# NOTES

# HOW FAVORED, EXACTLY? AN ANALYSIS OF THE MOST FAVORED NATION THEORY OF RELIGIOUS EXEMPTIONS FROM *CALVARY CHAPEL* TO *TANDON*

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## INTRODUCTION

In the past year, a certain momentum has gathered behind the Court's rulings on free exercise issues with cases like *Fulton v. City of Philadelphia* and *Roman Catholic Diocese of Brooklyn v. Cuomo* manifesting a vibrant free exercise jurisprudence. The Court has come a long way since *Employment Division v. Smith* broke ground with its pronouncement that rational basis review was the default for free exercise cases. Justice Kavanaugh's intriguing addition to this discussion is his promotion of Douglas Laycock's most favored nation theory of religious exemptions. While this theory first appeared in a sole dissent,[1] many scholars argue that it was explicitly adopted by a majority of the Court in *Tandon v. Newsom*.[2] In fact, some scholars predicted a devastating change in First Amendment jurisprudence

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1 Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2612 (2020) (Kavanaugh, J., dissenting).

2 *See, e.g.*, Josh Blackman, *The "Essential" Free Exercise Clause*, 44 HARV. J.L. & PUB. POL'Y 637, 717 (2021); Jim Oleske, Tandon *Steals* Fulton*'s Thunder: The Most Important Free Exercise Decision Since 1990*, SCOTUSBLOG (Apr. 15, 2021, 10:13 AM), https://www.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990/ [https://perma.cc/MRF5-MZTF]; Richard W. Garnett & Mitchell Koppinger, Tandon v. Newsom, South Bay Pentecostal, Diocese of Brooklyn, *and* Calvary Chapel *on Religious Liberty and the Pandemic*, *in* SCOTUS 2021: MAJOR DECISIONS AND DEVELOPMENTS OF THE US SUPREME COURT 119, 127 (Morgan Marietta ed., 2022).

when *Tandon* was first decided.[3] Instead, the majority Court opinion did not reference *Tandon* in the next high-profile free exercise case, *Fulton*, and lower courts have not shown any tendency to apply the test in a way that expands religious freedom. At this point, one might ask whether the most favored nation theory was really an innovation in the law at all and whether it actually changed the *Smith* analysis. Is there any merit to using the most favored nation framework in analyzing requests for religious accommodations and would such a framework tend to be more solicitous of religious rights?

In this Note, I argue that Justice Kavanaugh's most favored nation test for religious exemptions actually differs from the one employed by the majority of the Court in *Tandon*. The majority's formulation of the test is vague and explicitly requires courts to engage in a fact-intensive comparability analysis. Practically, lower courts applying *Tandon* to religious exemption questions have exploited this comparability step to rule against religious claimants generally, but more specifically to deny them strict scrutiny. Because the *Tandon* test was formulated to apply to all free exercise claims, the test is necessarily framed in more general terms and also imposes on religious claimants an additional burden before they can benefit from strict scrutiny analysis. Justice Kavanaugh's analysis, however, is less ambitious in scope, applying only to a subset of free exercise claims, and is formulated to provide more rigorous protection of First Amendment rights. As a result, it would provide a more consistent tool for deciding religious freedom cases and would be more solicitous of religious rights. In Part I, I lay out the legal and academic background necessary to understanding the most favored nation theory of exemptions that Justice Kavanaugh championed and that the Court applied in the pandemic cases. Then, in Part II, I turn to the majority's approach to the most favored nation theory in *Tandon* and contrast it with Justice Kavanaugh's description of the theory, illustrating the similarities as well as the differences in how the two approaches emphasize the necessity of comparability between the religious and secular activities in question. Finally, in Part III, I will examine four lower court decisions that have applied the *Tandon* majority's test to illustrate the shortcomings in the test as currently applied and to demonstrate how these cases would have led to different, religious-friendly, results under Justice Kavanaugh's test.

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3 ELIZABETH REINER PLATT, KATHERINE FRANKE & LILIA HADJIIVANOVA, L., RTS. & RELIGION PROJECT, COLUM. L. SCH., WE THE PEOPLE (OF FAITH): THE SUPREMACY OF RELIGIOUS RIGHTS IN THE SHADOW OF A PANDEMIC 4 (2021) ("The Court's new interpretation of the First Amendment amounts to a radical expansion of constitutional protections for religious exercise, made all the more remarkable by the fact that it has been accomplished on terms that severely limit efforts to protect public health during a deadly pandemic.").

# I. A BRIEF HISTORY OF FIRST AMENDMENT JURISPRUDENCE AND THE ACADEMIC ROOTS OF THE MOST FAVORED NATION THEORY OF RELIGIOUS EXEMPTIONS

## *A. A Legal History of First Amendment Jurisprudence*

Immediately before the ground-breaking *Smith* decision of the 1990s, First Amendment free exercise jurisprudence was largely carried out under the strict scrutiny standard established in *Sherbert v. Verner* in 1963.[4] Before *Sherbert*, going back to the days of the Founding, scholars debated whether the judiciary viewed exemptions as a legitimate answer to First Amendment claims. Philip Hamburger, for example, concludes from the historical evidence that courts could deny religious accommodation to people "not merely in the event of violence or force, but, more generally, upon the occurrence of illegal actions."[5] Practically speaking, that means that religious accommodations were not available when free exercise conflicted with the current state of law and that *Sherbert*'s strict scrutiny regime is an aberration from the original interpretation of the First Amendment. On the other hand, scholars like Stephanie Barclay explain the paucity of religious accommodations in the nineteenth century by the lack of broadly-worded statutes curtailing religious exercise that were passed and then reviewed by judges.[6] Barclay looks to the judicial attitude toward exemptions generally and finds evidence that judges in the early days of the country used their equity power to create "exemptions from generally applicable laws," including religious ones.[7] For Barclay, this is evidence that religious accommodations from generally applicable laws were a legitimate way to balance the First Amendment protections against the need for universal laws. Although scholars may not agree on exactly what status exemptions from neutral laws had in the beginning of the country,[8] as a matter of historical fact, religious

4 Sherbert v. Verner, 374 U.S. 398, 406 (1963).

5 Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 918–19 (1992). Even some pro-religious liberty scholars like Gerard Bradley argue that the religious clauses prohibit legislation motivated by animosity toward religion, but do not require exemptions from neutral laws. While the legislature may give out exemptions, the court is not required to do so. Gerard V. Bradley, *Is the First Amendment Hostile to Religion? Protecting Religious Liberty: Judicial and Legislative Responsibilities*, 42 DEPAUL L. REV. 253, 258–60 (1992).

6 Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 NOTRE DAME L. REV. 55, 70–71 (2020).

7 *Id.* at 103–04.

8 Michael W. McConnell admits that the historical evidence is "mixed" on the subject of religious exemptions in the early days of the country, but ultimately concludes that "[t]here is no substantial evidence that . . . exemptions were considered constitutionally questionable, whether as a form of establishment or as an invasion of liberty of conscience."

minorities benefited from these types of exemptions in the eighteenth century. For example, military conscription and the oath for office were both general laws that applied to the public at large, but both requirements were modified or waived to accommodate religious dissenters who objected to them.[9] Scholars have debated whether or not these accommodations were constitutionally required, but at the very least they reveal a permissive attitude toward religious accommodations.

