Constitutional Intolerance to Religious Gerrymandering

Jonathan J. Kim and Eugene Temchenko

Can the government pass a law criminalizing consumption of alcohol everywhere except at bars, hotels, clubs, restaurants and private homes? In practice, the law would ban sacramental consumption of alcohol. Yet surprisingly, in many circuits this law would not offend the First Amendment. There is a four-way circuit split on how to treat explicit and implicit secular exemptions under Employment Division v. Smith *and* Church of the Lukumi Babalu Aye, Inc. v. Hialeah. *Some circuits disregard all exemptions so long as there is no evidence of discriminatory intent. Other circuits apply strict scrutiny to every law that contains a single secular exemption. But application of strict scrutiny in free exercise context rarely results in a victory for the religious group. A series of cases significantly watered down strict scrutiny in the free exercise clause context, leaving religious individuals without a constitutional right to free exercise of religion. The purpose of this Article is to address these two related issues: first, when do exemptions warrant scrutiny; and second, when do laws fail scrutiny? The Article argues that a law warrants scrutiny when it exempts secular conduct that undermines the objective of the law to the same extent as a religious exemption would. A law fails scrutiny, in turn, when the compelling government interest and the harm to third-parties does not outweigh the harm the law causes to a religious individual. The right to Free Exercise deserves greater protection. It is a right by which people express a core part of their identities.*

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I. INTRODUCTION

Think of a law that appears neutral, but gerrymanders to create unequal effect—voter identification laws, which are neutral and common but disproportionately affect minorities.[1] You can also imagine such a gerrymandered law: a law prohibiting everyone from expressing a controversial view, except members of the Green Party. Regardless of whether these laws are constitutional,[2] this has not deterred scholars and activists from challenging lawful laws as unfair.[3] Unfortunately, many activists overlook the same kind of injustice when religion is involved. Suppose a law prohibits religious

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I give my thanks to God Almighty for his unending grace and blessings for my study would not have been possible without His grace. I also give thanks to my loving family and friends for their extraordinary support. Last, but not least, many thanks to Professor Michael C. Dorf at Cornell Law School, for his support, guidance, and valuable comments and suggestions.

[‡] A litigator with a deep conviction that the U.S. Constitution should protect core aspects of our identities. As the title of this piece makes clear, I do not believe it currently does. I received my J.D. from Cornell Law School in 2018 and my B.A. in Political Science and Philosophy from Boston University in 2015. Many thanks to my family for their unending support and to the members of *Connecticut Public Interest Law Journal* for their hard work. Many thanks to Cornell Law School Professor Nelson Tebbe, whose feedback was invaluable to the drafting of this article.

[1] Zoltan L. Hajnal, Nazita Lajevardi & Lindsay Nielson, *Do Voter Identification Laws Suppress Minority Voting? Yes. We Did the Research*., WASH. POST (Feb. 15, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/15/do-voter-identification-laws-suppress-minority-voting-yes-we-did-the-research/?noredirect=on&utm_term=.37deefeb6663.

[2] Whereas the law inhibiting speech is plainly unconstitutional as viewpoint discrimination, *see* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393 (1993); many voter identification laws are likely constitutional under current jurisprudence, *see generally* Washington v. Davis, 426 U.S. 229 (1976) (holding as constitutional laws that have racially discriminatory effect but not discriminatory intent).

[3] *See, e.g.*, Aziz Z. Huq, *Judging Discriminatory Intent*, 103 CORNELL L. REV. (forthcoming 2018); Jamal Hagler, *8 Facts You Should Know About the Criminal Justice System and People of Color*, CTR. FOR AM. PROGRESS (May 28, 2018, 12:01 AM), https://www.americanprogress.org/issues/race/news/2015/05/28/113436/8-facts-you-should-know-about-the-criminal-justice-system-and-people-of-color/.

practice in the same gerrymandered way—i.e., it prohibits consumption of all liquor on Sundays, except for non-ceremonial purpose. This kind of law would prohibit sacramental consumption of wine and would prohibit a central aspect of certain religions while permitting non-religious consumption. Is such a law constitutional? Many circuits would say it is.

The right to exercise one's religion free from government interference is enshrined in the Constitution. "Congress shall make no law . . . prohibiting the free exercise" of religion.[4] Just as the plain language of the Constitution binds the federal government, the same amendment guarantees free exercise from State intrusion via the Fourteenth Amendment.[5] The scope of the protections afforded by this clause waxed and waned as history marched on. The Founding Fathers were divided on whether the right to religious liberty encompassed the right to practice or merely the right to hold a belief.[6] The debate continued in state courts of the young republic. The Mayor's Court of New York refused to force Catholic clergy to reveal the substance of a confession in response to a subpoena.[7] The Supreme Court of Pennsylvania disagreed, observing that all members of civil society, "lay or secular, temporal or spiritual," tacitly consent to obey the law.[8] When the debate finally reached the U.S. Supreme

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[4] U.S. CONST. amend. I.

[5] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[6] Thomas Jefferson, for example, viewed religious liberty as a right to hold an opinion free from government punishment for that opinion. Thomas Jefferson, *A Bill for Establishing Religious Freedom, 18 June 1779*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082 (last updated Feb. 1, 2018) ("We the General Assembly of Virginia do enact that no man shall be compelled to frequent or support any religious worship . . . nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or beliefs; but that all men shall be free to profess, and by argument to maintain, their opinions in matter of religion."). Jefferson did not, however, support civic disobedience to laws that conflicted with religious liberty. Jefferson was an avid reader of John Locke's work, who, in turn, argued that an individual should not be exempted from law because of conflict with his or her religious beliefs. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1430–31 (1990). Locke wrote, "The private judgment of any person concerning a law enacted in political matters, for the public good, does not take away the obligation of that law, nor deserve a dispensation." John Locke, *A Letter Concerning Toleration*, *in* THE SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 113, 143 (Dover Thrift, 2002). To Locke and Jefferson, then, the right to free exercise meant the right to believe but not publicly practice. *See* McConnell, *supra* note 6, at 1446. Other Founding Fathers disagreed; to them, religious liberty meant more than toleration of ideas and necessarily involved practice. "Toleration is not the *opposite* of intolerance, but it is *counterfeit* of it. Both are despotisms. The one assumes to itself the right of withholding liberty of conscience, and the other of granting it." Thomas Paine, *The Rights of Man, pt. 1*, *in* 1 THE COMPLETE WRITINGS OF THOMAS PAINE 243, 291 (P. Foner ed. 1945).

[7] People v. Philips, *reprinted in* WILLIAM SAMPSON, THE CATHOLIC QUESTION IN AMERICA 8–9, 112–14 (1813). The clergy argued that he could not obey the subpoena for "were [he] to act otherwise, [he] should become a traitor . . . to my God." *Id.*

[8] Philips v. Gratz, 2 Pen. & W. 412, 417 (Penn. 1831).

Court in 1878, the Court was hardly sympathetic. The Court held that free exercise clause did not prohibit the government from criminalizing religious *practice* so long as it did not prohibit *belief* or *opinion*.[9]

Religious liberty began to expand in the twentieth century to include freedom to practice. The Court held that states could not criminalize peaceable pamphleteering by Jehovah witnesses.[10] A state could not, consistent with the First Amendment, impose a tax on the exercise of religion.[11] An ordinance prohibiting church sermons in the park was likewise unconstitutional.[12] The Court went so far as to hold that whenever the government imposes a burden on religious practice, even incidentally, it must justify the burden with a compelling government interest.[13] The rights of individuals to exercise their faith was balanced with government interests. Regardless of how "neutral [a regulation may be] on its face," if "it unduly burdens the free exercise of religion," then it would be unconstitutional.[14]

Then the Court issued *Employment Division v. Smith*,[15] fundamentally altering the free exercise clause jurisprudence.[16] The Court held that the free exercise clause does "not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability,'" and that the state need not justify burdens imposed by such laws.[17] Confusion and alarm followed the decisions. "Congress and thirty-three states have rejected the *Smith* standard, either by enacting the Religious Freedom Restorations Acts (RFRAs) or by interpreting state constitutions to subject neutral and generally applicable laws that burden religious exercise to heightened judicially

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[9] Reynolds v. United States, 98 U.S. 145, 166 (1878).

[10] *Cantwell*, 310 U.S. at 301, 303–04, 306.

[11] Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943). In *Murdock*, Pennsylvania attempted to tax pamphleteering, which imposed a burden on Jehovah witnesses' religious practice. *Id.* Jehovah witnesses testified that they must follow the example of St. Paul—i.e., to teach "publickly, and from house to house." *Id.* (quoting *Acts* 20:20 (King James)). The Court substantially diminished the effect of this decision in *Jimmy Swaggart Ministries v. Board of Equalization of California*, when it held that a neutral tax may be imposed on religious practice. 493 U.S. 378, 386–87 (1990).

[12] Fowler v. Rhode Island, 345 U.S. 67, 67–70 (1953).

[13] Sherbert v. Verner, 374 U.S. 398, 407–08 (1963).

[14] Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

[15] 494 U.S. 872 (1990).

[16] *See generally, e.g.*, Janet V. Rugg & Andria A. Simone, *The Free Exercise Clause:* Employment Division v. Smith*'s Inexplicable Departure from the Strict Scrutiny Standard*, 6 ST. JOHN'S J. LEGAL COMMENT. 117 (1990) (asserting that *Employment Division v. Smith* was a major and harmful departure from precedent).

[17] *Smith*, 494 U.S. at 879 (quoting United States v. Lee, 455 252, 263 n.3 (1982) (Stevens, J., concurring)).

scrutiny."[18] Justice Sandra O'Connor criticized the majority for giving "a strained reading of the First Amendment" and for "disregard[ing]" precedent.[19] Even those who support *Smith* agreed that the opinion "is neither persuasive nor well-crafted. It exhibits only a shallow understanding of free exercise jurisprudence and its use of precedent borders on fiction."[20]

Applying *Smith* likewise proved contentious. The *Smith* Court recognized three instances where a law would warrant strict scrutiny: (1) if it was not neutral; (2) if it was not generally applicable; or (3) if it implicated "hybrid rights."[21] The Court attempted to clarify the meaning of neutrality in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, but the case presented an extreme instance of anti-religious animus, where a city ordinance was carefully crafted with the intent of prohibiting animal sacrifice by an Afro-Caribbean religion Santeria.[22] The Court held that the ordinances were not neutral and that, therefore, strict scrutiny applied.[23] Yet the extraordinary facts of the case led some to conclude "that *Smith* states the broad general rule, and *Lukumi* states a narrow exception."[24] Similarly, much ink has been spilled over the meaning of the "hybrid rights" exception and the different treatment the circuits afford to the exception.[25]

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[18] Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 3 (2016) (citing other sources). The Supreme Court limited the application of federal RFRA in *City of Boerne v. Flores*, holding that it could not constitutionally apply to the states. *See* 521 U.S. 507, 532–36 (1997).

[19] *Smith*, 494 U.S. at 892 (O'Connor, J., concurring). As Douglas Laycock pointed out, Justice Antonin Scalia was perfectly inconsistent with his decisions. *See* Douglas Laycock, *The Remnant of Free Exercise*, 1990 SUP. CT. REV. 1, 3. In 1989, Justice Scalia stated:

> In such cases as *Sherbert v. Verner*, *Wisconsin v. Yoder*, *Thomas v. Review Bd. of Indiana Employment Security Div.*, and *Hobbie v. Unemployment Appeals Comm'n of Fla.*, we held that the free exercise clause of the First Amendment *required* religious beliefs to be accommodated by granting religion-specific exemptions from otherwise applicable laws.

Id. (quoting Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 38 (1989) (Scalia, J., dissenting) (emphasis in original) (citations omitted)). In *Smith*, however, Justice Scalia claimed, "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* (quoting *Smith*, 494 U.S. at 878–79).

[20] William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 308–09 (1991).

[21] *Smith*, 494 U.S. at 879, 882. "Hybrid situations, or hybrid rights claims, are claims that involve alleged violations of the Free Exercise Clause and some other 'constitutional protection[].'" Ryan S. Rummage, Note, *In Combination: Using Hybrid Rights to Expand Religious Liberty*, 64 EMORY L.J. 1175, 1179 (2015) (quoting *Smith*, 494 U.S. at 880–81).

[22] 508 U.S. 520 (1993).

[23] *Id.* at 543.

[24] Laycock & Collis, *supra* note 18, at 5.

[25] *See, e.g.*, Brietta R. Clark, *When Free Exercise Exemptions Undermine Religious Liberty and the Liberty of Conscience: A Case Study of the Catholic Hospital Conflict*, 82 OR. L. REV. 625, 653–55 (2003) (discussing the circuit split); Jack S. Vaitayanonta, Note, *In State Legislatures We Trust?: The "Compelling Interest" Presumption and Religious Free Exercise Challenges to State Civil Rights Laws*,

The circuit split on what amounts to general applicability, however, has garnered significantly less attention.[26] The objective of this Article is to address this gap in literature and argue for a resolution of the circuit split that adequately protects individuals' constitutional liberties. In Part I, the paper presents the circuit split. There is a four-way circuit split, with some circuits holding laws as not generally applicable when there is evidence of anti-religious animus, while others hold that a single secular exemption renders a law not generally applicable. Then in Part II, the Article proposes a resolution of the circuit split; namely, that a single secular exception does mean that a law is not generally applicable. Also in Part II, the Article explains why this approach best advances the goals of the Free Exercise clause, best serves the interests of our society, and is most congruent with Supreme Court precedent. Part III of the Article subsequently explains the proper standard for evaluating when a religious exemption to a law is required. Finally, Part IV addresses the potential criticism of this approach.

II. THE ELUSIVE MEANING OF A LAW OF GENERAL APPLICABILITY

The last time the Court addressed the free exercise clause under the *Smith* standard, it refused to "define with precision the standard used to evaluate whether a prohibition is of general application."[27] This created uncertainty: surely "a law that is not neutral will never be generally applicable," but must a law that is neutral necessarily be generally applicable?[28] There are four approaches to answering this question. On one side of the argument, four circuits—Sixth, Seventh, Eight, and Eleventh—hold that only non-neutral laws—those that evidence an intent to discriminate—violate the general applicability requirement. Second and Third Circuits adopted a polar opposite approach: even if a law is otherwise neutral, it is not generally applicable if it exempts even one secular entity that undermines government interest in the same way as a religious entity would. In

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101 COLUM. L. REV. 886, 903 n.59 (2001) (same); *see also* Rummage, *supra* note 21, 1179 (discussing the meaning of the hybrid rights exception).

[26] *See* Laycock & Collis, *supra* note 18, at 15, 27 (acknowledging the circuit split and arguing that exemptions render a law not generally applicable); James M. Oleske, Lukumi *at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare Laws*, 19 ANIMAL L. 295, 306–12 (2013) (acknowledging the different treatment and arguing that only discriminatory intent renders a law not generally applicable).

[27] *Lukumi*, 508 U.S. at 543.

[28] 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, 866 (2001).

the Ninth Circuit, a law is not generally applicable if there is discriminatory intent or the exemptions on the face of the law are unreasonable. One circuit, the Tenth Circuit, looks neither to discriminatory intent nor presence of exemptions; rather, a law is not generally applicable if it calls for routine, case-by-case determinations.

A. Law of the Sixth, Seventh, Eighth, and Eleventh Circuits: General Applicability as Absence of Neutrality.

The majority approach also tends to be the strictest. In these four circuits, the free exercise clause does not warrant strict scrutiny for any law that is neutral on its face. The Sixth Circuit decided the issue in *Michigan Catholic Conference and Catholic Family Services v. Burwell*, in regards to a challenge to the application of the Affordable Care Act (ACA).[29] One section of the ACA required employers to provide a group health plan,[30] which was interpreted by the relevant federal agencies to include insurance coverage for FDA approved contraceptives.[31] The appellants were Catholic entities and non-profits affiliated with the Catholic Church who could not, consistent with their religious beliefs, provide contraceptives.[32] In fact, providing contraceptives was antithetical to the Catholic Church's fundamental beliefs. The Catholic Church teaches that contraception is both sinful and unadvisable to a healthy relationship.[33] The Bible offers the following account:

> Judah said to Onan, "Sleep with your brother's wife and fulfill your duty to her as a brother-in-law to raise up offspring for your brother." But Onan knew that

[29] *See* 755 F.3d 372 (6th Cir. 2014), *rev'd*, 135 S. Ct. 1914 (2015) (remanding for a decision consistent with Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014)).

