

## FREE EXERCISE ON THE COVID COURT

*S.L. Mikochik*<sup>1</sup>

In 1990, the Supreme Court decided *Employment Division v. Smith*.<sup>2</sup> Writing for a five-person majority, Justice Scalia held that, “if prohibiting the exercise of religion . . . is not the object of the [challenged law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.”<sup>3</sup> The Court concluded that the Free Exercise Clause was not violated in that case, even though a religious practice was actually prohibited<sup>4</sup> and even though the burden on respondents’ religion was substantial.<sup>5</sup>

The reaction to *Smith* was swift and adverse. For example, Congress enacted the Religious Freedom Restoration Act,<sup>6</sup> with only three votes dissenting—a largely unsuccessful attempt to restore the pre-*Smith* caselaw.<sup>7</sup> Concurring in *Fulton v. Philadelphia*,<sup>8</sup> Justice Alito summarized the criticisms raised against *Smith*:

Paying little attention to the terms of the Free Exercise Clause, [the *Smith* Court] was satisfied that its interpretation represented a “permissible” reading of the text and it did not even stop to explain why that was so. The majority made no effort to ascertain the original understanding of the free-

---

1. Prof. emeritus, Temple University School of Law; Senior Lecturer, Ave Maria School of Law. I appreciate the assistance Ave Maria School of Law provided me in preparing this article.

2. *Emp’t Div. v. Smith*, 494 U.S. 872 (1990).

3. *Id.* at 878 (citations omitted).

4. *Id.* at 878–79 (“We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”).

5. Respondents were denied unemployment benefits because they were discharged from their jobs for having ingested peyote at a ceremony of the Native American church where they were members. *Id.* at 874. The Court held that the State could criminalize their use of peyote, even for sacramental purposes, and thus could impose the lesser burden of denying them unemployment benefits. *Id.* at 875.

6. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

7. See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating the Act as an exercise of Congress’ Section 5 power to enforce the Fourteenth Amendment against the States). But see *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (applying the Act to invalidate a ban on the sacramental use of a hallucinogen under the Federal Controlled Substances Act).

8. *Fulton v. City of Phila.*, 593 U.S. 522 (2021).

exercise right, and it limited past precedents on grounds never previously suggested.<sup>9</sup>

My aim here, however, is not to inquire whether *Smith* was wrongly decided. Notably, five sitting justices believed it was: Alito, Thomas, and Gorsuch would likely overrule it;<sup>10</sup> Barrett and Kavanaugh are hesitant, concerned about what would succeed it.<sup>11</sup> Since *Smith* remains good law at least for a time, my aim is to examine how justices have extended it by interpreting the prohibition against religious discrimination they believe was endorsed by that decision.<sup>12</sup> The expansion has chiefly occurred in summary decisions over limits on church attendance that were handed down during the COVID-19 pandemic. Examining these decisions will hopefully reveal how the Court approaches Free Exercise in the twilight of *Smith*.

The expansion began three years after *Smith* with Justice Kennedy's opinion in *Church of Lukumi Babalu Aye v. City of Hialeah*.<sup>13</sup> The City had adopted several ordinances prohibiting the slaughter of animals within its limits.<sup>14</sup> Viewed in combination, the ordinances prohibited only animal sacrifices that were part of a small church's religious ritual, and were thus, not neutral.<sup>15</sup> Further, since other slaughtering was permitted, the ordinances were not generally applicable.<sup>16</sup> Failing *Smith*'s requirement of neutrality and general applicability, they were subjected to strict scrutiny, which Kennedy concluded the City had failed to meet.<sup>17</sup>

Kennedy observed that “[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.”<sup>18</sup> In determining whether a law was discriminatory, he assumed that the Court could “also find guidance in our equal protection

---

9. *Id.* at 560 (Alito, J., concurring in the judgment) (citations omitted).

10. *See id.* at 545 (Alito, J., concurring in the judgment) (“This severe holding is ripe for reexamination.”).