Until the First Amendment was incorporated against the states, the Supreme Court did not have a chance to rule upon free exercise cases. Not until 1879 did the Supreme Court decide its first major free exercise case when it allowed the federal government to outlaw polygamy in *Reynolds v. United States* over the objections of the Mormon church.[10] This first case may seem to support the position that religious accommodations are an aberration in free exercise jurisprudence and that religious claimants are not typically exempt from general laws. In 1963, however, the Supreme Court established a predictable formula for First Amendment cases, formalizing its free exercise jurisprudence into what was known as the strict scrutiny analysis. *Sherbert v. Verner* and *Thomas v. Review Board of the Indiana Employment Security Division* provide the hallmarks of pre-*Smith* religious freedom litigation. In *Sherbert*, the Court wrote that unless the religious action posed a "substantial threat to public safety, peace or order," the governmental regulation would be subject to strict scrutiny, also known as the substantial burden analysis.[11] If the claimant could show that the regulation imposed a burden upon the free exercise of his religion, the government was then required to justify the burden by showing it had a compelling interest in applying the regulation to the religious claimant.[12] In *Thomas*, the Court looked for a sincere religious belief—one that "need not be acceptable, logical, consistent, or comprehensible to others"—in finding a substantial burden.[13] Judges were to accept the belief as sincere even if the religious claimant had difficulty articulating his belief, his belief conflicted with the majority of others in his religion, or he himself

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Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1511 (1990).

9 THOMAS C. BERG, SUMMARY: RELIGIOUS LIBERTY IN A POLARIZED AGE (forthcoming), https://wwws.law.northwestern.edu/research-faculty/events/colloquium/public-law/documents/berg-religious-liberty-in-a-polarized-age.pdf [https://perma.cc/2A4Y-SYDG] (page 2 of the chapter 7 summary).

10 Barclay, *supra* note 6, at 65; Reynolds v. United States, 98 U.S. 145, 166–67 (1879).

11 Sherbert v. Verner, 374 U.S. 398, 403 (1963).

12 *Id.* at 403, 406.

13 Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 714 (1981).

struggled to accept the belief.[14] Even a law that is facially neutral becomes unconstitutional as applied "if it unduly burdens the free exercise of religion."[15] Once the religious litigant has cleared this low hurdle of showing a burden, the government not only must justify the regulation, but also prove that there are no alternative ways to achieve its goal without "infringing [on] First Amendment rights."[16] Such a regime was generally favorable toward religious exemptions and, like in the early days of the country, indicated a permissive attitude toward religious accommodations.[17]

A dramatic change came with *Employment Division, Department of Human Resources of Oregon v. Smith*.[18] In 1990, Justice Scalia wrote for the majority of the Court in *Smith*, upsetting the existing First Amendment framework and ushering in a new legal framework for analyzing free exercise claims. According to the Court, the First Amendment does not require governments to give religious accommodations and rejected the position that "an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[19] The government no longer needed a compelling reason to burden an individual's free exercise but needed only to pass the much lower standard of review commonly referred to as *rational basis review*. The Court left only a few paths open to litigants to reach the friendlier regime of strict scrutiny review.[20] First, if the law was demonstrably not neutral or generally applicable, then the *Sherbert*-era, strict scrutiny test would apply.[21] Second and third, if there was a system of individualized exemptions[22] or the case involved hybrid-rights (a free exercise right coupled with parental rights or free speech rights, for example), strict scrutiny was available.[23] *Church of the Lukumi Babalu Aye, Inc. v. Hialeah* is a good example of the first pathway to strict scrutiny.[24] In that case the government showed overt hostility to religion and the Court examined

14 *Id.* at 715–16.

15 *Id.* at 717 (quoting Wisconsin v. Yoder, 406 U.S. 205, 220 (1972)).

16 *Sherbert*, 374 U.S. at 407.

17 Certainly, this approach also had its critics. One scholar argued that exemptions in the Sherbert regime were "sponsorship and endorsement" of a religion and conflicted with the Establishment Clause because it had "the impermissible effect of advancing religion." William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 320 (1991).

18 Emp. Div. v. Smith, 494 U.S. 872 (1990).

19 *Id.* at 878–79.

20 *Id.* at 884–86.

21 *Id.* at 871–72.

22 Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 48.

23 *Smith*, 494 U.S. at 872–73, 881.

24 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

the regulations more skeptically under strict scrutiny.[25] Regarding the second category, the implicit problem with a system of individualized exemptions is that the government is given discretion to make case-by-case decisions on who and what to accommodate. By its very terms, such a law is not neutral and generally applicable.[26] Finally, the hybrid rights exception enables the Court to justify decisions like *Wisconsin v. Yoder* which otherwise would directly contradict the new rule that as-applied challenges to neutral and generally applicable laws are upheld under rational basis review.[27]

The public reception of *Smith* was not warm. Calls for its overrule began almost immediately and continue to this day, most recently in *Fulton v. City of Philadelphia*.[28] In response to this revolution in free exercise rights, Congress passed the Religious Freedom Reformation Act (RFRA). According to the Act, the government could "not substantially burden a person's exercise of religion," even by a facially neutral law, unless it furthered a compelling governmental interest and was the least restrictive means of doing so.[29] When the Court ruled that RFRA did not apply to state governments, many states passed their own versions of RFRA, some with more and some with less protection than the federal version.[30] This was the state of First Amendment law before the Supreme Court started hearing pandemic-related cases.

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25 *Id.* at 541, 546. In that case, the Court ruled against the government's regulations prohibiting animal sacrifice because the laws arose from hostility to the Santeria religion. The Court gave a list of indicators that the law was not neutral or generally applicable including the fact that the law was gerrymandered to apply only to religious conduct, it was enacted with hostility toward religion, it included categorical exemptions for secular conduct, or it was selectively enforced against religious conduct. *Id.* at 535, 541, 537, 545.

26 The *Smith* Court mentioned *Sherbert v. Werner* as an example of individualized exemptions. *Smith*, 494 U.S. at 884.

27 Wisconsin v. Yoder, 406 U.S. 205 (1972). There, the Court gave Amish children an exemption from the requirement to attend public school until age sixteen. Justice Scalia characterizes this as a case involving both religious rights and parental rights. *See id.* at 213–15.

28 141 S. Ct. 1868 (2021). Although the Court declined to explicitly overrule *Smith* in that case, Justices Alito, Thomas and Gorsuch indicated their willingness to do so, and Justices Kavanaugh and Barrett called on legal scholars for alternatives that could replace *Smith* in the event of an overrule.

29 42 U.S.C. § 2000bb-1(a)–(b) (2018).