[30] 42 U.S.C. § 300gg-13 (2012).

[31] *See Mich. Catholic Conference*, 755 F.3d at 380–81 (citing 26 C.F.R. § 54.9815-2713A (2014); 29 C.F.R. § 2590.715-2713A (2014); 45 C.F.R. § 147.131 (2014)). The decision followed a report by the Institute of Medicine, which saw contraceptives coverage as a means to combat high unexpected and unintended pregnancy rates. *See* COMMITTEE ON PREVENTIVE SERVICES FOR WOMEN, CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 102 (2011), https://www.nap.edu/read/13181/chapter/7#102.

[32] *Mich. Catholic Conference*, 755 F.3d at 378.

[33] For a more detailed explanation of their position, see Robert H. Brom, *Birth Control*, CATHOLIC ANSWERS, https://www.catholic.com/tract/birth-control (last visited Oct. 13, 2018), and *Contraception*, BBC, http://www.bbc.co.uk/religion/religions/ christianity/christianethics/contraception_1.shtml (last updated Aug. 3, 2009), https://www.catholic.com/tract/birth-control (last visited Oct. 13, 2018), and *Contraception*, BBC, http://www.bbc.co.uk/religion/religions/christianity/christianethics/contraception_1.shtml (last updated Aug. 3, 2009).

> the child would not be his; so whenever he slept with his brother's wife, he spilled his semen on the ground to keep from providing offspring for his brother. What he did was wicked in the LORD'S sight; so the LORD put him to death also.[34]

The Catholic Church ground their opposition to contraception in this passage.[35] Additionally, they believe that procreation is participation in "God's design," and that the "physical expression of love between husband and wife in sexual intercourse can't be separated from the reproductive implications of both the act and marriage."[36] In other words, couples will be "happier" when their intimacy is a part of a larger, divine design. Thus, when the ACA requires certain Catholic employers to provide contraceptive coverage, the employers view the requirement as participation in a sinful act.[37] For these reasons, the appellants in *Michigan Catholic Conference* refused to provide contraceptive coverage.

Importantly, the ACA exempted "grandfathered plans, small businesses, and religious employers that obtain an exemption," which the appellants were not eligible for.[38] The appellants argued that the relevant section of the ACA was "not 'generally applicable' because it [was] riddled with exemptions and yet there [was] no exemption for *religious* employers like [a]ppellants."[39] The Sixth Circuit rejected their argument:

> A law is not of general applicability if it "in a selective manner impose[s] burdens only on conduct motivated by religious belief . . . ." "General applicability does not mean absolute universality. . . ." A law need not apply to every person or business in America to be generally applicable. A law is generally applicable if

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[34] *Genesis* 38:8–10 (New Int'l Version); *see also* Brom, *supra* note 33; *Contraception*, *supra* note 33.

[35] Isha Aran, *Wait, Why Does the Catholic Church Oppose Birth Control Again?*, SPLINTER (Feb. 18, 2016, 11:31 PM), https://splinternews.com/wait-why-does-the-catholic-church-oppose-birth-control-1793854826.

[36] *Contraception*, *supra* note 33; *see also* Aran, *supra* note 35.

[37] Becky Bowers, *The Health Care Law, Catholics and Birth Control*, POLITIFACT (Feb. 10, 2012, 10:44 AM), http://www.politifact.com/truth-o-meter/article/2012/feb/10/health-care-law-catholics-birth-control/.

[38] *Mich.*, 755 F.3d at 394.

[39] Plaintiff-Appellants' Brief at 53, Mich. Catholic Conference & Catholic Family Servs. v. Burwell, 755 F.3d 372 (6th Cir. 2014) (No. 13-2723, 13-6640), 2014 WL 345801, at *53.

> it does not make distinctions based on religion. To determine this, we consider whether the "legislature decide[d] that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation."[40]

The Sixth Circuit concluded that because the law did not target religions, it was generally applicable.[41] Accordingly, the Sixth Circuit found that there was no violation of the free exercise clause.[42]

The Seventh Circuit discussed the issue in *St. John's United Church of Christ v. Chicago*.[43] In this case, the Illinois General Assembly passed the O'Hare Modernization Act, to improve the efficacy of the Chicago airport.[44] The Illinois Assembly was concerned, however, that certain improvements to the airport would require relocation of cemeteries, thereby burdening religious practice in violation of the Illinois Religious Freedom Restoration Act.[45] So, the Assembly amended IRFRA to provide, "Nothing in [IRFRA] limits the authority of the City of Chicago to exercise its power under the [O'Hare Modernization Act] for the purpose of relocation of cemeteries or the graves located therein."[46] St. John's buried their members in an area condemned for O'Hare; they believe that "those buried at St. Johannes Cemetery should not be disturbed until Judgment day when Christ will raise them up to Heaven."[47] Additionally, St. John's believe that the cemetery is "consecrated ground" they hold "in sacred trust for God, and that seizure of ownership of" it amounts to "sacrilege."[48] So, they challenged the

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[40] *Mich. Catholic Conference*, 755 F.3d at 394 (citations omitted).

[41] *Id.*

[42] *Id.*

[43] 502 F.3d 616 (7th Cir. 2007). For a more recent decision on point, see River of Life Kingdom Ministries v. Vill. of Hazel Crest, 585 F.3d 364 (7th Cir. 2009) (holding that there are two ways that a law can be not neutral under *Smith*: first, if it facially discriminates against certain religious practice; second, if its object is to oppress religious practice), *rev'd en banc on other grounds*, 611 F.3d 367 (7th Cir. 2010).

[44] *See* 620 ILL. COMP. STAT. 65/1 *et seq.* (2017).

[45] 775 ILL. COMP. STAT. 35/15 (2017) ("Government may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest.").

[46] *Id.* § 35/30.

[47] Appellants' Brief Revised Pursuant to December 23, 2005 Court Order at 23, St. John's United Church of Christ v. Chicago, 502 F.3d 616 (7th Cir. 2007) (No. 05-4418, 05-4450, 05-4451), 2005 WL 3749817, at *23.

[48] *Id.*

amendment to IRFRA on free exercise grounds.[49] The Seventh Circuit rejected the challenge, holding that under *Smith*, St. John's must either show that the law is not neutral—"the object of the law is to infringe upon or restrict practices because of their religious" practice—or that the law is not generally applicable—that "the government . . . 'impos[es] burdens only on conduct motivated by religious belief' in a 'selective manner.'"[50] The Seventh Circuit upheld the amendment to IRFRA, finding that the "law passes the test of facial neutrality" and "[t]here are simply no facts in the voluminous record on appeal that support any such claim of targeting religious institutions or practices."[51]

In the Eighth Circuit, the issue arose after Eric Olsen, a member of the Ethiopian Zion Coptic Church ("EZCC"), sought a declaratory judgment and injunctive relief from the federal and Iowa Controlled Substances Acts prohibiting the use of marijuana.[52] The EZCC allegedly has roots in Jamaica and believe in a "Coptic deity."[53] They believe that marijuana, which they call *ganja*, is "a Godly creation from the beginning of the world" and is, therefore, sacred.[54] Olsen and the EZCC "assembly for communion, reasoning and worship through the Sacramental offering of Cannabis during prayer to the living god known to the church as Rastafari."[55]

As the Controlled Substances Acts prohibited the use of *ganja*, Olsen challenged the laws.[56] He argued, among other things, that the Act were "not generally applicable because they exempt the use of alcohol and tobacco, certain research and medical uses of marijuana, and the sacramental use of peyote."[57] The Eighth Circuit rejected this

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[49] 502 F.3d at 630–31.

[50] *Id.* at 631 (quoting Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533, 543 (1993)).

[51] *Id.* at 633.

[52] Olsen v. Mukasey, 541 F.3d 827, 829–30 (8th Cir. 2008). The relevant sections of the laws appear in 21 U.S.C. § 812(c)(I)(c)(10) (2006), 21 C.F.R. § 1308.11(d)(19) (2001), and IOWA CODE § 124.204 (2006).

[53] Walter Wells, *History of the Ethiopian Zion Coptic Church*, EZCC (last visited Oct. 13, 2018), http://www.ethiopianzioncopticchurch.org/Home/History. The EZCC should be distinguished from the Coptic Church, which refers to the Christian Church of Egypt founded by Mark the Evangelist. *See* Aziz Suryal Atiya & Mark N. Swanson, *Coptic Church*, *in* 3 ENCYCLOPEDIA OF RELIGION (Lindsay Jones ed., 2d ed., 2005).

[54] *See* Ethiopian Zion Coptic Church, *Marijuana and the Bible*, SHAFFER LIBRARY OF DRUG POL'Y, http://www.druglibrary.org/schaffer/hemp/potbible.htm (last visited Sept. 6, 2018); *see also Ethiopian Zion Coptic Church* (CBS television broadcast 1979), https://www.youtube.com/watch?v=4CFTgDx8crE.

[55] Brief for Appellants at 4–5, Olsen v. Mukasey, 541 F.3d 827 (8th Cir. 2008) (No. 07-3062), 2007 WL 4702790, at *4–5.

[56] *Id.* at *5.

[57] *Olsen*, 541 F.3d at 832.

claim, holding that "[g]eneral applicability does not mean absolute universality," and that "[a]bsent evidence of an 'intent to regulate religious worship,' a law is a neutral law of general applicability."[58] Accordingly, the Eighth Circuit rejected Olsen's free exercise claim.[59]

Finally, the Eleventh Circuit has not decided a case directly on point. Eleventh Circuit dicta, however, suggests that the Eleventh Circuit intends to follow the Sixth, Seventh and Eight. "[A] law is not neutral or generally applicable," the Eleventh Circuit observed, "either because the law is facially discriminatory or, alternatively, because 'the object of [the] law is to infringe upon or restrict practices because of their religious motivation.'"[60]

B. *Law of the Second and Third Circuits: A Single Secular Exemption Can Warrant Strict Scrutiny.*

The Second and Third Circuits adopted a polar opposite approach, allowing for strict scrutiny whenever a law exempts secular conduct that "is at least as harmful to the legitimate government interests purportedly justifying [the law]" as a religious exemption.[61] In the Second Circuit, the issue arose surrounding Orthodox Jewish circumcision of infants.[62] The Torah teaches that God entered into a covenant with Abraham, "[E]very male among you shall be circumcised. And you shall circumcise the flesh of your foreskin, and it shall be as the sign of a covenant between Me and between you. And at the age of eight days, every male shall be circumcised to you throughout your generations."[63] Oral tradition explains the procedure as consisting of three stages: "(1) *milah*, the removal of the foreskin; (2) *peri'ah*, the tearing off and the folding back of the mucous membrane to expose the gland; (3) and *metsitsah*, the suction of the blood from the wound."[64] Orthodox Jewish rabbi, called *mohel*,

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[58] *Id.* (quoting Cornerstone Bible Church v. Hastings, 948 F.2d 464, 472 (8th Cir. 1991)).

[59] *Id.*

[60] GeorgiaCarry.org, Inc. v. Georgia, 687 F.3d 1244, 1255 n.21 (11th Cir. 2012) (quoting Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 531–32 (1993)); *see also* Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cty., 450 F.3d 1295, 1309 (11th Cir. 2006) ("The Supreme Court also held that the ordinances were not generally applicable because they pursued the city's interests *only* against conduct motivated by religious belief." (citing *Lukumi*, 508 U.S. at 544–45) (emphasis in original)).

[61] Cent. Rabbinical Congress of U.S. & Canada v. N.Y. City Dep't of Health & Mental Hygiene, 763 F.3d 183, 197 (2d Cir. 2014).

[62] *See generally id.*

[63] *Genesis* 17:10–14 (NIV).

[64] Harvey E. Goldberg, *Rites of Passage: Jewish Rites*, *in* 11 ENCYCLOPEDIA OF RELIGION 7818, 7818–19 (Lindsay Jones ed., 2d ed., 2005).

perform oral suction to this day.[65] The practice, however, is known to spread herpex simplex virus to infants, which endangers their lives.[66] New York City Department of Health and Mental Hygiene decided in 2005 that the risk was significant enough to warrant educating the communities about the potential health complications.[67] When education did not reduce participation in the practice, the Department enacted a rule prohibiting "any person from performing direct oral suction as part of a circumcision without first obtaining written consent from one of the child's parents."[68] The consent form included a warning from the Department against agreeing to oral suction.[69]

Orthodox Jewish groups did not take kindly to the regulation. This is especially so, considering that the Department described it as an effort to "regulat[e] how part of a religious procedure is done."[70] The Orthodox Jewish groups sought a preliminary injunction, alleging the regulation infringed upon their free exercise of religion.[71] After the district court denied the injunction, the groups appealed to the Second Circuit.[72] The Second Circuit concluded that the regulation was neither neutral nor generally applicable.[73] The regulation was "not neutral because the religious ritual it regulates is 'the only conduct subject to' the Regulation."[74] As to general applicability, the Second Circuit defined the requirement as follows: "A law is therefore not generally applicable if it is substantially underinclusive such that it regulates religious conduct while failing to regulate secular conduct that is at least as harmful to the legitimate government interests purportedly justifying it."[75] The Second Circuit then found that "the Regulation applies exclusively to religious conduct implicating fewer than 10% of the cases of neonatal [herpex simplex virus] infection . . . . Yet, the record is almost entirely devoid of

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[65] *Id.* at 7819; Frimet Goldberger, *Why My Son Underwent Mitzitzah B'Peh*, FORWARD (Feb. 18, 2014), https://forward.com/sisterhood/192951/why-my-son-underwent-metzitzah-bpeh/.

[66] *Rabbinical Congress*, 763 F.3d at 185; Simon Feil, *Time Orthodox Jews to Oppose Metzitzah B'Peh*, JEWISH WEEK MEDIA GRP. (Apr. 3, 2017, 12:51 PM), http://jewishweek.timesofisrael.com/time-for-orthodox-jews-to-decry-metzitzah-bpeh/.

[67] *Rabbinical Congress*, 763 F.3d at 185.

[68] *Id.*at 185–86 (citing § 181.21(b)).

[69] *Id.*

[70] Sharon Otterman, *City Urges Requiring Consent for Jewish Rite*, N.Y. TIMES, June 12, 2012, at A23.

[71] Cent. Rabbinical Congress of U.S. & Canada v. N.Y. City Dep't of Health & Mental Hygiene, No. 12 Civ. 7590(NRB), 2013 WL 126399, at *1 (S.D.N.Y. Jan. 10, 2013).

[72] *Id.* at *36.

[73] 763 F.3d at 193–97.

[74] *Id.* at 195 (quoting Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533, 535 (1993)).

[75] *Id.* at 197 (citing *Lukumi*, 508 U.S. at 535–38).

explanation . . . for such selectivity."[76] Concluding that the law exempted substantially similar conduct while regulating religious conduct, the Second Circuit subjected it to strict scrutiny.[77]

Justice Samuel Alito reached a similar result while he was a judge on the Third Circuit. The issue first arose in *Fraternal Order of Police Newark Lodge No. 12 v. Newark*.[78] In *Newark*, a local police department's policy prohibited "[f]ull beards, goatees or other growth of hair below the lower lip, on the chin, or lower jaw bone area."[79] The policy exempted, however, individuals who wore beards for medical reasons.[80] There were other individuals who could not trim their beards. Sunni Muslims and other "traditionalists," for example, "trim[] [their] mustache and let[] [their] beard grow long" as an attempt to emulate Mohammed and thereby obey *hadith*—oral reports of Mohammed's statements.[81] Wearing a beard is a sign of piety.[82] Thus, two Sunni officers in the Newark police department retained their beards and were cited as non-compliant with the regulation and ordered "to appear for disciplinary hearing."[83] They argued that "the [d]epartment's refusal to make religious exemptions from its no-beard policy should be reviewed under strict scrutiny because the [d]epartment makes secular exemptions to its policy."[84] Judge Alito agreed and explained that the Supreme Court was concerned in *Smith* and *Lukumi* with "the prospect of the government's deciding that secular motivations are more important than religious motivations."[85] That is precisely what the Newark police department did: They determined that a medical (secular) reason for wearing a beard was important, while a religious one was not. After all, "wear[ing] beards

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[76] *Id.* at 197.

