Vaccines Mandates and Religion: Where are We Headed with the Current Supreme Court?

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Abstract: This article argues that the Supreme Court should not require a religious exemption from vaccine mandates. For children, who cannot yet make autonomous religious decision, religious exemptions would allow parents to make a choice that puts the child at risk and makes the shared environment of the school unsafe — risking other people's children. For adults, there are still good reasons not to require a religious exemption, since vaccines mandates are adopted for public health reasons, not to target religion, are an area where free riding is a real risk, no religion actually prohibits vaccinating under a mandate, and policing religious exemptions is very difficult.

Introduction

Vaccines are one of the greatest medical advances of the twentieth century, responsible for saving hundreds of millions of lives.[1] Although nothing is without risk, as the National Academies of Science, Engineering and Medicine point out, "[v]accines are extremely safe. They have many health benefits and few side effects."[2] In spite of that data, there has long been an anti-vaccine movement, and its impact has grown over time.[3] In the past two decades, rates of vaccine exemptions in some states have grown dramatically.[4] The increase in non-medical exemptions directly led to increases in outbreaks.[5] Most recently (and before the COVID-19 pandemic), in 2019, outbreaks of measles in the United States resulted in 1,249 cases, the highest number since 1992.[6] A substantial majority of the cases were in unvaccinated individuals and in communities with low vaccines rates.[7] Politicization of the COVID-19 pandemic is not going to help with this.[8]

In response to outbreaks, several states have acted to remove or tighten their non-medical exemptions. In 2015, California removed its non-medical exemption.[9] The repeal was challenged several times in court, but all the challenges were unsuccessful.[10] In 2019, both New York and Maine removed their non-medical exemptions, and Washington State removed the personal belief exemption to the MMR vaccine.[11] The New York repeal was also challenged in court, but so far, all challenges have failed. These challenges

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included claims that not having a religious exemption violates the First Amendment, but as late as March 2021, courts were unsympathetic to those claims.[12]

Courts that have rejected the claims that not having a religious exemption violates the First Amendment drew on several strands of case law. These included Supreme Court doctrine that general rules do not need to include an exemption for religious objectors.[13] Other cases suggest that mandates do not have to include a religious exemption because school vaccines mandates apply to children — who cannot yet decide on their own religion — and to a shared environment, where unvaccinated children can put other people's children at risk.[14] This jurisprudence will be addressed more in depth in Part II.

But there is another aspect to the vaccine religious exemptions issue, which is the reality that very few religions actually oppose vaccines.[15] Most religions either support vaccines or leave it to the believer. Even Christian Science, while clearly not in support of vaccines, tells adherents that if the law requires vaccinating, they should vaccinate.[16] Most people who refuse vaccines do it for reasons that are not religious.[17] Even for deeply religious people, the logic behind not vaccinating is usually secular.[18]

Against this background, recent decisions from the Supreme Court signaling increased protection for religious freedom raise the question of whether the Court will someday require a religious exemption from state-actors' vaccine mandates. This article contends that for children and school mandates, the new jurisprudence should not change the current legal situation, and that the arguments for not requiring a religious exemption remain extremely strong. For mandates applicable to adults, the argument for a religious exemption is more robust; but there are still good reasons not to require one. Among other reasons, vaccines mandates are adopted for public health reasons, clearly not targeting religion, are an area where free riding is a real risk, and policing religious exemptions to these mandates is very difficult. Even if strict scrutiny is applied, courts should not require that a religious exemption be added to a well-crafted law mandating a vaccine that clearly prevents death and other serious harms.

Two limits of this paper should be borne in mind. First, rather than provide a thorough discussion of the Supreme Court's decisions, it focuses on the narrower question of vaccine mandates. The wonderful article by my colleague Professors Wendy Parmet provides in depth discussion of the decisions in a broader context. Second, the article focuses on mandates by state actors, not by private actors like employers, to which a different framework would apply.[19]

This article contends that for children and school mandates, the new jurisprudence should not change the current legal situation, and that the arguments for not requiring a religious exemption remain extremely strong. For mandates applicable to adults, the argument for a religious exemption is more robust; but there are still good reasons not to require one. Among other reasons, vaccines mandates are adopted for public health reasons, clearly not targeting religion, are an area where free riding is a real risk, and policing religious exemptions to these mandates is very difficult. Even if strict scrutiny is applied, courts should not require that a religious exemption be added to a well-crafted law mandating a vaccine that clearly prevents death and other serious harms.

