REPLACING *SMITH* WITH A "GRADUATED SCALE" APPROACH TO THE FREE EXERCISE CLAUSE

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INTRODUCTION

The Summer 2021 Supreme Court term had an anticipation level akin to a blockbuster movie release. Many were expecting *Fulton v. City of Philadelphia* to be the premier decision of the term.[1] It is unusual that the Court has an opportunity to revisit 30-year-old precedent—especially one primed to be overturned.[2] However, this was the case in *Fulton*. Many also believed the Court would overturn *Employment Division, Department of Human Resources v. Smith*.[3] In *Smith,* Justice Scalia's majority opinion infamously rejected the strict scrutiny approach for Free Exercise claims and instead established the more relaxed neutral law of general applicability test.[4] Nonetheless, just as many movies flop in the box-office, *Fulton* was not the action-packed triumph religious liberty critics anticipated.

The purpose of this article is not to argue whether *Smith* should be overturned. Instead, it addresses Justice Barrett's concurrence in *Fulton*, in which she asked what test should replace the neutral-law-of-general-applicability test if *Smith* is overturned. She wrote, "[p]etitioners, their *amici*, scholars, and Justices of this Court have made serious arguments that *Smith* ought to be overruled."[5] She seemed inclined to agree with them but was "skeptical about swapping *Smith*'s categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court's resolution of conflicts between generally

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1. *See generally* Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021); Madeline Carlisle & Belinda Luscombe, *The Most Powerful Court in the U.S. Is About to Decide the Fate of the Most Vulnerable Children*, TIME (May 28, 2021, 2:02 PM) https://time.com/6051046/supreme-court-foster-care-fulton-philadelphia/(explaining the heated arguments on both sides of the case and how it made its way to the Supreme Court).

2. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990); Gabrielle M. Girgis, *What Is a "Substantial Burden" on Religion Under RFRA and the First Amendment?*, 97 WASH. U. L. REV. 1755, 1759 (2020); Eric D. Yordy, *Fixing Free Exercise: A Compelling Need to Relieve the Current Burdens*, 36 HASTINGS CONST. L.Q. 191, 192 (2009).

3. *See generally* Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872 (1990) (infamous case where the Supreme Court ruled that a law that infringes on the free exercise of religion must be neutral and generally applicable to survive).

4. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring)).

5. *Fulton*, 141 S. Ct. at 1882 (Barrett, J., concurring).

applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced."[6]

Justice Barrett raised these issues despite arguing that, "[w]e need not wrestle with these questions in this case."[7] Because a majority of Justices have shown desire to revisit *Smith,* its reconsideration is likely.[8] Justice Alito went on a lengthy diatribe against *Smith* in his separate concurrence in *Fulton*.[9] Justice Gorsuch followed Alito's with a scathing critique of *Smith* himself,[10] pointing out "*Smith* has been criticized since the day it was decided.… And not a single Justice has lifted a pen to defend the decision. So, what are we waiting for?"[11]

Justice Barrett may be given the opportunity to write the opinion that ultimately overturns *Smith*, allowing the case to come full circle from when she clerked for Justice Scalia.[12] This would give her the ability to rework her mentor's often criticized decision in *Smith*.[13] Supreme Court storylines are rarely so dramatic, but the story of the protégé who rights the wrong of her mentor is captivating.

The gravity of Justice Barrett's concurrence in *Fulton* has not gone unnoticed. It was recently mentioned by famed Constitutional law scholar Akhil Amar on his podcast *Amarica's Constitution* with co-host Andy Lipka.[14] Professor Amar argued persuasively that the concurrence was, "probably her most significant pronouncement thus far."[15]

Part I of this article will lay out the history of Free Exercise Clause at the Supreme Court level and the different approaches argued among legal scholars. Part II of this article will answer Justice Barrett's first question, "[s]hould entities like Catholic Social Services—which is an arm of the Catholic Church—be treated differently than individuals?"[16] Part III will address her second question, "[s]hould there be a distinction between indirect and direct burdens on religious exercise?"[17] Part IV will focus on which scrutiny should apply and if it is strict scrutiny "would pre-*Smith* cases rejecting free exercise challenges to garden-variety laws come out the same way?"[18] The final part of this article combines analysis of the questions above and suggests a "graduated scale" approach to the Free Exercise Clause, then

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6. *Id.* at 1883.
7. *Id.*
8. Girgis, *supra* note 2, at 1759.
9. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring).
10. *Id.* at 1926 (Gorsuch, J., concurring).
11. *Id.* at 1931.
12. Kevin Allen, *Amy Coney Barrett, Alumna and Longtime ND Law Faculty Member, Confirmed as Supreme Court Justice*, UNIV. OF NOTRE DAME (Oct. 26, 2020), https://law.nd.edu/news-events/news/amy-coney-barrett-confirmed-supreme-court/.
13. *See generally* HOWARD GILLMAN & ERWIN CHEMERINSKY, THE RELIGION CLAUSES: THE CASE FOR SEPARATING CHURCH AND STATE (2020) (criticizing the *Smith* decision).
14. Amarica's Constitution, *Confirmation Cacophony,* PODBEAN (Aug. 18, 2021), https://www.podbean.com/ew/pb-6jvf6-10b9a39.
15. *Id.* at 1:20:20.
16. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring).
17. *Id.*
18. *Id.*

shows examples of how the "graduated scale" would work in practice. Further it explains why this suggested approach best protects minority and majority religious practices equally. As shown by *Smith*, minority religious rights often do not receive the same level of support in discussions surrounding the Free Exercise Clause.[19]

I. A HISTORY OF THE FREE EXERCISE CLAUSE AT THE SUPREME COURT AND COMPETING APPROACHES

A. The Tumultuous Relationship Between the Court and the Free Exercise Clause

The Court's first major case involving the Free Exercise Clause was *Reynolds v. United States*.[20] The Court considered the constitutionality of the Morrill Anti-Bigamy Act, "which banned bigamy in federal territories such as Utah."[21] Reynolds was Brigham Young's secretary and was charged under the act after marrying a woman while still married to his previous wife.[22] Reynolds argued that the Morrill Act violated the Free Exercise Clause of the First Amendment.[23] In a unanimous decision, the Supreme Court ruled that Congress was within its powers to outlaw polygamy.[24]

Chief Justice Waite stated, "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[25] To explain this he elaborated, "[c]an a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land…. Government could exist only in name under such circumstances."[26] This view "represents the Court's first foray into these disputes in the late 19th century and has adherents among today's judges and commentators since it has been seen as offering too narrow an understating of the clause."[27]

Reynolds was not meaningfully challenged until *Braunfeld v. Brown*.[28] For the first time, the Court applied strict scrutiny to laws that were claimed to infringe on free exercise of religion.[29] Just two years later, the Court came to a seemingly different conclusion in *Sherbert v. Verner*.[30] Then, in 1990 the Court once again

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19. *Id.* at 1884 (Alito, J., concurring).

20. *See generally* Reynolds v. United States, 98 U.S. 145 (1879) (the Court's first major case involving the Free Exercise Clause).