[77] *Id.*

[78] 170 F.3d 359 (3d Cir. 1999).

[79] *Id.* at 360 (quoting Special Order from the Chief of Police No. 71-15 at 2).

[80] *Id.* One such condition noted in the opinion is folliculitis barbae which is a bacterial infection resulting from shaving that can cause lesions, itchy or painful boils, and scarring. Amanda Oakley & Jannet Gomez, *Folliculitis Barbae and Pseudofolliculitis Barbae*, DERMNET NZ (July 2016), https://www.dermnetnz.org /topics/folliculitis-barbae/.

[81] D.J. Stewart, *Islamic Law*, *in* 3 NEW DICTIONARY OF THE HISTORY OF IDEAS 1250, 1252 (Maryanne Cline Horowitz ed., 2005); *see also Are Beards Obligatory for Devout Muslims*, BBC NEWS (June 27, 2010), http://www.bbc.com/news/ 10369726; Amanullah De Sondy, *The Relationship Between Muslim Men and Their Beards Is a Tangled One*, GUARDIAN (Jan. 28, 2016, 4:00 AM), https:// www.theguardian.com/commentisfree/2016/jan/28/muslim-men-beards-facial-hair-islam.

[82] Shirin Akiner, *Islam: Islam in Central Asia*, 7 ENCYCLOPEDIA OF RELIGION 4620, 4627 (Lindsay Jones ed., 2d ed., 2005). There are exceptions in some countries, however; in Uzbekistan, for example, individuals who wear beards are viewed as suspicious. *Id.*

[83] *Newark*, 170 F.3d at 361.

[84] *Id.* at 364.

[85] *Id.* at 365.

for medical reasons undoubtedly undermines the [d]epartment's interest in fostering a uniform appearance" inasmuch as a religious exemption would.[86] So, the Third Circuit applied strict scrutiny to the order and determined that there was no compelling government interest supporting the policy.[87] Thus, a single secular exemption could warrant strict scrutiny, provided that it undermines the government's interest to the same extent as a proposed religious exemption would.[88]

C. *Law of the Ninth Circuit: Discriminatory Intent or Unreasonable Exemptions Trigger Strict Scrutiny.*

In *Thomas v. Anchorage Equal Rights Commission*, the Ninth Circuit considered whether an exception to a housing discrimination statute for landowners who inhabit the common area rendered the law not to be generally applicable.[89] The Ninth Circuit held that "[t]he single exception here . . . is relatively inconsequential," and that, more generally, "[u]nderinclusiveness is not in and of itself a talisman of constitutional infirmity; rather, it is significant only insofar as it indicates something more sinister"—i.e., discriminatory intent.[90] Then in *Stormans, Inc. v. Selecky*, the Ninth Circuit noted that laws that are substantially underinclusive are not generally applicable.[91] Although it may appear that the subsequent panel adopted a different standard—which it likely could not do[92]—the Ninth Circuit

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[86] *Id.* at 366.

[87] *Id.* at 366–67.

[88] Importantly, the policy in *Newark* contained one other exemptions that did not trigger strict scrutiny: Officers undercover could wear a beard. *Id.* at 360. Had this been the only exception, then the policy would not be subject to strict scrutiny. The undercover exemption "does not undermine the [d]epartment's interest in uniformity because undercover officers 'obviously are not held out to the public as law enforcement person[nel].'" *Id.* at 366. Thus, a religious exemption would not be sufficiently similar to the existing secular exemption to warrant strict scrutiny. This is not to say, of course, that an undercover exemption would never warrant strict scrutiny. Suppose that the Newark police department issued a policy that prohibited head-coverings at all times, even off-duty, except when an officer went undercover. As the policy extends to an officers' private life, an undercover officer wearing a hat undermines the policy inasmuch as an off-duty officer wearing a burka.

[89] 165 F.3d 692, 697, 701 (9th Cir. 1999), *rev'd on rehearing en banc*, 220 F.3d 1134 (9th Cir. 2000) (for ripeness). The appellants were Christians "who believe that cohabitation between individuals constitutes the sin of fornication and that facilitating cohabitation in any way is tantamount to facilitating sin." *Id.* at 696.

[90] *Id.* at 701–02.

[91] 586 F.3d 1109, 1134 (9th Cir. 2009).

[92] As a general matter, "a three judge panel normally cannot overrule a decision of a prior panel on a controlling question of law" absent intervening case law from the Supreme Court. Galbraith v. Santa Clara, 307 F.3d 1119, 1123 (9th Cir. 2002) (first citing Hart v. Massanari, 266 F.3d 1155, 1171 (9th Cir. 2001); and then quoting United States v. Lancellotti, 761 F.2d 1363, 1366 (9th Cir. 1985)). Although *Thomas v. Anchorage Equal Rights Commission* was reversed on other grounds *en banc*, decisions thus

concluded that the law was not substantially underinclusive because "[t]here was no evidence that [the] State . . . pursued [its] interest only against conduct with a religious motivation."[93] Thus, the dispositive issue was whether the State targeted religious practice—i.e., discriminated against religion. Thus formulated, *Stormans, Inc. v. Selecky* is consistent with *Thomas.*

Subsequent decisions from the Ninth Circuit added an additional element to the circuit's interpretation of *Smith*: whether the law contains unreasonable exemptions on its face. For example, *Stormans, Inc. v. Wiesman* involved a free-exercise challenge to a law requiring pharmacists to stock and deliver emergency contraception.[94] Some of the contraception, however, amounts to abortion.[95] Plaintiff-appellants were pharmacists of Stormans, Inc., and Christians "who believe that all of human life is uniquely and inherently precious because it is created by God in His image."[96] This belief is founded on biblical text.[97] The Bible teaches that all people are made in God's image,[98] God loved all humans from before humanity existed,[99] and God loved the individual while the individual was yet in the womb.[100] For Christians who endorse this view,[101] "[a]bortion is the worst domestic crime ever sanctioned by America" with "60 million unborn children . . . legally murdered since Roe."[102] For these pharmacists,

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reversed still have precedential value in the Ninth Circuit. *See* Durning v. Citibank, 950 F.2d 1419, 1424 n.2 (9th Cir. 1991).

[93] *Stormans*, 586 F.3d at 1134.

[94] *See* 794 F.3d 1064 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016). Importantly, the denial of certiorari does not imply the Court's views on the merits. *See, e.g.*, Redd v. Chappell, 135 S. Ct. 712, 713 (2014) (statement of Sotomayor & Breyer, JJ.); Martin v. Blessing, 134 S. Ct. 402 (2013) (statement of Alito, J.).

[95] Stormans v. Selecky, 854 F. Supp. 2d 925, 950 (W.D. Wash. 2012), *rev'd on other grounds sub nom.*, Stormans v. Wiesman, 794 F.3d at 1064. *See also The Abortion Pill*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/ abortion/the-abortion-pill (last visited Mar. 3, 2018).

[96] *Stormans*, 854 F. Supp. 2d at 962.

[97] *See, e.g.*, Randy Alcorn, *Part 11: 'But, the Bible Doesn't Say Anything About Abortion!,'* LIFEFACTS, https://www.lifesitenews.com/resources/abortion/pro-life-101-the-ultimate-guide-to-why-abortion-is-wrong-and-how-to-fight-for-life/part-11-but-the-bible-doesnt-say-anything-about-abortion (last visited Mar. 3, 2018).

[98] *Genesis* 1:27 (NIV).

[99] *John* 3:16 (NIV).

[100] *Jeremiah* 1:4–5 (NIV) ("Before I formed you in the womb I knew you, before you were born I set you apart; I appointed you as a prophet to the nations."); *Job* 10:8 (NIV) ("Your hands shaped me and made me. Will you now turn and destroy me?"); *Psalm* 139:13 (NIV) ("For you created my inmost being; you knit me together in my mother's womb.").

[101] There are, of course, contrary interpretations. *See What Does the Bible Say About Abortion*, CHRISTIAN BIBLE REFERENCE SITE, http://www.christianbible reference.org/faq_abortion.htm.

[102] William Doino, *March on for Life*, 41 HUMAN LIFE REV. 83, 83 (2015).

providing the medication was likely no better than participating in the holocaust.[103]

In challenging the statute, the pharmacists focused on the numerous unwritten and written exceptions to the law. Regulators gave pharmacies discretions in deciding what drugs to stock, and regulators had never before cited a pharmacy as violating the law.[104] There were numerous business reasons not to stock all drugs, and the regulators respected that decision.[105] Additionally, the law allows pharmacies not to provide a prescription if the prescription is incompatible with the patients' other drugs, if the prescription was fraudulently obtained, if there is ongoing national emergency, if the pharmacy "lack[s] specialized equipment or expertise," if the customer is unable to pay, if the pharmacy simply failed to deliver the drug "despite good faith" effort, and for all "substantially similar circumstances."[106] Essentially, the law allowed for all exemptions except a religious exemption. In adjudicating this claim, the Ninth Circuit admitted that "[a] law is not generally applicable if its prohibitions substantially underinclude non-religiously motivated conduct that might endanger the same governmental interest that the law is designed to protect."[107] What mattered, however, was whether the exemptions contained on the face of the statute—or as part of "an official interpretation"—were reasonable.[108] Finding that "the enumerated exemptions are 'necessary reasons for failing to fill a prescription' in that they allow pharmacies to operate in the normal course of business."[109] Essentially, the Ninth Circuit allowed Washington to decide that business exemptions were appropriate, while religious exemptions were not.[110]

The Ninth Circuit's hesitance to look beyond the written exemptions was particularly pronounced in *National Institute of Family and Life Advocates v. Harris*.[111] In this case, the California State Assembly discovered that "[m]illions of California women are

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[103] Christina Forrester, *The Truth About Christianity and Abortion*, HUFFINGTON POST (Apr. 17, 2017, 5:17 PM), https://www.huffingtonpost.com/entry/the-truth-about-christianity-and-abortion_us_58f52ed7e4b048372700dab5.

[104] Stormans v. Selecky, 854 F. Supp. 2d 925, 934 (W.D. Wash. 2012).

[105] *Id.* at 933–34, 970–75.

[106] WASH. ADMIN. CODE §§ 246-869-010(1)(a)–(e), 246-089-010(2) (2016).

[107] Stormans v. Wiesman, 794 F.3d 1064, 1079 (9th Cir. 2015).

[108] *Id.* at 1081.

[109] *Id.* at 1080.

[110] Laycock & Collis, *supra* note 18, at 14.

[111] 839 F.3d 823 (9th Cir. 2016), *rev'd sub nom.*, Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018) (on free speech grounds).

in need of publicly funded family planning services," with hundreds of thousands of women unintentionally pregnant.[112] So, they enacted the Reproductive FACT Act, which requires, among other things, all clinics to display a notice, "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women."[113] A number of pregnancy help centers took offense with the law. These centers are nonprofit Christian ministries that seek to convince pregnant women to choose life.[114] They "serve[] over 2.3 million people with pregnancy assistance, abstinence counseling and education, community outreach program and referrals, and public health linkages"; "[a] conservative estimate of community cost savings for these services during 2010 is over $100 million."[115] The centers operate based on their religious views.[116] For the reasons explained above, they "are strongly opposed to abortion" and neither "provide abortions [n]or referrals for abortions."[117] So, they filed for a preliminary injunction on the grounds that the Act violated their rights to free speech and free exercise of religion.[118]

Their free exercise clause claim was based on the existence of numerous explicit and inferred exceptions to the Act.[119] On the face of the Act, there are only two exemptions: for clinics owned by the federal government and for providers of publicly-funded abortion services.[120] A closer reading of the Act, however, reveals numerous other exemptions. As the Act only covers clinics, doctors in private practice are exempted.[121] The Act excludes any general practice clinic, because it only covers clinics whose "primary purpose" is to

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[112] *Id.* (quoting Assem. Bill No. 775, 2015–16 Assem. § 1(b) (2015)).

[113] *Id.* at 830 (quoting CAL. HEALTH & SAFETY CODE § 123472(a)(1) (2016)).

[114] Lauren Slavin, *Mother: Crisis Pregnancy Center of Bloomington Was There for Me*, HERALD-TIMES, Aug. 28, 2015, at B1.

[115] Brief for Charlotte Lozier Inst. as *Amici Curiae Supporting Petitioners*, Nat'l Inst. for Family & Life v. Becerra, No. 16-1140 (2018).

[116] *Nat'l Inst. of Family & Life*, 839 F.3d at 831.

[117] *Id.*

[118] Nat'l Inst. of Family & Life Advocates v. Harris, No. 15cv2277, 2016 WL 3627327, at *1 (S.D. Cal. Feb. 8, 2016).

[119] The best formulation of their argument appears in the brief before the Supreme Court. *Compare* Brief for Appellants at 13–14, *Nat'l Inst. of Family & Life*, 839 F.3d 831 (9th Cir. 2016) [hereinafter "NIFLA Ninth Circuit Brief"] (No. 16-55249), 2016 WL 117481, at *13–14 (offering examples of two explicit exemptions), *with* Brief of Petitioners at 32–33, Nat'l Inst. of Family & Life v. Becerra, No. 16-1140 (2018) [hereinafter "NIFLA SCOTUS Brief"] (offering a long list of explicit and implicit exemptions).

[120] *Nat'l Inst. of Family & Life*, 839 F.3d at 844.

[121] NIFLA SCOTUS Brief, *supra* note 119, at 32.

provide pregnancy-related service.[122] By reference, the Act excludes "student health centers, clinics operating as outpatient divisions of a hospital, clinics operated by an Indian tribe on tribal lands, community mental health centers, clinics affiliated with an institution of higher education that teaches any healing art, or clinics operated by employers for their employees."[123] Considering that abortion-providers are excluded, the Act seems to exempt everyone but the religious nonprofits.[124] Moreover, the pregnancy centers argued that the Act was meant to target them:

> The State explained, and the District Court found, that the "PURPOSE OF THIS BILL" . . . is to target the speech of pro-life centers, to wit: "that, unfortunately, there are nearly 200 licensed and unlicensed clinics known as crisis pregnancy centers . . . in California," which "aim to discourage and prevent women from seeking abortions," and that "often confuse [and] misinform" women. The legislative history contains no evidence that Plaintiff centers actually "misinform" women, and the Act does not require that a center be providing incorrect information before its required disclosures apply.[125]

The district court and the Ninth Circuit rejected their arguments.[126] The Ninth Circuit concluded that the Act was generally applicable.[127] The Circuit acknowledged two exemptions, but held them to be reasonable—"tied directly to limited, particularized, business related, objective criteria."[128]

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[122] *Id.*

[123] *Id.*

[124] *Id.* at 33. The Supreme Court agreed, calling the Act "wildly underinclusive". *See* Nat'l Institute of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2375 (2018).

[125] NIFLA Ninth Circuit Brief, *supra* note 119, at 12.

[126] Nat'l Inst. of Family & Life Advocates v. Harris, 839 F.3d 831 (9th Cir. 2016); Nat'l Inst. of Family & Life Advocates v. Harris, No. 15cv2277, 2016 WL 3627327, at *1 (S.D. Cal. Feb. 8, 2016).

[127] 839 F.3d at 844.

[128] *Id.* at 844–45 (quoting Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1082 (9th Cir. 2015)). The Supreme Court granted certiorari in this case and reversed, but on free speech grounds, not free exercise. *See Nat'l Inst. of Family & Life*, 138 S. Ct. 2361.

