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THE MOST-FAVORED RIGHT: COVID, THE SUPREME COURT, AND THE (NEW) FREE EXERCISE CLAUSE

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"[R]eligious liberty is fast becoming a disfavored right." — Justice Samuel Alito, November 12, 2020.[1]

"[A]s days gave way to weeks and weeks to months, this Court came to recognize that the Constitution is not to be put away in challenging times, and we stopped tolerating

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[1] Federalist Soc'y, *Address by Justice Samuel Alito [2020 NLC Live]*, YOUTUBE (Nov. 12, 2020) [https://perma.cc/4JDH-7B8G].

> discrimination against religious exercises." — Justice Neil Gorsuch, December 13, 2021.[2]

On Monday, May 4, 2020, the Supreme Court did something it had never done before: It heard oral argument by telephone. Traditionally, the Court was the one institution in Washington that refused to close—even when, as seems to happen nearly every winter, inclement weather shuts down the rest of the federal government. Among other things, the Court's obstinacy has led to some well-worn anecdotes about lawyers scheduled to argue a case on snow days. Lacking any means of reaching the Court's Capitol Hill building, counsel would often trek through snowdrifts in their formal attire to the nearest Justice's house just so that they could catch a ride downtown. (The real challenge, as it turns out, was getting a ride home afterwards.)[3]

But now, it wasn't weather that forced the Justices to postpone their regularly scheduled March and April argument sessions for the first time in over a century; it was the COVID-19 pandemic. Starting with a relatively straightforward dispute about whether the company "Booking.com" could legally trademark its rather generic corporate name (the Court would eventually say yes),[4] the Justices heard arguments and handed down decisions in argued cases from afar for the rest of the October 2019 Term and the entire October 2020 Term. They would not conduct business in person again for over a year—and would not physically return to the bench until October 2021.

As with everyone else, COVID necessitated changes to the Justices' longstanding habits and internal procedures. But far more importantly, it provoked an array of novel legal questions about just

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[2] Dr. A. v. Hochul, 142 S. Ct. 552, 559 (2021) (Gorsuch, J., dissenting).

[3] *See* Carter G. Phillips, *A Snow Story*, SUP. CT. HIST. SOC'Y (last visited Apr. 18, 2022) [https://perma.cc/EN77-YC6C].

[4] U.S. Pat. & Trademark Off. v. Booking.com B.V., 140 S. Ct. 2298 (2020).

how far local and state governments could go in responding to a global public health emergency. The Supreme Court had not addressed that topic in detail since a 1905 case upholding compulsory vaccinations in response to a smallpox epidemic.[5] Some of those questions arose in the context of COVID-inspired changes to local and state election laws. Others stemmed from prisoners challenging whether corrections facilities were doing enough to prevent the spread of the virus. But it was in cases involving religious liberty objections to state orders shuttering houses of worship or otherwise restricting public and private gatherings where the Court was the most active—relying on the so-called "shadow docket" to hand down decisions that rested on both procedural and substantive innovations.[6]

In the election cases, the Court shied away from broad, forward-looking pronouncements in the run-up to Election Day 2020.[7] After Election Day, it stayed out of those disputes entirely.[8] Ditto the prison cases, where the Court repeatedly refused to interfere with state and federal prisons even as conditions deteriorated during the

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[5] Jacobson v. Massachusetts, 197 U.S. 11 (1905).

[6] As Professor Baude (who coined the term) has explained, the "shadow docket" is a term that captures the obscurity of everything the Supreme Court does *besides* issuing signed decisions in argued cases—orders granting or denying certiorari; granting or denying applications for emergency relief; and so on. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 3–5 (2015); *see also* Stephen I. Vladeck, *The Supreme Court, 2018 Term – Essay: The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 125 (2019).

[7] Indeed, although the Court resolved more than a dozen applications for emergency relief in election-related cases during the summer and fall of 2020, none were accompanied by a majority opinion. *See, e.g.*, Dem. Nat'l Comm. v. Wis. St. Legis., 141 S. Ct. 28 (2020) (mem.). The only election-related dispute to produce an opinion of the Court all year involved the Wisconsin primary in April. *See* Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020) (per curiam).

[8] *See, e.g.*, Texas v. Pennsylvania, 141 S. Ct. 1230 (2020) (mem.) (denying Texas's motion for leave to file an original bill of complaint against four states seeking to contest their election results); *see also* Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732 (2021) (mem.) (denying certiorari, over three dissents, in case challenging Pennsylvania's counting of late-arriving mail-in ballots).

pandemic.[9] But where applicants raised claims grounded in religious liberty, the same five Justices consciously used the shadow docket to meaningfully alter the substantive scope of the Constitution. In the end, these efforts resulted in an understanding of the First Amendment under which far fewer government regulations will be allowed to burden religious practice—even unintentionally. Effecting such a monumental shift in constitutional doctrine through the shadow docket would be problematic enough in the abstract. But in the religion cases, specifically, the five-Justice majority went even further—willfully defying limits on the Court's power to issue emergency relief that the Justices themselves had long traced to the statute *authorizing* such relief, the All Writs Act.[10]

Perhaps most importantly, though, as opposed to the slow but steady shifts in both the volume and substance of other shadow docket rulings in recent years, the turnabout in religious liberty cases happened virtually overnight—and was made possible only by the unexpected death of Justice Ruth Bader Ginsburg in September 2020 and her replacement one month later by Justice Amy Coney Barrett. Barrett would not only write her first opinion on the Court in one of the COVID-related shadow docket religion cases;[11] her vote allowed opinions that four other Justices had expressed as dissents as late as July 2020 to become the law of the land within a month of her confirmation.[12]

Throughout the Supreme Court's October 2020 Term, it was on the shadow docket, and not the merits docket, where the impact of

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[9] *See, e.g.*, Valentine v. Collier, 141 S. Ct. 57 (2020) (mem.); Valentine v. Collier, 140 S. Ct. 1598 (2020) (mem.).

[10] 28 U.S.C. § 1651(a) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.").

[11] *See* S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 717 (2021) (Barrett, J., concurring in the partial grant of injunctive relief).

[12] *See* Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam).

Justice Barrett's confirmation was most visible. And that impact was reflected most visibly in her facilitation of a dramatic expansion in the Supreme Court's interpretation of the Constitution's Free Exercise Clause—a shift that, as subsequent decisions have made clear, was limited both to the procedural context of the Court's shadow docket and the substantive context of the Free Exercise Clause.

This paper sets out to both document and criticize these developments. Even to those who *support* the Court's new free exercise jurisprudence (or who believe it still doesn't go far enough to protect religious liberty), the unique procedural and substantive context in which it was enunciated should raise concerns about how the Justices are handling "emergencies"—and how they will do so going forward.

I. THE FREE EXERCISE OF RELIGION AND THE RISE AND FALL OF *SMITH*

The First Amendment to the U.S. Constitution protects religious liberty in two respects. First, the Establishment Clause prohibits Congress from enacting any law "respecting an establishment of religion"—a ban on having a state religion or government-endorsed preferences for any particular sect, or even for religion over irreligion.[13] Second, and just as importantly, the Free Exercise Clause bars laws that "prohibit the free exercise" of religion—prohibiting the government from interfering in religious practice.[14] In a society founded largely on the right of those of different faiths (or no faith) to live side-by-side in peace, these two guarantees, which have long been understood to apply to all government actors in the United

[13] U.S. CONST. amend. I.
[14] *Id.*

States (and not just Congress), prevent the government at once from doing either too much or too little to protect religion.[15]

But what is "too much," and what is "too little"? Consider zoning regulations and fire codes, for instance. Is it unconstitutional for local governments to enact rules that impact both where and how houses of worship can be constructed? What about religious employers? Can they be required to follow federal antidiscrimination laws when it comes to the hiring and firing of ministers? Of janitors? And can states refuse to allow religious schools to participate in educational grant programs out of concern that public tax dollars will end up subsidizing religious education? From the Founding onwards, questions like these have been left largely to the courts. And for decades, the Supreme Court's answers were—to put it mildly—inconsistent.

In its landmark 1990 ruling in *Employment Division v. Smith*,[16] the Court consciously attempted to bring some degree of clarity to its doctrine. In an opinion written by Justice Antonin Scalia, the majority held that laws that burden religious practice are not constitutionally suspect unless they single out religion. In other words, the fact that a local, state, or federal law imposed a burden on religious practice was not constitutionally problematic by itself. Otherwise, Justice Scalia wrote, courts would be in a difficult position because of America's pluralistic commitment to religious freedom. After all, if all laws burdening religious exercise were constitutionally suspect, that

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[15] *See generally* Zelman v. Simmons-Harris, 536 U.S. 639, 718 (2002) (Breyer, J., dissenting) ("These Clauses embody an understanding, reached in the 17th century after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens, permits those citizens to 'worship God in their own way.' . . . The Clauses reflect the Framers' vision of an American Nation free of the religious strife that had long plagued the nations of Europe." (citation omitted)). The Free Exercise Clause was incorporated against the states through the Due Process Clause of the Fourteenth Amendment in 1940. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940). And the Establishment Clause was incorporated against the states seven years later in Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947).

[16] Emp. Div. v. Smith, 494 U.S. 872 (1990).

"would open the prospect of constitutionally required exemptions from civic obligations of almost every conceivable kind," from "compulsory military service to the payment of taxes; to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and 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." Governments would have to walk on regulatory eggshells if every single law had to accommodate every single religious belief.[17]

In *Smith* itself, this conclusion led the Court to uphold Oregon's refusal to provide unemployment benefits to an individual who was fired for violating a state prohibition on the use of peyote, even though his use of the drug was part of a religious ritual. More generally, *Smith* was understood to establish that the Free Exercise Clause is not offended merely because a law impacts religious practice. Rather, the Constitution is violated only if that was the point.

From the day it was decided, *Smith* was controversial—and not just among conservatives. Indeed, it was the liberal Justices—Brennan, Marshall, and Blackmun—who dissented in *Smith*.[18] Because *Smith*'s deferential rule gave most of the power to democratic majorities in the political branches of government, the concern was that the rule Justice Scalia articulated would unduly burden minority religions. Into the 1990s, though, conservatives began to turn on *Smith*, as well—as more and more jurisdictions across the United States enacted laws that appeared to burden more traditional Christian beliefs, and as *Smith* therefore appeared to allow increasing inroads the domain of larger religious groups. As the debate shifted from laws requiring compulsory education up to a certain age and laws banning peyote to laws legalizing same-sex marriage and laws requiring insurance coverage for contraception,

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[17] *Id*. at 888–89.
[18] *Id*. at 907–21 (Blackmun, J., dissenting).

Smith was increasingly attacked as providing cover to progressive jurisdictions to impose their agenda on those whose religious beliefs aligned with more conservative social views.[19]

In 1993, while this shift was in its early stages, broad, bipartisan majorities of both the House and Senate passed, and President Clinton signed, the Religious Freedom Restoration Act (RFRA).[20] "RIFF-ra," as it's commonly referred to, represented a compromise between liberals and conservatives—and an overt attempt to undermine *Smith*. The new law did not purport to redefine the Free Exercise Clause; Congress can neither overrule the Supreme Court's constitutional interpretations nor amend the Constitution by statute. But it did attempt to require, as a matter of federal statute, that all laws burdening religious practice pass what's known as "strict scrutiny," *i.e.*, that they be narrowly tailored to achieve a compelling governmental interest.[21] (Under *Smith*, laws incidentally burdening religious practice need only a "rational basis" to survive.) Strict scrutiny, the saying goes, is often "strict in theory, but fatal in fact,"[22] because, relative to their goals, most laws of general applicability are necessarily based upon generalizations—and tend to therefore be overbroad and/or underinclusive. In practice, RFRA thus appeared to restore the law to what it was before *Smith*; that is, governments would need both special justifications and precisely calibrated rules for any laws that imposed even incidental burdens on religious practice. If the government couldn't adequately explain why a

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[19] *See, e.g.*, James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, 2019 WIS. L. REV. 689, 718–26.

