THOU SHALT NOT TAKE THY LORD'S NAME IN VEIN: VACCINE MANDATES & RELIGIOUS OBJECTORS

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I. INTRODUCTION

On January 20, 2020, the United States announced its first laboratory-confirmed case of SARS-CoV-2 ("coronavirus" or "COVID-19").[1] As of August 2022, the United States reports more than 91,585,521 confirmed coronavirus cases with 1,029,939 related deaths.[2] Despite the CDC's recommendations that everyone wear masks in public places, maintain six feet of distance between one another, and wash their hands more frequently,[3] our nation has suffered through five waves of coronavirus infection rates.[4]

The coronavirus is far from our nation's first bout with infectious disease. Smallpox came to North America in the 1600s; however, after a large vaccination initiative in 1972, smallpox is

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[1] Erin K. Stokes et al., *Coronavirus Disease 2019 Case Surveillance—United States, January 22–May 30, 2020*, 69 MORBIDITY & MORALITY WKLY. REP. 759, 760 n.††† (June 19, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6924e2-H.pdf.

[2] *Tracking the Spread of the Coronavirus Outbreak in the U.S.*, BLOOMBERG (April 25, 2022, 2:31 PM EDT), https://www.bloomberg.com/graphics/2020-united-states-coronavirus-outbreak/.

[3] *How to Protect Yourself & Others*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 25, 2022), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html.

[4] *See* Arielle Dreher, *The Fifth Wave of the Coronavirus Pandemic has Arrived in Washington*, SPOKESMAN-REV. (July 23, 2021), https://www.spokesman.com/stories/2021/jul/23/welcome-to-the-fifth-wave/.

now eradicated in the United States.[5] In 1921, diphtheria peaked with around 206,000 cases.[6] Now, more than eighty percent of children in the United States are vaccinated against the bacteria.[7] Throughout the 1950s, there were two major polio outbreaks in the U.S., with 57,628 reported cases in 1952;[8] a vaccine was approved and quickly adopted throughout the world and, by 1962, the number of cases dropped to 910.[9] From 1981–1991, the U.S. endured a second measles outbreak, and almost all children caught measles prior to the vaccine.[10] In the second half of the twentieth century, however, most measles cases were due to inadequate vaccination coverage.[11] Doctors began recommending a second dose of the measles vaccine for everyone and, since then, the U.S. typically reports fewer than 1,000 cases each year.[12] In 2009, the H1N1 virus—commonly known as "swine flu"—spread quickly across the United States.[13] The CDC estimates that there were over 60.8 million cases but, in late December 2009, the H1N1 vaccine became available and virus activity levels began to slow.[14] The success of vaccines is undisputed.

Almost a year into America's battle with the coronavirus—on December 11, 2020—the U.S. Food and Drug Administration ("FDA") issued an emergency use authorization of the Pfizer-BioNTech COVID-19 Vaccine, which allowed the U.S. to begin distribution.[15] Since then, the FDA has fully approved two COVID-19 vaccines—Pfizer and Moderna—with the Johnson & Johnson vaccine also available for use in the U.S.[16] These vaccines seem to

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[5] Dana Robinson & Ann Battenfield, *The Worst Outbreaks in U.S. History*, HEALTHLINE (May 24, 2020) [hereinafter Robinson & Battenfield], https://www.healthline.com/health/worst-disease-outbreaks-history.

[6] Robinson & Battenfield, *supra* note 5.

[7] Robinson & Battenfield, *supra* note 5.

[8] Robinson & Battenfield, *supra* note 5.

[9] Robinson & Battenfield, *supra* note 5.

[10] Robinson & Battenfield, *supra* note 5.

[11] Robinson & Battenfield, *supra* note 5.

[12] Robinson & Battenfield, *supra* note 5.

[13] Robinson & Battenfield, *supra* note 5.

[14] Robinson & Battenfield, *supra* note 5.

[15] *COVID-19 Vaccines: Pfizer-BioNTech*, AMERICAN MED. ASS'N, https://www.ama-assn.org/delivering-care/public-health/covid-19-vaccines-pfizer-biontech (last visited April 24, 2022).

[16] Alyssa Billingsley, *FDA COVID-19 Vaccine Approval: Live Updates on Pfizer,*

be America's *coup de grâce* in the hunt for a return to normalcy, which is only achieved by herd immunity. Herd immunity is when an "overwhelming majority" of the population develops some form of immunity to a disease, making the spread from person to person less likely.[17] Further, the World Health Organization ("WHO") suggests that the safest—and most effective—means of achieving herd immunity against COVID-19 is through vaccination, rather than exposing individuals to the pathogen that causes the underlying disease.[18]

Despite the potential benefits accompanying a rapid vaccine rollout, a 2020 tracking survey conducted by Gallup found that thirty-five percent of Americans would decline a free, FDA-approved vaccine.[19] This "anti-vaxxer" phenomenon seriously frustrates the nation's goal of achieving herd immunity against COVID-19, jeopardizing the seventy to ninety percent of the population that experts say is necessary to become immunized to prevent future outbreaks.[20] This Comment, however, focuses on another potential frustration in the pursuit of herd immunity—religious objections to a COVID-19 vaccination raised under the Free Exercise Clause of the First Amendment.[21]

This Comment will discuss the potential for compulsory vaccination measures, on both the state and federal level, and examines Free Exercise jurisprudence against the backdrop of

Moderna, and J&J Vaccines, GOODRX (Apr. 1, 2022), https://www.goodrx.com/conditions/covid-19/fda-covid-19-vaccine-approval-updates.

[17] *See* Thomas Buckley, *Fighting Anti-Vaccine Pseudoscience, One Viral Video at a Time*, BLOOMBERG (Aug. 13, 2020), https://www.bloomberg.com/features/2020-zdoggmd-covid-antivaxxers/?sref=voktyKaT.

[18] *Coronavirus Disease (COVID-19): Herd Immunity, Lockdowns and COVID-19*, WORLD HEALTH ORG. (Dec. 31, 2020), https://www.who.int/news-room/q-a-detail/herd-immunity-lockdowns-and-covid-19.

[19] Shannon Mullen O'Keefe, *One in Three Americans Would Not Get COVID-19 Vaccine*, GALLUP (Aug. 7, 2020), https://news.gallup.com/poll/317018/one-three-americans-not-covid-vaccine.aspx.

[20] *See* David G. Hill, *From the Frontlines: Understanding Herd Immunity*, AM. LUNG ASS'N: EACH BREATH (July 27, 2020), https://www.lung.org/blog/understanding-covid-herd-immunity#:~:text=In%20most%20cases%2C%20herd,lasting%20immunity%20is%20possible; *see also US Coronavirus Vaccine Tracker*, USA FACTS (Apr. 17, 2022), https://usafacts.org/visualizations/covid-vaccine-tracker-states/ (finding that 66 percent of the population is considered "fully vaccinated.").

[21] *See* U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise" of religion.).

public health laws. Part II of this Comment addresses the frustrations that the anti-vaxxer movement imposes on public health laws and raises questions concerning the sincerity of many claims for religious exemption. Part III suggests compulsory vaccination legislation as a means to combat the anti-vaxxer movement. It further provides a brief history of the states' police power to enact public health laws, and, on the federal level, it addresses the Executive and Legislative branches' ability to enact the proposed mandate, focusing on Congress' enumerated powers as potential avenues. Part IV examines Free Exercise Clause jurisprudence and outlines the significance of the Court's decision in *Employment Division v. Smith*.[22] Part V acknowledges the necessity of including a secular exemption for medical contraindication in any vaccine legislation and explores whether that fact requires Congress to also carve out an exemption for religious purposes. It goes on to argue in favor of rational basis review for adjudicating Free Exercise challenges brought against public health laws.

This Comment only aims to introduce the possibility of a vaccine mandate—on either the state or federal level—and discusses the legal implications of Free Exercise challenges to public health laws, generally. Although a definitive finding of the constitutionality of a vaccine mandate is beyond the scope of this Comment, this area of law is ripe for further research and analysis.

II. COVID-19 & THE "ANTI-VAXXER" PROBLEM

"Anti-vaxxers" are individuals who actively oppose widespread vaccination.[23] Scholarly profiles of such individuals suggest that many identify with the "anti-vaccine" label to feel a sense of belonging in a broader community.[24] This problematic phenomenon is known as anti-vaxx social identification, which often leads to increased receptivity to vaccine misinformation and

[22] 494 U.S. 872 (1990).

[23] Matt Motta et al., *Identifying the Prevalence, Correlates, and Policy Consequences of Anti-Vaccine Social Identity*, ROUTLEGE: TAYLOR & FRANCIS GRP.: POLITICS, GRPS, & IDENTITIES, at 1 (May 30, 2021), https://www.tandfonline.com/doi/full/10.1080/21565503.2021.1932528 (finding that about twenty-two percent of Americans self-identify as "anti-vaxxers").

[24] *Id.* at 1–2.

resistance to evidence-based medicine.[25] For many on the political right, "opposing COVID-19 vaccinations has become a matter of political identity."[26]

Given the large anti-vaccine movement in the U.S., "there is evidence that many claims of religious objections to vaccination are false."[27] While these objectors may sincerely object to vaccination, their reasoning is not based on religion.[28]

In fact, law professor Dorit Rubinstein Reiss compiled anecdotal and survey evidence that suggests that a majority of religion-based claims for refusing school vaccination requirements are false.[29] Given the current format of religious exemptions, however, it is easily abused in ways that undermine states' goals of public health.[30] A recent study of school-entry vaccination exemptions across the nation outlines this abuse and the correlated frustration of public health goals.[31] In analyzing CDC data on vaccination exemptions for children entering kindergarten from 2011 to 2018, the study found that "[s]tates with religious and personal belief exemptions were one-fourth as likely to have kindergartners with religious exemptions as states with religious exemptions only."[32] The study concluded that religious exemption rates are directly correlated with the availability of personal belief exemptions, with religious exemption claims acting as a "replacement" for personal belief exemptions.[33]

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[25] *Id.* at 2.

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

[27] *Id.*

[28] *Id.*

[29] 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, 1553 (2014).

[30] *Id.*

[31] *See* Joshua T.B. Williams et al., *Religious Vaccine Exemptions in Kindergartners: 2011-2018*, 144 PEDIATRICS 1, 2 (Dec. 2019), http://publications.aap.org/pediatrics/article-pdf/144/6/e20192710/1078615/peds_20192710.pdf.

[32] *Id.* at 3.

[33] *Id.* at 5.

