William & Mary Bill of Rights Journal

Volume *31 (2022-2023)*
Issue 3

Article 6

3-2023

# The False Promise of Expanded Religious Liberty Rights After the COVID-19 Cases and Fulton v. City of Philadelphia

Shlomo C. Pill

# THE FALSE PROMISE OF EXPANDED RELIGIOUS LIBERTY RIGHTS AFTER THE COVID-19 CASES AND *FULTON V. CITY OF PHILADELPHIA*

Shlomo C. Pill*

## INTRODUCTION

This Article explains and critiques the Supreme Court's recent reframing of religious free exercise rights. This change was initiated by a series of "shadow docket" rulings issued in late 2020 and early 2021 in which the Court sustained religious challenges to COVID-19 capacity restrictions and mask mandates. That doctrinal shift was confirmed and reinforced by the Court's subsequence decision in *Fulton v. City of Philadelphia*.[1] In these cases, the Court significantly narrowed the *Smith* test, which, since 1990, had subjected neutral and generally applicable laws that burden religious practice to only rational basis review. Under the Court's new free exercise regime, however, facially neutral laws are ostensibly subject to strict scrutiny whenever they fail to accommodate religious practices while permitting any analogous secular conduct. After tracing the development of the Court's free exercise jurisprudence and explaining the dramatic doctrinal shift that occurred during the height of the COVID-19 pandemic, this Article criticizes the Court's new approach for being analytically incoherent, manipulable, and unworkable. The Article goes on to justify these concerns by examining the Court's own inconsistency in responding to free exercise challenges to COVID-19 vaccination mandates.

Part I outlines and explains the development of the Court's free exercise jurisprudence from its origins in *Reynolds v. United States*,[2] to its more recent iteration in *Employment Division v. Smith*,[3] and the open questions that have lingered due to several critical ambiguities in *Smith* and its progeny.

Part II describes how the Court largely resolved these questions during the COVID-19 pandemic, establishing what appears to be a new, more expansive framework for constitutionally required exemptions from laws that burden religious practice. Early in the pandemic, the Court continued to apply the *Smith* test and

* Senior Lecturer, Emory University School of Law; Paul and Marion Kuntz Scholar in Law and Religion, The Center for the Study of Law and Religion; Managing Editor, *Canopy Forum* (canopyforum.org); SJ.D 2016, Emory University School of Law; LLM 2013, Emory University School of Law; JD 2012, Fordham Law School. I would like to thank Kara McCord, Ana Stallings, Robert Schmidt, and all stellar students (or former students) at Emory Law School, for their assistance in researching and editing this Article.

[1] *See generally* 141 S. Ct. 1868 (2021).

[2] *See infra* Section I.A.

[3] *Id.*

declined to grant requests for emergency injunctions blocking the enforcement of capacity limitations that imposed burdens on religious gatherings. However, when Justice Ginsburg was replaced by Justice Barrett in late 2020, the Court abruptly changed direction. In a series of "shadow docket" cases challenging public health regulations that burdened religious worship, the Court narrowed the applicability of the *Smith* test, holding that even facially neutral laws are subject to strict scrutiny when they restrict religious practice while exempting analogous secular conduct.

Part III goes on to explain how the Court's new, more expansive conception of free exercise rights was confirmed and concretized in *Fulton v. City of Philadelphia*, in which the Court upheld a Catholic adoption agency's right to exemption from Philadelphia's non-discrimination policies for the certification of potential foster families.[4]

Finally, Part IV critically assesses the Court's new free exercise jurisprudence by highlighting that the new, narrow version of the *Smith* test is analytically incoherent, easily manipulable, and unworkable. These deficiencies are evidenced by how the Court has responded to religious liberty challenges to COVID-19 vaccination mandates, which are analogous to the earlier religious free exercise challenges to capacity restrictions and mask mandates. While the Court granted emergency injunctions against the enforcement of capacity limits on houses of worship, it has so far consistently refused to do so in cases challenging vaccination mandates. The differing results suggest that the Court's new version of the *Smith* test is flexible enough to allow the Court to protect religious practice from government regulation when it chooses, and to permit the Court to reject free exercise claims that it does not support. This is a troubling and unprincipled basis for evaluating religious liberty rights, especially as the Court is likely to soon face free exercise challenges to state abortion restrictions.

## I. RELIGIOUS FREE EXERCISE'S EBB AND FLOW

This Part describes the evolution of the Court's free exercise jurisprudence from the 1870s through 2020. Sections I.A–C trace and explain the development of the Supreme Court's free exercise jurisprudence from its origins in *Reynolds* to the drastic curtailment of religious liberty rights in *Smith*. Section I.D concludes this discussion by explicating several important questions that were left unanswered by the Court's decision in *Smith* and which therefore set the stage for shifts in religious free exercise rights during the COVID-19 pandemic.

### *A. Phase 1: The* Reynolds *Test*

The first phase of the Court's free exercise jurisprudence began in 1879 with *Reynolds v. United States*.[5] The case involved a First Amendment challenge to the

[4] 141 S. Ct. at 1882.

[5] *See generally* 98 U.S. 145 (1879).

Morrill Anti-Bigamy Act, an 1862 federal statute targeting the Mormon Church by—among other things—criminalizing the practice of plural marriage in the United States and its territories.[6] The plaintiff, a Mormon resident of Utah and secretary to Brigham Young himself, married a second wife and was subsequently charged under the Act in a planned test case to challenge the constitutionality of the anti-bigamy statute.[7] The trial court refused to instruct the jury to find Reynolds not guilty if it determined that he committed bigamy only in order to follow the teachings of his religion.[8] As a result, Reynolds was convicted and the verdict was upheld by the Utah Supreme Court.[9] On appeal to the Supreme Court of the United States, Reynolds argued that the conviction was unconstitutional because, by committing bigamy in fulfillment of his religion, he committed an act protected by the Free Exercise Clause of the First Amendment.[10]

In an unanimous decision, the Court rejected Reynolds's free exercise claim.[11] The Court relied on evidence from the Founding era—as well as older English precedent and history—to conclude that the First Amendment does not provide immunity from prosecution for the violation of otherwise valid conduct regulations.[12] More specifically, the Court drew a sharp distinction between religious belief and religiously motivated conduct; the Court held that while the First Amendment offers absolute protection for the former, it does not prevent government from penalizing the latter as a function of its ordinary police powers to regulate behavior for the general welfare of society.[13] The Court further supported its conclusion by observing that construing the First Amendment to permit illegal actions whenever such actions were motivated by religious conviction would lead to serious societal ills.[14] Religious motives could be used to shield all kinds of criminal acts from prosecution, thereby effectively making "professed doctrines of religious belief superior to the law of the land."[15] Moreover, the Court noted that since the First Amendment certainly precludes the government from restricting or prescribing the kinds of

---

[6] *See* Morrill Anti-Bigamy Act, ch. 126, 12 Stat. 501 (1862).

[7] *Reynolds*, 98 U.S. at 146, 148; Stephen Pepper, Reynolds*,* Yoder*, and Beyond: Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV. 309, 318 n.35 (1981).

[8] *Reynolds*, 98 U.S. at 150.

[9] *Id.* at 150–51.

[10] *Id.* at 161–62.

[11] *Id.* at 166–67.

[12] *Id.* at 162–66.

[13] *Id.* at 166–67; *see* Rodney K. Smith, *Getting Off on the Wrong Foot and Back on Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the* Reynolds *and* Everson *Decisions*, 20 WAKE FOREST L. REV. 569, 635 (1984) ("While Congress could not forbid anyone from forming religious *opinions*, religious *acts* that furthered those opinions could be withheld at the whim of the government in the interests of 'good order.'").

[14] *Reynolds*, 98 U.S. at 167.

[15] *Id.*

religious beliefs citizens may hold, and the construction urged by Reynolds would thus leave each individual free to adopt and practice any faith tradition they choose immune from legal constrain, this approach would effectively "permit every citizen to become a law unto himself."[16] For these reasons, the Court concluded that while the Free Exercise Clause prohibits Congress from regulating religious belief or opinion, it does not prevent government from regulating action, even when that action is religiously motivated.[17]

*Reynolds* thus established the first phase of the Supreme Court's free exercise jurisprudence: The Free Exercise Clause offers absolute protection for the right to hold religious beliefs but offers no special protection for religiously motivated conduct that violates otherwise valid criminal laws.[18] Consequently, lower courts applying the *Reynolds* test consistently upheld statutes that regulated religiously motivated conduct.[19]

### *B. Phase 2: The* Sherbert *Test*

The Court's approach to religious free exercise rights changed dramatically in 1963, when its ruling in *Sherbert v. Verner* ushered in a new era of dramatically expanded First Amendment protections against laws that burden religious practice.[20] Like most major doctrinal shifts by the Court, however, *Sherbert* was not a bolt of lightning breaking through the calm. Rather, *Reynolds*' sharp distinction between absolutely protected religious belief and completely unprotected religious conduct had already been eroded by a series of earlier decisions.[21] Also, as is true of numerous

---

[16] *Id.*

[17] *See id.* at 166 ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.").

[18] *See* Pepper, *supra* note 7, at 317 ("[The Court] did so, however, in a remarkably drastic manner: the clause was interpreted to apply to belief and opinion *only*; all action, even if religiously motivated, remained subject to the criminal law.").

[19] *See, e.g.*, Harden v. State, 216 S.W.2d 708, 711 (Tenn. 1948) (holding that the First Amendment did not prohibit Tennessee from convicting defendants for violating a statute prohibiting the handling of poisonous snakes, even though it was part of a religious ceremony); Coleman v. Griffin, 189 S.E. 427, 429 (Ga. Ct. App. 1936) (holding that a defendant's conviction for distributing religiously related material without written permission from a city manager should be upheld because the ordinance prohibited conduct and not religious beliefs); Commonwealth v. Beiler, 79 A.2d 134, 137 (Pa. Super. Ct. 1951) (holding that Amish parents were required to conform with the Commonwealth's compulsory education for children between the ages of eight and seventeen because education involves conduct and not religious beliefs).

[20] *See* Pepper, *supra* note 7, at 331 ("With *Sherbert v. Verner*, free exercise doctrine turned abruptly . . . . [T]he decision protects religiously motivated action from state interference, and the states criterion brings freedom of religion within the protection of the strictest limits upon governmental action."). *See generally* 374 U.S. 398 (1963).

[21] *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 170–71 (1944) (affirming conviction

other judicial turnabouts, these earlier cases did not address the *Reynolds* precedent, or indeed free exercise jurisprudence head on. Instead, these harbinger cases provided the right factual scenarios within which a new awareness and a different perspective on the connectedness of religious belief and religious conduct might grow and ultimately be explicated in *Sherbert*.

These precursors to the Court's repudiation of *Reynolds* and articulation of the *Sherbert* test include a line of cases decided in the 1930s and 1940s involving the prosecution of Jehovah's Witnesses and others for violating various anti-loitering and anti-solicitation ordinances wherein the Court's protection for First Amendment free speech rights coincided with religiously motivated illegal conduct. In *Lovell v. City of Griffin*,[22] the Court held that a city ordinance requiring anyone who sought to distribute literature to first obtain permission from the City Manager was a violation of plaintiff's right to freedom of the press because it imposed a prior restraint on the distribution of literary materials protected by the First Amendment. One year later, in *Schneider v. State*,[23] the Court resolved several consolidated challenges to local ordinances that prohibited the distribution of pamphlets or handbills on public streets. The Court ruled that while the Government has a legitimate interest in keeping streets clean of discarded handbills, this interest does not justify a total ban on the distribution of printed literature to people willing to receive it—an exercise of core First Amendment rights to freedom of speech and press.[24] While these cases were decided on freedom of speech and press grounds, they all involved plaintiffs that were Jehovah's Witnesses and who had been subject to prosecution under local ordinances for distributing religious literature in observance of their faith's religious dictates.[25]

The constitutional importance of plaintiffs' religious motivations for violating anti-solicitation ordinances was brought to the fore a year later in *Cantwell v. Connecticut*.[26] Unlike the previous cases, *Cantwell* did not concern a law prohibiting the free speech/press activity of distributing literature.[27] Instead, plaintiffs had been convicted under a Connecticut statute that required people to obtain permission from local government officials before soliciting funds from the public—an activity that would not fall within the protection of the free speech and press clauses of the First Amendment.[28]

The Court ruled that the challenged statute was an unconstitutional violation of the plaintiffs' right to freely practice their religion in violation of the First and

---

for violating child labor laws for having a child distribute religious pamphlets and engage in street preaching even though such practices are part of Jehovah's Witnesses religious practice).

[22] 303 U.S. 444, 451–53 (1938).

[23] 308 U.S. 147, 148 (1939).

[24] *Id.* at 162–63.

[25] *See Lovell*, 303 U.S. at 448, 452; *Schneider*, 308 U.S. at 158, 161.

[26] *See generally* 310 U.S. 296 (1940).

[27] *Id.* at 298.

[28] *Id.* at 301–02, 304–05.

Fourteenth Amendments.[29] The Court distanced itself from the strict belief/practice paradigm established in *Reynolds*, and held that:

> The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus, the Amendment embraces two concepts—freedom to believe and freedom to act.[30]

Of course, the Court said freedom of religious practice is not absolute; it may be subject to legitimate laws made for the protection of the public that do not "unduly . . . infringe the protected freedom."[31] The challenged Connecticut statute, however, did just that. Since the law imposed an absolute prior restraint on plaintiffs' religious conduct subject to the total discretion of local officials to permit those solicitation activities, the Court regarded it as an overbroad intrusion on the right to free exercise of religion rather than a permissible and limited effort to "regulate the times, the places, and the manner" of solicitation activities to protect public safety and good order.[32]

Notably, the Court here invoked the terms of standard free speech doctrine—the validity of content-neutral time, place, and manner regulations—when mapping the limits of the Constitution's qualified protection for religious practice.[33] Seemingly, *Cantwell* draws on the Court's recent experience adjudicating similar cases under the free speech and press clauses and merges that thinking into its new approach to free exercise rights.[34] *Lovell* and *Schneider* provided the foundation for constructing in *Cantwell* a conception of the First Amendment that offers at least some protection for religious practice, rejecting the strict belief/practice dichotomy posited in *Reynolds*.[35]

---

[29] *Id.* at 303, 305.

[30] *Id.* at 303.

[31] *Id.* at 304.

[32] *Id.*

[33] *Id.*

[34] *See id.*; *see also* Lovell v. City of Griffin, 303 U.S. 444, 451–53 (1938); Schneider v. New Jersey, 308 U.S. 147, 162–63 (1939).

[35] *See* John W. Whitehead, *The Conservative Supreme Court and the Demise of Free Exercise of Religion*, 7 TEMP. POL. & CIV. RTS. L. REV. 1, 64 (1997) ("The Court [in *Cantwell*] borrowed a rule from the established free speech jurisprudence it cited in *Lovell* in order to articulate a compelling state interest standard to be applied to state infringements on religious liberty.").

In subsequent cases, the Court confirmed that the Free Exercise Clause offered at least some protection for religious practice. In *Murdock v. Pennsylvania*, the Court ruled that the Free Exercise Clause did not permit the state to require religious evangelists to purchase soliciting licenses before going door-to-door seeking donations in exchange for religious literature.[36] The Court confirmed that religious motivations do not provide absolute immunity from behavioral regulations but held that the state may not effectively tax the performance of a religious activity by requiring the purchase of a license to try and communicate one's religious beliefs to others.[37] Also, in *Largent v. Texas*, the Court struck down a Texas law requiring solicitors to first obtain permission from local officials as a violation of First Amendment rights to freedom of speech, press, and religious free exercise.[38]

While the Jehovah's Witnesses cases signaled that the Court had rejected the *Reynolds'* doctrine that left religious conduct outside the protection of the First Amendment, these and other cases did not offer any clear guidance about how much protection religiously motivated actors might expect.[39] Consequently, in *Prince v. Massachusetts*, the Court rejected a free exercise challenge to a state child labor law that prevented the plaintiff from engaging in door-to-door religious solicitation and evangelizing together with her nine-year-old daughter.[40] Later, in *Braunfeld v. Brown*, the Court rejected a free exercise challenge to Pennsylvania blue laws that prohibited the plaintiff—a Saturday-Sabbath-observing Jew—from operating his retail business on Sundays, thereby forcing him to choose between practicing his religion or keeping his store closed two days every week.[41] The Court reasoned that the Sunday closing law served a legitimate secular purpose and did not aim to limit religious observance or discriminate against religious commitments.[42] Under these circumstances, the incidental burden the law imposed on the plaintiff—requiring him to choose to either violate his religion's proscription against working on Saturday or keep his store closed two days a week—was held to not be an infringement of his right to religious free exercise.[43] The Court reached a similar conclusion in *Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*, which challenged a Massachusetts Sunday closing law.[44] A likely consequence of this lack of clear guidance about how much protection religiously motivated actors might expect is that lower courts generally still followed the belief/conduct dichotomy when they confronted free exercise cases.[45]

---

[36] 319 U.S. 105, 106, 115–17 (1943).
[37] *Id.* at 109, 116.
[38] 318 U.S. 418, 422 (1943).
[39] *See* Whitehead, *supra* note 35, at 70–71.
[40] 321 U.S. 158, 158–61, 170 (1944).
[41] 366 U.S. 599, 600–02, 609.
[42] *Id.* at 607, 609.
[43] *Id.* at 601–02, 609.
[44] 366 U.S. 617, 618, 631 (1961).
[45] *See, e.g.*, State v. Barlow, 153 P.2d 647, 653 (Utah 1944) (holding that although the

The Court clarified and broadened the scope of free exercise protections for religious conduct two decades later in *Sherbert v. Verner*.[46] In contrast with the Jehovah's Witnesses cases, the facts in *Sherbert* did not meld religious liberty claims with freedom of speech and press concerns.[47] Rather, the case involved a challenge to South Carolina's decision to deny the plaintiff unemployment benefits after she was fired from her job because of her religiously motivated refusal to work on Saturdays in accordance with her Seventh-Day Adventist faith.[48] The Court held that the state's denial of the plaintiff's unemployment claim was an unconstitutional violation of her free exercise rights.[49] In doing so, the Court established a new, more expansive conception of free exercise rights; under this interpretation, the First Amendment protects individuals from substantial government-imposed burdens on their religious practices—including the need to choose between their religious observances and some legal benefit or burden—unless the legal burden is narrowly tailored to achieve a compelling government interest.[50] Since the government interest in the integrity of the unemployment insurance system could be well-served while still recognizing that genuine religious commitments constitute good cause for refusing available work, the unemployment scheme challenged in *Sherbert* did not pass constitutional muster.

*Sherbert* affirmed the Jehovah's Witnesses cases' rejection of *Reynolds*' belief/practice paradigm; religiously motivated behavior would thenceforth enjoy First Amendment protection.[51] *Sherbert* went further, however. While the Jehovah's Witnesses cases characterized the challenged ordinances as being deeply problematic because of the absolute prior restraints they imposed on religious soliciting and the unfettered discretion they gave to local officials to arbitrarily deny permits,[52] *Sherbert* declared that all laws burdening religious practice would be subject to strict scrutiny.[53] This established an extremely high hurdle for governments seeking to regulate religiously motivated conduct to mount. Under this new practice, laws would be held unconstitutional even if they did not impose absolute prohibitions on

---

act of polygamy was committed as part of their religious beliefs, the defendants were properly convicted of unlawful cohabitation because the state may interfere with and regulate conduct); Hill v. State, 88 So. 2d 880, 886 (Ala. Ct. App. 1956) (holding that defendant's conviction for handling rattlesnakes during religious meetings was affirmed because the prohibition's purpose was to punish an act that was dangerous to public health and safety, and thus did not violate freedom of religion).