11. *Id.* at 543 (Barrett, J., concurring) (“As a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination. Yet what should replace *Smith*?”).

12. *Cf. Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 557–59 (1993) (Scalia, J., concurring in part and concurring in the judgment).

13. *See id.* at 520–57.

14. *Id.* at 527–28.

15. *Id.* at 534–38.

16. *Id.* at 543.

17. *Id.* at 546–47.

18. *Id.* at 532 (citations omitted).

cases[.]”<sup>19</sup> emphasizing the animus city council members displayed toward the Church at a public hearing.<sup>20</sup> Only Justice Stevens, however, joined this part of Kennedy’s opinion.<sup>21</sup>

In a concurrence joined only by Chief Justice Rehnquist, Scalia objected to Kennedy’s consideration of subjective motivation: “The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted[.] . . . This does not put us in the business of invalidating laws by reason of the evil motives of their authors.”<sup>22</sup>

More generally, Scalia seemed to disagree with reliance on equal protection case law as a guide in Free Exercise analysis, with its focus on actual purpose and its use of motive evidence.<sup>23</sup>

In my view, the defect of lack of neutrality applies primarily to those laws that by their terms impose disabilities on the basis of religion [;] . . . whereas the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment. . . . I do not join . . . [that part of the majority’s analysis that] departs from the opinion’s general focus on the object of the laws at issue to consider the subjective motivation of the lawmakers[.] . . . The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted[.]<sup>24</sup>

Perhaps, Scalia was only distinguishing between actual and imputed purpose. More radically, he may have intended to set aside purpose as irrelevant in Free Exercise analysis, limiting the inquiry to whether certain means were used and certain consequences followed. In any event, the COVID Court was inclined to amalgamate their two approaches.

At the outset of the Pandemic, the Court had denied an emergency application to enjoin enforcement of a California capacity limit on church attendance pending appeal.<sup>25</sup> In *South Bay United Pentecostal Church v. Newsom*, applicants had challenged the California Governor’s executive order

---

19. *Id.* at 540.

20. *Id.* at 541–42.

21. *Id.* at 522.

22. *Id.* at 558 (Scalia, J., concurring in part and concurring in the judgment).

23. See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

24. *Church of Lukumi*, 508 U.S. at 557–59 (Scalia, J., concurring in part and concurring in the judgment) (citations omitted).

25. See *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Mem).

limiting worship services to the lesser of twenty-five percent of capacity or 100 attendees.<sup>26</sup>

In a solo concurrence, Chief Justice Roberts first noted that such relief was granted only “where the legal rights at issue are indisputably clear and, even then, sparingly and only in the most critical and exigent circumstances.”<sup>27</sup> Citing the Court’s 1905 opinion in *Jacobson v. Massachusetts*,<sup>28</sup> upholding a smallpox vaccination mandate against a substantive due process challenge, he affirmed that “[o]ur Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States[,]”<sup>29</sup> affording them “especially broad” latitude “in areas fraught with medical and scientific uncertainties[.]”<sup>30</sup> The Governor, he maintained, had acted within such limits, and had likely done so in accord with the Free Exercise Clause by treating comparable cases alike, reasonably distinguishing between gatherings that were large and where people were in close proximity for extended periods of time, and treating secular activities the same or more restrictively than church attendance—and those gatherings that were not—treating such locations as grocery stores, banks, and laundromats more leniently.

Justice Kavanaugh filed a dissent which was joined by two of the other three dissenting justices.<sup>31</sup> He concluded that the Governor had likely violated the First Amendment by discriminating against houses of worship: “The basic constitutional problem is that comparable secular businesses are not [also] subject to a twenty-five percent occupancy cap[.]”<sup>32</sup>

Kavanaugh did not himself explain how such activities were comparable to worship services. He began with the fact that California had distinguished between public and private gatherings and it was up to the State to explain why some public gatherings were treated more leniently than worship services.<sup>33</sup> He thus shifted the difficult question of comparability to the State, requiring that it have a compelling reason, not just for the distinction between public and private gatherings, but, more particularly, for the distinction between religion

---

26. *Id.* (Roberts, C.J., concurring in denial of application for injunctive relief).