Moreover, Facebook, with its over 1.2 billion users, provides a forum for anti-vaccine activists to share advice about obtaining exemptions from school immunization requirements.[34] For example, in response to a request for advice on how to obtain a vaccination exemption for her child, one online commentator said: "She is going to have to lie. If you give any vaccine even 1 shot [sic] they say it can't be religious beliefs. I had to do a bit of Photoshop work to make the records say they have NEVER had any shots."[35]

Further, it is difficult for judges to determine the sincerity of religious claims, and they usually do not try.[36] The Court's robust deference to religious claims in *Burwell v. Hobby Lobby Stores*,[37] however, further invited questionable religious objections to public health laws. There, the petitioner-employer's religious exemption claim relied on the Religious Freedom Restoration Act ("RFRA")—an Act reinstating the pre-*Smith* "compelling interest" standard—alleging that it protected the close corporation from having to pay healthcare coverage for contraceptives that its owners *believed* were abortifacients when, in fact, they were not.[38] Ultimately, the Court found in favor of the petitioner-employer, finding that the regulation imposed a substantial burden on their "exercise of religion," in violation of RFRA.[39]

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[34] Rubinstein Reiss, *supra* note 29, at 1553 (citation omitted).

[35] Rubinstein Reiss, *supra* note 29, at 1553 (citation omitted).

[36] Laycock, *supra* note 26.

[37] 573 U.S. 682 (2014); *see* discussion *infra* pp. 27–29; *see also* Christopher T. Robertson, *Vaccines and Airline Travel: A Federal Role to Protect the Public Health*, 42 AM. J. L. & MED 543, 569 (2016) [hereinafter Robertson] ("the ruling casts a shadow over all public health regulation, given that virtually any objector can cloak their objection in religious garb."); Marci A. Hamilton, *The Biggest Threat to Herd Immunity Against COVID-19 May Be the Religious Freedom Restoration Act(s) and State Religious Exemptions*, JUSTIA: VERDICT (Aug. 25, 2020) [hereinafter Hamilton, *The Biggest Threat to Herd Immunity*], https://verdict.justia.com/2020/08/25/the-biggest-threat-to-herd-immunity-against-covid-19-may-be-the-religious-freedom-restoration-acts-and-state-religious-exemptions ("The *Hobby Lobby* decision also cast in doubt how robustly federal courts can question the sincerity of religious liberty claims, so expect innovation religious claims from anti-vaxxers against the COVID-19 vaccine, whether or not their objection is religious.").

[38] Hamilton, *The Biggest Threat to Herd Immunity*, *supra* note 37.

[39] *See Hobby Lobby*, 573 U.S. at 726.

Critics of the *Hobby Lobby* decision express concern over the precedent, arguing that it renders future courts powerless to block insincere claims of religious exemptions made by corporations "seeking to evade generally applicable laws."[40] In light of the Court's decision in *City of Boerne v. Flores*,[41] RFRA's scope is confined to laws enacted by the federal government.[42] The Court's narrowing in *Boerne*, however, proves insignificant as "roughly half of the states have a statute patterned on the federal RFRA that creates 'super rights' against any state law."[43]

The above factors invite a flood of false religious claims; however, not all claims are insincere, per se. Some Catholics object to COVID-19 vaccination because "decades-old fetal cell lines were used in the vaccine research,"[44] although Pope Francis disagrees.[45] In fact, most religions either do not prohibit or are explicitly in support of vaccination.[46] Still, even when religious objections are *truly* sincere, "the government has a compelling interest in overriding them and insisting that everyone be vaccinated."[47]

In February 2020, the Supreme Court granted certiorari in *Fulton v. City of Philadelphia*,[48] leading many to anticipate the law of exemptions to change dramatically.[49] There, petitioners sought to either: (1) overrule *Employment Division v. Smith*, which established that the Free Exercise Clause does not provide a religious exemption from neutral laws of general applicability; or (2) limit the impact of *Smith* by interpreting it as guaranteeing a

40 Ben Adams & Cynthia Barmore, *Question Sincerity: The Role of the Courts After* Hobby Lobby, 67 STAN. L. REV. ONLINE 59, 59 (2014).

41 521 U.S. 507 (1997).

42 *See* discussion *infra* pp. 25–26.

43 Hamilton, *The Biggest Threat to Herd Immunity*, *supra* note 37.

44 Laycock, *supra* note 26.

45 *See* Ad Council, *Unity Across the Americas: COVID-19 Vaccine Education*, YOUTUBE (Aug. 17, 2021), https://www.youtube.com/watch?v=zY5rwTnJF0U (describing receipt of an approved COVID-19 vaccine as "an act of love.").

46 Rubinstein Reiss, *supra* note 29, at 1569–82 (stating that Judaism, Islam and Christianity (specifically Catholics, Methodists, Lutherans, Mormons, Episcopalians and Presbyterians) actually support vaccinations).

47 Laycock, *supra* note 26.

48 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 141 S. Ct. 1868 (2021); *see* discussion *infra* pp. 37–40.

49 VALERIE C. BRANNON, CONG. RSCH. SERV., LSB10551, SUPREME COURT CONSIDERS OVERRULING FREE EXERCISE PRECEDENT IN FULTON V. PHILADELPHIA 1 (Nov. 9, 2020).

"most favored nation" status for claims of religious exemption.[50] With the validity of thirty years of precedent hanging in the balance, *Fulton* had the potential to reshape the Free Exercise landscape in a way that abandoned the common good for specific religious agendas.[51] The Court instead, however, chose to rule in favor of the religious objector on narrow, fact-specific grounds, in what can only be considered a "near miss"—portending a revolution soon to come.[52]

According to Dr. Anthony Fauci, the nation's leading infectious disease expert, COVID-19 is "the most disastrous pandemic that we have experienced in our civilization."[53] In our nation's three-year battle with coronavirus, two variants of the virus emerged—Delta and Omicron—which spread more easily from person to person.[54] Moreover, infectious disease experts are already focused on preventing the next pandemic, one that may be far more lethal, with the potential to "change the trajectory of life on the planet."[55] It is now, while we have the attention of our nation's politicians, that we must begin to consider our approach to future public health crises.

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[50] 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/ [hereinafter Oleske, Tandon *Steals* Fulton*'s Thunder*].

[51] Leslie C. Griffin & Marci A. Hamilton, *Why We Like Smith: We Want Neutral and General Laws to Prevent Harm*, JUSTIA:VERDICT (Apr. 20, 2021), https://verdict-justia-com.cdn.ampproject.org/c/s/verdict.justia.com/amp/2021/04/20/why-we-like-smith-we-want-neutral-and-general-laws-to-prevent-harm.

[52] Elizabeth Sepper & James D. Nelson, *Fulton v. Philadelphia: A Masterpiece of an Opinion?*, AM. CONST. SOC'Y (June 18, 2021), https://www.acslaw.org/expertforum/fulton-v-philadelphia-a-masterpiece-of-an-opinion/.

[53] Marie Rosenthal, *Fauci: COVID-19 Worst Pandemic in 100 Years*, INFECTIOUS DISEASE SPECIAL EDITION (Oct. 21, 2020), https://www.idse.net/Covid-19/Article/10-20/Fauci--COVID-19-Worst-Pandemic-in-100-Years/60937.

[54] *What You Need to Know About Variants*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 2, 2022), https://www.cdc.gov/coronavirus/2019-ncov/variants/about-variants.html.

[55] Jim Robbins, *Heading Off the Next Pandemic*, MEDSCAPE (Jan. 4, 2021), https://www.medscape.com/viewarticle/943517 (discussing the Nipah virus, which has a mortality rate as high as 75 percent).

III. THE VACCINE MANDATE SOLUTION

The government, however, is not powerless in the pursuit of finality from the COVID-19 pandemic. A potential legal tool at the government's disposal in reaching herd immunity vaccination levels is to require them.[56] In fact, the idea of compulsory vaccination finds support from the New York State Bar Association, which passed a resolution in 2020 encouraging the State to mandate that all New Yorkers undergo COVID-19 vaccination when one became available.[57] The resolution urged the state to not include exemptions for "religious, philosophical or personal reasons," recognizing that a person's health "can and does affect others."[58] While the resolution related solely to residents of the State of New York, the Bar Association's Health Law Section initially recommended that it should be mandatory for *all Americans* to undergo COVID-19 vaccination, with the only exception being "doctor-ordered medical reasons."[59]

Under the United States' system of federalism,[60] the states and the federal government both play a role in regulating matters of public health.[61] The states, pursuant to their general police powers,[62] have traditionally exercised a majority of authority in the realm of public health.[63] By contrast, the powers delegated to the

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[56] KEVIN J. HICKEY ET AL., CONG. RSCH. SERV., R46399, LEGAL ISSUES IN COVID-19 VACCINE DEVELOPMENT AND DEPLOYMENT 25 (Nov. 25, 2020), https://crsreports.congress.gov/product/pdf/R/R46399 [hereinafter HICKEY ET AL.].

[57] Jason Grant, *State Bar Passes Mandatory COVID-19 Vaccination Recommendation*, N.Y.L.J. (Nov. 7, 2020, 5:28 PM), https://www.law.com/newyorklawjournal/2020/11/07/state-bar-passes-mandatory-covid-19-vaccination-recommendation/.

[58] *Id.*

[59] *Id.*

[60] *See* Gregory v. Ashcroft, 501 U.S. 452, 457 (1991) ("[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government."); *see also* Tafflin v. Levitt, 493 U.S. 455, 458 (1990) ("States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.").

[61] HICKEY ET AL., *supra* note 56, at 25; *see also* United States v. Carolene Products Co., 304 U.S. 144, 154 (1938) (upholding an act of Congress which prohibited the interstate shipment of "Milnut" because it was injurious to public health).

[62] Barnes v. Glen Theatre, 501 U.S. 560, 569 (1991) (defining the police power of the states as "the authority to provide for the public health, safety, and morals" of their citizens).