[46] *See generally* 374 U.S. 398 (1963).

[47] *Compare* Lovell v. Griffin, 303 U.S. 444, 452–53 (1938), *and* Schneider v. New Jersey, 308 U.S. 147, 162–63 (1939), *with Sherbert*, 374 U.S. at 404.

[48] *Sherbert*, 374 U.S. at 399–401.

[49] *Id.* at 403–04.

[50] *Id.* at 406–09.

[51] *See* Pepper, *supra* note 7, at 331.

[52] *See Lovell*, 303 U.S. at 451–52; *Schneider*, 308 U.S. at 163–64.

[53] *Sherbert*, 374 U.S. at 406–09.

religious practice or go so far as to grant government officials total discretion to allow or disallow religious observances.[54]

The *Sherbert* test ushered in what may be characterized as a golden age of expansive religious free exercise rights.[55] In *Wisconsin v. Yoder*, the Court ruled that the state could not force Amish children to attend school beyond the eighth grade in accordance with the state's compulsory education laws because doing so placed a substantial burden on the plaintiff's religious practices, which eschewed higher education as inimical to the simple lifestyle prescribed by the Amish faith.[56] The Court rejected the state's argument that secondary education beyond eighth grade was necessary to prepare students to participate responsibly in American civic life.[57] Applying the strict scrutiny standard set out in *Sherbert*, the Court noted that the state did not offer adequate factual basis for concluding that burdening Amish religious practice with the additional two years of schooling required by the challenged law was necessary to promoting civic responsibility.[58] On the contrary, the self-sufficiency and law-abiding character of members of the Amish community demonstrated that good citizenship could be attained without a high school education.[59] In *Thomas v. Review Board of Indiana Employment Security Division*, the Court applied the *Sherbert* rule to the case of a Jehovah's Witness who was denied unemployment benefits after being fired from his job for refusing to participate in the manufacture of tank turrets in accordance with his religion's prescription of pacifism.[60] Shortly thereafter, in *Jensen v. Quaring*, an equally divided Court let stand a lower court decision that Nebraska's refusal to grant the plaintiff a driver's license unless she agreed to be photographed in violation of her religious beliefs violated the plaintiff's free exercise rights.[61] Lower federal courts and state courts, too, applied *Sherbert*, affording broad and firm exemptions for religiously motivated conduct from a wide array of state and federal laws.[62]

---

[54] *See* Whitehead, *supra* note 35, at 86 (explaining the compelling state interest test established by the *Sherbert* Court).

[55] *See, e.g.*, Pepper, *supra* note 7, at 311 n.7 ("With the decision in Sherbert v. Verner . . . the Supreme Court embarked on a substantially changed course of free exercise doctrine.").

[56] 406 U.S. 205, 207, 209, 235–36 (1972).

[57] *Id.* at 222.

[58] *Id.* at 222–23.

[59] *Id.* at 235–36.

[60] 450 U.S. 707, 709, 713 (1981).

[61] 472 U.S. 478 (1985); *see also* Quaring v. Peterson, 728 F.2d 1121, 1121 (1984).

[62] *See, e.g.*, Frank v. State, 604 P.2d 1068 (Alaska 1979); *In re* Jenison, 375 U.S. 14, *remanded* to 125 N.W.2d 588 (Minn. 1963) (holding that the state must provide exemptions from jury duty service to accommodate religious belief); Native Am. Church of N.Y. v. United States, 468 F. Supp. 1247, 1248 (S.D.N.Y. 1979) (requiring exemptions for religious use of peyote); Michaelson *ex rel.* Lewis v. Booth, 437 F. Supp. 439, 444 (D.R.I. 1977) (holding that municipal elections may not be held on religious holidays); Stevens v. Berger, 428 F. Supp. 896, 908 (E.D.N.Y. 1977) (requiring exemptions for plaintiff's religiously motivated

### *C. Phase 3: The* Smith *Test*

The Supreme Court once again altered the dimensions of constitutionally protected religious practice in 1990 in *Employment Division v. Smith*. In *Smith*, the Court repudiated it prior application of strict scrutiny to all laws that substantially burden religious practice and held that neutral and generally applicable laws that only incidentally impede religious observance are subject only to rational basis review.[63] As in the case of *Sherbert*'s rejection of *Reynolds*, the Court's new approach to religious liberty did not materialize suddenly out of thin air. A number of decisions reached in the 1980s signaled that the Court was beginning to question whether it had gone too far in its expansive definition of free exercise rights in *Sherbert*.[64]

In *United States v. Lee*, the Court considered a religious challenge to Social Security taxes by an Amish plaintiff who expressed religious objections to participating in the Social Security system on behalf of his employees.[65] Applying the strict scrutiny test established in *Sherbert*, the Court nevertheless declined to hold that the First Amendment required the claimed religious exemption.[66] In doing so, the Court articulated a line of reasoning that would become a theme in later cases limiting *Sherbert* and provided an important foundation for its later holding in *Smith*. The Court held that denying the plaintiff's requested religious exemption from participation in employer Social Security contributions was consistent with *Sherbert*'s

---

objections to obtaining Social Security number for their children); Geller v. Sec'y of Def., 423 F. Supp. 16, 18 (D.D.C. 1976) (ordering a religious exemption for a Jewish chaplain's wearing a beard); People v. Woody, 394 P.2d 813, 821 (Cal. 1964) (holding that Navajo peyote users are entitled to a religious exemption from criminal drug laws); X v. Brierley, 457 F. Supp. 350, 355, 357 (E.D. Pa. 1978) (holding a prison must accommodate prisoner's observance of religious holidays); Wright v. Raines, 457 F. Supp. 1082, 1085, 1088–89 (D. Kan. 1978) (holding there was a religious exemption for prisoner's religiously motivated beard).

[63] 494 U.S. 872, 872 (1989); *see, e.g.*, Michael McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 UNIV. CHI. L. REV. 1109, 1110 (1990) ("By a 5–4 vote . . . the Supreme Court abandoned the compelling interest test, holding that 'the 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 (or prescribes) conduct that his religion prescribes (or proscribes)."' In other words, 'an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.'").

[64] *See Developments in the Law—Religion and the State: V. Free Exercise Accommodation of Religion*, *in* 100 HARV. L. REV. 1703, 1708 (1987) ("In recent years, however, the Court has denied several substantial claims by religious objectors seeking relief from facially neutral regulations. These recent refusals of accommodation may portend a retreat from *Sherbert's* expansive protection of religious practice and a return to the formalistic conception of free exercise protection underlying *Reynolds*.").

[65] 455 U.S. 252, 254 (1982).

[66] *Id.* at 261.

narrow tailoring requirement because "it would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs."[67] Implicit in this position was the Court's realization that it is untenable to think that the First Amendment offers a religious opt-out from otherwise valid behavioral regulations. It would be impossible for the government to implement and achieve important policy schemes for the general welfare if every program could be frustrated by a Swiss cheese of religious carve-outs to account for the countless different religious needs of America's ecumenically diverse population. The First Amendment, the Court thought, must set a higher bar.[68]

This line of thinking was solidified in *Bowen v. Roy*[69] and *Lyng v. Northwest Indian Cemetery Protection Association*.[70] In *Bowen*, plaintiffs challenged the need to use their daughter's assigned Social Security number to apply for government welfare assistance programs.[71] Plaintiffs claimed that according to their Native American faith, it would be spiritually harmful to have their daughter identified by her assigned Social Security number unless and until she chose to do so of her own free will after reaching the age of majority.[72] In *Lyng*, the Court held that a government road construction project did not have to avoid disrupting a Native American burial ground to accommodate plaintiff's religious sensibilities.[73] In both cases, the Court relied on a combination of two mitigating factors. First, the Court questioned whether the challenged government actions truly imposed a substantial burden on the plaintiffs' religious practices as required to trigger strict scrutiny under *Sherbert*.[74] In both *Bowen* and *Lyng*, the government was not directly penalizing religiously motivated conduct or forcing citizens to choose between maintaining their religious observances or receiving some generally available government benefit.[75] Instead, the Court was faced with circumstances in which a broad policy initiative, unrelated to the regulation of specific conduct, empowered the government to act in ways which certain citizens religiously disapproved.[76] Such incidental insults to plaintiffs' religious sensibilities were distinct from rules directing people to abstain from religious duties or violate religious prohibitions.[77] Additionally, these cases recognized

---

[67] *Id.* at 259–60.

[68] *Id.* at 259–61 ("Religious beliefs can be accommodated, but there is a point at which accommodation would 'radically restrict the operating latitude of the legislature' . . . . Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs.").

[69] *See generally* 476 U.S. 693 (1986).

[70] *See generally* 485 U.S. 439 (1988).

[71] 476 U.S. at 695.

[72] *Id.* at 696.

[73] 485 U.S. at 451–52.

[74] *Bowen*, 476 U.S. at 701–07; *Lyng*, 485 U.S. at 447–52.

[75] *Bowen*, 476 U.S. at 700; *Lyng*, 485 U.S. at 451–52.

[76] *Bowen*, 476 U.S. at 706; *Lyng*, 485 U.S. at 450–51.

[77] *See Lyng*, 485 U.S. at 450–51 ("This does not and cannot imply that incidental effects

that First Amendment protections cannot be construed in a way that would subjugate government initiatives that are unrelated to religion or even behavioral regulation—for instance, road construction or Social Security—to the need to never do anything inconsistent with any citizen's religious worldview.[78]

This approach was confirmed again in *Hernandez v. Commissioner*, where the Court rejected a claim by Scientologists that expenditures for church training sessions should be tax-deductible because failing to do so left Scientology adherents with less money for religiously mandated training sessions.[79] The Court again reasoned that any imposition on the plaintiffs' ability to engage in religious conduct was justified by a "broad public interest in maintaining a sound tax system," which would be compromised if the government was forced to accommodate "myriad exceptions flowing from a wide variety of religious beliefs."[80] Importantly, this concern hearkened back to one of the reasons the *Reynolds* Court declined to extend First Amendment protection to religiously motivated conduct: it risked allowing each person "to make the professed doctrines of religious belief superior to the law of the land and in effect to permit every citizen to become a law unto himself."[81]

These limitations on the scope and applicability of *Sherbert*'s strict scrutiny test set the stage for the Court's repudiation of this standard in *Employment Division v. Smith*. In *Smith*, the Court faced a familiar scenario: a religious claimant challenged the state's refusal to grant them unemployment payments after they were fired from their job for engaging in religiously motivated conduct.[82] In *Smith*, the plaintiffs were fired from their jobs at a drug treatment facility over their religious use of peyote; the state refused to pay unemployment benefits because it concluded that the plaintiffs had been fired for cause.[83] Previously, the Court had routinely upheld such claims.[84] In *Smith*, however, the Court rejected the plaintiff's free exercise claim.

---

of government programs, which may make it more difficult to practice certain religions, but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions.").

[78] *See* McConnell, *supra* note 63, at 1126 n.85 ("In both *Roy* and *Lyng*, the Court reasoned that the First Amendment does not 'require the government *itself* to behave in ways that the individual believes will further his or her spiritual development . . . . The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.'").

[79] 490 U.S. 680, 684 (1989).

[80] *Id.* at 682 (citing United States v. Lee, 455 U.S. 252, 260 (1982)).

[81] Reynolds v. United States, 98 U.S. 145, 167 (1879).

[82] 494 U.S. 872, 874 (1990).

[83] *Id.*

[84] *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 398, 406 (1963) (holding that firing a Seventh-Day Adventist based on her refusal to work on Saturdays because it was against her religious beliefs imposes an unconstitutional burden on the free exercise of her religion); Thomas v. Rev. Bd. of Indiana Emp. Sec. Div., 450 U.S. at 707, 720 (1981) (holding that firing a Jehovah's Witness based on his refusal to participate in the production of weapons

Rejecting *Sherbert's* application of strict scrutiny to all cases in which government action imposes a substantial burden on religious practice, the Court held that only laws that target or discriminate against religious practice merit strict scrutiny, while neutral and generally applicable laws that also happen to impose burdens on peoples' observance of religious norms are subject to only rational basis review.[85] Notably, in reaching this conclusion, the Court once again made reference to the concern for unbounded exemptions from ordinary exercises of government police powers.[86] The strict application of the *Sherbert* test:

> [W]ould open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service . . . to the payment of taxes . . . to health and safety regulation such as manslaughter and child neglect laws, . . . compulsory vaccination laws, . . . drug laws, . . . and traffic laws; . . . to social welfare legislation such as minimum wage laws, . . . child labor laws, . . . animal cruelty laws, . . . environmental protection laws, . . . and laws providing for equality of opportunity for the races.[87]

This result, Justice Scalia wrote, "would . . . make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[88]

The Court's apparent narrowing of religious free exercise rights in *Smith* ignited a firestorm of public dissatisfaction that culminated in Congress's passing the Religious Freedom Restoration Act (RFRA) in 1993 and the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000, which aimed to resurrect through legislation the application of strict scrutiny to laws burdening religious practice.[89]

---

because producing weapons was against his religious beliefs imposes an unconstitutional burden on the free exercise of his religion); Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 138, 146 (1987) (holding that Florida's denial of unemployment benefits to a woman who joined the Seventh-Day Adventist Church years after her employment began because she refused to work on her religion's Sabbath, Friday evenings and Saturdays, imposes an unconstitutional burden on the free exercise of her religion).

[85] *Smith*, 494 U.S. at 878–79.

[86] *Id.* at 885 ("To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself'—contradicts both constitutional tradition and common sense.").

[87] *Id.* at 888–89.

[88] *Id.* at 879 (quoting Reynolds, v. United States, 98 U.S. 145, 166–67 (1879)).

[89] *See* McConnell, *supra* note 63, at 1111 ("The *Smith* decision is undoubtedly the most important development in the law of religious freedom in decades. Already it has stimulated a petition for rehearing joined by an unusually broad-based coalition of religious and civil

After the Supreme Court held that federal RFRA statutes could not be applied to limit state legislation in *City of Boerne v. Flores*,[90] twenty-one states have enacted their own RFRA statutes or added RFRA provisions to their constitutions in order to ensure that state legislation that substantially burdens religious practice is narrowly tailored to achieve a compelling government interest.[91] Still, as a matter of constitutional law, *Smith* ushered in an era of substantial curtailment of free exercise rights under the First Amendment.[92] Laws impacting religious observance that fell outside the bounds of RFRA or RLUIPA were subsequently subject to less exacting scrutiny and were often upheld as long as they did not seek to target religious practice for special negative treatment.[93] Moreover, *Smith* set a restrictive tone for religious liberty rights, and even challenges to laws that fell within the scope of RFRA and RLUIPA were often rejected.[94]

---

liberties groups from right to left and over a hundred constitutional law scholars, . . . as well as a drive for legislative correction, which is presently under consideration in Congress."); Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1120 (1996) ("It is unclear whether *Smith* remains good law. It has been widely criticized in the law review literature, questioned in a subsequent Supreme Court case, and arguably overturned by statute . . . . In response to *Smith*, Congress enacted the Religious Freedom Restoration Act, which reinstates the compelling state interest test."). Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4; Protection of Religious Exercise in Land Use and by Institutionalized Persons, 42 U.S.C. §§ 2000cc–2000cc-5.

[90] 521 U.S. 507, 536 (1997).

[91] ALA. CONST. art. I, § 3.01; ARIZ. REV. STAT. ANN. § 41-1493.01 (1999); ARK. CODE ANN. § 16-123-401 (2015); CONN. GEN. STAT. § 52-571b (1993); FLA. STAT. § 761.01 (1998); IDAHO CODE § 73-402 (2000); 775 ILL. COMP. STAT. 35/1 (1998); IND. CODE § 34-13-9-0.7 (2021); KAN. STAT. ANN. § 60-5301 (2021); KY. REV. STAT. ANN. § 446.350 (LexisNexis 2013); LA. STAT. ANN. § 13:5231 (2010); MISS. CODE ANN. § 11-61-1 (1972); MO. REV. STAT. § 1.302 (2003); N.M. STAT. ANN. § 28-22-1 (2020); OKLA. STAT. tit. 51, § 251 (2000); 71 PA. STAT. AND CONS. ANN. § 2403 (West 2002); 42 R.I. GEN. LAWS § 42-80.1-1 (1993); S.C. CODE ANN. § 1-32-10 (1999); TENN. CODE ANN. § 4-1-407 (20212009); TEX. CIV. PRAC. & REM. CODE § 110.001 (West 2021); VA. CODE ANN. § 57-2.02 (2021).

[92] *See* Carol M. Kaplan, *The Devil is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. REV. 1045, 1051 (2000) ("*Smith* reversed the presumption, holding that 'generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest.'").

[93] *See, e.g.*, Cath. Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67, 79 (Cal. 2004) (holding that the Women's Contraception Equity Act does not violate the Free Exercise Clause because the Act was facially neutral and generally applicable).

[94] *See, e.g.*, Navajo Nation v. United States Forest Service, 535 F.3d 1058 (9th Cir. 2008); Smith v. Fair Emp. & Hous. Comm'n, 913 P.2d 909, 921–22 (Cal. 1996) (holding that requiring the landlord to comply with Fair Employment and Housing Act's antidiscrimination provisions by renting to unmarried couples did not substantially burden her religious exercise rights because the alleged burden was the result, not of a law directed against religious exercise, but of a religion-neutral law that happened to operate in a manner that made the landlord's religious exercise more expensive).

### *D.* Smith*'s Open Questions*

In *Church of Lukumi Babalu Aye v. City of Hialeah*, the Court clarified its approach to determining whether a law discriminates against or targets religion, triggering strict scrutiny under *Smith*.[95] The case concerned a challenge to a facially neutral city ordinance that banned the unnecessary killing of animals for purposes other than food. Plaintiff adhered to the Santeria religious tradition, which practiced ritual animal sacrifice, a practice now banned by the ordinance.[96] The Court held the ban unconstitutional under the First Amendment.[97] While the ordinance did not directly ban religious practice or target Santeria rituals for special condemnation, the Court nevertheless concluded that it was subject to strict scrutiny under *Smith*.[98] The Court relied on both legislative history, which evinced animosity towards Santeria practices by the city council, as well as the law's many exceptions—kosher slaughter, hunting, fishing, euthanizing stray animals, pest control, feeding live animals to greyhounds, and general animal slaughter for human consumption—to conclude that the ordinance was clearly intended to apply specifically to religious ritual slaughter.[99] In reaching this conclusion, the Court utilized a technique common in its Equal Protection Clause jurisprudence under which facially neutral laws may be found to belie discriminatory intent where the over-inclusiveness or under-inclusiveness of the challenged law relative to its policy objectives demonstrates that its true aim was malevolence towards a particular group rather than advancing the general welfare.[100] In *Lukumi*, the city's asserted interest in public health and avoiding animal cruelty were badly undermined by the numerous exceptions included within the ordinance.[101] This poor alignment between legal means and the city's policy ends left the Court to conclude that the statute aimed to target ritual slaughter, thereby triggering strict scrutiny under *Smith*.[102]

Applying this standard, the Court found that even if the government interest were accepted as compelling, the ordinances at issue were not narrowly tailored because, as the Court already noted in finding that the facially neutral laws were motivated by religious animus, they were overbroad or underinclusive in substantial

---

[95] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531–46 (1993).