21. GILLMAN & CHEMERINKSY, *supra* note 13, at 98.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Reynolds*, 98 U.S. at 166.

26. *Id.* at 166-67.

27. GILLMAN & CHEMERINKSY, *supra* note 13, at 97.

28. *See generally* Braunfeld v. Brown, 366 U.S. 599 (1961) (Reynolds v. United States, 98 U.S. 145 (1879) was meaningfully challenged).

29. *Id.* at 601.

30. Sherbert v. Verner, 374 U.S. 398, 410 (1963) (holding that a state may not constitutionally deny unemployment compensation benefits to an individual who refuses to abandon her religious c-onvictions respecting the day of rest).

changed course in *Smith,* adopting the heavily criticized neutral-law-of-general-applicability test for the Free Exercise Clause.[31]

Congress responded to *Smith* by passing the Religious Freedom Restoration Act (RFRA).[32] The purpose of the act was "to restore the compelling interest test as set forth in *Sherbet v. Verner* and *Wisconsin v. Yoder*, and to guarantee its application in all cases where free exercise of religion is substantially burdened."[33] The Act received bipartisan support and was signed into law by President Clinton on November 16, 1993.[34] The Act stated that the, "government shall not burden a person's exercise of religion even if the burden results from a rule of general applicability [unless] it demonstrates that application of the burden… (1) furthers a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest."[35]

In a 6-3 decision, the Supreme Court "declared RFRA unconstitutional as applied to state and local governments" in *City of Boerne v. Flores*.[36] Justice Kennedy's majority opinion rationalized that defining the rights and privileges associated with the Fourteenth Amendment was a role for the courts and not appropriate for the legislature.[37] Justice Kennedy further argued,

> If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts,… alterable when the legislature shall please to alter it."[38]

However, the Supreme Court ruled that RFRA did apply to federal government actions in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*.[39]

This power struggle between the Court and Congress continued. In 2000, Congress passed the Religious Land Use and Institutionalized Personal Act (RLUIPA).[40] The act "prohibits state and local government actions that impose a substantial burden on religious exercise in the treatment of institutionalized persons or in land use decisions, unless the government can prove these actions are the least restrictive means of furthering a compelling government interest."[41] The legislation enacted following *Smith* illustrates the decision's bipartisan unpopularity in Congress.

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31. GILLMAN & CHEMERINSKY, *supra* note 13, at 118.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* (alteration in original).
36. *Id.*
37. *Id.*
38. City of Boerne v. Flores, 521 U.S. 507, 529 (1997) (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)).
39. GILLMAN & CHEMERINSKY, *supra* note 13, at 119. *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).
40. GILLMAN & CHEMERINSKY, *supra* note 13, at 119.
41. *Id.*

B. The Competing Approaches to the Free Exercise Clause

According to Gillman and Chemerinsky, the two competing theories of the Establishment Clause are the *Sherbert*/*Yoder* approach and the *Smith* approach.[42] They argue, "that Justice Kennedy got it right in his *Lukumi* decision: Religious practitioners cannot claim exemptions from neutral laws of general applicability, but the Court should be on guard against efforts by government officials to offer secular justifications as pretexts for laws that are actually motivated by religious animus."[43] Interestingly given he wrote the majority opinion in *Smith*, Justice Scalia agreed with the result in *Lukumi.* However, Justice Scalia argued that that the law was not generally applicable and there was no reason to try and infer what legislators' intent was.[44]

Gillman and Chemerinsky argue there are five main reasons to choose their preferred approach to the *Sherbert*/*Yoder* strict scrutiny experiment.[45] Further, they argue that their approach is more protective than "belief but not conduct" approach, but less protective than the *Sherbert*/*Yoder* approach.[46]

Their first argument for the Kennedy *Lukumi*/*Smith* approach is "if religious practitioners, but not others, may claim a right to be relieved of the ordinary social duties associated with a general law, then courts are immediately challenged with insoluble problems of distinguishing religious from non-religious objections."[47] Second, even for straightforward issues the "strict scrutiny approach would obligate them to determine the importance or centrality of the religious claim."[48] Third, "a constitutional obligation to grant special exemptions gives undue favoritism to people with religious convictions over people with similarly strong secular convictions…."[49] Fourth, "a commitment to accommodate the beliefs and conduct of religious practitioners whenever there is no 'compelling state interest' creates impossible expectations…" given the plethora of religious beliefs in the United States. Lastly, "during the 27-year experiment between *Sherbert* and *Smith*, there were only two narrow areas where any special exemptions or accommodations were considered justified."[50]

Gillman and Chemerinsky's argument is compelling. It both protects the rights of people to maintain their religious beliefs, but is limited by the "secular character" of the government.[51] However, Gillman and Chemerinsky acknowledge that their, "approach will result in some religious practitioners being burdened by neutral laws of general applicability."[52] There is no perfect approach to the Free

42. *Id.* at 120.
43. *Id.* at 126.
44. *Id.* at 123.
45. *Id.* at 128.
46. *Id.* at 120.
47. *Id.* at 128.
48. *Id.* at 130.
49. *Id.* at 132.
50. GILLMAN & CHEMERINSKY, *supra* note 13, at 135.
51. *Id.* at 136 (quoting Ira C. Lupu & Robert W. Tuttle, *The Forms and Limits of Religious Accommodation: The Case of RLUIPA*, 32 CARDOZO L. REV. 1907, 1908 (2011)).
52. *Id.* at 137.

Exercise Clause, but as the cases and history show us, the religious practitioners that will face these burdens will most likely be those of minority religions. This is the major flaw of the Kennedy *Lukumi*/*Smith* approach.

It probably is not a coincidence that during a time of expanding religious rights the Court reversed course in *Smith*.[53] Chief Justice Warren best described the religious melting pot of the United States as, "a cosmopolitan nation made up of people of almost every conceivable religious preference."[54] Free exercise of religion should apply to all religious beliefs, not only those held by a majority of Americans. The Court's approach must reflect that notion for all religions to receive adequate First Amendment protections.

II. "SHOULD ENTITIES LIKE CATHOLIC SOCIAL SERVICES—WHICH IS AN ARM OF THE CATHOLIC CHURCH—BE TREATED DIFFERENTLY THAN INDIVIDUALS?"[55]

A. The "Ministerial Exception"

The Court officially recognized the "ministerial exception" grounded in the First Amendment in *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*[56] Respondent sued Hosanna-Tabor Evangelical Lutheran Church and School claiming she was fired in violation of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2018).[57] Chief Justice Roberts' majority opinion stated, "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so… interferes with the internal governance of the church."[58] This "depriv[es] the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause."[59]

In *Hosanna-Tabor*, the Court emphasized the history of "[c]ontroversy between church and state over religious offices."[60] Early American Colonists fought the Church of England's control over their religious offices and this power dynamic between Church and State led to the adoption of the First Amendment.[61] The Court contrasted the issue in *Hosanna-Tabor* from *Smith* by pointing out that, "*Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself."[62]

The question in the case was whether the respondent would be considered a minister and if so, her employment discrimination case would be barred by the

53. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 875 (1990).

