Free Exercise's Lingering Ambiguity

Zalman Rothschild*

INTRODUCTION

Religious challenges to state-issued stay-at-home orders have become a staple of the litigation generated by the COVID-19 pandemic. These challenges allege that states discriminate against religion by granting lockdown exceptions to certain professions and businesses, but not to churches for communal religious services. It has become common, for example, for churches to demand that their ability to gather for worship not be considered less essential than the operation of liquor stores in those states that have designated the latter as "essential" businesses.[1] In other words, these churches argue that the First Amendment does not permit states to prioritize pinot noir over prayer. Judges hearing these challenges have had to grapple with an old question imbued with new pandemic-related nuance: What constitutes discrimination against religion under the Free Exercise Clause? The answer—as evidenced by the wide divergence in courts' responses—is anything but straightforward.

In what follows, I explore an ambiguity surrounding the meaning of religious discrimination in current free exercise jurisprudence, the role this ambiguity has played in recent religious challenges to stay-at-home orders, and how the Supreme Court next term may finally lay this ambiguity to rest.

DOI: https://doi.org/10.15779/Z38H98ZD7W

* Law clerk to the U.S. Court of Appeals for the Third Circuit and Nonresident Fellow at the Stanford Constitutional Law Center. J.D., magna cum laude, Harvard Law School; Ph.D., New York University; M.A., Yeshiva University. The author extends thanks to Zachary David, Emmett Gilles, Michael McConnell, Martha Minow, Micah Schwartzman, Nelson Tebbe, Mark Tushnet, and the California Law Review editors, in particular Natasha Geiling, for their helpful comments.

1. *See, e.g.*, Cassell v. Snyders, No. 20-cv-50153, 2020 WL 2112374, at *9 (N.D. Ill. May 3, 2020).

I.
THE MEANING OF RELIGIOUS DISCRIMINATION

The Free Exercise Clause of the First Amendment states that the government "shall make no law . . . prohibiting the free exercise of religion."[2] In 1990, the Supreme Court established a new constitutional rule for religious freedom in *Employment v. Smith*.[3] As of *Smith*, the government is no longer required to articulate a compelling interest in regulation that burdens religious exercise so long as the law is "neutral" and "generally applicable."[4] The meaning of "neutrality"—or more precisely its absence—is fairly clear: When laws are enacted "'because of,' not merely 'in spite of,' their suppression of . . . religious practice,"[5] these laws are not neutral. The meaning of "general applicability," however, remains mired in confusion, as multiple interpretations abound.[6]

One view of *Smith*'s general applicability requirement is that it is merely an extension of the concept of neutrality.[7] On this narrow view, asking whether a law is generally applied is a method for smoking out discriminatory intent. A law can be non-neutral even if it is not facially discriminatory, since it is possible to discern discrimination not just from the law's text but also from how it is applied. If a facially neutral law is applied almost exclusively to religious activity, such exclusive application suggests the law in fact has a discriminatory purpose.[8] The upshot of this interpretation is that a law is not generally applicable

---

2. U.S. Const. amend. I, § 1.

3. 494 U.S. 872, 879 (1990). For a general overview of *Smith* and its revolutionary nature, see Carol M. Kaplan, *The Devil is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. REV. 1045 (2000). *But see* Nelson Tebbe, Smith *in Theory and Practice*, 32 CARDOZO L. REV. 2055 (2011) (arguing that in light of the Court's previous practice, *Smith* was not revolutionary).

4. Because the Court feared that it would be "courting anarchy" if every law that burdened religion were subject to strict scrutiny, *Smith*, 494 U.S. at 888, the majority determined that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'" *Id*. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)). In so holding, the Court allowed the State of Oregon to enforce its "across-the-board criminal prohibition" of peyote against members of the Native American Church who ingested it as a sacrament. *Id*. at 884, 874. *Cf.* Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595 (2018) (arguing that Justice Scalia's anarchy concern has been empirically disproven).

5. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 541 (1993).

6. Indeed, one could not only say that *Smith* does not provide clarity, but confusingly suggests at least two primary interpretations of general applicability: one that is narrow and one that is broad, which I discuss at greater length below. On the one hand, *Smith*'s very example of a neutral and generally applicable law was of an "*across-the-board* criminal prohibition." 494 U.S. at 884 (emphasis added). Yet on the other hand, *Smith*'s example of a non-neutral, non-generally applicable law was of singling out religion. *Id*. at 877–78.

7. *See, e.g.*, Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71, 72 & 71 n.3 (2001).