I. Vaccine Mandates and Religious Freedom in the United States Before the COVID-19 Pandemic

Vaccine mandates have existed in the United States for over 150 years. The first state-level school mandate, for a vaccine against smallpox, was adopted in Massachusetts in 1855.[20] In the 1960s and 1970s school mandates spread across states.[21] Multiple empirical studies have demonstrated that strong school mandates increase rates of childhood vaccination and reduce outbreaks of vaccine preventable diseases.[22]

The famous case of *Jacobson v. Massachusetts* focused on an ordinance adopted in 1902 referencing an earlier statute empowering local boards of health

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to require people be vaccinated against small pox "if, in its opinion, it is necessary for the public health or safety."[23] In 1905, the Supreme Court upheld the vaccine mandate on the grounds that individual liberty may, on occasion, have to give way for the public good, and that restraints on liberty in the common good are usual and expected in society.[24] The Court did make it clear that regulations limiting individual rights need to be reasonable and in the public health and safety interest. But within those limits, it specifically allowed a vaccine requirement.[25]

Jacobson did not address whether the state has to provide a religious exemption from a vaccine requirement, because at the time, the First Amendment did not yet apply to the states.[26] Extensive litigation explored whether incorporating the First Amendment changed the framework towards school immunization mandates. The pre-COVID-19 the consensus in the courts is that school immunization mandates do not have to include a religious exemption.[27] Several sources and arguments support that. Part of the picture is that, under current Supreme Court jurisprudence, primarily under *Employment Division v. Smith*, a law that is neutral on its face and generally applicable — like school vaccines mandates — does not have to provide a religious exemption.[28] But there is more to it. School vaccine mandates are different from adult mandates, because they not only protect the public health, they also affect children. Unlike adults, children do not make their own decisions concerning religion, and parental rights can be limited when their decisions put children at risk.[29] Because school mandates sit at the intersection of children's welfare — vaccines reduce the risks to children — and public health, they are on especially strong constitutional ground.[30]

In a case that long predated *Smith*, *Prince v. Massachusetts*, the Supreme Court allowed prosecution of a guardian — in that case, an aunt — for violating child labor laws by allowing her niece to distribute religious pamphlets.[31] The Court upheld the conviction in spite of the fact that the aunt relied both on her rights as a guardian (the parents left the child in her care) and on her right to free exercise of her religion. The Court reminded us that:

> Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.[32]

Addressing vaccines mandates for children directly, the Court also said:

> [A parent] cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.[33]

Prince v. Massachusetts had been cited in numerous cases upholding school immunization requirements since then, including, most recently, cases examining California's decision to repeal its non-medical exemption,[34] and cases examining New York's decision to repeal its religious exemption.[35]

In essence, parents opposing a school mandate are arguing not only for an unlimited right to not protect their child from disease, but also for a right to make their child's school less safe from disease for other children, their families, staff, and others. Courts have not been particularly sympathetic to that demand.

Adult mandates belong on a somewhat different footing. When it comes to adults, the tension is only between the subject's religious freedom and the public health, without the additional factors of a child's wellbeing and the lack of a child's autonomous choice. Even for adults, though, current jurisprudence does not require a religious exemption from a state mandate. Under *Smith* (and its progeny[36]), a state is not required to provide a religious exemption from a generally applicable, neutral on its face law that otherwise meets rational basis review; vaccine requirements generally fit that bill — they are general, neutral laws, applicable towards the public health.[37] A longstanding exception is that laws motivated by hostility to religion must meet strict scrutiny. This exception was created in a case in which an ordinance was clearly passed to target a specific church.[38] It has since applied to a case where the hostility found by the Supreme Court in the government's application of an anti-discrimination law was more subtle.[39] Vaccines mandates aim to prevent outbreaks, not to target a specific religion or religion generally, and hence, fall squarely within *Smith* territory. That is, strict scrutiny should not apply to them. But changes to the jurisprudence — for example, overruling *Smith* — would directly affect them.

Vaccine state mandates for adults, outside the employment context, were extremely rare in the past century. As a result, there is almost no litigation in this context. The question of whether such laws are generally applicable was, however, raised in the context of childhood school mandates. In a case challenging New York's decision to repeal the religious exemption to

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its school immunization mandate, plaintiffs pointed to specific comments by legislators to allege that the repeal has been motivated by hostility to religion. The case has been rejected by the New York Supreme Court (the first instance) and by the appellate division, which found that the circumstances, and the legislative statements, did not support a claim of hostility to religion. Instead, the courts found that the context of a large measles outbreak better explained the legislation.[40] We can likely expect more challenges alleging hostility. As discussed in part II, recent Supreme Court Cases raise questions about the continued viability of *Smith*.

