FIRST AMENDMENT CHALLENGES TO STATE VACCINE MANDATES: WHY THE U.S. SUPREME COURT SHOULD HOLD THAT THE FREE EXERCISE CLAUSE DOES NOT REQUIRE RELIGIOUS EXEMPTIONS

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The U.S. Supreme Court has never issued a judicial opinion on the merits declaring that the First Amendment Free Exercise Clause permits states to mandate vaccinations without offering religious exemptions. However, in two recent cases, the Court in brief orders declined applications for emergency relief to block state vaccine mandates, and the petitioners have vowed to continue to pursue these cases.

This Article explores how the seemingly sudden onset of the coronavirus pandemic, coupled with its protracted duration, has occasioned both emergency and enduring state regulation of religious behavior in a way that exposes deep divides in our society's views of the proper exercise of the state's police powers to promote public health and safety, and of the protections afforded by the Free Exercise Clause. Part I of this article considers state vaccination jurisprudence in the United States, beginning with the seminal 1905 case of Jacobson v. Massachusetts*, illustrating that federal and state courts have consistently deferred to states' exercise of their police powers in mandating vaccination, and have held that states need not offer religious exemptions to vaccination. Part II of this article analyzes the two recent cases brought by health care workers who petitioned the Supreme Court for emergency relief from vaccine mandates. This Part focuses on the dissenting Justices' view that a state must offer a*

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religious exemption to vaccination if it offers a secular one. Part III explores how these dissenting justices developed their interpretation through cases relating to restrictions on religious gatherings, thereby changing Free Exercise jurisprudence significantly during the pandemic era. Finally, Part IV critiques the view that a state violates the Free Exercise Clause where it permits a secular but not a religious exemption to a state vaccine mandate, and explains how the Supreme Court can distinguish the cases concerning pandemic gatherings from cases involving vaccine mandates, so as to uphold state vaccine mandates as constitutional.

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"[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."

- *John Stuart Mill, ON LIBERTY 22 (2d ed. 1859)*

INTRODUCTION

The U.S. Supreme Court has never issued a judicial opinion on the merits declaring that the First Amendment Free Exercise Clause, which provides that the government "shall make no law . . . prohibiting the free exercise [of religion],"[1] permits states to mandate vaccinations without offering religious exemptions to their vaccine mandates.[2] However, on October 29, 2021, in the case *Does v. Mills*,[3] the Court in a brief order declined an application for emergency relief to block Maine's mandate for health care workers to be vaccinated against COVID-19, a requirement that allows no religious exemptions.[4] On December 13,

1. U.S. CONST. amend. I.

2. *Has the Supreme Court Ruled on the Constitutionality of Religious Exemptions to State-Compelled Vaccination?*, FREEDOM F. INST., https://www.freedomforuminstitute.org/about/faq/has-the-supreme-court-ruled-on-the-constitutionality-of-religious-exemptions-to-state-compelled-vaccination [https://perma.cc/6SJP-WUPJ] (stating that is not clear "whether or not the Court would find the free-exercise clause to mandate the inclusion of religious exemptions").

3. 142 S. Ct. 17 (2021) (mem.).

4. *Id.* at 1. After the Supreme Court denied plaintiffs' motion for a preliminary injunction, the legal team that pursued the case declared its intention to return to the Court for a full consideration on the merits, stating that "[t]his case is far from over." David Sharp & Jessica Gresko, *Supreme Court Declines to Block Maine Vaccine Mandate*, AP NEWS (Oct. 30, 2021), https://apnews.com/article/us-supreme-court-health-maine-6f246ae1c1dd501e40ceb470f0cc2366 (last visited July 6, 2022). Although the Supreme Court in February 2022 declined to grant a writ of certiorari in this case, Does 1–3 v. Mills, 142 S. Ct. 1112 (2022), the seven health care workers who have decided to proceed with the case filed an amended complaint on July 11, 2022. First Amended Verified Complaint for Injunctive Relief, Declaratory Relief and Damages at 1, *Lowe v. Mills*, No. 1:21-cv-00242-JDL (amended complaint filed July 11, 2022); s*ee also* Ceoli Jacoby, *Court Requires Transparency in Lawsuit Brought by Maine Healthcare Workers Fighting COVID-19 Vaccine Mandate*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, (July 15, 2022) https://www.rcfp.org/does-v-mills-covid-suit-unsealing [https://perma.cc/FWR5-Z9JU]. Although a federal district court judge dismissed plaintiff's amended complaint, lawyers for the plaintiffs have declared their intent to appeal this decision. Patrick Whittle, Judge Throws Out Maine Lawsuit Against COVID Vaccine Mandate, AP News, https://apnews.com/article/covid-us-supreme-court-health-maine-bac65fe8fa3d88e73280c7ee37f65f2d (August 19, 2022). In addition, the issue of the constitutionality of the absence of a religious exemption to a vaccine mandate is highly relevant in light of the many mandatory vaccines for diseases such

2021, in the case *Dr. A v. Hochul*,[5] the Court again in a brief order declined an application for emergency relief to block New York's COVID-19 vaccination requirement, which a group of health care workers challenged because it lacked a religious exemption.[6] In both cases, a minority of Justices—Alito, Gorsuch, and Thomas—would have granted the petitioners' request for relief based on their interpretation of Free Exercise jurisprudence,[7] and in particular the 1990 case *Employment Division, Department of Human Resources of Oregon v. Smith*.[8] In *Smith*,

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as polio and measles. *See, e.g.*, Andrew Koppelman, *Neil Gorsuch's Terrifying Paragraph*, THE HILL (Dec. 5, 2021), https://thehill.com/opinion/judiciary/584198-neil-gorsuchs-terrifying-paragraph [https://perma.cc/PT89-HNR6] (expressing that the author is "terrified" by the indication in Justice Gorsuch's dissent that three justices believe that states are constitutionally prohibited from imposing on religious dissenters vaccination requirements similar to those that led to the eradication of diphtheria, measles, and polio, and noting the author's fear that "[i]f these judges have their way, those diseases may come back"); Dahlia Lithwick & Mark Joseph Stern, *Gorsuch's Crusade Against Vaccine Mandates Could Topple a Pillar of Public Health*, SLATE (Dec. 15, 2021), https://slate.com/news-and-politics/2021/12/vaccine-mandates-supreme-court-religious-liberty-pandemic.html [https://perma.cc/DL34-QCDF] (expressing concern that Justice Gorsuch's dissent in *Mills* indicates that "Gorsuch seems to think that unless a disease is actively killing tens of thousands of Americans a month, the state cannot curb its spread in a manner that hampers 'religious liberty,'" and noting that Justice Gorsuch's dissent in *Mills* demonstrates his view that mandatory vaccination laws for a broad range of diseases that no longer "ravage the population" would be considered suspect, notwithstanding that these diseases have been eradicated because of vaccine mandates).

5. 142 S. Ct. 552 (2021) (mem.).

6. *Id.* at 552 (Gorsuch, J., dissenting). In February 2022, plaintiffs moved for another preliminary injunction after amending their complaint to include a preemption claim and a claim that they were unlawfully disqualified from unemployment benefits. Dr. A v. Hochul, No. 1:21-CV-109, 2022 WL 548260, at *2 (N.D.N.Y. Feb. 23, 2022). This motion was denied, however, by the same judge who had granted them a preliminary injunction, later overruled at the appellate level, on Free Exercise grounds. *Id.* at *7; *see infra* notes 183–184 and accompanying text. Although the U.S. Supreme Court denied on June 30, 2022 plaintiff's' petition for certiorari, Justice Thomas dissented from this denial and was joined by Justices Alito and Gorsuch. Dr. A v. Hochul, 142 S. Ct. 2569 (2022) (Thomas, J., dissenting).

7. *Mills*, 142 S. Ct. at 22 (Gorsuch, J., dissenting); Dr. A, 142 S. Ct. at 555 (Gorsuch, J., dissenting).

8. 494 U.S. 872 (1990), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106–274, 114 Stat. 803 *and* Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103–141, 107 Stat. 1488, *as recognized in* Ramirez v. Collier, 142 S. Ct. 1264 (2022). RLUIPA supersedes the *Smith* rule that generally applicable laws that burden religious exercise do not offend the First Amendment, but only insofar as a state or its subdivisions impose a substantial burden on religious exercise within the specific contexts of zoning and landmarking situations

the U.S. Supreme Court changed constitutional law significantly by ruling that neutral and generally applicable laws that do not target specific religious practices are presumed valid under the First Amendment Free Exercise Clause. As such, in *Smith*, the Court abandoned the strict scrutiny test that it had applied to Free Exercise cases since its 1963 decision in *Sherbert v. Verner*.[9]

The Supreme Court has evidenced, however, a significant narrowing of *Smith* in recent Free Exercise opinions relating to religious gatherings during the pandemic, as demonstrated by the examples of *Roman Catholic Diocese of Brooklyn v. Cuomo*[10] and *Tandon v. Newsom*.[11] According to *Diocese*, a law is not generally applicable as required by *Smith*, and therefore is subject to strict scrutiny, if it contains a secular exemption but denies religious ones.[12] Moreover, pursuant to *Tandon*, state action is subject to strict scrutiny if it treats *any* comparable secular activity more favorably than religious exercise, even if the government treats *some* comparable secular businesses or other activities as poorly or even less favorably than the religious exercise at issue.[13] Further, Justice Alito declared in his concurring opinion in the 2021 decision in *Fulton v. City of Philadelphia*[14] that he would overturn *Smith* altogether and apply strict scrutiny in all First Amendment Free Exercise cases.[15] Although Justice Alito appears unlikely in the short term to assemble a majority of the Court to overrule *Smith*,[16] the narrowing of *Smith* in several pandemic-era cases has impacted First Amendment Free Exercise jurisprudence in significant ways.

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and prison issues. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1217 (2d ed. 2002).

9. 374 U.S. 398, 406 (1963) (finding that the state failed strict scrutiny when it deprived a Seventh-day Adventist, who refused to work on her sabbath, unemployment benefits in violation of the First Amendment's right to free exercise of religion), *abrogated by* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990).

10. 141 S. Ct. 63 (2020) (per curiam) (granting a preliminary injunction against a New York gubernatorial order that restricted religious gatherings in certain geographic zones while permitting secular businesses to remain open in those zones, on the basis that the order violated the Free Exercise Clause).

11. 141 S. Ct. 1294 (2021) (per curiam) (enjoining California from enforcing COVID-19 restrictions on private gatherings as applied to applicants' at-home religious exercise, pending disposition of the appeal in the U.S. Court of Appeals for the 9th Circuit and disposition of the petition for a writ of certiorari, if any).

12. *See infra* Part III.B. for a discussion of *Diocese*.

13. *See infra* Part III.C. for a discussion of *Tandon*.

14. 141 S. Ct. 1868 (2021).

15. *Id.* at 1924 (Alito, J., concurring).

16. *See infra* note 238, 356, and accompanying text.

This Article explores how the seemingly sudden onset of the COVID-19 pandemic, coupled with its protracted duration, has occasioned both emergency and enduring state regulation of religious behavior in a way that exposes deep divides in our society's views of the proper exercise of the state's police powers to promote public health and safety, and of the protections afforded by the Free Exercise Clause. State statutory law relating to vaccination, which has traditionally applied to students, and, to a lesser extent, health care workers, provides an especially valuable opportunity to explore the Supreme Court's evolution in the interpretation of the First Amendment Free Exercise Clause, in light of the longstanding recognition of state police powers to mandate vaccination.[17]

Part I of this article considers state vaccination jurisprudence in the United States, beginning with the seminal 1905 case of *Jacobson v. Massachusetts*,[18] illustrating that federal and state courts have consistently deferred to states' exercise of their police powers in mandating vaccination and have held that states need not offer religious exemptions to vaccination. Part II of this article analyzes the *Mills* and *Dr. A* cases brought by health care workers who petitioned the Supreme Court for emergency relief from vaccine mandates. This Part focuses on the dissenting Justices' narrow interpretation of *Smith*, which they declared requires a religious exemption if the state offers a secular one. Part III explores how the dissenting justices in *Mills* and *Dr. A* developed their narrow interpretation of *Smith*, thereby changing Free Exercise jurisprudence significantly during the pandemic era, through the *Diocese* and *Tandon* cases. This Part also considers the non-COVID-19-related *Fulton* decision,[19] in which Justice Alito's concurrence called for overturning *Smith* altogether.[20] Finally, Part IV critiques the reading of *Smith* that finds a Free Exercise violation where the state permits a secular but not a religious exemption to a state vaccine mandate and explains how the Supreme Court can distinguish *Diocese* and *Tandon*,

17. *See infra* Part I.

18. 197 U.S. 11 (1905).

19. 141 S. Ct. at 1882 (holding unanimously that Philadelphia's refusal to contract with a Catholic social services agency for the provision of foster care services, unless that agency agreed to certify same-sex couples as foster parents, violates the Free Exercise Clause of the First Amendment).

20. *See infra* notes 455–457 and accompanying text (discussing Alito's argument for re-examining and "correcting" *Smith* based on a strict construction of the First Amendment).

which concern pandemic gatherings, from cases involving vaccine mandates, so as to uphold state vaccine mandates as constitutional.

I. FEDERAL AND STATE COURTS HAVE REPEATEDLY UPHELD THE STATE'S POWER TO MANDATE VACCINES AND TO DENY RELIGIOUS EXEMPTIONS

Among the fifty U.S. states and the District of Columbia, all mandate some vaccinations for students to enter school, and six states currently do not allow individuals to invoke a religious exemption to school vaccination mandates.[21] States increasingly mandate some vaccinations for health care workers,[22] and only Maine, New York, and Rhode Island have declined to offer religious exemptions to them.[23] What is clear,

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21. *States with Religious and Philosophical Exemptions from School Immunization Requirements*, NAT'L CONF. OF STATE LEGISLATURES, (May 25, 2022), https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx [https://perma.cc/Y2Z8-9C85] [hereinafter *State Immunization Exemptions*] (noting there are "44 states and Washington D.C. that grant religious exemptions for people who have religious objections to immunizations," and identifying California, Connecticut, Maine, Mississippi, New York, and West Virginia as the states without a religious exemption to school vaccination requirements).

22. *See, e.g.*, Dee Pekruhn & Eram Abbasi, *Vaccine Mandates by State, Who is, Who isn't, and How?*, LEADING AGE (Jan. 19, 2022), https://leadingage.org/workforce/vaccine-mandates-state-who-who-isnt-and-how [https://perma.cc/2FB4-HWC7] (setting forth state vaccination mandates for COVID-19 vaccination specifically for health care workers).

23. *See Mills Administration Requires Health Care Workers to Be Fully Vaccinated Against COVID-19 by October 1*, STATE OF ME., OFFICE OF GOVERNOR JANET T. MILLS (Aug. 12, 2021), https://www.maine.gov/governor/mills/news/mills-administration-requires-health-care-workers-be-fully-vaccinated-against-covid-19-october [https://perma.cc/35AZ-NKHT]; N.Y. COMP. CODES R. & REGS. tit. 10, § 2.61 (2021); Nellie M. Gorbea Sec'y of State, *Requirement for Immunization Against COVID-19 for All Workers in Licensed Health Care Facilities and Other Practicing Health Care Providers*, R.I. DEP'T OF STATE, https://rules.sos.ri.gov/regulations/part/216-20-15-8 [https://perma.cc/S8DG-29ZX]. Commentators noted that Rhode Island's COVID-19 vaccine mandate for health care workers, like New York's, offered medical exemptions but was silent as to religious exemptions. Janice G. Dubler & Sean J. Oliveira, *Rhode Island: Making Religious Accommodations to COVID-19 Vaccines in Health Care*, SHRM (Oct. 29, 2021), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/rhode-island-vaccine-religious-accommodations-in-health-care.aspx [https://perma.cc/A82X-RQC3]. Plaintiff health care workers sought a restraining order against the Rhode Island emergency regulation on Free Exercise grounds, among others. In September 2021, the District Court denied injunctive relief, citing the state police powers to mandate vaccination. Dr. T. v. Alexander-Scott, No. 1:21-cv-00387-MSM-LDA, 2021 WL 4476784, at *2 (D.R.I. Sept. 30, 2021). The District Court then upheld this decision after reviewing an expanded record. Dr. T. v. Alexander-Scott, No. 1:21-cv-00387-MSM-LDA, 2022 WL 79819, at *10 (D.R.I. Jan. 7, 2022). In March 2022, after these

since the Supreme Court's holding in the 1905 case of *Jacobson v. Massachusetts*, is that U.S. states possess broad police powers to mandate vaccination in order to promote public health and safety.[24] The law in this area has evolved over the last 115 years as the Court has developed and applied tiered scrutiny to review states' alleged violations of their citizens' fundamental rights.[25] In addition, the

judicial decisions, Rhode Island's emergency regulation that required health care workers to be fully vaccinated against the coronavirus expired. *See* Requirement for Protection Against COVID-19 for Health Care Workers in Licensed Health Facilities, 216-20 R.I. CODE § 15 (LexisNexis 2021)., https://rules.sos.ri.gov/regulations/part/216-20-15-9 [https://perma.cc/KN5X-VJG9]). Rhode Island health care workers remain subject to several other vaccine mandates, however. State of Rhode Island Department of Health, Immunization Information for Health Care Workers, https://health.ri.gov/immunization/for/healthcareworkers [https://perma.cc/NF5R-WNTP].

24. Zucht v. King, 260 U.S. 174, 176 (1922) (citing *Jacobson* for the proposition that it is "settled that it is within the police power of a state to provide for compulsory vaccination"). It should be noted that generally states do not force people to be vaccinated against their will, but instead withhold certain privileges, such as the right to attend school or to work in a particular sector, if an individual refuses to accept a mandated vaccine. WEN W. SHEN, CONG. RSCH. SERV., R46745, STATE AND FEDERAL AUTHORITY TO MANDATE COVID-19 VACCINATION 5 (2021), https://crsreports.congress.gov/product/pdf/R/R46745 [https://perma.cc/TJ8A-3N4J]. Thus, there is a distinction between mandatory public health powers, which impose particular conditions on individuals in order to encourage their participation in vaccination programs, and compulsory public health powers, which may be accomplished by force but are rarely used because they implicate ethical concerns. Jen Piatt, *COVID-19 Vaccine and Employer Mandates*, THE NETWORK FOR PUBLIC HEALTH L. (June 3, 2021), https://www.networkforphl.org/wp-content/uploads/2021/06/Guidance-COVID-19-Vaccine-and-Employer-Mandates-June-3-2021.pdf [https://perma.cc/9PVV-8PB4]. Although some courts quoted in this article use the term "compulsory" vaccination, none of the cases cited herein actually concern compulsory vaccination, but instead involve mandatory vaccination. Compulsory vaccination, which is very rare, may arise in the context of a public health emergency, during which a state health officer orders an individual to be vaccinated in the event that she carries a disease that presents a severe danger to public health. Even in such cases, medical and religious exemptions may be available, and the individual who refuses to be vaccinated will have the option to be quarantined during the public health emergency. JARED P. COLE & KATHLEEN S. SWENDIMAN, CONG. RSCH. SERV., RS21414, MANDATORY VACCINATIONS: PRECEDENT AND CURRENT LAWS 7–8 (2014), https://fas.org/sgp/crs/misc/RS21414.pdf [https://perma.cc/PM97-8X9N].

25. When the constitutionality of a law is challenged, both federal and state courts analyze that law using a system of tiered scrutiny. Presently, if state regulation affects a fundamental right, such as free speech, due process, or equal protection, strict judicial scrutiny must be applied. Reiss & Weithorn, *supra* note 26, at 896–97 (2015). S*ee generally* Tara Leigh Grove, *Tiers of Scrutiny in a Hierarchical Judiciary*, 14 GEO. J. L. & POL'Y 475, 477 (2016). Under the strict scrutiny standard, the state bears the burden of proving that its regulation seeks to achieve a compelling state interest and that the

modern-day application of the Bill of Rights to state action has enabled individuals to challenge the power of states to mandate vaccination, notably by bringing First Amendment claims against vaccine mandates.[26] While the analysis U.S. federal courts have applied to state vaccine mandates has changed, these courts have remained deferential to states' exercise of their police powers with respect to vaccination, in keeping with the principle that state legislatures, acting under the guidance of public health experts, are better able than courts to make determinations about vaccines.[27] Indeed, before the Supreme Court decisions denying requests from Maine and New York health care workers for injunctions against coronavirus vaccines mandates, many courts at both the federal and state level had published detailed opinions rejecting constitutional challenges to state vaccine mandates that lack a religious exemption. These lower courts held that the First Amendment Free Exercise Clause does not require a state to provide a religious exemption, even though all states permit medical exemptions.[28]

A. Federal and State Court Decisions Uphold State Vaccine Mandates for K–12 Students, Even Without a Religious Exemption

Pursuant to the federalist system in the United States, the federal government and states share regulatory authority over public health matters, with states traditionally holding most of the control in

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means to achieve this interest are the most narrowly tailored. Reiss & Weithorn, *supra*, at 896–97. Infringement on other liberties, including Fourteenth Amendment liberties, though still subject to a review of their constitutionality, are evaluated using rational basis review. *See id.* at 897 ("[A] range of arguably less-stringent alternative modes of analysis may be constitutionally required, depending on the characterization of the right allegedly infringed . . . ."). Under rational basis review, which is less demanding than strict scrutiny, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985).

26. Dorit Rubinstein Reiss & Lois A. Weithorn, *Responding to the Childhood Vaccination Crisis: Legal Frameworks and Tools in the Context of Parental Vaccine Refusal*, 63 BUFF. L. REV. 881, 898 n.79 (2015) (explaining that the doctrine of incorporation was used to apply the Free Exercise Clause of the First Amendment to state action in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)).

27. SHEN, *supra* note 24, at 3 ("[M]odern courts have continued to . . . giv[e] considerable deference to the states' use of their police power to require immunizations to protect public health.").

