are

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103. *Africa*, 662 F.2d at 1036. The organization lacked formal structure because it consisted of only "one member" and "everything is level." *Id.* Additionally, none of the alleged tenets of the religion were documented in books or scriptures. *Id.*

104. *Id*. at 1027.

105. *See id.* at 1036.

106. Sandrik, *supra* note 73, at 571.

107. Church of Body Modification, Ministers, http://uscobm.com/ministers/ (last visited Oct. 21, 2011). One of the four ministers includes Reverend Richard Ivey, who resides in Raleigh, North Carolina and serves as a minister to Ariana and her mother. Memorandum, *supra* note 1, at 5.

108. Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 129 (1st Cir. 2004).

109. Memorandum, *supra* note 1, at 4.

110. *Id.*

111. Church of Body Modification, Mission Statement, http://uscobm.com/mission-statement/ (last visited Oct. 21, 2011).

and what they can do.[112] Furthermore, members of the Church "strive to share a positive message with everyone we encounter, in order to act as positive role models for future generations in the body modification community."[113] Thus, members of the Church honor all forms of body modification and those who choose to practice it safely, but also respect those who do not engage in these practices.[114]

Although school officials did not explicitly object to the notion of "body modification," those who do not approve of this behavior for secular reasons are unlikely to support this conduct for religious purposes. However, members of the Church practice rituals of body modification that have existed for thousands of years. For example, Indian tribes tattooed their bodies for religious purposes or indications of marriage.[115] Furthermore, while Buddhists are characterized as docile believers, the practice of body modification, including burning of their bodies, is a historical practice of Chinese Buddhists.[116] Setting fire to one's body allowed Buddhists to be enlightened and "repa[y] the debts of his previous existences since the beginingless past… avoid [being reborn] in the world… [and] free of all outflow."[117] Because offering yourself to Buddha by burning your body is a legitimate Buddhist act,[118] this method of body modification obviously has religious significance. As such, it seems that no court, let alone school official, should deem the practices of the Church of Body Modification as "non-religious" since similar

112. Church of Body Modification, Statement of Faith, http://uscobm.com/statement-of-faith/ (last visited Oct. 21, 2011).

113. *Id.*

114. *Id*.

115. A.T. Sinclair, *Tattooing of the North American Indians*, 11 AM. ANTHROPOLOGIST, NEW SERIES, no. 3, Jul.-Sep., 1909 at 362, 368, 374. Eskimo women had multiple lines tattooed on their chins to indicate marriage, while an unmarried girl was generally marked with one line on her chin when she reached puberty. *Id*. at 374.

116. James A. Benn, *Where Text Meets Flesh: Burning the Body as an Apocryphal Practice in Chinese Buddhism*, 37 HISTORY OF RELIGIONS, no. 4, May 1998 at 295 n.1. Buddhist monks and nuns burned off or branded their arms and fingers as a form of autocremation of the living body, or burned incense on the crown of the head at ordination. *Id.* at 296.

117. *Id*. at 299, 300.

118. *Id.* at 312.

practices are seen in Buddhism, a religion recognized by courts[119] and presumably school districts.

The Church of Body Modification's status as a tax-exempt organization in Pennsylvania since 2008 also supports its religious nature.[120] Section 501(c)(3) of the Internal Revenue Code exempts organizations organized and operated exclusively for religious purposes.[121] Interestingly, to gain tax-exemption as a religious organization, courts avoid judging the validity or truth of the organization's religious beliefs.[122] However, the beliefs must still be religious in nature as opposed to personal.[123] Therefore, because the Church was granted tax-exempt status, at the very least, the IRS recognizes the Church of Body Modification as a religious organization that preaches religious beliefs to its members rather than a secular lifestyle. This notion is in direct conflict with the Johnston County School District's essential rejection of Ariana's religious beliefs.

Furthermore, the Church of Body Modification deserves recognition as a valid religion because the First Circuit seemed to acknowledge the religious nature of the Church within the context of a Title VII claim.[124] In 2004, Kimberly Cloutier made an unsuccessful Title VII religious discrimination claim when she sought an

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119. The Court did not expand the definition of religion, but gave recognition to religions like Buddhism and Taoism. *Torcaso v. Watkins,* 367 U.S. 488, 495 (1960) (dictum).