II. Supreme Court Jurisprudence on Religious Freedom Since 2014

Since at least 2014, Supreme Court decisions indicate that a growing majority on the Court seeks to strengthen protections for the free exercise of religion. This reflects growing tensions around religious freedom in our society, and increasing questions about the level of accommodation appropriate for religious freedom.[41]

In 2014, in *Burwell v. Hobby Lobby,* the Supreme Court held that requiring privately held companies to cover certain contraceptives for their employees, when the owners alleged the contraceptives were in tension with their religious beliefs, violated the federal Religious Freedom Restoration Act (RFRA).[42] Applying the federal RFRA was not remarkable, but protecting religious beliefs of corporations was an extension of previous law. Although the majority was cautious to state that the decision was focused on the RFRA, not the First Amendment, it suggested a move towards strengthening protection of religious freedom.[43]

In 2018, in *Masterpiece Cakeshop,* a majority of the Court overturned the Colorado Civil Rights Commission's sanction against a baker who refused to bake a wedding cake for a same-sex couple.[44] Here, too, the Supreme Court did not overturn *Smith*, instead finding that the Commission's comments showed hostility to religion, and hence fell under the hostile treatment exception to that ruling.[45] These cases set the ground for an increasing emphasis on religious freedom by the Court.

When the COVID-19 pandemic arrived in early 2020, one type of measure states adopted was to limit gatherings.[46] Many of these measures addressed houses of worship — some to limit their activities, a few to expressly exempt them from limits.[47] The limits on houses of worship were tightened after several outbreaks linked to churches, in response to risk factors applicable to church: a gathering of many people close together for long time, vocalizing and singing — activities that increase risk.[48]

Unsurprisingly, some churches brought legal challenges to these limits. The challenges to COVID-19 measures that reached the Supreme Court have been handled under the so-called "shadow docket." The term shadow docket was coined by law professor William Baude.[49] It is not a term used by the Supreme Court, but scholars and observers use it to refer unofficially to the "significant volume of orders and summary decisions that the Court issues without full briefing and oral argument."[50] Decisions under the shadow docket typically include decisions involving procedural matters such as whether or not to grant a stay or an injunction.

Professor Baude has explained that because the Court does not always issue opinions or explanations in these kinds of cases, and, shadow docket opinions do not always specify how each justice voted, lawyers do not know what legal standards apply.[51] These features also make it unclear whether the decisions are consistent with prior precedent. Further, shadow docket decisions affect lower courts procedurally because they do not know how to interpret and apply those decisions in new situations, lacking a clear explanation.[52]

The first challenges by churches to COVID-19 measures were rejected by the Supreme Court in 5-4 decisions in the spring and summer of 2020.[53] The composition of the Supreme Court changed after Justice Ruth Bader Ginsburg died on Friday, September 18, 2020. Judge Amy Coney Barrett, who was quickly nominated by President Trump to succeed her, was confirmed in near-record time on October 23, 2020. The impact of the change was felt soon after. On November 25, 2020, with Justice Barrett now on board, the Supreme Court decided another shadow docket case, *Roman Catholic Diocese v. Cuomo*.[54] Five justices found that religious entities in New York were entitled to a preliminary injunction because New York had supposedly treated house of worship more severely than comparable institutions.[55] Chief Justice Roberts agreed with the majority on the merits, but would have dismissed the case as moot, since the state already changed the designation of the affected areas and the religious entities were no longer subject to the requirements. Justice Gorsuch wrote a concurrence arguing that the limits on houses of worship were extreme.

Some scholars saw *Roman Catholic Diocese* as a warning signal of a Court aggressively willing to undermine efforts to protect the public health for the benefit of religious groups. The Court was willing to intervene in spite of the expiration of the governor's

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order, and because the Court offered low deference to public health decisions, or to decisions based on local conditions.[56] Others saw it as an important counter to a trend of devaluing constitutional rights generally — or religious rights specifically — in the service of public health, and as an important reminder that the constitution stands even during a pandemic.[57]

The *Roman Catholic Diocese* decision and its (limited) progeny focused on situations where a state expressly treated houses of worship differently than other institutions. Scholars challenged the Court's treatment of other institutions, like stores, as similar to houses of Worship for this purpose.[58] But the shadow docket cases still examined rules specifically directed at houses of worship, and not the kind of generally applicable rules which fall under *Smith*.

The Supreme Court's general approach to religious freedom is, as yet, unclear. The Court has not expressly overturned *Smith*, and it has not provided a new standard. After *Fulton* and the shadow docket cases, is it inevitable that states will have to provide an exemption based on religion from a vaccine mandate?