54. Braunfeld v. Brown, 366 U.S. 599, 606 (1961).

55. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring).

56. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 565 U.S. 171, 188 (2012).

57. *Id.* at 179.

58. *Id.* at 188.

59. *Id.* (alteration in original).

60. *Id.* at 182.

61. *Id.* at 701-04.

62. *Id.* at 707.

First Amendment.[63] The Court stated that the "ministerial exception is not limited to the head of a religious congregation," but it was "reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister."[64] In concluding that she was a minster, the Court referenced, "the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church" as evidence.[65]

B. The Ministerial Exception Applies to Individuals—Not Entities Like Catholic Social Services

The ruling in *Hosanna-Tabor*, which was then reaffirmed and expanded in *Our Lady of Guadalupe School v. Morrissey-Berru*, applies to "ministers" of churches or religious entities.[66] The ministerial exception is meant to "protect their [church's] autonomy with respect to internal management decisions that are essential to the institution's central mission.[67] And a component of this autonomy is the selection of the individuals who play certain key roles."[68] The Court clarified that, "[u]nder this rule, courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions."[69] The Court continued to stress that the rationale for the ministerial exception is that churches need autonomy over their internal operations.[70] The majority in *Guadalupe* cited the factors determining who qualifies as a minister under the ministerial exception from *Hosanna-Tabor*, and articulated the most significant is "what an employee does."[71] The ministerial exception protects religious autonomy regarding selection or retention of ministers. These ministers govern their internal affairs or facilitate their mission. Therefore, entities like Catholic Social Services, even though they are an arm of the Catholic church, should be treated differently than individuals because the application of the exception has been applied that way.

The rationale for the ministerial exception precedes the First Amendment.[72] The Court in *Hosanna-Tabor* emphasized, "[w]e cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers."[73] This further supports the proposition that the ministerial exception protects how religious entities manage their ministers, and does not protect the groups themselves.

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63. *Id.* at 701.
64. *Id.* at 707.
65. *Id.* at 708.
66. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2069 (2020).
67. *Id.* at 2060 (alteration in original).
68. *Id*.
69. *Id.*
70. *Id.* at 2060-61.
71. *Id.* at 2054.
72. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 565 U.S. 171, 181-83 (2012).
73. *Id.* at 189.

The firing of a minister is an example of a religious organization's *internal affairs*. In contrast, a city passing a law governing how Catholic Social Services handles adoptions is an example of *external affairs*. Justice Barrett framed the question of who should be covered under the ministerial exception by asking if the Catholic Social Services, a part of the Catholic church, should be considered a "minister" of the church. However, the issues are not similar because the city of Philadelphia was not forcing the Catholic Church to remove or keep Catholic Social Services. The city was governing the external actions of the entity. To use the comparison Justice Barrett framed, it would be like the government requiring a minster to have a driver's license. Because requiring a minister to be legally licensed to operate a vehicle has nothing to do with the internal affairs of the church, that requirement would not be unconstitutional under the ministerial exception. Given the ruling in *Hosanna-Tabor* and the historical justification of the ministerial exception, entities such as Catholic Social Services should be treated differently than individuals. Thus, the ministerial exception does not and should not apply to entities, and only applies to individuals deemed ministers by the courts.

III. "SHOULD THERE BE A DISTINCTION BETWEEN INDIRECT AND DIRECT BURDENS ON RELIGIOUS EXERCISE?"[74]

A. Examples of Indirect Versus Direct Burdens on the Free Exercise of Religion

In her *Fulton* concurrence, Justice Barrett asked whether there should be a distinction between indirect and direct burdens on religious exercise.[75] She referred to *Braunfeld*, where members of the Orthodox Jewish faith challenged a Pennsylvania Sunday Closing Law for supposedly violating their free exercise of religion by allegedly putting them at an economic disadvantage because their religious beliefs required them to refrain from working on Saturdays.[76] The Court noted that Sunday Closing Law evolved over time from a religious origin "to legislation concerned with the establishment of a day of community tranquility, respite and recreation, a day when the atmosphere is one of calm and relaxation rather than one of commercialism, as it is during the other six days of the week."[77] The Court further stated the "freedom to act," even when it connects to your religious beliefs, does not escape legislative restrictions.[78]

The Supreme Court cited two cases to distinguish *Braunfeld*: *Reynolds* and *Prince v. Massachusetts*, 321 U.S. 158 (1944). The Court upheld a polygamy conviction of a member of the Mormon faith in *Reynolds*, and upheld a statute that outlawed minor girls selling of newspapers, periodicals, or merchandise allegedly infringing on religious duties of Jehovah's Witnesses in *Prince*.[79] The Court

74. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021).
75. *Id.* at 1883, 1914.
76. Braunfeld v. Brown, 366 U.S. 599, 601 (1961).
77. *Id.* at 602.
78. *Id.* at 603.
79. *Id.* at 605.

distinguishes *Braunfeld* from *Reynolds* and *Prince* by noting both cases involved religious practices that "conflicted with the public interest."[80]

The majority noted, "this is not the case before us because the statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity."[81] It further added the law did not even affect the entire Orthodox Jewish faith, only those who believe it required to work on Sunday. Additionally, they are not faced with criminal prosecution in lieu of practicing their religion.[82] In her *Fulton* concurrence, Justice Barrett referenced the *Braunfeld* majority's argument that, "[t]o strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i.e.*, legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature."[83]

The Court in *Braunfeld* distinguished that the burden imposed by the challenged law was only indirect to their religious freedom.[84] The Court further added that at the time there were nearly 300 active religious denominations, and it would be impossible to "enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions."[85] However, the Court did stipulate that if a law only imposed an indirect burden, but the "purpose or effect" of the law was to hinder religious observance or discriminate between religions, such a law would be unconstitutional.[86] However absent such a purpose or effect, when a "State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden."[87]

B. There Should be a Distinction Between Indirect and Direct Burdens on Religious Exercise.

Distinguishing between indirect and direct burdens serves both those that seek to protect religious exercise and those that argue that religious beliefs cannot block legislation passed to better the public good. When using my "graduated scale" approach to the Free Exercise Clause, a direct burden on religion would trigger strict scrutiny. This is the highest level on the scale and is reserved for laws that directly impede the free exercise of religion. To satisfy strict scrutiny, the legislature that passed the law must show a compelling interest and must have

80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 606.
84. *Id.*
85. *Id.*
86. Braunfeld v. Brown, 366 U.S. 599, 607 (1961).
87. *Id.*

narrowly tailored the law to achieve that interest.[88] The final part of this article will detail, with case examples, a suggested "graduated scale" approach.

