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NOTE

# Selective Civil Rights Enforcement and Religious Liberty

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**Abstract.** Recent years have seen many high-profile cases involving enforcement of civil rights laws against religious groups who claim that they have been unfairly targeted. It is a basic principle of constitutional law that disparate enforcement of the law against a disfavored group—whether those of a particular race, religion, sex, ethnicity, or viewpoint—is problematic. In the context of religious discrimination, the First Amendment's Free Exercise Clause protects generally against the enactment of laws that blatantly target particular religious practices, and the Fourteenth Amendment's Equal Protection Clause protects generally against the law being applied differently against specific religious groups. But to this point, there has been little attention paid to the particular phenomenon of the use of civil rights laws, enforced disparately, as a tool for oppressing disfavored religious groups and suppressing disfavored religious practices.

This Note examines how selective enforcement claims operate under the Equal Protection Clause and the Free Speech Clause and attempts to build a framework for how such claims should be handled under the Free Exercise Clause. It constructs a spectrum of de jure religious discrimination and suggests a parallel to the spectrum of laws that implicate the Free Speech Clause. In particular, it argues that free exercise doctrine should explicitly handle "middle-of-the-spectrum" cases analogously to how they are handled in the free speech context—facially neutral laws that might otherwise receive reduced scrutiny should be given strict scrutiny when enforced disparately. Parties charged with civil

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rights violations (or violations of any law that burdens their religious practice) should have available, as an affirmative defense, the claim that the law is not being applied against similarly situated secular violators. Ultimately, the framework this Note chooses resembles selective prosecution claims brought under the Fourteenth Amendment, with the key difference that defendants raising selective enforcement claims under the Free Exercise Clause should not bear any burden to show discriminatory intent.

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## Introduction

In 2012, seven stores on Lee Avenue in Williamsburg, Brooklyn, caught the eye of the New York City Commission on Human Rights.[1] The stores, all owned by Satmar Hasidim,[2] had put up signs in their front windows laying out dress requirements for patrons entering the store.[3] For example, one sign read:

DRESS CODE FOR STORE
כאן נכנסים רק בתלבושת צנועה
No Shorts
No Barefoot
No Sleeveless
No Low Cut Neckline
ALLOWED IN THIS STORE
- - - - -
No Rope Escotada
No Pies Descubiertos
No Pantalones Cortos
Mangas Cortas
PERMITIDA EN ESTE NEGOCIO[4]

In the Commission's view, the policy discriminated against women, in violation of municipal civil rights law; the Commission therefore brought an enforcement action against the storeowners.[5]

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1. *See* Verified Complaint ¶¶ 4-5, Gestetner Printing, No. M-P-SC-12-1027203 (N.Y.C. Comm'n on Human Rights Aug. 2, 2012); Philip Messing, *Hearing for Orthodox Jewish Shops' "Modesty" Rules*, N.Y. POST (Sept. 30, 2013, 12:46 AM), https://perma.cc/G9XP-WRF3; Rachel Silberstein, *NYC Battles Ultra-Orthodox on Modesty Signs*, TABLET (Oct. 2, 2013), https://perma.cc/T95P-K2A4.

2. *See* Messing, *supra* note 1. The Hebrew word "Hasidim" literally means "pious ones" and refers to Orthodox Jewish groups who trace certain religious customs and theological ideas to their eighteenth- and nineteenth-century eastern European communities. *See generally, e.g.*, *A Brief Introduction to Hasidism*, PBS: LIFE APART; HASIDISM IN AM., https://perma.cc/7SK5-AGFH (archived Apr. 18, 2020); *Hasidism: Historical Overview*, YIVO ENCYCLOPEDIA JEWS E. EUR., https://perma.cc/CW82-WRB7 (archived May 3, 2020). The Satmar Hasidim trace to what is today Satu Mare, Romania. *See Satmar Hasidic Dynasty*, YIVO ENCYCLOPEDIA JEWS E. EUR., https://perma.cc/2FEU-HSGW (archived Apr. 18, 2020); *see also Satu Mare*, ENCYCLOPÆDIA BRITANNICA, https://perma.cc/ET7Q-6Z5N (archived Apr. 18, 2020).

3. *See* Messing, *supra* note 1; Silberstein, *supra* note 1.

4. Jen Chung, *Grocery Store in Ultra-Orthodox Williamsburg Bans Shorts, Low Cut Tops*, GOTHAMIST (July 19, 2012, 5:55 PM), https://perma.cc/S43W-FEAW. The Hebrew text of the sign means "entry allowed only in modest clothing." The Spanish text roughly tracks the English.