In two subsequent decisions, the Court, in short statements, struck down other limits on indoor gatherings, with little explanation.[59] But the real questions arose when the Court addressed cases where the rule was, arguably, general, and potentially in *Smith* territory. On April 9, 2021, in *Tandon v. Newsom* (another shadow docket case), the Court struck down California's limit on people who can gather in homes — for any reason.[60] The majority's short opinion suggested that what doomed the restrictions — which applied to any in-home gatherings, whether to pray or not — were the exceptions given to secular business. In a strong dissent, Justice Kagan argued that this comparison was flawed, since businesses like hardware stores and hair salons, she pointed out, were not similar to in-home gatherings and that a restriction on all at-home gatherings was generally applicable.

On June 17, 2021, the Supreme Court decided a case that could have dramatically changed the *Smith* framework. In *Fulton v. City of Philadelphia*, the Third Circuit Court of Appeals, affirming a district court decision, found that Philadelphia did not discriminate against Catholic Social Services (CSS), a foster care agency, in terminating its contract because CSS refused, on religious grounds, to certify same-sex couples as foster parents.[61] CSS appealed, alleging violation of its freedom to exercise its religion under the First Amendment. The Supreme Court granted certiorari on three issues, and heard oral arguments on November 4, 2020.[62] One of these issues was "whether to reconsider the standard that the Court set in *Smith* for courts to use to evaluate Free Exercise Clause claims."[63]

The decision did not overturn *Smith*.[64] In brief, the Court unanimously reversed the Third Circuit's decision, but was split on the grounds for doing so.[65] A majority of six justices joined Chief Justice Roberts' opinion that the Court did not need to overrule *Smith*. It found that the City of Philadelphia's actions fell into an exception to *Smith* because, in offering a discretionary exception from the non-discrimination provision, the contract was not generally applicable. Thus, if such exceptions exist and are not offered to those with religious objections, the refusal to offer them is subject to strict scrutiny.[66]

In concurrences that read like dissents, Justices Alito and Gorsuch, joined by Justice Thomas, strongly disagreed with the Court's choice not to overturn *Smith*. Justice Alito, in a 78-page concurrence (the majority's opinion was 15 pages), argued that *Smith* was flawed from its inception, that it could not constitutionally stand, and that it was inoperable.[67] Justice Gorsuch's concurrence went even further, arguing that the majority's analysis could not stand on the facts of the case, and that by refusing to address *Smith*, the Court created uncertainty and put people concerned about their religious freedom in a tight spot.[68] Justice Gorsuch was quite willing to overturn *Smith* immediately and sort out the implications later.

Justice Barrett, joined by Justice Kavanaugh and in part by Justice Breyer, explained in a concurrence that while she was also inclined to see *Smith* as flawed, she was unwilling to overturn it at present because she did not see a viable alternative.[69] Justice Barrett (and Kavanaugh), unlike Justices Alito, Thomas, and Gorsuch, was not yet willing to move to a regime in which any law that affects religion is subject to strict scrutiny.

Fulton left quite a few questions unanswered, but several things appear clear. First, there is not currently a majority on the Supreme Court for completely over-

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turning *Smith,* if that means applying strict scrutiny to any law that affects religion. Second, there is broad support on the Supreme Court for stronger protection of the free exercise of religion than in the past. Third, the boundaries of *Smith* are, at present, uncertain. *Fulton* itself found *Smith* inapplicable because the provision argued by the City of Philadelphia to be generally applicable contained a discretionary exception. This caselaw raises the question whether any law that contains a secular exception that involves some discretion is not protected under *Smith*. If so, the exception is likely to swallow the rule since many laws have some kind of implied discretionary exception. In the alternative, if this exception is understood to be limited to situations where the law provides a broad, express discretionary exception — i.e., a provision that says specifically that an official has discretion to grant exceptions — the impact will be much less.

The analysis of school mandates below in Part III will address both interpretations. The combination of *Fulton* and the shadow docket cases may suggest that the Court will someday hold that any rule that has any secular exemption must also provide a religious exemption.[70] But it also may not. The COVID-19 shadow docket cases addressed instances where the claimant asserting religious motivation was a house of worship — clearly a religious actor, asking to engage in activities that are clearly religious. That may be different than identifying whether an individual is acting based on religious reasons.[71] Justice Barrett's concurrence in *Fulton* suggests that the distinction between religious entities and individuals is one of the concerns that led to her reluctance to overturn *Smith*.[72]

Finally, *Fulton* addressed religious freedom in a specific context — a context similar to that of *Masterpiece Cakeshop* — the tension between an anti-discrimination policy and free exercise of religion.[73] That tension is not the one in place with vaccine mandates. For that reason alone, it is an open question whether the analysis in *Fulton* will apply in that context.