120. Memorandum, *supra* note 1, at 4.

121. I.R.C. § 501(c)(3) (2011). The organizational test requires that an organization is organized exclusively for one or more exempt purposes only if its articles of organization (a) Limit the purposes of such organization to one or more exempt purposes; and (b) Do not expressly empower the organization to engage, otherwise than as an insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purposes. 26 C.F.R. § 1.501(c)(3)-1 (2011). To satisfy the operational test, first, the organization must engage primarily in activities which accomplish one or more of the exempt purposes specified in I.R.C. § 501(c)(3). Church of Scientology v. Comm*.,* 823 F.2d 1310, 1315 (9th Cir. 1987). Second, the organization's net earnings may not benefit private shareholders or individuals. *Id.* Third, the organization must not use a substantial part of its resources to influence legislation or political campaigns. *Id.* Lastly, the organization must serve a valid public purpose and confer a public benefit. *Id*.

122. Church of the Chosen People v. United States, 548 F. Supp. 1247, 1252 (Minn. 1982).

123. *Id.*

124. *See* Cloutier v. Costco Wholesale Corp., 311 F. Supp. 2d 190, 199 (D. Mass. 2004) [hereinafter Cloutier v. Costco Wholesale Corp.].

exemption from Costco Wholesale Corporation's dress code.[125] As a member of the Church of Body Modification, Cloutier has multiple tattoos and an eyebrow piercing.[126] However, the Costco dress code prohibits facial piercings, and when Cloutier's supervisor asked her to remove the piercing, Cloutier explained that she wore the eyebrow ring for religious purposes.[127] Unwilling to remove her piercing, Cloutier suggested that she be allowed to cover her eyebrow piercing with a flesh-covered band-aid while at work, but the Costco store manager rejected this proposition.[128] Costco subsequently agreed to allow Cloutier to wear a plastic retainer in place of the eyebrow piercing or a band-aid over the earring, but Cloutier asserted that neither of these accommodations were sufficient because she interpreted the faith as requiring her to display her piercings at all times.[129] Costco refused to exempt Cloutier from the dress code, arguing that this accommodation would interfere with its ability to maintain the professional appearance of employees within their stores, thereby creating an undue hardship for its business.[130] The District Court agreed with Costco and Cloutier appealed.[131]

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125. Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 128 (1st Cir. 2004) [hereinafter Cloutier]. Cloutier also alleged a violation of her civil rights under state law, MASS. GEN. LAWS ch. 151B § 4(1A). *Id*.

> It shall be unlawful discriminatory practice for an employer to impose upon an individual as a condition of obtaining or retaining employment any terms or conditions, compliance with which would require such individual to violate, or forego the practice of, his creed or religion as required by that creed or religion … As used in this subsection, the words "creed or religion" mean any sincerely held religious beliefs, without regard to whether such beliefs are approved, espoused, prescribed or required by an established church or other religious institution or organization.

MASS. GEN. LAWS ANN. ch. 151B § 4(1A) (West 2010).

126. *Cloutier*, 390 F.3d at 128-29.

127. *Id*. at 129. Starting as an employee in the deli department in 1998, Cloutier was asked to remove all of her jewelry to comply with the dress code, but she refused, and requested to be transferred to a front-end position where Costco employees were permitted to wear facial jewelry. *Id*. at 128. In March 2001, Costco further revised its dress code, applying the no-facial-jewelry policy to all employees. *Id*. at 129.

128. *Id*.

129. *Id.* at 130.

130. *Id*. According to 42 U.S.C.A. § 2000e(j), "an employer must offer a reasonable accommodation to resolve a conflict between an employee's sincerely held religious belief and a condition of employment, unless such an accommodation would create an undue hardship for the employer's business." *Id.* at 133.

131. *Cloutier*, 390 F.3d at 132.

For Cloutier to have a successful Title VII claim under 42 U.S.C § 2000e-2(a), she must satisfy a two- part test [132] Cloutier is first required to establish a prima facie case of religious discrimination.[133] If the case is established, the burden then shifts to the employer to show that it made a reasonable accommodation for the religious practice or that any accommodation would result in undue hardship.[134]

To satisfy the first element of a prima facie case, the plaintiff must prove that a belief is religious and that it is sincerely held.[135] Within Title VII, the term "religion" also lacks a clear definition,[136] but can include beliefs that are uncommon, illogical or not part of a formal church.[137] As such, the District Court acknowledged the Church of Body Modification as a religion, but eventually rejected Cloutier's claim because her belief in displaying her facial piercings at all times was not sincerely held.[138] The court properly questioned the sincerity of Cloutier's beliefs because, at first, she was

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132. It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C.A § 2000e-2a (West 2010).