Many laws, such as the one in *Braunfeld*, will have an indirect burden on religious exercise and will warrant intermediate scrutiny by the Court. Of course, there will be different degrees of direct or indirect burdens. A direct burden can range from outlawing the practice of a religion completely to prohibiting a religious practice within a particular religion such as polygamy in *Reynolds*. The Court in *Braunfeld* gave future courts a perfect example of identifying an indirect burden versus a direct one. The Sunday Closing Law could result in a financial sacrifice by those members of the Orthodox Jewish faith to practice their religious beliefs, but that is "wholly different than when the legislation attempts to make a religious practice itself unlawful."[89]

A textbook way to contrast this example of an indirect burden with one of a direct burden is to look at the *Reynolds* case mentioned above. There is no doubt that a law labeling polygamy as a criminal act is a direct burden on those in the "Mormon" faith who practiced it. This burden is so direct that the only thing more oppressive would be to completely outlaw the religion itself. Of course, the Court could still find a compelling public welfare argument for the state to outlaw polygamy, but it is still a great example of what a direct burden law looks like.[90]

These examples of indirect and direct burdens show the value in having a distinction between the two as Justice Barrett inquired about. By using a direct burden guided analysis, which under my "graduated scale" triggers strict scrutiny, religious beliefs and practices of every denomination will receive more protection simply because the standard is appropriately difficult to overcome. In the alternative, an indirect burden legal analysis will protect secular interests and laws designed to serve the greater good but happen to indirectly affect a religious practice. However, it is important to note that these categories are not necessarily determinative of the constitutionality of the law. Not every law that has a direct burden on the free exercise of religion will be ruled unconstitutional, just as not every law that has an indirect burden will be upheld under my approach.[91]

88. Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 118 (1991) (quoting Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987)).

89. *Braunfeld*, 366 U.S. at 606.

90. Reynolds v. United States, 98 U.S. 145, 167 (1878).

91. *See generally id.*; *see also Braunfeld*, 366 U.S. at 607.

IV. "WHAT FORMS OF SCRUTINY SHOULD APPLY?" "AND IF THE ANSWER IS STRICT SCRUTINY, WOULD PRE-*SMITH* CASES REJECTING FREE EXERCISE CHALLENGES TO GARDEN-VARIETY LAWS COME OUT THE SAME WAY?"[92]

A. Under the "Graduated Scale" Method, Strict Scrutiny Would Apply for Direct Burdens on the Free Exercise of Religion, and Intermediate Scrutiny Would Apply for Indirect Burdens.

In her concurrence, Justice Barrett cites *Sherbert* and *Gillette v. United States* to compare when a government's interest must be "compelling" versus when it must be "substantial" to justify a burden on the free exercise of religion.[93] *Sherbert* involved the Employment Security Commission in South Carolina denying unemployment benefits to the appellant who was fired because of her unwillingness to work on Saturday, the Sabbath Day of her faith, and she failed to secure future employment for the same reason.[94] The Supreme Court stated:

> If [] the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate….'[95]

Ultimately, the Court found that the disqualification for benefits clearly imposed a burden on the appellant's free exercise of religion even though it was an indirect burden. Citing *Braunfeld*, the Court reiterated that, "'[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.'"[96] To justify this indirect burden, the State's compelling interest cannot only show a rational relationship to some state interest; for "this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation.'"[97] The Court dismissed the argument that potential fraud was a strong enough compelling interest and ruled that the state may not apply unemployment eligibility provisions that force a worker to abandon their religious belief in observing a day of rest.[98]

Turning to *Gillette*, this case involved a provision of the Military Selective Service Act which states, "[n]othing contained in this title… shall be construed to require any person to be subject to combatant training and service in the armed

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92. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021).

93. *Id.* (first citing Sherbert v. Verner, 374 U.S. 398, 403 (1963); then citing Gillette v. United States, 401 U.S. 437, 462 (1971)).

94. *Sherbert*, 374 U.S. at 399-401.

95. *Id.* at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

96. *Id.* at 403-404 (quoting Braunfeld v. Brown, 366 U.S. 599, 607 (1961)).

97. *Id.* at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

98. *Id.* at 407-408.

forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."[99] In interpreting this clause of the provision, the Supreme Court ruled that Congress wrote the section with the intention to give an exemption to those that oppose all war in any shape, not only a particular war, as was the situation in the case.[100]

The Court declared that the burdens felt by the petitioners were incidental and were "strictly justified by substantial governmental interests that relate directly to the very impacts questioned."[101] The Supreme Court argued that the conscription laws applied to everyone and were not designed to hinder religious practices.[102] In the Court's view, this meant that the laws did "not work [as] a penalty against any theological position."[103] This is what Justice Barrett focused on in her concurrence. Under my suggested "Graduated Scale" approach to the Free Exercise Clause, this sort of law would have to pass intermediate scrutiny because it is an indirect burden on the free exercise of religion. A conscription law would be labeled as an indirect burden under my approach because the intent of the law is not to directly hinder religious practices. However, the law still has an effect on the individuals' religious practices or beliefs, so it is an indirect burden. Intermediate scrutiny has historically been applied by the Court "when assessing sex-based equal protection claims and certain free speech claims."[104] However, I believe it would also serve the Court well to extend the use of this standard to laws that have indirect burdens on the free exercise of religion.

Justice Barrett showed concern with current and previous approaches to the Free Exercise Clause.[105] She expressed this apprehension in *Fulton*, stating, "[b]ut I am skeptical about swapping *Smith*'s categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court's resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced."[106] My suggested "graduated scale" approach to the Free Exercise Clause helps alleviate those concerns. It allows for laws that indirectly burden the free exercise of religion to be judged under intermediate scrutiny, which creates a more nuanced approached. Justice Barrett argues a nuanced approach makes more sense because that is the same path that the Court has taken with other First Amendment rights.[107]

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99. Gillette v. United States, 401 U.S. 437, 441 (1971) (quoting 50 U.S.C. App. § 456(j) (1964 ed., Supp. V)).

100. *Id.* at 447.

101. *Id.* at 462.

102. *Id*.

103. *Id*.

104. *Let the End Be Legitimate: Questioning the Value of Heightened Scrutiny's Compelling and Important Interest Inquiries*, 129 HARV. L. REV. 1406, 1408 (2016) (first citing Craig v. Boren, 429 U.S. 190, 197 (1976); then citing United States v. O'Brien, 391 U.S. 367, 376 (1968); then citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 298 n.8 (1984); then citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980)).

105. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882-83 (2021).

106. *Id.* at 1883.

107. *Id.*

The potential value of intermediate scrutiny was described in an article by Rodney A. Smolla, in which he explained that "adoption of an intermediate scrutiny standard would thus work no novel or arbitrary departure from the architecture of First Amendment doctrine, but would instead bring principles governing the freedom of religion into sensible synchronization with the principles governing freedom of speech."[108] In short, intermediate scrutiny is an important tool used by the Supreme Court in other areas of the First Amendment and logically it makes sense that it could be just as beneficial in the realm of the Free Exercise Clause.

B. Strict Scrutiny Would Not Apply to the "Garden-Variety" Laws Like Those in Smith because They Would Have an Indirect Burden on the Free Exercise Clause.