[20] Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-1).

[21] *Id.* § 3, 107 Stat. at 1488–89.

[22] Fullilove v. Klutznick, 448 U.S. 448, 507 (1980) (Powell, J., concurring) (citing Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

church of a particular size had to have 15 fire exits rather than 10, then the fire code would be preempted by RFRA.[23]

In 1997, however, the Supreme Court held that RFRA exceeded Congress's constitutional power under the Fourteenth Amendment to pass laws that directly regulate local and state governments.[24] The decision in *City of Boerne v. Flores* did not affect the federal government—which is still bound by RFRA's more exacting standard today. And in response to that ruling, at least 21 state legislatures enacted some analogue to RFRA as a matter of state law, while the supreme courts of several other states derived similar principles from their state constitutions.[25] But that still left local and state governments in just under half of the states in which *Smith*'s deferential standard remained the governing baseline—in which any and all laws burdening religious practice would be upheld by courts so long as the law applied to secular and religious activities alike and its burden on religion was not intentional. Those states, the governments of which tended to be controlled by Democrats, would be the focal point for the cases arising out of the COVID pandemic.

Indeed, notwithstanding its bipartisan origins, by the end of the 1990s, hostility to *Smith* had increasingly become the bête noire of conservative commentators and jurists. Prominent scholars, jurists, and religious groups not only called for overruling the 1990 decision, but also identified numerous different ways to limit its applicability, whether fairly or not.[26] In that respect, religious liberty gradually appeared to provide conservatives with a cudgel against the growing scope of federal statutory and constitutional antidiscrimination rules—protecting the right of a cakeshop owner to refuse to bake a

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[23] For a compelling argument that the pre-*Smith* regime reflected more of a balancing approach than true "strict scrutiny," see Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 YALE L.J. F. 416, 428–33 (2016).

[24] City of Boerne v. Flores, 521 U.S. 507 (1997).

[25] *See* Lucien J. Dhooge, *The Impact of State Religious Freedom Restoration Acts: An Analysis of the Interpretive Case Law*, 52 WAKE FOREST L. REV. 585 (2017); Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466 (2010).

[26] Although the critiques are numerous, one of the first—and most significant—was Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1.

cake for a gay wedding; or the right of a non-publicly traded corporation to refuse to include contraceptive coverage in the health insurance that it provided to its employees.[27] Whether as cause or effect, disagreements about the scope of the Free Exercise Clause increasingly broke neatly along partisan political lines.

As this shift matured in the early 2000s, one important precedent on which conservatives relied was an opinion for the Philadelphia-based Third Circuit in 1999 written by then-Judge Samuel Alito. At issue in that case was a Newark Police Department policy prohibiting male officers from having beards unless justified on medical grounds. Two Sunni Muslim officers sued, challenging the no-beard policy on the ground that it interfered with the First Amendment insofar as they had a religious obligation to grow a beard. Writing for the Court of Appeals, Alito agreed—entirely because the policy included at least one secular exception. In his words, "the Department's decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny" (which it did not survive).[28] To Alito, it wasn't just the existence of a secular exception with no corresponding religious exception; it was that this dichotomy appeared to be *intentional*—which is why heightened scrutiny was appropriate even under *Smith*.

Under this view, which scholars have dubbed the "most-favored nation" theory of the Free Exercise Clause,[29] neutral laws that burden religious practice will still be constitutionally suspect if they include any secular exceptions without exceptions for "comparable" religious activities. And although Alito attempted to explain why this understanding was not inconsistent with *Smith* because of the

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[27] *See* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719 (2018); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

[28] Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999).

[29] *See, e.g.*, Laycock, *supra* note 26, at 50.

extent to which such a distinction was evidence of discriminatory intent, the practical impact would be to turn *Smith* on its head—since almost every government regulation, especially those of general applicability, has at least some exceptions. Speed limits, for instance, do not apply to properly signed police, fire, or other emergency vehicles in appropriate circumstances.

Judge Alito's *Fraternal Order of Police* opinion was not alone. Additional efforts to chip away at *Smith* followed, especially in the lower federal courts.[30] The Supreme Court moved more slowly. Although the Court handed down a series of opinions in the mid-2010s that at least outwardly favored religious liberty claims, its decisions often produced fractured decisions on narrow grounds—reflecting the lack of a majority for any broader reconsideration of *Smith*.[31]

But once Justice Anthony Kennedy retired in 2018, no Justice remained who had been on the Court when *Smith* was decided. Six months later, Kennedy's successor, Justice Brett Kavanaugh, joined Justices Clarence Thomas, Samuel Alito, and Neil Gorsuch in a brief opinion hinting that the Court should revisit *Smith* in an appropriate case.[32] And on February 24, 2020, the Court appeared to find such a case on its merits docket—agreeing to take up the appeal in *Fulton v. City of Philadelphia*.[33] At issue in *Fulton* was Philadelphia's 2018 decision to cut off foster-care referrals from Catholic Social Services after learning that the agency categorically refused to certify unmarried couples or same-sex married couples to be foster parents. Represented by the Becket Fund for Religious Liberty, both Catholic Social Services and two prospective foster parents sued, claiming

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[30] *See, e.g.*, Mitchell Cty. v. Zimmerman, 810 N.W.2d 1 (Iowa 2012); Blackhawk v. Pennsylvania, 381 F.3d 202 (3d Cir. 2004); Keeler v. Mayor of Cumberland, 940 F. Supp. 879, 885 (D. Md. 1996).

[31] *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).

[32] *See* Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (Alito, J., respecting the denial of certiorari).

[33] Fulton v. City of Philadelphia, 140 S. Ct. 1104 (2020) (mem.).

that Philadelphia's decision discriminated against them because of their religious beliefs. And one of the questions the *Fulton* appeal presented was whether, insofar as Philadelphia's decision did not violate *Smith*, *Smith* itself should be overruled.[34] In the ordinary course, the case would be scheduled for argument that fall and would produce a decision by the following summer.[35] And the pandemic came.

II. THE EARLY COVID CASES:

CHIEF JUSTICE ROBERTS TOES THE LINE

From the moment local and state officials began imposing restrictions tied to preventing the spread of COVID, those restrictions were challenged in court on a dizzying array of grounds. In addition to claims that governors were exceeding their unilateral regulatory authority under state law, federal constitutional challenges were brought by business owners challenging closure orders; by abortion providers challenging efforts in some states to further restrict abortions during the pandemic; and by religious groups challenging the impact of limits on in-person gatherings. Two groups, in particular—the Alliance Defending Freedom (ADF) and the Becket Fund for Religious Liberty—spearheaded challenges in states without their own RFRAs. The first of those cases to reach the Supreme Court involved the South Bay Pentecostal Church in Chula Vista, California, just south of San Diego.

At issue in what would become known as "*South Bay I*" was California's effort to relax its original COVID-based ban on indoor public gatherings, which, as modified, effectively limited attendance

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[34] Petition for a Writ of Certiorari at i, *Fulton*, 140 S. Ct. 1104 (No. 19-123), 2019 WL 3380520.

[35] After granting certiorari on February 24, 2020, the Supreme Court scheduled *Fulton* for a November 4 argument on August 19. *See* Docket, *Fulton*, 140 S. Ct. 1104 (No. 19-123) [https://perma.cc/QZ9M-PW6F].

at indoor religious services to the lesser of 25% of the building's capacity or 100 attendees. Supported by ADF, the church argued that, because it had a capacity of 600 congregants and usually had roughly 200–300 congregants in attendance, California's limits would impair religious exercise—because of its failure to likewise impair what the church described as "comparable" secular activities.[36] California responded by noting the numerous instances in which indoor religious services had been identified as events at which COVID had been spread to large audiences; flagging the different but also strict limits on indoor secular gatherings like concerts, movies, plays, and spectator sports; and stressing that it was attempting to relax the restrictions as quickly as public health experts deemed reasonable.[37]

On May 15, 2020, the District Court refused the church's request for a temporary restraining order—an emergency order that would have blocked the California restrictions at the very outset of the litigation.[38] One week later, the Ninth Circuit agreed to expedite the church's appeal but refused by a 2-1 vote to issue an injunction that would have halted California's ability to enforce its rules pending the result of that expedited appeal.[39] Then, without waiting for its appeal to be heard by the Ninth Circuit, the church instead sought emergency relief from Justice Elena Kagan in her capacity as Circuit Justice for the Ninth Circuit[40]—who, presumably anticipating its divisiveness, referred the church's application for emergency relief to the full Court.[41]

The lower courts had refused to put California's restrictions on hold while the church pursued its appeal. Thus, unlike so many of

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[36] *See* Emergency Application for Writ of Injunction, S. Bay United Pentecostal Church v. Newsom ("*South Bay I*"), 140 S. Ct. 1613 (2020) (No. 19A1044) [https://perma.cc/MA4E-9M5C].

[37] *See* Opposition of State Respondents, *South Bay I*, 140 S. Ct. 1613 (No. 19A1044) [https://perma.cc/2F9P-B52W].

[38] S. Bay United Pentecostal Church v. Newsom, No. 20-cv-865, 2020 WL 2814636 (S.D. Cal. May 15, 2020).

[39] S. Bay United Pentecostal Church v. Newsom, 959 F.3d 938 (9th Cir. 2020).

[40] *See* Emergency Application for a Writ of Injunction, *supra* note 36.

[41] *See South Bay I*, 140 S. Ct. at 1613.

the other major shadow docket rulings in recent years in which the party that lost below asked the Supreme Court for a "stay" to put an adverse lower-court ruling on hold while it was challenged on appeal,[42] there was no lower-court ruling for the Court to freeze in the church's case; courts can't issue a stay of nothing.

Instead, the church had to ask the Justices for a more aggressive form of emergency relief—an "emergency writ of injunction," through which the Justices themselves could pause California's rules while the church appealed the lower-court rulings. The problem for the church was that the distinction between an emergency stay and an emergency injunction is far more than semantic. Whereas a stay pending appeal is simply an appellate court pausing the effect of a lower court's ruling, an injunction pending appeal is an appellate court directly halting the defendant's ongoing conduct—and in circumstances in which the lower courts had refused to do so. Thus, a stay pending appeal restores the status quo that existed in practice prior to a ruling by a lower court; an injunction pending appeal disrupts that status quo when lower courts had not.

That's why, as Justice Scalia explained in 1986, an emergency injunction "demands a significantly higher justification" than a stay; appellate courts need a stronger case for restraining the *parties* than for restraining the *courts* from which those parties are appealing.[43] Put another way, as a normative matter, it ought to take more for a party to convince the Supreme Court that it should reach out to block state or federal officials from acting when multiple lower courts have refused than to convince the Court that it should undo the effects of a ruling by the lower courts. In the latter scenario, the Supreme Court exercises supervisory authority over inferior tribunals; in the former, it does not.

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[42] On the broader uptick in significant shadow docket rulings even *before* the COVID pandemic, see Vladeck, *supra* note 6.

[43] Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm'n, 479 U.S. 1312, 1313 (Scalia, Circuit Justice 1986).