133. *Cloutier v. Costco Wholesale Corp.*, 311 F. Supp. 2d at 195. A prima facie case is established if the plaintiff shows that (1) a bona fide religious practice conflicts with an employment requirement, (2) he or she brought the practice to the employer's attention, and (3) the religious practice was the basis for the adverse employment decision. *Id*. (citing E.E.O.C. v. Union Independiente de la Autoridid de Acueductos y Alcantarillados de Puerto Rico, 279 F.3d 49, 55 (1st Cir. 2002)).

134. *Cloutier*, 390 F.3d at 133. An accommodation constitutes an "undue hardship" if it would impose more than a *de minimis* cost on the employer. *Id.* at 134. (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977)). The District Court acknowledged that Costco has a legitimate interest in presenting a workforce to the public that maintains a reasonably professional appearance, and granting this exemption would constitute as an undue hardship because it adversely affects Costco's public image. *Id.* at 135, 136.

135. *Cloutier v. Costco Wholesale Corp.*, 311 F. Supp. 2d at 196.

136. *See id*. at 195. Religion "encompasses 'all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's … religious observance or practice without undue hardship on the conduct of the employer's business.'" *Id*.

137. Daniel R. Kelly & Brian T. Benkstein, *KARMA, DOGMA, DILEMMA: RELIGIOUS ACCOMMODATION AT WORK*, 66 JUL BENCH & B. MINN. 26, 27 (2009).

138. *See Cloutier v. Costco Wholesale Corp.*, 311 F. Supp. 2d at 199.

willing to cover the eyebrow piercing.[139] The court therefore held that the religion did not require Cloutier to display her eyebrow ring at all times; rather, such a belief was Cloutier's personal interpretation of the religion.[140]

This case is important because the District of Massachusetts acknowledged the religious nature of the Church of Body Modification, but refrained from granting the organization formal recognition[141] because Cloutier raised doubts about the religion's tenets. Whereas Cloutier's beliefs were questionable because she initially offered to cover her eyebrow piercing, Ariana has never removed her nose stud nor offered to cover it.[142] Unlike the District of Massachusetts in *Cloutier*, here, the Eastern District of North Carolina has no reason to doubt the sincerity of Ariana's Iacono's beliefs. Even though the school district would have permitted Ariana to return to school had she worn a band-aid or a spacer in place of the stud, the Iacono's have consistently held that covering Ariana's piercing would contradict the Church's practices.[143]

To argue Ariana's belief in displaying her nose stud at all times is merely a personal choice, the school district can assert that the Church of Body Modification website does not state that a member's body modifications must be visible at all times, or that temporarily removing body modifications violates their religious tenets.[144] Because this website is the primary mode for reaching adherents of the religion,[145] and this was the material Nikki Iacono proffered to school officials to grant her daughter an exemption from the dress code,[146] the website's failure to state that members are required to display their body modifications at all times lends support to the school district's personal choice argument. Conversely, Ariana should stress that the website is not a complete

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139. *See Cloutier*, 390 F.3d at 131. The District Court also discredits the sincerity of Cloutier's belief that her facial piercings must be displayed at all times because she did not make the same argument in regard to the tattoos on her upper arms. *Cloutier v. Costco Wholesale Corp.*, 311 F. Supp. 2d at 199. "The temporary covering of plaintiff's facial piercings during working hours impinges on plaintiff's religious scruples no more than the wearing of a blouse, which covers plaintiff's tattoos." *Id.*

140. *See Cloutier*, 390 F.3d at 131.

141. *Id*.

142. Memorandum, *supra* note 1, at 5, 11.

143. *Id.* at 11.

144. *See Cloutier*, 390 F.3d at 129.

145. *Id.*

146. Memorandum, *supra* note 1, at 7.

statement of the Church's beliefs. Furthermore, First Amendment protection does not extend only to religious beliefs shared by all of the members of a religious sect.[147] Therefore, while some members may not believe in displaying his or her body modifications at all times, this does not prohibit protection of the belief as long as it is religious in nature.

Although Ariana has not filed a Title VII claim, the First Circuit's decision in *Cloutier* weighed heavily on the argument that allowing Cloutier to wear her eyebrow piercing would place an undue hardship on Costco.[148] However, exempting Ariana from the school dress code would not place an undue burden on Clayton High School whatsoever. Unlike Costco, who possessed a legitimate interest in upholding the professional appearance of its employees for business purposes, the Johnston County School District has emphasized that implementation of the dress code is a means of protecting the health and safety of other students, which thereby maintains an effective learning environment.[149] While the health and safety of students are certainly legitimate concerns, Ariana's nose stud poses no harm to the other students at Clayton High School. Therefore, since the school need not take any additional steps to ensure the safety of students if an exemption is granted to Ariana, the school district will in no way be unduly burdened. However, as discussed previously in this Note, a student in public school, as opposed to an employee in the workplace, has more difficulty challenging a school's "legitimate interests" in a constitutional violation claim.

