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Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause

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ABSTRACT. Scholars have interpreted the Supreme Court's recent decision in *Fulton v. City of Philadelphia* as declining to overrule *Employment Division v. Smith* so as to avoid revolutionizing the Free Exercise Clause. But what the *Fulton* Court did was arguably even more drastic than returning to the pre-*Smith* regime. This Essay uses vaccine mandates as a case study to clarify how *Fulton* has transformed free exercise doctrine by interpreting the right to free exercise as an expansive equality right. As the success of post-*Fulton* challenges to vaccine mandates demonstrates, free exercise as "religious equality" is potentially more powerful than free exercise ever was when it was treated as a liberty right protecting against incidental burdens on religion.

INTRODUCTION

In 2021, as the COVID-19 pandemic entered its second year and the largest mass vaccination rollout in American history raced to contain it, the Supreme Court quietly but dramatically expanded the First Amendment right to free exercise of religion. In *Fulton v. City of Philadelphia*,[1] the Court rested a free exercise holding on an individualized-exemptions rule that it had previously articulated only in passing.[2] Under this rule, when the government retains any discretion to grant exemptions from a general rule, it *must* exempt religious objectors unless it can meet constitutional law's most demanding test: strict scrutiny.

At first glance, *Fulton* may seem like a narrow decision—which is how most commentators have interpreted it and which would help explain how it garnered

1. 141 S. Ct. 1868 (2021).
2. *See infra* Part II.

the votes of all nine Justices.[3] But *Fulton* is not a narrow decision. As this Essay argues, *Fulton* in fact represents a significant expansion of the right to free exercise of religion. This expansion is part of the Supreme Court's recent project of transforming free exercise into a sprawling and unbounded "religious equality right."

Reva Siegel has coined the term "preservation through transformation" to explain equal-protection reforms that were presented as revolutionary but in fact served to preserve and perpetuate inequality.[4] This Essay suggests that the Roberts Court in *Fulton* did the opposite: it engaged in what we might call "transformation through preservation." As it has done in other recent free exercise cases,[5] the Court cast the decision as exceedingly narrow and limited — as merely

3. *See infra* Part II; *see also* Ira C. Lupu & Robert W. Tuttle, *The Radical Uncertainty of Free Exercise Principles: A Comment on* Fulton v. City of Philadelphia, 2020-2021 AM. CONST. SOC'Y SUP. CT. REV. 8 (suggesting that "somewhere along the way, a deal was struck to eliminate any dissenting opinions"); Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 271, 291-95 (2020) (discussing the tendency of some liberal Justices to vote with the majority in recent religion decisions). Five Justices joined Chief Justice Roberts's majority opinion, and Justices Alito, Thomas, and Gorsuch joined as to the judgment.

4. *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1129, 1146 (1997) (explaining, for example, how the "civil-political-social rights distinction" conceived in *Plessy v. Ferguson* "offered a framework within which white Americans could disestablish slavery, guarantee the emancipated slaves equality at law, and yet continue to justify policies and practices that perpetuated the racial stratification of American society" — in other words, the equal-protection jurisprudence that abolished slavery "simultaneously legitimated new forms of state action that perpetuated the racial stratification of American society").

5. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012) (holding unanimously on both Establishment Clause and Free Exercise Clause grounds that churches are insulated from employment-discrimination suits brought by ministers); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017) (holding in a 7-2 decision that the Missouri State Department's denial of otherwise public funds for playground resurfacing to Trinity Lutheran Church on account of its religious status violated the church's free exercise rights); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n., 138 S. Ct. 1719 (2018) (holding in a 7-2 decision that a religious baker's free exercise rights had been violated by the hostile application of a state antidiscrimination law prohibiting discrimination on the basis of sexual orientation in a place of public accommodation). In future work, I hope to explore how each of these ostensibly narrow decisions is in fact broad and highly consequential.

applying its existing individualized-exemptions doctrine rooted in earlier decisions—in order to win the votes of the liberal Justices.[6] In reality, *Fulton* represents a marked expansion of the right to free exercise of religion.[7]

The effects of this expansion project have been on full display in a recent spate of challenges to government efforts to mandate vaccinations against COVID-19. This Essay uses such challenges as a case study to clarify how *Fulton* has subtly but significantly altered free exercise doctrine by interpreting the right to free exercise as a broad religious-equality right. As the unprecedented success of post-*Fulton* free exercise challenges to vaccine mandates helps demonstrate, free exercise as religious equality has already proven to be a far more robust right than free exercise ever was when it was treated as a liberty right protecting against incidental burdens on religion.[8]

This is so even in cases involving specific constitutional questions that have been asked and answered uniformly in favor of the government for over a century.[9] Until 2021, every free exercise challenge to a vaccine mandate in federal or

6. It is widely accepted that the liberal Justices signed on to Roberts's majority opinion in *Fulton* to avert a broader decision overruling *Smith* altogether. *See supra* note 3 and accompanying text. On this view, the Justices traded their votes in exchange for a narrower holding that "merely" upholds *Smith*'s individualized-exemptions dictum rather than overturn *Smith*. *See also* Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, CATO SUP. CT. REV. (forthcoming) (manuscript at 4), https://ssrn.com/abstract=3893231 [https://perma.cc/TK2L-JUYH] (noting that "*Fulton* indicates that at least five justices believe *Smith*'s unprotective rule was wrongly decided").

7. Some scholars have suggested that *Fulton*'s antidiscretion rule is of a piece with free speech's "similar" antidiscretion doctrine, usually pointing to Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) when suggesting this. *See, e.g.*, Nelson Tebbe, *The Principle and Politics of Liberty and Conscience*, 135 HARV. L. REV. 267, 301-02 (2021); *see also* James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, 2019 WIS. L. REV. 689, 727. But the "too much discretion" rule in *Forsyth* and similar free-speech cases involved the government regulating speech as such, not conduct in a way that incidentally burdened speech. These cases thus involved prior restraints on viewpoints and speech-contents which are incomparable to *Fulton*. I hope to explore the free exercise/free speech comparison with respect to discretion more fulsomely in future work.

8. The reasons for this newfound success are historically and doctrinally complex, and those interested can explore them more fully elsewhere. *See* Zalman Rothschild, *Free Exercise Partisanship*, 107 CORNELL L. REV. (forthcoming 2022) (manuscript at 29), https://ssrn.com/abstract=3707248 [https://perma.cc/4V6X-J7D3] (contesting Laycock and Berg's position that the pre-*Smith* regime was still more protective); *see also* Jim Oleske, Masterpiece Cakeshop *and the Effort to Rewrite* Smith *and its Progeny*, TAKE CARE BLOG (Sept. 21, 2017), https://takecareblog.com/blog/masterpiece-cakeshop-and-the-effort-to-rewrite-smith-and-its-progeny [https://perma.cc/TQ23-2SZ6] (arguing that adoption of "the Berg/Laycock [most-favored-nation] position would provide a *stronger* exemption right than existed before *Smith*, when the Court applied a 'necessarily weaker test' than true strict scrutiny").

9. The Supreme Court's 1905 decision in *Jacobson v. Massachusetts* held that local-government vaccine mandates are constitutional. Although technically not a free exercise case, as the Free

state court had been straightforwardly rejected in favor of the government's public-health initiative.[10] Courts often seemed baffled at the mere suggestion that religious freedom could be imagined as freedom to opt out of a vaccine mandate.[11] In a post-*Fulton* world, however, it is no longer obvious to judges—Republican-appointed and Democratic-appointed judges alike[12]—that freedom of religion does not confer upon religious objectors the right of vaccine refusal.[13]

Exercise Clause had not yet been incorporated against the states, *Jacobson* has been construed as binding precedent for the conclusion that vaccine mandates override free exercise. Citing *Jacobson*, the Court in *Prince v. Massachusetts*, for example, stated that "the right to practice religion freely does not include liberty to expose the community . . . to communicable disease." 321 U.S. 158, 166-67 (1944); *see also* Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws Are Constitutional*, 110 NW. U. L. REV. 589, 606-08 (2016) (recognizing that all subsequent challenges to compulsory vaccination laws have been rejected by both federal and state courts); Caviezel v. Great Neck Pub. Sch., 739 F. Supp. 2d 273, 284 (E.D.N.Y. 2010), *aff'd*, 500 F. App'x 16 (2d Cir. 2012) ("Moreover, the Court is aware of no federal court that, after addressing the relevant Supreme Court opinions, has explicitly held that the First Amendment does provide a religious exemption from mandatory inoculation.").

10. *See* Dorit Rubinstein Reiss, *Thou Shalt Not Take the Name of the Lord Thy God in Vain: Use and Abuse of Religious Exemptions from School Immunization Requirements*, 65 HASTINGS L.J. 1551, 1559-61 (2014) ("No court—state or federal—has ever required a state to create a religious exemption."); sources cited *supra* note 9.

11. *See, e.g.*, Sherr v. Northport-East Northport Union Free Sch. Dist., 672 F. Supp. 81, 88 (E.D.N.Y. 1987) ("[I]t has been settled law for many years that claims of religious freedom must give way in the face of the compelling interest of society in fighting the spread of contagious diseases through mandatory inoculation programs."); *see also* Watkins-El v. Dep't of Educ., 2016 WL 5867048, at *3 (E.D.N.Y. Oct. 6, 2016) ("The Second Circuit has explicitly held that the immunization requirements of Public Health Law § 2164 violate neither the Free Exercise Clause of the First Amendment nor the Due Process clause of the Fourteenth Amendment." (citing *Phillips* v. City of N.Y., 775 F.3d 538 (2015))); *Caviezel*, 739 F. Supp. 2d at 285 ("[T]he Court finds that the free exercise clause of the First Amendment does not provide a right for religious objectors to be exempt from New York's compulsory inoculation law."), *aff'd*, 500 F. App'x 16 (2d Cir. 2012).

12. *See, e.g.*, A. v. Hochul, No. 1:21-CV-1009, 2021 WL 4734404 (N.D.N.Y. Oct. 12, 2021) (decided by Judge David N. Hurd, who was appointed by President Clinton); Thoms v. Maricopa Cnty. Cmty. Coll. Dist., No. CV-21-01781-PHX-SPL, 2021 WL 5162538 (D. Ariz. Nov. 5, 2021) (decided by Judge Steven Logan, who was appointed by President Obama); Kane v. De Blasio, 19 F.4th 152, 169 (2d Cir. 2021) (decided by Judge Debra A. Livingston, who was appointed by President Bush, Judge Amalya Kearse, who was appointed by President Carter, and Judge Eunice Lee, who was appointed by President Biden).

13. On one hand, the finding that some discretion regarding vaccine-mandate exemptions constitutes an "individualized-exemptions scheme" by both Republican- and Democratic-appointed judges reflects an appreciation by "both sides" of *Fulton*'s formalistic doctrine. On the other hand, given that the Court in *Fulton* provided all of *three* sentences of analysis when actually applying its individualized-exemptions rule, *Fulton* was hardly a beacon of clarity. Its individualized-exemptions doctrine was formalistic. But it was anything but fulsome. It should therefore not surprise that *Fulton*'s central holding has not been clear to many lower

This shift in outcomes can be attributed in large part to a shift in doctrine.[14] With a powerful new free-exercise-as-equality doctrine on the books, lower courts have been enabled and emboldened to strike down laws as applied to religious objectors in a range of cases, including—for the first time in history—cases adjudicating vaccine mandates.[15] The power of the new free-exercise-as-equality doctrine can be appreciated not only through a vertical lens, comparing the current free exercise vaccine-mandate cases with previous similar cases, but also through a horizontal lens, comparing free exercise challenges to vaccine mandates with constitutional challenges to vaccine mandates on other grounds. While every federal court in the country faced with the issue has rejected vaccine-mandate challenges brought under free-speech or substantive-due-process theories, free exercise challenges have succeeded in securing wins for vaccine objectors.[16]

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courts. Because of that lack of clarity, some courts addressing free exercise vaccine-mandate cases have leveraged *Fulton*'s nonclarity and decided them along partisan lines, continuing a previous trend of significant judicial partisanship in the free exercise context. *See* Rothschild, *supra* note 8, at 39-43.