In *Smith*, Justice Scalia was concerned with implementing a test for the free exercise of religion that would "constitutionally require[] religious exemptions from civic obligations of almost every conceivable kind…."[109] His mentee, Justice Barrett, echoed this sentiment in *Fulton*, by questioning whether the "garden-variety" laws mentioned in *Smith* would turn out differently if the proper level of scrutiny applied to free exercise claims was strict scrutiny.[110] The examples given in *Smith* of "garden-variety" laws include:

> compulsory military service, payment of taxes, health and safety regulations such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, traffic laws, to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.[111]

Under my suggested "graduated scale" approach these "garden-variety" laws would be indirect burdens on the free exercise of religion. As indirect burdens, under my suggested scale, intermediate scrutiny would apply. In the past, intermediate scrutiny has provided the Court a useful tool for examining free speech claims and could be similarly useful for free exercise claims. In *O'Brien*, the Court clarifies that intermediate scrutiny is met when:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[112]

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108. Rodney A. Smolla, *The Free Exercise of Religion After the Fall: The Case for Intermediate Scrutiny*, 39 WM. & MARY L. REV. 925, 938 (1998).

109. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 888 (1990).

110. *Fulton*, 141 S. Ct. at 1883.

111. *Smith*, 494 U.S. at 889.

112. United States v. O'Brien, 391 U.S. 367, 377 (1968).

Using intermediate scrutiny is both useful and logical; it remedies Justice Scalia's concern that the "compelling interest" test "would be courting anarchy" if applied across the board.[113] Further, it alleviates Justice Barrett's doubt of applying strict scrutiny to these sorts of laws. Justice Barrett correctly observes that necessity requires the Court to bring more nuance to free exercise jurisprudence, as it has done with free speech and assembly cases.[114] Applying intermediate scrutiny to "garden-variety" laws that impose an indirect burden on the free exercise of religion accomplishes that goal. A nuanced approach to free exercise claims cures the ailments of the current and previous approaches by the Court.

V. A "GRADUATED SCALE" APPROACH TO THE FREE EXERCISE CLAUSE

A. My "Graduated Scale" Approach Addresses the Issues Presented by Justice Barrett and Alleviates Any Smith Replacement Uncertainty Among the Justices.

Just as a grand unified theory of the universe has eluded physicists from Albert Einstein to Brian Green,[115] a "grand unified theory" of the Free Exercise Clause has proven to be similarly evasive for the Supreme Court.[116] Of course, no test is without flaws, but my "graduated scale" approach to the Free Exercise Clause would provide the Court with the refined tool needed to solve complex cases. Most importantly, my "graduated scale" approach protects often maligned minority religions just as vigorously as majority religions.

The answer to Justice Gorsuch's question as to why *Smith* was not revisited, even though the Court had the opportunity to do so in *Fulton*, is that a majority of the Court shares Justice Barrett's uncertainty with how the Court should progress from *Smith*. As Justice Barrett mentioned, there are a lot of issues to go through—and though Justice Alito leaned into overturning *Smith,* his suggestion was not signed onto by any other Justices. My "Graduated Scale" approach answers Justice Barrett's list of issues: should the ministerial exception only apply to individuals, should there be a difference between indirect and direct burdens, and how to address the troubles of applying strict scrutiny to free exercise cases. Further, my approach provides a framework that a majority of the Justices would be inclined to adopt.

Now let's examine how my "Graduated Scale" approach works when framed around the questions raised by Justice Barrett's concurrence in *Fulton*. First, the "ministerial exception" is recognized by the court and, as discussed earlier, this exception applies to individuals but not groups, such as Catholic Social Services. Without engaging in a debate on the pros and cons of the "ministerial exception," my approach would seamlessly integrate these cases into the graduated scale.

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113. *Smith*, 494 U.S. at 888.

114. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021).

115. *See generally* Brian Greene, *Why String Theory Still Offers Hope We Can Unify Physics*, SMITHSONIAN MAG.: SCI. (Jan. 2015), https://www.smithsonianmag.com/science-nature/string-theory-about-unravel-180953637/.

116. *Fulton*, 141 S. Ct. at 1930-31.

Under my approach, "ministerial exception" cases would pose a direct burden on the free exercise of religion and thus, would merit strict scrutiny.

Second, this "Graduated Scale" approach would compel the Court to distinguish between indirect and direct burdens, which would encourage the Court to engage in a more nuanced analytical approach. Once the Court has determined whether the burden is indirect or direct, it will then be required to apply strict scrutiny for direct burdens and intermediate scrutiny for indirect burdens. Distinguishing between the types of burdens allows for the cases to be sorted appropriately. Further, it does not put handcuffs on the Court even after deciding whether the burden is indirect or direct. A law that has a direct burden can still be ruled constitutional, such as in the case of *Reynolds*. Alternatively, a law that imposes an indirect burden could still be ruled unconstitutional, as in *Braunfeld*. The important reason to distinguish between the two types of burdens is that this distinction allows a broader range of case law to develop that is guided by the specific circumstances of each case. This wider range of interpretation and categorization is advanced by the fact that direct and indirect burdens themselves have degrees within their respective categories.

The difference between an indirect versus a direct burden comes down to the law itself, not the religious practice allegedly hindered. Chiefly, this means that the Court is not gauging the strength of anyone's religious beliefs or the relevance of a religious practice. The Court has consistently taken the stance that it is not the proper function of a Justice to determine what constitutes religious practice. In fact, the Court has stated in precedent that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[117] The best way to create the distinction between what religious beliefs and acts require protection and those that do not, is to use Justice Kennedy's "religious animus" approach.[118] Justice Kennedy's approach works as follows: if a law is "motivated by religious animus" then it imposes a direct burden; however, if there is no evidence of "religious animus" and the statutory burden is "neutral" and incidental, then the law would only present an indirect burden.[119] It is important to note that choosing the direct or indirect label does not automatically determine the constitutionality of the law. There are degrees within both labels and a range of possible justifications that could satisfy their respective tests or not.

Third, the "graduated scale" approach to the Free Exercise Clause would allow the use of both strict scrutiny and intermediate scrutiny, depending on whether the Court determines the burden to be indirect or direct. This approach would finally resolve the "garden-variety" laws issue that arose under both the "compelling interest" and strict scrutiny analyses. Under the "graduated scale" approach, "garden-variety" laws would be easily categorized as indirect burdens meriting intermediate scrutiny. Under intermediate scrutiny, states would only have to show that the law "furthers an important or substantial governmental

117. Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 714 (1981).
118. GILLMAN & CHEMERINKSY, *supra* note 13, at 120.
119. *Id.*

interest," which is a low bar since these laws are the least likely to be shaped by "religious animus."[120]

In this way, my "graduated scale" approach answers Justice Barrett's questions in *Fulton*. It provides a tool that the Court can use to handle the variety of Free Exercise Clause cases that come before it. Further, because it answers the daunting questions that the Justices have had concerning how to handle free exercise claims, it should have the support of a majority of Justices. Moreover, this approach will finally allow the Court to overturn *Smith*, since it is clear that none of the Justices are staunch defenders of it.[121]

Most importantly, my scale protects religions equally. As Gillman and Chemerinsky suggest, the failure of *Smith* and the Kennedy *Lukumi* alternate is that by not emphasizing the protection of all religions, these tests unintentionally upheld burdens mainly on minority religions.[122] The Court has gone on the record countless times to express the belief that all religions and religious practices deserve equal protection under the First Amendment. It is time that the test, used for the Free Exercise Clause, exhibits this founding principle. Any test that does not ensure the equal protection of all religions is inadequate to adjudicate Free Exercise Clause cases. My "graduated scale" approach begins with the premise that all religions must be treated equally if they are going to be able to receive adequate protection under the First Amendment. The biggest failure of the *Smith* test was leaving religious accommodation to the democratic political process, which undeniably places minority religions at a disadvantage, since they are "not widely engaged in."[123]

B. Examples of Applying the "Graduated Scale" Approach to the Free Exercise Clause for High Profile Cases

Describing a test is one thing but seeing how it applies will provide a better understanding for how it functions in practice. The strength of the "graduated scale" approach is that, while the structure of the test is concrete, there are areas within it left open for debate. There will be situations where one Justice sees a burden as clearly direct, while another believes it to be more indirect, though maybe close to direct. Each Justice can appropriately apply the scale, depending on the facts of the case and the laws involved.