V. OVERCOMING EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH

The last impediment for Ariana to overcome is the Supreme Court's ruling in *Employment Division, Department of Human Resources of Oregon v. Smith*. Up until 1990, the Supreme Court em-

147. Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707, 715-16 (1981). "Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation." *Id*. at 716.

148. *See Cloutier*, 390 F.3d at 135. Even though no customers submitted complaints regarding Cloutier's appearance, the court determined that her appearance would detract from Costco's image and standard of professionalism. *Id*.

149. *See* Johnston County Schools - Policy Code: 4220 - Student Dress and Appearance, *supra* note 32.

ployed strict scrutiny to review free exercise claims. However, *Smith* led to the imposition of a less restrictive standard.[150] "[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes conduct that his religion prescribes,"[151] unless a law is designed with malice towards a specific religious group or practice.[152] A policy concern is that if someone were entitled to excuse themselves from compliance with the law because of his or her religious beliefs, every citizen in effect would become a "law unto himself."[153] Additionally, the Supreme Court feared that judges would be unable to properly balance the importance of general laws against the importance of an individual's religious convictions.[154] In light of these concerns, the Supreme Court upheld an Oregon criminal statute forbidding the use of peyote and rejected the argument of a Native American Church, who asserted that upholding this law conflicted with their religious practice involving use of the illegal drug.[155]

Due to the implications of this ruling, there are two potential ways for plaintiffs similar to Ariana to persuade a court that he or she should be exempted from neutral, generally applicable school policies. One option is to rely on the Religious Freedom Reformation Act of their state. Although the federal Religious Freedom Reformation Act of 1993 (RFRA) was deemed unconstitutional,[156] several states, including Texas, proceeded to enact legislation to provide protection to religious practices originally provided by the RFRA, as well as additional protections not explicitly stated in their State or United States Constitutions.[157] The Texas Religious Reformation Freedom Act (TRFRA) specifically prevents any gov-

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150. Michael E. Lechliter, *The Free Exercise of Religion and Public Schools: The Implications of Hybrid Rights on the Religious Upbringing of Children*, 101 MICH. L. REV. 2209, 2211 n.12 (2005).

151. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990).

152. *Id*.

153. *Id.* (citing Reynolds v. United States, 98 U.S. 145, 166-67 (1878)).

154. Lechliter, *supra* note 150, at 2217. Although Justice O'Connor argues that "the 'parade of horribles' in the text 'demonstrate … that courts have been quite capable of … strik[ing] sensible balances between religious liberty and competing state interests,'" the Supreme Court argues that it is horrible to contemplate federal judges regularly balancing against the importance of general laws against the significance of religious practice. *Smith*, 494 U.S. at 889.

155. *Smith*, 494 U.S. at 890.

156. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

157. A.A. v. Needville Indep. Sch. Dist., 611 F.3d 248, 259 (5th Cir. 2010).

ernment agency in Texas from "substantially burdening a person's free exercise of religion" unless it "demonstrates that the application of the burden to the person … is in furtherance of a compelling government interest; and … is the least restrictive means of furthering that interest."[158]

The Fifth Circuit recently enforced the TRFRA for the second time after its enactment in 1999 in *A.A. v. Needville Independent School District*.[159] Similar to the exemption that Ariana seeks from the Johnston County School District dress code, the Fifth Circuit exempted a Native American male student from the Needville Independent School District dress code, requiring that "boys' hair shall not cover any part of the ear or touch the top of the standard collar in back."[160] Despite A.A.'s sincerely held belief in the Native American faith, he was denied an exemption from the dress code by the school district.[161] However, the school board offered A.A. the opportunity to attend school if he wore his hair in a bun on the top of his head, or in a tightly woven single braid down his back with

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158. *Id*. at 258.

> (a) Subject to Subsection (b), a government agency may not substantially burden a person's free exercise of religion.
>
> (b) Subsection (a) does not apply if the government agency demonstrates that the application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that interest.
>
> (c) A government agency that makes the demonstration required by Subsection (b) is not required to separately prove that the remedy and penalty provisions of the law, ordinance, rule, order, decision, practice, or other exercise of governmental authority that imposes the substantial burden are the least restrictive means to ensure compliance or to punish the failure to comply.

TEX. CIV. PRAC. & REM. CODE. ANN. § 110.003 (Vernon 2011).

159. *See generally Needville Indep. Sch. Dist.*, 611 F.3d at 259.