27. *Id.* at 1613 (citations and internal quotation marks omitted).

28. *Jacobson v. Mass.*, 197 U.S. 11 (1905).

29. *South Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring in denial of application for injunctive relief) (citations and internal quotation marks omitted).

30. *Id.* (Roberts, C.J., concurring in denial of application for injunctive relief) (citations and internal quotation marks omitted).

31. *Id.* at 1614–15 (Kavanaugh, J., dissenting from denial of application for injunctive relief).

32. *Id.* at 1614 (Kavanaugh, J., dissenting from denial of application for injunctive relief).

33. *Id.* (Kavanaugh, J., dissenting from denial of application for injunctive relief) (noting favored activities included “factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries”).

and more favored secular activities.<sup>34</sup> Even if that heavy burden were met, the State should also be required to show why it could not reduce any greater risk worship services posed through remedial measures already employed or conceivably available:

To justify its discriminatory treatment of religious worship services, California must show that its rules are justified by a compelling governmental interest and narrowly tailored to advance that interest. California undoubtedly has a compelling interest in combating the spread of COVID-19 and protecting the health of its citizens. What California needs is a compelling justification for distinguishing between . . . religious worship services and . . . the litany of other secular businesses that are not subject to an occupancy cap. California has not shown such a justification. [Further,] California has ample options that would allow it to combat the spread of COVID-19 without discriminating against religion. The State could insist that the congregants adhere to social distancing and other health requirements [;] . . . [o]r alternatively, the State could impose reasonable occupancy caps across the board.<sup>35</sup>

In other words, when the government classifies and the classification treats religion less favorably than some secular activities, it must have a compelling reason for the difference that it cannot eliminate through means less restrictive of religion.<sup>36</sup> Kavanaugh took the lead in crafting the approach the Court would ultimately adopt.

Kavanaugh refined his approach two months later, dissenting from a denial of another church's application for injunctive relief pending appeal in *Calvary Chapel Dayton Valley v. Sisolak*.<sup>37</sup> The Governor of Nevada had limited houses of worship to fifty attendees regardless of size, while permitting certain favored facilities to fill fifty percent of their capacity, which would allow, in the case of gigantic casinos, thousands of patrons.<sup>38</sup> The Church further planned to take safety measures far beyond what the State required, but the Governor made no showing that such measures would not reduce the risk of infection.<sup>39</sup> Alito, in another dissent, complained that "[t]he idea that

---

34. *Id.* at 1614.

35. *Id.* at 1614–15 (Kavanaugh, J., dissenting from denial of application for injunctive relief) (citations and internal quotation marks omitted).

36. *Id.*

37. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2609–15 (2020) (Mem) (Kavanaugh, J., dissenting from denial of application for injunctive relief).

38. *Id.* at 2604–05 (Alito, J., dissenting from denial of application for injunctive relief).

39. *Id.* at 2604 (Alito, J., dissenting from denial of application for injunctive relief).

allowing Calvary Chapel to admit ninety worshippers presents a greater public health risk than allowing casinos to operate at fifty percent capacity is hard to swallow, and the State's efforts to justify the discrimination are feeble."<sup>40</sup> Kavanaugh began his analysis by organizing laws affecting religion into four categories:

[L]aws that expressly discriminate against religious organizations; . . . laws that expressly favor religious organizations; . . . laws that do not classify on the basis of religion but apply to secular and religious organizations alike; . . . and laws that expressly treat religious organizations equally to some secular organizations but better or worse than other secular organizations.<sup>41</sup>