[63] *See* HICKEY AT AL., *supra* note 56, at 25.

federal government are "few and defined,"[64] limiting Congress' ability to those powers enumerated by the Constitution.[65]

A. *State Power*

The states' police power to govern matters of public health has been understood as encompassing the authority to mandate vaccination for their inhabitants.[66] The Supreme Court first addressed this issue in *Jacobson v. Massachusetts*, where a compulsory smallpox vaccination was upheld as a valid exercise of police power in regulating "for the protection of the public health and the public safety, confessedly endangered by the presence of a dangerous disease."[67] There, a smallpox outbreak was "prevalent and increasing" in the city of Cambridge.[68] At the time, Massachusetts law allowed for the board of health of a city or town to enforce the vaccination of all inhabitants over twenty-one years of age, upon a determination that public health and safety required such action.[69] There, the plaintiff argued that such a program violated his liberty interests which, under modern jurisprudence, is equivalent to a substantive due process claim.[70] Alternatively, the plaintiff alleged a violation of equal protection of the law, as applied to adults, because the statute allowed for exemptions in favor of children.[71] In upholding the law, the Court applied rational basis review, finding that the Massachusetts statute was enacted as a valid health measure and had a "real and substantial relation" to that objective.[72]

In the years following the *Jacobson* decision, courts have routinely rejected Due Process and Equal Protection claims against vaccine mandates, granting considerable deference to the states in

64 THE FEDERALIST NO. 45 (James Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.").

65 *See* U.S. CONST. art. I, § 8; *see also* McCulloch v. Maryland, 17 U.S. 316, 405 (1819) (stating that the federal government is "one of enumerated powers.").

66 *See* Jacobson v. Massachusetts, 197 U.S. 11, 39 (1905).

67 *Id.*

68 *Id.* at 28.

69 *Id.* at 11.

70 *Id.* at 26; *see also* HICKEY ET AL., *supra* note 56, at 26.

71 *Jacobson*, 197 U.S. at 30.

72 *See id.* at 31.

protecting public health.[73] In *Zucht v. King*, the Supreme Court addressed a San Antonio city ordinance which required children to present a certificate of vaccination to attend a place of education.[74] Relying on *Jacobson*, the Court upheld the requirement, finding that the school-immunization ordinance was "required for the protection of the public health."[75]

While both *Zucht* and *Jacobson* were Due Process and Equal Protection challenges,[76] courts continue to rely on them when adjudicating Free Exercise challenges to vaccination mandates—consistently rejecting such claims in favor of broad state police power.[77] Moreover, Justice Kennedy noted the significant interconnection between Free Exercise claims and Equal Protection claims in *Church of Lukumi Babalu Aye v. City of Hialeah*,[78] writing, "[i]n determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases."[79]

In 2020, the Supreme Court twice denied applications for emergency injunctive relief, heard on the Court's "shadow docket,"[80] for Free Exercise challenges brought by houses of worship, effectively allowing states to place harsher COVID-19 restrictions on indoor religious gatherings than on certain indoor secular gatherings.[81] The first case was *South Bay United Pentecostal Church v. Newson*, where the Court upheld a

[73] S*ee, e.g.*, Zucht v. King, 260 U.S. 174 (1922); Phillips v. City of New York, 775 F.3d 538 (2d Cir. 2015); Workman v. Mingo Cnty. Bd. of Educ., 419 F. App'x 348 (4th Cir. 2011); Whitlow v. California, 203 F. Supp. 3d 1079 (S.D. Cal. 2016); Boone v. Boozman, 217 F. Supp. 2d 938 (E.D. Ark. 2020).

[74] *Zucht*, 260 U.S. at 175.

[75] *Id.* at 177.

[76] HICKEY ET AL., *supra* note 56, at 26, 31.

[77] *See, e.g.*, *Phillips*, 775 F.3d 538; *Workman*, 419 F. App'x 348 ; *Whitlow*, 203 F. Supp. 3d 1079; *Boone*, 217 F. Supp. 2d 938.

[78] 508 U.S. 520 (1993).

[79] *Id.* at 540.

[80] "Shadow docket" is the informal term for emergency rulings that the Court issues, usually handed down in short opinions, without full briefing or oral argument. Ellena Erskine, *Senators Spar Over Shadow Docket in Wake of Court's Order Allowing Texas Abortion Law to Take Effect*, SCOTUSBLOG (Sep. 29, 2021, 8:20 PM), https://www.scotusblog.com/2021/09/senators-spar-over-shadow-docket-in-wake-of-courts-order-allowing-texas-abortion-law-to-take-effect/.

[81] *See* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2603 (2020).

California safety guideline that placed a twenty-five percent building capacity or one hundred-person occupancy limit on religious services—a limit which was not imposed on "dissimilar activities," such as supermarkets and retail stores.[82] In his concurrence, Chief Justice Roberts stressed the importance of entrusting "the safety and the health of the people" during "extraordinary health emergenc[ies]" to those "politically accountable," rather than subjecting public health laws to "second-guessing" by the judiciary.[83]

Subsequently, in *Calvary Chapel Dayton Valley v. Sisolak*, the Court again chose not to grant injunctive relief to a church on its Free Exercise challenge, stemming from a Nevada regulation that placed a fifty-person occupancy cap on religious services.[84] By contrast, secular indoor gatherings, such as casinos, were permitted to admit fifty percent of their maximum occupancy, which—in the case of Las Vegas casinos—meant "thousands of patrons."[85] Both of these 5-4 rulings were accompanied by sharp dissents from the conservative members of the Court.[86]

Following the death of Justice Ruth Bader Ginsburg in September 2020, the Senate confirmed Justice Amy Coney Barrett to the bench, solidifying a 6-3 conservative majority on the Supreme Court.[87] Given the new composition of the Court, the broad discretion traditionally afforded to the states in enacting public health regulations in times of emergency is no longer on such firm footing. For example, in *Roman Catholic Diocese v. Cuomo*,[88] Justice Amy Coney Barrett—new to the Court—joined the four conservative justices who dissented in *Newson* and *Sisolak* to form the majority.[89] In another 5-4 decision, this time in favor of the conservative majority, the Court held that Governor

82 140 S. Ct. at 1613.

83 *Id.* at 1613–14 (Roberts, C.J., concurring).

84 140 S. Ct. at 2604.

85 *Id.*

86 *See S. Bay*, 140 S. Ct. at 1614; *see also Calvary Chapel*, 140 S. Ct. at 2603.

87 Steven T. Dennis, *Barrett Confirmation Hands Win to Trump, GOP on Even of Election*, BLOOMBERG (Oct. 26, 2020, 11:37 PM EDT), https://www.bloomberg.com/news/articles/2020-10-27/senate-confirms-barrett-for-supreme-court?sref=voktyKaT.

88 141 S. Ct. 63 (2020).

89 *Id.*

Cuomo's Executive Order, which restricted attendance at religious services in areas classified as "red" and "orange" zones, violated the Free Exercise Clause because it ran afoul of "the minimum requirement of neutrality" toward religion.[90] The Executive Order in that case adopted a categorization method where "red" and "orange" zones were established in order to prevent the spread of COVID-19.[91] For instance, in an "orange" zone, a place of worship was limited to twenty-five persons, while "non-essential" businesses were left to decide for themselves how many people to admit.[92] While this case seemed like a straightforward application of the modern Free Exercise doctrine, it also indicated a shift in the amount of deference the Court is willing to grant states in enacting public health laws that incidentally burden religion.[93]

Aside from the apparent shift in deference, practical concerns also accompany state-centric responses to public health crises. Divergence in state policy is not a new concept; however, pandemic policy is much different than policies regarding education or law enforcement.[94] For one, there is an inherent lack of uniformity, especially in leaving vaccine requirements to state discretion. One state's decision to enforce robust vaccination laws is undermined by unvaccinated individuals regularly crossing its borders from out of state.[95]

The lack of uniformity among the states is exemplified by their varying responses, and the regulations enacted, in attempting to slow the spread of the coronavirus.[96] Such divergence creates pressures on federalism.[97] With states

90 *Id.* at 66.

91 *Id.*

92 *Id.*

93 *See id.* at 67 ("Stemming the spread of COVID-19 is unquestionably a compelling interest, but it is hard to see how the challenged regulations can be regarded as 'narrowly tailored.'").

94 Tyler Cowen, *Coronavirus Hands More Power to New York, California and Other States*, BLOOMBERG (Apr. 16, 2020, 4:04 PM EDT), https://www.bloomberg.com/opinion/articles/2020-04-14/coronavirus-could-bring-america-all-the-way-back-to-1781?sref=voktyKaT.

95 Robertson, *supra* note 37, at 545; *see also* Robertson, *supra* note 25, at 550 (discussing data that shows a direct correlation between the volume of travel and the rate at which influenza viruses spread).

96 Cowen, *supra* note 94.

97 Cowen, *supra* note 94.

"reopening" following COVID-19 regulations, however, three groups of governors pledged to work together in coordinating their pandemic relief policies.[98] One such governor, Tim Walz—governor of Minnesota—criticized the nation's current approach, comparing it to "a loose Articles of Confederation."[99] "Crises tend to widen fault lines that already exist,"[100] and the same problems raised under the Articles of Confederation, friction between the many states, is still at issue today.[101]

One example of that friction occurred in Rhode Island, where state police delayed cars with New York state license plates from entering their borders due to New York's high infection rates.[102] Rhode Island even went as far as acquiring the help of the National Guard in conducting house-to-house searches, attempting to find individuals who traveled from New York to "demand 14 days of self-quarantine."[103]

In recognition of the flaws of such a disjointed approach, public health experts warn against the potential dangers of strict adherence to conceptions of federalism in response to public health crises.[104] The current approach of the many states is counterintuitive to Justice Cardozo's cardinal principle of the Constitution, that "the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[105]

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98 Mihir Sharma, *Coronavirus is Straining the Concept of Federalism*, BLOOMBERG (May 2, 2020, 8:00 AM EDT), https://www.bloomberg.com/opinion/articles/2020-05-03/coronavirus-crisis-is-straining-the-concept-of-federalism?sref=voktyKaT (stating that governors in the West, Midwest, and East have decided to coordinate pandemic response policy within each region).

99 *Id.*

100 *Id.*

101 Martin Kelly, *Why the Articles of Confederation Failed*, THOUGHTCO (May 8, 2020), https://www.thoughtco.com/why-articles-of-confederation-failed-104674.

102 Cowen, *supra* note 94; Prashant Gopal & Brian K. Sullivan, *Rhode Island Police to Hunt Down New Yorkers Seeking Refuge*, BLOOMBERG (May 27, 2020, 5:14 PM EDT), https://www.bloomberg.com/news/articles/2020-03-27/rhode-island-police-to-hunt-down-new-yorkers-seeking-refuge?sref=voktyKaT (stating that "New York is the epicenter of the coronavirus outbreak in the U.S.").

103 Gopal & Sullivan, *supra* note 102.

104 Robertson, *supra* note 37, at 545.

105 Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935).