160. *See id.* at 253. A.A. is a prospective kindergartner whose parents have chosen to raise him in accordance with Native American tenets. *Id.* To keep with religious doctrines of the Native American faith, A.A. has never cut his hair and wears it down braided or unbraided. *Id.* According to Arocha, A.A.'s father, long hair is an outward expression of who the Native American people are, where they come from, their ancestry, and where they are going in life. *Id*. at 254. The Arochas alleged that the dress code enforced by the Needville School District violated A.A.'s right to the free exercise of religion under the First and Fourteenth Amendments, similar rights under the TRFRA, and A.A.'s parent's Fourteenth Amendment Due Process right to raise A.A. in accordance with the Native American religion. *Id.* at 257. Arocha explained to the court that each braid has a deep meaning and should be worn in plain sight. *Id.*

161. *Id*. at 256.

the hair behind his ears, out of his eyes, and with the braid tucked into the collar of his shirt.[162]

A.A. succeeded on his TRFRA claim[163] because the school district failed to establish that its hair length regulation – although expounding the compelling state interest of maintaining order in the school – was the least restrictive means for furthering this interest.[164] The school district suggested that exempting A.A. from the dress code would conflict with the school's interest in instilling discipline and asserting authority, a goal that is best achieved by having A.A. bear a closer resemblance to the other male students.[165] The Fifth Circuit held that any suggestion of uniformity in the context of a school fails to satisfy the compelling interest standard.[166] In an elementary school, where regulation of hair and dress is meant in part to instill discipline and to teach respect for authority, the act of a kindergartner wearing his hair for religious purposes is not representative of rebellion.[167] Furthermore, the school district did not suggest that A.A.'s visibly long hair would diminish obedience and discipline among the student population.[168]

Although A.A. was able to circumvent the ruling in *Smith* due to his reliance on the TRFRA, North Carolina has not implemented a Religious Freedom Restoration Act in response to the

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162. *Id.* Finding these solutions inadequate, A.A. attended the first few days of school wearing his hair in two long braids until he was disciplined with in-school suspension. *Id*. at 257.

163. *Id*. at 272. To succeed on a claim under the TRFRA, A.A. needed to demonstrate that the government's regulations burdened his free exercise of religion and that the burden was substantial. *See id*. at 259 (citing Merced v. Kasson, 577 F.3d 578, 588 (5th Cir. 2009)). If A.A. satisfied these two prongs, the government still could have prevailed had it established that its regulations further a compelling governmental interest and that the regulations are the least restrictive means for furthering that interest. *Id.* (citing *Merced*, 577 F.3d at 588).

164. *See* A.A. v. Needville Indep. Sch. Dist., 611 F.3d 248, 267 (5th Cir. 2010). Similar to the goals of the Johnston County School District, the Needville School District argues that a grooming policy for male students exists within the school dress code for the purposes of teaching hygiene, instilling discipline, preventing disruption, avoiding safety hazards, and asserting authority. *Id*. at 266.

165. *Id.* at 269.

166. *See id.* For example, uniformity in the context of the military, police departments or prison is considered a compelling interest because discipline is a fundamental value of these institutions. *See id*. at 270 (citing Cutter v. Wilkinson, 544 U.S. 709, 723 (2005)).

167. *See id*. at 271.

168. *Id*.

revocation of the RFRA in 1997.[169] If North Carolina passed an act similar to the Texas Act, which afforded greater protection to religious practices, it seems likely that the Eastern District of North Carolina would exempt Ariana from the school dress code. Like the Needville Independent School District, the Johnston County School District's arguments lack merit. As determined by the Fifth Circuit, the school district cannot rely on the notion that failure to exempt students from the dress code to maintain a uniform appearance amongst the students is an interest compelling enough to restrict religious practice.[170]

Because North Carolina lacks a state RFRA, Ariana's second option, and the option she hopes to succeed under, is the "hybrid-rights exception" acknowledged in *Smith*.[171] The Supreme Court noted that rejection of the Native American's Free Exercise claim in *Smith* was not new because the Court previously held that neutral, generally applicable laws were only inapplicable when a religiously motivated action involved the Free Exercise Clause, and was "in conjunction with other constitutional protections."[172] This "hybrid-rights exception" was first utilized in *Wisconsin v. Yoder*. In *Yoder*, an Amish family contested a criminal conviction for violating a state compulsory schooling law, arguing that the law violated the parents' free exercise right and substantive due process right to direct their child's religious upbringing.[173] A parent's right to control his or her child's religious upbringing has existed since the early 1900s,[174] and the Supreme Court in *Smith* specifically

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169. *See* Charles C. Haynes, *When the First Amendment Doesn't Help, Texas Will*, http://www.firstamendmentcenter.org/when-the-first-amendment-doesn't-help-texas-will (last visited Jan. 14, 2011). States that have enforced Religious Freedom Restoration Acts include Texas, Pennsylvania, Illinois, Florida, Arizona, Connecticut, Rhode Island, South Carolina, Alabama, Idaho, New Mexico, Oklahoma, Missouri and Virginia. *Id*.