The Governor's directive fit into the fourth category since it expressly treated religion less favorably than some secular activities, but equal to or more favorably than others.<sup>42</sup> Kavanaugh asserted that "[u]nless the State provides a sufficient justification otherwise, it must place religious organizations in the favored or exempt category."<sup>43</sup> This followed either because the Governor expressly disfavored religion on the face of the directive, and it was thus not neutral, or, as Kavanaugh at one point reasoned, because the Governor had excluded religion from a system of exemptions afforded some secular activities.<sup>44</sup> Either way, the analysis he employed was the same:

[I]n these kinds of cases, the Court's religion precedents require a basic two-step inquiry. First, does the law create a favored or exempt class of organizations, and, if so, do religious organizations fall outside of that class? That threshold question does not require judges to decide whether a church is more akin to a factory or more like a museum, for example. Rather, the only question at the start is whether a given law on its face favors certain organizations and, if so, whether religious organizations are part of that favored group. If the religious organizations are not, the second question is

---

40. *Id.* at 2606 (Alito, J., dissenting from denial of application for injunctive relief). Alito began a challenge to Roberts's analysis in *South Bay* by observing that "[t]he problem is no longer one of exigency, but one of considered yet discriminatory treatment of places of worship[.]" *id.* at 2605, and distinguishing *Jacobson* as a substantive due process, not a first amendment case. *See id.* at 2608. *See also id.* at 2614 (Kavanaugh, J., dissenting from denial of application for injunctive relief).

41. *Id.* at 2610 (Kavanaugh, J., dissenting from denial of application for injunctive relief). In discussing the third category, Kavanaugh embraced Kennedy's willingness in *Church of Lukumi* to consider motive evidence of animus against religion. *Id.*

42. *Id.*

43. *Id.* at 2612.

44. *Id.*

whether the government has provided a sufficient justification for the differential treatment and disfavoring of religion.<sup>45</sup>

Kavanaugh emphasized that “it [was] not enough for the government to claim that other secular organizations or individuals are also treated unfavorably.”<sup>46</sup> “That point is subtle but absolutely critical. And if that point is not fully understood, then cases of this kind will be wrongly decided.”<sup>47</sup>

Kavanaugh thus shifted the burden of showing incomparability to the State—that is, clearly demonstrating that the worship services would present a greater risk of infection than the activities exempted—and further proving that no available measures would eliminate any such difference.<sup>48</sup> He concluded that “[though] Nevada undoubtedly has a compelling interest in combating the spread of COVID–19 and protecting the health of its citizens[,] it does not have a persuasive public health reason for treating churches differently from restaurants, bars, casinos, and gyms.”<sup>49</sup>

The turning point came in *Roman Catholic Diocese of Brooklyn v. Cuomo* where the Court in a *per curiam* opinion granted applications by a Catholic diocese and a Jewish synagogue for injunctive relief pending appeal.<sup>50</sup> An executive order issued by the Governor of New York restricted worship services to ten attendees in “red zones” and twenty-five in “orange zones,” while “essential” businesses in the former and most others in the latter were under no capacity limits.<sup>51</sup>

The Court held that the applicants were likely to succeed on the merits because the Executive Order was not neutral toward religion.<sup>52</sup> Though the Governor had made statements that evidenced animus against the ultra-Orthodox Jewish community, the Court did not rely on them, but rather on the facial discrimination of the order, concluding that:

---

45. *Id.* at 2613.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 2613. As for the Governor’s economic rationale, that the favored activities produce revenue while worship services do not, “that rationale devalues religious reasons for congregating by judging them to be of lesser import than nonreligious reasons, in violation of the Constitution.” *Id.* at 2614 (internal quotation marks omitted) (citing *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 537–38 (1993)).

50. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 15–16 (2020).

51. *Id.* at 15–16.

52. *Id.* at 16–17.

