# PANDORA'S BOX OF RELIGIOUS EXEMPTIONS

## INTRODUCTION

In 2021, the Satanic Temple filed suit in federal court challenging Texas's abortion bans on grounds of religious liberty.[1] Thanks to the Supreme Court's recent free exercise decisions, federal courts must now embark on the difficult task of deciphering the Court's new jurisprudence and whether the First Amendment indeed protects such claims. Through its shadow docket and *Fulton v. City of Philadelphia*,[2] the Supreme Court has essentially adopted the test that had once been percolating among the lower courts — the most-favored-nation theory of free exercise. In doing so, the Court has signaled a radical shift in its religious exemption doctrine.

This Note argues, however, that the Supreme Court's adoption of the most-favored-nation doctrine was both haphazard and sloppy, leaving lower courts with little meaningful guidance on how to evaluate the constitutionality of laws burdening religion. The lack of clarity over how to apply this doctrine means that clever litigants can and will weaponize religious exemption claims against unpopular laws and regulations. And such claims will be legitimized by sympathetic federal courts. This Note focuses on these recent cases to illustrate the potentially chaotic outcomes of religious exemption litigation. After identifying these problems, this Note proposes a new test that seeks to capture the competing concerns posed by religious exemption claims — one that draws upon the principles underlying the First Amendment's free speech jurisprudence.

Part I introduces the most-favored-nation theory of religious exemptions and examines how the Supreme Court's recent decisions have adopted this doctrine. Part II highlights the problematic implications of these decisions. Part III introduces other free exercise principles and explains how these will interact with the Court's new religious exemption doctrine to open a Pandora's box of religious exemption claims. Part IV proposes new ways to read the Supreme Court's recent decisions, drawing upon the principles underlying First Amendment free speech law.

## I. MODERN RELIGIOUS EXEMPTION DOCTRINE

Since the Founding era, the Supreme Court has never constitutionally imposed broad religious exemptions under the First Amendment.[3]

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[1] Complaint Seeking Declaratory & Injunctive Relief at 1, Satanic Temple, Inc. v. Hellerstedt, No. 21-CV-00387 (S.D. Tex. Feb. 5, 2021).

[2] 141 S. Ct. 1868 (2021).

[3] *See* EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES 995–96 (4th ed. 2011).

But for the first time in First Amendment history, through its shadow docket decisions[4] and in *Fulton v. City of Philadelphia*,[5] the Court has adopted a version of the most-favored nation doctrine — a test that supports a broad theory of free exercise. This Part details the emergence of the most-favored-nation doctrine of free exercise in lower courts as a solution to answering the unresolved questions created by the Supreme Court's decision in *Employment Division v. Smith*.[6] This Part then provides an overview of the Supreme Court's adoption of the test in its most recent religious exemption cases.

### *A. The Most-Favored-Nation Doctrine*

In 1990, the Supreme Court decided the seminal free exercise case of *Employment Division v. Smith*. *Smith* reconsidered the Court's longstanding precedent established by *Sherbert v. Verner*,[7] which had applied strict scrutiny to free exercise cases.[8] Instead, *Smith* held that neutral and generally applicable laws incidentally burdening religious liberty did not violate the First Amendment.[9] However, in creating this new test, Justice Scalia's majority opinion sought to distinguish *Smith* from the unemployment-compensation system at issue in *Sherbert*. He explained that laws such as the unemployment-compensation system from *Sherbert* created a "mechanism for individualized exemptions" and thus still required heightened scrutiny.[10] Such language of "individualized exemptions" in *Smith* has been thought to serve the sole purpose of allowing "the Court to reach the conclusion it desired in *Smith* without openly overruling any prior decisions."[11] But the Court said little else on what would constitute a "neutral, generally applicable law."[12]

Three years later, the Court first elaborated on the meaning of "neutral, generally applicable law" in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[13] There, the Court invalidated a ban against animal

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[4] *See, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam) (granting injunctive relief to plaintiffs challenging California's COVID-19 restrictions on free exercise grounds).

[5] 141 S. Ct. at 1882 (holding that Philadelphia's antidiscrimination policy requiring a Catholic charity to consider same-sex couples in foster-care placements violated the Free Exercise Clause).

[6] 494 U.S. 872 (1990).

[7] 374 U.S. 398 (1963).

[8] *See id.* at 403.

[9] *Smith*, 494 U.S. at 878–79; *see also id.* at 888–89.

[10] *See id.* at 884 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986) (opinion of Burger, C.J.)).

[11] Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1124 (1990); *see also* Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of* Smith*,* Sherbert*, Hogwarts, and Religious Liberty*, 83 NEB. L. REV. 1178, 1184 (2005) ("The problem was that Scalia wished to use *Smith* to establish a new rule holding that the Free Exercise Clause would not protect religious conduct against restrictions imposed by neutral laws of general applicability, but *Sherbert*, which required strict scrutiny whenever any law substantially burdened religiously motivated conduct, stood in the way.").

[12] *Smith*, 494 U.S. at 872.

[13] 508 U.S. 520 (1993).

sacrifice,[14] which was defined as killing an animal in a "ritual or ceremony not for the primary purpose of food consumption."[15] The Court read the language of the ordinance as impermissibly targeting religious practices and held that the ordinance was neither neutral nor generally applicable.[16] Accordingly, strict scrutiny applied, and the law was invalidated.[17] *Lukumi* offered some insight but still provided little guidance on when a law would not be neutral or generally applicable. Thus emerged the most-favored-nation doctrine as one answer to this question.[18]

The most-favored-nation doctrine gets its name from international trade law — in a trade treaty, a "most-favored-nation" clause requires a country to treat a partner country at least as favorably as all of its other trading partners.[19] Professor Douglas Laycock was the first to argue that *Smith*'s neutral and generally applicable requirement seems "to require that religion get something analogous to most-favored nation status."[20] This meant that religious exemptions must be treated at least as favorably as any comparable conduct.[21] If a law has a comparable secular exemption, then it is not generally applicable under the most-favored-nation doctrine and is thus subject to strict scrutiny.[22]

The Third Circuit was the first federal court of appeals to adopt some version of the most-favored-nation doctrine, relying on the Supreme Court's "individualized exemptions" language in *Smith*.[23] In *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*,[24] two Muslim police officers brought free exercise claims against the police department's ban against wearing beards.[25] Writing for the panel, then-Judge Alito explained that the medical exemption in the police department's uniform policy implicated the *Smith* Court's underlying concern about systems of "individualized exemptions" — that they improperly invite the government to decide that secular motivations are more

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[14] *Id.* at 524.

[15] *Id.* at 527.

[16] *See id.* at 542, 545–46.

[17] *See id.* at 547.

[18] *See* Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 26 (2016). For a discussion of the history of the most-favored-nation theory in the development of the Court's recent free exercise jurisprudence, see generally Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397, 2407–12 (2021).

[19] *See* Luray Buckner, Note, *How Favored, Exactly? An Analysis of the Most Favored Nation Theory of Religious Exemptions from* Calvary Chapel *to* Tandon, 97 NOTRE DAME L. REV. 1643, 1649 (2022).

[20] *See* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 49 (1991).

[21] *See id.*

[22] Laycock & Collis, *supra* note 18, at 21.

[23] *See* Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999).

[24] 170 F.3d 359.

[25] *See id.* at 360.

important than religious ones.[26] The policy's categorical exemption for individuals with medical need but not religious need similarly suggested discriminatory intent, therefore triggering heightened scrutiny.[27] The police department identified various government interests supported by the policy: "convey[ing] the image of a 'monolithic, highly disciplined force,'" maintaining "[u]niformity [of appearance]" to benefit the "force's morale," and "offer[ing] the public a sense of security in having readily identifiable" police officers.[28] However, because the government failed to explain "why religious exemptions threaten important city interests but medical exemptions do not," the court held that the policy failed heightened scrutiny.[29]

The most-favored-nation doctrine can be understood as a two-step test. At step one, courts will consider whether the law grants a secular exemption to determine whether the law is generally applicable.[30] Importantly, the secular exemption must be comparable to a religious one in order for strict scrutiny to apply.[31] If so, then courts will apply strict scrutiny at step two.[32] If, however, the law is determined to be generally applicable, then the law will likely be upheld under rational basis review.[33]

While the Third Circuit embraced this doctrine, other federal courts of appeals did not. The Tenth Circuit rejected an argument under the most-favored-nation doctrine, holding that "*Smith*'s 'individualized exemption' exception is limited . . . to systems that are designed to make case-by-case determinations" and did "not apply to statutes that, although otherwise generally applicable, contain express exceptions for objectively defined categories of persons."[34] Under the Tenth Circuit's precedent, a grooming policy with a medical exemption would still be considered generally applicable. And, until late 2020, the Supreme Court had never found that a law violated the First Amendment based on the mere existence of a secular exemption.[35]

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[26] *Id.* at 365.

[27] *Id.*

[28] *Id.* at 366 (second and third alterations in original).

[29] *Id.* at 367.

[30] *See* Laycock & Collis, *supra* note 18, at 10.

[31] *See* Tebbe, *supra* note 18, at 2412.

[32] *See* Laycock & Collis, *supra* note 18, at 17.

[33] *See generally* Emp. Div. v. Smith, 494 U.S. 872 (1990).

[34] Axson-Flynn v. Johnson, 356 F.3d 1277, 1298 (10th Cir. 2004).

[35] *See* Nelson Tebbe, *The Supreme Court, 2020 Term — Comment: The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267, 300 (2021) ("Between the time it was invented and today, the individualized-exemptions rule had never provided the sole foundation for a holding by the Court.").

### *B. Recent Shifts in Religious Exemption Doctrine*

Through its shadow docket orders on various COVID-19 laws[36] and *Fulton v. City of Philadelphia*, the Supreme Court has adopted some version of the most-favored-nation doctrine. This section introduces these decisions in turn.

*1. The Supreme Court's Shadow Docket Orders.* — Throughout the COVID-19 pandemic, various religious institutions challenged state COVID-19 restrictions on free exercise grounds. And, after Justice Barrett's elevation to the Supreme Court, the Court began to grant such requests for emergency relief.[37] The night before Thanksgiving of 2020, the Court issued *Roman Catholic Diocese of Brooklyn v. Cuomo*,[38] granting an emergency relief request by religious organizations challenging New York Governor Cuomo's COVID-19 capacity limits.[39] In a 5–4 opinion, the Court explained that the capacity limits imposed requirements on churches and synagogues that were more restrictive than those on comparable secular organizations, which ran afoul of the Free Exercise Clause.[40] Therefore, the restrictions had to be reviewed under strict scrutiny, which they failed to overcome.[41]

In April 2021, the Court issued *Tandon v. Newsom*,[42] another shadow docket order granting emergency relief in favor of religious activity,[43] marking another shift in the Court's free exercise jurisprudence. *Tandon* involved free exercise challenges to California Governor Newsom's COVID-19 executive order limiting indoor gatherings to members of three households.[44] The order exempted gatherings at certain businesses (e.g., retail stores) and at houses of worship (e.g., churches and synagogues).[45] Despite the exemption for houses of worship, the plaintiffs argued that the Free Exercise Clause required the order to also exempt any indoor at-home gatherings for religious studies, prayer,

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[36] This Note focuses primarily on *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), and *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). For a more in-depth summary and analysis of the Supreme Court's shadow docket orders concerning free exercise challenges against COVID-19 orders, see generally Stephen I. Vladeck, *The Most-Favored Right: COVID, The Supreme Court, and the (New) Free Exercise Clause*, 15 N.Y.U. J.L. & LIBERTY 699 (2022).

[37] *See* Josh Blackman, *The "Essential" Free Exercise Clause*, 4 HARV. J.L. & PUB. POL'Y 637, 700–01 (2021).

[38] 141 S. Ct. 63 (per curiam).

[39] *See id.* at 65–66.

[40] *See id.* at 66–67.

[41] *See id.* at 67.

[42] 141 S. Ct. 1294 (2021) (per curiam).

[43] *See id.* at 1296.

[44] *See id.* at 1297; Tandon v. Newsom, 992 F.3d 916, 917–18 (9th Cir. 2021); Emergency Application for Writ of Injunction or in the Alternative for Certiorari Before Judgment or Summary Reversal at 9, *Tandon*, 141 S. Ct. 1294 (2021) (No. 20A151).

[45] *Tandon*, 992 F.3d at 918, 920; *Tandon*, 141 S. Ct. at 1297.

and worship.[46] The Supreme Court agreed.[47] Citing *Roman Catholic Diocese of Brooklyn*, the Court's order explained that "government regulations [that] are not neutral and generally applicable . . . trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[48]

*2.* Fulton v. City of Philadelphia. — In June of 2021, the Court decided *Fulton v. City of Philadelphia*. In *Fulton*, Catholic Social Services (CSS) — a religious organization providing foster care services — challenged Philadelphia's conditioning the continuation of its foster care referral relationship with CCS on an agreement to refrain from discriminating against same-sex couples.[49] The district court determined that the city's nondiscrimination policy was neutral and generally applicable, and it denied relief in light of *Smith*.[50] The Third Circuit — a circuit that has embraced the most-favored-nation doctrine — agreed that the law was neutral and generally applicable and affirmed.[51]

In a unanimous decision, the Supreme Court reversed.[52] Writing for the Court, Chief Justice Roberts focused his analysis on a clause in Philadelphia's standard foster care contract that permitted the City Commissioner to grant discretionary exceptions.[53] Although the city had never invoked the clause to actually grant any request for exemption, the Court determined that this rendered the law not generally applicable.[54] Therefore, the law was subject to strict scrutiny, which it did not satisfy.[55] The Court stated that strict scrutiny "demands a more precise analysis" than merely evaluating the government's "objectives at a high level of generality."[56] The question "is 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."[57] Although the city's interest in "the equal treatment of prospective foster parents and foster children . . . is a weighty one," the clause in the policy that permitted discretionary exemptions "undermine[d] the City's contention that its non-discrimination policies can brook no

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[46] *See* Opposition to Emergency Application for Writ of Injunction at 17, *Tandon*, 141 S. Ct. 1294 (2021) (No. 20A151).

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

[48] *Id.* at 1296 (citing Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67–68 (2020) (per curiam)).

[49] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1875–76 (2021).

[50] *See* Fulton v. City of Philadelphia, 320 F. Supp. 3d 661, 682–83 (E.D. Pa. 2018).

[51] Fulton v. City of Philadelphia, 922 F.3d 140, 147 (3d Cir. 2019) (citing Emp. Div. v. Smith, 494 U.S. 872, 877–78 (1990)).

[52] *Fulton*, 141 S. Ct. at 1882.

[53] *See id.* at 1878.

[54] *Id.* at 1878–79.

[55] *Id.* at 1882.

[56] *Id.* at 1881 (citing Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 430–32 (2006)).

[57] *Id.*

departures."[58] The Court concluded that the city offered "no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others."[59]

## II. The Far-Reaching Implications of These Recent Decisions

This Part argues that taken together, these Supreme Court decisions appear to support an extremely powerful and potent doctrine in support of religious exemptions — one that goes far beyond reversing *Smith* and even further than the most-favored-nation doctrine as first theorized by Laycock and adopted by then-Judge Alito on the Third Circuit.[60] These cases have departed from the heart of *Smith* — the notion that a law does not violate the Free Exercise Clause unless it impermissibly targets religion.[61] First, these decisions have essentially eroded the comparability requirement of the traditional most-favored-nation doctrine, meaning that any law with a secular exemption could be subject to strict scrutiny. Second, these decisions contemplate an aggressive form of strict scrutiny that is nearly impossible to satisfy.

### *A. The Extinction of Generally Applicable Laws*

Read together, *Tandon* and *Fulton* suggest the erosion, if not the elimination, of comparability from the most-favored-nation doctrine. As a result, any law, so long as it could potentially exempt some secular activity, is not generally applicable.[62] Prior to *Tandon* and *Fulton*, the lower courts of appeals were divided on when an individualized secular exemption would rise to the seriousness of triggering strict scrutiny.[63] However, all courts, even those that had adopted the most-favored-nation doctrine, required a showing of *comparability* to trigger strict scrutiny.[64] This meant that the secular exemptions needed to "implicate the government's interest in the same way as the claimed religious exemptions."[65] The requirement of comparability acted as an essential limiting principle to the expansive most-favored-nation doctrine — one

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[58] *Id.* at 1882.

[59] *Id.*

[60] *See* Zalman Rothschild, *Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 YALE L.J.F. 1106, 1114 (2022) (arguing *Fulton*'s individualized-exemptions rule was a doctrinal shift that "succeeded not only in tacitly reversing *Smith*, but also in establishing a new Free Exercise Clause altogether, one that pre-*Smith* religious plaintiffs would envy").

[61] *See* Vladeck, *supra* note 36, at 704.

[62] *See* Rothschild, *supra* note 60, at 1112–13 ("Under the so-called most-favored-nation view of religious equality that the Court endorsed in several of its emergency docket COVID-19-related lockdown order cases, if a general rule provides essentially any secular exemption, the government must also extend an exemption to religious individuals and institutions." (footnotes omitted)).

[63] *Compare* Axson-Flynn v. Johnson, 356 F.3d 1277, 1298 (10th Cir. 2004), *with* Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999).

[64] *See* Laycock & Collis, *supra* note 18, at 20–21.

[65] Tebbe, *supra* note 18, at 2412.

also required by Laycock's conception of the test.[66] But *Tandon* and *Fulton* seem to have eroded this requirement. Removing comparability will expand the scope of the doctrine to cover a wider range of laws, as a law could be determined to be not generally applicable even if it contains a secular exemption posing a risk to the government's interest not comparable to that posed by a religious exemption.

The *Tandon* Court retained the language of comparability, but its application of comparability seems to have watered down the requirement. After stating that a secular exemption will trigger strict scrutiny,[67] the Court asserted that gatherings at hair salons, retail stores, and movie theaters were comparable to at-home religious gatherings.[68] Therefore, strict scrutiny applied.[69] But, as Justice Kagan's dissent observed, the majority had failed to account for the lower courts' factual findings that brief visits to secular businesses "pose a lesser risk of transmission" compared to lengthier religious gatherings in private homes.[70] Indeed, while visits to secular businesses increased the risk of COVID-19 transmission, such activities did not pose the same *degree* of risk as at-home religious gatherings.[71] If California had exempted at-home gatherings for weekly book clubs or potlucks, then the law would have granted secular exemptions for comparable activities. But, instead, the California order treated all comparable religious and secular activity identically, uniformly banning indoor gatherings of more than three households.[72] Despite this, by holding that secular gatherings at hair salons and retail stores were comparable to at-home religious gatherings, *Tandon* suggested that the comparability requirement should be interpreted loosely to encompass any activities that might also pose some risk to the government's asserted interest, even if that risk is not comparable.

*Fulton* suggested an elimination of the comparability requirement altogether. The antidiscrimination policy at issue in *Fulton* contained no specific secular exemption, much less one that posed a comparable risk to the government's interest. The *Fulton* Court purported to apply the same test it adopted in its COVID-19 shadow docket orders, explaining that an exemption posing a comparable risk to the government's

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[66] Laycock, *supra* note 20, at 50 ("If the state grants exemptions from its law for secular reasons, then it must grant comparable exemptions for religious reasons.").

[67] Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam).

[68] *See id.* at 1297.

[69] *See id.* at 1296–97.

[70] *Id.* at 1298 (Kagan, J., dissenting) (quoting *id.* at 1297 (per curiam)).

[71] *See id.*

[72] *See id.* ("California need not, as the *per curiam* insists, treat at-home religious gatherings the same as hardware stores and hair salons — and thus unlike at-home secular gatherings, the obvious comparator here. . . . [T]he law does not require that the State equally treat apples and watermelons.").

interest will trigger strict scrutiny.[73] Ignoring the fact that no secular exemption had ever been granted by the Commissioner,[74] the Court explained that the possibility of a secular exemption meant that an exemption could not be denied to a religious claimant.[75] Even the Third Circuit panel that had previously ruled on the case explained that the most-favored-nation doctrine did not trigger strict scrutiny in this case because the policy did not treat religiously motivated conduct any worse than otherwise similar secular conduct.[76]

### *B. Strict in Theory, But Fatal in Fact*

*Tandon* and *Fulton* are especially potent because they advanced a version of the strict scrutiny test that is nearly impossible to satisfy — one that is far stricter than in the cases preceding *Smith*. Before *Smith* and under *Sherbert*, the Court applied strict scrutiny but upheld nearly every law burdening religious exercise, denying most claims for exemption.[77] Courts asked whether a compelling government interest could broadly justify the uniform application of the law[78] and "deferred to the government's interest in uniform application of its laws"[79] without closer inquiry.[80] Because strict scrutiny applied uniformly to cases brought under the Free Exercise Clause, the existence of a secular exemption was irrelevant to the strict scrutiny analysis. Strict scrutiny was met so long as the law advanced the "broad public interest"[81] and such interest would be difficult to achieve with "myriad exceptions

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[73] *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021) ("A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way.").

[74] *Id.* at 1887 (Alito, J., concurring in the judgment).

[75] *See id.* at 1879, 1881–82 (majority opinion).

[76] *See* Fulton v. City of Philadelphia, 922 F.3d 140, 155–56 (3d Cir. 2019) (citing Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 360, 365 (3d Cir. 1999); Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 151–52 (3d Cir. 2002)) (explaining why Philadelphia's ordinance did not treat CSS differently because of its religious beliefs).

[77] *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 858–59 (2006) ("[C]ourts granted very few religion-based exemptions to generally applicable laws despite applying strict scrutiny in many decisions.").

[78] *See, e.g.*, United States v. Lee, 455 U.S. 252, 257–58 (1982). Relying on the standard from *Sherbert v. Verner*, the Court has explained that the "state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding government interest." *Id.* (citing Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972); Gillette v. United States, 401 U.S. 437 (1971); Sherbert v. Verner 374 U.S. 398 (1963)).

[79] Aaron D. Bieber, Case Note, *The Supreme Court Can't Have It Both Ways Under RFRA: The Tale of Two Compelling Interest Tests.* Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, *126 S. Ct. 1211 (2006)*, 7 WYO. L. REV. 225, 235 (2007).

[80] *See id.* at 235–37 (noting that the stronger compelling interest standard from *Sherbert* and Wisconsin v. Yoder, 406 U.S. 205, had been weakened into a more generalized test through cases such as Braunfield v. Brown, 366 U.S. 599 (1961), United States v. Lee, 455 U.S. 252, Goldman v. Weinberger, 475 U.S. 503 (1986), and Bowen v. Roy, 476 U.S. 693 (1986)).

[81] *Lee*, 455 U.S. at 260.

flowing from a wide variety of religious beliefs."[82]

But the Court's application of strict scrutiny in its recent free exercise cases is much more rigorous, essentially equating the existence of a secular exemption with necessarily failing strict scrutiny. This version of strict scrutiny is "strict in theory, but fatal in fact."[83] In the context of free speech laws — where strict scrutiny also applies — the Court has stated that "a law's underinclusivity raises a red flag" and may signal that the statute "does not actually advance a compelling interest."[84] A law "riddled with exceptions" will likely be found "impermissibly underinclusive" and invalid under strict scrutiny.[85] But *Fulton* can be read as taking this principle to the extreme — the mere *possibility* of a secular exemption from Philadelphia's antidiscrimination law was enough to "undermine[] the City's contention that its non-discrimination policies can brook no departures."[86] A law does not need to be "riddled with exceptions" before a "red flag" is raised — instead, a single (even potential) exception necessarily fails the strict scrutiny analysis. *Fulton* looked to the mere possibility of an exemption itself as evidence that the government lacked an interest in enforcing a policy that "can brook no departures."[87] This suggests that the existence of a secular exemption alone means both that the government interest is not compelling and that the law is not narrowly tailored.

### *C. A Green Light for Lower Courts to Erode Laws*

Some lower federal courts have read *Tandon* and *Fulton* as a green light to chip away at laws that have been long considered constitutionally sound.[88] This section highlights a challenge to Title VII of the Civil Rights Act of 1964,[89] using antidiscrimination law to illustrate the ramifications of the Court's new religious exemption jurisprudence. The Supreme Court's decisions have enabled courts not only to more easily find state laws unconstitutional in free exercise challenges but also to find federal statutes invalid in litigation under the Religious Freedom Restoration Act[90] (RFRA).

In 2021, a Texas federal district court relied on the Supreme Court's recent decisions to hold that Title VII is not generally applicable, thus

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[82] *See* Hernandez v. Comm'r, 490 U.S. 680, 699–700 (1989) (quoting *Lee*, 455 U.S. at 260).

[83] *See* Winkler, *supra* note 77, at 795 (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995)).

[84] Williams-Yulee v. Fla. Bar, 575 U.S. 433, 449 (2015).

[85] *Id.* (citing City of Ladue v. Gilleo, 512 U.S. 43, 52–53 (1994)).

[86] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021).

[87] *Id.*

[88] For a discussion and analysis of the lower courts' decisions in religious exemption challenges to vaccine mandates, see generally Rothschild, *supra* note 60, at 1129–31.

[89] 42 U.S.C. §§ 2000e to 2000e-17.

[90] 42 U.S.C. §§ 2000bb to 2000bb-4, *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

triggering strict scrutiny.[91] In *Bear Creek Bible Church v. EEOC*,[92] a Christian-owned business challenged Title VII's antidiscrimination protections for LGBTQ+ employees[93] — a protection that the Court had recently clarified in *Bostock v. Clayton County*.[94] Citing *Tandon*, the district court agreed that Title VII's "non-discrimination requirement was not generally applicable"[95] because it contained numerous exemptions — for example, exempting businesses with fewer than fifteen employees.[96] The district court explained that Title VII failed strict scrutiny "[f]or the same reasons the Supreme Court articulated in *Fulton*."[97] Under new caselaw, the question was now whether the government had a compelling interest in denying the plaintiffs' religious exemption, not whether Title VII supported a compelling government interest.[98] Regardless of the "interests in preventing discrimination against homosexual and transgender individuals[,] . . . [t]he creation of a system of exceptions under Title VII undermine[d]"[99] the government's claim that Title VII's nondiscrimination policies "can brook no departures."[100]

Make no mistake, Title VII has faced plenty of religious liberty challenges over the last few decades. But no federal court has ever held Title VII to be not generally applicable, let alone a violation of the Free Exercise Clause. Even the courts of appeals that have long adopted the most-favored-nation doctrine have never held Title VII to be not generally applicable.[101] And, even under RFRA's standard of strict scrutiny, courts have uniformly denied exemptions to Title VII.[102] Evaluating Title VII under RFRA, courts had previously asked whether the law broadly advanced a compelling government interest and not whether the government had a compelling interest in denying a religious exemption in light of a secular exemption. As the Third Circuit once noted, "[n]othing in pre-*Smith* case law permitted an employee alleging employment discrimination based on religion to bypass Title VII's exclusive and comprehensive scheme."[103] Title VII was thus not subject to religious exemptions under the pre-*Smith* regime.

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91 Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571, 611–13 (N.D. Tex. 2021) (concerning RFRA and First Amendment claims).

92 571 F. Supp. 3d 571.

93 *Id.* at 585.

94 140 S. Ct. 1731 (2020); *see id.* at 1737.

95 *Bear Creek*, 571 F. Supp. 3d at 612.

96 *Id.* at 613 (citing 42 U.S.C. § 2000e(b)).

97 *Id.*

98 *See id.* at 611, 613.

99 *Id.* at 613.

100 *Id.* (quoting Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021)).

101 *See, e.g.*, Francis v. Mineta, 505 F.3d 266, 270 (3d Cir. 2007).

102 *See, e.g.*, EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 590 (6th Cir. 2018), *aff'd sub nom.* Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

103 *Francis*, 505 F.3d at 270.

This Note observes that the Supreme Court's recent cases equip a court with the tools to grant religious exemptions to Title VII without having to explicitly hold that the government lacks a compelling interest in preventing the discrimination of LGBTQ+ people or other protected classes. Under *Fulton*'s line of reasoning, a court can grant a religious exemption from Title VII not because the government's interest in antidiscrimination is unimportant but in spite of that important interest. But, even under this analysis, courts *are* in fact still making value judgments when they prioritize religious interests over equality interests in antidiscrimination. The existence of secular exemptions in the law ultimately becomes the scapegoat for courts to avoid the appearance of making such value judgments.

The implications for antidiscrimination law do not stop at LGBTQ+ people. Religious liberty has historically served as a justification for upholding slavery and as a basis for challenging civil rights legislation.[104] Religious freedom was invoked when defending the separate-but-equal doctrine[105] and antimiscegenation laws banning interracial marriage.[106] Such cases have been considered settled, especially in light of the Supreme Court's holding that the government has a compelling interest in eradicating racial discrimination in certain settings.[107] But now, under *Tandon* and *Fulton*, courts need not disclaim the importance of the government's interest in eradicating racial discrimination in order to permit religious exemptions against an antidiscrimination law. Perhaps these decisions call into question once-settled law — whether antidiscrimination protections against race-based discrimination could survive strict scrutiny when tested against a religious exemption claim.

## III. OTHER FREE EXERCISE PRINCIPLES AND PANDORA'S BOX

This Part discusses how other free exercise principles could interact with the Court's recent religious exemption doctrine to give rise to a wide array of religious exemption claims. The Establishment Clause defines religion broadly, and the Free Exercise Clause prohibits courts

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104 William N. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 666 (2011) ("[R]eligious leaders often justified slavery as part of the social order to which religion should defer, but they also deployed Bible-based arguments to support the notion that the Word of God sanctioned the slavery of Africans." (footnote omitted)); *id.* at 675–77 ("Notwithstanding ferocious religion-based opposition such as this, the 1964 bill was enacted, and that statute triggered a wave of legal clashes between civil rights for blacks and religious liberty of some religious whites." *Id.* at 675.).

105 *Id.* at 712 ("When the Supreme Court sanctioned apartheid in 1896, it did so against a background of American religion that either endorsed or acquiesced in apartheid as God's 'Plan' for America.").

106 *See* Loving v. Virginia, 388 U.S. 1, 3 (1967) ("Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix." (quoting state trial court opinion)).

107 *See* Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983).

from questioning the legitimacy of a religious belief. Combined, this means that any religious belief or practice can serve as the basis for an exemption claim. And, because most important laws have secular exemptions, religious exemption doctrine can serve as the vehicle for a flood of challenges against unpopular laws.

### *A. Pandora's Box of Religious Exemption Claims*

The Supreme Court has never attempted to articulate a single precise definition of "religion," instead interpreting it broadly to encompass a wide variety of religious beliefs. The Establishment Clause prohibits the government from preferring one religion over another, reflecting that all religious beliefs are equally worthy of protection under the First Amendment.[108] Religious exemptions extend to "persons who by reason of their religious training and belief are conscientiously opposed to" a law.[109] Beliefs qualifying for religious exemption encompass all "duties superior to those arising from any human relation."[110] Even beliefs grounded in humanism and atheism are "religious" for exemption purposes.[111]

Under longstanding Supreme Court precedent, the government is also prohibited from questioning the legitimacy of any sincerely held religious belief.[112] Even if a religious view "might seem incredible, if not preposterous, to most people," courts cannot enter the "forbidden domain" of examining the truth or falsity of the religious belief.[113] As a result, the state is not allowed to interpret religious doctrine or to discern the relative importance or centrality of a religious belief or practice to a believer.[114] The Free Exercise Clause "forbids civil courts from playing . . . a role" in "assessing the relative significance to the religion of the tenets from which departure was found."[115] *Smith* rejected a similar notion that courts could limit religious exemptions to situations in which the religious conduct was central to the adherent's belief because courts cannot "determine the place of a particular belief in a religion or the plausibility of a religious claim."[116] The judiciary cannot conduct this

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[108] *See* Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

[109] United States v. Seeger, 380 U.S. 163, 164–65 (1965).

[110] *Id.* at 165.

[111] *See* Kaufman v. McCaughtry, 419 F.3d 678, 681–82 (7th Cir. 2005); Jackson v. Crawford, No. 12-4018-CV, 2015 WL 506233, at *7 (W.D. Mo. Feb. 6, 2015); Am. Humanist Ass'n v. United States, 63 F. Supp. 3d 1274, 1283 (D. Or. 2014).

[112] *See* United States v. Ballard, 322 U.S. 78, 87 (1944).

[113] *Id.*

[114] *See* Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449–50 (1969); Hernandez v. Comm'r, 490 U.S. 680, 699 (1989).

[115] *Presbyterian Church in U.S.*, 393 U.S. at 450.

[116] Emp. Div. v. Smith, 494 U.S. 872, 887 (1990) (citing Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 716 (1981); *Presbyterian Church in U.S.*, 393 U.S. at 450; Jones v. Wolf, 443 U.S.

inquiry without improperly entangling itself with religion in violation of the First Amendment.[117]

### *B. A Flood of Claims*

The number of important laws that allow for secular exemptions is extensive: antidiscrimination laws,[118] public accommodations laws,[119] statutory rape laws,[120] animal cruelty laws,[121] and employment laws[122] are just a few examples.[123] Emboldened by the Supreme Court's decisions in its COVID-19 shadow docket orders and *Fulton*, litigants have begun challenging an array of laws that had once been thought to be indisputably constitutionally sound.[124] This means that across the country, federal courts will be forced to reckon with the question of determining exactly when a secular exemption renders a law no longer generally applicable and thus unconstitutional as applied against a religious exemption claimant. The recent rise in religious exemption claims against abortion bans illustrates how less dominant religious beliefs could serve as a basis for these claims.

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595, 602–06 (1979); *Ballard*, 322 U.S. at 85–87); Jared A. Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 518 (2005) (explaining that pre-*Smith* strict scrutiny improperly "required courts to determine the significance of religious practices and doctrines").

117 *See, e.g.*, *Hernandez*, 490 U.S. at 699 ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); *Smith*, 494 U.S. at 886–87 (noting that it is inappropriate for judges to assess the centrality of religious beliefs); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 725 (2014) ("This Court, however, held that 'it is not for us to say that the line he drew was an unreasonable one.'" (quoting *Thomas*, 450 U.S. at 715)); *see also* Carol M. Kaplan, Note, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. REV. 1045, 1054 & n.39 (2000).

118 State antidiscrimination laws typically apply only to employers who employ a certain number of employees. *See, e.g.*, N.Y.C., N.Y., ADMIN. CODE § 8-102 (2022) (defining the term "employer" for certain antidiscrimination provisions as excluding "any employer that has fewer than four persons").

119 *E.g.*, 42 U.S.C. § 2000a(e) (exempting private clubs from federal public accommodations law).

120 Many states have adopted age-gap provisions and "Romeo and Juliet" clauses, which provide an affirmative defense to a violator when both actors are below the legal age of consent and fall within certain age requirements. *See* Jana L. Kern, *Trends in Teen Sex Are Changing, But Are Minnesota's Romeo and Juliet Laws?*, 39 WM. MITCHELL L. REV. 1607, 1611–14 (2013).

121 "Most anti-cruelty laws include one or more exemptions," for example "by excluding whole classes of animals, such as wildlife or farm animals, from [their] application." Pamela D. Frasch et al., *State Animal Anti-cruelty Statutes: An Overview*, 5 ANIMAL L. 69, 75 (1999).

122 For example, executive, administrative, and professional employees are just some of the many employees exempt from the Fair Labor Standards Act's minimum wage and overtime provisions. *See* Joseph F. Tremiti, *Exempt & Non-exempt Employees*, N.Y.C. BAR (May 2017), https://www.nycbar.org/get-legal-help/article/employment-and-labor/exempt-employees [https://perma.cc/77UK-NWHH].

123 *See also* Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, 2019 BYU L. REV. 167, 173 ("[T]hink about it. If a law with even a few secular exceptions isn't neutral and generally applicable, then not many laws are.").

124 *See, e.g.*, Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571, 585 (N.D. Tex. 2021) (Title VII); Does 1–6 v. Mills, 16 F.4th 20, 24, 30 (1st Cir. 2021) (vaccine mandate).

Because of the important guarantees of the Establishment and Free Exercise Clauses, any belief grounded in religion serves as an adequate basis for a religious exemption claim — including those beliefs belonging to members of the Satanic Temple. Following Texas's passage of S.B. No. 8[125] (SB8), a restrictive abortion ban, the Satanic Temple initiated various free exercise challenges seeking to increase its members' access to abortion.[126] The Satanic Temple — a federally recognized religious group — claimed a religious liberty right to reproductive freedom and bodily autonomy based on its tenet that "one's body is inviolable, subject to one's own will alone."[127] The organization filed a lawsuit against the State of Texas, arguing that SB8 violated its members' rights to abortion.[128] In September 2022, the group filed a similar federal lawsuit against Indiana's abortion ban.[129]

After *Dobbs v. Jackson Women's Health Organization*[130] was decided in summer 2022, other religious organizations also initiated religious liberty litigation over abortion bans under the Free Exercise Clause. A synagogue filed suit in Florida state court arguing that the state's fifteen-week abortion ban violates "[d]eeply-rooted Jewish teachings" that abortion may be required if the mother's life is in danger.[131] Progressive Jews have also raised arguments that principles in Jewish law define life as beginning when a baby's head emerges from its mother's body and that in the meantime, the pregnant woman's welfare and life must take precedence over the fetus.[132] In the wake of SB8, rabbis spoke out against the banning of early abortions as a violation of the religious

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125 TEX. HEALTH & SAFETY CODE § 171.204 (2021).

126 La Carmina, Commentary, *How the Satanic Temple Is Fighting for Reproductive Rights*, INKSTICK (Oct. 13, 2021), https://inkstickmedia.com/how-the-satanic-temple-is-fighting-for-reproductive-rights [https://perma.cc/3RVS-CZFB]; Steph Solis, *Satanic Temple Goes After Abortion Bans*, AXIOS (Oct. 3, 2022), https://www.axios.com/local/boston/2022/10/03/satanic-temple-abortion-ban-lawsuits [https://perma.cc/DAH6-8MJT].

127 La Carmina, *supra* note 126.

128 Jordan Williams, *Satanic Temple to Challenge Texas Abortion Law Citing Religious Freedoms*, THE HILL (Sept. 6, 2021, 11:35 AM), https://thehill.com/blogs/blog-briefing-room/news/570971-satanic-temple-to-challenge-texas-abortion-law-citing-religious [https://perma.cc/8SRM-QVHU].

129 Aprile Rickert, *The Satanic Temple Challenges Indiana Abortion Ban in Federal Court*, WFYI (Sept. 26, 2022), https://www.wfyi.org/news/articles/the-satanic-temple-challenges-indiana-abortion-ban-in-federal-court [https://perma.cc/NC49-7JDE].

130 142 S. Ct. 2228 (2022).

131 Eliza Fawcett, *Synagogue Sues Florida, Saying Abortion Restrictions Violate Religious Freedoms*, N.Y. TIMES (June 16, 2022), https://www.nytimes.com/2022/06/16/us/florida-abortion-law-judaism.html [https://perma.cc/8PFG-3ACQ].

132 Sarah Seltzer, Opinion, *Not All Religious People Oppose Abortion*, N.Y. TIMES (Nov. 18, 2021), https://www.nytimes.com/2021/11/18/opinion/abortion-rights-judaism.html [https://perma.cc/C6A3-MLX6] ("The Talmud, where much of Jewish law is interpreted and where practice is hashed out, defines life as beginning when the baby's head emerges from the mother's body. . . . 'The principle in Jewish law is tza'ar gufah kadim, that her welfare is primary' . . . ." (quoting David M. Feldman, Rabbinical Assembly, *Abortion: The Jewish View*, *in* RESPONSA 1980–1990, at 800, 804 (David J. Fine ed., 2005))).

liberty to practice Judaism.[133] If a "pregnancy will be a serious threat to the woman's well-being, whether that be mentally, physically or otherwise . . . Judaism would require them to have an abortion."[134]

Because most laws contain secular exemptions and religious beliefs are so diverse, many laws are newly vulnerable to free exercise challenges in light of the Supreme Court's recent cases. Of course, granting every single religious exemption claim would lead to total anarchy and chaos. But courts will undoubtedly be put in the difficult position of deciding when religious exemptions are constitutionally mandatory and when they are not. They will need to decide which religious claims to recognize and which to reject.[135] They will decide which laws can stand despite the lack of a religious exemption and which cannot. And doing so may raise serious free exercise concerns.

## IV. CLOSING PANDORA'S BOX

The Supreme Court has handed down important decisions, but ones that provide little clarity for free exercise jurisprudence.[136] While the Court's decisions support a broad reading of religious exemptions, federal courts simply cannot permit religious exemptions against every single law with a secular exemption. Therefore, this Part proposes a new test that captures the competing interests and imposes limiting principles on the doctrine. First, this Part argues that *Fulton* should be read as an antidiscretion case separate from the most-favored-nation doctrine. Next, looking to First Amendment free speech doctrine, this Part proposes a doctrinal test to replace the Supreme Court's most-favored-nation doctrine.

### *A.* Fulton v. City of Philadelphia *as an Antidiscretion Case*

*Fulton* held that Philadelphia's antidiscrimination policy was not generally applicable because it contained a clause allowing the Department of Human Services (DHS) Commissioner to grant discretionary exceptions.[137] A clause allowing a potential — but never-invoked — secular exemption is difficult to square with the traditional

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[133] *See, e.g.*, Danny Horwitz, Opinion, *Texas' Abortion Ban Is Against My Religion. As a Rabbi, I Will Defy It if Necessary*, RELIGION NEWS SERV. (Sept. 2, 2021) https://religionnews.com/2021/09/02/texass-abortion-ban-is-against-my-religion-as-a-rabbi-i-will-defy-it-if-necessary [https://perma.cc/5D82-Q6B2]; Asher Lopatin, Opinion, *Hi SCOTUS, Reproductive Freedom Is Religious Freedom*, NAT'L COUNCIL OF JEWISH WOMEN (Nov. 11, 2021), https://www.ncjw.org/news/oped-repro-freedom-religious-freedom [https://perma.cc/9GFU-DH8N].

[134] Horwitz, *supra* note 133.

[135] For an empirical analysis of the stark partisan division of free exercise decisions, see generally Zalman Rothschild, *Free Exercise Partisanship*, 107 CORNELL L. REV. 1067, 1125 (2022) (documenting a seventy-three percent difference between Democratic- and Republican-appointed lower court judges when deciding free exercise claims concerning COVID-19 between November 26, 2020, and December 31, 2021).

[136] *See* Tebbe, *supra* note 35, at 297 ("The *Fulton* majority opinion will satisfy few.").

[137] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1878 (2021).

view of the most-favored-nation doctrine. If no secular exemption has been granted yet, how can a religious exemption be mandated on grounds that the law denies equal standing to religious beliefs in comparison to secular ones? Instead, this Note argues that *Fulton* should be read in line with First Amendment free speech cases that have rejected laws delegating overly broad discretion to government officials to grant licenses for protected speech.

In its First Amendment free speech doctrine, the Supreme Court has long held that laws granting complete discretion to government officials over permitting decisions are unconstitutional.[138] In *Saia v. New York*,[139] the Court invalidated the section of an ordinance requiring individuals to obtain permission from a local official before publicly disseminating information through loudspeakers.[140] It was held impermissible for an ordinance to place an important constitutional right "in the uncontrolled discretion" of a public official.[141] If a permit scheme "'involves appraisal of facts, the exercise of judgment, and the formation of an opinion' by the licensing authority, 'the danger of censorship and of abridgment of our precious First Amendment freedoms is too great' to be permitted."[142] Regardless of the particular facts of the government's decision to approve or deny particular permit requests, such schemes are facially unconstitutional because "[t]he First Amendment prohibits the vesting of such unbridled discretion in a government official."[143]

The outcome in *Fulton* is best understood on these grounds — as the Court's adoption of a near-categorical rule that laws burdening religion cannot delegate unbridled discretion to government officials to determine which beliefs are sufficiently worthy of exemption. Free speech has long been regarded as deserving of the most heightened protections in constitutional law.[144] While free speech and free exercise have historically been treated differently, the Court has recently embarked on a path toward elevating the constitutional importance of religious liberty rights.[145] Philadelphia's antidiscrimination clause granted the DHS

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[138] *E.g.*, Forsyth County v. Nationalist Movement, 505 U.S. 123, 131, 133 (1992); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150–51 (1969); Saia v. New York, 334 U.S. 558, 559–60 (1948).

[139] 334 U.S. 558.

[140] *Id.* at 559–60; *see also id.* at 558 n.1 (quoting ordinance).

[141] *Id.* at 559–61.

[142] *Forsyth County*, 505 U.S. at 131 (citation omitted) (quoting Cantwell v. Connecticut, 310 U.S. 296, 305 (1940); Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975)).

[143] *Id.* at 133.

[144] *See* Genevieve Lakier, *The Non–First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2300–01 (2021) ("The Free Speech Clause of the First Amendment has for decades now served as one of the most powerful mechanisms of individual rights protection in the Federal Constitution.").

[145] *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2415–16 (2022) (holding that public high school football coach cannot be prohibited from praying after football games); Carson *ex rel.* O.C. v. Makin, 142 S. Ct. 1987, 2002 (2022) (holding that Maine's school vouchers could not be

Commissioner unfettered discretion to determine — based on his own personal judgment — whether any particular religious belief is worthy of exemption.[146] The mere possibility of a discretionary exemption alone is sufficient to raise a red flag because it places one's constitutional rights in the unchecked discretion of a government official. Viewed this way, it is understandable that a Court seeking to take seriously religious liberty rights would find this unbridled discretion problematic.

### *B. Replacing the Most-Favored-Nation Doctrine*

This section turns to *Tandon* and the Court's other COVID-19 shadow docket orders. It argues that the two-tiered analysis in free speech cases that results in either intermediate or strict scrutiny can be extended to analyzing religious exemption claims against laws with secular exemptions. This proposed test better captures the competing interests and important considerations underlying these cases. The test consists of two parts. At the first step, the court would determine whether a secular exemption advances a compelling government interest. If it does, then the regulation would be evaluated under intermediate scrutiny. If it does not, then the regulation would be evaluated under strict scrutiny.

Before elaborating further on this test, this section briefly introduces the principles underlying free speech doctrine. Under First Amendment principles, regulations imposed on protected speech are typically evaluated under either intermediate or strict scrutiny.[147] If a regulation seeks to restrict content or a particular viewpoint, then the regulation is subject to strict scrutiny.[148] Courts view such regulations aimed at suppressing content or a viewpoint as inherently suspect and presumptively unconstitutional.[149] Strict scrutiny is proper because the First Amendment's free speech protections are aimed precisely at protecting against government suppression of speech based on content or

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limited to nonreligious schools); Shurtleff v. City of Boston, 142 S. Ct. 1583, 1587 (2022) (holding that Christian flag cannot be excluded from flying over Boston City Hall); Ramirez v. Collier, 142 S. Ct. 1264, 1280, 1284 (2022) (holding that incarcerated person on death row had the right to have his minister lay his hands on his body and pray during his execution).

146 *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1878 (2021).

147 *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 377 (1968) (applying intermediate scrutiny to expressive conduct); Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015) (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115, 118 (1991)) (applying strict scrutiny to content-based regulations).

148 *See, e.g.*, *R.A.V.*, 505 U.S. at 391, 395–96.

149 *E.g.*, *Town of Gilbert*, 135 S. Ct. at 2226 ("Content-based laws — those that target speech based on its communicative content — are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."); Matal v. Tam, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., concurring in part and concurring in the judgment).

viewpoint.[150]

In contrast, some other forms of government regulation of protected speech are subject only to intermediate scrutiny. Two examples that fall into this category include (1) regulation of expressive conduct[151] and (2) time, place, and manner restrictions.[152] Such regulations also implicate protected speech and First Amendment rights, but they are essential and necessary to the proper functioning of government. The Supreme Court has acknowledged that the government needs authority to regulate the conduct and behaviors of its citizens while also recognizing that symbolic conduct conveys ideas that deserve constitutional protection.[153] Similarly, time, place, and manner restrictions that regulate when, where, and how someone can speak are a necessary and ubiquitous part of civil society.[154] Nonetheless, because such laws also implicate protected speech, they should be reviewed under intermediate scrutiny rather than rational basis review.[155]

Drawing on those general principles that underlie free speech doctrine, this Note argues that laws granting secular exemptions can similarly be differentiated into two categories — one that is inherently constitutionally suspect and one that is not. Under this framework, if a secular exemption advances a compelling government interest, then it is not inherently constitutionally suspect. The legislative decision to provide a secular exemption for a particular law or regulation is often a necessary aspect of good governance. For example, passing Title VII without granting small businesses an exemption could impose disproportionate and unreasonable regulatory burdens on them.[156] There are many compelling reasons other than religious discrimination to grant a secular exemption. However, this does not mean that religious liberty rights are not implicated by regulations that burden religious freedom. Instead, the intermediate scrutiny test is most appropriate because it

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150 *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641–42 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Id.* at 641.).

151 *See, e.g.*, *O'Brien*, 391 U.S. at 377, 382.

152 *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989).

153 *Compare O'Brien*, 391 U.S. at 377 ("The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping."), *with* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) (plurality opinion) ("[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment . . . .").

154 *See, e.g.*, Cox v. New Hampshire, 312 U.S. 569, 576 (1941) ("[I]n fixing time and place, the license served 'to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to minimize the risk of disorder.'" (quoting State v. Cox, 16 A.2d 508, 514 (N.H. 1940))); Schneider v. New Jersey, 308 U.S. 147, 160–61 (1939).

155 *See O'Brien*, 391 U.S. at 382; *Ward*, 491 U.S. at 798 n.6.

156 *See, e.g.*, Papa v. Katy Indus., Inc., 166 F.3d 937, 940 (7th Cir. 1999) (explaining that the purpose of Title VII's small business exemption "is to spare very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail").

allows courts to balance the competing interests between governance and religious liberty.