170. *See Needville Indep. Sch. Dist.,* 611 F.3d at 269.

171. Memorandum, *supra* note 1, at 16.

172. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 881 (1990).

173. Wisconsin v. Yoder, 406 U.S. 205, 207, 214 (1972).

174. *See generally* Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). This case concerns a compulsory education law in which children aged eight through sixteen were required to attend public school. *Id.* at 530. Challenged by private schools losing student enrollment, the Supreme Court found this law to be unconstitutional due to a parent's right to direct the education of their children, including the right to send a child to a private school with a religious focus. *See id*. at 531, 534-35.

acknowledged a hybrid right involving parental rights acting in conjunction with the Free Exercise Clause.[175]

Despite creation of the hybrid-rights exception in *Smith*, Michael E. Lechliter explains that the Supreme Court has failed to explain the scope of this exception and how courts should handle these claims.[176] Justice Souter acknowledged the confusion surrounding the exception in his concurring opinion in *Church of the Lukumi Babalu Aye. Inc. v. City of Hialeah* stating:

> [I]f a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.[177]

Because of the misapplication of the hybrid-rights exception, Lechliter argues that the free exercise right and parental right should not be examined separately and then added together; instead they must be incorporated together at the outset to review a free exercise claim.[178] Lechliter urges that the language used in *Yoder* supports this "combined" analysis.[179] "[W]hen the interests of parenthood are combined with a free exercise claim … more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment."[180] Therefore, a judge should

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175. *Smith*, 494 U.S. at 882.

176. Lechliter, *supra* note 150, at 2212.

177. Church of the Lukumi Babalu Aye. Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring). Later in the opinion, Justice Souter adds that because *Smith* did not overrule prior free exercise cases that were fundamentally different than the rule declared in *Smith*, this decision has led to tension within free exercise law. *Id*. at 574.

178. Lechliter, *supra* note 150, at 2215. Lechliter's argument rests on the premise that the *Smith* opinion fails to note the importance of the two rights acting "in conjunction" when petitioners are seeking implication of a hybrid-right exception. *Id.* at 2218.

179. *Id.* at 2216.

180. Wisconsin v. Yoder, 406 U.S. 205, 233 (1972).

apply strict scrutiny and evaluate parental claims to ensure a sufficient hybrid-right exists, then balance that right against a school's narrow interest in not granting an exemption.[181] Despite the argument in *Smith* that federal judges are not well equipped to balance a free exercise of religion interest against the interests of the state, balancing interests is central to the role of judges in our society.[182] Furthermore, *Yoder* also mandates a careful weighing of interests to help guide judges in the hybrid-rights exception context.[183] By applying this balancing test, Lechliter concludes that a Free Exercise challenge involving religious acts viewed in conjunction with parental rights will receive a higher degree of protection.[184]

While confusion may surround this exception, it is nonetheless important as a means to safeguard minority religions.[185] The District Court for the Eastern District of North Carolina acknowledged the hybrid-rights exception in *Hicks v. Halifax County Board of Education*.[186] Catherine Hicks sought to have her great-grandson exempted from a uniform policy requiring all elementary school children to wear a blue shirt and khaki pants.[187] Although the uniform policy enforced in Halifax County does not contain a provision permitting an exemption from the dress code for religious purposes, Hicks argues that failure to exempt her great-

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181. *See* Lechliter, *supra* note 150, at 2221, 2239.

182. *See id.* at 2240. *See also* David L. Faigman, *Constitutional Adventures in Wonderland: Exploring the Debate Between Rules and Standards Through the Looking Glass of the First Amendment*, 44 HASTINGS L.J. 829, 838 (1993). Faigman states:

> [B]ecause rules are a function of the clash between majoritarian values and individual liberty, the Court must assume the responsibility for making the difficult choices along the constitutional frontier. Inevitably, therefore, when the Constitution is implicated, the Court must weigh the social importance of the government action against the value of individual liberty infringed by that action.

Id.

183. *See* Lechliter, *supra* note 150, at 2240. "[C]ourts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally applicable educational requirements." *See Yoder*, 406 U.S. at 235.

184. *See Lechliter, supra* note 150 at 2220.