30 City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (finding that Congress' attempt to apply such a solicitous constitutional standard upon the states violated the separation of powers and principles of federalism). Since 1993, twenty-three states had passed their own versions of the federal RFRA. Matthew J. Branaugh, *Religious Freedom Protection Expanded in South Dakota and Montana*, CHRISTIANITY TODAY: CHURCH L. & TAX (Aug. 5, 2021), https://www.churchlawandtax.com/web/2021/may-2021/religious-freedom-protection-expanded.html [https://perma.cc/F38T-92VF].

### *B. The Birth of the Most Favored Nation Theory Of Religious Exemptions*

Scholars living in the wasteland of *Smith*'s rational basis review searched for the silver lining to the decision. This was how the most favored nation theory of religious exemptions was born. In international law, a "most-favored-nation" clause is a treaty provision that binds one state to treat the contracting state, "its nationals or goods, no less favorably than any other state, its nationals or goods."[31] Most frequently used in trade, a most favored nation clause ensures that the contracting nation receives the same import taxes, duties, etc. as the state that is treated best under the opposing nation's laws.[32] In a law review article published the very year *Smith* was decided, Douglas Laycock drew upon this tradition in order to explain the state of religious freedom after *Smith*. He narrowed in on the individualized exemption exception to rational basis review, writing:

> In such individualized decisionmaking processes, the Court's explanation of its unemployment compensation cases would seem to require that religion get something analogous to most-favored nation status. Religious speech should be treated as well as political speech, religious land uses should be treated as well as any other land use of comparable intensity, and so forth. Alleged distinctions—explanations that a proposed religious use will cause more problems than some other use already approved—should be subject to strict scrutiny.[33]

For Laycock, then, the most favored nation theory was merely an analogical way to explain what was already the law in *Smith*. Such an analysis does not seem to be earth-shattering, or even particularly noteworthy.

However, in a second article, Laycock and co-author Steven Collis added a twist to the theory. In imagining the best possible interpretation of the words "generally applicable," the two suggested that

> The question is not whether one or a few secular analogs are regulated. The question is whether a single secular analog is *not* regulated. The constitutional right to free exercise of religion is a right to be treated like the most favored analogous secular conduct. It is not enough to treat a constitutional right like the least favored, most heavily regulated secular conduct.[34]

This article is where the most favored nation theory gets its real teeth. Laycock and Collis argue that even if the secular exemption is necessary and obviously required as a matter of practicality (such as an

31 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 801 (AM. L. INST. 1987).

32 *Id.* at § 801 cmt. a.

33 Laycock, *supra* note 22, at 49–50.

34 Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 22–23 (2016).

exemption to the no-beard requirement for those with a medical condition that prevents them from shaving), the government has permitted an exception and is now required to grant a religious exemption too.[35] Notice what is *not* important to Laycock and Collis. The religious exemption could undermine the government's reason for having the rule in the first place. It could be burdensome or costly to administer. Such considerations are irrelevant. What matters is that the government has signaled that some reasons are important enough to merit an exception and, by excluding religious reasons, the government is implicitly making a value judgment that religious reasons are not as important as secular ones. For Laycock and Collis, this is what is prohibited by the First Amendment, and this is what prevents the law from being generally applicable.

### *C. The Pandemic Cases and Justice Kavanaugh's Contribution*

Laycock's most favored nation theory made the leap from academia to the world of the judiciary in a case arising from pandemic-related regulations. In *Calvary Chapel Dayton Valley v. Sisolak*, Justice Kavanaugh dissented from the denial of application for injunctive relief and invoked the most favored nation theory to explain his legal reasoning.[36] In that case, the Nevada government had limited houses of worship to fifty occupants per building but allowed casinos and other facilities to operate at 50% capacity.[37] The case came to the Supreme Court when the rural church of Calvary Chapel requested an injunction staying the state's orders.[38] Although the Supreme Court denied the injunction, Justice Kavanaugh's dissent proved to be prescient of the Court's later approach to such questions. Justice Kavanaugh divided laws that affect religion into four categories with a corresponding form of legal review for each.[39] First are laws that expressly discriminate against religious organizations *because* they are religious. These laws are generally unconstitutional.[40] Next are laws that expressly favor religious organizations, giving them benefits that are not afforded to comparable secular institutions.[41] Justice Kavanaugh cautions that these laws can sometimes run afoul of the Establishment Clause because of "the apparent favoritism of religion."[42] Third, some laws treat religious and secular organizations

35 *Id.* at 14–15, 21–23.
36 140 S. Ct. 2603, 2603 (2020) (Kavanaugh, J., dissenting).
37 *Id.* at 2604.
38 *Id.*
39 *Id.* at 2610.
40 *Id.* at 2610–11.
41 *Id.* at 2611.
42 *Id.*

the same and are facially neutral but may burden religious claimants.[43] In the face of such burden, the religious claimant may seek an exemption from the law as applied to them, or attack it on the grounds that the legislature was motivated by hostility toward religion.[44] Finally, the fourth category is comprised of laws that "supply no criteria for government benefits or action, but rather divvy up organizations into a favored or exempt category and a disfavored or non-exempt category."[45] Unlike laws in the first or second categories, these laws are not formulated around the religious character of the institution. However, unlike the third category of laws, they do not treat all organizations the same.[46]

Justice Kavanaugh found that the challenged laws in Nevada fell into this fourth category. He then cited Laycock's article to support the proposition that the State must place religious organizations in the favored category or provide sufficient justification why it does not.[47] For Justice Kavanaugh, the test requires a two-step analysis. First, the judge asks whether the law creates a class of favored or exempt organizations and whether religion falls into that class.[48] Second, if the religious organizations are not favored, the government has to provide "sufficient justification" for the unfavorable treatment.[49] While most of the pandemic cases were concerned with comparing churches and religious activities to other secular activities that were either more or less restricted, Justice Kavanaugh promoted his test as eschewing such balancing.[50] Many pandemic restrictions varied even across secular establishments, so if the Court decided a church was more like a concert venue than a grocery store, a different regulation could apply. However, according to Justice Kavanaugh, such a minute analysis is not necessary under his framework because the religious litigants need only show that one secular activity was more favorably treated. Justice Kavanaugh cites Laycock and Collis's single secular analog rule to

43 *Id.* Justice Kavanaugh gives the example of a fire code that requires sprinklers in certain buildings regardless of whether a church or a car dealership owns the building as an example of this third category.

44 *Id.*

45 *Id.* at 2611–12.

46 The rough beginnings of this schema can be found in Justice Kavanaugh's concurrence in *Morris County Board of Chosen Freeholders v. Freedom from Religion Foundation* where he contrasts religious accommodation cases as separate and distinct from cases in which the state discriminates on the basis of religion. Morris Cnty. Bd. of Chosen Freeholders v. Freedom from Religion Found., 139 S. Ct. 909, 910–11 (2019) (Kavanaugh, J., concurring).

47 *Calvary Chapel*, 140 S. Ct. at 2612 (citing Laycock, *supra* note 22, at 49–50).

48 *Id.* at 2613.