Emergency injunctions do not just rest on distinct justifications from emergency stays; the Court's *formal* authority to issue them comes from an entirely different statute—the All Writs Act, which was part of the original Judiciary Act of 1789.[44] That distinction matters because the Court's formal power under that ancient law is far more limited. Unless the party seeking an emergency injunction pending appeal can show that their right to relief is "indisputably clear," the Justices lack the authority to issue such an order.[45] (A stay, in contrast, requires the applicant to have only a "reasonable likelihood of success on the merits," and so can be based on new law as well as old.) Indeed, when South Bay's application reached the Court in May 2020, the Court had not issued an emergency injunction in *any* case since a Hawaii election dispute in 2015[46]—one of only four injunctions that the Court had issued since Chief Justice Roberts's tenure began in September 2005.[47]

The technical but meaningful distinction between a stay and an injunction loomed large when, over four dissents, the Justices turned away the South Bay Pentecostal Church's request in a summary, one-sentence order filed on May 29, 2020.[48] Although there was no

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[44] 28 U.S.C. § 1651(a) (2018).

[45] *Id*. Although there is an argument that the "indisputably clear" standard may be tied less to the Court's formal statutory authority under the All Writs Act than to the practical limits on the power of *individual* Circuit Justices to issue such relief acting by themselves, the full Court has embraced Justice Scalia's understanding. *See* Respect Maine PAC v. McKee, 562 U.S. 996, 996 (2010) (mem.).

What's more, no Justice has argued that Justice Scalia's understanding of the limits on emergency injunctions are *inapplicable* when the Court sits en banc—and seven of the Justices (all except Justices Gorsuch and Barrett) have written or joined separate opinions respecting en banc orders that invoked the "indisputably clear" understanding as the governing one. *See, e.g.*, Chrysafis v. Marks, 141 S. Ct. 2482, 2483 (2021) (Breyer, J., dissenting); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2609 (2020) (Alito, J., dissenting); S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring); Wheaton Coll. v. Burwell, 573 U.S. 958, 961 (2014) (Sotomayor, J., dissenting).

[46] *See* Akina v. Hawaii, 577 U.S. 1024 (2015) (mem.).

[47] The other three are *Zubik v. Burwell*, 576 U.S. 1049 (2015) (mem.); *Wheaton College v. Burwell*, 573 U.S. 958 (2014) (mem.); and *Holt v. Hobbs*, 571 U.S. 1019 (2013) (mem.). Of note, the injunction in *Zubik* was conditional. *See* 576 U.S. at 1049.

[48] South Bay I, 140 S. Ct. at 1613–14 (Roberts, C.J., concurring).

majority opinion to explain the 5-4 ruling, Chief Justice Roberts (who was surely the decisive vote) wrote a solo opinion concurring in the denial of relief that rested on this exact procedural point—that the Court applies a stricter standard for emergency injunctive relief than it does for a stay pending appeal. In his words, "[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement," all the more so "while local officials are actively shaping their response to changing facts on the ground." Invoking the Court's high standard for an emergency injunction, Chief Justice Roberts concluded that "[t]he notion that it is 'indisputably clear' that the Government's limitations are unconstitutional seems quite improbable."[49] Over a dissent by Justice Kavanaugh (that was joined by Justices Thomas and Gorsuch),[50] California's restrictions were allowed to remain in place—for the time being. Indeed, here was one of the few contexts in which Chief Justice Roberts seemed poised to regularly side with the Court's more progressive Justices—and thereby form a majority.

History repeated itself two months later, when Alliance Defending Freedom, now on behalf of Calvary Chapel Dayton Valley (a small church about 45 minutes southeast of Reno), sued to challenge Nevada's restrictions on indoor gatherings. The specific problem ADF identified was that, true to form, Nevada exempted casinos from its rules but not houses of worship.[51] Thus, even if California's indoor gathering rules could have been justified on the ground that small businesses can't easily be analogized to large churches, the same didn't hold for casinos—a non-essential indoor

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[49] *Id*. at 1614.

[50] *Id*. at 1614–15 (Kavanaugh, J., dissenting). Justice Alito did not join Justice Kavanaugh's dissent, but noted that he would have granted the application. *Id*. at 1613.

[51] Office of Governor Steve Sisolak, Declaration of Emergency Directive 021 – Phase Two Reopening Plan (May 28, 2020) [https://perma.cc/AJW9-4C25]; Office of Governor Steve Sisolak, Declaration of Emergency Directive 026 (June 29, 2020) [https://perma.cc/JVM3-TTUL].

business in which large numbers of people tend to congregate for extended periods of time. Once again, the lower courts refused to block the state restrictions.[52] Once again, the church applied to the Supreme Court for a writ of injunction.[53] And once again, by the same 5-4 vote, the Justices demurred.[54]

In his dissent in the Nevada case, Justice Kavanaugh attempted to explain why, even if the California church did not deserve relief in May, the Nevada church did in July.[55] A bit more acerbically, Justice Alito, who wrote his own dissenting opinion, complained that "[t]he Constitution guarantees the free exercise of religion. It says nothing about the freedom to play craps or blackjack, to feed tokens into a slot machine, or to engage in any other game of chance."[56] To similar effect, Justice Gorsuch explained that "there is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel."[57] None of the dissenting opinions, however, specifically argued that Calvary Chapel had met the very high standard for an emergency injunction pending appeal. Without the vote of Chief Justice Roberts (who, unlike in *South Bay I*, did not write separately in the Nevada case), that argument was, quite clearly, a non-starter.[58]

The decisions in *South Bay I* and *Calvary Chapel* seemed to send a clear message about the Court's unwillingness to issue emergency injunctions against state and local COVID restrictions on religious liberty grounds. At least, they did until September 18, 2020, when 87-year-old Justice Ruth Bader Ginsburg lost her battle with pancreatic

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[52] *See* Calvary Chapel Dayton Valley v. Sisolak, No. 20-16169, 2020 WL 4274901 (9th Cir. July 2, 2020); Calvary Chapel Dayton Valley v. Sisolak, No. 3:20-cv-303, 2020 WL 4260438 (D. Nev. June 11, 2020).

[53] *See* Emergency Application for an Injunction Pending Appellate Review, Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020) (No. 19A1070) [https://perma.cc/5YZ3-DSZA].

[54] *Calvary Chapel*, 140 S. Ct. 2603.

[55] *Id*. at 2609–15 (Kavanaugh, J., dissenting).

[56] *Id*. at 2603–04 (Alito, J., dissenting).

[57] *Id*. at 2609 (Gorsuch, J., dissenting).

[58] *See* LINDA GREENHOUSE, JUSTICE ON THE BRINK 35–36 (2021) (summarizing the implications).

cancer. Only the third Justice to die in office since 1954, Ginsburg's death, among many other things, left what had been a stable 5-4 majority against emergency relief in the COVID religious liberty cases as a 4-4 deadlock (under which the lower courts' rulings—including denials of emergency relief—would automatically be left intact).

Even though the presidential election was less than six weeks away, President Trump and the Republican-controlled Senate hustled to name and confirm Ginsburg's successor—48-year-old Seventh Circuit Judge and former Notre Dame law professor Amy Coney Barrett. Barrett, a devout Catholic who had written extensively about her faith before taking the bench, was confirmed by the Senate on October 26, and took office the next day—one week before the presidential election. Although she would join her colleagues on the phone for oral arguments in regularly scheduled merits cases the following Monday, her first publicly discernible vote would come when religious liberty challenges to COVID restrictions returned to the shadow docket—as they would just before Thanksgiving. And it would be decisive.

III. JUSTICE BARRETT'S IMPACT: *ROMAN CATHOLIC DIOCESE*

Just three weeks after Justice Ginsburg passed away, the Roman Catholic Diocese of Brooklyn and the Agudath Israel Synagogue filed separate lawsuits challenging New York's complicated and ever-evolving COVID restrictions—which imposed varying attendance limits at houses of worship depending upon the recent prevalence of new cases in surrounding neighborhoods. Everyone agreed that the New York restrictions treated houses of worship differently. The complication was that, in most cases, it treated them more *favorably* than "non-essential" secular businesses. For instance, in so-called "red zones" (those with the highest rates of infection), houses of worship could hold no more than 25% of their maximum occupancy

or 10 people, whichever was fewer.[59] In contrast, the order simply *closed* non-essential secular businesses in those areas ("essential" businesses were allowed to remain open, albeit with their own restrictions). The Diocese and the Synagogue both claimed that the order thereby singled out religious practice—in violation of the Free Exercise Clause.[60]

On October 9, 2020, Brooklyn-based District Judge Eric Komitee—a Trump appointee—refused the Diocese's request for a temporary restraining order. Citing Chief Justice Roberts's concurring opinion in *South Bay I*, Judge Komitee wrote that "the government is afforded wide latitude in managing the spread of deadly diseases under the Supreme Court's precedent."[61] On the same day, a different district judge likewise denied Agudath Israel's request for a temporary restraining order on similar grounds.[62] After a bit of procedural wrangling in the district court, both parties challenged those decisions in the Second Circuit.

On November 9, the Court of Appeals agreed to expedite the merits of both appeals but declined to enjoin New York's restrictions pending those appeals. Also citing Chief Justice Roberts's concurrence in *South Bay I*, the court explained that "COVID-19 restrictions that treat places of worship on a par with or more favorably than comparable secular gatherings do not run afoul of the Free Exercise Clause."[63] Thus, "[t]he fact that theaters, casinos, and gyms are more restricted than places of worship" was not a sufficient basis for blocking the restrictions pending appeal.[64] Judge Michael

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[59] *See* Office of Governor Andrew M. Cuomo, Exec. Order No. 202.68 Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency (Oct. 6, 2020) [https://perma.cc/2R5S-N7KM].

[60] *See infra* text accompanying nn.62-66.

[61] Roman Catholic Diocese of Brooklyn v. Cuomo, 493 F. Supp. 3d 168, 171 (E.D.N.Y. 2020).

[62] *See* Agudath Israel of Am. v. Hochul, No. 20-cv-04834, 2021 WL 5771841, at *1 (E.D.N.Y. Dec. 6, 2021).

[63] Roman Catholic Diocese of Brooklyn v. Cuomo, 980 F.3d 222, 227 (2d Cir. 2020) (per curiam).

[64] *Id*.

Park, another Trump appointee, dissented from the Second Circuit's ruling. His objection focused not on the distinction between houses of worship and non-essential secular businesses, but on the distinction between those religious institutions and essential secular businesses. Because the New York restrictions were more restrictive of houses of worship in red zones than essential secular businesses, he argued, they ran afoul of the Free Exercise Clause.[65]

Three days later, the Diocese applied for an emergency injunction pending appeal from Justice Breyer (temporarily serving as the Circuit Justice for the Second Circuit, a position previously held by Justice Ginsburg). The application (which would shortly be joined by a similar application from the Synagogue) picked up on Judge Park's dissent. Its central claim was that, compared to at least some (essential) secular businesses, New York was treating houses of worship unfavorably.[66] In its response filed on November 18, New York explained that, already, the decrease in cases in the relevant neighborhoods had automatically loosened the restrictions on churches operated by the Roman Catholic Diocese.[67] Indeed, as of Friday, November 20, none of the Diocese's churches remained in red or orange zones—such that none of them were subjected to any gathering-size limits. The Diocese's challenge therefore appeared to be prudentially (if not jurisdictionally) moot; the churches were no longer subject to the very restrictions that they were challenging. Or, at the very least, the Diocese's request for an emergency injunction pending appeal seemed, at best, unnecessary.[68] The Diocese responded that the New York restrictions were a "Sword of

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[65] *Id*. at 228–31 (Park, J., dissenting).