Because the challenged restrictions are not “neutral” and of “general applicability,” they must satisfy “strict scrutiny,” and this means that they must be “narrowly tailored” to serve a “compelling” state interest. Stemming the spread of COVID–19 is unquestionably a compelling interest, but it is hard to see how the challenged regulations can be regarded as “narrowly tailored.”<sup>53</sup>

The Court found it “hard to believe that admitting more than ten people to a 1,000-seat church or 400-seat synagogue would create a more serious health risk than the many other activities that the State allows”<sup>54</sup> and observed that the capacity limits were “much tighter than those adopted by many other jurisdictions hard-hit by the pandemic, and far more severe than has been shown to be required to prevent the spread of the virus at the applicants’ services.”<sup>55</sup>

Though the Court concluded that the Executive Order’s restrictions were not “of general applicability,” it did not separately analyze that factor from lack of neutrality.<sup>56</sup> Given that the opinion did not cite *Smith*, perhaps the Court was distancing itself from that decision. Kavanaugh filed a solo concurrence reiterating his prior approach.<sup>57</sup> He emphasized that the Governor’s treatment of some secular activities worse than religion did not render the Executive Order neutral:

[U]nder this Court’s precedents, it does not suffice for a State to point out that, as compared to houses of worship, some secular businesses are subject to similarly severe or even more severe restrictions. Rather, once a State creates a favored class of businesses, as New York has done in this case, the State must justify why houses of worship are excluded from that favored class.<sup>58</sup>

A few months later, the Court again considered another application by *South Bay* for injunctive relief, this time pending disposition of its petition for

---

53. *Id.* at 18 (citation omitted).

54. *Id.* at 19. Roberts and Gorsuch filed separate solo opinions, the former dissenting from and the latter concurring in the grant of the application, with both disputing the weight the Court should give to *Jacobson*. *Id.* at 21, 31.

55. *Id.* at 18.

56. *Id.*

57. *Id.* at 27 (Kavanaugh, J., concurring).

58. *Id.* at 29 (Kavanaugh, J., concurring in grant of application for injunctive relief) (citations omitted).

certiorari.<sup>59</sup> Six justices voted to grant the application in part, finding that the Church was likely to succeed in its Free Exercise challenge against the Governor's regulation of indoor worship services.<sup>60</sup> While most indoor retail stores were permitted to operate at twenty-five percent capacity, "the maximum number of adherents who can safely worship in the most cavernous cathedral is zero[.]"<sup>61</sup> As Kavanaugh had repeatedly argued, the fact that some secular indoor activities were also banned was not controlling.<sup>62</sup>

Five justices finally agreed on a Free Exercise approach in *Tandon v. Newsom*.<sup>63</sup> Applicants had challenged a California ban on home gatherings of more than three families that applied to religious and secular activities alike.<sup>64</sup> The majority granted the application for injunctive relief pending appeal.<sup>65</sup> The per curiam opinion expressly adopted Kavanaugh's argument that "it is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue."<sup>66</sup> Nevertheless, the per curiam opinion bypassed his approach when it came to applicants' prima facie case: "[G]overnment 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."<sup>67</sup> Apparently, the initial burden was on applicants to make some showing of comparability.

Whether activities were comparable "must be judged against the asserted government interest that justifies the regulation at issue."<sup>68</sup> To prevent the spread of COVID-19, California had distinguished between indoor private and indoor public activities: "[H]air salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and

---

59. *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021).

60. The Chief Justice concurred in the grant of injunctive relief against the capacity limit; Justice Gorsuch agreed in a statement joined by Justices Thomas and Alito; Justice Barrett, joined by Justice Kavanaugh, agreed in a separate concurrence with Justice Gorsuch's statement on the capacity limit. Only three justices, however, voted to grant the application against the Governor's ban on indoor singing. *Id.*

61. *Id.* at 717 (Gorsuch, J., statement supporting a grant of application in full); *id.* (Roberts, C.J., concurring in partial grant of application for injunctive relief).

62. *Id.* at 717–19 (Kagan, J., dissenting).