8. The paradigmatic example of such discrimination is the Florida regulations that were at issue in *Lukumi*, 508 U.S. at 524. In *Lukumi*, the City of Hialeah outlawed animal slaughter, but its rule was riddled with exceptions, including for hunting and slaughter for food. The exceptions were so extensive—aside from for a certain type of religious slaughter—that the Court (correctly) concluded

only in the rare circumstance where religion is not just treated differently from some secular activities but is treated differently from *all* (or at least nearly all) secular activities.[9] Only extreme disparate application suggests that a law was gerrymandered with religious practice in mind.[10]

The other interpretation of *Smith*'s general applicability test is that it is a variant of the disparate impact test.[11] On this broad view, the general applicability test requires that religious interests be treated as well as virtually all secular interests. The animating rationale of this view is that legislatures should "not place a higher value on some well-connected secular interest group with no particular constitutional claim than [they] place[] on the free exercise of religion."[12] Thus, under this approach, identifying almost any secular exemption will give rise to a constitutional right to a religious exemption.[13]

Some who hold this view like to add that the general applicability test only fails when an exception for a secular activity or entity undermines the purported governmental *purpose* for the rule.[14] But it is hard to see how tacking on the

---

that the exemption scheme suggested that animosity toward religion, rather than other purported interests, was the law's true objective.

9. *See, e.g.*, Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77, 114 (2000) (arguing that the law must be "so dramatically underinclusive that religious conduct is virtually the only conduct to which the law applies"); Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith*,* Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 876 (2001) (the "degree of underinclusion [must] appear to be substantial").

10. *See, e.g.*, *Lukumi*, 508 U.S. at 542 ("The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings. . . .").

11. Disparate impact can be found when a seemingly neutral law affects one group differently than it does others. An example of disparate impact is when all applicants are required to take a single test, but the results of the test practically eliminate an entire group of minority applicants. *See* Lewis v. City of Chicago, 560 U.S. 205 (2010) (written test required by city for firefighter jobs had disparate impact on African American applicants).

12. Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 35 (2000).

13. *See, e.g.*, *id.* at 28. Perhaps ironically, granting general applicability a broad meaning along these lines is not meaningfully different from overturning *Smith* since practically every law has at least one exception for a secular entity or activity. *See* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1540 (1999); Zalman Rothschild, *Free Exercise in a Pandemic*, 87 U. CHI. L. REV. ONLINE (June 2020). In fact, the broad interpretation goes *further* than overturning *Smith*. Under *Smith*, the free exercise claimant must prove that the law at issue substantially burdens her religious practice. But not so if one argues the government discriminates against religion under *Smith*'s general applicability rule. Further, under *Smith*, after triggering the First Amendment, courts move on to applying heightened scrutiny. But under a broad general applicability test, strict scrutiny would almost always fail—how can a discriminatory, underinclusive exemption scheme be narrowly tailored?—and likely would not be undertaken in the first place.

14. *See, e.g.*, Douglas Laycock & Steven T. Collins, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 10–11, 21–23 (2016) (discussing *Lukumi* and related cases). This was the view of then-Judge Alito in Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999). At issue in *Fraternal Order* was a Newark Police Department policy prohibiting police officers from wearing beards. The policy included exceptions for medical reasons and for undercover officers but did not include an exemption for religious reasons. Reasoning

words "undermining the governmental purpose" is additive to the broad view of general applicability. It is in the nature of nearly every exception to "undermine" the purpose of the rule to which it is an exception to some degree,[15] and comparisons of the "degrees" to which various exceptions undermine a state's underlying purpose—as evidenced by COVID-19-related free exercise cases—are hardly workable in practice.[16] Virtually every entity and activity will be both similar and dissimilar to other entities and activities depending on the level of generality at which one analyzes them, resulting in the possibility that almost any secular exception can give rise to a constitutional right to a religious exception.

One might argue that courts often must make difficult judgment calls based on the facts presented to them to determine, for example, whether disparate impact is suggestive of purposeful discrimination, and that doing so with respect to religious discrimination is no different. But courts in other contexts have tools

---

that "the medical exemption raises concern because it indicates that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not," then-Judge Alito wrote for the court that the policy was not generally applicable and therefore triggered strict scrutiny. On this view, if the state is willing to undermine the purpose for which it enacted the law at issue by extending an exception for a secular activity, it demonstrates an undervaluation of religion when it does not also include a carve-out for religious activity. Unless one understands undervaluation to be the same as *intentional* discrimination—which would be hard to justify since the former is implicated even when government extends just a single exception, which certainly cannot be said to constitute deliberate discrimination against the potentially myriad entities and activities *not* extended exceptions—this view ultimately sees general applicability as a disparate impact test, though couched in different terminology. Although there may be no indication of deliberate discrimination against religion, religious entities should not be impacted differently than secular entities that receive special carve-outs.