[96] *Id.* at 526–27.

[97] *Id.* at 547.

[98] *Id.* at 526–27, 546.

[99] *Id.* at 535–47.

[100] *See id.* at 534 ("Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause 'forbids subtle departures from neutrality' and 'covert suppression of particular religious beliefs.'").

[101] *See Lukumi*, 508 U.S. at 536–37, 543.

[102] *See id.* at 547 ("[T]he ordinances are underinclusive to aa substantial extent with respect to each of the interests that respondent has asserted, and it is only conduct motivated by religious conviction that bears the weight of the governmental restrictions. There can be no serious claim that those interests justify the ordinances.").

respects.[103] The "proffered objectives are not pursued with respect to analogous nonreligious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree."[104] The Court's decision in *Lukumi* thus added an important clarification to the *Smith* test: free exercise claims will trigger strict scrutiny of even facially neutral laws in cases where their "texts and operation demonstrate that they are not neutral."[105] Even taken together, however, *Smith* and *Lukumi* left several important questions about how and when to apply strict scrutiny to religious free exercise challenges unanswered.

1. Neutral, Generally Applicable Laws: One or Two Prongs?

The first issue concerns *Smith*'s holding that laws burdening religion do not trigger strict scrutiny if they are "neutral" and "generally applicable."[106] The *Smith* Court repeatedly referred to "neutral, generally applicable" laws when describing the kinds of ordinances that do not merit strict scrutiny when challenged for substantially burdening religious practice.[107] According to the Court, "the 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 (or prescribes) conduct that his religion prescribes (or proscribes).'"[108] Such laws are subject only to rational basis review and are valid, despite the burdens they happen to impose on religious practice, as long as the duties or restrictions they impose are rationally related to furthering a legitimate government objective.[109] Laws that burden religious practice and that are not neutral and generally applicable must be carefully scrutinized to determine whether they are truly necessary to achieve a compelling government interest.[110] Since *Smith,* courts and commentators have grappled with the question of whether the terms, "neutral" and "generally applicable" are essentially synonymous or at least overlapping, or if they instead represent two distinct requirements that laws challenged under the Free Exercise Clause must meet in order to merit rational basis review.[111]

---

[103] *Id.* at 531–40.

[104] *See id.* at 546 ("[A]ll four ordinances are overbroad or underinclusive in substantial respects . . . . The absence of narrow tailoring suffices to establish the invalidity of the ordinances.").

[105] *Id.* at 521.

[106] 494 U.S. 872, 879 (1990).

[107] *See, e.g.*, *id.* at 881 ("The only decisions in which we have held that the First Amendment bars application of a neutral generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.").

[108] *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252 263, n.3 (1982)).

[109] *See id.*

[110] *See id.* at 882–83.

[111] *See, e.g.*, Jeffrey M. Shaman, *Rules of General Applicability*, 10 FIRST AMEND. L. REV.

One interpretation maintains that the concepts of "neutrality" and "general applicability" are closely interrelated.[112] On this view, *Smith* essentially aligns the scope of the First Amendment's Free Exercise Clause with non-discrimination principles that follow from the Fourteenth Amendment's Equal Protection Clause.[113] Indeed, the *Smith* Court itself appears to have repeatedly signaled that it was drawing its free exercise test from settled equal protection jurisprudence.[114] This understanding reads *Smith* as demanding simply that government act "neutrally" with respect to religion, meaning that laws not discriminate against religion by targeting religious practice for unique legal burdens.[115] For proponents of this view, "*Smith*'s general applicability requirement . . . is merely an extension of the concept of neutrality," and "asking whether a law is generally applied is [simply] a method for smoking out discriminatory intent."[116] When a law is "generally applicable" and applies to all the same kinds of conduct, whether religiously motivated or not, it is also "neutral" in that it evidently seeks to restrict not *religion* but the particular behavior it regulates. When a law is not "generally applicable," however, and applies only to some instances of the regulated behavior and not to others in a way that evidences a legislative purpose to restrict not the conduct per se but the conduct as an expression of religious conviction, that law—even if facially neutral—apparently discriminates against and targets *religious* practice rather than a particular kind of conduct as a whole.[117]

An alternative reading of *Smith*, however, construes "neutrality" and "general applicability" as distinct prongs of a two-part test.[118] First, a law challenged under

---

419, 419–20 (2012) (discussing the relatedness of the concepts of general applicability and neutrality).

[112] *Id.* ("As explained by the Supreme Court, the concepts of neutrality and general applicability are interrelated, and 'failure to satisfy one requirement is a likely indication that the other has not been satisfied.'").

[113] *Id.* at 420 ("The principle of general applicability parallels equal protection jurisprudence; to require laws to be generally applicable corresponds to the requirement of equal treatment under the law. Along the same lines, in determining if a law is neutral, guidance can be found in equal protection discourse. In fact, the Supreme Court has said that 'neutrality in its application requires an equal protection mode of analysis.'").

[114] *See, e.g.*, *Smith*, 494 U.S. at 894.

[115] *See* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 557 (1993) (Scalia, J., concurring) ("[T]he defect of lack of neutrality applies primarily to those laws that *by their terms* impose disabilities on the basis of religion . . . whereas the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment.").

[116] Zalman Rothschild, *Free Exercise's Lingering Ambiguity*, 11 CALIF. L. REV. 282, 283 (2020).

[117] *See Lukumi*, 508 U.S. at 557–58 (Scalia, J., concurring) ("But certainly a law that is not of general applicability . . . can be considered 'nonneutral'; and certainly no law that is nonneutral . . . can be thought to be of general applicability.").

[118] *See, e.g.*, *id.* at 532–46 (applying the two-part neutrality and general applicability test).

the Free Exercise Clause must, as a minimum, be "neutral" in that it does not target or purposefully discriminate against religious practice.[119] As the Court made clear in *Lukumi*, this neutrality requirement is not satisfied merely because a law does not discriminate against religiously motivated conduct on its face.[120] When considering whether a challenged statute is neutral, the Court also looks to the "texts and operation" of the law, which may demonstrate legislative gerrymandering to capture religiously motivated conduct within the reach of the statute while excluding other, similar behavior.[121] This would lead to the conclusion that the challenged law, while neutral on its face, was motivated by religious animus and targets religious practice, albeit without saying so explicitly.[122]

According to this second way of understanding the *Smith* test, neutrality and non-discrimination is not sufficient to afford rational basis review. The second prong of the *Smith* test requires that laws that burden religious practice also be "generally applicable."[123] As an additional requirement, "general applicability" must entail something more than the absence of the kind of carefully crafted statutory gerrymandering that would evidence an intent to discriminate against religion.[124] Thus, for example, a challenged statute might not be "generally applicable" if it prohibits some instances of the regulated conduct while allowing others.[125] Even if the law excludes some religiously motivated behaviors and includes some secularly based practices—thereby saving the statute from the charge that it is gerrymandered to target religious practice and thus not "neutral"—it might nevertheless fail the *Smith* test and trigger strict scrutiny because it does not apply generally to all similar conduct. This was the point made by the Court in *Lukumi*, which seems to have

---

[119] *Id.* at 532–33.

[120] *Id.* at 534 ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.").

[121] *See id.* at 521.

[122] *See* Shaman, *supra* note 111, at 458 ("In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court formulated an important boundary to the ruling in *Smith*, namely that the neutrality of a law is not to be determined simply from its text. Aside from its text, the effect of a law in its actual operation may be cogent evidence that the law is aimed at religious activities. The discriminatory impact of a law may disprove its benign appearance.").

[123] *Lukumi*, 508 U.S. at 546 ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.").

[124] *See* Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith*,* Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 866–67 (2001) ("It is very significant that the Court stated that a law that directly targets religion falls 'well below' the minimum requirement of general applicability, because this indicates that facial neutrality is a necessary, but not a sufficient, condition of generality. The neutrality requirement is designed to forbid direct religious persecution, however, the 'precise evil' prohibited by the general applicability requirement is the inequality that results when underinclusive legal prohibitions are enforced against religious conduct.").

[125] *See Lukumi*, 508 U.S. at 546.

found that the animal slaughter ordinances at issue were not generally applicable, irrespective of whether or not they were neutral.[126]

A lack of "general applicability" might also follow from the fact that a challenged law gives government officials discretion to allow "individualized exemptions" from the statute.[127] In this view, even if there is no evidence that a law targets or intentionally discriminates against religion, the fact that the law includes or allows for a variety of exemptions for similarly situated conduct triggers strict scrutiny, and invites the court to inquire whether the government has sufficiently good reasons for choosing not to grant an exemption for the religiously motivated behavior at issue in that case.[128]

*a. What Makes a Law Generally Applicable?*

The second point of ambiguity concerns the kinds of exceptions that might render a challenged statute not "generally applicable," thereby triggering strict scrutiny either because a lack of generality is a proxy for religious discrimination or because general applicability is an independent requirement under *Smith*. Here, too, courts and commentators have reached differing conclusions. One approach, exemplified by the Ninth Circuit's ruling in *Stormans, Inc. v. Selecky* (*Stormans II*), maintains that a law is generally applicable, even if it contains numerous exceptions, so long as the kinds of conduct the law does restrict includes non-religiously motivated as well as religiously motivated behavior.[129] A second approach, explicated by then-Judge Samuel Alito in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, holds that general applicability entails what has become known as the "most favored nation status" theory of religious free exercise.[130] In this view, a statute is not generally applicable whenever it treats any religiously motivated conduct any less favorably than analogous secular behavior.[131]

---

[126] *Id.* at 545–46 (explaining that the ordinances fail the general applicability prong of the test and are therefore subject to strict scrutiny).

[127] *See* Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 10 (2016).

[128] *See* Duncan, *supra* note 124, at 867 ("[W]hen a restriction is advanced 'only against conduct with a religious motivation,' that law is well below the standard of general applicability. However, it seems equally clear that at least some laws that stop short of targeting religion—laws that do not directly restrict religious conduct as such, but contain at least some 'categories of selection' that impose incidental burdens on religious exercise—are perhaps less than 'well below,' but nevertheless, still below the minimum standard of general applicability.").

[129] *See* Stormans, Inc. v. Selecky (*Stormans II*) 586 F.3d 1109, 1134–35 (9th Cir. 2009).

[130] 170 F.3d 359, 362 (3d Cir. 1999); s*ee* Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 195 (2002) (explaining the concept of "most favored nation status" in the context of free exercise jurisprudence).

[131] *See Fraternal Order*, 170 F.3d at 366 ("[W]hen the government makes a value

Additionally, as discussed earlier, a third theory maintains that general applicability is lacking whenever a statutory or policy scheme gives government officials discretion to grant exemptions from otherwise broadly applicable laws—even if the actual discretionary determinations by those officials have not previously treated any non-religious conduct better than analogous religious practices.[132]

*b. The Broad Definition of General Applicability*

The Ninth Circuit's decision in *Stormans II* exemplifies a broad definition of what kinds of laws rate as "generally applicable" under *Smith*.[133] *Stormans II* involved a Washington law that required pharmacies to carry and dispense emergency contraception medications.[134] Plaintiffs challenged the statute on the grounds that it would require them to dispense what they regarded as an abortifacient in violation of their religion.[135] The District Court found that the law was subject to strict scrutiny under *Smith* because numerous textual and operational exemptions from the law's mandate rendered the statute not generally applicable.[136] The Court found that the Washington law permitted pharmacies to not dispense emergency contraception for certain business or medical reasons, like a customer's failure to pay or where the drug is medically incompatible with others the patient is taking.[137] The District Court also noted regulators routinely exercised discretion and declined to enforce the law's mandate against pharmacies with a range of other reasons for not dispensing the drug.[138] When it came to pharmacists with religious objections to following the law, however, the state did not offer similar exemptions.[139] According to the District Court, this meant that while the law was neutral on its face and was not so precisely gerrymandered as to cover only religiously motivated conduct, it was nevertheless not generally applicable, and strict scrutiny applied under *Smith*.[140]

---

judgement in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny.").

[132] *See* Duncan, *supra* note 124, at 861 ("The South Carolina law [in *Sherbert*] was not generally applicable, because an applicant was ineligible for unemployment benefits if the Employment Security Commission made a finding that the applicant had failed without 'good cause' to accept 'suitable work' . . . . Such an individualized exemption process 'provides ample opportunity for discrimination against religion in general or unpopular faiths in particular.' Therefore, any refusal to extend discretionary exemptions to claims of religious hardship must be strictly scrutinized.").

[133] *See generally Stormans II*, 586 F.3d at 1134–42.

[134] *Id.* at 1114–17.

[135] *Id.*

[136] Stormans, Inc. v. Selecky (*Stormans I*), 524 F. Supp. 2d 1245, 1262–63 (W.D. Wash. 2007).

[137] *Id.* at 1252–53 (listing exemptions under the law).

[138] *Id.* at 1253.

[139] *See id.* at 1262 ("[T]he enforcement mechanism of the new law appears aimed only at a few drugs and the religious people who find them objectionable.").

[140] *Id.* at 1263.

On appeal, the Ninth Circuit reversed.[141] The Court concluded that the statute was generally applicable despite its various exemptions, therefore the state's failure to grant the plaintiffs an exemption from the mandate on religious grounds was subject only to rational basis review.[142] The Circuit Court first discounted the fact that regulators had enforcement discretion and had not previously enforced the contraception mandate against pharmacies that did not stock or dispense the drug for a variety of business or medical reasons.[143] Instead, the Court confined its consideration of the law's general applicability to the text of the statute itself, thus rejecting the view (discussed below) that the existence of a regime of discretionary exemptions by definition renders a law not generally applicable.[144] The Court further found that the various exceptions from the mandate provided for in the text of the statute itself did not render the law not generally applicable because these exemptions were "necessary reasons for failing to fill a prescription" in the normal course of business.[145] In other words, the fact that these secular exemptions did not undermine the law's policy objectives more than necessary to permit pharmacies to remain functional meant that these exemptions did not render the law not generally applicable despite the fact that it very clearly did not apply generally to all failures to dispense the contraception drug.

*Stormans I* is best understood as resting on a broad understanding of general applicability. In this view, a law is treated as generally applicable under *Smith*, even if it exempts some forms of secularly motivated conduct while prohibiting religiously motivated conduct, as long as those exemptions are consistent with the policy objectives the law seeks to achieve.[146] In *Stormans II*, the Court found that the many exemptions for medical and business reasons were consistent with the law's objective of ensuring that consumers would have "safe and legal access" to emergency contraception drugs whenever conditions permitted.[147] An exemption for a religiously motivated conscientious objection to dispensing the drug would undermine that goal, and so the failure to grant the religious exemption while maintaining

---

[141] *Stormans II*, 586 F.3d 1109, 1113 (9th Cir. 2009).

[142] *Id.* at 1137.

[143] *See id.* at 1135 ("That the pharmacy regulations recognize some exceptions cannot mean that the Board has to grant all other requests for exemption to preserve the 'general applicability' of the regulations.").

[144] *See id.* ("The text of the new rule itself suggests that their objective was to increase access to all lawfully prescribed medications, including Plan B.").

[145] *Id.* at 1134.

[146] *See* Laycock & Collis, *supra* note 127, at 14 ("[The Ninth Circuit in *Stormans v. Wiesman*] concluded that 'the enumerated exemptions are 'necessary reasons for failing to fill a prescription' in that they allow pharmacies to operate in the normal course of business.' And therefore, these exemptions for business reasons do not detract from the general applicability of the rules.") (quoting Stormans v. Wiesman, 794 F.3d 1064, 1080 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016)).

[147] *Stormans II*, 586 F.3d at 1135.

others did not defeat the law's general applicability.[148] The law was generally applicable because it applied generally to all conduct that would undermine its goals while not applying to conduct that was consistent with its goals.[149] General applicability, in other words, does not require that the law treat religious objections as well as any others. It merely requires that the law's determination to exempt some modes of conduct, and not similar religious practices, must be consistent with the law's policy objectives.

*c. The Narrow Definition of General Applicability*

Two other cases from the Third and Eleventh Circuits illustrate a narrower understanding of what it means for a law to be generally applicable under *Smith*. In *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, Muslim police officers challenged the police department's grooming standard that required officers to be clean shaven because they maintained that wearing a beard was mandated by their religion.[150] The Court, in an opinion written by then-Judge Alito, held that the department policy was not generally applicable because it provided an exception that allowed officers with medical skin conditions to grow beards.[151] The Court reasoned that failing to shave for medical reasons undermined the department's interest in officers having a uniform appearance, just as would failing to shave for religious reasons.[152] Thus, the department had essentially decided that medical reasons for growing a beard are weightier than religious ones.[153] This, Judge Alito said, rendered the law not generally applicable. It did not apply generally to *all* conduct that would undermine its goal of uniform officer appearance. It, instead, applied to religiously motivated beard growing (as well as to beards motivated by countless non-religious reasons like personal aesthetics, convenience, etc.) while not applying to at least one reason for non-religious beard growing.[154] Religious motives, Judge Alito concluded, could not be treated any worse than any secular reasons for engaging in the conduct regulated by the law without thereby negating the law's general applicability.[155]

The Eleventh Circuit took a similar approach in *Midrash Sephardi, Inc. v. Town of Surfside*, where it considered a religious challenge to a zoning ordinance that

---

[148] *Id.* at 1134–35.

[149] *Id.*

[150] 170 F.3d 359, 360–61 (3d Cir. 1999).

[151] *Id.* at 363–67.

[152] *See id.* at 366.

[153] *Id.* at 365 ("[I]t has unconstitutionally devalued their religious reasons for wearing beards by judging them to be of lesser import than medical reasons.").

[154] *Id.* at 365–66.

[155] *See id.* at 365 ("[W]e conclude that the Department's decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*.").

prohibited houses of worship, but not private clubs, from being located in designated business districts.[156] The Court applied the *Smith* test and found that the zoning ordinance was not generally applicable.[157] It noted that the town's zoning scheme "place[d] restrictions not only on religious entities, but also on other organizations, including educational institutions and museums, off-street parking lots and garages, public and governmental buildings, and public utilities."[158] Nevertheless, the Court read *Smith*'s general applicability requirement as demanding that "governments should not treat secular motivations more favorably than religious motivations."[159] Since the zoning law prohibited houses of worship while allowing private clubs—both of which were "analogous" uses that detracted from the town's policy objectives in creating a restricted-use business district—the zoning ordinance was not generally applicable.[160] Importantly, the fact that the town pursued its exclusionary zoning not only against houses of worship but against a myriad of other secular, non-commercial uses did not help that town's case. The court held that the zoning ordinance could not treat a religious use worse than *any* other analogous non-religious use.[161]

Both *Fraternal Order* and *Midrash Sephardi* rely on narrow understandings of general applicability. In each of these cases, the courts held that a challenged ordinance was not generally applicable because the law permitted at least one non-religious activity that undermined the law's policy goals, while failing to treat religiously motivated activities that undermined the law's policy objectives as favorably. The failure to treat religion as special and more deserving of legal accommodation than medical skin conditions or the entertainment value offered by private clubs rendered the challenged rules not generally applicable and subject to strict scrutiny.

