IN SATAN WE TRUST: THE SATANIC TEMPLE'S ONGOING CRUSADE TO PROTECT ABORTION RIGHTS

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INTRODUCTION

In the summer of 2022, the Supreme Court overruled the nearly fifty-year-old precedent of *Roe v. Wade*, eliminating the constitutional right to an abortion.[1] This was one of several decisions in which the newly minted conservative supermajority undermined what could be seen as progressive precedents.[2] At the same time, the Court has been elevating religious liberty claims and strengthening legal protections for religious individuals and organizations (predominantly Christian).[3] For anybody who cares about the "so-called separation of . . . church and state,"[4] this conservative Christian reformation taking place in the nation's highest court is a cause for concern.[5]

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1 410 U.S. 113 (1973); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

2 *See, e.g.*, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2351 (2021) (Kagan, J., dissenting) (characterizing the Voting Rights Act as undermined by the upholding of two state election laws that, per the dissent, "discriminate against minority voters"); Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) (rejecting affirmative action and severely restricting the use of race as a factor for university admissions).

3 *See* Fulton v. City of Phila., 141 S. Ct. 1868, 1882 (2021) (holding that the city of Philadelphia, Pennsylvania, violated the Free Exercise Clause by refusing to work with a Catholic adoption agency that discriminated against homosexual couples); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (holding that the Bremerton School District violated the Free Exercise and Establishment Clauses by firing a Christian high school football coach for private religious observance (kneeling in prayer) after a football game); Shurtleff v. City of Boston, 142 S. Ct. 1583 (2022) (holding that the City of Boston violated the Free Exercise Clause by refusing to allow a Christian flag to fly outside of Boston City Hall); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (holding that a Roman Catholic church and a Jewish synagogue were exempt from an executive order capping gathering sizes aimed at controlling the spread of COVID-19); 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023) (holding that a state's public accommodation laws forbidding discrimination on the basis of sexual orientation could not compel a Christian website designer to provide services for a gay wedding).

4 Transcript of Oral Argument at 78, *Shurtleff*, 142 S. Ct. 1583 (No. 20-1800) (demonstrating Justice Gorsuch belittling the notion of separating church and state at oral argument).

5 *See* Ian Millhiser, *The Supreme Court Is Leading a Christian Conservative Revolution*, VOX (Jan. 30, 2022, 8:00 AM), https://www.vox.com/22889417/supreme-court-religious-liberty-christian-right-revolution-amy-coney-barrett [https://perma.cc/U3GG-7VYU] ("The Court's current majority, in other words, is itching for a fight over religion. And it holds little regard for established law. That means that a whole lot is likely to change, and very quickly.").

However, the narrative that religious liberty claims belong exclusively to the Christian right is misguided and untrue.[6] Many such cases have been brought by religious claimants addressing progressive issues such as immigrant rights,[7] LGBTQ+ rights,[8] religious drug use,[9] and abortion.[10] In fact, in the wake of *Dobbs v. Jackson Women's Health Organization*, there have been several lawsuits filed by religious organizations challenging state abortion bans and seeking religious exemptions.[11] Among these complainants is The Satanic Temple, a religious organization that has been fighting for the reproductive rights of its members for over eight years via its "Religious Reproductive Rights" campaign.[12] The Satanic Temple has filed two post-*Dobbs* complaints challenging state abortion bans in Idaho and Indiana,[13] and an appeal of an unfavorable ruling in Texas.[14] The Satanic Temple has also launched numerous other campaigns and brought lawsuits for protection of its religious rights on other issues ranging from after-school prayer groups to religious discrimination from public officials.[15]

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6 ELIZABETH REINER PLATT, KATHERINE FRANKE, KIRA SHEPHERD & LILIA HADJIIVANOVA, WHOSE FAITH MATTERS? THE FIGHT FOR RELIGIOUS LIBERTY BEYOND THE CHRISTIAN RIGHT 23–24 (2019).

7 *See* United States v. Merkt, 794 F.2d 950 (5th Cir. 1986); United States v. Aguilar, 883 F.2d 662 (9th Cir. 1989).

8 *See* Gen. Synod of the United Church of Christ v. Reisinger, 12 F. Supp. 3d 790 (W.D.N.C. 2014).

9 *See* Emp. Div. v. Smith, 494 U.S. 872 (1990); Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418 (2006).

10 *See* Landreth v. Hopkins, 331 F. Supp. 920 (N.D. Fla. 1971); Watkins v. Mercy Med. Ctr., 520 F.2d 894 (9th Cir. 1975).

11 *See* Complaint, Pomerantz v. State of Florida, No. 2022-014373-CA-01 (Fla. Cir. Ct. Aug. 1, 2022) (demonstrating Jewish rabbis challenging Florida's criminalization of pre-viability abortions); Complaint, Generation to Generation, Inc. v. State of Florida, No. 2022 CA 000980 (Fla. Cir. Ct. June 16, 2022) (demonstrating a Jewish nonprofit challenging Florida's criminalization of pre-viability abortions); Complaint, Anonymous Plaintiffs 1–5 v. Individual Members Med. Licensing Bd. of Ind., No. 49D01-2209-PL-031056 (Ind. Sup. Ct. Sept. 8, 2022).

12 *The Satanic Temple Religious Reproductive Rights*, SATANIC TEMPLE, https://thesatanictemple.com/pages/rrr-campaigns [https://perma.cc/KPL8-FGFL]; *see also infra* Section I.C.1.

13 Complaint, Satanic Temple v. Little, No. 22-cv-00411 (D. Idaho Sept. 30, 2022), 2022 WL 4599129 [hereinafter *Little* Complaint]; Complaint, Satanic Temple v. Holcomb, No. 22-cv-01859 (S.D. Ind. Sept. 21, 2022), 2022 WL 4378551 [hereinafter *Holcomb* Complaint]. The *Holcomb* complaint has since been dismissed on procedural grounds. *See infra* note 148.

14 The appeal has since been dismissed on jurisdictional grounds. Satanic Temple, Inc. v. Tx. Health & Hum. Serv. Comm'n, 79 F.4th 512, 515 (5th Cir. 2023).

15 *After School Satan*, SATANIC TEMPLE, https://thesatanictemple.com/pages/after-school-satan [https://perma.cc/N9PG-5D3E]; *see also* Satanic Temple, Inc. v. City of Scottsdale, 423 F. Supp. 3d 766, 770 (D. Ariz. 2019) (demonstrating The Satanic Temple suing the city after being denied a request to give the opening prayer at a city council meeting).

Part I of this Note will begin with an overview of the evolution of free exercise jurisprudence, particularly its recent expansions under the new Supreme Court supermajority following the confirmation of Amy Coney Barrett.[16] It will then give a brief history of The Satanic Temple's origins, its belief system, and the group's early legal battles to defend its religious rights.[17] With that context, Part I will then outline The Satanic Temple's abortion practices and its pre-*Dobbs* legal battles for religious liberty, culminating in a breakdown of its post-*Dobbs* complaints which seek a religious exemption from state abortion bans.[18] After considering The Satanic Temple's legitimacy as a religion (particularly in light of their recognition by the Internal Revenue Service (IRS)) and thus its entitlement to constitutional and state-level legal protections,[19] Part II analyzes The Satanic Temple's free exercise claims under the current state of religious liberty jurisprudence.[20] Although The Satanic Temple has a compelling case to win its abortion exemptions on the merits, the conservative bent of the supermajority and what scholars have deemed "free exercise preferentialism" create a perilous legal landscape for these claims.[21] Part III then proposes that regardless of the legal outcome of its cases, The Satanic Temple performs a valuable national function: on one hand, it may win important and elusive religious rights for minority groups; but even if its cases fail, it still brings significant public attention to the hypocrisy of the courts and the religious discrimination faced by said minority groups.[22]

I. BACKGROUND

A. *The State of Free Exercise Jurisprudence*

1. Pre-*Smith* Decisions

The First Amendment of the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[23] These two clauses are commonly referred to

16 *See infra* Section I.A.

17 *See infra* Section I.B.

18 *See infra* Section I.C.

19 *See infra* Section II.A.

20 *See infra* Section II.B.

21 Micah Schwartzman & Richard Schragger, *Religious Freedom and Abortion*, 108 IOWA L. REV. 2299, 2335–40 (2023).

22 *See infra* Sections III.A–III.B.

23 U.S. CONST. amend. I.

as the Establishment Clause and the Free Exercise Clause, and they form the foundation of religious liberty protection in this country.[24]

An early but significant decision in free exercise jurisprudence was *Reynolds v. United States*, in which the Supreme Court refused to grant a religious exemption to a Mormon plaintiff who was convicted for violating state polygamy laws.[25] According to the Court, to permit such an exemption "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[26] Importantly, the Court distinguished between religious "belief[s]" and religious "practices," saying that beliefs cannot be interfered with, but practices must yield to government regulation.[27] While *Reynolds* has been criticized, it has not yet been overruled.[28]

Another landmark free exercise decision that crystalized the judicial standard used for nearly thirty years was *Sherbert v. Verner*.[29] In this case, a Seventh-day Adventist was discharged from her job for refusing to work on Saturdays, "the Sabbath Day of her faith," and subsequently was denied unemployment benefits.[30] The Supreme Court held that the denial of unemployment benefits imposed a burden on the appellant's free exercise of her religion, even if indirectly, and that the State presented no compelling interest that would justify the burden.[31] The Court emphasized that a rational basis for the challenged law would be insufficient and that strict scrutiny should be applied.[32] *Sherbert* established the constitutional requirement that religious believers should be exempted from government laws that burden their faith, even generally applicable laws, where the government cannot show a compelling reason for imposing such a burden.[33] The *Sherbert* standard was reaffirmed in *Wisconsin v. Yoder*, which held that Amish families

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24 *See* Lee v. Weisman, 505 U.S. 577, 605 (1992) (Blackmun, J., concurring) ("The First Amendment encompasses two distinct guarantees . . . both with the common purpose of securing religious liberty.").

25 98 U.S. 145, 161, 166–68 (1878).

26 *Id.* at 167.

27 *Id.* at 166.

28 Brown v. Buhman, 947 F.Supp.2d 1170, 1181 (D. Utah 2013).

29 374 U.S. 398 (1963).

30 *Id.* at 399–401.

31 *Id.* at 403–04, 406–07.

32 *Id.* at 406 ("[O]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation." (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945))).