Effective public health laws are further frustrated, however, when it comes to vaccination exemptions. A majority of states "explicitly authorize religious exemptions to vaccination, and sometimes philosophical exemptions as well—regardless of the government's compelling interests."[106] A potential solution is for the federal government to claim core public health functions, as those state exemptions only "protect people from mandates from their state or local government" and not against a federal vaccine mandate.[107]

B. *Federal Power*

The FDA has approved safe and effective vaccines for a wide array of highly contagious and dangerous diseases, which the Centers for Disease Control and Prevention ("CDC") recommend for all citizens.[108] The CDC declared vaccinations to be "one of the 10 great public health achievements of the twentieth century."[109] Due to insufficient vaccination rates, however, approximately 42,000 Americans die each year from vaccine-preventable diseases.[110] Science tells us that, when it comes to life-threatening diseases, morbidity and mortality rates are dependent on human behavior.[111] Without high levels of vaccination, infectious diseases remain a significant threat to our civil society.[112] While many vaccine mandates are in the context of immunization requirements for school children, adult vaccination at the federal level may become increasingly important in dealing with the next, potentially deadlier, pandemic.[113]

Although public health matters, including vaccination, are traditionally in the purview of state authority—by way of their broad police powers—there are three potential sources of such

106 Laycock, *supra* note 26.

107 Laycock, *supra* note 26.

108 Robertson, *supra* note 37, at 544 (discussing the eradication of smallpox, polio, diphtheria, measles, mumps, and pertussis).

109 Kevin Malone & Alan R. Hinman, *Vaccination Mandates: The Public Health Imperative and Individual Rights*, *in* LAW IN PUBLIC HEALTH PRACTICE 262, 262 (Richard A. Goodman et al. eds., 2d ed. 2007).

110 Robertson, *supra* note 37, at 544.

111 Robertson, *supra* note 37, at 544.

112 Robertson, *supra* note 37, at 544.

113 Robertson, *supra* note 37, at 544–45.

power at the federal level.[114]

1. The Executive Branch

Except in limited circumstances,[115] no existing federal law expressly imposes a vaccination requirement on the general public.[116] The Public Health Services Act ("PHSA"), however, provides a potential avenue for the executive branch to enact such a vaccination requirement.[117] PHSA empowers the Surgeon General to "make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases" from "one State . . . into any other State."[118] This provision has been described as "broad [and] flexible,"[119] and a broad construction may permit the CDC to require vaccination to prevent the interstate transmission of the coronavirus.[120]

Section 361 of PHSA however, provides that "[f]or purposes of carrying and enforcing such regulations," the CDC "may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in [its] judgment may be necessary."[121] The remaining subsections of PHSA pertain to the issuance of regulations related to the apprehension, detention, and examination of individuals "believed to be infected with a communicable disease."[122] Given the language of the Act—when read as a whole—regulations pursuant to it have been confined to

114 *See generally* HICKEY ET AL., *supra* note 56, at 28–31 (discussing state and federal authority to mandate vaccination).

115 HICKEY ET AL., *supra* note 56, at 28 (citing 8 U.S.C. § 1182(a)(1)(A) (stating that the limited circumstances include immigration and military contexts); DEP'T OF DEFENSE, INSTRUCTION 6205.02, DOD IMMUNIZATION PROGRAM 3 (July 23, 2019), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/620502p.pdf?ver = 2019-07-23-085404-617).

116 HICKEY ET AL., *supra* note 56, at 28.

117 42 U.S.C. § 264(a) (2021).

118 *Id.*

119 Louisiana v. Matthews, 427 F. Supp. 174, 176 (E.D. La. 1977).

120 HICKEY ET AL., *supra* note 56, at 28.

121 42 U.S.C. § 264(a).

122 *See id.* § 264(b)–(d).

the quarantine of goods and people, and measures to control or treat animals subject to contamination.[123] In light of its narrow application, it is doubtful that the authority granted to the CDC by PHSA provides an adequate vehicle for a federal vaccination mandate.[124]

2. The Legislative Branch

As discussed, Congress shares concurrent authority with the states when dealing with matters of public health, with Congress' authority confined to those enumerated powers established by the Constitution.[125] In particular, the Constitution's Spending Clause and the Commerce Clause are two provisions with the potential for Congress to draw on in enacting a federal vaccine mandate.[126]

i. The Spending Clause

The Spending Clause empowers Congress to "provide for the common Defence and general Welfare of the United States."[127] Stemming from this power is Congress' ability to attach conditions on the receipt of federal funds "to further broad policy objectives."[128] In practice, Congress has invoked this authority to further broad public health initiatives, including for purposes of "controlling specified diseases, establishing neighborhood or community health centers, and creating federal health insurance programs, including Medicare and Medicaid."[129] Under current precedent, it may be possible for Congress to condition the receipt of certain federal funds on state enactment of a vaccination mandate that complies with specified federal requirements.[130]

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123 HICKEY ET AL., *supra* note 56, at 29.

124 HICKEY ET AL., *supra* note 56, at 29.

125 HICKEY ET AL., *supra* note 56, at 29; *see* U.S. CONST. art. I, § 8.

126 HICKEY ET AL., *supra* note 56, at 29; *see* U.S. CONST. art. I, § 8, cl. 1–3.

127 U.S. CONST. art. I, § 8, cl. 1.

128 483 U.S. 203, 206 (1987) (quoting Fullilove v. Klutznick, 448 U.S. 448, 474 (1980)).

129 *See* HICKEY ET AL., *supra* note 56, at 29 (citing James G. Hodge, Jr., *The Role of New Federalism and Public Health Law*, 12 J. L. & HEALTH 309, 335–337 (1998)).

130 *See Dole*, 483 U.S. at 211–12 (holding that 23 U.S.C. § 158, which conditioned the provision of certain federal highway funds upon a state's enactment of a minimum drink age of twenty-one, was a valid exercise of Congress' Spending Clause authority).

Assuming that a federal vaccination mandate—issued during a global pandemic—would qualify as providing for the "general welfare,"[131] the mandate would be permissible, so long as it meets the requirements established in *South Dakota v. Dole*:

> (1) Congress provides clear notice of the vaccination mandate that states must enact; (2) the mandate is related to the purpose of the federal funds; (3) this conditional grant of funds is not otherwise barred by the Constitution; and (4) the amount of federal funds offered is not "so coercive as to pass the point at which pressure turns into compulsion."[132]

Spending Clause precedent, however, indicates that it may not be the most effective of Congress' enumerated powers to achieve herd immunity. Specifically, the fourth prong of the *Dole* test, that the funds must not be "so coercive as to pass the point at which pressure turns into compulsion,"[133] requires that states have a "legitimate choice" in deciding whether to enact such a vaccine mandate.[134]

ii. The Commerce Clause

Congress' commerce power is another potential—possibly more effective—means of effectuating a widespread vaccination mandate.[135] The Commerce Clause grants Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[136] The Supreme Court has identified three broad categories of activity that Congress may regulate under this power: (1) "the channels of interstate

131 *See generally* United States v. Butler, 297 U.S. 1 (1936) (discussing the breadth of the phrase for the "general welfare.").; see *also Dole*, 483 U.S. at 207 ("In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress.").

132 HICKEY ET AL., *supra* note 56, at 30 (citing *Dole*, 483 U.S. at 207–08, 211).

133 *Dole*, 483 U.S. at 211 (internal quotations omitted).

134 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 581 (2012) (finding that "the financial inducement Congress ha[d] chosen [was] much more than 'relatively mild encouragement'—it [was] a gun to the head.").

135 *See* U.S. CONST. art. I, § 8, cl. 3.

136 *Id.*

commerce," such as roads, canals, airways; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce;" and (3) "those activities having a substantial relation to interstate commerce, those activities that substantially affect interstate commerce."[137] Congress has relied on this power to enact comprehensive public health regulations in the past.[138]

While Congress' commerce authority is expansive, the Supreme Court reeled in some of that power in *National Federal of Independent Business (NFIB) v. Sebelius*.[139] There, in a portion of the opinion not joined by other justices,[140] Chief Justice Roberts explained that the Commerce Clause does not permit Congress to "regulate individuals precisely because they are doing nothing."[141] With this, *Sebelius* created a substantial limit to the commerce power—it must be used to regulate "commercial activity," rather than "compel[] individuals to become active in commerce."[142]

Further, the *Sebelius* decision suggests that a federal vaccine mandate imposed directly on individuals may be construed as unconstitutionally compelling individuals to engage in the "commercial activity" of receiving a particularized health care service.[143] Fewer constitutional concerns would arise, however, if the government were to require vaccination as a condition to engage in an already-existing economic market, such as employment.[144] Many health care workers—and other employees

137 United States v. Lopez, 514 U.S. 549, 558–59 (1995).

138 *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996) ("Despite the prominence of the States in matters of public health and safety, in recent decades the Federal Government has played an increasingly significant role in the protection of the health of our people."); *see also* Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301–399i (2018).

139 567 U.S. 519, 588 (2012).

140 HICKEY ET AL., *supra* note 56, at 30 (alluding to the fact that a lack of a majority in this portion of the opinion creates uncertainty as to whether this conclusion constitutes binding precedent).

141 *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 520.

142 *Id.* at 550.

143 HICKEY ET AL., *supra* note 56, at 30.

144 *See* Liberty Univ., Inc. v. Lew, 733 F.3d 72, 93 (4th Cir. 2013) (rejecting a Commerce Clause challenge to an Affordable Care Act provision that requires certain employers to offer a minimum level of health insurance coverage to their employees on the grounds that the requirement merely regulates an existing commercial activity). Recent efforts by the Biden administration to mandate vaccination for all federal employees and subcontractors doing business with the federal government

at great risk of contracting vaccine-preventable diseases—are already required to become vaccinated against the flu by their employers.[145]

Moreover, the coronavirus does not respect jurisdictional boundaries. A person with a contagious disease can travel virtually anywhere in the world within twenty-four hours.[146] In fact, travel is directly correlated to the rate at which contagious disease spreads throughout the United States.[147] For example, in 2015, a single outbreak of measles at Disneyland spread throughout the nation by travelers, leading to 189 cases of infection, spanning twenty-four states.[148] This problem is compounded by the fact that approximately two million people use U.S. airlines to travel, daily.[149] In recognition of the danger posed by allowing travel without first becoming vaccinated, Congress could potentially make vaccination screening a prerequisite to flying, which would have secondary benefits on public health, generally.[150] Under Supreme Court precedent, Congress' commerce power already encompasses the ability to regulate the channels and instrumentalities of interstate commerce, which includes airplanes, the airways, and their passengers.[151] Importantly, a vaccine prerequisite for use of U.S. airlines is on stronger constitutional footing than an individual requirement because it would only apply to individuals already engaged in economic activity—the act of purchasing an airline ticket.[152]

are outside the scope of this Comment. For more information regarding this topic, *see* Nathaniel M. Glasser et al., *President Biden's Vaccination Mandates for Federal Employees and Contractors Remain in Limbo*, NAT'L L. REV. (Apr. 24, 2022), https://www.natlawreview.com/article/president-biden-s-vaccination-mandates-federal-employees-and-contractors-remain.