*d. General Applicability as the Absence of Official Discretion*

A third approach to understanding the limits of the general applicability requirement under *Smith* is even narrower. The two approaches discussed above hold that general applicability may be negated by various numbers and kinds of exemptions to a law's conduct restrictions. This third approach, however, maintains that a law is not generally applicable whenever it merely gives government officials the discretion to grant exemptions from the law.[162] In this view, it is the mere possibility

---

[156] 366 F.3d 1214, 1219–20 (11th Cir. 2004).
[157] *Id.* at 1235.
[158] *Id.* at 1234.
[159] *Id.*
[160] *Id.* at 1235.
[161] *Id.*
[162] Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of* Smith*,* Sherbert*, Hogwarts, and Religious Liberty*, 83 NEB. L. REV. 1178, 1202 (2005).

of exemptions being granted by officials tasked with enforcing the challenged statute that render the law not generally applicable, and subject to strict scrutiny under *Smith*.[163] If officials *could* exempt religiously motivated conduct from the restrictive force of the statute and decline to do so, the government will be required to show that this decision was necessary to achieve a compelling government interest.

A number of lower court cases in the 1990s and early 2000s took this approach when concluding that challenged government actions were not generally applicable. In *Keeler v. Mayor of Cumberland*, for example, the ruling court held a local historic landmark ordinance was not generally applicable because it included exemptions for activities that would provide substantial benefit to the city or be in the best interests of the community—standards that left officials with discretion to weigh competing concerns when applying the rule.[164] Also, in *Axson-Flynn v. Johnson*, the Tenth Circuit applied strict scrutiny to a school's refusal to grant an acting student a religious exemption from reciting parts of a script that would violate his religion, because school officials had the discretion to grant such exemptions at will, and had in fact done so for various reasons in the past.[165] More recently, the Sixth Circuit found a policy penalizing a state university counseling student for referring a client to another provider because helping the client manage their same-sex attraction would have violated the student's religion was not generally applicable.[166] Here, too, the reason was that the university retained discretion to allow referrals for a number of reasons, and had in fact used that discretion to allow other students to refer clients for other kinds of value conflicts in the past.[167]

This understanding of the limits of general applicability is, in fact, rooted in the Supreme Court's decision in *Smith*. One of the challenges for the Court in *Smith* was the need to explain why it was subjecting the denial of unemployment benefits in that case to only rational basis review when it had previously upheld several other religious challenges to denials of unemployment benefits to employees who lost their jobs due to conflicts with their religious practices.[168] The Court distinguished those cases from *Smith* by noting that they allowed fired employees to receive unemployment compensation if officials determined that they refused to work for "good cause."[169] The fact that the unemployment statutes included an exemption that

---

[163] *See id.* at 1188 ("As I read *Smith* and *Lukumi*, the individualized-assessment rule is best understood as a subset of the rule that applies rigorous strict scrutiny to nonneutral or non-generally applicable laws. I believe that it is a categorical rule that classifies individualized exemption processes marked by discretionary decision-making as *per se* not neutral and not of general application.").

[164] 940 F. Supp. 879, 885–86 (D. Md. 1996).

[165] 356 F.3d 1277, 1281–83, 1297–99 (10th Cir. 2004).

[166] Ward v. Polite, 667 F.3d 727, 740 (6th Cir. 2012).

[167] *See id.* at 736–37.

[168] Emp. Division v. Smith, 494 U.S. 872, 883–84 (1990).

[169] *Id.* at 883–85.

allowed officials to determine whether an applicant had good cause for not working meant that these laws provided for "individualized exemptions" and were thus not "generally applicable."[170] The denial of unemployment benefits in *Smith* was different because Washington's rules did not provide for any exemptions, nor did they give officials discretion to grant any.[171] If officials can exempt certain kinds of behavior from statutory restriction, their decision to not exercise that discretion to permit religiously motivated conduct requires strong justification; officials must explain how their refusals to apply the law to the religious behavior at issue are necessary to achieve compelling government interests.[172]

Notably, this sort of judicial skepticism towards statutory schemes that grant executive officials broad discretion to decide whether to permit or prohibit legally regulated conduct is well settled in a variety of doctrinal contexts. Such reasoning was evident in several of the Jehovah's Witnesses cases, where the Supreme Court expressed serious concern over the fact that the challenged statutes gave local officials broad discretion to grant or deny permission to engage in solicitation activities.[173] Policy programs that grant officials substantial discretion also engender heightened scrutiny under the Equal Protection Clause and are often taken to indicate that facially neutral laws are actually driven by discriminatory intent rather than the legitimate policy aims they purport to support.[174] After all, it becomes hard for the government to credibly claim a law furthers a legitimate policy objective when it gives executive officials broad discretion in how to enforce and apply the law in ways that may undermine its supposed goals. Similarly, in the religious liberty context, systems of discretionary individualized exemptions that leave officials free to decide when and how to implement an otherwise religiously neutral law suggest that the statute may be driven by concerns (other than legitimate exercises of police powers) unrelated to religion.[175] Under this understanding of *Smith*'s general

---

[170] Laycock & Collis, *supra* note 127, at 10.

[171] *See Smith*, 494 U.S. at 884.

[172] *See* Duncan, *supra* note 162, at 1190 ("When faced with an individualized exemption process and the categorical rule of the transfigured *Sherbert*, religious-liberty claimants will usually prevail . . . . [W]hen a government official rejects a religious-liberty claim under an individualized system, the burden is on the government to justify its decision by establishing that it is necessary to achieve state interests of the highest order and is 'narrowly tailored in pursuit of those interests.'").

[173] *See, e.g.*, Lovell v. City of Griffin, 303 U.S. 444, 448, 451–52 (1938) ("Legislation of the type of the ordinance in question would restore the system of license and censorship in its baldest form.") (describing the historical struggle against publication licensing).

[174] *See, e.g.*, *id.* at 451 ("We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship.").

[175] *See* Duncan, *supra* note 162, at 1190 ("Even if the policy or regulation is neutral and generally applicable on its face, the mere existence of the individualized exemption process triggers strict scrutiny when a claim for a religious exemption has been rejected under the *ad hoc* system.").

applicability rule, such individualized exemptions should require the government to strenuously justify its decision to not grant exemptions for religious conduct under heightened judicial scrutiny.

2. What Makes Religious and Secular Conduct "Analogous"?

Both the narrow and broad readings of *Smith*'s "general applicability" requirement demand that reviewing courts identify which religious and secular activities are similar to each other and ought to receive similar treatment under the law. It is axiomatic, of course, that a law that aims to regulate one kind of behavior need not regulate an entirely different kind of conduct in the same way to be considered "generally applicable." "The Constitution does not require things which are different in fact . . . to be treated . . . as though they were the same."[176] Rather, as the Court said in *Lukumi*, the general applicability requirement is violated only when laws that restrict religious activities do not similarly restrict "analogous nonreligious conduct."[177] Thus, faced with a law that restricts some religious conduct and permits some secular behavior, a court applying *Smith* must "turn to analogy."[178] They must determine whether the permitted secular and prohibited religious conduct are indeed analogous—in which case, *Smith* says, they need to be treated alike absent compelling reasons for differentiating between them—or if they are different in legally relevant ways that justify differential treatment without compromising the law's general applicability.[179]

The Court's decisions in *Smith* and *Lukumi* did not explain *how* judges should go about determining whether differentially treated secular and religious activities are analogous, however. Yet, the need to engage in analogical reasoning when applying the *Smith* test raises numerous questions. For example: how much deference should a reviewing court give to state officials' determinations—evidenced by the challenged law itself—that the differentially treated religious and secular activities are not analogous? Also, on what grounds should judges base their assessments of whether differently treated religious and secular activities are indeed different in fact? *Lukumi* indicated that similarities ought to be judged in terms of the policy goals of a challenged law.[180] In finding the animal sacrifice laws not generally applicable, the Court in *Lukumi* observed that the ordinances "fail[ed] to prohibit

---

[176] Plyler v. Doe, 457 U.S. 202, 216 (1982) (quoting Tigner v. Texas, 310 U.S. 141, 147 (1940)).

[177] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546 (1993).

[178] *See* Note, *Constitutional Constraints on Free Exercise Analogies*, 134 HARV. L. REV. 1782, 1782 (2021).

[179] *See id.* at 1782–83 (2021) ("If favored secular activities are sufficiently similar to the disfavored religious activity, the religious plaintiff will prevail. If favored secular activities are markedly different, however, the court will defer to the state and reject the free exercise challenge.").

[180] *Lukumi*, 508 U.S. at 543–45.

nonreligious conduct that endanger[ed]" the government interests the ban was supposedly seeking to pursue "in a similar or greater degree than Santeria sacrifice [did]."[181] But what about legally relevant differences connected to government interests distinct from those contemplated by the challenged law?

The doctrinal ambiguity left by *Smith* and *Lukumi* in this regard is illustrated by the vast differences between the district and circuit courts' analyses of the religious free exercise challenge raised in *Stormans III*. In *Stormans III*, the District Court held that the state contraception mandate was not generally applicable because, among other reasons, it permitted pharmacies to not dispense emergency contraception for a variety of reasons, while prohibiting only religious reasons for refusing to do so.[182] Implicit in the district court's ruling was the view that the permitted secular reasons were in fact similar to the prohibited religious reasons for not dispensing emergency contraception.[183] Since these activities are analogous, the Court thought, a truly generally applicable law should treat them the same.[184] Thus, the fact that the law treated them differently, imposing greater burdens on religiously motivated conduct, showed that the law was not one of general applicability.[185] In overturning the District Court's decision, the Ninth Circuit engaged in a very different assessment of the similarities between the permitted secular and prohibited religious reasons for not dispensing the drug. The Circuit Court found that the challenged law was generally applicable because the secular conduct it allowed was not analogous to the religiously motivated behavior it proscribed.[186] As the court explained, the various allowances for not dispensing emergency contraception—such as where the drug is medically contraindicated or where the recipient fails to pay—are "'necessary reasons for failing to fill a prescription' in that they allow pharmacies to operate in the normal course of business."[187] Refusing to dispense a contraception for religious reasons, however, is different in the Ninth Circuit's view, and therefore justified harsher treatment under the law in order to promote the state's interest in insuring that patients could gain access to emergency contraception drugs whenever needed.[188]

Nothing in the Supreme Court's explanation of the *Smith* test, however, provides clear instruction about which of the analogical perspectives in *Stormans III* was correct.[189] Is the refusal to dispense contraception for religious reasons similar

---

[181] *Id.* at 543.

[182] Stormans Inc. v. Selecky (*Stormans III*), 854 F. Supp. 2d 925, 982 (W.D. Wash. 2012).

[183] *See id.* at 975 ("[T]he State . . . cannot provide secular exemptions on the ground that they will help keep pharmacies in business, while denying parallel religious exemptions that are just as necessary to keep pharmacies in business.").

[184] *Id.* at 978–82.

[185] *See id.*

[186] Stormans Inc. v Wiesman (*Wiesman*), 794 F.3d 1064, 1081–84 (9th Cir. 2015), *cert. denied*, 579 U.S. 942 (2016).

[187] *Id.* at 1080 (quoting *Stormans II*, 586 F.3d 1109, 1134 (9th Cir. 2009)).

[188] *See id.* at 1082.

[189] *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1921–22 (2021) (Alito, J.,

to the refusal to do so because the patient cannot pay, since in both cases the state's desire to ensure contraception access is undermined? Or are these explanations different in ways that justify their differential treatment under the law because a patient's failure to pay for the drug implicates countervailing justifications for refusing service in ways that the pharmacist's personal religious beliefs do not? *Smith* and its progeny provide little guidance on these issues. As a result, "[t]he legal test for what constitutes 'analogous' activity, though critical to determining general applicability under *Smith*, was . . . almost entirely defined by the individual judges applying it."[190] Indeed, even Douglas Laycock, once the chief proponent of the "most favored nation status" theory of general applicability, has pointed out that due to the unavoidable subjectivity of analogizing secular and religious activities, "[a] threshold requirement to show that a law is not generally applicable vastly complicates" every free exercise case.[191]

## II. FROM RBG TO ACB: THE COURT'S COVID-19 JURISPRUDENCE AS HARBINGER

*Smith*'s open-texture, which was accentuated and entrenched by lower court decisions evincing different understandings of the scope and meaning of neutrality and general applicability, persisted until a spate of religious liberty cases challenging public health regulations during the COVID-19 pandemic led the Supreme Court to clarify the operation of the *Smith* test.[192] The death of Justice Ruth Bader Ginsburg in September 2020 appears to have been a decisive event in this regard. In several cases during the early months of the pandemic, the Court declined to grant requests for emergency injunctions blocking the enforcement of capacity limitations that imposed burdens on religious gatherings.[193] Beginning in November 2020, however, once Justice Ginsburg was replaced by Justice Amy Coney Barrett, the Court shifted gears. It found that a number of public health regulations challenged on religious liberty grounds were unconstitutional under the *Smith* test.[194] In doing so, the Court

concurring) (describing disagreement on the Court in cases challenging COVID-19 regulations on religious practice based on very different approaches to "identifying the secular activities that should be used for comparison").

[190] *See* Note, *Constitutional Constraints on Free Exercise Analogies*, *supra* note 178, at 1790.

[191] Brief of Christian Legal Society et al. as Amicus Curiae Supporting Petitioners at 34, *Fulton*, 141 S. Ct. at 1868 (No. 19-123); *see generally* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 49 (1990).

[192] *See* Locke v. Davey, 540 U.S. 712, 719–25 (2004); Christian Legal Soc'y v. Martinez, 561 U.S. 661, 662–63 (2010); Watchtower Bible & Tract Soc'y of New York, Inc., v. Stratton, 536 U.S. 150, 160–69 (2002); Masterpiece Cakeshop v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1723–24 (2018); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2254–63 (2020).

[193] *See* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020) (Kagan, J., in chambers); South Bay United Pentecostal Church v. Newsom (*South Bay I*), 140 S. Ct. 1613 (2020) (Kagan, J., in chambers).

[194] *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 68–69 (2020) (Breyer,

made clear that (1) general applicability imposes additional requirements beyond *Smith*'s demand for neutrality; (2) laws are generally applicable only if they take care not to treat any religiously motivated conduct any worse than any analogous secular conduct; and (3) laws that treat religious and secular activities differently will be held to be generally applicable only if state officials can persuade the courts that the activities that are treated differently under a challenged law are in fact different in legally relevant ways that justify such disparate treatment.

### *A. COVID-19 and Religious Free Exercise in the Ginsburg Era*

During the spring and summer of 2020, the Supreme Court issued "shadow docket" opinions in two cases involving religious free exercise challenges to state public health regulations limiting public gatherings—including religious worship services—to control the spread of COVID-19.[195] The Court denied these requests for injunctive relief; but in both cases four justices dissented from the Court's decisions and wrote substantive opinions explaining their reasons for doing so. In part, these cases highlight what was an internal dispute in the Court over the correct understanding of *Smith*'s general applicability standard.

In *South Bay I*, the Court denied a church's request for an injunction against enforcement of California's COVID-19 regulations that limited attendance in places of religious worship to twenty-five percent of building capacity or a maximum of one hundred people, whichever was less.[196] The church's challenge was premised on the fact that state regulations imposed less restrictive occupancy standards on venues for various non-religious activities, including grocery stores, and banks.[197] Chief Justice Roberts provided a written concurrence with the Court's summary denial of the request—presumably in response to Justice Kavanaugh's authoring a substantive dissent on behalf of three justices.[198] Roberts explained his view in terms that largely track the more expansive understanding of "general applicability" under *Smith* described above.[199] Specifically, Roberts opined that the California capacity restrictions were consistent with the First Amendment because they did not treat "comparable secular gatherings" any better than religious worship services.[200] While the regulations imposed less burdensome capacity limits on some secular activities,

---

J., in chambers); South Bay United Pentecostal Church v. Newsom (*South Bay II*), 141 S. Ct. 716 (2021) (Kagan, J., in chambers).

[195] *South Bay I*, 140 S. Ct. at 1613; *Calvary Chapel*, 140 S. Ct. at 2603.

[196] 140 S. Ct. at 1613.

[197] *Id.* (Roberts, C.J., concurring).

[198] *See id.*; *id.* at 1614 (Kavanaugh, J., dissenting).

[199] *See id.* at 1613–14.

[200] *See id.* at 1613 ("Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time.").

this differential treatment did not render the challenged regulations not generally applicable because those secular activities were not ones "in which people neither congregate in large groups nor remain in close proximity for extended periods."[201] Thus, the less restricted secular activities were not similar to religious worship services in relation to the law's public health objectives, and with respect to activities or settings that were equally concerning due to their potential to spread the virus, the law applied to religious and secular conduct equally.

Justices Kavanaugh, Thomas, Alito, and Gorsuch would have granted the requested injunction.[202] In an opinion for himself and Justices Thomas and Gorsuch, Justice Kavanaugh argued that the challenged capacity regulations were not generally applicable because they allowed at least some secular activity to continue past the than twenty-five percent occupancy level while prohibiting religious worship at the same occupancy levels.[203] The mere existence of differential treatment for religious and secular conduct triggered a need for the state to provide "a compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap."[204] The fact that there are differences between church services and shopping trips to the grocery store with respect to the risk of viral spread was not relevant to the question of whether the regulations were generally applicable.[205] Instead, the dissenters adopted a narrow understanding of general applicability, which did not allow the state to "take a looser approach with, say, supermarkets, restaurants, factories, and offices while imposing stricter requirements on places of worship."[206] Differences between these uses may matter when considering whether the law's restrictions on religion are no greater than necessary, but they are not relevant to the question of whether a regulation that treats religious and secular conduct differently is generally applicable. For the *South Bay I* dissenters, such differential treatment, regardless of justification, means that the law is not generally applicable, and thus triggers strict scrutiny review under *Smith*.[207]

The Court denied a free exercise challenge to somewhat different Nevada regulations in *Calvary Chapel Dayton Valley v. Sisolak*.[208] In that case, houses of worship were subject to a maximum fifty-person occupancy regardless of building size, while various secular facilities, including casinos, were allowed to operate at

---

[201] *Id.*

[202] *South Bay I*, 140 S. Ct. 1613, 1613 (2020).

[203] *See id.* at 1614 (Kavanaugh, J., dissenting) ("The basic constitutional problem is that comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies.").

[204] *Id.* at 1615.

[205] *See id.* at 1614–15.

[206] *Id.* at 1615.

[207] *See id.* at 1614 (explaining that the state's discriminatory treatment of religious worship services is subject to strict scrutiny).

