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ARTICLES

FAITHFUL TO FREEDOM: THE NEBRASKA FIRST FREEDOM ACT V. THE SUPREME COURT'S FREE EXERCISE JURISPRUDENCE . . . . *Jackson T. Billings* 253

THE 14TH AMENDMENT FROM HOMER PLESSY TO KILMAR ABREGO GARCIA: CITIZENSHIP AND DUE PROCESS IN AMERICA'S CONSTITUTIONAL EVOLUTION. . . . . *Lynette Perez* 281

THE DORMANT COMMERCE CLAUSE'S LESSONS FOR RELIGIOUS EXEMPTIONS . . . . *Dennis J. Wieboldt III* 303

NOTES

UNITED STATES V. DUARTE: THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CORRECTLY APPLIES THE SECOND AMENDMENT'S HISTORIC TRADITION ANALYSIS BY DETERMINING A NON-VIOLENT FELON HAS THE RIGHT TO BEAR ARMS . . . . *Ryan Cody* 361

ISAACSON V. MAYES: PHYSICIAN PLAINTIFFS MAY ALLEGE SUFFICIENT INJURIES FOR ARTICLE III STANDING REGARDLESS OF WHETHER ABORTION IS CONSTITUTIONALLY PROTECTED . . . . *Anna A. Volenec* 391

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FAITHFUL TO FREEDOM: THE NEBRASKA FIRST FREEDOM ACT V. THE SUPREME COURT'S FREE EXERCISE JURISPRUDENCE

JACKSON T. BILLINGS†

ABSTRACT

This Article argues that Nebraska's First Freedom Act exemplifies a superior framework for protecting religious liberty and demonstrates the state's commitment to the principles of freedom. By safeguarding religious rights against government interference, the Act serves as a model for robust protection of free exercise rights. This Article further examines the Supreme Court's Free Exercise jurisprudence, draws key lessons from Nebraska's approach, and emphasizes the necessity for the Court to revisit its approach. It concludes by urging the Court to overrule Employment Division v. Smith *and adopt a compelling-interest framework to protect religious liberty nationwide.*

I. INTRODUCTION: THE DISCREPANCY IN RELIGIOUS LIBERTY PROTECTIONS 254
II. BACKGROUND 255
A. SUPREME COURT FREE EXERCISE JURISPRUDENCE 255
1. *Historical Foundations* 255
2. *Modern Approach* 258
B. THE NEBRASKA FIRST FREEDOM ACT: A BROADER SHIELD FOR FREE EXERCISE 263
C. CASE STUDY: APPLYING BOTH APPROACHES 269
1. *Supreme Court Outcome* 270
2. *Nebraska First Freedom Act Outcome* 272
III. THE WAY FORWARD: LESSONS FOR THE SUPREME COURT 274
IV. CONCLUSION: FAITHFUL TO FREEDOM 280

† J.D., with highest distinction, University of Nebraska College of Law. I thank God for His goodness and abundant blessings, and I pray that this Article may serve as an encouragement to those who read it. I am deeply grateful to my wife, Cora, for her constant love and support each day of our lives, and to my parents for their encouragement and guidance. I also extend sincere thanks to Professor Duncan for his exceptional teaching, guidance, and mentorship. Finally, I am grateful to the Creighton Law Review team for the opportunity to publish this Article.

I. INTRODUCTION: THE DISCREPANCY IN RELIGIOUS LIBERTY PROTECTIONS

Immediately after winning the College Football Playoff National Championship, Will Howard, Ohio State's quarterback, exclaimed: "First and foremost, I got to give the glory and the praise to my Lord and Savior Jesus Christ. I wouldn't be here without him."[1] These statements are commonplace in the sporting world. Similar commentary was seen by Oklahoma's Softball Team after winning the 2023 Women's College World Series.[2] These types of displays have also been seen in Nebraska, as numerous pro-life college athletes participated in the "Nebraska, It's Time to Get off the Bench" political advertisement in support of the pro-life initiative on the ballot in November 2024.[3] Rebekah Allick, a middle blocker on the Huskers Volleyball team, explained that she participated in the advertisement because of the importance of her faith, saying, "I just hope I'm making Jesus proud."[4]

All these athletes' ability to exercise their faith, just like every other individual across the country, is protected as a fundamental right through the First Amendment.[5] But, what if there was a neutral and generally applicable law prohibiting such conduct? Under the Supreme Court's Free Exercise jurisprudence, the athletes would theoretically lose their ability to freely exercise their religion.[6] Fortunately, in Nebraska, the athletes' fundamental right would still be protected through the First Freedom Act.[7]

This Article argues that the First Freedom Act is the best approach to protecting religious liberty, and the Supreme Court should consider

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1. Michael Gryboski, *Ohio State, Notre Dame Stars Give God Glory after Championship Game: 'Strengthen each other in our Faiths'*, CHRISTIAN POST (Jan. 21, 2025), https://www.christianpost.com/news/ohio-state-notre-dame-stars-give-glory-to-god-after-championship.html.

2. Jorge Gomez, *Oklahoma Softball Team Gives Glory to God After Championship*, FIRST LIBERTY (June 16, 2023), https://firstliberty.org/news/softball-team-gives-glory-to-god-after-championship/.

3. Tom Campisi, *Pro-Life College Athletes: 'Nebraska, It's Time To Get Off the Bench!'*, CARE NET (Jan. 8, 2025), https://care-net.org/abundant-life-blog/pro-life-college-athletes-nebraska/.

4. *Id.*

5. *See* U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . .").

6. *See* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990). This Article acknowledges that such a law would raise numerous First Amendment concerns, particularly under the Free Speech Clause due to its apparent content discrimination. Moreover, such a law raises additional questions: Does it implicate the hybrid rights exception (speech combined with free exercise) under *Smith* and *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*? Despite these issues, this Article briefly posits the question because it underscores how the Court's current Free Exercise framework could allow such law to inhibit religious conduct.

7. *See* NEB. REV. STAT. §§ 20-701–05 (Reissue 2024).

adopting a similar framework to strengthen its Free Exercise jurisprudence. This Article proceeds in three parts. First, both the Supreme Court's Free Exercise jurisprudence and the First Freedom Act will be discussed.[8] Then, the potential lessons for the Court will be examined.[9] Finally, this Article will briefly conclude by explaining that the First Freedom Act is an example of how the Supreme Court can robustly protect religious liberty through its jurisprudence.[10]

II. BACKGROUND

A. Supreme Court Free Exercise Jurisprudence

1. Historical Foundations

In 1879, the Supreme Court addressed the meaning of "free exercise" for the first time.[11] In *Reynolds v. United States*,[12] a member of the Church of Jesus Christ of Latter-day Saints, Reynolds, was prosecuted for bigamy under a federal statute.[13] Reynolds reasoned that his religion required him to marry multiple women, and the law therefore violated his First Amendment right to free exercise of religion.[14] The Court upheld Reynolds's conviction and Congress's power to prohibit polygamy.[15] The Court held that while Congress could not outlaw a belief in the correctness of polygamy, it could outlaw the practice of it.[16] In other words, the Court ruled that the Free Exercise Clause protects religious belief, but not religious exercise.

Reynolds was widely considered to be an erroneous opinion, so the Court properly corrected its error nearly a century later in *Sherbert v. Verner*.[17] In *Sherbert*, a member of the Seventh-day Adventist Church was denied unemployment benefits due to her unwillingness to accept employment that required her to work on Saturdays, which is the Sabbath day for Seventh-day Adventists.[18] This unwillingness to work on Saturdays triggered a provision of the South Carolina Unemployment Compensation Act that disqualified her from unemployment benefits because she failed, without "good cause," to accept "suitable work"

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8. *See infra* Part II.
9. *See infra* Part III.
10. *See infra* Part IV.
11. *See Reynolds v. United States (1879)*, Nat'l Const. Ctr. (last visited Feb. 4, 2025), https://constitutioncenter.org/the-constitution/supreme-court-case-library/reynolds-v-united-states (providing that this "case was the first time the Supreme Court addressed the meaning of free exercise of religion.").
12. 98 U.S. 145 (1878).
13. Reynolds v. United States, 98 U.S. 145, 146 (1878).
14. *Reynolds*, 95 U.S. at 145.
15. *Id.* at 168.
16. *Id.* at 166.
17. 374 U.S. 398 (1963).
18. Sherbert v. Verner, 374 U.S. 398, 400–02 (1963).

offered to her.[19] In other words, Sherbert's religiously based reason for her unwillingness to work on her Sabbath was not considered "good cause" for her unemployment.[20]

The Court held that the denial of benefits forced Sherbert "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[21] This was the equivalent to a fine imposed by the State on Saturday worship and triggered strict scrutiny under the Free Exercise Clause.[22] Thus, from *Sherbert*, the Court's jurisprudence provided the following guidance: "[I]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."[23]

Sherbert was applied by the Court in several other cases. First, in *Thomas v. Review Board*,[24] Thomas was transferred to a department that assisted in producing military tanks, which was problematic for him as a Jehovah's Witness whose religious beliefs prevented him from participating in the manufacture of weapons.[25] So, Thomas left his job and applied for unemployment benefits.[26] Thomas was denied payments because a termination motivated by religious belief was not "good cause."[27] Chief Justice Burger's majority opinion followed *Sherbert* and appeared to "stand clearly for the rule that a State may not impose a substantial burden on the free exercise of religion."[28] Second, in *Hobbie v. Unemployment Appeals Commission*,[29] Hobbie informed her supervisor that she was joining the Seventh-day Adventist Church and could no longer work on Saturdays.[30] Eventually, Hobbie was fired for refusing to work her scheduled shifts, and her claim for unemployment

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19. *Sherbert*, 374 U.S. at 400–02.

20. Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of* Smith, Sherbert, *Hogwarts, and Religious Liberty*, 83 NEB. L. REV. 1178, 1181 (2005).

21. *Sherbert*, 374 U.S. at 404.

22. Duncan, *supra* note 20, at 1181.

23. *Sherbert*, 374 U.S. at 404; *see also* Brenna M. Grasz, *Readdressing Nebraska's Misinterpreted Conscience Clause*, 97 NEB. L. REV. 890, 898 (2019) (explaining that *Sherbert* set the following standard: "any law that allegedly violated the Free Exercise Clause was required to meet strict scrutiny, or the 'compelling interest test,' to remain valid. For the law to be upheld under this standard, the Government must prove it has a compelling interest to unduly burden free exercise, and the law imposing the burden must be the least restrictive means of achieving that compelling interest.").

24. 450 U.S. 707 (1981).

25. Duncan, *supra* note 20, at 1182 (citing Thomas v. Rev. Bd., 450 U.S. 707, 709–10 (1981)).

26. *Id.* (citing *Thomas*, 450 U.S. at 710).

27. *Id.* (citing *Thomas*, 450 U.S. at 712–13).

28. *Id.*

29. 480 U.S. 136 (1987).

30. Duncan, *supra* note 20, at 1183 (citing *Hobbie*, 480 U.S. at 138).

benefits was denied because her religious based refusal to work was considered "misconduct."[31] The Court reaffirmed *Sherbert* and *Thomas* by explaining that "[t]he First Amendment protects the free exercise rights of employees who adopt religious beliefs or convert from one faith to another after they are hired."[32] Third, and finally, in *Frazee v. Illinois Department of Employment Security*,[33] a Christian was denied unemployment benefits because refusing to work on Sunday was not deemed "good cause."[34] The Court upheld his free exercise claim, even though it was grounded in his *personal* religious beliefs rather than a formal tenet of an established religious denomination.[35]

In addition to the *Sherbert* line of cases, the Court also decided another fundamentally important free exercise case in 1972: *Wisconsin v. Yoder*.[36] In *Yoder*, three members of certain Amish religious denominations were prosecuted under a Wisconsin law that required all children to attend public schools until the age of sixteen.[37] These members refused to send their children to such schools after the eighth grade because high school attendance was contrary to their religious beliefs.[38] The Court applied strict scrutiny because the law substantially burdened the parents' religiously motivated conduct.[39] The Court held that the parents' interests in their free exercise of religion outweighed the State's interests in compelling school attendance beyond the eighth grade.[40] Thus, even if the State had a compellingly important reason, it could not show how the compulsory education law was the least restrictive means of achieving that interest.[41]

Ultimately, *Sherbert* and *Yoder* survived for decades as a rule, at least in theory, protecting the free exercise of religion under the compelling interest test when a law substantially burdened religiously motivated conduct.[42]

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31. *Id.* (citing *Hobbie*, 480 U.S. at 138–39).
32. *Id.* (quoting *Hobbie*, 480 U.S. at 144).
33. 489 U.S. 829 (1989).
34. Duncan, *supra* note 20, at 1184 (citing Frazee v. Illinois Dept. of Employment Sec., 489 U.S. 829, 830–31 (1989)).
35. *Id.*
36. 406 U.S. 205 (1972); *see* Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise:* Smith, Lukumi, *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 857 (2001) ("For almost two decades prior to *Smith*, constitutional law students were taught that *Wisconsin v. Yoder* was a major landmark of the Supreme Court's free exercise jurisprudence." (footnote omitted)).
37. Wisconsin v. Yoder, 406 U.S. 205, 213–15 (1972).
38. *Yoder*, 406 U.S at 213–15.
39. *Id.* at 215.
40. *Id.*
41. *Id.*
42. Duncan, *supra* note 20, at 1180 (explaining that this approach was "[a]t least in theory . . . highly protective of religious liberty. However, as Ira Lupu has suggested, the strict scrutiny applied by the Court in free exercise cases was all-too-often 'strict in theory, but ever-so-gentle in fact.' In practice, the Court 'only rarely sided with the free exercise claimant.'").

2. Modern Approach

In 1990, Justice Scalia was seemingly determined to revise the Court's free exercise jurisprudence through *Employment Division v. Smith*.[43] In *Smith*, two counselors for a drug rehabilitation organization ingested peyote, an illegal drug, as part of their religious ceremonies as members of the Native American Church.[44] As a result of this conduct, the organization fired the counselors.[45] The counselors filed a claim for unemployment, which was denied because their dismissal from work was considered work-related "misconduct."[46] This may sound similar to the factual circumstances in the *Sherbert* line of cases; however, when the case arrived at the Court, Justice Scalia went an entirely different direction.[47]

In *Smith*, the Court held that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability'" even if the law prohibits conduct that one's religion requires.[48] Thus, the State had the power to enforce "an across-the-board criminal prohibition" of the drug peyote against members of the Native American Church.[49] This shift in the Court's free exercise jurisprudence was essentially Justice Scalia bringing back the conduct and belief distinction from *Reynolds*.[50]

After *Smith*, the governing rule for free exercise claims became that the government can prohibit practices that religion allows so long as the law is generally applicable.[51] If the law is not neutral and generally applicable, then strict scrutiny applies.[52] In other words, free exercise is only protected under the exceptions to the rule.[53]

This was a remarkable shift away from *Sherbert* and *Yoder*.[54] However, the *Smith* Court did not conduct a stare decisis analysis to

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43. *Id.* at 1179.

44. 494 U.S. 872 (1990).

45. Emp. Div. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 874 (1990).

46. *Smith*, 494 U.S. at 874–75.

47. Duncan, *supra* note 20, at 1184 (explaining that the "religious-conduct exemption found itself on the Hogwart's Express when Justice Scalia decided to revise free exercise doctrine in *Employment Division v. Smith*.").

48. *Smith*, 494 U.S. at 879.

49. *Id.* at 884.

50. Duncan, *supra* note 20, at 1184.

51. *Smith*, 494 U.S. at 879; *see also* Grasz, *supra* note 23, at 899 (explaining that under *Smith*, "if a law is (1) neutral and (2) generally applicable, any alleged burden placed on religious exercise by the law has no remedy under the Free Exercise Clause as long as the Government provides a rational basis for the law. Thus, if the Government is able to provide any rational basis for the law, the law will be upheld—regardless of the burden placed on religious exercise."); Duncan, *supra* note 36, at 883 (explaining that under *Smith* the "government may prohibit what religion requires or require what religion prohibits so long as it acts through neutral laws of general application.").

52. Duncan, *supra* note 36, at 851.

53. *Id.*

54. Duncan, *supra* note 20, at 1184.

determine if the Court would be justified in moving away from the previously established law.[55] In fact, the Court declared this shift in "existing law without an opportunity for briefing or argument, and it issued an opinion claiming that its new rules had been the law for a hundred years."[56] The Court attempted to justify this by stating that *Sherbert* fits within the *Smith* framework because it "was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct."[57] In other words, *Sherbert* was relegated to become an "individualized exemption" case, so strict scrutiny was properly applied there because Sherbert's religious liberty was burdened by the State's individualized, and thus not generally applicable, unemployment compensation process.[58] As for *Yoder*, Justice Scalia explained that it was still good law, but that it should instead be viewed as a hybrid case: one in which an insufficient free exercise claim was linked to another inadequate constitutional provision to support that right.[59] In *Yoder*, there was an insufficient free exercise claim and an insufficient parental rights claim that linked together to protect the parent's conduct.[60]

Ever since the Court decided *Smith*, it has attempted to define the terms "neutral" and "generally applicable." In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[61] there was an ordinance that had been gerrymandered to prohibit the killing of animals *only* when done as part of a religious ritual.[62] The Court held that scheme was neither neutral nor generally applicable, so "the most rigorous of scrutiny" was triggered.[63] The ordinances failed to survive this scrutiny because it only targeted conduct that was tied to religious belief.[64]

Lukumi clarified that the neutrality requirement demands formal rather than substantive neutrality. Formal neutrality is generally met if the law "neither targets religious practices" nor "adopts classifications that discriminate on the basis of religion."[65] Only in rare instances will

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55. *Id.* at 1184–85.

56. Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 1.

57. Duncan, *supra* note 20, at 1185 (quoting Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 884 (1990)).

58. *See id.* (explaining that the law at issue in *Sherbert* "was not generally applicable because . . . the Commission was empowered to grant 'good cause' or 'suitability' exemptions to those who had refused work for certain secular reasons . . . but refused to grant a similar exemption to Sherbert when she declined employment for religious reasons[.]").

59. Duncan, *supra* note 36, at 857–59.

60. *Id.*

61. 508 U.S. 520 (1993).

62. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah., 508 U.S. 520, 543 (1993).

63. *Lukumi*, 508 U.S. at 546.

64. *Id.* at 546–47.

65. Duncan, *supra* note 36, at 865; *see also* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999–1001 (1990) (explaining formal neutrality).

strict scrutiny be triggered by the neutrality requirement, because the requirement will be satisfied "unless the object or purpose of the law is to suppress religiously motivated conduct 'because of [the] . . . religious motivation.'"[66] For instance, in *Lukumi*, it was not neutral because the arrangement was a deliberate gerrymander "designed to prohibit the killing of animals only when done for religious purposes."[67] Put differently, it violated the neutrality requirement because it was designed to exclude religious practice.[68]

As for the general applicability requirement, Justice Kennedy explained that "[a]ll laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice."[69] From this, there are two aspects of the general applicability requirement: (1) substantial underinclusiveness, and (2) individualized exemption processes.[70]

First, laws that are substantially underinclusive fail "'to prohibit nonreligious conduct that endangers [state] . . . interests in a similar or greater degree' than the restricted religious conduct that is the subject of the free exercise claim."[71] Thus, laws containing "categories of selection" that burden religious exercise fail to qualify as generally applicable.[72] For example, in *Lukumi*, the government actions "were designed to promote the city's interest in protecting the public health, which was said to be threatened by the improper disposal of animal carcasses and the consumption of uninspected meat."[73] Despite that general interest, the actions did not qualify as generally applicable because they were substantially underinclusive as "the city did not prohibit hunting and certain other secular activities that equally endangered these public health concerns."[74]

Second, "when the government has in place a system of individualized exemptions, it must treat religious exemption claims as well as the *most favored* secular exemption claims."[75] In other words, the government must treat religious reasons for exemptions at least to the same degree as the preferred secular reasons, otherwise, the "most rigorous" strict scrutiny is triggered.[76] As mentioned above, this

66. Duncan, *supra* note 36, at 865.
67. *Id.* at 866.
68. *Id.*
69. *Lukumi*, 508 U.S. at 542.
70. *See* Duncan, *supra* note 20, at 1188 (explaining that the "individualized-assessment rule is best understood as a subset of the rule that applied rigorous strict scrutiny to nonneutral or nongenerally applicable laws.").
71. Duncan, *supra* note 36, at 865 (quoting *Lukumi*, 508 U.S. at 543).
72. *Id.* at 867.
73. *Id.*
74. *Id.*
75. *Id.* at 862.
76. *See id.*

is where *Sherbert* was relegated.[77] In *Sherbert*, the law at issue was not generally applicable because the State was empowered to grant exemptions to those who had refused work for certain secular reasons but refused to grant a similar exemption to Sherbert when she declined employment for religious reasons.[78] Thus, the law had an inherent selective process within it, which made it not generally applicable.[79]

Beyond *Sherbert*, the individualized exemption rule is significant because whenever an individual deals with laws, regulations, or policies administered by the government, including public schools, state universities, or other bureaucratic agencies, "there will often be some process for requesting an exemption, waiver, or variance."[80] Thus, even if the government's enactment is generally applicable on its face, if it has a system in place that allows for it to grant subjective exemptions or waivers, it may not refuse to grant such exemptions "in cases of 'religious hardship' without satisfying strict scrutiny."[81]

In *Masterpiece Cakeshop, Ltd., v. Colorado Civil Rights Commission*,[82] for instance, the Court found that the Colorado public accommodation law at issue was not generally applicable due to the individualized exemption process inherent in the Colorado Anti-Discrimination Act ("CADA").[83] Jack Phillips, the owner of a cakeshop, declined to bake a cake for a same-sex wedding because of his religious beliefs.[84] An administrative law judge issued a written order against Phillips under the CADA for discriminating against the same-sex couple based on their sexual orientation.[85] After the order was affirmed by the Colorado appellate courts, the Supreme Court of the United States reversed because, under CADA, "businesses are entitled to reject orders for any number of reasons, including because they deem a particular product requested by a customer to be 'offensive.'"[86] The State applied this "offensive product" exception subjectively and on an ad hoc basis, apparently granting an exception when it agreed with the business and refusing an exception when it disagreed.[87]

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77. *Id.*
78. Duncan, *supra* note 20, at 1185 (explaining that the law at issue in *Sherbert* "was not generally applicable because . . . the Commission was empowered to grant 'good cause' or 'suitability' exemptions to those who had refused work for certain secular reasons . . . but refused to grant a similar exemption to Sherbert when she declined employment for religious reasons[.]").
79. *Id.*
80. Duncan, *supra* note 36, at 862.
81. *Id.*
82. 584 U.S. 617 (2018).
83. *See* Masterpiece Cakeshop v. C.R. Comm'n, 584 U.S. 617 (2018).
84. *Id.* at 626.
85. *Id.* at 630.
86. *Id.* at 647.
87. *Id.* at 634–38.

Thus, because of the subjective test provided in the law, the Court found that there was an individualized exemption process, which meant that the law was not generally applicable.[88] As such, strict scrutiny applied.[89]

Further, in *Fulton v. City of Philadelphia*,[90] the Court found that the government's action was not generally applicable due to an individualized exemption process, even though an individualized exemption was never granted.[91] In March 2018, the City of Philadelphia barred Catholic Social Services ("CSS") from placing children in foster homes because CSS had a policy of not licensing same-sex couples as foster parents.[92] CSS sued the City of Philadelphia because it felt as if its right to free exercise of religion entitled it to reject same-sex couples.[93] The district court denied CSS's motion for a preliminary injunction, and the Third Circuit affirmed, finding that the City's non-discrimination policy was a neutral, generally applicable law.[94] The Supreme Court reversed because the relevant law gave the City an option to take a case-by-case, individualized exemption process from the requirement to certify same-sex couples as foster parents despite the exemption never being used.[95] The Court explained that the creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless of whether any exceptions have been given, because it "invites" the government to decide which reasons for not complying with the policy are worthy of respect, at the Commissioner's "sole discretion."[96]

Overall, under the Supreme Court's modern free exercise jurisprudence, if the government action is neutral and generally applicable, free exercise is not protected; however, if it is not neutral or generally applicable, then the government can prevail only if it satisfies the most rigorous of scrutiny.[97] In other words, when a law is not neutral and generally applicable, the government needs to go through a "gauntlet of superlatives" to show that it has a compellingly important reason for the restriction, and the means used must be necessary and narrowly

88. *Id.*
89. *Id.* at 640.
90. 593 U.S. 522 (2021).
91. *See* Fulton v. City of Phila., 593 U.S. 522 (2021).
92. *Id.* at 526–27.
93. *Id.* at 531–32.
94. *Id.*
95. *Id.* at 542.
96. *Id.* at 537, 542 ("The 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.") (citations omitted).
97. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah., 508 U.S. 520 (1993).

tailored to advance the compelling interest.[98] This standard is often challenging for the government to satisfy.[99] As a result, the government's defense in free exercise cases typically hinges on the assertion that its action was neutral and generally applicable.[100] However, this argument should not be accepted at face value. Instead, advocates must critically examine the government's position by identifying exceptions, instances of under-inclusiveness, or policies that allow individualized exemptions.[101]

B. The Nebraska First Freedom Act: A Broader Shield for Free Exercise

On July 19, 2024, Nebraska became the 27th state to supplement the Free Exercise Clause by enacting a state Religious Freedom Restoration Act. The Act provides people of all faiths a means to seek relief from oppressive state action.[102] Nebraska does have a religious freedom clause in its state constitution,[103] but it holds little meaning because the Nebraska Supreme Court interpreted it to have the same meaning as the federal Free Exercise Clause as interpreted in *Smith*.[104] In contrast to the Supreme Court's free exercise

98. *See* Duncan, *supra* note 36, at 864 ("[I]f a law is either not neutral or not generally applicable, it must pass through the gauntlet of superlatives that is strict scrutiny and will be upheld only if it advances a governmental interest 'of the highest order' and is narrowly tailored in pursuit of that truly compelling interest.") (footnote omitted).

99. *Id.*

100. *See, e.g.*, *Fulton*, 593 U.S. at 531 (indicating that the lower courts ruled against the protection of religious liberty because it found that the government practice was "neutral and generally applicable"); Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 584 U.S. 617, 630 (2018) (explaining that the administrative law judge determined that the government policy was a "neutral law of general applicability.").

101. *See, e.g.*, *Fulton*, 593 U.S. at 537 (finding that the law was not neutral and generally applicable due to the existence of a formal mechanism for granting exceptions); *Masterpiece Cakeshop*, 584 U.S. at 617 (explaining that the government policy was not a "neutral law of general applicability" because of the inconsistent and subjective exemptions granted by the Commission); *see also* Richard F. Duncan, *Government Always Argues*, Duncan's Con Law Course Blog (Sept. 20, 2021), https://professorduncan.blogspot.com/2021/02/government-always-argues.html ("In free exercise cases, the government will always argue that it's laws are both neutral and generally applicable . . . Do not let them get away with that. Search and destroy! Look for exceptions and under-inclusiveness, individualized exemption policies (good cause exemptions), and always ask whether anyone has ever been exempted.").

102. Zack Pruitt, *Nebraska Governor Signs Bill Protecting Religious Freedom, Donor Privacy*, All. Defending Freedom (Mar. 27, 2024), https://adflegal.org/press-release/nebraska-governor-signs-bill-protecting-religious-freedom-donor-privacy/; *see also* Neb. Rev. Stat. § 20-705 (Reissue 2024) (indicating the First Freedom Act became operative on July 19, 2024).

103. Neb. Const. art. I, § 4 ("All persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. . . . [N]or shall any interference with the rights of conscience be permitted.").

104. Grasz, *supra* note 23, at 901 (citing In re Interest of Anaya, 276 Neb. 825, 758 N.W.2d 10 (2008)) (providing that "the Nebraska Supreme Court interpreted Nebraska's

jurisprudence, the Act takes a more expansive approach, ensuring robust protections for religious practice regardless of whether a law is neutral or generally applicable.[105] This section explores the Act as a broader protection for free exercise.

Nebraska State Senator Brewer introduced this legislation as LB 277.[106] Senator Brewer explained that the Act was designed to ensure that religious freedom remains robustly protected, particularly in response to growing concerns over government overreach.[107] Specifically, he mentioned that he was concerned by how the government responded to COVID-19 by allowing liquor stores to remain open, but restricting churches.[108] From that inspiration, Senator Brewer examined how other states approached this issue to ensure that religious and secular institutions were at least "on the same playing field," which led him to the several state RFRAs.[109] From that, the Act was introduced.[110]

The Nebraska Legislature overwhelmingly supported the legislation.[111] Senator Conrad, for instance, supported it because RFRAs protect the free exercise rights of all people, including those practicing minority religions.[112] Notably, Senator Brewer stated that, beyond the government's response to COVID-19, his motivation for introducing this legislation stemmed from an incident at Cody-Kilgore Elementary School in Kilgore, Nebraska.[113] There, during routine lice checks, a school employee cut the hair of Native American students, violating

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Conscience Clause as requiring what the Free Exercise Clause requires. In doing so, the court held that the *Smith* standard was appropriate to apply to interferences with religious exercise under Nebraska's Conscience Clause. As a result, every neutral and generally applicable law that burdens the right of conscience is constitutional under the Nebraska constitution so long as the State presents any rational basis for the law that causes the undue burden."); *see also id.* at 903 (explaining that the Nebraska Supreme Court's interpretation in *Anaya* "rendered the text of the Conscience Clause meaningless and mere surplusage").

105. *See* Neb. Rev. Stat. §§ 20-701–05 (Reissue 2024) (detailing the First Freedom Act).

106. *See LB277 – Adopt the First Freedom Act and Authorize the Wearing of Tribal Regalia by Students*, Neb. Legislature, https://nebraskalegislature.gov/bills/view_bill.php?DocumentID=49859 (indicating LB277 was introduced by Senator Brewer).

107. Martha Stoddard, *Nebraska Bill Boosting Religious Freedom Protections Advances*, Omaha World Herald (Jan. 23, 2024), https://omaha.com/news/state-regional/government-politics/nebraska-bill-boosting-religious-freedom-protections-advances/article_c1af7b88-ba1c-11ee-a4b6-9364bb31264a.html#tncms-source=login.

108. *Id.*

109. *Id.*

110. *Id.*

111. *See Recorded Vote*, Neb. Legislature, https://nebraskalegislature.gov/bills/view_votes.php?KeyID=10479.

112. *See* Neb. Leg., Floor Debate Tr. (Jan. 23, 2024), https://www.nebraskalegislature.gov/FloorDocs/108/PDF/Transcripts/FloorDebate/r2day14.pdf.

113. Stoddard, *supra* note 107.

the student's traditional Lakota religious beliefs.[114] The parents of those students sued the school district, and eventually settled.[115] The Act would have provided direct protection for the students.[116] Because of this protection, the Legislature unanimously passed the law.[117]

From there, the legislation was signed into law by Governor Jim Pillen.[118] The Act can be found in Neb. Rev. Stat. §§ 20-701 to 20-705.[119] Section 20-703 provides the operative language of the Act. It begins by stating, "Notwithstanding any other provision of law, state action shall not . . . ."[120] Thus, the Act applies regardless of any other laws and uses the mandatory language of "shall not" to guarantee broad protection of religious freedoms.[121]

Subsection 20-703(1) continues by providing that state action shall not: "Substantially burden a person's right to the exercise of religion unless it is demonstrated that applying the burden to that person's exercise of religion in this particular instance is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest."[122]

This is a very broad protection of religious liberty, as it directly provides that free exercise is protected against state action unless the government satisfies strict scrutiny.[123] This approach contrasts with that of the Supreme Court: rather than safeguarding free exercise through exceptions to the general rule, the Act enshrines the protection within the rule itself.[124] Further, the compelling interest test

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114. Rose Godinez, *Alice Johnson v. Cody Kilgore*, ACLU NEB., https://www.aclunebraska.org/en/cases/alice-johnson-v-cody-kilgore (last visited Feb. 5, 2024).

115. *Id.*

116. *See* NEB. REV. STAT. §§ 20-701–05 (Reissue 2024) (detailing the First Freedom Act).

117. *See Recorded Vote*, *supra* note 111.

118. Pruitt, *supra* note 102.

119. *See* NEB. REV. STAT. §§ 20-701–05 (Reissue 2024) (detailing the First Freedom Act).

120. NEB. REV. STAT. § 20-703 (Reissue 2024); *see also* NEB. REV. STAT. § 20-702(5) (Reissue 2024) (broadly defining state action to include the "implementation or application of any law, including state and local laws, ordinances, rules, regulations, and policies, whether statutory or otherwise, or other action by the state or any political subdivision thereof and any local government, municipality, instrumentality, or public official authorized by state or local law").

121. *Notwithstanding*, BLACK'S LAW DICTIONARY (12th ed. 2024).

122. NEB. REV. STAT. § 20-703(1) (Reissue 2024); *see also* NEB. REV. STAT. § 20-702(2) (Reissue 2024) (defining "person" to include "any individual, association, partnership, corporation, church, religious institution, estate, trust, foundation, or other legal entity"); NEB. REV. STAT. § 20-702(1) (Reissue 2024) (defining "exercise of religion" to include "the practice or observance of religion and includes any action that is motivated by a sincerely held religious belief, whether or not the exercise is compulsory or central to a larger system of religious belief").

123. *See* NEB. REV. STAT. § 20-703(1) (Reissue 2024).

124. *Compare id., with* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah., 508 U.S. 520 (1993).

provided by the Act is very strong, as the state must show that granting a religious exemption to *the particular person* claiming religious liberty is necessary to further a compellingly important governmental interest.[125] Rarely, if ever, will that occur. And, even if the state passes that test, it must also show that it is the least restrictive means of furthering that *particularized* compelling interest.[126] Ultimately, the state truly has to go through the "gauntlet of superlatives" to hinder an individual's right to exercise their religion.[127]

Further, the Act's definition of what constitutes a substantial burden on religious exercise ensures a broad protection for persons seeking to freely exercise their religion. The Act provides that "[s]ubstantially burden means any action that directly or indirectly constrains, inhibits, curtails, or denies the exercise of religion by any person or compels any action contrary to a person's exercise of religion."[128] It then provides some examples of this occurring: "Substantially burden includes withholding benefits, imposing criminal, civil, or administrative penalties or damages, or exclusion from governmental programs or access to governmental facilities."[129] By defining substantial burden so expansively, the Act prevents the government from avoiding liability through indirect or subtle means. This gives religious persons strong legal protections, even in cases where restrictions are not explicitly aimed at religious practice but still have the effect of limiting it.[130]

Subsection 20-703(2) then provides that state action shall not: "Restrict a religious organization from operating and engaging in religious services during a state of emergency to a greater extent than the state restricts other organizations or businesses from operating during a state of emergency."[131] This subsection effectively incorporates the "Most Favored Nation" principle into the Act during states of emergency,

125. Duncan*, supra* note 36, at 864 (explaining that to satisfy strict scrutiny, the government must survive the "gauntlet of superlatives").

126. *See* Neb. Rev. Stat. § 20-703(1) (Reissue 2024).

127. Duncan*, supra* note 36, at 864.

128. Neb. Rev. Stat. § 20-702(6)(a) (Reissue 2024).

129. Neb. Rev. Stat. § 20-702(6)(b) (Reissue 2024).

130. *See Major Nebraska Religious Liberty Victory!*, Neb. Fam. All. (Mar. 21, 2024), https://nebraskafamilyalliance.org/major-nebraska-religious-liberty-victory/.

131. *See* Neb. Rev. Stat. § 20-703(2) (Reissue 2024); *see also* Neb. Rev. Stat. § 20-702(3) (Reissue 2024) (defining "religious organization" to include "(a) A house of worship; (b) A religious group, corporation, association, educational institution, ministry, order, society, or similar entity, regardless of whether it is integrated or affiliated with a church or other house of worship; or (c) An officer, owner, employee, manager, religious leader, clergy, or minister of an entity or organization described in subdivision (3)(a) or (b) of this section"); Neb. Rev. Stat. § 20-702(4) (Reissue 2024) (defining "religious service" to include "a meeting, gathering, or assembly of two or more persons organized by a religious organization for the purpose of worship, teaching, training, providing educational services, conducting religious rituals, or other activities that are deemed necessary by the religious organization for the exercise of religion").

which ensures that religious organizations receive treatment at least equal to that of the most favorably treated secular entities.[132] Thus, for instance, if liquor stores and casinos are allowed to be open during a state of emergency, then churches must be allowed to as well.[133] This resulted from the COVID-19 response, where the government often granted preferential treatment to so-called "essential businesses" (e.g., "hardware stores, acupuncturists, and liquor stores") over so-called "non-essential activities," including religious organizations.[134] Notably, subsection (2) provides a straight up prohibition against restricting religious organizations more than other organizations during emergencies.[135] Accordingly, regardless of any compelling interest the state may have, religious organizations must be treated the same as secular businesses during emergencies.[136]

These protections are very broad. The Act explains that it "applies to all state and local laws, and the implementation of those laws, whether statutory or otherwise, regardless of whether adopted before or after July 19, 2024."[137] Further, the Act broadly defines state action to include "the implementation or application of any law, including state and local laws, ordinances, rules, regulations, and policies, whether statutory or otherwise, or other action by the state or any political subdivision thereof and any local government, municipality, instrumentality, or public official authorized by state or local law."[138] Thus, the Act protects individuals from the "laws, ordinances, rules, regulations, and policies" of state and local governments, which includes public schools and state universities.[139] Additionally, its definition of religious

132. Mark Strasser, *COVID-19, Free Exercise, and Most Favored Nation Status*, 27 LEWIS & CLARK L. REV. 1, 2 (2023) ("if a statute provides any exemptions to the regulation at issue for secular reasons, then religious activity must be accorded an exemption as well.").

133. *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 22 (2020) (Gorsuch, J., concurring) (stating, "People may gather inside for extended periods in bus stations and airports, in laundromats and banks, in hardware stores and liquor shops. No apparent reason exists why people may not gather, subject to identical restrictions, in churches or synagogues . . . The only explanation for treating religious places differently seems to be a judgment that what happens there just isn't as 'essential' as what happens in secular spaces. Indeed, the Governor is remarkably frank about this: In his judgment laundry and liquor, travel and tools, are all 'essential' while traditional religious exercises are not. *That* is exactly the kind of discrimination the First Amendment forbids.").

134. *Cuomo*, 592 U.S. at 22.

135. NEB. REV. STAT. § 20-703(2) (Reissue 2024).

136. *Id.*

137. NEB. REV. STAT. § 20-705 (Reissue 2024).

138. NEB. REV. STAT. § 20-702(5) (Reissue 2024).

139. Jade Yeban*, The Roles of Federal and State Governments in Education*, FIND LAW (Dec. 4, 2024), https://www.findlaw.com/education/curriculum-standards-school-funding/the-roles-of-federal-and-state-governments-ineducation.html#:~:text=The%20state%20and%20federal%20governments,of%20education %20within%20the%20state (explaining that public school systems are included in state and local governments).

exercise is very broad, as it protects the practice or observance of religion "whether or not the exercise is compulsory or central to a larger system of religious belief."[140] As long as the belief is "sincerely held," it is protected by the First Freedom Act.[141]

Notably, the Act does not include an exemption for anti-discrimination laws, which is incredibly important because anti-discrimination laws are a big threat to religious freedom.[142] The Nebraska Family Alliance, an organization that supported this legislation, explained that these broad protections "ensure that religious freedom for all citizens is protected and is a generational win for one of our most fundamental human rights: freedom of religion."[143]

The Act further provides a private right of action and waives sovereign immunity. Subsection 20-704(1) explains that a "person or religious organization whose exercise of religion or religious service has been burdened or restricted, or is likely to be burdened or restricted, in violation of the First Freedom Act, may bring a civil action or assert such violation or impending violation as a defense."[144] Notably, the Act allows for persons to bring a civil action or assert a defense under the Act even if the exercise of their religion has not yet been burdened or restricted.[145] Subsection 20-704(2) explains that "this section applies regardless of whether the state or a political subdivision is a party to the judicial or administrative proceeding."[146] Thus, the state cannot escape a lawsuit under the Act by asserting sovereign immunity.[147]

Finally, the Act provides for broad remedies. These remedies include: "(a) Actual damages; (b) Such preliminary and other equitable or declaratory relief as may be appropriate; and (c) Reasonable

140. NEB. REV. STAT. § 20-702(1) (Reissue 2024).

141. *Id.*

142. *See* Scott W. Gaylord, *Is a Cake Worth a Thousand Words?* Masterpiece Cakeshop *and the Impact of Antidiscrimination Laws on the Marketplace of Ideas*, 85 TENN. L. REV. 361, 407 (2018).

143. *Religious Liberty Victory*, *supra* note 130.

144. NEB. REV. STAT. § 20-704(1) (Reissue 2024).

145. NEB. REV. STAT. § 20-704(1) (Reissue 2024) (authorizing such suits when religious liberty is "likely to be burdened or restricted" or to assert the Act as defense to "impending violations" of religious liberty).

146. NEB. REV. STAT. § 20-704(2) (Reissue 2024).

147. Garcia v. City of Omaha, 316 Neb. 817, 824, 7 N.W.3d 188, 195 (2024) (providing that "[t]he sovereign immunity of the State and its political subdivisions is preserved in NEB. CONST. art. V, § 22. This constitutional provision is not self-executing, and no suit may be maintained against a political subdivision unless the Legislature, by law, has provided otherwise."); Miles McCann, *State Sovereign Immunity*, NAT'L ASS'N OF ATT'YS GEN. (Nov. 11, 2017), https://www.naag.org/attorney-general-journal/state-sovereign-immunity/#:~:text=Under%20the%20doctrine%20of%20%E2%80%9Cstate,Court%20jurisprudence%20on%20sovereign%20immunity (explaining that "[u]nder the doctrine of 'state sovereign immunity,' a state cannot be sued in federal and state court without its consent," and that "state legislatures have legislative authority to determine the suability of the state.").

attorney's fees and other litigation costs reasonably incurred."[148] These remedies ensure that the government faces severe consequences for restricting religious liberty. The inclusion of reasonable attorney's fees is an especially crucial addition, as it ensures that individuals can effectively seek justice.[149]

In summary, the Act provides broad protections for religious liberty by barring state actors from imposing stricter limitations on churches and religious organizations than on secular businesses during emergencies. Also, it limits the government's ability to infringe on individual religious liberty rights by requiring the government to go through a rigorous compelling interest test.[150] The Act is a victory not only for religious liberty but also for federalism, as it demonstrates the ability of states to establish higher standards of protection for fundamental rights than those currently afforded under the Supreme Court's jurisprudence.[151]

C. Case Study: Applying Both Approaches

Given the widespread praise of God through sporting events, as briefly detailed at the beginning of this Article,[152] it is fitting to explore a hypothetical university policy that directly impacts an athlete's ability to exercise their religious beliefs. For the purpose of this analysis, it is assumed that the policy in question was enacted without any intent to suppress religious exercise. This Article focuses exclusively on the free exercise issues raised by the application of this hypothetical policy. The consideration of other potential legal arguments is beyond the scope of this Article. With that, here's the background of the hypothetical case study:

Moses Cunningham is the starting quarterback and team captain at the University of Cottonwood, a public, state-funded institution.

148. Neb. Rev. Stat. § 20-704(3) (Reissue 2024).

149. Pamela Cardullo Ortiz, *Courts and Communities: How Access to Justice Promotes a Healthy Community*, 72 Md. L. Rev. 1096, 1102 (2013) (explaining that awarding attorney's fees enhances access to justice).

150. *See* Neb. Rev. Stat. §§ 20-701–05 (Reissue 2024) (detailing the First Freedom Act).

151. *See* Daniel O. Conkle, *Free Exercise, Federalism, and the States as Laboratories*, 21 Cardozo L. Rev. 493 (1999) (explaining the purposes of federalism in protecting free exercise through state RFRAs); Grasz, *supra* note 23, at 916–17 (citing James Gardner, *State Courts as Agents of Federalism: Power and Interpretation in State Constitutional Law*, 44 Wm. & Mary L. Rev. 1725, 1734 (2003)) (explaining that the U.S. Constitution divides powers "between the federal and state governments to ensure state autonomy"); Michael Stokes Paulsen & Luke Paulsen, The Constitution: An Introduction 38–39 (2015) (explaining that federalism was an intentional design by the framers to ensure "that the states could have whatever laws they wished for governing their own citizens on local matters," and to provide a "security" for the "liberty of the People").

152. *See supra* Part I.

Moses is deeply committed to his faith and attends a local Baptist church near campus. Like many Baptist congregations, Moses' church holds weekly Wednesday night services dedicated to worship and studying scripture, which he faithfully attends because of his sincerely held religious beliefs.[153]

Recently, the University of Cottonwood introduced a policy requiring all student-athletes to attend an in-person program on Name, Image, and Likeness ("NIL") compliance. This program occurs once per academic year. The university emphasized that this program is essential to ensure its athletes understand and adhere to NIL guidelines.[154] Failure to attend the program results in the student-athlete being disqualified from their sport. Unfortunately for Moses, the program was scheduled on a Wednesday night, which directly conflicts with his church service.

Concerned about the overlap, Moses approached his coach and the athletic director, and requested an exemption from the program so he could attend the Wednesday night service. He explained that his request was rooted in his right to freely exercise his religion. However, the University of Cottonwood denied his request, and asserted that no athlete could be exempt from the program.[155] University officials further explained that the policy does not contain any formal mechanism for granting exemptions due to the program's critical importance. Frustrated by the refusal to accommodate his religious practice, Moses sought legal advice. He sought this advice before the program occurred and therefore had not yet been disqualified from football.

1. Supreme Court Outcome

Moses' attorney began by analyzing his claim under the Supreme Court's free exercise jurisprudence. As noted above, under the Supreme Court's free exercise jurisprudence, if a law is neutral and generally applicable, free exercise is not protected; however, if the government's action is not neutral or generally applicable, then the government can

153. *See, e.g.*, *Why Come to Church on Wednesday Night?*, Life Point Baptist Church (Apr. 4, 2018), https://www.lifepointbaptist.org/blog/post/why-come-to-church-on-wednesday-night (explaining that "Wednesday night is one of the most exciting times of the week at Life Point Baptist Church.").

154. Josh Lens, *NIL Compliance*, 103 B.U. L. Rev. Online 69, 88 (2023), https://www.bu.edu/bulawreview/2023/04/17/nil-compliance/ (detailing suggested monitoring activities for universities to ensure compliance with NIL guidelines).

155. The author acknowledges that such a policy would be unlikely to operate as written in practice, as some athletes would necessarily require excused absences due to illness or other unavoidable conflicts, such as funerals or weddings. Nevertheless, the author is aware of analogous situations in which universities have scheduled mandatory programs on days that conflicted with an individual's religious observances, such as final examinations held on religious holidays, and in those instances the university declined to provide religious accommodations.

prevail only if it satisfies the most rigorous of scrutiny.[156] Applying this framework, the attorney concluded that Moses's claim under the Free Exercise Clause would likely fail because the university's policy is neutral and generally applicable.

The university policy is likely neutral because it "neither targets religious practices" nor "adopts classifications that discriminate on the basis of religion."[157] Instead, it applies uniformly to all student-athletes, who are directly impacted by the evolving landscape of NIL regulations. In other words, the classification at issue is based solely on student-athlete status, not religious belief, making it unlikely to be deemed discriminatory under the Court's neutrality requirement.

The policy is also likely generally applicable because it is not substantially underinclusive, and it does not have an individualized exemption process. Instead, it applies equally to all student-athletes without exception, which reinforces its broad applicability. Additionally, when Moses sought an exemption from the university, it was explained that no student-athletes would receive an exemption from the policy because of its fundamental importance. Furthermore, the holding in *Fulton*, which found that the mere existence of a formal exemption mechanism renders a policy not generally applicable, does not apply here, as the university's policy lacks any such exemption process.

Therefore, under the Supreme Court's approach, Moses is left with an unfortunate choice: violate his religious beliefs by missing the church service or forfeit his ability to compete in the sport he loves. This dilemma is a particularly hard decision for Moses, as the starting quarterback and team captain. Of course, to avoid this dilemma, Moses could enter the transfer portal and easily find another university that does not have the same policy due to the lack of restrictions on the transfer portal today.[158] Ultimately, the Supreme Court's approach forces individuals like Moses into an unfortunate position: choosing between their faith and compliance with state-imposed requirements. This is an outcome that is fundamentally at odds with the First Amendment's clear mandate that no law shall prohibit the free exercise of religion.[159]

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156. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah., 508 U.S. 520 (1993).

157. Duncan, *supra* note 36, at 865; Laycock, *supra* note 65, at 999–1001 (explaining formal neutrality).

158. Cliff Ellis, *College Sports will Implode if we don't fix the Problem with the Transfer Portal and NIL*, TENNESSEAN (Mar. 16, 2024), https://www.tennessean.com/story/opinion/contributors/2024/03/16/ncaa-challenge-name-image-likeness-transfer-portal-destroy-college-sports/72993044007/ (explaining that the current "system is broken.").