145 Joanne Rosen, *Can COVID-19 Vaccines Be Mandatory in the U.S. and Who Decides?*, JOHNS HOPKINS BLOOMBERG SCH. PUB. HEALTH (Nov. 17, 2020), https://www.jhsph.edu/covid-19/articles/can-covid-19-vaccines-be-mandatory-in-the-u-s-and-who-decides.html.

146 Robertson, *supra* note 37, at 550.

147 Robertson, *supra* note 37, at 550.

148 Robertson, *supra* note 37, at 550.

149 Robertson, *supra* note 37, at 545.

150 Robertson, *supra* note 37, at 551.

151 United States v. Lopez, 514 U.S. 549, 558–59 (1995).

152 Robertson, *supra* note 37, at 567.

Generally, the federal government has played a limited role with respect to vaccination requirements,[153] but unprecedented times call for unprecedented measures. If the coronavirus, or a potentially deadlier virus, continues to have a stranglehold on the nation, it may be necessary for Congress to address the issue by implementing a vaccination mandate—and it will likely be grounded in one of Congress' enumerated powers described above.

IV. THE FREE EXERCISE CLAUSE

Assuming that either the states or the federal government actually possess the power to enact a vaccine mandate, other constitutional provisions—those establishing individual rights—may frustrate such an action.[154] A particular area of concern involves challenges brought under the Free Exercise Clause, which applies equally to federal, state, and local governments.[155] As discussed above, modern courts have systematically rejected Due Process and Equal Protection challenges to compulsory vaccination laws under *Jacobson* and *Zucht*.[156] Moreover, Free Exercise challenges are limited by the Court's precedent in *Employment Division v. Smith* and its progeny.[157]

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise" of religion.[158] For many years, the Supreme Court interpreted the Free Exercise Clause as requiring religious exemptions for neutral, generally applicable laws that incidentally burdened religious activity and were not justified by a compelling governmental interest.[159] In *Sherbert v. Verner*, the Court applied

153 *See* 42 U.S.C. §§ 300gg-13(a) (requiring private health insurance plans to cover certain recommended immunizations); *id.* at § 1396s(a) (requiring coverage of certain recommended pediatric vaccines under a state Medicaid plan).

154 HICKEY ET AL., *supra* note 56, at 31.

155 *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause against the states through the Fourteenth Amendment).

156 HICKEY ET AL., *supra* note 56, at 31.

157 *See* discussion *infra* pp. 22–24 (discussing *Smith*, which held that neutral and generally applicable laws do not violate the Free Exercise Clause); HICKEY ET AL., *supra* note 56, at 31.

158 U.S. CONST. amend. I.

159 *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 403–04 (1963); Wisconsin v.

this standard of strict scrutiny to a South Carolina law that disqualified unemployment benefits for those who failed, "without good cause," to accept "suitable work when offered."[160] There, the plaintiff—a Seventh-day Adventist—was discharged by her employer because her religion did not allow her to accept work on Saturdays, the Sabbath day of her faith.[161] In ruling in favor of the plaintiff's Free Exercise claim, Justice Brennan wrote, "to condition the availability of benefits upon this [plaintiff]'s willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties."[162] Applying strict scrutiny, the Court found that the state's asserted interest—a fear that insincere religious objections would dilute unemployment compensation funds and hinder employers in scheduling necessary Saturday work—failed to rise to the level necessary to constitute a compelling government interest.[163]

In 1990, however, the Court handed down its landmark decision in *Smith*.[164] There, an employer fired two Native American employees after they ingested peyote for "sacramental purposes;" the former employees were subsequently denied unemployment compensation.[165] At the time, Oregon law prohibited the "intentional possession of a controlled substance unless the substance [was] prescribed by a medical practitioner."[166] The employment division determined that the men were ineligible for benefits because they were "discharged for work-related

Yoder, 406 U.S. 205, 220 (1972) ("There are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability."); *see also* Marci A. Hamilton, *In Defense of Justice Scalia on Religious Liberty and* Smith, JUSTIA: VERDICT (Feb. 18, 2016), https://verdict.justia.com/2016/02/18/in-defense-of-justice-scalia-on-religious-liberty-and-smith [hereinafter Hamilton, *In Defense of Justice Scalia on Religious Liberty and* Smith] (stating that the decision in *Yoder* "tragically paved the way for religious communities to fail to educate their children, thereby disabling them in an increasingly verbal, online society.").

160 374 U.S. at 399–401, 406.

161 *Id.* at 399.

162 *Id.* at 406.

163 *Id.* at 407. *Contra* Braunfeld v. Brown, 366 U.S. 599, 608–09 (1961) (finding a governmental interest in providing one uniform day of rest for all workers).

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

165 *Id.* at 874.

166 *Id.*

misconduct"—i.e., the crime of ingesting a controlled substance.[167] Ultimately, the Court rejected the former employee's Free Exercise claim and, in doing so, established what would become the standard for adjudicating Free Exercise challenges for years to come: "[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[168]

Justice Scalia's opinion in *Smith* was significant for many reasons. First, the *Smith* decision was a dramatic departure from how courts were handling Free Exercise disputes for nearly three decades, establishing rational basis review as the governing standard for neutral laws of general applicability that incidentally burden religion—replacing *Sherbert*'s "compelling interest" test.[169] Second, the opinion noted the potential "anarchy" that accompanies the application of the "compelling interest" test for such neutral laws, which can be read as a warning to future courts in analyzing similar Free Exercise challenges.[170] Among this anarchy, Justice Scalia described *Sherbert*'s standard as producing "a private right to ignore generally applicable laws," creating a "constitutional anomaly."[171] By making such a law contingent upon the "coincidence" of alignment with the objectors' religious beliefs—Scalia believed—it permits the objector "to become a law unto himself."[172] The opinion further outlined the problem of finding a "compelling interest" for every law that conflicts with a religion in a society as diverse as ours and recognized that many laws would likely fail under *Sherbert*'s demanding standard.[173] The *Smith* decision essentially reiterated the notion that the United States is a haven for believers, but also a place where believers do not have a constitutional right to harm others,[174] an idea first

167 *Id.*

168 *Id.* at 879 (internal citations omitted).

169 *See id.* at 888.

170 Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 888 (1990).

171 *Id.* at 886.

172 *Id.* at 855 (citation omitted).

173 *Id.* at 888.

174 Hamilton, *In Defense of Justice Scalia on Religious Liberty and* Smith, *supra* note 159.

expressed by the Court in *Reynolds v. United States*.[175] Third, Scalia was one of the most conservative members of the Court at that time, and a devout Catholic,[176] so his shift on religious exemptions in *Smith* shocked many other religious conservatives.[177] Fourth, following *Smith*, the Coalition for the Free Exercise of Religion advocated legislative action to overturn the Court's decision because of its "dramatic departure" from Free Exercise jurisprudence,[178] ultimately resulting in Congress' enactment of RFRA.[179] Finally—and most importantly—Scalia read *Sherbert* as not wholly inconsistent with *Smith*. In dicta, the opinion stated that *Sherbert* stood for the proposition that, where the state creates a "mechanism for individualized exceptions," it may not refuse to extend that system to religious exceptions without a compelling reason.[180]

[175] 98 U.S. 145, 166–67 (1878)

> So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? The permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

[176] Elizabeth Dias, *How Scalia's Faith Reshaped the Supreme Court*, TIME (Feb. 13, 2016, 8:23 PM), https://time.com/4220768/antonin-scalia-dead-catholic-legacy/.

[177] Kelsey Dallas, *How Justice Scalia Rules on Religious Freedom—and Why it Matters*, DESERT NEWS (Feb. 25, 2016, 12:20 PM), https://www.deseret.com/2016/2/25/20583215/how-justice-scalia-ruled-on-religious-freedom-and-why-it-matters.

[178] Hamilton, *In Defense of Justice Scalia on Religious Liberty and* Smith, *supra* note 159.

[179] 42 U.S.C. § 2000bbb *et seq.* (2018).

[180] Emp. Div., Dep't of Hum. Res. of Or. v. Smith., 494 U.S. 872, 884 (1990) (citations omitted).

V. NOT ALL EXEMPTIONS ARE CREATED EQUAL

A. *The Religious Freedom Restoration Act*

As stated, Congress enacted RFRA in direct response to the Supreme Court's decision in *Smith*,[181] in an effort to "provide very broad protection for religious liberty."[182] Incorporated in the congressional findings is the idea that even "neutral" laws "may burden religious exercise as surely as laws intended to interfere with religious exercise," and the Act's purpose was to "restore the compelling interest test as set forth in [*Sherbert*]" and its progeny.[183] RFRA's stringent "compelling interest" test essentially amounts to strict scrutiny: "Government may substantially burden a person's exercise of religion *only if* it demonstrates that application of the burden *to the person*—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[184] As enacted in 1993, RFRA applied to both the federal government and the states.[185] In justifying RFRA's application against the states, Congress relied on its enforcement power under Section 5 of the Fourteenth Amendment, classifying the Act as a remedial measure.[186]

In *City of Boerne v. Flores*, however, the Court held that Congress exceeded its authority in enforcing RFRA against the states.[187] In doing so, the Court explained that remedial measures under the Fourteenth Amendment must have a "congruence and proportionality" between the injury remedied and the means adopted to that end.[188] If such a connection is lacking, the legislation becomes an unconstitutional attempt at substantive change in governing law.[189] The Court found that RFRA was a congressional attempt to overrule the precedent set out in *Smith*

181 42 U.S.C. § 20000bb *et seq.*; *see* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 694 (2014); City of Boerne v. Flores, 521 U.S. 507, 512 (1997).

182 *Hobby Lobby*, 573 U.S. at 693.

183 42 U.S.C. § 2000bb(a)–(b).

184 *Id.* at § 2000bb-1(b) (emphasis added).

185 *Boerne*, 521 U.S. at 532.

186 *Id.* at 530, 532.

187 *Id.* at 511.

188 *Id.* at 520.