[66] Emergency Application for Writ of Injunction, Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam) (No. 20A87) [https://perma.cc/78KJ-YNRM].

[67] Opposition to Application for Writ of Injunction, *Roman Catholic Diocese*, 141 S. Ct. 63 (No. 20A87) [https://perma.cc/325G-ZFYA].

[68] *See* Letter of Respondent, *Roman Catholic Diocese*, 141 S. Ct. 63 (No. 20A87), [https://perma.cc/G2HB-5U4X].

Damocles" over its head because, depending upon conditions on the ground, they could go back into effect at any time.[69]

Although the Diocese had urged the Court to act by Friday, November 20, no order came down through the close of business on Wednesday, November 25—the day before Thanksgiving. Then, four minutes before midnight,[70] the Court, with no public warning, handed down its ruling. With Justice Barrett silently joining the four dissenters from *South Bay I* and *Calvary Chapel*, the new majority voted 5-4 to block New York's restrictions—never mind that those restrictions were not even then in effect against the Diocese.[71]

The majority also joined together to write a short, unsigned "per curiam" ("for the Court") opinion purporting to explain its rationale. But even though the Court's precedents for emergency injunctions pending appeal were well-settled (and, as noted above, required a showing that the applicant's entitlement to relief was "indisputably clear"), the majority opinion instead analyzed the Diocese's claims under a different rubric. Its analysis focused entirely on the traditional (and far weaker) standard that trial courts use to decide whether to issue a preliminary injunction at the outset of a new lawsuit. The majority never explained why that was the relevant approach. Instead, all that the cryptic opinion analyzed was whether the Diocese was likely to succeed on the merits—and whether it would be irreparably harmed if the restrictions were to remain in place while its legal challenge worked its way through the courts. Echoing Judge Park, the majority said "yes" on both counts.[72]

The irreparable harm analysis was especially ironic given that the Diocese's churches were no longer subject to any capacity

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[69] Reply Brief in Support of Emergency Application for Writ of Injunction, *Roman Catholic Diocese*, 141 S. Ct. 63 (No. 20A87) [https://perma.cc/4E2H-5M83].

[70] There are no timestamps on Supreme Court orders. Instead, Supreme Court reporters have taken to using the time at which they receive rulings from the Court's Public Information Office via e-mail. *See, e.g.*, Greg Stohr (@GregStohr), TWITTER (Feb. 6, 2021, 1:02 p.m.) [https://perma.cc/3TEF-F7LD].

[71] Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam).

[72] *Id*. at 66–69.

restrictions. The Supreme Court majority responded, though, by invoking the hypothetical specter that they might be in the future: "The Governor regularly changes the classification of particular areas without prior notice. If that occurs again, the reclassification will almost certainly bar individuals in the affected area from attending services before judicial relief can be obtained." [73] The Justices had long interpreted the Constitution to bar federal courts from remedying future injuries unless they were "certainly impending."[74] But here, the new conservative majority was not only willing to provide a remedy for a hypothetical future remedy; it voted to provide the extraordinary remedy of an emergency injunction pending appeal. And all of this was only possible because of Justice Barrett, whose first publicly revealed vote came on her 30th day on the Court, and whose first signed opinion just over two months later also came in a COVID religious liberty dispute on the shadow docket.

Although the majority opinion in *Roman Catholic Diocese* focused its analysis on the debatable claim that New York was singling out religious worship for especially discriminatory treatment, Justice Gorsuch and Justice Kavanaugh each wrote separately to suggest an even broader objection to New York's restrictions. In their concurring opinions, both Justices nodded more aggressively toward the "most-favored nation" view of the Free Exercise Clause. As Justice Kavanaugh put it, the central problem with the New York restrictions was that, "[i]n a red zone, for example, a church or synagogue must adhere to a 10-person attendance cap, while a grocery store, pet store, or big-box store down the street does not face the same restriction."[75] The deferential standard articulated in *Smith* was nowhere to be seen.

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[73] *Id*. at 68.
[74] *See, e.g.*, Clapper v. Amnesty Int'l USA, 568 U.S. 398, 410–14 (2013).
[75] *Roman Catholic Diocese*, 141 S. Ct. at 73 (Kavanaugh, J., concurring).

The three more liberal Justices dissented. Not only did they disagree with the majority's analysis of the Free Exercise Clause issue, but they also argued, in detail, that injunctive relief was inappropriate given that the Diocese's churches were no longer subject to any capacity restrictions. As Justices Breyer and Sotomayor each noted in separate dissenting opinions (both of which were joined by Justice Kagan), it was thus pointless to issue an emergency injunction (and impossible to meet the standard for one) because the relief the majority had voted to issue would have no direct effect.[76]

It was on this last point that Chief Justice Roberts focused his separate dissent—only the second time in his fifteen years on the Court in which he wrote a dissenting opinion that no other Justice joined. [77] Noting that he agreed with Justice Kavanaugh's concurrence that New York's rules were distinguishable from (and more problematic than) the ones that he had voted not to block in the California and Nevada cases, the Chief Justice nevertheless focused, once again, on procedure. Even though he apparently had the same problems on the merits with the New York rules as his colleagues in the majority, he was not prepared to use the rare remedy of an emergency injunction—and the shadow docket, more generally—to address them. Just as in his concurring opinion in *South Bay I*, the Chief Justice played up the proper limits on the Court's power in cases seeking emergency relief.[78] The only difference was that, with Justice Barrett having replaced Justice Ginsburg, his view was now in the minority. The Court's first issuance of an emergency injunction in five years was also a harbinger of things to come.

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[76] *Id*. at 76–78 (Breyer, J., dissenting); *id*. at 78–81 (Sotomayor, J., dissenting).

[77] *See also* United States v. Windsor, 570 U.S. 744, 775 (2013) (Roberts, C.J., dissenting).

[78] *Roman Catholic Diocese*, 141 S. Ct. at 75 (Roberts, C.J., dissenting) ("As things now stand, however, the applicants have not demonstrated their entitlement to 'the extraordinary remedy of injunction.' An order telling the Governor not to do what he's not doing fails to meet that stringent standard" (quoting Nken v. Holder, 556 U.S. 418, 428 (2009))).

IV. AFTER *ROMAN CATHOLIC DIOCESE*: THE INSCRUTABLE ROAD TO *SOUTH BAY II*

At the same time as it issued the opinion and order in *Roman Catholic Diocese*, the Court issued another injunction, also by a 5-4 vote, in the *Agudath Israel* case—with both the majority and the dissenters reiterating their positions from *Roman Catholic Diocese*.[79] At least for New York, the message had been sent. But not long after those rulings, the Court's new majority made clear that its First Amendment concerns with capacity restrictions on religious gatherings were not limited to New York. What's more, rather than writing new majority opinions to carefully explicate the point, they did so by inventing a new form of summary, unexplained shadow-docket procedure.

In *Harvest Rock Church v. Newsom*, for instance, another California church (this one in Pasadena) challenged the state's evolving capacity restrictions and asked the Supreme Court for an emergency injunction after lower courts—ruling before *Roman Catholic Diocese* and relying on *South Bay I*—refused to provide one. Unlike in the New York cases, the Justices declined to issue such relief. Instead, they took the church's application for an emergency injunction and decided to treat it as something else—as a petition for a writ of certiorari "before judgment." Unlike an ordinary petition for a writ of certiorari (the procedural vehicle through which most appeals come to the Supreme Court), a petition for certiorari before judgment is intended for the rare circumstances in which the Justices want to take up the merits of truly important appeals as soon as they are filed in an intermediate appeals court—before that court has even ruled. To that end, the Supreme Court's own rules stress that such relief is available only when "the case is of such imperative public

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[79] *Agudath Israel*, 141 S. Ct. 889.

importance as to justify deviation from normal appellate practice and to require immediate determination in this Court."[80]

But whereas "cert. before judgment" has historically been a means of expediting merits consideration in such important and time-sensitive disputes, here, the Justices combined it with another procedural device—what's known colloquially as a "GVR" order.[81]Such an order summarily Grants the petition, Vacates the district court's order denying injunctive relief, and Remands the case for reconsideration in light of a recent development (in this instance, in light of the ruling in *Roman Catholic Diocese*). In other words, in one (rather long) sentence, the Justices took the church's application for an emergency injunction, turned it into a petition for cert. before judgment, wiped away the district court's denial of a preliminary injunction, and commanded the lower courts to reevaluate whether Harvest Rock Church was entitled to such relief in light of the Supreme Court's cryptic (and New York-specific) analysis in *Roman Catholic Diocese*.[82] Without issuing any relief directly or agreeing to take up the church's appeal, the Court effectively made the district court take a do-over—hinting, without actually saying, that *Roman Catholic Diocese* might require a different result.

Perhaps because no Justice publicly dissented, the order in *Harvest Rock Church* went largely unnoticed. But it's worth pausing for a moment to reflect on both how remarkable and how unprecedented the Justices' unorthodox procedural move truly was. Recall that the 5-4 majority in *Roman Catholic Diocese* had focused on the uniquely problematic nature of New York's restrictions—treating houses of worship in "red" and "orange" zones more harshly than "essential" secular businesses. The separate concurrences by Justices Gorsuch and Kavanaugh, and the dissent by Chief Justice Roberts, had each stressed why New York's approach was worse than

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[80] S. CT. R. 11.
[81] *See, e.g.*, Lawrence v. Chater, 516 U.S. 163, 165–68 (1996) (per curiam).
[82] Harvest Rock Church, Inc. v. Newsom, 141 S. Ct. 889 (2020) (mem.).

California's.[83] And yet, eight days after the *Roman Catholic Diocese* ruling, the Court used this novel procedural device to wipe away a district court ruling that had simply refused to block the California restrictions. In the process, the Justices effectively ordered the lower courts to try to sort out for themselves how a cryptic shadow docket ruling about New York's COVID restrictions could and should apply to California's.[84]

The novelty of the procedural device aside, the substance was problematic in at least two respects: First, even though the May 2020 Court (with Justice Ginsburg) had already refused to block California's restrictions, the December 2020 Court (with Justice Barrett) was now strongly hinting that it was ready to reverse itself, once again underscoring the newest Justice's immediate and dispositive impact. Second, and just as importantly, it implied that a ruling that had been focused on New York ought to be given effect elsewhere—even though the Court had insisted for decades that summary rulings, even those accompanied by short opinions, should be given far less precedential effect than merits rulings.[85] *Roman Catholic Diocese* had changed the law in New York; *Harvest Rock Church* implied (but did not actually *say*) that it had thereby meant to change the law nationwide.

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[83] *See supra* text accompanying notes 70–77.

[84] Given the Justices' routine insistence in *other* contexts on not reaching or deciding issues not raised by the parties—including refusing to grant relief that no party has sought—the willingness on the shadow docket to transmogrify requests for one form of relief into other, novel procedural devices seems inconsistent at best. *Cf.* Richard J. Lazarus, *Advocacy History in the Supreme Court*, 2020 SUP. CT. REV. 423.

[85] *See, e.g.*, Lunding v. N.Y. Tax Appeals Tribunal, 522 U.S. 287, 307 (1998) ("Although we have noted that '[o]ur summary dismissals are . . . to be taken as rulings on the merits in the sense that they rejected the specific challenges presented . . . and left undisturbed the judgment appealed from,' we have also explained that they do not 'have the same precedential value . . . as does an opinion of this Court *after briefing and oral argument on the merits*.'" (Alteration in original; citation omitted; emphasis added)).