III. Supreme Court Jurisprudence and Vaccines Mandates

The Supreme Court's general approach to religious freedom is, as yet, unclear. The Court has not expressly overturned *Smith*, and it has not provided a new standard. After *Fulton* and the shadow docket cases, is it inevitable that states will have to provide an exemption based on religion from a vaccine mandate? [74]

In answering that question, courts should separate the analysis for mandates requiring that children be vaccinated for school or daycare from other mandates usually directed at adults because there are meaningful differences between these two situations. First, childhood vaccine mandates long predated *Smith,* and were upheld in the face of free exercise claims even when the guiding Free Exercise precedents suggested that strict scrutiny should apply to laws touching on Free Exercise.[75] The rationale, as mentioned, is that there is a meaningful difference in regulating religion when it comes to adults as compared to children. The latter do not have the same autonomy to make religious choices, and there are already limits on what parents can do when it affects their child's welfare, even for religious reasons.[76] These limits are not exclusive to vaccines. States regulate, for example, the ability of parents to deny treatment to their child.[77] States impose compulsory education requirements, and child labor laws.[78] States criminalize some religiously motivated practices, for example, female genital mutilation.[79]

As of yet, there is no indication that the Supreme Court is willing to require states to provide religious exemptions from laws that affect a child's welfare. The hesitation to overturn *Smith* may be strongest when it addresses these type of laws — directly affecting the welfare of individual children who cannot yet make the choice in question. As mentioned above, one argument against the City of Philadelphia's actions in *Fulton* is the negative effect on the children in question. In a real sense, Fulton is a case where the free exercise claim of CSS is, arguably, in line with children's interests, whereas in school mandates cases, they clash.[80] Further, school mandates have even stronger justification. The child welfare laws described above directly regulate behavior to protect the welfare of an individual child from parental choices. Vaccine mandates, however, protect not only the child but the community as well in serving public health.[81] Unvaccinated children are at a higher risk of contracting a potentially fatal preventable disease — and transmitting it.[82] At the end of the day, when parents of unvaccinated children argue for a religious exemption (even assuming the claim is sincere) they are asserting not only the right *not* to protect their own children from dangerous, preventable diseases, but also the right to bring that risk to school and endanger other people's children and other people who are in the school to receive education. Even before *Smith*, the jurisprudence did not interpret religious freedom to allow someone to make a choice that imposes this double risk. If there is any context in which it is advisable to preserve *Smith*, it is where parental choice arguably undermines both the child's welfare and the safety of others. Arguably, religious freedom claims are weakest when invoked to jeopardize a child's physical welfare and the welfare of

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others — i.e., when the believer is making the choice for others and not just for him/herself.

Preserving *Smith* would exempt general school immunization mandates from strict scrutiny. But even if *Smith* were overruled, school vaccine mandates might survive strict scrutiny, given that in recent years courts have upheld immunization mandates without religious exemptions. For example, in California, courts have found that school mandates serve a compelling interest in children's and community health, and are narrowly tailored because there is no real alternative.[83]

The situation for state adult mandates is more complex. In that case, the tension is directly between the believers' choice for themselves and the public health. As a result, the Supreme Court, may decide to apply strict scrutiny to adult vaccine mandates, especially since broad adult mandates are not currently in use, and would be a new intrusion into autonomy. As I argue below, however, if *Smith's* application of rational basis review is preserved for a least some contexts, it would be very appropriate to preserve it for adult vaccines. Further, even if *Smith* did not apply to adult mandates, and they were subjected to strict scrutiny, carefully drafted adult mandates should withstand analysis even under that exacting standard.

There are three reasons *Smith* should continue to apply to adult mandates. First, adult vaccine mandates are generally applicable and neutral — they are usually put in place to preserve public health. Further, vaccines really are a public good, where broad compliance matters. The choice not to vaccinate affects not just the individual but the community, in two ways. The unvaccinated person may herself become a vector for the disease; she is not just vulnerable to infection, but also vulnerable to transmitting the disease to others. Mandated vaccines are different from the restrictions that applied to churches in the shadow docket cases, where, arguably, the main risk is to other congregation members who chose to take the risk by attending church. The unvaccinated person also undermines herd immunity by lowering vaccine rates. As discussed earlier, higher vaccine rates lead to fewer outbreaks by stopping the germ from spreading in the population. Unvaccinated individuals benefit from herd immunity, even as they undermine it, which is a form of free riding.