[208] *See generally* 140 S. Ct. 2603 (2020) (Kagan, J., in chambers).

fifty percent capacity.[209] Justices Alito, Kavanaugh, and Gorsuch each authored a dissent to the Court's refusal to enjoin the Nevada regulation.[210] Justice Alito suggested a preference for the narrow reading of *Smith*'s generally applicable standard and, on that basis, dismissed the state's argument that the regulations should not be subject to strict scrutiny because they treated many secular facilities and behaviors just as or more restrictively than houses of worship.[211] Ultimately, Alito concluded the challenged regulations should be subject to strict scrutiny under *Smith* even under a broad reading of the general applicability test because the Nevada rules, unlike the California standards at issue in *South Bay I*, permitted even secular gatherings, like casino gambling, that are similar to religious worship services in duration, density, and contagion risk, while still imposing more severe constraints on religious gatherings.[212]

Justice Kavanaugh's dissent in *Calvary Chapel* went further. There, Kavanaugh very explicitly endorsed the "most favored nation status" theory of *Smith*'s general applicability standard.[213] In explaining why he would have granted the requested injunction, Kavanaugh clarified what he viewed as the correct First Amendment inquiry, which bears the unmistakable hallmarks of the narrow, "most favored nation status" interpretation of *Smith*'s general applicability rule. The Free Exercise Clause, Kavanaugh wrote, requires the Court to determine "whether a given law on its face favors certain organizations [or activities] and, if so, whether religious organizations [or activities] are part of that favored group."[214] If religious conduct has not been afforded the specially exempt status that exists for some other forms of conduct, the state must then provide compelling justifications for that decision.[215] Thus, for Kavanaugh, it is the fact a law includes carve-outs or safe harbors for some groups or behaviors but not for religious groups or behaviors that renders the law not generally applicable.[216] In this view, it does not matter how different the restricted religious and exempted secular conduct might be, nor does it matter that the law restricts much secular conduct together with religious activities. The pertinent point is that *some* things are exempt from the challenged law's restrictions and that religion was not included among those exemptions.[217] Thus, while the Nevada

---

[209] *Id.* at 2604 (Alito, J., dissenting).

[210] *Id.* at 2603, 2609.

[211] *See id.* at 2606 (Alito, J., dissenting).

[212] *See id.* at 2607.

[213] *See id.* at 2610 (Kavanaugh, J., dissenting) ("[A] State may not impose strict limits on places of worship and looser limits on restaurants, bars, casinos, and gyms, at least without sufficient justification for the differential treatment of religion.").

[214] *Id.* at 2613.

[215] *See id.* at 2612.

[216] *See id.* at 2615.

[217] *See id.* at 2613 (quoting Laycock & Collis, *supra* note 127, at 22) ("[I]t is not enough for the government to point out that other secular organizations or individuals are also treated

regulations "expressly treat religious organizations equally to some secular organizations," they also treat religious organizations "worse than other secular organizations" like casinos.[218] Such laws, Kavanaugh argued, trigger strict scrutiny under *Smith*; and because the state did not provide any compelling reasons for allowing fifty percent occupancy in casinos but not in houses of worship, he would have granted the injunction.[219]

The dissenting justices in *South Bay I* and *Calvary Chapel* thus staked out a clear preference for a narrow interpretation of the general applicability requirement. The dissenters also indicated a willingness to apply at least some degree of judicial skepticism to government assertions that factual differences between favored secular and burdened religious conduct rendered these activities not analogous, and, thus, justified their differential treatment without violating *Smith*'s general applicability requirement.[220] In *Cavalry Chapel*, for example, Justices Alito and Kavanaugh demanded that the state demonstrate a strong factual basis for differentiating between casino gambling and religious worship.[221]

### *B. COVID-19 and Religious Free Exercise in the Barrett Era*

Justice Ginsburg's death in September 2020, and Justice Barrett's ascension to the Court that October, occasioned a dramatic switch in the Court's approach to religious challenges to COVID-19 restrictions. While *South Bay I* and *Calvary Chapel* offered opportunities for the dissenting justices to stake out their vision for an expanded scope for strict scrutiny under *Smith*, that approach could not garner the support of a majority of the Court. Justice Barrett shifted the balance. In several "shadow docket" rulings issued in late 2020 through the spring of 2021, a new Supreme Court majority offered clear support for a narrow understanding of *Smith*'s general applicability test.[222] Importantly, in these cases, the Court did not merely grant motions for injunctive relief from COVID-19 regulations that burdened religious practice, it went further—engendering significant criticism from some court watchers and scholars—by issuing several substantial opinions clarifying its new approach to religious free exercise claims.[223] This enabled the Court to affect

---

*unfavorably*. The point 'is not whether one or a few secular analogs are regulated. The question is whether a single secular analog is *not* regulated.'").

[218] *Id.* at 2610.

[219] *Id.* at 2613, 2615.

[220] *Id.* at 2615 (Alito, J., dissenting); *id.* at 2604–05; *South Bay I*, 140 S. Ct. 1613, 1614–15 (2020).

[221] *E.g.*, 140 S. Ct. at 2604 (Alito, J., dissenting) ("The State certainly has not shown that church attendance under Calvary Chapel's plan is riskier than what goes on in casinos.").

[222] *See* Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63, 66–67 (2020) (Breyer, J., in chambers); High Plains Harvest Church v. Polis, 141 S. Ct. 527 (2020) (Gorsuch, J., in chambers); *South Bay II*, 141 S. Ct. 716 (2021) (Kagan, J., in chambers).

[223] *See Cuomo*, 141 S. Ct. at 66–68.

a veritable revolution in First Amendment doctrine in a relatively short time and without the usual build-up of lower court rulings, full briefings, and oral arguments.

The first of these cases was *Roman Catholic Diocese v. Cuomo*,[224] in which Catholic and Jewish organizations challenged New York COVID-19 regulations that imposed more restrictive occupancy limits on houses of worship than many non-religious spaces.[225] Unlike in previous cases, the Court granted the injunction.[226] The majority of the Court split on the reasons for this result: the majority opinion emphasized that the New York rules violated even *Smith*'s neutrality requirement because they singled out houses of worship for special negative treatment, even as compared to other venues and activities that the state acknowledged were major contributors to the spread of COVID-19.[227]

Justice Gorsuch's concurrence went further and emphasized that "[t]he First Amendment . . . requires a State to treat religious exercises at least as well as comparable secular activities unless it can meet the demands of strict scrutiny."[228] Gorsuch concluded that the "only explanation" for the state's restricting house of worship occupancy more than other, similar spaces was that the state determined that those other non-religious uses are more "essential" than religious worship, which justifies permitting greater risk of viral spread in those settings.[229] This activity, Gorsuch thought, is "exactly the kind of discrimination the First Amendment forbids."[230] In other words, even under *Smith*, the Free Exercise Clause imposes a duty on government to treat religion as no less important than *anything* else. Notably, Justice Gorsuch's opinion appears to rest on his own independent assessment that religious worship and the less restricted secular activities like retail shopping are indeed analogous.[231] He was unwilling to simply defer to the apparent view of state health authorities that the religious activity was different because it posed a greater risk of viral spread.[232] Justice Kavanaugh used *Cuomo* as another opportunity to push the "most favored nation status" interpretation of *Smith*'s general applicability rule. He emphasized that "once a State creates a favored class . . . the State must justify why houses of worship are excluded from that favored class."[233] It is no answer, Kavanaugh wrote, that "*some* secular businesses are subject to similarly severe or even more severe restrictions."[234] Religion must be treated *at least as well* as the most favored non-religious activity.

---

[224] *Id.* at 66–67.
[225] *Id.* at 63, 66.
[226] *Id.* at 63.
[227] *Id.* at 67.
[228] *Id.* at 70 (Gorsuch, J., concurring).
[229] *Id.* at 69.
[230] *Id.*
[231] *Id.*
[232] *Id.*
[233] *Id.* at 73 (Kavanaugh, J., concurring).
[234] *Id.*

Just three weeks later, the Court applied the *Cuomo* precedent to grant another motion for injunctive relief from Colorado regulations limiting occupancy in houses of worship.[235] The Court again granted an injunction against state enforcement of capacity limits particular to houses of worship in *South Bay II*[236]—a case involving the same church's challenge to the same California public health regulations that the Court had declined to enjoin nine months earlier. While the challenged rules did not single out religion for uniquely negative treatment—they imposed similar restrictions on at least some non-religious activities—the state nevertheless "single[d] out religion for worse treatment than *many* secular activities."[237] For the Court and its new majority, this activity alone was sufficient to trigger strict scrutiny under *Smith*, a justificatory burden that California was unable to meet.[238]

Justices Kagan, Breyer, and Sotomayor dissented from the Court's grant of relief in *South Bay II*, and their reasoning highlights one of the salient aspects of the Court's new approach to free exercise cases developed in the COVID-19 cases. Throughout these cases, the Court (and dissenting opinions in the earlier cases where the Court denied requested injunctions) found that the occupancy regulations were not generally applicable because they imposed varying capacity limits on different kinds of spaces and activities.[239] Since some secular uses were permitted higher density occupancy than religious uses, the Court (or dissents, in the earlier cases) concluded that the regulations were not generally applicable and applied strict scrutiny.[240] Any differences between the more heavily restricted religious uses and less constrained secular uses, with respect to the regulations' goals of limiting the spread of COVID-19, were relevant to determining whether the disparate treatment was necessary to achieve a compelling government interest but did not obviate the Court's conclusion that the restrictions did not apply generally to all regulated conduct without regard for religion.[241]

The *South Bay II* dissent took clear exception with this approach.[242] It emphasized *Smith*'s requirement that laws be generally applicable "does not require things which are different in fact . . . to be treated . . . as though they are the same."[243] The

---

[235] *See generally* High Plains Harvest Church v. Polis, 141 S. Ct. 527 (2020).

[236] *South Bay II*, 141 S. Ct. 716, 716 (2021).

[237] *Id.* at 719 (Gorsuch, J., concurring) (emphasis added).

[238] *Id.* at 716.

[239] *South Bay II*, 141 S. Ct. at 716 (Kagan, J., in chambers); Calvary Chapel v. Sisolak, 140 S. Ct. 2603, 2607 (2020) (Kagan, J., in chambers) (Alito, J., dissenting); *South Bay I*, 140 S. Ct. 1613, 1614–15 (2020) (Kagan, J., in chambers) (Kavanaugh, J., dissenting).

[240] *See South Bay II*, 141 S. Ct. at 716; *Calvary Chapel*, 140 S. Ct. at 2607 (Alito, J., dissenting); *South Bay I*, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting).

[241] *See South Bay II*, 141 S. Ct. at 716–18; *Calvary Chapel*, 140 S. Ct. at 2607 (Alito, J., dissenting); *South Bay I*, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting).

[242] *South Bay II*, 141 S. Ct. at 721 (Kagan, J., dissenting).

[243] *Id.*

different risks for viral spread posed by religious worship services and less severely constrained secular activities—as determined by state public health officials—demarcated distinct kinds of conduct or space usage.[244] According to the dissent, for a regulation to be generally applicable under *Smith*, it had to apply to all equally risky conduct; it did not have to apply to *all* conduct without regard for the different ways in which different kinds of space usage impacted the state's concern for viral spread, as the *South Bay II* and *Cuomo* majorities held.[245] The dissent observed that the California rules appeared to meet this threshold.[246] They imposed similar capacity limits on similarly risky activities, including religious worship, political meetings, public lectures, plays, or eating in restaurants—all instances in which "large groups of people [come together] in close proximity for extended periods of time."[247] Activities treated less restrictively posed less risk of viral spread. This meant that the challenged laws were generally applicable: they applied to all conduct posing similar risks for viral transmission regardless of religion.[248] For the Court, however, this distinction was not sufficient to render the law generally applicable under *Smith*. Instead, the Court maintained that general applicability means the law does not admit exceptions and differences.[249] Since the California regulations differentiated between various space usages, restricting some uses more and other uses less, the Court held the state must provide a compelling justification for deciding to treat religious uses more rather than less restrictively.[250]

Finally, in *Tandon v. Newsom*[251] (the Court's opinion enjoining enforcement of California's COVID-19 regulations that imposed varying occupancy limits on a range of space uses including at-home religious worship), the Court made its approach to determining whether laws are neutral and generally applicable under *Smith* abundantly clear. "First," the Court held, "regulations are not neutral and generally applicable . . . whenever they treat *any* comparable secular activity more favorably than religious exercise."[252]

To further highlight its endorsement of the "most favored nation status" approach, the Court went on to cite Justice Kavanaugh's opinion in *Cuomo*: "It is no

---

[244] *Id.* at 721–22.

[245] *See id.* at 722 ("Where the State has regulated religious conduct, it has as well regulated 'nonreligious conduct that endangers [its] interests in a similar' way. The only secular conduct the State treats better is the kind that its experts have found does not so imperil its interests—the kind that poses less risk of COVID transmission. Nothing in that policy violates the First Amendment." (citation omitted)).

[246] *Id.*

[247] *Id.* at 721.

[248] *See id.*

[249] *See id.* at 722.

[250] *Id.* at 720 (Gorsuch, J., concurring).

[251] *See generally* Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021).

[252] *Id.* at 1296.

answer that a State treats some comparable secular . . . activities as poorly as or even less favorably than the religious exercise at issue."[253] So long as any analogous secular activity is given legal leeway not afforded to religious practice, the law will be considered not generally applicable. Next, the Court clarified that determining which secular and religious activities are "comparable" does not involve a wholistic determination of the state's reasons for distinguishing between the two kinds of conduct.[254] Instead, "whether two activities are comparable . . . must be judged against the asserted government interest that justifies the regulation at issue."[255] It is insufficient, in other words, for the state to explain how comparably risky but less restricted secular activities (for example, grocery shopping or banking) are more important than the more tightly regulated religious activities (like worship services). Such explanations are relevant to strict scrutiny analysis and may justify the state's decision to permit certain secular conduct while restricting similar religious behavior. But those considerations are irrelevant to determining if a law is generally applicable in the first place based on whether it treats analogous activities differently.

### *C. The Barrett Court's Responses to* Smith*'s Open Questions*

The Supreme Court's shifting majority on the meaning of religious free exercise under *Smith*—from one anchored by Justice Ginsburg and favoring a broader understanding of what laws are generally applicable and thus subject to only rational basis review, to one solidified by Justice Barrett and supporting more expansive use of strict scrutiny in religious liberty cases—seems to have provided some new clarity on at least some of *Smith*'s ambiguities.

#### 1. Neutral AND Generally Applicable

First, the Court's recent COVID-19 rulings have made clear that laws burdening religious practice may be found to be not generally applicable even if they are neutral and lack any clear discriminatory intent or religious animus. While some of the opinions in these cases have used "neutral" and "generally applicable" somewhat synonymously, the Court's treatment of the regulations at issue in *Cuomo*, *South Bay II*, and *Tandon* show that it is prepared to apply strict scrutiny both when it thinks state actions are driven by religious animus and also when religiously neutral laws fail to treat religious practice as well as similar secular conduct.[256] In *Cuomo*, Justice Gorsuch characterized New York Governor Cuomo's decision to treat

---

[253] *Id.*

[254] *See id.*

[255] *Id.*

[256] *See id.* at 1296–97; *South Bay II*, 141 S. Ct. 716, 717 (2021); Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63, 69 (2020).

religious worship more harshly than doing laundry, buying liquor, or traveling on an airplane as actually discriminatory; it meant the Governor thought less of religion than of these other secular activities.[257] Likewise, in *South Bay II*, Gorsuch characterized the California regulations as "obviously target[ing] religion."[258] The Court's rulings in those cases, as well as in *Tandon*, did not feel the need to characterize the enjoined regulations as "discriminatory" or "religious targeting."[259] Instead, the Court apparently took the approach that even if there was insufficient evidence of religious animus motivating the government's poorer treatment of religion, the mere fact that a law distinguishes between secular and analogous religious conduct—whatever the intentions—will render the policy not generally applicable and subject to strict scrutiny.[260]

2. Religion's Most Favored Nation Status

The Court's COVID-19 cases also clarified that "general applicability" under *Smith* is a relatively narrow concept.[261] One of the running debates between the Court's majority and minority factions throughout the COVID-19 religious liberty cases has been whether a law is generally applicable when it imposes one degree of restriction on both religious and some secular conduct while treating more leniently other forms of secular conduct.[262] The Ginsburg-era majority thought that such laws were still generally applicable.[263] *South Bay I* and *Calvary Chapel* suggest that in addition to the Court's granting substantial deference to the policies and determinations of public health officials during the first several months of the pandemic, a majority of the justices rejected the "most favored nation status" theory espoused by Justice Kavanaugh in his *Calvary Chapel* dissent.[264] As the Court's majority shifted, however, this understanding of "general applicability" was replaced by the narrower definition. In ruling after ruling from November 2020 onward, the Court made it abundantly clear that it will treat challenged laws as not generally applicable and

---

[257] *See Cuomo*, 141 S. Ct. at 69 (Gorsuch, J., concurring).

[258] *South Bay II*, 141 S. Ct. at 717 (Gorsuch, J., concurring).

[259] *See generally Tandon*, 141 S. Ct. at 1297.

[260] *See, e.g.*, *id.* at 1296; *Cuomo*, 141 S. Ct. at 67.

[261] *See generally Tandon*, 141 S. Ct. 1294; *South Bay II*, 141 S. Ct. 716; *Cuomo*, 141 S. Ct. 63.

[262] *Compare Cuomo*, 141 S. Ct. at 73 (Kavanaugh, J., concurring) (arguing that if any secular institution is treated better than religious institutions, strict scrutiny should be applied), *with Cuomo*, 141 S. Ct. at 81 (Sotomayor, J., dissenting) (arguing that strict scrutiny should not apply if some secular institutions are being treated worse than religious institutions).

[263] *See, e.g.*, *South Bay I*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) ("Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings.").

[264] *See* Calvary Chapel v. Sisolak, 140 S. Ct. 2603, 2612 (2020) (Kavanaugh, J., dissenting).

thus subject to strict scrutiny whenever the burdens imposed by a challenged policy scheme on religious practice are more severe than the restrictions they place on *any* comparable secular conduct.[265]

3. Nondeference in Religious/Secular Conduct Analogizing

Finally, the Court's COVID-19 religious liberty cases provided clarity on how to determine whether favored secular and disfavored religious activities are analogous when applying *Smith*'s general applicability test. Like the District Court in *Stormans II*, the Barrett Court has evaluated the similarity of differentially treated secular and religious activities exclusively in terms of how they relate to the specific, narrow policy objectives of challenged laws.[266] In the COVID-19 cases, this meant the Court considered whether permitted secular gatherings and prohibited religious activities were alike only in terms of whether they posed equal risks of virus transmission.[267] Other considerations, like the state's determination that certain non-religious activities, like grocery shopping or banking, are "essential" and must be permitted despite the risk, were not regarded as legally relevant in ways that would justify differential treatment without undermining the law's general applicability.[268]

The Barrett Court's adjudication of religious challenges to COVID-19 regulations also resolved that courts should not simply defer to state officials' conclusions that religious and secular activities are different in ways that justify different treatment under the law consistent with general applicability.[269] As Justice Kavanaugh put it, "judicial deference in an emergency or crisis does not mean wholesale judicial abdication" of the need to hold policymakers responsible for justifying regulatory determinations that impose greater burdens on religious, as compared to secular, activities.[270] Instead, the courts should exercise their own judgment to determine whether religious and non-religious activities covered by the law are similar enough to require similar treatment before the law can be considered generally applicable.

Following this view, the Court has declined to defer to health officials' judgments about the comparability of burdened religious and exempted secular activities in terms of viral spread risks.[271] In *Cuomo*, for example, the Court rejected the district court's view that the challenged regulations were based on public health

---

[265] *E.g.*, *Tandon*, 141 S. Ct. at 1296 ("[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."); *Cuomo*, 141 S. Ct. at 73 (Gorsuch, J., concurring).

[266] *See South Bay II*, 141 S. Ct. at 717.

[267] *See, e.g.*, *Cuomo*, 141 S. Ct. at 67 (comparing evidence of virus transmission in religious congregations and secular activities).

[268] *See id.* at 66.

[269] *See generally South Bay II*, 141 S. Ct. 716 (2021); *Cuomo*, 141 S. Ct. 63 (2020).