Nor were the Justices focused only on the nation's two largest blue states. On December 15, the Court issued the same kind of novel relief it had fashioned in the *Harvest Rock Church* case in two different disputes arising from New Jersey and Colorado. In both cases, as it had in *Harvest Rock Church*, the Court took applications for injunctions, turned them into petitions for cert. before judgment, and used that to justify wiping the district court rulings off the books and remanding for reconsideration.[86]

For non-Court watchers, the subtext of these machinations may well be lost in their procedural subtlety. Indeed, that may well have been the point. By their nature, these unsigned one-sentence orders did not mean that the Court was compelling the lower courts to block those states' COVID restrictions to the extent that they impacted religious worship. But they meant more than nothing. At bottom, they represented a crude but significant signal to lower courts, state officials, and religious groups that the Justices believed that something more significant had happened to the Free Exercise Clause in *Roman Catholic Diocese* than what the seven-page majority opinion actually said—that something fundamental about *Smith* had changed. A less charitable reading of these orders would be that the Court *wanted* the polices at issue to be blocked, but thought that remanding to the lower courts with such instructions would accomplish the same result—while spending less of the Court's capital and more generally receiving less scrutiny.

The Colorado case, especially, seemed to reflect this understanding.[87] There, the Court took these steps even though, citing the *Roman Catholic Diocese* ruling, Colorado Governor Jared Polis had already lifted the state's capacity limits for houses of worship (as Justice Kagan pointed out in a short but sharply worded dissent).[88] For the moment, all that the Justices in the majority were

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[86] *See* Robinson v. Murphy, 141 S. Ct. 972 (2020) (mem.); High Plains Harvest Church v. Polis, 141 S. Ct. 527 (2020) (mem.).

[87] *See High Plains Harvest Church*, 141 S. Ct. 527.

[88] *Id.* at 527 (Kagan, J., dissenting).

demanding was reconsideration. For lower-court judges either unable or unwilling to see the writing on the wall, nothing in the Court's December 2020 orders required a different result. This was the trap of the shadow docket: The five Justices in the majority in *Roman Catholic Diocese* were clearly up to something more than slapping down New York Governor Andrew Cuomo, but because they had not further explained their views or intentions, it was left to lower courts to divine them.

Thus, in both the *South Bay* and *Harvest Rock* cases, the Ninth Circuit dutifully returned the disputes to the district courts. There, not only did California continue to defend its restrictions, but it introduced significant evidence—including detailed expert reports and scientific testimony—supporting the distinctions that its revised restrictions drew. Among other things, California introduced data tending to suggest that indoor religious services had become a significant vector for the spread of COVID across the state. As California argued, that evidence justified more aggressive measures in those areas with the highest positivity rates, including outright bans on indoor religious services in some areas, and a 25% capacity restriction and ban on singing or chanting (because of the documented risk of spread those activities presented) in others.[89]

Based in large part on this expert testimony, separate district courts concluded that the revised California restrictions didn't suffer from the same infirmities as the ones the Supreme Court identified in *Roman Catholic Diocese*.[90] Following the district courts' lead, the Ninth Circuit refused to enjoin most of the restrictions pending the churches' appeals (the Court of Appeals *did* enjoin 100- and 200-

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[89] *See generally* S. Bay United Pentecostal Church v. Newsom, 508 F. Supp. 3d 756 (S.D. Cal. 2020).

[90] *See id.*; *see also* Harvest Rock Church, Inc. v. Newsom, 982 F.3d 1240, 1240 (9th Cir. 2020) (O'Scannlain, J., concurring in part and dissenting in part) (summarizing the other district court holding).

person attendance caps in some areas).[91] Both churches then returned to the Supreme Court. And just like in the New York case, they asked for emergency injunctions pending appeal.[92]

At 10:44 p.m. EST on Friday, February 5, 2021,[93] the Court largely obliged. In a pair of unsigned orders in "*South Bay II*" and "*Harvest Rock II*," the Court issued separate emergency injunctions against much of California's revised restrictions. In particular, the Court blocked the prohibition on indoor religious services in "Tier 1" (areas with the highest incidence of the virus), but left in place the 25% capacity restriction on such services — and the ban on the prohibition on singing or chanting during indoor services. There was no majority opinion to explain either why the categorical prohibition was being blocked or why the other provisions were being left intact.[94]

Indeed, it took a scorecard just to figure out the votes with respect to each holding.[95] Justices Thomas, Alito, and Gorsuch would have blocked the restrictions in their entirety (although Alito noted that he would have given the state thirty additional days to defend the percentage capacity restrictions); Justices Breyer, Kagan, and Sotomayor would have left the restrictions in place in their entirety. That left Chief Justice Roberts and Justices Kavanaugh and Barrett somewhere in the middle. As in *South Bay I*, Roberts wrote a solo concurrence (this one running two paragraphs), briefly reiterating his view that governments were entitled to deference in responding to COVID with the caveat that "[d]eference, though broad, has its

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[91] S. Bay United Pentecostal Church v. Newsom, 985 F.3d 1128 (9th Cir. 2021); *see also* Harvest Rock Church, Inc. v. Newsom, 985 F.3d 771 (9th Cir. 2021) (mem.).

[92] Emergency Application for Writ of Injunction, S. Bay United Pentecostal Church v Newsom ("*South Bay II*"), 141 S. Ct. 716 (2021) (mem.) (No. 20A136) [https://perma.cc/KK7G-AHMS]; Emergency Application for Writ of Injunction, Harvest Rock Church, Inc. v. Newsom, 141 S. Ct. 1289 (2021) (mem.) (No. 20A137) [https://perma.cc/GGQ3-8RPA].

[93] *See* Stohr, *supra* note 70.

[94]. *South Bay II*, 141 S. Ct. 716; *Harvest Rock Church*, 141 S. Ct. 1289.

[95] *See* Tom Goldstein, *Counting Votes in the* South Bay *Decision*, SCOTUSBLOG, (Feb. 9, 2021) [https://perma.cc/A9RX-6GXS].

limits." [96] And Kavanaugh joined the separate concurrence by Barrett, whose first signed opinion on the Court ran one full paragraph.[97]

Usually, a new Justice's "maiden opinion" is a big deal. By tradition, it's meant to be a straightforward opinion for the Court in an uncontroversial merits case, where the other Justices show their support for their new colleague by not publicly disagreeing.[98] It was a sign of the times, then, that Justice Barrett's maiden opinion came as it did: one month before her first signed opinion for the Court in an argued case (for a 7-2 majority expanding an exception to the Freedom of Information Act),[99] Barrett penned a short concurrence to a late-Friday-night shadow docket ruling in which the Court granted another emergency injunction pending appeal.

As she explained, the reason why she and Justice Kavanaugh were joining the three more progressive Justices to leave the singing ban intact was because it just wasn't clear if the ban singled out religious performances: "Of course, if a chorister can sing in a Hollywood studio but not in her church, California's regulations cannot be viewed as neutral. But the record is uncertain, and the decisions below unfortunately shed little light on the issue."[100] Given that the issue reached the Justices on an application for an emergency injunction to allow the rest of the litigation to unfold, it could hardly have been surprising that the record was unclear. Indeed, even Justice Gorsuch (who wrote for himself and Justices Thomas and Alito in explaining why he would have blocked the singing restrictions) conceded that the record was unsettled; he just wouldn't

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[96] *South Bay II*, 141 S. Ct. at 716–17 (Roberts, C.J., concurring).

[97] *Id*. at 717 (Barrett, J., concurring).

[98] Justice Kavanaugh's first opinion, for instance, was a unanimous, eight-page majority opinion in an arbitration case. *See* Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019).

[99] U.S. Fish & Wildlife Serv. v. Sierra Club, Inc., 141 S. Ct. 777 (2021).

[100] *South Bay II*, 141 S. Ct. at 717 (Barrett, J., concurring).

give the state the benefit of the doubt.[101] That view might make sense in the abstract, but not in the procedurally fraught context of an application for an emergency injunction, where the burden is most decidedly on the party seeking that relief, *not* the state.

The apparent majority to block the prohibition on indoor services provoked an unusually strident dissent by Justice Kagan, who opened with the rather pointed observation that "Justices of this Court are not scientists."[102] The crux of her opinion, which Justices Breyer and Sotomayor joined, was that California had based its restrictions on careful study and detailed testimony from public health experts—factual evidence that, given the posture of the case, the Court was supposed to accept as true (and had done nothing to rebut). As she wrote,

> Given all that evidence, California's choices make good sense. The State is desperately trying to slow the spread of a deadly disease. It has concluded, based on essentially undisputed epidemiological findings, that congregating together indoors poses a special threat of contagion. So it has devised regulations to curb attendance at those assemblies and—in the worst times—to force them outdoors.[103]

And critically, Kagan pointed out, the rules applied alike to religious and secular assemblies—including political gatherings, which necessarily ranked alongside worship services in the pantheon of First Amendment protection.[104]

Worse still, Kagan explained, was the fact that the Court provided no explanation for its decision. "Is it that the Court does not believe the science, or does it think even the best science must give way? In any event, the result is clear: The State may not treat worship services like activities found to pose a comparable COVID risk, such

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[101] *Id*. at 717–20 (statement of Gorsuch, J.).
[102] *Id*. at 720 (Kagan, J., dissenting).
[103] *Id*. at 721.
[104] *See id*.

as political meetings or lectures."[105] But what about decisionmakers elsewhere, or confronting other regulations? "The Court's decision," she wrote, "leaves state policymakers adrift, in California and elsewhere." [106] As she concluded, "It is difficult enough in a predictable legal environment to craft COVID policies that keep communities safe. That task becomes harder still when officials must guess which restrictions this Court will choose to strike down. The Court injects uncertainty into an area where uncertainty has human costs."[107]

For a Justice whose dissents usually stick to the legal issues, Kagan's *South Bay II* missive closed with what was, for her, an unusually personal swipe at the majority—and the relative safety from which they had issued their unsigned order: "if this decision causes suffering," she wrote, "we will not pay. Our marble halls are now closed to the public, and our life tenure forever insulates us from responsibility for our errors."[108] It was quite a shot for her to take at her colleagues. And, as it turns out, it wouldn't be her last.

Just as they had after their November ruling in the New York *Roman Catholic Diocese* case, the Justices quickly invoked the ruling in *South Bay II* as the basis for ordering a district court to reconsider its refusal to enjoin a separate aspect of California's COVID restrictions. [109] But whereas *Roman Catholic Diocese* included an opinion for the Court, *South Bay II* didn't. Rather, the unsigned February 8 order in *Gish v. Newsom* shows just how much the pathology of the shadow docket had become hard-wired in these religious liberty disputes: Even though there was no majority opinion in *South Bay II* for the lower courts to follow, and, thus, no analysis to govern other cases, the Justices simply *assumed* that lower

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[105] *Id.* at 722.
[106] *Id.* at 723.
[107] *Id.*
[108] *Id.*
[109] *See* Gish v. Newsom, 141 S. Ct. 1290 (2021) (mem.).

courts could and should be able to read the tea leaves from the fact that they enjoined California's restrictions—and from the separate opinions disagreeing as to why.[110]

Thus, three weeks after *South Bay II*, when the Gateway City Church in San Jose challenged not California's restrictions on indoor gatherings, but those of Santa Clara County, the *South Bay II* majority lashed out. Although the Ninth Circuit had explained in detail why the county's rules were not subject to the same infirmities as those identified in the state's rules by the Justices' separate opinions in *South Bay II*,[111] the Court, in (another) unsigned Friday-night order, not only enjoined the county's restrictions without any detailed analysis, but criticized the Court of Appeals in the process, simply asserting—without any analysis—that "[t]he Ninth Circuit's failure to grant relief was erroneous," because "[t]his outcome is clearly dictated by this Court's decision" in *South Bay II*.[112] Here, for the first time, the Court made explicit what its growing body of remand orders had only implicitly assumed: Even unsigned emergency orders, like *South Bay II*, should be given precedential effect in the lower courts.[113]

V. *TANDON*: THE SHADOW DOCKET COMES FULL CIRCLE

The summary, unsigned orders in *South Bay II* and *Gateway City Church* drove home that the Justices were not willing to let California's restrictions on indoor religious services in houses of worship stand under any circumstances. But what about the state's distinct limits on in-home gatherings? Again, based upon significant

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[110] *See supra* text accompanying notes 93–107.