49 *Id.*

50 *Id.*

support this point, claiming it is "absolutely critical" to determining whether a religious exemption is constitutionally required.[51] Applying his test to the case at hand, Justice Kavanaugh found that Nevada could not justify placing churches in the disfavored, nonexempt category.[52]

Shortly after *Calvary Chapel*, the Court had a chance to address similar questions in *Roman Catholic Diocese of Brooklyn v. Cuomo*.[53] In this case, Jewish and Catholic communities sought an injunction for the governor's order that limited houses of worship to ten or twenty-five people at a time while allowing essential businesses to operate at full capacity. Justice Kavanaugh once again laid out his most favored nation theory, this time in a concurrence. He argued that New York had created a favored class of businesses and was therefore required to justify why houses of worship were not in that favored category.[54] He wrote that, "under this Court's precedents, it does not suffice for a State to point out that, as compared to houses of worship, *some* secular businesses are subject to similarly severe or even more severe restrictions."[55] Once again, the regulations would fail because they were not sufficiently justified.[56] Justice Kavanaugh's brief opinion laid out substantially the same analysis found in his *Calvary Chapel* dissent.

Finally, the climactic moment came with the Supreme Court's decision in *Tandon v. Newsom* to grant injunctive relief to the religious litigants mere days after it was requested.[57] Here, the per curiam opinion cited Justice Kavanaugh's *Roman Catholic Diocese* concurrence in holding that California's ban on in-home gatherings of more than three households for religious services likely violated the First Amendment.[58] The Court wrote that:

> [G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise. It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue.[59]

Providing some much-needed clarity, the Court explained that whether a secular activity was comparable to a religious one should be

51 *Id.* (citing Laycock & Collis, *supra* note 34, at 22).

52 *Id.*

53 Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (Kavanaugh, J., concurring).

54 *Id.* at 73.

55 *Id.*

56 *Id.*

57 Tandon v. Newsom, 141 S. Ct. 1294 (2021).

58 *Id.* at 1296.

59 *Id.* (citing *Roman Catholic Diocese*, 141 S. Ct. at 67–68).

determined by judging it against "the asserted government interest that justifies the regulation at issue."[60] Like Justice Kavanaugh, the majority placed the burden on the government to make this justification and to show that it was impossible to make the regulation less burdensome.[61] Although at first glance Justice Kavanaugh's most favored nation theory of religious exemptions appeared to have won over the hearts of a majority on the Court, the story is not quite so straightforward.

## II. DISTINGUISHING BETWEEN *SMITH*, *TANDON*'S MOST FAVORED NATION THEORY, AND JUSTICE KAVANAUGH'S *CALVARY CHAPEL* TEST

Although ultimately the *Tandon* analysis and the *Calvary Chapel* approach are distinguishable, both are significant departures from the *Smith* framework. While *Smith* did discuss a system of individualized exemptions, it did so narrowly and as a way to keep *Sherbert* as good precedent, not as a generalized framework for all exemptions.[62] In *Sherbert*, the government gave out unemployment benefits to those who with "good cause" were not able to accept employment offered to them, but did not consider the refusal to work on the Sabbath for religious reasons a good cause.[63] The Court held that the government must include religious reasons as good cause reasons and give eligible workers unemployment benefits.[64] In *Smith*, the unemployment benefits were denied for a similar reason, because the state decided that ingesting peyote during a religious ceremony (the reason why the religious claimants were fired) made them ineligible for employment benefits. In explaining why *Sherbert*'s compelling interest test should not apply to the case at hand, the Supreme Court explained that *Sherbert* was "a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct."[65] In that circumstance, "where the State has in place a system of individual exemptions," it cannot refuse an exemption for religious conduct "without compelling reason[s]."[66] In terms of *Sherbert*, the Court seemed to think that the governmental discretion involved in making a case-by-case determination of whether an organization shall receive benefits undermines the neutrality or generality of the law.

60 *Id.*
61 *Id.* at 1296–97.
62 Blackman, *supra* note 2, at 718.
63 Sherbert v. Verner, 374 U.S. 398, 399–401 (1963).
64 *Id.* at 408–09.
65 Emp. Div. v. Smith, 494 U.S. 872, 884 (1990).
66 *Id.*

*Tandon* endorsed an expansion of the system of individualized exemptions referenced in *Smith* by requiring religious accommodation when there is a single secular exemption.[67] Such a change is not insignificant. The *Smith* language—"a system of individualized exemptions"—implies that the government has broad discretion to administer a program individually. It does not necessarily include administrative or physically necessary exceptions. The rationale in *Smith* was that the law could not be generally applicable if the government had the discretion to make case-by-case decisions about whether an individual person would receive the benefit or exemption. That same rationale does not justify the *Tandon* and *Calvary Chapel* rules that only require one, comparable, secular exemption. Under *Smith*, a law could theoretically be neutral and generally applicable if some organizations were treated more favorably than others as long as the determination depended on a rational, statutory basis rather than an exercise of administrative discretion. With the *Tandon* and *Calvary Chapel* development, "the Court has reinterpreted *Smith* in a way that would be unrecognizable to Justice Scalia. It has so profoundly changed the meaning of 'discrimination' against religion that *Smith*'s central holding—that religious objectors must obey nondiscriminatory laws—has been largely hollowed out."[68] In fact, in a dissenting opinion to a denial of injunctive relief, Justice Gorsuch described the system of individualized exemptions and the disfavored treatment of comparable activities as two distinguishable, though related, paths toward strict scrutiny.[69]

*Tandon* and *Calvary Chapel* share the same broad holding that a "law or policy that contains exemptions and exceptions—or even a mechanism for granting accommodations on a case-by-case basis—is not . . . generally applicable, and so must be carefully evaluated if it imposes a burden on religious exercise."[70] However, there are differences between the two tests that, as discussed below, lead to astonishingly different outcomes.

The main difference comes in how the tests handle comparability. For Justice Kavanaugh, the most favored nations analysis did not

67 Jim Oleske, Fulton *Quiets* Tandon*'s Thunder: A Free Exercise Puzzle*, SCOTUSBLOG (June 18, 2021, 4:20 PM), https://www.scotusblog.com/2021/06/fulton-quiets-tandons-thunder-a-free-exercise-puzzle/ [https://perma.cc/JXL3-WVTU].

68 PLATT, FRANKE & HADJIIVANOVA , *supra* note 3, at 10.

69 Doe v. Mills, 142 S. Ct. 17, 19–20 (2021) (Gorsuch, J., dissenting). After citing *Lukumi* to support the claim that individualized exemptions require strict scrutiny, Justice Gorsuch cites *Tandon* and its comparable activity language as "another related reason" why strict scrutiny applies. *Id.*

70 Richard W. Garnett, *After* Fulton, *Religious Foster Care Agencies Still Vulnerable*, FIRST THINGS (June 22, 2021), https://www.firstthings.com/web-exclusives/2021/06/after-fulton-religious-foster-care-agencies-still-vulnerable [https://perma.cc/4TSW-3ZBT].

require "judges to decide whether a church is more akin to a factory or more like a museum."[71] The only time he deals with the necessity of comparison is when deciding in which category the law belongs. For Justice Kavanaugh, the most favored nation test is an answer to the question of what constitutional requirements apply when, in zoning, for example, "religious properties arguably could be considered similar to some of the secular properties in *both* [favored and disfavored] categories."[72] Justice Kavanaugh does not elaborate on this section in terms of how good the arguments have to be or how comparable the religious and secular activities or organizations must be. Of course, he does quote Laycock's "single secular analog" language when discussing step two of his test,[73] but overall Justice Kavanaugh determines that judges do not have to compare organizations at all in the initial step since the "only question" is whether religious organizations are in the favored category.[74] The implication is that as long as the parties can rationally argue the religious activity or organization resembles the secular ones that are favored, the most favored nation analysis applies. Practically, the judge might engage in an implicit comparison in step two of Justice Kavanaugh's test, which examines the government's justification of disfavored treatment. When examining Nevada's rules for business capacity, Justice Kavanaugh reasoned that "the State cannot plausibly maintain that those large secular businesses are categorically safer than religious services."[75] However, because the inquiry is ultimately about the government's justification, Justice Kavanaugh examines the rationale for the distinction rather than the similarities between the activities or characteristics of churches and grocery stores.