Smith is an especially good fit for situations where a general law is adopted because of the importance of broad-based compliance to protect the general safety and welfare, where the nature of the law makes it unlikely that it targets religion, and where non-compliance leads to either free riding or harm to others. That is exactly the situation for vaccine mandates.

Second, in the case of vaccine mandates, the risk of false claims of religion is high, and policing the claims is challenging. Most people who choose not to vaccinate are not acting out of religious convictions, but out of a belief rooted in misinformation regarding vaccine safety (or other related misinformation). Decades of experience in the school mandate context suggests that people lie about the reasons for the refusal.[84] Our jurisprudence — appropriately — makes it hard to police sincerity (for example, you cannot require a letter from a religious leader to prove sincerity, since that discriminates in favor of organized religions).[85] Although limited, several cases predating *Smith* suggested that in contexts where there is incentive to claim religious beliefs to obtain a secular benefit and it is a challenge to police sincerity, there are grounds not to allow a religious exemption. For example, the Supreme Court concluded just that in a case upholding a statute prohibiting the sale of certain commodities on Sunday against a free exercise challenge, saying

> To allow only people who rest on a day other than Sunday to keep their businesses open on that day might well provide these people with an economic advantage over their competitors who must remain closed on that day; this might cause the Sunday-observers to complain that their religions are being discriminated against. With this competitive advantage existing, there could well be the temptation for some, in order to keep their businesses open on Sunday, to assert that they have religious convictions which compel them to close their businesses on what had formerly been their least profitable day. This might make necessary a state-conducted inquiry into the sincerity of the individual's religious beliefs, a practice which a State might believe would itself run afoul of the spirit of constitutionally protected religious guarantees.[86]

The Court made a similar point in a case asking for a religious exemption from a statutory requirement that a social security number be provided by an applicant seeking to receive certain welfare benefits. The Court stated that

> we know of no case obligating the Government to tolerate a slight risk of "one or perhaps a few individuals" fraudulently obtaining benefits in order to satisfy a religious objection to a requirement designed to combat that very risk. Appellees may not use the Free Exercise Clause to demand Government benefits, but only on their own terms ...[87]

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Bowen is not as good a fit. Many vaccine mandates would not involve conditioning a government benefit on vaccine status, though some will. Vaccines mandates are also not designed to prevent fraud. But the risk of lies to obtain a religious objection does come up in the context of vaccine mandates, and the argument that the government does not have to take even a slight risk of fraud to avoid harm to an important interest would apply here as well.

Although there are no additional Supreme Court cases on point, several scholars have argued against religious exemptions because of concerns about policing them.[88] Opponents, however, point out that a sincerity inquiry is not inherently different from other legal inquiries into mental state or credibility, and that there are other contexts in which sincerity of religion has to be examined.[89] This is true, but context matters. In some areas, such as intentional torts, one's mental state is an inherent part of the legal norm.[90] But with regard to a vaccine mandate, the sincerity inquiry is only necessary if a religious exemption is constitutionally required — and the concern about assessing sincerity is a reasonable argument against requiring it. When the risk of abuse is high — as it is with vaccine mandates — that is not a good idea. A serious concern is that people will claim religious exemption out of "pure selfishness — to enjoy herd immunity without undergoing the costs and risks of immunization."[91] That very real risk — coupled with the challenges in enforcing religious exemptions — argues against applying strict scrutiny in this context. And the mere existence of a sincerity requirement in other contexts does not justify importing it into a context where it may not be required.

Finally, as discussed by Justice Alito in *Fulton,* in cases before *Sherbert*[92] — which set the pre-*Smith* standard of strict scrutiny — courts rejected claims for religious exemptions when "'[t]he conduct or actions [in question] invariably posed some substantial threat to public safety, peace or order.'"[93] Justice Alito points out that this approach fits his understanding of the scope of free exercise at the time the First Amendment was adopted, suggesting an originalist interpretation of the amendment.[94] The Supreme Court's shadow docket decisions are concerning, suggesting lack of emphasis on public safety, as set out by Parmet. Ideally, however, cases fully argued, without the urgency of the shadow docket, would give the Court a chance to examine the implications of and carve out appropriate exemptions, including a narrow public health exception.[95]

Compared to the extensive literature on school vaccine mandate, there is little empirical literature on adult mandates, maybe because they were so rare in the past. But as mentioned above, extensive literature shows that school mandates for children are correlated with fewer outbreaks.[96] Similarly, in the influenza context, studies show that workplace mandates reduce harms and deaths in hospitals.[97] This evidence suggests that vaccine mandates help prevent a real and substantial threat to public health (and safety), and therefore, it is appropriate not to apply strict scrutiny when there are no religious exemptions.