[111] *See* Gateway City Church v. Newsom, No. 21-15189, 2021 WL 781981 (9th Cir. Feb. 12, 2021) (mem.).

[112] Gateway City Church v. Newsom, 141 S. Ct. 1460, 1460 (2021) (mem.).

[113] *But see* Hon. Samuel Alito, Jr., "The Emergency Docket," Speech at Notre Dame Law School (Sept. 30, 2021) ("[A] ruling on an emergency application is not a precedent with respect to the underlying issue in the case."). There is no public record of Justice Alito's speech. The quote is from an unofficial transcript generated by Otter.ai from the live (but not archived) video.

testimony and input from epidemiologists and other public health experts, California had also limited private gatherings in private homes to members of no more than three households — with no exceptions.[114] Thus, to whatever extent discernible principles could be extracted from the separate opinions in *South Bay II*, they didn't seem to apply to a truly neutral policy that imposed categorical capacity restrictions in private homes.

That's why, on March 30, 2021, the Ninth Circuit denied a request for an emergency injunction pending appeal from two pastors claiming that the in-home gathering limits unconstitutionally interfered with their right to conduct Bible study and hold prayer meetings in their personal homes. By a 2-1 vote, the panel of three Republican appointees (one by President George W. Bush; two by President Trump) held that "the record does not support that private religious gatherings in homes are comparable—in terms of risk to public health or reasonable safety measures to address that risk—to commercial activities, or even to religious activities, in public buildings."[115] In other words, even under the "most-favored nation" view of the Free Exercise Clause, the pastors were likely to lose because California treated in-home religious gatherings the exact same way that it treated in-home secular gatherings. Undeterred, the pastors applied to the Supreme Court for an injunction pending appeal. [116] And in another late-Friday-night ruling, the Court agreed.[117]

Given everything that preceded it, the Court's 5-4 ruling in *Tandon v. Newsom* might seem entirely anticlimactic. But as in *Roman Catholic Diocese*, the majority wrote a brief "per curiam" opinion. And

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[114] *See* CAL. DEP'T OF PUB. HEALTH, UPDATED GUIDANCE FOR GATHERINGS (Apr. 15, 2021) [https://perma.cc/T45R-NED2].

[115] Tandon v. Newsom 992 F.3d 916, 920 (9th Cir. 2021) (mem.).

[116] Application for Writ of Injunction, Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam) (No. 20A151) [https://perma.cc/GPP5-CBZT].

[117] *Tandon*, 141 S. Ct. 1294.

this time, the Court finally made clear what it had been hinting at (and, in retrospect, building toward) since the previous November: The prevailing understanding of the Free Exercise Clause adopted by the Supreme Court in *Smith* in 1990 had changed. As the majority wrote, "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[118]

Although the *Tandon* opinion cited the November ruling in *Roman Catholic Diocese* as support for that proposition, it was in this sentence, and not in its prior ruling, where the Court for the first time directly embraced the most-favored nation theory of the Free Exercise Clause.[119] And because California permitted "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time," it didn't matter that the nation's largest state treated secular and religious in-home gatherings alike. For the first time since *Smith*, a majority of the Supreme Court struck down under the Free Exercise Clause a facially neutral government regulation entirely because it made no exception for—and *therefore* burdened—religious practice.[120] In the process, the Court went even further than then-Judge Alito's 1999 opinion in *Fraternal Order of Police*, because the lack of a religious exception was

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[118] *Id*. at 1296.

[119] For this proposition, the *Tandon* majority cited a passage from *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67–68 (2020) (per curiam), that … said no such thing. To the contrary, *Roman Catholic Diocese* relied heavily on the fact that the challenged New York regulations "cannot be viewed as neutral because they *single out* houses of worship for *especially harsh* treatment." 141 S. Ct. at 66 (emphases added). Nothing in the *majority* opinion Roman Catholic Diocese suggested, or even implied, that *any* disparate treatment of comparable secular and religious activity would be unconstitutional.

[120] In that respect, *Tandon* was a significant step beyond *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), where the Court distinguished *Smith* on the ground that the City of Hialeah was specifically discriminating against religious practice. I thank Laura Portuondo for helping to make this point (among numerous others) clearer.

dispositive even *without* taking it as evidence of discriminatory intent.[121] As one of the nation's leading scholars of law and religion wrote shortly thereafter, *Tandon* was the Court's "most important free exercise decision since 1990."[122] And it came on the shadow docket, to boot.

As if all of that weren't enough, the majority concluded their brief opinion with a parting shot at the Court of Appeals, noting that "[t]his is the fifth time the Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise."[123] Oblivious to the irony of complaining about a lower court not doing enough to distinguish summary rulings in prior cases, a five-Justice majority thus put in writing what the *Gateway City Church* order had all-but already entrenched into the law: All of the Court's shadow docket orders in the COVID religion cases were to be treated as precedent by lower courts, even the unsigned and unexplained ones. For the sixth time in just over four months, the Court issued an emergency writ of injunction to block state COVID restrictions on religious liberty grounds while challenges to them proceeded through the lower courts. And this time, they did it by explicitly changing the law and chiding lower courts for not detecting the implicit change sooner.

As in *Roman Catholic Diocese*, Chief Justice Roberts joined the three more progressive Justices in dissenting (although this time, he did not write separately). Justice Kagan again wrote on behalf of the Democratic appointees, and, as in *South Bay II*, did not pull her punches: "California need not, as the per curiam insists, treat at-home religious gatherings the same as hardware stores and hair salons—and thus unlike at-home secular gatherings, the obvious comparator here. As the per curiam's reliance on separate opinions

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[121] *See supra* notes 28–29 and accompanying text.

[122] Jim Oleske, Tandon *Steals* Fulton's *Thunder: The Most Important Free Exercise Decision Since 1990*, SCOTUSBLOG, (Apr. 15, 2021) [https://perma.cc/FF3X-2Q4X].

[123] *Tandon*, 141 S. Ct. at 1297–98.

and unreasoned orders signals, the law does not require that the State equally treat apples and watermelons."[124] She also once again criticized the majority for ignoring the lower courts' factual findings—including the different levels of risk associated with brief visits to secular businesses compared to lengthy gatherings in private homes. "No doubt this evidence is inconvenient for the per curiam's preferred result," she continued, "[b]ut the Court has no warrant to ignore the record in a case that (on its own view) turns on risk assessments."[125]

But neither Justice Kagan nor Chief Justice Roberts flagged perhaps the most offensive aspect of the ruling in *Tandon*: that it was affirmatively lawless. After all, by formally adopting the most-favored nation reading of the Free Exercise Clause, the majority clearly articulated a new understanding of the Constitution. But relief based upon the All Writs Act, as the Court had explained for decades, depended upon the violation of rights that were already "indisputably clear." It is, of course, logically impossible for that standard to be satisfied by a decision that changes the underlying law.[126]

And that's how desensitized everyone had become to the shadow docket: By April 2021, when *Tandon* was handed down, none of the Justices thought it worthy of note that the majority was using a shadow docket ruling, specifically, to effect a fundamental change in the Constitution's protection of religious liberty. The fact that the ruling was clearly in excess of the Court's authority under the All Writs Act was simply immaterial compared to the merits of the Free Exercise Clause analysis. That fact drives home just how much the shadow docket had come full circle. From the perspective of both the majority and dissenting opinions, the posture of the case was irrelevant; the formal limits on the Court's power were beside the

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[124] *Id*. at 1298 (Kagan, J., dissenting).

[125] *Id*.

[126] *See* Stephen I. Vladeck, *The Supreme Court is Making New Law in the Shadows*, N.Y. TIMES (Apr. 15, 2021) [https://perma.cc/DA5J-UTHD].

point; and the longstanding norms militating against emergency relief were just brushed aside. All that mattered was the substantive constitutional issue—on which they sharply divided.

In that respect, *Tandon* is yet one step more problematic. Even for those who cared only about the merits, and wanted the Court to expand the First Amendment to make it harder for government actors to defend neutral laws that only incidentally burdened religious practice, there were numerous opportunities for the Justices to use cases already pending on their merits docket to effectuate the same shift in doctrine.

At the time *Tandon* was decided, for instance, the Philadelphia (*Fulton*) case in which the petitioners had directly asked the Court to overrule *Smith* had long-since been granted, set for argument, and argued (on November 4, 2020).[127] That means that the Justices would have voted on the result at their Conference on November 6, and that the opinions were being drafted when *Tandon* was decided. In other words, *Tandon* was decided at a moment when the Justices already knew how the *Fulton* case was going to come out. And as the rest of us would learn on June 17, *Fulton* left untouched *Smith*'s holding that laws of general applicability that incidentally burden religious practice do not violate the Free Exercise Clause.[128] Thus, at the time they decided *Tandon* (which itself took a healthy bite out of *Smith*), the Justices knew that they weren't going any further in *Fulton*. Although everyone else expected *Tandon* to be a bellwether for *Fulton*, it turned out that *Tandon* was the much bigger ruling—something that only the Justices and their clerks could know in real-time.

But even if the Justices preferred to revisit *Smith* in the specific context of COVID restrictions, they had already bypassed one opportunity to do so in the *Calvary Chapel* case from Nevada (in

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[127] *See* Docket, *Fulton*, 140 S. Ct. 1104 (No. 19-123) [https://perma.cc/9K7E-EFHA].
[128] Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

which they denied a petition for plenary review in January).[129] What's more, the entire time that the Justices were considering *Tandon*, they were sitting on a petition for plenary review from the South Bay Pentecostal Church, finally raising the full merits of their challenge to California's capacity and singing restrictions (on April 26, the Court granted the petition in "*South Bay III*," vacating and remanding the lower court's ruling in light of . . . *Tandon*).[130]

To tie this all together, *Tandon* is important not only because it shows that the Justices *knew* that they were making significant new constitutional law on the shadow docket late on a Friday night; it's important because it shows that they *preferred* to make significant new constitutional law on the shadow docket rather than through the regular—if laborious—procedure of a merits case. That is to say, *Tandon*'s significance comes not only from what it held, but from the fact that the Justices, faced with a choice (several, really), opted to reach that holding on the shadow docket specifically. It's too early to tell whether *Tandon* will end up as the high-water mark of the shadow docket or merely the end of the beginning. But what cannot be gainsaid is that, as much as any other decision over the last few years, it shows just how radically the Court's use of the shadow docket has evolved substantively, and not just procedurally—at least in the context of religious liberty.