28. SHEN, *supra* note 24, at 3 & n.26. Individuals may, for example, seek a medical exemption to a vaccine if they are immunocompromised or allergic to the components of the vaccine. *Id.* at 3.

accordance with their general police powers.[29] Police powers are the powers of a state government to make and enforce all laws necessary "to provide for the public health, safety, and morals . . . ."[30] As noted by one commentator, police power "originate[s] from the English common law system that colonists brought with them to America," and "the states did not surrender their powers as a condition of entering into the union" upon the ratification of the Constitution in 1788.[31] In contrast, pursuant to our federalist system of government enshrined in the Tenth Amendment to the U.S. Constitution, the federal government's powers are confined to those enumerated in the Constitution.[32]

In the early twentieth century, the U.S. Supreme Court, in the only two cases prior to 2021 in which it issued opinions pertaining to vaccination,[33] twice rejected constitutional challenges to state vaccine mandates, holding that laws requiring vaccination fall within the state police powers.[34] The first such case, *Jacobson v. Massachusetts*, which federal courts still cite as precedent,[35] was brought by the petitioner as a Fourteenth Amendment Due Process case.[36] The *Jacobson* case arose from the first mandatory state immunization statute in the U.S., when the state of Massachusetts in 1809 required the population to be

29. SHEN, *supra* note 24, at 1 (citing Elizabeth Y. McCuskey, *Body of Preemption: Health Law Traditions and the Presumption Against Preemption*, 89 TEMPLE L. REV. 95, 113–20 (2016)).

30. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569, 572 (1991) (upholding an Indiana state statute prohibiting nude dancing as entertainment).

31. Douglas C. Ligor, *State Police Powers: A Less than Optimal Remedy for the COVID-19 Disease*, RAND CORP. (May 1, 2020), https://www.rand.org/blog/2020/05/state-police-powers-a-less-than-optimal-remedy-for.html [https://perma.cc/U3XD-JHSU].

32. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

33. *See* Marie Killmond, Note, *Why Is Vaccination Different? A Comparative Analysis of Religious Exemptions*, 117 COLUM. L. REV. 913, 925, 927 (2017) (stating that as of 2017 the Supreme Court had "spoken directly on vaccine-related issues only twice").

34. Zucht v. King, 260 U.S. 174, 176–77 (1922); Jacobson v. Massachusetts, 197 U.S. 11, 25, 39 (1905).

35. *See, e.g.*, Workman v. Mingo Cnty. Bd. of Educ., 419 F. App'x. 348, 353–56 (4th Cir. 2011); Whitlow v. California, 203 F. Supp. 3d 1079, 1083–84 (S.D. Cal. 2016); Boone *ex rel.* Boone v. Boozman, 217 F. Supp. 2d 938, 954–57 (E.D. Ark. 2002); Sherr v. Northport-East Northport Union Free Sch. Dist., 672 F. Supp. 81, 83 (E.D.N.Y. 1987).

36. *Jacobson*, 197 U.S. at 14. The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

immunized against smallpox.[37] Nearly a century after the enactment of that law, during a smallpox outbreak in 1902, Cambridge Pastor Henning Jacobson, who believed that he was at an increased risk for an adverse reaction to the smallpox vaccine, refused to be vaccinated and, in accordance with the Massachusetts law, was fined five dollars.[38] Although the law permitted children with medical justifications to avoid vaccination, it permitted no such exemption for adults.[39] According to the Court, Jacobson argued that "his liberty [was] invaded when the State subject[ed] him to fine or imprisonment for neglecting or refusing to submit to vaccination," that the law was "unreasonable, arbitrary, and oppressive," and "that the execution of such a law against one who objects to vaccination, no matter for what reason, [was] nothing short of an assault upon his person."[40]

The Supreme Court in 1905 rejected Jacobson's constitutional arguments, holding that the Constitution "does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint" and that there are "manifold restraints to which every person is necessarily subject for the common good."[41] The *Jacobson* Court imposed a "reasonableness" standard, recognizing the "power of a local community to protect itself against an epidemic threatening the safety of all" so long as this power was not exercised in "an arbitrary, unreasonable manner" or "far beyond what was reasonably required for the safety of the public."[42] It should be noted that *Jacobson*, which mandated an adult vaccine, addressed this question while facing an actual smallpox outbreak, which lent a sense of

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37. *See* Walter A. Orenstein & Alan R. Hinman, *The Immunization System in the United States—The Role of School Immunization Laws*, 17 VACCINE (SUPPLEMENT) S19, S20 (1999); *see also Jacobson*, 197 U.S. at 12 (noting that the Revised Laws of Massachusetts, chapter 75, section 137, the statute at issue, then provided that "'the board of health of a city or town if, in its opinion, it is necessary for the public health or safety shall require and enforce the vaccination and revaccination of all the inhabitants thereof and shall provide them with the means of free vaccination. Whoever, being over twenty-one years of age and not under guardianship, refuses or neglects to comply with such requirement shall forfeit [five dollars].'").

38. *Jacobson*, 197 U.S. at 14; Daniel A. Salmon, Stephen P. Teret, C. Raina MacIntyre, David Salisbury, Margaret A. Burgess, & Neal A. Halsey, *Compulsory Vaccination and Conscientious or Philosophical Exemptions: Past, Present, and Future*, 367 LANCET 436, 438 (2006).

39. Salmon, et al., *supra* note 38, at 438.

40. *Jacobson*, 197 U.S. at 26.

41. *Id.*

42. *Id.* at 28.

urgency to the state's vaccination mandate[43] leading the Court to hold that "it cannot be adjudged that the present regulation of the board of health was not necessary in order to protect the public health and secure the public safety."[44]

Less than two decades after *Jacobson*, the U.S. Supreme Court in 1922 upheld the constitutionality of a local vaccine ordinance mandating vaccines for school children, in the absence of any outbreak.[45] In *Zucht v. King*,[46] the parents of a child who was excluded from both public and private school due to her unvaccinated status challenged the San Antonio local ordinance requiring vaccination for schoolchildren, arguing that the ordinance violated the Fourteenth Amendment's Equal Protection and Due Process Clauses.[47] In rejecting this constitutional challenge, the Supreme Court cited *Jacobson* as having "settled that it is within the police power of a state to provide for compulsory vaccination."[48] The Court declared that "these ordinances confer not arbitrary power, but only that broad discretion required for the protection of the public health."[49]

Commentators have noted that constitutional jurisprudence has evolved since the Jacobson and Zucht decisions in several ways. For example, modern courts have adopted a system of tiered scrutiny.[50] Another change is that modern plaintiffs can now invoke the First Amendment to raise religious objections to vaccine mandates, an argument unavailable to the *Jacobson* and *Zucht* petitioners, given that it was not until 1940 that the U.S. Supreme Court held that First Amendment claims applied to state action.[51]

Most of the challenges to state vaccine mandates involve students,[52] given that all fifty U.S. states presently have legislation requiring

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43. Dorit L. Reiss & Arthur L. Caplan, *Considerations in Mandating a New Covid-19 Vaccine in the USA for Children and Adults*, 7 J. L. & BIOSCIENCES 1, 2 (2020).

44. *Jacobson*, 197 U.S. at 28.

45. *Zucht v. King*, 260 U.S. 174, 177 (1922).

46. 260 U.S. 174 (1922).

47. *Id.* at 175–76. The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

48. *Zucht*, 260 U.S. at 176.

49. *Id.* at 177.

50. *See supra* note 25.

51. *See supra* note 26 and accompanying text.

52. SHEN, *supra* note 24, at 3 n.21.

specified vaccines for students.[53] Increasingly, parents and others challenging state vaccine mandates invoke First Amendment Free Exercise claims,[54] either because the state does not offer any religious exemption or because they allege that the state's religious exemption is unconstitutional.[55] While all states recognize medical exemptions for mandatory student vaccinations, six states—California, Connecticut, Maine, Mississippi, New York, and West Virginia do not offer students religious exemptions.[56]

Two federal appellate courts have upheld the constitutionality of a statutory vaccine mandate for students that does not provide for a religious exemption, finding that the absence of such an exemption does not violate the Free Exercise clause. In 2015, the U.S. Court of Appeals for the Second Circuit held in *Phillips v. City of New York*,[57] in the context of a chicken pox outbreak, that a state is not constitutionally required to offer students a religious exemption.[58] Plaintiffs, parents of an unvaccinated minor excluded from school based on a chicken pox outbreak, challenged New York's statutory vaccination mandate, which

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53. *State Immunization Exemptions*, *supra* note 21. In most instances, state school vaccination laws expressly apply to both public school as well as private schools, with identical immunization and exemption provisions. All states establish vaccination requirements for children as a condition for day care attendance, which are similar to the requirements for school children. CDC, STATE SCHOOL IMMUNIZATION REQUIREMENTS AND VACCINE EXEMPTION LAWS 1–2 (2019), https://www.cdc.gov/phlp/docs/school-vaccinations.pdf [https://perma.cc/3QNP-DCLV].

54. *See* Greg Stohr, *New York School Vaccine Mandate Survives as Supreme Court Rejects Appeal*, BLOOMBERG, (May 23, 2022, 9:31 AM), https://www.bloomberg.com/news/articles/2022-05-23/n-y-school-vaccine-mandate-survives-as-top-court-rejects-appeal [https://perma.cc/A994-28LG] (reporting on the Supreme Court's refusal to hear a group of parents' First Amendment challenge to the New York school vaccine mandate). *See generally* Ruth Graham, *Vaccine Resisters Seek Religious Exemptions, but What Counts as Religious?*, N.Y. TIMES (Sept. 12, 2021), https://www.nytimes.com/2021/09/11/us/covid-vaccine-religion-exemption.html [https://perma.cc/CA6J-K52V] (citing a sharp rise in the request for religious exemptions to vaccine mandates).

55. *See, e.g.*, We The Patriots USA, Inc. v. Hochul, 17 F. 4th 266, 272 (2d Cir. 2021) (per curiam) (challenging constitutionality of New York's omission of a religious exemption in the state's mandatory vaccination order for health care workers); McCarthy v. Boozman, 212 F. Supp. 2d 945, 948 (W.D. Ark. 2002) (challenging constitutionality of religious exemption to Arkansas' mandatory immunization statute).

56. *State Immunization Exemptions*, *supra* note 21.

57. 775 F.3d 538 (2d Cir. 2015) (per curiam).

58. *Id.* at 543.

at that time did offer a religious exemption,[59] on Due Process and Free Exercise grounds, among others.[60]

With respect to plaintiffs' due process claim under the Fourteenth Amendment, the *Phillips* court cited *Jacobson* for the principle that, although plaintiffs argued that "a growing body of scientific evidence demonstrates that vaccines cause more harm to society than good," this calculation "is a determination for the legislature, not the individual objectors."[61] In terms of the plaintiffs' Free Exercise claim, after noting that *Jacobson* did not address the question of free exercise of religion,[62] the *Phillips* court cited Supreme Court dictum from *Prince v. Massachusetts*,[63] a child labor case, stating that the "right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."[64] Despite the fact that the New York statute in force at the time of the *Phillips* decision did offer a religious exemption to mandatory student vaccination,[65] the Second Circuit declared that "New York could constitutionally require that all children be vaccinated in order to attend public school" and that "New York law goes beyond what the Constitution requires by allowing an exemption for parents with genuine and sincere religious beliefs."[66] In *Phillips*, the Second Circuit expressly chose to address the Free Exercise argument and declare that the First Amendment does not require a religious exemption, even though the court could have avoided this question given that it based its ruling on its finding that plaintiffs' objections to vaccination were health-related rather than religious in nature.[67]

A few years prior to the Second Circuit's declaration in *Phillips* in dictum that a religious exemption is not a necessary accompaniment to a student vaccine mandate, the Fourth Circuit decided in 2011 in

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59. *Id.* at 540–41.
60. *Id.* at 542.
61. *Id.*
62. *Id.* at 543.
63. 321 U.S. 158 (1944).
64. *Phillips*, 775 F.3d at 543 (quoting Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944)).
65. *Id.* at 540. New York State no longer offers students a religious exemption for mandatory student vaccinations. *See infra* notes 98–101 and accompanying text.
66. *Phillips*, 775 F.3d at 543 (denying a parent's challenge to a provision in New York State vaccination law which temporarily prevented her non-vaccinated child from attending school during a chicken pox outbreak, on the basis that her belief was primarily health-related as opposed to religious).
67. *Id.* at 541.

Workman v. Mingo County Board of Education[68] that a West Virginia statute mandating student vaccination without providing a religious exemption did not violate the Free Exercise Clause.[69] The *Workman* court cited *Jacobson* and declined to limit the holding of that case to instances of disease outbreak.[70] Acknowledging a circuit split over whether strict scrutiny or rational basis is the appropriate level of judicial scrutiny,[71] the court cited numerous precedential cases, starting with *Jacobson*, in holding that the interest of society in preventing the spread of infectious disease supersedes claims of religious freedom.[72]

Nearly two decades before *Phillips*, a New York federal trial court, in considering a Free Exercise challenge to a mandatory student vaccination requirement, stated in dictum that a religious exemption to the state's school vaccination mandate was not constitutionally required.[73] In its 1987 decision in *Sherr v. Northport*,[74] the federal district court considered the complaints of two families who challenged New York's statutory exemption for student vaccination, which was available only to members of recognized, organized religious groups.[75] The court declared the exemption unconstitutional under the Free Exercise Clause, because it unfairly discriminated against religious adherents not affiliated with an organized religion, invoking *Jacobson* for the proposition that "[i]t has long been settled that one area in which religious freedom must be subordinated to the compelling interests of society involves protection against the spread of disease."[76] As in *Phillips*, the *Sherr* court went further than it needed to in declaring that a religious exemption for student vaccination is not constitutionally required.[77] Although the court held that one of the two plaintiffs in *Sherr*

68. 419 F. App'x 348 (4th Cir. 2011).

69. *Id.* at 353–54 (upholding West Virginia's vaccine mandate for students that did not allow for religious exemptions and declaring that "the West Virginia statute requiring vaccinations as a condition of admission to school does not unconstitutionally infringe Workman's right to free exercise"). The *Mingo* court also upheld the mandatory school vaccination requirement on Equal Protection and Due Process grounds. *Id.* at 354–56.

70. *Id.* at 353.

71. The court used the term "compelling interest," which indicates application of strict scrutiny. *See supra* note 25.

72. *Workman*, 419 F. App'x at 353–54.

73. *Sherr v. Northport-E. Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 88 (E.D.N.Y. 1987).

74. 672 F. Supp. 81 (E.D.N.Y. 1987).

75. *Id.* at 97.

76. *Id.* at 83.

77. *Id.*; *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015) (per curiam).

did demonstrate a sincerely held religious belief that merited protection under New York's religious exemption, the court nonetheless asserted that, in light of *Jacobson*, the legislature's creation of the statutory exemption "goes beyond what the Supreme Court has declared the First Amendment to require."[78]

The 2002 case of *Boone ex rel. Boone v. Boozman*[79] illustrates the willingness of a federal district court to uphold a vaccine mandate, even as the court struck down the state's religious exemption as unconstitutional.[80] The *Boone* court declared Arkansas's religious exemption to vaccination discriminatory because, as in *Sherr*, the statute required the religious adherent to prove membership in a "recognized" religious group.[81] Rather than striking down the entire Arkansas statutory vaccine mandate, however, the court chose to sever the religious exemption.[82] Noting that "it was perhaps enlightened" of the legislature "to attempt to provide a religious exemption where one was not constitutionally required," the *Boone* court declined "to re-write the immunization statute," leaving that instead to the legislature.[83] "In other words," declared the federal court, "there now exists no statutory religious exemption to immunization in the State of Arkansas."[84]

In analyzing the plaintiff's Free Exercise Claim, the *Boone* court declared, once it had severed the discriminatory religious exemption, that the vaccine mandate did not trigger strict scrutiny under the system

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78. *Sherr*, 672 F. Supp. at 88.

79. 217 F. Supp. 2d 938 (E.D. Ark. 2002).

80. *Id.* at 950–51.

81. *Id.* at 947, 951 (holding that the statutory vaccination exemption violated the Establishment and Free Exercise clauses and was therefore unconstitutional, as it discriminated against a "nondenominational, nonsectarian individual with a sincerely held individual religious belief" and allowed government officials to make choices not permissible by the Constitution regarding which religions they would "recognize" and which they would not). The First Amendment Establishment Clause prohibits the government from making any law "respecting an establishment of religion." U.S. CONST. amend I. This amendment prohibits the government from extending benefits to some religious observers but not others, absent adequate secular justification. Marci Hamilton & Michael McConnell, *The Establishment Clause*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/264 [https://perma.cc/FU6C-MGHG].

82. *Boone*, 217 F. Supp. 2d at 952.

83. *Id.*

84. *Id.*; *see also* Davis v. Maryland, 451 A.2d 107, 111–12 (Md. 1982) (severing Maryland's unconstitutional religious exemption that required membership in a "recognized church or religious denomination" but upholding compulsory immunization for school-aged children as the state need not provide a religious exemption from its immunization program).

of tiered scrutiny, but instead the more lenient rational basis review, given that an immunization statute is a law of "neutral and of general applicability" that "need not be justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice."[85] Furthermore, the *Boone* court emphasized that the U.S. Supreme Court "has frowned upon extending strict scrutiny to compulsory immunization laws, albeit in *dictum*."[86] Thus, pursuant to the court's rational basis review, "the right to free exercise of religion and parental rights are subordinated to society's interest in protecting against the spread of disease."[87]

Closely related to religious exemptions are personal belief exemptions ("PBE").[88] Of the forty-four states that offer religious exemptions, fifteen also offer PBEs because of personal, moral, or other beliefs.[89] In the 2016 case *Whitlow ex rel. B.A.W. v. California*,[90] a California federal district court upheld, on First Amendment grounds, state legislation eliminating a personal belief exemption to California's immunization requirements for children entering public and private educational and day care facilities.[91] The court held "it is clear that the Constitution does not require the provision of a religious exemption to vaccination requirements, much less a PBE."[92] In ruling that the plaintiff did not have a likelihood of success on her Free Exercise claim, the *Whitlow* court rejected plaintiff's argument that the case of *Employment*

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85. *Boone*, 217 F. Supp. 2d at 952–53 (citing Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 531 (1993)).

86. *Id.* at 953 (citing Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 888–89 (1990)).

87. *Id.* at 954; *see also* McCarthy v. Boozman, 212 F. Supp. 2d 945, 948 (W.D. Ark. 2002) (holding that it is "well settled that a state is not required to provide a religious exemption from its immunization program" and that the "constitutional right to freely practice one's religion does not provide an exemption for parents seeking to avoid compulsory immunization for their school-aged children").

88. Although the term "personal belief exemption" came into popular use in the 1990s, the idea of granting exemptions from mandatory vaccination on the basis of secular beliefs arose in nineteenth century England in response to "decades of widespread noncompliance and openly hostile antivaccinationism." Elena Conis, *The History of the Personal Belief Exemption*, 145 PEDIATRICS 1 (2020), https://pediatrics.aappublications.org/content/pediatrics/145/4/e20192551.full.pdf [https://perma.cc/AF7C-PS7Q].

89. *State Immunization Exemptions*, *supra* note 21.

90. 203 F. Supp. 3d 1079 (S.D. Cal. 2016).

91. Whitlow *ex rel.* B.A.W. v. California, 203 F. Supp. 3d 1079, 1085–87 (S.D. Cal. 2016).

92. *Id.* at 1084.

Division, Department of Human Resources of Oregon v. Smith established that the state must provide a religious exemption if it provides secular ones.[93] The *Whitlow* court declared, "nowhere in [*Smith*] does the Supreme Court state that if the government provides a secular exemption to a law or regulation that it must also provide a religious exemption" and further emphasized that "a majority of the Circuit Courts of Appeal have 'refused to interpret *Smith* as standing for the proposition that a secular exemption automatically creates a claim for a religious exemption.'"[94] The plaintiff's interpretation of *Smith* in *Whitlow* presages the arguments of the plaintiffs in subsequent pandemic-era Free Exercise cases.[95]

State courts have also upheld student vaccine mandates that lack any religious exemption. In March 2021, a New York State appellate court held in *F.F. ex rel. Y.F. v. State*[96] that New York's repeal of a religious exemption to mandated vaccines for students does not violate the Free Exercise clause.[97] That case arose in June 2019 when the New York legislature repealed the religious exemptions formerly available in New York State Public Health Law section 2164,[98] which requires immunizations for children from the ages of two months to eighteen years attending most public and private day cares and K–12 schools in New York State.[99] Prior to 2019, the law permitted two exemptions, one for medical reasons and the other a religious exemption that required only a statement by the parent or guardian of the child indicating that the parent or guardian objected to the vaccination on religious grounds.[100] The New York State legislature repealed the religious

93. *Whitlow*, 203 F. Supp. 3d at 1086.

94. *Id.* at 1086 (quoting Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 651 (10th Cir. 2006)).

95. *See infra* Part II.

96. 143 N.Y.S.3d 734 (N.Y. App. Div. 2021).

97. *Id.* at 739–42.

98. THE NEW YORK STATE SENATE, SENATE BILL S2994A (2019), https://www.nysenate.gov/legislation/bills/2019/s2994/amendment/original [https://perma.cc/P3ZL-ZTNH].

99. New York's Public Health Law mandates that every parent or guardian of a child "shall have administered to such child an adequate dose or doses of an immunizing agent against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, Haemophilus influenzae type b (Hib), pertussis, tetanus, pneumococcal disease, and hepatitis B." N.Y. PUB. HEALTH LAW § 2164(2)(a) (McKinney 2019). For purposes of the mandatory vaccination statute, "school" is defined broadly to mean "any public, private or parochial child caring center, day nursery, day care agency, nursery school, kindergarten, elementary, intermediate or secondary school." *Id.* § 2164(1)(a).