[270] *Cuomo*, 141 S. Ct. at 74 (Kavanaugh, J. concurring).

[271] *Compare Cuomo*, 141 S. Ct. at 67–68, *with Cuomo*, 141 S. Ct. at 79.

officials' scientific and epidemiological conclusions that justified treating houses of worship differently from grocery stores and other non-religious establishments.[272] The *Cuomo* dissenters deferred to medical professionals' conclusions that there is a greater risk of viral transmission when people meet to sing and talk near each other in worship services.[273] They, therefore, thought that restricted religious worship services and permitted retail shopping were not "analogous" activities, and that *Smith*'s "general applicability" requirement did not require them to be treated alike.[274] Justices in the *Cuomo* majority, however, rejected that approach. The Court found that the state failed to provide any specific evidence that religious worship posed a greater risk of viral spread than less restricted activities,[275] thus implicitly shifting the burden of demonstrating a legally relevant difference between differently treated activities to the state—and indicating that the Court demanded something more than just a rationally plausible difference between the religious and secular activities to satisfy *Smith*'s general applicability standard.[276] In his concurrence in that case, Justice Gorsuch was even more explicit. Concluding that the state's capacity rules improperly treated religious worship less well than similar secular activities, Gorsuch observed: "People may gather inside for extended periods in bus stations and airports, in laundromats and banks . . . No apparent reason exists why people may not gather, subject to identical restrictions, in churches or synagogues."[277] Likewise, Justice Kavanaugh emphasized that the state failed to demonstrate that the lines drawn between religious and secular activities were carefully tailored to track the actual risk of viral transmission.[278]

4. A Note on Precedent and the Shadow Docket

It is worth noting the clarifications the Court's COVID-19 decisions have provided for *Smith*'s open questions are especially significant since these cases were disposed of through the so-called "shadow docket," rather than through ordinary appellate processes. In contrast to the Supreme Court's "merits docket," which comprises the relatively few cases the Court decides based on the substantive merits of the legal issues briefed and argued by the parties, the "shadow docket" refers to a much larger number of cases in which the Court issues procedural orders, often resolving requests for emergency relief from the effect of lower court rulings before any law court makes an appellate judgment on the merits.[279] The Court hands down

---

[272] *Id.* at 67.
[273] *Id.* at 78 (Breyer, J., dissenting).
[274] *Id.*
[275] *Id.* at 67 (per curium opinion).
[276] *See id.*
[277] *Cuomo*, 141 S. Ct. at 69 (Gorsuch, J., concurring).
[278] *See id.* at 74 (Kavanaugh, J., concurring).
[279] *See generally* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 2 (2015).

thousands of shadow docket orders each term, often without issuing any opinions or providing any legal reasoning to explain those rulings.[280] Consequently, the shadow docket has, for the most part, been largely ignored by scholars and commentators and shadow docket rulings have not typically been treated as carrying much precedential weight beyond the specific cases in which they were issued.[281]

In recent years, however, scholars and policymakers have expressed concern over the Court's growing use of the shadow docket to resolve issues of substantive importance.[282] In more and more of its shadow docket decisions, the Court is producing written opinions (and concurrences, and dissents) that explain the legal reasons for these dispositions. Unsurprisingly, many lower courts have begun to give precedential weight to such written opinions explaining the Court's thinking.[283] After all, shadow docket orders coupled with reasoned opinions signal how the Court is likely to dispose of cases raising similar issues that come before it, and lower court judges, as well as other government officials, would be wise to proceed accordingly.

The shifts and clarifications of free exercise doctrine occasioned by the Court's COVID-19 rulings illustrate this reality. All of the Court's decisions in First Amendment challenges to COVID-19 regulations were in response to shadow docket requests for emergency injunctions staying the effect of lower court rulings upholding the challenged laws.[284] Yet, despite the absence of an opportunity for full briefing and argument in these cases, the Court—as well as concurring and dissenting justices—issued numerous opinions explaining at some length the correct framework for resolving free exercise challenges under *Smith*.[285] The Supreme Court has relied on these opinions in its later pandemic-era decisions, and lower courts around the country have done the same, citing per curium and concurring opinions from *Cuomo*, *Tandon*, and other cases authoritatively as they continue to dispose of religious challenges to public health regulations.[286]

Thus, the Barrett Court's resolutions to *Smith*'s open questions matter. True, these answers derive from a slew of shadow docket orders issued without the benefit

---

[280] *Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the Senate Committee on the Judiciary*, 117th Cong. 1, 2 (2021) (testimony of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law), https://www.judiciary.senate.gov/imo/media/doc/Vladeck%20testimony1.pdf [https://perma.cc/93YK-FBWQ].

[281] *See generally* Alexander Gouzoules, *Clouded Precedent:* Tandon v. Newsom *and its Implications for the Shadow Docket*, 70 BUFF. L. REV. 87 (2022).

[282] *See, e.g.*, *id.* at 124–29.

[283] *See generally* Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL'Y 828 (2021).

[284] *See* Gouzoules, *supra* note 281, at 90–91.

[285] *See id.* at 103–07 (summarizing the Court's shadow-docket opinions affecting the interpretation of the *Smith* test of neutrality and general applicability during COVID-19).

[286] *See, e.g.*, Doe v. Mills, 16 F.4th 20 (1st Cir. 2021); Resurrection Sch. v. Hertel, 35 F.4th 524 (6th Cir. 2022); Dr. A. v. Hochul, 142 S. Ct. 552 (2021).

of a full briefing or argument, which are not usually given much precedential weight. However, the Court's decision to issue substantive opinions on the First Amendment issues raised in these cases means the clarifications it has provided for the meaning and application of the *Smith* test are likely now well established.

## III. *FULTON*'S (TENTATIVE) CONFIRMATION OF A NEW DIRECTION FOR RELIGIOUS FREE EXERCISE CLAIMS

The Court's much anticipated decision in *Fulton v. City of Philadelphia*,[287] which followed closely in the wake of the Barrett Court's COVID-19 rulings, has provided further clarification on the meaning and viability of the *Smith* test. In a case that some commentators had anticipated the Court might use to overrule *Smith* entirely, the Court confirmed the continued viability of the *Smith* test, while providing a full-merits decision addressing—explicitly or implicitly—*Smith*'s open questions. Specifically, *Fulton* held that under *Smith*, general applicability imposes an additional, more strenuous requirement than mere neutrality.[288] The Court further explicated that laws are not generally applicable if they even just create a framework for government officials to exercise discretion in choosing whether to exempt or include specific conduct from regulatory enforcement.[289] Additionally, in upholding the *Fulton* plaintiffs' free exercise claim, the Court impliedly—though not explicitly—confirmed its views on the scope and application of *Smith*'s general applicability test as expressed in the COVID-19 cases.[290] *Fulton* suggests that (1) strict scrutiny applies when a government policy fails to treat religiously motivated behavior as well as any analogous secular conduct, and (2) similarity between favored secular and burdened religious activities should be determined only in terms of whether the behaviors both undermine the policy objectives of the challenged law, without reference to extraneous policy justifications for treating them differently.[291]

*Fulton* involved a free exercise challenge by Catholic Social Services (CSS) to Philadelphia's decision to terminate a foster care placement contract between CSS and the city due to CSS's religiously motivated refusal to certify same-sex couples as foster care parents.[292] Philadelphia contracted with numerous private organizations to screen and certify potential foster care parents, and to place children in the city's foster care system with appropriate host families.[293] After a news report revealed that CSS would not certify couples in same-sex marriages for foster care

---

[287] *See generally* 141 S. Ct. 1868 (2021).

[288] *See id.* at 1877 ("CSS points to evidence in the record that the City has transgressed this neutrality standard, but we find it more straightforward to resolve this case under the rubric of general applicability.").

[289] *See id.*

[290] *See id.*

[291] *See id.* at 1868, 1876–77.

[292] *Id.* at 1875–76.

[293] *Id.* at 1875.

placement due to its religious opposition to same-sex marriage, the city informed CSS that it would no longer refer foster care children to CSS and would not renew CSS's contract with the city.[294] The city noted that CSS's refusal to certify same-sex couples violated a non-discrimination provision of the foster care contract, as well as city ordinances that prohibit discrimination on the basis of sexual orientation in the provision of services held open to the general public.[295] The district court found the city's non-discrimination policy was neutral and generally applicable and thus subject only to rational basis review under *Smith*, and the Third Circuit affirmed.[296] CSS appealed and the Supreme Court granted certiorari to consider, among other questions, whether to revisit the *Smith* test.[297]

Some observers anticipated that the Court would use *Fulton* to overturn *Smith*, especially after a majority of the justices had successfully expanded free exercise protections in the COVID-19 cases.[298] The Court declined to do so, however. Instead, all nine justices upheld CSS's free exercise claim against the city by affirming the continued relevance of the *Smith* test and concluding that the city's decision to terminate its relationship with CSS did not satisfy strict scrutiny.[299] The Court's holding was a narrow one, likely the reason why it was able to garner unanimous support on an increasingly divided Court.[300] The Plaintiffs argued that the city's actions were subject to strict scrutiny under *Smith* because Philadelphia's non-discrimination policy was not generally applicable since it allowed for other non-religious exemptions.[301] For example, the city required private foster care placement agencies to consider applicants marital and family status, as well as physical and mental disabilities, when making foster placements.[302] Agencies were even apparently authorized to consider applicants' and foster children's race when selecting appropriate foster care families.[303] Though such considerations entail discrimination based on protected characteristics, the city was willing to compromise its own interests in preventing discrimination to accommodate other interests like foster children's well-being.[304] The Plaintiffs urged the Court to adopt a narrow definition of general applicability and to hold that, absent compelling justifications, Philadelphia's

---

[294] *Id.* at 1875–76.

[295] *Id.* at 1875.

[296] *Id.* at 1876.

[297] *Id.*

[298] *See* Scott Merrill, *Testing the Waters of Conventional Wisdom and the Law: Changing Times are Forcing Debates About Difficult Topics*, N.H. BAR NEWS, https://nhba.s3.amazonaws.com/wp-content/uploads/2021/10/21142317/BN-10-20-21.pdf [https://perma.cc/CMX8-2A9S].

[299] *See generally Fulton*, 141 S. Ct. 1882.

[300] *See generally id.*

[301] *See* Brief for Petitioners at 27–30, *Fulton*, 141 S. Ct. 1868 (No. 19-123).

[302] *Id.* at 13.

[303] *Id.*

[304] *Id.* at 6–7.

acceptance of some kinds of discrimination for some reasons required it to accept CSS's discrimination against same-sex couples for religious reasons.[305]

In finding for CSS, however, the Court declined to rely exclusively on this argument. Instead, the Court found that Philadelphia's policy was not generally applicable for another, narrower reason: the contract between CSS and the city included a "system of individualized exemptions" under which a city official had the sole discretion to exempt foster care agencies from the contract's non-discrimination requirement.[306] The Court noted that under *Smith*, "the creation of a formal mechanism for granting exceptions renders a policy not generally applicable . . . because it 'invite[s] the government to decide which reasons for not complying with the policy are worthy of solicitude.'"[307] Thus, even if the city had never permitted any foster care agency to engage in any kind of discrimination, the mere fact that it could allow such conduct meant that the city's decision to not do so in CSS's case was subject to strict scrutiny.[308]

The Court's conclusion that Philadelphia's non-discrimination policy was not generally applicable because it included the potential for individualized exemptions at the discretion of city officials provided a sufficient basis for the holding in *Fulton*.[309] The Court's opinion went a bit further, however, and appears to also confirm the narrow, "most favored nation status" interpretation of *Smith*'s general applicability requirement.[310] Writing for the Court, Justice Roberts noted, seemingly unnecessarily, that the general applicability standard also condemns laws that "prohibit[] religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."[311] To illustrate this point, Roberts referred to the Court's reasoning in *Lukumi*, noting that "underinclusiveness" in the kinds of policy-advancing behaviors that a challenged law restricts means that the law is not generally applicable.[312] This framing of the general applicability test—though dicta—sounds a lot like the narrow read discussed above and embraced by the Court in its later COVID-19 cases.[313] Simply put, if a law is underinclusive and prohibits religious conduct that undermines the law's policy aims, while permitting secular conduct that also detracts from those aims, it is not generally applicable.[314] This approach also seems to track the kind of analogical analysis previously used

---

[305] *See id.* at 27–30.

[306] *Fulton*, 141 S. Ct. at 1878 ("No matter the level of deference we extend to the City, the inclusion of a formal system of entirely discretionary exceptions in section 3.21 renders the contractual non-discrimination requirement not generally applicable.").

[307] *Id.* at 1879.

[308] *Id.*

[309] *Id.* at 1878.

[310] *See supra* Section I.D.2, Section II.C.2.

[311] *Fulton*, 141 S. Ct. at 1877.

[312] *Id.*

[313] *See supra* Section I.D.2.

[314] *Fulton*, 141 S. Ct. at 1877.

by the Court in *Cuomo*, *Tandon*, and other COVID-19 cases. It very clearly identifies the relevant point of comparison between permitted secular and prohibited religious activities as the specific policy goals the government asserts are served by the challenged law.[315] Extraneous government interests not directly furthered by the policy in question are not a basis for differential treatment of otherwise similarly situated modes of religious and secular conduct.

The Court's decision to uphold *Smith*, albeit with a seemingly narrower scope for rational basis review of laws burdening religious practices, frustrated Justices Alito, Thomas, and Gorsuch. The three concurred in the judgment but wrote separately to explain why they would have preferred to overturn the *Smith* test and return to a free exercise regime under which "[a] law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest."[316] In a concurrence authored by Justice Alito, these three justices argued that *Smith* is incompatible with the Constitution's text, history, and original meaning, that its reasoning is faulty and that the standard it prescribes is unworkable, and that it is unreconcilable with earlier established precedents.[317] Justices Barrett and Kavanaugh also expressed serious doubts about the textual and structural soundness of the *Smith* test, but appeared unwilling to replace *Smith* with a blanket strict scrutiny rule for all laws burdening religious practice.[318] Barrett and Kavanaugh further observed that there was no need to reconsider *Smith*, since all the justices agreed that strict scrutiny should apply to Philadelphia's refusal to work with CSS due to the latter's religious commitments in any case.[319]

## IV. LOOKING AHEAD

The COVID-19 cases and *Fulton* have affected what at first glance appears to be a remarkable shift in First Amendment free exercise rights in a relatively short period of time.[320] After Justice Barrett's ascent to the Court in October 2020, the Court's decisions in *Cuomo*, *South Bay II*, and *Tandon* clarified several previously unanswered questions about the scope and proper application of the *Smith* test.[321] Specifically, the Court's disposition of these shadow docket cases established that (1) laws burdening religious practice may be subject to strict scrutiny even if they

---

[315] *See id.* ("A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines *the government's asserted interests* in a similar way." (emphasis added)).

[316] *Id.* at 1924 (Alito, J., concurring).

[317] *See id.* at 1894–1931.

[318] *Id.* at 1882–83 (Barrett, J., concurring).

[319] *See id.* at 1883.

[320] *See generally* Wendy E. Parmet, *From the Shadows: The Implications of the Supreme Court's COVID Free Exercise Cases*, 49 J. L. MED. & ETHICS 564–65 (2021).

[321] *See generally* Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63 (2020) (per curiam); *South Bay II*, 141 S. Ct. 716 (2021) (mem.); Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam).

are neutral and not engaged in religious targeting or discrimination;[322] (2) a challenged law will not be treated as generally applicable and will therefore be subject to strict scrutiny if it imposes any greater restriction on any religious conduct than it does on any similar secular behavior;[323] and (3) courts should take an active role in determining whether religious and secular activities are different in ways related to the policy objectives of the challenged law that justify their differential treatment.[324] *Fulton* affirmed the continued applicability of the *Smith* test, confirmed this framework for analyzing free exercise claims, and also reiterated that any government policy that establishes a system of even merely potential legal exemptions subject to official discretion is not generally applicable and subject to strict scrutiny.[325]

Still, the more than ninety pages of concurring opinions in *Fulton* suggest that matters are far from settled. Three justices—Alito, Thomas, and Gorsuch—explicitly favored replacing *Smith* with a blanket strict scrutiny rule,[326] and two others—Barrett and Kavanaugh—expressed their dissatisfaction with *Smith* and appear open to an alternative as well.[327] *Fulton* upheld *Smith*, not because the *Smith* test enjoys majority support on the Court; it does not. Instead, *Fulton* affirmed *Smith* because it was at bottom a relatively easy case that could be decided on narrow grounds that the Court's liberal justices could support.[328] Justice Gorsuch noted in his *Fulton*

---

[322] *See, e.g.*, *Cuomo*, 141 S. Ct. at 66 (holding that the plaintiffs made a "strong" showing that the challenged restrictions violated a "minimum requirement of neutrality" by specifically naming religious entities for restrictions while allowing secular businesses categorized as "essential" to operate).

[323] *See, e.g.*, *Tandon*, 141 S. Ct. at 1296 ("First, government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, when ever they treat *any* comparable secular activity more favorably than religious exercise . . . . It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue.").

[324] *See, e.g.*, *South Bay II*, 141 S. Ct. at 718–20 (comparing the dangers of worship activities during the COVID-19 pandemic with the dangers of secular activities, such as shopping).

[325] *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1878 (2021) ("No matter the level of deference we extend to the City, the inclusion of a formal system of entirely discretionary exceptions in section 3.21 renders the contractual non-discrimination requirement not generally applicable.").

[326] *See id.* at 1883 (Alito, J., concurring) ("Even if a rule serves no important purpose and has a devastating effect on religious freedom, the Constitution, according to *Smith*, provides no protection. This severe holding is ripe for reexamination.").

[327] *See id.* at 1882–83 (Barrett, J., concurring) ("In my view, the textual and structural arguments against *Smith* are more compelling. As a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination.").

[328] *See, e.g.*, *id.* at 1876–77 (majority opinion) ("CSS urges us to overrule *Smith*, and the concurrences in the judgement argue in favor of doing so . . . . But we need not revisit that decision here. This case falls outside *Smith* because the City has burdened the religious exercise of CSS through policies that do not meet the requirement of being neutral and generally applicable.").

concurrence, however, that more challenging cases for which recourse to the Court's "system of individualized exemptions" approach to triggering strict scrutiny does not provide satisfactory results are sure to come.[329] And come they have. Religious liberty challenges to COVID-19 vaccination mandates offer one example. To date, the Court has considered appeals from lower court denials of injunctions in several such cases,[330] and federal appellate and district courts have been asked to apply the *Fulton* framework to many others.[331] As discussed below, those cases have laid bare some of the pressure cracks in the framework of free exercise analysis prescribed in *Fulton* and the COVID-19 cases.

### *A. Does* Fulton *Entail a Religious Veto?*

In Justice Alito's *Fulton* concurrence, he advocates for overturning *Smith* entirely in favor of an across-the-board strict scrutiny regime for laws that substantially burden religious practice.[332] Opposition to the *Smith* test has become a kind of litmus test for politically conservative constitutional jurisprudence over the last thirty years.[333] Yet, it is worth considering whether continued calls for overruling S*mith* are actually warranted under the Court's post-COVID-19 and post-*Fulton* free exercise jurisprudence. Does the *Smith* test—augmented by a narrow reading of its general applicability standard that endorses both the "most favored nation status" theory and the "system of individualized exceptions" rule, and is further buttressed by judicial nondeference to government officials' judgments about the similarity of religious and secular conduct—really allow government to substantially burden sincere religious practice with neutral and generally applicable laws subject to only rational basis review?