To date, in free exercise vaccine-mandate cases in federal courts (district and appellate), Democratic-appointed judges (twenty-five total) have sided with the government 80 percent of the time (twenty times total) and with the religious plaintiff 20 percent of the time (five times total); Republican-appointed judges (twenty-six total) have sided with the government 23 percent of the time (six times total) and with religion 77 percent of the time (twenty times total). *See also* Mark L. Movsesian, *Law, Religion, and the COVID-19 Crisis*, 37 J.L. & RELIGION 9, 9 (2022) ("The COVID-19 crisis has revealed a cultural and political rift that makes consensual resolution of conflicts over religious freedom problematic, and perhaps impossible, even during a once-in-a-century pandemic.").

14. Rothschild, *supra* note 8, at 35, 39-40.

15. *See, e.g.*, Dahl v. Bd. of Tr. of W. Mich. Univ., 15 F.4th 728 (6th Cir. 2021); *Thoms*, 2021 WL 5162538; Grantonz v. Earley, No. 21CV2137, 2021 WL 5866978 (N.D. Ohio 2021).

16. To date, there have been forty-one judicial decisions or votes in federal district and appellate courts involving substantive-due-process challenges and nine involving free-speech challenges to vaccine mandates, zero of which have resulted in a win for vaccine objectors. This despite the fact that it is not obvious that refusing a vaccine should not be considered a fundamental right to refuse medical treatment. *See* Cruzan *ex rel.* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990) (affirming a Missouri state-court decision requiring surrogates seeking to withdraw medical care to prove by clear and convincing evidence that an incompetent patient would have chosen to terminate hydration and nutrition as consistent with a competent individual's fundamental right to refuse medical treatment). Indeed, the right to bodily integrity is one of the oldest fundamental rights recognized by the law. *See, e.g.*, Abigail All. for Better Access to Developmental Drugs v. von Eschenbach, 445 F.3d 470, 480 (D.C. Cir. 2006) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *125, *130) ("A right of control over one's body has deep roots in the common law."), *rev'd en banc*, 495 F.3d 695 (D.C. Cir. 2007); *In re* Cincinnati Radiation Litig., 874 F. Supp. 796, 816-18 (S.D. Ohio 1995) (outlining U.S. Supreme Court decisions regarding the right to be free from unwanted bodily intrusions dating back to 1884). Nor is it entirely obvious that refusing to be vaccinated should not be construed as political expression. *See* United States v. O'Brien, 391 U.S. 367 (1968) (holding

Part I of this Essay situates *Fulton* within the Court's recent project of reconceptualizing free exercise as a broad equality right, elevating religion to "most favored nation" status. Part II of this Essay briefly traces the evolution of the individualized-exemptions free exercise doctrine and argues that the Court in *Fulton* adopted a novel, more capacious interpretation of the rule in keeping with its increasingly expansive view of the Free Exercise Clause. Part III describes and analyzes how federal-court judges have used the new individualized-exemptions doctrine to strike down pandemic-related public-health measures as applied to religious objectors. Finally, Part IV considers the implications of the Court's new individualized-exemptions doctrine for legislation more generally, including for government employers that must comply with statutory schemes that require government employers to provide individualized accommodations, such as the Americans with Disabilities Act, Title VII, and even the Religious Freedom Restoration Act.

I. "MOST FAVORED NATION": THE NEW FREE EXERCISE CLAUSE

In order to understand *Fulton*'s significance, the decision must be contextualized within the broader project of casting free exercise as an equality right. For roughly three decades before the Court's 1990 decision in *Employment Division v. Smith*, the Court interpreted the Free Exercise Clause as providing a liberty right that triggered strict scrutiny of any law that incidentally burdened religiously motivated activity.[17] Then, in *Smith*, the Court narrowed free exercise by deeming it a "mere" equality right against religious discrimination.[18] Proponents of religious freedom immediately began advocating for overturning *Smith*

that burning a draft card is a communicative act of political protest deserving of free-speech protection). According to Professor Catherine Ross, a scholar with free-speech expertise at George Washington University, for example, the argument that disclosing one's vaccination status is a form of political speech is at the very least "plausible." *See* Bob Fernandez, *A Federal Lawsuit Filed by Bruce Castor Argues That Vaccine Status Is Protected Free Speech and Nobody's Business*, PHILA. INQUIRER (Dec. 10, 2021), https://www.inquirer.com/business/castor-vaccine-mandate-union-lawsuit-20211210.html [https://perma.cc/SV3J-34WY].

17. Sherbert v. Verner, 374 U.S. 398, 403 (holding any law that incidentally burdens an individual's free exercise of religion must be "justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate'").

18. For a general overview of *Smith* and how it seemed to radically change the doctrinal landscape, *see* Carol M. Kaplan, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. REV. 1045 (2000); and Oleske, *supra* note 7, at 697-98, 719 (arguing that *Smith* broke with precedent without acknowledging as much). *See also* Douglas Laycock, *The Remnants of Free Exercise*, 1990 S. CT. REV. 1, 1 ("*Smith* produced widespread

and returning free exercise to its more elevated status as a liberty right.[19] But some scholars and jurists also sought to recast *Smith*'s central holding as creating an expansive equality right by insisting on a capacious interpretation of "religious discrimination."[20]

While equality is susceptible to a wide range of meanings, the interpretation of religious equality that was championed by these religious-freedom advocates[21] — and that has recently been adopted by the Supreme Court — is arguably among the more radical interpretations possible.[22] Under the so-called most-favored-nation view of religious equality[23] that the Court endorsed in several of

disbelief and outrage. . . . The Court sharply changed existing law . . . and it issued an opinion claiming that its new rules had been the law for a hundred years."); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990) ("The Smith decision is undoubtedly the most important development in the law of religious freedom in decades. . . . Free exercise is no longer wanting for controversy."). *But see* Nelson Tebbe, Smith *in Theory and Practice*, 32 CARDOZO L. REV. 2055, 2060 (2011) (arguing that in light of the Court's previous practice, *Smith* was not revolutionary).

19. *See also* Rothschild, *supra* note 8, at 29 ("[T]he focal point of religious freedom proponents for years was overturning *Smith*.")

20. *See also* Rothschild, *supra* note 8, at 29; Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 628 (2003) (explaining how "practitioners and academics have . . . thrown their efforts into making the *Smith* test as protective as possible").

21. A host of progressive scholars has also now signed on to the rapidly evolving "free exercise as equality" project. *See, e.g.*, Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM L. REV. 2397, 2401 (2021) ("[Equal value] capture[s] an intuition that the government can wrongly burden protected actors through disregard or devaluing."); David Simson, *Most Favored Racial Hierarchy—The Ever-Evolving Ways of the Supreme Court's Superordination of Whiteness*, 120 MICH. L. REV. (forthcoming 2022) (on file with author) ("[A]rguments can be made that the most favored nation approach should be applied to race as well. Doing so would provide more doctrinal space for racial equality-enhancing government programs and would call into question deeply entrenched aspects of the Court's current affirmative action jurisprudence."); Laura Portuondo, *Effecting Free Exercise and Equal Protection*, 72 DUKE L.J. (forthcoming 2023) (manuscript at 1), https://ssrn.com/abstract=4039962 [https://perma.cc/N2GJ-F57Z] ("Recent free exercise decisions have justified attention to effects by insisting that laws premised on the devaluation of protected interests merit heightened scrutiny. In doing so, they have endorsed a theory of formal equality that applies to, and requires attention to effects in, the equal protection context."). *But see* Andrew Koppelman, *The Increasingly Dangerous Variants of the "Most-Favored-Nation" Theory of Religious Liberty* (Nw. Pub. L. Rsch. Paper No. 22-01, 2022) https://ssrn.com/abstract=4049209 [https://perma.cc/C7U3-ZCXC] (criticizing the "most favored nation" theory of religious discrimination).

22. Rothschild, *supra* note 8, at 35-36. My view is that the most-favored-nation theory of "equality" should not be understood as a proper species of "equality" law, a view I hope to flesh out more in future work. For a different view, *see* Tebbe, *supra* note 21.

23. *See* Laycock, *supra* note 18, at 49-50.

its emergency docket COVID-19-related lockdown order cases,[24] if a general rule provides essentially any secular exemption, the government must also extend an exemption to religious individuals and institutions.[25] Since nearly every rule impinges on at least some individuals' religious sensibilities and has at least one secular exemption, under the most-favored-nation doctrine, the exception *is* the rule for religious individuals and institutions.[26] And this rendering of free exercise as an equality right not only triggers strict scrutiny in essentially every instance but also virtually guarantees victory for religious objectors. The very logic that implicates strict scrutiny—that a secular interest or entity is exempt,

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24. The Supreme Court threw its weight behind this view in two of its emergency orders relating to COVID-19 lockdowns. *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020); Tandon v. Newsom, 141 S. Ct. 1294 (2021); *see also* Zalman Rothschild, Blog Post, *Free Exercise in a Pandemic*, U. CHI. L. REV. ONLINE (2020) [hereinafter Rothschild, *Free Exercise in a Pandemic*] ("[T]o argue that religion must be treated as well as the most favored secular interest in society—as Justice Kavanaugh essentially did in his dissenting opinion [in *South Bay United Pentecostal Church v. Newsom*]—is just another way of demanding that religion receive special accommodation every time a religious practitioner has a religious objection to a law."); Zalman Rothschild, *Free Exercise's Lingering Ambiguity*, 11 CALIF. L. REV. ONLINE 282, 293 (2020) [hereinafter Rothschild, *Free Exercise's Lingering Ambiguity*] ("[The] broad interpretation of general applicability adopted by [Justice] Kavanaugh in *South Bay United* [is] likely to be adopted by the remaining members of the Court's conservative bloc."); Rothschild, *supra* note 8, at 35, 49 ("The leveraging of free exercise's equality interpretation has exploded . . . [T]he Court in a 5-4 decision in *Roman Catholic Diocese of Brooklyn v. Cuomo* applied the 'most favored nation' interpretation of religious discrimination to a state's stay-at-home orders' finding that 'if a state order treats any secular businesses better than any religious institutions, that order violates the Free Exercise Clause.'"); Jim Oleske, Tandon *Steals* Fulton*'s Thunder: The Most Important Free Exercise Decision Since 1990*, SCOTUSBLOG (Apr. 15, 2021), https://www.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990 [https://perma.cc/3HK4-SSFW] ("[I]n *Tandon v. Newsom*, a majority of the court formally adopted the [most-favored-nation] theory for the first time in a short *per curiam* opinion joined by five justices."); Mark Storslee, *The COVID-19 Church-Closure Cases and the Free Exercise of Religion*, 37 J.L. & RELIGION 72, 72 (2022) ("[The COVID-19-related] decisions clarified that, under the Free Exercise Clause, laws burdening religion aren't 'generally applicable' when they treat religious conduct less favorably than comparable secular conduct.").

25. *See generally* Rothschild, *Free Exercise in a Pandemic*, *supra* note 24 ("[T]o argue that religion must always be treated as well as the most favored secular interest in society . . . is just another way of demanding that religion receive special accommodation every time a religious practitioner has a religious objection to a law. This is because nearly every law has at least some 'secular' exceptions."); Rothschild, *Free Exercise's Lingering Ambiguity*, *supra* note 24 ("[G]eneral applicability demands that religion not be treated worse than almost *any* secular activity under the law—or, put differently, that religion be given special treatment vis-à-vis all secular interests that are not extended exceptions."); Rothschild, *supra* note 8 ("Under [the 'most favored nation'] approach, identifying almost any secular exemption will give rise to a constitutional right to a religious exemption.").