As one can tell from the work that has gone into developing the "graduated scale," it sits within the Free Exercise Clause jurisprudence of the Court over its history. This approach will not always result in outcomes that fit personal beliefs, but that was not the point of this article. The goal was to answer the concerns and questions presented by Justice Barrett in *Fulton*. In doing so, I am providing the Justices with the best approach to cure the issues of both the pre-*Smith* tests and the *Smith* precedent itself.

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120. United States v. O'Brien, 391 U.S. 367, 377 (1968).
121. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1931 (2021).
122. GILLMAN & CHEMERINKSY, *supra* note 13, at 122-25.
123. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 890 (1990).

The following analysis will cover four examples to demonstrate how the "graduated scale" approach will work in practice. The four cases that will be examined are *Smith*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), *Gillette*, and *Ramirez v. Collier*, No. 21-5592, 2021 WL 4129220 (U.S. Sept. 10, 2021). These four examples will provide a comprehensive overview of how to apply the "graduated scale" approach and its unique utility. These cases were chosen because they provide well-known or cover issues currently before the Supreme Court.

As noted earlier, *Smith* is the infamous case in which the Court established the neutral-law-of-general-applicability test for the Free Exercise Clause.[124] The case involved an Oregon law that prohibited "knowing or intentional possession of a 'controlled substance' unless the substance has been prescribed by a medical practitioner."[125] The respondents in the case were both fired from their respective jobs for ingesting peyote during ceremonies at the Native American Church, of which they were both members.[126] The respondents then applied for unemployment benefits with the Employment Division, but were denied because they were fired for "misconduct."[127]

Writing for the majority, Justice Scalia stated, "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all 'governmental regulation of religious *beliefs* as such.'"[128] In the majority opinion, Justice Scalia then lists what the government cannot do because of the First Amendment's religious freedom protection.[129]

The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.[130]

The majority argues that the respondents are asking the Court to "carry the meaning of 'prohibiting the free exercise [of religion]' one large step further" by arguing that their religious use of peyote is "beyond the reach of a criminal law that is not specifically directed at their religious practice…."[131] The logic put forth by the majority is that the text of the First Amendment can be read "to say that if prohibiting the exercise of religion… is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, [then] the First Amendment has not been offended."[132]

Continuing in the opinion, Justice Scalia reviews the Court's record to show that for more than a century of free exercise jurisprudence individuals have not

124. *Id.* at 879.
125. *Id.* at 874.
126. *Id.*
127. *Id.*
128. *Id.* at 877 (quoting Sherbert v. Verner, 374 U.S. 398, 402 (1963)).
129. *Id.*
130. *Id.* (citing Torcaso v. Watkins, 367 U.S. 488, 488 (1961)).
131. *Id*. at 878.
132. *Id*.

been excused "from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[133] To further support this position, Justice Scalia quotes the infamous Justice Frankfurter, who said, "[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."[134]

From there, the Court ruled that the appropriate test going forward for free exercise claims was the neutral-law-of-general-applicability test.[135] The Court also cites a string of cases to support this test as the most appropriate for analyzing free exercise claims under the First Amendment.[136] Furthermore, Justice Scalia notes that the only time the Court has ever struck down a neutral, generally applicable law in violation of the First Amendment, was when the law involved the violation of other protections under the Constitution, such as freedom of speech or press, in addition to free exercise of religion.[137]As noted in the opinion, the case at hand is dissimilar because it does not involve this "hybrid situation." Or, in Justice Scalia's words, "[the] [r]espondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now."[138]

Moving on to the *Sherbert* test, Justice Scalia acknowledges that the *Sherbet* test has been used by the Court in the past, but clarifies that it was only used to invalidate the denial of unemployment compensation.[139] In fact, even recently, the Supreme Court has avoided applying the *Sherbet* test even for relevant cases.[140]

Next, the majority says that the "compelling government interest" requirement serves other areas of constitutional rights, such as race or government regulation of speech, but a "constitutional anomaly" would be created if it was used for free exercise claims because it would allow "a private right to ignore generally applicable laws."[141] If the Court was going to apply the "compelling interest" test, it would have to "be applied across the board," and in its full form, it is a very high standard to meet.[142] Doing so would allow unlimited exemptions to "civic obligations of almost every conceivable kind."[143] Ultimately, the Court concluded that under the newly minted neutral-law-of-general-applicability test, the Oregon law was constitutional, and therefore, Oregon may deny the

133. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 879 (1990).

134. *Id.* (quoting Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594-95 (1940), *overruled by* W. Va. State Bd. Of Educ. v. Barnette, 319 U.S. 624 (1943)).

135. *Id.*

136. *See generally* United States v. Lee, 455 U.S. 252 (1982); Minersville Sch. Dist. V. Gobitis, 310 U.S. 586 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Prince v. Massachusetts, 321 U.S. 158 (1944).

137. *Smith*, 494 U.S. at 881.

138. *Id.* at 882.

139. *Id.* at 883.

140. *Id.*

141. *Id.* at 885-86.

142. *Id.* at 888.

143. *Id.* at 888-89.

respondents unemployment compensation, even though their peyote use was part of their religious practice.[144]

Now, let's apply my "graduated scale" approach and see if the outcome would change. Arguably, the Oregon law would not fall under the "garden-variety" laws that Justice Scalia noted in the majority opinion.[145] Peyote is traditionally used for religious practice by Native Americans and is even protected under federal law.[146] As the law clearly states, "for many Indian people, the traditional ceremonial use of the peyote cactus as a religious sacrament has for centuries been integral to a way of life, and significant in perpetuating Indian tribes and cultures."[147] Further, "[n]otwithstanding any other provision of law, the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful, and shall not be prohibited by the United States or any State."[148] To clarify the confusion brought forth by the *Smith* decision, the law includes that, "[n]o Indian shall be penalized or discriminated against on the basis of such use, possession or transportation, including, but not limited to, denial of otherwise applicable benefits under public assistance programs."[149]

Congress passed this law to recognize the religious nature of the peyote use, and to protect the use, possession, and transportation of it for religious purposes.[150] Twenty-eight states followed suit and enacted similar laws.[151] It is undeniable that peyote has a traditional religious use for Native Americans. Therefore, the Oregon law would be a direct burden under my "graduated scale" approach because it exhibits "religious animus." This means that the Court would apply strict scrutiny, which would require Oregon to show a compelling state interest, and that the law was narrowly tailored to achieve that interest.