5. *See* Reply Memorandum of Law to Respondents' Opposition to Law Enforcement Bureau's Motion for Summary Judgment & Respondents' Cross-Motion for Summary Judgment at 4, N.Y.C. Comm'n on Human Rights v. Gestetner Printing, Nos. M-P-SC-12-1027203 et al. (N.Y.C. Office of Admin. Trials & Hearings May 20, 2013) [hereinafter NYCCHR Reply Brief] ("The signs explicitly refer to female clothing,
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The Commission's argument that the dress code discriminated against women was dubious, not least because the dress code appeared to apply just the same to men and sought only to enforce a religious norm of modesty applicable to both sexes.[6] But even assuming the Commission were right that by mandating disparate dress requirements for men and women, the storeowners' dress code discriminated based on sex,[7] there was something troublingly inconsistent about this argument. Was the Commission taking the position that all sex-specific dress codes violate New York City civil rights law? The Lee Avenue storeowners noted that they were far from the only New York City establishment with a dress code that treated men and women differently.[8] Indeed, noted Jay Lefkowitz, one of the storeowners' attorneys,[9] "it's very troubling that the commission thinks it's [okay] for the Four Seasons

namely 'sleeveless' and 'low-cut neckline,' and there is no question of fact that a sign banning a person's entry into a store for wearing sleeveless clothing or a low-cut neckline has the effect of making a female's patronage unwelcome, objectionable or not acceptable, desired or solicited."); Verified Complaint, *supra* note 1; Silberstein, *supra* note 1; *see also* N.Y.C. ADMIN. CODE § 8-107(4)(a)(1) (2019).

6. For its part, the Commission argued that "[i]t is just plain common sense that more women are affected by the signs because of the fact that . . . 'low-cut neckline' traditionally refers to women's, not men's dress, and when combined with the words 'sleeveless' the intent of the sign is unquestionably meant for women." NYCCHR Reply Brief, *supra* note 5, at 15. *But see* Affidavit of Israel Belsky ¶ 7, *Gestetner Printing*, Nos. M-P-SC-12-1027203 et al. (N.Y.C. Office of Admin. Trials & Hearings May 2, 2013) ("Jewish laws, customs and values of modesty are deeply concerned with issues of how both men and women dress.").

7. While the question whether the storeowners' dress code actually discriminated on the basis of sex is not the focus of this Note, it bears noting by way of comparison that employers' sex-specific dress codes have been found not to violate Title VII of the Civil Rights Act. *See, e.g.*, Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1109-10 (9th Cir. 2006) (en banc) (noting that "sex-differentiated requirements" that "differ according to gender" do not violate Title VII if they "are not more onerous for one gender than the other"); Tavora v. N.Y. Mercantile Exch., 101 F.3d 907, 908 (2d Cir. 1996) (per curiam) ("Every court of appeals that has considered [whether sex-specific hair requirements violate Title VII] has agreed."); *see also* Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e, 2000e-1 to -16, 2000e-17 (2018)). To be sure, the contours of sex discrimination under Title VII are somewhat in flux due to several cases on the issue pending in the U.S. Supreme Court. *See* R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (U.S. argued Oct. 8, 2019); Bostock v. Clayton County, No. 17-1618 (U.S. argued Oct. 8, 2019); Altitude Express, Inc. v. Zarda, No. 17-1623 (U.S. argued Oct. 8, 2019). In the interest of full disclosure: I was a student in the clinic that represents the plaintiff employees in *Bostock* and *Zarda*, and I participated in the representation.

8. *See* Memorandum of Law in Opposition to Law Enforcement Bureau's Motion for Summary Judgment & in Support of Respondents' Cross-Motion for Summary Judgment at 2, 16-17, *Gestetner Printing*, Nos. M-P-SC-12-1027203 et al. (N.Y.C. Office of Admin. Trials & Hearings May 6, 2013).

9. Another disclosure: Several members of my family were part of the pro bono team at Kirkland & Ellis LLP that represented the storeowners.

restaurant to impose a dress code but not a bakery owned by a Hasidic businessman."[10] Why was the Commission going after the Hasidic storeowners but not ritzy clubs and hotels?[11]

One might conclude that the Commission was using municipal civil rights law and its own enforcement authority to hassle a disfavored religious group.[12] Or, slightly less cynically, one might think that the Commission was targeting a disfavored religious *practice*—the manifestation of a perceived notion that in the Hasidic community, women are not treated equally.[13] Of course, the Commission's action against the Brooklyn Hasidim and inaction against the Manhattan elite might also have been a mere product of unconscious bias.[14]

But whatever its root causes, this phenomenon is troubling. Disparate enforcement of the law against a disfavored group—whether those of a particular race, religion, sex, ethnicity, or viewpoint—is a nefarious practice.[15]

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10. Messing, *supra* note 1.