100. *F.F.*, 143 N.Y.S.3d at 737–38.

exemption after a nationwide measles outbreak that was concentrated in two New York counties with low immunization rates.[101] A group of parents of diverse religious beliefs then sued the state on behalf of their children, who previously attended school while unvaccinated under a religious exemption but would not be entitled to do so any longer.[102] In bringing a declaratory judgment action to have the legislation declared unconstitutional, the parents argued, among other things, that the repeal of the religious exemption "was motivated by active hostility towards religion and thus violated the Free Exercise Clause."[103] Before submitting an answer, defendants moved to dismiss the complaint, and the lower court granted defendants' motion, finding that the statute that was repealed was "a neutral law of general applicability" motivated by public health concerns and not hostility towards religion, leading plaintiffs to appeal.[104]

In analyzing plaintiffs' Free Exercise claim, the New York State appellate court invoked *Smith* in order to analyze whether the law was "a neutral law of generally applicability" such that a rational basis standard of constitutional review would apply.[105] Plaintiffs had raised three arguments in support of their contention that the repeal of the religious exemptions was not a neutral law.[106] First, the legislature did not act during the height of the measles outbreak, which plaintiffs charged belied the legislature's stated public health concerns.[107] Second, despite multiple requests from plaintiffs and others in the six months between the proposal of the bills and their adoption, no public hearings were held on the matter.[108] Third, plaintiffs alleged that legislators made statements reflecting religious animus.[109] The court rejected all of these arguments.[110] As to the first, the court noted that the legislation needed time to work its way through the legislative process.[111] In terms of the absence of any public hearings, the court emphasized the legislature's reliance on public health experts, including through the many amici briefs submitted in support of the repeal; the "spirited floor debate"

101. *Id.*
102. *Id.* at 738.
103. *Id.*
104. *Id.*
105. *Id.* at 739.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 739–41.
111. *Id.* at 739.

where legislators expressed their constituents' concerns; and the receipt of many letters in opposition to the appeal.[112] Finally, the court observed that not only had a very small number of legislators expressed hostility toward religion, but also that many legislators did not express animus but rather concern that religion was being misused by people with a secular, as opposed to genuinely religious, opposition to vaccination.[113]

Addressing the *Smith* requirement of "general applicability," the *F.F.* court distinguished the recent case of *Roman Catholic Diocese of Brooklyn v. Cuomo* on the grounds that *Diocese* involved exclusion of houses of worship from a "favored class,"[114] whereas the *F.F.* case involved the elimination of an exemption favoring religious objectors to include them in the vaccine regime applicable to the general public.[115] Indeed, the *F.F.* court declared "the sole purpose of the repeal [was] to make the vaccine requirement generally applicable to the public at large in order to achieve herd immunity."[116]

Having found that New York State's repeal of the religious exemption for mandatory student vaccinations was neutral and generally applicable as required under *Smith*, the *F.F.* court then applied the rational basis test and found that the repeal "easily survives" that test.[117] Vaccinating children not only ensures they will be vaccinated as adults, but also prevents the spread of communicable disease so common in classrooms.[118] The court deferred to the legislature's distinction between the necessity of a medical exemption as opposed to a religious one, citing *Zucht v. King* in support of the power of the legislature "to exercise such 'broad discretion required for the protection of the public health.'"[119]

In the 1979 case *Brown v. Stone*,[120] the Mississippi Supreme Court went so far as to hold that not only is a religious exemption for mandatory vaccination not required, but even further that religious exemptions to mandatory vaccination violate the Fourteenth

112. *Id.* at 739–40.
113. *Id.* at 740–41.
114. *Diocese*, 141 S. Ct. 63, 73 (Kavanaugh, J., concurring). *See infra* Part III.B and accompanying text for a discussion of the *Diocese* case.
115. *F.F.*, 143 N.Y.S.3d at 741.
116. *Id.*
117. *Id.* at 743.
118. *Id.*
119. *Id.* (citing Zucht v. King, 260 U.S. 174, 177 (1922)).
120. 378 So. 2d 218 (Miss. 1979).

Amendment Equal Protection Clause.[121] The court disallowed religious exemptions because they "require the great body of school children to be vaccinated and at the same time expose them to the hazard of associating in school with children exempted under the religious exemption who had not been immunized as required by the statute."[122] The Brown court also articulated the rationale behind state vaccine mandates for children, proclaiming that even though a child has bodily autonomy, the state has a legitimate concern when safety, morals, and the health of children are involved.[123] In this way, statutory vaccine mandates for children may limit the autonomy of the parents to make decisions for their children, with the aim of ensuring the health and safety of the children, who lack the capacity to make their own decisions to protect their health.[124] The rationale for statutory vaccine requirements for adults differs significantly in that the state's goal in mandating adult vaccines is mainly to protect public health more generally, rather than the health of the particular adult subject to the vaccine mandate.

B. Adult Vaccine Mandates Have Also Withstood Legal Challenge

While all states mandate elementary and secondary school student vaccinations subject to medical exemptions, and sometimes religious exemptions as well,[125] state vaccine mandates for adults are far less common. Adult vaccine mandates are usually adopted in specific situations, such as the seminal *Jacobson* case, which upheld a smallpox vaccine mandate in the context of an outbreak.[126] Those states that do mandate adult vaccines typically limit them to health care workers, requiring them to be vaccinated as a condition of their employment.[127]

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121. *Id.* at 223.
122. *Id.*
123. *Id.*
124. Robert I. Field & Arthur L. Caplan, *A Proposed Ethical Framework for Mandates: Competing Values and the Case of HPV*, 18 KENNEDY INST. OF ETHICS J. 111, 113–16, 118 (2008).
125. *See supra* note 56 and accompanying text.
126. Reiss & Caplan, *supra* note 43, at 2.
127. See SHEN, *supra* note 24, at 2–3; *see also* Brian Dean Abramson, *Vaccine Law in the Health Care Workplace*, 12 J. HEALTH & LIFE SCI. L. 22, 26–27 (2019) [hereinafter Abramson] (setting forth varying state laws relating to vaccination of health care workers, which may include an annual flu vaccine and/or proof of inoculation against, or immunity to, a variety of vaccine-preventable diseases such as measles, mumps, rubella, varicella, and Hepatitis B, among others). Adults may also face vaccine mandates

As with mandates for student vaccinations, state vaccination mandates for health care workers are generally subject to medical exemptions, and while states may provide religious exemptions,[128] they are not required to do so.[129] For example, sixteen states require long-term care facilities to ensure that health care workers are vaccinated against influenza,[130] and thirteen of these states permit religious exemptions to this requirement.[131] While adults present a stronger case for autonomy in vaccine decision-making as compared to children, the accepted view has been that adults must cede some of their freedom

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from private employers, typically in the health care setting. Cole & Swendiman, *supra* note 24, at 6. Private mandates may coexist with and be more stringent than state mandates, as long as the private mandates violate no constitutional principles or antidiscrimination laws. Abramson, *supra* note 127 ("State and private mandates may coexist, as state mandates only set a floor, with private institutions generally being permitted to mandate vaccinations more broadly than those mandated by the state, absent state laws expressly limiting the ability of private institutions to impose vaccination requirements."). The federal Americans with Disabilities Act of 1990 (ADA) allows employers to mandate vaccination so long as reasonable accommodations are provided to employees with disabilities, and provides that accommodations are not required in cases of undue hardship or where others may be directly threatened and there is no way to provide a reasonable accommodation that would eliminate or reduce the direct threat. 42 U.S.C. §§ 12112, 12113. Title VII of the Civil Rights Act of 1964 requires reasonable accommodation for employees' religious practices, including religious objections to vaccination, except in cases of undue hardship. 42 U.S.C. §§ 2000e(j), 2000e-2(a)(1). Moreover, some private employers' vaccine mandates may be barred by collective bargaining agreements that require management to negotiate with employee unions before imposing a vaccine mandate as a condition of employment. *See Va. Mason Hosp. v. Wash. State Nurses Ass'n*, 511 F.3d 908, 917 (9th Cir. 2007) (upholding an arbitrator's decision prohibiting a hospital from unilaterally implementing a vaccination policy without bargaining with the nurses' union). Another major limitation to employers' private vaccine mandates are state laws permitting employees to opt out of vaccine mandates. Cole & Swendiman, *supra* note 24, at 6. Because private employer mandates do not raise First Amendment Free Exercise issues, such mandates are beyond the scope of this article.

128. *See* Abramson, *supra* note 127, at 28–34 (describing scope of medical and religious exemptions to vaccination mandates for health care workers).

129. *See Zucht v. King*, 260 U.S. 174, 176 (1922) (stating that it is within the state's police power to determine which health regulations are mandatory).

130. CDC, *Menu of State Long-Term Care Facility Influenza Vaccination Laws*, https://www.cdc.gov/phlp/publications/topic/menus/ltcinfluenza/index.html [https://perma.cc/6K66-6AFW].

131. *Id.*; *see also* CDC, *Menu of State Hospital Influenza Vaccination Laws*, https://www.cdc.gov/phlp/docs/menu-shfluvacclaws.pdf [https://perma.cc/24WK-8BN9] (listing each state's vaccination requirements for health care workers and available exemptions, which do not always include religious exemptions).

when they elect to enter into certain professions.[132] For example, health care workers are expected to sacrifice some of their autonomy when entering a highly regulated profession that entails significant risks, both to their patients and to themselves.[133] However, the COVID-19 pandemic upended this longstanding notion, and health care workers have

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132. *See Pickering v. Bd. of Educ. of Township High Sch. Dist.*, 205, 391 U.S. 563, 568 (1968) (demonstrating this principle in the First Amendment freedom of speech context by recognizing that the government has a greater interest in regulating public employee speech than regulating private speech).

133. Field & Caplan, *supra* note 124, at 118. Numerous recently enacted bills and pending legislative proposals aim to restore the ability of adults to opt out of vaccine mandates. For example, in May 2021 Montana enacted the most sweeping of such laws, which bars the state's public and private employers, other than certain health care facilities, from requiring employees to receive *any* vaccine. Sophie Quinton, *Red States Have Limited Options for Fighting Biden's Vaccine Rules*, THE PEW CHARITABLE TRUSTS (Oct. 8, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/10/08/red-states-have-limited-options-for-fighting-bidens-vaccine-rules [https://perma.cc/SR7N-FAL5]; H.B. 702, 67th Leg. (Mont. 2021). Montana medical groups have challenged this law on the grounds that it conflicts with federal agency rules, and litigation surrounding this issue continues in the Montana federal courts. Roger G. Trim & Jody Ward-Rannow, *Federal Court Enjoins Enforcement of Montana Law that Conflicts with CMS Vaccine Rule*, 12 THE NAT'L L. REV. (2022), https://www.natlawreview.com/article/federal-court-enjoins-enforcement-montana-law-conflicts-cms-vaccine-rule [https://perma.cc/9FUT-69J5]. Along with Montana, fourteen additional states ban state agencies in some measure from requiring employees to be vaccinated. *State Efforts to Ban of Enforce COVID-19 Vaccine Mandates and Passports*, THE NAT'L ACAD. FOR STATE HEALTH POL'Y, https://www.nashp.org/state-lawmakers-submit-bills-to-ban-employer-vaccine-mandates [https://perma.cc/YCT9-V8N2] (last modified July 11, 2022). These state laws banning state vaccine mandates must nevertheless comply with the Supreme Court's January 2022 holding in *Biden v. Missouri*. In that case, the Court held in a per curiam opinion that the U.S. Department of Health and Human Services has the authority to enforce its rule requiring health care workers at facilities that participate in Medicare and Medicaid programs to be fully vaccinated against COVID-19 unless they qualify for a medical or religious exemption. 142 S. Ct 647, 653–55 (2022) (per curiam). However, in another January 2022 per curiam opinion, the Supreme Court ruled against the Biden administration's temporary emergency regulation (ETS), issued by the Occupational Safety and Health Administration (OSHA), that sought to require all U.S. employers with at least 100 employees to mandate vaccination. *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S. Ct. 661, 664–66 (2022) (per curiam). The ETS did not raise Free Exercise concerns, however, given that the OSHA rules create exemptions for workers citing religious objections, along with exemptions for those who do not interact in-person with coworkers or customers, or who work only outdoors. *See Biden-Harris Administration Issues Emergency Regulation Requiring COVID-19 Vaccination for Health Care Workers*, CTRS. FOR MEDICARE AND MEDICAID SERVS. (Nov. 4, 2021), https://www.cms.gov/newsroom/press-releases/biden-harris-administration-issues-emergency-regulation-requiring-covid-19-vaccination-health-care [https://perma.cc/L3XV-X3MV].

recently challenged state vaccine mandates, ultimately pursuing these cases up to the Supreme Court.[134]

II. WHILE THE U.S. SUPREME COURT DENIED EMERGENCY RELIEF TO SEEKERS OF RELIGIOUS EXEMPTIONS FROM VACCINE MANDATES IN THE *MILLS* AND *DR. A* CASES, THE DISSENTING JUSTICES EXPRESSED A NEW NARROW READING OF *SMITH*

In *Does v. Mills*, the Supreme Court denied an emergency injunction to health care workers who invoked the First Amendment to challenge the state's vaccine mandate for medical professionals.[135] The petitioners opposed a State of Maine emergency declaration of August 14, 2021 (hereinafter Maine vaccine mandate) requiring all health care workers to receive a COVID-19 vaccine by October 29, 2021,[136] without the possibility of religious exemptions.[137] Petitioners sought an emergency writ of injunction pending the outcome of their request for a writ of certiorari,[138] citing their religious objection to all three COVID-19 vaccines on the grounds that they were developed using fetal cell lines from elective abortions.[139]

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134. *See* Biden v. Missouri, 142 S. Ct 647, 653–55 (2022) (per curiam); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 664–66 (2022) (per curiam).

135. 142 S. Ct. 17, 18 (2021) (mem.).

136. Emergency Application for Writ of Injunction Pending Disposition of Petition for Writ of Certiorari Relief Requested by Oct. 26, 2021 at 2, Does v. Mills, 142 S. Ct. 17 (2021) (mem.) (No. 21A90) [hereinafter *Mills* Emergency Application for Injunction]. Petitioners also challenged the Maine vaccine mandate on the grounds of the Supremacy and Equal Protections Clauses. Opposition of State Respondents to Emergency Application for Writ of Injunction at 10, *Mills*, 142 S. Ct. 17 (No. 21A90) [hereinafter *Mills* Opposition to Emergency Application].

137. The parties disagreed as to the date on which the religious exemption to vaccination had been removed, with petitioners alleging the religious exemptions were eliminated in August 2021 at the time COVID-19 vaccines were mandated, while respondents asserted that non-medical exemptions were eliminated by legislation enacted in 2019 that ultimately became effective in April 2020. *Mills* Opposition to Emergency Application, *supra* note 136, at 17.

138. *Mills* Emergency Application for Injunction, *supra* note 136, at 1. Both the Maine Federal District Court and the First Circuit Court of Appeals had previously denied petitioners' Motion for Preliminary Injunction on the grounds that petitioners "were unlikely to succeed on the merits of their challenge" to the vaccine mandate. *Id.* at 6–7. The Supreme Court ultimately declined to grant certiorari. Does v. Mills, 142 S. Ct. 1112, 1112 (2022) (mem.).

139. *Mills* Emergency Application for Injunction, *supra* note 136, at 7. The journal SCIENCE explains that, "[c]ells derived from elective abortions have been used since the 1960s to manufacture vaccines, including current vaccines against rubella, chickenpox,

The *Mills* petitioners argued that the vaccine mandate was neither neutral nor generally applicable. First, petitioners noted that the state removed only religious, not medical, exemptions, and therefore failed the neutrality test.[140] Petitioners argued that "Maine has plainly singled out religious employees who decline vaccination for religious reasons for especially harsh treatment (i.e., depriving them from earning a living anywhere in the State), while favoring and accommodating employees declining vaccination for secular, medical reasons."[141] Next, petitioners contended that the vaccine mandate, in the absence of a religious exemption, was not generally applicable because the risk of outbreaks is the same regardless of whether a health care worker invokes a religious or medical exemption.[142] The petitioners emphasized that "[s]ince the COVID-19 virus does not know whether a healthcare worker has declined vaccination based on medical or religious grounds," the risk unvaccinated health care workers pose is "equal (indeed, exactly the same) whether they are unvaccinated because of medical or religious reasons."[143] Therefore, according to petitioners, the State of Maine discriminated in making "a value judgment that one risk (the secular) is acceptable and can be mitigated, while the other risk (the religious) is unacceptable and cannot be mitigated."[144] One critical omission from petitioners' discussion, however, is acknowledgement that the absence of a medical exemption would harm a medically vulnerable person forced to undergo vaccination, thereby undermining the State's public health goals, a subject addressed by respondents in their opposition to petitioners' motion.[145]

Concluding that strict scrutiny applied, petitioners then argued that although avoiding the spread of a deadly disease is a compelling governmental interest,[146] Maine's vaccine mandate did not protect against such disease for the same reason that the mandate was not

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hepatitis A, and shingles." Meredith Wadman, *Abortion Opponents Protest COVID-19 Vaccines' Use of Fetal Cells*, SCIENCE (June 5, 2020), https://www.science.org/content/article/abortion-opponents-protest-covid-19-vaccines-use-fetal-cells [https://perma.cc/UR93-Y37C] (discussing religious objections to vaccines developed through the use of fetal cell lines).

140. *Mills* Emergency Application for Injunction, *supra* note 136, at 17–19.

141. *Id.* at 18.

142. *Id.* at 18–19, 22–23.

143. *Id.* at 22.

144. *Id.*

145. *See infra* notes 155–156 and accompanying text.

146. *Mills* Emergency Application for Injunction, *supra* note 136, at 25.

generally applicable.[147] According to petitioners, an unvaccinated employee poses the same risk regardless of the reason—medical or religious—for their exemption.[148] Petitioners also argued that Maine's vaccine mandate for health care workers was not narrowly tailored, citing the availability of alternatives in other states, such as testing and masking.[149]

In its brief in opposition to petitioners' motion for emergency relief, the State of Maine emphasized the neutrality of its vaccine mandate for health care workers and elimination of religious exemptions, declaring "their object or purpose is not to infringe or restrict any particular religious practice, and they are not 'specifically directed at [Applicants'] religious practice,'" but instead aim "to control and prevent communicable diseases."[150] According to respondents, the elimination of the religious exemption predated the COVID-19 pandemic.[151]

The State of Maine then argued that the vaccine mandate, which maintained medical but not religious exemptions, applied equally to all covered entities, did not include a discriminatory scheme of individualized exemptions, and vested authority regarding eligibility for medical exemptions with health care providers, and not the state.[152] The respondents also addressed the issue of "comparability" set forth in the Supreme Court's 2021 decision in *Tandon v. Newsom*, which held that "government 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."[153] The decision that "two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at

147. *Id.*

148. *Id.* Petitioners also questioned whether vaccinated people are scientifically proven to be less likely to spread the virus and reiterated that it is the government's burden to prove its compelling interest. *Id.* at 25–26.

149. *Id.* at 28–29. Petitioners rejected the State of Maine's assertion that Maine could not offer the same accommodations as other states because of Maine's small contingent of health care workers, and emphasized that given the First Amendment issues at stake, Maine faced the burden of proving that the masking and testing approaches followed in other states would not work. *Id.* at 29–31.

150. *Mills* Opposition to Emergency Application, *supra* note 136, at 16 (citing Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 878 (1990)).

151. *Mills* Opposition to Emergency Application, *supra* note 136, at 17–18.

152. *Id.* at 19.

153. Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam).

issue."[154] Maine insisted that a medical exemption is not comparable to a religious exemption because both the medical exemption and the vaccine mandate aim to achieve the same three mutually reinforcing goals: (1) to protect public health by making sure health care workers remain healthy; (2) to safeguard vulnerable populations who cannot vaccinate for medical reasons; (3) and to protect the health of all Maine citizens, including health care workers.[155] Vaccinating health care workers whose health would be harmed by the vaccine would not further any of these objectives.[156]

In light of its position that the vaccine mandate, without a religious exemption, was neutral and generally applicable, the State of Maine advocated for the application of rational basis review, while contending that the law at issue would survive even strict scrutiny.[157] Respondents cited earlier cases for the principle that protecting the public from a deadly disease is a compelling interest and cited reports indicating the vaccine's effectiveness.[158] Maine also explained that it pursued vaccines as the least restrictive means available to it, given that relying merely on masks, personal protective equipment, and testing proved unavailing and was clearly considered less effective once vaccines became available.[159] While other states did permit religious exemptions, Maine noted that "[w]hat other States may choose to do does not answer the question of what is constitutionally required," and also explained that Maine differed from other states in that it has a very sparse population, and therefore, a limited workforce.[160] Considering the state's responsibility to safeguard public health, respondents cited a Seventh Circuit decision for the principle that: "'When balancing the public interest—meaning the interests of those not before the court—courts must also keep in mind that plaintiffs are not asking to be allowed to make a self-contained choice to risk only their own health.'"[161]

The Supreme Court, on October 29, 2021, denied injunctive relief to the petitioners in *Does v. Mills*.[162] In a concurring opinion joined by

154. *Id.*; *Mills* Opposition to Emergency Application, *supra* note 136, at 20. *See infra* Part III.C. for a discussion of *Tandon*.
155. *Mills* Opposition to Emergency Application, *supra* note 136, at 20–21.
156. *Id.* at 22.
157. *Id.* at 26–27.
158. *Id.* at 27 (citations omitted).
159. *Id.* at 28–30.
160. *Id.* at 31.
161. *Id.* at 35 (citation omitted).
162. 142 S. Ct. 17, 18 (2021) (mem.).