The state certainly has a compelling public safety interest in prohibiting the use of hallucinogenic drugs by the general public. However, it is hard to deny that the use of peyote is a historic and important spiritual ritual for Native Americans deeply tied to their religious beliefs. In this way, the law is not narrowly tailored to achieve a compelling interest because the law could have easily carved out an exception for the religious use of peyote. Given that the law is not narrowly tailored to achieve the government's interest, it fails strict scrutiny. Using my "graduated scale" approach, the Court would rule that the Oregon law is unconstitutional because it violates the respondents' free exercise of religion guaranteed by the First Amendment. Of course, this is the opposite outcome of the heavily criticized opinion in *Smith*, but that is why it is a great example of how the "graduated scale" approach protects all religious liberties and allows for minority religious rights to be protected on equal footing as those of majority religions.

144. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 890, 890 (1990).
145. *Id.* at 889.
146. 42 U.S.C. § 1996a.
147. 42 U.S.C. § 1996a(a)(1).
148. 42 U.S.C. § 1996a(b)(1).
149. *Id.*
150. *Id.*
151. *Id.*

Turning to the second example, the case of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) [*Lukumi*]. This case involved a city council ordinance "making religious animal sacrifice unlawful."[152] The petitioners argued that the city ordinance was directed at the Church of the Lukumi Babalu and its members, who followed the Santeria religion.[153] The Santeria faith uses animal sacrifice as a part of their religious practices.[154] The majority applied the *Smith* neutral-law-of-general-applicability test and noted, "[n]eutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied."[155] Further, a law that fails those requirements "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest."[156]

For testing neutrality, the Court found that while the ordinances may not facially target the Santeria religion, "[t]here are further respects in which the text of the city council's enactments discloses the improper attempt to target Santeria."[157] Then, the Court turned to the *Smith* requirement that a law that burdens religious practice must be of general applicability.[158] The Court found that the ordinances were underinclusive to achieve both protecting health and preventing cruelty to animals.[159] In conclusion, the Court stated that "[t]he ordinances 'ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself.' This precise evil is what the requirement of general applicability is designed to prevent."[160]

Because the law failed the *Smith* test, the law "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests."[161] The Court quickly dismisses the opportunity for the law to survive by explaining that "[a] law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases. It follows from what we have already said that these ordinances cannot withstand this scrutiny."[162]

Now let's apply my "graduated scale" approach and see if the outcome would change. This case can be dismissed rather quickly and follows the same logic that the majority used. As the Court correctly noted, "[i]t becomes evident that these ordinances target Santeria sacrifice when the ordinances' operation is considered."[163] This is clearly an example of a direct burden on the Santeria

152. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 527 (1993).
153. *Id.* at 528.
154. *Id.* at 525-26.
155. *Id.* at 531.
156. *Id.* at 531-32.
157. *Id.* at 534.
158. *Id.* at 542.
159. *Id.* at 543.
160. *Id.* at 545-46 (quoting The Fla. Star v. B.J.F., 491 U.S. 524, 542 (1989) (Scalia, J., concurring in part and concurring in the judgment)) (alteration in original).
161. *Id.* at 546 (citing McDaniel v. Paty, 435 U.S. 618, 628 (1978)).
162. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).
163. *Id.* at 535.

religion, because the targeted nature of the law exposes its religious animus.[164] Under the "graduated scale" approach, the Court would easily find a direct religious burden, and thus, would apply strict scrutiny. As noted above, the majority did apply strict scrutiny in this case, so the analysis would be the same. Since the law is not narrowly tailored to achieve a compelling interest, it is therefore unconstitutional.

In this example, both the neutral-law-of-general-applicability test and my "graduated scale" approach to the Free Exercise Clause claim had the same result. However, the benefit to my approach is that it involves one less step; the Court would only have to decide whether the burden was indirect or direct, not whether it was neutral and generally applicable. The ruling in *Lukumi* is not nearly as contested as that in the *Smith,* which gives credence to the outcome being the same in this case, while it wasn't in *Smith*.

For the third example, *Gillette* will be reexamined; first, with *Smith's* neutral-law-of-general-applicability test, and then with my "graduated scale" approach. Since *Gillette* was covered in detail earlier, the review here will be brief. *Gillette* involved two individuals arguing that Congress violated the Free Exercise Clause of the First Amendment, by not allowing religious-based conscientious objection to forced military service via the draft.[165]

Under *Smith's* neutral-law-of-general-applicability test, the Court should find the law to be neutral. Section 6(j) of the Military Selective Service Act of 1967 does not single out any particular groups and allows any conscientious objector to be relieved from military service. On its face, the statute appears to be neutral. Concerning applicability, the law applies indiscriminately to all male citizens within the desired age group.[166] Thus, any argument that the law is not neutral and generally applicable would certainly be standing on weak ground. Under the *Smith* approach, the Court would uphold the original ruling of *Smith's* neutral-law-of-general-applicability test, therefore making it constitutional.

Using the "graduated scale" approach would produce the same outcome, because this case is a perfect example of an indirect burden. There is no "religious animus" in the statute and a clear secular governmental purpose. As the majority noted, the government undeniably has an interest "in procuring the manpower necessary for military purposes, pursuant to the constitutional grant of power to Congress to raise and support armies."[167] The purpose of the Military Selective Service Act was to guarantee adequate support for the United States' military affairs.[168] Therefore, the burden felt by the individuals claiming a violation of their free exercise of religion would be labeled as indirect.

Given that the burden is indirect, the "graduated scale" approach would have the Court apply intermediate scrutiny. Per precedent, a government regulation will pass intermediate scrutiny:

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164. *Id.* at 536-40.
165. Gillette v. United States, 401 U.S. 437, 448 (1971).
166. 50 U.S.C. § 3803(a).
167. *Gillette*, 401 U.S. at 462 (citing U.S. CONST. art. 1, § 8).
168. *Id.*

> [I]f it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[169]

As previously mentioned, the regulation has a significant government interest and is vested in Congress's Article I, Section 8 powers to raise and support armies. Thus, under my "graduated scale" approach, the statute would pass intermediate scrutiny and be ruled constitutional.