185. *Id.* at 2241. Lechliter supports the necessity of protecting minority religions on the grounds that the House of Representatives voted unanimously in favor of the RFRA, and that the Senate approved the RFRA by a vote of 97-3. *Id*. at 2241 n.218.

186. *See* Memorandum, *supra* note 1, at 16.

187. 93 F. Supp. 2d 649, 652-53 (E.D.N.C. 1999).

grandson, Aaron Ganues, from the policy would infringe on her religious beliefs.[188] She explains wearing this uniform signifies "allegiance to the spirit of the anti-Christ, a being that requires uniformity, sameness, enforced conformity, and the absence of diversity."[189] Aaron's inability to choose his clothing, violates Hicks' religion and way of life, which focuses on "oppos[ing] the coming of the anti-Christ and prevent[ing] the programming of our children to accept the anti-Christ, his orders, and his mark."[190]

Initially determining the uniform policy as a neutral, generally applicable regulation,[191] the District Court applied the hybrid-rights exception because the sincerity of Hicks beliefs were not contested, and she alleged that the policy violated her free exercise right as well as her parental right to direct the upbringing of Aaron.[192] The District Court appears to agree with Lechliter's interpretation of the hybrid-rights exception by applying the language from *Yoder*.[193] Furthermore, it suggests that if a parent's free exercise right is alone not sufficient to qualify for an exemption from a neutral, generally applicable law, combining that right with the parent's individual right to direct his or her child's upbringing may be sufficient to trigger heightened scrutiny.[194] Therefore, the Dis-

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188. *Id*. The policy as initially drafted included an opt-out provision in which a student could argue "wearing a school uniform violates [that] student's sincerely held religious belief." *Id.* at 642-53.

189. *Id.* at 653 (citing Am. Compl. P. 20; Hicks Decl. PP 10-12).

190. *Id.* at 653-54 (citing Hicks Decl. PP 13-14). Catherine Hicks proclaims to be a self-described minister and prophetess, and upon explanation of her religious beliefs to the Halifax County School Board, officials were unable to figure out what "anti-Christ" Hicks was referring to. *Id*. at 653.

191. *Id.* at 655. Hick's argues that the dress code was implemented in spite of her religious beliefs, and sought to rely on the holding in *Church of the Lukumi Babalu Aye. Inc. v. City of Hialeah*, where the Supreme Court determined facial neutrality of a law is not determinative, and the Free Exercise Clause exists to protect plaintiffs from government hostility that is masked or overt. *Id.* (citing Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 534 (1993)). However, because there was no hostility on behalf of the School Board or intention to suppress her religious beliefs by implementing this policy, Hicks' argument failed. *Id.* at 655-56.

192. Hicks v. Halifax Cnty. Bd. of Educ., 93 F. Supp. 2d 649, 657 (E.D.N.C. 1999). Hicks also attempts to implicate the hybrid-rights exception by alleging that Aaron's right to freedom of speech was violated, but this argument failed as well. *Id.*

193. *See id.* at 662.

194. *Id.* at 662 (citing William L. Esser IV, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smokescreen?*, 74 NOTRE DAME L. REV. 211, 218-19 (1998)).

trict Court also determined that these rights were sufficient to invoke strict scrutiny.[195]

There is no subsequent case law indicating if Aaron Ganues was exempted from the uniform policy on the grounds of the hybrid-rights exception. However, because the Eastern District of North Carolina will be hearing Ariana's claim and has previously applied the hybrid-rights exception amid the confusion surrounding this right, Ariana has a significant advantage. Unlike the dress code in *Hicks*, the Johnston County dress code includes a provision permitting exemption from the policy for religious purposes. Thus, denial of Ariana's request for exemption violates two constitutional rights: (1) Ariana's right to religious freedom and (2) Nikki Iacono's substantive due process right to raise Ariana as a member of the Church of Body Modification. Accordingly, the Eastern District of North Carolina should apply the hybrid-rights exception, which would result in Ariana's exemption from the school dress code.[196]

CONCLUSION

Ariana Iacono will present interesting questions to the Eastern District of North Carolina; questions that often amount to a great deal of discomfort amongst judges. Despite the history and numer-

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> [C]learly, what the Court must have meant is that a less than sufficient free exercise claim, plus a less than sufficient claim arising under a different part of the Constitution, together trigger the compelling interest test. In other words, the cumulative effect of two or more partial constitutional rights equals one sufficient constitutional claim. Put simply, two losers equals one winner.

Id. (citing Esser, at 219).