D. *Tenth Circuit: Strict Scrutiny for any Law Requiring Case-by-Case Review.*

The Tenth Circuit has chosen an approach different from any other circuit. The issue arose in *Axson-Flynn v. Johnson*.[129] Christina Axson-Flynn was a member of the Church of Jesus Christ of Latter-day Saints and a student at Utah's Actor Training Program.[130] At her audition to the program, she admitted to being unable to do three things. She would not remove her clothing.[131] She would not use words "God" or "Christ" because one of the Ten Commandments prohibits "tak[ing] the name of the LORD thy God in vain."[132] She would not say "fuck," because "it vulgarizes what Plaintiff, as a Mormon, believes is a sacred act, appropriate only within the bounds of marriage."[133] Axson-Flynn made clear that she "would rather not be admitted . . . than use those words."[134] She was admitted to the program and substituted the objectionable words with alternatives; although some teachers pushed her to use the expletives, they relented and did not penalize her.[135] Other students likewise received individualized deviations from the rubric. "[A] Jewish student," for example, "asked for and received permission to avoid doing an improvisation exercise on Yom Kippur."[136] The school asked Axson-Flynn, however, to modify her values or leave, which she did and subsequently filed suit.[137] The Tenth Circuit concluded that she stated a viable free exercise claim because the school policy was not generally applicable.[138] The Tenth Circuit explained that strict scrutiny applies to laws that "give rise to the application of a subjective test,"[139] where "case-by-case inquiries are routinely made, such that there is an 'individualized governmental assessment of the reasons for the relevant conduct' that 'invite[s] considerations of the

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[129] 356 F.3d 1277 (10th Cir. 2004).

[130] *Id.* at 1281.

[131] *Id.*

[132] *Id.*; *Exodus* 20:7 (ESV).

[133] *Axson-Flynn*, 356 F.3d at 1281. Another explanation Mormons sometimes give for avoiding expletives is that "the way we speak [is] an outward manifestation of an inward belief." Rebbie Groesbeck, *Do Mormons Swear?*, NORMONS (Apr. 28, 2013), http://www.normons.com/do-mormons-swear/.

[134] *Axson-Flynn*, 356 F.3d at 1281.

[135] *Id.* at 1281–82.

[136] *Id.* at 1298.

[137] *Id.* at 1280, 1282. She filed a 42 U.S. Code § 1983 action for deprivation of constitutional rights. *Id.*

[138] *Id.* at 1299.

[139] Swanson By & Through Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 701 (10th Cir. 1998).

particular circumstances' involved in the particular case."[140] As the school here occasionally exempted some individuals, including Axson-Flynn, from the curricula, they exercised an "individualized case-by-case" approach thus potentially warranting strict scrutiny.[141] Axson-Flynn would have to prove her case at trial.

III. TOWARDS A COHERENT DEFINITION OF GENERAL APPLICABILITY

The four approaches to the general applicability requirement articulated in the previous part are hardly complementary. They disagree, fundamentally, about three things: do exemptions matter? How many and what kind of exemptions matter? And, can courts look beyond the face of the statute? As this part shows, the Second and Third Circuits correctly interpreted the general applicability requirement—i.e., where a secular exemption undermines the interest the law is meant to serve to the same or greater extent as a religious exemption, even a single secular exemption means that a law is not generally applicable.

A. *General Applicability and Neutrality Are Two Separate and Distinct Requirements.*

Perhaps the easiest approach to dismiss is one that interprets the general applicability requirement as prohibiting the government from targeting religions.[142] The fundamental problem with this approach is that it renders Supreme Court's holding in *Smith* and *Lukumi* partially superfluous in text and in practice. Beginning with the text of *Smith*, the Supreme Court held there that the free exercise clause does not excuse non-compliance with "neutral law of general applicability."[143] Importantly, the Court's test applies to *neutral* laws and *generally applicable* laws. There are two adjectives modifying the word laws. Circuits that interpret the general applicability requirement as prohibiting the targeting of religions, however, combine these two

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[140] *Axson-Flynn*, 356 F.3d at 1297 (quoting Emp't Div. v. Smith, 494 U.S. 872, 884 (1990)). Note that this test is different from the circuits that consider express or implicit exemptions. The Tenth Circuit observed that this doctrine "does not apply to statutes that, although otherwise generally applicable, contain express exceptions for objectively defined categories of persons." *Id.* at 1298 (citing *Swanson*, 135 F.3d at 698, 701).

[141] *Id.* at 1299.

[142] *See, e.g.*, Mich. Catholic Conference & Catholic Family Servs. v. Burwell, 755 F.3d 372, 394 (6th Cir. 2014); St. John's United Church of Christ v. Chicago, 502 F.3d 616, 633 (7th Cir. 2007); *see also* subpart I.A.

[143] Emp't Div. v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens J., concurring in judgment)).

requirements into a single one. After all, as the Eighth Circuit noted in *Olsen v. Mukasey*: "[a]bsent evidence of an 'intent to regulate religious worship,' a law is a neutral law of general applicability."[144] The same evidence of intent to regulate religious worship would render the law non-neutral and non-generally applicable. But under this formulation the *Smith* test means the same thing even if the Court never articulated a general applicability requirement. A law that targets religion or whose "object" is to regulate religion, as the Seventh Circuit put it,[145] is certainly not neutral. Thus, the *Smith* test is rendered partially superfluous on its face, which is an unacceptable result.[146]

The effect on *Lukumi* is even greater. The *Lukumi* opinion had two distinct sections, one on neutrality and one on general applicability.[147] The sections are very different. In the neutrality section, the Court explicitly states that "[t]here are . . . many ways of demonstrating that the object or purpose of a law is the suppression of religion."[148] Moreover, the neutrality section "uses the language of equal protection and nondiscrimination law," noting that the government should not *discriminate* against a religion or otherwise target it.[149] This language is absent from the general applicability section, which shows that the Court viewed the two requirements as separate and distinct.[150] The *Lukumi* Court even calls general applicability as "second requirement of the Free Exercise clause."[151] Accordingly, combining the requirements of neutrality and general applicability is contrary to Supreme Court precedent.

It is important to note that, in practice, the general applicability and neutrality requirements target different laws. Take a law that, for example,[152] prohibits consumption of alcoholic beverages. State A prohibits consumption of alcohol during the Eucharist (i.e.,

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[144] Olsen v. Mukasey, 541 F.3d 827, 832 (8th Cir. 2008) (quoting Cornerstone Bible Church v. Hastings, 948 F.2d 464, 472 (8th Cir. 1991)).

[145] *St. John's United Church*, 502 F.3d at 632.

[146] *See* United States v. Bishop, 66 F.3d 569, 596 (3d Cir. 1995), *as amended* (Sept. 29, 1995) (Becker, J., concurring in part and dissenting in part); Barish v. United Mine Workers of Am. Health & Ret. Fund, 753 F. Supp. 165, 169 (W.D. Pa. 1990) ("It is a truism that language in the Supreme Court's opinions should not readily be assumed to be superfluous . . . .").

[147] *See* Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993).

[148] *Id.* at 533.

[149] Laycock & Collis, *supra* 18, at 6.

[150] *Id.* at 7; *see Lukumi*, 508 U.S. at 542–46.

[151] *Lukumi*, 508 U.S. at 542.

[152] These examples are modified from those mentioned by Richard Duncan. *See* Duncan, *supra* note 28, at 859–60.

communion or the Lord's Supper).[153] State B prohibits consumption of sacramental wine. State C, in turn, prohibits any consumption alcohol, except at bars, clubs, private dwellings, restaurants, and other licensed facilities. There is no doubt that the law of State A is discriminatory and exempts everyone but the pious. So, it is neither neutral nor generally applicable. Law of State B applies to everyone, but it discriminates against religion. It is, arguably, generally applicable but is not neutral. As for law of State C, assume that the legislature was not acting with bad intent.[154] The law is neutral; it does not use say anything about religion. Nonetheless, it exempts just about everyone other than religious individuals. Accordingly, it may be neutral but it is not generally applicable. Of course, as the following sections show, a law does not need to contain this many exemptions to fail the general applicability test.

It is thus clear that the Sixth, Seventh, Eighth and Eleventh Circuits err in holding that only laws that target religions are not generally applicable. Neutrality and general applicability are distinct requirements and must be interpreted as such.

B. *Supreme Court Precedent Evidences Concern for Express and Implicit Exemptions.*

Even assuming that the two requirements are separate, do enumerated or implicit exemptions even matter? The Tenth Circuit observed, after all, that the general applicability requirement is not violated by "statutes that, although otherwise generally applicable, contain express exceptions for objectively defined categories of persons."[155] A close reading of the relevant case law refutes this position.

State governments have used exemptions to burden specific individuals. In *Speiser v. Randall*, for example, California would grant a tax exemption to a certain class of individuals, provided they

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[153] The practice is a direct command from Jesus Christ to his followers, to use bread and wine to remember His sacrifice. 1 *Corinthians* 11:23–26 (NIV); *Luke* 22:19 (NIV) ("[D]o this in remembrance of Me."). *See also* John Welrick, *What Is Communions and Why Do We Do It?*, NEWSPRING CHURCH (Mar. 6, 2018), https://newspring.cc/articles/what-is-communion-and-why-do-we-do-it. Some churches, however, use grape juice instead of wine. *See* Jack Wellman, *What Should a Church Use for Communion? Grape Juice or Wine?*, PATHEOS (June 20, 2016), http://www.patheos.com/blogs/christiancrier/2016/06/20/what-should-a-church-use-for-communion-grape-juice-or-wine/.

[154] There are, after all, notoriously strange laws. *See* Christina Sterbenz & Melia Robinson, *Here Are the Most Ridiculous Laws in Every State*, BUS. INSIDER (Feb. 21, 2014), http://www.businessinsider.com/most-ridiculous-law-in-every-state-2014-2.

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

affirmed their loyalty to the state government.[156] The Court interpreted the exemption as penalizing individuals for particular viewpoints. It held that "[t]o deny an exemption to claimants who engage in [constitutionally protected conduct] is in effect to penalize them for such [conduct]."[157] The denial of the exemption deterred individuals from expressing particular viewpoints and thus infringed speech. The practical effect of the exemption was "the same as if the State were to fine" the individuals for their speech.[158] Thus, when a government exempts one group but not another, the practical effect of the exemption could be to punish the second group.

The issue of exemptions also arose in *Sherbert v. Verner*,[159] the case celebrated as establishing "a high level of protection for the freedom to practice" religion.[160] *Sherbert* involved an unemployment compensation claim for Adell Sherbert, a Seventh-day Adventist, who refused to work on Saturday.[161] Adventists are Christians who, among other things, strictly adhere to a command to keep the Sabbath holy and refrain from working.[162] Adventists teach that the Sabbath was historically and traditionally set on Saturday and, accordingly, must be observed on Saturday.[163] South Carolina Employment Security Commission determined that the company terminated Sherbert's employment with good cause and denied her unemployment.[164] The Supreme Court disagreed, holding that the denial of unemployment benefits burdened Sherbert's exercise of religion.[165] The Court devised a balancing test that was used to adjudicate free exercise

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[156] 357 U.S. 513 (1958).

[157] *Id.* at 518.

[158] *Id.*

[159] 374 U.S. 398 (1963).

[160] Charles C. Haynes, *Justice Scalia's Disastrous Decision on Religious Freedom*, RELIGIOUS FREEDOM CTR. (Feb. 18, 2016), http://www.religiousfreedomcenter.org /justice-scalias-disastrous-decision-on-religious-freedom/; *but see* KATHLEEN A. BRADY, THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW: RETHINKING RELIGION CLAUSE JURISPRUDENCE 190–92, 197 (2015) (arguing that the *Sherbert* test did not offer significant protection to religious liberty).

[161] *Sherbert*, 374 U.S. at 399–400.

[162] *Exodus* 20:8–11. For more information about Adventists, *see* Jonathan M. Butler, Ronald L. Numbers & Gary G. Land, *Seventh-Day Adventism*, *in* 12 ENCYCLOPEDIA OF RELIGION 8235 (Lindsay Jones ed., 2d ed., 2005).

[163] CAPITOL HILL SEVENTH-DAY ADVENTIST CHURCH, WHY SATURDAY?, http://capitolhillsdachurch.org/why-saturdays/ (last visited Oct. 13, 2018). Other Christian denominations interpret the Bible as not requiring adherence of the original Sabbath. *See, e.g.*, *Why Don't Christians Observe the Original Sabbath?*, GODWORDS, https://godwords.org/why-dont-christians-observe-the-original-sabbath/.

[164] *Sherbert*, 374 U.S. at 401.

[165] *Id.* at 403.

claims until *Smith*.[166] *Sherbert* also dealt with the issue of statutory exemptions, because a South Carolina law "expressly save[d] the Sunday worshipper" by providing that "no employee shall be required to work on Sunday . . . who is conscientiously opposed to Sunday work."[167] The Court called this clause a "religious discrimination" that only "compounded" the "unconstitutionality" of the law.[168]

The Court explained its skepticism of exemptions in *Lukumi*.[169] In *Lukumi*, the ordinance prohibited Santeria's ritual slaughter of animals, but exempted a wide variety of businesses, as necessary slaughter.[170] The Court remarked that "the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons."[171] Such treatment of religion was plainly unconstitutional. Moreover, the statutory exemptions in *Lukumi* were used to "single[] out for discriminatory treatment" Santeria's religious practices.[172] Exemptions are suspect, therefore, because they can be used to disadvantage certain groups. Importantly, it does not matter whether the exemptions appear on the face of the statute or in its application. The Court expressly rejected the view that the "inquiry [into constitutionality of the ordinance] must end with the text of the law at issue."[173] Instead, courts must look beyond the text of the statute to decide whether it violates the free exercise clause.[174]

More fundamentally, laws that contain exemptions are not applicable *generally*. General means "involving, relating to, or applicable to every member of a class, kind, or group."[175] This does not mean that a law must be universal,[176] for a law to be generally applicable, it should apply equally to a class of similar people. The bar exam, for example, is generally applicable because all *law*

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[166] Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 38 (1989) (Scalia, J., dissenting) ("In . . . *Sherbert v. Verner* . . . we held that the free exercise clause of the First Amendment required religious beliefs to be accommodated by granting religion-specific exemptions from otherwise applicable laws.").

[167] *Sherbert*, 374 U.S. at 406.

[168] *Id.*

[169] Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993).

[170] *Id.* at 528.

[171] *Id.* at 537–38.

[172] *Id.* (first citing Bowen v. Roy, 476 U.S. 693, 722 & n.17 (1986) (Stevens, J., concurring in part and concurring in result); then citing *id.* at 708 (opinion of Burger, C.J.); and then citing United States v. Lee, 455 U.S. 252, 264 n.3 (1982) (Stevens, J., concurring in judgment)).

[173] *Id.* at 534.

[174] *Contra.* Stormans, Inc. v. Weisman, 794 F.3d 1064, 1080–81 (9th Cir. 2015).

[175] *General*, MERRIAM-WEBSTER (2018).

[176] *Cf.* Olsen v. Mukasey, 541 F.3d 827, 832 (8th Cir. 2008) (noting that general applicability does not mean universality).

students have to take it, even though not all *students* do. If the bar exam excluded, however, all students from top schools, then it is no longer generally applicable to all law students. It is selective. Thus, the Tenth Circuit interpretation of the generally applicable requirement is inconsistent with the Supreme Court's precedent.

C. *Reasonable Exemptions Can Still Be Unconstitutional.*

The Ninth Circuit decided that reasonable exemptions do not violate the general applicability requirement.[177] The Ninth Circuit failed to realize, however, that it "is precisely the preference for secular reasons over religious reasons that *Smith* and *Lukumi* prohibit."[178] "Allowing secular but not religious refusals is flatly inconsistent with . . . *Lukumi*."[179] After all, respondents in *Lukumi* argued that the ordinance's secular exemptions "for killing animals were 'important,' 'obviously justified,' and 'ma[de] sense.'"[180] Any purported reasonableness of the secular exemptions did not sway to the Court to excuse them. The explanations for the exemptions, the Court held, "do not explain why religion alone must bear the burden of the ordinances, when many of these secular killings fall within the city's interest in preventing the cruel treatment of animals."[181] Thus, what mattered in *Lukumi* was that the exemptions for secular animal slaughter undermined the law's interest inasmuch as a religious exemption would.