189 *Id.* at 519–20.

by creating a "substantive change in constitutional protections."[190] "The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*."[191] The *Boerne* Court went on to reaffirm the central holding of *Smith*, reasoning that RFRA's broad protection extended far beyond the constitutional prohibition against laws motivated by religious bigotry.[192] Ultimately, the Court "invalidated RFRA only insofar as it applied to the states," but "RFRA's strict scrutiny of the denial of religious exemptions from general laws has continued to be applied to the federal government."[193]

Following *City of Boerne*, the Supreme Court addressed several cases pertaining to RFRA in the federal context—these cases show the breadth of protection offered to religious objectors. In *Gonzales v. O Centro*,[194] the Government sought to enforce the Controlled Substance Act ("CSA") against members of a Christian Spiritist sect to prohibit them from participating in the communion practice of drinking a sacramental tea, consisting of two plants with hallucinogenic properties.[195] The sect moved for a preliminary injunction, asserting a violation of RFRA.[196] Despite the Government presenting evidence that the hallucinogens—both Schedule I drugs—had "a high potential for abuse," "no currently accepted medical use in treatment," and "a lack of accepted safety for use . . . under medical supervision," the Court

[190] *Id.* at 532–33 ("[T]he statute . . . would require searching judicial scrutiny of state law with the attendant likelihood of invalidation. This is a considerable congressional intrusion into the Stats' traditional prerogatives and general authority to regulate for the health and welfare of their citizens.").

[191] City of Boerne v. Flores, 521 U.S. 507, 534 (1997).

[192] *Id.* at 535 ("When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs.").

[193] NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 907 (19th ed. 2016).

[194] 546 U.S. 418 (2006).

[195] *Id.* at 423, 425 (2006).

[196] *Id.* at 423.

ruled in favor of the sect.[197] In reaching its decision, the Court established that "RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government's categorical approach. RFRA requires the government to demonstrate that the compelling interest test is satisfied through application of the law '*to the person*'—the particular claimant" burdened by the law.[198] In support, the Court pointed to a provision in the CSA, which allowed the Attorney General to "waive the requirement for registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety," and exemptions made by Congress for other religious use.[199]

In *Burwell v. Hobby Lobby*, the Court addressed three consolidated cases arising from a United States Department of Health and Human Services ("HSS") mandate, promulgated under the Affordable Care Act ("ACA"), which required employers with more than fifty full-time employees to offer twenty FDA-approved methods of contraception.[200] The three closely held corporations involved challenged the mandate under RFRA, claiming that they will be "facilitating abortions," violative of their religious principles, by providing health insurance coverage for four of the contraceptives—which they considered to be "abortifacients."[201] The Court held in favor of the corporations, finding that the regulation imposed a substantial burden on their exercise of religion.[202]

Although the Court attempted to limit its holding,[203] the *Hobby Lobby* decision was remarkably broad for several reasons. First, it established that a for-profit, closely held corporation is a "person," capable of possessing sincerely held religious beliefs.[204]

197 *Id.* at 430, 439.

198 *Id.* at 430–31 (emphasis added).

199 *Id.* at 432–33 ("[A]n exception has been made to the Schedule I ban for religious use. For the past 35 years, there has been a regulatory exemption form use of peyote—a Schedule I substance—by the Native American Church") (citing 21 C.F.R. § 1307.31 (2005)).

200 573 U.S. 682, 683, 696 (2014).

201 *Id.* at 691 (stating that the business considered the contraceptive methods to be "abortifacients").

202 *Id.*

203 *See id.* at 692–93.

204 *See id.* at 707–12; *but see* Dartmouth College v. Woodward, 4 Wheat. 518,

A corporation, however, is a "fictional entity," and is deemed "legally distinct" from its owners for purposes of legal liability.[205] For Free Exercise purposes, on the other hand, owners may now impute their beliefs to this separate entity while continuing to benefit from the close corporation form.[206] Second, it would be a mistake to overlook the breadth of the *Hobby Lobby* decision. With more than 900 stores, over 43,000 employees, and operating in forty-seven states, Hobby Lobby is no small organization.[207] Like Hobby Lobby, "an overwhelming majority of U.S. corporations incorporate as 'closely held' business,"[208] apparently all of which are capable of exercising religion.

Further, the *Hobby Lobby* Court reaffirmed *O Centro*'s "more focused inquiry" for RFRA claims, one that focuses on the "application of the challenged law '*to the person*'—the particular claimant whose sincere exercise of religion is substantially burdened."[209] This subjective inquiry, determined by how the belief is held by the claimant, opened the door for insincere claims to go unchecked,[210] and enabled the Court to find a sufficient religious burden where the employers simply "believed" the contraceptives were abortifacients when, in fact, they were not.[211]

636 (1819)

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.

[205] Erwin Chemerinsky & Michele Goodwin, *Religion is Not a Basis for Harming Others: Review Essay of Paul A. Offit's Bad Faith: When Religious Belief Undermines Modern Medicine*, 105 GA. L. J. 1111, 1133 (Sept. 1, 2015), https://escholarship.org/content/qt0b39g9ds/qt0b39g9ds_noSplash_3e44cade5dc7eda9d779c328f868d226.pdf.

[206] *Id.*

[207] *Our Story*, HOBBY LOBBY, https://www.hobbylobby.com/about-us/our-story (last visited April 25, 2021).

[208] Chemerinsky & Goodwin, *supra* note 205, at 1133.

[209] *Hobby Lobby*, 573 U.S. at 726 (quoting 42 U.S.C. § 20000bb-1(b)) (emphasis added).

[210] Adams & Barmore, *supra* note 40, at 59 ("In the wake of the decision, however, critics have expressed concern that future courts will be powerless to block insincere RFRA claims brought by wholly secular corporations seeking to evade generally applicable laws.").

[211] Hamilton, *The Biggest Threat to Herd Immunity*, *supra* note 37.

Moreover, the Court disregarded evidence presented by HSS suggesting that "the $2,000 per-employee penalty [for failing to comply with the mandate was] actually less than the cost of providing [the disputed] health insurance," and therefore, the employers could eliminate the "substantial burden" on their religion while simultaneously reducing their financial burden—making it difficult to accept the sincerity of the plaintiff's claims.[212] The Court refused to entertain this argument, finding it difficult to believe that Congress would place a family-run business in the position of choosing between "violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare plans."[213]

The final reason the *Hobby Lobby* decision proved substantial was the resounding implication that religious rights are more powerful than the interest of promoting public health.[214] In applying the least restrictive means prong demanded by RFRA, the majority pointed out that, instead of imposing a substantial burden on the religious objectors, "the Government can assume the cost of providing the four contraceptives at issue."[215] The Court's analysis on this issue implies that there will always be a less restrictive alternative: "[T]he general public . . . can pick up the tab."[216]

Following the *Hobby Lobby* decision, the Departments of Health and Human Services, Labor, and the Treasury ("Departments") amended the contraceptive mandate to include religious and moral exemptions.[217] In *Little Sisters of the Poor v. Pennsylvania*, the states of New Jersey and Pennsylvania brought suit, alleging that the Departments lacked the authority to include such exemptions under both the ACA and RFRA.[218] The Court found that the Departments had the authority to craft the exceptions and remanded the consolidated cases.[219] In reaching

212 *Hobby Lobby*, 573 U.S. at 720–23.

213 *Id.* at 723.

214 *See id.* at 728–729.

215 *Id.* at 728.

216 *Id.* at 740 (Ginsburg, J., dissenting).

217 Little Sister of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2373 (2020).

218 *Id.* at 2378.

219 *Id.* at 2386.

its decision, the Court recognized that *Hobby Lobby* essentially forced the federal government to develop a solution to the formerly unlawful contraceptive mandate, and found it appropriate for the Departments to consider RFRA in doing so.[220]

As exemplified by the former cases, RFRA is a major frustration in the pursuit of herd immunity by way of mandatory vaccination.[221] RFRA is strong medicine, and the "least-restrictive means standard is exceptionally demanding."[222] Justice Neil Gorsuch referred to RFRA as a "super statute,"[223] which seems fitting as the Act has elevated religious rights over public health. Congress, however, left for itself a means to temper RFRA's effects. Embedded into the statute is a provision that states: "Federal statutory law adopted after the date of the enactment of this Act . . . is subject to this Act *unless* such law explicitly excludes such application by reference to this Act."[224] If Congress were to issue a federal vaccine mandate, this "[r]ule of construction" allows it to eliminate any RFRA concerns, once again subjecting the mandate to *Smith*'s neutral, generally applicable standard.

B. *The Alito Trilogy*

For health purposes, any mandatory vaccination legislation would need to include a secular exemption for "medical contraindications"—i.e., "conditions in a recipient that increases the risk for a serious adverse reaction."[225] Some have adopted the view that any exemption defeats *Smith*'s neutral, generally applicable test, for it is no longer "generally applicable."[226] Justice Samuel Alito is an adherent of this view, and a line of opinions he

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220 *Id.* at 2383.

221 Hamilton, *The Biggest Threat to Herd Immunity*, *supra* note 37.

222 Burwell v. Hobby Lobby, Stores, Inc., 573 U.S. 682, 728 (2014).

223 Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020) ("RFRA operates as a kind of super statute").

224 42 U.S.C. § 2000bb-3(b) (emphasis added).

225 *Vaccine Recommendations and Guidelines of the ACIP*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 14, 2022), https://www.cdc.gov/vaccines/hcp/acip-recs/general-recs/contraindications.html.

226 *See* MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 215 (2005) ("Religious groups . . . seized the theory that the Court must have meant that any law creating an exception for one class off beneficiaries and not for religious individuals . . . would be presumptively unconstitutional.").

authored ("The Alito Trilogy") indicates how he *might* evaluate a potential Free Exercise challenge to a vaccine mandate that only includes a secular exemption for medical purposes.

In *Fraternal Order of Police v. City of Newark*,[227] the United States Court of Appeals for the Third Circuit addressed an internal police department order that required officers to shave their beards.[228] Under this policy, the department made exemptions for medical reasons (a skin condition called pseudo folliculitis barbae), but refused to exempt officers "whose religious beliefs prohibit them from shaving their beards."[229] Two officers—both devout Sunni Muslims—asserted that they were under a "religious obligation" to grow their beards and sought permanent injunctive relief from the department's policy.[230] In an opinion authored by then-Judge Alito, the Third Circuit concluded that the internal policy violated the Free Exercise rights of the officers because the department made secular exceptions but not religious exceptions.[231] In attempting to distinguish the department's policy from the law at issue in *Smith*, the court found that the decision to provide a medical exemption undermined the department's asserted interest "in fostering a uniform appearance," whereas the medical exemption in *Smith* did not undermine the interest of curbing the use of dangerous drugs.[232]

In *Blackhawk v. Pennsylvania*,[233] the Third Circuit addressed a Free Exercise challenge to Pennsylvania's wildlife permit scheme, which required persons "wishing to keep wildlife in captivity" to pay a fee in order to obtain an exotic wildlife possession permit.[234] The statute excluded these requirements for zoos and nationally recognized circuses and, additionally, allowed for the Game Commission to authorize waiver of such payment

227 170 F.3d 359 (3d Cir. 1999).

228 *Id.* at 360.

229 *Id.*

230 *Id.*

231 *Id.* at 360, 366 ("[T]he medical exemption raises concern because it indicates that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a bear are important enough to overcome its general interest in uniformity but that religious motivations are not.").

232 *Id.* at 366.

233 381 F.3d 202 (3d Cir. 2004).

234 *Id.* at 205.

"where hardship or extraordinary circumstances warrant[]," so long as the waiver is "consistent with sound game or wildlife management activities or the interest of the Game and Wildlife Code."[235] Blackhawk, a follower of the religious traditions of the Lakota Indians, sought an exemption from the permit fee "on the ground that he possessed . . . bears for Native American religious purposes"[236] When his permit waiver was denied, Blackhawk challenged the permit provision, claiming that the Commission's waiver policies violated the Free Exercise Clause.[237] Then-Judge Alito agreed, finding that Pennsylvania's wildlife permit scheme was not neutral and generally applicable in that the scheme "feature[d] both individualized and categorial secular exemptions," triggering the application of strict scrutiny.[238] Because the state permitted certain secular exemptions, the Third Circuit found "no plausible ground" for the differential treatment of religious purposes, ultimately ruling in favor of Blackhawk.[239]

After being appointed to the Supreme Court, Justice Alito continued to adhere to the idea that any exemption defeats *Smith*'s neutral, generally applicable standard but, this time, it came by way of a scathing dissent following the denial of certiorari in a case from the Ninth Circuit.[240] In *Stormans, Inc. v. Wiesman*, the Washington State Pharmacy Board adopted two rules to combat instances of pharmacies referring customers to other, nearby pharmacies to fill prescriptions for emergency contraceptives, such as Plan B, because the pharmacy's religious beliefs "require[d]" them to avoid stocking such drugs.[241] These rules, known as the Delivery Rule and the Pharmacist Responsibility Rule, did not require any *individual* pharmacist to dispense medication; rather, they placed the burden on the

235 *Id.*

236 *Id.* at 204–05.

237 *Id.* at 204.

238 *Id.* at 212.

239 Blackhawk v. Pennsylvania, 381 F.3d 202, 212, 216 (3d Cir. 2004).

240 Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2016), *cert. denied*, 136 S. Ct. 2433, 2433 (2016) (Alito, J., dissenting) (finding that "[t]his case is an ominous sign" and that "this Court does not deem the case worthy of our time. If this is a sign of how religious liberty claims will be treated in the years ahead, those who value religious freedom have cause for great concern.").

241 *Id.* at 2434.

pharmacies to "deliver lawfully prescribed drugs or devices to patients and to distribute drugs and devices approved by the FDA for restricted distribution by pharmacies."[242] The new rules worked in tandem with the existing Stocking Rule, which required pharmacies to stock "a representative assortment of drugs in order to meet the pharmaceutical needs of its patients."[243] The Delivery Rule, however, embraced a number of secular exemptions; most importantly, it included a broad payment exception: "a pharmacy is not required to deliver a drug without payment of its usual and customary or contracted charge."[244] Moreover, the trial court found that "there [were also] many unwritten exceptions" to the rules.[245] The pharmacies argued that the board's regulations violated the Free Exercise Clause because they believed that, by providing such contraceptives, they would become complicit in "taking a life," which was against their Christian values.[246] Justice Alito agreed and, in his dissent, found that, by allowing for secular but not religious refusals, the regulations "devalue[d] religious reasons" for declining to dispense medication," and judged them to be "of lesser importance than nonreligious reasons."[247] In Justice Alito's opinion, the board's regulations were not neutral and generally applicable, and he would have subjected the regulations to strict scrutiny review.[248]

Most recently, in an address to the Federalist Society, Justice Samuel Alito stated that "for many today, religious liberty is not a cherished freedom."[249] This Comment takes issue with that assessment. As stated above, the United States is a haven for believers, but also a place where believers do not have a constitutional right to harm others.[250] In recognition of that

242 *Id.* at 2435–36.

243 *Id.* at 2436.

244 *See id.*

245 *Id.* at 2436, 2437–38 ("a pharmacy may decline to stock a drug because the drug requires additional paperwork or patient monitoring, has a short shelf life, may attract crime, requires simple compounding, or falls outside the pharmacy's niche.").

246 *Stormans*, 136 S. Ct. at 2433–34 (Alito, J., dissenting).

247 *Id.* at 2438.

248 *Id.* at 2440.

249 The Federalist Society, *Address by Justice Samuel Alito [2020 National Lawyers Convention]*, YOUTUBE (Nov. 25, 2020), https://www.youtube.com/watch?v=VMnukCVIZWQ.

250 Hamilton, *In Defense of Justice Scalia on Religious Liberty and* Smith, *supra*

principle, it is equally important to realize that not all exemptions are created equal; when it comes to public health laws, medical exemptions reign supreme. Importantly, the fact that the Oregon law at issue in *Smith* prohibited the "knowing or intentional possession of a controlled substance *unless the substance has been prescribed by a medical practitioner*" goes underappreciated.[251] By upholding that law against a Free Exercise challenge,[252] the Supreme Court implicitly recognized the notion of medical superiority in the realm of exemptions to public health laws.

C. *A "Most Favored Nation"?*

On February 24, 2020, the Supreme Court granted certiorari in *Fulton v. City of Philadelphia*, a case where petitioners sought to either: (1) overrule *Smith*; or (2) "sharply limit the impact of *Smith* by turning a caveat the *Smith* majority used to distinguish a prior case—the 'mechanism for individualized exemptions' reading of [*Sherbert*]—into a broader 'most favored nation' approach to religious-exemption claims."[253] The "most favored nation" theory suggests that a law loses neutral, generally applicable status under *Smith* "if it contains any exemptions that are deemed 'comparable' to the requested religious exemption,"[254] a theory Justice Alito seemed to approve. Therefore, the existence of any exemption for "favored activity" automatically presumes a right for a religious exemption, which can only be denied by satisfying strict scrutiny.[255]

While the *Fulton* decision was looming, the COVID-19 pandemic began to dominate the U.S., leading many states to issue orders that limited group gatherings in an effort to slow transmission.[256] Among the groups affected by these orders were churches, some of which brought Free Exercise challenges to these

note 159.

251 Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 874 (199) (emphasis added).

252 *Id.* at 890.

253 Jim Oleske, *Fulton Quiets Tandon's Thunder: A Free Exercise Puzzle*, SCOTUSBLOG (June 18, 2021) [hereinafter Oleske, Fulton *Quiets* Tandon*'s Thunder*].

254 Oleske, Tandon *Steals* Fulton*'s Thunder*, *supra* note 50.

255 Oleske, Tandon *Steals* Fulton*'s Thunder*, *supra* note 50.

256 Oleske, Tandon *Steals* Fulton*'s Thunder*, *supra* note 50.

gathering limits.[257] Specifically, these churches "contended that they had a right to be exempted from size limits on gatherings because those same limits were not applied to limit the number of people who could be present in what they described as 'favored' business establishments (*e.g.*, retail stores, manufacturing facilities)."[258] Several of these limitation challenges reached the Supreme Court in the form of emergency application for injunctive relief on the Court's "shadow docket."[259]

One such case was *Tandon v. Newsom*,[260] where—in a short per curiam opinion—the majority, joined by Justice Barrett, 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. It is no answer that a State treats some comparable secular business or other activities as poorly or even less favorably than the religious exercise at issue.[261]

For the first time, the Court seemed to fully embrace the most favored nation theory as the governing standard.[262] Applying this theory, the majority found that religious in-home gatherings must be exempt from California's COVID restrictions, which applied equal household limits to both secular and religious in-home gatherings because the same limitation did not apply to various businesses.[263]

In dissent, Justice Kagan argued that "[t]he Free Exercise Clause requires that a States treat religious conduct as well as *comparable* secular conduct."[264] Recognizing that some cases may

257 Oleske, Tandon *Steals* Fulton*'s Thunder*, *supra* note 50.

258 Oleske, Tandon *Steals* Fulton*'s Thunder*, *supra* note 50.

259 Oleske, Tandon *Steals* Fulton*'s Thunder*, *supra* note 50; *see* discussion, *supra* pp. 11–13.

260 141 S. Ct. 1294 (2021).

261 *Id.* at 1296 (emphasis added).

262 Oleske, Tandon *Steals* Fulton*'s Thunder*, *supra* note 50.

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

264 *Id.* at 1298 (Kagan, J., dissenting) (emphasis added).

provide difficulties in finding the right secular analog, no such problem was present in *Tandon*.[265] California limited *all* in-home gatherings to three households, secular and religious.[266] Therefore, by insisting that in-home religious gatherings be treated as well as hardware stores and hair salons, and not as the obvious comparator—in-home secular gatherings—the Court required states to cast an expansive comparative net so as to "equally treat apples and watermelons."[267] Moreover, the majority defied the factual record, suggesting that "'the Ninth Circuit did not conclude that' activities like frequenting stores or sales 'pose a lesser risk of transmission' than . . . at-home religious activities."[268] Conversely, the Ninth Circuit did find three reasons that those activities posed a lesser risk: (1) "when people gather in social settings, their interactions are likely to be longer than they would be in a commercial setting," (2) "private houses are typically smaller and less ventilated than commercial establishments," and (3) "social distancing and mask-wearing are less likely in private settings and enforcement is more difficult."[269]

With *Tandon* seeming to resolve the issues for consideration by the Court in *Fulton*—seemingly declaring the most favored nation approach as the law of the land—it led some to characterize the decision as "stealing *Fulton*'s thunder."[270] That characterization, however, proved to be a misnomer, as the *Fulton* decision quelled much of that thunder.