195. *Hicks*, 93 F. Supp. at 663. Recognizing that the Supreme Court in *Smith* failed to establish a specific standard of review, the District Court acknowledges that other post-*Smith* courts have interpreted *Smith* to require strict scrutiny in hybrid-rights cases. *Id*. (citing Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 711-12 (1999) (explaining that the compelling interest will apply where plaintiffs have demonstrated hybrid-rights claims)).

196. To bolster their argument, the ACLU contends the Johnston County School Board will be unable to satisfy strict scrutiny. Memorandum, *supra* note 1, at 17. In order for the School Board to satisfy strict scrutiny, it must prove that the dress code is narrowly tailored and only eliminates the exact "evil" it is designed to eliminate. *Id.* (citing Ward v. Rock Against Racism, 491 U.S. 781, 804 (1989)). Despite the safety concerns that the Board has raised, it cannot "show that there is a compelling government interest in prescribing the precise locations on a student's head to which jewelry may be affixed" because smooth jewelry on a flat surface such as the face is unlikely to cause harm to other students. *Id*.

ous opinions supporting freedom to practice one's religion, these discussions have never led to a concrete definition of religion. Without a guiding definition, courts have continued to struggle to determine when religious freedom should outweigh the government's interests and vice versa. While implementation of the sincerity test sought to facilitate this process, it leaves open the question of what constitutes a "religious" belief and if courts should grant protection to beliefs that seem purely crazy, or even illegal. Unfortunately, for proponents of religious freedom, *Smith* allowed courts to implement a more rigid rule that seemingly permits judges to circumvent the process of determining if a belief is religious in nature. Thus, a Free Exercise claim will be settled relatively quickly if a neutral law of general applicability is involved, and the ruling will most likely not be in favor of the petitioner seeking religious protection.

These conditions combined with the skepticism surrounding Ariana's religious beliefs make Ariana's Free Exercise claim look grim. However, the Eastern District of North Carolina cannot judge the content of Ariana's belief system, but only the sincerity of her beliefs. As evidenced, it is clear that Ariana sincerely believes she should wear her nose stud at all times. The "unusual" practices of the Church of Body Modification should not prevent the court from properly granting Ariana an exemption from the dress code. Furthermore, the ACLU is correctly attempting to implicate the hybrid-rights exception because Nikki Iacono has been denied her constitutional right to raise Ariana to possess the same beliefs as her in the Church of Body Modification. With the strength of this right, it is predicted that the court will find that Johnston County School District's refusal to exempt Ariana from its dress code policy satisfied no compelling interest.

While granting religious protection to Ariana would appear to benefit individuals possessing untraditional religious beliefs, the court's decision will likely rest on satisfaction of a hybrid-rights exception. Therefore, any individual who is unable to assert a second constitutional violation within their claim will likely lose a religious freedom argument. Hypothetically speaking, suppose one of Ariana's fellow students also possesses unique religious beliefs. If the parent of that student does not share those same beliefs, there can be no implication of the hybrid-rights exception, and therefore, no exemption from a school policy which conflicts with the student's belief. As such, any decision granted in favor of Ariana is simply a personal victory for she and her mother. Protection

for religious freedom will remain limited and courts will still lack a guiding definition of religion.

EPILOGUE

Prior to the publication of this Note, the Johnston County School Board settled this matter outside of court on June 6, 2011.[197] Under the conditions of the settlement, Ariana was permitted to wear her nose stud at Clayton High School so long as she remains a member of the Church of Body Modification.[198] Her suspensions will no longer appear on her disciplinary record and the school district agreed to pay $15,000 in attorney fees and court costs.[199] Furthermore, on September 13, 2011, the Johnston County School District amended the school dress code.[200] The dress code now permits students to wear studs and rings in their noses, lips and eyebrows.[201] If the piercing is found to be distracting or dangerous, the principal is authorized to ask the student to remove the piercing.[202] Additionally, students who violate the dress code for the first time will have the opportunity to change clothes rather than serving a ten-day suspension as punishment.[203] Superintendent Ed Croom stated that these changes were not related to the lawsuit involving Ariana.[204]

197. Tom Breen, *Student Can Still Wear Nose Stud to Class*, ABILENE REPORTER-NEWS, June 9, 2011, http://www.reporternews.com/news/2011/jun/09/student-can-still-wear-nose-stud-to-class/?print=1 (last visited Oct. 29, 2011).
198. *Id*.
199. *Id.*
200. Stacy Davis, *A Year After Lawsuit, Johnston Schools OK Facial Piercings*, WRAL.com, Sept. 13, 2011, http://www.wral.com/news/local/story/10126811/ (last visited Oct. 29, 2011).
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*