Moreover, it is important to remember that "[t]he Free Exercise Clause 'protect[s] religious observers against unequal treatment.'"[182] Unequal treatment "does not turn on whether secular reasons are 'better' than religious ones, a judgment that government is generally not permitted to make."[183] In deciding that business exemptions in *Stormans* and *National Institute of Family and Life Advocates* were necessary,[184] the Ninth Circuit implicitly assumed "that religious

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[177] *See supra* subpart I.C.

[178] Laycock & Collis, *supra* note 18, at 15.

[179] Stormans, Inc. v. Wiesman, 136 S. Ct. 2433, 2438 (2016) (Alito, J., dissenting from denial of certiorari).

[180] *Id.* (quoting *Lukumi*, 508 U.S. at 544).

[181] *Lukumi*, 508 U.S. at 544.

[182] Steven T. Collis, Stormans v. Wiesman*: Paths to Strict Scrutiny in Religious Free Exercise Cases*, 17 FEDERALIST SOC' REV. 46, 49 (2016).

[183] *Id.*

[184] *See* Nat'l Inst. For Family & Life Advocates v. Harris, 839 F.3d 823, 844–45 (9th Cir 2016); Stormans v. Weisman, 794 F.3d 1064, 1082 (9th Cir. 2015).

reasons are unnecessary—even if the religious practice is absolutely necessary to the believer."[185]

Why should we prohibit states and courts from making such value judgments? In free speech jurisprudence, we have determined that the Constitution is blatantly violated whenever the government "favor[s] some viewpoints or ideas at the expense of others" or subjects "particular views" to different treatment.[186] We prohibit such value judgment because it violates the basic principles of the Equal Protection of the laws, "that all persons subjected to state legislation shall be treated alike, under like circumstances and conditions, both in privileges conferred and in liabilities imposed."[187] These principles "run back to Magna Carta" and represent "advances in the conceptions of justice and freedom by a progressive society."[188] Considering the deep roots of constitutional protection against discrimination on the basis of religion, and notwithstanding Establishment Clause prohibition against public aid to a particular religious sect, it is hard to imagine that the Framers of Equal Protection clause created a broad ban on class legislations, yet excluded all forms of class legislation against them, simply on the basis of their religious beliefs.[189] Accordingly, the spirit of equal protection bans governments from making value judgements between religion and secular interests, and thus, a secular exemption, even if reasonable, may nonetheless violate the free exercise clause.

D. *A Single Secular Exemption Should Warrant Strict Scrutiny.*

The correct interpretation of the general applicability requirements was articulated by Justice Alito when a judge on the Third Circuit:

> A law fails the general applicability requirement if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same

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[185] Collis, *supra* note 182, at 49.

[186] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993) (citing another source).

[187] FRANCIS C. AMENDOLA ET AL. 16B C.J.S. CONSTITUTIONAL LAW § 1256 (2018).

[188] State of La. *ex rel.* Francis v. Resweber, 329 U.S. 459, 467 (1947).

[189] Steven A. Calabrasi and Abe Salandar, Religion and Equal Protection Clause, Why the Constitution Requires School Vouchers, 65 Fla. L. Rev. 909, 917 (2013).

> degree as the covered conduct that is religiously motivated.[190]

This test best synthesizes Supreme Court precedent. First, it treats general applicability as a distinct requirement, such that a law could be neutral but nonetheless fail the general applicability requirement.[191] Second, it recognizes that exemptions need to be scrutinized to prevent the government from unduly burdening religion.[192] Finally, it ensures that neither the government nor the courts engage in value judgments about whether a religious exemption is as reasonable or necessary as a secular exemption.[193] Catholics have been forced to provide birth control.[194] Christian pro-life clinics feel they are being forced to support abortion.[195]

Yet it is not merely legally rational for us to interpret the general applicability requirement as such, it is advisable. Accepting religious practices and enabling the free exercise is important to a stable society. For the sake of equity, the "government [began] demand[ing] for the first time in American history that our largest religious minorities violate core religious teachings" in a plethora of ways.[196] During the election campaign, President Donald Trump suggested that there was no choice but to "close down some mosques."[197] Groups in California advocate for banning male circumcision, which would have

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[190] Blackhawk v. Pennsylvania, 381 F.3d 202, 211 (3d Cir. 2004) (Alito, J.). *See also* Cent. Rabbinical Congress v. N.Y. City Dep't of Health & Mental Hygiene, 763 F.3d 183, 197 (2d Cir. 2014); Fraternal Order of Police Newark Lodge No. 12 v. Newark, 170 F.3d 359, 366–67 (3d Cir. 1999).

[191] Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 542 (1993) (describing general applicability as the "second requirement of the Free Exercise clause").

[192] *Id.* at 537 (first citing Bowen v. Roy, 476 U.S. 693, 722 n.17 (1986) (Stevens, J., concurring in part and concurring in result); then citing *id.* at 708 (opinion of Burger, C.J.); and then citing United States v. Lee, 455 U.S. 252, 264 n.3 (1982) (Stevens, J., concurring in judgment)).

[193] *Id.* ("[T]he ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons.").

[194] *See, e.g.*, Laura Bassett, *Nuns Lose Case Against Birth Control Mandate*, HUFFINGTON POST (July 14, 2015, 4:18 PM), https://www.huffingtonpost.com/ 2015/07/14/little-sisters-of-the-poor_n_7796404.html.

[195] David French, *The Dangerous Supreme Court Case Nobody Is Talking About*, NAT'L REV. (Jan. 16, 2018), https://www.nationalreview.com/2018/01/nifla-becerra-supreme-court-case-religious-freedom-free-speech/.

[196] Douglas Laycock, *The Wedding-Vendor Cases*, 41 HARV. J.L. & PUB. POL'Y 49, 59–60 (2018); *cf.* STEVEN D. SMITH, THE DISENCHANTMENT OF SECULAR DISCOURSE 108 (2010).

[197] Alex Isenstadt, *Trump: 'Absolutely No Choice' But to Close Mosques*, POLITICO (Nov. 18, 2015), https://www.politico.com/story/2015/11/trump-close-mosques-216008.

a serious effect on Jews and Muslims.[198] It is precisely such "demand[s] that produced social conflict."[199]

It is important to note that religions are unlikely to change under societal pressures to a significant extent. After all, we have long accepted that religious individuals will not turn from their beliefs solely because the government punishes them for it. After all, most major religions have the concept of martyrdom. Muslims who suffer for their religious practice participate in *shahada*, and are "prepared to die . . . in the course of" submitting "to the will of Allah."[200] Likewise, Jews may believe that they are obeying the commandment of *qiddush ha-shem*, to sanctify the divine name, by enduring punishment for disobeying laws that conflict with Judaism.[201] Finally, Christians have a long history of enduring persecution, from the stoning of St. Stephen in the first century[202] to contemporary persecution in totalitarian regimes.[203] Christian media welcomes the concept of suffering for Christ, and the Bible promises a reward for martyrs.[204] Thus, even if the government prohibited the commands of the Bible, Quran or the Torah, the religious individuals will suffer the consequence. Punishing the religious individual will neither deter nor

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[198] Rishu Bhardwaj, *Decision About Circumcision Deserves Thoughtful Contemplation by Parents*, DAILY TITAN (Oct. 16, 2017), https://dailytitan.com/ 2017/10/circumcision-health-parents/. While it is unlikely that California would take any action on the issue, Iceland is contemplating banning circumcision, much to the alarm of religious groups. Kim Hjelmgaard, *Iceland Could Become First Country to Ban Male Circumcision*, USA TODAY (Feb. 19, 2018, 12:52 PM), https://www.usatoday.com/story/news/2018/02/19/iceland-male-circumcision/ 350495002/.

[199] Laycock, *supra* note 196, at 60 ("There was no conflict over contraception until government demanded that dissenters pay for it.").

[200] A. Ezzati, *The Concept of Martyrdom in Islam*, AL-ISLAM.ORG, https://www.al-islam.org/al-serat/vol-12-1986/concept-martyrdom-islam/concept-martyrdom-islam. Some commentators interpret Quran as encouraging the murder of non-Muslims in battle even at the cost of one's life. *See, e.g.*, Rosemary Black, *Islamic Sense of Martyrdom Is Different than Western Concept*, DAILY NEWS (Dec. 10, 2008, 5:32 PM), http://www.nydailynews.com/news/world/islamic-sense-martyrdom-western-concept-article-1.354377; *see also* Quran 4:74 ("Let those fight in the way of God who sell the life of this world for the other. Whoever fights in the way of God, be he slain or be he victorious, on him We shall bestow a vast reward.").

[201] *See* Robert Chazan, *Persecution: Jewish Experience*, *in* 10 ENCYCLOPEDIA OF RELIGION 7054, 7057 (Lindsay Jones ed., 2d ed., 2005).

[202] *Acts* 7:54–60 (New Int'l Version); *see also* Jack Zavada, *Stoning of Stephen: A Bible Story Summary*, THOUGHTCO. (last updated June 29, 2018), https://www.thoughtco.com/ stoning-of-stephen-bible-story-summary-700061.

[203] *See North Korea*, OPENDOORS, https://www.opendoorsusa.org/christian-persecution/world-watch-list/north-korea/ (last visited Oct. 13, 2018).

[204] *See, e.g.*, *Revelations* 6:11 (New Int'l Version) ("Then each of them was given a white robe"); NEWSBOYS, *Guilty*, *on* LOVE RIOT (Sparrow Records 2016) ("If serving you's against the law of man[.] If living out my faith in you is banned[.] Then I'll stand before the jury . . . [and] want to be guilty.").

rehabilitate him or her,[205] because regardless of how loudly the entire world condemn her, she will stand firm by her belief.

In that sense, religious individuals are like the LGBT individuals. After all, "both same-sex couples and committed religious believers argue that some aspect of human identity are so fundamental that they should be left to each individual, free of all nonessential regulation, even when manifested in conduct."[206] Inasmuch as a homosexual couple will pursue the "nobility and dignity" of civil marriage regardless of the law,[207] and an interracial couple will risk contempt of court,[208] no "religious believer can change his [or her] understanding of divine by any act of will."[209]

But do we not already tolerate their belief, why should we permit their practice? A religious individual cannot meaningfully exercise her identity if her belief is confined to the secrecy of the home, inasmuch as an LGBT individual feels stifled when the government prohibits public display of her identity. As Justice Anthony Kennedy recently observed, "tolerance is most meaningful when it is mutual."[210] But it is not toleration for various religions and viewpoints that our society needs, but acceptance. After all, in words of Thomas Paine, "[t]oleration is not the *opposite* of intoleration, but it is *counterfeit* of it. Both are despotisms. The one assumes to itself the right of withholding liberty of conscience, and the other of granting it."[211] Moreover, we already permit a wide variety of expression. The free speech clause protects "the speech rights of anarchists, syndicalist, communists, civil rights marchers, Maoist flag burners," and even Nazis and white supremacists.[212] If we can exist while permitting even anti-government and anti-human entities to be politically active, religious exemptions are also possible.

Yet it is not simply just for us to accept religious practice, applying strict scrutiny to any law that exempts one class but not a similar class

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[205] These represent two of the three rationales for punishing law breakers. *See* 22 C.J.S. CRIMINAL LAW: SUBSTANTIVE PRINCIPLES § 1 (2016). The third theory, retribution to the victim, may be satisfied, assuming there is a victim from the religious practice being punished. *Id.* Where there is no apparent victim, however, there is no justification for imposing the punishment.

[206] *Laycock, supra* note 196, at 61.

[207] Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015).

[208] Loving v. Virginia, 388 U.S. 1 (1967).

[209] Laycock, *supra* note 196, at 61.

[210] Transcript of Oral Argument at 62, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2017) (No. 16-111).

[211] Paine, *supra* note 6, at 291.

[212] Blameuser v. Andrews, 630 F.2d 538 (7th Cir. 1980); Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 144 (2010).

also improves social cohesion. "Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support."[213] One of the reasons our Constitution has endured for so long is the promise each citizen receives from the Bill of Rights: that his or her fundamental rights are protected.[214] Justice Alito's test would best protect religious minorities such as the Santeria and Seventh-Day Adventists.[215] These minorities rarely have the political power to influence politics.[216] Without the adequate protection, religious minorities may eventually disappear, which would harm the diversity of our communities.[217]

Accordingly, this Article urges the circuit split to be resolved in favor of the Second and Third Circuit's interpretation. Laws that contain a single exemption that undermines the law's interest inasmuch as a religious exemption would must be subject to strict scrutiny.

III. A TEST FOR DETERMINING WHEN EXEMPTIONS ARE REQUIRED

Yet simply subjecting laws that are not neutral or not generally applicable to *Sherbert*'s strict scrutiny test does not mean that religious liberty will be adequately protected. After all, *Sherbert* is woefully incomplete. This part presents the problems with *Sherbert* and offers an addendum to its balancing test.

A. *How Sherbert Failed Its Purpose.*

In *Sherbert,* the Supreme Court balanced the religious rights of a Seventh-day Adventist with the interests of South Carolina.[218] The Supreme Court's balancing test required that any burden on the free

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[213] W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624, 636–37 (1943).

[214] *Id.* ("Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification.").

[215] *See* Michael Lipka, *A Closer Look at Seventh-Day Adventists in America*, PEW RESEARCH CTR. (Nov. 3, 2015), http://www.pewresearch.org/fact-tank/2015/11/03/a-closer-look-at-seventh-day-adventists-in-america/ (Adventists make up 0.5% of the U.S. population); *Santeria: Rapid Growth in Urban America*, CRI, http://www.equip.org/article/santeria-rapid-growth-in-urban-america/ (there are less than one-million followers).

[216] Collis, *supra* note 182, at 53. Mainstream religions have been more successful at receiving exemptions. *See, e.g.*, Civil Rights Restoration Act, 20 U.S.C. § 1681(3) (2012) (exempts religious institutions); Nation's Capital Religious Liberty and Academic Freedom Act (Armstrong Amendment), Pub. L. No. 100-462, 102 Stat. 2269 (1988) (exempts Georgetown University from a law prohibiting discrimination based on sexual orientation); Volstead Act, 41 Stat. 305, 308-39 (1919) (exempting sacramental wine from the prohibition under the Eighteenth Amendment).

[217] Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 169 (1992).

[218] Sherbert v. Verner, 374 U.S. 398 (1963).

exercise of the applicant's religious exercise to be outweighed by a compelling government interest.[219] South Carolina proffered two governmental interests: to reduce payments made out of the unemployment compensation funds, and to protect the fund from fraudulent claims made by individuals claiming that their religion prevented them from performing certain work and thereby obtaining benefits.[220] Justice William J. Brennan rejected such broad approach of determining government interests, remarking that even if the state could offer evidence of false claims, it would be insufficient to warrant a substantial infringement on Sherbert's religious liberties.[221] In any event, given the lack of such evidence, the mere possibility of fraud was not suited for consideration.[222] Thus, the Court ruled in favor of the religious claimant, holding that a state could not constitutionally apply its unemployment compensation law so as to compel a worker to abandon her religious convictions.[223]

Despite the favorable ruling for the religious claimant, the *Sherbert* Court did not adequately explain the cost to, or burden on, the individual's religious liberty. The Court in Sherbert may have envisioned a strict scrutiny review that would be rigorous and demanding, where the government would need to demonstrate that the application of law to the plaintiff is necessary to achieve a state interest that truly overweighs the individual's interest.[224] The *Sherbert* Court, however, analyzed the compelling state interest not in marginal terms but in the aggregate, while simultaneously measuring the religious burden of the *individual* plaintiff rather than of a class of similarly situated plaintiffs in aggregate.[225] This set the ground for problems, allowing courts to balance a burden on the individual

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[219] *See id.* at 403.

[220] *See id.* at 407; Brief for the Respondents at 16–18, Sherbert v. Verner, 374 U.S. 398 (1963) (No. 526), 1963 WL 105528, at *16–18.