26. *See* sources cited *supra* note 25.

but a religious one is not—automatically locks in the conclusion that the lack of an exemption for religion is either not compelling, not narrowly tailored, or both.[27] It should come as no surprise that in just a few short years, this doctrinal shift has succeeded not only in tacitly reversing *Smith*, but also in establishing a new Free Exercise Clause altogether, one that pre-*Smith* religious plaintiffs would envy. Whereas pre-*Smith*, federal courts at every level regularly sided with the government when faced with challenges to incidental burdens on religion, in the post-*Smith* religious-equality world, religious plaintiffs win far more often.[28]

Fulton's individualized-exemptions rule must be understood as a subset of the most-favored-nation doctrine and as a part of the broader project of leveraging free exercise as an expansive equality right. The muscled-up free-exercise-as-equality doctrine, which first appeared in the form of the most-favored-nation interpretation of religious discrimination, now underlies the Supreme Court's anti-any-and-all-discretion rule. According to this doctrine, in the name of equality, any time the government reserves any discretion regarding whether to exempt anyone or anything from a general rule, it cannot deny an exemption

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27. Rothschild, *Free Exercise's Lingering Ambiguity*, *supra* note 24, at 284 ("[U]nder this approach, identifying almost any secular exemption will give rise to a constitutional right to a religious exemption."); Rothschild, *supra* note 8, at 29 n. 121 ("Perhaps ironically, granting general applicability a broad meaning along these lines [by adopting the 'most favored nation' view] is not meaningfully different from overturning *Smith* since practically every law has at least one exception for a secular entity or activity.").

28. *See generally* James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407 (1992) (describing the poor track record of free exercise claims in federal courts of appeals); *see also* EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d. 610, 625-29 (9th Cir. 1988) (Noonan, J., dissenting) (surveying free exercise decisions by the federal courts). At the Supreme Court, meanwhile, in only four cases after *Sherbert* did the Court find that religious believers were entitled to exemptions, and three of those were minor variations on *Sherbert* itself—they were all cases in which states denied unemployment-insurance benefits after ruling that claimants who left jobs for religious reasons lacked "good cause." The four cases are *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Thomas v. Revenue Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987); and *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989). All but *Yoder* involved claims for unemployment insurance benefits. As Professor Ira C. Lupu has suggested, the strict scrutiny applied by the Court in its free exercise cases was all-too-often "strict in theory, but ever-so-gentle in fact." Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756 (1992); *see also* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Doctrine*, 57 U. CHI. L. REV. 1109, 1110 (1990); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994); Lee Epstein & Eric Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, SUP. CT. REV. (forthcoming 2022); Rothschild, *supra* note 8, at 39.

to religious actors or interests—even if it has never actually extended an exemption and has no intention of extending one, either for religious *or* secular interests.[29]

II. THE RISE OF THE INDIVIDUALIZED-EXEMPTIONS RULE

The individualized-exemptions rule has its roots in *Sherbert v. Verner*, decided in 1963 at the height of the Warren Court's rights-protective era.[30] In *Sherbert*, the Court held that laws that incidentally burden individuals' religious exercise are subject to strict scrutiny.[31] To that end, the Court in *Sherbert* concluded that the state of South Carolina could not deny unemployment benefits to a Seventh-day Adventist who would not accept employment that required working on his Sabbath, since such a denial would amount to a tax on religious observance.[32] And in three subsequent cases, each involving individualized "good cause" evaluations, the Court required the state to grant unemployment benefits to members of minority religions who would not accept employment requiring them to work on their Sabbath.[33]

In 1990, however, the Court scaled back its free exercise jurisprudence. Writing for the Court, Justice Scalia announced in *Smith* that *Sherbert*'s rule did not apply to neutral and generally applicable laws—that is, to laws that do not discriminate against religious individuals or practices. *Smith* thus converted free exercise, which had previously provided protection against even incidental burdens on religious practice, from a liberty right into an equality right.[34] Attempting to distinguish *Sherbert* and several subsequent cases involving unemployment benefits, the Court in *Smith* explained that these previous cases were unique.[35] According to the *Smith* Court, when states operate unemployment-benefits programs, they often require "individualized governmental assessment[s] of the reasons" why the unemployed claimant has turned down

29. *See infra* notes 55, 88 and accompanying text.

30. 374 U.S. 398, 401 (1963).

31. *Id.* at 403.

32. *Id.* at 406.

33. *See* Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707 (1981); Hobbie v. Unemployment App. Comm'n of Fla., 480 U.S. 136 (1987); Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829 (1989).

34. Specifically, *Smith* held that the claimants—members of the Native American Church who ingested peyote as a sacrament—were not entitled to an exemption from a law denying them unemployment benefits on account of their illegal drug use. Emp. Div., Dep't Hum. Res. of Or. v. Smith, 494 U.S. 872, 884-85 (1990).

35. *Id.* at 883-84.

available work.[36] If a state assesses individuals' reasons for turning down available work and evaluates secular reasons, but not some religious reasons, as "good cause," that scheme constitutes a "system of individual exemptions" such that it is unconstitutional for the government to "refuse to extend that system to cases of 'religious hardship' without compelling reason."[37]

Smith's dictum that individualized-exemptions regimes trigger strict scrutiny is thus exceedingly narrow.[38] It applies only in circumstances involving government benefits that require individual assessments of applicants' requests and the reasons underlying them, where it is possible (if not probable) that the government will be less sensitive and attentive to religious concerns — especially those based on minority, idiosyncratic religions.

Before it decided *Fulton* in 2021, the Court had applied *Smith*'s individualized-exemptions dictum only once, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[39] The Court in *Lukumi* closely analyzed whether the City of Hialeah intentionally discriminated against the Afro-Cuban Santerian Church of Lukumi Babalu Aye by gerrymandering an "unnecessary animal-killing" ordinance to apply almost exclusively to one small religious sect's practice of religious slaughter. Tucked away in its twenty-five-page opinion, the Court explained (in three sentences' worth of analysis) that because the ordinance "require[d] an evaluation of the particular justification for the killing [to determine if the killing was "necessary"], [it] represent[ed] a system of 'individualized governmental assessment of the reasons for the relevant conduct.'"[40] And because the city's "application of the ordinance's test of necessity devalue[d] religious reasons for killing by judging them to be of lesser import than nonreligious reasons. . . . [the church's] religious practice [was] singled out for discriminatory treatment" in violation of *Smith*'s individualized-exemptions rule.[41] The Court's application of

36. *Id.* at 884.

37. *Id.*

38. Indeed, the Court in *Smith* was bent on circumscribing its individualized-exemptions doctrine to unemployment-benefit cases, emphasizing, for example, how the Court had "never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation." *Id.* at 883. And *Smith itself* involved an "individualized-exemptions scheme" of sorts, yet the Court did not consider it to be an individualized-exemptions scheme that would pose any tension between *Smith*'s characterization of *Sherbert* and *Smith*'s own holding, presumably because the Court had a fairly narrow view of "individualized exemptions" in mind as it (re)interpreted *Sherbert*.

39. 508 U.S. 520 (1993).

40. *Id.* at 537.

41. *Id.* at 537-38.

Smith's dictum in *Lukumi* was an afterthought and is easily missable among the numerous more fleshed-out bases for the Court's holding.[42]

Taking their cue from the Supreme Court, lower courts shied away from relying on *Smith*'s individualized-exemptions dictum. Likely because they understood the "doctrine" to be narrow, lower federal courts drew on it rarely and fleetingly.[43] Free exercise scholars likewise interpreted *Smith*'s individualized-

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42. *See* Nelson Tebbe, *The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267, 300 (2021) (observing that "the individualized-exemptions rule had never provided the sole foundation for a holding by the Court").

43. *See, e.g.*, Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1081-82 (9th Cir. 2015) (holding that although relevant rules "contain[ed] discretionary text that allow[ed] those who enforce the rules to discriminate against religion," there was no individualized-exemptions scheme); Ward v. Polite, 667 F.3d 727, 740 (6th Cir. 2012) (mentioning only in passing that "[a]t some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny"); Blackhawk v. Pennsylvania, 381 F.3d 202, 209-12 (3d Cir. 2004) (finding an individualized-exemptions scheme regarding permit fees for keeping wildlife in captivity); Axson-Flynn v. Johnson, 356 F.3d 1277, 1299 (10th Cir. 2004) (finding that the "record raises a material fact issue as to whether Defendants maintained a discretionary system of making individualized case-by-case determinations regarding who should receive exemptions from curricular requirements"); Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999) (explaining, only, that it was no matter that the case at hand did *not* involve individualized exemptions); Keeler v. Mayor & City Council of Cumberland, 940 F. Supp. 879, 885 (D. Md. 1996) ("[T]o the extent that Cumberland's historic zoning laws provide for a 'system' of exemptions and exceptions, the free exercise analysis requires application of principles other than those set forth in *Smith II*."); Rader v. Johnston, 924 F. Supp. 1540, 1553 (D. Neb. 1996) (applying the individualized-exemptions doctrine).

The Religious Land Use and Institutionalized Persons Act (RLUIPA) arguably codified *Smith*'s dictum at least with respect to one type of scenario: land-use determinations. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc (2018)). RLUIPA's section 2 states that the Act applies when a "substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved." *Id.* at § 2(a)(2)(C). But RLUIPA's adoption of an "individualized assessments" rule was premised on the specific and narrow concern for intentional discrimination against religion, including preferential treatment of better-known religions vis-à-vis lesser-known ones. *See, e.g.*, 146 CONG. REC. 16698 (2000) (joint statement of Sen. Orrin Hatch & Sen. Ted Kennedy) (stating that "[c]hurches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation"). And numerous circuit courts have rejected a *per se* approach and instead apply a fact-specific inquiry to determine whether the regulation at issue was *in fact* motivated by discriminatory animus or whether the challenged rule was applied in an *intentionally* discriminatory fashion. *See, e.g.*, First Assembly of God of Naples, Fla., Inc. v. Collier Cnty., 20 F.3d 419, 423-24 (11th Cir. 1994); Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472

exemptions dictum as "extremely narrow and generally unhelpful."[44]

The *Fulton* Court changed course, injecting doctrinal muscle into *Smith*'s dormant individualized-exemptions dictum. In *Fulton*, Catholic Social Services (CSS), a Catholic adoption agency, sued the City of Philadelphia for refusing to refer foster children to it after the agency confirmed it would not match children with same-sex couples — a policy that violated the antidiscrimination provision in the city's contract.[45] The agency argued that the city's refusal to permit the adoption agency to place children amounted to discrimination against religion.[46] Specifically, the agency contended that because the city had discretionary authority to grant "exemptions" to the antidiscrimination provisions in its contract, the city had established an "individualized exemptions" regime.[47] The Court agreed. Writing for the majority, Chief Justice Roberts focused on the terms of the city's contract with foster-care agencies, which forbade discrimination based on sexual orientation but permitted city officials to make exceptions to that prohibition.[48] He concluded that this wiggle room doomed the city's requirement that the Catholic agency must not discriminate against same-sex couples.[49]

Sherbert, its progeny, and *Lukumi* all involved required government "assessments" of the "reasons" for the actions in question — in the unemployment-benefits cases, why the individual would not accept available work, and in *Lukumi*, why the individual felt it was "necessary" to slaughter an animal.[50] Many commentators understood these cases to be driven by a heightened concern that the

(8th Cir. 1991); Mount Elliot Cemetery Ass'n v. City of Troy, 171 F.3d 398, 405 (6th Cir. 1999); Rector, Wardens & Members of the Vestry of St. Bartholomew's Church v. City of N.Y., 914 F.2d 348, 354 (2d Cir. 1990); C.L. for Urb. Believers v. City of Chi., 342 F.3d 752, 764-65 (7th Cir. 2003); Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 277 (3d Cir. 2007); *see also* Grace United Methodist Church v. City of Cheyenne, 235 F. Supp. 2d 1186, 1200 (D. Wyo. 2002) (supporting the proposition that zoning laws *may* be neutral and generally applicable); Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 FORDHAM URB. L.J. 1021, 1025 (2012) ("Churches continue to face hostility and discrimination in the zoning context, and RLUIPA rightly assists courts in bringing the First Amendment to bear.").

44. Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & Pol. 119, 194 (2002).

45. Fulton v. City of Phila., 141 S. Ct. 1868, 1874 (2021).

46. Brief for Petitioners at 23-30, *Fulton*, 141 S. Ct. 1868 (No. 19-123).

47. *Id.* at 17.

48. *Fulton*, 141 S. Ct. at 1878-79.

49. *Id.* at 1878 ("No matter the level of deference we extend to the City, the inclusion of a formal system of entirely discretionary exceptions in section 3.21 renders the contractual non-discrimination requirement not generally applicable.").

50. *See* Storslee, *supra* note 24, at 83 ("By employing categories like 'necessary' or 'good cause,' these laws unambiguously required government to 'asses[s] . . . the reasons for the . . . conduct' in question. But even more, when used to punish religious conduct, they revealed that

government would not appreciate lesser-known religious beliefs or practices and, as a result, would not consider practices grounded in those beliefs as "good cause" or "necessary"—inherently vague and indeterminate subjective standards—while it *would* do so for secular and more well-known religious beliefs and practices.[51] Jurists similarly understood this concern as the basis for the individualized-exemptions doctrine embedded in these cases. For example, Chief Justice Burger, in *Bowen v. Roy*, characterized the government's actions in the unemployment cases as demonstrating more than just insensitivity toward the Seventh-day Adventists and Jehovah's Witnesses, the religious minorities involved in these cases.[52] According to him, "to consider a religiously motivated resignation to be 'without good cause' tends to exhibit *hostility*, not neutrality, towards religion."[53] It was the government's assessment of select personal reasons, but not those grounded in minority religious beliefs, as "good cause" that led the Court to demand close scrutiny of the state's refusal to offer a religious exemption. The *Smith* Court also read the unemployment benefits cases this way.[54]

In *Fulton*, by contrast, there was no evidence that the government had ever evaluated the importance of the agencies' religious "reasons"; indeed, the government emphasized repeatedly to the Court that it believed it *could not*—and therefore never did and never would—exempt any agency whatsoever from its antidiscrimination policy for any reason.[55] The Court, however, insisted that the

government had 'devalue[d] religious reasons,' because they allowed punishment *only after* determining that religious motivations didn't qualify as 'good cause' or 'necessary.' By regulating an activity contingent on a negative judgment about the religious reasons for undertaking it, these laws discriminated against religion in a way the Free Exercise Clause forbids.").

51. *See, e.g.*, Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of* Smith*,* Sherbert*, Hogwarts, and Religious Liberty*, 83 NEB. L. REV. 1178, 1180–203 (2005) ("[S]ubjective review creates too great a risk of discrimination and bias against unpopular or minority religious beliefs.").

52. 476 U.S. 693, 708 (1986).

53. *Id.* (emphasis added).

54. Emp. Div., Dep't Hum. Res. of Or. v. Smith, 494 U.S. 872, 884 (1990) (describing *Sherbert* as having "read[] [the] state unemployment compensation law [at issue to] allow[] benefits for unemployment caused by at least some 'personal reasons'" but not for reasons grounded in religion).

55. Philadelphia repeatedly argued that it understood 3.21 to apply exclusively to the matching stage and not the certification stage (only the latter was at issue in *Fulton*)—thus it would not actually ever use discretion to grant exemptions for the specific policy rule at issue in the case. And it represented again and again that it never did grant any such exemption—ever. It also argued that the discretion provided under 3.21 for the matching stage did not apply to the potential *type* of exemption at issue in *Fulton*, namely, an exemption from the city's nondiscrimination policy. Rather, the city explained, the kind of exemption that *might* be provided

contract *theoretically* permitted discretion. On that thin basis, the Court applied its new antidiscretion rule and held that the government's refusal to grant an exemption to CSS contravened the Free Exercise Clause. The Court's reasoning was short and blunt: the sheer fact that (according to the Court)[56] the Commissioner *could* grant exceptions meant that "the City may not refuse to extend" one for "religious hardship without compelling reason."[57]

Absent any actual concerns about unjustified discrimination against religion, the Court's reasoning can be made sense of only on most-favored-nation grounds.[58] The most-favored-nation rule dictates that whenever the government provides exemptions for secular interests, it must also provide them for

under 3.21—which generally provided numerous grounds on which an agency could not refuse a referral—was for geographical hurdles associated with an agency working on matching a particular child with a particular family. *See, e.g.*, Brief for City Respondents at 35-36, Fulton v. City of Phila., 141 S. Ct. 1868 (2021) (No. 19-123) ("DHS has no authority to grant exemptions to the contract's non-discrimination requirement. . . [Section 3.21] does not permit DHS to authorize discrimination in the recruitment or certification of foster parents—and, indeed, there is no evidence that DHS has ever granted an exemption under this provision for any purpose."); Transcript of Oral Argument at 77-78, Fulton v. City of Phila., 141 S. Ct. 1868 (2021) (No. 19-123) (Neal Katyal explaining the city's interpretation of 3.21 as being "about, like, if the child lives far away or something like that, we're not going to force the FCA to take it, but there's nothing about any sort of categorical or classified—classification on race or gender or anything like that with respect to 3.21" and also explaining that "it certainly hasn't happened in practice[.]"); Transcript of Oral Argument, *supra*, at 74-75 (Justice Sotomayor, regarding 3.21: "[H]as there ever been an agency that has or an exemption granted on the basis of a protected characteristic?" Mr. Katyal: "No, Your Honor."). And to determine that the potential exemptions for geographical hurdles are "comparable" to religious exemptions for nondiscrimination prohibitions is to operate under most-favored-nation logic. It would require formalistically concluding that *any* secular exemption—even a merely theoretical one—from any part of the policy renders *all non*exemptions for religion unconstitutional. *See also* Ira C. Lupu & Robert W. Tuttle, *Two Surprises in* Fulton v. City of Philadelphia*—A Unanimous Outcome and the Enduring Quality of Free Exercise Principles*, AM. CONST. SOC'Y (June 18, 2021), https://www.acslaw.org/expertforum/two-surprises-in-fulton-v-city-of-philadelphia-a-unanimous-outcome-and-the-enduring-quality-of-free-exercise-principles [https://perma.cc/YM29-6MHR] (observing how, in "contrast" to the "unemployment context," "the City Commissioner in Philadelphia had *never* made an exception under 3.21 for discrimination on forbidden grounds against prospective foster parents, and the City asserted that the Commissioner lacked authority under other provisions of the contract and under local law to make such exceptions").

56. *See* sources cited *supra* note 55.

57. *Fulton*, 141 S. Ct. at 1878 (internal quotation marks omitted).

58. The free-speech antidiscretionary rule is not a good analogy to free exercise antidiscretion, lest one think the Court was simply adopting an "analogous" rule from free speech. *See supra* note 7. It is noteworthy that the Court did not cite any free-speech cases when discussing and applying its new individualized-exemptions rule in *Fulton*, although amici, including the United States, urged it to draw on free-speech cases. *See* Brief for the United States as Amici

"comparable" religious interests.[59] *Fulton*'s new individualized-exemptions doctrine extends that rule to *potential* exemptions, that is, the doctrine mandates religious exemptions even when the government *might be* retaining discretion to grant exemptions, regardless of whether it actually does or does not provide them. And the uncompromising logic of most-favored nation carries over to strict scrutiny. According to the *Fulton* Court, it could not be said that the government has a compelling interest "in denying an exception" when it generally "mak[es] them available."[60] Since the government cannot claim its "polic[y] can brook no departures," the policy is either not compelling, not necessary, or both.[61]

By holding that government discretion to offer exemptions from contractual provisions requires the government to grant exemptions to all religious objectors, the Court effectively rendered countless government decisions and actions constitutionally infirm as applied to religious objectors. Take essentially all government contracts. Contracts are by their very nature individualized, and drafting them involves case-by-case determinations, which in turn involve discretion.[62] *Fulton*'s formalistic rule would seem to subject to strict scrutiny *all* requirements in *all* government contracts with *all* religious objectors.[63] Indeed, in a bizarre twist, even *Smith*—which *Fulton* purported to merely be upholding—cannot be explained on *Fulton*'s terms, as the underlying facts in *Smith* involved

Curiae Supporting Petitioners at 16, Fulton v. City of Phila., 141 S. Ct. 1868 (2021) (No. 19-123).

59. Some frame the most-favored-nation rule as being triggered only when the secular exemption undermines the interest of the law to the same degree as would the religious exemption. But such a test, predicated on identifying similarly situated secular and religious comparators, is unworkable. *See* Rothschild, *Free Exercise's Lingering Ambiguity*, *supra* note 24, at 290 ("[T]he meaning of 'similarly situated' is in the eye of the beholder. Church gatherings can be compared to both lecture halls and restaurants, as demonstrated by the divergent opinions of the concurrence and dissent [in *South Bay United Pentecostal Church v. Newsom*]. If the test of what constitutes religious discrimination boils down to the relative similarity between a secular activity that has received an exemption and a religious activity that has not, it is no test at all."). I hope to develop this argument more in future work.

60. *Fulton*, 141 S. Ct. at 1882.

61. The *Fulton* Court cited the *Lukumi* Court's strict scrutiny analysis and its reasoning that underinclusivity meant the governmental interests were not compelling and the ordinances were not narrowly tailored. *See Fulton*, 141 S. Ct. at 1882 (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546-47 (1993)).

62. The Supreme Court itself has recognized that "subjective and individualized" determinations are "par for the course" in the contracting context. Engquist v. Or. Dep't of Agric., 553 U.S. 591, 604 (2008).

63. See *supra* note 7, which discusses comparing free exercise to free speech in this respect.

individualized discretion.[64] By the logic of *Fulton*, *Smith* — which established the individualized-exemptions doctrine through a rereading of *Sherbert* and its progeny — should have come out the other way.

III. INDIVIDUALIZED-EXEMPTIONS FORMALISM AND VACCINE MANDATES

Debate over *Fulton*'s expansive individualized-exemptions doctrine erupted almost overnight. To some, the doctrine was "[h]ighly questionable" and served only as an act of "convenience" that "allow[ed] the Court to rule in favor of CSS without addressing the question of whether *Smith* should be overruled."[65] To others — most notably Professors Douglas Laycock and Thomas Berg — the Court's reasoning was unimpeachable. In their view, Philadelphia's contract squarely "fell within the principle [of individualized exemptions] dating back to *Smith*."[66]

But nearly all insist on viewing *Fulton* as a narrow decision.[67] Recent free exercise challenges to vaccine mandates help put into relief that this reading is

64. Philadelphia gestured toward this argument in its brief when it argued that "[i]f the existence of discretion to grant exemptions defeated general applicability, *Smith* would be a dead letter." Brief for City Respondents, *supra* note 55, at 38; *see also Fulton*, 141 S. Ct. at 1914 (Alito, J., concurring in the judgment) (explaining that the state used its prosecutorial discretion in *Smith*); Tebbe, *supra* note 7, at 299-300 (same).