Just over two months after *Tandon*, the Court finally handed down the much-anticipated merits ruling in *Fulton*. Although the Court unanimously sided with Catholic Social Services, the majority—headed by Chief Justice Roberts (who dissented in *Tandon*) and joined by Justices Kavanaugh and Barrett (who were in the majority in *Tandon*) avoided any broader repudiation of *Smith*.[131] Justices Thomas, Alito, and Gorsuch would have gone further and

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[129] Calvary Chapel Dayton Valley v. Sisolak, 141 S. Ct. 1285 (2021) (mem.).

[130] S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 2563, 2563 (2021) (mem.).

[131] *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

overruled *Smith* in its entirety.[132] But without a majority, what the Justices already knew became clear to the rest of us: *Tandon*, not *Fulton*, was the key religious liberty ruling of the October 2020 Term. It was on the shadow docket, not the merits docket, that the conservative Justices were willing (and had been able) to fundamentally change the substance of U.S. constitutional law. And although Justice Barrett (joined by Justice Kavanaugh) wrote separately in *Fulton* to explain why she was joining the Chief Justice's narrow opinion and leaving *Smith* alone (at least for the time being),[133] her brief opinion nowhere attempted to reconcile how those two Justices (and those two alone) could also have signed onto the sharp narrowing of *Smith* in *Tandon*.[134]

VI. SB8 AND VACCINE MANDATES:

THE SHADOW DOCKET'S DENOUEMENT

It would be one thing, of course, if the arrival of Justice Barrett had simply heralded a fundamental shift in the Supreme Court's approach to emergency writs of injunction across the board. But with one exception,[135] *every* application seeking such relief during the October 2020 Term on non-religious liberty grounds was denied. That included a case that, in some respects, presented a no-less-

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[132] *See id*. at 1883–1926 (Alito, J., concurring in the judgment); *id*. at 1926–31 (Gorsuch, J., concurring in the judgment).

[133] It's difficult to know where *Smith* stands today. Since Fulton, Justices Thomas, Alito, and Gorsuch have dissented from at least three denials of certiorari in cases raising additional questions about *Smith*. *See* Dignity Health v. Minton, 142 S. Ct. 455 (2021) (mem.); Boardman v. Inslee, 142 S. Ct. 387 (2021) (mem.); Arlene's Flowers, Inc. v. Washington, 141 S. Ct. 2884 (2021) (mem.).

[134] *Fulton*, 141 S. Ct. at 1882–83 (Barrett, J., concurring). Justice Breyer joined in two paragraphs of Justice Barrett's concurrence, but not the key first paragraph. *Id*. at 1882.

[135] The one grant of emergency injunctive relief on grounds other than religious liberty was in *Chrysafis v. Marks*, 141 S. Ct. 2482 (2021) (mem.), in which the Court issued a three-paragraph order blocking New York's COVID-related eviction moratorium.

compelling vehicle than *Tandon*: *Whole Woman's Health v. Jackson*—the challenge to Texas's controversial "Senate Bill 8" (SB8).

SB8 was enacted by the Texas legislature and signed into law by Governor Greg Abbott in May 2021.[136] As is familiar by now, the law:

> purports to ban all abortions performed on any pregnant person where cardiac activity has been detected in the embryo, with no exceptions for pregnancies that result from rape, sexual abuse, incest, or a fetal defect incompatible with life after birth. S.B. 8 is enforced through a dual private and public enforcement scheme, whereby private citizens are empowered to bring civil lawsuits in state courts against anyone who performs, aids and abets, or intends to participate in a prohibited abortion, and the State may take punitive action against [providers] through existing laws and regulations triggered by a violation of S.B. 8—such as professionally disciplining a physician who performs an abortion banned under S.B. 8.[137]

The shift of enforcement responsibility away from the State of Texas and to private individuals was designed—deliberately—to complicate, if not frustrate, efforts to block SB8 from going into effect, and even from challenging it once it went into effect. Because of a 2001 en banc ruling by the Fifth Circuit,[138] this enforcement structure makes it impossible for private parties to seek injunctive relief against state executive officers—including the Governor, the Attorney General, and so on—as a means of blocking enforcement of the act. SB8 also prohibits providers from recovering costs or fees from plaintiffs who sue them under the statute (even frivolously), meaning that providers bear the expense of defending against every

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[136] Texas Heartbeat Act, 87th Leg., Reg. Sess. (codified at Tex. Health & Safety Code §§ 171.201–212 (West Cum. Supp. 2021)).

[137] Whole Woman's Health v. Jackson, 556 F. Supp. 3d 595, 603 (W.D. Tex. 2021).

[138] Okpalobi v. Foster, 244 F.3d 405 (5th Cir. 2001) (en banc).

case filed under the act—even if they win.[139] Finally, it also provides that abortions performed while SB8 is subject to a judicial temporary restraining order or injunction can nevertheless provide a basis for liability if that injunction or restraining order is vacated or reversed on appeal.[140] SB8 was scheduled to go into effect on September 1, 2021.[141]

The way these provisions fit together is in the litigation that they both frustrate and incentivize. To the former, these provisions are designed to cut off pre-enforcement review. Even if there is an appropriate *private* defendant to a suit for pre-enforcement injunctive relief, there is no single defendant against whom an injunction would bar *all* potential enforcement actions. And if providers violate the law once it is in effect and are sued, and seek to invoke *Roe* and *Casey* as a *defense* to the enforcement proceeding, all that the providers would obtain if they were to succeed is a judgment against the plaintiff who sued them—without *any* opportunity to recover their costs and fees.[142] Nothing would stop an endless flood of copycat lawsuits—even though they would be patently meritless, if not frivolous, once SB8 is held to violate *Casey*—that providers would have to pay to defend against *ad infinitum*. As Professor Tribe and I wrote, SB8's novel procedural Catch-22 "would not just make it impossible for anyone to challenge one of the most restrictive abortion laws in the country. It would also set an ominous precedent for turning citizens against one another on whatever contentious issue their state legislature chose to insulate from ordinary constitutional review."[143] This is perhaps the most important thing that can and should be said about the procedural conceit of the law: Whatever one thinks about

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[139] Tex. Civ. Prac. & Remedies Code § 30.022.

[140] Tex. Health & Safety Code § 171.208(e)(3).

[141] Fetal Hearbeat Act, § 12.

[142] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113 (1973).

[143] Laurence H. Tribe & Stephen I. Vladeck, *The Texas Abortion Law Threatens Our Legal System*, N.Y. TIMES, July 22, 2021, at A20.

abortion, the ability of Americans to vindicate their constitutional rights ought not to depend upon the whim of each of the 50 state legislatures. And yet, that's exactly the regime SB8 attempted to create.

In *Whole Woman's Health*, numerous providers sued eight defendants—including a Texas state court judge and a state court clerk—seeking injunctive relief to block the filing of future enforcement actions under SB8. The suit named the judge and the clerk as putative representatives of statewide classes of such officials—on the theory that an injunction against a class comprising every state court judge or clerk would be sufficient to prevent additional enforcement actions, and to thereby allow the providers to legally offer abortions after the sixth week of pregnancy.[144]

On Wednesday, August 25, the district court denied the defendants' motion to dismiss based upon various immunity doctrines, and scheduled a preliminary injunction hearing for Monday, August 30.[145] After several of the defendants filed notices of appeal in the Fifth Circuit, they applied for a stay pending appeal—arguing that their appeals divested the district court of the power to even hold a preliminary injunction hearing.[146] On Friday, August 27, the Fifth Circuit (with no explanation) granted an administrative stay, blocking all proceedings in the district court.[147] Although the Court of Appeals ordered the defendants to file responsive briefs by 9:00 a.m. CDT on Tuesday, August 31 (presumably so it could conclusively rule on the stay by the end of the day on August 31), it did not rule on the application until 10 days later, on Friday, September 10 (summarily denying the providers'

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[144] Complaint, *Whole Woman's Health*, 556 F. Supp. 3d 595 (W.D. Tex. 2021) (No. 1:21-cv-00616) [https://perma.cc/H65E-EN3W].

[145] *Whole Woman's Health*, 556 F. Supp. 3d 595.

[146] Defendants-Appellants' Opposed Emergency Motion to Stay Proceedings Pending Appeal, Whole Woman's Health v. Jackson, No. 21-50792, 2021 WL 3919252 (5th Cir. Aug. 27, 2021) (per curiam).

[147] *Whole Woman's Health*, 2021 WL 3919252.

motion for an injunction pending appeal in the meantime).[148] Thus, it was from the Fifth Circuit's preliminary, administrative stay that the providers sought emergency relief in the Supreme Court on Monday, August 30—asking Justice Alito (and, through him, the Court) to vacate the Fifth Circuit's administrative stay or to directly enjoin SB8 pending further litigation.[149]

The first thing to note about the Court's ruling is that it did *not* come in time to prevent SB8 from going into effect. Exactly 11 days earlier in the "Remain in Mexico" case, Justice Alito had issued an administrative stay to prevent the district court's injunction from going into effect *until* the full Court could rule on the Biden administration's application for a stay pending appeal.[150] Even though the full Court eventually *rejected* that application four days later,[151] Justice Alito as Circuit Justice for the Fifth Circuit still froze the status quo long enough for the full Court to reach such a result. No such interim relief was issued in the SB8 case. Instead, midnight CDT on September 1 came and went with no order from the Court—and the most aggressive abortion restrictions since *Roe* was decided went into effect in the nation's second-largest state.[152]

It was only just before midnight the *following* night—at 11:58 p.m. EDT on Wednesday, September 1—that the Supreme Court handed down its ruling. In one long, unsigned paragraph, a 5-4 majority

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[148] *See* Whole Woman's Health v. Jackson, 13 F.4th 434 (5th Cir. 2021) (per curiam).

[149] Emergency Application for Writ of Injunction, Whole Woman's Health v. Jackson, 141 S. Ct. 2494 (2021) (mem.) (No. 21A24) [https://perma.cc/YW5K-GWCQ].

[150] Biden v. Texas, No. 21A21, 2021 WL 3702101 (Circuit Justice Alito Aug. 20, 2021) (mem.).

[151] Biden v. Texas, 142 S. Ct. 926 (2021) (mem.).