Finally, the last example is an upcoming case where the 5th Circuit recently granted an emergency stay to prevent the execution of a prisoner based on a Free Exercise Clause claim.[170] First, the case will be examined under the *Smith* standard, and then under my "graduated scale" approach. The case involves Appellant Ramirez, who was convicted of capital murder by a Texas jury and sentenced to death in 2008.[171] Ramirez has a pending lawsuit challenging the Texas Department of Criminal Justice (TDCJ) current execution policy, which allows for his spiritual advisor to be in the execution chamber, but does not allow his spiritual advisor to audibly pray or physically touch Ramirez during the execution.[172] He claims that this violates the First Amendment's Free Exercise Clause and the Religious Land Use and Institutionalized Person Act (RLUIPA).[173] After granting the stay, the Court directed the parties to submit briefs addressing specific issues before arguments.[174]

Because this analysis is strictly hypothetical, there are some caveats to address regarding the Free Exercise Clause issue in the case. The Court may not get to Ramirez's Free Exercise Clause claim due to issues with the Prison Litigation Reform Act and RLUIPA. However, I am going to strictly focus on the merits of the case, assuming that the Court does not find fault with one of those statutes. The point at issue is the role and permissions given to spiritual advisors in the TDCJ Execution Procedure. The current TDCJ Execution Procedure was revised on April 21, 2021, to allow spiritual advisors to be present in the execution chamber but does not allow them to physically touch prisoners in the execution chamber."[175]

Starting with the *Smith* approach, the Court would need to determine if the Execution Procedure is neutral. It appears that the Execution Policy applies to all spiritual advisors, and it does not single out any one religion. So, on its face, the Execution Policy appears to be neutral. Similarly, the Execution Policy does not seem to have any issues with applicability either. It applies to all inmates that are

169. United States v. O'Brien, 391 U.S. 367, 377 (1968).

170. Ramirez v. Collier, 10 F.4th 561, 563 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 50 (2021), *and rev'd and remanded*, 142 S. Ct. 1264 (2022).

171. *Id.* at 564.

172. *Id.* at 563.

173. *Id.*

174. 2020 J. SUP. CT. U.S. 771, 780-81 (2020-2021).

175. *Ramirez*, 10 F.4th at 562-63.

being executed and there are no exceptions. Under the *Smith* standard, TDCJ's Execution Policy would pass the neutrality test, and the Court would rule that it does not violate the Free Exercise Clause. Therefore, the Texas law would be upheld as constitutional, and Ramirez's free exercise claim would be denied.

Now let's apply my "graduated scale" approach. There would likely be some debate on the Court, as to whether the Execution Policy is an indirect or direct burden. To make this distinction, the court would need to examine the content of what is not allowed during the execution process. Since the policy applies to all spiritual advisors, there is no direct burden on a specific religion because none have been singled out. However, the Execution Policy prevents the spiritual advisors from audible prayer and physically touching the prisoner. These are both important aspects of many, if not all religions. So, while in *Smith*, the Oregon law directly burdened the Native American religious practice of consuming peyote and in *Lukumi*, the Santeria religion was directly burdened, here it is a general religious practice that is being directly burdened. The "religious animus" in this case is towards common religious practice behaviors, rather than certain religious sects. Thus, the burden on the free exercise of religion is direct because the procedure restricts religious conduct itself.

In other words, this case presents a unique opportunity for the Court to examine a general religious exercise direct burden as opposed to the traditional direct burden targeted at a specific religious sect or minority. Because the Execution Policy directly burdens the general religious practices of audible prayer by a religious advisor, and the ability of those advisors to physically console members of their religion, it is a direct burden on the Free Exercise Clause. The next process should be routine now. Since it is a direct burden on the Free Exercise Clause, the Court would apply strict scrutiny.

Texas would have to show a compelling state interest and that the law is narrowly tailored to achieve that interest. Based on the submitted briefs, it appears that the state interests concern the complexities involved in the execution process and the medical risks of the procedure.[176] This certainly qualifies as compelling state interests, so the Court must look to see if the policies are narrowly tailored to achieve those interests. The Execution Policy lists many requirements and a detailed process for when an inmate wants to have a spiritual advisor with them in the execution chamber.[177] There is no doubt that the complexities of administering the execution were taken into consideration when constructing the policy.

The extensive background check, orientation, and certification seem to alleviate any complexities or security issues that could arise here. Further, Ramirez is not asking for his spiritual advisor to be allowed to hug him, which would of course restrict the efforts of the medical team from properly administering the lethal injection. He is simply asking for his spiritual advisor to be able to "put[] [his] hand on [his] shoulder."[178] It is hard to imagine that this small gesture would even remotely hinder the ability of the trained medical professionals to perform

176. *Id.* at 563.

177. TEX. DEP'T OF CRIM. JUST., CORR. INSTS. DIV., EXECUTION PROC. (2021).

178. Ramirez v. Collier, 10 F.4th 561, 566 (5th Cir. 2021) (quoting First Amended Complaint, Exh. 2).

their duties or to act in an emergency. It is even more unconvincing that disallowing audible prayer spoken at a reasonable volume would serve any possible compelling interests.

Given that the Execution Policy has a lengthy process and detailed requirements for an inmate to even have a spiritual advisor in the execution chamber, it is improbable that placing a hand on Ramirez's shoulder would cause significant problems for the medical team, and the absurdity of banning audible prayer for seemingly no reason leads to the conclusion that this policy is not narrowly tailored. Therefore, the Execution policy should fail strict scrutiny, and the Court should rule that it is an unconstitutional violation of the Free Exercise Clause.

CONCLUSION

The Free Exercise Clause is both a foundational pillar of the United States and an unsolvable puzzle for the Court and the legal scholars who study it. Justice Barrett showed in *Fulton* that she is wise beyond her years on issues that plague the Supreme Court. Instead of simply overturning *Smith* with an equally inadequate approach because the Court had the opportunity to do so, she framed what needs to be addressed if the Court truly wants to fix the issues in *Smith* going forward. She does not hide the fact that she agrees with the critics of *Smith* and thinks that it needs to be overturned.[179] However, *Fulton* was not the correct case to attempt such a feat.[180] She took the opportunity to let her fellow Justices, the general public, and those who study these issues, know her thoughts and concerns for overturning *Smith* in the future.

My "graduated scale" approach addresses each of Justice Barrett's concerns and provides an approach to the Free Exercise Clause that will best suit the Court as it moves forward. My "graduated scale" approach equally protects the religious exercise of minority and majority religions, while not giving them an absolute trump card to stifle all legislation that potentially hinders religious activity. In this way, my approach fits within the structure of the Court's jurisprudence on the matter and was specially shaped by the questions posed by Justice Barrett in *Fulton*.

It is impossible to ignore the significance that Justice Barrett will play on the Court during her tenure. When she provides the general public and the legal community with a framework of her thought process on an issue, it is important to listen and respond. To accept any new approach, the Court will have to overturn *Smith*, but no matter how unpopular, a 30-year-old precedent should not be overturned lightly. Justice Barrett said it best, "[j]ustifying a decision to overrule precedent… requires both reason giving on the merits *and* an explanation of why its view is so compelling as to warrant reversal.… If she is not sure enough, the preference for continuity trumps."[181] Considering the arguments presented in this

179. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881 (2021).

180. *Id.* at 1883.

181. Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1722 (2013).

paper, there should be no doubt that the neutral-law-of general-applicability test from *Smith* needs to be replaced. My "graduated scale" approach to the Free Exercise Clause cures the wrongs of *Smith* and provides equal protection for the exercise of both minority and majority religious practices, while not restraining legislatures from passing important secular laws that serve the public good.