15. COVID-19-related secular exceptions are a case in point. The objective of stay-at-home orders is curtailing the spread of COVID-19. Allowing individuals to shop at grocery stores will increase the chances of people contracting COVID-19. So, even an example of an exception for an entity that for many reasons is clearly not similar to church gatherings—people sit together in churches whereas they can move in and out of grocery stores quickly, and grocery stores can be necessary for survival whereas church gatherings once a week are not—is similar to church gatherings with respect to the purpose underlying the governmental order at issue, i.e., curtailing the spread of the virus. This means that practically *any* exception to a state's stay-at-home order will, on some level, necessarily undermine the order's purpose. And street protests and religious gatherings, which seemingly have much in common, can be differentiated on countless grounds, including—to list just several examples—that street protests occur outdoors, that it would be harder to regulate protests than it would to be regulate religious gatherings, and that protests involve other First Amendment rights such as free speech and free assembly.

Support for my argument that comparisons in the context of religious discrimination are not only extremely difficult but also do not rest on objective metrics comes from the wide disparity of decisions by lower courts—and the split between Roberts and Kavanaugh in *South Bay United*, *see infra* Part II—in the recent COVID-19-related free exercise cases. In the absence of objective metrics, it is perhaps not surprising that judges' decisions in these cases have broken down along political lines. To the best of my knowledge, so far, every judge to have sided with a church was nominated by a republican president, and virtually every judge to have sided with the state was nominated by a democratic president. *Compare, e.g.*, Berean Baptist Church v. Cooper, No. 4:20-CV-81-D, 2020 WL 2514313, at *2 (E.D.N.C. May 16, 2020) *with* Spell v. Edwards, No. CV 20-00282-BAJ-EWD, 2020 WL 2509078, at *2 (M.D. La. May 15, 2020).

16. *See infra* Part II.

at their disposal to assist with adjudication. In the employment context, for instance, courts may avail themselves of the *McDonnell Douglas* tripartite burden-shifting framework for Title VII disparate treatment claims, whereby a claim of discrimination can be made out by satisfying a series of prongs, including that an employer's explanation for its allegedly discriminatory treatment was pretextual.[17] And drawing comparisons in the employment context is easier. Courts ask whether two people—one in a protected class and one not—were treated dissimilarly despite having the same position and qualifications. But in the context of assessing whether religion has been discriminated against among a scheme of exceptions, courts often must compare widely different entities and activities; they do not have the advantage of a specific workplace context that brings the two comparators into the kind of close proximity that makes comparisons—though still challenging—significantly more tenable.

Thus, while both interpretations of general applicability agree that *Smith* transformed free exercise into an equality right, they differ on the precise brand of equality that is required. According to the first view, general applicability only requires that religion not be treated worse than practically *all* secular activities under a given law—or, put differently, that religion not be singled out. According to the second view, general applicability demands that religion not be treated worse than almost *any* secular activity under the law—or, put differently, that religion be given special treatment vis-à-vis all secular interests that are not extended exceptions.[18]

The lack of clarity over how to interpret *Smith*'s general applicability test has framed a debate among scholars and judges alike. The debate, for example, played out in the decisions of a federal district court and the reviewing Ninth Circuit panel in *Stormans, Inc. v. Selecky*.[19] At issue in *Stormans* was a Washington regulation that required pharmacies to dispense Plan B emergency contraceptives upon request.[20] Some pharmacists objected on religious grounds and challenged the regulation under the Free Exercise Clause.[21] The district court held that because the regulation provided pharmacies with exemptions from the need to dispense the contraceptives for certain "logistical reasons," including if a pharmacy lacked necessary equipment or a medicine was out of stock,[22] it was discriminatory under *Smith*'s general applicability test for the state to not also provide an exemption for pharmacists who objected to dispensing Plan B on religious grounds.[23]

---

17. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

18. *See, e.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 49–50 (arguing that religious interests should receive a "favored nation status").

19. Stormans, Inc. v. Selecky, 524 F. Supp. 2d 1245 (W.D. Wash. 2007); Stormans, Inc. v. Selecky, 586 F.3d 1109 (9th Cir. 2009).

20. *Stormans*, 524 F. Supp. 2d at 1245.

21. *Id.* at 1253.

22. *Id.* at 1261–62.

23. *Id.* at 1262–63.

The Ninth Circuit disagreed: It reasoned that there was "no evidence that [the state regulators] pursued their interests *only* against conduct with a religious motivation" and accordingly reversed the district court.[24] The Ninth Circuit panel, in other words, interpreted *Smith*'s general applicability test narrowly as an extension of *Smith*'s neutrality rule, triggered only when exemptions for secular reasons are so extensive that the omission of an exemption for religious objectors can be understood only as purposeful discrimination against religion.[25]

II.
COVID-19 AND RELIGIOUS DISCRIMINATION

These two vastly different interpretations of *Smith*'s general applicability test have been thrown into further relief by courts' varied responses to religious challenges to COVID-19-related stay-at-home orders.

One example comes from a challenge to an executive order issued by the governor of North Carolina in the state's efforts to curtail the spread of the virus.[26] The governor issued an executive order forbidding "mass gatherings."[27] Exempt from the order's mass gatherings ban were "normal operations at airports, bus and train stations or stops, medical facilities, shopping malls, and shopping centers" as well as mass gatherings for "worship, or exercise of First Amendment rights."[28] The order, however, required that gatherings for religious purposes be conducted outdoors, unless it was "impossible" to do so, in which case indoor gatherings were permissible.[29] The state's rationale for applying its rule differently to religious gatherings was that while it is impossible for shopping malls to relocate to the outdoors, in most instances it is feasible for churches to conduct their services outdoors—a safer alternative to indoor gatherings.[30] In response to a challenge to the order, a federal district court in the Eastern District of North Carolina concluded that the Free Exercise Clause requires that churches receive the *same* unconditional exceptions secular entities receive regardless of the differences between them.[31] In other words, the court held that if people are permitted to gather in shopping centers but are not permitted to gather in churches, the lockdown order cannot be said to be generally applied in compliance with the Free Exercise Clause.

---

24. *Stormans*, 586 F.3d at 1134.

25. It should be noted that the First and Tenth Circuits share the Ninth Circuit's more narrow interpretation of general applicability. *See* Strout v. Albanese, 178 F.3d 57, 65 (1st Cir. 1999); Axson-Flynn v. Johnson, 356 F.3d 1277, 1298 (10th Cir. 2004).

26. *See* Berean Baptist Church v. Cooper, No. 4:20-CV-81-D, 2020 WL 2514313, at *1 (E.D.N.C. May 16, 2020).

27. *Id.*

28. *Id.* at 3.

29. *Id.* at 4.

30. *Id.* at 7.

31. *Id.* at 8.

By contrast, a Louisiana church challenged a state order that forbade large religious gatherings altogether by arguing that the order was discriminatory because similarly situated, secular businesses were permitted to remain open to crowds.[32] The state, for its part, argued that "the transient, in-and-out nature of consumer interaction with business, like those identified by the [church], are markedly different from the extended, more densely packed environments of churches, or from nonessential businesses that *have* been fully closed."[33] The court accepted the state's position and found there to be no religious discrimination.[34]

These contrasting responses are ultimately attributable to the lack of clarity surrounding the meaning of *Smith*'s general applicability test. The North Carolina district court found discrimination against religion under *Smith*, despite the state's explanation for the disparate application of its order, because religious practice was not extended the *same* exemption that some secular entities received, and even though there were countless secular entities that did not receive *any* exemption at all—such as schools, libraries, and museums. Meanwhile, the Louisiana district court did not find discrimination against religion despite a difference in application of the state's stay-at-home order because religious gatherings were not the only gatherings prohibited and the state had articulated a reasoned explanation for the divergence in its application of its order.

* * *

After numerous decisions by lower courts, the Supreme Court finally weighed in on the viability of a free exercise challenge to states' stay-at-home orders. In *South Bay United Pentecostal Church v. Newsom*,[35] the South Bay United Pentecostal Church asked the Court for emergency injunctive relief against California's stay-at-home order (in time to celebrate the holy day of Pentecost), which it argued unfairly discriminated against religion.[36] It grounded that allegation on the fact that California imposed an attendance cap on religious gatherings but allowed certain entities—including factories, offices, and restaurants—to fully reopen.[37] A fractured Court declined to interfere with California's regulation, denying the church's petition.[38]

---

32. Spell v. Edwards, No. CV 20-00282-BAJ-EWD, 2020 WL 2509078, at *3 (M.D. La. May 15, 2020). The church argued that the state's "orders are discriminatory and disparately applied because they permit other 'similarly situated non-religious business' such as 'big box retailers, groceries and hardware stores' to remain open to crowds larger than 10 people," while churches are categorically prohibited from having assemblies of more than ten people.

33. *Id.*

34. *Id.* at 4.

35. *See* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020).

36. *Id.*

37. *Id.*

38. *Id.*

Chief Justice Roberts explained his reasoning in a short concurrence. He began by noting that COVID-19 "has killed thousands of people in California and more than 100,000 nationwide" and that there is "no known cure, no effective treatment, and no vaccine."[39] Further, he added, people "may be infected but asymptomatic" and can easily and unwittingly infect others.[40] The purpose of California's stay-at-home order, the Chief Justice recognized, was "to address this extraordinary health emergency."[41] And the relief South Bay United Pentecostal Church sought—an order blocking the state from enforcing its restrictions on public gatherings—faced a particularly high bar. It had to be indisputably clear that the state's order violated the Constitution.[42] In Roberts's view, South Bay United Pentecostal Church could not meet that bar.[43]

According to Roberts, restrictions allowing churches to reopen at 25 percent of their capacity, with no more than 100 worshipers at a time, "appear[ed] consistent" with the First Amendment.[44] California, in Roberts's view, had an acceptable reason for treating churches more like concerts and movie theaters, where people "congregate in large groups" and "remain in close proximity for extended periods," than grocery stores, where they can more easily socially distance.[45] "The precise question of when restrictions on particular social activities should be lifted during the pandemic," Roberts further reasoned, "is a dynamic and fact-intensive matter subject to reasonable disagreement."[46] It is also a question that has been primarily delegated to local politicians. "That is especially true," Roberts explained, when the church is seeking emergency relief "while local officials are actively shaping their response to changing facts on the ground."[47]

Justice Kavanaugh dissented from the Court's order, as did Justices Alito, Gorsuch, and Thomas.[48] In a short dissenting opinion, Kavanaugh cited the supermarkets, restaurants, hair salons, and other businesses not subject to the same restrictions as churches and movie theaters. He then declared that the restriction on churches "discriminate[d] against places of worship and in favor of comparable secular businesses" in violation of the First Amendment.[49]

In their brief opinions, Roberts and Kavanaugh did not directly engage *Smith*'s general applicability test.[50] But the astute student of free exercise

39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* (citing S. SHAPIRO ET AL., SUPREME COURT PRACTICE § 17.4, 17–19 (11th ed. 2019)).
43. *Id.* at 1614.
44. *Id.* at 1613.
45. *Id.*
46. *Id.*
47. *Id.* at 1614.
48. *Id.* at 1614–15.
49. *Id.*
50. Despite the fact that the Ninth Circuit below did. *See* S. Bay United Pentecostal Church v. Newsom, 959 F.3d 938, 944 (9th Cir. 2020) (Collins, J., dissenting).

jurisprudence understands them to be debating just that. For both Justices, the central question was what to compare religious gatherings to. The appropriate comparators in Roberts's view were "lectures, concerts, movie showings, spectator sports, and theatrical performances"—the secular gatherings that were *not* exempted—on the reasoning that, like religious gatherings at churches, they involve "large groups of people gather[ing] in close proximity for extended periods of time."[51] By contrast, "grocery stores, banks, and laundromats"—those entities that had been extended exemptions—differ from churches in that they are not places in which people "congregate in large groups" and "remain in close proximity for extended periods."[52] For Kavanaugh, meanwhile, the apt comparison was to consider churches alongside "supermarkets, restaurants, [and] hair salons," where numerous patrons sometimes gather and remain for long periods of time and which were extended exemptions under California's order.[53]

But the meaning of "similarly situated" is in the eye of the beholder. Church gatherings can be compared to both lecture halls and restaurants, as demonstrated by the divergent opinions of the concurrence and dissent.[54] If the test of what constitutes religious discrimination boils down to the relative similarity between a secular activity that has received an exemption and a religious activity that has not, it is no test at all.[55]

Thus, a "similarity test" cannot be what was doing the most significant work in Roberts and Kavanaugh's dueling opinions. Rather, the real constitutional question they grappled with was whether it could be said that California was discriminating against religion by having different standards for church gatherings and certain secular gatherings. In other words, was

51. *S. Bay United*, 140 S. Ct. at 1613.

52. *Id.*

53. *Id.* at 1614.

54. *Cf.* Linda Greenhouse, *The Supreme Court, Too, Is on the Brink*, N.Y. TIMES (June 4, 2020), https://www.nytimes.com/2020/06/04/opinion/supreme-court-religion-coronavirus.html [https://perma.cc/HQ5T-WE5M]. Greenhouse argues that it is "obvious" that churches are radically different from the secular entities exempted under California's order. "Sitting in communal worship for an hour or more is not like picking up a prescription, or a pizza, or an ounce of marijuana. You don't need a degree in either law or public health to figure that out." But Greenhouse cherry picks the exemptions she sees as obviously different. As compared to pharmacies, Greenhouse is correct that churches are drastically different. One does not typically linger in a pharmacy, whereas the entire point of congregations is to congregate for extended time. But pharmacies, take-out restaurants, and cannabis dispensaries were not the only secular entities that were granted an exception from California's order. Office spaces, shopping malls, pet grooming shops, bookstores, florists, hair salons, and sit-down restaurants—spaces where people often do "linger"—were also exempt from the prohibition. Further, although surprisingly not mentioned by Kavanaugh in his dissent but certainly made known to him and to Roberts from the petitioner's application for emergency relief and from the parties' briefs filed in the Ninth Circuit, California also exempted schools, which are even more analogous to churches. *See* Emergency Application for Writ of Injunction Relief at 3, 7, S. Bay United Pentecostal Church v. Newsom (S. Ct. May 24, 2020) (No. 19A1044); Appellants' Opening Brief at 13–14, S. Bay United Pentecostal Church v. Newsom, 959 F.3d 938 (9th Cir. 2020) (No. 20-5533).

55. *See supra* note 15.

California's order generally applicable? Roberts espoused the view that churches were not discriminated against because they were not singled out (considering the various secular entities that also did *not* receive exemptions from the stay-at-home order), while Kavanaugh proclaimed that the church was discriminated against because some secular entities *did* receive an exemption. According to Kavanaugh, religion must always be treated *as well as* the most favored secular interest in society. Under Kavanaugh's view, if there are any exceptions to California's order—even if they are for dissimilar establishments, like restaurants—an exception must be provided for churches, too. According to Roberts, by contrast, so long as it is not clear that religion has been singled out, there is no free exercise violation.

This would suggest that in *South Bay United* Roberts has staked his ground in the debate over the correct meaning of general applicability. But, at least on first glance, one cannot ignore the unique context in which Roberts's exceptionally short opinion arose: an emergency petition for the Supreme Court to intervene with a state order in response to a national emergency. Clarity from the Supreme Court on the meaning of general applicability will have to wait for another day.

III.
THE FUTURE OF RELIGIOUS DISCRIMINATION

That day might well arrive soon enough. Perhaps ironically, after decades of dodging the question, the Supreme Court agreed to review a case that may finally put confusion over the meaning of "general applicability" under *Smith* to rest.

Just weeks after the first report of a COVID-19 infection in the United States, the Court granted certiorari in *Fulton v. City of Philadelphia*.[56] In *Fulton*, a Catholic adoption agency challenges the City of Philadelphia for refusing to channel foster children to it after the agency confirmed it would not match children with gay couples. The agency argues that the city's refusal to permit the adoption agency to place children constitutes discrimination against religion.[57] More specifically, the agency argues that despite Philadelphia's antidiscrimination laws, the city expressly permits agencies to consider various factors—including religious, economic, and racial considerations—when determining the placement for a child.[58] If adoption agencies may take these various factors into consideration in service of the "best interests" of the child, the agency contends, then prohibiting a Catholic agency from considering the sexual orientation of potential adopting couples in the name of "religious belief"

56. *See* Fulton v. City of Philadelphia, 140 S. Ct. 1104 (2020).

57. Brief for Petitioners at 23–30, Fulton v. City of Philadelphia, 2020 WL 2836494 (S. Ct. May 1, 2020) (No. 19-123).

58. *Id.* at 28.

is discriminatory.[59] In other words, according to the agency, if a city provides any exceptions to a general rule, it must provide exceptions to that rule for all religious entities as well no matter the state's reasons for the differences.[60] To not do so, the agency argues, constitutes religious discrimination under *Smith*'s general applicability test.

In *Fulton* the Court will be presented with a choice. To be clear, one choice available to the Court will be to resolve the case on other grounds entirely, as the parties have presented the Court with a variety of claims.[61] But if the Court decides to engage with the general applicability of the policy in *Fulton*, it will have to choose either to overturn *Smith* (along with its general applicability test) altogether or to confine itself to clarifying the meaning and scope of "generally applicable." While four Justices recently indicated their eagerness to "revisit" *Smith*,[62] which has been interpreted as a desire to overturn it,[63] Roberts likely holds the swing vote that would be necessary to do so,[64] and it is doubtful he will

59. *Id.*

60. The City of Philadelphia has provided reasons for the differences, including most obviously that factoring an adoptive couple's religious, economic, or racial status when assessing the best match between couple and child does not send a discriminatory message whereas categorically refusing to work with gay couples does. *See* City Respondents' Brief in Opposition at 24, Fulton v. City of Philadelphia, 2019 WL 5189127 (S. Ct. Oct. 10, 2019) (No. 19-123).

61. The plaintiff in *Fulton* comes armed with more claims than just the two outlined here, including that the government displayed animus towards it—constituting explicit intentional religious discrimination not dissimilar from the discrimination that was found in Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018)—and that the government's "exemptions" to its antidiscrimination scheme operated under an "individualized exemptions" regime which, as per *Smith*, implicates the Free Exercise Clause. The Court may choose to confine its holding to a finding of constitutional infringement on either of these two fact-heavy bases without reaching the more impactful doctrinal question of general applicability's meaning. Yet these other claims seem weak. And if the Court does not find for the plaintiff on one of these two other bases, it will have to decide either *Smith*'s fate or the meaning of *Smith*'s general applicability test. (Perhaps ironically, these are not vastly different propositions. As I mentioned above, to give general applicability a broad meaning is not meaningfully different from overturning *Smith* since practically every law has at least one exception for a secular entity or activity. *See* Rothschild, *supra* note 13.) Nonetheless, only once the Court issues its decision will we know for certain whether that decision will be narrow (e.g., similar to *Masterpiece Cakeshop*) or broad (deciding the meaning of general applicability).

62. *See* Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (Alito, J., concurring) (lamenting the fact that the Court had "not been asked to revisit" *Smith* which "drastically cut back on the protection provided by the Free Exercise Clause"). Notably, Justices Thomas, Gorsuch, and Kavanaugh, all of whom signed onto Justice Alito's concurrence, also dissented from the Court's denial of the South Bay Church's petition for emergency relief.

63. *See, e.g.*, Stephanie Barclay, Richard Katskee, & Jeffrey Rosen, *Football, Faith, and the First Amendment*, WE THE PEOPLE (Jan. 31, 2019), https://constitutioncenter.org/interactive-constitution/podcast/football-faith-and-the-first-amendment [https://perma.cc/73XG-BF94] ("Justice Alito also suggested that he and some of his colleagues may be willing to overturn *Employment Division v. Smith* in order to bolster free exercise and religious exemption claims under the First Amendment.").

64. *See, e.g.*, Adam Winkler, *John Roberts May Not Be the Ally Gun-Rights Advocates Hoped For*, THE ATLANTIC (June 16, 2020), https://www.theatlantic.com/ideas/archive/2020/06/court-not-ally-gun-rights-advocates-wanted-it-be/613105 [https://perma.cc/UBR6-QGK2] (describing Roberts as the swing voter for Second Amendment cases).

be willing to deviate from *stare decisis*.[65] More likely, the Court will stick with providing much-needed clarification on what general applicability under *Smith* means. If the Court assesses the soundness of adopting either a narrow or a wide-sweeping interpretation of general applicability along the lines of the foregoing discussion, it will have a significant number of new cases from across the country, spanning a wide spectrum of contexts, to look to for insight. But given that he likely possesses the decisive swing vote, the most important insight will come from Roberts's concurrence in *South Bay United*.

Roberts may very well consider himself bound by his opinion in *South Bay United*.[66] In *South Bay United*, Roberts can be viewed as having made a constitutional choice between a narrow and broad definition of religious discrimination. Roberts's analysis in his concurring opinion rests on the narrow interpretation of general applicability—that it is derivative of discriminatory purpose, serving as a mechanism for smoking it out. Because, according to Roberts, "[s]imilar . . . restrictions apply to comparable secular interests,"[67] religion had not been unfairly singled out, and therefore any disparate treatment was not suggestive of discriminatory intent. If religion must be treated as well as the most favored secular interest—i.e., the broad interpretation of general applicability adopted by Kavanaugh—then pointing to the many secular entities similar to churches that were *not* exempt would not matter one iota. Roberts's emphasis on this comparative observation drives home that religion could not have been purposefully singled out, and therefore California's stay-at-home order were generally applicable.

To be sure, one can argue that *South Bay United* is unique and not analogous to *Fulton*—or to other more run-of-the-mill religious discrimination cases—given the public health emergency backdrop against which the challenged state decision was made, which arguably called for more deference.[68]

---

65. *See, e.g.*, Jonathan H. Adler, *The Stare Decisis Court?*, THE VOLOKH CONSPIRACY (July 8, 2018), https://reason.com/volokh/2018/07/08/the-stare-decisis-court [https://perma.cc/2UWV-H4AD] (examining empirical data and concluding that the Roberts Court has, overall, been reluctant to overturn precedent).

66. Or, at the very least, he *should* consider himself bound. *See, e.g.*, JEROME HALL, FOUNDATIONS OF JURISPRUDENCE 68 (1973) ("Since it is highly improbable that [the legal theorist, Hans Kelsen] means to assert that judges are always consistent, his theory is ethically normative in implying that judges should be consistent.").

67. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020).

68. One can additionally argue that under *Jacobson v. Commonwealth of Massachusetts*—a case that has received much publicity during the COVID-19 pandemic—the government clearly may restrain individual liberties "by reasonable regulations, as the safety of the general public may demand." 197 U.S. 11, 29 (1905). However, *Jacobson* did not involve free exercise but rather a substantive due process challenge. And, as several courts have held, it does not control free exercise cases even in the wake of an epidemic. *See, e.g.*, Phillips v. City of New York, 775 F.3d 538, 543 (2d Cir. 2015) (reasoning that *Jacobson* does not control plaintiffs' free exercise claim because, at the time *Jacobson* was decided, the Free Exercise Clause was not binding on the states). *But see* In re Abbot, 954 F.3d 772, 786 (5th Cir. 2020) ("*Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency.").

But Roberts's choice in adopting the narrower interpretation of general applicability is not one he will be able to easily walk back. While it may be tempting to interpret Roberts's opinion as a narrow holding limited to the facts and circumstances presented by COVID-19, the persisting logic of Roberts's chosen approach to general applicability may compel him to apply it more broadly.[69]

If free exercise translates into a prohibition against governmental religious discrimination, and religious discrimination translates into a mandate that religious interests be treated as well as all secular interests—this being the broad interpretation of general applicability adopted by Kavanaugh in *South Bay United* and likely to be adopted by the remaining members of the Court's conservative bloc—then it only makes sense that this constitutional rule should apply uniformly. And vice versa. If religious discrimination under the Free Exercise Clause merely translates into a prohibition against singling out religion, that meaning of the First Amendment should be applied consistently, to both government decisions in the context of state emergency-health orders and in the context of state antidiscrimination laws.

Roberts may take from his opinion in *South Bay United* and the numerous COVID-19-related church challenges to stay-at-home orders that a broad interpretation of religious discrimination (i.e., that religious discrimination occurs every time the government does not treat religion as well as all secular interests) has unworkable consequences. The pandemic may have underscored how challenging it would be for states if they are not afforded latitude to restrict activities deemed harmful to broader society for fear that their restrictions will be struck down as discrimination against religion. If so, perhaps the pandemic served as the tipping point for Roberts with respect to the three-decades-old debate over whether *Smith* was rightly decided.[70] His concurring opinion in *South Bay United* could well be an indication that he has come to appreciate

69. While it is true that Roberts emphasized the "expertise" needed in a pandemic to adjudicate between different types of activities and entities when applying stay-at-home orders, state decisions pertaining to how it applies its antidiscrimination laws—for example, determining what constitutes LGBTQ discrimination and what doesn't, which can hinge on social science assessments of what causes people to feel shut out by society and what doesn't—also rest on expertise. *See, e.g.*, Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1952 (2006) ("[I]t has become increasingly clear that the legislature amending Title VII in 1972 correctly identified employment discrimination as a complex phenomenon whose identification and resolution requires expertise."). And conversely, states often pass legislation pertaining to public health; they do not get a pass whenever they waive the wand of "public health," and nor should they. *See, e.g.*, Cent. Rabbinical Congress of U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene, 763 F.3d 183 (2d Cir. 2014) (holding that strict scrutiny applies under the Free Exercise Clause to health regulations targeting *metzitzah b'peh*, a Jewish Orthodox ritual during circumcision that involves sucking a tiny amount of blood from the infants just-circumcised penis).

70. *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990).

Smith's consequentialism—that if free exercise is given too broad an interpretation, "government could not work."[71]

Ultimately, *Fulton* will present the Court with the option of adopting the narrow or expansive interpretation of religious discrimination. But whether it does or does not choose to address the lingering question of general applicability's meaning in *Fulton*, it will surely have to face it eventually. The answer—whenever it comes—will have far-reaching implications for the future of free exercise.[72]

71. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 885 (1990) ("To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself,'—contradicts both constitutional tradition and common sense." (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)); *id.* at 888 ("we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order"). *See also* Nikolas Bowie, *The Government-Could-Not-Work Doctrine*, 105 VA. L. REV. 1, 28 (2019). This would suggest a change of heart—or, put differently, a lesson learned—for Roberts. Just several years ago, by signing onto Justice Alito's dissent from the Court's denial of certiorari in *Stormans*, he insinuated he was not concerned about the consequences of a broad interpretation of free exercise. *See* Stormans, Inc. v. Wiesman, 136 S. Ct. 2433 (2016) (Alito, J., dissenting).

72. To list one example, just weeks after the Court handed down its order in *South Bay United*, it issued a landmark decision changing the future of antidiscrimination employment law for LGBTQ employees by extending them protections under Title VII. *See* Bostock v. Clayton Cty., 140 S. Ct. 1731, 1737 (2020). But if the Court adopts a broad interpretation of general applicability in *Fulton*, *Bostock* will mostly have been for naught. Employers' objections to having LGBTQ employees are often connected to their religious beliefs. And Title VII has several exceptions, including, for example, the bona fide occupational qualification exception for disparate treatment, *see* 42 U.S.C. § 2000e-2(e) (2018), and the exception for employment decisions that are tied to a "business necessity" for disparate impact. *See id.* § 2000e-2(k)(1)(A)-(B). If the Court in *Fulton* determines that any exception for a secular interest necessitates under the Free Exercise Clause exceptions for all religious interests, too, then that ruling would presumably apply to Title VII just as it applies to Philadelphia's antidiscrimination policy.