Justice Kavanaugh, Justice Barrett declined, in the absence of full briefing and oral argument, to "grant of extraordinary relief in this case, which is the first to address the questions presented."[163] Justice Gorsuch, joined by Justices Alito and Thomas, dissented, expressing the view that injunctive relief was warranted.[164] The dissenting justices believed that Maine's vaccine mandate is not neutral and generally applicable because it allows for medical exemptions, which are secular. They objected to the fact that an individual requesting a medical exemption could rely on a medical statement from a doctor that the vaccine "'may be'" medically inadvisable, even for reasons beyond the contraindications included on the Food and Drug Administration labels.[165] Based on this, the dissenting justices opined that "it seems Maine will respect even mere *trepidation* over vaccination as sufficient, but only so long as it is phrased in medical and not religious terms," concluding that such a "double standard is enough to trigger at least a more searching (strict scrutiny) review."[166] In addition, the dissent cited *Tandon* for the principle that a law is "not neutral and generally applicable if it treats '*any* comparable secular activity more favorably than religious exercise.'"[167] Because health care workers with medical exemptions could avail themselves of alternatives such as protective gear and regular testing, but those invoking religious exemptions could not, the dissent believed strict scrutiny was appropriate.[168]

In applying strict scrutiny, the dissent argued that while stemming the spread of COVID-19 might have been a compelling interest at one time, it could not remain one forever.[169] Given the existence of three vaccines and more treatments, their main concern was "that civil liberties face grave risks when governments proclaim indefinite states of emergency."[170] Even assuming a compelling interest, the dissent declared that requiring vaccinations without a religious exemption was not the least restrictive means available, given the high vaccination rates at Maine medical facilities.[171] The dissent closed by describing the case

163. *Id.* at 18 (Barrett, J., concurring).
164. *Id.* at 19 (Gorsuch, J., dissenting).
165. *Id.*
166. *Id.*
167. *Id.* at 19 (citing Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam)).
168. *Id.* at 19 (Gorsuch, J., dissenting).
169. *Id.*
170. *Id.* at 21.
171. *Id.*

as "an important constitutional question" and "a serious error" that the Court ought to remedy.[172]

In December 2021, less than two months after its decision in *Does v. Mills*, the Supreme Court once again declined an application for emergency relief from health care workers challenging a COVID-19 vaccine mandate on Free Exercise grounds because it lacked a religious exemption.[173] The majority did not offer an explanation, while the same three dissenting Justices—Thomas, Gorsuch, and Alito—expressed the view that the application should have been granted.[174] Justice Gorsuch authored a fourteen-page dissent, which Justice Alito joined, arguing that the vaccine mandate was not neutral and generally applicable because, among other reasons, it offered medical but not religious exemptions.[175]

The *Dr. A* case arose on August 16, 2021, when New York State's health commissioner announced an emergency measure requiring certain health care workers to receive their first COVID-19 vaccine dose by September 27, with limited exceptions for workers with religious or medical reasons.[176] On August 26, the State's twenty-five-member Public Health and Health Planning Council (PHHPC), under the emergency rulemaking procedures set forth in New York law, approved emergency regulations requiring that a broader range of health care workers be vaccinated for COVID-19, without including

172. *Id.* at 22.
173. *Dr. A v. Hochul*, 142 S. Ct. 552, 552 (2021) (mem.).
174. *Id.*
175. *Id.* at 556–57 (Gorsuch, J., dissenting).
176. *Governor Cuomo Announces COVID-19 Vaccination Mandate for Healthcare Workers*, (Aug. 16, 2021), https://www.governor.ny.gov/news/governor-cuomo-announces-covid-19-vaccination-mandate-healthcare-workers [https://perma.cc/3KUW-P7XE]; *see also We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 274 (2d Cir. 2021) (per curiam). The Second Circuit Court of Appeals considered two cases challenging New York State vaccine mandates for health care workers in tandem. The *Dr. A* case was brought by health care workers, and the *We the Patriots USA, Inc. v. Hochul* case was brought by the nonprofit organization We the Patriots USA, Inc., which is dedicated, among other goals, to promoting religious rights. *See We the Patriots USA, Inc.*, 17 F.4th at 272; *About Us*, WE THE PATRIOTS USA, https://wethepatriotsusa.org/about-us [https://perma.cc/G6Q6-9KZG]. This Article uses the case names *Dr. A* and *We the Patriots* interchangeably, depending on the context, to refer to the two cases, which were decided together by the Second Circuit and then by the Supreme Court.

religious exemptions.[177] The August 26 emergency regulations superseded the previously announced vaccine requirement for health care workers.[178] The New York State Health Department required health care organizations to implement the mandate and plan their approach toward noncompliant employees, which could include termination of their employment,[179] but did not prohibit employers from providing religious objectors with accommodations.[180]

On September 13, 2021, a group of seventeen doctors, nurses, and other health care professionals filed a legal challenge to New York's vaccine mandate, alleging that it violated their constitutional rights, including their Free Exercise rights.[181] As Christians, they objected to receiving the vaccines because the cell lines of aborted fetuses were used in their testing and development.[182] Procedurally, this case differed from *Does v. Mills* in that one New York federal district court judge granted the plaintiffs' motion for a temporary restraining order and

177. N.Y. COMP. CODES R. & REGS. tit. 10 § 2.61 (2021) (requiring vaccination for health care workers employed at covered entities and providing for medical, but not religious, exemptions); *see also We the Patriots USA, Inc. v. Hochul*, 17 F.4th at 274–75. Commentators noted that the PHHPC decision not to offer religious exemptions was brought about by "feedback in the health care community about a significant rise in purported religious objections to COVID-19 vaccination," due in part to prior health crises, such as a 2019 measles outbreak in the New York City area, which led to the removal of religious objections to measles, mumps, and rubella (MMR) vaccinations for health care workers and students. See Kelly C. Spina, Lisa M. Griffith, Jason R. Stanevich, & Terri M. Solomon, *New York Expands Vaccination Mandate for Health Care Workers*, SHRM (Sept. 3, 2021), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/new-york-expands-vaccination-mandate-for-health-care-workers.aspx [https://perma.cc/8YF5-GK6N]. Counsel for the New York State Department of Health declared that the agency is not "Constitutionally required to provide a religious exemption," based on the prior removal of religious exemptions for MMR vaccines, and acknowledged the possibility of a constitutional challenge in future litigation. *Id.*

178. Kelly Gooch, *New York State Removes Religious Exemption from COVID-19 Vaccine Mandate*, BECKER'S HOSP. REV. (Aug. 27, 2021), https://www.beckershospitalreview.com/workforce/new-york-state-removes-religious-exemption-from-covid-19-vaccine-mandate.html [https://perma.cc/6BZJ-JUW4].

179. *Id.*; *We the Patriots USA, Inc. v. Hochul*, 17 F.4th at 295.

180. *We the Patriots USA, Inc. v. Hochul*, 17 F.4th at 292.

181. Verified Complaint at 1, 7, *Dr. A v. Hochul*, 17 F.4th 266 (2021) (No. 1:21-CV-1009) [hereinafter *Dr. A.* Complaint].

182. *Id.* at 3, 11–13; *see also supra* note 139 (explaining the use of cell lines to develop vaccines).

preliminary injunction,[183] based on the judge's view that the elimination of the religious exemption "is the kind of 'religious gerrymander' that triggers heightened scrutiny,"[184] while another federal district judge denied the preliminary injunction.[185] Ultimately, the U.S. Court of Appeals for the Second Circuit issued a combined judgment rejecting all of the applicants' claims and overturning the trial court's issuance of a preliminary injunction in *We the Patriots USA, Inc. v. Hochul*, finding that the vaccine mandate for health care workers was neutral and generally applicable, and "easily" met the rational basis standard.[186]

In their request for injunctive relief following the Second Circuit's denial in *We the Patriots*, the petitioners argued that New York State's vaccine mandate for health care workers failed the neutrality requirement because the new Governor Hochul did not include the religious exemption that the previous Governor Cuomo had previously mentioned.[187] Petitioners argued that the reason for the change was Governor Hochul's alleged animus to religion, as expressed in her public comments that the Pope and God want people to be vaccinated, which Petitioners characterized as "disagreement with" and "targeting" of their religious beliefs in violation of the First Amendment.[188]

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183. *Dr. A v. Hochul*, 567 F. Supp. 3d 362, 377 (N.D.N.Y. 2021) (granting preliminary injunction), *vacated*, We the Patriots USA, Inc. v. Hochul, 17 F.4th 266 (2d Cir. 2021) (per curiam).

184. *Id.* at 375.

185. *We the Patriots USA*, 17 F.4th at 273 (noting that the Eastern District of New York had denied the preliminary injunction).

186. *Id.* at 266, 290.

187. Emergency Application for Writ of Injunction Relief Requested by As Soon As Possible at 20–21, *We the Patriots USA, Inc. v. Hochul*, 142 S. Ct. 734 (2021) (No. 21A125) (mem.) [hereinafter *We the Patriots* Emergency Application for Injunction].

188. *Id.* at 22. It should be noted that the complaints in *Dr. A v. Hochul* and *We the Patriots v. Hochul* raise questions about whether the petitioners' objections to vaccination are truly religious in nature, or instead indicate secular opposition to vaccination. For example, the *Dr. A* plaintiffs objected to what they deem the "targeting" of health care professionals for vaccination without a religious exemption, despite the fact that health care professionals "are very knowledgeable on this subject," while "any ill-informed college student can obtain a religious exemption from a panoply of vaccinations simply by filing a statement that 'he/she objects to immunization due to his/her religious beliefs.'" *Dr. A* Complaint, *supra* note 181, at 7–8. With regard to religious beliefs, however, it should be noted that college students can be just as informed as any health care professional about the students' own religious beliefs. Health care professionals are more informed only as to medical questions, so plaintiffs' argument belies their insistence that their objections to the vaccine are truly religious in nature. Plaintiffs also asserted their "religious conviction that the ensouled human

Turning to the "generally applicable" requirement set forth in *Smith*, petitioners cited *Fulton v. City of Philadelphia* for the proposition that a law "lacks general applicability if it permits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."[189] Petitioners emphasized that any unvaccinated person, regardless of whether her reason for being unvaccinated is religious or secular, poses the same risk of infecting others.[190] In Petitioners' view, New York State made a "value judgment" that secular medical exemptions are "more important" than religious exemptions, thereby violating the First Amendment requirement of general applicability and triggering strict scrutiny.[191]

Petitioners then argued that New York's health care worker vaccine mandate could not survive strict scrutiny because the State undermined

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person, made in the image and likeness of God, is inviolable as a temple of the Holy Ghost" but then undercut that statement with their insistence that "civil authorities have no right to *force* anyone to be medicated or vaccinated against his or her will, *whether or not the medication or vaccine is abortion-connected*," *id.* at 13 (second emphasis added), and a "risk-benefit analysis factors into each person's formulation of a conscientious religious position on the morality of vaccinations." *Id.* at 14. In their complaint, the *Dr. A* plaintiffs also express concern about the health effects of the COVID-19 vaccine, alleging that they know people who died or became ill after receiving the vaccine, or that they lack data on the safety of the vaccine for pregnant and nursing people, and then claim that these medical "facts" form the basis of their "religious objections" to the vaccine. *Id.* at 20–21, 28, 30, 38–39. Moreover, fetal cell lines were used to test the rubella vaccine, which New York's health care workers were already legally required to accept. Brief in Opposition to Emergency Application for Writ of Injunction at 5, *We the Patriots USA, Inc. v. Hochul*, 142 S. Ct. 734 (2021) (No. 21A125) (mem.) [hereinafter *We the Patriots* Brief in Opposition]. Professor Laycock, a strong supporter of religious liberty, has theorized that the Supreme Court may be reluctant to recognize a right to a religious exemption under the Free Exercise Clause, given the sheer magnitude of such requests and the difficulty of discerning their sincerity. Douglas Laycock, *What's the Law on Vaccine Exemptions? A Religious Liberty Expert Explains*, THE CONVERSATION (Sept. 15, 2021), https://theconversation.com/whats-the-law-on-vaccine-exemptions-a-religious-liberty-expert-explains-166934 [https://perma.cc/ATA6-7YJQ]. One study has gathered anecdotal and survey evidence supporting the notion that most claims for refusing school vaccination requirements on religious grounds are not based in genuine religious belief. *See generally* Dorit Rubinstein Reiss, *Thou Shalt Not Take the Name of the Lord Thy God in Vain: Use and Abuse of Religious Exemptions from School Immunization Requirements*, 65 HASTINGS L.J. 1551, 1570–73 (2014). Of course, the insincere requests for judicial relief under the Free Exercise Clause of some plaintiffs ought not to undermine the claims of truthful plaintiffs.

189. *We the Patriots* Emergency Application for Injunction, *supra* note 187, at 23 (citing Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021)).

190. *Id.* at 23–24.

191. *Id.* at 24.

its stated compelling interest in preventing the spread of COVID-19 by permitting health care workers to claim medical exemptions.[192] Further, petitioners contended that New York's statute was not narrowly tailored, since the State offered accommodations such as frequent testing and masking to those with medical exemptions, but not those seeking religious exemptions.[193] Petitioners warned against a collective comparison of the number of individuals seeking religious as opposed to medical exemptions, which would depart from the notion of comparing the risk of an individual religious exemption against an individual secular one,[194] noting that the "law does not permit the faithful to be singled out because they are more numerous than those suffering from medical conditions."[195]

In their response to Petitioners' request for injunctive relief, the respondents in *Dr. A* explained that the New York State vaccine mandate for health care workers was neutral. First, the original fifteen-day order from the Commissioner of the New York State Department of Health permitting religious exemptions was superseded by a new rule promulgated by a larger administrative body that engaged in an independent administrative process.[196] Second, Governor Hochul's statements about God and the Pope were not intolerant of religion, but instead expressed "her own religious principles as being compatible with receiving the COVID-19 vaccine."[197] Respondents raised the Second Circuit's admonition to avoid using a state official's expression of her own religious beliefs as targeting others, lest "'politicians' frequent use of religious rhetoric to support their positions' trigger heightened scrutiny for many government actions."[198] Moreover, the allegedly discriminatory statements were not made by the Public Health and Health Planning Council, the body which made the rule, unlike in the *Diocese* case.[199]

The respondents in *We the Patriots* also declared that the New York State vaccine mandate for health care workers was generally applicable because it did not permit discretionary exemptions, but rather only a

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192. *Id.* at 25.
193. *Id.* at 26.
194. *Id.* at 27.
195. *Id.* at 28.
196. *We the Patriots* Brief in Opposition, *supra* note 188, at 22–23.
197. *Id.* at 24.
198. *Id.* at 17 (citing We the Patriots USA, Inc. v. Hochul, 17 F.4th 266, 283 (2d Cir. 2021)).
199. *Id.* at 24. *See infra* Part III.B for a discussion of *Diocese*.

single, narrowly-defined medical exemption.[200] In addition, respondents explained that the medical exemption was in furtherance of the state's interest in promoting individual and public health, unlike the religious exemption.[201] Furthermore, many medical exemptions are merely temporary and subject to periodic reassessment, such as deferral for acute illness.[202]

Respondents asserted that the vaccine mandate not only satisfied rational basis scrutiny, as it would prevent the spread of disease among patients and staff and reduce staffing shortage, but also satisfied strict scrutiny. Respondents noted that preventing disease is a compelling state interest and that the mandate is narrowly tailored to apply only in high-risk settings with vulnerable populations.[203] They also explained that alternatives such as masking and testing are insufficient on their own.[204]

In denying injunctive relief to health care workers and others challenging New York State's vaccine mandate, the 6–3 Supreme Court majority in *We the Patriots v. Hochul* did not explain its decision.[205] Justice Gorsuch, in a dissent joined by Justice Alito, found that the New York vaccine mandate was neither neutral nor generally applicable, and therefore necessitated an application of the strict scrutiny test, which he believed the mandate failed to satisfy.[206] As an initial matter, Justice Gorsuch found that the factual record "practically exudes suspicion of those who hold unpopular religious beliefs,"[207] citing the state's policy change newly excluding religious exemptions as well as Governor Hochul's impolitic statements about her own religious views.[208] Even if the governor's language was not evidence of animus, Justice Gorsuch found that the mandate failed the *Smith* requirement of neutrality

200. *We the Patriots* Brief in Opposition, *supra* note 187, at 24–25. Respondents distinguished the New York medical exemption from the exemption at issue in *Mills* on the grounds that the former is clearly defined under New York law and subject to federal standards. *Id.* at 26.

201. *Id.* at 26–29.

202. *Id.* at 30.

203. *Id.* at 32–34.

204. *Id.* at 34.

205. *See* Dr. A v. Hochul, 142 S. Ct. 552, 552 (2021) (mem.) (denying petitioners' demands for injunctive relief allowing religious exemptions for mandatory COVID-19 vaccinations).

206. *Id.* at 556–57 (Gorsuch, J., dissenting).

207. *Id.* at 555 (Gorsuch, J., dissenting).

208. *Id.*

because it was "specifically directed" at petitioners' atypical religious practices.[209]

Justice Gorsuch then analyzed the mandate's neutrality and general applicability. In his dissent, Justice Gorsuch cited *Fulton v. City of Philadelphia* for the principle that a law should not be considered generally applicable if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."[210] Justice Gorsuch found that New York's vaccine mandate violated this principle by "prohibit[ing vaccine] exemptions for religious reasons while permitting exemptions for medical reasons."[211] Although the state might fear that more health care workers would seek exemptions for religious rather than medical reasons, Justice Gorsuch reminded that "[l]aws operate on individuals; rights belong to individuals."[212]

Having reached the conclusion that New York's statute was not neutral and generally applicable, Justice Gorsuch applied strict scrutiny.[213] He argued that New York's statute was not narrowly tailored, and thus failed the test, for several reasons. First, he pointed out that most other states offered religious exemptions.[214] Second, Justice Gorsuch critiqued New York's policy for failing to specify what percentage of health care workers ought to be vaccinated and posited that its current rate of over ninety percent was sufficient.[215]

In closing, Justice Gorsuch invoked the case *West Virginia State Board of Education v. Barnette*,[216] in which the Supreme Court overruled a World War II-era decision and upheld the rights of a religious group to refuse to salute the American flag, in support of the notion that the Court

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209. *Id.* at 556 (citation omitted).

210. *Id.*

211. *Id.*

212. *Id.* Justice Gorsuch explained that estimates of the numbers seeking each type of exemptions could come into play only at a later stage, in the application of strict scrutiny, if the state were to argue, for example, that it needed to achieve herd immunity by dividing the number of vaccines "in a nondiscriminatory manner between medical and religious objectors." *Id.* at 556–57.

213. *Id.*

214. *Id.* at 556. One inconsistency in Justice Gorsuch's reasoning is his conviction that an individual is entitled to "unpopular and unorthodox" views while a state should not deviate from the path followed by other states. *Id.* at 558. Justice Gorsuch's view conflicts with Justice Brandeis's view of states as "laborator[ies]" of democracy. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

215. *Dr. A*, 142 S. Ct. at 557.

216. 319 U.S. 624 (1943).

must uphold individual rights in trying times, in the face of war or pandemic.[217] However, Justice Gorsuch's analogy was lacking in that he characterized the conflict in the instant case as one over belief, whereas New York State was not seeking to regulate the beliefs of health care workers, but rather their likelihood of contracting and transmitting COVID-19.[218] This is supported by the fact that individuals who opposed vaccines on other grounds, such as safety concerns, were also required to receive the vaccine.[219] The state did not seek to achieve ideological conformity, but rather to follow a vaccination approach supported by the available scientific data.

While the United States Supreme Court denied preliminary relief in both the *Mills* and *Dr. A*/*We the Patriots* cases, the Court did not have an opportunity to consider full briefs nor to rule on the merits,[220] and more such cases are likely to arise in the future.[221] Thus, the views of the dissenting justices are important, both in terms of the possibility that they will prevail in future cases relating to vaccine mandates that do not offer religious exemptions, as well as in the way they reflect significant changes in Free Exercise jurisprudence more generally.

III. SIGNIFICANT CHANGES IN U.S. SUPREME COURT FREE EXERCISE JURISPRUDENCE DURING THE PANDEMIC MAY IMPACT STATE VACCINE MANDATES WITHOUT A RELIGIOUS EXEMPTION

A. U.S. Supreme Court Jurisprudence Relating to the First Amendment Free Exercise Clause Is in Flux

The Supreme Court applied strict scrutiny for the first time in its 1963 decision *Sherbert v. Verner*. In *Sherbert*, the Court held that the government lacked the power to enforce laws that impose a "substantial infringement" on an individual's First Amendment Free Exercise rights

217. *Id.* at 638; *Dr. A*, 142 S. Ct. at 558–59.

218. *Dr. A*, 142 S. Ct. at 557.

219. *We the Patriots* Brief for Appellees, at 10 ("The emergency rule does not contain an exemption for those who oppose vaccination on religious or any other grounds."). Indeed, the brief submitted by the plaintiffs in *We the Patriots v. Hochul* raises the question of whether the plaintiffs actually objected to the vaccine on other grounds, but instead cited religious opposition because that is subject to constitutional protection. *See supra* note 188.

220. *See supra* notes 163, 173–174 and accompanying text.

221. *See supra* note 4 and accompanying text.

absent a "compelling state interest."[222] However, commentators have noted that, after *Sherbert*, the Court did not in fact apply strict scrutiny to Free Exercise cases.[223] This is especially true where religious adherents challenged generally applicable laws, as opposed to laws that intentionally targeted religions for discriminatory treatment.[224] In the 1970s and 1980s, the Court granted few religious exemptions to generally applicable laws, despite invoking the strict scrutiny standard, thereby establishing the precedent that lower courts followed.[225] A 1992 study found that the U.S. Courts of Appeals rejected eighty-five of the ninety-seven Free Exercise claims brought before them from 1980 to 1990, a failure rate of eighty-seven percent.[226] A similar study from 1990 to 2003 found that, for Free Exercise cases specifically involving laws of general applicability, which are more common than cases of overt discrimination, religious adherents lost their constitutional challenges seventy-four percent of the time (while not losing at all in cases where they were targeted for discrimination).[227] This stood in contrast to the application of strict scrutiny in free speech and racial discrimination cases, where plaintiffs lost their cases only twenty-two and twenty-seven percent of the time, respectively.[228]

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222. Sherbert v. Verner, 374 U.S. 398, 406 (1963) (holding that the Free Exercise Clause prohibits the government from denying unemployment benefits to an individual who was deemed ineligible because her religious beliefs prevented her from accepting employment on Saturday if offered).

223. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 858 (2006) ("Strict scrutiny has had a troubled history in the area of religious liberty."); *see also* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 367 (1997) (declaring that "in the free exercise context, the Court had long purported to apply 'strict scrutiny' to all burdens on religious exercise, direct or incidental. In reality, it had done so haphazardly.").

224. Winkler, *supra* note 223, at 860–61 (explaining that an example of a challenge to a generally applicable law is "a religious adherent's lawsuit to permit him to refuse to pay taxes or participate in the social security program," while an example of a challenge to discriminatory treatment is "a religious adherent's lawsuit to invalidate a law that bars members of her religion from practicing a traditional ritual, such as animal sacrifice, when other people are allowed to slaughter animals").

225. *Id.* at 858–59.

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

227. Winkler, *supra* note 223, at 861–62.

228. *Id.* at 815.

In what has been described as a "mercy killing"[229] of *Sherbert*, the Supreme Court held in its 1990 decision in *Employment Division* that strict scrutiny no longer applied to most Free Exercise claims.[230] *Smith* involved plaintiffs who brought a First Amendment challenge when the state denied them unemployment benefits after their termination from their jobs at a private drug rehabilitation center. Their employer had fired plaintiffs for consuming peyote, a controlled substance, for sacramental purposes during a Native American religious ceremony.[231] The Court asserted a new rule that a religious objector must follow "'neutral law[s] of general applicability,'" meaning that so long as a law applies equally to both religious and secular actors, the religious objectors cannot seek an exemption under *Smith*.[232] Writing for the Court, Justice Scalia wrote that "[t]o 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,'" allows him "by virtue of his beliefs, 'to become a law unto himself,'" an outcome that "contradicts both constitutional tradition and common sense."[233]

After *Smith*, Congressional lawmakers, reacting to what they perceived as a threat to religious liberties, enacted the Religious Freedom Restoration Act of 1993[234] (RFRA), which created a statutory cause of action for Free Exercise claimants to seek exemptions from generally applicable laws and required courts to apply the "compelling interest test as set forth in *Sherbert*."[235] The Supreme Court held that RFRA applied only to the federal government, however,[236] meaning that

229. Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 300 (1992).

230. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 882–85 (1990).

231. *Id.* at 874.

232. *Id.* at 879–80 (quoting United States v. Lee, 455 U.S. 252, 263–64 n.3 (1982) (Stevens, J., concurring in judgment)).

233. *Id.* at 885 (citation omitted).

234. 42 U.S.C. § 2000bb.

235. §§ 2000bb(b)(1)-2000bb-1.

236. City of Boerne v. Flores, 521 U.S. 507, 532–36 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* Ramirez v. Collier, 142 S. Ct. 1264, 1277 (2022). Following *Boerne*, Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA) to enhance religious uses of land and protect the religious rights of institutionalized persons. 42 U.S.C. § 2000cc. However, this statute applies in a limited set of circumstances, such as when a state program that imposes a substantial burden on religion receives federal funding; when the state-imposed burden affects interstate commerce; or in certain cases in which the burden affects the implementation of land use regulations. 42 U.S.C. § 2000cc(a)(2).

Smith still applied to the states, permitting them to enforce any "neutral law of general applicability" against religious objectors.[237]

A series of pandemic-era Supreme Court opinions, most notably *Roman Catholic Diocese of Brooklyn v. Cuomo* and *Tandon v. Newsom*, demonstrate the Supreme Court's narrowing of *Smith*. According to the Court's interpretation of *Smith* in these cases, a law is not generally applicable if it contains a secular exemption but denies religious ones, the same position advanced by the dissenters in the *Mills* and *Dr. A/We the Patriots* cases.[238] Further, Justice Alito declared in his concurring opinion in the 2021 case *Fulton v. City of Philadelphia*, which was unrelated to public health, that he would overrule *Smith* altogether and apply strict scrutiny in all First Amendment Free Exercises cases.[239] Although Justice Alito appears unlikely to assemble a majority of the court to overrule *Smith*,[240] the narrowing of *Smith* in several pandemic-era cases has impacted First Amendment Free Exercise jurisprudence in significant ways.

B. Roman Catholic Diocese of Brooklyn v. Cuomo *Establishes a*

237. Winkler, *supra* note 223, at 859–60 (explaining that "the *Smith* Court only discarded strict scrutiny to the extent religious adherents challenged generally applicable state laws," but "[w]here laws intentionally target religions for discriminatory treatment, the Free Exercise Clause still requires strict scrutiny"). With respect to First Amendment Free Exercise cases challenging federal, as opposed to state, laws of general applicability, however, the Supreme Court held that strict scrutiny applied when considering whether an employer could refuse to provide to employees a health plan that offered contraception, as required under the federal Affordable Care Act. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 690–91 (2014) (holding that RFRA "prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest"). The Supreme Court in *Hobby Lobby* also interpreted the RFRA quite broadly, allowing for-profit businesses, not just religious institutions, to avail themselves of the statute. *Id.* at 691 ("The plain terms of RFRA make it perfectly clear that Congress did not discriminate in this way against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs.").

238. Dr. A v. Hochul, 142 S. Ct. 552, 552 (2021) (mem.) (Gorsuch, J., dissenting) (citing *Smith* to emphasize that New York's vaccine mandate was unconstitutionally applied because it treated secular and religious exemptions differently); Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 73 (2020) (Kavanaugh, J., concurring) (per curiam) (citing *Smith* to emphasize that Respondent governor did not sufficiently justify his "treating houses of worship more severely than secular businesses").

239. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883, 1926 (2021) (Alito, J., concurring).

240. *See infra* note 356 and accompanying text (describing the perceived lack of a majority consensus to overturn *Smith*).

Narrow Interpretation of Smith *in the Context of Public Health*

Some commentators have expressed concern that the Supreme Court's 5–4 unsigned per curiam opinion[241] in *Roman Catholic Diocese of Brooklyn v. Cuomo*, issued in 2020, jeopardizes over a century of judicial deference to the states' exercise of their police powers in order to protect public health.[242] The case arose in late 2020, when former New York Governor Andrew Cuomo issued Executive Order 202.68 ("Executive Order"), which empowered the New York State Department of Health to designate certain regions of the state experiencing cluster-based cases of COVID-19 as "red," "orange," or "yellow" zones, in descending order of severity.[243] The Executive Order imposed differing restrictions, including capacity restrictions on businesses, houses of worship, and social gatherings in those zones.[244] In red zones, essential businesses could operate without any capacity restrictions;[245] non-

241. A per curiam opinion is issued unsigned by the court, hence its name, which comes from the Latin phrase "by the court." As explained by one author, the justices' individual positions are "not always so clear" and "[a]ll we know for sure is that at least five members—a majority of the court—agreed with the unsigned order." Josh Blackman, *Invisible Majorities: Counting to Nine Votes in Per Curiam Cases*, SCOTUSBLOG (July 23, 2020, 3:23 PM), https://www.scotusblog.com/2020/07/invisible-majorities-counting-to-nine-votes-in-per-curiam-cases [https://perma.cc/V4CZ-7K3Q]. While an individual justice may write separately to concur or dissent, the failure to do so does not necessarily indicate assent, rendering it impossible to determine which justices were in the majority and which were in the dissent. *Id.*

242. *See* Lawrence Gostin, *The Supreme Court's New Majority Threatens 115 Years of Deference to Public Officials Handling Health Emergencies*, FORBES, (Dec. 11, 2020, 11:00 AM EST), https://www.forbes.com/sites/coronavirusfrontlines/2020/12/11/the-supreme-courts-new-majority-threatens-115-years-of-deference-to-public-officials-handling-health-emergencies (last visited Aug. 21, 2022) (describing the case as an example of "a major erosion of public health powers amid an historic pandemic"); Wendy E. Parmet, Roman Catholic Diocese of Brooklyn v. Cuomo—*The Supreme Court and Pandemic Controls*, 384 NEW ENG. J. MED. 199, 199 (2021) (declaring "the decision has the potential to upend public health law during the current pandemic and afterward").

243. Governor Andrew M. Cuomo, Exec. Ord. No. 202.68, Continuing Temporary Suspension and Modification of Laws Relating to Disaster Emergency (2020), https://www.governor.ny.gov/sites/default/files/atoms/files/EO202.68.pdf [https://perma.cc/8GXN-38T6] [hereinafter Cuomo Executive Order 202.68].

244. *Id.*

245. New York State developed around the time of this case an extensive list of "essential" businesses, and expressly deemed non-essential "any large gathering or event venues, including but not limited to establishments that host concerts, conferences, or other in-person performances or presentations in front of an in-person audience" except for certain "low-risk" activities. Empire State Development, *Guidance*

essential businesses could not operate in person at all; non-essential gatherings had to be postponed or cancelled; and restaurants could serve take-out only.[246] "[H]ouses of worship" had their own set of rules somewhere between essential and non-essential businesses, such that the number of people who could be present at any one time in red zones was limited to twenty-five percent of maximum occupancy or ten people, whichever was fewer.[247] In orange zones, essential businesses could operate without any capacity restrictions; non-essential businesses could operate without any capacity restrictions unless they were of the type associated with a higher transmission of COVID-19, such as gyms, barbers, nail salons, and other personal care services, which could not operate in person; non-essential gatherings were limited to ten people; and restaurants could serve take-out only.[248] Houses of worship again had their own set of rules, limiting the number of people present at any one time to the lesser of twenty-five people or thirty-three percent of maximum capacity in an orange zone.[249] Finally, in yellow zones, no restrictions were set forth for businesses (other than restaurants), whether essential or nonessential; non-essential gatherings were limited to no more than twenty-five people; and houses of worship were subject to a capacity limit of fifty percent of their maximum occupancy.[250] The penalty for violation of this Executive Order was a civil penalty capped at $15,000 per day.[251]

The Roman Catholic Diocese of Brooklyn sought a preliminary injunction against Governor Cuomo's Executive Order in federal district

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on Executive Order 202.6, N.Y. STATE, https://esd.ny.gov/guidance-executive-order-2026 [https://perma.cc/HT48-FYKN] (last updated Oct. 23, 2020, 10:10 AM). Although essential businesses under this regime could operate without any capacity restrictions, such businesses were not exempt from public health rules that apply to all individuals, such as Executive Order 202.17 requiring anyone over the age of two to wear a mask or face-covering that covered the nose and mouth when in a public space or when unable to maintain a social distance. Governor Andrew M. Cuomo, Exec. Ord. No. 202.17, Continuing Temporary Suspension and Modification of Laws Relating to Disaster Emergency (2020), https://www.governor.ny.gov/sites/default/files/atoms/files/EO_202.17.pdf [https://perma.cc/VGY2-BJ6D].

246. Cuomo Executive Order 202.68, *supra* note 243.

247. *Id.*; *see also* Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 72–73 (2020) (Kavanaugh, J., concurring) (per curiam) ("In New York's red zones, most houses of worship are limited to 10 people . . . [t]hose strict and inflexible numerical caps apply even to large churches and synagogues that ordinarily can hold hundreds of people").

248. Cuomo Executive Order 202.68, *supra* note 243.

249. *Id.*

250. *Id.*

251. *Id.*

court, contending that the Order violated the Free Exercise Clause by limiting attendance at houses of worship to ten to twenty-five people, while numerous secular businesses operated without any capacity restrictions.[252] An Orthodox Jewish organization and an Orthodox Jewish synagogue also requested preliminary injunctions from the Supreme Court.[253] These Jewish groups also alleged a Free Exercise violation, claiming that Governor Cuomo had engaged in religious "gerrymander[ing]" in creating the zones and specifically singled out Orthodox Jews as the cause of community spread.[254] The cases brought by the Roman Catholic and Jewish groups were considered together by the United States Supreme Court.[255]

Both the U.S. District Court for the Eastern District of New York and the U.S. Court of Appeals for the Second Circuit declined to issue the preliminary injunction sought by the religious groups, although the Second Circuit did agree to expedite the underlying appeal.[256] In ruling against the Diocese, the District Court accepted the premise that the Governor "made remarkably clear that this Order was intended to target . . . religious institutions," albeit "a different set" of such institutions than the Diocese, which became "swept up in that effort."[257] Nonetheless, the court found that New York's regulations were "crafted based on science and for epidemiological purposes"[258] and "religious gatherings [were] treated more favorably than similar gatherings" with comparable risks, such as "public lectures, concerts or theatrical performances."[259] The essential businesses treated more favorably were distinguishable from religious services in that "they [did] not involve people arriving and leaving simultaneously," "people packed in closely," or "greeting each other, or singing or chanting."[260] The Court declined to

252. Emergency Application for Writ of Injunction at i, Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam) (No. 20A87) [hereinafter *Diocese* Emergency Application].

253. Emergency Application for Writ of Injunction Relief Requested by 3:00 PM on Friday, November 20, 2020 at ii, Agudath Israel of Am. v. Cuomo, 980 F.3d 222 (2d Cir. 2020) (No. 20A90) [hereinafter *Agudath Israel* Emergency Application].

254. *Id.* at 3, 5–7.

255. Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 65–66 (2020).

256. Roman Catholic Diocese of Brooklyn v. Cuomo, 495 F. Supp. 3d 118, 119 (E.D.N.Y. 2020); Agudath Israel of Am. v. Cuomo, 980 F.3d 222, 225 (2d Cir. 2020).

257. *Diocese*, 495 F. Supp. 3d at 123 (citing a district court judge's findings in an emergency oral argument in the case).

258. *Id.* at 131.

259. *Id.* at 129 (citation omitted).

260. *Id.* at 130.

"second guess the State's judgment about what should qualify as an essential business," which would violate the principle articulated in *Jacobson* that the judiciary ought to defer to the state legislature during a pandemic.[261] After the Court of Appeals for the Second Circuit also denied the Diocese's request for an emergency injunction,[262] the plaintiffs appealed to the Supreme Court.[263] Prior to the Supreme Court's decision in *Diocese*, the court had denied similar challenges during spring and summer 2020,[264] but *Diocese* came before a different Supreme Court, after the death of Justice Ruth Bader Ginsburg and the subsequent confirmation of Justice Amy Coney Barrett in October 2020.[265]

In their application to the Supreme Court for an injunction, the *Diocese* petitioners argued that their Free Exercise rights were infringed by the Governor's Executive Order, which "single[d] out 'houses of worship' by that name," restricting their attendance while businesses the Governor deemed "essential" remained open in red zones, without any capacity limits.[266] Furthermore, in orange zones, the vast majority of businesses, even non-essential ones, remained open without any

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261. *Id.* (citation omitted).

262. Agudath Israel of Am. v. Cuomo, 980 F.3d 222, 225 (2d Cir. 2020).

263. Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020).

264. *See, e.g.*, South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (mem.) (denying a California church's First Amendment Free Exercise challenge to a gubernatorial executive order that imposed capacity restrictions on places of worship while certain secular activities, which the majority found to entail less risk, were not subject to these limitations), *vacated*, South Bay United Pentecostal Church v. Newsom, 141 S. Ct. 2563 (2021); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2604 (2020) (mem.) (denying a Nevada church's First Amendment Free Exercise challenge to a gubernatorial executive order limiting indoor in-person services at houses of worship to fifty people at one time, while secular businesses such as casinos and gyms were capped at fifty percent of their fire code capacity), *rev'd*, Calvary Chapel Dayton Valley v. Sisolak, 982 F.3d 1228 (9th Cir. 2020).

265. Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html [https://perma.cc/9KZR-6S68]. As noted by one commentator writing in April 2021, before Justice Barrett joined, the Court had denied the first two applications for injunctions relating to COVID-related restrictions on gatherings. Jim Oleske, Tandon *Steals* Fulton*'s Thunder: The Most Important Free Exercise Decision Since 1990*, SCOTUSBLOG (Apr. 15, 2021, 10:13 AM), https://www.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990 [https://perma.cc/KW4Z-SS8A]. However, once she joined the Court in October 2020, the Court granted five similar applications between November 2020 and February 2021, including in *Diocese*. *Id.*

266. *Diocese* Emergency Application, *supra* note 252, at 1–2, 23.

capacity limits.[267] Petitioners argued that "'[o]fficial action that targets religious conduct for distinctive treatment'" must be subject to "'strict scrutiny,'"[268] and that the Executive Order was not neutral on its face toward houses of worship, because even though some secular businesses were treated less favorably, others were treated better.[269] They noted the Governor's own acknowledgment at a press conference that his Executive Order was "most impactful on houses of worship."[270] According to the petitioners, *Jacobson* did not establish rational basis review for the entire duration of a pandemic and throughout changing circumstances, since such a standard would function as "effective *carte blanche* to impose unfettered restrictions on houses of worship."[271] They distinguished recent Supreme Court precedents denying First Amendment Free Exercise challenges from executive orders that imposed more restrictions on houses of worship as compared to secular entities, because those cases arose months earlier in the pandemic, involved less restrictive capacity limits, and did not involve the damaging admissions the Governor made in the instant case.[272]

In response to petitioners' First Amendment claim, the Cuomo administration explained that it was not singling out religious institutions for discriminatory treatment, and had in fact treated houses of worship better than comparable secular gatherings, such as concerts, where people arrive simultaneously, sit close together for an extended period, and leave at the same time.[273] Indeed, red and orange zones prohibited such secular activities altogether.[274] In addition, speaking

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267. *Id.* at 1.

268. *Id.* at 2 (alteration in original) (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534, 546 (1993) (holding that a city ordinance prohibiting ritual animal sacrifices violated the First Amendment's Free Exercise Clause by singling out one religious group and suppressing more religious conduct than necessary to achieve the stated goal of protecting public health and preventing cruelty to animals)).

269. *Diocese* Emergency Application, *supra* note 252, at 2.

270. *Id.*

271. *Id.* at 2–3.

272. *Id.* at 20–21. The Diocese emphasized that it had voluntarily shut its doors in the early days of the pandemic before it was required to do so, observed strict safety protocols, and in fact intended to operate at twenty-five percent capacity once permitted to open. *Id.* at 5.

273. *See id.* at 35.

274. Opposition to Application for Writ of Injunction or, in the Alternative, Certiorari Before Judgment at 30, Agudath Israel of Am. v. Cuomo, 141 S. Ct. 889 (2020) (mem.) (No. 20A90) [hereinafter *Cuomo* Opposition to Application]. The Cuomo administration further defended its capacity restrictions on houses of worship by noting that religious

and singing at religious services increases the risk of transmission, unlike the retail settings plaintiffs emphasized.[275] As to the anti-Orthodox Jewish gerrymandering charge, the governor emphasized that the zones' boundaries were driven by data, not animus; included secular businesses as well as houses of worship from other faiths; in some cases included no houses of worship at all; and also omitted some areas with significant Orthodox Jewish populations as the data dictated.[276] Finally, the Cuomo administration argued that the Supreme Court should deny injunctive relief because the demanding requirements for obtaining this remedy were not met, given that all the zones at issue were presently yellow, and therefore the contested limitations had been eased to a level no more restrictive than those in place before the litigation.[277]

The Supreme Court granted the Diocese's preliminary injunction, holding "that the challenged restrictions violate[d] 'the minimum requirement of neutrality'" toward religion by "singl[ing] out houses of worship for especially harsh treatment."[278] The Court noted that in a red zone, houses of worship could not admit more than ten people, while essential businesses could admit as many as they wished.[279] In orange zones, while houses of worship were limited to twenty-five people, even non-essential businesses had no limit.[280]

Because the Court found that the restrictions imposed by the Governor's Executive Order were not neutral, the Court applied the strict scrutiny test and found the Executive Order failed this test.[281] While acknowledging the severity of the COVID-19 outbreak, the Court observed that the petitioners had not had any outbreaks in their congregations and stated that the maximum attendance should be tied

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gatherings were documented super-spreader events, and that all gatherings, whether religious or secular, were highly risky as compared to other activities. *Id.* at 31.

275. *Id.* at 32–34.

276. *Id.* at 21–25 (explaining the use of data to establish the zones).

277. *Id.* at 2. The Cuomo administration also argued that injunctive relief was not legitimized by the need to bring New York "'into line with the approaches of other states,'" given the rising case rates in other states, and advocated for the vital role States play as "'laboratories for experimentation'" to solve complex social problems. *Id.* at 38–39 (quoting United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring)); *see supra* note 214.

278. Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020) (per curiam) (quoting Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993)).

279. *Id.*

280. *Id.*

281. *Id.* at 67.

to the size of the house of worship rather than limited by numerical cap.[282] The Court also found that the petitioners would be irreparably harmed by not being able to assemble their religious communities.[283] In granting injunctive relief, the Court declined the dissenters' suggestion to withhold relief in light of the changed circumstances, given that the Governor had already reclassified some areas from orange to yellow, thereby allowing petitioners to hold their services at fifty percent capacity.[284] The Court noted the frequent unannounced reclassifications of the zones, and the possibility that the petitioners would miss more religious services if they could not obtain relief in time.[285] It should be noted that, although the majority expressed concern about the possibility of frequent reclassifications of the zones, it did not acknowledge that the cause of such reclassifications would ostensibly be a concerning worsening of the COVID-19 pandemic.[286] The majority placed great faith in the fact that, in the few months since they reopened, the Diocese churches had not experienced an outbreak, despite the protean nature of the pandemic.[287] In addition, the majority advanced as a model the less restrictive approaches of other jurisdictions,[288] despite the rising COVID-19 rates in New York State and around the country, acknowledged in the District Court's opinion.[289]

Ultimately, the Supreme Court's decision in *Diocese* rested on the majority's view that the Executive Order was not a "neutral law of general applicability."[290] In his concurring opinion, Justice Gorsuch lamented: "laundry and liquor, travel and tools, are all 'essential' while traditional religious exercises are not. *That* is exactly the kind of discrimination the First Amendment forbids."[291] The majority opinion thereby suggests that a law is suspect if a court can find *any* example of

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282. *Id.* at 67.
283. *Id.* at 67–68.
284. *Id.* at 68.
285. *Id.* Although the dissenting opinion indicated that the Court could "decide the matter in a day or two, perhaps even in a few hours," *id.* at 77 (Breyer, J., dissenting), the majority was not persuaded.
286. *Id.* at 68.
287. *Id.* at 67.
288. *Id.*
289. Roman Catholic Diocese of Brooklyn v. Cuomo, 495 F. Supp. 3d 118, 120, 121 (E.D.N.Y. 2020) (expressing concern that "while New York has had success fighting the pandemic for the past few months, it is still with us, and positivity rates remain over 10% in 33 other states").
290. *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. 80, n.2 (Sotomayor, J., dissenting).
291. *Id.* at 69 (Gorsuch, J., concurring).

a secular institution that is treated differently than a religious institution.