There is still the question of whether *Fulton* should be interpreted to apply strict scrutiny every time there is a secular exemption. Vaccine mandates — for children or adults — generally do (and should) offer medical exemptions when medical conditions make vaccination substantially more dangerous than average. One effect of mandates is to protect those who cannot safely be vaccinated by providing them with a protective ring of immunized people, who keep the disease away. As a result, those who cannot be safely vaccinated for medical reasons should be exempt from the requirement. Would the new Supreme Court apply strict scrutiny to vaccines mandates that offer a medical exemption?

The Supreme Court should not apply strict scrutiny if a vaccine mandate provides a medical exemption but not a religious exemption. First, medical exemptions are fundamentally different than other secular exemptions; they tend to apply to well defined medical conditions and require a doctor to determine their necessity. These exemptions involve medical discretion, but are not discretionary in the sense that the exemption in *Fulton* was. Medical exemptions involve professional discretion which, if misapplied, can lead to disciplinary charges (as happened to several doctors in California who wrote baseless medical exemptions).[98] This is different from the purely discretionary exemption mentioned in *Fulton.* A medical exemption is also different from a religious exemption, which is substantially harder to evaluate, as discussed.[99] Second, *Jacobson* implied, and is correctly understood to have decided, that medical exemptions are constitutionally required.[100] Constitutionally required medical exemptions are different than discretionary secular exemptions. In the latter case, the legislature does not choose to exempt categories of people for secular reasons, while failing to exempt those with religious objections. Instead, the legislature aims to preserve the logic of vaccine mandates.[101] The natural implication is that more finely tuned mandates that target specific populations may be held to strict scrutiny if they do not offer a religious exemption.[102]

The Supreme Court would have some ground to apply strict scrutiny to vaccine mandates for adults,

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though. An adult vaccine mandate requires an adult to undergo a medical procedure, albeit one that is minimally invasive and low risk. Nevertheless, it is still an imposition. Holding legislatures and agencies to a high standard in such cases may mean adult vaccines mandates are rarely imposed, and only when needed; in those circumstances, states should be able to meet strict scrutiny. Given the recent rulings on the shadow docket and *Tandon,* though, public health scholars, fear that courts will not give sufficient weight to public health in applying strict scrutiny, and will read the existence of any exemption as requiring a religious one, setting aside the judgment of public health officials.[103] We have a long line of cases upholding vaccines mandates separate from religious jurisprudence, quite a few of them predating *Smith.* We can hope that courts will follow some of the guidance from previous vaccine mandate cases, acknowledging the special features of this context.

Jurisprudence concerning school mandates treats the prevention of disease as a compelling state interest.[104] Mandates should only be adopted when they are needed to prevent diseases that can kill and harm (though the jurisprudence — rightly — allows them to be used preventively, to avoid the occurrence of a disease outbreak, and not just to stop an ongoing outbreak). Such an appropriate mandate should meet the compelling interest standard.

But an additional question will be whether the law is narrowly tailored. States can narrow these mandates in two ways; ideally, they will use a combination of both. First, states can impose the mandate only as needed. For example, in 2019, when New York City adopted an MMR mandate during a measles outbreak, it limited it to neighborhoods with high rates of cases.[105] In the context of COVID-19, for example, states could pass general laws empowering local boards to adopt a mandate if the locality becomes a hotspot or has an outbreak — somewhat like the law in *Jacobson*. Alternatively, states could adopt narrow mandates limited to specific professions or draw other careful, and constitutionally permissible, distinctions. For example, a state could adopt a mandate directed at healthcare providers or correction offices, groups working with at-risk populations that may not be able to choose to distance themselves. States could also offer broad general exemptions, to more narrowly tailor the mandates. While adopting any exemption may subject mandates to strict scrutiny, providing broad exemptions and applying the mandate only where necessary may fill the requirement that the mandate be narrowly tailored. In the context of COVID-19, for example, it may be justified to exempt people with evidence of prior COVID-19 infection from the mandate.

The second way a mandate can be made less restrictive is by imposing a relatively low penalty for violations. For example, a moderate fine may increase the mandate's chances of surviving. In his concurrence in *Roman Catholic Diocese*, Justice Gorsuch suggested that one of the reasons for the holding in *Jacobson* was the low penalty — a $5 fine, which was modest even for its time.[106] I think that is an incorrect reading of *Jacobson*; although the penalty at issue was a fine, the Court's reasoning relied on decisions upholding school mandates that imposed the higher penalty of keeping a child out of school.[107] But modest penalties are another way for states to choose the least restrictive means to achieve the goal of preventing disease.