This two-tiered approach would allow courts to address the competing interests of the government's ability to make policy decisions and individuals' religious liberty rights. Under the existing most-favored-nation doctrine, courts focus their inquiries on comparability, knowing that comparability will necessarily dictate the outcome of the case. But the lack of clarity over comparability means that "[i]t is hard to find any law that cannot be characterized as excusing comparable activity, especially if, as the Court says, the comparison is based on whether the state ever tolerates any setback to its pertinent interests."[157] Other courts have held that if government interests are impeded to a lesser degree by a secular exemption than a religious one, then they are not comparable. The First and Second Circuits took this approach when denying religious exemption challenges against vaccine mandates imposed by Maine and New York, respectively.[158] Both federal appellate courts concluded that a medical exemption was not comparable to a religious one.[159] Nonetheless, as Justice Gorsuch argued in dissent from the Court's denial of the Maine plaintiffs' application for injunctive relief, the secular medical exemption did impede three of the government's other asserted interests: protecting patients from COVID-19, protecting healthcare workers from COVID-19, and reducing the likelihood of outbreaks in healthcare facilities.[160]

Because of the binary nature of the most-favored-nation test, courts disproportionately focus on analyzing technicalities about comparability rather than addressing the important constitutional questions — namely, whether the policy's secular exemption is a sound political decision in light of the important religious interests implicated. But, as Justice Gorsuch explained in his dissent from the Court's denial of an injunction in the New York case, courts should address questions about the tailoring of the law and the number of religious exemption claims separately from comparability.[161] The new test proposed by this Note

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[157] Andrew Koppelman, *The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty* 6 (Nw. Univ. Pritzker Sch. of L. Pub. L. & Legal Theory Series, Paper No. 22-01, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4049209 [https://perma.cc/BM5Y-SZGK]; *see also* Zalman Rothschild, *Free Exercise's Lingering Ambiguity*, 11 CALIF. L. REV. ONLINE 282, 290 (2020) ("[T]he meaning of 'similarly situated' is in the eye of the beholder.").

[158] *See* Does 1–6 v. Mills, 16 F.4th 20, 24, 30 (1st Cir. 2021) (quoting Fulton v. City of Philadephia, 141 S. Ct. 1868, 1877 (2021)); We the Patriots USA, Inc. v. Hochul, 17 F.4th 266, 273 (2d Cir. 2021).

[159] *Mills*, 16 F.4th at 31 ("Providing a medical exemption does not undermine any of Maine's . . . goals, let alone in a manner similar to the way permitting an exemption for religious objectors would."); *We the Patriots USA*, 17 F.4th at 285 ("[A]pplying the vaccine to individuals in the face of certain contraindications, depending on their nature, could run counter to the State's 'interest' . . . ." (quoting Gonzales v. Carhart, 550 U.S. 124, 157 (2007)).

[160] *See* Does 1–3 v. Mills, 142 S. Ct. 17, 19–20 (2021) (Gorsuch, J., dissenting from the denial of application for injunctive relief).

[161] *See* Dr. A v. Hochul, 142 S. Ct. 552, 555–56 (2021) (Gorsuch, J., dissenting from the denial of application for injunctive relief).

would allow courts to reach these important questions — without fear that claims will necessarily prevail — by evaluating them under intermediate scrutiny.

Under intermediate scrutiny, courts should look to whether the nonreligious exemption is reasonably related to advancing an important government interest. At this step, courts should consider whether including a religious exemption would, unlike the secular exemption, impede the government's interests underlying the law. Again, using Title VII as an example, providing a religious exemption from employment protections against discrimination may result in a substantially lower number of employees being protected from discrimination. This reflects the reality that a substantial number of the individuals who discriminate against LGBTQ+ people do so on religious grounds.[162] In contrast, a similar correlation between small businesses and discrimination is unlikely to exist.[163]

If, however, the secular exemption does not advance a compelling government interest, then strict scrutiny applies. Strict scrutiny should be rigorously applied, especially for laws with a plethora of secular exemptions.[164] However, it should not be impossible for a law with a secular exemption to be upheld under strict scrutiny, as even content-based restrictions have never required perfect tailoring.[165]

Ultimately, even a test that more clearly captures the competing interests underlying religious exemption claims cannot resolve all relevant complexities. In free speech doctrine, "deciding whether a particular regulation is content based or content neutral is not always a simple task."[166] Likewise, deciding whether a secular exemption advances a compelling interest will be a difficult task, and so will applying either intermediate or strict scrutiny. But this proposed test ameliorates the current problem where judges talk past one another, focusing entirely on the technicalities of whether a law is comparable or not because of the outcome-determinative nature of comparability.

## CONCLUSION

Although the Supreme Court framed *Fulton* as a narrow decision, this Note posits that the Court's recent decisions have uprooted religious

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[162] *See* Craig Westergard, *LGBT Discrimination as Religious Discrimination: Ruse or Resolution?*, 26 BARRY L. REV. 45, 48 (2020) ("[V]iews about LGBT status are often motivated by religious beliefs.").

[163] *See* Papa v. Katy Indus., Inc., 166 F.3d 937, 940 (7th Cir. 1999) ("The purpose [of Title VII's small business exemption] is not to encourage or condone discrimination.").

[164] *See* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 449 (2015) (indicating that a law "riddled with exceptions" is likely "impermissibly underinclusive" (citing City of Ladue v. Gilleo, 512 U.S. 43, 52–53 (1994))).

[165] *See, e.g.*, *id.* at 454 (noting that the law at issue must "be narrowly tailored, not . . . 'perfectly tailored'" (quoting Burson v. Freeman, 504 U.S. 191, 209 (1992) (plurality opinion))).

[166] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994).

exemption doctrine, going far further than merely overturning *Smith*. As Justice Scalia explained in *Smith*:

> [I]f "compelling interest" really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them.[167]

If the Court has declared that "compelling interest" really *does* mean what it says, then it has opened the floodgates of religious liberty claims against most laws in American society.

The Court's new free exercise jurisprudence, particularly its rigorous application of strict scrutiny, might have implications for other areas of law that also apply strict scrutiny. Race-based affirmative action admissions in higher education[168] and compelled speech[169] are just two issues that will also be reviewed under strict scrutiny this Term. Having created an especially heightened version of strict scrutiny in its free exercise cases, the Court may also apply a heightened standard in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*[170] to invalidate university affirmative action plans. A more rigorous strict scrutiny test might similarly be used to invalidate the public accommodations law at issue in *303 Creative LLC v. Elenis*.[171]

When it comes to religious liberty, the Court has rejected its typical course of judicial deference and conservatism, instead embracing judicial activism and intervention. *Tandon* and *Fulton* force lower courts into the uncomfortable role of micromanaging religious exemption claims and second-guessing the government's reasoned policy decisions. While the Court is unlikely to abandon its journey toward strengthening constitutional protections for religious liberty, the Court should not adopt the categorical, restrictive strict scrutiny framework that Justices Scalia[172] and Barrett[173] have warned against. And, in developing its new test, the Court must take care to balance the various competing rights and liberties protected by the Free Exercise Clause.

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167 Emp. Div. v. Smith, 494 U.S. 872, 888 (1990).

168 *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 142 S. Ct. 895 (2022) (mem.) (granting certiorari).

169 *See* 303 Creative LLC v. Elenis, 142 S. Ct. 1106 (2022) (mem.) (granting certiorari).

170 142 S. Ct. 895.

171 142 S. Ct. 1106; *id.* at 1106.

172 *See Smith*, 494 U.S. at 888–89.

173 *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring) ("I am skeptical about swapping *Smith*'s categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court's resolution of conflicts between generally applicable laws and other First Amendment rights — like speech and assembly — has been much more nuanced.").