[152] Justice Sotomayor made this point explicitly in her dissent. *See Whole Woman's Health*, 141 S. Ct. at 2498 (Sotomayor, J., dissenting) ("Last night, the Court silently acquiesced in a State's enactment of a law that flouts nearly 50 years of federal precedents. Today, the Court belatedly explains that it declined to grant relief because of procedural complexities of the State's own invention.").

declined both forms of emergency relief sought by the providers. Among other things, the majority noted, the application:

> presents complex and novel antecedent procedural questions on which [the Applicants] have not carried their burden. For example, federal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves. And it is unclear whether the named defendants in this lawsuit can or will seek to enforce the Texas law against the applicants in a manner that might permit our intervention. The State has represented that neither it nor its executive employees possess the authority to enforce the Texas law either directly or indirectly. Nor is it clear whether, under existing precedent, this Court can issue an injunction against state judges asked to decide a lawsuit under Texas's law. Finally, the sole private-citizen respondent before us has filed an affidavit stating that he has no present intention to enforce the law.[153]

In other words, the cryptic order justified the Court's refusal to intervene by invoking three variations on the same procedural uncertainty: Whether the named defendants could properly be the subject of the injunction that the providers were seeking. The majority went out of its way to "stress that we do not purport to resolve definitively any jurisdictional or substantive claim in the applicants' lawsuit. In particular, this order is not based on any conclusion about the constitutionality of Texas's law, and in no way limits other procedurally proper challenges to the Texas law, including in Texas state courts."[154]

Each of the four dissenting Justices wrote a short opinion. Justices Breyer and Sotomayor, in particular, focused on the merits—and on the undeniable hardships that allowing SB8 to go into effect

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[153] *Id*. at 2495 (majority order).
[154] *Id*. at 2495–96.

would put on Texans seeking to vindicate their constitutional right to a pre-viability abortion.[155] Chief Justice Roberts, no fan of the Court's abortion jurisprudence, [156] wrote to stress that "the consequences of approving the state action [in insulating the six-week ban from judicial review], both in this particular case and as a model for action in other areas, counsel at least preliminary judicial consideration before the program devised by the State takes effect." [157] But it was Justice Kagan's dissent that most directly contrasted the Court's non-intervention in the SB8 case with its prior shadow docket rulings in the religious liberty context. She sharply criticized the majority for "barely bother[ing] to explain its conclusion—that a challenge to an obviously unconstitutional abortion regulation backed by a wholly unprecedented enforcement scheme is unlikely to prevail."[158] As she concluded, "[i]n all these ways, the majority's decision is emblematic of too much of this Court's shadow-docket decisionmaking—which every day becomes more unreasoned, inconsistent, and impossible to defend."[159]

That the same 5-4 majority that granted emergency relief in *Roman Catholic Diocese* and *Tandon* found itself hamstrung in *Whole Woman's Health* is more than a little difficult to square—especially because the Court would later hold on the merits, by an 8-1 vote, that the providers *were* allowed to proceed against at least some of the same named defendants at least at that juncture. [160] More fundamentally, the same majority that saw mootness as a speed bump in *Roman Catholic Diocese* and ignored a fatal procedural

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[155] *Id*. at 2496–98 (Breyer, J., dissenting); *id*. at 2498–99 (Sotomayor, J., dissenting).

[156] *See, e.g.*, June Medical Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2133 (2020) (Roberts, C.J., concurring in the judgment) ("I joined the dissent in *Whole Woman's Health* [v. *Hellerstedt*, 136 S. Ct. 2292 (2016),] and continue to believe that the case was wrongly decided.").

[157] *Whole Woman's Health*, 141 S. Ct. at 2496 (Roberts, C.J., dissenting).

[158] *Id*. at 2500 (Kagan, J., dissenting).

[159] *Id*.

[160] Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021).

obstacle in *Tandon* relied upon unanswered procedural *questions*—not settled procedural obstacles—to justify its non-intervention to block enforcement of SB8. And unlike in *Tandon*, where the Court jumped through procedural hoops to issue an emergency injunction based upon a *new* interpretation of the Constitution, the same Justices refused to do so in *Whole Woman's Health* to protect a right that—to that point, anyway—was clearly established.

The Court's non-intervention in the SB8 case provoked a significant and sustained public backlash.[161] Perhaps as a result, the next time the full Court considered an application for emergency relief challenging a COVID-based state law on religious liberty grounds—this time, a challenge to Maine's vaccination mandate for certain health care workers—the Court turned the request away.[162] Despite a lengthy dissent from Justice Gorsuch (joined by Justices Thomas and Alito) arguing that Maine was discriminating against the sincerely held religious beliefs of some of its health care workers (who objected to the vaccines because of their connection to the cells of aborted fetuses), the Court refused to intervene.[163] Although there was no majority opinion, Justices Barrett and Kavanaugh (whose votes had been necessary in *Roman Catholic Diocese* and *Tandon*) filed a short concurrence. As Justice Barrett wrote for the Court's two newest Justices:

> When this Court is asked to grant extraordinary relief, it considers, among other things, whether the applicant is likely to succeed on the merits. I understand this factor to encompass not only an assessment of the underlying merits

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[161] Although there were dozens of articles criticizing the Court's September 1 ruling, perhaps the most prominent was Adam Serwer, *Five Justices Did This Because They Could*, THE ATLANTIC, (Sept. 2, 2021) [https://perma.cc/LHF7-SWS5]. In an unrecorded, unpublished speech at Notre Dame Law School on September 30, 2021 defending what he called the "emergency docket," Justice Alito called out Serwer's critique, specifically.

[162] Does 1-3 v. Mills, 142 S. Ct. 17 (2021) (mem.).

[163] *Id*. at 18–22 (Gorsuch, J., dissenting).

> but also a discretionary judgment about whether the Court should grant review in the case. Were the standard otherwise, applicants could use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take—and to do so on a short fuse without benefit of full briefing and oral argument. In my view, this discretionary consideration counsels against a grant of extraordinary relief in this case, which is the first to address the questions presented.[164]

In other words, and perhaps tacitly conceding that some of the Court's prior rulings had gone too far, the two most important votes signaled that even when they were inclined to agree with the applicants on the merits, that was not the sole consideration in deciding whether to grant emergency relief on the shadow docket. That may also explain the Court's December 2021 refusal to intervene, again over the dissents of Justices Thomas, Alito, and Gorsuch, to block New York's even more expansive vaccination mandate for health care workers.[165] Between them, the Maine and New York rulings seemed to suggest that the Court's aggressive use of the shadow docket to expand the scope of the Free Exercise Clause had run its course—even though three of the Justices would clearly have gone further.

Why did the Court show favoritism for the Free Exercise Clause, at the expense of every other constitutional right, in the specific and unique context of COVID-related emergency orders? Neither of the Court's two majority opinions—in *Roman Catholic Diocese* or *Tandon*—provide any insight on the point. But the separate opinions of Justices Alito, Gorsuch, and Kavanaugh all insist, at various points, that policymakers were disguising hostility toward particular

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[164] *Id.* at 18 (Barrett, J., concurring) (citations and internal quotation marks omitted).

[165] *See* Dr. A v. Hochul, 142 S. Ct. 552 (2021) (mem.); We the Patriots USA v. Hochul, 142 U.S. 734 (2021) (mem.).

religious beliefs behind their COVID-mitigation policies. Consider this passage from Justice Gorsuch's dissent in the New York case, referring to various public statements made by Governor Kathy Hochul:

> This record gives rise to more than a 'slight suspicion' that New York acted out of 'animosity [toward] or distrust of' unorthodox religious beliefs and practices. This record practically exudes suspicion of those who hold unpopular religious beliefs. That alone is sufficient to render the mandate unconstitutional as applied to these applicants.[166]

Similar claims of anti-religious bias can be found in other separate opinions in the cases discussed above—from Justices Alito and Kavanaugh in addition to Justice Gorsuch.[167] Nor does this appear to be an isolated phenomenon; my *own* criticisms of the Court's use of the shadow docket in these cases have provoked suggestions that I don't "put the ability to attend worship very high in [my] own values rankings."[168] Thus, perhaps the best that can be said about the Court's aggressive vindication of religious liberty claims on the shadow docket is that it is motivated by a good-faith belief that policymakers are hiding hostility to religious practice behind otherwise neutral COVID mitigation policies.

There are at least three problems with this view, though. *First*, and most importantly, it assumes *bad faith* on the part of any number of government actors—bad faith that is, at best, inferred from

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[166] *Dr. A*, 142 S. Ct. at 555 (Gorsuch, J., dissenting) (citation omitted).

[167] *See, e.g.*, Roman Catholic Diocese of Am. v. Cuomo, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2605 (2020) (Alito, J., dissenting); *id*. at 2614 (Kavanaugh, J., dissenting).

[168] Mark Rienzi, *The Supreme Court's "Shadow" Docket – A Response to Professor Vladeck*, NAT'L REVIEW, (Mar. 16, 2021) [https://perma.cc/GK38-JFQE]; *see also* Brief *Amicus Curiae* of the Becket Fund for Religious Liberty at 3, Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam) (No. 20A95) ("That some observers think suppressing worship is not an emergency says more about how much they value freedom to worship than it does about the scope of the Court's emergency powers.") [https://perma.cc/7C6V-FZJ2].

circumstantial "evidence" in proceedings in which there is little to no opportunity to develop a factual record. Indeed, the Supreme Court is only *asked* to grant an emergency injunction pending appeal when both lower courts have refused to do so—usually based upon factual findings that are supposed to be reviewed on appeal only for clear error. One would think that a constitutional theory that depended upon proof of anti-religious motive ought to require more than the Justices' *ipse dixit*—all the more so where, as here, the relevant government officials have compelling justifications for taking aggressive action in the name of protecting public health; and where, as here, the case comes to the Court in the aberrational context of an application for emergency relief.[169]

Second, and related, there is a telling contrast between these same Justices' willingness to carefully scrutinize the motives of government actors when it comes to claims of religious liberty in the COVID context and their unwillingness to do so when it came to President Trump's travel ban. Recall that the central constitutional claim in *Trump v. Hawaii*[170] was that the President had singled out the countries at issue *because* they were predominantly Muslim—a claim that relied upon public statements by President Trump to the same extent that the *Dr. A.* dissent relied upon public statements by Governor Hochul.[171]There, the Court explained that:

> the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive

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[169] *See, e.g.*, Leslie Kendrick & Micah Schwartzman, *The Supreme Court, 2017 Term – Comment: The Etiquette of Animus*, 132 HARV. L. REV. 133, 135 (2018) (noting, and criticizing, the trend in Supreme Court decisions of elevating "etiquette" over the existence of principled governmental justifications).

[170] 138 S. Ct. 2392 (2018).

[171] *See supra* text accompanying note 162.

> responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself.[172]

Perhaps the implication is that governments require even *stronger* justifications for acting in a manner that impedes religious liberty during a pandemic than at other times? If that's the theory, none of the Justices have ever publicly endorsed it.

And *third*, even if that *is* the best way of reconciling the Supreme Court's unique treatment of religious liberty in COVID cases with its other jurisprudence, it's normatively indefensible on its face. As Professor Wiley and I have written, ordinary modes of judicial review should not be abandoned during a public health crisis—in *either* direction.[173] Thus, although governments should not be entitled to meaningfully *more* deference when adopting public health measures in response to the COVID pandemic, they should not be entitled to meaningfully *less* deference, either.

If Justice Barrett's cryptic but undeniably significant concurring opinion (joined by Justice Kavanaugh) in the Maine vaccine mandate case is any indication,[174] we may have passed the high-water mark for the Supreme Court's embrace of religious liberty challenges to COVID-mitigation policies. Indeed, one reading of their separate opinion is as a tacit confession that perhaps the Court had gone *too* far in decisions like *Roman Catholic Diocese*, *South Bay II*, and *Tandon*; time will tell. But the key for present purposes is to highlight the *uniqueness* of the Court's embrace of religious liberty claims during the COVID pandemic—both in *how* the Justices provided relief and in *when* they did so in contrast to other claims.

For those to whom religious liberty predominates over other constitutional protections, these developments may well seem a

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[172] *Hawaii*, 138 S. Ct. at 2418.

[173] Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 HARV. L. REV. F. 179, 189 & n.63 (2020).

[174] Does 1–3 v. Mills, 142 S. Ct. 17, 17–18 (2021) (Barrett, J., concurring).

feature, rather than a bug. But for those who care about the Court as an institution, and who believe that charges of inconsistency and illegitimacy leveled by Justice Kagan in her *Whole Woman's Health* dissent[175] are not to be taken lightly, the new majority's actions in religious liberty cases since November 2020 give more than a little reason for pause—regardless of whether, on the merits, they've gotten those rulings "right."

[175] Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting).