FIRST AMENDMENT — RELIGIOUS EXERCISE — SECOND CIRCUIT FINDS THAT A VACCINE MANDATE MAY HAVE VIOLATED *SMITH*. — *M.A. v. Rockland County Department of Health*, 53 F.4th 29 (2d Cir. 2022).

In recent years, the Supreme Court has demonstrated a willingness to revisit,[1] and even overturn,[2] long-standing precedents. Given this trend, many have wondered: What precedent might be next to go? For some jurists,[3] scholars,[4] and litigants,[5] *Employment Division v. Smith*[6] should be on its way out. In that landmark 1990 case, the Supreme Court held that the First Amendment's Free Exercise Clause does not bar the "application of a neutral, generally applicable law to religiously motivated action."[7] But despite calls for its overturning, *Smith* still lives on. In fact, it was on full display in a recent case at the Second Circuit. In *M.A. v. Rockland County Department of Health*,[8] the Second Circuit held that a New York county's vaccine mandate may have run afoul of *Smith*, so the court remanded the case for more factual findings.[9] However, despite the court's use of *Smith*, Judge Park, in a concurrence, cataloged the persistent difficulties courts have had with applying the 1990 test.[10] But his apparent call to the Supreme Court to "overrule[]" *Smith* is, perhaps, better directed elsewhere; if critics of *Smith* want it gone, they should turn their attention to Congress — not the Court.

In October 2018, Rockland County, New York, experienced a measles outbreak.[11] In response, the County issued an "Exclusion Order" in December 2018, prohibiting unvaccinated students from entering two public schools for twenty-one days.[12] Despite permitting religious exemptions for vaccine mandates in the past, the Order broke from standard practice, providing for neither religious nor medical exemptions.[13] The County renewed this initial Order twice, and subsequent versions of the Order similarly did not permit religious exemptions.[14]

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[1] *See, e.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023).

[2] *E.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2240 (2022) (overturning Roe v. Wade, 410 U.S. 113 (1973)).

[3] *E.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1924 (2021) (Alito, J., concurring).

[4] *E.g.*, Bradley J. Lingo & Michael Schietzelt, *A Second-Class First Amendment Right? Text, Structure, and Free Exercise After* Fulton, 57 WAKE FOREST L. REV. 711, 711 (2022).

[5] *E.g.*, Petition for Writ of Certiorari at 35, Tingley v. Ferguson, No. 22-942 (U.S. Mar. 27, 2023).

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

[7] *Id.* at 881.

[8] 53 F.4th 29 (2d Cir. 2022).

[9] *Id.* at 39.

[10] *Id.* at 41–42 (Park, J., concurring).

[11] *Id.* at 33 (majority opinion).

[12] *Id.*

[13] *Id.*

[14] *Id.* These Exclusion Orders "formed the basis for the Plaintiffs' initial complaint." *Id.* at 34. Later, that complaint was amended. *See id.*

Still observing a rise in measles cases, the County then issued an emergency declaration in March 2019.[15] It provided that unvaccinated children over the age of six months would be barred from entering places of public assembly.[16] However, the County exempted certain classes of children — those with immunity or medical reasons.[17] Yet, just like with the Exclusion Orders, no religious exemption was permitted.[18] In fact, the County Executive, Ed Day, would later testify that the Declaration was issued partly due to "concern[s] regarding a possible rise in measles during the upcoming holiday season of Easter and Passover."[19]

Though the Declaration — an emergency edict — was ordered, New York State still had in place a "statutory religious exemption to the vaccine requirement for school children."[20] So, Day and Patricia Ruppert — the Commissioner of the County's Department of Health — successfully lobbied the New York legislature to repeal all religious exemptions for vaccination.[21] When urging legislators, Day argued that "[t]here's no such thing as a religious exception."[22] Day also described "anti-vaxxers" as "loud, very vocal, [and] also very ignorant."[23]

A collection of parents who had children enrolled in County schools then amended a previously filed complaint in federal court.[24] The plaintiffs alleged violations of several constitutional provisions, including the First Amendment's Free Exercise Clause.[25] With respect to that claim, the plaintiffs alleged that the County's actions "impermissibly targeted them based on their sincerely held religious beliefs."[26] Listed as defendants were the County's Department of Health, Day, and Ruppert.[27]

At the district court,[28] the defendants moved for summary judgment on all claims.[29] The court granted their motion in full.[30] When addressing the plaintiffs' free exercise claims, the district court invoked *Smith*.[31] Regarding neutrality, the district court first concluded that the

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15 *Rockland County*, 53 F.4th at 34.
16 *Id.*
17 *Id.*
18 *Id.*
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.* (quoting Joint Appendix at 2186, *Rockland County*, 53 F.4th 29 (No. 21-551)).
24 *Id.* The plaintiffs had sued earlier regarding Exclusion Orders issued by the County. *See id.* However, in the end, the district court and Second Circuit primarily focused on the constitutionality of the Declaration.
25 *Id.* at 34–35.
26 *Id.* at 35.
27 *Id.* at 34.
28 W.D. v. Rockland County, 521 F. Supp. 3d 358 (S.D.N.Y. 2021).
29 *Id.* at 371.
30 *Id.* at 414.
31 *Id.* at 397.

Declaration did not "'single out' religious groups for harsher treatment."[32] It was also not motivated by a "discriminatory intent"[33] because the court found that Day's comments did not evince religious animus.[34] On general applicability, the court held that the edict was not suspect because "it imposes identical burdens on religious and nonreligious conduct and certainly does not impose special burdens on religion alone."[35] Given that the Declaration was viewed as "both facially neutral and generally applicable,"[36] the court concluded that it would be subject to rational basis review.[37] Under this forgiving standard, the County's Declaration survived.

The plaintiffs appealed.[38] The Second Circuit vacated in part and reversed the district court's grant of summary judgment on the free exercise claim, and remanded for more factual development.[39] Writing for the unanimous panel,[40] Judge Lee wrote that the district court's grant of summary judgment was premature.[41] To her, with respect to the "neutrality" analysis, a jury could have gone either way; for instance, a "reasonable juror could [have] conclude[d] that Day's statements evinced religious animus, rendering the Declaration not neutral."[42] Additionally, with respect to general applicability, there was a "dispute regarding what governmental interest the Declaration was intended to serve, which is relevant to the question of whether the Declaration was 'substantially underinclusive,' and therefore, not generally applicable."[43] In short, there were "fact-intensive" issues that "should be explored at trial through the examination of evidence."[44]

Judge Park concurred. He thought "a straightforward application of *Smith* to facts not in dispute show[ed] that the Emergency Declaration was neither neutral nor generally applicable."[45] For Judge Park, the Declaration was not neutral because "Day publicly defended [it] as an effort to address the risk of rising measles cases during religious holidays, and he made numerous disparaging comments about religious objectors."[46] He also concluded that the law was not generally applicable. In his eyes, "it 'prohibit[ed] religious conduct while permitting secular

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[32] *Id.* at 399.
[33] *Id.* at 401.
[34] *Id.*
[35] *Id.* at 402.
[36] *Id.* at 397.
[37] *Id.*
[38] *Rockland County*, 53 F.4th at 39.
[39] *Id.*
[40] Judge Lee was joined by Judge Pooler and Judge Park.
[41] *Rockland County*, 53 F.4th at 36.
[42] *Id.*
[43] *Id.* at 39.
[44] *Id.*
[45] *Id.* at 40 (Park, J., concurring).
[46] *Id.*

conduct that undermine[d] the government's asserted interests in a similar way.'"[47] Judge Park then lasered in on *Smith*. In his view, *Smith*'s "general-applicability test embraces a purposivist approach that is vulnerable to manipulation and arbitrariness."[48] For instance, a law's purpose could be so "narrowly . . . construed" that it would be "difficult . . . for an exception to undercut it."[49] Or a "law's purpose could be framed broadly — for example, 'to promote public health' — so that an exception would rarely undermine it."[50] For Judge Park, *Smith* was unworkable and susceptible to manipulation. Accordingly, he ended his concurrence with an apparent call for the Supreme Court to "overrule[]" the "ill-defined test" set out in *Smith*.[51]

Judge Park aptly identified and characterized the lingering difficulties with applying *Smith*; indeed, the Supreme Court, too, has noted its infirmities. To be sure, Judge Park's diagnosis may have been on point, but his apparent call to the Supreme Court to overrule *Smith* may not be heeded. That's because the Court has had several chances to overturn *Smith*, but, in each instance, it has balked. But critics of *Smith* need not despair. The 1990 decision could be "overruled" by a different branch of the federal government. Significant shifts in free exercise jurisprudence coupled with increased instances of religious discrimination suggest that Congress — instead of the courts — could (and, perhaps, should) take the lead in scrapping *Smith*.

For starters, several Justices on the Supreme Court have largely agreed with Judge Park's assessment of *Smith*: it's unworkable, and it needs to go.[52] But the Court has stopped short of overturning the 1990 decision. For instance, in *Fulton v. City of Philadelphia*,[53] the Court was asked to reconsider *Smith*,[54] but opted to leave it intact.[55] And, in 2022, a petition for certiorari again asked the Court to overturn *Smith*.[56] Yet again, the Court punted on the issue, only granting review on a free speech question.[57] Thus, while five Justices have called for *Smith* to

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[47] *Id.* at 41 (quoting Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021)).

[48] *Id.* at 42.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Fulton*, 141 S. Ct. at 1882 (Barrett, J., concurring) ("*Smith* ought to be overruled."); *id.* at 1917 (Alito, J., concurring in the judgment) (noting in a section titled "*Workability*" that "[o]ne of *Smith*'s supposed virtues was ease of application, but things have not turned out that way"); *id.* at 1926 (Gorsuch, J., concurring in the judgment) (noting that *Smith* "has proven unworkable in practice").

[53] 141 S. Ct. 1868.

[54] *Id.* at 1876.

[55] *Id.* at 1876–77.

[56] Petition for a Writ of Certiorari at i, 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023) (No. 21-476).

[57] 303 Creative LLC v. Elenis, 142 S. Ct. 1106 (2022) (mem.).

go,[58] worries about what should fill *Smith*'s shoes[59] have resulted in the Court refraining, so far, from discarding it altogether.

That does not mean, however, that free exercise jurisprudence has remained unchanged since 1990. Rather than getting rid of *Smith* wholesale, the Court has instead opted to meaningfully bulk up free exercise protections, while keeping *Smith* ostensibly intact. For instance, in *Tandon v. Newsom*,[60] the Court clarified *Smith*'s general-applicability prong by outlining its "most favored nation" theory[61]: "government regulations are not neutral and generally applicable . . . whenever they treat *any* comparable secular activity more favorably than religious exercise."[62] To some scholars, however, that "clarification" of *Smith* was actually an enervation.[63] To them, the "practical impact [of that theory is] to turn *Smith* on its head — since almost every government regulation, especially those of general applicability, has at least some exceptions."[64] For these scholars, the "most favored nation" theory meaningfully altered the *Smith* test, making it far more stringent than originally conceived.[65] So, while the Court has stopped short of overturning *Smith*, it also has, in practice, made it more exacting.

But *Smith* still lives on and presents practical difficulties. As some have noted, even the "most favored nation" theory hasn't stopped courts from manipulating levels of generality when applying *Smith*.[66] And *Smith* also poses more substantive concerns. Today, religious exercise is still out of luck when "rules appl[y] to everyone and there [is] no possibility of exemptions."[67] In these instances, even the "most favored nation" theory is still of little help to burdened religious practice.[68] So, as a matter of administrability and religious liberty, some still might want *Smith* definitively gone, notwithstanding the advent of the "most favored nation" theory.

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[58] *See* opinions cited *supra* note 52. Justice Thomas and Justice Kavanaugh joined in opinions calling for *Smith* to be overturned. *Fulton*, 141 S. Ct. at 1882 (Barrett, J., concurring, joined by Kavanaugh, J.); *id.* at 1883 (Alito, J., concurring in the judgment, joined by Thomas & Gorsuch, JJ.).

[59] *Fulton*, 141 S. Ct. at 1883 (Barrett, J., concurring) (articulating worries "about swapping *Smith*'s categorical antidiscrimination approach for an equally categorical strict scrutiny regime").

[60] 141 S. Ct. 1294 (2021) (per curiam).

[61] 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, 708 (2022).

[62] *Tandon*, 141 S. Ct. at 1296.

[63] *See, e.g.*, David M. Smolin, *Kids Are Not Cakes: A Children's Rights Perspective on* Fulton v. City of Philadelphia, 52 CUMB. L. REV. 79, 92 (2022).

[64] Vladeck, *supra* note 61, at 709.

[65] *See* Andrew Koppelman, *The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty*, 108 IOWA L. REV. 2237, 2297 (2023).

[66] *See* Petition for Writ of Certiorari, *supra* note 5 at 34.

[67] Christopher C. Lund, *Second-Best Free Exercise*, 91 FORDHAM L. REV. 843, 858 (2022).

[68] *See* JOSH BLACKMAN, HOWARD SLUGH & MITCHELL ROCKLIN, HERITAGE FOUND., FIGHTING ANTISEMITISM BY PROTECTING RELIGIOUS LIBERTY 2 (Nov. 16, 2021), https://www.heritage.org/religious-liberty/report/fighting-antisemitism-protecting-religious-liberty [https://perma.cc/3VTT-2VP8] ("Under the *Smith* regime, neutral laws arguably could be used to criminalize ritual slaughter [and] prohibit ritual circumcision . . . without running afoul of the First Amendment.").

Yet, despite Judge Park's apparent call to the Court to overrule *Smith*, the Court, as discussed above, has yet to do so. But there's still hope for those who want *Smith* gone. Congress can step in. It can amend the Religious Freedom Restoration Act of 1993[69] (RFRA) to apply to state and local governments. Given the Court's current free exercise jurisprudence and a recent rise in religious targeting, the logic undergirding *City of Boerne v. Flores*[70] — the case that invalidated a 1993 version of RFRA as it applied to the states[71] — no longer rings true. If Congress passed RFRA today, it would likely pass constitutional muster.

By way of background, in 1993, in response to *Smith*, Congress passed RFRA.[72] The law codified a strict scrutiny regime: when any government — federal, state, or local — substantially burdened a person's exercise of religion, strict scrutiny would apply.[73] RFRA, in other words, effectively overturned *Smith*'s neutrality and general applicability tests.[74] However, just a few years after its enactment, the law was challenged in court.[75] In *Boerne*, the Supreme Court struck down RFRA as it applied to the states;[76] the Court did so for two reasons.

First, the *Boerne* Court rejected the notion that Congress could pass "[l]egislation which alters the meaning of the Free Exercise Clause."[77] The Court had just demarcated the contours of the First Amendment in *Smith*; Congress could not then jump in, effectively overturn that decision, and "decree the substance" of a constitutional provision.[78] Such a congressional usurpation would "contradict[] vital principles necessary to maintain separation of powers and the federal balance."[79] But the Court's reasoning was predicated on *Smith* and RFRA being starkly at odds with one another. Indeed, they were irreconcilable.

However, given the muscularity of the "most favored nation" theory, the free exercise doctrine of 1997 is not the free exercise doctrine of today. Thus, an updated RFRA that implemented a strict scrutiny regime would more closely accord with — albeit not exactly mirror — the substance of the Court's current doctrinal framework. To be clear, the mere fact that an amended RFRA would not *precisely* line up with the Court's current free exercise jurisprudence shouldn't be a problem. That's because Congress's conclusions about "whether and what

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[69] 42 U.S.C. §§ 2000bb to 2000bb-4, *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[70] 521 U.S. 507.

[71] *See id.* at 536.

[72] *See id.* at 515.

[73] *See* 42 U.S.C. §§ 2000bb-1 to -2.

[74] *See Boerne*, 521 U.S. at 515.

[75] *Id.* at 511.

[76] *Id.* at 536.

[77] *Id.* at 519.

[78] *Id.*

[79] *Id.* at 536.

legislation is needed to secure the guarantees [of the Free Exercise Clause]"[80] are "entitled to much deference."[81]

Second, a RFRA passed today would be responsive to court-identified constitutional violations of free exercise rights. To the *Boerne* Court, RFRA was a "[s]weeping"[82] legislative act that could only be warranted by concrete evidence of constitutional violations.[83] For instance, RFRA put all state laws under a microscope. It made any law "subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion."[84] But when the *Boerne* Court surveyed the nation, it did not observe widespread religious discrimination. The Court found it "difficult to maintain that [there were] examples of [state] legislation enacted or enforced due to animus or hostility to the burdened religious practices" or that there was "some widespread pattern of religious discrimination in [the] country."[85] Simply put, for the Court, RFRA was unprecedented legislation. Yet, it was also uncalled for, considering the dearth of observed religious discrimination. So, the Court concluded that Congress exceeded its legislative power when it passed RFRA, and the law was deemed unconstitutional as it applied to the states.[86] Later, Congress would amend RFRA to remove any mention of state or local governments.[87]

Perhaps the Supreme Court was right in 1997 when it declared that RFRA constituted a disproportionate congressional response. But things have changed. Recently, governments have increasingly singled out religious people and practices.[88] And courts have noticed.

Take *Rockland County*. Of course, Judge Lee's majority opinion took a more agnostic approach to the claims of religious discrimination.[89] But, in his concurrence, Judge Park was more certain that free exercise violations were afoot. As he put it: "County officials did not even try to hide their reasons for engaging in this 'religious gerrymander[ing],' which served to isolate, target, and burden Plaintiffs' religious practices."[90] In his eyes, the case was open and shut.

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[80] *Id.* (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)).

[81] *Id.*; *see also id.* at 519–20 ("While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, Congress must have wide latitude in determining where it lies . . . ."); *id.* at 518.

[82] *Id.* at 532.

[83] *See id.* at 529–36.

[84] *Id.* at 532.

[85] *Id.* at 531.

[86] *See id.* at 536.

[87] Religious Land Use and Institutionalized Persons Act of 2000, Pub L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc to 2000cc-5).

[88] *See, e.g.*, *COVID-19 and Religious Liberty*, BECKET FUND, https://www.becketlaw.org/covid-19-religious-worship [https://perma.cc/KA4Y-STVN] (collecting data on how states, during the recent pandemic, "subordinated" religious gatherings to "similar secular services").

[89] *Rockland County*, 53 F.4th at 39.

[90] *Id.* at 40 (Park, J., concurring) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993)).

Rockland County is not an outlier. The Supreme Court has dealt with several free exercise cases in recent years. Often, in these cases, like in *Rockland County*, exemptions were given to secular groups but denied to religious ones.[91] In other cases, government actors have exhibited clear religious animus.[92] In each instance, when it observed governments singling out religious practice, the Court condemned and put a stop to the discriminatory behavior.

This rise in religious targeting, however, may have a silver lining for religious liberty advocates. As discussed above, the Supreme Court and lower courts have been identifying constitutional violations of religious exercise. So, if RFRA were amended today, the Court would not have to look far for "examples of legislation enacted or enforced due to animus or hostility to[wards] . . . burdened religious practices."[93] Recent precedent itself evinces that, in the Court's eyes, there is a "widespread pattern of religious discrimination in this country."[94] If it were to update RFRA, Congress would, in essence, be passing legislation to prevent the types of constitutional violations *that courts have already identified*. Thus, the *Boerne* Court's concern — that the 1993 RFRA was not remedying a real national problem — should no longer be an obstacle.

Judge Park's concurrence in *Rockland County* reviews the familiar deficiencies with *Smith* and describes, in his eyes, an egregious instance of religious discrimination. The Supreme Court, too, has lamented *Smith*'s drawbacks and, in turn, has embraced more stringent free exercise doctrine, while simultaneously putting a stop to religious discrimination in the states. But Judge Park seems to have called on the Court to overrule its 1990 decision. As discussed above, the Court, thus far, has balked at getting rid of *Smith*. But if the Court won't act, Congress can. The national legislature could amend RFRA to again apply to state and local governments. And that amended law would likely survive judicial review. A 2024 RFRA's strict scrutiny regime would not be too dissimilar from the Court's "most favored nation" doctrine, and it would also be responsive to recent court-identified constitutional violations of free exercise. The logic undergirding *Boerne* would not doom a 2024 RFRA. The only question left then: Is Congress up to the task?

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[91] *See, e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1878 (2021); Tandon v. Newsom, 141 S. Ct. 1294, 1298 (2021) (per curiam); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020) (per curiam) ("[S]tatements made . . . can be viewed as targeting the 'ultra-Orthodox [Jewish] community.' . . . But even if we put those comments aside, the regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment.").

[92] *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1729 (2018) (identifying "clear and impermissible hostility toward . . . sincere religious beliefs"); *see also* Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ., No. 22-15827, 2023 WL 5946036, at *20 (9th Cir. Sept. 13, 2023) (en banc) (noting that "the facts of this case arguably demonstrate animus by government decisionmakers exceeding that present in *Masterpiece Cakeshop*").

[93] City of Boerne v. Flores, 521 U.S. 507, 531 (1997).

[94] *Id.*