[221] *Sherbert*, 374 U.S. at 406.

[222] *Id*. at 407.

[223] *Id*. at 410.

[224] BRADY, *supra* note 160, at 190; *see also* Jonathan C. Lipson, *When Churches Fail: The Diocesan Debtor Dilemmas*, 79 S. CAL. L. REV. 363, 418 (2006) ("[T]he 'strict' scrutiny of the Sherbert era was quite weak."); Christopher L. Eisgruber & Lawrence G. Sager, *Protecting Without Favoring Religiously Motivated Conduct*, 2 NEXUS 103, Fall 1997, at 103, 105 (same and listing cases).

[225] *Compare Sherbert*, 374 U.S. at 403 ("We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of *appellant's* religion." (emphasis added), *with id.* at 407 (discussing the effect on the government interest from "unscrupulous *claimants* feigning religious objections." (emphasis added)).

religious objector against the collective interest of the government to deny the exemption.[226]

In fact, this was precisely what happened in many cases following *Sherbert*. Lower courts often departed from a rigorous strict scrutiny review, accepting unsubstantiated fears about future claims for exemption.[227] In *Mozert v. Hawkins County Board of Education*,[228] for example, multiple parents asserted that the school board's imposition of a uniform reader series to their children without alternative reading options violated their free exercise clause, because many passages in the reader series were contrary to their religious belief.[229] In determining whether requiring that a person be exposed to ideas, which he or she finds objectionable on religious grounds, constitute a burden on the free exercise of his or religion, the Sixth Circuit considered the burden on the individual and the interest of the school system in having a uniformity of reading texts.[230] Considering the state's interest in the aggregate, the Circuit painted the interest broadly: the state had compelling interest in teaching students about complex and controversial social and moral issues; the state had an interest in preparing public school students for citizenship and self-government; and, the school board had a compelling interest in having mandatory participation in uniform text in its reading classes.[231] Implicit in this interpretation of the interest is the assumption that the exemption could potentially affect all public schools and students across the state.

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[226] In any event, the Sherbert-era courts showed unwillingness to apply "strict scrutiny really strictly," that the courts would "only rarely reject considered legislative judgments that a certain law had to be applied uniformly." Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1484 (1999).

[227] BRADY, *supra* note 160, at 190–91. Moreover, in some subsequent cases the Court held the compelling interest test inapplicable. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986). BRADY, *supra* note 160, at 190–91.

[228] 827 F.2d 1058 (6th Cir. 1987).

[229] *See id*. at 1060–62.

[230] *Id.* at 1063.

[231] *Id.* It is important to note that the school alleged that it had an interest in maintaining uniformity. Uniformity as an interest is omnipresent, and says nothing more than that we must enforce the law uniformly according to its text, because that is what the law says. The government always has an interest in uniform application of its laws. *Cf.* O'Melveny & Myers v. F.D.I.C., 512 U.S. 79, 86 (1994) ("Uniformity of law might facilitate the FDIC's nationwide litigation of these suits, eliminating state-by-state research and reducing uncertainty—but if the avoidance of those ordinary consequences qualified as an identifiable federal interest, we would be awash in 'federal common-law' rules."). While there may be cases where uniformity is a legitimate interest—e.g., military or police operations—the interest cannot justify any and every law. In fact, the Court recently expressed deep skepticism at the claim that one exemption will inevitably lead to another. *See* Holt v. Hobbs, 135 S. Ct. 853, 866 (2015) (noting that the Court has long rejected the "classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." (quoting Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 436 (2006))).

The Circuit also significantly limited the alleged burden of the plaintiffs' religion. The Circuit noted that because the school did not compel belief in the teachings of the text, the requirement did not impose a burden on the students' free exercise of religious belief. [232] The Circuit found it significant that the school board's requirement did not compel the students to engage in any conduct prohibited by religion, or refrain from any practice required by their religious belief.[233] In its view, no one's religious exercise can be burdened simply by compelled exposure. Thus, by construing the government's interest broadly assuming a myriad of future exemption and the individual's interest narrowly, the circuit court determined that the free exercise clause was not offended.[234]

As Judge Danny Julian Boggs recognized, however, the majority discounted the plaintiffs' honest belief that studying the series would amount to conduct contrary to their religion, and ignored the prior Supreme Court free exercise cases that have broadly interpreted "conducts offensive to religious exercise."[235] The parents viewed the series as endorsing mental telepathy, witchcraft and prayers to idols.[236] Thus, the parents were concerned that their children were being forced to read anti-religious contents without being taught a contrasting view that is consistent with their religious belief, thus inculcating values in children that were anti-religious.[237] The parents were worried that this would force their children to question their own religious beliefs, which would amount to an undue burden on their children's religious belief.[238] For the purposes of the First Amendment, whether the parents' beliefs were reasonable or sensible is irrelevant, because as the Supreme Court noted in *Thomas v. Review*

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[232] *Mozert*, 827 F.2d at 1063–64.

[233] *Id*. The Supreme Court also had cases that interpreted the burden narrowly. *E.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (holding that a road project threatening sacred Native American land did not burden religion); Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985) (holding that forcing religious believers to accept minimum wage (they wanted to work for free for religious reasons) did not impose a burden on their religion).

[234] *Mozert*, 827 F.2d at 1070.

[235] *Id.* at 1076 (Boggs, J., concurring) (citing Thomas v. Review Bd., 450 U.S. 707 (1981)). In *Thomas*, the Court held that although there was no commandment against hooking up chains, the Court accepted Thomas's claims that for him, hooking up chains to a conveyer in a factory would amount to aiding in the manufacture of items used in the advancement of war, contrary to his religious belief. *Thomas*, 450 U.S. at 714.

[236] Nomi Maya Stolzenberg, *"He Drew A Circle That Shut Me out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581, 593–94 (1993) (citing Brief for the Appellees at 3, 25, Mozert v. Hawkins Cty. Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987) (Nos. 86-6144, 86-6179 & 86-6180)).

[237] See *Mozert,* 827 F.2d at 1060–61.

[238] *See* Mozert v. Hawkins Cty. Pub. Schs., 579 F. Supp. 1051, 1052 (E.D. Tenn. 1984).

Board, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[239]

Another problem with the application of the *Sherbert* test is that the Supreme Court often considered the burden on religious exercise in purely economic terms. Consider, for example, *Bob Jones University v. United States*,[240] a case correctly decided but for the wrong reason. *Bob Jones* involved the decision of the IRS to refuse tax-exemption status to a private religious university that had a strict rules prohibiting interracial dating.[241] The University "genuinely believe that the Bible forbids interracial dating and marriage."[242] It acted upon these beliefs, and had nonetheless been extended tax-exempt status as a non-profit religious educational institute, until IRS changed its policy and refused tax-exempt status for private schools practicing racial discrimination policies.[243] The University sued, arguing that this refusal of exemption burdened its right to free exercise of its religious belief.[244] The Court disagreed because it decided to measure religious burden purely as a financial loss.[245] In so doing, the Court discounted the burden on the university's religious belief in its balancing test, by considering only the financial impact from the university's loss of tax-exempt status.

The *Bob Jones* Court erred in two respects: it interprets the petitioners' interest too narrowly and the governments' interest too broadly. Consider, for example that the IRS were instead to threaten every church with loss of nonprofit status if the church refused to perform same-sex marriage. It is well accepted that churches and clergy can refuse to do so on religious grounds.[246] But the *Bob Jones*

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[239] *Thomas*, 450 U.S. at 714.

[240] Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

[241] *Id.* at 578 (quoting I.R.S. News Release IR 81-3 (July 10, 1970)).

[242] *Id.* at 580. Note that a significant number of churches and church leaders opposed this interpretation and sponsored civil rights. *See, e.g.*, George Yancey, *Was Opposition to Interracial Marriage Motivated by Christianity?*, BLACK. WHITE. & GRAY (Apr.18,2014), http://www.patheos.com/blogs/blackwhiteandgray/2014/04/was-opposition-to-interracial-marriage-motivated-by-christianity/; *supra* notes 332–333 and accompanying text.

[243] *Bob Jones*, 461 U.S. at 581.

[244] Brief for Petitioner, Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (Nos. 81-3 & 81-1), 1981 U.S. S. Ct. Briefs LEXIS 1345, at *43-44.

[245] *Bob Jones*, 461 U.S. at 604 ("Th[e] governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs.").

[246] As religious organizations, compelling them would amount to substantial burden. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775–76 (2014) (decided on Religious Freedom Restoration Act grounds); *see also* Travis Weber, *Can Pastors and Churches Be Forced to Perform Same-Sex Marriages?*, FAMILY RES. COUNCIL, http://www.frc.org/clergyprotected (concluding that they cannot be).

Court held that the refusal to extend the IRS exemption imposed only a purely financial burden. The government interest, on the other hand, is the "fundamental, overriding interests in eradicating [gender identity] discrimination."[247] Under *Bob Jones* approach, the purely financial burden would not outweigh the government interest, but the Supreme Court has disagreed with such result.[248] What about using the IRS to compel religious leaders to support the war in Afghanistan? Putting the free speech concerns aside, if the church merely suffers a financial injury, the government could prevail by claiming a compelling interest in protecting the morale of the troops abroad. Or, what about using the IRS to force a church to relocate to a different neighborhood in order to improve diversity and thereby "eradicate[e] racial discrimination?" In short, the *Bob Jones* Court applied *Sherbert* in a way where the government can always win, because religion's interest is measured in purely monetary terms. Instead, the Court should have realized that refusing a religious nonprofit a tax-exemption status reflects the government's finding that the institution is not a "beneficial and stabilizing influence in the community life" and is not charitable.[249] Moreover, it signifies government opposition to the religious practice and inflicts dignitary harm on the followers of the religion.

Finally, the *Bob Jones* decision was incorrect because it failed to consider how much the government's interest would suffer from a single exemption. There is no doubt that eradicating discrimination in every form is an important government interest. Nonetheless, the government already permits some cases of discrimination. For example, schools are allowed to "provide separate toilet, locker room, and shower facilities on the basis of sex," which enables some cases of discrimination.[250] Presumably, these minor exemptions are allowed because they are few in number and thus only nominally undermine the government's interest in eradicating discrimination. Similarly, the *Bob Jones* Court should have considered the effect of exempting the single religious institution on the government interest. In any event, the Bob Jones University would still lose, because the University's discriminatory policies affect and harm so many

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[247] *Bob Jones*, 461 U.S. at 604.
[248] *Burwell*, 134 S. Ct. at 2775-76.
[249] *Bob Jones*, 461 U.S. at 594.
[250] 34 C.F.R. § 106.33 (2017). *This Court Decision in the Gavin Grimm Case Will Bring Tears to Your Eyes*, ACLU (Apr. 10, 2017, 10:00 AM), https://www.aclu.org/blog/lgbt-rights/transgender-rights/court-decision-gavin-grimm-case-will-bring-tears-your-eyes.

students—in fact, potentially every non-adherent member of its student body—from the lack of diversity and prohibition of interracial dating and marriage.

Thus, it is clear that the *Sherbert* test, as applied, does not adequately protect the free exercise of religion. By considering the collective interest of the government versus an individual harm of the burden on religion, courts have effectively watered down the so-called "strict scrutiny" test in the Free Exercise Clause.[251]

B. *The Sherbert-Plus Approach.*

In determining whether to accommodate a religious belief, the dispositive question should be whether the exemption will inflict on society a higher cost than that a religious individual suffers without the exemption. This is similar to cases of nuisance, where a form of externality inflicts cost on third parties.[252] In doing so, an accommodation is unnecessary when the cost to the society outweighs the benefit to the religious claimant.[253] First Amendment and the philosophical foundations of America dictates a presumption that all religious groups' peculiar needs and practices be accommodated, with some compromise among individuals and groups with diverse viewpoints.[254] While the traditional jurisprudence of Free Exercise Clause, underlined by *Sherbert* suggests that government must accommodate religious beliefs unless the individual interest is substantially outweighed by compelling governmental interest, this Article proposes a balancing test that uses a deeper analysis of the cost

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[251] In any event, it certainly does not bear any resemblance to the strict scrutiny approach in free speech cases. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 653 (1994) (strict scrutiny requires a law to be "narrowly tailored to a compelling government interest").

[252] Richard Posner & Michael McConnell, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 9–10 (1989) (noting that there is no difference to an economist qua economist between a nuisance that inflicts cost on third parties greater than the benefits to transactors, and a religion that inflicts cost on non-adherents that they would be willing to pay something to remove. Admitting that on a very strict economic view, Free Exercise Clause would disappear and be replaced by a commitment to efficient interferences with the free exercise of religion, Posner and McConnell propose a "neutral" constrained economic analysis that would protect the values embodied in the religion clauses.).

[253] NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 50 (2017) ("Forcing one person to bear the burden burdens of accommodating the religious practices of another person can work a basic injustice"); *id*. at 76 ("[C]onstitutional law recognizes the principle of fairness to others in addition to the rule of avoiding harm to others.").

[254] Hillel Y. Levin, Allan J. Jacobs & Kavita Shah Arora, *To Accommodate or Not to Accommodate: (When) Should the State Regulate Religion to Protect the Rights of Children and Third Parties*, 73 WASH. & LEE. L. REV. 915, 926 (2016); *See also* THE CRISIS OF RELIGIOUS LIBERTY, REFLECTIONS FROM LAW HISTORY AND CATHOLIC SOCIAL THOUGHT (Stephen M. Krason ed., 2015).

to both sides, in a restrained economic approach.[255] The test considers four factors: (1) presence of a compelling state interest in enforcing the challenged regulation or statute; (2) indirect cost to the members of the society outside the religious group affected by the religious practice in question; (3) the amount of burden on the religious claimer's ability or freedom to exercise the religious practice in question; and (4) harm to the individual resulting from the challenged statute absent religious accommodation.

Under this test, the government would not need to provide religious accommodation when *(1) the compelling state interest + (2) indirect cost to the members of the society resulting from the accommodation* outweighs *(3)the burden on religious freedom + (4) economic and non-economic harm to the individual resulting from the challenged statute, absent a religious accommodation*. In applying this test, the burdens, costs, risks, or harms must be actual, rather than merely speculative or hypothetical,[256] and must not be unlikely, for these factors to constitute a basis for restricting a religious practice. Finally, under the principle of neutrality, fairness, and the Establishment Clause, if the society tolerates harms from a comparable mainstream practice, whether secular or religious in nature, which imposes harm or cost to the society of similar magnitude, then the society should not restrict the religious practice in question based on its harm or cost to the society. On the other hand, if a practice that imposes severe harms is forbidden to secular and religious individuals, this fact could help tilt the balance in favor of restricting the religious practice that imposes comparable harms.[257]

What then, are some of the harms that need to be considered and not considered in the test? On the side of the religious claimant, the economic harm is obvious. In cases of outright prohibition in a criminal sense,[258] the loss of time and income, and the likely loss of earning potential as a result of being branded a convict, all amount to economic injury. In cases of laws not prohibiting, but creating financial burden on the person's ability and freedom to exercise religious belief, the economic harm that a religious claimant would

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[255] This is contrasted with a strict economic approach that considers only monetary harm. Posner & McConnell, *supra* note 252, at 10.

[256] This is not a new requirement, the courts already routinely dismiss speculative harm. *See, e.g.*, Cockrum v. Baumgartner, 95 Ill. 2d 193, 198 (1983) (refusing to grant future damages in wrongful birth cases because of its speculative nature).

[257] Levin, Jacobs & Arora, *supra* note 254, at 965–67.