65. Lupu & Tuttle, *supra* note 3, at 228, 254; *see also* Tebbe, *supra* note 7, at 273 (contending that *Fulton* "whitewash[ed] a turnabout, so that [the Court] could continue to remake free exercise law to more strongly empower religious interests without formally repudiating any cases").

66. Laycock & Berg, *supra* note 6, at 35.

67. *See, e.g.*, Lupu & Tuttle, *supra* note 3, at 228 ("[S]omewhere along the way, a deal was struck to eliminate any dissenting opinions. In exchange, the likely dissenters got a very narrow Court opinion . . . ."); Linda C. McClain, Obergefell*,* Masterpiece Cakeshop*,* Fulton*, and Public-Private Partnerships: Unleashing v. Harnessing "Armies of Compassion" 2.0?*, 60 FAM. CT. REV. 50, 67 (2022) (describing the majority opinion in *Fulton* as a "narrow ruling"); Laycock & Berg, *supra* note 6, at 37, 39 ("[*Fulton*'s] general applicability holding turns on specific features of Philadelphia's rules. . . . Overruling *Smith*'s unprotective rule is important . . . ."); Noah Feldman, *Is the Supreme Court on Its Way to Becoming a Conservative Bastion?*, N.Y. TIMES (Dec. 29, 2021), https://www.nytimes.com/2021/11/08/books/review/linda-greenhouse-justice-on-the-brink-supreme-court.html [https://perma.cc/4LMA-R3XT] (describing the Court siding with plaintiffs in several free exercise COVID restrictions cases as "not hav[ing] a transformative effect on . . . legal doctrine" and emphasizing that *Fulton* "did not reverse 30-plus years of First Amendment precedent by creating a constitutional right to automatic exemptions from neutral, generally applicable laws, despite being expected to do so by just about every court watcher, myself included"); LINDA GREENHOUSE, JUSTICE ON THE BRINK: THE DEATH OF RUTH BADER GINSBURG, THE RISE OF AMY CONEY BARRETT, AND TWELVE MONTHS THAT TRANSFORMED THE SUPREME COURT 208 (2021) ("[T]o many, it appeared that nothing much had happened [in *Fulton*]."). *But see* GREENHOUSE, *supra*, at 213-14 (herself appreciating

wrong. In addition to revealing *Fulton*'s radicalness, the vaccine challenges also demonstrate the consequences that flow from that radicalness. Relying on *Fulton*'s individualized-exemptions rule, judges appointed by both Republican and Democratic presidents have[68] — for the first time in history[69] — struck down vaccine mandates as applied to religious objectors. This Part illustrates how they have done so. Section III.A shows how courts have applied *Fulton*'s individualized-exemptions doctrine, adopting, as the Court did in *Fulton*, a highly formalistic-textualist interpretation of the government's exemptions schemes to find one even where the government insisted none existed. Sections III.B and III.C demonstrate how courts have extended *Fulton* even to governmental "discretion" regarding *factual* determinations, including whether an individual's religious belief is sincerely held.

A. Court-Invented Assessments as Individualized Exemptions

A flurry of recent free exercise vaccine-mandate cases lays bare the capaciousness of *Fulton*'s new free exercise doctrine and its consequences. In *Dahl v. Board of Trustees of Western Michigan University*, for instance, several student-athletes sued Western Michigan University (WMU), which had denied their requests for a religious exemption from the university's vaccination mandate.[70] The students-athletes — along with all athletes at WMU — received a text message in mid-August 2021 informing them that "all student-athletes" must provide proof of at least one dose of a COVID-19 vaccine "to maintain full involvement in the athletic department" and that "[m]edical or religious exemptions and accommodations will be considered on an individual basis."[71]

The plaintiffs in *Dahl* submitted requests for religious accommodations, asserting that their sincerely held religious beliefs would be compromised if they were to receive the required vaccination and asking that they be allowed to continue playing competitively while remaining unvaccinated.[72] WMU rejected

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the radicalness of *Fulton*, writing "*Fulton v. City of Philadelphia* was something other than the display of judicial minimalism and collegiality that many commentators perceived" and describing *Fulton* as not "inconsequential as legal doctrine").

68. *See* sources cited *supra* note 12.

69. *See* sources cited *supra* notes 9-11.

70. 15 F.4th 728, 730 (6th Cir. 2021).

71. *Id.* at 730, 733.

72. *See, e.g.*, Complaint at 7, Dahl v. Bd. of Trs. of W. Mich. Univ., No. 1:21-cv-00757, 2021 WL 3891620 (W.D. Mich. Aug. 31, 2021), https://www.bloomberglaw.com/product/blaw/document/X1QM0PFM30R91AO8OR78KIM8PDJ/download?imagename=1 [https://perma.cc

their requests to continue playing,[73] explaining that it had a "compelling interest" in requiring all student-athletes to be vaccinated in order to prevent COVID-19 outbreaks among team members.[74] However, WMU granted the students-athletes the accommodation of maintaining their scholarships despite their noncompliance with the department's vaccine policy.[75]

The District Court for the Western District of Michigan found that WMU had "exercise[ed] discretion" in meting out these accommodations and that its policy was therefore not "generally applicable."[76] WMU insisted in its briefs that the policy it had broadcasted via text message required vaccination "to maintain full involvement in the athletic department," and that both the school's medical and religious exemptions pertained specifically and exclusively to the retention of scholarships (a key aspect of "full" membership at the athletic department) and *not* to participating in sport activities.[77] Unvaccinated students who had a medical or religious reason to oppose the vaccine mandate could retain their scholarships, but the policy never contemplated that they could participate in athletic activities. This clarification was borne out by WMU's subsequent actions—it granted "exemptions" exclusively with respect to scholarships.[78] But the district court rejected this explanation, concluding that the language of the text message that WMU sent the student-athletes regarding its religious and medical exemptions covered *both* types of "accommodations"—maintaining

/J5XJ-LWRF]; *see also* Brief in Support of Motion for Temporary Restraining Order and Certificate of Compliance at 3, *Dahl*, 2021 WL 3891620, https://www.bloomberglaw.com/product/blaw/document/X5OIKBN83OO99J9B6GTQ807SUP4/download?imagename=2 [https://perma.cc/M4W3-E48T] ("Plaintiffs seek . . . [a]n order that Defendants are enjoined from requiring that Plaintiffs be vaccinated prior to participating in any intercollegiate sporting activities.").

73. *Dahl*, 15 F.4th at 734.

74. Dahl v. Bd. of Trs. of W. Mich. Univ., No. 1:21-cv-00757, 2021 WL 3891620, at *1 (W.D. Mich. Aug. 31, 2021) (providing a compelling interest and explaining that "prohibiting unvaccinated members of the team from engaging in practices and competition is the only effective manner of accomplishing this compelling interest").

75. *See* Affidavit Kathy Beauregard ¶ 24, *Dahl*, 2021 WL 3891620, https://www.bloomberglaw.com/product/blaw/document/XG44420B4G9NT9TM08T8HDQPE5/download?imagename=3 [https://perma.cc/79RE-GBDS] ("Any athlete who has been granted a religious exemption, but for which the only reasonable accommodation is to no longer participate as a student athlete, will maintain any athletic scholarship they have and will continue to be listed as a player on the team website.").

76. *Dahl*, 2021 WL 3891620, at *7.

77. Defendants' Response to Plaintiffs' Motion for Injunctive Relief at 3-6, *Dahl*, 2021 WL 3891620, https://www.bloomberglaw.com/product/blaw/document/XG44420B4G9NT9TM08T8HDQPE5/download?imagename=1 [https://perma.cc/V7EV-AZYF].

78. *Id*.

scholarships and allowing continued participation on their respective teams while remaining unvaccinated.[79]

The Sixth Circuit agreed.[80] In doing so, it dismissed as irrelevant WMU's argument that it had refused to allow *any* unvaccinated players to participate in sports activities, including medically contraindicated students.[81] *Fulton* had already disposed of that "defense," the Sixth Circuit explained.[82] As of *Fulton*, what must be "put front and center" are "the terms of the policy itself"; the only relevant question is whether the policy facially provides for the "creation of a formal mechanism for granting exceptions."[83] Because WMU's vaccine policy did so, it was not "generally applicable."[84]

It is important to note that WMU argued not only that it did not exempt any student from its general policy against actively playing sports while unvaccinated, but also that doing so was not even an option. As it did in the district court, WMU explained to the Sixth Circuit that its policy forbade "all unvaccinated student-athletes from participating in sports" and that it invited students "with medical or religious objections" to submit requests for accommodations *only* with respect to "retain[ing] their scholarships and avoid[ing] dismissal and discipline."[85] But the court dismissed WMU's clarification out of hand. Despite WMU's repeated entreaties to the court that it had never made available to anyone even the *possibility* of participating in athletic activities unvaccinated, the Sixth Circuit concluded that "[t]he policy's text [] says nothing of the sort."[86] And because WMU, on the Sixth Circuit's telling, had established a scheme for individualized exemptions from its "no playing competitive sports if not vaccinated" policy, it was unconstitutional for it not to extend the allegedly available exemption to the students asserting religious objections to the vaccine.

For the district court and the Sixth Circuit, a government entity's use of the talismanic words "accommodations will be considered on an individual basis" was enough to render its lack of exemptions for religious objectors unconstitutional.[87] It did not matter *which* potential accommodations the government contemplated. These courts took their cue from *Fulton*, in which the Supreme Court

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79. *Dahl*, 2021 WL 3891620, at *7-9.

80. Dahl v. Bd. of Trs. of W. Mich. Univ., 15 F.4th 728 (6th Cir. 2021).

81. *Id.* at 734.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 736.

similarly adopted a highly formalistic-textualist, not to mention strained, interpretation of the city's "discretionary exemptions" contractual provision.[88] Following the Supreme Court's lead, the courts concluded that words alone can and should be construed to the broadest extent possible and applied to the widest range of potential "accommodations," despite any and all evidence and repeated representations to the contrary.[89]

And it does not matter what *type* of inquiry the government conducted "on an individual basis." WMU had explained that it was evaluating *sincerity*: when it invited students to submit requests for religious exemptions and stated it would evaluate them individually, it explained that its case-by-case inquiry was necessary to confirm that each student's religious opposition was sincere.[90] But the courts still concluded that "words alone" are controlling—regardless of all evidence of what these words actually referred to and instituted. Echoing the

88. *See* Brief for City Respondents, *supra* note 55, at 36 (explaining that, contrary to the interpretation ultimately adopted by the Court, section 3.21 and its "discretionary exemption" procedure did not apply to the certification process, the stage of the foster process at issue in the case and that it did not consider itself to have "discrimination in the recruitment or certification of foster parents"). Justice Gorsuch—correctly in my opinion—criticized the majority over precisely this point. *See* Fulton v. City of Phila., 141 S. Ct. 1868, 1928-29 (2021) (Gorsuch, J., concurring). On Gorsuch's telling, rather than focus on the contractual provision at issue—§ 15.1, which contained no exemption procedure from the city's antidiscrimination rule—the majority pointed instead to a different provision, § 3.21, notwithstanding the fact that it applied to a wholly different stage of the foster process that was not at issue in the case. According to Gorsuch, the majority "asks us to ignore § 3.21's title and its limited application to the referral stage," and "reconceive § 3.21 as authorizing exceptions to the City's nondiscrimination rule at *every* stage of the foster process." *Id.* at 1929. These were the mental gymnastics required to conclude that the city's contract creates an individualized-exemption scheme.