The *Tandon* majority also has to grapple with comparability, but in that case the Court lists it as a distinct step in the analysis. While the Court still maintains that the strict scrutiny analysis applies whenever a single secular activity is treated more favorably than a religious one, the two activities must be comparable.[76] The very first step in the analysis for the *Tandon* Court is whether the government is treating a comparable secular activity more favorably than a religious one.[77] And in the second step, the Court explicitly engages in a comparison of the secular and religious activities. Here, the activities are "judged against

71 Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2613 (2020) (Kavanaugh, J., dissenting).

72 *Id.* at 2612.

73 *Id.* at 2613 (quoting Laycock & Collis, *supra* note 34, at 22).

74 *Id.*

75 *Id.* at 2615.

76 Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021).

77 *Id.*

the asserted government interest that justifies the regulation at issue."[78] Only after the Court concludes that the religious activity is similar enough to the secular one does it pass into the third and final step which places the burden on the government to satisfy strict scrutiny.[79]

Does this difference matter? The answer is a resounding yes. While theoretically a judge could apply the two tests to achieve the same result, in practice the *Tandon* test is much easier to manipulate to rule against religious litigants. As the following cases demonstrate, *Tandon* has not opened the floodgates to religious liberty accommodations but rather slowed the trickling stream of accommodations down to a drip. The reason is that for Justice Kavanaugh the mere fact that the government has started to divide organizations up into different categories is a reason to shift the burden onto the government and use the strict scrutiny analysis. On the other hand, in *Tandon*, the judge is given leeway to decide, as a preliminary step of the analysis, whether the secular activity is comparable to the religious one. In this analysis of similarity, the test loses predictability because judges can highlight or minimize the differences in order to justify whether the religious claimant will benefit from strict scrutiny review or will be analyzed on a rational basis review. To be fair, the Court itself probably did not intend to create a different test in *Tandon*. When Justice Gorsuch explained the *Tandon* test in his concurring opinion in *Fulton v. City of Philadelphia*, he emphasized that the mere existence of an exemption means the law is not generally applicable and must be examined strictly. The state's "power to grant exemptions . . . *anywhere* 'undercuts its asserted interests' and thus 'trigger[s] strict scrutiny' for applying the policy *everywhere*."[80] Justice Gorsuch at least considers the discretionary power as the central point of the test, not the comparability of the actions. However, lower courts have used the comparability step to consistently rule against religious claimants and *Tandon* has a poor record of protecting free exercise.

A second element of potential divergence between the two tests is the standard of review that applies at the end of the analysis. The majority explicitly applies strict scrutiny in *Tandon*, writing that the government "has the burden to establish that the challenged law satisfies strict scrutiny."[81] As expected, this requires the government to

78 *Id.*

79 *Id.* at 1296–97.

80 Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1929 (2021) (Gorsuch, J., concurring) (quoting Brief for United States as Amicus Curiae Supporting Petitioners at 21, *Fulton*, 141 S. Ct. 1868 (No. 19-123)).

81 *Tandon*, 141 S. Ct. at 1296.

justify why religious exercise must be treated differently to achieve the governmental interest and that the method used is narrowly tailored to achieve that end.[82] In contrast, Justice Kavanaugh only requires a "sufficient justification" for the governmental intrusion. What exactly does Justice Kavanaugh mean by "sufficient justification"? In threshing out the standard, Justice Kavanaugh quotes *Smith*, requiring the government to have a "compelling reason" and *Fraternal Order of Police v. Newark*, which requires a "substantial justification" for the government's decision.[83] This seems to indicate that Justice Kavanaugh intends to invoke either strict scrutiny or something very much like it for the analysis. Justice Kavanaugh's application of his test to Nevada's regulations provide further evidence that he intends to use strict scrutiny as the standard of review. Justice Kavanaugh found that the government had a "compelling interest" at stake, but it did not overcome its burden of showing that the occupancy limits placed on churches was narrowly tailored to achieve that end.[84] The analysis looks very much like strict scrutiny since the burden is on the government to justify its regulation and prove that it is narrowly tailored. Based on this evidence, it is reasonable to assume that Justice Kavanaugh intended to invoke strict scrutiny review when he wrote about "sufficient justification."

Finally, it is worth noting that the *Tandon* majority almost exclusively speaks in terms of religious exercise while Justice Kavanaugh's test applies to discrimination against religious organizations in their status as organizations. For *Tandon*, what matters is whether the "two activities" are comparable and if the government can justify its regulation of "First Amendment activity."[85] Justice Kavanaugh, however, considers whether "religious organizations" are favored and whether there is sufficient reason for treating them differently.[86] Perhaps the reason for this difference is that the majority tried to formulate a rule that would apply generally to all situations where free exercise claims are raised—perhaps intending to merely reformulate, rather than alter *Smith*—while Justice Kavanaugh applies the most favored nation theory to a discrete category of laws: ones that divide organizations into favored and disfavored categories. Because Justice Kavanaugh has narrowed the universe of cases that his test applies to, he is able to formulate it so that it is more solicitous of religious

82 *Id.* at 1296–97.

83 Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2612 (2020) (Kavanaugh, J., dissenting) (first quoting Emp. Div. v. Smith, 494 U.S. 872, 884 (1990); and then quoting Fraternal Ord. of Police Newark Lodge No. 12, 170 F.3d 359, 360 (3d Cir. 1999)).

84 *Id.* at 2613.

85 *Tandon*, 141 S. Ct. at 1296–97.

86 *Calvary Chapel*, 140 S. Ct. at 2613.

exercise while the *Tandon* test cannot provide as much guidance to judges in how to balance and apply the test. This may be another reason why the *Tandon* test in practice has proven to be less solicitous of religious claimants while Justice Kavanaugh's test would likely provide more protection to religious litigants seeking accommodations.