In contrast, Justices Sotomayor and Kagan expressed in their dissenting opinion that the Executive Order treated religious institutions similar to or even better than "'comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances,'" where large groups of people gather, speak, and/or sing in close proximity for extended periods of time, activities that present the greatest risk of COVID-19.[292] In this way, the dissent ultimately deferred to the state's risk assessment in a time of pandemic, in keeping with the *Jacobson* precedent. While recognizing that the Executive Order did "single[] out" religious institutions by name, the dissent observed that the State's goal was not to discriminate, but instead to treat houses of worship preferentially as compared to secular institutions that presented a similar risk profile.[293] Justices Sotomayor and Kagan wryly observed that the Diocese attempted to parlay its already "preferential treatment in comparison to secular gatherings" into "laxer restrictions by pointing out that it is already being treated better than comparable secular institutions."[294]

The majority based its argument on its view that the Executive Order drew an invidious distinction between houses of worship and secular businesses. However, houses of worship were in fact treated more favorably than some comparable secular gatherings. Governor Cuomo, who since resigned due to unlawful sexual harassment, among other reasons,[295] had spoken out harshly against the Orthodox Jewish community (though not the Catholic one), which created a cognizable charge of intentional religious discrimination.[296] As the petitioners pointed out in their emergency application for an injunction, the

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292. *Id.* at 79 (Sotomayor, J., dissenting); *see also id.* at 78 (Breyer, J., dissenting) ("[M]embers of the scientific and medical communities tell us that the virus is transmitted from person to person through respiratory droplets produced when a person or group of people talk, sing, cough, or breathe near each other.").

293. *Id.* at 80 (Sotomayor, J., dissenting).

294. *Id.*

295. Luis Ferré-Sadurní & J. David Goodman, *Cuomo Resigns amid Scandals, Ending Decades-Long Run in Disgrace*, N.Y. TIMES (Aug. 11, 2021), https://www.nytimes.com/2021/08/10/nyregion/andrew-cuomo-resigns.html [https://perma.cc/RS75-MDFA] (last modified Nov. 10, 2021).

296. Miranda Bryant, *Orthodox New Yorkers Condemn Cuomo over New Covid Shutdowns*, THE GUARDIAN (Oct. 8, 2020, 8:42AM) https://www.theguardian.com/us-news/2020/oct/08/new-york-orthodox-jews-andrew-cuomo-covid-coronavirus [https://perma.cc/8WD6-9ZTK].

Governor had stated on CNN that the area where the cases occurred was "'predominantly ultra-Orthodox'" and that "'Catholic schools [we]re closed because' of their proximity to" the area in question.[297] In addition, the Governor declared in October 2020 that certain ultra-Orthodox synagogues were "not even close" to complying with 50% of capacity rules.[298]

It is worth questioning whether such admittedly combative language constitutes animus against religious adherents on the basis of their faith. Governor Cuomo expressed frustration with certain specific religious congregations because of their documented disregard for public health, not due to their religion per se. Indeed, Cuomo criticized "congregations" of young people, saying of their decision to gather, "'it's stupid what you're doing, it is stupid.'"[299] He also expressed frustration that the "'bad restaurant and bar owners are going to make it worse for the good ones.'"[300] Impolitic statements are not discriminatory ones. While the Governor criticized individuals who he felt disregarded the rules, he distinguished between those individuals and others who were members of the same social group and did comply. At that time, news reports documented weddings and other gatherings in defiance of city rules in the zones in question during late summer 2020, with a concomitant increase in COVID-19 test positivity rates, which reached four to six times that of the rest of the city.[301] New York City's health commissioner expressed a desire to protect the community, stating, "[t]he neighborhoods experiencing transmission were particularly hard

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297. *Diocese* Emergency Application, *supra* note 252, at 13 (quoting *Diocese* Emergency Application Exhibit I, Transcription of Relevant Excerpts from Governor Andrew Cuomo's October 9, 2020 Interview on "CNN Newsroom with Poppy Harlow and Jim Sciutto").

298. *Id.* at 13–14 (quoting *Diocese* Emergency Application Exhibit J, Second Supplemental Declaration of Randy M. Mastro in Further Support of the Roman Catholic Diocese of Brooklyn, New York's Application for a Preliminary Injunction).

299. *Gov. Cuomo: Irresponsible Businesses Could Lead to Rollback of Reopening Phases*, ROCHESTERFIRST.COM (July 20, 2020, 9:42 PM), https://www.rochesterfirst.com/coronavirus/watch-live-gov-cuomos-update-on-covid-19-pandemic-in-new-york-state [https://perma.cc/T724-TVXT].

300. *Id.*

301. *See, e.g.*, Jennifer Millman, *NYC Fines up to $15K for COVID Violations in Effect; NY Hospitalizations Highest Since July 15*, NBC (Oct. 10, 2020, 9:13AM) https://www.nbcnewyork.com/news/local/nyc-fines-of-up-to-15000-a-day-for-covid-rule-breakers-take-effect-friday/2660359 [https://perma.cc/W4YN-2YTB]; Troy Closson, *'Nobody likes Snitching': How Rules Against Parties Are Dividing Campuses*, N.Y. TIMES (Sept. 9, 2020) https://www.nytimes.com/2020/09/02/nyregion/colleges-universities-covid-parties.html [https://perma.cc/84WX-VGUK].

hit in the worst weeks of the pandemic this past spring and we never want to return to those awful days."[302] Furthermore, in her dissent, Justice Sotomayor, joined by Justice Kagan, pointed out the Court's hypocrisy in interpreting Governor Cuomo's blunt statements as establishing animosity toward religion that would give rise to strict scrutiny, admonishing that "[j]ust a few Terms ago, this Court declined to apply heightened scrutiny to a Presidential Proclamation limiting immigration from Muslim-majority countries, even though President Trump had described the Proclamation as a 'Muslim Ban'" intended to effect a "'total and complete shutdown of Muslims entering the United States.'"[303]

Diocese ultimately hinged on the Supreme Court's refusal to defer to New York State's decision to categorize religious gatherings in houses of worship as riskier than retail establishments. The Court then faced the issue of religious gatherings in private homes in the case of *Tandon v. Newsom*.[304]

C. The Supreme Court Adopts a Most-Favored-Nation Theory for Religious Exemption Claims in Tandon v. Newsom

In a 2021 decision described by one commentator as the "most important free exercise decision" since Smith in 1990, the Supreme Court held in Tandon v. Newsom that California's COVID-19 orders limiting religious gatherings in homes likely violated the Free Exercise Clause of the First Amendment, and the Court enjoined enforcement of the limitations pending appeal.[305] As noted by one commentator, *Tandon* "sharply limit[ed] the impact of *Smith"* by rejecting "a caveat the *Smith* majority used to distinguish" *Sherbert v. Verner*—that the "mechanism for individualized exemptions" in *Sherbert,* which offered the state discretion to grant some exemptions to unemployment compensation law while denying religious exemptions, rendered the

302. Shira Hanau, *Large Weddings Blamed as Virus Rates Spike in NYC Orthodox Neighborhoods*, THE TIMES OF ISRAEL (Sept. 8, 2020, 6:25 AM), https://www.timesofisrael.com/large-weddings-blamed-as-virus-rates-spike-in-nyc-orthodox-neighborhoods [https://perma.cc/FL35-8ZSJ]. A local doctor noted that the spike in cases coincided with the traditional wedding season in the Jewish calendar. *Id.*

303. Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 80 (2020) (Sotomayor, J., dissenting).

304. 141 S. Ct. 1294, 1297 (2021) (per curiam).

305. *Tandon*, 141 S. Ct. at 1297.

statute unconstitutional.[306] *Tandon* implemented a "broader 'most favored nation' approach to religious-exemption claims."[307] According to the *Tandon* Court, even if a law widely applies to both secular and religious conduct, it would not be considered "neutral and generally applicable" for purposes of *Smith* if it "treat[ed] *any* comparable secular activity more favorably than religious exercise," even if the government "treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue."[308] Applying this reasoning, the court held that even though California's COVID-19 rules limited both secular and religious in-home gatherings to members of three households or less, religious in-home gatherings must be exempted from the limitation because various secular businesses were not subject to the same limitation.[309]

The *Tandon* case arose after California's Governor Gavin Newsom issued a state of emergency on March 4, 2020, due to the initial outbreak of COVID-19 in California.[310] The California Department of Health ultimately instituted a four-tiered system to determine when local health jurisdictions could open various sectors, depending on particular metrics, including the case rate and positivity rate.[311]

The petitioners in *Tandon* included individuals who challenged, under the Free Exercise Clause, the executive orders that limited in person gatherings,[312] including the right to hold religious gatherings inside and

306. Jim Oleske, Fulton *Quiets* Tandon*'s Thunder: A Free Exercise Puzzle*, SCOTUSBLOG (June 18, 2021, 4:20 PM), https://www.scotusblog.com/2021/06/fulton-quiets-tandons-thunder-a-free-exercise-puzzle [https://perma.cc/3VW5-8THS].

307. *Id.*

308. *Tandon*, 141 S. Ct. at 1296 (per curiam) (citing first Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67–68 (2020) (per curiam), then 141 S. Ct. at 72–73 (Kavanaugh, J., concurring)).

309. *Id.* at 1297.

310. Emergency Application for Writ of Injunction or in the Alternative for Certiorari Before Judgement or Summary Reversal at 9, Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam) (No. 20A151) [hereinafter *Tandon* Emergency Application].

311. *Id.* at 10–12 (explaining the state scheme for regulating which activities and businesses could open).

312. Under California rules, "gatherings" were defined as "social situations that bring together people from different households at the same time in a single space or place." Opposition to Emergency Application for Writ of Injunction at 5, Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam) (No. 20A151) [hereinafter *Tandon* Opposition to Emergency Application].

outside their homes.[313] In most of the state, indoor gatherings could occur but were limited to members of three households, and throughout the state, outdoor gatherings could occur but had been similarly limited.[314] By contrast, the State permitted many activities to take place outdoors without any numerical limitations, including weddings, funerals, secular cultural events, and political rallies, and allowed more than three households to gather inside public transportation; establishments that provide personal care, like salons; government offices; movie studios; tattoo parlors; and other commercial spaces.[315] In some areas, restaurants and movie theatres even operated indoors at fifty percent capacity.[316]

The federal district and appellate courts had denied the petitioners' request for a preliminary injunction, on the grounds that the state's restrictions on private gatherings were "neutral and generally applicable," as required by *Smith*.[317] The appellate court expressed the view that appellants were "making the wrong comparison because the record does not support that private religious gatherings in homes are comparable—in terms of risk to public health or reasonable safety measures to address that risk—to commercial activities, or even to religious activities, in public buildings."[318] Thus, on April 2, 2021, petitioners requested injunctive relief from the Supreme Court.[319]

In their request for emergency relief, petitioners charged that the state engaged in a "subtle but unmistakable religious gerrymander" by limiting "social situations" but "conveniently excluding business gatherings from the definition of prohibited activity, even though people from many different households are allowed to be in the same place at the same time" in various business establishments, even restaurants.[320] Although the state did permit people to gather outdoors in unlimited numbers, petitioners contended that this permission was offered only

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313. *Tandon* Emergency Application, *supra* note 310, at ii. The petitioners also included individuals seeking to hold in-home political events and to operate their small businesses. *Id.* at 13.

314. *Id.* at ii. The Tandon respondents disagreed as to the facts of the case, contending that small groups could hold worship services outside, without any particular affiliation with a house of worship. *See infra* note 337 and accompanying text.

315. *Tandon* Emergency Application, *supra* note 310, at ii.

316. *Id.*

317. Tandon v. Newsom, 517 F. Supp. 3d 922, 974–75 (N.D. Cal. 2021); Tandon v. Newsom, 992 F.3d 916, 920 (9th Cir. 2021).

318. *Tandon*, 992 F.3d at 920.

319. *See generally Tandon* Emergency Application, *supra* note 310.

320. *Id.* at 4.

to "houses of worship" and therefore protected only "more traditional, ritualistic faith practices" but excluded other religious adherents who wished to engage in backyard prayer groups with members of more than two other households, "all of which are common (and deeply important) practices of millions of contemporary Christians in the United States."[321] Although the state disfavored some secular activities, such as in-home parties, petitioners argued that "regulations must place religious activities on par with *the most favored class* of comparable secular activities, or face strict scrutiny."[322] Moreover, "secular 'businesses are analogous comparators' when they involve comparable social interactions."[323]

Petitioners disputed the appellate court panel majority's finding that social gatherings present a particular risk because people have longer interactions, particularly face-to-face conversations.[324] Petitioners pointed out that many secular interactions similarly involve prolonged contact, including personal care services, which sometimes even allow clients to forego masking.[325] They further disputed the notion that social gatherings necessarily involve settings that are smaller, less well ventilated, and less likely to include mask-wearing and other safety protocols.[326] Given that the State of California imposed more stringent rules on religious gatherings as opposed to businesses that presented a comparable risk, petitioners called for the application of strict scrutiny.[327]

Petitioners then argued that the state's restriction of in-home religious gatherings failed the strict scrutiny test, invoking the Supreme Court decision in *South Bay United Pentecostal Church v. Newsom*,[328] another case involving Governors Newsom's restrictions on California houses of worship,[329] for the principle that the state cannot assume that

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321. *Id.* It should be noted that petitioners specified the needs of Christians in their brief, *id.*, without acknowledging that other religious group might wish to gather for worship in small groups.

322. *Id.* at 6, 18 (emphasis added).

323. *Id.* at 18 (quoting *Tandon*, 992 F.3d at 932 (Bumatay, J., dissenting)).

324. *Id.* at 23; *Tandon*, 992 F.3d at 925.

325. *Tandon* Emergency Application, *supra* note 310, at 23.

326. *Id.* at 23–24.

327. *Id.* at 26.

328. 141 S. Ct. 716 (2021) (mem.) [hereinafter *South Bay II*].

329. *Id*. at 716 (enjoining California from enforcing a ban on indoor worship, because secular businesses and activities were not subject to complete bans, but denying an injunction with respect to the state's enforcement of a 25% capacity cap on indoor

religious gatherings always involve, or that secular activities always lack, the risk factors of large gatherings: in close proximity; for extended periods; with singing.[330] Petitioners suggested that the state could use less restrictive means short of a total ban, such as requiring masking and social distancing, or even limiting the length of gatherings.[331]

In its brief in opposition to petitioners' request for injunctive relief, the State of California maintained that its restrictions were "entirely neutral toward religion, applying to all 'private gatherings,' secular and religious alike,"[332] with no record of animus toward or singling out of religious gatherings.[333] Respondents differentiated personal care businesses from private gatherings because businesses are subject to "'extensive safety protocols,'" including implementing a COVID-19-prevention plan and training workers on compliance; performing temperature and/or symptoms screening on workers; using hospital-grade products for cleaning; and providing adequate ventilation.[334] In contrast, private gatherings involved not only longer social interactions, but also smaller and less ventilated spaces, less mask wearing and social distancing, and more challenges to enforcement;[335] respondents charged that plaintiffs had not meaningfully asserted to the contrary.[336] Respondents also insisted that petitioners were in any event permitted under the law to hold *outdoor* religious services without any restriction on the number of attendees or households in attendance, *as long as* they adhered to protocols such as wearing masks and physically distancing, and that nothing in the State's policy on outdoor gatherings required

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worship, and also refusing to enjoin California from prohibiting chanting and singing at indoor worship services). After *South Bay II*, California amended its executive orders to permit indoor worship services in all tiers, subject to capacity limits and certain other public health restrictions. *Tandon* Opposition to Emergency Application, *supra* note 312, at 5.

330. *Tandon* Emergency Application, *supra* note 310, at 28–29.

331. *Id.* at 29–30.

332. *Tandon* Opposition to Emergency Application, *supra* note 312, at 12 (citation omitted). Respondents also insisted that injunctive relief was not appropriate because they had announced, in light of improved public health circumstances, a forthcoming policy that would allow the contested gatherings, *id.* at 12–13, 20–23, or "even larger groups" if petitioners chose. *Id.* at 21.

333. *Id.* at 14–15, 18–19 (distinguishing *Diocese* and *South Bay*).

334. *Id.* at 16 (citation omitted).

335. *Id.* at 15.

336. *Id.* at 15–16 (critiquing respondents for "asserting, without support, that 'it does not require any special expertise to appreciate that the exempted conduct' presents the 'same risks of viral spread' as certain indoor gatherings").

that the gathering be hosted by or on the premises of a house of worship.[337]

In a short per curiam opinion, the Supreme Court granted petitioners' application for injunctive relief pending resolution of the appeal before the Ninth Circuit.[338] First, citing *Diocese*, the Court held that "government 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" regardless of whether "a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue."[339] California had permitted secular activities, such as personal care businesses, retail stores, and sporting events, to bring together more than three households at a time, while people could not host in-home religious gatherings of more than three households.[340] Second, the Court declared that the determination of "whether two activities are comparable for purposes of the Free Exercise Clause" hinges upon "the risks various activities pose, not the reasons why people gather."[341] The Court did not find that the Ninth Circuit had determined that the risk posed by in-home religious gatherings exceeded the risk of retail establishments.[342] Third, the Court held that the government had failed to meet its burden under strict scrutiny to demonstrate that the religious gatherings at issue were more dangerous than permitted secular activities, such that no less restrictive measures would be sufficient to stem the spread of COVID-19.[343] The Court held that petitioners should be permitted to use the same precautions as secular activities, cautioning that "[t]he State cannot 'assume the worst when people go to worship but assume the best when people go to work.'"[344] Finally, the Court denied that any change in state policies would moot the case, given that the applicants felt "'under a constant threat'" that the government would reinstate the restrictions.[345] Applying this reasoning, the Court held that even though

337. *Id.* at 17–18.
338. Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam).
339. *Id.*
340. *Id.* at 1297.
341. *Id.* at 1296.
342. *Id.* at 1297.
343. *Id.* at 1296–97.
344. *Id.* at 1297 (quoting Roberts v. Neace, 958 F.3d 409, 414 (6th Cir. 2020) (per curiam)).
345. *Id.* (quoting Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 68 (2020) (per curiam)).

California's COVID-19 rules limited both secular and religious in-home gatherings to members of three households or less, the inclusion of religious in-home gatherings violated the Free Exercise Clause.[346]

The *Tandon* dissent, authored by Justice Kagan, joined by Justices Breyer and Sotomayor,[347] did not expressly address the majority's embrace of the most-favored-nation theory.[348] Justice Kagan posited in her dissent that a state must "treat religious conduct as well as the State treats comparable secular conduct." However, one commentator noted that ambiguity remained as to whether that meant "as well as the State generally treats comparable secular conduct or as well as the State treats any comparable secular conduct," with the latter interpretation supporting the most-favored-nation theory.[349] However, the dissent's conclusion that the majority "disregard[ed] law and facts alike" in order to achieve its "preferred result"[350] seems to suggest that the dissent rejected the most-favored-nation approach. The dissent clearly deferred to the state's choice of comparators, emphasizing that this case presents a straightforward secular analogue: "California limits religious gatherings in homes to three households. If the State also limits all secular gatherings in homes to three households, it has complied with the First Amendment."[351] Furthermore, the dissent would have deferred to the "uncontested testimony of California's public-health experts" at the trial court level, who found that the factual record did indeed support distinguishing the risk profiles of in-home religious services versus retail activities.[352]

Read together, *Diocese* establishes that a law is not "neutral and generally applicable," as required under *Smith*, if it provides an exemption for secular behavior but not for comparable religious behavior.[353] *Tandon* goes further in establishing a most-favored-nation rule for religious behavior.[354] In the context of vaccine mandates, since every state necessarily provides secular exemptions to vaccination on medical grounds, this line of cases suggests that the Supreme Court

346. *Id.*
347. *Id.* at 1298–99 (Kagan, J., dissenting). Chief Justice Roberts would have denied the application but did not write or join a dissent. *Id.* at 1298.
348. Oleske, *supra* note 265.
349. *Id.* (identifying the ambiguity of the dissent's position on the most-favored-nation theory).
350. *Tandon*, 141 S. Ct. at 1298–99 (Kagan, J., dissenting).
351. *Id.* at 1298 (Kagan, J., dissenting).
352. *Id.* (Kagan, J., dissenting).
353. Oleske, *supra* note 265.
354. *Id.*

would hold in a case on the merits that the Free Exercise Clause requires states to provide religious exemptions if they provide medical ones.

While Justice Alito has been known as a proponent of the most-favored-nation approach in Free Exercise cases,[355] it should be noted that he, along with Justices Gorsuch and Thomas, advocated in his 2021 concurring opinion in *Fulton v. City of Philadelphia* for overturning *Smith* altogether.[356] These Justices contend that those who ratified the Bill of Rights intended for the First Amendment to offer broad protection for religious freedom and to permit religious exemptions to generally applicable laws.[357] Although one expert has expressed doubt that there are five Justices willing to overturn *Smith*,[358] Justice Alito's concurrence in *Fulton* expresses the view of the conservative wing of the Court that the First Amendment provides an affirmative right to be free from government interference.