89. *See* Defendants' Response to Plaintiffs' Motion for Injunctive Relief, *supra* note 77, at 2 ("The requirement that student athletes be vaccinated against Covid-19 is the most effective and reasonable way to guard against a Covid-19 outbreak in any given sport. Allowing students to participate in a masking and testing protocol as an accommodation for *any* reason greatly undermines the efficacy and intent of the vaccine requirement and is not medically reasonable . . . . Although the formal response on the form from WMU states the requested exemption was denied, each is more accurately described as granting the exemption but denying the specific accommodation that the Plaintiffs requested: participating unvaccinated in intercollegiate athletics while the policy is in place and they are unable to comply." (emphasis added)).

90. *See id.* at 18-19 ("[The accomodation] inquiries cannot be made without assessing each request individually. The record here establishes that Ms. Miller reviews each request for a religious exemption individually (as she is required to do) and has accepted each individual's statement of their religious beliefs and that those beliefs are sincerely held."). The university ultimately concluded that all sixteen students who submitted requests were sincere; *id.* at 17 ("[E]very request for a religious exemption has been individually considered, each has been granted to the extent that no student is being compelled to receive a vaccination, no student is having their scholarship revoked, and no student is being 'kicked off' their team.").

Fulton Court,[91] the district court and the Sixth Circuit reasoned that so long as there is any possible construal of those words as exceptionally broad, they will be interpreted formalistically to impute a theoretical individualized-exemptions scheme and render the lack of exemptions for religious objectors to vaccine mandates unconstitutional.

Indeed, some courts have gone even further. In *Thoms v. Maricopa County Community College District*, two nursing students sued their college for rejecting their requests for religious exemptions from the school's in-person clinical-rotation requirement.[92] The nursing school had a vaccination requirement for on-campus instruction and an in-person clinical-rotation requirement for graduation — exemptions were available for the former but not the latter. The rotation clinic to which the students were randomly assigned, the Mayo Clinic, had a strict vaccine requirement with no religious exemptions.[93] When the students requested a religious exemption to the college's vaccination requirement, the college granted it and allowed them to participate in on-campus instruction and activities while unvaccinated. But the school denied the students' requested religious accommodation as to the school's in-person clinical-rotation requirement.[94] The district court held that the school's "process for reviewing religious accommodation requests" constituted an "individualized mechanism."[95]

It must be emphasized that the community college never so much as insinuated it would consider requests for exemptions from its in-person clinical requirement. In fact, it went out of its way to make clear that "accommodations

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91. *See* sources cited *supra* notes 55, 88 (explaining the stretch of Chief Justice Roberts's textualism in *Fulton*).

92. No. CV-21-01781, 2021 WL 5162538, at *3 (D. Ariz. Nov. 5, 2021).

93. *Id.* at *1.

94. Based on the school's denial letters, it is clear the students asked for an exemption from the *school*'s in-person clinic requirement. *See* Response in Opposition to Motion for Preliminary Injunctive Relief at Exhibit 12, *Thoms*, 2021 WL 5162538 (No. 2:21-cv-01781-SPL), https://www.bloomberglaw.com/product/blaw/document/X6VKEM0VGFR9FFP19LLU151CH7O/download?imagename=2 [https://perma.cc/89PC-NA8E]. And the school explained it was applying Title VII standards when making its evaluation. The denial letters stated, "While we can approve your religious accommodation request to forego receiving the COVID-19 vaccine while you are participating in classroom instruction and activities on the college campus, we cannot remove a requirement for placement at a clinical site, as this would constitute an undue hardship upon the College/District. . . . The college cannot change its requirements for program completion, exempt students from, or remove academic or clinical components that are part of its approved and accredited program of study as this would constitute an undue hardship upon the College/District."

95. *Thoms*, 2021 WL 5162538, at *9.

may *only* be granted in the academic spaces (classrooms, labs, college campuses)" or in the form of "waivers of the tuition refund or withdrawal policies."[96] And the students received those accommodations in spades: all 124 religious students who requested accommodations received them.[97] But the students also asked for an *additional* accommodation not mentioned in the school's vaccination policy: that the school waive its in-person clinical requirement for students who object on religious grounds to taking the vaccine and are randomly placed at clinics requiring vaccination.[98] For the court, it was enough that the school "denied [the students'] requested accommodations" (responding to their specific requests) that they be exempt from the school's in-person clinical rotations requirement.[99] When the school replied to that specific request, its response metamorphosed into an individualized-exemptions scheme regarding the requested accommodation. In other words, even when the government is clear about what its exemptions procedure covers, if requests are made regarding quite literally anything and the government responds, the response itself can be — and according to at least some courts will be — construed as an individualized-exemptions scheme.

B. Factual Assessments as Individualized Exemptions

In addition to the formalistic antidiscretion rule adopted by the courts discussed above — counting any procedure that provides any exemptions at all as an individualized-exemptions scheme — recent vaccine-mandate decisions illustrate that *Fulton* can be read to require an even more radical outcome: that merely confirming basic facts can constitute individualized exemptions, rendering the failure to exempt any religious objector presumptively unconstitutional.

In *Does 1-6 v. Mills*, several healthcare workers and a provider challenged Maine's emergency rule requiring all employees of designated healthcare facilities to be vaccinated against COVID-19.[100] The plaintiffs contended that the vaccination requirement violated their free exercise rights because it did not allow exemptions for religious objectors. According to the plaintiffs, the sheer availability of *medical* exemptions rendered the government's vaccine mandate an in-

96. Response in Opposition to Motion for Preliminary Injunctive Relief, *supra* note 94, at Exhibit 2.

97. *Thoms*, 2021 WL 5162538, at *2.

98. *Id.*

99. *Id.* at *9.

100. No. 1:21-CV-00242-JDL, 2021 WL 4783626, at *1 (D. Me. Oct. 13, 2021), *aff'd*, 16 F.4th 20 (1st Cir. 2021); *id.* at *11-12.

dividualized-exemptions scheme. In response, Maine argued that the government did not use discretion when assessing medical exemptions; instead, exemption assessments were made by the workers' own "healthcare providers" who "utilize[d] their professional judgment in deciding whether to sign a written statement in support of a medical exemption."[101]

The District Court for the District of Maine, and later the First Circuit, held that the emergency rule was "generally applicable" because it did not involve individualized exemptions.[102] The First Circuit distinguished the case at hand from *Sherbert*, explaining that while in *Sherbert* "the government had discretion to decide whether 'good cause' existed to excuse the requirement of an unemployment benefits scheme," in the case at hand there was only a "single objective exemption."[103] According to the court, the government's choice to exempt the entire category of medically contraindicated healthcare workers from its vaccine mandate could not be said to be an "individualized exemptions scheme."[104] And because it is the nongovernment healthcare providers who assess the individual worker's condition when deciding whether a *particular* individual merits the "general" and "categorical" medical exemption, that assessment likewise could not be said to be an "individualized exemptions scheme" under the Free Exercise Clause.[105]

It is worth pausing to reflect on each of these distinctions. For the First Circuit, it was meaningful that the medical exemptions were a priori provided for a single category of people—that is, anyone with a verified medical reason to not take a COVID-19 vaccine. *Sherbert* involved unemployment benefits conditioned on an individualized assessment of all applicants as to whether they availed themselves of obtainable employment and, if they did not, whether they did so with "good cause"—an inherently vague and subjective standard.[106] In contrast,

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101. State Defendants'-Appellee's Principal Brief at *37, *Does 1-6*, 16 F.4th 20 (No. 21-1826) (citing 22 M.R.S.A. § 802(4-B)(A)).

102. *Does 1-6*, 16 F.4th at 30.

103. *Id.*

104. *Id.*

105. *Id.* ("The emergency rule does not require the state government to exercise discretion in evaluating individual requests for exemptions. Unlike, for example, *Sherbert v. Verner*, in which the government had discretion to decide whether "good cause" existed to excuse the requirement of an unemployment benefits scheme, here there is no 'mechanism for individualized exemptions' of the kind at issue in *Fulton*. Instead, there is a generalized "medical exemption . . . available to an employee who provides a written statement from a licensed physician, nurse practitioner or physician assistant that, in the physician's, nurse practitioner's or physician assistant's professional judgment, immunization against one or more diseases may be medically inadvisable.").

106. Sherbert v. Verner, 374 U.S. 398, 399-401 (1963).

the "good cause" determination in *Mills* was made by the state ex ante for an entire category of people. Maine determined that being medically contraindicated was "good cause" not to be vaccinated. All that remained to determine was whether a particular individual was *in fact* medically contraindicated. And that assessment—which, according to the First Circuit, is purely objective—was made not by any Maine officer but by third-party private healthcare providers. Maine merely had to assess *whether* the individual bringing the exemption request had in fact been evaluated by a medical professional who had in fact determined that the individual was medically contraindicated.

These differences were unconvincing to Justices Gorsuch, Thomas, and Alito, who dissented from the Supreme Court's rejection of plaintiffs' request for emergency relief.[107] According to the dissenting Justices, in an opinion penned by Gorsuch, *Fulton*'s rule that "a law fails to qualify as generally applicable, and thus triggers strict scrutiny, if it creates a mechanism for 'individualized exemptions' . . . applie[d] to Maine's regulation."[108] Their reasoning, which comports with *Fulton*'s broad individualized-exemptions doctrine, was simple: the "State's vaccine mandate is not absolute; individualized exemptions are available."[109]

Although commentators rushed to decry Gorsuch's dissent as "alarming,"[110] it should not have come as a surprise. The opinion did not represent a radical break from controlling law; rather, Gorsuch was applying the only several-months-old unanimous decision in *Fulton*. According to *Fulton*'s holding, *any* amount of discretion regarding *any* potential exemption for *any* category of persons renders *any* law without religious exemptions presumptively unconstitutional. And the sheer *availability* of a secular-based exemption—even if only theoretical—compels the conclusion that withholding religious exemptions is not *necessary*, thereby guaranteeing the government regulation cannot meet strict scrutiny.[111] The object of some commentators' ire was the "[t]hree Supreme Court justices"[112] who, according to a growing consensus, constitute the far-

107. Does 1-3 v. Mills, 142 S. Ct. 17, 18 (2021). Less than two months later, the Court again denied relief in *We the Patriots USA Inc. v. Hochul*, a suit challenging New York's vaccine mandate for healthcare workers which allowed for medical exemptions but not religious exemptions. *See* 142 S. Ct. 734 (2021).

108. *Does 1-3*, 142 S. Ct. at 19.

109. *Id.*

110. Andrew Koppelman, *Has the Supreme Court Been Infected with Long Trump Syndrome?*, HILL (Nov. 2, 2021, 7:30 AM ET), https://thehill.com/opinion/judiciary/579406-the-supreme-court-and-long-trump-syndrome [https://perma.cc/YUM4-H3T9]; *see also* Wendy E. Parmet, *From the Shadows: The Public Health Implications of the Supreme Court's COVID-Free Exercise Cases*, 49 J.L. MED. & ETHICS 564, 573 (describing Justice Gorsuch's dissent as "chilling").

111. Fulton v. City of Phila., 141 S. Ct. 1868, 1881-82 (2021).

112. Koppelman, *supra* note 110.

right of the Court.[113] But it would perhaps be more appropriate for commentators to focus their attention—and alarm—on the purportedly "moderate" *Fulton* decision penned by Roberts and signed by the entire Court, a decision that is of a piece with the Court's rapidly expanding religious-equality doctrine.