## III. *TANDON* IN THE LOWER COURTS PROVIDES LITTLE RELIEF FOR RELIGIOUS LITIGATORS WHILE *CALVARY CHAPEL* WOULD CONSISTENTLY HAVE DONE SO

The lower courts that have applied *Tandon* to free exercise cases have used it to deny accommodations to religious litigants. A case out of Michigan recently used the *Tandon* analysis when considering a religious challenge to the Michigan governor's executive order mandating masks in schools.[87] The order required all children in grades K–5 to wear masks while in school.[88] The district court denied the plaintiff's request for an injunction staying the order and on appeal the appellate court affirmed the district court's decision.[89] The appellate court quite clearly applied the *Tandon* analysis in determining whether the religious claimants were entitled to relief and whether to examine the regulation under strict scrutiny or under rational basis review. After examining conflicting precedents, the court decided that "[s]chools educating students in grades K–5 are unique in bringing together students not yet old enough to be vaccinated against COVID-19 in an indoor setting and every day. Accordingly, the proper comparable secular activity in this case remains public and private nonreligious schools."[90] Because masks were required in private nonreligious and public schools, the court determined that the law was generally applicable and rational basis review applies to the question. Under the *Tandon* test, this outcome is hardly debatable. However, Justice Kavanaugh's test from *Calvary Chapel* characterizes the question quite differently and arguably leads to a different result.

First, the executive order divides up certain organizations into favored and disfavored categories, which would make it part of Justice Kavanaugh's fourth category of laws. Grocery stores must require their customers to wear masks, but restaurants and food service establishments do not need to require masks of their patrons.[91] Businesses must

87 Resurrection Sch. v. Hertel, 11 F.4th 437, 441 (6th Cir. 2021), *vacated pending rehearing en banc*, 16 F.4th 1215, 1216 (6th Cir. 2021) (mandate stayed pending hearing).

88 *Id.* at 447.

89 *Id.* at 441.

90 *Id.* at 457–58.

91 *Id.* at 444–45.

require employees to wear masks, but an auditorium hosting a speaker addressing an audience twelve feet away does not have to require the speaker to wear a mask.[92] Private, religious schools must require all students to wear masks, but churches do not have to require children engaging in a religious service to wear a mask.[93] The plaintiff's free exercise claim is that wearing a mask at the school prevents their children from effectively learning the Catholic faith through their Catholic school education.[94] In Justice Kavanaugh's analysis, the private school teaching children the faith could arguably fall into the favored category of organizations (because it is arguably akin to churches and restaurants) as well as the disfavored category (because it is also like the public schools). With this background, the court should embark on the first prong of the test: asking whether the activity is in the favored category. Here, it is not. According to the second prong, the Court now must engage with the government's justification for why religious schools should fall into the disfavored category rather than the favored one. At this stage, the religious claimants may still lose depending on whether the judge accepts the state's arguments that prolonged interaction in schools is significantly different from gathering together to worship for a couple of hours or sitting down for a meal. However, the analysis must be conducted under strict scrutiny which means the government will have to justify applying the regulation to the private school as well as show that it is narrowly tailored. This would give the religious litigants a better chance at an accommodation.

A few comments on the difference between the *Tandon* test and Justice Kavanaugh's test are in order. First, the Michigan executive order is phrased in terms of favored/exempt and disfavored/non-exempt *activities* rather than favored or disfavored *organizations*. As mentioned above, this is one difference between the two tests that makes *Tandon* more clearly applicable since it encompasses all free exercise claims rather than claims centered around organizations and their treatment. The law could still fairly fall into Justice Kavanaugh's fourth category of rules, however, since the organizations are the entities required to enforce the mask requirements upon individuals engaged in the specified activities. Second, *Tandon's* step one comparability analysis proved to be insurmountable for the religious claimants, but they did not face that obstacle in Justice Kavanaugh's regime. Once the judge decided that private schools and public schools are comparable because they pose similar risks to the spread

92 *Id.*
93 *Id.*
94 *Id.* at 447.

of COVID-19—as indeed they must under *Tandon*—the law was deemed neutral and generally applicable and the religious claim was analyzed under rational basis review rather than strict scrutiny. By the mere fact of the division of organizations, however, Justice Kavanaugh's test puts the burden on the government to justify its reason for treating a religious school as disfavored rather than as favored like religious churches or restaurants.

A second case that arose because of pandemic-related regulation was *Does v. Mills*, which was decided in a Maine district court. In that case, the religious claimants sought an exemption from the regulation requiring all healthcare employees to receive the COVID-19 vaccination.[95] The Maine Legislature issued a rule that required healthcare workers to receive certain vaccinations and originally included both medical and religious exemptions.[96] In 2019, the legislature amended the rule to remove religious exemptions from the requirement and in 2021 added the COVID-19 shot to the requirements.[97] Once again, the court explicitly applied *Tandon* to the free exercise claim and found that the regulation should be viewed under a rational basis review, ruling against the religious claimants.[98] In engaging in the comparability analysis, the court probably misapplied even *Tandon* when finding that medical exemptions were not comparable to religious exemptions. The court found that in this case "there is a fundamental difference between a medical exemption—which is integral to achieving the public health aims of the mandate—and exemptions based on religious or philosophical objections—which are unrelated to the mandate's public health goals."[99] The asserted government interest is what is comparable in this case; that is, protecting public health by reducing the spread of COVID-19. Upon review, the First Circuit court affirmed the decision, declaring that "the comparability concerns the Supreme Court flagged in the *Tandon* line of cases are not present here."[100] Once again, the court briskly declared that strict scrutiny therefore did not apply and decided the case upon rational basis review.[101]

95 Does 1–6 v. Mills, No. 21-cv-00242, 2021 WL 4783626, at *1 (D. Me. Oct. 13, 2021).

96 *Id.* at *4.

97 *Id.*

98 *Id.* at *8, *12.

99 *Id.* at *8.

100 Does 1–6 v. Mills, 16 F.4th 20, 32 (1st Cir. 2021). The Supreme Court denied an application for injunctive relief on October 29, 2021. Does 1–3 v. Mills, 142 S. Ct. 17 (2021). Justice Kavanaugh joined Justice Barrett's concurrence in denying such "extraordinary relief" in a case which is "the first to address the questions presented" without full briefing and argument. *Id.* at 18 (Barrett, J., concurring).

101 *Does 1–6*, 16 F.4th at 32.

The district court erred in this case by comparing the reasons why the regulation exempted people with medical conditions. What is important are *not* the common-sense reasons or necessities why the government may have granted certain exemptions, but the fact that the government has decided some reasons justify an accommodation and some do not.[102] As Justice Gorsuch stated when applying *Tandon*, "[e]xceptions for one means strict scrutiny for all."[103] The judgment call of whether religious exercise counts as a good reason to grant an exemption is not left to the discretion of the legislature; the Constitution requires religious reasons to be treated as well as secular reasons. A proper reading of *Tandon* would require the court to find that religious and medical exemptions are comparable because both undermine the state's goals of protecting public health, especially the most vulnerable, and keeping healthcare workers healthy.[104] The court reasoned that public health would be undermined by giving healthcare workers a vaccine that would harm them medically, but that requiring a vaccination of those who have conscientious objections would not.[105] While this particular interest may be more clearly undermined by religious exemptions, the entire reason for the vaccine mandate is to protect the state through universal vaccination. That goal is undermined any time someone does not get the shot, whether for religious or medical reasons. Although this case is probably incorrectly decided,[106] it illustrates that lower courts have interpreted *Tandon* so that it does not provide strong protection to religious litigants, even in seemingly clear cases.