[258] *See, e.g.*, Emp't Div. v. Smith, 494 U.S. 872, 874 (1990).

suffer is the tax effect, either in the form of loss of benefits, a fine, or competitive disadvantage, which the claimant would need to pay upon choosing to keep true to his or her faith and violate the societal law. In *Sherbert*, the economic harm Ms. Sherbert experienced was the loss of unemployment benefits that she was denied.[259] In *Braunfield v. Brown*,[260] the economic harm would have been the competitive disadvantage that Braunfield would have suffered as a result of keeping the Saturday Sabbath and only being allowed to work five of the seven days a week, compared to six out of seven days permitted for other religious business owners under the Sunday Rest Law.[261]

The non-economic harm the religious claimant suffers is also quite obvious, but less quantifiable. By being prohibited from or restricted in their exercise of religion, or by being compelled to perform acts antithetical to their religious faith, the religious claimant would be burdened from exercising conduct required by their religious belief. Just as conduct-speech is also speech under the Free Speech doctrine,[262] a religious conduct is often a necessary expression of religious belief. A Muslim must bow while praying, a Christian must perform communion, and Jews must perform circumcision.[263] Not being able to perform a particular religious conduct means that the individual is disobeying a particular divine law. There are two significant harms to the individual in this respect. First, in the psyche of the religious believers, their divine law is "a higher law" than the societal law, such that they would suffer eternal condemnation or divine punishment.[264] Of course, future and potential eternal condemnation is a speculative harm that is non-quantifiable and need not be considered.[265] The present mental anguish, however, is a real harm that could significantly affect the individual.[266] Moreover, for a

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[259] Sherbert v. Verner, 374 U.S. 398, 399–400 (1963).

[260] 366 U.S. 599, 607–09 (1961).

[261] *See* Posner & McConnell, *supra* note 252, at 42.

[262] For limits to this doctrine, *see* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL. L. REV. 1277 (2005).

[263] *Bowin Down {ruku'} and Prostration {sujud}*, AL-ISLAM, https://www.al-islam.org/commentary-prayer-professor-muhsin-qaraati/bowing-down-ruku-and-prostration-sujud; Elon Gilad, *Circumcision, a Symbol of the Jews' Covenant with God*, HAARETZ (Aug. 26, 2015, 2:35 AM), https://www.haaretz.com/jewish/circumcision-a-symbol-of-the-jews-covenant-with-god-1.5391356; Mark M. Mattison, *The Meaning of Communion*, AUBURN.EDU, http://www.auburn.edu/~allenkc/openhse/communion.html.

[264] *See* Rudolph C. Barnes, Jr., *Religion, Law, and Conflicting Concepts of Legitimacy* (Nov. 17, 2014) (unpublished manuscript), https://www.law.upenn.edu/live/files/5473-barnesreligion-and-conflicting-concepts-of.

[265] *See, e.g.*, Cockrum v. Baumgartner, 95 Ill. 2d 193 (1983).

[266] RESTATEMENT (SECOND) OF TORTS § 905 (1979).

person of sincere religious faith, a major part of her identity as a person derives from her religious belief.[267] Accordingly, a burden on religious belief necessarily harms a person's sense of identity.[268] As both same-sex couples and religious believers similarly argue, some aspects of human identity are so fundamental that they should be left to each individual.[269] In the cases of public accommodation or civil equality laws, the conscientious objectors are forced to repeatedly violate their conscience and religious decrees, or give up their occupation and profession to avoid violating their conscience again.[270]

On the other hand, providing religious exemption may also cause both economic and non-economic harms to the third-party members of the society. Economic harm they may suffer from religious accommodation is also easily quantifiable. For example, in cases of religious exemption for Saturday Sabbatarians from the Sunday Rest Law, allowing a Saturday Sabbatarian to rest on Saturday and work on Sunday would necessarily give her a competitive advantage over their market competitors who are obliged by the law to rest on Sunday, since they would be able work and get a larger share of the business than the ones open on Saturday.[271] In cases of public accommodation laws and civil equality laws, non-adherents—say a same-sex couple—would suffer non-economic dignitary harm, by the virtue of being turned away and experiencing the vendor's moral disapproval. The emotional harm these same-sex couples suffer is often real, but do not come one-sided.[272]

The non-economic harms on both sides of the table are very real, but intangible and hard to quantify. Attempting to come up with a

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[267] *See, e.g.*, *What Is a Christian View of Materialism*, COMPELLING TRUTH, https://www.compellingtruth.org/materialism-Christian.html (last accessed Mar. 7, 2018). Christians are taught to view materialism with skepticism, always placing God before the things they own on this earth. *See also Ecclesiastes* 12:13 (ESV) ("The end of the matter; all has been heard. Fear God and keep his commandments, for this is the whole duty of man."); *Matthew* 6:33 (ESV) ("[S]eek first the kingdom of God and his righteousness."). In fact, Christians often view the life on earth as a "bus stop" on their path to heaven. Debbie Griffith, *Earth Is the Bus Stop, Heaving Is Our Home*, DL-ONLINE (July 10, 2015, 5:00 AM), http://www.dl-online.com/lifestyle/3781859-earth-bus-stop-heaven-our-home.

[268] Needless to say, a person's sense of identity is very important in how he or she behaves, and what he or she values in life. "Identity" can be defined in two different inter-linked senses: identity as a social category and identity as some distinguishing characteristic that a person takes special pride in or views as socially consequential and unchangeable. James D. Fearon, *What is Identity?* (draft article Nov. 3, 1999), https://web.stanford.edu/group/fearon-research/cgi-bin/wordpress/wp-content/uploads/2013/10/What-is-Identity-as-we-now-use-the-word-.pdf.

[269] Laycock, *supra* note 196, at 59–60.

[270] *Id.* at 65.

[271] Posner & McConnell, *supra* note 252, at 42.

[272] There is also a dignitary and emotional harm on the religious side as well, by the virtue of the religious adherent being asked to defy God's will, and doing something they believe is a serious wrong, that will torment their conscience for a long time thereafter. Laycock, *supra* note 196, at 64–65.

way to calculate specific monetary values of each harm would likely be very arbitrary, if at all feasible. However, as Eric Posner and Matthew Adler have argued in their book on Cost-Benefit Analysis,[273] interpersonal welfare comparisons considering moral values are possible through a (restricted) preference-based account of welfare.[274] Imagine a scenario where, for a person P and P^2, there are two possible outcomes O and O^2, in which "O is pareto-superior to O^2"[275], where at least one person (P) is better off in O than in O^2, and another person (P^2) is better off in O^2 than in O. If it is assumed for simplicities' sake that overall welfare gained by P in outcome O is greater than the loss of overall welfare incurred by P^2 in outcome O, then, interpersonal welfare comparison analysis would suggest that the benefit P would gain from outcome O is greater than the loss P^2 incurs from outcome O. Conversely, in case of outcome O^2, the loss P incurs would be greater than the benefit P^2 gains from O^2.[276]

For a real life example, consider *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.[277] This case would fall within the test because of Colorado's double-standard when it comes to religion or the apparent anti-religious animus in the application of the civil rights laws.[278] In this case, Phillips, the owner and cake artist of Masterpiece Cakeshop,[279] who refused to make a cake celebrating same-sex marriage, would prefer outcome O where he would not have to make a cake and would not be punished by law for the refusal, to outcome O^2 where he would be punished for not making the cake. Conversely, the same-sex couples would benefit prefer the outcome O^2 over the outcome O, because they would feel vindicated for the

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[273] *See generally* MATTHEW D. ADLER & ERIC A. POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS (2006).

[274] *See id.* at 35–56.

[275] An outcome is pareto-superior, if at least one person is better off in that outcome, and no one is made worse off by reaching that outcome, or if the gain in objective welfare realized by people who preference O over O^2 is greater than the loss in objective welfare incurred by people who preference O^2 over O. ADLER & POSNER, *supra* note 273, at 51.

[276] *See id.* at 35–56.

[277] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

[278] *See id.* at1728 (2018) ("[W]hile enforcement proceedings against Phillips were ongoing, the Colorado Civil Rights Division itself endorsed this proposition in cases involving other bakers' creation of cakes, concluding on at least three occasions that a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages."); *see also* Transcript of Oral Argument, *supra* note 210, at 61–63 (discussing anti-religious animus of the Colorado Civil Rights Commission). Absent evidence of such anti-religious animus and any explicit or implicit exemptions, civil rights laws do not come under the purview of this Note's test.

[279] Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272 (Colo. Ct. App. 2015), *cert. denied*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), cert. *granted sub nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017).

dignitary harm they suffered from being denied service and discriminated upon by Jack Phillips. Phillips gains from outcome O monetary gain, relief from fear of violating his religious beliefs, relief from dignitary harm, and the ability to exercise his identity.[280] In contrast, from outcome O^2, same-sex couples would feel vindicated from a one-time dignitary harm they suffered from Phillip's refusal of service, but do not gain in any monetary way.[281] Accordingly, outcome O would make Jack Phillips better off than outcome O^2 benefits the same-sex couples. The interpersonal welfare comparison analysis of *Masterpiece Cakeshop* thus suggests that the government should allow a religious exemption for Jack Phillips.

Of course, this welfare comparison does not complete the proposed test. The court must also consider compelling governmental interest. Continuing with the example of *Masterpiece Cakeshop*, Colorado Civil Rights Commission argued that the state had a compelling interest to prevent the "unique evils" of discrimination by commercial entities, and to extend anti-discrimination protections to homosexual individuals.[282] The Commission argued that public accommodation laws further "compelling interests of the highest order."[283] On the other hand, United States, in favor of Jack Phillips, argued that the government had a compelling interest to eradicate racial discrimination, but that the same cannot be said for opposition to same-sex marriage, noting that classification based on sexual orientation are not subject to the same strict scrutiny as racial classification.[284] The United States also recognized that "opposition to same-sex marriage has long been held in good faith by reasonable and sincere people . . . based on decent and honorable religious or philosophical premises," noting that while government may have some interest in preventing discrimination based on sexual orientation, it also has a countervailing interest in recognizing First Amendment protections for religious objectors.[285] Needless to say, the two governmental briefs show that there can be a conflict between

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[280] Laycock, *supra* note 196, at 65.

[281] *Id.* The case of Bob Jones University would fail this Note's test here as well. As the policy against interracial dating or marriage affected the entire student body, there was a significantly higher burden on bystanders than on the religious organization.

[282] Brief of Respondent Colo. Civil Rights Comm'n at 56, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, No. 16-111 (2017).

[283] *Id.*

[284] Brief for United States at 32, as Amicus Curiae Supporting Petitioner, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, No. 16-111 (2017).

[285] *Id.* at 32.

governmental interest in many cases involving religious objection, and it is not always entirely clear which way the balancing of such conflicting governmental interests would cut. In determining whether these conflicting government interests outweigh Phillips' religious exercise, the test requires the court to consider to what extent these interests are undermined by granting the single exemption at issue.[286] There are numerous other bakeries near Masterpiece Cakeshop,[287] so the single exemption for Phillips would not prevent homosexual couples from a meaningful selection of cakes. Of course, if the other ten likewise seek exemptions or do not make wedding cakes, then the homosexual couples have no alternative, and the government interest in eradicating discrimination would be subverted. Based on what we know thus far, however, this Article's approach would come out in favor of Phillips.

One possible complication to this analysis is the recent trend for plaintiffs to assert a stigmatizing injury.[288] Indeed, issues of possible social stigmatization cannot simply be ignored. Nonetheless, both sides experience some social stigma. For example homosexual individuals or women seeking abortion may experience social stigma when they are refused services by religious claimants on the grounds that the practices they seek are sinful. On the other hand, the religious claimants may feel government condemnation when the government outlaws, taxes, or fines their religious belief, implicitly designating the religious views as unwanted or improper. Which side is more stigmatized is difficult to determine. On one hand, when the government prosecutes religious objectors, it may use stigmatizing language—e.g., "freedom of religion used to justify discrimination is a despicable piece of rhetoric."[289] On the other hand, religious individuals may use abhorrent language in expressing their views.[290] Harsh language on either side increases the weight of the stigmatizing injury. Moreover, the publicity of the case can affect the scope of the injury. When stigmatizing action is routinely reported on major news

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[286] *See supra* notes 238–41, 246–60 and accompanying text.

[287] *See The Best 10 Bakeries Near Masterpiece Cakeshop in Lakewood, CO*, YELP, https://www.yelp.com/search?cflt=bakeries&find_near=masterpiece-cakeshop-lakewood.

[288] This is not the harm to the property of an individual, *see* ROBERT E. ANDERSON ET AL., 22 AM. JUR. 2D DAMAGES § 279 (2018), but rather refers plaintiffs feeling that a certain conduct the promotes of views that condemns the plaintiffs as individuals. *See, e.g.*, Sarsour v. Trumo, 245 F. Supp. 3d 719, 726 (E.D. Va. 2017).

[289] Transcript of Oral Argument, *supra* note 210, at 51.

[290] *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 448 (2011) (church picketed, among other things, "Thank God for Dead Soldiers").

networks, the number of individuals stigmatized increase.[291] Thus, determining the scope of the stigmatizing injury will have to be a case-by-case analysis. It would be up to the parties to prove to the court who suffers greater stigmatizing injury.

As proposed, the Article's test seeks to increase protections afforded by the free exercise clause without undermining important government interests or harming a significant number of innocent third parties. United States has long been called a "melting pot" of people with diverse views, values, religious beliefs, and identity.[292] Thus, we must learn to accept individuals regardless of their race, sex, sexual orientation, political opinion, or religious identity.[293]

V. IN DEFENSE OF THE AFOREMENTIONED

Without a doubt, the positions this Article advocates expand religious liberty. So, there are valid concerns that one may have about the scope of these positions and the effect they would have on society. *Smith*, after all, sought to limit religious exemptions to avoid "courting anarchy," because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," so people could seek religious exemptions from all kinds of laws.[294] The LGBT community is also understandably concerned about the prospect of individuals receiving exemptions from anti-discrimination laws.[295] This Part will address some, but not all, of these concerns.[296]

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[291] Constant reporting of Trump's Muslim ban likely increased the number of Muslims feeling unsafe. *See, e.g.*, Farhana Khera & Johnathan J. Smith, *How Trump Is Stealthily Carrying out His Muslim Ban*, N.Y. TIMES (July 18, 2017), https://www.nytimes.com/2017/07/18/opinion/trump-muslim-ban-supreme-court.html. This is not to say that reporting is at fault; rather, publicity of a given problem by definition increases the number of people who learn of and are affected by it.

[292] JASON J. MCDONALD, AMERICAN ETHNIC HISTORY 50 (2007).

[293] *America the Divided: Why the Great Melting Pot Is Having a Meltdown*, KNOWLEDGE @ WHARTON (July 26, 2017), http://knowledge.wharton.upenn.edu/ article/america-the-divided-why-the-great-melting-pot-is-having-a-meltdown/.

[294] Emp't Div. v. Smith, 494 U.S. 872, 888 (1990) (quoting Braunfield v. Brown, 366 U.S. 599, 606 (1961)).

[295] *See, e.g.*, *LGBT Side Worried After Oral Arguments in* Masterpiece, JOE. MY. GOD. (Dec. 5, 2017), http://www.joemygod.com/2017/12/05/lgbt-side-worried-oral-arguments-masterpiece/.

[296] One potential concern is whether the exemptions increase the tension between the Free Exercise clause and he Establishment Clause. *See, e.g.*, Erwin Chemerinsky, *Do State Religious Freedom Restoration Acts Violate the Establishment Clause or Separation of Powers?*, 32 U.C. DAVIS L. REV. 645, 652 (1999). Any attempt to reconcile the two is to grand of a proposal to undertake in a note. *See* James M. Oleske, Jr., *Grand Theory or Discrete Proposal? Religious Accommodations and Health Related Harms*, 73 WASH. & LEE L. REV. ONLINE 387, 391 (2016).

A. *Not All Laws Contain Exemptions Warranting Scrutiny.*

One concern that commentators frequently express about subjecting laws to scrutiny because of express or implicit exemptions is that "virtually all laws . . . contain many secular exemptions."[297] For example, trespass law excludes adverse possession, duty to testify excludes testimonial privileges, statutory-rape excludes individuals close enough in age to the minor, and intentional homicide excludes murders in self-defense.[298] This understanding of exemptions, however, misses the point. A law does not warrant scrutiny solely because it contains secular exemptions, rather a law warrant scrutiny because the exemptions it contains undermine the law's interest to at least the same extent as a religious exemption sought. Examples are illustrative.