63. *Tandon v. Newsom*, 593 U.S. 61, 62 (2021).

64. *Id.* at 63–65 (Kagan, J., dissenting).

65. *Id.* at 64.

66. *Id.* at 62 (per curiam) (citing *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 18 (2020) (Kavanaugh, J., concurring)).

67. *Tandon*, 593 U.S. at 62 (per curiam) (Kavanaugh, J., concurring) (citations omitted).

68. *Id.* (citations omitted).

indoor restaurants”<sup>69</sup> were permitted more than three households at a time, while indoor private religious activities were not.<sup>70</sup> Such religious and commercial activities appeared comparable since both were conducted indoors and could thus increase the risk of COVID-19.<sup>71</sup>

Since applicants had made some showing of comparability, the government had the burden to satisfy strict scrutiny.<sup>72</sup> It was not enough to argue, as the court of appeals had, that all activities conducted in private buildings, contrasted with those conducted in public buildings, were treated alike since “[c]omparability is concerned with the risks various activities pose, not the reasons why people gather.”<sup>73</sup>

According to the dissent, the district court had found without contradiction that indoor private activities created a greater risk of transmission than indoor public activities.<sup>74</sup> Notwithstanding this, the government was still required to show that no less restrictive alternatives were available to avoid the risk:

[Government] must do more than assert that certain risk factors are always present in worship, or always absent from the other secular activities the government may allow. Instead, narrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID-19. “Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied.”<sup>75</sup>

The COVID-19 cases were clear that religion was just not as important for many governors as were commercial activities that made money for the State. The primary threat to religion has shifted today from hostility to marginalization. Viewing Free Exercise only in Equal Protection terms would disregard that threat.

Justice Barrett observed that, “[a]s a matter of text and structure, it is difficult to see why the Free Exercise Clause . . . offers nothing more than

---

69. *Id.* at 63 (citations omitted).

70. *Id.* at 63–64.

71. *Id.*

72. *Id.* at 62.

73. *See id.* (citations omitted).

74. *See id.* at 65–66 (Kagan, J., dissenting) (citations and internal quotation marks omitted) (listing the district court’s relevant findings).

75. *Id.* at 63 (per curiam) (citations and internal quotation marks omitted).

protection from discrimination.”<sup>76</sup> Race is a suspect category;<sup>77</sup> religion is a preferred one.<sup>78</sup> In the former, we are concerned about intent but not effects; in the latter, we are concerned about both. In the former, we are concerned about animus; in the latter, we are concerned about cheapening religion.

Of course, discrimination against religion has not disappeared. If religion is placed alone in a restrictive category, we are concerned about hostile intent. Adding other activities to the mix, or even treating some worse, does not eliminate the concern. But, if the scheme treats some activities better than religion, government must justify the difference, not because we fear that it is discriminating against religion but because we worry that it is not affording religion its constitutional due. It is no answer that some religions are also preferred since the issue is not animus but what each religion is entitled to.

Once applicants identify a preference in the scheme, the burden should shift to the State without any further showing of comparability. No inference of animus is needed, just evidence that the scheme prefers some activities over religion. That shown, the State has not acted neutrally toward religion. It is in a superior position to justify the difference by showing that applicants’ activities carry a higher risk of transmission that no available practice can remediate. Further, comparability is a quagmire applicants can only cross with difficulty since religious activities are not unities but composites with each part carrying its own risk of infection. The State is the one regulating, and it should show what about the religious activities raise the greater risk and why such risk is irremediable.

In other words, the *Tandon* Court should have adopted Kavanaugh’s Free Exercise approach in full.

---

76. *Fulton v. City of Phila.*, 593 U.S. 522, 543 (2021) (Barrett, J., concurring).

77. *See, e.g., Palmore v. Sidoti*, 466 U.S. 429 (1984).

78. *Emp’t Div. v. Smith*, 494 U.S. 872, 901–02 (1990) (O’Connor, J., concurring in the judgment).