In his lengthy *Fulton* concurrence, Justice Alito answered this question in the affirmative. In addition to his strictly legal arguments for why *Smith* is wrong as a matter of sound textual and originalist constitutional interpretation,[334] Alito also

---

[329] *See id.* at 1931 (Gorsuch, J., concurring).

[330] *See, e.g.*, Doe v. Mills, 142 S. Ct. 17 (2021) (denying a preliminary injunction to a group of medical professionals who sought to be exempted from Maine's vaccine mandate because of their religious convictions); Dr. A v. Hochul, 142 S. Ct. 552 (2021) (denying injunctive relief to New York healthcare workers who sought to be exempted from a healthcare worker vaccine mandate because it violated their religious beliefs).

[331] *See, e.g.*, Klein v. Bureau of Lab. & Indus., 506 P.3d 1108, 1114 (Or. Ct. App. 2022) (holding that the bakers failed to show that the *Fulton* decision altered the court's prior conclusion that Or. Rev. Stat. § 659 A.403 was a generally applicable law); Resurrection Sch. v. Hertel, 35 F.4th 524, 529 (6th Cir. 2022).

[332] *Fulton*, 141 S. Ct. at 1924 (Alito, J. concurring) ("If *Smith* is overruled, what legal standard should be applied in this case? The answer that comes most readily to mind is the standard that *Smith* replaced: A law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest.").

[333] *See, e.g.*, McConnell, *supra* note 63, at 1152.

[334] *See Fulton*, 141 S. Ct. at 1888 (Alito, J. concurring) ("*Smith*'s interpretation is hard to

offered up litany of high-profile examples of legislative efforts that he argued would result in intolerable burdens on religious practice.[335] First, Alito considers the hypothetical scenario where the Volstead Act, which prohibited the production and consumption of alcohol and was enacted to effectuate the 18th Amendment,[336] had not included an exemption for sacramental wine. "The Act would have been consistent with *Smith*," Alito argued, "even though it would have prevented the celebration of a Catholic Mass anywhere in the United States."[337] Next, he points to recent European bans on animal slaughter in cases where the animal is not first rendered unconscious.[338] "That law would be fine under *Smith* even though it would outlaw kosher and halal slaughter."[339] Next, Alito draws on a recent effort by the city of San Francisco to ban infant circumcision.[340] That "categorical ban would be allowed by *Smith*," he argues, "even though it would prohibit an ancient and important Jewish and Muslim practice."[341]

Alito's concerns seem misplaced, however. The Volstead Act included exceptions for medically prescribed alcohol;[342] European animal slaughter restrictions

---

defend. It can't be squared with the ordinary meaning of the text of the Free Exercise Clause or with the prevalent understanding of the scope of the free-exercise right at the time of the First Amendment's adoption.").

[335] *See id.* at 1884.

[336] The Nat'l Prohibition Act, Pub. L. No. 66-66, 41 Stat. 305 (1919) (repealed in 1933) (also known as the "Volstead Act"); U.S. CONST. amend. XVIII (1919) (subsequently repealed by U.S. Constitutional amendment XXI on December 5, 1933).

[337] *Fulton*, 141 S. Ct. at 1884 (Alito, J. concurring).

[338] *See, e.g.*, Case C-336/19, Centraal Israëlitisch Consistorie van België v. Vlaamse Regering, ECLI:EU:C:2020:1031 (Dec. 17, 2020) (upholding a Belgian law that requires animals be stunned before slaughter). *See generally* LAW LIBRARY OF CONGRESS, GLOBAL LEGAL RESEARCH CENTER, LEGAL RESTRICTIONS ON RELIGIOUS SLAUGHTER IN EUROPE (Mar. 2018), https://www.loc.gov/law/help/religious-slaughter/religious-slaughter-europe.pdf (describing various animal slaughter laws across Europe).

[339] *Fulton*, 141 S. Ct. at 1884 (Alito, J., concurring).

[340] *See generally* Adam Cohen, *San Francisco's Circumcision Ban: An Attack on Religious Freedom?*, TIME (June 13, 2011), http://content.time.com/time/nation/article/0,8599,2077240,00.html [https://perma.cc/HPQ5-N2L3]; Jennifer Medina, *Efforts to Ban Circumcision Gain Traction in California*, N.Y. TIMES (June 4, 2011), https://www.nytimes.com/2011/06/05/us/05circumcision.html [https://perma.cc/4MJJ-N6GY] (describing the bans on circumcision proposed in San Francisco); Mikaela Conley, *Proposed Circumcision Ban Struck from San Francisco Ballot*, ABC NEWS (July 28, 2011, 10:06 AM), https://abcnews.go.com/Health/san-francisco-circumcision-ban-striken/story?id=14179024 [https://perma.cc/TZL2-UGK3] (describing the arguments for and against a circumcision ban in San Francisco); Michael A. Helfand, *No, Bloomberg Isn't Banning Circumcision*, FIRST THINGS (Oct. 15, 2012), https://www.firstthings.com/web-exclusives/2012/10/no-bloomberg-isnt-banning-circumcision [https://perma.cc/NZ9Z-PLSH] (describing the religious liberty implications of a circumcision ban).

[341] *Fulton*, 141 S. Ct. at 1884 (Alito, J., concurring).

[342] The National Prohibition Act, 66 Pub. L. No. 66-66, 41 Stat. 305, 310 (1919) (repealed

include numerous exceptions for hunting, fishing, and scientific experimentation;[343] and the proposed San Francisco ordinance exempted circumcisions performed due to medical need.[344] Each of Justice Alito's proposed examples are thus not generally applicable under the Court's current understanding of the *Smith* test. Each law exempts some kinds of non-religious conduct that undermines its policy objectives. Each law appears to regard some non-religious reasons for consuming alcohol, slaughtering conscious animals, or circumcising infants as sufficient to justify allowing these disfavored acts, but declines to treat religious reasons for such behavior as equally weighty. Such laws would therefore be subject to strict scrutiny under the Court's post-*Fulton* understanding of *Smith*.

The fact that one can conjure scenarios in which legislatures might pass such laws without *any* exemptions does little to strengthen Alito's point. It is hard to realistically imagine governments imposing behavioral restrictions that do not include, at the very least, an exception for addressing life-threatening situations.[345] Indeed, if they did not do so, such laws might raise other serious constitutional questions.[346] Ultimately, even such a narrow exception for serious medical need would amount to favorable treatment that undermines the law's specific policy ends and, under the Court's new reading of the general applicability rule, such laws would also have to grant similar exemptions for religiously motivated behavior.[347] It seems then, that *Smith*—at least as now framed by the Court—offers fairly strong protection for religious practice.

Blunting Justice Alito's claim that the *Fulton* Court's free exercise framework provides inadequate protection for religious practice also helps reveal a critical

---

in 1933) (also known as the "Volstead Act") ("No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do, except that a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician herein provided.").

[343] *See* Case C-336/19, ECLI:EU:C:2020:1031 (upholding a regulation allowing for exceptions for animal killings without stunning during scientific experiments, during hunting or fishing, or during cultural or sporting events).

[344] *See* Gabrielle Saveri, *Circumcision Ban in San Francisco Considered*, NBC NEWS (April 27, 2011, 2:01 PM), https://www.nbcnews.com/id/wbna42784426 [https://perma.cc/8LEL-MP4Q].

[345] *See, e.g.*, Jon F. Merz et al., *A Review of Abortion Policy: Legality, Medicaid Funding, and Parental Involvement, 1967–1994*, 17 WOMEN'S RTS. L. REP. 1, 3–5 (discussing extended history of exemptions to abortion restrictions when the life or health of the mother was at stake).

[346] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 164 (1973) (requiring otherwise valid regulations of post-viability abortions to permit abortion "when it is necessary to preserve the life or health of the mother"), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Jacobsen v. Massachusetts, 197 U.S. 11, 38–39 (1905).

[347] *See* Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 651–52 (2003) (describing the effects of medical exemptions under the *Smith* test).

weakness in the new, narrow *Smith* test: it is quite hard to imagine *any* religion-burdening laws that would not be subject to strict scrutiny when analyzed under the Court's new approach to free exercise claims.[348] Every law either includes statutory exemptions for at least some kinds of behavior that violate the prescribed general rule, or else allows for officials to use discretion to grant exemptions in cases that warrant special consideration given countervailing concerns. Such exemptions inevitably undermine the narrow and specific policy aims served by the rule, yet they are given because the legislature or relevant executive official determines that doing so serves other, weightier values or policy goods. If the free exercise framework established by the COVID-19 cases and *Fulton* were to be applied on its own terms, then, virtually every law, policy, or course of government action would be subjected to strict scrutiny under *Smith* unless it accommodated every sincerely motivated religious practice that might otherwise violate the challenged rule. Since every law, policy, or government action entails at least some exemptions or exercises of discretion, they must also offer similar exemptions for religiously motivated violations of the law, unless not doing so is strictly necessary to achieve a compelling government interest.

Such a far-reaching strict scrutiny regime seemingly goes much further than even the *Sherbert* test, under which the Court gradually recognized a need for numerous exceptions to protect general government policies from being subject to every religious American's personal veto.[349] More importantly, this exceedingly broad framework for protecting religious practice from legal restriction is evidently unworkable. As Professor Elizabeth Reiner Platt observed in a 2021 report of the *Law, Rights, and Religion Project* at Columbia Law School, the new free exercise regime put in place by the Court's COVID-19 cases jurisprudence would seemingly "make it all but impossible for legislatures to write laws that can be applied" to all citizens and entities without accommodating virtually every claim of sincere religious conflict.[350] Applied as laid out in *Fulton* and the COVID-19 cases, the new *Smith* framework would require criminal laws that do not exempt religiously motivated crimes to meet the demands of strict scrutiny because prosecutors enjoy discretion to decline to prosecute criminal offenses for a variety of secular reasons.[351] Similarly, wage and hour laws would be subject to strict scrutiny if challenged by

---

[348] *See generally* Zalman Rothschild, *Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 YALE L.J. 1106 (2022) (discussing the *Fulton* decision and how the "individualized exemptions" rule created in the case could subject almost any government policy to a credible free exercise challenge).

[349] *See supra* Section I.B.

[350] Elizabeth R. Platt et al., *We the People (of Faith): The Supremacy of Religious Rights in the Shadow of a Pandemic*, L. RTS. & RELIGION PROJECT 13–14 (June 2021).

[351] *See generally* Rothschild, *supra* note 348, at 1136 ("Moving forward, in light of the individualized-exemptions rule adopted by the Court in Fulton, any number of government policies could face credible free exercise challenges.").

an individual with religious objections to complying with such rules, because the law offers a secular exemption for salaried employees.[352] Moreover, a party with religious objections to paying income taxes might trigger strict scrutiny by pointing out that the tax code exempts some individual from paying income taxes for secular reasons (such as poverty).[353] The point here is not to argue that the Court's new approach to religious free exercise claims will actually produce such results. Instead, the absurd but logically entailed consequences of the new robust "system of individual exemptions" and "most favored nation status" rules reveal the unworkability of the new doctrine.

### *B. The Incoherence of the Court's Vaccine Exemption Decisions*

Helpfully, there is no need to rely on contrived hypotheticals to illustrate the problematic nature of the post-*Fulton* approach. In the months after confirming its new free exercise test, the Court has faced several religious challenges to state and federal COVID-19 vaccine mandates premised its new and expanded protection for religious liberty from the burdens of neutral laws. The way the Supreme Court has addressed these cases helps illustrate the untenability of the *Fulton* doctrine.

#### 1. *Dahl v. Board of Trustees of Western Michigan University*

What does it look like for a court to apply the new free exercise test mandated by *Fulton* and the COVID-19 cases to a religious free exercise challenge to a COVID-19 vaccination mandate? District and Circuit courts have split on the question. The Sixth Circuit's refusal to stay a district court order granting a preliminary injunction against a state university's enforcing a vaccine mandate for student athletes exemplifies a straightforward application of the Supreme Court's COVID-19 cases and *Fulton* precedents to a religious free exercise challenge to a vaccine mandate. In *Dahl v. Board of Trustees of Western Michigan University*,[354] sixteen student athletes challenged a university policy barring unvaccinated students from full participation in university athletic programs, while allowing medical and religious exemptions to be considered by university health officials on a case-by-case basis.[355] The District Court granted the plaintiffs a preliminary injunction against enforcement of the policy, and the Sixth Circuit affirmed.[356] Applying *Fulton*, the Sixth Circuit concluded that the university policy was not generally applicable and

---

[352] *See id.*

[353] *See id.*

[354] *See generally* Dahl v. Bd. of Trs. of W. Mich. Univ., 558 F. Supp. 3d 561 (W.D. Mich. 2021).

[355] *See id.* at 564.

[356] *See generally* Dahl v. Bd. of Trs. of W. Mich. Univ., 15 F.4th 728 (6th Cir. 2021).

thus was subject to strict scrutiny because it "provides a 'mechanism for individualized exemptions'" from the COVID-19 vaccine mandate.[357] The court further applied the kind of narrow focus on government interests served by a challenged law exemplified in the COVID-19 cases and affirmed in *Fulton*.[358] It rejected the university's claims that the state had a compelling interest in instituting a vaccine mandate and instead declared that the correct question was whether the state had a compelling interest in applying its vaccine mandate specifically to religious objectors and, if so, whether that application is truly necessary to achieve the critical policy ends served by not exempting religious dissenters from the mandate.[359] Framed this way, the Circuit Court concluded that the university policy would likely fail under strict scrutiny and left the district court's injunction in place.[360]

Similar results have obtained in several district court cases, where judges have concluded that the straightforward application of the Supreme Court's new free exercise framework demands religious exemptions from COVID-19 vaccine requirements. A recent ruling by Judge Reed O'Conner of the Northern District of Texas provides a useful illustration.[361] The case involved a challenge to a Department of Defense COVID-19 vaccination mandate that included exemptions for personnel involved in vaccine clinical trials and for those for whom the vaccine was medically contraindicated. The vaccine policy specifically refused to grant exemptions based on personal or religious beliefs, however.[362] The mandate was challenged by thirty-five naval personnel of various faiths with religiously motivated objections to taking the vaccine and argued that the mandate violated their religious liberty rights.[363] The District Court granted the plaintiffs' motion for a preliminary injunction, holding that the plaintiffs were likely to succeed on the merits of the case on both RFRA and First Amendment grounds.[364] In finding that the navy's vaccination mandate likely violated the Free Exercise Clause, the District Court relied heavily on the new framework established by *Fulton* and the COVID-19 cases.[365]

The COVID-19 cases established the "most favored nation status" rule for determining whether a challenged law is generally applicable.[366] Judge O'Conner found that under this standard, the navy's mandate was not generally applicable under *Smith* because it permitted personnel to remain unvaccinated for at least some

---

[357] *Id.* at 733.
[358] *See id.* at 733–35.
[359] *See id.* at 735.
[360] *See id.* at 736.
[361] *See generally* U.S. Navy Seals 1–26 v. Biden, 578 F. Supp. 3d. 822 (N.D. Tex. 2021).
[362] *See id.* at 827–28.
[363] *See id.*
[364] *See id.* at 835–38.
[365] *Id.*
[366] *See generally* Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63 (2020); *South Bay II*, 141 S. Ct. 716 (2021); Tandon v. Newsom, 141 S. Ct. 1294 (2021).

non-religious reasons, such as allergies, medical contraindication, and ongoing participation in clinical trials.[367] The District Court went on to reject the government's explanation for distinguishing between religious and medical exemptions because, following the Court's COVID-19 cases rulings, "*any* favorable treatment" for secular conduct that undermines the mandate's goal of universal vaccination "defeats neutrality."[368] Judge O'Conner also found the navy's vaccine mandate problematic based on *Fulton*'s "mechanism for individualized exemptions" standard for general applicability under *Smith*.[369] The navy's vaccine mandate allowed naval personnel to apply for religious exemptions, which could be denied or granted at the navy's discretion.[370] This, the District Court held, rendered the rule not generally applicable and thus subject to strict scrutiny.[371] Other district courts have followed suit.[372]

2. *Does 1–3 v. Mills* and *Dr. A v. Hochul*

The seemingly correct conclusion reached by these courts—that the Supreme Court's new free exercise rules requires religious exemptions to vaccination mandates—has been repeatedly rejected. The First and Second Circuit Courts of Appeals have rejected this view, as have several district courts in other circuits.[373] More critically, in two per curium rulings, the Supreme Court itself has affirmed the First and Second Circuit decisions denying preliminary injunctions against the enforcement of COVID-19 vaccination mandates because the plaintiffs in those

---

[367] *See U.S. Navy Seals 1–26*, 578 F. Supp. 3d. at 837–38.

[368] *Id.* at 838.

[369] *Id.* at 837–38.

[370] *See id.* at 827.

[371] *See id.* at 838.

[372] *See, e.g.*, Kentucky v. Biden, 571 F. Supp. 3d. 715, 734–35 (E.D. Ky. 2021) (discussing how the government was enjoined from enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts in Kentucky, Ohio, and Tennessee because for the plaintiffs, the loss of constitutional freedoms for even a short amount of time constituted irreparable injury); Brnovich v. Biden, 562 F. Supp. 3d 123, 167 (D. Ariz. 2022) (enjoining federal government from enforcing the federal contractor vaccine mandate). *Contra* Clementine Co. v. de Blasio, No. 21-cv-7779, 2021 WL 5756398, at *1 (S.D.N.Y. Dec. 3, 2021) (denying preliminary injunction to group of small theatres and comedy clubs subject to "Key to the City" vaccine mandate, which required proof of vaccination to enter the theatres and clubs).

[373] *See, e.g.*, Does 1–6 v. Mills, 16 F.4th 20, 30, 32, 36–37 (1st Cir. 2021) (holding the district court did not err in denying healthcare workers' motion for preliminary injunction to prevent enforcement of a Maine statute that required workers in licensed healthcare facilities to be vaccinated against COVID-19 because it was facially neutral and furthered a compelling public health interest); We the Patriots USA, Inc. v. Hochul, 17 F.4th 266, 272–73 (2d Cir. 2021) (holding that healthcare workers were not entitled to preliminary injunctive relief restraining New York from enforcing its emergency rule requiring healthcare facilities to ensure certain employees were vaccinated against COVID-19).

cases are not likely to succeed on the merits of their free exercise claims.[374] The Court has done so even though a more straightforward application of its own *Fulton* and COVID-19 cases precedents would seem to demand the opposite result.