Consider a law that requires a permit to keep exotic wildlife.[299] Thus stated, the law certainly applies to anyone wishing to keep an exotic animal. By definition, however, it excludes possession of non-exotic animals such as cats, dogs, or cattle. Does this "exemption" mean that when a Lakota Indian demands to keep a bear for religious reasons the law will be subject to strict scrutiny?[300] It does not. The exemption for keeping non-exotic wildlife does not undermine the state's interest for regulating the possession of exotic wildlife—i.e., to "bring[] in money and . . . discourage the keeping of wild animals in captivity."[301] So, the Lakota Indian would not be able to claim to be similar enough to the existing exemption. The law is neutral and of general applicability and so does not offend the free exercise clause.[302] Now suppose that the law exempts zoos and circuses.[303] Exempting zoos and circuses undermines both of the laws interests because it decreases state revenue from sale of permits and keeps wild animals in captivity. Were the state to exempt a member of the Lakota tribe to keep a bear for religious reasons, the state would suffer the same harm it already suffers by affording the secular exemptions. Nor

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[297] Volokh, *supra* note 226, at 1540.

[298] *Id.* (first citing MODEL PENAL CODE § 3.02 cmt. 1 (1985); then citing CAL. EVID. CODE §§ 950–1063 (2017); and then citing N.Y. Penal Law § 130.25 (McKinney 2017)).

[299] Blackhawk v. Pennsylvania, 381 F.3d 202, 205 (3d Cir. 2004) (Alito, J.).

[300] Lakota Indians "believe that black bears protect the Earth, sanctity religious ceremonies, and imbue worshippers with spiritual strength." *Id.* at 204. Accordingly, black bears are a part of the religious ceremonies and are necessary to the religious practice. *Id.*; *see also Native American Bear Mythology*, NATIVE LANGUAGES OF THE AMS., http://www.native-languages.org/legends-bear.htm (last visited Jan 21, 2019).

[301] *Blackhawk*, 381 F.3d at 211.

[302] Emp't Div. v. Smith, 494 U.S. 872, 888 (1990).

[303] *Blackhawk*, 381 F.3d at 205 (citing 34 PA. CONST. STAT. ANN. § 2965(a)(1)–(3) (2017)).

could the state claim that it could not make an exemption for a member of the Lakota tribe because it would require it to make exemptions for everyone else. Such an argument is foreclosed by Supreme Court precedent.[304] Accordingly, the law fails the general applicability requirement and must be subject to scrutiny.

What about a religious objection to the payment of income tax? A member of the Religious Society of Friends (i.e., Quakers), for example, filed a conscientious objection with the IRS to avoid paying federal taxes because a percentage of it would be used to fund ongoing military conflicts.[305] Under the tests advocated here, the Quaker could cite to five groups exempt from paying income tax—not-for-profit and nonprofit organizations, foreign citizens, low-income taxpayers, taxpayers with many deductions, and taxpayers with many dependents.[306] Despite these exemptions, however, the challenge would fail. The exemptions for taxpayers with low-income, high deductions or many dependents recognizes that these individuals would not be paying income tax to begin with. Thus, these exemptions do not undermine the basic goal of the income tax—fund the government[307]—because these individuals would not fund the government anyways. Similarly, a nonprofit is typically required to turn over income less expenses to charities and will be taxed on profit made from activities unrelated to their purpose.[308] Thus, the nonprofits likewise do not generate any profit that the government could tax. Lastly, nonresident aliens are only exempt from income taxes assuming the income does not come from a "trade or business within the United States."[309] Thus, only non-U.S. income is exempted, which again does not affect the revenue the United States is entitled to from commerce on U.S. soil. Thus, the existing exemptions do not undermine the purpose of the tax law, while

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[304] Holt v. Hobbs, 135 S. Ct. 853, 866 (2015) (noting that the Court has long rejected the "classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." (quoting Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 436 (2006)).

[305] I.R.S. Gen. Couns. Mem. 20133303F at 1 (Aug. 16, 2013). One church claimed it to be a sin to pay certain federal taxes. *See* United States v. Indianapolis Baptist Temple, 224 F.3d 627, 628 (7th Cir. 2000).

[306] Mark P. Cussen, *5 Groups That Don't Pay Taxes*, INVESTOPEDIA (Apr. 20, 2011, 2:00 AM), https://www.investopedia.com/financial-edge/0411/5-groups-that-dont-pay-taxes.aspx.

[307] Reuven S. Avi-Yonah, *The Three Goals of Taxation*, 60 TAX. L. REV. 1, 3 (2006).

[308] Chizoba Morah, *Do Nonprofit Organizations Pay Taxes?*, INVESTOPEDIA (Nov. 10, 2017, 9:50 AM), https://www.investopedia.com/ask/answers/08/nonprofit-tax.asp.

[309] Alan B. Stevenson, *Is the Connection Effective? Through the Maze of Section 864*, 5 NW. J. INT'L L. & BUS. 213, 215 (1983)

exempting a Quaker (or any religious individual) from taxes would. Thus, income tax would not be subject to scrutiny.

Lastly, the exemptions to criminal law Professor Eugene Volokh cites—statutory-rape excludes individuals close enough in age to the minor and intentional homicide excludes murders in self-defense, government executions, and murders of enemy combatants[310]—would likewise not merit an exemption. Statutory-rape presumes that children under "the age of 16 or 18 in some states . . . are not capable of consenting to intercourse" and seeks to protect minor from influence from adults.[311] Certain "Romeo and Juliet laws," however, exempt consenting teenagers that are close-enough in age from sex offender registration requirement.[312] This exemption recognizes that young individuals are capable of rational and voluntary love—i.e., presumably without force, coercion, or undue influence.[313] Thus, the Romeo and Juliet exception does not undermine the objective of statutory-rape laws. Similarly, the exemptions to intentional homicide law only include justified homicide.[314] These exemptions do not undermine the law's interest in protecting people from unwarranted murder. Accordingly, the exemptions to criminal law Professor Volokh was concerned with would neither allow an Aghor cannibal to murder for religious consumption of human flesh[315] nor any conceivable attempt to have intercourse with a child.[316]

B. *Courts Will Not Adjudicate Religious Issues Any More than They Already Do.*

Another potential objection is that the proposed balancing test would require the courts to peer and decided issues of religious

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[310] Volokh, *supra* note 226, at 1540.

[311] *What You Need to Know About Statutory Rape*, NOBULLYING.COM (Jan. 31, 2015), https://nobullying.com/statutory-rape/.

[312] *See, e.g.*, Jake Tover, *"For Never Was A Story of More Woe Than This of Juliet and Her Romeo"—An Analysis of the Unexpected Consequences of Florida's Statutory Rape Law and Its Flawed "Romeo and Juliet" Exception*, 38 NOVA L. REV. 145, 159 (2013).

[313] Jordan Franklin, *Where Art Thou, Privacy?: Expanding Privacy Rights of Minors in Regard to Consensual Sex: Statutory Rape Laws and the Need for A "Romeo and Juliet" Exception in Illinois*, 46 J. MARSHALL L. REV. 309, 317 (2012).

[314] *See, e.g.*, JAMES BUCHWALTER ET AL., 40 C.J.S. HOMICIDE § 182 (2018).

[315] Vikram Zutshi, *CNN's Portrayal of a "Cannibalistic' Religious Sect Has Exposed the Hypocrisy of the Indian Diaspora*, QUARTS INDIA (Mar. 24, 2017), https://qz.com/940071/cnns-portrayal-of-a-cannibalistic-religious-sect-in-india-has-exposed-the-hypocrisy-of-the-hindu-diaspora/.

[316] The examples above assume, however, that the laws are not enacted in order to discriminate against a religion. Any law would fail the neutrality test if the legislative history or its application evidence animus for religion or an attempt to target religious practice.

doctrine.[317] This is not an issue in this case because the proposed tests do not require the courts to decide religious issues any more than the courts already do. The test only requires for the court to decide whether a given practice is central to an individual's faith, taking into consideration the evidence, including any scripture, the individual cites. The Supreme Court has not refused to make such determinations before.

In *Hernandez v. Commissioner*,[318] for example, the Court was asked to decide whether denying the charitable gift deduction to Scientologists[319] who donated to their church violated the free exercise clause. As part of its decision, the Court admitted to having "doubts whether the alleged burden imposed by the deduction disallowance on the Scientologists' practices is a substantial one."[320] Looking into Scientology text, the Court noted that "[n]either the payment nor the receipt of taxes is forbidden by the Scientology faith generally, and Scientology does not proscribe the payment of taxes in connection with auditing or training sessions specifically."[321] Accordingly, the Supreme Court has already authorized courts to consider the legitimacy of a belief by reviewing a religion's scripture. There is nothing wrong with requiring the courts to consider, and plaintiffs to prove, how important a given religious practice is to their religious identity.

Such examination of an individual's beliefs is not uncommon in our law. For example, a person who commits a crime because he or she genuinely believes that God ordered the crime may be entitled to an exemption under the deific-decree doctrine.[322] Moreover, the deific-decree defense requires a case-by-case analysis to determine whether a particular individual actually believed in the delusion.[323] Consider also the scrutiny the government affords in the immigration context to religious persecution claims. Individuals have to prove that they have a "religion," which may require, for minority beliefs,

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[317] *See, e.g.*, Jones v. Wolf, 443 U.S. 595, 602 (1979) (noting that the First Amendment "prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice"); Congregation Beth Yitzhok v. Briskman, 566 F. Supp. 555, 557–58 (E.D.N.Y. 1983) (refusing to decide issue of religious succession).

[318] 490 U.S. 680 (1989).

[319] For more information on Scientologists, see J. Gordon Melton, *Scientology*, 12 ENCYCLOPEDIA OF RELIGION 8192, 8192–94 (Lindsay Jones, 2d ed., 2005).

[320] *Hernandez*, 490 U.S. at 699.

[321] *Id.*

[322] *See, e.g.*, People v. Serravo, 823 P.2d 128, 139 (Colo. 1992) (the person would be held to be legally insane).

[323] State v. Cameron, 674 P.2d 650, 654 (Wash. 1983).

convincing asylum officers that a set of tenets constitutes a religion.[324] Even then, the asylum officer or a court would scrutinize a refugee applicant to see if the applicant is an actual believer.[325]

As these cases show, there is nothing improper or unusual about tasking courts with determining to what extent a law burdens a given religious practice.

VI. CONCLUSION

Defending religious liberty is rarely at the forefront of progressivism nowadays. There are few progressive voices outraged when judges demand that religious individuals "compromise" their beliefs or pay the "price" for adhering to it.[326] Individual rights are ignored as cities decide to regulate religious ceremonies of the Orthodox Jews, requiring consent and disclaimers for certain historic traditions.[327] Perhaps the lack of support for religious rights stems from the frequent disagreements that arise between Christian conservatives and liberals.[328]

Yet there is no reason not to defend the individual rights of religious individuals. Religious liberty is a freedom guaranteed by the Constitution and there is no reason not to "enforce [it] as we enforce other civil liberties."[329] Religions were a source of progressivism for centuries. Baptists in eighteenth century Virginia strengthened communities through "supportive relationships" where everyone was "brothers and sisters," including the enslaved.[330] William Lloyd Garrison, a prominent abolitionist, decried slavery as a "cardinal sin," imploring for its end.[331] In the Civil Rights Movement, Reverend Martin Luther King Jr. inspired millions to yearn for equality in his

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[324] Amien Kacou, *Qualifying for Asylum Based on Persecution for Your Religion*, NOLO, https://www.nolo.com/legal-encyclopedia/qualifying-asylum-based-persecution-your-religion.html.

[325] *E.g.*, Singh v. Ashcroft, 121 F. App'x 742, 743 (9th Cir. 2005).

[326] Elane Photography, LLC v. Willock, 309 P.3d 53, 79–80 (N.M. 2013) (Bosson, J., concurring).

[327] *E.g.*, Paul Berger, *New York City Stonewalls Forward on Metzitzah B'Peh Circumcision Regulations*, FORWARD (Apr. 24, 2014), https://forward.com/news/ 197015/new-york-city-stonewalls-forward-on-metzitzah-bpeh/.

[328] J. GRESHAM MACHEN, CHRISTIANITY & LIBERALISM 2 (Wm. B. Eerdmans Publishing Co. 2009) (1923).

[329] Laycock, *supra* note 196, at 59.

[330] RHYS ISAAC, THE TRANSFORMATION OF VIRGINIA, 1740-1790, at 165, 171 (1999).

[331] DANIEL OTT & HANNAH SCHELL, CHRISTIAN THOUGHT IN AMERICA: A BRIEF HISTORY 140 (2015). This is not to say that all nineteenth century Christians opposed slavery. Southerners used the Bible to justify it. *See e.g.*, John Blake, *How the Bible Was Used to Justify Slavery, Abolitionism*, CNN: BELIEF BLOG (Apr. 12, 2011, 6:00 AM), http://religion.blogs.cnn.com/2011/04/12/how-the-bible-was-used-to-justify-slavery-abolitionism/.

sermons.[332] In the background, churches worked endlessly to enact the Civil Rights Act of 1964.[333] Senators even described churches as "the most important force at work."[334] Moreover, religious liberty is under attack in the United States. Take, for example, the ongoing struggle between the White House and Muslims, as the White House continues to vilify all adherents of Islam.[335] Today more than ever we need more religious liberty.

This Article had two objectives. First, it sought to highlight the circuit split on the issue of general applicability and propose a resolution that is consistent with Supreme Court precedent and is advisable as a matter of policy. Second, the Article sought to explain why *Sherbert* and courts interpreting *Sherbert* applied less than strict scrutiny and permitted conduct that significantly curtailed religious liberty. To that end, the Article proposed changes to the *Sherbert* balancing test, whereby courts should consider whether government cost and effect of granting the exemption outweighs the economic and non-economic harm to the religious objector. As explained above, the test better protects religious liberty while preventing anarchy or widespread discrimination.

Inasmuch as the Article argued for broader religious liberty, it says nothing about the utility of religion. That is because entire books can, and have been, written debating this precise issue.[336] Political scientists also studied the subject ad infinitum, finding, among other thing that subjective well-being improves "from strong religious beliefs and from frequent church attendance."[337] Regardless of our views on utility of religion, the constant debate over religion has certainly benefitted publishers.[338] But the time has come for the

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[332] *See* Archive of Sermons by Martin Luther King Jr., THE KING CTR., http://www.thekingcenter.org/genre/sermons.

[333] One Senator opposing the bill compared the passion of the churches' efforts to the Spanish inquisition. 110 CONG. REC. 14300 (daily ed. June 18, 1964) (statement of Sen. Russell).

[334] James F. Findlay, *Religion and Politics in the Sixties: The Churches and the Civil Rights Act of 1964*, 77 J. AM. HIST. 66, 66 (1990).

[335] Gregory Krieg, *Trump's History of Anti-Muslim Rhetoric Hits Dangerous New Low*, CNN: POLITICS (Nov. 30, 2017, 10:30 AM), https://www.cnn.com/2017/11/ 29/politics/donald-trump-muslim-attacks/index.html.

[336] *See, e.g.*, DAVID BAGGETT & JERRY L. WALLS, GOOD GOD: THE THEISTIC FOUNDATIONS OF MORALITY (2011); TIMOTHY KELLER, THE REASON FOR GOD: BELIEF IN AN AGE OF SKEPTICISM (2009); JOHN STUART MILL, THREE ESSAYS ON RELIGION: NATURE, THE UTILITY OF RELIGION, THEISM (Prometheus Books, rev'd ed., 1998).

[337] John F. Helliwell & Robert D. Putnam, *The Social Context of Well-Being*, 359 PHIL. TRANS. ROYAL SOC'Y OF LONDON 1435, 1441 (2004).

[338] This observation was made by I. Pottinger in a satirical piece published in 1760. *See* I. POTTINGER, AN ENQUIRY WHETHER THE CHRISTIAN RELIGION IS OF ANY BENEFIT OR ONLY AN USELESS COMMODITY TO A TRADING NATION at A (1760).

publishers to go out of business. The positions advocated in this Article will hopefully become the first step to ending the injustice many religious believers face.