D. *Fulton v. City of Philadelphia*

In *Fulton*, the City of Philadelphia's Department of Human Services ("Department") ceased referring children to Catholic Social Services ("CSS") after discovering that the agency would refuse to certify same-sex couples as foster parents because of its belief that "marriage is a sacred bond between a man and a woman."[271] In support of the City's decision, it explained that, by

265 *Id.*
266 *Id.*
267 *Id.*
268 *Id.*
269 *Tandon*, 141 S. Ct. at 1298 (Kagan, J., dissenting).
270 Oleske, Tandon *Steals* Fulton*'s Thunder*, *supra* note 50.
271 Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1871 (2021).

refusing to certify same-sex couples, CSS was in violation of a non-discrimination provision in the foster care contract agreed to by CSS.[272] The non-discrimination provision relied on by the City stated, in relevant part: "Provider shall not reject a child or family including, but not limited to . . . prospective foster or adoptive parents, for Services based upon . . . their . . . sexual orientation . . . *unless an exception is granted* by the Commissioner or the Commissioner's designee, in his/her *sole discretion*."[273] CSS filed suit, alleging that the City's referral freeze violated the Free Exercise Clause.[274] In reaching its decision, the Court seemingly "sidestep[ed]" the issues for which it granted certiorari,[275] instead, opting to decide the case on much narrower grounds. Ultimately, the majority held for CSS, finding that the contractual non-discrimination requirement was not generally applicable because it included "a mechanism for individualized exemptions," in that it made exemptions available at the "sole discretion" of the Commissioner,[276] artfully relying on dicta from *Smith* which first suggested the prohibition against such state-created mechanisms. In applying strict scrutiny, the Court analyzed the City's three asserted interests: "maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children."[277] The Court reframed the question as, "not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS,"[278] essentially adopting *O Centro*'s "to the person" approach for Free Exercise challenges. After narrowing the scope of the City's formulated interests, the Court found that the City failed to establish a compelling interest for denying CSS an exemption while continuing to make secular exceptions for others.[279]

272 *Id.* at 1875.

273 *Id.* at 1878 (emphases added).

274 *Id.* at 1876.

275 *Id.* at 1926 (Gorsuch, J., concurring).

276 *Id.* 1877–78 (quoting Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 884 (1990)).

277 *Fulton*, 141 S. Ct. at 1881.

278 *Id.*

279 *Id.* 1882.

The *Fulton* majority provided no additional guidance on the most favored nation approach taken in *Tandon*—failing to even mention the case.[280] Justice Amy Coney Barrett's *Fulton* concurrence, however, may prove the most consequential of the four opinions authored.[281] In the leadup to *Fulton*, many wondered how Justice Barrett would rule: on one hand, Justice Barrett's devout Catholic faith is widely reported—a topic of public debate stemming from her Supreme Court nomination.[282] That fact is further compounded by Justice Barrett's resume, which makes her one of the most conservative justices since Clarence Thomas.[283] On the other hand, however, Justice Barrett clerked for Justice Scalia,[284] the author of the *Smith* decision, and has been quoted as saying "his judicial philosophy is mine, too."[285] Although Justice Barrett never reached the issue of *Smith*'s legitimacy going forward, her concurrence did, however, provide skepticism in adopting a categorical strict scrutiny regime.[286] Instead, Justice Barrett suggested a "more nuanced" approach, one informed by "other First Amendment" doctrines.[287]

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[280] Oleske, Fulton *Quiets* Tandon*'s Thunder*, *supra* note 253 (noting that shift away from the most favored nation approach seemingly adopted in *Tandon* may stem from the fact that *Tandon* was decided on the Court's "shadow docket," so the Justices "did not have the benefit of full briefing or oral argument.").

[281] Oleske, Fulton *Quiets* Tandon*'s Thunder*, *supra* note 253.

[282] Thomas B. Griffith, *Amy Coney Barrett's Religion Won't Dictate Her Rulings*, BLOOMBERG (Oct. 12, 2020, 9:30 AM), https://www.bloomberg.com/—opinion—/—articles/2020-10-12/amy-coney-barrett-s-religion-won-t-dictate-her-rulings?sref=—voktyKaT (quoting Justice Barrett as saying that a judge should "never" impose her "personal convictions, whether they derive from faith or anywhere else, on the law.").

[283] Greg Stohr et al., *Barrett Could Be Most Conservative Justice Since Clarence Thomas*, BLOOMBERG (Sept. 26, 2020, 5:10 PM), https://www.bloomberg.com/—news/articles/2020-09-26/barrett-could-be-most-conservative-justice-since-clarence-thomas.

[284] Mark Satta, *Amy Coney Barrett Sizes Up 30-Year-Old Precedent Balancing Religious Freedom with Rule of Law*, THE CONVERSATION (Nov. 13, 2020, 8:40 AM), https://theconversation.com/amy-coney-barrett-sizes-up-30-year-old-precedent-balancing-religious-freedom-with-rule-of-law-149600.

[285] Marcia Coyle, *'His Judicial Philosophy is Mine': Amy Barrett Touts Scalia in Remarks from Rose Garden*, NAT'L L. J. (Sept. 26, 2020, 5:27 PM), https://www.law.com/nationallawjournal/2020/09/26/his-judicial-philosophy-is-mine-amy-barrett-touts-scalia-in-remarks-from-rose-garden/.

[286] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring).

[287] *See id.*

Moreover, in light of the "Alito Trilogy,"[288] and the fact that Justice Alito joined the majority in *Tandon*, one might assume—incorrectly—that he would have advocated on behalf of the most favored nation approach. Again, with no mention of *Tandon*, Justice Alito's seventy-seven-page concurrence raised doubts about the administrability of such an approach—pointing to the "confusion" among the lower courts in determining appropriate "comparators" for places of worship.[289]

The *Fulton* decision can be properly characterized as a near miss; however, *Fulton* may be broader than it first appears. The immediate effects are two-fold: First, welfare agencies in Philadelphia may now constitutionally refuse to certify LGBTQ couples as foster families; second, agencies that once agreed to the City's non-discrimination provision may now seek the same exemption as CSS.[290]

Further, the secondary effects of *Fulton* have yet to be seen; however, recent activity by similarly situated foster care programs points to some of the ripple effects to come:

> [T]he Archdiocese of Galveston-Houston is seeking to enter the foster care business, but only if exempted from antidiscrimination rules. Miracle Hill Ministries is facing lawsuits for turning away families because they were Catholic, Jewish, or gay. The litigants may point to the Department of Health and Human Services' ability to grant waivers from child welfare funding requirements as proof of individualized exemptions.[291]

E. *The* Smith *Standard & Vaccine Mandates*

Now that the smoke has cleared, it seems as though the most favored nation approach is off the table, at least for now, and *Smith* remains intact. With a more robust Free Exercise jurisprudence seemingly on the horizon, however, it is time to recognize the

288 *See* discussion, *supra* Part V.B and accompanying text.
289 Oleske, Fulton *Quiets* Tandon*'s Thunder*, *supra* note 253.
290 Sepper & Nelson, *supra* note 52.
291 *Id.*

superiority of *Smith*'s rational basis standard—that being: "We all benefit from neutral and general laws, just as those adjectives suggest."[292]

Under current Free Exercise jurisprudence, individuals have no right to a religious exemption from neutral and generally applicable laws unless there is also a secular exception, or gap in coverage, which undermines the government's interest equally.[293] If the law includes no such secular exception, the government does not have to provide a reason for refusing religious exemptions.[294]

Any compulsory vaccination legislation, however, would necessarily need to include a secular exemption for medical contraindications. Medical exemptions in these circumstances are different than, for example, the policy at issue in *Fraternal Order of Police*. There, the department's decision to provide a medical exemption undermined its stated interest of fostering a uniform appearance. In the vaccine context, medical exemptions "[do not] undermine the government's interest in saving lives, preventing serious illness[,] or preserving hospital capacity."[295] Therefore, medical exemption from vaccine legislation is more analogous to *Smith*, where the Court reasoned that a medical exception for doctor-prescribed controlled substances did not undermine the state's interest in curbing the use of dangerous drugs. In fact, by avoiding medical complications caused by vaccination, such exemptions actually further the government's interest in public health.[296] Therefore, *Smith* is the proper standard by which any Free Exercise challenge to vaccine legislation should be adjudicated.

Even under *Sherbert*'s strict scrutiny standard, however, "the government has a compelling interest in preventing significant threats to other people's health, especially so in a pandemic."[297] In fact, when it comes to compulsory vaccination against infectious disease, the government's case to refuse a religious exemption is

292 Griffin & Hamilton, *supra* note 51.
293 Laycock, *supra* note 26.
294 Laycock, *supra* note 26.
295 Laycock, *supra* note 26.
296 Laycock, *supra* note 26.
297 Laycock, *supra* note 26.

quite clear.[298] Unvaccinated individuals pose a unique threat to those who are immunocompromised and those who cannot be vaccinated due to their age or underlying medical conditions.[299] Moreover, the unvaccinated similarly endanger vaccinated individuals "because no vaccination is 100% effective, as is evident from the number of breakthrough COVID-19 infections in the U.S."[300] In sum, the general idea is that the government has a "compelling interest in not having a general policy's effectiveness undermined by" religious objectors.

Justice Scalia recognized just as much in *Smith*, stating that, in a society "made up of people of almost every conceivable religious preference,"[301] the government would be required to grant religious exemption from "civic obligations of almost every" kind, ranging from:

> [C]ompulsory military service, to payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, *compulsory vaccination laws*, drug laws . . . traffic laws, to social welfare legislation, such as minimum wages laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.[302]

The First Amendment does not give *carte blanche* to believers to the detriment of others and strict adherence to *Smith*'s neutral, generally applicable standard is essential for upholding that principle.

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298 Laycock, *supra* note 26.

299 Laycock, *supra* note 26.

300 Laycock, *supra* note 26.

301 Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 888 (1990) (citing Braunfeld v. Brown, 366 U.S. 599, 606 (1961).

302 *Id.* at 888–89 (citations omitted) (emphasis added).

VI. CONCLUSION

Public health laws are often in tension with individual freedoms. However, the Supreme Court has consistently held that the First Amendment right to the free exercise of religion, provided for in the Constitution, is not absolute. In a civil society, such as ours, it is inherent in its design that individuals sacrifice a reasonable amount of freedom to ensure the safety of our community, as a whole. Quite possibly the most important component of this communal safety—public health—is dependent on the collective fulfillment of civil duties and obligations, such as vaccination, which provides for societal conditions that further the general wellness of our population.

As vaccine mandates—and religious objections to such government action—look poised to grow, the government's interest in maintaining public health will continue to be put to the test. However, in times of public crisis, such as the COVID-19 pandemic, it is imperative that the Supreme Court continues to recognize the government's paramount interest in public health and safety.