In *Does 1–3 v. Mills*,[375] the Supreme Court denied a request by several Maine healthcare workers to stay the First Circuit's denial of their request for a preliminary injunction against enforcement of Maine's vaccination mandate for healthcare workers.[376] The Maine mandate exempted healthcare workers who had medical concerns with taking the vaccine attested to by a medical professional, but did not offer any exemptions for religious objections.[377] The First Circuit Court of Appeals denied the plaintiffs' request for a preliminary injunction after finding that they were not likely to succeed on the merits of their free exercise claim.[378] The Court concluded that the Maine rule was generally applicable and thus subject to only rational basis review and that it would likely satisfy strict scrutiny even if that more stringent standard were to apply.[379]

With respect to the law's general applicability, the Court concluded that the permitted medical exemptions were not analogous to the prohibited religious exemptions and that the disparity did not therefore render the law not generally applicable.[380] In reaching this conclusion, the Appellate Court relied on its conclusion that the mandate's medical exemptions did not permit secular conduct that would undermine the law's asserted goals in a similar way to religious exemptions.[381] The Court found that the vaccine mandate served several broad policy concerns: "(1) ensuring that healthcare workers remain healthy and able to provide . . . needed care . . . (2) protecting the health of . . . those . . . who are vulnerable to [the virus] because they cannot be vaccinated for medical reasons; and (3) protecting the health and safety of all Mainers."[382] According to the Court, the law's medical exemptions served, rather than undermined, these goals.[383] By not requiring healthcare workers to receive vaccinations that might harm their health, the law

---

[374] *See*, *e.g.*, Does 1–3 v. Mills, 142 S. Ct. 17, 17 (2021) (denying a preliminary injunction to a group of medical professionals who sought to be exempted from Maine's vaccine mandate because of their religious convictions); Dr. A v. Hochul, 142 S. Ct. 552, 552 (2021) (denying injunctive relief to New York healthcare workers who sought to be exempted from a healthcare worker vaccine mandate because it violated their religious beliefs).

[375] 142 S. Ct. at 17.

[376] *Id.*

[377] *Does 1–6*, 16 F.4th at 24.

[378] *See id.* at 30, 32, 36–37 (holding the District Court did not err in denying healthcare workers' motion for preliminary injunction to prevent enforcement of a Maine statute that required workers in licensed healthcare facilities to be vaccinated against COVID-19 because it was facially neutral and furthered a compelling public health interest).

[379] *See id.* at 30–35.

[380] *See id.* at 30.

[381] *See id.*

[382] *Id.* at 30–31.

[383] *See Does 1–6*, 16 F.4th at 31.

helped insure that workers would remain healthy, since "providing healthcare workers with medically contraindicated vaccines would threaten the health of those workers and thus compromise both their own health and their ability to provide care."[384] By contrast, the Court said, religious exemptions "would not advance the three interests Maine has articulated."[385]

It is notable that in denying the plaintiffs' request for a preliminary injunction, the Appellate Court appears to have skirted a straightforward application of the Supreme Court's new free exercise framework in at least three ways.[386] First, the First Circuit apparently found it sufficient that the medical exemptions were consistent with one of the state's three policy objectives.[387] The Court was almost certainly correct in finding that the state's interest in protecting the health of healthcare workers and ensuring their ability to provide care to others would be better served by allowing them to avoid potential negative effects of receiving the vaccine while risking being infected by COVID-19 than by requiring them to minimize the risk of viral infection by taking a vaccine that might them cause medical complications.[388] Notably, however, under the analysis offered in the Court's decisions in *Cuomo* and *South Bay II*, that interest balancing appears more appropriate to conducting strict scrutiny analysis *after* concluding that a law is not generally applicable.[389] The state's decision about how to balance these competing risks of medical complications and viral infection in healthcare workers should not provide a basis for concluding the law is generally applicable.

Second, the Appellate Court elided the fact that medical exemptions do undermine at least some of the state's policy goals. As Justice Gorsuch pointed out in his dissent, allowing healthcare workers to remain unvaccinated risks exposing patients in healthcare facilities to the virus carried by unvaccinated healthcare workers, regardless of whether or not that portends better health outcomes for the workers themselves.[390] Likewise, exempting healthcare workers from vaccination requirements in this way allows a segment of Maine's population to remain at greater risk for infection and for spreading the virus to others.[391] Under the Supreme Court's

---

[384] *Id.*

[385] *Id.* at 31–32.

[386] *See infra* notes 396–407 and accompanying text.

[387] *Does 1–6*, 16 F.4th at 31 ("Providing a medical exemption does not undermine any of Maine's three goals . . . . Rather, providing healthcare workers with medically contraindicated vaccines would threaten the health of those workers and thus compromise both their own health and their ability to provide care.").

[388] *Id.* ("Maine CDC's rule offers only one exemption, and that is because the rule itself poses a physical health risk to some who are subject to it. Thus, carving out an exemption for those people to whom that physical health risk applies furthers Maine's asserted interests.").

[389] *See* Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63, 67–68 (2020); *South Bay II*, 141 S. Ct. 716, 716–17 (2021).

[390] *See* Does 1–3 v. Mills, 142 S. Ct. 17, 20 (2021) (Gorsuch, J., dissenting).

[391] *See id.*

"most favored nation status" approach to general applicability, the fact that medical exemptions detract from the state's ability to achieve these vaccine mandate aims should have rendered the law not generally applicable.[392]

Third, the Circuit Court's observation that religious exemptions would not serve Maine's policy goals is an irrelevant concern under the Court's new free exercise doctrine. The relevant question for determining whether a law is generally applicable is not whether additional religious exemptions would further the state's interests, but whether the granted secular exemptions in any way undermine the law's objectives.[393] If they do (as did the medical exemptions to Maine's vaccine mandate), the state must prove that its refusal to grant exemptions for religious reasons in genuinely necessary to achieve a compelling government interest.[394] Thus, Justice Gorsuch pointed out in his dissent in *Does 1–3* that, under *Tandon*, a challenged law is subject to strict scrutiny under *Smith* if "it treats '*any* comparable secular activity more favorably than religious exercise'" no matter what reasons the state may have for doing so.[395] This was very clearly true of the Maine regulation, which treated medical reasons for not receiving the mandated vaccine more favorable than religious reasons for the same conduct.[396]

The First Circuit went on to hold that even if strict scrutiny were to apply, the Maine regulation would pass constitutional muster.[397] Here too, the Appellate Court engaged in an analysis that departs substantially from the searching, non-deferential approach adopted by the Supreme Court in its COVID-19 cases precedents.[398] The First Circuit found that because the state had tried a variety of methods to get its healthcare workers vaccinated without achieving the goal of ninety percent vaccination needed to halt community transmission of the virus, "Maine has no alternative to meet its goal other than mandating healthcare workers to be vaccinated."[399] The Appellate Court's decision in *Does 1–3* thus demonstrates substantial deference to the state's judgments about what sort of measures are actually necessary to achieve its goals.[400] Under *Fulton*, however, this analysis is mistaken. The correct focus should have been on whether the state had any alternative to meet its ninety percent vaccination goal, rather than by requiring specifically those with religious objections to

---

[392] *See id.* at 19.

[393] *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021) (the question is whether the challenged law contains an exemption for a secular objector that "undermines the government's asserted interests in a similar way" an exemption for a religious objector may); Tandon v. Newsom 141 S. Ct. 1294, 1296 (2021) (per curiam) (comparing the relevant secular exemptions to the "religious exercise at issue").

[394] *See Fulton*, 141 S. Ct. at 1881–82.

[395] *Does 1–3*, 142 S. Ct. at 19 (Gorsuch, J., dissenting).

[396] *Id.* at 19.

[397] Does 1–6 v. Mills, 16 F.4th 20, 32–35 (1st Cir. 2021).

[398] *See id.*

[399] *Id.* at 33.

[400] *See id.* at 32–35.

be vaccinated. Moreover, as Justices Gorsuch, Thomas, and Alito pointed out in their dissent from the Court's refusal to stay the First Circuit's ruling, it appears that Maine had achieved its goal of at least a ninety percent vaccination rate among healthcare workers in almost all healthcare settings within the state, and that denying religious exemptions from the mandate were not at all necessary to meeting that aim.[401]

Six weeks after its per curium disposition of *Does 1–3*, the Court denied another request for an emergency stay in *Dr. A v. Hochul*.[402] The case challenged the Second Circuit refusal to grant a preliminary injunction against a New York vaccine mandate for healthcare workers that did not include any religious exemptions.[403] Here too, the Appellate Court rejected a religious liberty challenge to a state vaccination mandate only by avoiding a straightforward application of the rigorous free exercise standards established in *Fulton* and the COVID-19 cases. For example, the Second Circuit rejected the plaintiff's claims that the New York mandate was not generally applicable because it found that the allowed medical exemptions and disallowed religious exemptions were not comparable.[404] Specifically, the Court found that risks of granting medical exemptions were less acute than those posed by religious exemptions[405] and concluded that this difference justified the mandate's differential treatment of medical and religious exemptions without negating the law's general applicability.[406] The plaintiffs appealed to the Supreme Court requesting an emergency stay of the Circuit Court's ruling.[407] As in *Does 1–3*, the Supreme Court declined to grant the stay, signaling its agreement with the Second Circuit's view that the plaintiffs were unlikely to succeed on the First Amendment merits of their claims.[408]

The Second Circuit's analysis gets the Court's COVID-19 cases precedents badly wrong, however. In both *Cuomo* and *Tandon*, the Court made clear that the relevant question for determining if secular and religious conduct is analogous for purposes of general applicability is whether the permitted secular conduct undermines the specific policy aims of the challenged law.[409] If it does, the Court held, the state must offer exceedingly convincing justifications to explain why it is willing to undermine the law's goals to accommodate secular conduct, but is unwilling to do so to accommodate religiously motivated behavior.[410] The relative degree to which

---

[401] *See Does 1–3*, 142 S. Ct. at 21 (Gorsuch, J., dissenting).

[402] *See* Dr. A v. Hochul, 142 S. Ct. 552, 552 (2021).

[403] *See id.* at 552, 554.

[404] *See* We the Patriots USA, Inc. v. Hochul, 17 F.4th 266, 289 (2d Cir. 2021).

[405] *Id.* at 286 ("[I]t may be feasible for healthcare entities to manage the COVID-19 risks posed by a small set of objectively defined and largely time-limited medical exemptions. In contrast, it could pose a significant barrier to effective disease prevention to permit a much greater number of permanent religious exemptions.").

[406] *See id.* at 286–88.

[407] *See Dr. A*, 142 S. Ct. at 554.

[408] *See id.* at 552.

[409] *See* Roman Cath. Diocese v. Cuomo, 141 S. Ct. 63, 66–67 (2020); Tandon v. Newsom 141 S. Ct. 1296, 1296–97 (2021).

[410] *See Tandon*, 141 S. Ct. at 1297 ("[I]nstead of requiring the State to explain why it

exempt secular and disallowed religious activity each undermine the law's goals may be relevant to determining whether it is "necessary" to not exempt the religious conduct.[411] But this inquiry is properly part of a strict scrutiny analysis to be conducted only after the challenged law is held to not be generally applicable due to the disparate treatment it accords to religious and secular behaviors that undermine the law's objectives. As Justice Gorsuch explained in his *Dr. A* dissent, when determining whether a challenged law is generally applicable, "the only question is whether the challenged law contains an exemption for a secular objector that 'undermines the government's asserted interests in a similar way.'"[412] The *degree* to which secular and religious conduct undermines the government's interests is beside the point so long as both kinds of activities frustrate the law's policy objectives.[413]

3. The New Free Exercise Doctrine Laid Bare

The recent rulings by the First and Second Circuit Courts denying requested religious exemptions from state vaccine mandates fly in the face of the Supreme Court's most recent free exercise jurisprudence in several respects. These circuit court decisions misapply the Court's freshly prescribed "most favored nation status" approach to determining general applicability under *Smith* by considering the degree to which differentially treated religious and secular conduct undermine asserted government interests. The rulings also treated asserted government interests and state judgments about the necessity of denying religious exemptions to achieve those interests with far more deference than the Court's recent cases suggest is appropriate. Nevertheless, the Court has declined to grant emergency stays of these decisions.

The question, of course, is why? Why does the Court appear uncommitted to applying its own recent religious free exercise precedents—precedents created largely through the disposition of challenges to other pandemic-related public health regulations—to current religious challenges to COVID-19 vaccine requirements?

Leaving aside possible speculations about the subjective motives of individual justices, the Court's unwillingness to apply its robust "most favored nation status" approach to religious free exercise to vaccine mandates helps highlight the unworkability for this new First Amendment framework. Justice Holmes observed that "hard cases make bad law."[414] There are misgivings about the universality of this generalization based on some comparative insights from other legal systems that

---

could not safely permit at-home worshipers to gather in larger numbers while using precautions used in secular activities, the Ninth Circuit erroneously declared that such measures might not 'translate readily' to the home.").

411 *See generally Cuomo*, 141 S. Ct. at 63; *South Bay II*, 141 S. Ct. 716, 716 (2021); *Tandon*, 141 S. Ct. at 1294.

412 *Dr. A*, 142 S. Ct. at 556 (Gorsuch, J., dissenting).

413 *See id.*

414 *See* N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

think hard cases that pose vexing tensions between competing values, interests, and concerns are precisely the right place to develop good legal standards. Still, it seems that Holmes's dictum holds true here: In the midst of a global pandemic the medical community was, at least initially, almost entirely powerless to treat COVID-19;[415] federal, state, and local lawmakers and public health officials responded to the crisis with a hodgepodge of shifting and poorly explained measures that imposed burdens on religious practice (as well as virtually every other aspect of life);[416] and Americans were faced with an unknown reality, an uncertain future, and a scenario that felt much too close the beginnings of so many apocalyptic dramas.[417] In that context, faced with the need to police government bans on core religious practices during an ongoing emergency with no obvious endpoint, the Supreme Court—many of whose members ascended to the bench skeptical of existing, limited protections for religious free exercise[418]—made some bad law. Trying to reach what it saw as the right decisions in *Cuomo*, *South Bay II*, and *Tandon*, the Court ended up articulating an impossibly high bar for religious free exercise rights.

The Court's COVID-19 cases rulings resulted in a doctrinal and analytic framework that effectively means that no law or policy—all of which must inevitably include at least some exceptions or space for executive discretion—can survive constitutional review unless it also exempts virtually all forms of religiously motivated conduct from legal regulation. As the Court made clear numerous times during earlier stages of its free exercise jurisprudence, when religious liberty was given a wider breadth than in the post-*Smith* world, this is a societally unworkable standard.[419]

---

[415] *See* Selam Gebrekidan & Matt Apuzzo, *Covid Response Was a Global Series of Failures, W.H.O.-Established Panel Says*, N.Y. TIMES (Jan. 18, 2021), https://www.nytimes.com/2021/01/18/world/europe/virus-WHO-report-failures.html?smid=url-share.

[416] *See* Edward Stringham, *When 800 Mainstream US Scientists Warned Against Lockdowns*, BROWNSTONE INST. (May 24, 2022), https://brownstone.org/articles/when-800-mainstream-us-scientists-warned-against-lockdowns/?utm_source=FFF+Daily&utm_campaign=be3e0722d0-FFF+Daily+2022-05-26&utm_medium=email&utm_term=0_1139d80dff-be3e0722d0-318121705 [https://perma.cc/59QM-W47F].

[417] Mark Kortepeter, *Whether It's Covid, Monkeypox or a Zombie Apocalypse, Here's How to Investigate a New Epidemic*, FORBES (June 24, 2022, 2:21 PM), https://www.forbes.com/sites/coronavirusfrontlines/2022/06/24/whether-its-covid-monkeypox-or-a-zombie-apocalypse-heres-how-to-investigate-a-new-epidemic/?sh=16314b8c25c6 [https://perma.cc/WZW7-RBSZ].

[418] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1924 (2021) (Alito, J. concurring) (contending that the *Smith* standard should be replaced with "the standard that *Smith* replaced: A law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest").

[419] *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 166 (1879) ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practice."); Harden v. Tennessee, 216 S.W.2d 708, 709, 711 (Tenn. 1948) (holding that the First Amendment did not prohibit Tennessee from convicting

Governments must be able to pass laws to regulate conduct to achieve public policy objectives. Yet the First Amendment rule expressed in the COVID-19 cases and reinforced in *Fulton* makes it virtually—if not actually—impossible for any government entity to establish any general rule of conduct to achieve public policy ends. If that framework is consistently and faithfully applied, it would effectively give any and every sincere religious belief—of which our thankfully diverse society has so many—a constitutionally required exemption from the ordinary demands of legal compliance with society's democratically chosen norms of conduct. The circuit court's ruling in *Dahl*, and petitioners' arguments in *Does* and *Dr. A* pushed that view. But the stakes in those cases—the undermining of a critical public policy initiative that offered the best hope yet for emerging from the dark throes of the pandemic into a resumed state of normalcy—appear to have indicated to the Court that its recent posture to religious liberty claims could not be quite right—or at least need some adjusting.

## CONCLUSION

At its core, this Article has told a story. The story of the ebb and flow of the Supreme Court's interpretation and application of the First Amendment's Free Exercise Clause as the Court has tried to navigate the challenging questions raised by our dual, sometimes competing commitments to effective democratic policy making through law and the special protection and respect afforded to American's sincerely held religious practices. It is relatively easy for society to permit each person their subjective beliefs, but it is much harder to strike the right balance between societal and individual religious needs when it comes to behavior and conduct.

This story is one that tracks a learning process wherein cases, presenting unique fact-driven challenges to existing notions of how to balance general law and individual religion, induced the Court to question and reevaluate its own prior assumptions. The Jehovah's Witnesses Cases of the 1930s–1950s helped the Court appreciate and rectify its error in maintaining an artificial distinction between religious belief and religious practice.[420] Later, the expansion of restrictive regulations and government-provided benefits, like unemployment payments, further induced the Court to recognize the reality of the burdens and marginalization experienced when American's are forced to make sacrifices in terms of their legal rights and entitlements in order to maintain their religious practices.[421] Further assertions of desired religious

---

defendants for violating a statute prohibiting the handling of poisonous snakes, even though it was part of a religious ceremony).

[420] *See* Lovell v. City of Griffin, 303 U.S. 444, 444 (1938); Cantwell v. Connecticut, 309 U.S. 296, 296–97 (1940).

[421] *See* United States v. Lee, 455 U.S. 252, 254 (1982); Sherbert v. Verner, 374 U.S. 398, 398 (1963).

exemptions, that effectively amounted to a religious veto on government policy, next signaled to the Court that the scope of the exemptions could not be limitless and had to be constrained.[422] Ultimately, this led to the articulation of the *Smith* doctrine and its contraction of free exercise rights.[423] Viewed in this context, the expansion of religious liberty rights during the COVID-19 pandemic and the Court's walking back from that framework in its responses to vaccine mandate challenges, are merely the next chapter of this story—the next refining stage in the Court's learning process as it tries to identify the correct First Amendment balance.

More questions remain, of course. It is almost certain that in the wake of *Dobbs v. Whole Women's Health* and the rollback of a substantive due process right to abortion, the Court will face religious challenges to state abortion restrictions. Several such challenges are already underway in lower courts,[424] and the Court's rulings in the COVID-19 cases and *Fulton* make such claims eminently viable, though they would have almost surely failed under the old *Smith* test. How will a more conservative Court, a majority of whose justices are unfavorably disposed to abortion (some for personal religious reasons) and also ostensibly committed to broad protections for religious free exercise from even religious neutral and generally applicable laws deal with such cases?

That chapter remains to be written.

---

[422] *See* Bowen v. Roy, 476 U.S. 693, 693 (1986); Lyng v. Nw. Indian Cemetery Protection Ass'n, 485 U.S. 439, 439–40 (1987).

[423] *See* Emp. Division v. Smith, 494 U.S. 872, 872–73 (1990).

[424] *See* Madeleine Carlisle & Abigail Abrams, *Does Religious Freedom Protect a Right to an Abortion? One Rabbi's Mission to Find Out*, TIME (July 7, 2022, 6:51 PM), https://time.com/6194804/abortion-religious-freedom-judaism-florida/ [https://perma.cc/3TLA-4TFH].