159. *See* U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . ."); *see also* Blaine L. Hutchison, *Revisiting* Employment Division v. Smith, 91 U. CIN. L. REV. 396, 416 (2022) ("To remain textually faithful, exceptions should be narrow because the text supplies none. The text's absolute prohibition, moreover, requires the

2. Nebraska First Freedom Act Outcome

Fortunately, in this hypothetical, the University of Cottonwood is a Nebraska public university, so the First Freedom Act may provide Moses with some relief.[160] As mentioned above, unlike the Supreme Court's approach, which protects free exercise only in exceptions to the general rule, the Act provides direct and robust protection for religious exercise.[161] Specifically, Neb. Rev. Stat. § 20-703(1) provides that free exercise is protected against state action unless the government can satisfy an exceptionally rigorous form of strict scrutiny.[162] Applying this framework, the attorney concludes that Moses's claim would likely succeed under the Act because the university's policy constitutes state action that substantially burdens his free exercise rights, and the university cannot overcome the rigorous strict scrutiny.

First, the university policy qualifies as state action under the Act. The Act broadly defines state action to include "the implementation or application of any law, including state and local laws, ordinances, rules, regulations, and policies, whether statutory or otherwise, or other action by the state or any political subdivision thereof and any local government, municipality, instrumentality, or public official authorized by state or local law."[163] Thus, the Act protects individuals from the policies, rules, and regulations of state universities. Accordingly, Moses is entitled to the Act's protections against the university's NIL program requirement.

Second, the university policy substantially burdens Moses's right to freely exercise his religion. As mentioned above, the Act defines "substantially burden" very broadly: "Substantially burden means any action that directly or indirectly constrains, inhibits, curtails, or denies the exercise of religion by any person . . ."[164] The penalty of being disqualified from the sport for violating the policy is substantial. But, even without the threat of such a penalty, the policy would likely qualify as a substantial burden on Moses' right to exercise his religion because it is directly inhibiting his ability to attend church.

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government to prove an exception from the rule is necessary to lawfully burden religious practice.").

160. Again, this is entirely hypothetical. The University of Cottonwood does not exist. The Author selected this name in honor of Nebraska's state tree, the Cottonwood. *See State Symbols*, NEB. SEC'Y OF STATE, https://sos.nebraska.gov/state-symbols (last visited Dec. 11, 2025) ("The 1972 Legislature named the cottonwood (Populus deltoides) as the state tree. The cottonwood often is associated with pioneer Nebraska. Several famous early landmarks were cottonwood trees, and their shoots often were collected by settlers who planted them on their claims. Today, the cottonwood grows throughout the state.").

161. *See supra* section II.B.

162. *See* NEB. REV. STAT. § 20-703(1) (Reissue 2024).

163. NEB. REV. STAT. § 20-702(5) (Reissue 2024).

164. NEB. REV. STAT. § 20-702(6)(a) (Reissue 2024).

The University may argue that this does not constitute a substantial burden, but such arguments are unpersuasive. One such argument is that Moses's religion does not require him to attend Wednesday night service. However, this does not matter because the Act protects religious exercise "motivated by a sincerely held religious belief, whether or not the exercise is compulsory or central to a larger system of religious belief."[165] Thus, Moses is protected by the Act because he has a sincerely held religious belief that attending Wednesday night service allows him to grow his faith. Another argument is that Moses has not been substantially burdened because the program has not yet occurred and he therefore has not been disqualified from football. However, this does not matter because the Act also protects individuals from "impending violations" of religious liberty.[166] As such, it is irrelevant that Moses has not yet been disqualified, because the disqualification is an impending violation. Finally, the University could argue that the program does not impose a substantial burden because it affects only one Wednesday night service and that Moses remains free to attend church on Sundays and on Wednesdays other than the one impacted by the program. This argument is also unlikely to succeed because the Act shifts the burden onto the government to accommodate religious exercise, not the other way around.[167]

While Moses's ability to freely exercise his religion has been substantially burdened, the policy may still be enforceable if the university can satisfy the Act's stringent compelling interest test. However, that is unlikely. The Act provides that the University must "demonstrate[] that applying the burden to that person's exercise of religion in this *particular instance* is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest."[168] Thus, the university first needs to show how denying Moses an exemption in this *particular instance* is necessary to further a compellingly important governmental interest. The university is unlikely to establish a compelling interest because compelling government interests typically involve public health, safety, or national security, not NIL compliance.[169] However, the university might argue that strong NIL compliance enhances revenue for the

165. NEB. REV. STAT. § 20-702(1) (Reissue 2024).
166. NEB. REV. STAT. § 20-704(1) (Reissue 2024).
167. *See supra* section II.B.
168. NEB. REV. STAT. § 20-703(1) (Reissue 2024) (emphasis added).
169. Ronald Steiner, *Compelling State Interest*, FREE SPEECH CTR. (July 5, 2024), https://firstamendment.mtsu.edu/article/compelling-state-interest/ ("Regulation vital to the protection of public health and safety, including the regulation of violent crime, the requirements of national security and military necessity, and respect for fundamental rights are examples of compelling governmental interests.").

university and the state.[170] Additionally, the university may claim that Moses, as the starting quarterback, is typically the person receiving the most NIL opportunities, and thus ensuring compliance in this particular instance is especially important.[171]

Even if the compelling interest argument succeeds, which does not seem likely, the university still must prove that its policy is the least restrictive means of achieving their goal. This is where the university's case *certainly* fails because the university could easily accommodate Moses in less restrictive ways, such as: (1) recording the session so Moses can watch at a later time; (2) providing reading materials to ensure he stays informed; (3) scheduling a make-up session. Also, the university could have scheduled the program for a different evening as there are no facts suggesting that the program had to occur on a Wednesday night. Because these less restrictive alternatives exist, the university will not be able to survive the "gauntlet of superlatives" provided by the Act.[172]

Therefore, under the Act, Moses is entitled to an exemption so that he can attend church. Unlike the Supreme Court's jurisprudence, which forces individuals to choose between their faith and state-imposed obligations, the Act ensures that religious exercise is given the highest level of protection. Also, the Act may discourage Moses from transferring to another university, as he enjoys stronger legal protection for his religious beliefs at a Nebraska public university. All jokes about the transfer portal aside, the First Freedom Act is worth celebrating because it ensures that individuals like Moses can participate in public life without having to sacrifice their faith. Moreover, because Moses likely has a strong claim under the Act, his attorney has reason to celebrate as well because the Act provides that a person with a prevailing claim under the Act may obtain reasonable attorney's fees.[173] Ultimately, unlike the Supreme Court's jurisprudence, Nebraska faithfully upholds the right of people to freely exercise their religion.

III. THE WAY FORWARD: LESSONS FOR THE SUPREME COURT

After reviewing the above case study, it should be clear that the Supreme Court's current free exercise jurisprudence under *Employment Division v. Smith*[174] fails to provide adequate protection

170. Emily Wilson, *How Universities are Boosting Revenue in the NIL Era?*, ATHLETE ADVANTAGE (Dec. 19, 2024), https://athleteadvantage.com/how-universities-are-boosting-revenue-in-the-nil-era/.
171. Lens, *supra* note 154, at 95 (providing "meeting with high profile student-athletes" as a suggested method of ensuring compliance with NIL guidelines).
172. Duncan, *supra* note 36, at 864 (utilizing the phrase "gauntlet of superlatives").
173. NEB. REV. STAT. § 20-704(3)(c) (Reissue 2024).
174. 494 U.S. 872 (1990).

for religious liberty.[175] The decision has been widely criticized by justices, legal scholars, and legislators alike for many reasons.[176] First, *Smith* departed from well-settled law by abandoning the compelling-interest test promoted in *Sherbert* and *Yoder*.[177] Second, *Smith* deviated from the original meaning of the Free Exercise Clause, which was intended to protect religious practices from government coercion.[178] Third, *Smith* harms minority religions by enabling coercive restrictions on religious exercise.[179] Moreover, the Court's justification, that the traditional test was unworkable has been disproven by the successful legislative rebellion against *Smith*, exemplified by RFRA, RLUIPA, and their many state counterparts—including Nebraska's First Freedom Act.[180] Finally, stare decisis does not shield *Smith*.[181] Thus, the Court should return to the pre-*Smith* compelling-interest test, which functions effectively under existing legislative frameworks.

As detailed above, before the Court decided *Smith*, it employed a compelling-interest test that required the government to show that it had a compellingly important governmental interest that was narrowly tailored before it could burden religious exercise.[182] "When *Smith* came before the Court, the parties litigated under this compelling-interest test."[183] Despite the parties' embrace of that test, the Court still departed from it and replaced it with a new rule that upheld neutral and generally applicable laws even when they substantially burden a particular religious practice.[184] Many have realized that this decision was a departure from well-settled law.[185] For instance, Justice

175. *See supra* section II.C.; *see also* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1419 (1990) (providing numerous laws that are facially neutral that nevertheless interfere with religious exercise: "[A] general prohibition of alcohol consumption could make the Christian sacrament of communion illegal, [and] uniform regulation of meat preparation could put kosher slaughterhouses out of business.").

176. *See, e.g.*, Brief for Seven Legal Scholars as Amici Curiae Supporting Petitioners, Roman Catholic Diocese of Albany v. Harris, 145 S. Ct. 2794 (Mem) (No. 24-319) [hereinafter Seven Legal Scholars]; Fulton v. City of Philadelphia, 593 U.S. 522, 545 (2021) (Alito, J., concurring) (explaining that *Smith* "abruptly pushed aside nearly 30 years of precedent," with "a devastating effect on religious freedom."); Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb–2000bb-4 (2018).

177. Seven Legal Scholars, *supra* note 176, at 6.

178. *Id.* at 8.

179. *Id.* at 13.

180. *Id.* at 2.

181. *Id.*

182. Sherbert v. Verner, 374 U.S. 398, 406–07 (1963).

183. Seven Legal Scholars, *supra* note 176, at 5; *see also* Hutchison, *supra* note 159, at 402–03 (explaining that neither party in *Smith* "asked the Court to review its free exercise framework.").

184. Seven Legal Scholars, *supra* note 176, at 5 (citing Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 895 (1990)).

185. *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1120–28 (1990); Branton J. Nestor, *Revisiting* Smith: *Stare*

Alito explained that *Smith* "largely repudiated the method of analysis used in prior free exercise cases,"[186] and that it "abruptly pushed aside nearly 30 years of precedent" with "a devastating effect on religious freedom."[187]

Smith also deviated from the original meaning of the Free Exercise Clause.[188] Justices and academics alike have realized this.[189] Professor Michael McConnell explained that at the founding of our country, religious exemptions were widely granted and thus such exemptions were likely part of the right enshrined in the Free Exercise Clause.[190] Further, following the American Revolution, "most of the state constitutional provisions that protected religious exercise explained that free exercise of religion was protected unless it was contrary to the 'peace' and 'safety' of the State."[191] Justices Alito and Gorsuch explained that this historical evidence is proof that *Smith* lacks a plausible historical foundation because the Free Exercise Clause "guarantees the free *exercise* of religion, not just the right to inward belief (or status)."[192] Instead of substantively protecting the right to religious liberty, *Smith* allows religious liberty to be infringed upon when the government's action is neutral and generally applicable.[193] Ultimately, *Smith* deviated from the original meaning of the Free Exercise Clause.[194]

Decisis and Free Exercise Doctrine, 44 HARV. J. L. & PUB. POL'Y 403, 415–26 (2021); *see also* Hutchison, *supra* note 159, at 406 ("Because *Smith* upended settled precedent, the majority tried to reinterpret the many well-known cases that contradicted *Smith*—based on hybrid rights and unemployment benefits.").

186. Holt v. Hobbs, 574 U.S. 352, 357 (2015).

187. Fulton v. City of Philadelphia, 593 U.S. 522, 545 (2021) (Alito, J., concurring in the judgment).

188. Seven Legal Scholars, *supra* note 176, at 8; *see also* Michael W. McConnell, *Religion and Constitutional Rights: Why is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1243–44 (2000) (explaining that religious tolerance dates back to founding of the nation); MICHAEL STOKES PAULSEN & LUKE PAULSEN, THE CONSTITUTION: AN INTRODUCTION 100 (2015) (providing that the earliest definitions of the free exercise clause required religion to be "respected, accommodated, and protected").

189. *See, e.g.*, *Fulton*, 593 U.S. at 553 (Alito, J., concurring in the judgment) (explaining that *Smith* "can't be squared with . . . the prevalent understanding of the scope of the free-exercise right at the time of the First Amendment's adoption"); Hutchison, *supra* note 159, at 420 (explaining that the original meaning of the Free Exercise Clause was to protect "a broad, substantive right to practice religion").

190. Seven Legal Scholars, *supra* note 176, at 8 (citing McConnell, *supra* note 175, at 1425).

191. *Id.* at 9.

192. Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 469 (2017) (Gorsuch, J., concurring in part); *Fulton*, 593 U.S. at 553 (Alito, J., concurring in the judgment) (explaining that *Smith* "can't be squared with . . . the prevalent understanding of the scope of the free exercise right at the time of the First Amendment's adoption").

193. Seven Legal Scholars, *supra* note 176, at 11 (citing Laycock, *supra* note 56, at 10).

194. *See* U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . ."); *see also* Hutchison, *supra* note 159, at 417 ("The Constitution . . . bars the government from prohibiting religious exercise. This is a substantive protection from government interference with religion.").

Smith also harms religious minorities.[195] One of the underlying purposes of Nebraska's First Freedom Act was to protect minority religions.[196] This protection of religious minorities through the Act would not have been necessary if *Smith* adequately protected minority religions.[197] In *Smith*, the Court conceded that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in," dismissing this as an "unavoidable consequence of democratic government."[198] However, a fundamental purpose of the Free Exercise Clause, and the Bill of Rights as a whole, is to protect minorities from precisely such "consequences" of majority rule.[199] Thus, *Smith* undermines the very core of the Free Exercise Clause: safeguarding the religious practices of minority groups.[200]

The *Smith* Court justified its approach by arguing that the compelling-interest test would be unworkable in a religiously pluralistic society.[201] However, those fears were rebutted due to what some have called "legislative rebellion."[202] This legislative rebellion can be seen through RFRA,[203] RLUIPA,[204] and similar state laws—including

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195. Seven Legal Scholars, *supra* note 176, at 13.

196. Stoddard, *supra* note 107.

197. Seven Legal Scholars, *supra* note 176, at 14 (explaining that the harm that *Smith* has caused to religious minorities is not "a hypothetical concern").

198. *Id.* at 13 (quoting citing Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 890 (1990)).

199. McConnell, *supra* note 185, at 1129; *see also* William N. Eskridge, Jr., *A Pluralistic Theory of the Equal Protections Clause*, 11 U. Pa. J. Const. L. 1239, 1244 (2009) (explaining that "the Framers of the Bill of Rights provided explicit rights-conferring protections for minorities against discriminatory statutes or implementation," and further noting that "religious minorities" were of the most salient minorities needing protection); *see also* Hutchison, *supra* note 159, at 419 ("The Founders did not intend a free exercise provision that permits Cromwellian persecution where the majority may lawfully suppress minority religions. The majority in *Smith*, however, rewrote the Free Exercise Clause to potentially allow for just that. Under *Smith*, Protestants who win a civil war may lawfully suppress Catholic mass, and groups who win political battles may lawfully suppress minority religions.").

200. McConnell, *supra* note 185, at 1129.

201. *Smith*, 494 U.S. at 888–89 (explaining that the compelling interest test "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind . . . The First Amendment's protection of religious liberty does not require this.") (citations omitted).

202. Seven Legal Scholars, *supra* note 176, at 2.

203. *See* 42 U.S.C. §§ 2000bb–2000bb-4 (2012); *see also* Grasz, *supra* note 23, at 899 (providing that "Congress unanimously passed the Religious Freedom Restoration Act (RFRA) to provide Americans with greater religious exercise protection than the First Amendment provides under *Smith*. The Act . . . intended to codify pre-*Smith* federal Free Exercise case law, re-establish strict scrutiny and abrogate *Smith*."); Raphael A. Friedman, *Why This Supreme Court Should Overrule* Employment Division v. Smith, Canopy Forum (January 24, 2022), https://canopyforum.org/2022/01/24/why-this-supreme-court-should-overrule-employment-division-v-smith/ (stating that "RFRA basically reinstated the *Sherbert* rule for deciding religious freedom cases.").

204. *See* 42 U.S.C. § 2000cc et seq.

Nebraska's First Freedom Act.[205] Through all this legislation, "the compelling-interest test now applies to the entire federal government and over half of the States."[206] Yet, the fears that *Smith* predicated have not occurred.[207] Thus, the compelling-interest test is workable even in a religiously pluralistic society, such as the United States.

Finally, *Smith* is not protected by stare decisis because several of the traditional stare decisis factors counsel against maintaining it as a precedent.[208] For instance, *Smith* exhibits a very poor quality of reasoning, as indicated by how many justices have expressed their frustrations and doubts about *Smith* since it was adopted.[209] Additionally, *Smith* has failed to illicit any meaningful reliance interests, as the Court has avoided relying on *Smith* in its recent free exercise decisions.[210] Notably, in several post-*Smith* cases, "the petitioners rested their claims on RFRA or RLUIPA–not on *Smith* or the Free Exercise Clause," which further limits *Smith*'s reliance interests.[211] Further, *Smith* has proven to be unworkable because lower courts have struggled to apply it, which has only resulted in religious liberty being

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205. *See* NEB. REV. STAT. §§ 20-701–05 (Reissue 2024) (detailing the First Freedom Act); *Religious Liberty Victory!, supra* note 130; Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466 (2010) (explaining that many states have enacted heightened standards for their state religious freedom provisions).

206. Seven Legal Scholars, *supra* note 176, at 15.

207. *Id.* at 15–16; *see also* Hutchison, *supra* note 159, at 411 ("Yet after nearly thirty years with these religious freedom protections, anarchy has not occurred. *Smith*'s anarchy prediction is wrong: religious liberty does not cause anarchy. Far from it, it allows people with conflicting beliefs to live together in peace.").

208. *See* Ramos v. Louisiana, 590 U.S. 83, 121 (2020) (Kavanaugh, J., concurring) (providing a list of several factors); *see also* Morgan Johnson, *Conservative Stare Decisis on the Roberts Courts: A Jurisprudence of Doubt*, 55 U.C. DAVIS L. REV. 1953, 1962–72 (2022) (explaining the Justices' distinct approaches to stare decisis).

209. Seven Legal Scholars, *supra* note 176, at 16–17 (citing City of Boerne v. Flores, 521 U.S. 507, 547 (1997) (O'Connor, J., dissenting) ("Stare decisis concerns should not prevent us from revisiting our holding in *Smith*."); Fulton v. City of Philadelphia, 593 U.S. 522, 594–95 (2021) (Alito, J., concurring in the judgment, joined by Thomas and Gorsuch, JJ.) ("No relevant [stare decisis] factor, including reliance, weighs in *Smith*'s favor.").

210. *See, e.g.*, Espinoza v. Mont. Dep't of Revenue, 591 U.S. 464, 476 (2020) (holding that excluding "religious schools from public benefits solely because of the religious character of the schools" is odious to the Constitution. Notably, with no citation to *Employment Division v. Smith*); Hosanna-Tabor v. E.E.O.C., 565 U.S. 171, 190 (2012) (holding that a "ministerial exception" prevents the government from interfering with the internal governance of a church even though the law at issue was "a valid and neutral law of general applicability").

211. Seven Legal Scholars, *supra* note 176, at 19–20 (citing Holt v. Hobbs, 574 U.S. 352, 356 (2015) (applying RLUIPA); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (applying RFRA)).

unnecessarily restricted.[212] Accordingly, *Smith* should not be protected by stare decisis.[213]

The Court should replace *Smith* with the pre-*Smith* compelling-interest test articulated in *Sherbert* and *Yoder*, which was later codified in statutes like RFRA, RLUIPA, and their state counterparts.[214] This test provides a "strong but workable standard," ensuring robust protection for religious liberty.[215] For example, Nebraska's First Freedom Act demonstrates how the compelling-interest standard can effectively safeguard religious rights.[216] The Court should have no hesitation in returning to this test, as legislative experiences with RFRA and similar statutes have proven that it does not lead to the "anarchy" predicted in *Smith*.[217] Moreover, a return to the pre-*Smith* framework would not conflict with post-*Smith* precedents.[218]

In summary, *Smith* provides inadequate protection for religious liberty and should be overruled in favor of the compelling-interest framework reflected in statutes like Nebraska's First Freedom Act.[219] Under the compelling-interest framework, the people facing religious discrimination would easily prevail. Given *Smith*'s shortcomings and the proven ability of the compelling-interest approach to safeguard religious freedom, the Court should restore the pre-*Smith* framework to ensure more robust protection of free exercise rights.

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212. Nestor, *supra* note 185, at 415–26; *see also* Seven Legal Scholars, *supra* note 176, at 21 (explaining that lower courts struggled to apply *Smith* during COVID-19 "even for laws that overtly discriminated against religious activity," citing how the Court soundly rejected both California and New York restrictions on religious exercise during COVID, even though those same restrictions were upheld by the lower courts under *Smith*).

213. *See* Friedman, *supra* note 203 ("Stare decisis does not pose an obstacle to doing so because *Smith* was wrongly decided. This bold action will actually enhance the integrity of the Court and will provide clear guidance to lower courts adjudicating these cases and to state legislatures trying to draft law which is constitutional.").

214. Tanner Baird, *"Yet what should replace* Smith*?" How the Question of what Comes next Exposed an Ideological Divide in the New SCOTUS Majority*, FEDERALIST SOC'Y (Oct. 20, 2021), http://fedsoc.org/commentary/fedsoc-blog/yet-what-should-replace-smith-how-the-question-of-what-comes-next-exposed-an-ideological-divide-in-the-new-scotus-majority (indicating that at least three justices (Alito, Thomas, and Gorsuch) would support replacing *Smith* with the pre-*Smith* compelling interest test).

215. Seven Legal Scholars, *supra* note 176, at 22 (quoting Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under* Smith *and After* Smith, 2020-2021 CATO SUP. CT. REV. 33, 44).

216. *See supra* section II.B.; NEB. REV. STAT. §§ 20-701–05 (Reissue 2024) (detailing the First Freedom Act).

217. Seven Legal Scholars, *supra* note 176, at 22 (citing Laycock & Berg, *supra* note 215); *see also* Hutchison, *supra* note 159, at 411 ("Yet after nearly thirty years with these religious freedom protections, anarchy has not occurred. *Smith*'s anarchy prediction is wrong: religious liberty does not cause anarchy. Far from it, it allows people with conflicting beliefs to live together in peace.").

218. *Id.*

219. *See supra* section II.B.; NEB. REV. STAT. §§ 20-701–05 (Reissue 2024) (detailing the First Freedom Act).

IV. CONCLUSION: FAITHFUL TO FREEDOM

Nebraska's First Freedom Act is a model for how the promise of religious liberty can and should be upheld. Through implementing this Act, Nebraska has faithfully preserved the principles of freedom, ensuring that individuals and organizations can live out their beliefs without unwarranted government interference. The Supreme Court should follow suit by overruling *Smith*[220] and restoring the compelling-interest test, as reflected in RFRA, RLUIPA, and similar state statutes, to secure religious liberty across the nation. By doing so, the Court would not only reaffirm the foundational principles of freedom but also foster a society where the right to exercise one's religion is both protected and celebrated as an integral part of our pluralistic nation.

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220. 494 U.S. 872 (1990).

THE 14TH AMENDMENT FROM HOMER PLESSY TO KILMAR ABREGO GARCIA: CITIZENSHIP AND DUE PROCESS IN AMERICA'S CONSTITUTIONAL EVOLUTION

LYNETTE PEREZ†

ABSTRACT

This Article examines the constitutional evolution of 14th Amendment citizenship and due process protections through the historical lens spanning from Plessy v. Ferguson *to the contemporary case of* Noem v. Abrego Garcia*. While separated by more than a century, these cases illuminate persistent tensions between individual constitutional rights and executive power, revealing how citizenship status and due process protections remain contested terrain in American constitutional law. This Article argues the modern challenges to citizenship and due process rights echo the same fundamental questions that plagued the Reconstruction Era: Who deserves constitutional protections, and what limits exist on government power to deny such protections? By tracing this constitutional arc, this Article demonstrates that contemporary*

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Author's Note: This Article is dedicated to my great-great-great grandparents, Edward and Elizabeth Hodgson, who immigrated to America through Ellis Island from Newcastle, England in 1836, and to my maternal great-great grandmother, Phillis Anderson, who was born a slave in South Carolina and eventually purchased by Edward and Elizabeth's son, ER Hodgson, in Georgia. The elder Edward Hodgson, who never owned slaves, died shortly after arriving in this country. The intersection of these family lines—through the children born to Phillis Anderson and ER Hodgson, including my maternal great grandfather Robert Anderson, born 100 years before me—embodies the complex and often painful convergence of freedom and bondage that shaped American society. Their stories remind us that the promise of citizenship and constitutional protection has never been equally accessible to all, and that the 14th Amendment's guarantees emerged from a nation grappling with the fundamental contradictions between its founding ideals and the reality of human bondage. This Article is also dedicated to the memory of Homer Plessy, whose constitutional courage planted seeds that would bear fruit in generations yet to come, and to Kilmar Abrego Garcia, whose case reminds us that the struggle for constitutional justice continues. May we prove worthy of their courage and sacrifice and may the Constitution's promise of equal protection finally extend to all who call America home.

immigration and citizenship disputes represent not aberrations but continuations of America's ongoing struggle to fulfill the 14th Amendment's egalitarian promise.

I. INTRODUCTION 283
II. THE HISTORICAL FOUNDATION: RECONSTRUCTION AND THE 14TH AMENDMENT'S PROMISE 284
A. The Amendment's Revolutionary Purpose 284
B. Early Interpretations and the Narrowing of Protection 284
III. PLESSY V. FERGUSON: THE CONSTITUTIONAL BETRAYAL 285
A. The Strategic Challenge to Segregation 285
B. The Supreme Court's Constitutional Failure 286
C. Justice Harlan's Prophetic Dissent 286
IV. THE CONSTITUTIONAL EVOLUTION: FROM PLESSY TO MODERN DUE PROCESS 287
A. The Gradual Expansion of 14th Amendment Protections 287
B. Brown and the Rejection of Plessy 288
C. The Resistance to Brown and the Need for Continued Federal Intervention 288
D. Modern Due Process and Citizenship Protections 291
V. CONTEMPORARY CHALLENGES: THE CASE OF KILMAR ABREGO GARCIA 292
A. The Facts and Legal Context 292
B. Constitutional Parallels to the Plessy Era 293
C. The Broader Constitutional Stakes 294
VI. LESSONS FROM CONSTITUTIONAL HISTORY . . . 295
A. The Persistence of Constitutional Struggle 295
B. The Importance of Constitutional Advocacy 295
C. The Continuing Relevance of Reconstruction Principles 296
VII. IMPLICATIONS FOR THE EIGHTH CIRCUIT AND FEDERAL JUDICIAL DIVERSITY 296
A. The Constitutional Foundation for Diverse Judicial Perspectives 296
B. The Eighth Circuit's Constitutional Role and Judicial Restraint 298
C. Constitutional Leadership Through Judicial Restraint 299
VIII. CONCLUSION: THE UNFINISHED PROMISE OF THE 14TH AMENDMENT 301

I. INTRODUCTION

The 14th Amendment stands as one of the most consequential and contested provisions in American constitutional law.[1] Born from the ashes of the Civil War and the moral imperative to secure citizenship and equal protection for formerly enslaved Americans, the 14th Amendment promised to revolutionize the relationship between individuals and government power. Yet from its earliest interpretations in cases like *Plessy v. Ferguson*[2] to contemporary disputes exemplified by the case of Kilmar Abrego Garcia,[3] the 14th Amendment's promises have proven both transformative and elusive.

Homer Plessy's challenge to Louisiana's Separate Car Act in 1896 represented one of the first major tests of the 14th Amendment's Equal Protection Clause. His case, though unsuccessful, laid the groundwork for constitutional arguments that would eventually dismantle state-sanctioned segregation. More than a century later, Kilmar Abrego Garcia's wrongful deportation and subsequent legal battles illuminate ongoing struggles over citizenship, due process, and the limits of executive power—struggles that echo the constitutional debates of the Reconstruction Era.

This Article traces the constitutional journey from *Plessy* to *Garcia*, examining how interpretations of 14th Amendment citizenship and due process protections have evolved while fundamental tensions remain. The thesis of this Article is that contemporary challenges to citizenship and due process rights, exemplified by *Garcia*, represent not constitutional aberrations but the continuation of America's foundational struggle to define who belongs in the American constitutional community and what protections that membership entails.

This historical examination is particularly relevant today as the nation grapples with executive orders challenging birthright citizenship,[4] immigration enforcement controversies, and the scope of constitutional protections for non-citizens. Understanding this constitutional evolution is essential for practitioners, scholars, and jurists working to fulfill the 14th Amendment's egalitarian promise in the 21st century.

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1. U.S. CONST. amend. XIV, § 1.
2. Plessy v. Ferguson, 163 U.S. 537 (1896).
3. *See* Kristi Noem, Sec'y, Dep't of Homeland Sec. v. Kilmar Armando Abrego Garcia, 145 S.Ct. 1017 (2025).
4. *See* Exec. Order 14,160, Protecting the Meaning and Value of American Citizenship, 90 Fed. Reg. 8449 (Jan. 20, 2025).

II. THE HISTORICAL FOUNDATION: RECONSTRUCTION AND THE 14TH AMENDMENT'S PROMISE

A. The Amendment's Revolutionary Purpose

The 14th Amendment, ratified on July 9, 1868, represented a revolutionary reimagining of American citizenship and constitutional rights. Section 1 declared, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[5]

This language served multiple revolutionary purposes. First, it directly overruled the Supreme Court's decision in *Dred Scott v. Sandford*, which had declared that persons of African descent could never be American citizens.[6] Second, it established birthright citizenship as a constitutional principle, removing citizenship from the realm of legislative grace and establishing it as a constitutional right. Third, it created new federal constitutional protections against state government overreach through the Due Process and Equal Protection Clauses.

The Amendment's architects understood they were creating something unprecedented in American constitutional law.[7] Representative John Bingham, the Amendment's primary drafter, described it as ensuring that, "the privileges or immunities of citizens of the United States. . .and the natural rights of every person, and the rights of citizens of the United States and of every person within their jurisdiction, receive the protecting shield of the Constitution."[8]

B. Early Interpretations and the Narrowing of Protection

Despite its expansive language, the 14th Amendment's protections were quickly circumscribed by judicial interpretation and political compromise. The Supreme Court's decision in *The Slaughter-House Cases* (1873) dramatically narrowed the Privileges or Immunities Clause, limiting federal constitutional protections and leaving the field open for state-sanctioned discrimination.[9] This judicial retrenchment coincided with the political Compromise of 1877, which effectively ended

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5. U.S. CONST. amend. XIV, § 1.
6. Dred Scott v. Sandford, 60 U.S. 393 (1857).
7. *See generally* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877 (1988); DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY (2001).
8. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. Bingham).
9. Slaughter-House Cases, 83 U.S. 36 (1873).

the Reconstruction and federal protection of African American rights in the South.[10]

This historical context is crucial for understanding both the *Plessy* decision and contemporary constitutional struggles. The constitutional promises of the 14th Amendment were undermined, not through formal amendment, but through restrictive judicial interpretation and political accommodation to racist political forces.[11] This pattern of constitutional promise followed by judicial and political retrenchment would prove remarkably persistent in American constitutional history.

III. PLESSY V. FERGUSON: THE CONSTITUTIONAL BETRAYAL

A. The Strategic Challenge to Segregation

Homer Plessy's challenge to Louisiana's Separate Car Act represented a carefully orchestrated test case designed to challenge the emerging system of state-mandated racial segregation.[12] The Comité des Citoyens, a group of New Orleans civil rights activists, understood that the federal courts offered their best hope for constitutional protection, as state courts in Louisiana would not vindicate their rights.[13]

Plessy's legal team, led by Albion Tourgée, advanced a sophisticated constitutional argument that segregation laws violated both the 13th and 14th Amendments. Crucially, they argued that the intent behind segregation laws was discriminatory—it "mark[ed] [African Americans] as inferior and belonging to a degraded class."[14] This focus on discriminatory intent represented a radical constitutional argument that would not be fully embraced by the Supreme Court until the mid-20th century.[15]

The lawyers also argued that forcing Plessy to sit in a car designated for African Americans deprived him of the "property interest in his whiteness"—a troubling argument that nonetheless highlighted how racial classifications imposed stigmatic harm on their targets.[16] This argument presaged later Supreme Court recognition that segregation imposed a "badge of inferiority" on African Americans.[17]

10. *See* C. Vann Woodward, Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction (1951).

11. *See generally* Rayford W. Logan, The Betrayal of the Negro: From Rutherford B. Hayes to Woodrow Wilson (1965).

12. Act No. 111,1890 La. Acts 152.

13. *See* Keith Weldon Medley, We As Freemen: Plessy v. Ferguson (2003); Mark Elliott, Color-Blind Justice: Albion Tourgée and the Quest for Racial Equality from the Civil War to Plessy v. Ferguson (2006).

14. Brief for Plaintiff in Error at 6, Plessy v. Ferguson, 163 U.S. 537 (1896) (No. 210).

15. *See generally* Charles A. Lofgren, The Plessy Case: A Legal-Historical Interpretation (1987).

16. *Id.* at 11.

17. *See* Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707 (1993).

B. The Supreme Court's Constitutional Failure

The Supreme Court's 7-1 decision in *Plessy* represented a catastrophic failure of constitutional interpretation. Writing for the majority, Justice Henry Billings Brown rejected both the 13th and 14th Amendment challenges to segregation. Most damagingly, the Court held that the 14th Amendment was "intended to secure only the legal equality of African Americans and whites, not their social equality."[18]

This artificial distinction between "legal" and "social" equality fundamentally misunderstood the 14th Amendment's purposes. The 14th Amendment's text protects "any person within [a state's] jurisdiction," not just citizens, and its Equal Protection Clause contains no limitation to "legal" as opposed to "social" rights.[19] The Court's interpretation effectively wrote the Amendment's egalitarian promise out of the Constitution.

Justice Brown's opinion also endorsed the fiction that segregation laws imposed no harm on African Americans because "if this stamps the colored race with a badge of inferiority, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[20] This reasoning absurdly placed responsibility for segregation's harms on its victims rather than its perpetrators.

C. Justice Harlan's Prophetic Dissent

Justice John Marshall Harlan's solitary dissent in *Plessy* offered a dramatically different constitutional vision. Harlan argued that segregation laws violated both the 13th and 14th Amendments because they imposed a "badge of servitude" on African Americans and violated the principle that "in respect of civil rights, all citizens are equal before the law."[21]

Most famously, Harlan declared that "our Constitution is colorblind, and neither knows nor tolerates classes among citizens."[22] This language has become iconic, but it is important to understand Harlan's argument in context. Harlan was not advocating for contemporary notions of colorblind constitutionalism that ignore the continuing effects of past discrimination. Rather, he was arguing that the

18. Plessy v. Ferguson, 163 U.S. 537, 548 (1896).

19. *See* John A. Powell, The Law and Significance of Plessy, 7 RSF: Russell Sage Found. J. Soc. Sci. 20, 27 (2021) (explaining that the Plessy Court "distinguished between three types of equality: legal, political, and social," and "distort[ed] the meaning and intent of the Civil War amendments" by suggesting "the Equal Protection Clause of the Fourteenth Amendment was intended to extend only to political and legal equality, not to social equality").

20. *Id.* at 551.

21. *Id.* at 559 (Harlan, J., dissenting).

22. *Id.*

Constitution prohibits state-imposed racial classifications designed to subordinate African Americans.[23]

Harlan's dissent also presciently warned that the *Plessy* decision would prove "quite as pernicious as the decision made by this tribunal in the Dred Scott Case."[24] This prediction proved accurate, as *Plessy* provided constitutional cover for the systematic disenfranchisement and subjugation of African Americans that characterized the Jim Crow Era.[25]

IV. THE CONSTITUTIONAL EVOLUTION: FROM PLESSY TO MODERN DUE PROCESS

A. The Gradual Expansion of 14th Amendment Protections

The constitutional evolution from *Plessy* to modern 14th Amendment jurisprudence was neither linear nor inevitable. It required decades of constitutional advocacy, political mobilization, and social change to realize the Amendment's egalitarian promise.

The process began with the Supreme Court's gradual recognition that the 14th Amendment's Due Process Clause protected certain fundamental rights against state interference. In cases like *Gitlow v. New York*,[26] the Court began the process of incorporating Bill of Rights protections against state governments through the 14th Amendment.[27] This development was crucial because it established the principle that the 14th Amendment could serve as a vehicle for expanding federal constitutional protections.

Simultaneously, the National Association for the Advancement of Colored People (NAACP) began its legal strategy of chipping away at the "separate but equal" doctrine by demonstrating that segregated facilities were never actually equal.[28] This approach, pioneered by attorneys like Charles Hamilton Houston and Thurgood Marshall, ultimately culminated in *Brown v. Board of Education*,[29] which

23. *See* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 Stan. L. Rev. 1, 16-23 (1991) (analyzing different meanings of constitutional colorblindness); Andrew Kull, The Color-Blind Constitution 123–28 (1992) (discussing Harlan's original meaning); Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 Iowa L. Rev. 151, 182-84 (1996) (examining Harlan's views on racial classifications).

24. *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting).

25. *Id.* at 559. *See generally* Richard C. Cortner, A Mob Intent on Death: The NAACP and the Arkansas Riot Cases (1988); Mark V. Tushnet, The NAACP's Legal Strategy Against Segregated Education, 1925-1950 (1987).

26. 268 U.S. 652 (1925).

27. Gitlow v. New York, 268 U.S. 652 (1925).

28. *See generally* Cortner, *supra* note 25; Tushnet, *supra* note 25.

29. 347 U.S. 483 (1954).

recognized that segregation imposed inherent harms on African American children.[30]

B. Brown and the Rejection of Plessy

The decision in *Brown v. Board of Education* represented the constitutional vindication of Justice Harlan's *Plessy* dissent and the legal arguments advanced by Homer Plessy's attorneys.[31] Chief Justice Earl Warren's opinion for a unanimous Court recognized that segregation in public education "generates a feeling of inferiority [in African American children] as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[32]

This recognition of segregation's stigmatic harms directly contradicted the *Plessy* Court's holding that segregation imposed no constitutional injury. *Brown* effectively acknowledged what *Plessy*'s attorneys had argued in 1896, that segregation laws were designed to mark African Americans as inferior and that such laws violated the 14th Amendment's guarantee of equal protection.[33]

Importantly, *Brown* also demonstrated the 14th Amendment's continuing vitality and capacity for constitutional growth. The Amendment's text had not changed since 1868, but the Court's understanding of its requirements had evolved to better reflect its egalitarian purposes.

C. The Resistance to Brown and the Need for Continued Federal Intervention

Despite the Supreme Court's clear mandate in *Brown*, the promise of school desegregation remained largely unfulfilled for more than a decade.[34] Southern states, led by Virginia's "Massive Resistance" campaign, employed a coordinated strategy to thwart federal desegregation orders through legal challenges, school closures, and political defiance.[35] This resistance insinuates that constitutional rights, even

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30. Brown v. Board of Education, 347 U.S. 483 (1954).
31. *Brown*, 347 U.S. at 494.
32. *Id.*
33. Plessy v. Ferguson, 163 U.S. 537, 541–43 (1896) (summarizing the arguments made by Plessy's attorneys, including Albion Tourgée, that the law implied inferiority and violated equal protection).
34. *See* Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle For Equality* 753–78 (1976); *see also* Massive Resistance, Encyclopedia VA. (Feb. 18, 2025), https://encyclopediavirginia.org/entries/massive-resistance/ (stating that massive resistance "delayed large-scale desegregation of Virginia's public schools for more than a decade").
35. *See generally* Massive Resistance, Encyclopedia VA. (Feb. 18, 2025), https://encyclopediavirginia.org/entries/massive-resistance/; James W. Ely Jr., The Crisis of Conservative Virginia: The Byrd Organization and the Politics of Massive Resistance (1976).

when clearly established by the Supreme Court, require sustained federal enforcement to become meaningful realities.

Virginia's response was particularly systematic and prolonged. Senator Harry F. Byrd Sr.'s "Massive Resistance" strategy included implementing state laws that cut funding to any school district that attempted integration.[36] This led to entire school systems choosing to close rather than comply with federal court orders.[37] In Prince Edward County, officials closed all public schools from 1959 to 1964, leaving 1,700 students—predominantly African American—without access to public education.[38] This extreme response illustrated how state and local governments could effectively nullify Supreme Court decisions through political intransigence.

Richmond, the former capital of the Confederacy, exemplified the persistence of segregation despite federal mandates. Throughout the 1960s, Richmond Public Schools employed various schemes to avoid meaningful integration, including dual attendance zones and ineffective "Freedom of Choice" plans.[39] The inadequacy of these token measures meant that many African American families, including the author's family, sought educational alternatives. In the late 1960s, when Richmond's public schools remained effectively segregated, my siblings and I were enrolled in Catholic schools—institutions that, ironically, often provided more integrated educational environments than the public schools supposedly operating under federal desegregation orders.

This experience was shared by many families throughout Virginia and the South, where Catholic institutions often led the way in providing integrated education.[40] Pope Leo XIV's family history itself represents the intersection of faith, migration, and educational opportunity that characterized the Civil Rights era. His maternal grandparents migrated from New Orleans to Chicago in the early 1930s as part of

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36. 1956 Va. Acts ch. 70 (enacted Sept. 21, 1956) (withholding state funds from any integrated school and authorizing the Governor to close any school under court order to desegregate).

37. *See How Massive Resistance Delayed School Desegregation in Virginia*, AXIOS RICHMOND (May 16, 2024), https://www.axios.com/local/richmond/2024/05/16/massive-resistance-virginia-delayed-school-desegregation.

38. Griffin v. Cnty. Sch. Bd. 377 U.S. 218 (1964); *see also* KRISTEN L. GREEN, SOMETHING MUST BE DONE ABOUT PRINCE EDWARD COUNTY: A FAMILY, A VIRGINIA TOWN, A CIVIL RIGHTS BATTLE (2015).

39. *See* Desegregation in Public Schools, ENCYCLOPEDIA VIRGINIA (Feb. 18, 2025), https://encyclopediavirginia.org/entries/desegregation-in-public-schools/.

40. *See* Amy Julia Harris, *Desegregation of Catholic Schools: The Role of the Bishops, Catholic Educators, and the Laity in the Archdiocese of Washington, D.C.*, 8 U. ST. THOMAS L.J. 273, 279-81 (2011); *see also* Desegregation of Virginia Education (DOVE): Timeline, OLD DOMINION UNIV., https://www.odu.edu/library/special-collections/dove/timeline (last visited Dec. 18, 2025).

the Great Migration.[41] Like Homer Plessy, Pope Leo XIV embodies the complex racial heritage of America. His maternal grandparents were identified as Black or mulatto in New Orleans census records but were classified as white after their migration to Chicago.[42] This illustrates the fluid and constructed nature of racial categories the 14th Amendment sought to transcend.

The persistence of segregation despite *Brown* required additional federal intervention. The Civil Rights Act of 1964 provided crucial enforcement mechanisms by threatening the withdrawal of federal funding from non-compliant school districts.[43] More importantly, the Supreme Court's decision in *Green v. County School Board of New Kent County*[44] rejected "Freedom of Choice" plans as insufficient and established the affirmative obligation for school districts to eliminate segregation "root and branch."[45] The *Green* decision established specific criteria to evaluate desegregation progress, consisting of "Green factors," which covered faculty, staff, transportation, extracurricular activities, and facilities.[46]

Even these measures proved insufficient in many urban areas. In Richmond, federal district court Judge Robert R. Merhige Jr. ordered extensive busing programs in 1970 and attempted to merge the predominantly Black Richmond city schools with the predominantly white suburban districts of Henrico and Chesterfield counties.[47] However, the Fourth Circuit Court of Appeals overturned the metropolitan consolidation order, effectively limiting the scope of desegregation remedies and contributing to continued de facto segregation.[48] Thus, the judicial limitation of metropolitan remedies would become a persistent obstacle to meaningful school integration.

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41. *See* Chicago-born Pope Leo XIV, New Leader of Catholic Church in Vatican City, Has Family Tree That Shows Black Roots in New Orleans, ABC7 CHICAGO (May 10, 2025), https://abc7chicago.com/post/chicago-born-pope-leo-xiv-new-leader-catholic-church-vatican-city-has-family-tree-shows-black-roots-orleans/16371684/.

42. *See* Pope Leo XIV's Family Tree Shows Black Roots in New Orleans, ABC NEWS (May 9, 2025), https://abcnews.go.com/US/pope-leo-xivs-family-tree-shows-black-roots/story?id=121644537; *From the French Quarter to the Vatican: The Creole Heritage of Pope Leo XIV*, HISTORIC NEW ORLEANS COLLECTION, https://hnoc.org/publishing/first-draft/from-the-french-quarter-to-the-vatican.

43. Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 241, 252 (codified as 42 U.S.C. § 2000d).

44. 391 U.S. 430 (1968).

45. Green v. Cnty. Sch. Bd. of New Kent Cnty., 391 U.S. 430, 437–38 (1968).

46. *Id.* at 435–37; *see also* DAVISON M. DOUGLAS, JIM CROW MOVES NORTH: THE BATTLE OVER NORTHERN SCHOOL SEGREGATION, 1865–1954 (2005).

47. Bradley v. Sch. Bd. of Richmond, 338 F. Supp. 67 (E.D. Va. 1972), *rev'd*, 462 F.2d 1058 (4th Cir. 1972), *aff'd by an equally divided court*, 412 U.S. 92 (1973).

48. Bradley, 462 F.2d at 1058 (4th Cir. 1972), *aff'd by an equally divided court*, 412 U.S. 92 (1973); *see generally* FROM THE COURTROOM TO THE CLASSROOM: THE SHIFTING LANDSCAPE OF SCHOOL DESEGREGATION (Claire E. Smrekar & Ellen B. Goldring eds., Harvard Education Press 2009).

This prolonged resistance to *Brown* offers crucial lessons for contemporary constitutional challenges. Just as the *Plessy* decision required more than fifty years to overturn, the implementation of *Brown* required sustained federal intervention, multiple Supreme Court decisions, and continuous advocacy to achieve even partial success. The pattern reveals that constitutional principles, however clearly established, remain vulnerable to political resistance and require institutional commitment to maintain their vitality.

D. Modern Due Process and Citizenship Protections

The constitutional evolution that began with the rejection of *Plessy* in *Brown* continued with the expansion of 14th Amendment due process protections. The Court's decision in *Goldberg v. Kelly*[49] established that due process protections apply to government benefit determinations, while *Mathews v. Eldridge*[50] created a framework for analyzing what process is due in particular circumstances.[51]

Most relevantly for contemporary immigration cases, the Court established in *Kwong Hai Chew v. Colding*[52] and subsequent cases that due process protections extend to all persons within the United States, regardless of citizenship status.[53] This principle was powerfully reaffirmed by Justice Antonin Scalia, writing for the Court in *Reno v. Flores*,[54] where he declared that "it is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."[55] Justice Scalia's textualist approach to constitutional interpretation makes this pronouncement particularly significant—the Constitution's use of the word "person" rather than "citizen" in the Due Process Clause was, for Scalia, dispositive of the question.[56] This principle means that even undocumented immigrants possess constitutional rights, including the right to due process before deportation.[57]

The Court also clarified in cases like *Afroyim v. Rusk*[58] and *Vance v. Terrazas*[59] that American citizenship, once acquired, cannot be taken

49. 397 U.S. 254 (1970).
50. 424 U.S. 319 (1976).
51. Goldberg v. Kelly, 397 U.S. 254 (1970); Mathews v. Eldridge, 424 U.S. 319 (1976).
52. 344 U.S. 590 (1953).
53. Kwong Hai Chew v. Colding, 344 U.S. 590 (1953).
54. 507 U.S. 292 (1993).
55. Reno v. Flores, 507 U.S. 292, 306 (1993) (Scalia, J., majority opinion).
56. *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (holding that the Fourteenth Amendment's protection extends to all persons, not just citizens, based on its textual use of "person" rather than "citizen").
57. *Id.* ("The fourteenth amendment to the Constitution is not confined to the protection of citizens . . . These provisions are universal in their application, to all persons within the territorial jurisdiction"); *see also* Plyler v. Doe, 457 U.S. 202, 210 (1982).
58. 387 U.S. 253 (1967).
59. 444 U.S. 252 (1980).

away without the citizen's express consent.[60] This development protected the citizenship rights established by the 14th Amendment from government overreach.

V. CONTEMPORARY CHALLENGES: THE CASE OF KILMAR ABREGO GARCIA

A. The Facts and Legal Context

The facts of Kilmar Abrego Garcia's case illustrate how the constitutional struggles of the Reconstruction era continue to resonate in contemporary immigration law.[61] Garcia, a Salvadoran national who had been granted protection from deportation by an immigration judge in 2019, was arrested and deported in March 2025 as part of the Trump administration's immigration enforcement efforts.[62] The administration later admitted that Garcia's deportation was due to an "administrative error."[63]

Garcia's case became a constitutional crisis when the administration refused to comply with federal court orders requiring his return to the United States.[64] The Supreme Court ultimately ruled that the administration must "facilitate" Garcia's return, but the executive branch argued that foreign policy considerations prevented compliance with the Court's order.[65]

Noem v. Garcia[66] raises fundamental questions about the relationship between executive power and constitutional rights that echo the debates of the Reconstruction era, such as whether the executive branch may invoke foreign policy considerations to avoid compliance with federal court orders, and what due process protections exist for non-citizens wrongfully removed from the United States.[67] These questions implicate core 14th Amendment principles about the scope of constitutional protection and the limits of government power.

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60. Afroyim v. Rusk, 387 U.S. 253 (1967); Vance v. Terrazas, 444 U.S. 252 (1980).

61. *See* Timeline: Wrongful Deportation of Kilmar Abrego Garcia to El Salvador, ABC News (July 26, 2025), https://abcnews.go.com/US/timeline-wrongful-deportation-kilmar-abrego-garcia-el-salvador/story?id=120803843.

62. *Id.*

63. *See generally* Hiroshi Motomura, Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States (2006); *see also* Gerald L. Neuman, Strangers to the Constitution: Immigrants, Borders, and Fundamental Law (1996); *see also* Abrego Garcia v. Noem, No. 8:25-CV-00951-PX, 2025 WL 1024654 (D. Md. Apr. 4, 2025) (ordering the government to facilitate and effectuate Garcia's return to the United States).

64. *See generally* Abrego-Garcia, 2025 WL 1024654.

65. *See* ABC News, *supra* note 61.

66. 145 S.Ct. 1017 (2025).

67. *See* Kristi Noem, Sec'y, Dep't of Homeland Sec. v. Kilmar Armando Abrego Garcia, 145 S.Ct. 1017 (2025); *see also* Cori Alonso-Yoder & Tania N. Valdez, *Supreme Court Affirms Lawlessness of the Removal of Kilmar Abrego Garcia*, Geo. Wash. L. Rev. On The Docket (Apr. 18, 2025), https://www.gwlr.org/kilmar-abrego-garcia/.

The constitutional mechanics of *Garcia* reveal violations that mirror the systematic denial of due process that characterized the *Plessy* era.[68] Constitutional protections should have shielded Garcia from removal without additional due process because he possessed a valid work permit and had received protection from deportation through proper legal proceedings. Yet the Trump administration bypassed these protections entirely, deporting him without a hearing or due process of the law.[69] This procedural violation echoes the *Plessy* Court's willingness to ignore constitutional text in favor of administrative convenience. Just as Louisiana argued in *Plessy* that segregation served legitimate state interests while ignoring the 14th Amendment's guarantee of equal protection, the Trump administration defended Garcia's deportation as an "administrative error" while refusing to remedy the constitutional violation.[70] The administration's subsequent refusal to comply with federal court orders requiring Garcia's return represents the same type of institutional defiance that characterized Southern resistance to Reconstruction-era constitutional protections.[71] When the district court, and subsequently, the U.S. Supreme Court, ordered Garcia's return and the executive branch simply refused to comply, constitutional rights became as meaningless as they were for African Americans in the post-*Plessy* era—formally existing, but practically unenforceable.

B. Constitutional Parallels to the Plessy Era

Garcia reveals troubling parallels to the constitutional failures of the *Plessy* era. Like the Louisiana segregation law challenged in *Plessy*, the immigration enforcement actions in *Garcia* were defended as race-neutral policies designed to serve legitimate government interests.[72] The administration argued that Garcia's deportation was

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68. *See* Abrego Garcia, 2025 WL 1024654, at *2 (finding that in 2019, an immigration judge granted Garcia withholding of removal to El Salvador, and that Garcia possessed a valid work permit and was living legally in Maryland under federal supervision when he was wrongfully deported in March 2025).

69. *See* Demore v. Kim, 538 U.S. 510, 523 (2003) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings"); *cf.* Landon v. Plasencia, 459 U.S. 21, 32 (1982) (applying due process protections to immigrants with established connections to the United States).

70. *See* Abrego Garcia, 2025 WL 1166402, at *2 (noting government acknowledged deportation as "administrative error" but failed to take meaningful steps to facilitate Garcia's return despite court orders).

71. *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958) (establishing that federal court orders interpreting constitutional requirements are binding on state officials).

72. Application to Vacate the Injunction Issued by the United States District Court for the District of Maryland and Request for an Immediate Administrative Stay at 1–2, Noem v. Garcia, 145 S.Ct. 1017 (2025) (No. 24A949) (arguing Garcia's deportation served national security interests and that foreign policy considerations prevented compliance with court order requiring his return).

merely an "administrative error" and that foreign policy considerations prevented his return.[73]

The constitutional parallels run deeper than mere executive defiance. In *Plessy*, the Court accepted Louisiana's pretextual argument that segregation served "public order" rather than racial subordination, despite overwhelming evidence of discriminatory intent.[74] Similarly, *Garcia* demonstrates how modern courts must navigate government claims that immigration enforcement serves "national security" even when specific enforcement actions violate individual constitutional rights. The Trump administration's characterization of Garcia's deportation as an "administrative error" parallels Louisiana's argument that segregation was merely a "police regulation" rather than a tool of racial oppression. Both cases reveal how government actors invoke facially neutral justifications to defend constitutionally problematic actions. Moreover, just as the *Plessy* decision emboldened Southern states to expand segregation laws knowing they had constitutional cover, *Garcia* threatens to provide a template for executive branch officials to circumvent federal court orders by claiming foreign policy considerations trump constitutional protections.[75] The constitutional injury in both cases extends beyond the individual plaintiffs to the broader principle that constitutional rights must be enforceable against government power.

C. The Broader Constitutional Stakes

Garcia is part of a broader contemporary challenge to 14th Amendment citizenship and due process protections. President Trump's executive order attempting to eliminate birthright citizenship for certain children born in the United States directly challenges the 14th Amendment's Citizenship Clause, while expanded immigration enforcement raises due process concerns for millions of immigrants and their families.[76]

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73. *Id.* at 6–10 (contending that district court order violated separation of powers by interfering with Executive Branch's conduct of foreign affairs with El Salvador).

74. Brief for Plaintiff in Error at 9–11, Plessy v. Ferguson, 163 U.S. 537 (1896) (No. 210) (presenting evidence that Louisiana's segregation law was enacted with discriminatory purpose to mark African Americans as inferior class of citizens); *see also* Charles A. Lofgren, The Plessy Case: A Legal-Historical Interpretation 28–43 (1987) (documenting racial animus behind Louisiana's Separate Car Act).

75. S*ee* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (establishing framework for analyzing executive power claims in tension with other constitutional requirements).

76. *See* Exec. Order 14,160, Protecting the Meaning and Value of American Citizenship, 90 Fed. Reg. 8449 (Jan. 20, 2025); *see also* State of Washington v. Trump, 765 F. Supp. 3d 1142 (W.D. Wash. Feb. 16, 2025).

These challenges represent the most direct assault on 14th Amendment protections since the Jim Crow era.[77] Like the post-Reconstruction retrenchment that enabled the *Plessy* decision, contemporary challenges to immigration rights and birthright citizenship seek to narrow the circle of constitutional protection and reduce the Constitution's egalitarian promise.

The constitutional response to these challenges will determine whether the 14th Amendment continues to serve as a bulwark against government overreach or becomes a historical document whose promises are honored more in breach than observance.

VI. LESSONS FROM CONSTITUTIONAL HISTORY

A. The Persistence of Constitutional Struggle

The journey from *Plessy v. Ferguson*[78] to *Noem v. Garcia*[79] teaches us that constitutional rights are not self-executing and that constitutional progress is neither linear nor permanent.[80] The 14th Amendment's promises were betrayed in *Plessy*, vindicated in *Brown*, and are again under assault in contemporary immigration cases.[81] This pattern suggests that constitutional rights require constant vigilance and advocacy to maintain their vitality.

Garcia also demonstrates that constitutional protections are only as strong as the institutions willing to enforce them. When the executive branch refuses to comply with federal court orders, constitutional rights become merely aspirational rather than enforceable legal protections.

B. The Importance of Constitutional Advocacy

Both *Plessy* and contemporary immigration challenges highlight the crucial role of constitutional advocacy in expanding and defending civil rights. Homer Plessy's legal team advanced constitutional

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77. *See* Scott Bomboy, *Update: Birthright Citizenship Cases to be Heard at the Supreme Court in May*, National Constitution Center (Apr. 17, 2025), https://constitutioncenter.org/blog/birthright-citizenship-cases-arrive-at-the-supreme-court.

78. 163 U.S. 537 (1896).

79. 145 S.Ct. 1017 (2025).

80. Plessy v. Ferguson, 163 U.S. 537 (1896); Kristi Noem, Sec'y, Dep't of Homeland Sec. v. Kilmar Armando Abrego Garcia, 145 S.Ct. 1017 (2025). *See generally* Kenneth W. Mack, Representing the Race: The Creation of the Civil Rights Lawyer (2012).

81. *See, e.g.,* Department of Homeland Sec. v. Thuraissigiam, 591 U.S. 103 (2020) (limiting habeas corpus review for asylum seekers); Trump v. Hawaii, 585 U.S. 667 (2018) (upholding travel ban affecting predominantly Muslim countries despite evidence of discriminatory intent); Jennings v. Rodriguez, 583 U.S. 281 (2018) (holding immigrants can be detained indefinitely without bond hearings during removal proceedings); Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999) (limiting judicial review of selective enforcement claims in deportation proceedings).

arguments that were decades ahead of their time, laying the groundwork for the eventual success in *Brown*. Similarly, contemporary immigration advocates are advancing constitutional arguments that may not succeed immediately but may prove prophetic in future cases.[82]

This history suggests that constitutional advocates must be willing to advance bold constitutional arguments even when immediate success seems unlikely. Constitutional progress often requires planting seeds that will only bear fruit in subsequent generations.

C. The Continuing Relevance of Reconstruction Principles

The constitutional principles established during the Reconstruction Era remain relevant to contemporary challenges. The 14th Amendment's guarantee that "all persons born or naturalized in the United States" are citizens continues to resist attempts to narrow the scope of American citizenship. The 14th Amendment's Due Process and Equal Protection Clauses continue to provide constitutional tools for challenging government overreach.

Understanding this historical continuity is essential for contemporary constitutional advocates. The same constitutional principles that ultimately vindicated the civil rights movement can be deployed to defend contemporary challenges to immigration rights and citizenship protections.

VII. IMPLICATIONS FOR THE EIGHTH CIRCUIT AND FEDERAL JUDICIAL DIVERSITY

A. The Constitutional Foundation for Diverse Judicial Perspectives

The constitutional journey from *Plessy v. Ferguson*[83] to *Noem v. Garcia*[84] illustrates a fundamental truth about constitutional interpretation: different judicial perspectives, grounded in rigorous adherence to constitutional text and original meaning, can lead to more faithful constitutional interpretation.[85] Justice Harlan's dissent in *Plessy* reflected not judicial activism, but a more faithful reading of the 14th Amendment's text and original purpose. His prophetic vision emerged

82. Douglas NeJaime, *Winning Through Losing*, 96 Iowa L. Rev. 941 (2011).
83. 163 U.S. 537 (1896).
84. 145 S.Ct. 1017 (2025).
85. *See generally*, Plessy v. Ferguson, 163 U.S. 537 (1896); Kristi Noem, Sec'y, Dep't of Homeland Sec. v. Kilmar Armando Abrego Garcia, 145 S.Ct. 1017 (2025). Jack M. Balkin, How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure, 39 Suffolk L. Rev. 27 (Jan. 2005).

not from policy preferences, but from his unique understanding of the Amendment's constitutional design and historical context.[86]

This lesson finds support in the judicial philosophy of conservative jurists who have emphasized the importance of judicial restraint and textual fidelity. Justice Antonin Scalia, the leading proponent of originalism, recognized that constitutional interpretation requires judges to look beyond their own preferences to the Constitution's original meaning: "The Constitution that I interpret and apply is not living but dead, or as I prefer to call it, enduring. It means today not what current society, much less the court, thinks it ought to mean, but what it meant when it was adopted."[87] Scalia understood that faithful constitutional interpretation sometimes requires judges to reach outcomes they personally dislike: "We must be faithful to the original meaning of the Constitution, even if it leads to outcomes we personally disagree with."[88]

The current Supreme Court's conservative majority has increasingly narrowed constitutional protections in immigration cases through restrictive textual interpretation. Justice Neil Gorsuch, while advocating for rigorous constitutional analysis, has articulated a judicial philosophy prioritizing methodological consistency over outcome-based justice, stating that "a judge who likes every outcome he reaches is very likely a bad judge."[89] This originalist framework, dominant among the Court's conservative justices, has profound consequences for immigrants like Garcia, whose constitutional claims depend on judicial willingness to enforce rights protections even when politically contentious.[90]

Chief Justice John Roberts has emphasized the importance of judicial independence and constitutional fidelity over personal or political preferences. As he noted, judges "do not speak for the people, but we

86. See generally LINDA PRZYBYSZEWSKI, THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN (1999); James W. Gordon, *Did the First Justice Harlan Have a Black Brother?*, 15 W. NEW ENG. L. REV. 159 (1993).

87. *Originalism: A Primer On Scalia's Constitutional Philosophy*, NPR (Feb. 14, 2016), https://www.npr.org/2016/02/14/466744465/originalism-a-primer-on-scalias-constitutional-philosophy.

88. *10 Inspiring Quotes By Justice Scalia*, QUOTESANITY (May 24, 2025), https://quotesanity.com/10-inspiring-quotes-by-justice-scalia/.

89. NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 96 (2019).

90. *See, e.g.,* Department of Homeland Sec. v. Thuraissigiam, 591 U.S. 103, 117–28 (2020) (majority opinion by Alito, J., joined by Roberts, C.J., Thomas, Gorsuch, Kavanaugh, and Barrett, JJ.) (using originalist analysis to narrow habeas corpus protections for asylum seekers); Trump v. Hawaii, 585 U.S. 667 (2018) (Roberts, C.J.) (upholding travel ban affecting predominantly Muslim countries with deference to executive authority). *See also* Aziz Z. Huq, *The Consequences of Disparate Convergence in Constitutional Theory*, 89 U. CHI. L. REV. 109, 113–17 (2022) (analyzing how originalist methodology adopted by conservative justices has constrained rights protections for immigrants and other vulnerable populations).

speak for the Constitution," and this role "obviously requires independence from the political branches."[91] Roberts' approach to constitutional interpretation emphasizes that the Constitution "is made for people of fundamentally differing views," requiring judges to interpret constitutional text rather than impose their own policy preferences.[92]

B. The Eighth Circuit's Constitutional Role and Judicial Restraint

The Eighth Circuit's role in constitutional development requires judges committed to what Gorsuch describes as having "one client—it's the law."[93] This commitment to legal text rather than personal policy preferences becomes particularly important in conservative federal appellate courts. The Eighth Circuit's approach to constitutional questions must be grounded in what Scalia called "neutral principles of constitutional law" rather than judges' own understanding of "what freedom is and must become."[94]

The Circuit has played an important role in constitutional development, with three of its judges subsequently serving on the Supreme Court.[95] As constitutional challenges to immigration rights and citizenship protections continue to evolve, federal Courts of Appeals will likely face cases that implicate the same fundamental questions raised in *Plessy* and *Garcia*: who deserves constitutional protection, and what limits exist on government power to deny such protection? These questions must be answered through faithful application of constitutional text and original meaning, not through judicial policymaking.

Current demographics show that the Eighth Circuit has only one African American judge and one female judge among its eleven members.[96] However, the constitutional argument for diverse perspectives rests not on demographic representation for its own sake, but on the recognition that different life experiences can enhance judges' ability to faithfully interpret constitutional text. As Justice Gorsuch noted,

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91. Andrew Hamm, *Chief Justice Roberts Emphasizes Supreme Court's Independence*, SCOTUSBLOG (May 10, 2025), https://www.scotusblog.com/2018/10/chief-justice-roberts-emphasizes-supreme-courts-independence/.

92. Edward Whelan, *Chief Justice Roberts, Judicial Restraint, and Dobbs*, Ethics & Public Policy Center (Aug. 26, 2021), https://eppc.org/publication/chief-justice-roberts-judicial-restraint-and-dobbs/.

93. Steve Inskeep & Ailsa Chang, *Judge Neil Gorsuch Sums Up His Philosophy In 7 Words*, NPR (Mar. 21, 2017), https://www.npr.org/2017/03/21/520972350/judge-neil-gorsuch-sums-up-his-philosophy-in-7-words.

94. Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (1997).

95. *See United States Court of Appeals for the Eighth Circuit*, Ballotpedia, https://ballotpedia.org/United_States_Court_of_Appeals_for_the_Eighth_Circuit (last visited Aug. 16, 2025).

96. *See* Examining the Demographic Compositions of U.S. Circuit and District Courts, Center for American Progress (Nov. 4, 2021), https://www.americanprogress.org/article/examining-demographic-compositions-u-s-circuit-district-courts/.

judges from diverse backgrounds bring different perspectives to the application of fairly subtle principles in constitutional law.[97] These perspectives can illuminate different aspects of constitutional text and historical meaning that might be missed by a more homogeneous court.

The historical lesson of Justice Harlan's *Plessy* dissent demonstrates this principle. Justice Harlan's superior constitutional interpretation did not result from judicial activism, but from his deeper understanding of the 14th Amendment's text and purpose. His experience during the Reconstruction Era informed his recognition that the Amendment's guarantee of "equal protection of the laws" could not be reconciled with state-mandated racial segregation.[98] This was textual fidelity, not policymaking.

C. Constitutional Leadership Through Judicial Restraint

The constitutional challenges facing the nation require judicial leadership grounded in what Roberts calls "proper respect for a coordinate branch of the government," which requires that courts "strike down an Act of Congress only if 'the lack of constitutional authority to pass [the] act in question is clearly demonstrated.'"[99] This approach to judicial restraint does not require judicial passivity in the face of clear constitutional violations, but it does require that constitutional interpretation be grounded in text and original meaning rather than contemporary policy preferences.

The journey from *Plessy* to *Garcia* demonstrates that constitutional progress requires judges to apply constitutional text faithfully, even when doing so contradicts popular opinion or political pressure. Justice Harlan's willingness to apply the 14th Amendment's text to strike down segregation laws represented judicial restraint properly understood: deference to constitutional text rather than contemporary political preferences.

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97. *See* Supreme Court Justice Neil M. Gorsuch Discusses His Work and Judicial Philosophy in a Conversation with Former Clerk Tim Meyer, VANDERBILT LAW SCHOOL (Nov. 13, 2020), https://law.vanderbilt.edu/supreme-court-justice-neil-m-gorsuch-discusses-his-work-and-judicial-philosophy-in-a-conversation-with-former-clerk-tim-meyer/.

98. Plessy, 163 U.S. at 555–56 (Harlan, J., dissenting) ("Our Constitution is colorblind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. . . . The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution."); *see also* EARL M. MALTZ, THE FOURTEENTH AMENDMENT AND THE LAW OF THE CONSTITUTION 31–33 (2003) (explaining Harlan's dissent as grounded in textual interpretation of Fourteenth Amendment's guarantee of equal protection).

99. Damon Root, *How Judicial Restraint Shaped John Roberts' ObamaCare Decision*, REASON (June 29, 2012), https://reason.com/2012/06/29/how-judicial-restraint-shaped-john-rober/.

Justice Scalia's recognition that "originalism doesn't mean that the radio is not covered by the First Amendment" illustrates how faithful constitutional interpretation can address new circumstances without abandoning textual moorings.[100] This approach allows constitutional text to speak to contemporary challenges like immigration enforcement and citizenship rights without requiring judges to become "philosopher-king judges" who "ordain answers rather than allow the people and their representatives to discuss, debate, and resolve them."[101]

For the Eighth Circuit, this approach requires judges who understand both the constitutional text's original meaning and its application to contemporary challenges. Judges with diverse backgrounds and experiences can enhance this constitutional analysis not by bringing different policy preferences to bear, but by bringing different perspectives on how constitutional text applies to the complex factual situations that come before federal courts.

Garcia illustrates this principle. The constitutional questions raised—about due process rights for non-citizens, the scope of executive power, and the enforcement of federal court orders—require careful application of constitutional text and precedent. Judges with different backgrounds may bring different insights to these questions, but all must be grounded in constitutional text rather than personal policy preferences.

This need for constitutional leadership is particularly acute in the current political moment, when constitutional rights face direct challenges from political actors. Judges who understand the historical context of these challenges and the Constitution's original meaning are essential for maintaining constitutional protections. As Gorsuch observed, "when it comes to the social and political questions of the day they care most about, many living constitutionalists would prefer to have philosopher-king judges swoop down from their marble palace to ordain answers rather than allow the people and their representatives to discuss, debate, and resolve them."[102] Constitutional fidelity requires the opposite approach—judges who apply constitutional text faithfully while leaving policy questions to the democratic process.

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100. Andrea Seabrook, *Supreme Court Justices Scalia And Breyer Share Candid Conversation About The Constitution,* NPR (Oct. 9, 2011), https://www.npr.org/2011/10/09/141188564/a-matter-of-interpretation-justices-open-up.

101. *Gorsuch: Originalism Is Best Approach to the Constitution*, TIME (Sept. 6, 2019), https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution/.

102. *Id.*

VIII. CONCLUSION: THE UNFINISHED PROMISE OF THE 14TH AMENDMENT

The constitutional journey from Homer Plessy to Kilmar Abrego Garcia reveals both the transformative potential and persistent limitations of the 14th Amendment. The Amendment's promises of citizenship, due process, and equal protection have proven capable of revolutionary change, dismantling state-sanctioned segregation and expanding constitutional protections to previously excluded groups. Yet these same promises remain vulnerable to political and judicial retrenchment, as contemporary challenges to immigration rights and birthright citizenship demonstrate.

Garcia serves as a contemporary reminder that constitutional rights require institutional commitment and political will to maintain their vitality. When government officials refuse to comply with federal court orders enforcing constitutional protections, those protections become meaningless regardless of their formal existence. This dynamic mirrors the post-Reconstruction period, when political compromise and judicial retrenchment undermined the 14th Amendment's guarantees.

Understanding this historical pattern is essential for contemporary constitutional advocates, practitioners, and jurists. The constitutional principles that ultimately vindicated the civil rights movement remain available to defend against contemporary challenges to constitutional rights, but their effectiveness depends on sustained advocacy and institutional commitment to constitutional governance.

For practitioners in the Eighth Circuit and beyond, this history suggests several crucial lessons. First, constitutional advocacy must be willing to advance bold arguments even when immediate success seems unlikely, as today's dissents may become tomorrow's majority opinions. Second, constitutional progress requires coalition-building and sustained political mobilization, not merely legal argument.[103] Third, constitutional rights are only as strong as the institutions and individuals willing to defend them against political pressure.

The 14th Amendment's promise remains unfinished, but its potential for transformation remains intact. Whether that potential is realized will depend on the willingness of advocates, practitioners, and jurists to defend constitutional principles against contemporary

103. *See, e.g.,* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 290–310, 344–68 (2004) (documenting how Brown's implementation required sustained political organizing and coalition-building beyond legal victories); RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 6–9 (2007) (explaining how civil rights legal strategy required coordination with grassroots political movements); TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT 1–18 (2011) (demonstrating necessity of local political organizing to effectuate constitutional change).

challenges and to continue the long struggle to fulfill the Amendment's egalitarian promise. The journey from *Plessy* to *Garcia* is not yet complete, and its final destination remains to be written by current and future generations of constitutional advocates.

In this moment of constitutional challenge, we must remember Justice Harlan's prophetic words in *Plessy*: "The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law."[104] Contemporary challenges to immigration rights and citizenship protections plant similar seeds of division and exclusion. The constitutional response to these challenges will determine whether the 14th Amendment continues to serve as a charter of liberation or suffers the fate of the Reconstruction Amendments in the post-*Plessy* era—formally recognized but practically unenforced.

The choice is ours, and the Constitution awaits our answer.

104. Plessy v. Ferguson, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).

THE DORMANT COMMERCE CLAUSE'S LESSONS FOR RELIGIOUS EXEMPTIONS

Dennis J. Wieboldt III†

I. INTRODUCTION 303
II. THE EMERGENCE OF A "MOST FAVORED RIGHT" 304
III. EXEMPTIONS AND THE DORMANT COMMERCE CLAUSE 313
  A. *South Carolina State Highway v. Barnwell* (1938) 316
  B. *Southern Pacific v. Arizona* (1945) 319
  C. *Dean Milk Co. v. Madison* (1951) 323
  D. *Hughes v. Oklahoma* (1979) 326
  E. *Kassel v. Consolidated* (1981) 329
  F. *National Pork Producers Council v. Ross* (2023) 331
IV. EXEMPTIONS AND THE FREE EXERCISE CLAUSE 334
  A. *Church of Lukumi v. Hialeah* (1993) 337
  B. *Roman Catholic Diocese of Brooklyn v. Cuomo* (2020). 345
  C. *Tandon v. Newsom* (2021) 349
  D. *Fulton v. City of Philadelphia* (2021) 351
V. THE LESSONS OF THE DORMANT COMMERCE CLAUSE 354

I. INTRODUCTION

There is an emerging scholarly consensus that the Supreme Court has begun to read the Free Exercise Clause as safeguarding a "most favored right" to religious liberty. Following the Court's COVID-19-era free exercise cases in particular, scholars have argued that the Court now acts in a uniquely deferential way to religious claimants seeking exemptions from otherwise generally applicable laws. Those who advance this "most favored right" theory have, however, failed to recognize that the Court's methodological approach to religious exemption

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litigation closely tracks the way that it analyzes claims arising under other constitutional provisions that similarly involve exemptions from generally applicable laws. This Article therefore compares the Court's Free Exercise Clause jurisprudence with its Dormant Commerce Clause jurisprudence to illustrate that recent scholarly claims of religious favoritism are misguided.

Both the Free Exercise and Dormant Commerce Clauses are principally concerned with discrimination: in the first instance against religion, and in the second against interstate commerce. In litigation arising under both constitutional provisions, the Supreme Court begins its inquiry by attempting to identify facial discrimination in the text of a challenged enactment. And, in litigation arising under both provisions, a frequent indicator of such facial discrimination is the government's decision to exempt a favored entity from an otherwise generally applicable regulatory burden. If the Court successfully identifies this type of exemption, it then proceeds down a predictable path to discern whether the existence of that exemption reveals the government's constitutionally impermissible disfavor for religion or interstate commerce.

In both the Free Exercise Clause and Dormant Commerce Clause contexts, the Supreme Court understands the existence of regulatory exemptions to create a rebuttable presumption that the government is engaged in a form of constitutionally impermissible disfavoritism. Because the Court in neither context has articulated a *per se* rule of unconstitutionality once it merely identifies the existence of an exemption, however, the Court enables the government to rebut this presumption when the Court applies heightened means-end scrutiny to a challenged enactment at the second step of its analysis.

The Supreme Court's recent application of this methodology to religious exemption litigation is far from remarkable, and certainly does not substantiate scholarly claims of religious favoritism. This is chief among the Dormant Commerce Clause's lessons for litigating our "most favored right," and one that should aid lower courts confronted with post-COVID-19 Free Exercise Clause disputes.

II. THE EMERGENCE OF A "MOST FAVORED RIGHT"

Over the last few years, the Supreme Court's Free Exercise Clause jurisprudence has become subject to widespread scholarly and popular critique. In 2020, for example, one author in *The Atlantic* decried the Court's "sustained drive to provide religious organizations more leeway to claim exemptions from civil laws on the grounds of protecting 'religious liberty.'"[1] "These cases," the author continued, "have become a top priority for conservative religious groups, usually led by

1. Ronald Brownstein, *The Supreme Court is Colliding With a Less–Religious America*, THE ATLANTIC (Dec. 3, 2020), https://www.theatlantic.com/politics/archive/2020/12/how–supreme–court–champions–religious–liberty/617284/.

white Christians[.]"[2] Around the same time, the Court began to receive amicus briefs in pending litigation asserting that, if proponents of a so-called "most favored nation" theory of religious liberty prevailed at One First Street, there would be "dramatic consequences" for the nation.[3] Between 2020 and 2023, at least a half-dozen scholarly articles were published on this "most favored nation"[4] (or "most favored right")[5] theory and its implications for the Court's contemporary jurisprudence of the Religion Clauses.[6] And these critiques continue to find their way into the pages of the nation's leading law reviews.[7]

Although this "most favored [nation/right]" language was first coined by scholars in the 1990s and early 2000s, recent critiques of the Supreme Court predicated on its alleged adherence to this theory of religious liberty largely emerged in response to the Court's COVID-19-era treatment of government restrictions on religious activities.[8] As Professor Stephen Vladeck has argued recently, "the Court for the first time directly embraced the most-favored nation theory of the Free Exercise Clause"[9] in its 2020 decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*.[10]

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2. *Id.*

3. Brief for Church–State Scholars as Amici Curiae Supporting Respondents, *Gateway City Church, et al. v. Gavin Newsom*, 2021 WL 1418485, at *7.

4. *See, e.g.*, Allen E. Brownstein & Vikram David Amar, *Locating Free–Exercise Most–Favored–Nation–Status (MFN) Reasoning in Constitutional Context*, 54 LOY. U. CHI. L. J. 777 (2022); René Reyes, *Religious Liberty, Racial Justice, and Discriminatory Impacts: Why the Equal Protection Clause Should Be Applied at Least as Strictly as the Free Exercise Clause*, 55 IND. L. REV. 275 (2022); Luray Buckner, Note, *How Favored, Exactly? An Analysis of The Most Favored Nation Theory of Religious Exemptions from* Calvary Chapel *to* Tandon, 97 NOTRE DAME L. REV. 1643 (2022); Andrew Koppelman, *Increasingly Dangerous Variants of the 'Most–Favored–Nation' Theory of Religious Liberty*, 108 IOWA L. REV. 2237 (2023); Mark Strasser, *COVID–19, Free Exercise, and Most Favored Nation Status*, 27 LEWIS & CLARK L. REV. 1 (2023).

5. Stephen I. Vladeck, *The Most–Favored Right: COVID, the Supreme Court, and the (New) Free Exercise Clause*, 15 N.Y.U. J. L. & LIBERTY 699 (2022).

6. The theory also has garnered explicit attention among some lower-court judges. *See, e.g.*, Pleasant View Baptist Church v. Beshear, 78 F.4th 286, 303 (6th Cir. 2023) (Murphy, J., concurring) (describing a recent opinion of the Supreme Court as "adopt[ing] a 'most–favored nation status' for religious exercise"), *cert. denied*, 144 S. Ct. 1348 (2024).

7. *See, e.g.*, Zalman Rothschild, *The Impossibility of Religious Equality*, 125 COLUM. L. REV. 453 (2025).

8. *See* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 49; Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise:* Smith, Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 880 (2001). This is not to say, however, that there is not a longer history of understanding the right to religious liberty as Americans' "first freedom." *See, e.g.*, WILFRID PARSONS, S.J., THE FIRST FREEDOM: CONSIDERATIONS ON CHURCH AND STATE IN THE UNITED STATES (1948).

9. Vladeck, *supra* note 5, at 733 (discussing Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14 (2020)); *see also* Rothschild, *supra* note 7, at 458 ("Just months after President Donald Trump's third Supreme Court appointee, Justice Amy Coney Barrett, joined the Court in 2020, the Court formally adopted [a] most favored nation (MFN) definition of religious equality"); *id.* at 476 (identifying *Cuomo* as the first case in which "[the theory of] MFN religious equality [became] the operative constitutional rule of free exercise").

10. 592 U.S. 14 (2020).

In *Cuomo*, the Supreme Court held that New York's pandemic-related restrictions on indoor "religious services"[11] likely violated the Free Exercise Clause because the government did not limit the activities of comparable non-religious entities, including "acupuncture facilities, camp grounds, [and] garages[.]"[12] In other words, the Court in *Cuomo* held that, because New York exempted non-religious entities from a general regulatory burden, but declined to exempt religious entities from that burden, the structure of New York's regulation suggested that the government held a disfavored (and constitutionally impermissible) view of religion. Once subjected to the Court's most stringent standard of constitutional scrutiny, this suggestion was confirmed because New York's regulation could not be justified as a necessary health measure; the regulation's exemptions, after all, could not logically advance the government's purported interest in preventing the spread of COVID-19.[13]

As *Cuomo* suggests, "the denial of a religious exemption [to a government regulation] is presumptively unconstitutional if the state 'treats some comparable secular activities more favorably' [than religious activities]."[14] When a law is underinclusive—meaning that it does not, for example, prohibit all potentially suspect activity, but rather only (or primarily) religious activity—the Supreme Court therefore applies its most stringent standard of constitutional scrutiny to determine whether the asserted government interest in enacting the law justifies the government's differential treatment of religious and non-religious entities.[15] This is true both when the text of a law treats religious and non-religious entities differently, and when a (purportedly) facially neutral regulation nevertheless produces obviously disparate forms of treatment.[16]

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11. Roman Catholic Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 19 (2020).

12. *Cuomo*, 592 U.S. at 17. The Court adjudicated *Cuomo* in a preliminary posture.

13. *See id.* at 18 (noting that New York sought with its regulation to "stem[] the spread of COVID–19").

14. Koppelman, *supra* note 4, at 2238 (quoting Tandon v. Newsom, 593 U.S. 61, 63 (2021)).

15. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1291 (2007) (describing the operation of strict scrutiny in the context of the Free Exercise Clause).

16. Consequently, on the "most favored [nation/right]" view of the Court's Free Exercise Clause jurisprudence, *Cuomo* seems to represent an abandonment of *Employment Division v. Smith*'s holding that "facially neutral government regulation[s]" are, without evidence of intentional discrimination, presumptively lawful. *See* Vladeck, *supra* note 5, at 733 (discussing Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990)). When there is evidence of intentional religious discrimination in the enactment of a purportedly "generally applicable" regulation, it will nevertheless be subjected to strict scrutiny because it is not "neutral" (as that term is used in *Smith*). *See generally* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

Although *Cuomo* is perhaps the most often-cited example, the Supreme Court's other COVID-19-era free exercise decisions, especially *Tandon v. Newsom*[17] and *South Bay United Pentecostal Church v. Newsom*,[18] have also been viewed as evidence that the Court is now reading the Free Exercise Clause as safeguarding a "most favored right" to religious liberty. The consequences of these COVID-19-era decisions in favor of religious claimants,[19] moreover, have appeared to reverberate outside of the pandemic health-regulation context. In one scholar's telling, in fact, the "doctrinal shift" made in *Cuomo*, *Tandon*, and *South Bay* "was confirmed and reinforced by the Court's subsequen[t] decision in *Fulton v. City of Philadelphia*."[20]

After Philadelphia suspended its foster-care contract with a Catholic social services agency on account of the agency's refusal to "certify same-sex couples to be foster parents due to its religious beliefs about marriage," the Supreme Court in *Fulton* found that Philadelphia violated the Free Exercise Clause.[21] To reach this conclusion, the Court first framed *Fulton* as falling outside of *Employment Division v. Smith*'s reach because a clause in Philadelphia's foster-care contract empowered a local official to exercise his "sole discretion" to grant exemptions to a general prohibition on foster care agencies' "reject[ion] [of] a child or family . . . based upon . . . their . . . sexual orientation."[22] In light of this unilateral discretion, the Court proceeded from the view that the regulatory scheme governing Philadelphia's foster-care system was not "generally applicable" under *Smith*, and therefore that Philadelphia's

17. 593 U.S. 61 (2021).

18. 141 S. Ct. 716 (2021).

19. This is not to say, however, that concerns about the Supreme Court's exempting religious individuals and institutions from otherwise generally applicable regulatory burdens suddenly emerged during COVID-19. During the Obama Administration, for example, the "dispute surrounding the Affordable Care Act's 'contraception mandate'" called into question the traditional view that "individuals and institutions deserve exemptions (or, at least, strong consideration for exemptions) from generally applicable laws that burden sincerely held religious beliefs and exercises." Vincent Philip Muñoz, *Two Concepts of Religious Liberty: The Natural Rights and Moral Autonomy Approaches to the Free Exercise of Religion, in* THE CAMBRIDGE COMPANION TO THE FIRST AMENDMENT AND RELIGIOUS LIBERTY 276 (Michael D. Breidenbach & Owen Anderson eds., 2020). On the history of religious exemptions, see, e.g., Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 NOTRE DAME L. REV. 55 (2020).

20. Shlomo C. Pill, *The False Promise of Expanded Religious Liberty Rights After the COVID-19 Cases and* Fulton v. City of Philadelphia, 31 WM. & MARY BILL OF RTS. J. 825, 825 (2023) (discussing Fulton v. City of Phila., 593 U.S. 522 (2021)); *see also* Rothschild, *supra* note 7, at 477 (arguing that, "in *Fulton v. City of Philadelphia*, the Court ratified its MFN interpretation of religious equality in a unanimous decision").

21. Fulton v. City of Phila., 593 U.S. 522, 527 (2021).

22. *Fulton*, 593 U.S. at 535.

actions vis-à-vis the Catholic social services agency did not merit the presumption of constitutionality typically afforded by *Smith*.[23]

Because the Supreme Court's analysis in *Fulton* was not governed by *Smith*, its attention was largely focused on whether Philadelphia's regulatory scheme could satisfy strict scrutiny. As Professor Stephanie Barclay has argued, "strict scrutiny should properly be understood as primarily (1) a rule of exclusion regarding certain types of reasons, and (2) an evidentiary burden that ensures the government action is necessary to advance the nonexcluded reason [for regulation that] the government has itself identified."[24] In short, the question presented to the Court in *Fulton* after disposing of *Smith* was whether Philadelphia had identified a "compelling interest" that justified its decision to require the Catholic foster-care agency to comply with the anti-discrimination regulation, given that Philadelphia could exempt non-religious entities from compliance with the regulation.[25] The answer, evidently, was that Philadelphia had not identified such an interest.[26]

Fulton is illustrative of the crucial role that heightened means-end scrutiny plays when the Supreme Court decides that a government regulation burdens a religious claimant's fundamental[27] free exercise right and is not immunized from strict scrutiny by *Smith* (because the regulation is "neutral" and "generally applicable").[28] Scholars who oppose *Fulton* and similar decisions, therefore, frequently posit that the Court's undertaking of Free Exercise Clause means-end scrutiny is circumscribed by the Justices' normative moral judgments and produces results deferential to those advancing the Justices' preferred

23. *See* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (observing that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability'" (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (Stevens, J., concurring in judgment))).

24. Stephanie H. Barclay, *Strict Scrutiny, Religious Liberty, and the Common Good*, 46 HARV. J. L. & PUB. POL'Y 938, 939 (2023).

25. *See Fulton*, 593 U.S. at 534 (observing that, historically, the Court has only upheld the denial of a religious exemption when the government has identified a "compelling interest" in pursuing its preferred regulatory course).

26. *Id.* at 542 (holding that "[t]he refusal of Philadelphia to contract with [the Catholic agency] for the provision of foster care services unless it agrees to certify same–sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment").

27. If, alternatively, the Court concludes that a government regulation does not burden a fundamental right, it will apply rational–basis review. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 300 (2022) (holding that "rational–basis review is the appropriate standard" when the government burdens something other than a "fundamental constitutional right").

28. *See* Dennis J. Wieboldt III, *How "Religious" is a "Religious Employer"? Church History and the Future of American Religious Liberty Litigation*, 18 N.Y.U. J. L. & LIBERTY 70, 74 (describing *Smith* as "immuniz[ing] 'neutral' and 'generally applicable' laws that burden religion from strict scrutiny").

(religious) viewpoints.[29] This line of argument has been debated by its exponents and detractors at length, and it appears unlikely that any future intervention will resolve the substantial disagreements that exist between the Court's observers on this score.[30] But for those who have lost interest in these (sometimes circular) debates, there still remains doctrinal territory unexplored.

As *Fulton* illustrates, the Supreme Court proceeds in two formal steps once the Court determines that the government has imposed a substantial burden on a religious claimant's fundamental free exercise right. First, the Court determines whether the regulation is "neutral" and "generally applicable" under *Smith*; then, if not, the Court interrogates whether the regulation can survive strict scrutiny.[31]

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29. *See, e.g.*, Caroline Mala Corbin, *Religious Liberty for All? A Religious Right to Abortion*, 2023 WIS. L. REV. 475, 479–82, 507, 511 (arguing that the Court favors the claims of (conservative) Christian litigants). Though this critique is evident in contemporary scholarship on the Religion Clauses, it is perhaps even more prominent in scholarship addressing the Court's adjudication of other types of constitutional claims. *See, e.g.*, Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 729, 732 n.15 (2024) (asserting that "there are rights associated with issues of increasing public significance—gun rights, for example—that this Court views as inviolable and sacrosanct, seemingly oblivious to the prospect of majoritarian preferences and democratic deliberation"); Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 HOUS. L. REV. 799, 804 (2023) (arguing that "the Roberts Court's jurisprudence of masculinity . . . [expresses] a preference for constitutional rights that code male or that are likely to be exercised by men"); Michelle Goodwin, *Opportunistic Originalism:* Dobbs v. Jackson Women's Health Organization, 2022 SUP. CT. REV. 111, 164 (seemingly agreeing with scholars that the interpretive method employed in *Dobbs* is a "smokescreen or cover for Justices leaning into ideological or even political preferences and judgments"); Carlos A. Ball, *First Amendment Exemptions for Some*, 137 HARV. L. REV. 46 (2023) (positing that the Court's decisions in cases involving gender and sexuality will be informed by the Justices' preferences for viewpoints that they "understand to be sincere and reasonable (such as those of owners who refuse to provide wedding–related goods and services to same–sex couples)"); Barbara Pfeffer Billauer, *Abortion, Moral Law, and the First Amendment: The Conflict Between Fetal Rights & Freedom of Religion*, 23 WM. & MARY J. OF RACE, GENDER, AND SOC. JUSTICE 271, 295 (2017) (predicting that, in the context of abortion, "judges [may] employ personal preferences" but "creat[e] legal fictions like 'potential people' or 'profound" interests'" to obscure the fact that "their personal beliefs (which includes religious background) might influence their decision").

30. For conflicting views on the Court's (non)reliance on its normative moral judgments in the First Amendment context in particular, *compare, e.g.*, Marc O. DeGirolami, *Virtue, Freedom, and the First Amendment*, 91 NOTRE DAME L. REV. 1465, 1496 (2016) (proposing that, if the Court has expressed any preference in its First Amendment jurisprudence, it is a "prefer[ence] [for] a seemingly more egalitarian regime of 'neutrality'—sameness of treatment for religion and non–religion"), *with* Richard Schragger, Micah Schwartzman & Nelson Tebbe, *Reesetablishing Religion*, 92 U. CHI. L. REV. 199 (2025) (characterizing the Court's First Amendment jurisprudence as reflecting a "structural preferentialism" for religion). It is important to note that Professor DeGirolami's discussion of the Court's turning to "neutrality" is not meant to suggest that the Court has adopted a "formal neutrality position" that would "make unconstitutional all legislation that explicitly exempts religious institutions or individuals from generally applicable burdens or obligations." Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 166 (1992).

31. *See generally Smith*, 494 U.S.

Again, for its regulation to withstand strict scrutiny in *Fulton*, Philadelphia was required to demonstrate that compelling the Catholic foster-care agency to comply with its anti-discrimination regulation served a compelling government interest, and that requiring the agency to do so was the least restrictive means of advancing that interest.

This approach to Free Exercise Clause litigation requires federal courts to answer two related questions.[32] As such, scholars critical of the Supreme Court's "most favored [nation/right]" theory of religious liberty have suggested that, once the Court identifies the existence of any exemption(s) to a law burdening religion, the Court's answering of the first question (about compliance with *Smith*) effectively resolves the second question (about whether the government has met its burden under strict scrutiny).[33] On this view, for example, if the government enacts a regulation that exempts some secular entities from a general regulatory burden, but does not also exempt religious entities, the Court, in the same stroke of its pen, will find that the regulation runs afoul of *Smith* and cannot survive strict scrutiny.[34] Irrespective of what opaque label might be used to describe this adjudicatory method, it is effectively framed as a *per se* test of (un)constitutionality; indeed, on the "most favored [nation/right]" reading of the Court's decisions in *Cuomo*, *Fulton*, and its progeny, a law that (1) burdens religion and (2) contains at least one secular exemption will (3) always be found unconstitutional.[35]

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32. Again: (1) "Is the regulation 'neutral' and 'generally applicable' under *Smith*?" Then, if not: (2) "Can the regulation withstand strict scrutiny because it is the least restrictive means of advancing a compelling government interest?"

33. Although not discussed in this Article, another popular critique of exemptions in the context of the Religion Clauses proceeds from the view any legislative or judicial exempting of religious conduct from general regulatory burdens "amounts to an unconstitutional 'privileging' of religion over nonreligion, in violation of the Establishment Clause." Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DePaul L. Rev. 1, 2 (2000). To be sure, the Supreme Court has "recognized that an exemption from [a] generally applicable law[] can be viewed as a type of favoritism," but the Court has consistently rejected the argument that the types of exemptions discussed in this Article amount to unconstitutional establishments of religion. Marc O. DeGirolami, The Tragedy of Religious Freedom 70 (2013).

34. *See, e.g.*, Koppelman, *supra* note 4, at 2253 (arguing that, in COVID-19-era decisions like *Cuomo*, the Supreme Court "ma[de] strict scrutiny impossible to satisfy").

35. *See, e.g.*, *id. See also* Micah Schwartzman, Richard Schragger & Nelson Tebbe, *The Structure of Religious Preference*, 139 Harv. L. Rev. 211, 222 (2025) ("Under [the Court's recent approach to Free Exercise Clause disputes], if a law that burdens religion has any exceptions for comparable secular activities, then the Court will apply strict scrutiny. And here the old slogan of '"strict" in theory and fatal in fact' — once derided as a constitutional epithet — remains descriptively apt. When the Court finds that a policy has exceptions for secular activities that are comparable in the sense of undermining the government's articulated interest in that policy, those exceptions will also have the effect of showing either that the government, in fact, lacked a compelling interest or that it had less restrictive means to achieve its interest — namely, by granting a religious exemption.").

For the Supreme Court's contemporary critics, this post-*Cuomo* collapsing of what was once two separate inquiries (under *Smith*) into, effectively, a single inquiry significantly favors religious claimants.[36] This is because the Court now seems to conclude with greater frequency that challenged government regulations are not "neutral" and/or "generally applicable."[37] As Professor Stephen Feldman has argued characteristically, "[t]he Roberts Court has not explicitly overruled *Smith*, but it has in effect repudiated most of its doctrinal significance[.]"[38]

Litigants and their amici today may finally be poised to invalidate *Smith*,[39] but if and until the Supreme Court does so, an important question remains: Are the Court's scholarly critics right to argue that the Justices have adopted a "most favored [nation/right]" theory of the Free Exercise Clause that renders all government enactments unconstitutional if they (1) burden religion and (2) contain exemptions for secular entities, but not religious entities? On the best reading of the Court's recent Free Exercise Clause decisions, the answer, in my view, must be "no."

To be sure, scholars who have characterized the Supreme Court's recent decisions as evidence of a "most favored [nation/right]" approach to the Free Exercise Clause are right to emphasize the importance of exemptions to the Court.[40] However, they err in suggesting that the mere presence of a secular exemption in a regulation burdening religion automatically violates some *per se* rule of constitutionality. As this Article will illustrate, no such *per se* rule exists. And, whatever adjudicatory significance exemptions do, in fact, have at the first and second formal steps of the Court's Free Exercise Clause inquiry is not

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36. *See, e.g.*, Schwartzman, Schragger & Tebbe, *supra* note 35, at 213 (describing the Court's Free Exercise Clause jurisprudence as requiring "special treatment" for religious claimaints).

37. For further discussion, *see, e.g.*, Nathan S. Chapman, *The Case for the Current Free Exercise Regime*, 108 IOWA L. REV. 2115, 2124 (2023) (observing that "[t]he Court has recently expanded [its] approach" to determining whether a regulation runs afoul of *Smith*); *see also* Koppelman, *supra* note 4, at 2239 ("The Court has been remarkably casual in its findings of underinclusiveness . . . It has declared that the mere possibility of an exemption, even if it has never been exercised, triggers strict scrutiny.").

38. Stephen M. Feldman, *The Roberts Court's Transformative Religious Freedom Cases: The Doctrine and the Politics of Grievance*, 28 CARDOZO J. EQUAL RTS. & SOC. JUST. 507, 539 (2022). *See also* Schwartzman, Schragger & Tebbe, *supra* note 35, at 220 (arguing that the Supreme Court's "commitment to *Smith* is obviously wearing thin").

39. *See, e.g.*, Petition for Writ of Certiorari, Roman Cath. Diocese of Albany, et al. v. Harris, 2024 WL 4277508, at *i (asking the Court to decide "[if] Smith be overruled?"); Brief of Amici Curiae Seven Legal Scholars in Support of Petitioners, Roman Cath. Diocese of Albany, et al. v. Harris, 2024 WL 4574534, at *1–2 (describing *Smith* as being "ripe for reconsideration"). Scholars of the Religion Clauses have advocated for such a reversal of *Smith* since the year that the decision was handed down. See, e.g., Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1152–53 (1990).

40. *See, e.g.*, Rothschild, *supra* note 7, at 509 (describing exemptions as having a "crucial role" in the Court's contemporary jurisprudence of the Religion Clauses).

particularly unique to the Free Exercise Clause context. Indeed, scholars who have advanced "most favored [nation/right]" critiques of the Court have largely failed to appreciate that the Court's methodological approach to religious exemption litigation closely tracks the way that it analyzes claims arising under other constitutional provisions that similarly involve exemptions from generally applicable laws.[41] This Article therefore compares the Court's Free Exercise Clause jurisprudence with its Dormant Commerce Clause jurisprudence to illustrate that recent scholarly claims of religious favoritism are misguided.

Both the Free Exercise and Dormant Commerce Clauses are principally concerned with discrimination—in the first instance against religion, and in the second against interstate commerce. In litigation arising under both constitutional provisions, the Supreme Court begins its inquiry by attempting to identify facial discrimination in the text of a challenged enactment. And, in litigation arising under both provisions, a frequent indicator of such facial discrimination is the government's decision to exempt a favored entity from an otherwise generally applicable regulatory burden. If the Court successfully identifies this type of exemption, it then proceeds down a predictable path to discern whether the existence of that exemption reveals the government's constitutionally impermissible disfavor for religion or interstate commerce.

In both the Free Exercise Clause and Dormant Commerce Clause contexts, the Supreme Court understands the existence of regulatory exemptions to create a rebuttable presumption that the government is engaged in a form of constitutionally impermissible disfavoritism. Because the Court in neither context has articulated a *per se* rule of (un)constitutionality once it merely identifies the existence of an exemption, however, the Court enables the government to rebut this presumption when the Court applies heightened means-end scrutiny to a challenged enactment at the second step of its analysis.

The Supreme Court's recent application of this methodology to religious exemption litigation is far from remarkable, and certainly does not substantiate scholarly claims of religious favoritism. This is chief among the Dormant Commerce Clause's lessons for litigating our "most favored right," and one that should aid lower courts tasked with adjudicating post-COVID-19 Free Exercise Clause disputes.

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41. In 2023, for example, Professor Andrew Koppelman briefly mentioned the Dormant Commerce Clause in an article on the Supreme Court's adoption of "increasingly dangerous variants" of the "most favored [nation/right]" theory of religious liberty. *See* Koppelman, *supra* note 4, at 2249. But Professor Koppelman did not offer a particularly detailed account of how the Court's approach to the Free Exercise Clause compares with its approach to the Dormant Commerce Clause.

III. EXEMPTIONS AND THE DORMANT COMMERCE CLAUSE

In *Federalist 22*, Alexander Hamilton famously observed that "[t]he interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage[.]"[42] Without "restrain[t] by a national control," Hamilton feared, "animosity" and "discord"[43] would proliferate throughout the nation because individual states would be enabled (as they were under the Articles of Confederation) to enact protectionist economic regulations. Perhaps for this reason above all,[44] the Framers of the Constitution empowered Congress to regulate interstate commerce in Article I.[45] And, though the Commerce Clause "speaks only of congressional power, the Clause has been interpreted to empower the federal courts to enjoin state laws that interfere unduly with interstate commerce."[46] As the Supreme Court has "repeatedly [been] called upon . . . to remove state-level barriers to the construction of a national market,"[47] such interpretations have, in effect, constructed the "Dormant Commerce Clause" from what might be more simply described as the "Commerce Clause."[48]

In the decades that have followed U.S. Attorney General Edwin Meese III's 1985 address before the American Bar Association on the "Jurisprudence of Original Intention,"[49] scholars have devoted outsized attention to the Commerce Clause's original historical meaning.[50]

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42. THE FEDERALIST No. 22, at 140 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

43. *Id.*

44. *See, e.g.*, Lina A. Graglia, *How the Constitution Disappeared, in* INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 42 (Jack N. Rakove ed., 1990) ("The primary motivating force for the creation of a stronger national government was the felt need of a central authority to remove state–imposed obstacles to interstate trade"); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 15 (1990) ("The commerce clause . . . [was] designed . . . not to permit national controls on the free market, but on the contrary to authorize Congress to overcome state barriers to free trade.").

45. *See* U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .").

46. Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMM. 395, 395 (1986).

47. KEN I. KERSCH, CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW 141 (2004).

48. *See* U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .").

49. For further discussion, see, e.g., STEVEN GOW CALABRESI & GARY LAWSON, THE MEESE REVOLUTION: THE MAKING OF A CONSTITUTIONAL MOMENT 1–5 (2024).

50. *See, e.g.*, Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695 (1996); Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1 (1999); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); Randy E.

This was especially true in the 1990s, during which Justice Clarence Thomas began to articulate his view that the Supreme Court had "drifted far from the original understanding of the Commerce Clause."[51] But for whatever these rather recent historical studies of the Commerce Clause have revealed, it remains true that federal courts have long "prevent[ed] states from engaging in purposeful economic protectionism."[52] Following its 1824 decision in *Gibbons v. Ogden*,[53] in fact, the Supreme Court in *Cooley v. Board of Wardens*[54] held in a "celebrated"[55] 1851 decision that federal courts may invalidate "state

Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2002–2003); Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201 (2007).

51. United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring); *see also, e.g.*, United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas J., concurring) (reiterating his view that the Court's approach to the Commerce Clause "is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases"). For further discussion of originalism at the Supreme Court in the 1990s, *see* JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS 205–12 (2007).

52. Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1093 (1986); *see also id.* at 1092 ("the Court has [long] been concerned exclusively with preventing states from engaging in purposeful economic protectionism"); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, 236 (1985) (noting that, after 1837, "the [Supreme] Court . . . was prepared to act vigorously to protect both contracts and commerce from state interference"); S. Pac. Co. v. State of Ariz. ex. rel. Sullivan, 325 U.S. 761 (1945) (observing that, "[f]or a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests"). This is not to say, however, that the outlawing of inter-state economic discrimination is all that the Commerce Clause has been interpreted by the Supreme Court to achieve. See, e.g., James M. McGoldrick, Jr., *The Dormant Commerce Clause: The Origin Story and the "Considerable Uncertainties"—1824 to 1945*, 52 CREIGHTON L. REV. 243, 249 (2019) (describing two "primary principles that mark the boundaries of a State's authority to regulate interstate commerce"). Professors Jack Goldsmith and Alan Sykes have recently argued that the "Court has long suggested that a primary justification for the [Dormant Commerce Clause] is an efficiency criterion: to ensure free trade and associated benefits in interstate transactions[.]" Jack Goldsmith & Alan Sykes, *The California Effect, Process–Based Regulation, and the Future of* Pike *Balancing*, 2024 SUP. CT. REV. 125, 128. But, such an efficiency-based (rather than discrimination-based) explanation for the Court's Dormant Commerce Clause decisions seems unpersuasive in light of the cases discussed in *infra* Section III. To their credit, Professors Goldsmith and Sykes acknowledge that the Court's most recent Dormant Commerce Clause decision "stated that the 'very core' of the [Clause] was the antidiscrimination principle[.]" *Id.* at 131. And yet, in their view, this and other similar statements from the Court do not accurately reflect its underlying doctrinal commitments. For a critique of the efficiency theory of the Dormant Commerce Clause, see, most recently, Andrew Jordan, *What on Earth is a Burden on Interstate Commerce?*, 120 NW. U. L. REV. 247 (2025).

53. 22 U.S. 1 (1824).

54. 53 U.S. 299 (1851).

55. David Walter Brown, *The Exclusive Power of Congress to Regulate Interstate and Foreign Commerce*, 4 COLUM. L. REV. 490, 492 (1904). As the Court in *South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 173 (2018), confirmed, *Cooley* remains standard bearing

regulation[s] touch[ing] upon . . . aspect[s] of interstate commerce that [are] best handled by uniform national treatment[.]"[56] Following *Cooley*, the Court was enabled as early as the 1870s and 1880s to begin invalidating what Hamilton described a century earlier as the "unneighborly regulations of some States."[57] In these Dormant Commerce Clause decisions, the Court sought to "balance the need for nationally protected commercial development against promotional and occasional regulatory tendencies in the states"[58] by designing doctrinal tests that could ferret out constitutionally impermissible forms of economic protectionism.[59]

This Section surveys a selection of the Supreme Court's leading Dormant Commerce Clause decisions from the twentieth century, each of which illustrates how the Court traditionally has evaluated state and local commercial regulations that allegedly discriminate against or otherwise unconstitutionally burden interstate commerce. In each of these cases, the Court not only sought to identify whether state and local governments had facially discriminated against interstate commerce, but also articulated its view that *de facto* differential treatment between in-jurisdiction and out-of-jurisdiction entities may still be cause for constitutional concern.

As in the Free Exercise Clause context, a decisive adjudicatory fact for the Supreme Court in determining whether a non-federal actor has constitutionally regulated interstate commerce frequently has been the presence or absence of exemptions from otherwise generally applicable regulatory burdens. Indeed, when a state or local government's commercial regulation has facially discriminated against out-of-jurisdiction entities because it has exempted those within its borders from a regulatory burden, the Court has required the government to

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among early decisions in "la[ying] the groundwork for the analytical framework that now prevails in Commerce Clause cases." *But see* Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1115 (2000) (arguing that *Cooley* had a "limited scope").

56. James A. Todd, Cooley v. Board of Wardens *and its Nineteenth-Century Legacy*, 45 J. SUP. CT. HIST. 7, 10 (2020).

57. THE FEDERALIST No. 22, at 140 (Alexander Hamilton). *See, e.g.,* Hannibal v. St. J.R. Co. v. Husen, 95 U.S. 465 (1877); Wabash, St. L. & P. Ry. Co. v. State of Illinois, 118 U.S. 557 (1886); *see also* McGoldrick, *supra* note 52, at 269 (observing that, "[b]y 1877, discrimination in interstate commerce was firmly recognized as a violation of the Dormant Commerce Clause").

58. ALFRED H. KELLY, WINFRED A. HARBISON & HERMAN BELZ, 1 THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 230 (7th ed. 1991).

59. As Professor Donald Regan argued more forcefully in 1986, the Court's Dormant Commerce Clause jurisprudence has been "concerned *only* with . . . purposeful economic protectionism[.]" *See* Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENV. L. REV. 255, 260 (2017) (describing Regan, *supra* note 52) (emphasis added). However, this view has not been shared by all scholars. *See, e.g.*, *id.* at 281–92 (disagreeing with Regan).

articulate a compelling rationale for its differential treatment. As has been suggested, this requirement has enabled the government to rebut the presumption—created by the presence of suspect exemption(s)—that it seeks to engage in constitutionally impermissible discrimination. And, when a state or local government has enacted a facially neutral commercial regulation that nevertheless carries with it incidental extraterritorial effects, the Court has applied a less stringent standard of review that, through means-end scrutiny, seeks to fairly balance non-federal regulatory interests with the regulation's practical impact on interstate commerce. Crucially, in this latter set of circumstances, the absence of regulatory exemptions for preferred entities has led the Court to eschew the heightened standard of review that is typically used to ferret out discrimination—a standard once rightly characterized as a "test of illicit motives."[60]

In concluding, this Section reviews the Supreme Court's most recent engagement with (and perhaps modification of)[61] the Dormant Commerce Clause in *National Pork Producers Council v. Ross*.[62] By appreciating the underlying doctrinal continuities in the Court's Dormant Commerce Clause jurisprudence, it will become clear that the Court's approach to religious exemption litigation is not especially unique, but instead resembles in important respects the Court's approach to Dormant Commerce Clause litigation. Once again, in both contexts, exemptions are key because their presence or absence helps jurists to "tease out what [the government's] real intention might have been"[63] when it created a novel regulatory burden.

A. *South Carolina State Highway v. Barnwell* (1938)

In April 1933, the General Assembly of South Carolina enacted a prohibition on the use of motor trucks whose width exceeded 90 inches, and whose weight exceeded 20,000 pounds, on state highways.[64] Two years later, Congress passed the Federal Motor Carrier Act of 1935,[65] a piece of legislation described by one influential lobbyist at the time as marking the "threshold of an important new era in the history of

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60. Fallon, *supra* note 15, at 1308. Before Fallon, Professors Owen Fiss and John Hart Ely were the first to describe this heightened standard of review as a means by which to uncover illicit regulatory motives. *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Aff. 107, 111–13 (1976); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 156–80 (1980).

61. *See, e.g.*, Kate R. Bowers, Cong. Rsch. Serv., LSB11031, Supreme Court Narrows Dormant Commerce Clause and Upholds State Animal Welfare Law (2023).

62. 598 U.S. 356 (2023).

63. Charles Fried, *Types*, 14 Const. Comment. 55, 63 (1997).

64. *See* S.C. State Hwy. Dep't v. Barnwell Bros., 303 U.S. 177, 180 (1938) (describing the facts that gave rise to the litigation).

65. 49 U.S.C.A. § 304 (1935).

the motor bus industry — the era of Federal regulation."[66] Given the "[e]xcessive speed" and "negligent driving" that, just one year prior, had caused over "36,000 reported deaths from motorcar accidents," Congress apparently sought with the Act's passage to "preserve and foster the economic and commercial advantages of an efficient transportation system," an objective unattainable without roadway safety.[67] Likely recognizing individual states' concomitant interests in roadway safety, however, President Franklin Roosevelt was sure to note during the Act's signing that the legislation would not "interfere[] with the exercise by the States of full authority over intra-state transportation."[68]

In the text of the Motor Carrier Act, Congress made "no provision for the regulation of sizes and weights of motor vehicles[.]"[69] Instead, Congress directed the Interstate Commerce Commission (ICC) to "investigate and report o[n] the need for federal regulation in this area."[70] As such, both commentators and the Supreme Court[71] agreed that Congress's intent in passing the Act was to leave to the states "the power to regulate this feature of motor carrier activity."[72] Following a three-judge district court,[73] the Supreme Court in *South Carolina State Highway v. Barnwell* therefore did not find that the Act "preempted the field from state regulation of weights and sizes of interstate trucks."[74]

Although the district court that first considered *Barnwell* found that the Motor Carrier Act did not preempt South Carolina's size and weight regulation, it separately concluded that the state had "unreasonably burden[ed] interstate commerce" because there was "a large amount of motortruck traffic passing interstate in the southeastern part of the United States, which would normally pass over the highways of South Carolina, but which [was] barred from the state" by

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66. *See* Margaret Walsh, *The Motor Carrier Act of 1935: The Origins and Establishment of Federal Regulation of the Inter-State Bus Industry in the United States*, 8 J. TRANSP. HIST. 66 (1987).

67. Maurer v. Hamilton, 309 U.S. 598, 605–06 (1940) (citing the National Safety Council's 1936 "Accident Facts").

68. Franklin D. Roosevelt, *Statement on Signing the Motor Carrier Act*, THE AM. PRES. PROJ., available at: https://www.presidency.ucsb.edu/node/209000 (accessed Feb. 10, 2025).

69. Val Sanford, *Motor Carrier Regulation—An Adventure in Federalism*, 11 VAND. L. REV. 987, 997 (1958).

70. *Id.*

71. *See Maurer*, 309 U.S. at 617 (holding that the Motor Carrier Act did not preempt Pennsylvania's regulation of vehicle weight and sizes because the ICC was merely directed to study (rather than regulate) weight and sizes).

72. Sanford, *supra note* 69, at 997.

73. *See generally* Barnwell Bros. v. S.C. State Highway Dep't, 17 F. Supp. 803 (E.D.S.C. 1937).

74. Louis A. Bledsoe, Jr., *Constitutional Law—Validity of Penalties Imposed by States on Interstate Carriers for Violation of Weight and Size Regulations*, 33 N.C. L. REV. 621, 622–23 (1955).

South Carolina's regulation.[75] In simpler terms, the court reasoned that South Carolina had exceeded its regulatory authority because it effectively regulated out-of-state trucks; such interstate economic regulation, the argument went, was reserved to Congress by the Commerce Clause.

In its review of the district court's decision below, the Supreme Court in *Barnwell* affirmed Congress's authority under the Commerce Clause to preempt state regulations in this area if it so desired.[76] But because the Motor Carrier Act did not set any national vehicle size or weight standards, the question presented to the Court in *Barnwell* was merely: (1) "whether [South Carolina] in adopting [size and weight standards] ha[d] acted within its province," and (2) "whether the means of regulation chosen [by South Carolina were] reasonably adapted to the end sought."[77] In other words, the Court framed its task in *Barnwell* as first determining the scope of South Carolina's regulatory authority (absent preemptive federal legislation), and, second, determining whether South Carolina's exercise of that authority was reasonable (given the state's legitimate interest in promoting roadway safety).

In resolving the threshold question in *Barnwell*—whether South Carolina enjoyed the authority to impose size and weight standards on vehicles traveling through the state—the Supreme Court proceeded from the view that states may impose "*nondiscriminatory* restrictions with respect to the character of motor vehicles moving in interstate commerce as a safety measure and as a means of securing the economical use of its highways."[78] By doing so, the Court in *Barnwell* suggested that, if South Carolina had enacted size and weight restrictions that applied only to out-of-state carriers, for example, its threshold inquiry would have taken on a different form. According to the Court, this would have been true even if South Carolina's regulation was "nominally" focused on local concerns.[79] Indeed, if "by its necessary operation [the regulation was shown to be] a means of gaining a local benefit by throwing the attendant burdens on those [not from South Carolina]," the Court strongly implied that the state would have exceeded its

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75. *Barnwell*, 303 U.S. at 182.

76. *Id.* at 189–90 ("Congress, in the exercise of its plenary power to regulate interstate commerce . . . may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory power.").

77. *Id.* at 190.

78. *Id.* (emphasis added); *see also id.* at 189 ("[South Carolina] may not, under the guise of regulation, discriminate against interstate commerce[]"); *id.* ("But so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states.").

79. *Id.* at 185.

regulatory authority.[80] But without any facts in the record to suggest that in-state and out-of-state carriers would be treated differently by South Carolina's regulation, the Court quickly moved to the second stage of its analysis.[81]

After determining that South Carolina's regulation of vehicle sizes and weights was nondiscriminatory (because it "applied alike to interstate and intrastate traffic"[82]), the Supreme Court in *Barnwell* applied a form of rational-basis review.[83] Indeed, because South Carolina's regulation was both facially neutral (in applying to both in-state and out-of-state carriers), and did not produce disparate effects (between in-state and out-of-state carriers), its regulation merely needed to be justified (and advanced) by rational regulatory interests (and means).[84] And with "the presumption of constitutionality"[85] afforded to state regulations enacted under the police power, the Court concluded that South Carolina's judgment as to the appropriate sizes and weights of trucks traveling in the state was "within the range of permissible legislative choice."[86] Unlike later regulations challenged under the Dormant Commerce Clause—in which state and local governments were found to have created "discriminatory effect[s] on interstate commerce"—in *Barnwell*, there was no evidence that South Carolina "legislated with the impermissible motivation of protecting in-state interests against out-of-state competition."[87] Thus, heightened judicial scrutiny was not required.

B. *Southern Pacific v. Arizona* (1945)

Nearly a decade after the Supreme Court decided *Barnwell*, it was presented with a dispute over the quintessential medium of

80. *Id.* at 186.

81. In fact, the Court explicitly acknowledged that all carriers in the state were treated equally by South Carolina's regulation. *See id.* at 187 ("The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse."). *See also id.* at 190 ("Here the first inquiry has already been resolved by our decisions that a state may impose *nondiscriminatory* restrictions with respect to the character of motor vehicles moving in interstate commerce as a safety measure and as a means of securing the economical use of its highways" (emphasis added)).

82. *Id.* at 187.

83. *Id.* at 191–92 ("[I]n reviewing the present determination, we examine the record . . . to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis.").

84. *See id.*

85. *Id.* at 195.

86. *Id.* at 196.

87. Fallon, *supra* note 15, at 1309.

nineteenth- and early twentieth-century interstate commerce: the railroad.[88] As Professor Herbert Hovenkamp has argued, railroad expansion in the postbellum period (and especially during the Gilded Age) gave rise to two "broad, very different issues: how should the railroads be regulated, and which sovereign—state or federal—is the optimal regulator."[89] And though "the 'first' [ICC] was generally regarded as little more than a statistical agency," by 1912, the ICC "was energetically applying the enormous powers which had been entrusted to it . . . to a strong, well organized railroad industry."[90] Unsurprisingly, with greater federal involvement in railroad regulation came increasingly sharp conflicts with states that similarly sought to regulate this important feature of the American economy.[91]

Shortly after its admission as the forty-eighth state in the Union, Arizona became one of many jurisdictions to regulate railroad operations. With its Train Limit Law, in fact, Arizona "ma[de] it unlawful for any person or corporation to operate within the state a railroad train of more than fourteen passenger[s] or seventy freight cars[.]"[92] After the Southern Pacific Company operated two trains in violation of the Train Limit Law, Arizona brought suit to recover statutory penalties, to which Southern Pacific responded with two principal defenses: (1) that the regulation was preempted by federal legislation in this area, and (2) that the regulation exceeded Arizona's authority under the Commerce Clause.[93] As to preemption, however, the state trial court that first considered Southern Pacific's claims, like the Arizona Supreme Court, was unpersuaded. As the Arizona Supreme Court observed, "although interstate commerce was incidentally and indirectly affected" by the Train Limit Law, "[t]he facts presented [were] not sufficient to distinguish . . . this case from [others] . . . in which

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88. *See* CHARLES WARREN, 2 THE SUPREME COURT IN UNITED STATES HISTORY 408–09 (1922) (describing the growth of railroads in the 1840s and their importance to the national economy); GABRIEL KOLKO, RAILROADS AND REGULATION, 1877–1916, 7 (1965) (observing that, from 1870 to 1876, "railroad mileage increased by 50 per cent"); WILLIAM J. NOVAK, NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE 106 (2022) (identifying the railroad industry as being among the "dominant sectors of the late nineteenth- and early twentieth-century American economy").

89. Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 YALE L. J. 1017, 1018 (1988).

90. Albro Martin, *The Troubled Subject of Railroad Regulation in the Gilded Age—A Reappraisal*, 61 J. AM. HIST. 339, 339–40 (1974).

91. *See* H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 534 (1949) (observing that the Commerce Clause is both a "prolific source[] of national power and an equally prolific source of conflict with legislation of the state[s]").

92. *S. Pac. Co.*, 325 U.S. at 763.

93. *See id.* ("Appellant answered, admitting the train operations, but defended on the ground that the statute offends against the commerce clause and the due process clause of the Fourteenth Amendment and conflicts with federal legislation.").

statutes enacted in the exercise of the police power of the state were sustained[.]"[94] And the U.S. Supreme Court agreed.[95]

After setting Southern Pacific's preemption defense aside, the U.S. Supreme Court considered whether Arizona's Train Limit Law could be sustained under *Cooley*—a decision, according to the Court, that, along with *Gibbons*, prevented states from "imped[ing] substantially the free flow of commerce from state to state, or . . . regulat[ing] those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single [federal] authority."[96] According to these standards, the Court concluded that Arizona's regulation could not pass constitutional muster because it "interpose[d] a substantial obstruction to the national policy proclaimed by Congress . . . to promote adequate, economical and efficient railway transportation service."[97]

In reaching its conclusion about the unconstitutionality of Arizona's Train Limit Law, the Supreme Court could not identify any facial discrimination in the Law against out-of-state railroad operators (or, in another formulation, preference for Arizona operators). As in *Barnwell*, this was because the Train Limit Law "applied alike" to trains traveling "interstate" and "intrastate."[98] Had the Court been able to identify facial disparate treatment, the Court in *Southern Pacific* suggested that, following *Barnwell*, the regulation would likely have been unconstitutional. Indeed, the Court in *Southern Pacific* noted that "[r]egulations affecting the safety of [railroad] use must be applied alike to intra state and interstate traffic."[99] According to the Court, this (seemingly *per se*) rule against discrimination was a "safeguard against regulatory abuses,"[100] presumably because differential treatment between in-state and out-of-state entities without justification would vitiate any regulator's claim that it genuinely seeks to advance "safety" or some other legitimate, non-discriminatory state interest.

Even in the absence of facial discrimination against out-of-state railroad operators, Arizona's Train Limit Law could not be saved from successful constitutional challenge. As the Supreme Court observed, "[t]he practical effect of [Arizona's] regulation is to control train

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94. State ex rel. Conway v. S. Pac. Co., 145 P.2d 530, 534 (Ariz. 1943).

95. *S. Pac. Co.,* 325 U.S. at 765 ("We can hardly suppose that Congress, merely by conferring authority on the [ICC] to regulate car service in an 'emergency,' intended to restrict the exercise, otherwise lawful, of state power to regulate train lengths before the Commission finds on 'emergency' to exist.").

96. *Id.* at 767.

97. *Id.* at 773.

98. *See Barnwell*, 303 U.S. at 187.

99. *S. Pac. Co.*, 325 U.S. at 783. In later cases, the Court further emphasized the importance of a transportation regulation's applying "alike" to "interstate and intrastate commerce[.]" See, e.g., Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 523 (1959).

100. *S. Pac. Co.*, 325 U.S. at 783.

operations beyond the boundaries of the state . . . because of the necessity of breaking up and reassembling long trains at the nearest terminal points before entering and after leaving the regulating state."[101] In *Southern Pacific*, this *de facto* burden on out-of-state entities was not sufficiently justified by Arizona's purported interest in railway safety, especially given "the interest of the nation in an adequate, economical and efficient railway transportation service."[102] Importantly, this was because the Train Limit Law's provisions did not appear to "lessen rather than increase the danger of accident."[103] Unlike in *Barnwell*, the Court in *Southern Pacific* therefore invalidated Arizona's regulation because the state's interest in railway safety was not rationally advanced by its regulation. (By way of reminder, in *Barnwell*, the Court conceded that efficient national highways were important, but also that South Carolina's regulation did, in fact, significantly advance its interest in highway safety.)[104]

The Supreme Court ultimately reached different conclusions in *Barnwell* and *Southern Pacific* about the constitutionality of South Carolina's and Arizona's regulations, but its threshold analyses in both cases were analogous.[105] Before applying any form of means-end scrutiny, in fact, the Court in both cases first sought to determine whether the text of the states' regulations revealed some form of (potential) disfavor for out-of-state interests. According to the logic of the Court's decisions in *Barnwell* and *Southern Pacific*, a decisive adjudicatory fact in making this determination would have been the existence of exemptions for in-state entities such that only out-of-state entities were burdened by the regulations. As in other constitutional contexts in which the Court has sought to "discover[] . . . improper governmental motives,"[106] the Court in these two Dormant Commerce Clause cases thus applied a consistent analytical method that was principally concerned with whether the regulations applied evenhandedly to in-state and out-of-state entities. Having not identified any regulatory exemptions, the Court in *Barnwell* and *Southern Pacific* needed not engage in the extensive "motive-hunting"[107] that is easily recognizable when the Court has been presented, contrastingly, with non-comprehensive regulations that burden interstate commerce. Another

101. *Id.* at 775.
102. *Id.* at 783–84.
103. *Id.* at 782.
104. *See Barnwell*, 303 U.S. at 192–96 (describing the safety interests advanced by South Carolina's regulation).
105. *See* McGoldrick, *supra* note 52, at 286–87 (arguing that the Court applied the same "Rational Basis test" in *Southern Pacific* and *Barnwell*).
106. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996).
107. *Id.*

dispute that the Court adjudicated under the Dormant Commerce Clause at mid-century will, in this sense, be illustrative.

C. *Dean Milk Co. v. Madison* (1951)

In *Barnwell* and *Southern Pacific*, the Supreme Court suggested that, under the Dormant Commerce Clause, the existence of facial discrimination against out-of-state entities would, at a minimum, significantly call into question the constitutionality of a regulation seeking to advance health or safety. And, in both cases, the Court appeared to indicate that the existence of exemptions from otherwise generally applicable regulations—which, by their nature, privilege in-state interests—would likely be indicative of a state's unconstitutional disfavor for interstate commerce. In *Dean Milk Company v. Madison*,[108] the Court was presented with one of its first opportunities to apply these doctrinal principles to illustrative regulatory facts.[109]

For more than a century, Wisconsin has been known for its dairy production.[110] Beginning in the 1870s, state-level professional organizations began to be established to promote the Badger State's dairy industry.[111] And, by 1910, Wisconsin was producing nearly 50% of the entire nation's cheese.[112] As one Wisconsinite observed in 1914, with the "courage, enthusiasm and ideals" of "earnest men, unafraid of work," the state had been progressively lifted "ever higher in her progress to leadership in one of the world's great industries."[113] It was 1914, in fact, that closed Wisconsin's "Progressive Era," a nearly two-decade-long period that "transformed Wisconsin's agricultural sector into America's Dairyland, enmeshing the state's farmers in a web of developing national commercial and financial system."[114]

Unsurprisingly protective of its dairy industry, the City of Madison enacted an ordinance in 1949 that "ma[de] it unlawful to sell any milk as pasteurized unless it has been processed and bottled at an approved pasteurization plant within a radius of five miles from the central square of Madison" and that "prohibit[ed] the sale of milk, or

108. 340 U.S. 349 (1951).

109. Again, such privileging of in-state "actors, interests, or activities, to the detriment of interstate or out-of-state equivalents" is "[p]erhaps above all else [what] the dormant Commerce Clause prohibits[.]" Francis, *supra* note 59, at 260.

110. *See* Eric E. Lampard, The Rise of the Dairy Industry in Wisconsin: A Study in Agricultural Change, 1820–1920 (1963); Jerry Apps, Wisconsin Agriculture: A History 65–130 (2015).

111. *See* Edward G. Lange, *Dairying in Wisconsin*, 12 J. Geography 241, 242 (1914) (describing the establishment and operations of the Wisconsin Dairyman's Association).

112. *Id.* at 247.

113. *Id.* at 248.

114. John D. Buenker, The History of Wisconsin: The Progressive Era, 1893–1914, v (1998).

the importation, receipt or storage of milk for sale, in Madison unless from a source of supply possessing a permit issued after inspection by Madison officials[.]"[115] After an Illinois corporation that distributed milk products in Illinois and Wisconsin was "denied a license to sell its products within Madison solely because its pasteurization plants were more than five miles away," it challenged the constitutionality of Madison's ordinance under the Commerce Clause.[116]

As with the state regulations challenged in *Barnwell* and *Southern Pacific*, the ordinance at issue in *Dean Milk* was not preempted by federal legislation. In fact, in *Dean Milk*, the Supreme Court conceded that Congress had affirmatively "recognized the appropriateness of local regulation of the sale of fluid milk."[117] And, as in *Barnwell* and *Southern Pacific*, the Court in *Dean Milk* acknowledged that Madison had a "legitimate local interest[]" in "protect[ing] the health and safety of its people[.]"[118] But because Madison's ordinance facially discriminated against extraterritorial entities, it could not pass constitutional muster. As the Court itself observed, the ordinance "in practical effect exclude[d] from distribution in Madison wholesome milk produced and pasteurized in Illinois" and "plainly discriminate[d] against interstate commerce."[119]

The Supreme Court's decision in *Dean Milk* was analytically continuous with its earlier Dormant Commerce Clause decisions in *Barnwell* and *Southern Pacific* by first seeking to identify facial discrimination in the text of Madison's ordinance, and then applying a form of means-end scrutiny appropriate to the circumstances presented to the Court. Indeed, after noting that Madison's ordinance treated milk producers differently solely based upon their residency (inside or outside of Madison), the Court considered whether there were any "reasonable and adequate alternatives . . . available" to advance Madison's legitimate regulatory interests that imposed lesser burdens on interstate commerce.[120] In doing so, the Court effectively clarified that facial discrimination is not *per se* evidence of unconstitutionality; instead, the Court emphasized that the existence of facial discrimination in a regulation requires the regulator to demonstrate that it is not unnecessarily burdening interstate commerce when the Court applies heightened

115. Dean Milk Co. v. City of Madison, 340 U.S. 349, 350 (1951).

116. *Dean Milk*, 340 U.S. at 352. The Supreme Court "found it necessary" to adjudicate only Dean Milk's Commerce Clause arguments because "the ordinance impose[d] an undue burden on interstate commerce." *Id.* at 353.

117. *Id.* at 353.

118. *Id.* at 354.

119. *Id*.

120. *Id*. at 355.

scrutiny.[121] Because Madison did, in fact, facially discriminate against out-of-jurisdiction producers, it was required to rebut the presumption created by its facial discrimination—namely, that its ordinance unconstitutionally disfavored out-of-jurisdiction producers—by demonstrating that its ordinance advanced a non-discriminatory, legitimate local interest. To allow Madison to rebut this presumption—created, again, by the ordinance's facial discrimination—the Court applied a form of heightened means-end scrutiny that was not similarly applied in *Barnwell* and *Southern Pacific* because, in those cases, no facial discrimination could be identified.

In *Dean Milk*, the Supreme Court found that reasonable and adequate regulatory alternatives were available to advance Madison's interests in health and safety. Echoing *Federalist 22*, the Court observed that "permit[ting] Madison to adopt a regulation not essential for the protection of local health interests" that also "plac[ed] a discriminatory burden on interstate commerce" would "invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause."[122] Madison's preferred regulatory scheme was thus unconstitutional because, as various health officials had testified, milk would not be less safe for consumption in Madison merely because it was inspected by out-of-jurisdiction officials under the same safety standards, and that, even if Madison "prefer[ed] to rely upon its own officials for inspect of distant milk sources, [the cost of] such inspection could [be] charg[ed] . . . to the importing producers and processors."[123] As such, *Dean Milk* confirms that facial discrimination in a commercial regulation requires the government to rebut the presumption created by that discrimination that it is engaged in unconstitutional economic

121. Other scholars have also rightly recognized (or minimally suggested) that the Supreme Court has not articulated such a *per se* test. *See, e.g.*, Francis, *supra* note 59, at 260 ("a discriminatory measure is not automatically invalid"); *id.* at 264–65 (describing how the Court theoretically permits regulators to justify discrimination); James M. McGoldrick, Jr., *The Dormant Commerce Clause: The Endgame—From* Southern Pacific *to* Tennessee Wine & Spirits—*1945 to 2019*, 40 PACE L. REV. 44, 45 (2020) (arguing that "the Court will *almost* certainly find [a] discriminatory state law to violate the Dormant Commerce Clause") (emphasis added). The Court itself has repeatedly stated that discrimination may, under some circumstances, be justified. See, e.g., United Haulers Ass'n, Inc. v. Oneida–Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 339–40 (2007) ("Discriminatory laws motivated by 'simple economic protectionism' are subject to a 'virtually per se rule of invalidity,' which can only be overcome by a showing that the State has no other means to advance a legitimate local purpose") (citing Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); Maine v. Taylor, 477 U.S. 131, 138 (1986)); Tennessee Wine & Spirits Retailers Ass'n v. Thomas, 588 U.S. 504, 518 (2019) ("Under our dormant Commerce Clause cases, if a state law discriminates against out-of-state goods or nonresident economic actors, the law *can be sustained* only on a showing that it is narrowly tailored to 'advanc[e] a legitimate local purpose'") (quoting Department of Revenue of Ky. v. Davis, 553 U.S. 328, 338 (2008)) (emphasis added).

122. *Dean Milk*, 340 U.S. at 356.

123. *Dean Milk*, 340 U.S. at 354–55.

protectionism. And, as the Court's opinion in *Dean Milk* suggests, the government can only effectively rebut that presumption if it demonstrates, at the second step of the Court's inquiry, that the challenged enactment advances a non-discriminatory interest through regulatory means least restrictive of interstate commerce.[124]

D. *Hughes v. Oklahoma* (1979)

Among early and mid-twentieth-century Dormant Commerce Clause decisions, *Dean Milk* is especially illustrative of the Supreme Court's employment of heightened means-end scrutiny to evaluate whether a non-federal commercial regulation that facially discriminates against out-of-jurisdiction entities can nevertheless be constitutionally justified. More than two decades later in *Hughes v. Oklahoma*,[125] the Court again applied its developing Dormant Commerce Clause doctrine to a state regulation that similarly discriminated on its face against extraterritorial interests—albeit this time by expressly exempting in-state residents from a general conservation law. Given the distinctive features of the *Hughes* litigation, the Court's decision there thus helpfully emphasizes that the existence of exemptions from otherwise generally applicable regulatory burdens is powerful evidence that the government seeks to engage in unconstitutional economic (dis)favoritism. Indeed, as *Hughes* illustrates, the existence of such exemptions creates a rebuttable presumption of unconstitutionality that, we will later see, is similarly animating in the Court's Free Exercise Clause jurisprudence.

In 1978, Oklahoma enacted a statute that prohibited the "transport[ation] or ship[ping] of minnows for sale outside the state which were seined or procured within the waters of [the] state."[126] After an Oklahoma official arrested William Hughes for transporting minnows procured within Oklahoma into Texas, Hughes challenged the statute's constitutionality under the Commerce Clause.[127]

In *Hughes*, the Supreme Court began by echoing *Federalist 22* and observing that a "central concern of the Framers [was] that . . . the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among

124. As Professor Richard Fallon once put it, the Supreme Court in *Dean Milk* can therefore be understood as having articulated a "precursor[]" to modern strict scrutiny by "point[ing] to the availability of more narrowly tailored alternatives as a ground for invalidating [local] regulatory legislation that was ostensibly intended to protect health or safety but adversely affected interstate commerce." Fallon, *supra* note 15, at 1309.

125. 441 U.S. 322 (1979).

126. Hughes v. Oklahoma, 441 U.S. 322, 323 (1979).

127. *See Hughes*, 441 U.S. at 324 (describing the facts that gave rise to the litigation).

the States under the Articles of Confederation."[128] Then, the Justices in *Hughes* rearticulated the standard for reviewing non-facially discriminatory commercial regulations that the Court had established nearly a decade earlier in *Pike v. Bruce Church*.[129] "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental," the Court in *Pike* declared, "[the regulation] will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[130]

According to the Supreme Court in *Hughes*, the first analytical step required by *Pike* was to determine "whether the challenged [state] statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect[.]"[131] As to this threshold matter of facial discrimination, Oklahoma's regulation became constitutionally suspect. "[Oklahoma's regulation] on its face discriminates against interstate commerce,"[132] the Court observed, because it "forbids the transportation of natural minnows out of the State for purposes of sale[.]"[133] Given this facial discrimination, the Court in *Hughes* went on to note that "[s]uch facial discrimination by itself may be a fatal defect, regardless of the State's purpose, because 'the evil of protectionism can reside in legislative means as well as legislative ends,'" and that, "[a]t a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives."[134] Echoing the logical premises of *Dean Milk*, in other words, the Court in *Hughes* confirmed that facial discrimination is not *per se* evidence of unconstitutionality, but does significantly call into question the constitutionality of a state's preferred regulatory scheme such that a heightened standard of review will be applied. Application of this heightened standard, the theory goes, better enables the Court to "flush out illicit [regulatory] motivations and to invalidate actions infected with them."[135]

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128. *Id.* at 325.

129. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). For a normative critique of *Pike*, *see* Andrew Jordan, *Commerce in the Balance*, 38 CONST. COMM. 179 (2023).

130. *Pike*, 397 U.S. at 142 (quoted in Hughes, 441 U.S. at 331). *Pike* was decided after *Barnwell* and *Southern Pacific*, but the test that the Court articulated in *Pike* well explains its decisions in those earlier cases because South Carolina and Arizona's laws regulated even-handedly and therefore were subject merely to a form of rational-basis review.

131. *Hughes*, 441 U.S. at 336.

132. *Id.*

133. *Id.* at 336–37.

134. *Id.* at 337 (quoting Phila. v. New Jersey, 437 U.S. 617, 626 (1978)).

135. Kagan, *supra* note 106, at 414.

After identifying facial discrimination in the text of Oklahoma's statute, the Supreme Court applied a form of heightened scrutiny by asking: (1) "whether the statute serve[d] a legitimate local purpose," and (2) "whether alternative means could promote this local purpose as well without discriminating against interstate commerce."[136] In *Hughes*, the Court acknowledged Oklahoma's "legitimate" interest in "maintaining the ecological balance in state waters by avoiding the removal of inordinate numbers of minnows,"[137] but simultaneously held that Oklahoma had effectively rendered its purported conservation interest meaningless by exempting in-state minnow fishers from any production limit. In the Court's words, by "plac[ing] no limits on the numbers of minnows that can be taken by licensed minnow dealers nor [limiting] in any way how these minnows may be disposed of within the State," Oklahoma revealed that its primary regulatory interest was not in conservation, but rather in discriminating against interstate commerce.[138]

From a doctrinal perspective, Oklahoma's exemption of its minnow fishers from its otherwise generally applicable conservation statute led the Supreme Court, at the first step of its inquiry, to understand the statute to have created a rebuttable presumption of unconstitutionality. Evidently, when the Court was led by the existence of these exemptions to apply heightened means-end scrutiny at the second step of its inquiry, Oklahoma could not rebut this presumption. "Far from choosing the least discriminatory [regulatory] alternative," the Court observed, "Oklahoma . . . chose[] to 'conserve' its minnows in the way that most overtly discriminates against interstate commerce."[139] For these reasons, the Court held that Oklahoma's facially discriminatory regulation—one that, again, prominently exempted in-state fishers—was "repugnant to the Commerce Clause."[140] Thus, at both the first and second steps of the Court's analysis, it is clear that the existence of exemptions for preferred (in-state) fishers was a decisive adjudicatory fact. Why? Because, as Professor Richard Fallon once argued, when "more narrowly tailored [regulatory] alternatives exitst[], the most plausible explanation [for the government's preferred regulatory scheme] will typically be that the state legislated with the impermissible motivation of protecting in-state interests against out-of-state competition."[141] In its next major Dormant Commerce Clause decision—handed down just two years after *Hughes*—the Court again affirmed that it would use

136. *Hughes*, 441 U.S. at 336.
137. *Id.* at 337.
138. *Id.* at 338.
139. *Id.* at 337–38.
140. *Id.* at 338.
141. Fallon, *supra* note 15, at 1309.

its traditional doctrinal tools to determine whether a challenged government enactment sought to unconstitutionally disfavor out-of-state entities.

E. *Kassel v. Consolidated* (1981)

In *Hughes*, the Supreme Court built upon its decades-old line of leading Dormant Commerce Clause decisions to emphasize that facial discrimination against interstate commerce significantly calls into question the constitutionality of state commercial regulations, even when those regulations purport to advance legitimate non-federal interests. In doing so, the Court in *Hughes* moreover confirmed that exempting in-state entities from otherwise generally applicable regulatory burdens is decisive evidence of facial discrimination against interstate commerce that creates a rebuttable presumption of unconstitutionality—a presumption to which the government can respond when the Court applies a heightened form of means-end scrutiny designed to ferret out constitutionally impermissible discrimination at the second step of its inquiry. When Iowa limited the length of trucks traveling on its interstate highways to improve safety, but built into its regulation various types of exemptions, the Court was presented with another opportunity to clarify this relationship between regulatory exemptions and unconstitutional discrimination against interstate commerce.

Though popularly known for its corn production industry,[142] Iowa also contains within its borders, among other important national highways, Interstate 80, "the principal east-west route linking New York, Chicago, and the west coast."[143] Upon recognizing that it could not operate some of its vehicles in Iowa because of the state's unique prohibition on trucks greater than 55 feet in length, Consolidated Freightways Corporation brought suit against Iowa under the Commerce Clause in 1980.[144]

In introducing the dispute in *Kassel v. Consolidated*, the Supreme Court first noted that Iowa's regulation had built-in exemptions for certain types of vehicles. For example, the Court listed no less than five specific types of trucks that could exceed the 55-foot length limit.[145] Additionally, Iowa's seemingly general regulation of vehicles traveling

142. Casey Leins, *10 Things to Know About Iowa*, U.S. News & World Rep. (Oct. 11, 2019) (noting that "Iowa produces more corn than any other state, with farmers harvesting 12.8 million acres of corn in 2018").

143. Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662 (1981).

144. *Id.* at 667.

145. *See id.* at 665–66 (noting that "[d]oubles, mobile homes, trucks carrying vehicles such as tractors and other farm equipment, and singles hauling livestock, are permitted to be as long as 60 feet").

within its borders also "permit[ted] cities abutting the [Iowa] state line by local ordinance to adopt the length limitations of the adjoining State," an exemption allowing "otherwise oversized trucks" to be "permitted within city limits and in nearby commercial zones."[146] Finally, the Court noted that "[a]n Iowa truck manufacturer may obtain a permit to ship trucks that are as large as 70 feet," and that "[p]ermits also are available to move oversized mobile homes" (presumably greater than 55 feet) under certain circumstances.[147]

Responding to Consolidated's lawsuit, Iowa contended that its exemption-replete regulatory scheme was a "reasonable safety measure enacted pursuant to its police power" because, in the state's view, 65-foot trucks were "more dangerous than" those under 60 feet.[148] "But the incantation of a purpose to promote the public health or safety," the Supreme Court in *Kassel* responded, "does not insulate a state law from Commerce Clause attack."[149] Rather, the Court acknowledged that it was required to engage in a heightened form of means-end scrutiny to determine whether Iowa sought to discriminate against interstate commerce or legitimately advance highway safety.[150]

For our purposes, the most important feature of *Kassel* is the Supreme Court's reflections on how the exemptions built-in to Iowa's regulatory scheme ultimately vitiated its constitutionality. "Iowa's scheme, although generally banning large doubles from the State," the Court observed, "nevertheless has several exemptions that secure to Iowans many of the benefits of large trucks while shunting to neighboring States many of the costs associated with their use."[151] "At the time of trial," the Court continued, "there were two particularly significant exemptions. First, singles hauling livestock or farm vehicles were permitted to be as long as 60 feet . . . Second cities abutting other States were permitted to enact local ordinances adopting the larger length limitation of the neighboring State."[152] Thus, the Court concluded that Iowa's regulatory scheme "offered the benefits of longer trucks to individuals and businesses in important border cities without burdening Iowa's highways with interstate through traffic."[153]

146. *See id.* at 666.
147. *Id.*
148. *See id.* at 667.
149. *See id.* at 670.
150. *See id.* at 670–71 (observing that "the constitutionality of the state regulation depends on . . . 'a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce'") (internal citations omitted).
151. *See id.* at 676.
152. *Id.* (internal citations omitted).
153. *Id*. (internal citations omitted).

According to the Supreme Court in *Kassel*, Iowa's "statutory exemptions, their history, and the arguments that Iowa has advanced in support of its law in this litigation" revealed that Iowa's goal was to "discourage interstate truck traffic," not "ban dangerous trucks[.]"[154] True to the "spirit"[155] of *Federalist 22*, the Court in *Kassel* therefore invalidated Iowa's regulation because it purported to advance a legitimate local interest, but did so through unnecessarily discriminatory means. Consequently, *Kassel* represents yet another example of the Court's recognition that regulatory schemes replete with exemptions are unlikely to pass constitutional muster. Indeed, unable to rebut the presumption of unconstitutionality created by the existence of exemptions in its regulation, Iowa was found to be engaged in a constitutionally impermissible form of discrimination against interstate commerce.[156]

F. *National Pork Producers Council v. Ross* (2023)

From *Barnwell* to *Kassel*, the Supreme Court sought to reconcile the Hamiltonian desire for a productive national economy with the traditionally Jeffersonian desire to privilege local self-governance.[157] And, despite the Court's articulation of various specific strands of Dormant Commerce Clause doctrine, it settled in the twentieth century on a consistent conviction that: (1) a non-federal regulator's facial discrimination against interstate commerce creates a rebuttable presumption of unconstitutionality, (2) the existence of exemptions from generally applicable regulatory burdens favoring in-jurisdiction interests is decisive evidence of such facial discrimination, and (3) a facially discriminatory regulation of interstate commerce will be subjected to a heightened standard of means-end scrutiny that is designed to ferret out constitutionally impermissible disfavor for interstate commerce. For whatever its specific adjustments were to its Dormant

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154. *Id.* at 677–78.

155. *See* Saikrishna B. Prakash, *The Spirit of the Law: "Controuling the Letter by the Plain Spirit*,*"* 173 Penn. L. Rev. 937, 1024 (2025).

156. *See Kassel*, 450 U.S. at 675–76. Like Arizona in *Southern Pacific*, Iowa in *Kassel* was unable to demonstrate the necessity of its regulation because the state merely presented "weak[]" safety evidence. *Id.*

157. *See, e.g.*, Anwar Hussain Syed, The Political Theory of American Local Government 38 (1996) (describing Thomas Jefferson as the "first and also the foremost . . . advocate of local self government"). For further discussion of the tradition of American localism, *see* Alexis De Tocqueville, Democracy in America 74 (Harvey C. Mansfield & Delba Winthrop eds., 2000) (describing the importance of townships to American democracy); *id.* at 274 (identifying the "federal form that the Americans have adopted" as "permit[ting] the Union to enjoy the power of a great republic and the security of a small one," and the township as "moderating the despotism of the majority. . . [and] at the same time giv[ing] the people the taste for freedom and the art of being free").

Commerce Clause jurisprudence in *National Pork Producers v. Ross*,[158] the Court's decision there reveals that these aspects of its jurisprudence have endured.

In November 2018, 68% of California voters approved "a ballot initiative that . . . announced new standards for the in-state sale of pork and veal products."[159] This initiative, known popularly as Proposition 12, "forb[ade] the in-state sale of whole pork meat that comes from breeding pigs (or their immediate offspring) that are 'confined in a cruel manner.'"[160] Shortly after California voters approved Proposition 12, the National Pork Producers Council and the American Farm Bureau challenged the law's constitutionality under the Commerce Clause.[161] According to the Council and Bureau, the costs required to comply with the law would "fall on California and out-of-state producers alike," but "because California imports almost all the pork it consumes . . . 'the majority' of Proposition 12's compliance costs [would] be initially borne by out of state firms."[162]

At the outset of its opinion in *Ross*, the Supreme Court took care to note that, like in the twentieth-century Dormant Commerce Clause cases described above, Congress had not preempted Proposition 12 by adopting a law "regulating pork production."[163] And, as in these cases, the Court in *Ross* continued to observe that the mere absence of preemptive federal legislation did not resolve the question of Proposition 12's constitutionality. Rather, citing *Gibbons*, *Cooley*, and other nineteenth-century Commerce Clause precedents, the Court in *Ross* affirmed that "state laws offend the Commerce Clause when they seek to 'build up . . . domestic commerce' through 'burdens upon the industry and business of other states[.]'"[164]

In *Ross*, the Supreme Court characterized its Dormant Commerce Clause jurisprudence as resting on an "antidiscrimination principle[.]"[165] Because "Proposition 12 impose[d] the same burdens on in-state pork producers that it impose[d] on out-of-state ones," however, both the parties arguing before the Court and the Court itself set aside issues of discrimination to resolve the case.[166] And yet, the Court in *Ross* (which upheld the constitutionality of Proposition 12) affirmed the insight of *Dean Milk*, *Hughes*, and other similar twentieth-century

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158. 598 U.S. 356 (2023).
159. Nat'l Pork Producers v. Ross, 598 U.S. 356, 365 (2023).
160. *Id.* at 365–66 (quoting Cal. Health & Safety Code Ann. § 25990(b)(2) (West Cum. Supp. 2023)).
161. *See id.* at 367 (describing the facts that gave rise to the litigation).
162. *Id.*
163. *Id.* at 368.
164. *Id.* at 369 (quoting Guy v. Baltimore, 100 U.S. 434, 443 (1880)).
165. *Id*.
166. *Id.* at 370.

Dormant Commerce Clause decisions that treating extraterritorial entities differently merely because of their residence outside of the regulating entity's borders calls into question the constitutionality of a state health or safety regulation—even if the constitutional questions that inhere with such differential treatment do not lend support for an "'almost *per se*' rule against laws that have the 'practical effect' of 'controlling' extraterritorial commerce[.]"[167] Thus, after again affirming that "antidiscrimination principle[s]"[168] lie at the heart of its Dormant Commerce Clause jurisprudence, the Court explained how, under *Pike*, a facially neutral state regulation of interstate commerce may still evince an unconstitutional "discriminatory purpose" through its "practical effects[.]"[169]

These insights place *Ross* squarely within the line of Dormant Commerce Clause decisions stretching from *Barnwell* to *Kassel*. In this line of decisions, the Supreme Court consistently has taught that facially discriminatory regulations (*Dean Milk*, *Hughes*, *Kassel*) are most likely to be constitutionally suspect, even if they are not *per se* unconstitutional, and that, even facially neutral regulations (*Barnwell*, *Southern Pacific*) may still fail to pass constitutional muster if they burden out-of-jurisdiction interests more substantially than in-jurisdiction interests without rational justification. In the former set of circumstances, the existence of exemptions from generally applicable regulatory burdens (favoring in-jurisdiction entities) has provided decisive evidence of facial discrimination and has, therefore, created a rebuttable presumption of unconstitutionality. This presumption has required the Court's application of heightened means-end scrutiny at the second step of its inquiry. Contrastingly, in the latter set of circumstances, facial neutrality has required the Court to merely apply a form of rational-basis review that is exceedingly deferential to the government's preferred regulatory scheme if it legitimately advances the government's interests in, for example, health and safety.

Again, though stipulated away by the parties in *Ross*, perhaps the clearest lesson of these Dormant Commerce Clause decisions is that the existence of exemptions from otherwise generally applicable regulatory burdens raises a specter of unconstitutionality because those exemptions frequently reveal that regulators do not seek genuinely to advance their regulatory interests, but rather to engage in a pernicious form of interstate economic discrimination. As we will see, this lesson—and the attendant "test of illicit motives"[170] that the Supreme

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167. *Id.* at 375.
168. *Id.* at 376.
169. *Id.* at 377.
170. Fallon, *supra* note 15, at 1308.

Court has designed[171] as a result—long has been instructive for the Court's Free Exercise Clause jurisprudence, too.

IV. EXEMPTIONS AND THE FREE EXERCISE CLAUSE

Like the Dormant Commerce Clause, the Religion Clauses of the First Amendment have at their heart a principle of nondiscrimination.[172] As Professors Christopher Eisgruber and Lawrence Sager rightly observed nearly two decades ago, "the Constitution's religion-specific goal is that of opposing discrimination[.]"[173] Consequently, it should come as little surprise that the Supreme Court's treatment of government regulations that burden religion frequently has been concerned with whether the government has sought to disfavor (or, in a firmer formulation, discriminate against) religious believers and institutions. And, just as the Court has designed doctrinal tools in the Dormant Commerce Clause context to enable it to discern whether the government has sought to impermissibly disfavor interstate commerce,

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171. As Professors Jack Goldsmith and Alan Sykes have argued, the Supreme Court has "devised a number of tests" that, at least in part, seek to make concrete the Dormant Commerce Clause's "central prohibition . . . on protectionist state legislation that discriminates against out-of-staters." Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 788 (2001). More recently, Professors Goldsmith and Sykes have noted that, in *Ross*, the Court emphasized that the "core concern" of *Pike* was "to smoke out a law's discriminatory purpose or impact[.]" Goldsmith & Sykes, *supra* note 52, at 132; *see also id.* at 137 ("*Ross* confirms that a primary function of the [Dormant Commerce Clause] is to condemn state policies that discriminate against interstate commerce and insulate in–state firms from competition with out–of–state firms—classic 'protectionism'").

172. *See Nat'l Pork Producers*, 598 U.S. at 369 (characterizing the Supreme Court's Dormant Commerce Clause jurisprudence as resting on an "antidiscrimination principle").

173. CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 9 (2007). Other scholars have characterized the aim(s) of the Religion Clauses somewhat differently, but there appears to be agreement as to the Religion Clauses' fundamental principle of non-discrimination. *See* KENT GREENWALT, 2 RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 12 (2008) (describing various theories); *see also, e.g.*, KATHLEEN A. BRADY, THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW: RETHINKING RELIGION CLAUSE JURISPRUDENCE 3 (2015) (arguing that "protect[ing] religion from discriminatory laws" is the "new paradigm" of Free Exercise Clause jurisprudence); Richard W. Garnett & Andrew Koppelman, *Introduction: The Many Paths to Neutrality, in* FIRST AMENDMENT STORIES 4 (Richard W. Garnett & Andrew Koppelman eds., 2012) (describing the Supreme Court's jurisprudence of the Religion Clauses as "striving . . . toward neutrality [between religion and non-religion]"); John Witte, Jr., *Introduction, in* NO ESTABLISHMENT OF RELIGION: AMERICA'S ORIGINAL CONTRIBUTION TO RELIGIOUS LIBERTY 3 (T. Jeremy Gunn & John Witte, Jr. eds., 2012) (observing that the Religion Clauses were "designed to end what James Madison called the Western 'career of intolerance'"); T. Jeremy Gunn, *The Separation of Church and State Versus Religion in the Public Square: The Contested History of the Establishment Clause, in id.* at 39 (describing the ultimate objective of the Religion Clauses as "achieving a society where . . . the government's power is not deployed in favor or against any religious belief"); *cf.* Rothschild, *supra* note 7, at 526–29 (surveying historical scholarship on the Religion Clauses and articulating an "antireligious persecution" theory of the Religion Clauses that would seem to "forbid[] intentional discrimination").

so too has the Court similarly employed particular doctrinal tools in the Free Exercise Clause context to discern whether the government has sought to impermissibly discriminate against religion. As has been suggested, in making this determination, the presence or absence of exemptions is often a crucial adjudicatory fact.

In the context of Dormant Commerce Clause disputes, the Supreme Court traditionally has begun its constitutional inquiry by determining whether a state or local government's commercial regulation is facially neutral. When the Court has found that the government's regulation is facially neutral—because, for example, the regulation *does not* exempt preferred (in-jurisdiction) entities from a general regulatory burden—it then has sought to determine whether the challenged regulation nevertheless impacts entities outside of the jurisdiction. To facially neutral regulations of interstate commerce, the Court merely has applied a form of rational basis review, as it did in *Barnwell* and *Southern Pacific*.[174] Under this standard, the government's facially neutral regulation has been upheld when the government has demonstrated that it selected a regulatory course that rationally advanced its regulatory interest(s). In *Barnwell*, the Court found that South Carolina's highway regulation did, in fact, advance its interest in highway safety; in *Southern Pacific*, contrastingly, the Court found that Arizona's train regulation did not, in fact, advance its interest in railway safety. When the government has discriminated facially against interstate commerce, however, this analytical framework has changed markedly.

When the Supreme Court has found that a state or local government's commercial regulation is *not* facially neutral—because, for example, it *does* exempt preferred (in-jurisdiction) entities from a general regulatory burden—the Court has applied a cognizably more stringent standard of review. As the Court clarified in *Ross*, no *per se* rule of constitutionality is violated when the text of a commercial regulation indicates that it will impose some form of burden on out-of-jurisdiction entities. But as demonstrated in *Dean Milk*, *Hughes*, and *Kassel*, non-federal commercial regulations that treat entities differently solely based on their residency are scrutinized far more closely to "ensure that the government has not purposely targeted" interstate commerce for disfavored treatment.[175]

To be sure, the Supreme Court has not described its employment of heightened means-end scrutiny after identifying such facial discrimination as "strict scrutiny." But in effect, the Court's analyses of Madison's milk ordinance (*Dean Milk*), Oklahoma's conservation law

174. See *supra* Sections III.A.–B.
175. Fallon, *supra* note 15, at 1308.

(*Hughes*), and Iowa's truck-length law (*Kassel*) reveal that the Court has applied far more than mere rational-basis review when considering the constitutionality of facially discriminatory regulations of interstate commerce. Indeed, in these cases, the Court did not simply seek to determine whether the government had identified a rational basis for pursuing its preferred regulatory course and had chosen a rational means of advancing its non-federal regulatory interest(s). Rather, in these cases, the Court acted as though the existence of facial discrimination in the challenged regulations created a rebuttable presumption of unconstitutionality. Why? Because, as especially revealed in *Hughes* and *Kassel*, the existence of exemptions for in-jurisdiction entities often indicates that a regulator is engaged in a form of constitutionally impermissible discrimination. To rebut this presumption, the Court therefore has required regulators to identify non-discriminatory regulatory interests that they have sought to advance, and explain how their chosen regulatory schemes advanced those interests in ways that least burdened interstate commerce.

It goes without saying, but the Supreme Court's Free Exercise Clause jurisprudence does not seek to prevent the economic balkanization that Alexander Hamilton described in *Federalist 22* and that motivated the inclusion of the Commerce Clause in Article I. Over the last four decades, however, the Court has been particularly concerned with the religious discrimination that the Religion Clauses were designed to prevent.[176] Just as the Court under the Dormant Commerce Clause has leveraged the presence or absence of exemptions in challenged commercial regulations to determine whether regulators have been engaged in impermissible forms of inter-state discrimination, so too has the Court leveraged the presence or absence of exemptions in challenged regulations burdening religion to determine whether regulators have been engaged in impermissible forms of religious discrimination.

This Section begins by describing how, since *Employment Division v. Smith*, the Supreme Court has analyzed facially discriminatory regulations that burden religion. In doing so, this Section emphasizes that the presence or absence of exemptions from otherwise generally applicable regulatory burdens bears significantly on challenged regulations' constitutionality. In fact, when the Court has identified the existence of an exemption for a preferred (non-religious) entity in a regulation, the Court has understood that exemption to have created a rebuttable presumption of unconstitutionality. Like in the Dormant Commerce Clause context, to rebut this presumption in Free Exercise

176. *See* Religion and the American Constitutional Experiment 267–73 (John Witte, Jr., Joel A. Nicholas & Richard W. Garnett eds., 5th ed. 2022) (describing the (re)emergence of "equal treatment" jurisprudence in the early 1980s).

Clause litigation, the Court has required the government to identify a non-discriminatory regulatory interest that it has sought to advance, and explain how its chosen regulatory scheme advances that interest in a way that least burdens religion. In concluding, this Section therefore makes clear that the Court's approach to religious exemption litigation is not especially unique, but instead resembles in important respects the Court's approach to Dormant Commerce Clause litigation. Once again, in both contexts, exemptions are key.

A. *Church of Lukumi v. Hialeah* (1993)

In its much debated[177] 1990 decision in *Smith*, the Supreme Court held "that the government may 'enforce a law that burdens a particular religious practice . . . [if] the law is both neutral and of general applicability[.]'"[178] When a challenged law has been found to be "neutral" and "generally applicable" post-*Smith*, therefore, the Court merely has reviewed that law under its rational-basis standard. By the same token, when a challenged law has been found not to be "neutral" and/or "generally applicable," the Court has applied strict scrutiny.

In its 1993 decision in *Church of Lukumi v. Hialeah*,[179] the Supreme Court defined non-"neutral" laws as those that "target religious beliefs as such[.]"[180] But in *Lukumi*, the text of the challenged local ordinances did not appear to "target religious conduct 'on their face,'" at least according to the district court below.[181] Thus, the Supreme Court there had to confront the question of whether a government regulation burdening religion can be immunized from strict scrutiny merely by obscuring in its text its underlying discriminatory purpose.

In the nineteenth century, "hundreds of thousands of members of the Yoruba people were brought as slaves from western Africa to Cuba[.]"[182] In this process, "their traditional African religion absorbed

177. *See* Wieboldt, *supra* note 28, at 77–80 (discussing recent debates about *Smith*).

178. *Id.* at 74 (quoting Constitutional Law 1291 (Gregory E. Maggs & Peter J. Smith eds., 6th ed. 2023)). For further discussion of *Smith* and the context in which the case was litigated, *see* Carolyn N. Long, Employment Division, Department of Human Resources v. Smith*: The Battle for Religious Freedom, in* Law & Religion 107–23 (Leslie C. Griffin ed., 2010).

179. 508 U.S. 520 (1993).

180. Church of Lukumi v. Hialeah, 508 U.S. 520, 533 (1993).

181. *Lukumi*, 508 U.S. at 529 (quoting the district court's decision below). Although the Supreme Court has more recently described the ordinances challenged in *Lukumi* as "facially neutral," the Court's analysis in *Lukumi* reveals that the ordinances were not, in fact, facially neutral. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 461 (2012) (describing the ordinances challenged in *Lukumi* as being "facially neutral"). As will become clear, the Court's decision in *Lukumi* describes at length how the text of the challenged ordinances and their practical effects evinced the government's lack of neutrality (facial and otherwise) towards religion.

182. *Lukumi*, 508 U.S. at 524.

significant elements of Roman Catholicism."[183] "The resulting syncretion . . . is Santeria, 'the way of the saints.'"[184] This faith "teaches that every individual has a destiny from God, a destiny fulfilled with the aid and energy of the *orishas* [spirits][.]"[185] Crucially, "one of the principal forms of devotion [to the *orishas*] is an animal sacrifice."[186] Given their persecution in Cuba, adherents of the Santerían religion brought their families and religious practices to South Florida in the 1950s and 1960s.[187] In time, this move of a "'great urban people who have lived in cities for at least one thousand years . . . [with] subtle and complex religious ways of life'" would set up a clash with a hostile community in Hialeah, Florida.[188]

In 1987, the Santería-practicing Church of the Lukumi Babalu Aye "leased land in the City of Hialeah . . . and announced plans to establish a house of worship"[189] and other related community institutions. Through these efforts, the leader of the Church "indicated that the Church's goal was to bring the practice of the Santería faith, including its ritual of animal sacrifice, into the open."[190] But this was cause for grave concern among residents in Hialeah, leading the city council to adopt a resolution noting "the 'concern' expressed by residents of the city 'that certain religions may propose to engage in practices which are inconsistent with public morals, peace, or safety[.]'"[191] Shortly thereafter, the council approved an emergency ordinance that "subjected to criminal punishment 'whoever . . . unnecessarily or cruelly . . . kills any animal.'"[192]

Various additional public efforts were undertaken by Hialeah's city council in the summer and fall of 1987 to formally express the community's opposition to the Santerians' sacrificial practices.[193]

183. *Id*.

184. *Id*.

185. *Id.*

186. *Id*.

187. *See id.* at 525 (referencing the district court's factual findings below). For further discussion of the historical context in which *Lukumi* arose, see, e.g., Larry Catá Backer, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*: The Protection of Majority Religions' Privilege at the Nexus of Race, Class, and Ethnicity, in* Long, *supra* note 178, at 127–40.

188. Richard W. Garnett, Andrew Koppelman & Kenneth L. Karst, First Amendment Stores 443 (Foundation Press, 1st ed. 2011) (quoting a scholar of Santerían religion).

189. *Lukumi*, 508 U.S. at 525–26.

190. *Id.* at 526.

191. *Id*. (quoting from the resolution).

192. *Id*. (quoting from the ordinance that incorporated a state animal cruelty law).

193. As Professor Linda McClain has rightly noted, these public efforts were critical to Justice Kennedy's opinion in *Lukumi* (on behalf of a unanimous Court). Moreover, Professor McClain has rightly suggested that, as a general matter, when government officials employ discriminatory "rhetoric," challenged regulations that they are involved in drafting or executing are more likely to be constitutionally suspect. *See* Linda McClain, Who's The Bigot? Learning From Conflicts Over Marriage and Civil Rights Law 205–09

Of greatest importance to the lawsuit that the Church of Lukumi brought against Hialeah, however, were three "substantive ordinances addressing the issue of religious animal sacrifice."[194] One of these ordinances prohibited all animal killings "not for the primary purpose of food consumption," but further stipulated that the prohibition would *only* apply to "any individual or group that 'kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed.'"[195] Importantly, this ordinance also "contained an exemption for slaughtering by 'licensed establishment[s]' of animals 'specifically raised for food purposes.'"[196] And another one of these ordinances prohibited "slaughter outside of areas zoned for slaughterhouse use,"[197] but "provided an exemption . . . for the slaughter or processing for sale of 'small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law.'"[198]

The federal district court that first considered a challenge to Hialeah's regulatory scheme "concluded that the purpose of the ordinances was not to exclude the Church of Lukumi from the city but to end the practice of animal sacrifice, for whatever reason practiced[.]"[199] And so, to advance "'public health and welfare,'" Hialeah, that court held, could "'incidental[ly]'" burden the Church's religious free-exercise rights.[200] Indeed, the district court found that Hialeah's ordinances advanced its interests in preventing "emotional injury to children who witness the sacrifice of animals," "protecting animals from cruel and unnecessary killing," "restricting the slaughter or sacrifice of animals to areas zoned for slaughterhouse use," and limiting the "substantial health risk[s]" that accompany "animal sacrifices[.]"[201]

In its review of the district court's decision below (that was summarily affirmed by the Eleventh Circuit),[202] the Supreme Court first re-articulated the nondiscrimination principle that lies at the heart

(2020) (identifying the resonances between Justice Kennedy's opinions in *Lukumi* and *Masterpiece Cakeshop v. Colorado C.R. Comm'n*, 584 U.S. 617 (2018)).

194. *Lukumi*, 508 U.S. at 527.

195. *Id.* (quoting from the ordinance).

196. *Id.* at 528 (quoting from the ordinance).

197. *Id.*

198. *Id.* (quoting from the ordinance).

199. *Id.* at 529.

200. *Id*. (quoting from Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 688 F. Supp 1522 (S.D. Fla. 1988)).

201. *Lukumi*, 508 U.S. at 529–30.

202. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 936 F.2d 586 (11th Cir. 1991).

of the Religion Clauses.[203] Then, the Court observed that a law is not "neutral" (as that term was used three years earlier in *Smith*) if "the object of [the] law is to infringe upon or restrict practices because of their religious motivation[.]"[204] To determine whether the "object or purpose of [a] law" is to disfavor religion, the Court instructed that judges begin by identifying any facial discrimination in challenged regulatory schemes.[205]

On the facts of *Lukumi*, the Supreme Court averred that Hialeah's references to "sacrifice" and "ritual" in the text of its ordinances suggested the existence of "facial discrimination," but noted shortly thereafter that this alone could not be "conclusive."[206] As such, the Court affirmed that "[f]acial neutrality [was] not determinative" of the ordinances' constitutionality.[207] And, the Court further noted that facially neutral regulations would not be immune from serious constitutional scrutiny merely because they did not discriminate against religion on their face. In the Court's words, "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality . . . [t]he Free Exercise Clause protects against governmental hostility which is masked as well as overt."[208]

Applying these non-discrimination principles to the facts of *Lukumi*, the Supreme Court ultimately found that both the text of Hialeah's ordinances and their practical effects revealed that the primary objective of the city's preferred regulatory scheme was to impermissibly discriminate against Santerían s.[209] In fact, following Justice Harlan's concurrence in *Walz v. Tax Commission of City of New York*[210]—in which Justice Harlan articulated his concerns about legislative "religious gerrymander[s]"[211]—the Court in *Lukumi* concluded that Hialeah's ordinances did not advance the government's potentially "legitimate" interests in, for example, limiting "the suffering or mistreatment visited upon the sacrificed animals and health hazards [that inhere] from

203. *Lukumi*, 508 U.S. at 532 (describing the Supreme Court's Establishment Clause decisions as "forbid[ding] [as] an official purpose to disapprove of a particular religion or of religion in general," and its Free Exercise Clause decisions as prohibiting "discriminat[ion] against some or all religious beliefs . . . [and] conduct because [they] are undertaken for religious reasons").

204. *Id.* at 533.

205. *Id*. ("To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face.").

206. *Id.* at 534.

207. *Id*.

208. *Id*.

209. *Id*. ("The record in this case compels the conclusion that suppression of the central element of the Santería worship service was the object of the ordinances.").

210. 397 U.S. 664 (1970).

211. Walz v. Tax Comm'n of City of N.Y., 397 U.S. 664, 694 (1970) (Harlan, J., concurring).

improper disposal."[212] Rather, the Court found that Hialeah specifically designed its ordinances only (or at least primarily) to impose regulatory burdens on Santeríans' religious conduct, and not also on comparable non-Santerían conduct. And to reach this conclusion, the Court in *Lukumi* unsurprisingly looked to the existence of regulatory exemptions in the text of Hialeah's ordinances—the first step in a longstanding two-step inquiry designed to "flush out illicit [regulatory] motives and to invalidate actions infected with them."[213]

As in the Dormant Commerce Clause cases introduced above, the Supreme Court in *Lukumi* first sought to identify the existence of exemptions in Hialeah's regulatory scheme to determine whether its ordinances likely evinced a constitutionally impermissible form of religious disfavoritism. For example, the Court in *Lukumi* observed that Hialeah created an exemption in its ordinances that permitted "almost all killings of animals *except* for religious sacrifice[.]"[214] "Careful drafting," the Court continued, "ensured that, although Santería sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished."[215] Additionally, the Court found that Hialeah exempted from regulation "'any licensed [food] establishment' with regard to 'any animals which are specifically raised for food purposes,' if the activity is permitted by zoning and other laws."[216] Not only did this exemption seem "intended to cover kosher slaughter," but it also confirmed that "the burden of [Hialeah's scheme], in practical terms, falls on Santería adherents but almost no others[.]"[217] Finally, the Court found that one of the ordinances' allegedly most facially neutral provisions—punishing "[w]hoever . . . unnecessarily . . . kills any animal"[218]—was, in practical effect, only poised to impose burdens on Santeríans.

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212. *Lukumi*, 508 U.S. at 535–36 (referencing Walz, 397 U.S. at 694 (Harlan, J., concurring)).

213. *See* Kagan, *supra* note 106, at 414.

214. *Lukumi*, 508 U.S. at 536 (emphasis added).

215. *Id.*

216. *Id*.

217. *Id*.

218. *Id.* at 537 ("Ordinance 87-40 incorporates the Florida animal cruelty statute. Its prohibition is broad on its face, punishing 'whoever . . . unnecessarily . . . kills any animal.' The city claims that this ordinance is the epitome of a neutral prohibition. The problem, however, is the interpretation given to the ordinance by respondent and the Florida attorney general. Killings for religious reasons are deemed unnecessary, whereas most other killings fall outside the prohibition. The city, on what seems to be a per se basis, deems hunting, slaughter of animals for food, eradication of insects and pests, and euthanasia as necessary. There is no indication in the record that respondent has concluded that hunting or fishing for sport is unnecessary." (internal citations omitted)). Among other constitutional problems, this ordinance "require[d] an evaluation of the particular justification for the killing" that, in the language of *Smith*, represented a constitutionally impermissible "system of 'individualized governmental assessment of the reasons for the relevant conduct.'" *Id.*

The exemptions built into the text of Hialeah's ordinances imposed unique burdens on Santerı́ans, therefore creating a rebuttable presumption of unconstitutionality to which Hialeah could have effectively responded when the Supreme Court applied strict scrutiny. As in several of the Dormant Commerce Clause cases introduced above, however, the Court in *Lukumi* repeatedly found that Hialeah failed to do so because the ordinances' exemptions undermined the city's asserted regulatory interests.[219] For instance, the Court acknowledged that Hialeah had a legitimate regulatory interest in "prohibiting cruel methods of killing."[220] But, given that Hialeah designed an exemption to permit kosher slaughter, but not Santerı́an, the Court held that the existence of the exemption suggested that Hialeah's regulatory interest was not actually in preventing animal cruelty.[221] This disfavorable treatment for Santerı́an religion, the Court went on to conclude, could not survive judicial scrutiny:

> The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santería adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense.[222]

Although the Supreme Court in *Lukumi* could have applied strict scrutiny after determining that Hialeah's ordinances were not "neutral" (under *Smith*), the Court continued to discuss *Smith*'s second requirement—namely, that a law be "generally applicable" if it is to be immunized from strict scrutiny. Here too, the Court found that the existence of exemptions in Hialeah's regulatory scheme rendered its ordinances violative of *Smith*, and therefore subject to the rebuttable presumption of unconstitutionality that inheres in *Smith*'s absence. First, Hialeah exempted many forms of animal killings from its general prohibition, but not Santerı́an.[223] Second, Hialeah exempted meat that was not procured from religious sacrifices from a general disposal rule.[224] Third, Hialeah exempted meat that was not procured from

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219. See, e.g., *supra* Section III.D.

220. *Lukumi*, 508 U.S. at 539.

221. *Id*. In the Court's words, "'simultaneous and instantaneous severance of the carotid arteries with a sharp instrument'—the method used in kosher slaughter—is approved as humane," whereas Santerı́an sacrifice that "also results in severance of the carotid arteries" is deemed "less reliable and therefore not humane." *Id.* at 542 (quoting the district court below and state statutes incorporated in Hialeah).

222. *Id.* at 542.

223. *See id.* at 544.

224. *See id.* at 545.

religious sacrifices from a general inspection rule.[225] And finally, Hialeah exempted from its general prohibition on animal slaughter outsized of zoned areas producers of "'small numbers'" of hogs and cattle.[226]

Having articulated how the exemptions built into Hialeah's ordinances rendered the city's regulatory scheme neither "neutral" nor "generally applicable," the Supreme Court applied strict scrutiny.[227] Even setting aside the question of whether Hialeah's asserted regulatory interests were, in fact, compelling, the Court found that the means that Hialeah had chosen to advance its interests rendered the city's ordinances unconstitutional. Again, at this second step in the Court's analysis, exemptions were key.[228]

First, because Hialeah exempted many forms of animal killing, but not Santerían, from its general prohibition on animal sacrifice, the Supreme Court found that the ordinances would not advance "the city's proffered interest in preventing cruelty to animals."[229] Second, the Court found that the "city's interest in public health, which is threatened by the disposal of animal carcasses in open public places and the consumption of uninspected meat," would not be advanced by Hialeah's regulatory scheme because of the existence of exemptions for meat that was not procured from religious sacrifices.[230] In the Court's words, "The health risks posed by the improper disposal of animal carcasses are the same whether Santería[n] sacrifice or some nonreligious killing preceded it. The city does not, however, prohibit hunters from bringing their kill to their houses, nor does it regulate disposal after their activity."[231] As to Hialeah's third interest in preventing "health risk[s] posed by consumption of uninspected meat," exemptions again rendered the ordinances unconstitutional because, unlike Santeríans, "hunters may eat their kill and fishermen may eat their catch without undergoing governmental inspection."[232] And finally, Hialeah's limitation of animal slaughter to only areas zoned for slaughterhouses

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225. *Id*.
226. *Id*. (quoting from one of the challenged ordinances).
227. *Id.* at 546 ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "'interests of the highest order'" and must be narrowly tailored in pursuit of those interests" (quoting McDaniel v. Paty, 435 U.S., 618, 628 (1978) (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972))).
228. *See id.* at 546–47 ("The proffered objectives are not pursued with respect to analogous non–religious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree.").
229. *Id.* at 544.
230. *Id*.
231. *Id.* at 545.
232. *Id*.

contained an exemption that revealed Hialeah's impermissible disfavor for religion:

> [Hialeah failed to explain] why commercial operations that slaughter "small numbers" of hogs and cattle do not implicate its professed desire to prevent cruelty to animals and preserve the public health. Although the city has classified Santería sacrifice as slaughter, subjecting it to this ordinance, it does not regulate other killings for food in like manner.[233]

As *Lukumi* illustrates, the Supreme Court's approach to post-*Smith* litigation arising under the Free Exercise Clause closely resembles its approach to litigation arising under the Dormant Commerce Clause. In *Lukumi*, in fact, the Court first sought to determine whether Hialeah had discriminated against religion facially; in other words, it first searched in the text of the challenged regulatory scheme for any indication that religion and non-religion would be treated unequally by Hialeah's ordinances. At this stage of its analysis, the Court found that Hialeah's ordinances would, in fact, treat Santerían conduct less favorably than other forms of conduct, and therefore held that the ordinances were not immunized from heightened scrutiny by *Smith*. Importantly, to reach this threshold conclusion that Hialeah's regulatory scheme must be subjected to strict scrutiny, the Court looked to the existence of exemptions in Hialeah's ordinances. Like in *Dean Milk*, *Hughes*, and *Kassel*, as to this threshold question of non-discrimination, the existence of exemptions for favored conduct in Hialeah's ordinances rendered the city's chosen regulatory scheme constitutionally suspect. This is unlike the circumstances of *Barnwell* and *Southern Pacific*, in which South Carolina's and Arizona's regulations included no exemptions for favored entities and consequently were found to be neutral and merely subject to a form of rational-basis review.

As in *Dean Milk*, *Hughes*, and *Kassel*, the existence of exemptions in Hialeah's ordinances created a rebuttable presumption of unconstitutionality at the first step of the Supreme Court's inquiry. And, as in *Dean Milk*, *Hughes*, and *Kassel*, the government in *Lukumi* was unable to rebut this presumption effectively when the Court applied a heightened standard of review at the second step of its inquiry. Once again, this was because the exemptions built into Hialeah's ordinances did not advance non-discriminatory regulatory interests in ways that least burdened religion. Rather, as was especially clear in *Hughes* and *Kassel*—in which neither Oklahoma's nor Iowa's regulations were found to meaningfully advance their interests in conservation and highway safety, respectively, because of the amount of conduct that they exempted from otherwise generally applicable burdens—in

233. *Id*.

Lukumi, the Court found that Hialeah's ordinances did not meaningfully advance its asserted regulatory interests because of the amount of non-Santerían conduct that Hialeah exempted from otherwise generally applicable burdens.

Given the methodology employed in *Lukumi*, it is clear that exemptions have been key at both the first and second steps of the Supreme Court's Dormant Commerce *and* Free Exercise Clause inquiries. First, the existence of exemptions in the text of challenged regulatory schemes has indicated that regulators have likely sought to engage in forms of constitutionally impermissible discrimination. This has created a presumption of unconstitutionality that could be rebutted when the Court has applied heightened scrutiny. At this second stage of analysis too, exemptions have been key. Indeed, in *Dean Milk*, *Hughes*, *Kassel*, and *Lukumi* alike, the regulators subject to suit could not articulate how they had advanced any legitimate regulatory interests in ways that least restricted, on the one hand, interstate commerce, and, on the other, religion. In all three cases, therefore, the regulators were found to have run afoul of constitutional provisions that have at their heart a principle of nondiscrimination.

B. *Roman Catholic Diocese of Brooklyn v. Cuomo* (2020)

In the decades that followed *Lukumi*, the Supreme Court prominently affirmed on at least two other occasions that the Religion Clauses of the First Amendment have at their core a principle of nondiscrimination. In *Trinity Lutheran v. Comer*, for example, the Court applied strict scrutiny to a Missouri grant program that was generally accessible to nonprofit organizations unless they were religious. This program discriminated on its face against a preschool and daycare center affiliated with the Trinity Lutheran Church solely because of its "religious 'status,'"[234] and was invalidated because Missouri's asserted interest in "achieving greater separation of church and State"[235] was insufficiently compelling to justify its discrimination. A similar set of circumstances gave rise to the Court's decision, three years later, in *Espinoza v. Montana Department of Revenue*.[236] There, Montana generally provided scholarships to families whose children attended private schools, but prohibited scholarships from being used at religious schools.[237] Like in *Trinity Lutheran*, Montana's program facially discriminated against religion, was subjected to strict scrutiny, and was found to be constitutionally impermissible because seeking greater

234. *Trinity Lutheran*, 582 U.S. at 491 (Sotomayor, J., dissenting).
235. *Id.* at 466 (citing Widmar v. Vincent, 454 U.S. 263, 276 (1981)).
236. 591 U.S. 464 (2020).
237. *See generally* Espinoza v. Mont. Dep't. of Revenue, 591 U.S. 464 (2020).

separation of church and state is not a sufficiently compelling interest to justify discrimination against religion.[238]

Unlike *Lukumi* and the Dormant Commerce Clause decisions introduced above, neither *Trinity Lutheran* nor *Espinoza* involved the government's creation of a novel regulatory burden that, because of the existence of exemptions for preferred entities, only imposed a burden on disfavored entities. In other words, the government programs challenged in *Trinity Lutheran* and *Espinoza* did not involve legislative gerrymanders that generally *prohibited* certain forms of conduct, unless the actors were of favored identities. Rather, in *Trinity Lutheran* and *Espinoza*, the government created *positive* benefits that could only *not* be accessed by religious individuals and/or institutions. In this way, *Trinity Lutheran* and *Espinoza* are not typical exemption decisions in the mold of *Lukumi*—which we can term a "*negative* exemptions" decision because Hialeah's regulatory scheme exempted favored entities from a *prohibition* on certain forms of conduct. And yet, the Supreme Court's decisions in *Trinity Lutheran* and *Espinoza* reveal the enduring importance of exemptions to the Court's religious liberty jurisprudence. Indeed, *Trinity Lutheran* and *Espinoza* can fairly be read as "*positive* exemptions" decisions—in other words, as decisions in which disfavored (religious) entities were exempted from generally available *benefits* by the challenged government programs, rather than as decisions in which favored (non-religious) entities were exempted from otherwise generally applicable *prohibitions* on conduct by the challenged government programs.

In both negative- and positive-exemptions cases after *Smith*, the Supreme Court has affirmed that the presence (or absence) of exemptions in challenged regulatory schemes is a decisive adjudicatory fact at both steps of its constitutional inquiry. In *Lukumi*, a negative exemptions case, for instance, the Court first sought to determine whether Hialeah's ordinances were "neutral" and "generally applicable" by identifying the presence of any exemptions in the ordinances that benefitted preferred entities (i.e., non-Santeríans). [239] Because the Court found that such exemptions did, in fact, exist, it applied strict scrutiny. And, at this second step of the Court's analysis, exemptions again were critical to the Court's ultimate disposition of the case. As the Court repeatedly noted in its decision in *Lukumi*, because the exemptions for preferred entities (i.e., non-Santeríans) built into Hialeah's ordinances undermined the city's purported regulatory interests, it was clear that

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238. *Id.* at 484–85 (discussing this argument).
239. See *supra* Section IV.A.

Hialeah sought to unconstitutionally discriminate against Santerían religion, not protect health and safety.[240]

Although some scholars have argued that one of the Supreme Court's first COVID-19-era Free Exercise Clause decisions, *Roman Catholic Diocese of Brooklyn v. Cuomo*, represented a substantial break with the Court's traditional approach to evaluating constitutional challenges to state health and safety regulations, the opposite is true. Rather than a break with the past, *Cuomo* represents continuity in how the Court long has reviewed the constitutionality of government regulations that impose novel burdens on some, not all, Americans, because the regulations exempt some preferred entities from general burdens. This is perhaps chief among the Dormant Commerce Clause's lessons for litigating our "most favored right," and one that was similarly animating in decades-old decisions like *Lukumi*.

In *Cuomo*, the Supreme Court considered a constitutional challenge to one of New York Governor Andrew Cuomo's COVID-19-era executive orders. At issue in the case was one executive order that "impose[d] very severe restrictions on attendance" at some religious services.[241] According to the order, no more than ten persons could attend religious services in a "red" zone, and no more than twenty-five persons could attend religious services in an "orange" zone.[242] According to New York, these colored zones (and their corresponding gathering restrictions) were designed to stem the spread of COVID-19. But, as the Court's opinion in *Cuomo* illustrates, the existence of exemptions to the gathering restrictions for non-religious entities revealed that the government sought not to honestly improve health and safety, but rather (at least in part) to impose unique burdens on religious entities.

The first exemptions that the Supreme Court in *Cuomo* identified were in red zones. There, religious institutions were prohibited from admitting more than ten congregants, but "'essential' businesses"[243] were exempted from the prohibition. In orange zones too, religious institutions were required to abide by the twenty-five person gathering limit, but businesses were empowered to "decide for themselves how many persons to admit."[244] This facial discrimination against religion (because of the existence of exemptions), the Court concluded, required the executive order to be justified by a compelling government interest and be narrowly tailored to advance that interest.[245] And, while

240. See *supra* Section IV.A.
241. *Roman Cath. Diocese of Brooklyn*, 592 U.S. at 15–16.
242. *Id.* at 16.
243. *Id*. at 17.
244. *Id.*
245. *Id*. at 18 ("Because the challenged restrictions are not 'neutral' and of 'general applicability,' they must satisfy 'strict scrutiny,' and this means that they must be 'narrowly tailored' to serve a 'compelling' state interest" (quoting Lukumi, 508 U.S. at 546)).

acknowledging that "[s]temming the spread of COVID-19 is unquestionably a compelling interest,"[246] the Court concluded that the means that New York had chosen to advance that interest—which, because of the existence of exemptions, imposed unique burdens on religion—were constitutionally impermissible.

The Supreme Court's decision in *Cuomo* was made *per curiam* and on an expedited, emergency basis.[247] The opinion is thus brief and provides relatively little detail as to the steps that the Justices took to reach their conclusion. Justice Kavanaugh's concurring opinion in *Cuomo*, however, helpfully highlights the adjudicatory significance of exemptions that has long been evident at both steps of the Court's Dormant Commerce and Free Exercise Clause inquiries. As Justice Kavanaugh noted, "New York's restrictions on houses of worship" were not only "severe," but also "discriminatory" because the gathering limits imposed on houses of worship "[did] not apply to some secular buildings in the same neighborhoods."[248] This facial discrimination "trigger[ed] heightened scrutiny" and "required" New York to "provide a sufficient justification of the discrimination."[249] But New York was ultimately unable to do so.[250]

Even if the Supreme Court's opinion in the case was relatively lacking in detail, *Cuomo* was analytically continuous with *Lukumi* and other similarly situated decisions of the Court. First, the Court in *Cuomo* sought to identify facial discrimination in the text of Governor Cuomo's executive orders. As in *Lukumi* and *Dean Milk*, for example, the Court in *Cuomo* was able to recognize such facial discrimination because the executive orders included affirmative regulatory exemptions that led its burdens to apply differently to different types of entities. In *Lukumi*, the Court likewise found there to be facial discrimination in one of Hialeah's ordinances because certain businesses outside of designated slaughterhouse zones were affirmatively exempted from the ordinance, but Santerían churches outside of the same zones were not.[251] Similarly, in *Dean Milk*, the Court found there to be facial discrimination because Madison's regulation applied differently to different milk producers based on their residency (i.e., inside or outside of Madison).[252] In neither *Lukumi* nor *Dean Milk* did the text of the

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246. *Id*.

247. On the Court's granting of emergency relief during the COVID-19 pandemic, *see, e.g.*, Stephen I. Vladeck, *Response: Emergency Relief During Emergencies*, 102 B.U. L. Rev. 1787 (2022).

248. *Roman Cath. Diocese of Brooklyn*, 592 U.S. at 28 (Kavanaugh, J., concurring).

249. *Id.* at 29.

250. *Id.* (observing that Governor Cuomo did not "justif[y] treating houses of worship more severely than secular businesses").

251. *See supra* Section IV.A.

252. *See supra* Section III.C.

challenged regulations mention the *disfavored* entities—Santeríans or Illinois milk producers, respectively—but the Court nevertheless identified the existence of facial discrimination because of the existence of exemptions for *favored* entities.[253]

Again, in *Cuomo*, an analogous set of circumstances inhered: New York affirmatively exempted "essential" businesses from an otherwise generally applicable regulatory burden, for example, but did not exempt houses of worship.[254] So, even if lacking specific mention of "religion," this executive order was found to treat religious and non-religious entities differently on its face.[255] As in *Lukumi* and *Dean Milk*, therefore, the facial discrimination that the Supreme Court identified at the first step of its inquiry in *Cuomo* created a rebuttable presumption of unconstitutionality to which New York had an opportunity to respond when the Court applied heightened scrutiny at the second step of its inquiry. But again, as in *Lukumi* and *Dean Milk*, the government in *Cuomo* was unable to rebut this presumption of unconstitutionality because its exemptions for favored entities did not advance its asserted regulatory interests in the least restrictive way possible.[256] In "remain[ing] vigilant in ensuring that the devout were not treated with disfavor,"[257] the Court in *Cuomo* and later COVID-19-era decisions thus maintained analytical continuity with its preceding Free Exercise Clause and Dormant Commerce Clause decisions.

C. *Tandon v. Newsom* (2021)

As in *Lukumi* and several of the Dormant Commerce Clause decisions introduced above, the Supreme Court in *Cuomo* found that New York's COVID-19-era restrictions on in-person gatherings "create[d] a favored class"[258] through its scheme of exemptions. This differential treatment on the basis of religious status in *Cuomo* was constitutionally impermissible because it was not justified by a compelling government interest and narrowly tailored to advance that interest. Importantly, to reach this conclusion, the Court in *Cuomo* first looked to the existence of facial discrimination in the text of Governor Cuomo's executive orders, ultimately finding that they did, in fact, facially discriminate against religion because of their built-in scheme of exemptions. This finding created a rebuttable presumption of unconstitutionality and required the Court to apply strict scrutiny.

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253. *See supra* Sections IV.A.; III.C.
254. *See supra* Section IV.B.
255. *See supra* Section IV.B.
256. *See supra* Section IV.B.
257. Stuart Banner, The Most Powerful Court in the World: A History of the Supreme Court of the United States 526 (2024).
258. *Roman Cath. Diocese of Brooklyn*, 592 U.S. at 29 (Kavanaugh, J., concurring).

And at this second stage of analysis, the existence of exemptions ultimately rendered the government's scheme unconstitutional.[259] One year after *Cuomo*, the Court was again presented with an opportunity to apply this methodology to other COVID-19-era restrictions on in-person gatherings.

In *Tandon v. Newsom*,[260] the Supreme Court considered a challenge to a slew of California's COVID-19-era restrictions on in-person gatherings. As the Court noted in its decision in *Tandon*, to effectuate its interest in reducing the spread of COVID-19, California enacted a "Blueprint System"[261] that limited the size of in-person gatherings, but that also "contain[ed] myriad exceptions and accommodations for comparable [secular] activities[.][262] This differential treatment, the Court held, "require[ed] the application of strict scrutiny[.]"[263] And because "strict scrutiny require[d] [California] to further 'interests of the highest order' by means 'narrowly tailored in pursuit of those interests,'"[264] the Court unsurprisingly found California's exemption-replete regulatory scheme to have violated the Free Exercise Clause.

To reach its conclusion in *Tandon*, the Supreme Court applied the methodology that it articulated in *Lukumi* and applied in *Cuomo*—a methodology that, in important respects, resembles that which the Court long has applied in other constitutional contexts. First, the Court sought to identify facial discrimination in the text of California's regulatory scheme. After the Court did, in fact, find that California had discriminated against religion facially—because the Golden State exempted preferred (non-religious) entities from otherwise generally applicable regulatory burdens—the Court subjected California's Blueprint System to strict scrutiny. In doing so, the Court found that California had not effectively rebutted the presumption of unconstitutionality created by its facially exemption-replete regulation. Once again, at this second step of the Court's analysis, exemptions were a decisive adjudicatory fact.

At the first step of its analysis in *Tandon*, the Supreme Court found that California's Blueprint System facially discriminated against religion because the Blueprint System exempted some non-religious entities from otherwise generally applicable regulatory burdens. For example, the Court observed that California "permit[ed] hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together

259. *See supra* Section IV.B.
260. 593 U.S. 61 (2021).
261. Tandon v. Newsom, 593 U.S. 61, 64 (2021).
262. *Tandon*, 593 U.S. at 64.
263. *Id.*
264. *Id.* at 64–65 (quoting Lukumi, 508 U.S. at 520).

more than three households at a time,"[265] but did not permit the same for religious activities involving more than three households. Given this differential treatment between religious and non-religious gatherings, the Court understood the structure of California's Blueprint System to have created a presumption of unconstitutionality. But the mere fact of this presumption did not end the Court's inquiry. In fact, the Court went on—even in a short, *per curiam* opinion—to explain that, at the second step of its analysis (strict scrutiny), it was these exemptions that rendered the law unconstitutional. In the Court's words, California "ha[d] not shown that 'public health would be imperiled'"[266] by employing other regulatory measures that were less restrictive of religion. As such, the fact of secular exemptions having been built into California's regulatory scheme rendered the Golden State's preferred regulatory course unconstitutional because the exemptions confirmed that California sought not to advance its asserted interest in public health, but rather (at least in part) to disfavor religion. In other words, the secular exemptions in California's Blueprint System prevented California from rebutting the presumption of unconstitutionality created by their existence because those exemptions could not be shown to advance legitimate, non-discriminatory regulatory interests.

D. *Fulton v. City of Philadelphia* (2021)

In both *Cuomo* and *Tandon*, the Supreme Court applied the Free Exercise Clause methodology that it articulated in *Smith* to disputes over New York's and California's COVID-19-era restrictions on religious gatherings.[267] And, importantly, its doing so was analogous to the way in which the Court has historically approached litigation arising under the Dormant Commerce Clause. Indeed, in both constitutional contexts, the Court has been concerned principally with discrimination and has therefore designed analogous doctrinal tests that seek to ferret out constitutionally impermissible discrimination. In litigation arising under both constitutional provisions, the Court has begun its inquiry by attempting to identify facial discrimination in the text of challenged enactments; a frequent indicator of such facial discrimination has been the government's decision to exempt a favored entity from an otherwise generally applicable regulatory burden. When the Court successfully has identified such an exemption, it then has proceeded down a predictable path to discern whether the existence of that exemption reveals the government's constitutionally impermissible disfavor for religion or interstate commerce.

265. *Id.* at 63.
266. *Id.* at 64.
267. *See supra* Sections IV.B.–C.

The longstanding doctrinal principles animating many of the Supreme Court's leading Dormant Commerce Clause and Free Exercise Clause decisions were put on prominent display again in the Court's 2021 decision in *Fulton*. By way of reminder, there, Philadelphia suspended its foster-care contract with a Catholic social services agency on account of the agency's refusal to "certify same-sex couples to be foster parents due to its religious beliefs about marriage."[268] Consequently, the Court found that Philadelphia violated the Free Exercise Clause.[269] To reach this conclusion, the Court in *Fulton* first framed the dispute as falling outside of *Smith*'s reach because a clause in Philadelphia's foster-care contract empowered a local official to exercise his "sole discretion"[270] to grant exemptions to a general prohibition on foster care agencies' "reject[ion] [of] a child or family . . . based upon . . . their . . . sexual orientation[.]"[271] In light of this unilateral discretion, the Court proceeded from the view that the regulatory scheme governing Philadelphia's foster-care system was not "generally applicable" under *Smith*, and therefore that Philadelphia's actions vis-à-vis the Catholic social services agency did not merit the presumption of constitutionality typically afforded by *Smith*.[272] In short, the question presented to the Court in *Fulton* after disposing of *Smith* was thus whether Philadelphia had identified a "compelling interest" that justified its decision to require the Catholic foster-care agency to comply with the anti-discrimination regulation, given that Philadelphia could exempt non-religious entities from compliance with the same.[273] The answer, evidently, was that Philadelphia had not identified such an interest.[274]

As the Supreme Court confirmed in *Fulton*, following *Smith*, a regulatory scheme that creates a "system of 'individualized governmental assessment of the reasons for the relevant conduct'"[275] is, on its face, constitutionally suspect. According to the logic of the Court's decision in *Fulton*, the mere fact that a city official was empowered to grant or deny religious exemptions created the same presumption of

268. *Fulton*, 593 U.S. at 527.
269. *Id.* at 543.
270. *Id.* at 535.
271. *Id.*
272. *See Smith*, 494 U.S. at 879 (observing that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability'" (quoting *Lee*, 455 U.S. at 263 n.3 (Stevens, J., concurring in judgment))).
273. *See Fulton*, 593 U.S. at 534 (observing that, historically, the Court has upheld the denial of a religious exemption only when there is a "compelling interest").
274. *Id.* at 542 (holding that "[t]he refusal of Philadelphia to contract with [the Catholic agency] for the provision of foster care services unless it agrees to certify same–sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment").
275. *Id.* at 537 (quoting *Smith*, 494 U.S. at 873.).

unconstitutionality that is present when the text of a challenged regulatory scheme includes exemptions for favored (non-religious) entities. Indeed, the logic of the Court's decision in *Fulton* reveals that, at the first step of its inquiry into the constitutionality of Philadelphia's regulatory scheme, the Court reasonably applied the principles that it had articulated earlier in *Lukumi* and similarly situated Dormant Commerce and Free Exercise Clause decisions. At the first step of all these decisions, the Court consistently has been concerned with whether the government has discriminated on its face against disfavored entities. When the Court has identified such facial discrimination—because, for example, the government has exempted favored entities from otherwise generally applicable regulatory burdens—the Court has applied a heightened standard of review that permits the government to rebut the presumption (created by the existence of the exemptions) that the government impermissibly seeks to disfavor religion or interstate commerce. But when the government provides an official with the discretion to grant or deny religious exemptions at will, this concern that the Court has articulated in other facially discriminatory contexts remains, just in a different form.[276] Therefore, it should come as no surprise that the Court has understood challenged government regulations that burden religion to have created a presumption of unconstitutionality at the first step of its analysis when: (1) the government explicitly discriminates against religion by affirmatively exempting favored non-religious entities from a general regulatory burden, and (2) the government enables an official to do the same on a merely discretionary basis.

In both of these circumstances, the Supreme Court's interest in vindicating "the Constitution's fundamental religion-specific goal . . . of opposing discrimination"[277] has led the Court, at the first step of its analysis, to presume that the government seeks to engage in a constitutionally impermissible form of discrimination. To be sure, in both circumstances, the government has had the opportunity to rebut this presumption when the Court has applied heightened means-end scrutiny at the second step of its analysis. But as to the threshold question of facial discrimination, it is certainly reasonable for the Court to have

276. As Professors Douglas Laycock and Steven Collis have argued, "If governments can write vague rules that leave accepted understandings unstated, or that leave much to the discretion of enforcement authorities or activists among the public, and courts then ignore both the extratextual understandings and the actual and intended exercise of discretion, government is completely free to treat religious and secular practices unequally. The Free Exercise Clause would protect only against unsophisticated governments that explicitly state what they are doing and make no effort to conceal it." Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 19 (2016).

277. EISGRUBER & SAGER, *supra* note 173, at 9.

concluded that the opaque structure of a regulatory scheme should not automatically insulate that scheme from strict constitutional scrutiny. Indeed, from the Court's perspective, city ordinances with built-in regulatory exemptions, like ones that enable government officials to grant the same exemptions at will, "at least [pose] risk[s] of unconstitutional [regulatory] motivation"[278] that may, after the application of strict scrutiny, similarly be found to be "intolerably large."[279] Contrary to Professor Vladeck's suggestion then, *Fulton* does not provide evidence that the Court, for the first time, "directly embraced the most-favored nation theory of the Free Exercise Clause."[280] Rather, *Fulton* represents yet another example of Free Exercise Clause "motive-hunting"[281] that is not all too unusual in constitutional adjudication writ large, including (but not only)[282] in the context of the Dormant Commerce Clause.

V. THE LESSONS OF THE DORMANT COMMERCE CLAUSE

This Article has illustrated that, throughout the last century, the Supreme Court has applied a consistent adjudicatory method when confronted with disputes arising under the Dormant Commerce and Free Exercise Clauses—both of which are principally concerned with discrimination. Like other recent scholarship on the Roberts Court that has sought to illuminate the Court's underlying methodological commitments,[283] this Article has demonstrated particularly that the Court's much-debated "most favored [nation/right]" decisions in *Cuomo*, *Tandon*, and *Fulton* do not supply evidence for a unique form of contemporary deference to religious claimants seeking exemptions from otherwise generally applicable laws. Instead, these decisions are read more accurately as but the most recent applications of doctrinal principles that the Court has articulated in various forms over the last century when asked to decide whether the government has engaged in constitutionally impermissible forms of discrimination.

Beginning in early and mid-twentieth-century Dormant Commerce Clause decisions, and then extending through the Supreme Court's first major post-*Smith* Free Exercise Clause decision in *Lukumi*, the Court consistently has begun its constitutional inquiry by attempting to identify facial discrimination in the text of challenged enactments. At this first step of its analysis, the Court has recognized that a

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278. Fallon, *supra* note 15, at 1308.
279. *Id.*
280. Vladeck, *supra* note 5, at 733.
281. Kagan, *supra* note 106, at 414.
282. *See id.* (describing the importance of motive-hunting to Free Speech Clause jurisprudence).
283. *See, e.g.*, Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. Rev. 1477 (2023).

frequent indicator of facial discrimination is the government's decision to exempt a favored entity from an otherwise generally applicable regulatory burden. When an exemption or scheme of discretionary individualized exemptions has been identified, the Court then has proceeded down a predictable path to discern whether the existence of that exemption reveals the government's constitutionally impermissible disfavor for religion or interstate commerce. Indeed, in both the Free Exercise Clause and Dormant Commerce Clause contexts, the Court long has understood the existence of regulatory exemptions to create a rebuttable presumption that the government is engaged in a form of constitutionally impermissible disfavoritism. Because the Court in neither context has articulated a *per se* rule of unconstitutionality once it merely identifies the existence of an exemption, however, the Court has enabled the government to rebut this presumption when the Court has applied means-end scrutiny to a challenged enactment.

Now that the COVID-19 pandemic has subsided, the next form of litigation likely to raise questions about the Supreme Court's "most favored [nation/right]" approach to religious liberty will involve Free Exercise Clause challenges to state vaccination mandates.[284] Thus, a close reading of just one recent decision upholding a state vaccination mandate is illustrative of how at least some lower federal courts have attempted to make sense of the Free Exercise Clause methodology most recently articulated in *Cuomo*, *Tandon*, and *Fulton*. Indeed, this decision—*Miller v. McDonald*—demonstrates, contrary to the scholarly consensus, that a law that (A) burdens religion and (B) contains secular exemptions may *not* (C) always be found to be unconstitutional after *Cuomo*, *Tandon*, and *Fulton*.[285] And yet, *Miller* also illustrates that lower federal courts may still be in need of further conceptual guidance from the Court.

In 1966, New York enacted an immunization law requiring students to receive certain vaccines.[286] According to this law, "students

284. These disputes emerged with notable frequency during 2021, and have continued to be litigated in the years since in the federal courts of appeals. See, e.g., Does 1–6 v. Mills, 16 F.4th 20 (1st Cir. 2021); Doe v. San Diego Unified Sch. Dist., 19 F.4th 1173 (9th Cir. 2021); B.W.C. v. Williams, 990 F.3d 614 (8th Cir. 2021); Kane v. De Blasio, 19 F.4th 152 (2d Cir. 2021); Dahl v. Bd. of Trustees of W. Michigan Univ., 15 F.4th 728 (6th Cir. 2021); M.A. on behalf of H.R. v. Rockland Cnty. Dep't of Health, 53 F.4th 29 (2d Cir. 2022); Lukaszczyk v. Cook Cnty., 47 F.4th 587 (7th Cir. 2022); Lowe v. Mills, 68 F.4th 706, 709 (1st Cir.), *cert. denied*, 144 S. Ct. 345, 217 L. Ed. 2d 184 (2023); We The Patriots USA, Inc. v. Connecticut Off. of Early Childhood Dev., 76 F.4th 130 (2d Cir. 2023), *cert. denied*, 144 S. Ct. 2682, 219 L. Ed. 2d 1298 (2024); Spivack v. City of Philadelphia, 109 F.4th 158 (3d Cir. 2024); New Yorkers for Religious Liberty, Inc. v. New York, 125 F.4th 319 (2d Cir. 2024); Bacon v. Woodward, 104 F.4th 744 (9th Cir. 2024); W. Virginia Parents for Religious Freedom v. Christiansen, 124 F.4th 304 (4th Cir. 2024).

285. Miller v. McDonald, 130 F.4th 258, 269 (2d Cir. 2025), *cert. granted, judgment vacated*, No. 25–133, 2025 WL 3506969 (U.S. Dec. 8, 2025).

286. See *Miller*, 130 F.4th at 261–62.

who could not be vaccinated for medical reasons or students whose parents held religious objections to vaccines were exempted" from the immunization mandate.[287] Between 2018 and 2019, however, New York experienced a significant outbreak of measles, ultimately leading the state legislature to repeal the religious exemption.[288] After three Amish schools were fined for teaching unvaccinated students whose parents had sincere religious objections to vaccination, suit was brought under the Free Exercise Clause.[289] In particular, the religious claimants in *Miller* argued that New York's modified mandate (i.e., without the religious exemption) was not "neutral and generally applicable" under *Smith* and could not "withstand strict scrutiny."[290]

To support their argument that New York's immunization mandate ran afoul of *Smith*, the religious claimants in *Miller* first turned to neutrality. Citing *Fulton*'s definition of neutral laws as those that do not "proceed[] in a manner intolerant of religious beliefs or restrict[] practices because of their religious nature," though, the U.S. Court of Appeals for the Second Circuit concluded that New York's regulation was, in fact, neutral.[291] Unlike in *Cuomo*, where the government "'single[d] out houses of worship for especially harsh treatment,'"[292] in *Miller*, the Second Circuit concluded that New York's immunization requirement applied to "*all* schoolchildren who [did] not qualify for the law's medical exemption."[293] Additionally, the Second Circuit found that the "legislative history" of the immunization mandate did not "reveal an anti-religious bias."[294] And so, having rejected the religious claimaints' argument that New York's mandate was not neutral, the Second Circuit moved to a consideration of whether the mandate was generally applicable. Following *Tandon* and *Fulton*, the Second Circuit in *Miller* defined non-generally applicable laws as those which "treat[] secular conduct more favorably than religious activity"[295] and/or "'invite[]' the government to consider the particular reasons for a person's conduct by providing a 'mechanism for individualized exemptions[.]"[296]

To determine whether New York's mandate "treat[ed] secular conduct more favorably than religious activity," the Second Circuit in *Miller* compared the scope of the prior religious exemption to the remaining medical exemption. According to the religious claimaints in

287. *Id.* at 262.
288. *See id.*
289. *See id.* at 261.
290. *Id.* at 265.
291. *Id.* at 265–66 (quoting Fulton, 593 U.S. at 522).
292. *Id.* at 266 (quoting Cuomo, 492 U.S. at 17).
293. *Id.* (emphasis original).
294. *Id.*
295. *Id.* (quoting Tandon, 593 U.S. at 62).
296. *Id.* (quoting Fulton, 593 U.S. at 533).

Miller, the government's exempting students from vaccination for medical reasons, but not for religious reasons, placed the mandate beyond the scope of *Smith*'s generally applicable standard. And on the "most favored [nation/right]" view of the Supreme Court's contemporary Free Exercise Clause jurisprudence, this argument would seem certain to prevail because New York's mandate (1) burdened religion and (2) contained a secular exemption. But according to the Second Circuit, New York's mandate did not treat secular conduct more favorably than religious conduct because the medical and religious exemptions were so different in their "scope and duration."[297] In fact, according to the Second Circuit, "[New York's prior] religious exemption was generalized to *all vaccines* for the duration of that child's school admission,"[298] whereas the remaining medical exemption would be "granted only with 'sufficient' documentation of the child's contraindication to 'a specific immunization,'"[299] and would be temporally limited "only 'until such immunization is found no longer to be detrimental to the child's health[].'"[300] Then, the Second Circuit went on to explain how various pieces of demographic and medical evidence revealed that New York acted reasonably in seeking to "protect[] New Yorkers from disease."[301]

At this juncture, it is clear that the Second Circuit in *Miller* misunderstood the analytical framework demanded by the Supreme Court's post-*Smith* Free Exercise Clause decisions. Indeed, to reach its conclusion that New York's regulation was neutral and generally applicable (and therefore only subject to rational-basis review), the Second Circuit proceeded from the view that the immunization mandate applied to "*all* schoolchildren who [did] not qualify for the law's medical exemption."[302] But even in the Second Circuit's own framing, a mandate that applies to all students *except* those who do not qualify for a medical exemption cannot be generally applicable; after all, on the face of the regulation, religious and non-religious conduct is treated differently. Thus, the Second Circuit in *Miller* alternatively should have concluded that this differential treatment gave rise to a presumption of unconstitutionality that could be rebutted by New York when strict scrutiny was applied. Instead, the Second Circuit concluded that the mandate was neutral and generally applicable and merely subject to rational-basis review, under which even the religious claimaints stipulated that the mandate would pass constitutional muster.[303]

297. *Id.* at 267.
298. *Id.* at 268.
299. *Id.* at 269.
300. *Id.* at 268 (quoting the relevant statutory provisions) (emphasis original).
301. *Id.*
302. *Id.* at 266.
303. *Id.* ("Plaintiffs concede that New York Public Health Law § 2164 satisfies rational basis review—immunization programs reduce disease.")

Despite the lack of analytical precision in *Miller*, the ultimate outcome of the case may not have been different if the Second Circuit had, in fact, applied strict scrutiny. For instance, the Second Circuit's extensive discussion of the medical exemption's narrow scope minimally suggests that the court could have found that the structure of New York's regulation was the least restrictive means of pursuing the state's compelling interest in protecting New Yorkers from disease. At this second (means-end scrutiny) stage of the court's inquiry, then, the structure of the regulation could have been found to rebut the presumption of unconstitutionality created by the mandate's facial discrimination against religion.

Setting aside these aspects of *Miller*, the Second Circuit's observations there about the (non)existence of individualized exemptions reflect some intuitive sense that the Supreme Court's Free Exercise Clause jurisprudence is concerned principally with discrimination, and is reliant on certain doctrinal tests to ensure that the government is not discriminating against religion impermissibly. Indeed, following *Fulton*, the court in *Miller* noted that New York's regulation would not be "generally applicable" if it afforded "broad discretion to government officials to grant exemptions based on their assessment of 'which reasons for not complying' with the law 'are worthy of solicitude.'"[304] As demonstrated above, according to the animating logic of the Court's Free Exercise Clause jurisprudence, the creation of a scheme of individualized exemptions ought to be as constitutionally suspect as the creation of particular affirmative categories of exempted conduct.

To determine whether New York's regulation did, in fact, create a constitutionally suspect scheme of individualized exemptions, the Second Circuit in *Miller* emphasized that the challenged immunization mandate *required* physicians and school officials to grant or deny exemptions according to specific criteria.[305] Thus, unlike in *Fulton*, the officials in *Miller* did "not have 'discretion to approve or deny exemptions on a case-by-case basis' for *any reason*."[306]

In *Miller*, the Second Circuit did not explain—and, in its defense, was not obligated to explain—the underlying rationale for a doctrinal test that is concerned with the existence or extent of discrimination against religion. But as the Second Circuit's analysis of the individualized-exemptions claims raised below would seem to suggest, the Supreme Court's Free Exercise Clause jurisprudence takes interest in the type of discretion that government officials can exercise precisely because the doctrinal test that the Court has articulated in this area

304. *Id.* at 268 (quoting Fulton, 593 U.S. at 537).
305. *See id.* at 268–69
306. *Id.* at 269 (quoting We The Patriots USA, 76 F.4th at 151, and comparing it with Fulton, 593 U.S. at 536–37 (emphasis in original)).

is concerned principally with discrimination. If, as was apparently the case in *Miller*, an official does *not* have discretion to deny religious exemptions at will, then there need not be a presumption created by the structure of an enabling statute that the government likely has sought to engage in an impermissible form of religious discrimination. Contrastingly, as was the case in *Fulton*, when an official *does* have wide latitude to grant or deny religious exemptions at will, the concerns about potential religious discrimination present when the government has affirmatively granted exemptions on the face of a challenged enactment similarly inhere. Consequently, in *Miller*, the Second Circuit should have applied strict scrutiny, but not because New York created a scheme of individualized exemptions; rather, the Second Circuit should have applied strict scrutiny because New York exempted students from the vaccination mandate for medical reasons, but not for religious reasons. This facially differential treatment of religious and non-religious conduct should have given rise to a presumption of unconstitutionality that New York could have rebutted when the Second Circuit applied heightened scrutiny—a form of judicial review designed to ferret out constitutionally impermissible disfavor for (in this circumstance) religion.

The Second Circuit's recent decision in *Miller* is just one example, but it illustrates that at least some lower federal courts have not yet entirely appreciated the animating logic of the Supreme Court's post-*Smith* Free Exercise Clause jurisprudence. By devoting greater attention to the Dormant Commerce Clause's lessons for litigating "our most favored right," therefore, perhaps both lower federal courts and the Supreme Court will be more readily prepared to apply the consistent two-step approach that long has been applied to ferret out constitutionally impermissible forms of discrimination against, on the one hand, interstate commerce, and, on the other, religion.

UNITED STATES V. DUARTE: THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CORRECTLY APPLIES THE SECOND AMENDMENT'S HISTORIC TRADITION ANALYSIS BY DETERMINING A NON-VIOLENT FELON HAS THE RIGHT TO BEAR ARMS

I. INTRODUCTION 362
II. FACTS AND HOLDING. 363
III. BACKGROUND 366
A. *District of Columbia v. Heller*: The United States Supreme Court's Landmark Second Amendment Ruling That Affirmed the Individual Right to Bear Arms in the Home and for Self-Defense 366
B. *McDonald v. City of Chicago*: The United States Supreme Court's Follow-Up Ruling to *District of Columbia v. Heller* that Incorporated Second Amendment Protections to the States Per the Fourteenth Amendment 368
C. *N.Y. State Rifle & Pistol Ass'n v. Bruen*: The Origin of the Historic Tradition Test and Its Application to The Second Amendment 370
D. *Range v. AG United States*: The United States Court of Appeals for the Third Circuit's Successful Application of the Historic Tradition Test in The Post-*Bruen* Era 373
E. *United States v. Rahimi*: The United States Supreme Court's Most Recent Second Amendment Ruling That Clarified the Historic Tradition Test 376
IV. ANALYSIS. 380
A. The Historic Tradition Test Created by the Supreme Court in *Bruen* Requires a Historical Analog from the Founding Era in Order for a Challenged Second Amendment Statute to be Upheld 381
B. There Is No Historical Analog From the Founding Era Similar to 18 U.S.C. § 922(g)(1) That is Applicable to Duarte's Prior Convictions in *United States v. Duarte* 383

C. The Ninth Circuit Ruled Correctly in United States v. Duarte Based on the Proper Application of the Historic Tradition Test and the Government's Inability to Provide a Historical Analog to § 922(g)(1) 384
V. CONCLUSION 385
ADDENDUM 386

I. INTRODUCTION

This Note focuses on the Second Amendment and how it applies to individuals who were formerly incarcerated for nonviolent offenses, and whether they should be able to bear arms once they are released.[1] The United States Supreme Court has been active in shaping Second Amendment precedent over the past twenty years, as the Court worked to develop an applicable test for Second Amendment challenges.[2] In one of the Court's most recent Second Amendment rulings, *N.Y. State Rifle & Pistol Ass'n v. Bruen*,[3] Justice Clarence Thomas and the Court's majority crafted what is now known as the "historic tradition test."[4] The creation of the historic tradition test can be viewed as a continuation of the Court's established Second Amendment precedents, which first began in the *District of Columbia v. Heller*[5] and *McDonald v. City of Chicago*[6] cases.[7]

In *United States v. Duarte*,[8] defendant Steven Duarte was a felon who had been convicted of nonviolent criminal offenses on five separate occasions.[9] All five offenses were punishable with a prison term of more than one year.[10] The basis of the present case involved Duarte's arrest for the possession of a firearm while he was a convicted felon.[11] Duarte challenged his conviction under 18 U.S.C. § 922(g)(1), and argued his Second Amendment rights were violated in light of the United States Supreme Court's ruling in *Bruen*, where the Court created the historic tradition test to be applied to Second Amendment challenges.[12] The United States Court of Appeals for the Ninth Circuit ultimately ruled

1. United States v. Duarte, 101 F.4th 657 (9th Cir. 2024).
2. D.C. v. Heller, 554 U.S. 570 (2008); McDonald v. City of Chi., 561 U.S. 742 (2010); N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).
3. 597 U.S. 1 (2022).
4. *Bruen*, 597 U.S. at 24.
5. 554 U.S. 570 (2008).
6. 561 U.S. 742 (2010).
7. *Bruen*, 597 U.S. at 22-24.
8. 101 F.4th 657 (9th Cir. 2024).
9. United States v. Duarte, 101 F.4th 657, 662–63 (9th Cir. 2024).
10. *Duarte*, 101 F.4th at 662.
11. *Id.*
12. *Id.*

in favor of Duarte, and arrived at its decision after applying the two-step historic tradition test to his circumstances.[13]

This Note will begin by reviewing the facts and holding of *Duarte*.[14] It will then highlight United States Supreme Court case law and trace the development of the Court's Second Amendment analysis over the last twenty years, and how the Court's precedents shaped its eventual creation of the historic tradition test in *Bruen* when assessing Second Amendment challenges.[15] This Note will argue that the established historic tradition test requires that the government identify a historic analog from the Founding Era in order for the challenged Second Amendment statute to be successfully upheld.[16] It will then argue that there was no sufficient historical analog provided that was similar to § 922(g)(1) that Steven Duarte was convicted under, and reference a case from the United States Court of Appeals for the Third Circuit that also found no historical analog similar to § 922(g)(1).[17] Lastly, this Note will conclude by arguing that the Ninth Circuit was correct in finding for Duarte and reversing and vacating his conviction under § 922(g)(1), since the government was unable to provide evidence of any historical analogs from the Founding Era that were sufficiently similar to the statute he was charged under.[18]

II. FACTS AND HOLDING

In *United States v. Duarte*,[19] the defendant Steven Duarte's conviction was reversed and vacated by the United States Court of Appeals for the Ninth Circuit, following the appeal of Duarte's conviction from the United States District Court for the Central District of California.[20] On March 20, 2020, a red Infiniti drove past two police officers who then trailed the car before witnessing it run a stop sign.[21] After the cruiser's patrol lights were activated, one of the officers noticed a passenger, who would later be identified as Duarte, lower his window to dispose of a handgun.[22] After the officers stopped the vehicle, removed Duarte and the driver and handcuffed them, a search of the vehicle produced a loaded magazine.[23] A search of the immediate

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13. *See infra* notes 30–50 and accompanying text.
14. *See infra* notes 19–50 and accompanying text.
15. *See infra* notes 51–204 and accompanying text.
16. *See infra* notes 220–29 and accompanying text.
17. *See infra* notes 230–36.
18. *See infra* notes 237–246.
19. 101 F.4th 657 (9th Cir. 2024).
20. United States v. Duarte, 101 F.4th 657, 662 (9th Cir. 2024).
21. *Duarte*, 101 F.4th at 662.
22. *Id.*
23. *Id.*

area produced the handgun that Duarte had recently disposed of, a .380 caliber Smith & Wesson with a missing magazine.[24]

Following Duarte's arrest he was indicted by a federal grand jury on a charge of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), which states that it is unlawful for any person to possess any firearm or ammunition "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year."[25] The grand jury's indictment referenced Duarte's five prior non-violent criminal convictions.[26] Each of his prior convictions carried a possible sentence of one or more years in prison.[27] Duarte pled not guilty and went to trial, where he was ultimately found guilty and sentenced to fifty-one months in prison.[28]

Duarte filed an appeal with the United States Court of Appeals for the Ninth Circuit that challenged the constitutionality of his conviction, following the United States Supreme Court's 2022 ruling in *N.Y. State Rifle & Pistol Ass'n v. Bruen*.[29] Duarte argued that, based on the Supreme Court's ruling in *Bruen*, 18 U.S.C. § 922(g)(1) violated the Second Amendment in this instance because he was a non-violent offender who had completed his prison sentence and had reentered society.[30] The Ninth Circuit agreed with Duarte's argument, as the new mode of analysis established in *Bruen* now required lower courts to assess Second Amendment challenges through "the dual lenses of text and history."[31] The court then reconsidered § 922(g)(1)'s constitutionality as it applied to Duarte's conviction through *Bruen*'s historic tradition framework.[32]

In applying the *Bruen* two-factor test, courts have to consider whether the Second Amendment's text encompasses the challenger of the law, the weapon involved, along with the individual's course of conduct.[33] If the Second Amendment covers the factors above, the burden shifts to the government to show that the challenged regulation is compliant with the United States' historical tradition of regulating

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24. *Id.*

25. *Id.* Duarte's indictment in violation of 18 U.S.C. § 922(g)(1) was because of his five prior non-violent convictions that had carried a term of imprisonment potentially longer than one year, which then permanently prohibited him from possessing a firearm. 18 U.S.C. § 922(g)(1).

26. *Duarte*, 101 F.4th at 662-63. The grand jury indictment noted Duarte's "five prior non-violent criminal convictions in California: vandalism; felon in possession of a firearm; possession of a controlled substance; and two convictions for evading a police officer." *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 661; 597 U.S. 1 (2022).

30. *Duarte*, 101 F.4th at 661.

31. *Id.*

32. *Id.*

33. *Id.* at 665.

the Second Amendment.[34] To meet the burden, a "well-established and representative historical analogue" must apply to the challenged law.[35] Only when the government proves the firearm regulation is applicable to the nation's historical tradition is a court allowed to decide that the individual's conduct is outside of the confines of the Second Amendment and can be regulated.[36]

The Ninth Circuit held in *Duarte* that step one of the *Bruen* test was satisfied, as Duarte's weapon was a handgun, which was an "arm" as classified under the Second Amendment's text.[37] Additionally, Duarte's conduct of carrying a handgun for self-defense also fell within the Second Amendment's purview, a point the government did not dispute.[38] However, the government argued that the phrase "the people" in the Second Amendment did not include felons like Duarte, since felons were not considered part of the "virtuous" citizenry.[39] The court stated that because Duarte was an American citizen, and under its Second Amendment analysis, an "individual right to keep and bear arms [b]elongs to 'all Americans,'" Duarte was a part of the people protected by the Second Amendment.[40] Moving to *Bruen*'s second step, the Ninth Circuit also found the government unable to prove that § 922(g)(1)'s application to Duarte's case had any historical analog that justified a lifelong ban on Duarte's ability to bear arms.[41] Based upon the court's application and analysis of the two-part *Bruen* test to Duarte's conviction, the Ninth Circuit vacated his conviction and reversed the district court's judgment.[42]

The Ninth Circuit explained its disagreement with the government's assertion that Duarte was not part of "the people" protected under the Second Amendment.[43] The court stated that "the people" meant all citizens, and that the "right of the people" to bear arms was the fundamental right of every person.[44] Further, since Duarte was an American citizen he was sufficiently part of "the people" who were provided Second Amendment guarantees, of which one guarantee is the

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34. *Id.*
35. *Id.*
36. *Id.* The two-part historic tradition test created in *Bruen* is now controlling law for all lower courts to apply to Second Amendment challenges. The Ninth Circuit's *Vonxgay* test is no longer applicable within the circuit because the test employed a mode of analysis entirely different from the historic tradition test. *Id.*
37. *Id.* at 662.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* (emphasizing the requirement of the government's need to overcome the burden that § 922(g)(1) is applicable to Duarte only if there is a historical analog from the Founding Era is an integral factor of the historic tradition test developed in *Bruen*.).
42. *Id.*
43. *Id.* at 674.
44. *Id.*

right to possess a firearm for self-defense.[45] Regarding step two of the *Bruen* test, the Ninth Circuit stated that the government had the burden to identify a "well-established and representative historical analogue" to § 922(g)(1), and a law which only remotely resembled a felon firearm ban would not be sufficient.[46] Referencing the *Bruen* case, the court reasoned that while § 922(g)(1) addressed gun violence generally by placing a ban on felons owning firearms, the Founding Fathers could have adopted a similar measure during the Founding Era, but instead there were no laws on record that limited those formerly incarcerated from possessing a firearm.[47] Thus, since the government was unable to produce a "well-established and representative historical analogue" from the Founding Era that was sufficiently similar to § 922(g)(1), the Ninth Circuit concluded there was strong evidence that the statute was inconsistent with the Second Amendment.[48]

III. BACKGROUND

A. *District of Columbia v. Heller*: The United States Supreme Court's Landmark Second Amendment Ruling That Affirmed the Individual Right to Bear Arms in the Home and for Self-Defense

In *District of Columbia v. Heller*,[49] the United States Supreme Court held that individuals have a Second Amendment right to possess a firearm for traditional lawful purposes, with one purpose being for self-defense.[50] In the United States District Court for the District of Columbia, Dick Heller sued the city of the District of Columbia after it refused to issue Heller a registration certificate so he could keep his handgun at home.[51] Heller was a D.C. police officer authorized to carry a handgun while working at the Thurgood Marshall Judiciary Building.[52] Heller's lawsuit sought to enjoin the city from enforcing its prohibition on the registration of handguns, which made it illegal to possess a firearm in one's home without a license, as well as the trigger-lock requirement, that also prohibited an individual's ability to have a functional firearm in their home for self-defense.[53] The United States District Court for the District of Columbia dismissed the complaint that Heller was a party to, since the other appellants lacked sufficient standing and instead granted summary judgment to Heller,

45. *Id.* at 676.
46. *Id.* at 677.
47. *Id.*
48. *Id.*
49. 554 U.S. 570 (2008).
50. D.C. v. Heller, 554 U.S. 570, 574–75 (2008).
51. *Heller*, 554 U.S. at 575.
52. *Id.*
53. *Id.* at 576.

establishing his standing based on his employment as a special police officer.[54] The District Court held that because Heller had invoked his Second Amendment right to challenge the D.C. statute used to deny people the ability to own a handgun under D.C. law, the injury to his constitutional interests was "concrete and particular."[55]

Heller then appealed his case to the United States Court of Appeals for the District of Columbia Circuit, which ultimately reversed the district court's ruling.[56] The D.C. Circuit held that the District of Columbia's handgun ban, as well as the requirement that firearms remain nonfunctional in the home, even when owned for self-defense, violated the Second Amendment.[57] The District of Columbia appealed to the United States Supreme Court, who granted certiorari.[58] In analyzing the claim, the Supreme Court's majority focused on the text of the Second Amendment and divided it into two parts: the prefatory clause and the operative clause.[59] The operative clause of the Second Amendment codified a "right of the people" in the Court's view, and it highlighted six provisions within the Constitution where the term "the people" referred to all members of the political community.[60] Based on that interpretation, the Court strongly believed that the Second Amendment should be exercised individually among all Americans.[61] After further review of the text of the operative clause, the Court found that the Second Amendment guaranteed the individual right to "possess and carry weapons in case of confrontation."[62]

The Court found there to be no question that, based upon the text and history of the Second Amendment, that the Second Amendment did indeed bestow the right to keep and bear arms upon individual persons.[63] However, the Court stressed that the Second Amendment right to keep and bear arms did not apply to any sort of confrontation.[64] The Court emphasized that its opinion in *Heller* should not be viewed as to cast any doubt upon the established prohibition on felons or the mentally ill from possessing firearms.[65] Additionally, the Court's interpretation of the prefatory and operative clauses found that the clauses fit together since the prefatory clause's main purpose was to ensure that a militia could not be eliminated by the federal government by

54. Parker v. D.C., 478 F.3d 370, 376, 401 (D.C. Cir. 2007).
55. *Parker*, 478 F.3d at 376.
56. *Heller*, 554 U.S. at 576.
57. *Id.*
58. *Id.*
59. *Id.* at 577.
60. *Id.* at 579-80.
61. *Id.*
62. *Id.* at 592.
63. *Id.* at 595.
64. *Id.*
65. *Id.* at 626.

taking away the militia's arms.[66] The Court also found that the right to self-defense was integral to the Second Amendment and that the city handgun ban virtually prohibited an entire class of weapons (namely handguns) that were used by Americans for predominantly lawful purposes.[67] Ultimately, the Court ruled in favor of Heller and struck down the District of Columbia's handgun possession ban, along with the prohibition on having an operable firearm in the home for self-defense, finding that both bans violated the Second Amendment.[68] The District of Columbia was required to permit Heller to register and license a handgun to carry in his home.[69]

B. *McDonald v. City of Chicago*: The United States Supreme Court's Follow-Up Ruling to *District of Columbia v. Heller* that Incorporated Second Amendment Protections to the States Per the Fourteenth Amendment

In *McDonald v. City of Chicago*,[70] the United States Supreme Court held that the Second Amendment right fully applied to the States, which reinforced its decision in *Heller*.[71] In *McDonald*, Otis McDonald and other Chicago residents wanted to keep handguns in their homes strictly for self-defense, but were prohibited from doing so because of Chicago's firearm laws.[72] The city code prohibited most handguns from registration, which effectively banned nearly all private citizens from possessing a handgun in the city of Chicago.[73] Chicago had enacted the ban to protect residents "from the loss of property and injury or death from firearms."[74] However, McDonald and others argued that the ban left them unable to defend themselves against criminals, especially because Chicago had one of the highest rates for murder and other violent crimes in the country.[75] Following the *Heller* decision, McDonald and the other petitioners filed suit against the city of Chicago in the United States District Court for the Northern District of Illinois, where they argued that the city's handgun ban and other related ordinances violated the Second and Fourteenth Amendments.[76]

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66. *Id.* at 598.
67. *Id.* at 628.
68. *Id.* at 635.
69. *Id.*
70. 561 U.S. 742 (2010).
71. McDonald v. City of Chi., 561 U.S. 742, 750 (2010).
72. *McDonald*, 561 U.S. at 750.
73. *Id.*
74. *Id*. (quoting Journal of Proceedings of the City Council of the City of Chicago, Illinois, P. 10049 (Mar. 19, 1982), https://chicityclerk.s3.us-west-2.amazonaws.com/s3fs-public/document_uploads/journals-proceedings/1982/031982.pdf).
75. *Id.* at 751.
76. *Id.* at 752.

The district court ruled against the plaintiffs' argument that the Chicago ordinance was unconstitutional, deferring to a United States Court of Appeals for the Seventh Circuit ruling, which had upheld a ban on handguns within the past twenty-five years.[77] The district court also noted that in *Heller,* the United States Supreme Court refrained from addressing the subject of incorporation of the Second Amendment.[78] McDonald then appealed to the United States Court of Appeals for the Seventh Circuit, which affirmed the district court's ruling on the city ordinance.[79] The Seventh Circuit stated it had an obligation to adhere to past Supreme Court precedent with respect to the Fourteenth Amendment incorporation doctrine, and declined to comment on how the Second Amendment would be interpreted with the Supreme Court's selective incorporation approach.[80] McDonald and the petitioners appealed to the United States Supreme Court in a final effort to invalidate Chicago's handgun ban ordinance.[81] The petitioners' argued that their Second Amendment right to keep and bear arms was violated because of the handgun ban ordinance, and that their right to bear arms was among the "privileges and immunities of citizens of the United States."[82] The cities of Chicago and Oak Park alternatively argued that a right within the Bill of Rights should only be incorporated to the States if that right was an integral attribute of a civilized legal system.[83] The cities argued that if a civilized country that did not have a right to keep and bear arms could be imagined, that such a right was then not protected.[84] The Court ultimately ruled that because *Heller* established the Second Amendment right to keep a handgun in the home for self-defense, the principle of stare decisis established that the Fourteenth Amendment's Due Process Clause incorporated the Second Amendment to the States.[85]

The Supreme Court traced the development of the Due Process Clause as it applied to the Bill of Rights and its incorporation to the states.[86] The majority highlighted the Court's movement to the process of "selective incorporation," where it held that the Due Process Clause did incorporate rights found in the first eight Amendments.[87]

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77. *Id.*
78. *Id.* ("*Heller* had explicitly refrained from 'opin[ing] on the subject of incorporation vel non of the Second Amendment'" (quoting NRA, 617 F.Supp.2d 752, 754 (2008))).
79. *Id.*
80. *Id.* (indicating their reliance on the United States Supreme Court's rulings in *United States v. Cruikshank*, *Presser v. Illinois*, and *Miller v. Texas* in affirming the district court's ruling on the incorporation of the Second Amendment to the states.).
81. *Id.* at 753.
82. *Id.* (quoting U.S. CONST. art. VI § 2).
83. *Id.*
84. *Id.*
85. *Id.* at 791.
86. *Id.* at 764.
87. *Id.* at 763.

Additionally, the Court clarified that the new standard was whether the "Bill of Rights guarantee is fundamental to our scheme of ordered liberty and system of justice."[88] With the new selective incorporation approach, the Court overruled its previous precedent which established that certain Bill of Rights guarantees were not incorporated to the States.[89] In finding that the Second Amendment was fundamental to the scheme of ordered liberty and rooted in the nation's history, the Court found that self-defense was a basic right and central component of the Second Amendment.[90] In so finding, the Supreme Court rejected the city of Chicago and Oak Park's arguments that the established incorporation methodology as applied to the Second Amendment was inconsistent with the principles of federalism.[91] The Court stated further that based upon its precedent, and unless stare decisis dictated otherwise, a fundamental guarantee under the Bill of Rights that the Second Amendment is should be incorporated to the States.[92]

C. *N.Y. State Rifle & Pistol Ass'n v. Bruen*: The Origin of the Historic Tradition Test and Its Application to The Second Amendment

In *N.Y. State Rifle & Pistol Ass'n v. Bruen*,[93] the United States Supreme Court held that the state of New York's proper-cause requirement violated both the Second and Fourteenth Amendments by not allowing law-abiding citizens to keep and bear arms for the ordinary need of self-defense.[94] In *Bruen*, Brandon Koch and Robert Nash, both New York state residents, applied for licenses to carry a handgun in public for self-defense.[95] Both men were denied licenses because they did not satisfy the proper-cause requirement.[96] Koch and Nash then sued the state officials who oversaw the licensing applications, arguing their Second and Fourteenth Amendment rights were violated; they sought relief in the United States District Court for the Northern District of New York.[97]

The complaint was dismissed by the district court because the court was bound by the ruling in *Kachalsky v. County of Westchester*,[98] decided in 2012 by the United States Court of Appeals for the Second

88. *Id.* at 764.
89. *Id.* at 766.
90. *Id* at 767.
91. *Id.* at 783.
92. *Id.* at 784–85.
93. 597 U.S. 1 (2022).
94. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 11 (2022).
95. *Bruen*, 597 U.S. at 15–16.
96. *Id.* at 16.
97. *Id.*
98. 701 F.3d 81 (2d Cir. 2012).

Circuit.[99] The district court found that the factual circumstances in *Kachalsky* were substantially similar to Koch and Nash's circumstances, and held that neither Koch nor Nash demonstrated a proper cause that justified their ability to obtain a license to conceal carry in public for self-defense.[100] Koch and Nash argued that the Second Amendment's protections and the fact that they were individuals of "good standing" afforded them the ability to obtain a licensing permit without the need to establish proper cause.[101]

The men appealed to the United States Court of Appeals for the Second Circuit.[102] The Second Circuit affirmed the district court's holding and again relied upon the *Kachalsky* case as precedent for doing so.[103] Since the proper-cause standard requirement was "substantially related to the achievement of an important governmental interest," the Second Circuit believed the standard remained proper and enforceable.[104] The men appealed the matter to the United States Supreme Court, who granted certiorari to decide whether the state of New York's denial of their licensing applications was unconstitutional.[105]

Koch and Nash's arguments before the Supreme Court reiterated the violation of their Second and Fourteenth Amendment rights because the state of New York denied their concealed carry license applications since both men failed to show proper cause or a unique need for self-defense.[106] Bruen, as superintendent of the New York State Police, had authority over the enforcement of state licensing laws and represented the interests of the state of New York.[107] The state argued there was historical precedent set during the period of the early Republic which placed restrictions on public carry and established a tradition of public carry regulation.[108] It provided additional late eighteenth and early nineteenth century statutes, similar to the early Republic statutes, that prohibited the bearing of arms in public areas since those arms could result in the terror or fear of citizens.[109] The Court ultimately held that New York's law, requiring that proper cause be shown for a licensing application to be granted, violated the Second and Fourteenth Amendments and ruled in favor of Brandon

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99. N.Y. Rifle & Pistol Ass'n v. Beach, 354 F. Supp. 3d 143 (N.D.N.Y. 2018).
100. *Beach*, 354 F. Supp. 3d at 148.
101. *Id.*
102. *Bruen*, 597 U.S. at 16.
103. *Id.* at 17.
104. *Id.* (quoting 701 F.3d at 96).
105. *Id.*
106. *Id.* at 16.
107. *Id.*
108. *Id.* at 46.
109. *Id.* at 49–50.

Koch and Robert Nash.[110] Accordingly, the Second Circuit's judgment was reversed and remanded.[111]

The Court began its reasoning by addressing the *Heller* and *McDonald* cases and the Second and Fourteenth Amendment precedents established in both.[112] It highlighted that following those cases, a two-step approach was adopted by various courts of appeals that coupled an analysis of history with means-end scrutiny.[113] Going forward, however, the Court would utilize a different approach.[114] Known as the "historic tradition test," the standard the Court's majority crafted to apply to the Second Amendment was: (1) When an individual's conduct is covered by the Second Amendment's text, their conduct is presumptively protected by the Constitution; (2) The burden then falls to the government to justify the regulation in question by proving that the regulation adheres to a historically based firearm regulation.[115]

Writing for the majority, Justice Clarence Thomas elaborated on how lower courts should determine if current firearm regulations were relevantly similar to historically based analogs and again looked to *Heller* and *McDonald* for useful guidance.[116] The respective cases pointed to two metrics: (1) *how* and (2) *why* the regulations burdened the right to self-defense, the right specifically established by the Second Amendment in *Heller* and *McDonald*.[117] Since self-defense was established as a central component of the Second Amendment in the respective cases, the Court stated that whether the modern and historical regulations infringed upon the right to self-defense, and whether it was legitimate to burden that right, were important considerations when comparing the regulations.[118] However, the Court made clear that the newly crafted analogical reasoning method for interpreting the Second Amendment should not be used to uphold every single modern law that was sufficiently similar to a historical analog.[119] If it did so, the Court believed it would lead to the endorsement of outlier regulations that the Founders would have deemed unacceptable.[120]

In separate concurrences, Justice Samuel Alito and Justice Brett Kavanaugh highlighted important points the *Bruen* case addressed and points it did not.[121] Justice Alito reiterated that the Court's ruling

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110. *Id.* at 70–71.
111. *Id.* at 71.
112. *Id.* at 17.
113. *Id.*
114. *Id.*
115. *Id.* at 24.
116. *Id.* at 29.
117. *Id.*
118. *Id.*
119. *Id.* at 30.
120. *Id.*
121. *Id.* at 71, 79.

in *Bruen* only held that a state could not enforce a licensing regulation on firearms that prevented its law-abiding residents from possessing a handgun for self-defense purposes.[122] Justice Alito also noted that the *Bruen* ruling did not decide anything regarding who could legally possess a firearm, as it did not alter the restrictions established in *Heller* or *McDonald* pertaining to who could keep and bear arms.[123] Justice Kavanaugh emphasized similarly that, as in the *Heller* and *McDonald* decisions as well as the *Bruen* decision, the Second Amendment right was not unlimited.[124] Justice Kavanaugh quoted a section of Justice Scalia's opinion from the *Heller* decision, ". . . [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools. . . ."[125] Thus, the Court's decision in *Bruen* overruled New York state's licensing regulations for handguns, because the licensing regulations violated an individual's Second Amendment right to carry a handgun for self-defense.[126]

D. *Range v. AG United States*: The United States Court of Appeals for the Third Circuit's Successful Application of the Historic Tradition Test in The Post-*Bruen* Era

In *Range v. AG United States*,[127] the United States Court of Appeals for the Third Circuit held for Bryan Range and found that Range's classification as a "felon in possession" under 18 U.S.C. § 922(g)(1) violated his Second Amendment rights.[128] In *Range*, Bryan Range sued the Attorney General of the United States and the Acting Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives, after he was repeatedly denied the ability to purchase firearms for hunting and self-defense.[129] Range had previously pled guilty in a Pennsylvania state court to making a false statement to receive food stamps.[130] His conviction was classified as a misdemeanor punishable by up to five years in prison, which subjected Range to the firearm prohibition under 18 U.S.C. § 922(g)(1), because the statute stated that a person convicted of a crime with a potential sentence of more than a year in prison prohibited them from possessing a firearm.[131]

122. *Id.* at 71–72.
123. *Id.* at 72.
124. *Id.* at 81 (quoting *D.C. v. Heller*, 554 U.S. 570, 626–27 (2008)).
125. *Id.*
126. *Id.* at 79.
127. 69 F.4th 96 (3d Cir. 2023).
128. Range v. AG United States, 69 F.4th 96, 98 (3d Cir. 2023).
129. *Range*, 69 F.4th at 98–99.
130. *Id.* at 98.
131. *Id.*

Range filed a lawsuit in the United States District Court for the Eastern District of Pennsylvania alleging § 922(g)(1) violated his Second Amendment rights, but the claim was ultimately denied by the district court.[132] The district court applied controlling Third Circuit precedent at the time and ruled that Range's conviction for false statements was serious enough that the denial of his Second Amendment rights under § 922(g)(1) was justified.[133] The factors the district court weighed was whether Range was (1) convicted of a misdemeanor or felony; (2) whether the offense involved violence; (3) the sentence imposed; (4) whether multiple jurisdictions had a consensus on the seriousness of the crime; and (5) the potential of harm to others as a result of the offense.[134] While the government agreed that four of the five factors did not apply to Range, the district court held that since other jurisdictions classified Range's conviction as a felony it was sufficient enough to deny Range the right to keep and bear arms.[135]

Range then appealed to the United States Court of Appeals for the Third Circuit, claiming that the district court erred because it rejected his claim that 18 U.S.C. § 922(g)(1) violated his Second Amendment rights.[136] The Third Circuit held for Range and found that his classification as a "felon in possession" under § 922(g)(1) violated his Second Amendment rights.[137] The Third Circuit relied upon the *Bruen* decision and attempted to compare Range's conviction for a false statement and subsequent loss of his Second Amendment rights by § 922(g)(1) to a historical firearm regulation.[138] The court pointed out that the government failed to identify any historical analogs and also did not successfully analogize Range's conviction to any historical status-based restriction.[139] Additionally the Third Circuit rejected the government's Founding Era analogy that some nonviolent crimes were punished more severely with death, and stated that those punishments did not mean that disarming a person for life was a part of the nation's historical tradition.[140] The government also did not cite any case law that excluded a felon who had completed their sentence from obtaining another firearm, especially if the felon served time on a non-firearm related charge.[141]

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132. *Id.* at 99.
133. *Id.*
134. *Id.*
135. *Id.* (noting that the Third Circuit had rejected as-applied challenges of a similar nature when only one of the five factors were satisfied, the district court nevertheless ruled against Range on the cross-jurisdictional factor.).
136. *Id.*
137. *Id.* at 103.
138. *Id.*
139. *Id.* at 104.
140. *Id.* at 105.
141. *Id.*

Range served three years of probation on the false statement charge.[142] Since the government was unable to provide a proper historical analog that deprived persons of their firearms who were in a similar situation to Range, he could not be deprived of his Second Amendment right under § 922(g)(1).[143] The Third Circuit reversed and remanded the district court's judgment in favor of Range.[144]

Following the Third Circuit's judgment in favor of Range, the government filed an appeal with the United States Supreme Court.[145] However, while the government's appeal was pending before the Supreme Court, the Court issued its ruling in *United States v. Rahimi*[146] in June 2024.[147] Instead of hearing arguments in the *Range* case, the Supreme Court vacated and remanded the Third Circuit's en banc decision for reconsideration by the lower court.[148] The Third Circuit issued its final ruling in December 2024 after rehearing the case en banc.[149] Ultimately, the Third Circuit again ruled in favor of Range and reversed and remanded the district court's finding that he be disarmed under 18 U.S.C. § 922(g)(1).[150] The Third Circuit reapplied the historic tradition test created in *Bruen* to reevaluate Range's challenge to § 922(g)(1).[151] While much of the opinion's reasoning pertained to the historic tradition test and the government's inability to again identify a sufficient historical analog to Range's conviction, the court made sure to distinguish Range's case from *Rahimi*.[152]

The Supreme Court's holding in *Rahimi* was distinguishable from *Range* for two reasons. First, because the statute in question in *Rahimi* was 18 U.S.C. § 922(g)(8), compared to Range's Second Amendment challenge against 18 U.S.C. § 922(g)(1).[153] Second, Range was not found to be a threat to another's physical safety, which § 922(g)(8) required for a person to be disarmed.[154] The government did not attempt to disarm Range on the basis that he posed a physical threat to another person; rather, it argued that the "dangerousness" metric should extend to all felonies and also misdemeanors equated with felonies under federal law.[155] Additionally, the government noted

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142. *Id.* at 98.
143. *Id.* at 106.
144. *Id.*
145. Range v. AG United States, 124 F.4th 218, 224 (3d Cir. 2024).
146. 602 U.S. 680 (2024).
147. *Range*, 124 F.4th at 224.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 225.
152. *Id.* at 230.
153. *Id.*
154. *Id.*
155. *Id.*

that *Rahimi* did not foreclose the possibility of a possession ban for those deemed by a legislature to present a special danger of misuse.[156]

The Third Circuit found the government's argument to be too broad and inapplicable to Range's situation, because being found guilty of making a false statement to obtain food stamps is not categorically similar to being a physical threat to another person.[157] The majority pointed out that the Supreme Court only allowed temporary disarmament for those who threatened the physical safety of others since there was a sufficient historical analog that temporarily imprisoned those who threatened the safety of others.[158] Thus, the Third Circuit's decision following the application of the historic tradition test to Range's false statement conviction did not change, and § 922(g)(1) could not be applied to enjoin his Second Amendment right.[159]

E. *United States v. Rahimi*: The United States Supreme Court's Most Recent Second Amendment Ruling That Clarified the Historic Tradition Test

In *United States v. Rahimi*,[160] the United States Supreme Court held that a person who is determined by a court to pose a threat to the physical safety of others can be temporarily disarmed without violating the Second Amendment.[161] Over a one-month period from December 2020 to January 2021, Zackey Rahimi was involved in five shootings.[162] In one altercation after selling narcotics, he fired multiple shots into the buyer's home.[163] The next day Rahimi was engaged in another shooting, where he shot at the driver of a vehicle and fled before returning to fire at another person's vehicle.[164]

Three additional instances occurred before the Arlington, Texas Police Department identified Rahimi as the suspected shooter and secured a search warrant for his home.[165] Upon searching Rahimi's home, the officers found multiple weapons that belonged to him.[166] Rahimi also informed the officers that he was subject to a civil protective order after an alleged assault of his ex-girlfriend, which prohibited

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156. *Id.* (arguing for a ban on the possession of firearms based on the rather general term of "special danger of misuse" would need to be further defined by the legislatures passing the regulations, otherwise the statute may run the risk of being challenged on vagueness, and it is also important to specifically identify those that would be dangerous.).
157. *Id.*
158. *Id.* at 231.
159. *Id.* at 232.
160. 602 U.S. 680 (2024).
161. United States v. Rahimi, 602 U.S. 680, 702 (2024).
162. United States v. Rahimi, 61 F.4th 443, 448 (5th Cir. 2023).
163. *Rahimi*, 61 F.4th at 448.
164. *Id.* at 448.
165. *Id.* at 448–49.
166. *Id.*

him from committing violence against his ex-girlfriend, going within 200 yards of her work or home, and from possessing a firearm.[167] As a result of his actions, Rahimi was indicted under 18 U.S.C. § 922(g)(8), which made it unlawful for someone who threatened the physical safety of an intimate partner or child from being in possession of a weapon while a domestic violence restraining order is in effect.[168] Rahimi attempted to have the indictment dismissed by arguing that § 922(g)(8) was unconstitutional, which the district court denied because *United States v. McGinnis*[169] invalidated his argument.[170]

Rahimi then appealed to the United States Court of Appeals for the Fifth Circuit, and again constitutionally challenged § 922(g)(8).[171] While Rahimi's case was before the Fifth Circuit, the United States Supreme Court issued its ruling in *Bruen*, which Rahimi used to argue that § 922(g)(8) was unconstitutional.[172] Under Fifth Circuit rules, the court convened a new panel of judges to consider Rahimi's case to determine if the preceding panel's decision was out of step because of a change in the law, which resulted because of the *Bruen* ruling.[173] Ultimately, the Fifth Circuit held for Rahimi and reversed and vacated his conviction because the government was unable to prove that § 922(g)(8)'s restriction on the Second Amendment was justified within the historical firearm regulations of the nation.[174] The Fifth Circuit focused on the Supreme Court's interpretative analysis of the Second Amendment in the *Heller* and *Bruen* cases as it pertained to § 922(g)(8).[175] Applying *Heller* to Rahimi's case, the Fifth Circuit was skeptical of the government's argument that the Supreme Court's reference to "law abiding, responsible citizens" excluded Rahimi following the historical tradition analysis formulated in *Bruen*.[176] The Fifth Circuit reasoned that Rahimi did not fall within any group that had been historically stripped of their Second Amendment right, since he was only under a domestic violence restraining order at the time of his arrest.[177] The court added that while Rahimi was suspected of committing crimes at the time, he was not a convicted felon and thus not prohibited from possessing a firearm under 18 U.S.C. § 922(g)(1).[178] Because the government could not identify any historical analogs from

167. *Id.* at 449.
168. *Id.*
169. 956 F.3d 747 (5th Cir. 2020).
170. *Rahimi*, 61 F.4th at 449.
171. *Id.*
172. *Id.* at 450.
173. *Id.*
174. *Id.* at 460.
175. *Id.* at 451.
176. *Id.* at 451–52.
177. *Id.* at 452.
178. *Id.*

the Founding Era which were historically similar to the prohibition of possessing a firearm under § 922(g)(8) due to a civil protection order, the Fifth Circuit ruled in favor of Rahimi.[179]

The government then appealed to the United States Supreme Court, which granted certiorari to decide whether § 922(g)(8) could be enforced against Rahimi and not violate his Second Amendment rights post-*Bruen*.[180] The government argued that the Fifth Circuit erred in its holding because Rahimi violated 18 U.S.C. § 922(g)(8), which prohibited him from possessing a firearm because of the domestic violence restraining order against him.[181] The Court ultimately ruled in favor of the United States, concluding that a person determined by a court to pose a credible threat to another's physical safety can in fact be temporarily disarmed without violating the Second Amendment.[182] Chief Justice John G. Roberts Jr., writing for the eight to one majority, stated that § 922(g)(8) did fit into the historical tradition of the nation's firearm regulations, because firearm laws from the Founding Era did include provisions that kept threatening individuals from misusing firearms.[183]

Predictably, the Court relied on its previous rulings in *Heller* and *McDonald* to reaffirm the importance of the Second Amendment's protections, and how far those protections extended.[184] The Court acknowledged in *McDonald* that the Second Amendment right to bear arms for self-defense is a fundamental right, but also highlighted in its *Heller* opinion that the right was not unlimited.[185] While the Court's inquiry of the Second Amendment's constitutional text and history began in *Heller*, an analysis that centered on the historical tradition of firearm regulations was not crafted until the *Bruen* ruling.[186] However, the Court slightly modified *Bruen*'s historic tradition test, stating that the challenged law or regulation in question and the historical match must be "analogous enough" to be sufficient, but that the historical analog does not need to be a "historical twin."[187]

The Court found that the government provided sufficient evidence that Rahimi posed a credible threat to his ex-girlfriend's physical safety, thus permitting his disarmament.[188] From the beginning days of common law, there were firearm regulations in place that barred people

179. *Id.* at 460–61.
180. United States v. Rahimi, 602 U.S. 680, 685–86 (2024).
181. *Rahimi*, 602 U.S. at 701.
182. *Id.* at 702.
183. *Id.* at 690.
184. *Id.* at 690–91.
185. *Id.* at 690.
186. *Id.* at 692.
187. *Id.*
188. *Id.* at 693.

from using weapons to intimidate or harass others.[189] Upon analysis of the historical tradition of the nation's surety and going armed laws, the Court found numerous historical analogs that justified its proper application to Rahimi and the requirement that he be disarmed under § 922(g)(8).[190] The historical surety and going armed laws regulated gun use in the pursuit of physical violence just as § 922(g)(8) restricted such threats of physical violence today.[191] The Court also emphasized that § 922(g)(8) was similar to surety bonds of limited duration since Rahimi was also only temporarily prohibited from possessing a firearm, which only strengthened the government's argument against Rahimi.[192] Based on the historical precedents and because Chief Justice Roberts and the majority slightly altered *Bruen*'s historic tradition test, the Court reversed the Fifth Circuit's ruling and held that Rahimi could be temporarily disarmed under § 922(g)(8) consistent with the Second Amendment.[193]

The lone dissent in *Rahimi* was written by the author of the *Bruen* opinion and creator of the historic tradition test, Justice Clarence Thomas.[194] In Justice Thomas's view, § 922(g)(8) was not satisfied by any historical regulation.[195] Thomas analyzed the severe implications that resulted from violating the statute, such as being sentenced up to fifteen years in prison upon conviction, which leads to permanently being prohibited from possessing a firearm under § 922(g)(1).[196] The statute violated the Second Amendment's plain text because it banned someone, Rahimi in this case, from even possessing a firearm for self-defense.[197] And second, Justice Thomas argued that Rahimi was classified as part of "the people" under the Second Amendment, since he was an American and a member of the political community.[198]

In addition, Justice Thomas argued that the laws targeting dangerous people which the majority referred to as historical analogs for upholding § 922(g)(8) were what led to the Second Amendment's creation in the first place.[199] Justice Thomas felt that this case was not about whether states could disarm those that threaten others since states already could through criminal prosecution, but rather whether the government could hinder someone's Second Amendment right

189. *Id.*
190. *Id.* at 698.
191. *Id.*
192. *Id.* at 699.
193. *Id.* at 701–02.
194. *Id.* at 747.
195. *Id.*
196. *Id.* at 748.
197. *Id* at 751–52.
198. *Id.*
199. *Id.* at 754.

while they were party to a protection order, even if they had not been convicted of a crime.[200]

IV. ANALYSIS

In *United States v. Duarte*,[201] the United States Court of Appeals for the Ninth Circuit held that 18 U.S.C. § 922(g)(1),[202] which prohibited any person convicted of a crime punishable by more than one year in prison from possessing a firearm, did not apply to Steven Duarte based upon the United States Supreme Court's Second Amendment ruling in the 2022 case *N.Y. State Rifle and Pistol Ass'n v. Bruen*.[203] Duarte was arrested by the police during a traffic stop when they noticed that he tossed a handgun out of the moving car he was in.[204] He was subsequently convicted under § 922(g)(1), as he was a felon in possession of a firearm due to his five previous non-violent state convictions.[205] The Ninth Circuit utilized the current mode of Second Amendment analysis, the "historic tradition test," established in *Bruen* which required district and circuit courts to combine both text and history when adjudicating Second Amendment challenges.[206] First, the court determined Duarte's handgun was an "arm" under the meaning of the Second Amendment, and that he possessed the handgun for self-defense.[207] Second, Duarte as a non-violent felon was found to be part of "the people" whom the Second Amendment protected because the Ninth Circuit held the amendment was a fundamental right for every citizen.[208] Finally, the government did not satisfy the historic tradition test's second step because it did not sufficiently identify a historical analog that mirrored § 922(g)(1) and the impact of the statute on Duarte's ability to ever own a firearm.[209]

To begin, this analysis will argue that the United States Supreme Court's development of Second Amendment interpretation, specifically in the preceding cases of *District of Columbia v. Heller*[210] and *McDonald v. Chicago*,[211] laid the groundwork for the eventual creation of the historic tradition test, which is now the prevailing mode of

200. *Id.* at 777.
201. 101 F.4th 657 (9th Cir. 2024).
202. 18 U.S.C. § 922 (2024).
203. United States v. Duarte, 101 F.4th 657, 661 (9th Cir. 2024); 597 U.S. 1 (2022).
204. *Duarte*, 101 F.4th at 661.
205. *Id.*
206. *Id.*
207. *Id.* at 662.
208. *Id.*
209. *Id.*
210. 554 U.S. 570 (2008).
211. 561 U.S. 742 (2010).

Second Amendment interpretation following the *Bruen* decision.[212] The analysis will then segway into arguing how the outcome determinative factor of the historic tradition test in *Bruen* rests upon the ability of the government to prove a historical analog from the Founding Era existed that was similar to the Second Amendment statute being challenged in the present.[213] The government in Duarte's case was unable to provide a historical analog from the Founding Era that similarly prohibited a non-violent offender's ability to possess a weapon, similar to that of 18 U.S.C. § 922(g)(1).[214] A Third Circuit case, similar to Duarte's, will also be addressed to highlight that the historic tradition test was properly applied by another sister circuit.[215] Lastly, the analysis will argue that the Ninth Circuit was correct in its holding that Duarte's conviction under § 922(g)(1) be reversed and vacated, because the government was unable to provide a sufficient historical analog similar to § 922(g)(1) that showed a non-violent offender was prohibited from possessing a weapon in the Founding Era.[216]

A. The Historic Tradition Test Created by the Supreme Court in *Bruen* Requires a Historical Analog from the Founding Era in Order for a Challenged Second Amendment Statute to be Upheld

The two most influential Second Amendment cases decided by the United States Supreme Court that developed the Court's Second Amendment interpretation prior to its ruling in *Bruen*, decided in 2022, were the *Heller* and *McDonald* decisions.[217] The Court's ruling in both cases affirmed two important precedential implications for the Second Amendment: First, that the Second Amendment protected the ability to bear arms for self-defense inside the home; and second, that the Second Amendment was officially incorporated to the States through the Due Process Clause of the Fourteenth Amendment.[218] The *Heller* and *McDonald* opinions were referenced in *Bruen* by the majority as the Court utilized tenets of both cases in creating the historic tradition test, which became the newest mode of analysis for addressing Second Amendment challenges.[219] The principal issue that arose from

212. *See supra* notes 52–117 and accompanying text.
213. *See supra* text accompanying notes 16–17.
214. *See supra* text accompanying note 43.
215. *See supra* text accompanying notes 129–63.
216. *See supra* text accompanying notes 35–50.
217. *See* D.C. v. Heller, 554 U.S. 570 (2008) (holding that the Second Amendment protected the right of Americans to possess a firearm for purposes of self-defense, namely in the home); *see also* McDonald v. City of Chi., 561 U.S. 742 (2010) (holding that the Second Amendment was a fundamental right to be incorporated to the States via the Due Process Clause of the Fourteenth Amendment.).
218. *Id.*
219. *See Bruen*, 597 U.S. at 10.

the *Heller* and *McDonald* decisions was: how and why the regulations in question burdened a person's right to self-defense.[220] The Second Amendment regulation challenged in Duarte's case was 18 U.S.C. § 922(g)(1), which states that it is unlawful for any person to possess any firearm or ammunition "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." Since Duarte was carrying a firearm for self-defense, as was his right to do per the rulings in *Heller* and *McDonald*,[221] he should not have been arrested and charged under 18 U.S.C. § 922(g)(1) as a felon in possession of a firearm.[222]

It is important to recognize the prevalence of the originalist judicial philosophy that has been quite influential on Second Amendment jurisprudence over the past twenty years.[223] Beginning in 2008 with *Heller*, Justice Scalia's majority opinion emphasized a close reading of the Second Amendment through an originalist lens.[224] Additionally, parallels between the eventual establishment of the historic tradition test in the *Bruen* case can be seen through Justice Scalia's mention of text and history and how that interpretation of the Second Amendment's prefatory and operative clauses led to the individual right to self-defense in the home being reinforced.[225] The historic tradition test officially solidified an originalist mode of interpretation for analyzing challenges to the Second Amendment, which has continued to divide lower circuit courts in their subsequent rulings. The Ninth Circuit in Duarte's case was correct in its interpretation of § 922(g)(1), as the government could not provide any historical analog that showed the Founding Fathers would have permanently disarmed Duarte because of his previous convictions for vandalism, possession of a controlled substance, and evading a peace officer.[226]

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220. *See supra* text accompanying notes 118–20.

221. *See supra* note 25.

222. *See supra* text accompanying notes 40–42.

223. *See* D.C. v. Heller, 554 U.S. 570, 573 (2008) (writing for the majority was conservative originalist Justice Antonin Scalia); *see also* McDonald v. City of Chi., 561 U.S. 742, 748 (2010) (writing for the majority was also conservative originalist Justice Samuel Alito); N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 8 (2022) (writing for the majority in the most recent Second Amendment ruling was conservative originalist Justice Clarence Thomas.).

224. *See supra* text accompanying notes 61–65.

225. *Id.*

226. *Compare* United States v. Duarte, 101 F.4th 657, 676–77 (9th Cir. 2024) (noting the Ninth Circuit's analysis of Duarte's case and prior non-violent convictions using the historic tradition test established in *Bruen*), *with Bruen*, 597 U.S. at 24–26 (2022) (explaining the new historic tradition mode of analysis and how if the Second Amendment's text covers a person's conduct, it is presumptively constitutional, and that the government must provide a sufficient historical firearm regulation to justify the current regulation.).

B. There Is No Historical Analog From the Founding Era Similar to 18 U.S.C. § 922(g)(1) That is Applicable to Duarte's Prior Convictions in *United States v. Duarte*

Since the government was unable to successfully identify a historical analog from the Founding Era that was sufficiently similar to § 922(g)(1) which Duarte was convicted under, the Ninth Circuit's only option was to rule in favor of Duarte and reverse and remand his conviction.[227] Importantly, in holding for Duarte, the Ninth Circuit ruled in favor of a non-violent felon who had not committed any violent crimes or was subject to any protection orders that deemed Duarte a threat to the physical safety of others.[228] In doing so, the Ninth Circuit provided a non-violent felon the right to possess a firearm for self-defense; and while the Supreme Court noted in *Heller* and reiterated in *Bruen* that common sense firearm prohibitions still applied to felons and the mentally ill, the Ninth Circuit was justified in finding for Duarte because it properly applied the historic tradition test factors to his case.[229]

The Ninth Circuit's decision is further supported by the United States Court of Appeals for the Third Circuit's ruling in *Range v. AG United States*,[230] which involved a similar § 922(g)(1) challenge that was vacated and remanded following the *Rahimi* ruling, and reaffirmed after an en banc hearing by the Third Circuit.[231] The *Duarte* and *Range* cases both involved previously incarcerated individuals who had non-violent felonies on their record that them from bearing arms due to their classification under § 922(g)(1).[232] Especially after the Third Circuit reaffirmed its original ruling in *Range* in December 2024, and the Ninth Circuit's original ruling for Duarte, it is clear that lower courts are properly interpreting and applying the historic tradition test.[233]

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227. United States v. Duarte, 101 F.4th 657, 667.

228. *Compare Duarte*, 101 F.4th 657, 691 (9th Cir. 2024) (holding for Duarte since his previous non-violent convictions did not have a historical analog that could be traced back to the Founding Era), *with* United States v. Rahimi, 602 U.S. 680, 700 (2024) (stating that § 922(g)(8), that Rahimi was convicted under due to being under a civil domestic violence protection order, allowed him to be disarmed consistent with the Second Amendment).

229. *See supra* text accompanying notes 35–44.

230. 69 F.4th 96 (3d Cir. 2023).

231. *Compare Duarte*, 101 F.4th 657, 691 (9th Cir. 2024) (holding that upon an analysis of Duarte's case with the historic tradition test that his right to self-defense was constitutional because the government could not provide a sufficient historical analog to § 922(g)(1)), *with* Range v. AG United States, 124 F.4th 218, 232 (3d Cir. 2024) (reaffirming its decision after the *Rahimi* case that § 922(g)(1) did not apply to Bryan Range as a non-violent felon because the government was unable to provide a sufficient historical analog to the present statute.).

232. *See supra* notes 25–28, 132–33 and accompanying text.

233. *See Duarte*, 101 F.4th at 691; *see also Range*, 124 F.4th at 232.

C. The Ninth Circuit Ruled Correctly in United States v. Duarte Based on the Proper Application of the Historic Tradition Test and the Government's Inability to Provide a Historical Analog to § 922(g)(1)

Because a historical analog was not provided that was sufficiently similar to 18 U.S.C. § 922(g)(1), which the historic tradition test required in order for the statute to justifiably restrict Duarte's ability to possess a firearm, the Ninth Circuit's decision to reverse and vacate Duarte's conviction was properly reached.[234] The majority's ruling in *Bruen* was clear about the factors that needed to be met by the government when arguing that a current firearm regulation was properly applied to a prohibition on the defendant's ability to bear arms under the Second Amendment.[235] First, when an individual's conduct, such as Duarte's ability to bear arms for self-defense, is covered by the plain text of the Second Amendment, his conduct is presumptively protected by the Constitution.[236] Second, the government has the burden of demonstrating that the regulation, in this case 18 U.S.C. § 922(g)(1), is consistent with the historical tradition of a firearm regulation from the Founding Era.[237] Since Duarte was deemed by the Ninth Circuit to be a part of "the people" who are afforded protections under the Second Amendment, along with the government's inability to provide a well-established historical analog that in effect was a firearm ban for felons, Duarte could not be permanently prohibited from bearing arms for self-defense.[238]

It is important to distinguish the *Duarte* case from the *Rahimi* case, where the United States Supreme Court was correct in finding that Rahimi could be temporarily disarmed under the Second Amendment because he was subject to a domestic violence restraining order and had been deemed a threat to another's physical safety.[239] Duarte had served time in prison for non-violent felony offenses such as vandalism and possession of a controlled substance, whereas Rahimi had been involved in numerous shootings and an alleged assault of his ex-girlfriend.[240] It was justified for Rahimi to be temporarily disarmed under § 922(g)(8) because of the threat he posed to the physical safety of others.[241] But for someone like Duarte who had non-violent felonies on his record to be permanently barred from possessing a firearm

234. *Duarte*, 101 F.4th at 674–77; *see also supra* text accompanying notes 45–50.
235. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 24 (2022).
236. *Bruen*, 597 U.S. at 24.
237. *Id.*
238. *See supra* text accompanying notes 44–50.
239. *See supra* text accompanying notes 192–97.
240. *See supra* notes 25–27, 171–72 and accompanying text.
241. *See supra* text accompanying notes 192–97.

under § 922(g)(1), it could not be justified by the government.[242] Thus, based upon the preceding analysis, the Ninth Circuit correctly held for Duarte in restoring his Second Amendment right to bear arms.[243]

V. CONCLUSION

In *United States v. Duarte*,[244] Steven Duarte was arrested by the police following a traffic stop, where it was discovered he was a felon in possession of a firearm.[245] Because Duarte had five prior non-violent criminal convictions that carried a prison term exceeding more than one year, he was charged under 18 U.S.C. § 922(g)(1) as a felon in possession of a firearm.[246] Duarte was convicted and sentenced to fifty-one months in prison, but appealed his conviction to the United States Court of Appeals for the Ninth Circuit and challenged it following the *N.Y. State Rifle and Pistol Ass'n v. Bruen*[247] ruling by the United States Supreme Court in 2022.[248] The Ninth Circuit ultimately reversed and vacated Duarte's § 922(g)(1) conviction, holding that under the historic tradition test analysis, Duarte's prior non-violent felony convictions were not supported by a sufficient historical analog that justified permanently depriving him of his Second Amendment right to bear arms.[249] Since the government was unable to provide a historical analog from the Founding Era that was sufficiently similar to § 922(g)(1) that permanently deprived a felon from bearing arms, Duarte's conduct was presumptively lawful under the Second Amendment.[250]

The analysis argued that the United States Supreme Court's development of Second Amendment interpretation, specifically in the *District of Columbia v. Heller*[251] and *McDonald v. Chicago*[252] cases, laid the groundwork for the eventual creation of the historic tradition test that is now the prevailing mode of Second Amendment interpretation following the *Bruen* decision.[253] The analysis then argued how the outcome determinative factor of the historic tradition test in *Bruen* centered upon the ability of the government to prove a historical analog from the Founding Era existed similar to the Second Amendment

242. *See supra* text accompanying notes 35–50.
243. *See supra* note 50.
244. 101 F.4th 657 (9th Cir. 2024).
245. United States v. Duarte, 101 F.4th 657, 662 (9th Cir. 2024).
246. *See supra* text accompanying notes 25–27.
247. 597 U.S. 1 (2022).
248. *See supra* text accompanying notes 28–29.
249. *See supra* text accompanying notes 35–50.
250. *See supra* text accompanying notes 48–50.
251. 554 U.S. 570 (2008).
252. 561 U.S. 742 (2010).
253. *See supra* text accompanying notes 220–29.

statute being challenged by the defendant.[254] The government in Duarte's case was unable to provide a sufficient historical analog from the Founding Era that prohibited a non-violent offender's ability to possess a weapon, similar to that of 18 U.S.C. § 922(g)(1).[255] To conclude, the analysis argued that the Ninth Circuit was correct in its holding that Duarte's conviction under § 922(g)(1) be reversed and vacated, because the government unsuccessfully provided a sufficient historical analog from the Founding Era similar to § 922(g)(1) that prohibited a non-violent felon like Duarte from bearing arms.[256]

Following the *Bruen* decision, it is clear that the historic tradition test is now the established mode of analysis for any Second Amendment regulation challenge filed in federal court.[257] The longer-term implications of the historic tradition test have the potential to be beneficial in ensuring important constitutional rights are restored to non-violent felons like Duarte, who should not be permanently barred from bearing arms under the Second Amendment.[258] However, the United Supreme Court and lower courts will continue to grapple with constitutional challenges by those that do threaten the safety of others, like Zackey Rahimi, who use firearms for malicious and nefarious purposes other than self-defense.[259] Thus, while the historic tradition test may be the prevailing analytical framework in assessing current Second Amendment challenges for now, it is all but assured that there will continue to be changes to the analytical framework in the ever evolving Second Amendment landscape.[260]

ADDENDUM

In May 2025, following the completion of this Note, the United States Court of Appeals for the Ninth Circuit issued an en banc opinion, following the United States Supreme Court's remand of *United States v. Duarte*[261] after its June 2024 decision in *United States v. Rahimi*.[262] Upon review of the *Duarte* case by the full Ninth Circuit panel, the court found that 18 U.S.C. § 922(g)(1) was constitutional as it applied to

254. *See supra* text accompanying notes 230–36.
255. *See supra* text accompanying notes 230–32.
256. *See supra* text accompanying notes 237–46.
257. *See Duarte*, 101 F.4th at 691; Range v. AG United States, 69 F.4th 96, 113 (3d Cir. 2023); United States v. Rahimi, 602 U.S. 680, 700 (2024).
258. *Duarte*, 101 F.4th at 691.
259. *Rahimi*, 602 U.S. at 700.
260. *Compare* N.Y. Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 24 (2024), *with Rahimi*, 602 U.S. at 700.
261. 101 F.4th 657 (9th Cir. 2024).
262. 602 U.S. 680 (2024).

non-violent felons, which Steven Duarte is.[263] The Ninth Circuit began by making the point that Duarte's case had been fully adjudicated in the federal courts before *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*[264] was decided by the Supreme Court in 2022, and that no circuit court had held that § 922(g)(1) was unconstitutional before *Bruen* was decided.[265] Additionally, while determining the constitutionality of § 922(g)(1) was an issue of first impression for the Ninth Circuit, the court stated that it took note of sister circuits' § 922(g)(1) rulings to gain an understanding of how the *Bruen* framework was applied.[266] Ultimately, the Ninth Circuit decided to align itself with the Fourth, Eighth, Tenth, and Eleventh Circuits in holding that § 922(g)(1) was constitutionally permissible as it applied to non-violent felons, and Duarte himself.[267]

Writing for the majority, Judge Kim McLane Wardlaw began by asserting that the United States Supreme Court's ruling in *Bruen* did not alter the felon-in-possession law assurances that the Court had carried over when it decided *District of Columbia v. Heller*.[268] Indeed, while the Court in *Heller* did expand the right to bear arms under the Second Amendment, it expressly stated that nothing in the *Heller* opinion should be understood to "cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill."[269] Based on the Court's declaration in *Heller*, the Ninth Circuit continued to dismiss § 922(g)(1) Second Amendment challenges, no matter if the underlying felony was violent or not.[270] Further, the majority noted that the Court in *Bruen* mainly derived the new Second Amendment constitutional test from *Heller*, and stated that its analysis was "consistent with *Heller* and *McDonald*."[271] The court also mentioned that the Supreme Court limited the *Bruen* opinion to "law-abiding citizens," since it used that term fourteen times in the opinion, and that six justices (along with three in the majority) highlighted that *Bruen* did not disturb the limiting principles established in *Heller* and *McDonald*.[272] And most recently in *Rahimi*, the Court repeated those same assurances.[273]

263. United States v. Duarte, 137 F.4th 743 (9th Cir. 2025).
264. 597 U.S. 1 (2022).
265. *Duarte*, 137 F.4th at 747.
266. *Id.* at 747.
267. *Id.* at 748.
268. *Id.* at 750; 554 U.S. 570 (2008).
269. *Duarte*, 137 F.4th at 750.
270. *Id.*
271. *Id.*; 561 U.S. 742 (2010).
272. *Id.* at 751.
273. *Id.*

The majority then analyzed Duarte's situation again under the *Bruen* two-step framework to support its holding that § 922(g)(1) remained a constitutional regulation.[274] The court did not disagree that Duarte's "course of conduct" was covered under the Second Amendment, as it pertained to the right of Americans to keep and bear arms.[275] Since Duarte was considered a member of the national community, he was part of "the people" and the Constitution protected his right to possess a firearm.[276] The Court also analyzed treatises and prior Ninth Circuit case law that the government used to argue that Duarte's status as a felon prohibited him from exercising his Second Amendment rights.[277] Ultimately, the Court was not convinced that Duarte and other felons were excluded from the "ambit of the Second Amendment," as he was considered one of "the people" under the Second Amendment.[278]

However, under the second part of the *Bruen* test, the Ninth Circuit found that the government met its burden in showing that § 922(g)(1) was consistent with the historical tradition of firearm regulation.[279] The government provided a vast amount of case law on historical felony punishments and laws that categorically disarmed dangerous individuals over the last few hundred years.[280] For example, the government cited the 1689 English Bill of Rights, referred to as the "predecessor to our Second Amendment," which allowed Protestants to have arms for defense, but only "as allowed by law."[281] Another historic example the government relied on was an instance in the late 1600s where the British parliament, who also enacted the English Bill of Rights, disarmed Catholics whom would not renounce their faith.[282] There were numerous categorical restrictions throughout the late 1800s that disarmed certain groups of people, and therefore the Ninth Circuit found that § 922(g)(1) fit within that historical tradition.[283] And because the historical tradition was one of disarming people who the legislature found to represent "a special danger of misuse," § 922(g)(1)'s application applied just as equally to non-violent felonies as it did to violent felonies.[284] This led to the Ninth Circuit's finding that § 922(g)(1) was

274. *Id.* at 752.
275. *Id.*
276. *Id.*
277. *Id.* at 753–55.
278. *Id.* at 755.
279. *Id.*
280. *Id.* at 755–62.
281. *Id.* at 757 (citing *Bruen*, 597 U.S. at 44).
282. *Id.* at 759.
283. *Id.* at 761.
284. *Id.*

constitutional as applied to Duarte; and while the court noted that historical principles "may allow greater regulation than would an approach that employs means-end scrutiny . . ." this was how the *Bruen* case was decided.[285]

In dissent was Judge Lawrence VanDyke, who authored the Ninth Circuit's original majority opinion when the *Duarte* case was decided by a three-judge panel.[286] Judge VanDyke took issue that the majority reviewed Duarte's claims *de novo*, and the case should have instead been reviewed and disposed of under plain error review.[287] Additionally, he argued that the majority was incorrect in stating that the Ninth Circuit's rulings in pre-*Bruen* cases were not inconsistent with Supreme Court authority, and that legislatures had absolute discretion to disarm anyone by labeling "felon" to whatever conduct they chose.[288] Judge VanDyke argued that since the *Bruen* ruling established a historical analytical framework that rejected the Ninth Circuit's previous framework, that was the analytical framework the court was now bound to.[289] Judge VanDyke also emphasized that sister circuits were split on whether *Bruen* abrogated the respective circuits pre-*Bruen* precedent regarding § 922(g)(1).[290] And because of that, Judge VanDyke believed the majority should have stated in its opinion that any mode of analysis other than the *Bruen* historical framework was no longer binding on future court panels.[291]

In his own analysis of the categorical disarmament laws, as held in the original opinion before the en banc rehearing, Judge VanDyke argued that the history and tradition of disarming dangerous persons did not include non-violent felons.[292] The majority's analysis of the Founding Era laws was wrong, in Judge VanDyke's view, because laws that disarmed the Catholics, for example, were united because it allowed members of a group to be disarmed if a member of said group planned to take up "arms against the government."[293] And the second set of laws that allowed for temporary disarmament were not "relevantly similar" because they were not permanent bans, which § 922(g)(1) is.[294] Overall, Judge VanDyke strongly disagreed with the majority's decision to review the case *de novo* instead of under plain

285. *Id.* at 762.
286. *Id.* at 773.
287. *Id.* at 774.
288. *Id.*
289. *Id.* at 781.
290. *Id.*
291. *Id.* at 782.
292. *Id.* at 793.
293. *Id.* at 792–93.
294. *Id.*

error review, which he argued the Ninth Circuit panel would have done if it had not wanted to announce such a broad Second Amendment holding.[295] Judge VanDyke concluded his dissent by stating that the Ninth Circuit had, in this holding, demonstrated a "deep-seated prejudice against a fundamental constitutional right."[296]

–Ryan Cody '26†

295. *Id.* at 805.

296. *Id.*

† This Note is dedicated to my parents, Greg and Kelly Cody, and to my wonderful aunt who we lost much too soon, Dr. Carolyn Cody. To my parents, your love and continuous support throughout my law school journey has made all the difference, and for that I am endlessly grateful. And to my aunt, for the example of success you set for me while I was growing up, and for the timeless advice you were always willing to give, it has had a lasting impact on me and always will. I would also like to thank my Editorial Board colleagues for giving me the opportunity to publish this note, I am grateful for your support and to have worked alongside all of you this year!

ISAACSON V. MAYES: PHYSICIAN PLAINTIFFS MAY ALLEGE SUFFICIENT INJURIES FOR ARTICLE III STANDING REGARDLESS OF WHETHER ABORTION IS CONSTITUTIONALLY PROTECTED

I. INTRODUCTION 391
II. FACTS AND HOLDING 393
III. BACKGROUND 396
A. *Lujan v. Defenders of Wildlife*: The Basis of Modern Standing Requirements 396
B. The Many Interpretations of Standing 397
C. Injuries Defined 401
IV. ANALYSIS 406
A. Void for Vagueness Claims Need Not Implicate an Express Constitutional Right to Fulfill Article III Standing Requirements 407
B. *Driehaus* Does Not Require That the Injury Be Sustained as a Result of Prevention from Engaging in Activities Protected by a Constitutional Right 410
C. The Ninth Circuit Correctly Interpreted *Driehaus* in Finding That the Doctors Fulfill the Injury Requirements of Article III Standing 412
V. CONCLUSION 414

I. INTRODUCTION

The United States Court of Appeals for the Ninth Circuit recently decided that plaintiffs need not allege an injury tied to a constitutional interest in order to fulfill the *Driehaus* standing requirements in void for vagueness challenges.[1] These standing requirements originate from *Susan B. Anthony List v. Driehaus*,[2] which outlines the standing requirements necessary in pre-enforcement void for vagueness challenges.[3] In *Driehaus*, the United States Supreme Court reiterated the standing requirements found in *Lujan v. Defenders of Wildlife*.[4] That is, in order to bring suit, plaintiffs must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct

1. Isaacson v. Mayes, 84 F.4th 1089 (9th Cir. 2023).
2. 573 U.S. 149 (2014).
3. Susan B. Anthony List v. Driehaus, 573 U.S. 149 (2014).
4. 504 U.S. 555 (1992).

complained of, and (3) a likelihood that a favorable decision will redress the injury.[5] Furthermore, the court expanded on the injury in fact requirements, finding that a plaintiff establishes Article III standing when there is a credible threat of future enforcement of prosecution against conduct that includes a constitutional interest.[6]

In *Isaacson v. Mayes*,[7] the Ninth Circuit Court of Appeals considered whether doctors had alleged a sufficient injury in fact to bring suit challenging a vague Arizona abortion law, known as the Reason Regulations.[8] Before *Isaacson* made it before the appellate court, the district court denied that the plaintiffs had standing based on the injury in fact prong.[9] The district court held that the injury in fact, in this case an economic injury, must have been sustained while engaging in a constitutionally protected activity.[10] In reversing the district court's holding, the Ninth Circuit found that the injury in fact prong is satisfied when a plaintiff is prevented from engaging in their normal business activities.[11] The Ninth Circuit's holding marked a circuit split with the Eleventh Circuit Court of Appeals on the issue of standing in these pre-enforcement void for vagueness challenges.[12]

This Comment will first provide background on the issue at hand by exploring in-depth the issues and ideas of standing, specifically Article III standing.[13] This Comment will argue that the Ninth Circuit correctly interpreted *Driehaus* in finding that vagueness claims do not require that injuries be sustained while engaging in activities protected by the Constitution.[14] First, this Comment will show that void for vagueness claims need not implicate an express constitutional right.[15] Next, this Comment will demonstrate that *Driehaus* does not require that injuries be sustained while being prevented from engaging in activities protected from the Constitution.[16] Finally, this Comment will conclude that the Ninth Circuit correctly interpreted the standing requirements in *Susan B. Anthony List v. Driehaus*, and that the physician plaintiffs in *Isaacson* had presented a sufficient injury for Article III standing.[17]

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5. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).
6. *See Driehaus*, 573 U.S. 149.
7. 84 F.4th 1089 (9th Cir. 2023).
8. 84 F.4th 1089.
9. *Id.* at 1095.
10. *Id.* at 1096.
11. *Id.*
12. *See id.*; *see also* Bankshot Billiards, Inc. v. City of Ocala, 634 F.3d 1340 (11th Cir. 2011).
13. *See infra* notes 52–189.
14. *See infra* notes 191–287.
15. *See infra* notes 204–34.
16. *See infra* notes 235–52.
17. *See infra* notes 253–78.

II. FACTS AND HOLDING

In *Isaacson v. Mayes*, Arizona physicians, specifically OBGYNs, brought suit to challenge recently passed legislation known as the Reason Regulations.[18] The Reason Regulations were passed in 2021, and the statutes provided criminal penalties against physicians who performed abortions for genetic deformities.[19] The statute, in addition to imposing two different felony penalties, also provided another avenue for recovery for abortions provided for these genetic reasons, as fathers were also allowed to bring suit.[20] The Arizona OBGYNs who brought suit regularly performed genetic testing to identify abnormalities, and then offered patients abortions based upon the results of the testing.[21] When the Reason Regulations were passed, the OBGYNs stopped performing essentially all abortions at their practice, and ultimately lost a significant portion of their business.[22] The physicians argued that, because the Reason Regulations did not prescribe what constituted a genetic abnormality, their overcompliance with the vague statute caused significant injury.[23]

The physician's brief specifically mentioned multiple aspects of how the statute is vague, including a lack of notice of which fetal conditions were covered, and how a physician would be able to determine whether a patient was receiving an abortion solely because of the genetic abnormalities present in the fetus.[24] The physicians argued that they had to over comply with the Reason Regulations, as they imposed steep criminal penalties.[25] Out of fear of being criminally prosecuted, the physicians found that they sacrificed their business interests in order to avoid criminal penalties.[26] Further, the physicians stated that, because the laws could not be enforced equally, this additionally evidenced their vagueness.[27] The brief of the physicians noted multiple aspects of fetal medicine that were not mentioned when

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18. *Isaacson*, 84 F.4th at 1094–95.
19. *Id.*
20. *Id.* at 1094.
21. *Id.* at 1094–95.
22. *Id.* (arguing that "[s]ince the law was enacted, Plaintiffs have 'significantly curtailed their medical practices.' Plaintiffs no longer provide abortions to 'patients with likely or confirmed fetal conditions,' even though these patients previously made up a significant portion of Plaintiffs' businesses.").
23. *Id.* at 1094–95 ("Although the Reason Regulations do not outlaw all abortions involving genetic abnormalities, Plaintiffs allege that they are 'over-complying' with the law and staying away from those abortions entirely, because it is unclear what conduct falls within the law's grasp.").
24. *See* Brief of Plaintiff at 14–19, *Isaacson v. Mayes*, 84 F.4th 1089 (9th Cir. 2023).
25. *Id.* at 21.
26. *Id.*
27. *Id.* at 22 (arguing that because the statute allowed for "arbitrary and discriminatory enforcement," it therefore was unconstitutionally vague.).

crafting the Reason Regulations, further demonstrating the vagueness present within the language of the statute.[28]

In September of 2021, Dr. Paul Isaacson filed suit in federal district court in Arizona, challenging the Reason Regulations as unconstitutionally vague.[29] The suit was filed against Kristin Mayes, the Arizona Attorney General.[30] The district court first enjoined the state defendants from enforcing the laws, as the court found them to be vague and placing undue burdens upon the physicians who filed suit.[31] The defendants then requested a partial stay of the injunction, but the Ninth Circuit denied this request.[32] The defendants further requested the same from the United States Supreme Court, who then turned the request for a stay into a petition for a writ of certiorari.[33] The Supreme Court then granted the request for review, vacating and remanding the case to the district court for deliberation, considering that *Dobbs v. Jackson Women's Health Organization*[34] had overruled the constitutional right to an abortion provided by *Roe v. Wade*.[35] The plaintiffs once again resumed their request for an injunction solely on vagueness grounds, setting aside the undue burden theories.[36] However, the district court then denied this motion, finding that the plaintiffs no longer had standing due to the decision in *Dobbs*.[37] The plaintiffs then appealed the decision of the district court to the Ninth Circuit.[38]

The Ninth Circuit heard the case, ultimately deciding that the physician plaintiffs did have proper Article III standing.[39] The main issue when hearing the claim involved the injury in fact aspect of Article III standing.[40] The court found that the plaintiffs had shown two aspects

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28. *Id.* at 26 (arguing that the Reason Regulations "have severely curtailed the care [the physicians] previously offered to patients with suspected or known fetal conditions (even care that may still be legal under the Scheme) to avoid as best they can the threat of arbitrary enforcement and attendant loss of liberty and livelihood.").

29. *Isaacson*, 84 F.4th at 1094–95.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 1095 ("Defendants then sought a stay pending appeal from the Supreme Court. On June 30, 2022, the United States Supreme Court converted the stay application into a petition for a writ of certiorari. . . .").

34. 597 U.S. 215 (2022).

35. *Isaacson*, 84 F.4th at 1095 ("[The Supreme Court] granted review, and vacated and remanded the case for further consideration in light of *Dobbs v. Jackson Women's Health Organization*.").

36. *Id.*

37. *Id.* ("After remand, Plaintiffs renewed their motion for a preliminary injunction, focusing solely on their vagueness claim. The district court denied the motion, holding that although it had previously ruled in favor of Plaintiffs on vagueness grounds, Plaintiffs no longer had standing for pre-enforcement review in light of *Dobbs*.").

38. *Id.*

39. *Id.* ("We hold that Plaintiffs have demonstrated an injury sufficient for standing.").

40. *Id.*

of injury, both actual and future.[41] As for their actual injury, the Ninth Circuit found that losing money is usually considered an injury.[42] When the Reason Regulations passed, the physicians began their overcompliance with the law to avoid criminal penalties, and ultimately lost a large part of their business.[43] Therefore, as the Ninth Circuit reasoned, this overcompliance led to the actual injury of monetary loss.[44]

On remand, the district court found that plaintiffs no longer had standing as *Dobbs* had removed the constitutional right to an abortion.[45] The Ninth Circuit disagreed with this finding, however, instead holding that the decision by the United States Supreme Court in *Dobbs* did not revoke the plaintiffs' standing.[46] Rather, as the Ninth Circuit noted, the injury prong of Article III standing is fulfilled even when plaintiffs are not prevented from engaging in activities that are expressly protected by the Constitution.[47] The district court relied upon both the state's interest and police power regarding medicine and providing abortions to withold standing from[48] Specifically, the court not[49] Instead, the monetary injuries that the plaintiffs alleged were sufficient[50] The court determined that the standing of the physician plaintiffs was based on their harmed economic interests rather than the plaintiffs' inability to engage in performing.[51]

41. *Id.* at 1099 ("Plaintiffs alleged both actual injury and imminent future injury.").

42. *Id.* ("For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'") (quoting *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 464 (2017)).

43. *Id.* at 1096 ("[Plaintiffs] assert that the statute's vagueness has forced them to 'over-compl[y],' causing them to cease providing abortion care to 'patients with suspected or known fetal diagnoses—even if that care could arguably fall outside of the Reason [Regulations'] grasp,' rather than risk prosecution or penalties.").

44. *Id.* at 1096 ("[B]ecause the plaintiffs lost money by complying with the law, they had suffered an actual injury.").

45. *See id.* at 1095.

46. *Id.* at 1096.

47. *Id.* ("Contrary to the holding of the district court, standing does not also require that the economic injury be sustained while engaging in an activity separately protected by the Constitution, such as First Amendment protected speech. Rather, our cases make clear than an Article III injury in fact can arise when plaintiffs are simply prevented from conducting normal business activities.").

48. *See id.* at 1097 ("The State's police power and interest in regulating the practice of medicine, relied upon by the district court, are also irrelevant. Plaintiffs do not dispute Arizona's authority to regulate their industry generally, nor do they claim that the Reason Regulations were an improper exercise of that authority.")

49. *Id.* ("Any weighing of the State's interest against the interest asserted by Plaintiffs should be undertaken upon consideration of the merits, not to determine an injury in fact.").

50. *Id.* ("Plaintiffs' alleged economic losses—notwithstanding their relationship to abortion—qualify as an actual injury in fact sufficient for Article III standing.").

51. *Id.* ("Plaintiffs' standing is based on their economic interest in providing medical services.").

III. BACKGROUND

A. *Lujan v. Defenders of Wildlife*: The Basis of Modern Standing Requirements

In *Lujan v. Defenders of Wildlife*,[52] the Court considered a case whereby citizens challenged a regulation of the Endangered Species Act ("ESA").[53] The citizens believed that the government's limitation of where the ESA applied was incorrect and felt that they would suffer harm as a result.[54] The Secretary of the Interior, Lujan, moved to dismiss the claim based on standing grounds.[55] As Lujan argued, the citizens were not adequately harmed by the regulation and its effects.[56] The district court granted this motion to dismiss, but the appellate court disagreed, reversing and remanding the claim.[57] In its second instance in the district court, the plaintiff's request for an injunction was granted, with the appellate court affirming this finding.[58] The case was then granted certiorari for review by the United States Supreme Court.[59]

In its reasoning, the Court discussed in detail what constitutes a harm or grievance to fulfill standing requirements.[60] First, the Court noted that the injury must be genuine, actual, or imminent to occur.[61] The requirement of imminence proved challenging to the plaintiffs' claim.[62] As the Court found, the plaintiffs' alleged injury was not necessarily imminent, but rather conjectural.[63] There was no guarantee that the regulation at hand would lead to injuries on the part of the plaintiff.[64] Furthermore, the Court noted that the injuries could have been suffered by people in general, and not just the plaintiffs.[65] That, as the Court found, made the injury too generalized, and could not fulfill the concreteness requirement of Article III standing.[66] The Court

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52. 504 U.S. 555 (1992).
53. Lujan v. Defenders of Wildlife, 504 U.S. 555, 557–58 (1992).
54. *Lujan*, 504 U.S. at 559.
55. *Id.* at 559 ("The District Court granted the Secretary's motion to dismiss for lack of standing.").
56. *Id.*
57. *Id.*
58. *Id.* at 559 ("The District Court denied the Secretary's motion, on the ground that the Eighth Circuit had already determined the standing question in this case; it granted respondents' merits motion, and ordered the Secretary to publish a revised regulation.").
59. *Id.*
60. *Id.* at 573–74.
61. *Id.* at 560.
62. *Id.* at 564 ("Such 'some day' intentions . . . do not support a finding of the 'actual or imminent' injury that our cases require.").
63. *Id.*
64. *Id.*
65. *Id.* at 567. ("It goes beyond the limit, however . . . to say that anyone who observes or works with an endangered species . . . is appreciably harmed . . . .").
66. *Id.* at 566–67.

ultimately found that the plaintiffs did not have standing, reversing the injunction.[67]

B. The Many Interpretations of Standing

In *Allen v. Wright*,[68] the United States Supreme Court confronted standing issues, ultimately holding that a plaintiff's injury must not be conceptual or theoretical, and that the injury must be sufficiently traceable to the government's conduct.[69] The case involved a class action alleging injuries related to the Internal Revenue Service not adequately denying tax-exempt status to private schools that discriminated based upon race.[70] In its initial stages, the claim was dismissed for standing issues.[71] The appellate court reversed this finding, prompting the case to be heard in the Supreme Court.[72] In its opinion, the Court noted multiple requirements for fulfilling standing.[73]

The Court first reasoned that Article III standing requires traceability of the injury to the defendant's conduct, and that a successful suit would redress said injuries.[74] Next, the Court noted that the injury must be judicially cognizable.[75] In order for an injury to be judicially cognizable, as the Court found, it needed to demonstrate actual harm as a direct result of unequal treatment or another act.[76] Finally, the Court stated that although some injuries may be judicially cognizable, they may still fail to fulfill standing requirements if the challenged conduct is not the direct cause of the injury itself.[77] Ultimately, injuries alleged must be closely related to, and not too attenuated from, the challenged conduct to fulfill standing requirements.[78]

In *Bennett v. Spear*,[79] agricultural workers brought suit under the ESA, alleging injuries due to reservoir water potentially being used for wildlife preservation.[80] The workers' suit was unsuccessful in both the district court and the Ninth Circuit Court of Appeals, leading to

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67. *Id.* at 578.
68. 468 U.S. 737 (1984).
69. Allen v. Wright, 468 U.S. 737, 751 (1984).
70. *Wright,* 468 U.S. at 739–40.
71. *Id.* at 737.
72. *Id.* at 750.
73. *See id*. at 751.
74. *Id*. at 751 ("The injury must be 'fairly' traceable to the challenged action, and relief from the injury must be 'likely' to follow from a favorable decision.") (citing *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976)).
75. *Id.* at 752.
76. *Id*. at 755–56.
77. *Id*. at 753 ("The second fails because the alleged injury is not fairly traceable to the assertedly unlawful conduct . . . .").
78. *See id*.
79. 520 U.S. 154 (1997).
80. Bennett v. Spear, 520 U.S. 154, 157 (1997).

a dismissal and an affirmation of the district court's dismissal.[81] The United States Supreme Court then heard the case, reversing the decisions of the previous courts.[82] The Court held that the workers fulfilled the required elements of prudential standing, which included an alleged injury in fact that was fairly traceable to the conduct at hand.[83]

In its reasoning, the Court noted that the workers had standing to seek review of the determinations of the Fish and Wildlife Service under the ESA.[84] The Court of Appeals used the zone of interests tests to determine that the plaintiffs did not have standing, but the Court disagreed with this finding.[85] While the case offered discussion of standing under specific statutes, it generally discussed that the petitioners did fulfill Article III standing requirements.[86] As the Court stated, the Biological Opinion created by the Fish and Wildlife Service was capable of creating an injury, and that injury would therefore be fairly traceable to the Opinion.[87] Furthermore, a review of the Opinion could lead to its overturning.[88] If overturned, the petitioners would then be able to achieve redressability, ultimately fulfilling the requisite elements of Article III standing.[89]

In *Clapper v. Amnesty International USA*,[90] a group of petitioners brought a claim seeking review of surveillance of non-U.S. citizens under the Foreign Intelligence Surveillance Act (FISA).[91] The petitioners alleged harm due to unconstitutional surveillance of those persons not located in the United States.[92] The district court granted summary judgment for the defendants, and the Second Circuit Court of Appeals reversed this finding.[93] The defendants appealed to the United States Supreme Court, receiving certiorari to review their claim.[94] The Court

81. *Bennett*, 520 U.S. at 160–61.
82. *Id.* at 179.
83. *Id.* at 179 ("Petitioners' complaint alleges facts sufficient to meet the requirements of Article III standing . . . .").
84. *Id.* at 177–78.
85. *Id.* at 164 ("The first question in the present case is whether the ESA's . . . provision . . . negates the zone-of-interests test . . . We think it does.").
86. *Id*. at 167–68.
87. *Id*. at 170–71 ("[I]t is not difficult to conclude that petitioners have met their burden . . . of alleging that their injury is 'fairly traceable' to the Service's Biological Opinion and that it will 'likely' be redressed . . . .").
88. *Id.*
89. *Id.* at 171 ("[A]nd that it will 'likely' be redressed . . . if the Biological Opinion is set aside.").
90. 568 U.S. 398 (2013).
91. Clapper v. Amnesty Int'l. USA, 568 U.S. 398, 401–02 (2013).
92. *Clapper*, 568 U.S. at 401.
93. *Id.* at 407.
94. *Id.* at 408 ("Because of the importance of the issue and the novel view of standing . . . we granted certiorari . . . .").

reversed the findings of the Court of Appeals, leading to a favorable decision for the defendants.[95]

In concluding that the petitioners should prevail, the Court heavily discussed whether the respondents were truly harmed by the alleged conduct.[96] The respondents asserted that they would suffer injuries by eventually being surveilled under FISA, but the Court found that this potential, future injury was insufficient to confer standing.[97] More specifically, the Court noted that the injury must be impending and certain to occur without adequate judgment.[98] Mere allegations of injuries that may occur in the future without judgment are insufficient for the purposes of Article III, according to the Court.[99] Furthermore, the alleged injuries may not be speculative in nature, reaffirming the idea that injuries must be concrete and particularized to fulfill standing requirements.[100] Finally, the Court also noted the traceability and proximity of the alleged injury, finding it too attenuated from the conduct at issue.[101] While the respondents alleged costs incurred to avoid surveillance, the Court again found that the petitioners were not guaranteed to be surveilled, disallowing standing to be conferred upon them.[102]

In *Bankshot Billiards, Inc. v. City of Ocala*,[103] a pool hall and nightclub establishment in the city of Ocala challenged a vague city ordinance that affected their ability to run their business.[104] More specifically, the city ordinance that was passed disallowed any persons under the age of 21 from entering an establishment that sold alcohol unless a billiards hall exception applied.[105] In discussing the business's standing to bring a vagueness action, the court noted that statutes may only be evaluated on issues of vagueness if the party asserts a constitutional injury.[106] The court found that the activities the business was engaged in were simply normal business-related conduct rather than conduct that implicated a constitutional right.[107] Ultimately,

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95. *Id.*
96. *See id.* at 410–414.
97. *Id.* at 414 ("In sum, respondents' speculative chain of possibilities does not establish that injury based on potential future surveillance is certainly impending or is fairly traceable to § 1881a.").
98. *Id.*
99. *Id.* at 411–12.
100. *Id.* at 413.
101. *Id*. at 413 ("[T]hey cannot satisfy the 'fairly traceable' requirement.").
102. *Id.* at 413 ("[R]espondents can only speculate as to whether that court will authorize such surveillance.").
103. 634 F.3d 1340 (11th Cir. 2011).
104. Bankshot Billiards v. City of Ocala, 634 F.3d 1340 (11th Cir. 2011).
105. *See Bankshot*, 634 F.3d at 1342.
106. *Id.* at 1349.
107. *Id.* at 1350 ("[E]ven though Bankshot is 'chilled' from engaging in an activity in which it once engaged, that activity is not constitutionally protected. Rather, it is

the Eleventh Circuit ruled that an injury in fact alleged in void for vagueness actions must be tied to being prevented from engaging in constitutionally protected activity.[108]

In its opinion, the Eleventh Circuit found that there was not a sufficient injury to fulfill Article III standing requirements as the activities that the business was engaged in were not constitutionally protected.[109] The Eleventh Circuit reasoned that statutes may only be analyzed for vagueness when a party demonstrates a constitutional injury.[110] That harm, according to the court, must be tied to the Constitution, and that may occur in two forms:[111] first, when a person violates a law and is prosecuted for such action; or second, under the pre-enforcement review that was sought by the billiards hall in this case.[112] However, the court reasoned that the pre-enforcement review pathway may only be taken when the vague law prohibits the individual from participating in an activity that is protected by the Constitution.[113]

Finally, in *Susan B. Anthony List v. Driehaus*,[114] the United States Supreme Court heard a claim regarding the speech of a pro-life advocacy group, Susan B. Anthony List ("SBA") as potentially negatively affecting a former congressman's campaign.[115] The congressman originally brought suit, but SBA filed their own suit in a federal district court after a commission panel heard the original case on an expedited basis due to election concerns.[116] When the congressman lost the election, he withdrew his complaint and SBA worked to amend theirs.[117] The amended complaint argued that an Ohio statute caused their group a constitutional injury.[118] When issues arose regarding the

normal business activity; Bankshot is simply unsure whether it may simultaneously serve alcohol and permit entry to persons under twenty-one.").

108. *Id.*

109. *Id.* at 1350.

110. *Id.* at 1349 (stating that statutes may receive this analysis "only when a litigant alleges a constitutional harm" rather than in cases concerning what the court may consider a general harm).

111. *Id.*

112. *Id.* at 1349–50.

113. *Id.* (noting that pre-enforcement review is available "when the vague law causes a separate injury: the litigant is chilled from engaging in constitutionally protected activity" rather than for all types of injuries).

114. 573 U.S. 149 (2014).

115. Susan B. Anthony v. Driehaus, 573 U.S. 149, 153–56 (2014).

116. *Driehaus*, 573 U.S. at 154–56 ("On October 18, 2010—after the panel's probable-cause determination, but before the scheduled Commission hearing—SBA filed suit in Federal District Court, seeking declaratory and injunctive relief . . . .").

117. *Id.* at 155.

118. *Id.* at 155 ("Specifically, the complaint alleged that SBA's speech about Driehaus had been chilled; that the SBA 'intends to engage in substantially similar activity in the future'; and that it 'face[d] the prospect of its speech and associational rights again being chilled and burdened' because '[a]ny complainant can hale [it] before the [Commission], forcing it to expend time and resources defending itself.'").

sufficiency of the injuries the SBA endured, the Sixth Circuit heard the suit and found that it was not ripe for review.[119] Finally, the United States Supreme Court granted a writ of certiorari to review the claim, reversing the findings of the Sixth Circuit regarding the standing issue.[120]

The Court was tasked with determining whether the SBA had demonstrated a sufficient injury for a pre-enforcement statutory challenge.[121] When making this determination, the Court found that the SBA had presented a sufficient injury to fulfill Article III standing requirements.[122] The Court heavily discussed *Lujan* and its elements of Article III standing, finding that the case at bar directly concerned the injury aspect of *Lujan*.[123] The Court noted that a litigant may allege a future injury, and that the allegation may be sufficient to fulfill the injury prong of *Lujan*.[124] Additionally, the Court found that the threat of prosecution is sufficient in establishing the injury prong.[125] Further, the Court noted the injury prong may be fulfilled when an individual is prevented from engaging in activities that involve a constitutional interest, but the Court did not find that the constitutional interest had to be express.[126] Additionally, the Court stated that courts may review statutes before they take effect if the injury to be sustained is properly impending.[127] The Court ultimately found that, because there was an actual threat of action against SBA if they continued their conduct, the injury prong was satisfied.[128]

C. Injuries Defined

In *Logan v. Zimmerman Brush Co.*,[129] the Court considered whether a plaintiff held a certain property right under the Due Process Clause.[130] The plaintiff was discharged from his employment and brought suit under an Illinois employment act, alleging discriminatory

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119. *Id.* at 156–57.
120. *Id.* at 157.
121. *Id.* at 152.
122. *Id.* at 168 ("Petitioners in this case have demonstrated an injury in fact sufficient for Article III standing.").
123. *Id.* at 158.
124. *Id.* (stating that "[a]n allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur.") (quoting Clapper v. Amnesty Int'l. USA, 568 U.S. 398 (2013)).
125. *Id.* ("When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law.").
126. *See id.* at 159.
127. *Id.* (stating that "we have permitted pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent.").
128. *Id.* at 161 ("Here, SBA. . . contend[s] that the threat of enforcement of the false statement statute amounts to an Article III injury in fact. We agree: Petitioners have alleged a credible threat of enforcement.").
129. 455 U.S. 422 (1982).
130. Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982).

conduct.[131] The plaintiff was unable to comply with certain requirements for bringing suit in the Illinois Fair Employment Practices Commission.[132] This failure to comply led to his suit being dismissed.[133] When the United States Supreme Court granted certiorari, the plaintiff argued that his due process rights were violated by being disallowed from bringing suit.[134]

In agreeing with the plaintiff, the Court reasoned that the plaintiff was deprived of a property interest under the Due Process Clause.[135] The Court specifically noted that the plaintiff held a property interest in having his claims properly heard.[136] The Court noted that property rights are imagined when a plaintiff holds an entitlement under state law.[137] Further, the Court discussed procedural versus substantive elements of the plaintiff's claim.[138] The Court held that the requirements that were not complied with were procedural in nature, allowing more leniency to have the claim properly heard.[139] The Court concluded that the plaintiff held certain property rights that required his claim to be heard.[140]

Harmed economic interests have also been discussed in the context of harmed property rights.[141] In *City of Baytown v. Schrock*,[142] the Texas Supreme Court considered whether a property owner had been subject to a regulatory taking.[143] Schrock wished to rent his property out, but the city would not restore the water supply to the property.[144] Schrock argued that the lack of water affected his economic interests and amounted to a regulatory taking.[145] However, Schrock had not paid his utility bills, which caused the city to shut off water access to the property.[146] This important finding affected the outcome of the case.[147]

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131. *Logan*, 455 U.S. at 426.
132. *Id.* at 426.
133. *Id.*
134. *Id.* at 427 ("Before the Illinois Supreme Court, Logan argued that terminating his claim because of the Commission's failure. . . would violate his federal rights to due process and equal protection of the laws.").
135. *Id.* at 428.
136. *Id.*
137. *Id.* at 430 ("The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law . . . .").
138. *Id.* at 433.
139. *Id.*
140. *Id.* at 437 ("It is such an opportunity that Logan was denied.").
141. *See* City of Baytown v. Schrock, 645 S.W.3d 174 (Tex. 2022).
142. 645 S.W.3d 174 (Tex. 2022).
143. *Schrock*, 645 S.W.3d 174, 176 (Tex. 2022).
144. *Id.* at 176–77.
145. *Id.* at 177.
146. *Id.* at 177 ("At some point, utility bills for the City's water service to the property went unpaid.").
147. *Id.* at 178–79.

Due to this finding, the court held that Schrock did not suffer from a regulatory taking.[148] As the court noted, Schrock's claim should have come from a wrongful or unlawful enforcement of an ordinance by the city.[149] The claim was not related to takings, as the court found, because Schrock's property was not intruded upon.[150] Although Schrock's economic interests were harmed due to a lack of being able to rent the property, the court found this claim was rooted in wrongful enforcement rather than a regulatory taking.[151] Finally, the court noted that, because Schrock could reverse the loss of use of his property, it would not constitute an unconstitutional taking, although Schrock's harmed economic interests were related to his property.[152]

In *Johnson v. U.S.*,[153] the Supreme Court heard a claim regarding whether a portion of the Armed Career Criminal Act ("ACCA") was unconstitutionally vague in violation of the Due Process Clause.[154] Johnson, the defendant, pleaded guilty to being a felon in possession of a firearm, and the government requested an enhanced sentence under the ACCA.[155] The Eighth Circuit affirmed his conviction before the Court heard the case, and the government argued that the ACCA was sound.[156] However, the defendant argued that certain wording within the ACCA was vague and therefore violated his due process rights.[157]

First, to provide background context, the Court noted that a statute may be considered vague when an ordinary person is unable to ascertain fair notice of the sort of behavior that it seeks to prevent or penalize, or when it requires unpredictable enforcement.[158] In finding that the wording was unconstitutionally vague, the Court found that it fulfilled both aspects of vagueness, including the lack of fair notice and the unpredictable enforcement.[159] The statute did not provide fair notice as it was not clear exactly what conduct would be considered a violent felony.[160] The statute further invited unpredictable

148. *Id.* at 180.

149. *Id.* ("As with the claims in *Carlson*, the true nature of Schrock's claim lies in the City's wrongful enforcement of its ordinance, not in an intentional taking or damages of his property for public use.").

150. *Id.*

151. *Id.*

152. *Id.* at 180–81.

153. 576 U.S. 591 (2015).

154. Johnson v. United States, 576 U.S. 591 (2015).

155. *Johnson*, 576 U.S. at 593–95.

156. *Id.* at 595.

157. *Id.*

158. *Id.* at 595 (stating specifically that a statute is vague when it "fails to give ordinary people fair notice of the conduct it punishes" or additionally when it is "so standardless that it invites arbitrary enforcement.").

159. *Id.* at 597 (holding that the "wide-ranging inquiry required by the [statute] both denies fair notice to defendants and invites arbitrary enforcement by judges.").

160. *Id.* at 598.

enforcement as it would require a judge to imagine certain things in order to make a determination.[161] If a statute requires a judge to picture conduct or behavior that the statute may include, it goes beyond their normal judicial duties and demonstrates that the statute is in fact vague.[162] Ending its discussion on vagueness, the Court noted that vagueness may be evidenced by a failure to set a standard through continuing efforts.[163]

In *Czyzewski v. Jevic Holding Corp.*,[164] the United States Supreme Court was tasked with evaluating a bankruptcy case.[165] When a business filed for bankruptcy, the bankruptcy court structured repayments of debt in a way that certain creditors disagreed with.[166] Specifically, certain mid-tier creditors were not to be paid back with assets from the estate of the business.[167] The parties to the case had a settlement agreement, which the bankruptcy court disapproved of as it unfairly affected the petitioners, and the district court affirmed this finding.[168] Eventually, the Third Circuit Court of Appeals heard the claim, finding that the petitioners were not entitled to repayment in a certain priority tier.[169] The petitioners appealed to the Supreme Court, which granted a writ of certiorari to review the claim.[170]

On appeal, the respondents argued that, because of the finding of the Third Circuit regarding the process and priority of repayment, as well as the settlement agreement, the petitioners had not suffered an injury and therefore did not have standing.[171] The Court, however, disagreed with the arguments of the respondents, finding that petitioners had in fact suffered an injury.[172] The bankruptcy court had approved a specific dismissal that removed the petitioner's ability to bring suit

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161. *Id.* at 596–97.

162. *Id.* at 596–98 (noting that the "ordinary case" of the conduct within the statute would have to be "judicially imagined" rather than relying on "real-world facts or statutory elements.").

163. *Id.* at 598 ("This Court has acknowledged that the failure of 'persistent efforts. . . to establish a standard' can provide evidence of vagueness.") (quoting *U.S. v. L. Cohen Grocery Co.*, 255 U.S. 81, 91 (1921)).

164. 580 U.S. 451 (2017).

165. Czyzewski v. Jevic Holding Corp., 580 U.S. 451, 454–55 (2017).

166. *Czyzewski,* 580 U.S. at 454–55.

167. *Id.* at 454 ("Instead, the court ordered a distribution of estate assets that gave money to high-priority secured creditors and to low-priority general unsecured creditors but which skipped certain dissenting mid-priority creditors.").

168. *Id.* at 460–61.

169. *Id.* at 461–62 ("The majority held that structured dismissals need not always respect priority.").

170. *Id.* at 462.

171. *Id.* ("Respondents initially argue that petitioners lack standing because they have suffered no injury, or at least no injury that will be remedied by a decision in their favor.").

172. *Id.* at 463.

or recover in the original action.[173] Therefore, as the Court found, the petitioners had suffered an injury.[174] Further, the Court noted that within its precedent, monetary loss of even a small amount is to be considered an injury, specifically in regards to standing.[175] The Court then noted that petitioners had fulfilled the other aspects of Article III standing, determining that they had in fact established a sufficient injury to have standing to bring suit.[176]

Finally, in *TransUnion LLC v. Ramirez*,[177] the Supreme Court heard a class action lawsuit alleging harm done by TransUnion through incorrect credit reports.[178] Consumers brought the suit for credit reporting violations under the Fair Credit Reporting Act.[179] The Ninth Circuit held that the consumers did have proper Article III standing.[180] The Court discussed Article III standing, specifically deducing what constitutes a concrete injury to fulfill standing requirements.[181] The Court ultimately found that the majority of the class members did not fulfill the concreteness requirement of an injury for Article III standing.[182]

In its opinion, the Court discussed that there are some harms that are immediately concrete.[183] These harms include both physical and monetary injury.[184] If a plaintiff suffers a monetary harm at the hands of a defendant, the plaintiff's harm is concrete.[185] The Court specifically noted that some harms are specifically proscribed by the Constitution, but did not specify that the harms suffered must be constitutional in nature.[186] The Court held that 1,835 of the 8,185 class members did have sufficiently concrete injuries to confer Article III standing.[187] Justice Kavanaugh reasoned that because those 1,835

173. *Id.* at 464 ("Consequently, the Bankruptcy Court's approval of the structured dismissal cost petitioners something. They lost a chance to obtain a settlement that respected their priority. Or, if not that, they lost the power to bring their own lawsuit on a claim that had a settlement value of $3.7 million.").

174. *See id.*

175. *Id.* at 464 ("For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'").

176. *Id.* at 464 ("We accordingly conclude that petitioners have standing.").

177. 594 U.S. 413 (2021).

178. TransUnion LLC v. Ramirez, 594 U.S. 413, 417–18 (2021).

179. *TransUnion*, 594 U.S. at 417–18.

180. *Id.* at 418.

181. *Id.* at 422 ("In Part II, we summarize the requirements of Article III standing—in particular, the requirement that plaintiffs demonstrate a 'concrete harm.'").

182. *Id.* at 433.

183. *Id.* at 425.

184. *Id.*

185. *Id.* ("[C]ertain harms readily qualify as concrete injuries under Article III . . . If a defendant has caused . . . monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III.").

186. *Id.* ("And . . . traditional harms may also include harms specified by the Constitution itself.").

187. *Id.* at 433.

members had incorrect reports sent to third parties, those customers did suffer a harm.[188] However, although the other 6,332 members also had incorrect reports, those reports were never given to third parties, and therefore those plaintiffs did not suffer a concrete harm.[189]

IV. ANALYSIS

In *Isaacson v. Mayes*,[190] multiple parties brought suit, including doctors who performed genetic abnormality abortions, medical associations, and certain advocacy groups, against multiple Arizona government entities, including the Attorney General, the Department of Health Services, the Medical Board, and county attorneys.[191] The petitioners alleged that a newly implemented Arizona law that criminalized performing abortions was unconstitutionally vague, and that its implementation was harming their medical practices.[192] The Ninth Circuit eventually heard the case, and the court was tasked with determining whether the doctors adequately fulfilled Article III standing requirements.[193] The court held that the doctors did have standing, reasoning that the doctors alleged an injury in fact that was fairly traceable to the challenged law.[194] More specifically, the court found that the economic loss suffered by the doctors was sufficient to fulfill the element of injury in fact that is required to present Article III standing.[195] As the court reasoned, this is because plaintiffs need not demonstrate that the injury stemmed from conduct that is expressly protected by the Constitution.[196] Rather, as the court noted, the fact that the doctors' economic injuries were tied to abortion was irrelevant—if plaintiffs can demonstrate an economic injury that is tied to being prevented from undertaking lawful activity, they fulfill the requirements of Article III standing.[197]

This Analysis will first demonstrate that constitutional rights need not be implicated in order to fulfill standing in void for vagueness claims.[198] Rather, as will be argued, it is enough that the injuries are

188. *Id.*
189. *Id.*
190. 84 F.4th 1089 (9th Cir. 2023).
191. *Isaacson v. Mayes*, 84 F.4th 1089, 1094 (9th Cir. 2023).
192. *Isaacson,* 84 F.4th at 1094–95.
193. *Id.* at 1095 (holding "that although it had previously ruled in favor of Plaintiffs on vagueness grounds, Plaintiffs no longer had standing for pre-enforcement review in light of *Dobbs*.").
194. *Id.* at 1101.
195. *Id.* at 1097 ("Plaintiffs' alleged economic losses—notwithstanding their relationship to abortion—qualify as an actual injury in fact sufficient for Article III standing.").
196. *Id.* at 1096 ("Contrary to the holding of the district court, standing does not also require that the economic injury be sustained while engaging in an activity separately protected by the Constitution . . . .").
197. *Id.* at 1096–97.
198. *See infra* notes 204–34.

tied to a constitutional interest.[199] Next, this Analysis will show that *Driehaus* does not require that injuries in vagueness actions be sustained as a result of prevention from engagement with constitutionally protected activities.[200] Finally, this Analysis will show that the Ninth Circuit correctly held that the doctors fulfilled Article III standing.[201] As will be reasoned, there are a multitude of constitutional interests that could be harmed by the implementation of Arizona's abortion criminalization law, and this harm leads to the ability to allege a sufficient injury.[202]

A. Void for Vagueness Claims Need Not Implicate an Express Constitutional Right to Fulfill Article III Standing Requirements

Pre-enforcement void for vagueness claims do not need to implicate an express constitutional right to fulfill Article III standing requirements.[203] Therefore, plaintiffs would fulfill Article III standing requirements when they have presented a genuine injury-in-fact, regardless of whether that injury stems from being prevented from engaging in activities that are specifically constitutionally protected.[204] The United States Supreme Court has found that a sufficient injury is present when an interest is affected, and that interest must be legally perceivable.[205] That is, the judicial system must be able to cognize the interest in order to provide some sort of remedy for the injured party.[206] However, that interest does not need to be expressly protected by the Constitution.[207] Rather, a general interest such as the loss of economic opportunity or, more succinctly, loss of possible profits or actual monetary losses is considered a judicially cognizable interest that is capable of both injury and remedy.[208]

The Court's discussion in *TransUnion*[209] evidences why the Ninth Circuit correctly decided the standing issue: the doctors in *Isaacson* would suffer a monetary injury if they were forced to abide by the vague statute.[210] The lack of notice the statute provides caused the doctors to avoid performing most, if not all, of the operations they used

199. *See infra* notes 204–52.
200. *See infra* notes 235–52.
201. *See infra* notes 253–78.
202. *See infra* notes 235–78.
203. *See infra* notes 204–34.
204. *See* Bennett v. Spear, 520 U.S. 154 (1997); *see also* TransUnion LLC v. Ramirez, 594 U.S. 413 (2021).
205. *Bennett*, 520 U.S. at 167.
206. *Id.* ("'[I]njury in fact'—an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical . . . .")
207. *See generally Bennett*, 520 U.S. 154; *see also TransUnion*, 594 U.S. 413.
208. *See TransUnion*, 594 U.S. at 425.
209. 594 U.S. 413 (2021).
210. *See* Isaacson v. Mayes, 84 F.4th 1089 (9th Cir. 2023).

to provide, injuring their economic interests.[211] As *Bennett*[212] demonstrates, laws are capable of producing injuries; as *TransUnion* illustrates, general interests like lost profits are sufficient to confer Article III standing.[213] Further, as noted in *Czyzewski*,[214] monetary loss even of the smallest amount may be considered as injurious to a party.[215] These cases illustrate the concreteness of the standing of the doctors in *Isaacson,* as their legally cognizable monetary interests were negatively affected.[216]

Article III standing does not require that the injury be suffered while undertaking a specific activity.[217] Rather, the elements of standing that the Court provides in *Bennett* and *Johnson*[218] are clear, deducing the exact path to gaining Article III standing.[219] As the Court in *Bennett* noted, the injury prong is fulfilled when a legally perceivable interest is affected.[220] Further, as the Court in *TransUnion* found, general monetary interests are sufficient.[221] As the Ninth Circuit in *Isaacson* correctly determined, the doctors' economic interests were harmed by the vagueness of the statute, and this fulfilled the injury requirements of Article III standing.[222]

Further, although these claims need not implicate an express constitutional right, the economic interests of individuals who bring suit are protected by the Constitution as a sort of property right.[223] Economic interests are connected with property rights, making economic interests inherently constitutional interests.[224] As economic interests bear a close relationship with property rights, injured economic interests are enough to fulfill standing requirements to bring suit.[225]

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211. *See Isaacson*, 84 F.4th 1098.
212. 520 U.S. 154 (1997).
213. *See generally Bennett*, 520 U.S. 154; *see also TransUnion*, 594 U.S. at 425 ("[C]ertain harms readily qualify as concrete injuries under Article III . . . If a defendant has caused . . . monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III.") ("And . . . traditional harms may also include harms specified by the Constitution itself.").
214. 580 U.S. 451 (2017).
215. *See* Czyzewski v. Jevic Holding Corp., 580 U.S. 451, 464 (2017) ("For standing purposes, a loss of even a small amount of money is ordinary an 'injury.'").
216. *See generally Isaacson*, 84 F.4th 1089; *see also Bennett*, 520 U.S. 154.
217. *See generally Isaacson*, 84 F.4th 1089; *see also Bennett*, 520 U.S. 154.
218. 576 U.S. 591 (2015).
219. *See generally Isaacson*, 84 F.4th 1089; *see also Bennett*, 520 U.S. 154; *and Johnson*, 576 U.S. 591.
220. *See Bennett*, 520 U.S. at 167.
221. *See TransUnion*, 594 U.S. at 425 (noting that *Spokeo* was relied on for its discussion of monetary interests being injured as concrete injuries.).
222. *Bennett*, 520 U.S. at 167 ("[A]n invasion of a *judicially cognizable interest* which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical") (emphasis added).
223. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).
224. *See generally Logan*, 455 U.S. 422 (1982).
225. *See id.*

The United States Supreme Court has demonstrated these ideas, noting that those interests that are considered and protected as property can vary greatly.[226] The *Logan v. Zimmerman Brush Co.* Court reasoned that plaintiffs hold a property interest in having their claims heard.[227] Specifically, claims hold value as property under the Due Process Clause.[228]

There is no set list of which interests may be considered protected as property—rather, the Court has found that social and economic facts are important aspects of determining which interests may be protected as property.[229] In recognizing this, the Court directly ties economic ideas and interests to the discussion of property rights, and even lists certain interests that are protected as property that directly involve economic interests.[230] These include licenses, education, employment, and welfare benefits.[231] This continues to reaffirm the idea that persons may have interests that hold property protections under the Constitution, regardless of whether the Constitution expressly names specific interests that receive property protections.[232]

The Texas Supreme Court has applied similar ideas, finding that harmed economic interests are inherently tied to property, specifically in the context of takings.[233] Although the petitioner's claim was unsound for certain reasons, it was noted that his economic interests could be harmed based on a lack of ability to use his property.[234] This again conveys the correctness of the Ninth Circuit—economic interests are inherently tied to property, therefore receiving certain constitutional protections.[235] Although the doctors' claims in *Isaacson* do not include takings issues, caselaw involving economic interests, such as takings claims, demonstrate that economic interests are not isolated—they cannot be treated as unprotected by the Constitution.[236] The doctors' claims rely on a finding that their economic interests hold enough constitutional weight to allow their claim to survive a standing

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226. *See id.*

227. *Id.* at 433 ("Because the state scheme has deprived Logan of a property right, then, we turn to the determination of what process is due him.").

228. *Id.* at 430.

229. *Id.* at 430–31.

230. *See id.* at 430–31.

231. *Id.* at 431 (listing specifically "horse trainer's license," "disability benefits," "government employment," a "driver's license," and "welfare benefits" as economic interests that hold value as property.).

232. *See id.*; *see generally Bennett*, 520 U.S. 154.

233. *See* City of Baytown v. Schrock, 645 S.W.3d 174 (Tex. 2022).

234. *Schrock*, 645 S.W.3d at 179–80 ("We do not foreclose the possibility that enforcement of an ordinance that does not directly regulate land use could amount to a taking . . . .").

235. *See generally Logan*, 455 U.S. 422; *see also Schrock*, 645 S.W.3d 174.

236. *See generally Isaacson*, 84 F.4th 1089; *see also Schrock*, 645 S.W.3d 174.

analysis.[237] As demonstrated, economic harm can amount to injury to property interests protected by the Constitution.[238]

B. *Driehaus* Does Not Require That the Injury Be Sustained as a Result of Prevention from Engaging in Activities Protected by a Constitutional Right

The injury sustained by the individuals bringing suit does not need to come as a result of being prevented from engaging in activities protected by the Constitution.[239] The United States Supreme Court heard *Driehaus* and did not offer a finding that these claims must demonstrate an inability to engage in undertakings that are expressly constitutionally protected.[240] The Court did not state that the activities engaged in needed to be expressly allowed by the Constitution.[241] Rather, the Court noted that statutes may be reviewed before enforcement when certain conditions are met.[242] Specifically, Courts may review statutes for vagueness before enforcement if there is a properly impending injury, or the conduct engaged in has some connection to the Constitution.[243]

The Eleventh Circuit Court of Appeals presents a contradiction in its interpretation of *Driehaus*, finding that the activities engaged in by those bringing suit must be the type of activities that are expressly allowed by the Constitution.[244] More specifically, the court held that the billiards hall was only engaging in normal business activities, and that those activities did not rise to the level of constitutional protection to allow for pre-enforcement review.[245] However, *Driehaus* does

237. *See generally Isaacson*, 84 F.4th 1089.
238. *See supra* notes 219–28.
239. *See infra* notes 235–52.
240. *See* Susan B. Anthony List v. Driehaus, 573 U.S. 149 (2014).
241. *See generally Driehaus,* 573 U.S. 149.
242. *See id.* at 159.
243. *Id.* at 159 (stating that "we have permitted pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent . . . we have held that a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest'"). *Compare id.* at 159 (finding that Article III standing for pre-enforcement review is satisfied when a plaintiff alleges a harm that is "arguably affected with a constitutional interest" rather than an express constitutional harm) *with* Bankshot Billiards v. City of Ocala, 634 F.3d 1340, 1349 (11th Cir. 2011) (differing from *Driehaus* by holding that a plaintiff must "allege[] a constitutional harm" in order to seek pre-enforcement review).
244. Bankshot Billiards, Inc. v. City of Ocala, 634 F.3d 1340, 1349 (11th Cir. 2011) (stating that statutes may be reviewed for vagueness "only when a litigant alleges a constitutional harm" rather than a harm like the physician plaintiffs suffered in *Isaacson*.).
245. *Id.* at 1350 ("[E]ven though Bankshot is "chilled" from engaging in an activity in which it once engaged, that activity is not constitutionally protected. Rather, it is normal business activity; Bankshot is simply unsure whether it may simultaneously serve alcohol and permit entry to persons under twenty-one.").

not require that the activities engaged in by the individual seeking pre-enforcement review are expressly protected by the Constitution.[246] Rather, as the Court in *Driehaus* noted, the activities engaged in by the individuals simply need to include some sort of constitutional interest.[247] As demonstrated, economic interests are inherently tied to the Constitution as a branch of property rights, and economic injuries are further recognized by courts as the type of concrete injuries required for Article III standing in cases such as *Driehaus*.[248]

As the Ninth Circuit in *Isaacson* correctly reasoned, *Driehaus* does not require that the individual bringing suit be engaged in activities that are expressly constitutionally protected.[249] Rather, as the Ninth Circuit correctly determined, the typical business ventures of the physician plaintiffs that suffered economic injuries did suffice to fulfill the injury prong to properly confer Article III standing.[250] Nothing within *Driehaus* states that the interests at issue must be expressly allowed or protected by the Constitution, and the Ninth Circuit correctly followed this when reasoning through the claims of the physician plaintiffs.[251]

Further, it is important to note that statutes may indeed be analyzed for vagueness concerns even when the activities engaged in by the individual bringing suit are expressly illegal.[252] As *Johnson* demonstrates, statutes are capable of being vague in violation of the Due Process Clause even when the individual bringing suit is committing crimes.[253] Individuals are still capable of incurring injury even when their actions are expressly prohibited, such as by law.[254] While the Eleventh Circuit in *Bankshot* focused on the constitutionality of the activities engaged in, the real focus is on the injury sustained.[255]

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246. *See generally Driehaus*, 573 U.S. 149.

247. *See id.* at 159.

248. *See supra* notes 219–28; *see also* Czyzewski v. Jevic Holding Corp., 580 U.S. 451 (2017).

249. *See generally* Isaacson v. Mayes, 84 F.4th 1089 (9th Cir. 2023); *see generally Driehaus*, 573 U.S. 149. *Compare Isaacson*, 84 F.4th 1089 (finding that express Constitutional rights need not be implicated) *with Cameron v. EMW Women's Surgical Center, P.S.C.*, 664 S.W.3d 633, 689 (Ky. 2023) (Nickell, J., concurring in part) (discussing that a "fundamental right" must be "implicated" in order to obtain pre-enforcement review).

250. *Isaacson*, 84 F.4th at 1096 ("Contrary to the holding of the district court, standing does not also require that the economic injury be sustained while engaging in an activity separately protected by the Constitution, such as First Amendment protected speech. Rather, our cases make clear than an Article III injury in fact can arise when plaintiffs are simply prevented from conducting normal business activities.").

251. *See generally Driehaus*, 573 U.S. 149; *see also Isaacson*, 84 F.4th 1089.

252. *See generally* Johnson v. United States, 576 U.S. 591 (2015).

253. *See generally Johnson*, 576 U.S. 591.

254. *See generally id.*

255. *See Driehaus*, 573 U.S. 149; *see also Isaacson*, 84 F.4th 1089; *and Bankshot*, 634 F.3d 1340.

That is, if the injury sustained is one properly recognized as one conferring Article III standing, the suit should proceed.[256]

C. The Ninth Circuit Correctly Interpreted *Driehaus* in Finding That the Doctors Fulfill the Injury Requirements of Article III Standing

The physician plaintiffs that brought suit in *Isaacson* did properly fulfill the injury requirements of Article III standing, and the Ninth Circuit correctly decided the issue.[257] While the Eleventh Circuit in *Bankshot* found that the injuries must be received as a result of prevention of engagement in constitutionally protected activities, the Ninth Circuit correctly disagreed with this finding, and instead found that prevention of engaging in business activities is a proper injury for pre-enforcement review.[258] In order to fulfill the injury requirements of Article III standing, as discussed above, plaintiffs must demonstrate sufficient injuries that are either currently occurring or are immediately impending.[259]

As demonstrated, there are a broad range of injuries that may qualify for Article III standing, such as harm to monetary interests.[260] The broad range of injuries that qualify an individual for standing, specifically a loss of money, demonstrate that the physician plaintiffs in *Isaacson* did present a sufficient injury through their loss of business and therefore profits.[261] In *Czyzewski*, the United States Supreme Court found that the plaintiffs did have standing by demonstrating a loss of money.[262] The physician plaintiffs in *Isaacson* similarly demonstrated a loss of money, and that loss of money was already occurring, evidencing the concreteness of the injuries they suffered.[263] Further, as the Ninth Circuit correctly decided, the standing of the plaintiffs was based on their legitimately and already harmed economic interests rather than the activities they were prevented from engaging in.[264] Statutes may be vague and require review regardless of whether the conduct affected is constitutionally protected.[265]

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256. *See infra* notes 253–78.
257. *See supra* notes 254–78.
258. *See* Bankshot Billiards, Inc. v. City of Ocala, 634 F.3d 1340 (11th Cir. 2011); *see also* Isaacson v. Mayes, 84 F.4th 1089 (9th Cir. 2023).
259. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).
260. *See* Czyzewski v. Jevic Holding Corp., 580 U.S. 451, 464 (2017) ("For standing purposes, a loss of even a small amount of money is ordinary an 'injury.'").
261. *See generally Isaacson*, 84 F.4th 1089.
262. *See generally Czyzewski*, 580 U.S. 451.
263. *See generally Isaacson*, 84 F.4th 1089.
264. *Id.* at 1097 ("Plaintiffs' standing is based on their economic interest in providing medical services.").
265. *See generally Johnson*, 576 U.S. 591 (noting that a statute may be reviewed for vagueness even though the plaintiff was engaged in criminal activities.).

As *Johnson* demonstrates, statutes may need to be reviewed for vagueness regardless of whether the individual bringing suit is engaged in constitutionally protected activities.[266] As the Court in *Johnson* noted, if a judge must imagine the conduct a statute prohibits, it evidences vagueness.[267] An individual is still capable of being injured by a vague statute regardless of whether they are engaged in constitutionally protected activities.[268] The Ninth Circuit acknowledged this in its reasoning, finding that reviewing statutes for vagueness is a Due Process Clause issue.[269] Further, as *Bennett* demonstrates, statutes are capable of producing harm.[270] The Ninth Circuit further demonstrated this principle by noting that vague statutes can produce harm that produces a legitimate injury.[271]

Additionally, the Ninth Circuit's interpretation of the physician plaintiffs as incurring an injury is correct based upon precedent set by the United States Supreme Court in both *TransUnion* and *Driehaus*.[272] In *TransUnion*, the Court found that if a plaintiff incurs monetary harm as their alleged injury, it is immediately seen as a concrete injury.[273] Further, the Court in *TransUnion* did not find that the harms suffered had to be constitutional in nature to fulfill the injury prong of Article III standing.[274] In *Driehaus*, the Court found that the threat of prosecution is a sufficient injury for Article III standing when challenging vague statutes.[275] The Court did not find that the plaintiffs bringing vagueness suits were required to demonstrate prevention from engaging in activities that are expressly allowed by the Constitution.[276]

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266. *See id.*

267. *See id.* at 597 (noting that the prohibited conduct would have to be "judicially imagined" rather than relying on "real-world facts or statutory elements.").

268. *See id.*

269. *See Isaacson*, 84 F.4th at 1099 ("A void-for-vagueness challenge is rooted in the Due Process Clause.").

270. *See* Bennett v. Spear, 520 U.S. 154, 170–71 (1997) ("[I]t is not difficult to conclude that petitioners have met their burden. . .of alleging that their injury is 'fairly traceable' to the Service's Biological Opinion and that it will 'likely' be redressed").

271. *See Isaacson*, 84 F.4th at 1099 ("And an imminent threat to life, liberty, or property interests without due process of law, in violation of the Fifth and Fourteenth Amendments, is a cognizable injury.").

272. *See* Susan B. Anthony List v. Driehaus, 573 U.S. 149 (2014); see also TransUnion LLC v. Ramirez, 594 U.S. 413 (2021).

273. *See TransUnion*, 594 U.S. at 425 ("[C]ertain harms readily qualify as concrete injuries under Article III . . . If a defendant has caused . . . monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III.").

274. *See id.* (finding that "traditional harms may also include harms specified by the Constitution itself," but not finding that as a requirement to fulfill the injury prong of the standing analysis.).

275. *Driehaus*, 573 U.S. at 158 ("An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur.") (quoting *Clapper v. Amnesty Int'l. USA*, 568 U.S. 398 (2013)).

276. *See generally id*. at 149.

Rather, the Court found that if the injury involves a sort of constitutional interest, it is sufficient.[277]

Even if the Eleventh Circuit was correct in its interpretation of *Driehaus* and standing, the Ninth Circuit still did not err in finding that the physician plaintiffs had standing to challenge the vague Arizona statute.[278] As the Supreme Court in *Driehaus* found, a constitutional interest is sufficient to fulfill the injury prong in pre-enforcement void for vagueness challenges.[279] Constitutional interests are broad, and as demonstrated, monetary interests may be considered constitutional interests as they are connected with property rights.[280] As *Logan* demonstrates, plaintiffs hold property rights in having their claims heard.[281] Further, as the Texas Supreme Court found in *Schrock*, economic interests of plaintiffs can be directly tied to property.[282]

V. CONCLUSION

In *Isaacson v. Mayes*,[283] physician plaintiffs brought suit against the Arizona Attorney General, among other parties, challenging the recently passed Reason Regulations as unconstitutionally vague.[284] The Reason Regulations prohibited doctors from performing abortions for fetal abnormalities.[285] The doctors argued that the Reason Regulations did not provide enough information to understand what the laws prohibited, thereby making the Regulations vague.[286] While the Ninth Circuit did not reach the merits of the vagueness claim, the court did reverse the holding of the district court, and found that the doctors alleged a sufficient injury for Article III standing purposes.[287] Disagreeing with the Eleventh Circuit in *Bankshot Billiards v. City of Ocala*,[288] the Ninth Circuit found that regardless of whether abortions were expressly protected by the Constitution, the injuries sustained by the doctors were sufficient to confer Article III standing to challenge the vagueness of the Reason Regulations.[289]

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277. *See id.* at 159.
278. *See generally Isaacson*, 84 F.4th 1089; *see also Driehaus*, 573 U.S. 149.
279. *See Driehaus*, 573 U.S. at 159.
280. *See infra* notes 219–28.
281. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).
282. *See* City of Baytown v. Schrock, 645 S.W.3d 174 (Tex. 2022).
283. 84 F.4th 1089 (9th Cir. 2023).
284. *See* 84 F.4th 1089 (9th Cir. 2023).
285. Isaacson v. Mayes, 84 F.4th 1089, 1094–95 (9th Cir. 2023).
286. *See Isaacson*, 84 F.4th at 1094–95; *see generally also* Brief of Petitioner, *Isaacson*, 84 F.4th 1089 (9th Cir. 2023).
287. *Isaacson*, 84 F.4th at 1095.
288. 634 F.3d 1340 (11th Cir. 2011).
289. *Id.* ("We hold that Plaintiffs have demonstrated an injury sufficient for standing.").

The Ninth Circuit correctly held that the plaintiffs in *Isaacson* had Article III standing based on a presentation of sufficient injuries.[290] Article III standing does not require that an express constitutional right be implicated in order to fulfill said standing requirements.[291] *Driehaus* does not require that the injury sustained by the individuals bringing suit be sustained as a result of being prevented from engaging in activities that are expressly protected by the Constitution.[292] Therefore, as demonstrated, the Ninth Circuit properly interpreted *Driehaus* and correctly found that the doctors presented sufficient injuries for Article III standing.[293]

Isaacson v. Mayes presents a challenging topic that could lead to an array of circuit splits on the issue of void for vagueness challenges.[294] While the Ninth Circuit correctly interpreted *Driehaus*, demonstrating that the correct interpretation is possible, it is evident that courts are capable of misinterpreting the ruling of the Supreme Court.[295] Misinterpretation of this ruling may lead to a lack of recovery for plaintiffs, leaving individuals with injuries that do not find redress.[296] Further, a difference in interpretations may lead to inconsistent application depending upon the location of the claim.[297] Finally, this issue is uniquely important, as vague statutes present an important legal issue capable of producing serious injuries for plaintiffs.[298]

–Anna A. Volenec '26†

290. *See id.*
291. *See supra* notes 204–34.
292. *See supra* notes 235–52.
293. *See supra* notes 253–78.
294. *Compare* Isaacson, 84 F.4th 1089 (9th Cir. 2023) with Bankshot Billiards, Inc. v. City of Ocala, 634 F.3d 1340 (11th Cir. 2011).
295. *See generally Bankshot*, 634 F.3d 1340. While *Bankshot* was decided before *Driehaus*, its interpretation of Article III standing demonstrates that misinterpretation of Constitutional principles is possible.
296. *See id.*
297. *Compare Isaacson*, 84 F.4th 1089 *with Bankshot*, 634 F.3d 1340. Plaintiffs in Arizona may receive different treatment from those in Florida, for instance.
298. *See* Johnson v. United States, 576 U.S. 591 (2015).

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