Conclusion

The Court's latest religious jurisprudence creates substantial uncertainty about the correct standard to be applied to laws that impose burdens on religion. This article addresses one narrow — but important — subset of laws, vaccine mandates. It argues that there are grounds to apply a lower standard of review than strict scrutiny to vaccine mandates. Even if courts use that higher standard of review, however, the mandates should survive strict scrutiny, if they are narrowly tailored to foster the compelling governmental interest of saving millions of lives and avoiding substantial harm to many more individuals.

Note

Dorit R. Reiss's family owns stock in GSK, a vaccine manufacturer. Reiss also served as a volunteer (unpaid) advisor on Moderna's ethics advisory group.

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    The Revised Laws of that Commonwealth, chap. 75, § 137, provide that 'the board of health of a city or town if, in its opinion, it is necessary for the public health or safety shall require and enforce the vaccination and revaccination of all the inhabitants thereof and shall provide them with the means of free vaccination. Whoever, being over twenty-one years of age and not under guardianship, refuses or neglects to comply with such requirement shall forfeit five dollars.'
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2021); *V.D. v. State of New York*, 403 F. Supp. 3d 76 (E.D.N.Y. 2019).
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38. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531-32 (1993) ("[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice … [but a] law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.") In that case, a seemingly neutral ordinance prohibiting animal sacrifice was, evidence showed, enacted to target a church belonging to the religion of Santeria.
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70. An interpretation raised previously in a decision by Judge Alito, as he was then, on the Third Circuit in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 364-66 (3d Cir. 1999).
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72. *Prince v. Massachusetts,* 321 U.S. 158, 166-167 (1944).
73. On that tension, see M. S. Chavez, *supra* note 62; C. Figueroa, *"Fulton v. City of Philadelphia:* The Third Circuit's Bittersweet Advancement of LGBTQ+ Rights," *Tulane Journal of Law and Sexuality* 29 (2020): 51-58; one alternative concern by a scholar in relation to *Fulton* is that that the discussions of the case ignore the interests of the children in question; J. G. Dwyer, "The Child's Rights Forgotten, Again: Reframing Fulton v. City of Philadelphia," November 12, 2020, *available at* <https://ssrn.com/abstract=3737686> (last visited July 28, 2021).
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80. J. G. Dwyer, *supra* note 72.
81. *Prince,* 321 U.S. at 166-67.
82. Reiss, *supra* note 10, 222-223 and the footnotes there. Unvaccinated adults pose a similar risk, as discussed below, but the point here is that the combination of risk to the child and risk to others is what makes this especially strong.
83. *See Brown v. Smith,* 24 Cal. App. 5th 1135, 1146, 235 Cal. Rptr. 3d 218, 226 (Cal. Ct. App. 2018) (rejecting plaintiff's "complaint that Senate Bill No. 277 is not narrowly tailored to meet the state's interest, because there are less restrictive alternatives (such as alternative means (unspecified) of immunization, and quarantine in the event of an outbreak of disease)" because "compulsory immunization has long been recognized as the gold standard for preventing the spread of contagious diseases"); *Whitlow v. California,* 203 F. Supp. 3d 1079, 1089-1091 (S.D. Cal 2016); *Love v. State Department of Education,* 29 Cal. App. 5th 980, 996, 240 Cal. Rptr. 3d 861 (Cal. Ct. App. 2018). Note that strict scrutiny was not applied in New York: *F.F. v. State of New York,* 194 A.D.3d 80, slip. op. at 87 (3d Dep't 2021). Although the argument that a medical exemption is a secular exemption that requires a religious one may be applicable here as well, I left that discussion for under the adult mandates, to avoid repetition.
84. Reiss, "Thou Shalt Not Take the Name of the Lord Thy God in Vain," *supra* at 1570-1588.
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86. *Braunfeld v. Brown,* 366 U.S. 599, 608-09 (1961). *Braunfeld* was positively cited in a few other state cases challenging similar laws. *Marks Furs, Inc. v. City of Detroit,* 365 Mich. 108, 117, 112 N.W.2d 66, 70 (1961); *Miles-Lee Supply Co. v. Bellows,* 197 N.E. 2d 247, 250 (1964) *(Held for defendant on unrelated grounds.)*
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89. D. E. Steinberg, "Rejecting the Case against the Free Exercise Exemption: A Critical Assessment," *Boston University Law Review* 75, no. 2 (1995): 241-320, at 278.
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91. R. B. Collins, "Too Strict?" *First Amendment Law Review* 13, no. 1 (2014): 1-70.
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