These three Justices would have applied *Fulton* to the facts in *Mills*, which explicitly involved discretion regarding medical exemptions *only*. *Fulton*'s application to *Mills* may not have been required, but it was certainly not foreclosed given the most-favored-nation logic embedded in *Fulton*. According to that logic, any discretion—even purely theoretical discretion—is fatal when the government does not provide exemptions for religion.[114] Tellingly, two additional Justices went out of their way to signal they might well agree with the dissent, as have other federal judges.[115]

C. Sincerity Assessments as Individualized Exemptions

With such a formalistic individualized-exemptions doctrine in place, it is hard to see how the new Free Exercise Clause would permit a court to evaluate even the *sincerity* of objectors' religious beliefs, as such evaluations necessarily involve a degree of "factual" discretion. And indeed, some courts deciding vac-

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113. *See, e.g.*, Noah Feldman, *What's Dividing the Supreme Court's Conservatives?*, BLOOMBERG (June 28, 2021, 12:20 PM EDT), https://www.bloomberg.com/opinion/articles/2021-06-28/kavanaugh-and-barrett-split-with-gorsuch-alito-and-thomas [https://perma.cc/7KDL-RQEE] ("Justice Brett Kavanaugh and Amy Coney Barrett . . . have been joining Chief Justice John Roberts and the [C]ourt's three liberals to reach cautious, moderate decisions. Meanwhile, the hard-core group of Alito, Thomas and Gorsuch has been arguing for more forthrightly conservative results."); Josh Blackman, *We don't have a 6-3 Conservative Court. We have a 3-3-3 Court.*, REASON (June 18, 2021, 9:21 AM), https://reason.com/volokh/2021/06/18/we-dont-have-a-6-3-conservative-court-we-have-a-3-3-3-court [https://perma.cc/Z7RG-UDPE] ("On Thursday, June 17, the new Roberts Court formally revealed itself. In three cases, the Court largely split into three triads: a conservative wing, a moderate wing, and a principle-fluid progressive wing.").

114. On my reading of *Fulton*, the most-favored-nation rule is implicated whenever the government provides secular exemptions *or* the *possibility* of such exemptions. *See supra* note 55.

115. Justice Barrett wrote a concurrence, joined by Justice Kavanaugh, making clear that the reason she refrained from granting emergency relief was procedural—that, in her view, the relief should be requested through the normal certiorari route rather than by way of the emergency docket. *See, e.g.*, Doe v. San Diego Unified Sch. Dist., 19 F.4th 1173, 1185 n.6 (9th Cir. 2021) (Ikuta, J., dissenting) (arguing that a state school's "medical exemption" which involves "a student's own physician confirm[ing] . . . that an underlying medical problem *makes the vaccine unsafe for their patient* . . . may be an example of the 'individualized exemptions' that render government regulations not generally applicable").

cine-mandate challenges have found that the Free Exercise Clause does not permit the government to evaluate the sincerity of religious beliefs.[116] For example, in *Grantonz v. Earley*, two employees of the Cleveland Municipal Court—a bailiff and a court reporter—sued their employer over its denial of their requests for exemptions from the municipal court's COVID-19 vaccine mandate.[117] In connection with its vaccine mandate, the municipal court had instructed employees who believed they had a "qualifying medical condition or sincerely held religious belief" that would prevent them from receiving the vaccine to contact Human Resources to initiate the process for obtaining an exemption.[118] The two plaintiffs submitted religious-exemption request forms, which were denied.[119] The municipal court had found the two employees' requests to be based on "personal, secular beliefs and not upon sincerely-held religious beliefs."[120]

The first plaintiff, the municipal court explained, declined to answer whether she had previously been vaccinated over the past five years and thus failed to comply with its inquiry into the basis of her claimed exemption.[121] The first plaintiff also submitted a statement from her husband relating only that she had "decided that it is in her best interest to forego the COVID-19 vaccine at this time."[122] The second plaintiff had stated that his religious beliefs prevented him from taking some but not all vaccines.[123] He provided a statement from a religious elder asserting that members of their religion decline vaccines that they "feel may be dangerous to [their] bodies [or] detrimental to [their] health."[124] The plaintiff also declared that "[he] and many others will be endangered by these MRNA gene therapy untested 'vaccines' and [his] health would be greatly compromised by ingesting them."[125] The municipal court determined that the

116. In addition to the case discussed presently, see *supra* notes 90–91 and accompanying text.

117. Grantonz v. Earley, No. 1:21-CV-2137, 2021 WL 5866978 (N.D. Ohio 2021).

118. *Id.* at *1.

119. *Id.* (noting that "[n]o reasons for the denial were provided").

120. *Id.* at *2.

121. Memorandum in Opposition to Plaintiffs' Motion for TRO at 3, Grantonz v. Earley, No. 1:21-CV-2137 (N.D. Ohio Nov. 19, 2021), https://www.bloomberglaw.com/product/blaw/document/X27DE97Q54N9C4A78VERENC4P75/download?imagename=1 [https://perma.cc/9Z5L-B3V7].

122. *Id.* at 4. ("Additionally, Grantonz's husband and Pastor Henry F. Curtis, IV provided a statement which Grantonz submitted in support of her religious accommodation that stated, 'Ms. Grantonz . . . has decided that it is in her best interest to forego the COVID-19 vaccine at this time.'").

123. *Id.* at 7.

124. *Id.*

125. *Id.*

plaintiffs' requests for exemptions were "not based upon sincerely held religious beliefs but instead [on] concerns about safety of the vaccine."[126]

The District Court for the Northern District of Ohio concluded that because the municipal court's policy "provide[d] for an exemption process" whereby an employee must contact the municipal court's "HR Department and [] complet[e] an exemption request form," it had "set[] up a mechanism for exemptions which are granted at the municipal court's discretion[.]"[127] As a result, the municipal court's vaccine mandate was "not generally applicable."[128] On the *Grantonz* court's analysis, any amount of discretion—even when the "discretion" pertains to *facts* (rather than value, as was the case in *Sherbert*) and even when those facts pertain to establishing the *sincerity* of the religiously based objection to the vaccine mandate—makes it unconstitutional to apply a general policy to religious objectors. According to the *Grantonz* court as well as other courts,[129] the government must extend religious exemptions (or face strict scrutiny) even when the objection may not be sincerely religious in nature; under this view, it is impossible for the government to evaluate the religious nature and sincerity of a claim *without* triggering strict scrutiny.

IV. IMPLICATIONS

The free exercise vaccine-mandate cases demonstrate that the Supreme Court's new doctrine, couching free exercise as an equality right, is far more protective of religious objectors than was the Court's previous doctrine framing free exercise as a liberty right. Indeed, this new doctrine has already achieved what was previously thought unfathomable: conferring upon religious objectors the right of vaccine refusal.

Some scholars have argued that regardless of how robust the Supreme Court's new individualized-exemptions doctrine is, it will not present a serious impediment to government regulation as the doctrine at most triggers strict scrutiny, which need not be fatal.[130] On this view, courts can still uphold government regulations that are necessary—including, for example, measures to

126. *Id.*

127. Grantonz v. Earley, No. 1:21CV2137, 2021 WL 5866978, at *3 (N.D. Ohio Dec. 10, 2021).

128. *Id.*

129. *See, e.g.*, *supra* note 90 and accompanying text.

130. *See, e.g.,* Tebbe, *supra* note 7, at 295, 283 (describing the new free exercise equality right as "contain[ing] an egalitarian safeguard at the back end of the analysis, insofar as it can be overcome by strong state interests such as the imperative of enforcing civil rights laws" and stating that "[w]hatever formulation [of scrutiny] is adopted . . . interpreters should adhere to the principle that civil rights laws are driven by government interests that are sufficiently strong

stem a deadly pandemic.[131] While this view has been adopted by some of free exercise's staunchest supporters, including Professor Laycock, it has already been decisively refuted.[132]

In a *New York Times* guest opinion essay written early in the pandemic, Professor Laycock insisted that even an expansive view of free exercise as equality allows the government to impose "[p]andemic restrictions" on houses of worship.[133] Laycock emphasized that "no court has ever protected" "religious objectors" from "vaccination" and other pandemic-related mandates.[134] "Covid-19 kills some and permanently injures others; the threat to human life is real and immediate," Laycock explained.[135] Thus, "[t]hose who flout the rules endanger everyone around them, and this is sufficient reason for regulating even a worship service."[136] Laycock was unperturbed by the robust free-exercise-as-equality right he had promoted for decades.[137] As he saw it, strict scrutiny could—and would—bail out the government.

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to overcome the presumption [of unconstitutionality]"); Douglas Laycock, *Do Cuomo's New Covid Rules Discriminate Against Religion?*, N.Y. TIMES (Oct. 9, 2020), https://www.nytimes.com/2020/10/09/opinion/cuomo-synagogue-lockdown.html [https://perma.cc/NLB5-J4TC]; *see also* Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756 (1992) (generally pointing out that, particularly in the free exercise context, "a standard of review that [is] strict in theory, but ever-so-gentle in fact" is certainly possible).

131. *See* Dorit R. Reiss, *Vaccines Mandates and Religion: Where Are We Headed with the Current Supreme Court?*, 49 J.L. MED. & ETHICS 552, 560 (concluding that "[vaccine] mandates should survive strict scrutiny"). *But see* Parmet, *supra* note 110, at 573 (explaining that it "seems possible that Alito and the justices who joined his concurrence might not endorse a more relaxed approach to strict scrutiny for public health laws").

132. After all, if the "new" Free Exercise Clause is to provide expansive protection for religious adherents, its defenders must answer the obvious challenge—voiced by Justice Scalia in *Smith*—that a constitutional right surely should not be construed so as to render the government "unworkable." *See* Emp. Div., Dept. of Hum. Res. of Or. v. Smith, 494 U.S. 872, 885 (1990) ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.' To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself,'—contradicts both constitutional tradition and common sense." (citations omitted)).

133. Laycock, *supra* note 130.

134. *Id.*

135. *Id.*

136. *Id.*

137. *See* Rothschild, *supra* note 8, at 29-30, 33-35.

Laycock and others who believe strict scrutiny can serve as a reasonable backstop to the new free exercise doctrine[138] overlook the fact that once a court establishes that the government has acted discriminatorily against religion, that court will likely not conclude the government has a necessary reason to *discriminate*.[139] Laycock imagined the government could survive free exercise challenges by invoking self-evident, general justifications for lockdown orders and vaccine mandates.[140] But such reasons have already proven insufficient for courts asking why the government has no choice but to discriminate against religious objectors when it countenances exemptions for nonreligious objectors.[141] General justifications for mandates are irrelevant in such circumstances; only precise reasons why the government cannot exempt the religious objectors will do. This directive was made clear by the Court in *Fulton*[142]—a decision Laycock enthusiastically celebrated, wishing only that the Court had gone further.[143]

Fulton's supporters have resisted acknowledging the radical change the decision represents. When free exercise challenges to vaccine mandates began making their way through federal courts across the country, Laycock once again expressed his "belie[f] that under the general law of religious liberty . . . the government has an easy case to refuse religious exemptions from vaccines

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138. *See* sources cited *supra* note 130.

139. As I explain elsewhere, "under *Smith*, after triggering the First Amendment, courts move on to applying heightened scrutiny. But under a broad general applicability test, strict scrutiny would almost always fail—how can a discriminatory, underinclusive exemption scheme be narrowly tailored?—and likely would not be undertaken in the first place." Rothschild, *Free Exercise's Lingering Ambiguity*, *supra* note 24, at 284 n.13.

140. Laycock, *supra* note 130.

141. As the Court in *Fulton* curtly put it, "[t]he creation of a system of exceptions under the contract undermines the City's contention that its non-discrimination policies *can brook no departures*. The City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others." Fulton v. City of Phila., 141 S. Ct. 1868, 1882 (2021) (emphasis added) (citation omitted).

142. In applying strict scrutiny, *Fulton* explained that "[t]he question . . . is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS." *Id.* at 1881. The same reasoning has been adopted by courts in the vaccine-mandate context. *See, e.g.*, Grantonz v. Earley, No. 1:21-CV-2137, 2021 WL 5866978, at *3-4 (N.D. Ohio Dec. 10, 2021) ("[T]he question confronting the Court is not whether Defendants have a compelling interest in promoting health and safety among its employees and the public the Municipal Court serves, but whether Defendants have an 'interest of the highest order' in denying the exemptions to Plaintiffs.").