Under Justice Kavanaugh's test, the court would have less flexibility to craft a preferred outcome. The law creates a favored group—those with medical reasons for refusing the COVID-19 shot—and a disfavored group—those with philosophical or religious reasons for refusing the shot. Because Justice Kavanaugh only requires an "arguable" similarity between the religious activity and the secular one, the court would be hard pressed to deny that refusing the shot for religious reasons is similar to refusing it for medical reasons. After all, the result is exactly the same. Now that the law is subject to the most favored nation analysis, the religious claimants are in the disfavored

102 In *Tandon*, the court said that the reasons why people gather were not important, what mattered was whether the gatherings threatened the government's interest. Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam).

103 Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1929 (2021) (Gorsuch, J., concurring).

104 *Does 1–6*, 16 F.4th at 31.

105 *Id.*

106 See Justice Gorsuch's dissent from the denial of injunctive relief as an example of how the Supreme Court would apply *Tandon* and the strict scrutiny analysis to this case. *Does 1–3*, 142 S. Ct. at 19 (Gorsuch, J., dissenting).

category and so would immediately receive the preferential standard of strict scrutiny. While the government certainly would have a compelling interest in promoting public health through vaccination, it would have a difficult time showing that the regulation is narrowly tailored to achieve that end. The district court distinguished this case from *Fraternal Order of Police v. Newark*;[107] however, that case actually speaks quite specifically to the underlying doctrinal question. In *Fraternal Order of Police*, the government required every police officer to be clean-shaven except those with medical conditions or undercover assignments.[108] The state's asserted interest was uniformity of appearance which justified the rule against beards and its application to Muslim officers who sought an exception for religious reasons.[109] In both the Maine case and in *Newark*, the government's objective is undermined by any exemption and so once one is granted, even for a necessary reason, the door is open for religious exceptions. *Tandon*'s second step, at which judges determine whether the religious and secular activities are comparable, once again led to the death of the religious litigant's claim. Under *Tandon*, the court was able to summarily dismiss the claim because of the supposed dissimilarity, while under Justice Kavanaugh's test, the single secular analog element would force the court to engage in strict scrutiny analysis, giving the religious claimant a better chance of success.

Moving beyond the context of pandemic regulations, the *Tandon* test applies to all free exercise claims, but Justice Kavanaugh's test would still be more solicitous of religious rights. A recent case in Colorado about religious accommodations illustrates this point. In *303 Creative LLC v. Elenis*, a creative designer sought an exemption from Colorado's laws that prohibited individuals from refusing service to others on account of sexual orientation and from publishing any communication expressing the message that patronage is unwelcome because of an individuals' sexual orientation.[110] However, a patron may restrict access to certain goods and facilities to individuals of one sex "if such restriction has a bona fide relationship to the goods, services, facilities, privileges[, etc.]."[111] The plaintiff hoped to expand her services to include custom wedding websites, but her religious beliefs prevented her from celebrating same-sex weddings.[112] While she would serve anyone regardless of their sexual orientation, she

107 Does 1–6 v. Mills, No. 21-cv-00242, 2021 WL 4783626, at *11 (D. Me. Oct. 13, 2021).

108 Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 360 (3d Cir. 1999).

109 *Id.* at 366.

110 303 Creative LLC v. Elenis, 6 F.4th 1160, 1169–70 (10th Cir. 2021).

111 *Id.* at 1169 (quoting COLO. REV. STAT. § 24-34-601(3) (2021)).

112 *Id.* at 1172.

would not create a custom website that expressed support of same-sex marriage.[113] The court in this case found that Colorado's law against discrimination was generally applicable and that rational basis review was required.[114] Although Colorado did allow message-based refusals of service, the court found that such a refusal was not comparable to the plaintiff's refusal to celebrate same-sex marriage. Instead, the court decided that the appropriate comparator would be someone who refused to support same-sex marriage for secular reasons. Here, the religious claimant "provide[d] no evidence that Colorado permits secularly-motivated objections to serving LGBT consumers."[115] The court dealt with the "bona fide" exemption in the same way, saying that it did not trigger strict scrutiny because the government had not yet declared a religious reason for discrimination invalid while simultaneously upholding a secular reason.[116]

Once again, the court is probably not properly applying the *Tandon* test, and once again this case reveals that the step two comparability analysis is easy to abuse because of its vague standard. As the dissent aptly points out, the mere fact that an exception exists whereby discrimination is tolerated should trigger strict scrutiny of religious reasons for discrimination.[117] This is a clear system of case-by-case, discretionary decisions on who must comply with the law. However, the *Tandon* test is admittedly difficult to apply in this context. The first step is whether a religious exercise is treated less favorably than a secular one, so it is understandable why the court would look for secularly-motivated discrimination against sexual orientation as a comparator. The state condoned a message-based refusal by a baker when he refused to make a cake with a Bible verse and a message that expressed disapproval of same-sex marriage.[118] That exemption was given for a secularly-motivated refusal of serve and would require the state to give refusals of service for religious reasons similarly favorable treatment. The difficulty here lies in the justification for the law since the government intends to protect the dignity of homosexual individuals. The state could argue that permitting the religious objector to refuse service harms the dignity of the same-sex couple while a refusal to make anti-gay marriage messages does not. This comparability analysis will depend on how exactly the judge characterizes the purpose of the law and the similarity between the activities. When judges are given authority to define whether an

113 *Id.* at 1192 (Tymkovich, C.J., dissenting).
114 *Id.* at 1188 (majority opinion).
115 *Id.* at 1186.
116 *Id.* at 1188.
117 *Id.* at 1208 (Tymkovich, C.J., dissenting).
118 *Id.* at 1185–86 (majority opinion).

activity is comparable based on the justification for regulation (here, that would be a desire to promote equal treatment of LGBT consumers) the results are unpredictable and vary according to a particular judge's sensitivities.

On the other hand, Justice Kavanaugh's test does not require judges to engage in detailed comparison. Colorado claims that the law "allows for message-based refusals" which means that some kinds of service refusals—refusals because the creator disagrees with the message—are exempt from the law while those done because of the status of the customer are not exempt.[119] Because the religious-based refusal is declaratively a refusal because of the message, and not because of status, the government must explain why it has denied this favored status under a strict scrutiny standard. In this analysis, the court must determine whether the government's goal of promoting equal treatment for homosexual couples is narrowly tailored to achieve its end. Although a balancing of interests is still required with Justice Kavanaugh's test, at least it is carried out under the banner of strict scrutiny rather than rational basis.

Finally, *Chung v. Washington Interscholastic Activities Organization* dealt with *Tandon* in the context of school scheduling requirements and shows that Justice Kavanaugh's test has the potential to apply beyond religious organizations. In this case, Seventh-day Adventists sought an accommodation for their Sabbath observance in the scheduling of high school tennis tournaments.[120] The court decided that strict scrutiny did not apply because it found that *Tandon* required "myriad exceptions" to the rule before strict scrutiny applied.[121] The plaintiffs pointed out that the school did accommodate religious exercise when scheduling volleyball tournaments because religious schools competed and the entire team needed an exemption.[122] Additionally, golf tournaments were not scheduled for the weekend because golf courses were not open.[123] However, the court determined that these reasons were so different from the reasons to grant an individual religious exemption that they were not comparable. The golf exception was because of practical necessity and the volleyball accommodation was a categorical, rather than an individual exemption.[124] The court here once again manipulated *Tandon*'s step two comparability analysis to rule against the religious claimants. After

119 *Id.* at 1210 (Tymkovich, C.J., dissenting).

120 Chung v. Wash. Interscholastic Activities Ass'n, No. C19-5730, 2021 WL 3129624, at *1 (W.D. Wash. July 23, 2021).

121 *Id.* at *3.

122 *Id.*

123 *Id.*

124 *Id.*

all, nowhere in *Tandon* did the Supreme Court indicate that multiple exceptions were a prerequisite for granting a religious accommodation. However, the formulation of the *Tandon* test is unfortunately vague and only weakly protects religious exercise.

In contrast, Justice Kavanaugh's approach would almost certainly lead to strict scrutiny. The mere fact that some sports receive religious accommodations and that others do not indicates that there are favored and disfavored categories, and tennis should be in the same category as other sports like volleyball. Under Justice Kavanaugh's test, the fact that some exemption requests come from individuals and some from teams would only factor into the second prong of the state's justification for treating the two activities differently. Quite likely, the court would find that this was not a sufficient justification. After all, if the reasons for denying exemptions are ease of scheduling and convenience to the students, such reasons are probably not going to carry the day in a strict scrutiny analysis. Once again, it is important to note that Justice Kavanaugh's test is formulated to protect religious organizations from being treated worse than secular organizations. In this case and others, the free exercise claim is phrased in terms of individual accommodation or free exercise activities. The *Calvary Chapel* framework is flexible enough to fit these fact patterns as well, but it is worth considering whether Justice Kavanaugh intended his test to encompass so much. The four types of law mentioned in *Calvary Chapel* appear to be Justice Kavanaugh's attempt to categorize all religious claims.[125] Justice Kavanaugh explained all four categories of laws in terms of their effect upon religious organizations rather than upon individual religious litigants or religious activity generally. If Justice Kavanaugh is truly making an exhaustive list, it is reasonable to extrapolate that the fourth category must include not just treatment of religious organizations but also treatment of individuals. Consequently, *Tandon*'s initial advantage of providing a flexible framework for analyzing all free exercise cases may be moot if Justice Kavanaugh's test extends beyond mere religious institutions into religious activities generally and individual religious litigants. As cases like *Chung* show, Justice Kavanaugh's most favored nation test is flexible enough to encompass a broad spectrum of religious liberty claims.

A final question to address is whether Justice Kavanaugh's test would be subject to the same danger of manipulation that the *Tandon* test has experienced in the lower courts. The weakness of Justice Kavanaugh's test is that he does not explicitly state the standard for

125 Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2610 (2020) (Kavanaugh, J., dissenting).

when a religious activity could "arguably" fall into either the favored or disfavored category. As it stands now, lower courts may be tempted to avoid Justice Kavanaugh's analysis altogether by simply "explaining away" why the religious activity is unlike the secular one. Perhaps the best formulation of Justice Kavanaugh's test would be one that enacts a "conceivability" standard for this lurking, pre–step one question. As long as the religious activity could conceivably be placed in either category, the court must launch into the rest of the *Calvary Chapel* test. "Arguably" implies a reasonableness component as to whether the religious act could be placed in the favored category, but "conceivable" would pose the question in terms of whether favored treatment is within the realm of possibilities. Courts and judges would have a harder time side-stepping the analysis without the comforting vagueness of a "reasonable" standard to hide behind. Although it is easy to meet, the "conceivability" formulation does not pose a danger of unduly increasing religious litigation and will not necessarily multiply religious exceptions to an unmanageable degree. After all, courts can filter out religious claims that are too disruptive of the public welfare and that are rationally regulated in the second step when the government explains its justification for the disfavored treatment. What is important is to formulate the test so that judges are not invited to pre-decide the case by reintroducing the comparability analysis that caused so much unpredictability in the *Tandon* test. No test is perfect, and the second step of Justice Kavanaugh's test does require a weighing and balancing that will inevitably differ according to each judge's sensibilities. However, his test would be at least incrementally more protective of religious freedom than the *Tandon* test.

## CONCLUSION

The pandemic cases were an exciting development in First Amendment jurisprudence. Most especially, Justice Kavanaugh's exposition of the most favored nation theory for evaluating religious exemptions broadened the horizon in terms of analyzing free exercise accommodation claims. As laid out by Justice Kavanaugh, the most favored nation theory provides a consistent, systemic way to evaluate religious accommodation claims which places appropriate weight on the importance of religious freedom. Because he limited the test to laws that place religious organizations in a disfavored category rather than suggesting a new standard for all free exercise claims, Justice Kavanaugh could be especially protective of religious claimants' rights without opening the floodgates to constant religious accommodations. Although the majority of the Court appeared to adopt a similar test in *Tandon*, a close examination reveals that the majority's formulation of the test leads to inconsistent outcomes and, as interpreted by lower

courts, resulted in a shocking record of defeats for religious litigants. In inviting the judges to test the comparability of activities before affording them strict scrutiny, the *Tandon* test places an additional obstacle before religious claimants seeking protection. The vagueness of the comparability test—whether two activities are similar in terms of the governmental interest involved—leaves the door open for judicial gerrymandering against religious claims. Lower court judges using this test have arrived at decisions that were surely not intended by the majority who adopted it.

Although both the *Tandon* test and Justice Kavanaugh's test share the same theoretical basis and move past the narrow system of exemptions subject to strict scrutiny analysis under *Smith*, the practical differences are quite extreme. As lower courts have demonstrated, the most favored nation test favored by the *Tandon* majority can easily be weaponized against religious litigants and consistently denies them strict scrutiny. In contrast, Justice Kavanaugh's test would yield predictable results and would avoid the necessity of judges diving deeply into the rationale and practical considerations behind the policy. Most courts are not equipped to make determinations about the practical effects of a particular policy and one reason Justice Kavanaugh's approach is so appealing is that it eliminates the need for judges to do so. It consistently provides religious litigants with a more favorable, strict scrutiny review, but also allows for denial of exemptions when necessary. This would enable courts to strike the right balance of protecting the central principle of religious liberty and leaving detailed, technical judgments about policy to legislative bodies. For all these reasons, Justice Kavanaugh's most favored nation test should become the governing test going forward for challenges to laws that divide institutions or activities into favored and disfavored categories. Of course, if *Smith* does finally get overturned in the future, this test may fall by the wayside depending on what test or analysis replaces *Smith*. In the meantime, however, Justice Kavanaugh's test would provide a haven for religious litigants in search of that pre-*Smith* strict scrutiny analysis.