33 PLATT, FRANKE, SHEPHERD & HADJIIVANOVA, *supra* note 6, at 14.

could be exempt from a state law requiring formal school attendance until the age of sixteen.[34]

2. *Smith*: The Current Constitutional Standard

In 1990, the Supreme Court did away with the *Sherbert* "compelling interest" standard in *Employment Division v. Smith*, a case which involved two Native American claimants who were fired from their jobs for sacramental use of peyote, and were subsequently denied unemployment benefits for their violation of a state law prohibiting peyote use.[35] The Oregon Supreme Court held that the refusal of benefits was a violation of the Native Americans' free exercise rights, citing *Sherbert*.[36] But the Supreme Court reversed, saying 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.'"[37] Thus, the *Smith* majority declared that so long as a law does not target a particular religious group, even if it incidentally burdens a particular religious practice, it "need not be justified with a compelling governmental interest."[38] It declared that disadvantages faced by minority religions whose practices are burdened by generally applicable laws are the "unavoidable consequence of democratic government."[39] It also cited the *Reynolds* decision's distinction between regulating beliefs versus actions, reinforcing the notion that religiously motivated actions can be curtailed by otherwise neutral state laws.[40] As the dissent pointed out, the majority's decision in *Smith* represented "a wholesale overturning of settled law concerning the Religion Clauses of our Constitution," one that abolished the application of strict scrutiny to free exercise claims, making it significantly more difficult for a religious claimant to succeed in getting an exemption.[41]

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34 406 U.S. 205, 234, 236 (1972). The Court found that the state's requirement of compulsory education to the age of sixteen "would gravely endanger if not destroy the free exercise of [the] respondents' religious beliefs" and that the state's interest in universal enforcement of its compulsory education was insufficient to justify the burden on religious liberty. *Id.* at 219–22.

35 494 U.S. 872, 874, 882–84 (1990).

36 *Id.* at 875.

37 *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (Stevens J., concurring).

38 *Id.* at 886 n.3.

39 *Id.* at 890.

40 *Id.* at 878–79.

41 *Id.* at 908–09 (Blackmun J., dissenting).

3. The Religious Freedom Restoration Act

In response to *Smith*, a large and diverse coalition of religious organizations lobbied Congress to pass the Religious Freedom Restoration Act (RFRA), a federal statute aimed at restoring *Sherbert*'s "compelling interest" standard (i.e., strict scrutiny for religious exemption claims) that *Smith* eliminated.[42] In 1993, RFRA was approved with overwhelming bipartisan support and signed into law.[43] The law states that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . [unless the burden] (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[44] It initially applied to both the federal government and state governments pursuant to the Fourteenth Amendment but was later found to be unconstitutional as applied to the states.[45] Nevertheless, more than half of states now have their own state laws based on RFRA or constitutional provisions requiring strict scrutiny for religious claims.[46]

Interestingly, the need to protect the rights of religious minorities was a recurring theme during congressional hearings for RFRA and a motivating force behind passing the act.[47] Even more interesting is that pro-life opponents of the bill, namely the United States Catholic Conference and the National Right to Life Committee, initially feared

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42 42 U.S.C. § 2000bb; *see also* Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 YALE L. J. F. 416, 416–17 (2016); BAPTIST JOINT COMM. FOR RELIGIOUS LIBERTY, THE RELIGIOUS FREEDOM RESTORATION ACT: 20 YEARS OF PROTECTING OUR FIRST FREEDOM (2014), https://bjconline.org/wp-content/uploads/2014/04/RFRA-Book-FINAL.pdf [https://perma.cc/7PB8-BK4A].

43 Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210 (1994) ("[T]he U.S. Senate passed the Religious Freedom Restoration Act of 1993 (RFRA) by a vote of 97-3. The House of Representatives, after passing a similar bill by unanimous voice vote on May 11, 1993, passed the Senate version of the bill on November 3, and President Clinton signed it into law on November 16." (footnotes omitted)).

44 42 U.S.C. § 2000bb-1(a)–(b).

45 City of Boerne v. Flores, 521 U.S. 507, 519 (1997) ("The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is.").

46 Angela C. Carmella, *Progressive Religion and Free Exercise Exemptions*, 68 U. KAN. L. REV. 535, 581 (2020); Juliet Eilperin, *31 States Have Heightened Religious Freedom Protections*, WASH. POST (Mar. 1, 2014, 2:13 PM), https://www.washingtonpost.com/news/the-fix/wp/2014/03/01/where-in-the-u-s-are-there-heightened-protections-for-religious-freedom [https://perma.cc/W27G-USZV] (showing U.S. states with increased protections for religious freedom).

47 Carmella, *supra* note 46, at 548–49, 549 n.72 (collecting testimony).

that RFRA would be used to challenge abortion restrictions on religious liberty grounds in the event that *Roe v. Wade* was overturned.[48] Their fears stemmed, in part, from a district court's holding that the Hyde Amendment, which restricted Medicaid funds from being used for abortions, violated the Free Exercise Clause for women who sought medically necessary abortions as a product of their religious beliefs (under certain Protestant and Jewish tenets).[49] Although this decision was later reversed by the Supreme Court, the possibility of this kind of ruling nevertheless scared pro-life advocates enough to initially oppose the bill in its entirety.[50]

4. *Hobby Lobby*

One of the most significant Supreme Court decisions interpreting and applying RFRA is *Burwell v. Hobby Lobby Stores, Inc.*[51] In a 5-4 decision, the majority held that the Affordable Care Act's contraceptive mandate substantially burdened the sincerely held religious beliefs of the Christian owners of three corporations, and thus exempted the employers from providing health care coverage, including what the plaintiffs believed to be abortifacients.[52] To arrive at this decision, the majority claimed that RFRA was designed not merely to restore the *Sherbert* standard but to provide even broader protection for religious liberty "far beyond what this Court has held is constitutionally required."[53] It also expanded the word "person" as used in RFRA to include "corporations, companies, [and] associations" as entities capable of the "exercise of religion,"[54] and thus entitled to RFRA protection.[55] The dissent noted the "startling breadth" of the majority's decision, summarizing the holding

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48 Laycock & Thomas, *supra* note 43, at 236; *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 102d Cong. 33–35, 39–43 (1992) (statement of Mark E. Chopko, General Counsel, on behalf of the United States Catholic Conference).

49 McRae v. Califano, 491 F. Supp. 630, 741–42 (E.D.N.Y. 1980), *rev'd sub nom.* Harris v. McRae, 448 U.S. 297 (1980).

50 Laycock & Thomas, *supra* note 43, at 236–37. However, *Planned Parenthood of Se. Pa. v. Casey* was decided shortly thereafter, which resolved constitutional claims relating to abortion for the time being, and compromise language was added to the House and Senate reports that eventually assuaged most opponents into voting for the bill. 505 U.S. 833, 845–46 (1992); Laycock & Thomas, *supra* note 43, at 237–38.

51 573 U.S. 682 (2014).

52 *Id.* at 688–91.

53 *Id.* at 706.

54 *Id.* at 707–08. *Compare* 42 U.S.C. § 2000bb-1(a) (covering "a person's exercise of religion"), *with* 1 U.S.C. § 1 (providing a more expansive definition of "person").

55 *Burwell*, 573 U.S. at 707–08.

as one that allows "commercial enterprises, including corporations . . . [to] opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs."[56]

Legal scholar Gary J. Simson cites *Hobby Lobby*'s "immoderate reading of RFRA" as a signal of a new era of religious liberty doctrine, in which the Court aggressively departed from the pre-*Smith* free exercise standard (i.e., the *Sherbert* "compelling interest" standard) that RFRA was enacted to restore.[57] He notes that the "substantial burden" on religious exercise claimed by the *Hobby Lobby* plaintiffs fell far below the formidable burden standard of pre-*Smith* cases, and that the "least-restrictive-means" showing found inadequate by the *Hobby Lobby* court was "obviously adequate," under pre-*Smith* case law.[58] And the way that *Hobby Lobby* contradicts the holding of *Reynolds*, despite one being decided under RFRA and the other under the First Amendment, suggests that under RFRA, religious practices *cannot* be regulated by state or federal governments, even via a neutral, generally applicable law.[59] Thus, with *Hobby Lobby*'s aggressive expansion of religious liberty protections under RFRA, the Court "seemed to announce loud and clear that religious groups in search of an exemption have an ally in the Court."[60] This has indeed been the case, at least for *certain* religious groups.

5. Free Exercise Post–Amy Coney Barrett

In September of 2020, Ruth Bader Ginsburg, a staunchly liberal justice, died at the tail end of the Trump presidency and was swiftly replaced with Amy Coney Barrett, a devout Catholic judge from the Seventh Circuit.[61] This established a conservative 6-3 supermajority

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56 *Id.* at 739–40 (Ginsburg, J., dissenting).

57 Gary J. Simson, *The Uncertain Good of Overruling* Employment Division v. Smith, EMORY U. CANOPY F. ON INTERACTIONS L. & RELIGION 6 (Oct. 2020) (quoting Ginsburg's dissent in *Burwell*, 573 U.S. at 772).

58 *Id.* ("In fact, [the least-restrictive-means showing] was so obviously adequate that the Court in *Hobby Lobby* felt obliged to concede that its finding of inadequacy was predicated on an understanding of RFRA as codifying a more exemption-friendly test than the test the Court had applied in the pre-*Smith* era.").

59 *See* Reynolds v. United States, 98 U.S. 145, 166 (1878) ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.").

60 Simson, *supra* note 57, at 6.

61 Joan Biskupic & Ariane de Vogue, *Justice Ruth Bader Ginsburg Dead at 87*, CNN (Sept. 19, 2020, 9:19 AM), https://www.cnn.com/2020/09/18/politics/ruth-bader-ginsburg-dead/index.html [https://perma.cc/VVG2-UNYR]; Stephen I. Vladeck, *The Most-Favored Right: COVID, the Supreme Court, and the (New) Free Exercise Clause*, 15 NYU J.L. & LIBERTY 699, 716 (2022); *see also* Millhiser, *supra* note 5.

among the justices, the impact of which was felt immediately when she cast her first discernible vote on a shadow docket case involving religious liberty challenges to COVID-19 restrictions.[62] The case was brought by a Catholic church (and merged with a similar complaint from a Jewish congregation) that sought an emergency injunction from Governor Cuomo's executive order limiting attendance at religious services in order to prevent the spread of COVID-19.[63] Months earlier, the Court had denied similar emergency injunctions to religious groups in two 5-4 decisions, reasoning that state officials knew better than an unelected federal judiciary and must be given broad latitude to deal with an ever-changing public health crisis.[64] However, in *Roman Catholic Diocese of Brooklyn v. Cuomo*, the same type of emergency injunction was granted, the only difference being Amy Coney Barrett's vote, which turned the prior minority into the new 5-4 majority.[65]

In the per curiam opinion, the majority declared that the executive order violated the "minimum requirement of neutrality" by restricting the gathering size for religious organizations while allowing "essential" businesses to admit people as they wish.[66] This "disparate treatment" amounted to religious discrimination, which triggered a strict scrutiny analysis in which the government needed (and failed) to show that the restrictions were "narrowly tailored" to serve a "compelling" interest.[67] The concurring opinions of Justice Gorsuch and Justice Kavanaugh also referred to what scholars have deemed the "most-favored nation" view of the Free Exercise Clause, in which neutral laws burdening religious practice will "be constitutionally suspect if they include any secular exceptions without exceptions for 'comparable' religious activities."[68] Justice Kavanaugh illustrated this line of thinking most clearly, saying that "[i]n a red zone, for example, a church or synagogue must adhere to a 10-person attendance cap, while a grocery store, pet store, or big-box store down the street does not face the same restriction."[69] As one scholar noted, this formulation of free exercise "turn[s] *Smith* on its head—since

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62 Vladeck, *supra* note 61, at 716 ("[H]er first publicly discernible vote would come when religious liberty challenges to COVID restrictions returned to the shadow docket—as they would just before Thanksgiving. And it would be decisive."); *see* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020).

63 *Roman Cath. Diocese*, 141 S. Ct. at 65–66.

64 S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2603 (2020).

65 141 S. Ct. at 65–66.

66 *Id.* (quoting Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993)).

67 *Id.* at 66–67 (quoting *Church of Lukumi*, 508 U.S. at 546).

68 Vladeck, *supra* note 61, at 708, 720 (quoting Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 50).

69 *Roman Cath. Diocese*, 141 S. Ct. at 73 (Kavanaugh, J., concurring).

almost every government regulation, especially those of general applicability, has at least some exceptions."[70]

The Court's reasoning in *Roman Catholic Diocese* was then extended to California's in-home gathering restrictions in *Tandon v. Newsom*, another shadow docket decision in which a 5-4 majority granted an emergency injunction for two pastors who claimed that the in-home gathering restriction interfered with their constitutional "right to conduct Bible study and hold prayer meetings in their . . . homes."[71] In this short per curiam opinion, the majority wrote that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[72] In doing so, the Court stepped further away from the "generally applicable" standard of *Smith* by explicitly embracing the most-favored nation theory of free exercise.[73] Thus, *Tandon* represents a fundamental change in the Constitution's protection of religious liberty, effectively (but not explicitly) replacing *Smith* via an unargued, sharply divided shadow docket ruling.[74] One religious liberty scholar has gone so far as to call *Tandon* the "most important free exercise decision since 1990."[75] And while the Court has suggested that rulings without briefing and oral argument do not carry the full weight of legal precedent, the Court has chastised and overruled lower courts that did not comply with the new COVID-19 orders, causing confusion as to the precedential value of these shadow docket rulings.[76]

Despite being presented with numerous opportunities to explicitly overrule *Smith* on the merits docket, the Court has so far refused to do

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70 Vladeck, *supra* note 61, at 709 (explaining that speed limits "do not apply to properly signed police, fire, or other emergency vehicles in appropriate circumstances").

71 Vladeck, *supra* note 61, at 731–32; 141 S. Ct. 1294, 1296–97 (2021).

72 *Tandon*, 141 S. Ct. at 1296 (citing *Roman Cath. Diocese*, 141 S. Ct. at 67–68).

73 Vladeck, *supra* note 61, at 733 (quoting *Tandon*, 141 S. Ct at 1296).

74 *Id.* at 734–35.

75 *Id.* at 734 (quoting Jim Oleske, Tandon *Steals* Fulton*'s Thunder: The Most Important Free Exercise Decision Since 1990*, SCOTUSBLOG (Apr. 15, 2021, 10:13 AM), https://www.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990 [https://perma.cc/FF3X-2Q4X]).

76 Lunding v. N.Y. Tax Appeals Tribunal, 522 U.S. 287, 307 (1998) ("Although we have noted that '[o]ur summary dismissals are . . . to be taken as rulings on the merits' we have also explained that they do not 'have the same precedential value . . . as does an opinion of this Court after briefing and oral argument on the merits.'" (quoting Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 477, n.20 (1979)); *see also Tandon*, 141 S. Ct. at 1297–98 (citing numerous shadow docket cases and chastising the Ninth Circuit for its failure to comply, saying, "[t]his is the fifth time the Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise").

so.[77] In *Fulton v. City of Philadelphia*, the majority held that the City of Philadelphia had burdened a Catholic adoption agency's religious liberty by ceasing their working relationship because of the Catholic agency's refusal to certify same-sex couples as adoptive parents, in apparent violation of the city's antidiscrimination laws.[78] Justice Alito, in a concurring opinion joined by Justices Thomas and Gorsuch, explicitly called for the reconsideration (and implicitly, the overruling) of *Smith* "without further delay."[79] However, the majority decided the issue on narrower grounds, namely that the city's contract was not "generally applicable" as defined by *Smith* because it contained a secular exception that could be granted by the city's Commissioner at "his/her sole discretion," and was thus discriminatory against religion.[80] In a concurring opinion, Justice Barrett explained her hesitance to overrule *Smith*, calling for a more nuanced approach to religious liberty claims and listing a series of difficult questions that would arise in a post-*Smith* vacuum.[81] However, this concurrence rings hollow, as it directly contradicts the majority's decision in *Tandon* that she signed on to, which effectively replaced the *Smith* standard with the "most-favored nation" standard.[82] In fact, one scholar has argued that the *Fulton* holding implicitly incorporates an aggressive form of *Tandon*'s standard into the *Smith* test, such that any law that contains *any* secular exemption will now be subject to strict scrutiny, and a religious exemption likely granted, regardless of whether the secular exemption is "comparable."[83]

More recently, the Court found that a Christian high school football coach had his religious liberty violated when he was fired by the school district for repeatedly kneeling in prayer after football games.[84] As the dissent points out, this decision not only misreads the record in a way that entirely mischaracterizes the "private and quiet" nature of the prayer in question, but it overrules a seminal Establishment Clause decision and privileges free exercise over the Court's long-held precedent that school

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77 *See, e.g.*, Fulton v. City of Phila., 141 S. Ct. 1868, 1876–77 (2021).

78 *Id.* at 1875–76.

79 *Id.* at 1888 (Alito, J., concurring).

80 *Id.* at 1878 (explaining that the relevant contract contained the provision: "Provider shall not reject a child or family including, but not limited to, . . . prospective foster or adoptive parents, for Services based upon . . . their . . . sexual orientation . . . *unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion.*" (emphasis added)).

81 *Fulton*, 141 S. Ct. at 1882–84 (Barrett, J., concurring).

82 Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021); Vladeck, *supra* note 61, at 733.

83 Note, *Pandora's Box of Religious Exemptions*, 136 HARV. L. REV. 1178, 1184–85 (2023) ("Read together, *Tandon* and *Fulton* suggest the erosion, if not the elimination, of comparability from the most-favored-nation doctrine. As a result, any law, so long as it could potentially exempt some secular activity, is not generally applicable.").

84 Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2415–16 (2022).

officials leading prayer is constitutionally impermissible.[85] And even more recently, the Court exempted a Christian web designer from a state public accommodation law that forbade discrimination on the basis of sexual orientation,[86] and changed the standard for religious accommodations in the workplace in favor of a Christian postal worker who refused to make deliveries on Sundays.[87] Thus, in just three years, the Supreme Court has drastically altered the Constitution's religious liberty doctrines, making it significantly easier for religious liberty claimants to obtain exemptions from state laws on a variety of legal theories.

B. *The History of The Satanic Temple*

The co-founders of The Satanic Temple, Malcolm Jarry and Doug Mesner (a.k.a. Lucien Greaves), met at a Harvard faculty club function in 2012, and bonded over their shared concern with the growing power of conservative evangelicals.[88] Jarry became interested in Satanism in 2001 when George W. Bush announced an executive order allowing for federal funds to support faith-based philanthropic efforts, thinking, "They wouldn't allow a Satanic organization to take advantage of this."[89] Greaves, on the other hand, was led to Satanism by a variety of factors, such as growing up during the Satanic Panic of the 1980s, an increasing "disgust with mainstream religion," and an "appreciation for scientific skepticism."[90] In an essay describing the ethos of the group, Jarry wrote, "Action is based on the theory that when the rules that are used to subjugate a population are applied to the people who create and enforce those rules, constructive changes occur."[91]

Their first action together as The Satanic Temple took place on January 25, 2013, when they held a rally on the steps of the Florida legislature facetiously praising then-governor Rick Scott for allowing Satanic prayer in public schools.[92] Donning cheap costume-store robes, a

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85 *Id.* at 2434 (Sotomayor, J., dissenting).

86 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2308, 2322 (2023) (deciding the case under a free speech theory rather than under a religious liberty doctrine).

87 Groff v. DeJoy, 143 S. Ct. 2279, 2286–87, 2297 (2023).

88 JOSEPH P. LAYCOCK, SPEAK OF THE DEVIL: HOW THE SATANIC TEMPLE IS CHANGING THE WAY WE TALK ABOUT RELIGION 27–28 (2020).

89 *Id.* at 28; *see also* Exec. Order No. 13199, 66 Fed. Reg. 8499, 8499 (Jan. 29, 2001).

90 LAYCOCK, *supra* note 88, at 30.

91 *Id.* at 31 (quoting Malcolm Jarry, Educational Mission: A Report and Plan of Action (Dec. 12, 2012) (unpublished essay) (on file with author)).

92 *Id.* at 32. This was in response to Rick Scott signing a bill in 2012, which allowed students to read "inspirational messages of their choosing" (code for "prayer") at school assemblies and

small group of Satanists and actors stood in front of a sign reading "Hail Satan! Hail Rick Scott!" and one declared, "[w]e feel confident that Rick Scott has helped initiate the inevitable—opening the gates of hell to unleash a new Luciferean age that will last one thousand years and beyond!"[93] Their next official action, "The Pink Mass," took place in April of 2013, when they had two gay couples kiss over the grave of the mother of the Westboro Baptist Church's founder, in order to turn her gay and pleasure her in the afterlife.[94] Although these two humorous actions could be perceived as politically motivated stunts, Greaves "at all times saw [them] as sincere."[95] With the barrage of media attention these events garnered, Jarry and Greaves realized that they were launching a religious movement in the public eye and set out to formalize The Satanic Temple's true convictions.[96]

It was at this point that Jarry and Greaves derived the organization's core belief system, the "Seven Tenets." The most relevant tenets to the abortion suits are that "[o]ne's body is inviolable, subject to one's own will alone" and that "[b]eliefs should conform to one's best scientific understanding of the world. One should take care never to distort scientific facts to fit one's beliefs."[97] In creating these tenets, Jarry conformed The Satanic Temple's philosophy to a legitimation strategy for new religious movements based on "rational appeals," in which the beliefs "are presented as self-evident and rooted in common sense rather than any superhuman authority."[98] Temple members have described the tenets as "articulating—and in some cases *sacralizing*—the values they already

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sporting events. *Id.* at 31 (citing Paige Lavender, *Rick Scott Praised by 'Satanists' at Mock Rally*, HUFFPOST (Jan. 28, 2013), https://www.huffpost.com/entry/rick-scott-satanists_n_2559018 [https://perma.cc/4G9C-PP2H]).

93 LAYCOCK, *supra* note 88, at 32–33. *See also* HAIL SATAN?, at 0:00–4:16 (Magnolia Pictures 2019).

94 LAYCOCK, *supra* note 88, at 34–35 The idea for this project was "loosely adapted from the idea of baptism for the dead practiced by the Church of Latter-day Saints." *Id.* at 35.

95 *Id.* at 36 (quoting Interview by Joseph P. Laycock with Malcolm Jarry (July 18, 2018)).

96 *See id.* at 36–37.

97 These are tenets III and V, respectively. *Id.* at 37–38; *see also About Us*, SATANIC TEMPLE, https://thesatanictemple.com/pages/about-us [https://perma.cc/23R7-QCS2] (listing the other tenets: "(I) One should strive to act with compassion and empathy toward all creatures in accordance with reason. (II) The struggle for justice is an ongoing and necessary pursuit that should prevail over laws and institutions. . . . (IV) The freedoms of others should be respected, including the freedom to offend. To willfully and unjustly encroach upon the freedoms of another is to forgo one's own. . . . (VI) People are fallible. If one makes a mistake, one should do one's best to rectify it and resolve any harm that might have been caused. (VII) Every tenet is a guiding principle designed to inspire nobility in action and thought. The spirit of compassion, wisdom, and justice should always prevail over the written or spoken word.").

98 LAYCOCK, *supra* note 88, at 38 (citing JAMES R. LEWIS, LEGITIMATING NEW RELIGIONS 13–14 (2004)).

held."[99] Today, The Satanic Temple describes itself as "a nontheistic religion whose membership openly defies the authority of God and the Church. To the congregants of [The Satanic Temple], Satan deserves veneration as a revolutionary antihero who stood up against impossible odds to seek justice and egalitarianism for himself and others."[100] Modern Satanism has been compared to the New Age and Human Potential movements in that it is a "self-religion" whose members regard "the self as sacred and . . . the demands of society as a hindrance to being one's 'authentic' self."[101]

One of The Satanic Temple's first legal battles took place in Oklahoma after a bill was passed that would allow a Ten Commandments monument on capitol grounds.[102] The bill relied heavily on the Supreme Court case *Van Orden v. Perry*, which held that a Ten Commandments monument erected on Texas capitol grounds was constitutional, in part because it was one of seventeen monuments on capitol grounds, and would thus be seen as part of a "broader moral and historical message reflective of a cultural heritage," rather than state endorsement of a specific religion.[103] The Satanic Temple stepped in, formally proposing to the State Capitol Preservation Commission the construction of a monument to Satan to be placed alongside the Ten Commandments monument.[104] Several other religious and political groups followed suit, with Pastafarians, the Universal Society of Hinduism, and People for the Ethical Treatment of Animals also proposing monuments in line with the spirit of diversity supposedly championed by the bill.[105] In response, the commission "declared a moratorium on new monument proposals."[106] Ultimately, the Ten Commandments monument was declared a violation of the Oklahoma Constitution by the state's supreme court in a case brought by a Baptist preacher.[107]

A "nearly identical" situation occurred in Arkansas, where The Satanic Temple proposed installing its Baphomet statue only to be informed that its hearing would be "cancelled because of a new law—that

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99 *Id.*

100 The Satanic Temple's Opening Brief at 10, Satanic Temple, Inc. v. Tx. Health & Hum. Serv. Comm'n, 79 F.4th 512 (5th Cir. 2023) (No. 22-20459) (citation omitted).

101 LAYCOCK, *supra* note 88, at 15.

102 *See id.* at 2–3, 5.

103 *Id.* at 3; Van Orden v. Perry, 545 U.S. 677, 700–03 (2005) (Breyer, J. concurring).

104 LAYCOCK, *supra* note 88, at 5.

105 *Id.* at 6.

106 *Id.*; *see also* Associated Press, *Okla. Imposes Moratorium on Capitol Monuments*, USA TODAY (Dec. 19, 2013, 7:48 PM), https://www.usatoday.com/story/news/nation/2013/12/19/oklahoma-capitol-statehouse-monuments/4134307 [https://perma.cc/6NFQ-KPDV].

107 Prescott v. Okla. Capitol Pres. Comm'n, 373 P.3d 1032, 1033–34 (Okla. 2015); *see also* LAYCOCK, *supra* note 88, at 8.

was applied retroactively to their proposal—that the legislature must first approve monument proposals before they can be considered."[108] The Satanic Temple intervened in another religious discrimination case against the Arkansas Secretary of State in 2018.[109] The case has since been long delayed in discovery and motion practice, and currently awaits a ruling on summary judgment motions after hearings were held in July of 2023.[110]

Another significant legal battle (again concerning religious monuments) took place in Belle Plaine, Minnesota, where The Satanic Temple "submitted an application to erect a display in Belle Plaine's Veterans Memorial Park" alongside a Christian statue of a soldier kneeling before a cross pursuant to a resolution that would allow any private party to erect statues in the park "with the purpose of honoring and memorializing veterans."[111] Once approved, The Satanic Temple spent $35,000 to create and transport the memorial statue, only to have the city rescind its original resolution and disallow anybody from putting a statue in the park.[112] The Satanic Temple then sued the city for, among other things, promissory estoppel, for which the district court initially found all elements were met and denied judgment on the pleadings for the city.[113] This case is significant for two reasons. First, it marked the first time The Satanic Temple was solicited by the "far more established" Freedom From Religion Foundation to take action against a local government's seeming endorsement of Christianity, signaling The Satanic Temple's growing significance in the religious liberty arena.[114] And second, The Satanic Temple successfully called the City of Belle Plaine's bluff when it opened the park to all religions as a "limited public

108 LAYCOCK, *supra* note 88, at 12.

109 Order, Cave v. Martin, No. 18-cv-00342 (E.D. Ark. Dec. 17, 2018), ECF No. 38 (granting an amended motion to intervene).

110 *See* Order, Cave v. Thurston, No. 18-cv-00342 (E.D. Ark. June 20, 2023), ECF No. 298 (granting a motion for summary judgment hearing).

111 Satanic Temple v. City of Belle Plaine, 475 F. Supp. 3d 950, 956–57 (D. Minn. 2020); LAYCOCK, *supra* note 88, at 58.

112 LAYCOCK, *supra* note 88, at 59 ("But by the time the public forum was revoked, TST owed $35,000 for constructing and shipping a monument that the City Council had approved."). Importantly, the Christian monument was removed prior to the limited public forum policy being rescinded. *City of Belle Plaine*, 475 F. Supp. 3d at 957, 963. The court cited this fact as evidence of lack of discriminatory intent or impact behind the resolution. *See id.*

113 *City of Belle Plaine*, 475 F. Supp. 3d at 965–66. However, in a later proceeding, the district court granted Belle Plaine summary judgment on the estoppel claim, finding that TST had not relied *to its detriment* on the promise by the city, in part due to its crowdfunding of the $35,000 (thus experiencing no loss of its own money) and the lack of "evidence of reputational harm" amongst its crowdfunders due to being unable to display the monument. Satanic Temple v. City of Belle Plaine, No. 19-cv-1122, 2021 WL 4199369, at *6–7, *6 n.6 (D. Minn. Sept. 15, 2021).

114 LAYCOCK, *supra* note 88, at 58, 60.

forum" and got the original Christian statue removed, even if at its own significant expense.[115]

The Satanic Temple has since launched a series of campaigns aimed at promoting progressive ends such as religious pluralism, bodily autonomy, and the separation of church and state. These include a campaign to end corporal punishment in schools, a push for inclusion of religiously diverse "holiday displays" on government property, and launching a Satanic after-school club to counterprogram the evangelical "Good News Clubs" in thousands of elementary schools.[116] Notably, The Satanic Temple achieved a rare legal victory when a federal district court in Pennsylvania granted it a preliminary injunction requiring a school district, which permitted a Good News Club to meet on campus, to allow the After School Satan Club to meet on school grounds.[117] Today, The Satanic Temple has over fifty active local congregations and over 700,000 members around the globe.[118]

115 *Id.* at 58–60.

116 *Id.* at 39–44, 50–57.

117 Satanic Temple, Inc. v. Saucon Valley Sch. Dist., No. 23-cv-01244, 2023 WL 3182934, at *1, *12 (E.D. Pa. May 1, 2023) (granting a preliminary injunction where a school selectively excluded the After School Satan Club). The case has since settled, with the school district agreeing to pay $200,000 in attorney's fees and to allow the After School Satan Club access to school facilities. *School district and The Satanic Temple reach agreement in lawsuit over After School Satan Club*, ASSOCIATED PRESS (Nov. 19, 2023, 1:02 PM), https://apnews.com/article/satan-club-pennsylvania-lawsuit-112e1cd6a71d708accaee36c1815a975 [https://perma.cc/2G95-R2F8].

118 *Find a Congregation*, SATANIC TEMPLE, https://thesatanictemple.com/pages/find-a-congregation [https://perma.cc/J9KT-6RRP]; *see also* Press Release, The Satanic Temple, The Satanic Temple Is One of the World's Fastest-Growing Religions with Over 700,000 Members, https://cdn.shopify.com/s/files/1/0428/0465/files/700k_Members_Recognition_Press_Release_-_Final.docx.pdf?v=1655327867 [https://perma.cc/2NW5-JUMK].

C. *Satanic Abortion Practices*

1. The Reproductive Rights Campaign and Religious Abortion Ritual

What has since become The Satanic Temple's "Reproductive Rights Campaign" began in 2014, partly in response to the *Hobby Lobby* decision.[119] Many Satanists "were alarmed by the [Court's] decision, which . . . [seemingly] privileged subjective religious beliefs about medicine over objective scientific facts,"[120] but the Temple's leaders were simultaneously intrigued by the way that the case "framed reproductive rights in the context of religious liberty."[121] In March of 2015, The Satanic Temple published a letter on its website that pregnant people seeking abortions "could present to abortion providers demanding a religious exemption to informed consent laws."[122] The letter states that the mandated informed consent laws interfere with one's religious abortion ritual practices and substantially burden their religious beliefs, particularly Tenet III ("One's body is inviolable, subject to one's own will alone.") and Tenet V ("Beliefs should conform to one's best scientific understanding of the world.").[123]

The religious abortion ritual itself "provides spiritual comfort and affirms bodily autonomy, self-worth, and freedom from coercive forces" to those seeking abortions.[124] The ritual procedure for medical abortions is as follows:

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119 *See* Laycock, *supra* note 88, at 106–07; *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (holding that the Affordable Care Act's contraceptive mandate substantially burdened employers' religious liberty by forcing them to provide their employees access to contraceptives that violated their religious beliefs about abortion). *See also The Satanic Temple Religious Reproductive Rights*, *supra* note 12.

120 LAYCOCK, *supra* note 88, at 107; *see also* Caroline Mala Corbin, *Abortion Distortions*, 71 WASH. & LEE L. REV. 1775, 1197–200 (2014) (highlighting the bad science courts allow when deciding abortion-related cases, such as the *Hobby Lobby* plaintiffs' claims that morning-after pills such as Plan B "destroy fertilized eggs" and "end a pregnancy," thus acting as abortifacients, when they actually prevent pregnancy from occurring at all by preventing fertilization).

121 LAYCOCK, *supra* note 88, at 107 (explaining that Jarry and The Satanic Temple's attorney realized that "by acknowledging that claims about when life begins are religious convictions, [the Court] framed reproductive rights in the context of religious liberty").

122 *Id.*

123 Sample Letter Demanding Religious Exemption to Abortion Restrictions, THE SATANIC TEMPLE, https://cdn.shopify.com/s/files/1/0428/0465/files/Religious_Abortion_Exemption_Letter.pdf?v=1621515132 [https://perma.cc/2D3P-G39G].

124 *Satanic Abortions Are Protected by Religious Liberty Laws*, SATANIC TEMPLE, https://announcement.thesatanictemple.com/rrr-campaign41280784 [https://perma.cc/74ZN-TBRE].

> Immediately before taking the medication(s) to terminate your pregnancy, look at your reflection, or imagine yourself, to be reminded of your personhood and your responsibility to yourself. Focus on your intent. Take deep breaths, and make yourself comfortable. When ready, read the Third Tenet aloud to begin the ritual. After swallowing the medication(s), take another deep breath and recite the Fifth Tenet. After you have passed the embryo, return to your reflection, and recite the personal affirmation. Feel doubts dissipating and your confidence growing as you have just undertaken a decision that affirms your autonomy and free will. The religious abortion ritual is now complete.[125]

This ritual functions as a formal expression of The Satanic Temple's sincerely held beliefs and was designed and implemented with a sophisticated understanding of the purpose and value of ritual within religious communities.[126] Thus, a total ban on abortion by a state would clearly interfere with the practice of this religious ritual, but the Temple has argued that even minor obstacles to an abortion, such as a waiting period before obtaining an abortion, conflict with its religious beliefs and practices in legally impermissible ways.[127]

2. *Doe v. Parson*

In 2015, a member of The Satanic Temple, Mary Doe, became pregnant and sought to have an abortion in Missouri.[128] However, under Missouri's informed consent laws, she was required to wait for seventy-two hours and was provided with an ultrasound opportunity and a booklet that contained religiously inflected lines, such as "The life of each

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125 *Satanic Abortion Ritual*, THE SATANIC TEMPLE, https://cdn.shopify.com/s/files/1/0428/0465/files/Abortion_Ritual_Procedure_061322.pdf?v=1657724339 [https://perma.cc/G7MC-EGLH]. For surgical abortions, the ritual procedure is as follows:

> Prior to receiving any anesthetic or sedation, look at your reflection, or imagine yourself, to be reminded of your personhood and your responsibility to yourself. Focus on your intent. Take deep breaths, and make yourself comfortable. When you are ready, say the Third Tenet and Fifth Tenet aloud. You may now undergo the surgery. After the surgery is completed and any anesthetic has worn off, return to your reflection and recite your personal affirmation. Feel doubts dissipating and your confidence growing as you have just undertaken a decision that affirms your autonomy and free will. The religious abortion ritual is now complete.

Id.

126 LAYCOCK, *supra* note 88, at 123–24; *see also* ADAM B. SELIGMAN, ROBERT P. WELLER, MICHAEL J. PUETT & BENNETT SIMON, RITUAL AND ITS CONSEQUENCES: AN ESSAY ON THE LIMITS OF SINCERITY 24 (2008).

127 Doe v. Parson, 567 S.W.3d 625, 626–28, 630 (Mo. 2019) (en banc).

128 *Id.* at 626–28.

human being begins at conception," and "Abortion will terminate the life of a separate, unique, living human being."[129] Doe presented The Satanic Temple's letter demanding a religious exemption from these requirements, but Planned Parenthood denied her request. She then filed suit in Missouri state court seeking an injunction against the informed consent laws on the grounds that they violated the Establishment Clause and the state RFRA.[130] She also filed suit in federal court alleging violations of the Establishment and Free Exercise Clauses of the Constitution.[131]

At the state level, the trial court dismissed Doe's petition for failure to state a claim, finding that Doe had failed to show "why relief was required under the state RFRA law."[132] On appeal, the Missouri Supreme Court also dismissed the case, the primary reason being that the Missouri law does not *require* women to have an ultrasound, listen to the fetal heartbeat, or read the booklet provided; rather, it requires that an abortion provider "*present* a woman seeking an abortion with the *opportunity* to have or to view *an* ultrasound[,] . . . an *opportunity* to listen to the heartbeat[,] . . . [and] the *opportunity* to read the booklet in question."[133] This novel interpretation of the statute, presented for the first time during a hearing before the Missouri Supreme Court, "had . . . never been made explicit to Planned Parenthood."[134] Thus, despite the dismissal, leaders of The Satanic Temple felt they had achieved a victory, as the clarification of the state law meant that abortion providers would no longer make people feel obligated by state law to partake in any of the above-mentioned practices.[135] The court also held that Doe failed to demonstrate how the seventy-two-hour waiting period constituted an undue burden on her religious beliefs, citing her failure to seek a temporary restraining order or preliminary injunction during the waiting period as evidence that she was not unduly burdened.[136]

Mary Doe's federal lawsuit was dismissed by the district court for lack of standing, without any discussion of the Free Exercise or Establishment Clause claims, because the plaintiff Doe was not then

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129 *Id.* at 627.

130 *Id.* at. 627–30.

131 Satanic Temple v. Nixon, No. 15CV986, slip op. at 6–7 (E.D. Mo. July 15, 2016), *aff'd sub nom.* Satanic Temple v. Parson, 735 F. App'x 900 (8th Cir. 2018).

132 LAYCOCK, *supra* note 88, at 110; *Doe*, 567 S.W.3d at 626, 628.

133 *Doe*, 567 S.W.3d at 629–30.

134 LAYCOCK, *supra* note 88, at 110.

135 *Id.*

136 *Doe*, 567 S.W.3d at 630–31.

pregnant, and not guaranteed to become pregnant in the future.[137] The Satanic Temple then brought a second case before the same court in 2018, this time with plaintiff Judy Doe.[138] The judge in this case again dismissed both the Establishment and Free Exercise Clause claims, citing *Smith* as a primary justification for the latter.[139] The Eighth Circuit affirmed, holding that the law was generally applicable and served a legitimate governmental purpose of reducing the risk of a pregnant woman electing to abort without being fully informed.[140] The Supreme Court denied review of the case.[141]

3. Post-*Dobbs* Complaints

In the wake of *Dobbs*, the Temple filed two complaints in federal courts challenging abortion bans that went into effect immediately following the decision, one in Idaho[142] and the other in Indiana.[143] Both complaints are substantially similar, bringing these actions on behalf of female members of The Satanic Temple residing in each state who became "[i]nvoluntarily [p]regnant."[144] The Indiana complaint emphasizes that "[n]one of the Involuntarily Pregnant Women was aware of or consented to the implantation of a blastocyst into her uterus at the time it occurred,"[145] and highlights the secular exception made for a pregnancy that "is the result of rape or incest."[146] It goes on to list a series of somewhat surprising claims, in addition to the expected claim of the

137 Satanic Temple v. Nixon, No. 15CV986, slip op. at 1, 11 (E.D. Mo. July 15, 2016), *aff'd sub nom.* Satanic Temple v. Parson, 735 F. App'x 900 (8th Cir. 2018); *see also* LAYCOCK, *supra* note 88, at 109–10.

138 Doe v. Parson, 368 F. Supp. 3d 1345, 1347 (E.D. Mo. 2019), *aff'd*, 960 F.3d 1115 (8th Cir. 2020); LAYCOCK, *supra* note 88, at 110.

139 *Doe*, 368 F.Supp.3d 1345 at 1351–53 (holding that the Missouri informed consent laws were generally applicable laws that do not specifically target members of The Satanic Temple, and that "'[t]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability'" (quoting Emp. Div. v. Smith, 494 U.S. 872, 879 (1990))).

140 *Doe*, 960 F.3d at 1119.

141 Doe v. Parson, 141 S. Ct. 874 (2020) (mem.) (denying certiorari).

142 First Amended Complaint, Satanic Temple v. Labrador, No. 22-cv-411, 2022 WL 20527174 (D. Idaho Dec. 13, 2022).

143 *Holcomb* Complaint, *supra* note 13.

144 First Amended Complaint, *supra* note 142, at 3; *Holcomb* Complaint, *supra* note 13, at 2–3 (defining an "Involuntarily Pregnant Woman" as "a woman who . . . [b]ecame pregnant without her consent due to . . . [t]he legal inability to consent to sex (other than rape or incest); and/or . . . [t]he failure of her Birth Control").

145 *Holcomb* Complaint, *supra* note 13, at 6.

146 *Id.* at 3–4.

abortion ban's violation of each state's RFRA.[147] The Indiana case was recently dismissed for lack of standing—without touching on the merits of the RFRA claim—but Greaves has since tweeted that The Satanic Temple may re-file.[148]

II. ANALYSIS

A. The Satanic Temple's Legitimacy as a Religion

One of the first legal hurdles that The Satanic Temple must overcome is proving to courts that it is a bona fide religion entitled to legal protection. Significantly, "religion" is not defined in the Constitution.[149] However, courts typically interpret the word broadly and inclusively, with the Supreme Court noting that "it is no business of courts to say that what is a religious practice or activity for one group is not religion under protection of the First Amendment."[150] Beliefs must only be "sincerely held" and "in [the claimant's] own scheme of things, religious [in nature]," and a claimant's averment of sincerity is to be given great weight.[151] Further, government officials are not allowed to pass judgment on what is or is not a religious cause.[152] RFRA, on the other hand, does define "religious exercise," as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[153] Although a bit circular, this definition is similarly broad and inclusive, and one in which The Satanic Temple comfortably sits.

That being said, minority religious groups bringing progressive claims are sometimes met with skepticism as to whether their claims are truly religious in nature, rather than merely political or philosophical.[154]

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147 *Id.* at 9–13 (including claims that "The Indiana Abortion Ban Unconstitutionally Takes the Property of Involuntarily Pregnant Women Without Just Compensation" and "The Indiana Abortion Ban Unconstitutionally Discriminates Between Women Who Become Pregnant by Accident and Those Who are Pregnant by Rape or Incest").

148 The Satanic Temple v. Rokita, No. 1:22-cv-01859-JMS-MG (S.D. Ind. Oct. 25, 2023); *see also* Lucien Greaves, X (Nov. 7, 2023, 12:33 PM), https://twitter.com/LucienGreaves/status/1721943941363163511 [https://perma.cc/3DMU-6L5M].

149 Reynolds v. United States, 98 U.S. 145, 162 (1878).

150 Fowler v. Rhode Island, 345 U.S. 67, 70 (1953).

151 United States v. Seeger, 380 U.S. 163, 185 (1965).

152 Cantwell v. Connecticut, 310 U.S. 296, 305–07 (1940) ("[T]o condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.").

153 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A).

154 Carmella, *supra* note 46, at 583.

Indeed, The Satanic Temple has been dismissed by opponents as a political organization that "simply camouflages itself as religion," and as a group of irreverent trolls.[155] These accusations are due in large part to the satirical nature of many of The Satanic Temple's campaigns as well as the nontheistic nature of their beliefs.[156]

Regarding the satirical nature of many of The Satanic Temple's actions (such as the mock rally for Rick Scott and the Pink Mass), religious studies scholar Joseph P. Laycock argues that "[The Satanic Temple]'s use of satire does not disqualify it from being a religion," as the satire is deployed "as an activist strategy that 'simultaneously critiques and reclaims cultural traditions,'" in this case the "fears and rumors associated with Satanic Panic."[157] Thus, the Temple's use of satire is not merely absurdity for absurdity's sake but rather is a "strategy for directing the public's attention toward unquestioned assumptions [about the prevailing religious discourse] so that they may be reassessed."[158]

Regarding The Satanic Temple's nontheistic beliefs, a belief in a supernatural or almighty deity is not a requirement for legal recognition as a religion.[159] To reserve religious protections for supernaturalists alone, Greaves states, "would be reprehensible," arguing that The Satanic Temple's values "are no less sincerely held" merely because they reject superstition.[160] Instead of unwavering faith in a supernatural deity, The Satanic Temple's belief system is governed by a series of core values and a code of ethics,[161] the underlying ideal being the "pursuit of justice as a search for transcendence."[162] Some courts have even held that atheism qualifies as a religion.[163] Thus, The Satanic Temple's nontheistic beliefs

155 LAYCOCK, *supra* note 88, at 103; Anna Merlan, *Trolling Hell: Is the Satanic Temple a Prank, the Start of a New Religious Movement—or Both?*, VILL. VOICE (July 22, 2014), https://www.villagevoice.com/2014/07/22/trolling-hell-is-the-satanic-temple-a-prank-the-start-of-a-new-religious-movement-or-both [https://perma.cc/6XQ5-5AWB].

156 *See* LAYCOCK, *supra* note 88, at 113.

157 *Id.* at 114–15 (quoting MELISSA M. WILCOX, QUEER NUNS: RELIGION, ACTIVISM, AND SERIOUS PARODY 2 (2018)).

158 *Id.* at 116.

159 Torcaso v. Watkins, 367 U.S. 488, 495, 495 n.11 (1961) ("Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.").

160 LAYCOCK, *supra* note 88, at 117.

161 *See About Us*, *supra* note 97.

162 LAYCOCK, *supra* note 88, at 119.

163 *See, e.g.*, Kaufman v. McCaughtry, 419 F.3d 678, 684 (7th Cir. 2005) ("Atheism is Kaufman's religion, and the group that he wanted to start was religious in nature even though it expressly rejects a belief in a supreme being."); Jackson v. Crawford, No. 12-4018-CV-C, 2015 WL 506233, at *7 (W.D. Mo. Feb. 6, 2015) ("[P]laintiff has adequately alleged that the inability to list atheism as his religion on his facesheet substantially burdened plaintiff's ability to exercise his religion."); Am.

by no means disentitle it from legal protection, and if anything, suggest a thoughtfulness and complexity of religious belief beyond a simple claim of "worshipping the devil."[164]

The Satanic Temple has survived two important legitimacy tests. The first, and perhaps most significant, was by the IRS, which officially granted The Satanic Temple the tax-exempt status of a religious entity in February of 2019.[165] According to a Satanic Temple press release from the time, this official recognition entitles The Satanic Temple to legal protections offered to other religions such as "access to public spaces . . . ; affirming its standing in court when battling religious discrimination; and enabling The Satanic Temple to apply for faith-based government grants."[166] As historian of religion Jonathan Z. Smith noted, "[t]he Internal Revenue Service is, both de facto and de jure, America's primary definer and classifier of religion[,] . . . distinguishing licit and illicit religions."[167]

In order for a religious organization to qualify as tax exempt under the Internal Revenue Code § 501(c)(3), the IRS must determine that the group: (1) is organized exclusively for religious purposes, (2) does not use its earnings to benefit a private shareholder or individual, and (3) does not participate in political campaigns or legislative influence.[168] As Smith points out, defining a religious organization as one organized for "religious" purposes is "singularly uninformative," suggesting the IRS's reluctance to make these types of formal judgments about a religion's legitimacy but for the most obvious cases of fraud.[169] That said, in defining what qualifies as a tax-exempt "church," the IRS has developed a more helpful list of fourteen specific attributes.[170] The Satanic Temple

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Humanist Ass'n v. United States, 63 F.Supp.3d 1274, 1283 (D. Or. 2014) ("[T]he court finds that Secular Humanism is a religion for Establishment Clause purposes . . . .").

164 LAYCOCK, *supra* note 88, at 105 ("When I first asked Lucien Greaves about his sincerity in 2014, he answered, 'If I were a fake, I would just claim a theistic belief in Satan.'").

165 Letter from Stephen A. Martin, Dir., Exempt Orgs., Internal Revenue Serv., to The Satanic Temple (Feb. 6, 2019), https://apps.irs.gov/app/eos (search by organization name, with search term "Satanic Temple"); *see also* Menachem Wecker, *The Satanic Temple Is a Real Religion, Says IRS*, RELIGION NEWS SERV. (Apr. 25, 2019), https://religionnews.com/2019/04/25/the-satanic-temple-is-a-real-religion-says-irs [https://perma.cc/7H6G-HN2Y].

166 EJ Dickson, *The IRS Officially Recognizes the Satanic Temple as a Church*, ROLLING STONE (Apr. 24, 2019), https://www.rollingstone.com/culture/culture-news/irs-satanic-temple-church-tax-exempt-826931 [https://perma.cc/L6QM-2V9F].

167 LAYCOCK, *supra* note 88, at 130 (quoting JONATHAN Z. SMITH, RELATING RELIGION: ESSAYS IN THE STUDY OF RELIGION 376 (2004)).

168 26 U.S.C. § 501(c)(3).

169 SMITH, *supra* note 167, at 377.

170 INTERNAL REVENUE SERV., TAX GUIDE FOR CHURCHES & RELIGIOUS ORGANIZATIONS 33 (2015), https://www.irs.gov/pub/irs-pdf/p1828.pdf [https://perma.cc/Z4ZR-XHVH].

meets nearly all of these criteria.[171] Further, while the IRS does not attempt to adjudicate the validity or substance of religious beliefs, it must make a judgment as to whether those beliefs are "truly and sincerely held by those professing them" when granting tax-exempt status.[172] Thus, the IRS's recognition of The Satanic Temple as a religious organization with sincerely held beliefs, while not necessarily dispositive in court, is some of the strongest possible evidence of the group's legitimacy as a religion.[173]

The second official confirmation of legitimacy came from the District of Arizona, where a district court judge held that a Satanic Temple member's beliefs and practices "are religious for purposes of her religious discrimination claims."[174] In doing so, the court found that the plaintiff's beliefs (1) concerned "fundamental and ultimate questions having to do with deep 'imponderable matters,'" (2) were part of a comprehensive belief system, and (3) involved a sufficient amount of "formal and external signs such as formal services, ceremonial functions, the existence of clergy, structure and organization . . . and other similar manifestations associated with the traditional religions."[175] More recently, the Kentucky Department of Corrections recognized Satanism as a legitimate religion, granting an incarcerated member of The Satanic Temple access to Sober Faction's religious materials, which they were previously denied.[176]

Lastly, Laycock argues that the Temple's extensive practice of various rituals are the best evidence that The Satanic Temple functions as a legitimate religion.[177] He describes their most established ritual, the "unbaptism," as one meant to "undo the psycho-social effects of a Christian baptism" that many born into Christianity did not consent to,

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171 *Id.* ("Certain characteristics are generally attributed to churches. These attributes of a church have been developed by the IRS and by court decisions. They include: distinct legal existence; recognized creed and form of worship; definite and distinct ecclesiastical government; formal code of doctrine and discipline; distinct religious history; membership not associated with any other church or denomination; organization of ordained ministers; ordained ministers selected after completing prescribed courses of study; literature of its own; established places of worship; regular congregations; regular religious services; Sunday schools for the religious instruction of the young; and schools for the preparation of its ministers."); *see also* Letter from Stephen A. Martin to The Satanic Temple, *supra* note 165.

172 INTERNAL REVENUE SERV., *supra* note 170, at 33.

173 LAYCOCK, *supra* note 88, at 130.

174 Satanic Temple v. City of Scottsdale, No. CV18-00621, 2020 WL 587882, at *7 (D. Ariz. Feb. 6, 2020).

175 *Id.* at *6 (quoting Alvarado v. City of San Jose, 94 F.3d 1223, 1229–31 (9th Cir. 1996)).

176 Press Release, The Satanic Temple, Satanic Temple Wins Fight to Have Satanism Recognized by Kentucky State Government, https://cdn.shopify.com/s/files/1/0428/0465/files/Final_KY_Sober_Faction_Member_Press_Release.pdf?v=1687821932 [https://perma.cc/47ZY-R7DM].

177 LAYCOCK, *supra* note 88, at 121.

and which in theory "restores and affirms their spiritual autonomy."[178] The ritual is often a powerful experience for participating members, some of whom weep with relief, as the ceremony "lend[s] . . . epistemological weight" and a sense of reality to members' sincerely held religious beliefs.[179] Additionally, The Satanic Temple's "Sober Faction" offers a ritual-based peer support group for those recovering from addiction, seeking to provide this invaluable service "free from the pseudoscience and superstitious dogma entrenched in most mainstream programs."[180] Thus, between The Satanic Temple's nontheistic veneration of Satan, their complex creed and code of ethics, and the regular expression of their beliefs via formal rituals, The Satanic Temple offers an example of a religion "that is nuanced and in many ways richer than one that hangs exclusively on supernatural or otherwise 'sincerely held' beliefs."[181]

B. *Free Exercise Analysis of The Satanic Temple's Post-*Dobbs *Cases*

On their face, The Satanic Temple cases in Indiana and Idaho are strong, particularly with respect to their state RFRA and discriminatory treatment claims.[182] For these claims, The Satanic Temple will have to show that the state abortion bans "substantially burden" their religious practice by preventing members from practicing their Satanic abortion ritual at all.[183] In this sense, its post-*Dobbs* cases are significantly stronger than the *Doe v. Parson* case, which was ultimately dismissed because the informed consent laws being challenged did not "require" or compel any actions, and in that sense were not a substantial burden on Mary Doe's religious beliefs.[184] The new cases are also stronger than *Doe* because of the Supreme Court's recent "expansive rhetoric and doctrine concerning religious freedom," which, in theory, would bolster protections for religious minorities making free exercise claims as well.[185] Significantly, an Indiana state court recently granted Jewish, Muslim, and pagan plaintiffs a preliminary injunction in an analogous case, exempting them

178 *Id.* at 122.

179 *Id.* at 123–24.

180 *Sober Faction*, SATANIC TEMPLE, https://thesatanictemple.com/pages/sober-faction [https://perma.cc/73R8-ZNE7] (including among the "Seven Rituals" "the practice of continual introspection and mindfulness" and "striv[ing] towards self-actualization, seeking knowledge on [the] path to act & respond ethically & responsibly in all things").

181 LAYCOCK, *supra* note 88, at 125.

182 *Holcomb* Complaint, *supra* note 13, at 11–13; First Amended Complaint, *supra* note 142, at 14–16.

183 42 U.S.C. § 2000bb-1.

184 Doe v. Parson, 567 S.W.3d 630 (Mo. 2019).

185 Schwartzman & Schragger, *supra* note 21, at 2302; *see also supra* Section I.A.5.

from the state's abortion ban because it "substantially burdens the [plaintiffs'] religious exercise" in violation of the state RFRA.[186]

Of course, state governments will defend their abortion bans by asserting that they have a compelling governmental interest in "protecting the life of the unborn," as the State of Mississippi did in *Dobbs*.[187] However, this argument is vulnerable due to the fact that both the Indiana and Idaho abortion bans contain exceptions for cases of rape and incest.[188] The idea being: "If its interest is so important, why is the state permitted to include any exemptions at all?"[189] In fact, this allowance for secular exceptions in Indiana's abortion ban was a key reason that the State court found the law to be insufficiently narrowly tailored when issuing a preliminary injunction in favor of religious plaintiffs seeking an exemption.[190] This type of argument could also be brought in states without RFRA protection, in which the *Smith* standard still controls, allowing laws that burden religion to stand so long as they are neutral and generally applicable.[191] Under *Tandon* and *Fulton*, laws with exceptions for "comparable secular activit[ies]" would no longer be "generally applicable," and would thus trigger strict scrutiny.[192] This line of argument likely led many states to implement abortion bans without exceptions for rape or incest, to insulate their laws from these exact types of challenges.[193]

The Supreme Court has thus far declined to overrule *Smith*, despite being presented ample opportunity, and despite several justices' eagerness to do so.[194] A convincing explanation for this, put forth by scholars Micah Schwartzman and Richard Schragger, is that *Smith* serves the current conservative court "an important purpose: [i]t permits the Court to limit the reach of free exercise where a majority is inclined to do

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186 Order Granting Plaintiffs' Motion for Preliminary Injunction at 43, Anonymous Plaintiff 1 v. The Individual Members of the Med. Licensing Bd. of Ind., No. 49D01-2209-PL-031056 (Ind. Super. Ct. Dec. 2, 2022).

187 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022) (quoting MISS. CODE ANN. § 41-41-191(2)(b)(i)(7) (2023)).

188 IND. CODE § 16-34-2-1 (2022); IDAHO CODE ANN. § 18-622(2)(b) (West 2023).

189 Schwartzman & Schragger, *supra* note 21, at 2323.

190 Order Granting Plaintiffs' Motion for Preliminary Injunction, *supra* note 186, at 38 ("The State is willing in these instances to 'forgo' its interest where it deems the countervailing interest 'compelling,' but not where a religious mandate rests on the other side of the balance.").

191 *See* Emp. Div. v. Smith, 494 U.S. 872, 879 (1990).

192 Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021); Fulton v. City of Phila., 141 S. Ct. 1868, 1878 (2021).

193 Schwartzman & Schragger, *supra* note 21, at 2326–27; *see also* Fabiola Cineas, *Rape and Incest Abortion Exceptions Don't Really Exist*, VOX (July 22, 2022, 4:20 PM), https://www.vox.com/23271352/rape-and-incest-abortion-exception [https://perma.cc/AV5G-GA6T].

194 *Fulton*, 141 S. Ct. at 1889 (Alito, J., concurring).

so."[195] In other words, it provides the Court a "doctrinal mechanism for rejecting religious liberty claims," on the grounds that a law is neutral and generally applicable.[196] Schwartzman and Schragger note that *Fulton* was decided the year before *Dobbs*, when the Justices must have known that *Roe* was in trouble, and perhaps wanted to shield themselves from having to apply strict scrutiny to the inevitable religious liberty claims against state abortion bans.[197] Rather than allow that possibility, the Court seems willing to live with inconsistencies in free exercise jurisprudence in order to uphold and privilege dominant (i.e., Christian) religious beliefs.

Strict scrutiny does not guarantee a win for The Satanic Temple, especially in the religious liberty context, where a majority of claimants who brought free exercise claims pre-*Smith* or post-RFRA lost, despite the application of the supposedly rigorous standard of strict scrutiny.[198] In the context of abortion exemptions specifically, legal scholars have proffered a number of potential arguments courts may offer to ensure that state abortion bans, even with secular exemptions, survive strict scrutiny, including the argument that the state "has a compelling interest to protect maternal health in certain circumstances, even as it also seeks to advance the compelling interest of protecting fetal life."[199] Nevertheless, these scholars argue that "current free exercise doctrine leans strongly in favor of granting exemptions, even when the state has weighty interests supporting its regulations."[200] In summary, "[t]he availability of *Smith* and the manipulability of the compelling interest analysis provide predictable—though not principled—doctrinal grounds for the Supreme Court (and lower courts) to reject free exercise challenges to abortion bans."[201] Despite the Court's recent rulings expanding the doctrine, it will be no surprise if and when it rejects these

195 Schwartzman & Schragger, *supra* note 21, at 2324.

196 *Id.* at 2325.

197 *Id.*

198 PLATT, FRANKE, SHEPHERD & HADJIIVANOVA, *supra* note 6, at 26; *see also* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1417 (1992) ("Of the ninety-seven [free exercise] claims brought [in the ten years preceding *Smith*, applying *Sherbert*'s compelling interest test], the courts of appeals rejected eighty-five."); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 857–60 (2006) (finding that religious liberty cases had more than double the survival rate of any area of law in which strict scrutiny applied, and that federal courts upheld seventy-two percent of laws challenged under RFRA and the Religious Land Use and Institutionalized Persons Act in the time period studied).

199 Schwartzman & Schragger, *supra* note 21, at 2326–27.

200 *Id.* at 2323.

201 *Id.* at 2329.

free exercise claims to abortion ban exemptions, whether from The Satanic Temple or other religious groups.[202]

III. PROPOSAL

A. *The Difficulty of Bringing Progressive Religious Liberty Claims*

What all of this—the judicial hypocrisy and the likely difficulty of The Satanic Temple's claims surviving in court—shows is a broader point, namely that religious minorities and those bringing progressive free exercise challenges face an uphill battle that religious majorities and conservatives do not.[203] Although the evidence is sparse and may be subject to different interpretations, two recent Supreme Court developments suggest that the current Court is insensitive to minority religions. The first was *Trump v. Hawaii*, in which the Court upheld former President Donald Trump's ban on travel from six predominantly Muslim countries on national security grounds, despite clear evidence of religious animus against Muslims motivating the ban's enactment.[204] In another high-profile case, *Dunn v. Ray*, the Supreme Court denied a Muslim prisoner's request to stay his execution in order to request the presence of an imam during his final moments, despite allowing Christian prisoners the presence of a chaplain in the execution chamber.[205] However, this decision was so fiercely criticized that the Supreme Court has since backtracked, later allowing a similar request from a Buddhist prisoner to proceed.[206]

To help explain the disparate treatment between conservative and progressive religious liberty claims, scholar Angela C. Carmella makes the useful distinction between two types of free exercise claims: refusal and affirmative.[207] "Refusal claims arise when a law or government policy mandates a person to act in ways that are contrary to her faith, . . . [such as when] a health care law requires a religious employer to provide

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202 *See id.* at 2323, 2326, 2329.

203 *See* Carmella, *supra* note 46, at 615; *see also* Schwartzman & Schragger, *supra* note 21, at 2335 n.210 (providing a comprehensive list of free exercise victories for religious conservatives in the past decade).

204 138 S. Ct. 2392 (2018).

205 139 S. Ct. 661, 661 (2019) (Kagan, J., dissenting).

206 Murphy v. Collier, 139 S. Ct. 1475, 1475 (2019); *see also* Ian Millhiser, *The Supreme Court Must Decide If It Loves Religious Liberty More than the Death Penalty*, VOX (Nov. 7, 2021, 8:30 AM), https://www.vox.com/22763939/supreme-court-death-penalty-religious-liberty-ramirez-collier-execution-pastor [https://perma.cc/4HRS-NHQK].

207 Carmella, *supra* note 46, at 540.

contraception insurance coverage . . . ."[208] Affirmative claims, on the other hand, arise when a religious person engages in faith-based conduct but "is met with a legal restraint—a law prohibiting or curtailing that religious exercise."[209] Carmella posits that most conservative claims are refusal claims, whereas most progressive claims are affirmative claims, though neither are inherently bound to those categories.[210] Indeed, The Satanic Temple's challenges fall into the latter category, as it claims that the state abortion bans prohibit its religious practice in violation of its religious liberty rights. However, Carmella argues that affirmative claims are harder to bring successfully due to both the wide-ranging nature of such claims and the difficulty of establishing a "substantial burden" as compared to refusal claims.[211] Thus, in addition to the possibility of judicial bias, progressive claims that are affirmative in nature face doctrinal obstacles that conservative refusal claims typically do not.[212]

Other scholars point to yet another distinction between religious liberty claims gaining attention in legal and academic discourse, though it has not (yet) been adopted by courts.[213] The distinction is between that of Christians and pagans, the former being any person who affirms "God's transcendence as the source of moral and ethical value, giving meaning and purpose to human life and to the natural world," and the latter being "secular liberals" who reject "transcendent religion, including biblical morals, in favor of an immanent conception of value."[214] This distinction has been aimed at Reform Jews in the abortion context before, with critics claiming that they have "no religious duties or obligations with respect to abortion," and are thus not entitled to free exercise protections.[215] Schwartzman and Schragger worry that this line of thinking could be taken up by conservative judges, which would give

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208 *Id.* at 540–41; *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 703 (2014).

209 Carmella, *supra* note 46, at 541.

210 *Id.*

211 *Id.* at 543–44 ("Refusal claims are narrower than affirmative claims because they directly respond to a particular legal mandate: Do this; no, I will not. The law requires a person to act in a way that violates some religious tenet. . . . [A]ffirmative claims are guided instead by what a religion teaches. Faith, not the state, says, 'Do this.' Thus, affirmative claims, as their name suggests, are immensely wide ranging." (emphasis omitted)).

212 *Id.* at 543.

213 Schwartzman & Schragger, *supra* note 21, at 2333.

214 *Id.* at 2332–2333 (citing STEVEN D. SMITH, PAGANS AND CHRISTIANS IN THE CITY: CULTURE WARS FROM THE TIBER TO THE POTOMAC 113 (2018)).

215 *Id.* at 2333 (first citing Josh Blackman, *Tentative Thoughts on the Jewish Claim to a "Religious Abortion,"* VOLOKH CONSPIRACY (June 20, 2022, 5:04 PM), https://reason.com/volokh/2022/06/20/tentative-thoughts-on-the-jewish-claim-to-a-religious-abortion [https://perma.cc/KZE4-KCU3]; and then citing Andrew Kubick, *Why Religious Freedom Can't Protect Abortion*, PUB. DISCOURSE (Sept. 6, 2022), https://www.thepublicdiscourse.com/2022/09/84357 [https://perma.cc/9NJC-9UTG]).

them an easy way to undermine the claims of liberal and progressive believers without having to find a compelling state interest or deal with *Tandon*'s single secular exception rule.[216] Obviously, were this to happen it would be catastrophic not only for The Satanic Temple's abortion cases, but for any future cases it, or any other nontheistic religions, may bring forward.

B. *The Value of The Satanic Temple Outside of Legal Victories*

If The Satanic Temple has little chance of a legal victory in lower courts, and virtually no chance of a favorable ruling from the Supreme Court's conservative supermajority, it must be asked: What is the point? The Temple's commitment to taking concrete legal action against oppressive legislation, combined with its status as a federally recognized religious institution, makes it uniquely qualified to call the judiciary's bluff, essentially forcing judges to decide, on the record, whether they truly value "religious freedom" for all or just for their own. To this point, Laycock argues that one of the greatest values of The Satanic Temple is its ability to challenge and expose the hidden mechanisms of the (now fully operational) Christian hegemony.[217] He defines hegemonic discourse as that which "works to maintain the power of the dominant group—often operat[ing] by presenting the interests of the dominant group as the interests of everyone."[218] The Satanic Temple, he argues, reveals the hegemony's inherent contradictions by deploying shock value to "tirelessly pick at the almost invisible seams of dominant discourses" surrounding, amongst other things, the desired relationship between church and state.[219] In doing so, The Satanic Temple has provoked some Christians into fully rejecting the notion of religious liberty if it must be applied equally to Satanists, suggesting that many people do not value religious liberty as a human right, but rather value "their own cultural dominance, and when religious freedom is no longer in alignment with that goal, it is either discarded or else utterly reimagined."[220]

Laycock goes on to list other virtues of The Satanic Temple, namely "its ability to draw media attention, its creative use of the legal system,

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216 Schwartzman & Schragger, *supra* note 21, at 2334.

217 LAYCOCK, *supra* note 88, at 23.

218 *Id.* at 23.

219 *Id.* at 23, 127 (quoting CRAIG MARTIN, MASKING HEGEMONY: A GENEALOGY OF LIBERALISM, RELIGION, AND THE PRIVATE SPHERE, EQUINOX 31 (2010)) (highlighting inherent contradictions such as the common belief that "everyone has a right to freedom of religion, while simultaneously believing that certain religions are 'evil' and should not enjoy the same rights as one's own").

220 *Id.* at 23, 127.

and its tactical manipulation of its opponents rhetoric."[221] Regarding the latter two virtues, The Satanic Temple has indeed drawn attention from legal scholars for its effective use of parody as a rhetorical strategy in litigation to "provoke comparison and critique" by means of "a humorous, formal doubling."[222] Analyzing the *Doe v. Parson* cases, one legal scholar framed The Satanic Temple's legal strategy as effectively parodying the arguments made by the plaintiffs in *Burwell v. Hobby Lobby*.[223] She argues that Mary Doe's claims are "identical in kind to that of the *Hobby Lobby* plaintiffs," except for the fact that Doe swaps the "sacred" evangelical beliefs of the *Hobby Lobby* plaintiffs with the "profane" beliefs in Satan and abortion.[224] In doing so, The Satanic Temple "invites direct comparison between the two claims," in a way that puts the Court's *Hobby Lobby* opinion "on display for collective reflection."[225] This parodic litigation technique is another effective means by which The Satanic Temple exposes the "invisible seams" of Christian hegemony, and it has also inspired other progressive religious organizations to sue for their rights.[226]

The Satanic Temple is also valuable for exposing judicial biases and the ways in which claimants of minority religions are far more closely scrutinized than their Christian counterparts. In Mary Doe's lawsuit, for example, despite the intentionally similar nature of the claims to those of the *Hobby Lobby* plaintiffs, Doe did not receive the same deference by courts to the sincerity of her religious beliefs, with the trial court judge dismissing the claim and stating: "Plaintiff is merely cloaking her political beliefs in the mantle of religious faith in order to avoid laws of general applicability she finds imprudent or offensive. . . . [Her] interpretation of RFRA would establish a faith-based 'Get Out of Jail Free' card."[227]

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221 *Id.* at x (Prologue).

222 Christen E. Hammock, Mary Doe Ex Rel. Satan*?: Parody, Religious Liberty & Reproductive Rights*, 40 COLUM. J. GENDER & L. 46, 51–52 (2020).

223 *Id.* at 78.

224 *Id.* at 81.

225 *Id.* at 80, 82 (quoting Robert Hariman, *Political Parody & Public Culture*, 94 Q. J. SPEECH 247, 251 (2008)).

226 LAYCOCK, *supra* note 23 at 127 (quoting MARTIN, *supra* note 219, at 31); *see* Pam Belluck, *Religious Freedom Arguments Underpin Wave of Challenges to Abortion Bans*, N.Y. TIMES (July 5, 2023), https://www.nytimes.com/2023/06/28/health/abortion-religious-freedom.html (last visited Nov. 9, 2023) ("[A] religious freedom expert at the University of Pennsylvania who represents clergy in abortion rights lawsuits in Florida[] called the [T]emple's lawsuits 'extremely helpful.'").

227 Doe v. Nixon, No. 15AC-CC00205, 2017 WL 2362217, at *3 (Mo. Cir. Ct. May. 1, 2017); *see also* Hammock, *supra* note 222, at 82–83.

The Satanic Temple's involvement in the monument cases mentioned above[228] also sheds light on its significance outside of concrete legal wins in several key ways. First, these incidents exposed the reasoning underlying the bill allowing for the Ten Commandments monument—the supposed championing of diversity—to be an insincere cover for state endorsement of Christianity.[229] Second, it derailed the common narrative deployed by Christians as being the victims of persecution by simply proposing equal treatment for Satanists, not any revocation of privileges for Christians.[230] And third, the looming threat of Satanic inclusion (and/or legal action) in social and political life entered into the public discourse, acting as a deterrent for any future plans to weaken the separation of church and state.[231] It is this deterrent effect on those who would otherwise privilege their religion above all others that may be the most significant nonlegal contribution in the ongoing (though currently disheartening) battle to keep church and state separated. By defining themselves in opposition to the Christian right, and enshrining these principles into a concrete belief system, they have essentially created a legally viable Satanic religion that will either ensure the separation of church and state or shine a glaring spotlight on the judiciary's naked hypocrisy. The Satanic Temple is thus a powerful reminder that, if you open the State's doors to God, then you open them to Satan as well. Better to keep the doors closed.

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228 *See supra* Section I.B.

229 *See* LAYCOCK, *supra* note 88, at 6.

230 *Id.* at 7–8 ("Greaves said of [the state representative who proposed the Ten Commandments bill], 'He's helping a satanic agenda grow more than any of us possibly could. You don't walk around and see too many satanic temples around, but when you open the door to public spaces for us, that's when you're going to see us.'" (quoting Betsy Reed, *Satanists Plan Statue to Stand Alongside Ten Commandments in Oklahoma*, THE GUARDIAN (Dec. 8, 2013, 2:22 PM), https://www.theguardian.com/world/2013/dec/08/satan-ten-commandments-oklahoma-city [https://perma.cc/Z2SQ-PXZL])).

231 *See id.* at 9–10. In the wake of the removal of the Ten Commandments monument, a conservative think tank started a campaign to repeal the article of the state constitution forbidding the use of government property to support any religion. *Id.* at 9. An editor for *Tulsa World* opined that "[t]he legislature can pass a lot of laws but they can't repeal the law of unintended consequences. . . . [F]or example, there was a group that wanted to put a Satanic statue on the grounds of the capitol. I think the chances of that become much greater if you just take out article 2, section 5." *Id.* at 10 (quoting a no longer extant website); *see also* Josh Mann, *Is Oklahoma AG Drummond's 'Mayday' over a Catholic Charter School a Politically Motivated False Alarm?*, THE LION (July 13, 2023), https://readlion.com/is-oklahoma-ag-drummonds-mayday-over-a-catholic-charter-school-a-politically-motivated-false-alarm [https://perma.cc/G6CP-JT42] ("[Oklahoma's Attorney General] worries openly, for example, whether the Satanic Temple will apply to sponsor a charter school—or 'a mosque wishing to teach sharia law.'").

CONCLUSION

The Satanic Temple's post-*Dobbs* lawsuits seeking religious exemption from state abortion bans, particularly its claims on state RFRA grounds, are undeniably strong.[232] The Temple's belief system, which explicitly enshrines bodily autonomy and scientific reasoning,[233] as well as its Satanic abortion ritual, are without question "substantially burdened" by state RFRA laws, as their religious practice has been made entirely illegal (with some key exceptions).[234] The current Supreme Court's recent bolstering of religious liberty protections also lends strength to claims brought by any religious group, including The Satanic Temple, at least in theory. As one scholar put it, "[i]f Christian companies can claim a religious exemption to a healthcare law, then why can't Satanists claim a religious exemption to a restriction on abortion?"[235]

However, the Supreme Court's sufficiently manipulable free exercise doctrine has provided it, as well as lower courts, ample legal pathways to deny The Satanic Temple an exemption.[236] Sadly, The Satanic Temple will likely become a textbook example of "free exercise preferentialism," a concept posited by legal scholars essentially describing how current religious liberty doctrine allows for religious favoritism in courts, making it nearly impossible for "those with conscientious objections that are inconsistent with the prevailing religious orthodoxy" to find judicial recourse.[237] If nothing else, it should be interesting to see the creative reasons proffered by judges in their denial of what are facially rather straightforward state RFRA claims. The fact that the mere possibility of these types of abortion claims caused conservative Christian lawmakers to initially oppose passing RFRA lends further credence to the theoretical strength of these claims.[238]

That said, the Temple's Sisyphean legal efforts are not in vain. Despite the heightened difficulties it faces in securing legal victories, its persistent efforts and far-reaching platform are doing important work: exposing the agents of Christian hegemony currently operating in many

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232 *See Little* Complaint, *supra* note 13; *Holcomb* Complaint, *supra* note 13; *supra* Section II.B.

233 *See supra* note 97 and accompanying text.

234 *See supra* Section II.B.

235 LAYCOCK, *supra* note 88, at 23.

236 Schwartzman & Schragger, *supra* note 21, at 2323–28.

237 *Id.* at 2335–40.

238 Laycock & Thomas, *supra* note 43, at 236; *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong. 33–35, 40–43 (statement of Mark E. Chopko, General Counsel, on behalf of the United States Catholic Conference).

of the nation's courts and legislatures, including our highest Court.[239] It is also forcing the public "to rethink attitudes about religious freedom and the separation of church and state,"[240] and is doing so with humor, poise, and a large global audience.[241] The Satanic Temple's iteration of "socially engaged Satanism"[242] is a powerful new voice in the religious liberty arena, and it has the legitimacy, platform, and litigation experience to make a serious impact in the realm of abortion rights and beyond.

239 LAYCOCK, *supra* note 88, at 23.

240 *Id.* at 19.

241 As of November 21, 2023, The Satanic Temple had approximately 146,000 followers on X. The Satanic Temple (@satanic_temple_), X, https://twitter.com/satanic_temple_ [https://perma.cc/49AD-EAQ9]. It had 352,000 followers on Instagram. The Satanic Temple (@thesatanictemple), INSTAGRAM, https://www.instagram.com/thesatanictemple [https://perma.cc/87KD-2SQM].

242 LAYCOCK, *supra* note 88, at 14 ("I use the term 'socially engaged Satanism' . . . to delineate a form of activism rooted in a religious tradition.").