143. *See* Laycock & Berg, *supra* note 6, at 38, 39 (stating that *Fulton*'s "protections are important" but that "*Smith*'s unprotective part should [still] be overruled").

against infectious disease."[144] When one of the first district courts to address a free exercise vaccine-mandate challenge held that a public university could not require student-athletes with religious objections to comply with its vaccine mandate, Laycock dismissed it out of hand.[145] The decision in *Dahl*, he asserted, was "unlikely to stand up through further proceedings and appeal, since every judge to encounter such an issue in the past has ruled the other way."[146]

But thanks in no small measure to the very free-exercise-as-equality doctrine Laycock has promoted, the "past" is incomparable, if not completely irrelevant, to the "present."[147] Under the new free exercise jurisprudence adopted by the Court in *Fulton*, even the mere potential for secular exemptions automatically renders the lack of any religious exemption unconstitutional. If the government can countenance providing individualized exemptions from an emergency vaccine mandate, it cannot claim to have a compelling interest that can be met only by denying religious exemptions. Less than one month after Laycock expressed his optimism about the free exercise vaccine-mandate cases, the Sixth Circuit issued a unanimous decision in *Dahl* upholding the district court's ruling that a public university must exempt religious objectors from its vaccine mandate.[148]

Moving forward, in light of the individualized-exemptions rule adopted by the Court in *Fulton*, any number of government policies could face credible free exercise challenges. Take for example the government's attempt to obey basic requirements of federal antidiscrimination statutes. It is hard to see how a government employer will be able to comply with the explicit individualized-accommodations requirements under the Americans with Disabilities Act or Title VII without running afoul of the "new" Free Exercise Clause, unless the government grants every employee's request that is grounded in religion.[149] Merely by indi-

144. Douglas Laycock, *What's the Law on Vaccine Exemptions? A Religious Liberty Expert Explains*, CONVERSATION (Sept. 15, 2021), https://theconversation.com/whats-the-law-on-vaccine-exemptions-a-religious-liberty-expert-explains-166934 [https://perma.cc/SSK2-KPBR].

145. *Id.*

146. *Id.*

147. *Id.*

148. Dahl v. Bd. of Trs. of W. Mich. Univ., 15 F.4th 728, 730 (6th Cir. 2021).

149. Religious-accommodation requests often take the form of requests for *exemptions*. *See*, *e.g.*, *What You Should Know: Workplace Religious Accommodation*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Mar. 6, 2014), https://www.eeoc.gov/laws/guidance/what-you-should-know-workplace-religious-accommodation [https://perma.cc/8VS6-WN2B] (listing as example of a Title VII accommodation an "employee [who] needs an exception to the company's dress and grooming code for a religious practice"). And religious-accommodation requests pursuant to Title VII involve an "interactive process . . . between the responsible management official and the individual making the request to discuss the request and assess available options." Off. of the Assistant Sec'y for Admin. & Mgmt., *Religious Discrimination and Accommodation*

vidually evaluating whether they can (and must) provide Title VII religious accommodations, government employers will find themselves in an exceedingly difficult, if not impossible, position: do not consider religious-accommodation requests and violate Title VII, or consider religious-accommodation requests from any employee and be required to provide accommodations to every religion-based request on the religious employee's own terms.[150]

Indeed, the Supreme Court's adoption of a most-favored-nation rule in its emergency-docket COVID-19 lockdown cases has already prompted one federal district court to strike down Title VII as applied to religious employers. The federal court for the Northern District of Texas concluded that because Title VII "exempts" businesses of fewer than fifteen employees, it must also exempt all employers who object to its antidiscrimination requirements on religious grounds.[151] And, using a similar most-favored-nation logic, but in this instance resting on *Fulton*'s new individualized-exemptions doctrine, the Second Circuit (among other courts[152]) has held that the discretion afforded government employers under Title VII renders decisions to not grant religious accommodations presumptively (and also actually) unconstitutional.[153] Finally, in an ironic twist,

in the Federal Workplace, U.S. DEP'T LAB., https://www.dol.gov/agencies/oasam/civil-rights-center/internal/policies/religious-discrimination-accommodation [https://perma.cc/43LW-3F9Q]. Then, on a case-by-case basis, the employer determines whether providing the requested accommodation would "create an undue hardship" for the employer. Off. of the Assistant Sec'y for Admin. & Mgmt., *supra*.

Individualized, interactive processes are also inherent in the Americans with Disabilities Act of 1990 context. *See* Marissa Ditkowsky, *Supporters and Advocates in Disability Accommodations Meetings: Using Title IX as a Framework*, 28 AM. U. J. GENDER SOC. POL'Y & L. 383, 400 (2020) ("In order to receive any reasonable accommodations under 504 or the ADA, students must typically meet with universities and disclose information about their disabilities. Once this information is disclosed, typically, students must support their requested accommodations with a licensed professional's certification or some form of medical history.").

150. Strict scrutiny will not help the government because the outcome will already be a foregone conclusion under the Supreme Court's current "free exercise as an outsized equality right" jurisprudence. *See supra* notes 138-143 and accompanying text.

151. U.S. Pastor Council v. U.S. Equal Emp. Opportunity Comm'n, No. 4:18-cv-824, at 7 (N.D. Tex. Jan. 26, 2021) (granting in part and denying in part motion to dismiss); *see also* Zalman Rothschild, *'Religious Equality' Is Transforming American Law*, ATLANTIC (Oct. 29, 2020), https://www.theatlantic.com/ideas/archive/2020/10/coming-threat-gay-rights/616882 [https://perma.cc/LPS6-RFUJ] ("If the Court in *Fulton* determines that any exception for a secular interest also necessitates, under the free-exercise clause, exceptions for all religious interests, then that ruling would presumably apply to Title VII just as it applies to Philadelphia's anti-discrimination policy.").

152. *See, e.g.*, supra notes 94-95 and accompanying text.

153. *See, e.g.*, Kane v. de Blasio, 19 F.4th 152, 169 (2d Cir. 2021) (holding that, in a case involving procedures for considering accommodations requests undertaken in accordance with Title VII

one federal court has held that applying the Religious Freedom Restoration Act—the federal statute intended to protect the free exercise of religion—itself violates the Free Exercise Clause whenever the government denies any request for a religious exemption under the statute.[154] The rationale underlying this holding naturally flowed from the logic of *Fulton*: because it necessarily exercises some degree of discretion when it decides individualized-exemption requests under RFRA, the government cannot constitutionally refuse to grant *any* request for a religious exemption.

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and using Title VII's standards, because arbitrators "reviewing [plaintiffs'] requests for religious accommodations had substantial discretion over whether to grant those requests," the "procedures as applied to them were not generally applicable"); Brief for Appellees at 33, *Kane*, 19 F.4th 152 (No. 21-2678) (describing the denials of requests for exemptions from vaccine mandate as "based on . . . Title VII" and its "undue hardship" standard). The Second Circuit panel consisted of both Republican-appointed and Democrat-appointed judges. *See supra* note 12.

154. In *U.S. Navy SEALs 1-26 v. Biden*, plaintiffs complained that the Navy, pursuant to its "obligations under the Religious Freedom Restoration Act of 1993[,]" has "discretion in granting religious accommodations[.]" *See* Memorandum in Support of Motion for Preliminary Injunction at 11, U.S. Navy SEALs 1-26 v. Biden, No. 4:21-CV-01236-O (N.D. Tex. Jan. 3, 2022), 2021 WL 7186974; Complaint at 7, *U.S. Navy SEALs 1-26*, 2022 WL 34443 (No. 4:21-cv-01236-P), 2021 WL 5227389 (citing Department of Defense Instruction 1300.17, which requires individualized assessment of religious-accommodation requests). RFRA requires religious exemptions, but exemptions naturally cannot be provided every time they are requested and thus—sensibly—the government evaluates each request on a case-by-case basis to determine whether it must provide the exemption. And, plaintiffs argued, the sheer fact that the Navy "invit[es] individual applications for exemptions" constitutes "a mechanism for individualized exemptions" under *Fulton*. Memorandum in Support of Motion for Preliminary Injunction, *supra*, at 23. The district court agreed, holding that "[t]he Navy's [vaccine] mandate is not neutral and generally applicable [because] by accepting individual applications for exemptions, the law invites an individualized assessment of the reasons why a servicemember is not vaccinated." *U.S. Navy SEALs 1-26*, 2022 WL 34443, at *11.

The Fifth Circuit refused to stay the district court's grant of preliminary injunction. *See* U.S. Navy SEALs 1-26 v. Biden, 27 F.4th 336, 353 (5th Cir. 2022). The Supreme Court, over dissents from Justices Thomas, Alito, and Gorsuch, granted a limited, "partial stay[,]" staying the district court's "order, insofar as it precludes the Navy from considering respondents' vaccination status in making deployment, assignment, and other operational decisions [] pending disposition of the appeal in the United States Court of Appeals for the Fifth Circuit and disposition of the petition for a writ of certiorari[.]" Austin v. U.S. Navy SEALs 1-26, 142 S. Ct. 1301, 1301 (2022). Justice Kavanaugh took pains to explain he was concurring only "for a simple overarching reason" that the case involved the *military*, which uniquely implicates separation of powers concerns. *See Austin*, 142 S. Ct. at 1302.

CONCLUSION

Fulton's expansive individualized-exemptions doctrine—which builds on earlier efforts to interpret free exercise as an expansive equality right—suggests that the ongoing debate over whether *Smith* should be overruled may be misplaced. Those who call for *Smith*'s demise typically do so on the assumption that the Supreme Court's pre-*Smith* interpretation of free exercise as a liberty right is broader and more protective of religion than the post-*Smith* interpretation of it as a "mere" equality right.[155] It is widely accepted that the liberal Justices signed on to *Fulton* to avert a broader decision overruling *Smith* altogether.[156] On this view, these Justices traded their votes in exchange for a narrower holding "merely" upholding *Smith*'s individualized-exemptions dictum rather than overturning *Smith*.[157]

But, as this Essay has argued, that apparent compromise was no compromise at all. Perhaps unwittingly, in exchange for *Smith*'s survival, the liberal Justices helped the *Fulton* Court entrench a free-exercise-as-equality jurisprudence that has already proven *more* deferential to religious freedom claims as compared to the Court's pre-*Smith* jurisprudence. The implications of that new jurisprudence can already be seen in lower court decisions granting—for the first time in history—a right to refuse vaccination on free exercise grounds. It remains to be seen what the further implications of this subtle but serious expansion may be. But if the logic and principle of this expanded doctrine continue to be extended to other areas of the law, the consequences could be far reaching.

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155. This project of calling for *Smith* to be overturned continues even as the broader view of "religious equality" continues to take hold. For example, in *Fulton* itself, Justice Alito devoted a seventy-seven-page concurring opinion arguing that *Smith* must be put to rest. *See Fulton*, 141 S. Ct. at 1883 (Alito, J., concurring). Noted scholars Douglas Laycock and Thomas Berg penned an article in the immediate wake of *Fulton* to say essentially the same, *see* Laycock & Berg, *supra* note 6, at 38-40, while noted free exercise experts Ira Lupu and Robert Tuttle authored their own "response" to Alito and the project of overturning *Smith*, arguing that *Smith* should be preserved, *see* Lupu & Tuttle, *supra* note 3, at 233-44. On the analysis of this Essay (and as I will argue in future work as well), *Smith* has been so vastly surpassed that one should wonder at this point whether it has not been rendered completely irrelevant.

156. *See supra* note 3 and accompanying text.

157. *See* Lupu & Tuttle, *supra* note 3, at 228; Laycock & Berg, *supra* note 66, at 37-38.

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