D. Fulton v. City of Philadelphia *Also Favors a Narrow Interpretation of* Smith*, and Justice Alito's Concurrence Advocates for Overruling* Smith *Altogether*.

The Supreme Court's 2021 unanimous decision in *Fulton v. City of Philadelphia* once again demonstrates that the Court defines very narrowly a "neutral law of general applicability" as set forth in *Smith*, such that the existence of a secular exemption imposes strict scrutiny on a state's refusal to offer a religious exemption.[359] As noted by one commentator, prior to the rash of pandemic-related cases raising Free Exercise claims, many believed that *Fulton* would be the case where the Court would either overrule *Smith* or implement a most-favored-nation

355. Oleske, *supra* note 306 (noting that Justice Alito "wrote two decisions while on the U.S. Court of Appeals for the 3rd Circuit that are viewed as leading most-favored-nation opinions").

356. 141 S. Ct. 1868, 1888 (2021) (Alito, J., concurring).

357. *Id.* at 1897.

358. See Josh Blackman, *Making Sense of* Danville Christian Academy v. Beshear, VOLOKH CONSPIRACY (Dec. 18, 2020, 2:10AM), https://reason.com/volokh/2020/12/18/making-sense-of-danville-christian-academy-v-beshear [https://perma.cc/NV73-LZVW] (arguing the Justices "punt[ed]" on addressing the Free Exercise clause issue by using a creative approach). Professor Blackman is an expert on constitutional law and the U.S. Supreme Court. *About Josh*, JOSH BLACKMAN, https://joshblackman.com/about-josh [https://perma.cc/US9K-TXMF].

359. *Fulton*, 141 S. Ct. at 1876; Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990).

approach to religious exemption claims.[360] However, because Tandon v. Newsom arose quickly on an emergency application for injunctive relief in the context of COVID-19, similarly to Diocese, Tandon was the case where the Court implemented the most-favored-nation rule, a result that the commentator described as Tandon "steal[ing] Fulton's thunder."[361] On the other hand, the *Fulton* case was fully briefed, since it did not arise in an emergency context,[362] thereby providing the opportunity for the concurring justices to advocate overruling *Smith*.[363]

In *Fulton*, the Supreme Court held that the City of Philadelphia violated the Free Exercise rights of the Catholic Social Services ("CSS") organization by denying it a contract based on the agency's refusal, when locating suitable foster families for foster children, to comply with the city's nondiscrimination policy protecting same-sex couples.[364] The Court based its decision in large part on the fact that the commissioner of the City's Department of Human Services ("DHS") had the authority to grant exemptions in her "sole discretion," so the presence of this secular exemption, even though it was never exercised, meant that the lack of a religious exemption triggered strict scrutiny.[365]

The *Fulton* case arose in March 2018 when the Philadelphia City Council enacted a resolution that instructed DHS, which is charged with finding homes for foster children, to change its contracting practices.[366]

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360. Oleske, *supra* note 306.

361. *Id.*

362. Commentators use the term "shadow docket" to refer to the many pandemic-related cases that reached the Supreme Court in 2020 as emergency appeals "without the full-dress treatment of thorough briefing and oral argument." Stephen Wermiel, *On the Supreme Court's Shadow Docket, the Steady Volume of Pandemic Cases Continues*, SCOTUSBLOG (Dec. 23, 2020, 3:16 PM), https://www.scotusblog.com/2020/12/on-the-supreme-courts-shadow-docket-the-steady-volume-of-pandemic-cases-continues [https://perma.cc/2TFS-FDK9]. According to Stephen Wermiel, a constitutional law professor and U.S. Supreme Court expert, "[d]espite the truncated consideration, the justices have had quite a lot to say in these cases," producing in total nearly one hundred pages of opinions across a number of a cases, "a substantial body of work that has taken place on the shadow docket." *Id.*

363. *Fulton*, 141 S. Ct. at 1924 (Alito, J., concurring, joined by Justice Thomas and Justice Gorsuch); *id.* at 1931 (Gorsuch, J., concurring, joined by Justice Thomas and Justice Alito) (agreeing with Justice Alito's "comprehensive opinion explaining why *Smith* should be overruled").

364. *Fulton*, 141 S. Ct. at 1875–77.

365. *Id.* at 1878–79.

366. *See* Amy Howe, *Case Preview: Court Will Tackle Dispute Involving Religious Foster-care Agency, LGBTQ Rights*, SCOTUSBLOG (Oct. 28, 2020, 4:00 PM), https://www.scotusblog.com/2020/10/case-preview-court-will-tackle-dispute-

The Philadelphia City Council resolution called for an investigation into certain foster services providers with "policies that prohibit the placement of children with LGBTQ people . . . ."[367] Philadelphia also indicated its intent to stop referring children to CSS unless the agency was willing to place children with same-sex couples,[368] and expressed in a letter to CSS that nondiscrimination is a "value that must be embodied in our contractual relationships."[369]

CSS and some of their foster parents filed a complaint against the city of Philadelphia in May 2018, seeking a temporary restraining order or preliminary injunction from the federal court requiring DHS to resume referrals to CSS.[370] Plaintiffs argued that the city's actions violated the First Amendment Free Exercise Clause, as well as the Establishment and Free Speech Clauses.[371] The district court denied CSS's request, holding that under *Smith*, government actions do not violate the Constitution's Free Exercise clause as long as they are neutral and generally applicable.[372] The U.S. Court of Appeals for the Third Circuit affirmed. Because the contract between the parties had expired, the Court of Appeals focused on whether the City could insist on the inclusion of new language forbidding discrimination on the basis of sexual orientation as a condition of contract renewal.[373] The appellate court concluded that the proposed contractual terms were a neutral and generally applicable

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involving-religious-foster-care-agency-lgbtq-rights [https://perma.cc/NEP6-PDA8] (describing the facts leading up to litigation in *Fulton v. City of Philadelphia*). The city's actions were spurred by a 2018 newspaper story recounting the Archdiocese of Philadelphia's position that CSS would not, due to Catholicism's position on same-sex marriage, consider prospective foster parents in same-sex marriages. *Fulton*, 141 S. Ct. at 1875; Tom MacDonald, *Philly Halts Foster Placements with 2 Faith-Based Agencies Shutting out LGBT Couples*, WHYY (Mar. 16, 2018), https://whyy.org/articles/philly-halts-foster-placements-2-faith-based-agencies-shutting-lgbt-couples [https://perma.cc/2CL7-CL26].

367. Complaint at 15–17, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123) [hereinafter *Fulton* Complaint].

368. *Fulton* Complaint, *supra* note 367, at 17–18; Brief of *Amici Curiae* Former Foster Children and Foster Parents and the Catholic Association Foundation in Support of Petitioners at 17, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123).

369. *Fulton* Complaint, *supra* note 367, at 20.

370. *Id.* at 39–40.

371. *Id.* at 39. Plaintiffs also alleged a violation of Pennsylvania state law. *Id.* at 24–25, 39.

372. Fulton v. City of Philadelphia, 320 F. Supp. 3d 661, 682–83 (E.D. Pa. 2018), *aff'd*, 922 F.3d 140 (3d Cir. 2019), *rev'd* 141 S. Ct. 1868 (2021).

373. Fulton v. City of Philadelphia, 922 F.3d 140, 153 (3d Cir. 2019), *rev'd*, 141 S. Ct. 1868 (2021).

policy under *Smith*.[374] CSS then filed an emergency application for injunction and a writ of certiorari to the U.S. Supreme Court.[375]

In its emergency application, CSS offered several reasons why the Supreme Court should reverse the Third Circuit's ruling in favor of the City of Philadelphia. With respect to its Free Exercise claim, CSS first argued that Philadelphia's actions were unconstitutional because they were hostile toward CSS's religious beliefs.[376] CSS cited as evidence of religious animus what it deemed the "coordinated actions by every branch of City government . . . ,"[377] including a City Council resolution calling for an investigation to weed out "discrimination that occurs under the guise of religious freedom"; the act of the Human Relations Commission ("HRC") to open "an extra-jurisdictional inquiry"; the Mayor's allegation that CSS "has a history of publicly disparaging the archdiocese," prompting inquiries by the Commission and DHS; and the DHS Commissioner's "summon[ing of] Catholic[] leadership to headquarters to discuss their religiously mandated policies" then accusing them of "not following 'the teachings of Pope Francis'" and telling them "it was 'not 100 years ago.'"[378] CSS further alleged discrimination because Philadelphia had neither informed secular agencies of its policies nor asked secular agencies whether they complied with them.[379]

Second, CSS argued that Philadelphia's policy was not neutral or generally applicable because the city could actually grant at its discretion two different types of exemptions to agencies. The DHS Commissioner could grant an exemption in her or his "sole discretion" to a particular agency, permitting that agency not to consider a parent as a foster if the agency was not the appropriate one to certify a given foster family, given the particular needs of the child.[380] Among the reasons prospective foster parents could be referred to a different agency were "geographic proximity, medical expertise, behavioral expertise, specialization in pregnant youth, and language needs."[381]

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374. *Id.* at 159.

375. Emergency Application for Injunction Pending Appellate Review, or, in the Alternative, Petition for Writ of Certiorari and Injunction Pending Resolution, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123) [hereinafter CSS Emergency Application].

376. *Id.* at 22.

377. *Id.*

378. *Id.* at 22–23.

379. *Id.* at 23.

380. *Id.* at 26.

381. *Id.* at 12.

Moreover, city officials also granted case-by-case exemptions to the intake freeze imposed on CSS, based on "individualized assessments."[382] Because of the existence of secular exemptions, but the absence of religious ones, CSS contended that strict scrutiny must be applied to Philadelphia's ordinance.[383]

Third, CSS argued that the City's actions could not survive strict scrutiny. According to CSS, Philadelphia did not demonstrate a compelling interest in its policy, given that the City had not informed agencies of and enforced its policy, and also had accepted that different agencies can have "different requirements."[384] Even if it did have a strong interest in enforcing its nondiscrimination policy against CSS, the agency continued, Philadelphia did not use the least restrictive means to achieve that interest because CSS barred children from being placed with foster parents even when CSS had already certified those homes, which CSS contended did not achieve the City's goal of protecting future prospective LBGTQ foster parents.[385] According to CSS, a less restrictive alternative would be to allow CSS to refer same-sex couples to one of the twenty-nine other agencies in the City's foster-care system, just as the City permitted secular agencies to do when the particular circumstances of the child warranted it.[386]

In its 2019 brief on the merits, CSS directly challenged the Supreme Court's decision in *Smith*, which upholds the right of the State to impose a neutral law of general applicability. As an initial matter, CSS argued that Philadelphia's termination of referrals to CSS did not result from an actual neutral, generally applicable law at all.[387] According to CSS, unable to find a law to achieve its objectives, Philadelphia sought a particular outcome and then "reverse-engineered policies to justify its actions."[388] CSS also contended that Philadelphia's actions were not

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382. *Id.* at 26–27. For example, after the placement freeze, DHS denied the placement of an autistic child with his former foster mother, who was working with CSS and had cared for the child since he was an infant, but then DHS reversed its decision and allowed the placement after CSS sought a temporary restraining order in federal court. *Id.* at 14.

383. *Id.* at 30.

384. *Id.* at 32–33.

385. *Id.* at 33–34.

386. *Id.* at 33–34.

387. *Id.* at 11; Brief for Petitioners at 17–18, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123), [hereinafter *Fulton* Brief for Petitioners].

388. Brief for Petitioners at 17, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123), [hereinafter *Fulton* Brief for Petitioners]. CSS charged that Philadelphia "candidly acknowledges that it 'allow[s] agencies to holistically consider protected traits

neutral but were instead hostile to CSS and its religious beliefs.[389] According to CSS, the City Council demonstrated "non-neutrality" by deeming CSS's actions "'discrimination' taking place 'under the guise of religious freedom."[390] Similarly, DHS's Commissioner exhibited non-neutrality by telling CSS that it was "not 100 years ago" and that CSS should follow "the teachings of Pope Francis," as opposed to the Archbishop.[391]

CSS also insisted in its brief for the Supreme Court that Philadelphia's policy was not generally applicable because the City offered secular exemptions in two ways. First, Philadelphia created a Waiver/Exemption Committee that could grant exemptions or waivers from city policies, at its own discretion, for constitutional reasons, including First Amendment concerns.[392] In addition, the DHS could grant exemptions in an individual case.[393] For example, the City required foster agencies to take into account marital status, disability, and family status, and it allowed agencies to make referrals to other agencies for secular reasons, for example by referring Native American children to Native American parents, yet it disallowed exemptions for religious reasons.[394] Moreover, city officials also granted case-by-case exemptions to the intake freeze imposed on CSS, based on "individualized assessments."[395]

CSS insisted that because the City's actions were not neutral and generally applicable, they were not protected by *Smith*, and therefore must face strict scrutiny, the most stringent constitutional test.[396] CSS contended that Philadelphia's policies failed this test, which requires the government to take the most narrowly tailored actions possible to achieve a compelling interest.[397] CSS contended that the City did not

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to secure the best interests of a particular child while matching them to a new family,' but distinguishes this from 'categorically excluding members of a particular group." *Id.* at 28. CSS declared "That is not a law, nor even a written policy." *Id.* at 28–29.

389. *Fulton* Brief for Petitioners, *supra* note 388, at 17.

390. *Id.* at 24–25.

391. *Id.* at 23–25.

392. *Id.* at 26.

393. *Id.*

394. *Id.* at 28.

395. *Id.* at 11 n.3; *see also* CSS Emergency Application, *supra* note 375, at 26–27 (noting that city officials granted "case-by-case exemptions to the intake freeze—based on 'individualized assessments'—but not for Catholic's religious exercise"). *See supra* note 382 (exemplifying an exemption for a child with autism).

396. *Fulton* Brief for Petitioners, *supra* note 388, at 30.

397. *Id.* at 30, 33–36.

have a compelling interest in preventing discrimination, as demonstrated by the fact that the City granted secular exemptions from the nondiscrimination policy to others.[398] Even if Philadelphia did have a strong interest in enforcing its nondiscrimination policy against CSS, the agency continued, the City's actions were not narrowly tailored to achieve that interest because the effects of that enforcement went beyond CSS, barring children from being placed with foster parents even when CSS had already certified those homes.[399] CSS reiterated its claim that the City could simply allow CSS to refer same-sex couples to one of the twenty-nine other agencies in the City's foster-care system.[400]

CSS went further, urging the Court that "*Smith* should be replaced" with "a free exercise standard that reflects the text, history, and tradition of the clause."[401] *Smith*, CSS contended, rested on a series of predictions that had been proven to be wrong: that granting religious exemptions would be "courting anarchy;" that most Free Exercise claims would be challenging laws rather than administrative rules or policies; and that legislatures would be willing to grant religious exemptions.[402] With regard to the first prediction, CSS argued that granting exemptions from laws would not lead to "anarchy," and that experience with the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act,[403] federal laws enacted in response to *Smith*, had shown that courts can determine when laws should supersede religious rights.[404] With regard to the second prediction, CSS argued that "growing *regulatory* power—not democratic law-making—is the source of most religious liberty disputes," eliminating the opportunity for religious adherents to "make their cases in the give-and-take of democratic lawmaking."[405] CSS then turned to constitutional textual analysis in averring that *Smith* was also wrong in its interpretation of the Free Exercise Clause, which "safeguards an affirmative right for believers to *practice* their religion, not just hold particular religious beliefs."[406] CSS emphasized the First Amendment

398. *Id.* at 33–34.
399. *Id.* at 36.
400. *Id.*
401. *Id.* at 37.
402. *Id.* at 37–38.
403. *Id.* at 37–38. *See supra* notes 234–237 and accompanying text for a discussion of the RFRA and RLUIPA.
404. *Fulton* Brief for Petitioners, *supra* note 388, at 38.
405. *Id.* at 40.
406. *Id.* at 42.

does not contain any limitations on the free exercise of religion, unlike, for example, the Fourth Amendment, which prohibits searches that are "unreasonable," or the Eighth, which protects against "excessive" punishment.[407] CSS therefore concluded that the First Amendment provides "an affirmative freedom from government interference."[408]

In its response to CSS's Free Exercise claims, Philadelphia framed the question before the Court very differently. The lawsuit had originally focused on the constitutionality of the City's decision to freeze referrals under a 2018 contract, which had expired, and the City's stated reasons for doing so.[409] By 2020, the City asserted that the only remaining issue was whether the City could constitutionally include in its new foster-care agency contracts a provision barring discrimination on the basis of protected characteristics.[410] The City averred that its actions were lawful because CSS "lacks a constitutional right to demand that it be granted a government contract to perform a government function using government funds without complying with the same contractual obligation that every other [foster care agency] must follow."[411]

The City emphasized that it had "greater leeway" in regulating CSS, as one of its contractors, as compared to regulating private citizens, including with respect to the Free Exercise clause.[412] Otherwise, the government "could not function" if its agents had a constitutional right to perform their jobs as they see fit."[413] Indeed, a government contractor "who refuses to serve individuals of whom her religion disapproves . . . risks placing the government itself in the role of divvying up rights . . . " based on "religious beliefs, potentially violating both the Establishment Clause and the Free Exercise Clause itself."[414]

The City maintained that, in this case, the nondiscrimination requirement was "generally applicable and neutral."[415] With respect to general applicability, Philadelphia explained that every foster-care agency contract contained the same nondiscrimination provision, which

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407. *Id.* at 42–43.

408. *Id.* at 43; *see id.* at 43–47 (discussing petitioners' historical understanding of the Free Exercise clause).

409. Fulton v. City of Philadelphia, 320 F. Supp. 3d 661, 668 (E.D. Pa. 2018), *aff'd*, 922 F.3d 140 (3d Cir. 2019).

410. Brief of City Respondents at 15, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123) [hereinafter *Fulton* Brief for Respondents].

411. *Fulton* Brief for Respondents, *supra* note 410, at 15.

412. *Id.* at 11.

413. *Id.* at 11 (citation omitted).

414. *Id.* at 21.

415. *Id.* at 12.

applied regardless of whether the discrimination was based on religious beliefs.[416] The City stressed that it did not allow any agencies, whether religious or secular, to discriminate by denying service and referring potential foster parents to other agencies, although agencies could provide information about their services, such as their lack of a license to serve special-needs children or their emphasis on historically underserved communities, that might lead prospective foster parents to go elsewhere.[417] Moreover, the City distinguished between the foster parent recruitment process, which must cast as wide a net as possible, as opposed to the later stage of placing children, when characteristics such as race ought to be taken into account in the best interests of the child.[418]

Philadelphia also argued that the nondiscrimination requirement was neutral because nothing in it suggested that it made distinctions based on religion.[419] The City contended that, as the lower courts found, there was no evidence that CSS was targeted "because of" its religious beliefs.[420] CSS could not rely on statements by the mayor or the city council to make its case because DHS's actions were the ones at issue.[421] Moreover, DHS evidenced its desire to keep working with CSS by offering it "the same" contract that it offered to other agencies and continuing to pay CSS "millions of dollars" for other services that the agency provided.[422]

Philadelphia cautioned that the *Fulton* case was "an extremely poor vehicle" to overrule *Smith*.[423] Even before the Supreme Court's ruling in *Smith*, there was no individual right to challenge the government's management of its "'internal affairs.'"[424] The doctrine of stare decisis also counseled against overruling *Smith*, according to the City. Stare

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416. *Id.* at 12, 29.
417. *Id.* at 30–31.
418. *Id.* at 33–34.
419. *Id.* at 12.
420. *Id.* at 38 (citation omitted).
421. *Id.* at 39–40.
422. *Id.* at 42.
423. *Id.* at 13. The City emphasized that even if *Smith* were overruled and strict scrutiny applied, the City would prevail, *id.*, given its compelling interests in ensuring that prospective foster parents and foster children are treated with equal dignity regardless of sexual orientation; maximizing the availability of qualified, willing foster parents; and preventing contractors from violating citizens' constitutional rights while carrying out functions on behalf of the government. *Id.* at 25–26.
424. *Id.* at 47 (citing Bowen v. Roy, 476 U.S. 693, 699 (1986)).

decisis requires a "special justification"[425] to reverse a past decision, and no such justification existed here.[426] By contrast, overruling *Smith* "would create a doctrinal mess," and CSS has provided "little guidance on how courts would clean it up."[427] For example, "[i]f *Smith* were overturned, the 'numerous state laws' that 'impose a substantial burden on a large class of individuals' would be subject to strict scrutiny," thereby effecting "a massive transfer of power to federal courts."[428]

In its 2021 opinion in *Fulton*, the Supreme Court issued an unexpectedly unanimous ruling that Philadelphia violated CSS's Free Exercise rights by denying it a contract based on the agency's refusal to comply with the City's nondiscrimination policy.[429] The Court found that Philadelphia's nondiscrimination policy was not "generally applicable" because of a contract provision allowing the commissioner of the City's DHS to grant exemptions in her "sole discretion."[430] Justice Roberts dismissed the City's argument that the commissioner had never actually granted an exception, declaring that the "creation of a formal mechanism for granting exceptions renders a policy not generally applicable" because such a scheme "'invite[s]' the government to decide which reasons for not complying with the policy are worthy of solicitude."[431]

Finding that the City's nondiscrimination policy was not "generally applicable," and therefore not subject to *Smith*, the Court applied strict scrutiny rather than overruling *Smith*,[432] despite CSS's urging.[433] In the fifteen-page opinion authored by Chief Justice Roberts, the Court held that Philadelphia must exempt CSS from working with same-sex couples in the government function of certifying potential foster parents.[434]

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425. *Id.* at 48 (citation omitted).

426. *See id.* at 48–51 (examining the factors that would favor overturning precedent and declaring they were not present).

427. *Id.* at 52.

428. *Id.* at 51 (quoting City of Boerne v. Flores, 521 U.S. 507, 535 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* Ramirez v. Collier, 142 S. Ct. 1264, 1277 (2022)). *See supra* note 8 for a discussion of this history.

429. Fulton v. Philadelphia, 141 S. Ct. 1868, 1882 (2021).

430. *Id.* at 1878.

431. *Id.* at 1879.

432. *Id.* at 1877 (stating that the Court need not revisit *Smith* since the instant case fell outside it).

433. *See supra* notes 401–408 and accompanying text regarding CSS's arguments for overruling *Smith*.

434. *Fulton*, 141 S. Ct. at 1882.

Justices Samuel Alito, Neil Gorsuch, and Clarence Thomas concurred only in the result, not the reasoning, arguing in a separate opinion that *Smith* should be revisited.[435] Justice Amy Coney Barrett emphasized in her concurrence that revisiting *Smith* was unnecessary for the Court's decision, since "the same standard applies regardless whether *Smith* stays or goes," and overruling would raise difficult questions about what would replace it.[436] As stated by one expert, the *Fulton* decision seems designed to avoid revisiting *Smith*, at least for now.[437]

Commentators have noted that the Court's application of strict scrutiny in *Fulton* was lacking.[438] "[T]he [C]ourt seemed to rely on a single fact—the prospect of exceptions—both to trigger strict scrutiny and to conclude that the city [did not] meet that standard."[439] A court analyzing a governmental action under a strict scrutiny standard must consider the nature of the government-imposed burden on religious exercise, whether the burden was imposed in furtherance of a compelling governmental interest, and whether the government tailored its actions to the least restrictive means possible in order to achieve that goal.[440]

Finding government-imposed burden on religious exercise, the majority declared without further explanation that Philadelphia "burdened CSS's religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs."[441] The Court accepted CSS's claim of a burden based on the Court's view "that certification is tantamount to endorsement."[442] Justice Roberts did not address the City's argument that it did not interfere with CSS's beliefs or practices regarding marriage in a religious

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435. *See id.* at 1883, 1888–1931 (Alito, J., concurring) (Justices Thomas and Gorsuch joined Alito's concurrence, stating that the Court "should reconsider *Smith* without further delay").

436. *Id.* at 1882–83 (Barrett, J., concurring).

437. Holly Hollman, *Court Requires Religious Exemption but Leaves Many Questions Unanswered*, SCOTUSBLOG (June 22, 2021, 3:02 PM), https://www.scotusblog.com/2021/06/court-requires-religious-exemption-but-leaves-many-questions-unanswered [https://perma.cc/3X89-SMGL].

438. *See* Hollman, *supra* note 437 (noting that the Court's discussion of the elements of government-imposed burden and government's interest in its strict scrutiny analysis lacked depth).

439. *Id.*; *Fulton*, 141 S. Ct. at 1876–79, 1881–82.

440. *See supra* note 25 and accompanying text regarding tiered scrutiny.

441. *Fulton*, 141 S. Ct. at 1876.

442. *Id.*

setting nor burden any of CSS's privately funded ministries, but rather simply required contractors that voluntarily offered to perform a delegated government function to do so in compliance with the City's nondiscrimination policy,[443] other than to note that "'religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.'"[444]

Similarly, the *Fulton* Court did not engage deeply on the issue of the government's interest. The City and its allies had emphasized that the nondiscrimination policy ensured equal treatment of all foster parents and children, thereby maximizing the number of foster families and minimizing the City's legal liability.[445] Justice Roberts asserted that, to the contrary, "including CSS in the program seems likely to increase, not reduce, the number of available foster parents," and dismissed as mere "speculation" the City's concerns over being sued over CSS's practices.[446] Justice Roberts acknowledged the City's "weighty" interest in the "equal treatment of prospective foster parents and foster children," but concluded that it was not sufficient to "justify denying CSS an exception for its religious exercise."[447] Rather, the City's "creation of a system of exceptions under the contract undermines [its] contention that its non-discrimination policies can brook no departures."[448] In this way, the Court failed to distinguish between exceptions the DHS commissioner might make on a case-by-case basis in the *best interests of the child*, and the blanket exceptions CSS made against all same-sex couples. Chief Justice Roberts concluded that CSS "seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs" but "does not seek to impose those beliefs on anyone else."[449] In so deciding, the Court did not address whether and under what circumstances the Constitution requires an exemption to nondiscrimination law.[450] For example, the Court did not

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443. *See supra* note 411 and accompanying text.

444. *Fulton*, 141 S. Ct. at 1876 (quoting Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 714 (1981)).

445. *See supra* notes 414 and 418 and accompanying text.

446. *Fulton*, 141 S. Ct. at 1882.

447. *Id.*

448. *Id.*

449. *Id.*

450. *See generally id.* at 1874–82 (holding that a non-discrimination requirement was unconstitutional under the Free Exercise Clause). "*Fulton* marks the second time the [C]ourt has upheld on narrow grounds a [F]ree [E]xercise claim in a clash between a religious objection to same-sex marriage and a government rule prohibiting

address the distinction between religious objections to same-sex marriage and other religious objections, such as to interracial marriage, as in the case *Bob Jones University v. United States*.[451] Also, the *Fulton* Court did not offer guidance as to whether the requirement of a religious exemption to a nondiscrimination rule would depend on the availability of other providers, in light of the Court's emphasis on the over twenty other agencies in Philadelphia willing to certify gay couples.[452] Neither did the Court square this argument with its acknowledgement in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*[453] that "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth."[454]

Justice Alito's seventy-seven-page concurring opinion in *Fulton* makes plain the goals of the more conservative wing of the Court to overrule *Smith*. Justice Alito, joined by Justices Thomas and Gorsuch, declared that *Fulton* presented the issue of "whether this Court's governing interpretation of a bedrock constitutional right, the right to the free exercise of religion, is fundamentally wrong and should be corrected[,]" and described *Smith* as a "severe holding" that is "ripe for reexamination."[455] According to Justice Alito, *Smith* erred in interpreting the Free Exercise clause as an anti-discrimination provision barring federal and state governments from restricting "conduct that constitutes a religious practice for some people unless it imposes the same restriction on everyone else who engages in the same conduct."[456] Instead, Justice Alito averred, a strict construction of the First Amendment, which lacks any language regarding equal treatment, suggests that those who ratified the Bill of Rights intended for the First Amendment to offer broad protection for religious freedom and to

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discrimination against LGBTQ[IA] people." Hollman, *supra* note 437. The 2018 decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* "in favor of a baker who refused on religious grounds to make a custom wedding cake for a same-sex couple was based on an administrative record that the [C]ourt said showed hostility toward religion." *Id.*; 138 S. Ct 1719, 1724 (2018).

451. 461 U.S. 574, 580–81, 584–85 (1983) (holding that the United States may deny tax-exempt status to a religious university that fails to comply with racial nondiscrimination law).

452. *Fulton*, 141 S. Ct. at 1875 (referring to the "more than 20 other agencies in the City, all of which currently certify same-sex couples").

453. 138 S. Ct. 1719 (2018).

454. *Id.* at 1727.

455. *Fulton*, 141 S. Ct. at 1883 (Alito, J., concurring).

456. *Id.* at 1897.

permit religious exemptions to generally applicable laws.[457] The "key point for present purposes is that the text of the Free Exercise Clause gives a specific group of people (those who wish to engage in the 'exercise of religion') the right to do so without hindrance" and "does not tie this right to the treatment of persons not in this group."[458] Since the *Fulton* majority did not overrule *Smith*, it seems that the Supreme Court, on a fuller briefing of the *Mills* and *Dr. A* cases, is likely to apply *Smith* to state vaccine mandates that do not include a religious exemption.

IV. THE U.S. SUPREME COURT SHOULD NOT FIND A FREE EXERCISE VIOLATION WHERE A STATE PERMITS MEDICAL BUT NOT RELIGIOUS EXEMPTIONS TO A VACCINE MANDATE

If the Supreme Court engages in a fuller consideration of the *Mills* and *Dr. A* on the merits, it must reconcile its prior Free Exercise decisions. The Supreme Court recognized in the 1990 *Smith* case that constitutionally required religious exemption claims could potentially be used to defeat "civic obligations of almost every conceivable kind," including "compulsory military service"; "payment of taxes"; "manslaughter and child neglect laws"; "drug laws"; "traffic laws"; "minimum wage laws"; "child labor laws"; "animal cruelty laws"; "environmental protection laws"; antidiscrimination laws; and, indeed, even "compulsory vaccination laws."[459] The *Smith* Court cautioned that

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457. *Id.* at 1898–1907 (analyzing colonial era approaches to religious freedom in the United States).

458. *Id.* at 1897.

459. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 888–89 (1990), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* Ramirez v. Collier, 142 S. Ct. 1264, 1277 (2022). *See supra* note 8 for a discussion of this history. For example, the Supreme Court held in a unanimous 1982 decision in *United States v. Lee* that the imposition of social security taxes did not violate the Free Exercise Clause as applied to those who object on religious grounds to the receipt of public insurance benefits, because compulsory participation in the Social Security System was essential to accomplish an overriding governmental interest. 455 U.S. 252, 254, 258 (1982), *superseded by statute*, Exemption Act of 1988, Pub. L. No. 100-647, 102 Stat. 3781, *as recognized in* United States v. Bauer, 75 F.3d 1366, 1375 (9th Cir. 1996). The Supreme Court again held unanimously in limiting Free Exercise rights, in the 1985 case *Tony & Susan Alamo Foundation v. Secretary of Labor*, refusing to exempt a religious nonprofit organization from labor laws relating to minimum wage and overtime. 471 U.S. 290, 306 (1985), *superseded by statute*, Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060, *as recognized in* Purdham v. Fairfax Cnty. Sch. Bd., 637 F.3d 421, 427 (4th Cir. 2011).

federal courts would become enmeshed in setting aside legislative enactments in almost every imaginable area.[460] Acknowledging that reliance on the democratic process could potentially disadvantage members of religions with small numbers of adherents, the *Smith* Court nonetheless declared that this "unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[461]

Three years later, the Supreme Court declared in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[462] that "[a]ll laws are selective to some extent"[463] and found a Free Exercise violation only "when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation."[464] The *Lukumi* Court emphasized throughout its opinion that the Free Exercise Clause aims to prevent the targeting of religion by prohibiting legislation that applies *only* to religious conduct, declaring that "[t]he principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause."[465]

As explained by Professor Volokh, author of a *Fulton* amicus curiae brief in favor of neither party, but advocating for the application of *Smith* even when a law contains secular exemptions,[466] "there is a good reason why [the Supreme Court] did not conclude in *Lukumi* that laws with secular exemptions were outside the scope of *Smith*: most laws have secular exemptions, because they are animated by a mix of secular interests."[467] Even Professor Douglas Laycock, co-author of an amicus

460. *Smith*, 494 U.S. at 887–89.

461. *Id.* at 890.

462. 508 U.S. 520 (1993), *superseded in part by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Meriwether v. Trs. of Shawnee State Univ., 2019 WL 4222598 (S.D. Ohio, 2019).

463. *Id.* at 542 (holding that local ordinances banning animal sacrifice violated the Free Exercise Clause because the ordinances were not neutral and generally applicable, but instead singled out the activities of the Santeria church).

464. *Id.* at 542–43.

465. *Id.*

466. Brief for Professor Eugene Volokh as *Amicus Curiae* in Support of Neither Party, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123) [hereinafter Volokh Amicus Brief].

467. *Id.* at 24.

brief in support of the Fulton petitioners and critic of *Smith*,[468] agrees that "[i]f a law with even a few secular exemptions isn't neutral and generally applicable, then not many laws are."[469]

Professor Volokh offers numerous common examples of secular exemptions to laws. For example, the law of trespass might permit Person A to trespass on Person B's land in order to recapture A's straying animals.[470] However, A is not entitled to trespass on B's land for a religious reason, such as if A believes that land is a sacred site, or to remove what A believes to be a blasphemous display.[471] Professor Volokh also presents the example of the duty to testify when subpoenaed, and the many testimonial privileges that represent secular exemptions to this duty, including spousal privilege and doctor-patient privilege.[472] Nonetheless, a state is not constitutionally required to provide a religious privilege to individuals who cite religious beliefs in refusing to testify against their own parents, children, or co-religionists.[473] Professor Volokh further proffers the example of the Copyright Act, which "contains one operative section followed by over fifteen sections of exceptions," yet federal courts have held that the Free Exercise Clause does not permit a religious believer to infringe upon the rights of a copyright holder in a religious work.[474]

Professor Volokh also argues that the legislative process, rather than the judicial one, ought to be used to decide whether two types of conduct are similar enough to be treated alike for the purpose of constitutional inquiry.[475] Citing some substantive due process cases from the early 1900s, he explained that

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468. *See, e.g.*, Brief for the Christian Legal Society, the Anglican Church in North America, Center for Public Justice, Institutional Religious Freedom Alliance, the Lutheran Church—Missouri Synod, Queens Federation of Churches, Union of Orthodox Jewish Congregations of American, and World Vision, Inc. as *Amici Curiae* in Support of Petitioners, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123) (advocating for overturning *Smith*).

469. Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, 2019 BYU L. REV. 167, 173 (2019).

470. Volokh Amicus Brief, *supra* note 466, at 24–25 (citing the Second Restatement of Torts).

471. *Id.*

472. *Id.* at 25–26.

473. *Id.* at 26 n.14 (explaining that judges have "generally" rejected cases where Jewish adherents attempted to invoke such religious exemptions).

474. *Id.* at 26.

475. *Id.* at 29.

> [t]he problem, as the Court ultimately recognized . . . , is that whether two kinds of conduct should be treated alike calls for the same sort of normative and practical judgment about government interests (and rival private interests) that is called for by the decision about whether certain conduct should be restricted.[476]

The executive branches in New York and Maine have determined, based on the advice of public health experts, that vaccination of health care workers will help protect patients and workers from the worst effects of COVID-19.[477] The necessity of mandatory vaccination is a determination that courts, from the time of *Jacobson* until now, have entrusted to the states, guided by medical experts, especially in a time of disease outbreak.[478] Further, as noted by Professor Volokh, religious beliefs do not "give the believer the right to harm a third party, even slightly," since, from "the legal system's perspective, the believer's God is just the believer's own, not the third party's and not the legal system's."[479] While those opposed to mandated vaccines for religious reasons may argue that their decision to reject a vaccine does not constitute a harm to others, previous vaccine jurisprudence has established that states have the right to make such determinations regarding public health.[480] As noted by Professor Laycock, the "government has a compelling interest in preventing significant threats to other people's health, and especially so in a pandemic[,]" and the "unvaccinated endanger people who are immunosuppressed or cannot be vaccinated because of their age or any other medical reason[,]" as well as "endanger people who are vaccinated because no vaccination is

476. *Id.*

477. *Governor Cuomo Announces COVID-19 Vaccination Mandate for Healthcare Workers*, (Aug. 16, 2021) https://www.governor.ny.gov/news/governor-cuomo-announces-covid-19-vaccination-mandate-healthcare-workers [https://perma.cc/3ZGU-G7XL]; *Mills Administration Requires Health Care Workers to Be Fully Vaccinated Against COVID-19 by October 1*, Office of Governor Janet T. Mills, (Aug. 12, 2021), https://www.maine.gov/governor/mills/news/mills-administration-requires-health-care-workers-be-fully-vaccinated-against-covid-19-october [https://perma.cc/8LUA-PCSG].

478. *See supra* Part I for a discussion of over a century of judicial deference to policy makers and the legislators that rely on them, in the context of state vaccine mandates.

479. Volokh Amicus Brief, *supra* note 466, at 21.

480. *See supra* Part I. The challenges to vaccine mandates by those who question the efficacy of vaccines is outside the scope of this article.

100 [percent] effective."[481] For this reason, Professor Laycock, a noted advocate for strong First Amendment protections, expressed as late as September 2021, just before the Supreme Court's decision in *Mills* and *Dr. A.*, that "the government has an easy case to refuse religious exemptions from vaccines against infectious disease."[482] According to Professor Laycock, the ease of this refusal rests on the fact that medical exemptions do not "undermine the government's interest in saving lives, preventing serious illness or preserving hospital capacity" but instead "actually serve the government's interests."[483]

In deciding a future case involving a constitutional challenge to a state vaccine mandate that does not offer a religious exemption, the Supreme Court will also be bound by its holdings in the pandemic-era *Diocese* and *Tandon* cases. The former held, in the context of restrictions on religious gatherings, that a state's recognition of a secular exemption necessitates a religious exemption.[484] The latter case established a "most-favored-nation" approach to religious-exemption claims, meaning that state action is subject to strict scrutiny if it treats any comparable secular activity more favorably than the religious activity at issue, even if the government also treats some comparable secular businesses or other activities the same or even less favorably than the religious activity.[485]

There are three ways of distinguishing the *Diocese* and *Tandon* cases from cases involving vaccine mandates without religious exemptions, however. First, *Diocese* and *Tandon* specifically mentioned and restricted religious worship, while permitting secular activities to continue.[486] Vaccine mandates are distinct from this situation, in that they do not mention or attempt to regulate religion. Indeed, religious

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481. Douglas Laycock, *What's the Law on Vaccine Exemptions? A Religious Liberty Expert Explains*, THE CONVERSATION (Sept. 15, 2021, 8:15 AM), https://theconversation.com/whats-the-law-on-vaccine-exemptions-a-religious-liberty-expert-explains-166934 [https://perma.cc/MJA9-G6Y7].

482. *Id.*

483. *Id.*

484. Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 68–69 (2020) (per curiam) (reasoning that imposing admission limits on churches and synagogues while creating exceptions for "essential" businesses "single[d] out houses of worship for especially harsh treatment").

485. Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam).

486. *Diocese*, 141 S. Ct. at 7777 (Breyer, J., dissenting)) (arguing that there is no practical or legal need for the majority to prevent fixed-capacity restrictions on houses of worship)); *Tandon*, 141 S. Ct. at 1298 (Kagan, J., dissenting) (arguing that the state "need not . . . treat at-home religious gatherings the same as hardware stores and hair salons").

beliefs about vaccination do not necessarily correlate with one's religious denomination and are therefore not widely known to others,[487] so in that sense there is no religious "targeting" of individuals through the use of vaccine mandates. Second, the gathering restrictions at issue in *Diocese* and *Tandon* were inexpertly drawn, since large gatherings such as weddings could take place but small religious gatherings could not.[488] It seemed as if the state was indeed relegating religious activity to a lower priority. A vaccine mandate for health care workers is more objective, however, in that it applies to everyone, except in the case of medical exemptions, where administration of the vaccine could cause disease or death, the very events vaccination is designed to prevent. Finally, those prevented from gathering religiously in *Diocese* and *Tandon* lacked other alternatives for worship, since the restrictions affected the very heart of their religion.[489] In contrast, those subject to vaccine mandates that violate their religious precepts may "continue to adhere to their religious beliefs and refuse vaccination against [COVID]-19 if they wish to do so," as asserted by the respondents in the *Mills* and *Dr. A* cases.[490]

As noted in the epigraph of this article, state power must be wielded sparingly and for the public good. In a time of pandemic, no individual has the right to privilege her religious observance above the health of others, a principle established in numerous federal and state judicial decisions, at both the appellate and trial court level, upholding state vaccine mandates. Indeed, as noted by the Mississippi Supreme Court, *failure to vaccinate* may in fact violate the rights of others under the Fourteenth Amendment Equal Protection Clause, by exposing them to health risks.[491] In accordance with this principle, families of students with disabilities have initiated lawsuits charging that a state's failure to require masking in school violates the rights of their children, whose

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487. Abramson, *supra* note 127, at 31 ("In every major world religion, at least some high-level figures within the faith have endorsed vaccination generally and deemed it to be consistent with the teachings of the religion.").

488. *Diocese*, 141 S. Ct. at 67; *Tandon*, 141 S. Ct. at 1297.

489. *See, e.g.*, *Diocese*, 141 S. Ct. at 67–68 (finding that the state's restriction prevented most people from attending religious services, causing irreparable harm to "Catholics who watch a Mass at home [and] cannot receive communion").

490. *Mills* Opposition to Emergency Application, *supra note* 136, at 34; *see also We the Patriots* Brief in Opposition, *supra* note 188, at 37–38 ("They remain free to refuse a COVID-19 vaccine, subject to potential employment consequences.").

491. *See supra* notes 120–123 and accompanying text.

preexisting conditions place them at particular risk from COVID-19.[492] While the United States embraces diversity of thought and religious belief, those who wish to participate in the public spheres of education and health care must share a singular view of the importance of public health, and acceptance of the expertise of medical experts in formulating health policy. As Thomas Jefferson declared, "it does me no injury for my neighbor to say there are twenty Gods, or no God. It neither picks my pocket nor breaks my leg."[493] However, as the pandemic has made clear, public health can be preserved only when we share a commitment to protect one another and empower our elected leaders to reach decisions driven by science, not religious belief.

492. Sneha Dey, *Parents of Children with Disabilities Join the Legal Battle over Masks in Schools*, NPR (Sept. 7, 2021, 3:56 PM), https://www.npr.org/sections/back-to-school-live-updates/2021/09/07/1034918212/parents-of-children-with-disabilities-join-the-legal-battle-over-masks-in-school [https://perma.cc/74QS-TPCW] (explaining that "[c]omplaints filed in Tennessee, Florida, Utah, Texas[,] and South Carolina argue that restrictions on mask mandates infringe on disability rights and that children with disabilities are being forced to choose between their health and their education"); Sarah Rankin, *Federal Judge Sides with 12 Disabled Kids Seeking Masks in School*, PBS (Mar. 24, 2022, 2:38 PM), https://www.pbs.org/newshour/health/federal-judge-sides-with-12-disabled-kids-seeking-masks-in-schools [https://perma.cc/6PX6-66X3] (describing a federal district judge's grant in part of a preliminary injunction sought by parents of disabled students in Virginia who seek a "reasonable modification" to a law that permits their classmates to opt out of mask mandates).

493. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 170 (1853).