11. The New York Athletic Club's City House, for instance, has a detailed dress code explicitly differentiating between men and women. *See Dress Code*, N.Y. ATHLETIC CLUB, https://perma.cc/3E8Y-5RBV (archived Apr. 18, 2020). For "[g]entlemen": "Jackets are optional in most areas. Slacks, a collared shirt and dress shoes are permitted. Shirts must be tucked in. Jackets are required in the Main Dining Room and Cocktail Lounge." *Id.* For "[l]adies": "Permitted attire refers to business suits, tailored pant or skirt ensembles, and dresses. Spandex, open midriffs, halter tops, leggings, denim and extremely short hemlines (more than 3" above the knee, as a guideline) are not permitted." *Id.* And of course, "members and guests will be expected to dress, at all times, in a refined and appropriate manner," and in no instance may any visitor wear "[e]xcessively revealing clothing which might be offensive to other members or guests." *Id.* For just one of many other examples, see *Frequently Asked Questions*, 21 CLUB, https://perma.cc/TWS6-DKVG (archived Apr. 18, 2020) ("Gentlemen must wear jackets to gain entry to the Bar Room . . . .").

12. On anti-Semitism in New York City, particularly against Orthodox Jews, see, for example, Danielle Ziri, *"Anti-Semitism Has Become Mainstream": NYC Orthodox Jews Face Surge of Violence*, HAARETZ (Feb. 21, 2019, 1:05 AM), https://perma.cc/98LN-289M.

13. *See, e.g.*, Ruth Rosen, *The Modesty Wars: Women and the Hasidim in Brooklyn*, OPENDEMOCRACY (Mar. 25, 2013), https://perma.cc/L8XD-48BP.

14. Perhaps this is the best way to make sense of the somewhat puzzling justification for the charges given by Cliff Mulqueen, the deputy commissioner and general counsel of the Commission, who argued:

> Dress codes are OK . . . . Telling someone to wear a jacket is saying we want a certain kind of clientele here; we want to project a certain image. It has nothing to do with a protected class. Whereas telling someone they have to abide by certain rules of the Jewish faith crosses the line into [establishing] a protected class. You can't post a sign that makes someone's patronage appear unwelcome. That's what the law says.

Jonathan Mark, *Religious Dress Codes vs. Human Rights?*, N.Y. JEWISH WK. (Apr. 17, 2013, 12:00 AM) (second alteration in original), https://perma.cc/NWH2-44DR.

15. *Cf., e.g.*, Nev. Comm'n on Ethics v. Carrigan, 564 U.S. 117, 131 (2011) (Kennedy, J., concurring) ("A statute of this sort is an invitation to selective enforcement; and even if enforcement is undertaken in good faith, the dangers of suppression of particular speech or associational ties may well be too significant to be accepted."); Yick Wo v.

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Yet it is not obvious how the Constitution safeguards against it in the religious context. The First Amendment's Free Exercise Clause protects generally against legislatures enacting laws that blatantly target particular religious practices.[16] But it is less protective of religious groups when the laws enforced against them are facially neutral.[17] And while the Fourteenth Amendment's Equal Protection Clause protects generally against the law being applied differently against people of different races or genders, it apparently does little to protect against disparate enforcement on the axis of religion.[18] So what does the Constitution say about the particular phenomenon seen in the case of Williamsburg—the use of administrative authority, applied disparately, as a weapon to oppress disfavored religious groups and suppress disfavored religious practices?

In the end, the charges against the Williamsburg storeowners were dropped after the storeowners agreed to clarify in any future signage that they did not discriminate on the basis of sex.[19] But as discussed below, the Williamsburg incident is far from the only recent story in which nondiscrimination or other civil rights laws have been applied against religious groups with ideologies and practices seemingly out of the mainstream, while left unapplied to secular violators.[20] And with the growing incidence of religious individuals and groups claiming that various laws are incompatible with their First Amendment rights,[21] it has never been more important for courts to have a framework for

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Hopkins, 118 U.S. 356, 373-74 (1886) ("Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.").

16. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542-43, 546 (1993); *see also* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

17. *See* Emp't Div. v. Smith, 494 U.S. 872, 879 (1990).

18. *See, e.g.*, Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 911 (2013); *see also* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.").

19. *See, e.g.*, Notice of Administrative Closure, Gestetner Printing, No. M-P-SC-12-1027203 (N.Y.C. Comm'n on Human Rights Feb. 24, 2014); Joseph Berger, *No Fines for Stores Displaying a Dress Code*, N.Y. TIMES (Jan. 21, 2014), https://perma.cc/GNM8-4MG6.

20. *See infra* Part I.

21. *See generally, e.g.*, Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. 871 (2019) (discussing the constitutionality of religious accommodations and exemptions); Adam K. Hersh, Note, *Daniel in the Lion's* Den*: A Structural Reconsideration of Religious Exemptions from Nondiscrimination Laws Since* Obergefell, 70 STAN. L. REV. 265 (2018) (focusing on accommodations in the context of LGBT-related civil rights laws).

dealing with such disputes that is clear, protective of religious freedom, and administrable.[22]

Part of the problem is that cases raising free exercise questions exist on a spectrum of discrimination, but the Supreme Court has given clear guidance only on how to deal with cases at the extremes of the spectrum. On the safe end of the spectrum live laws that (1) are generally applicable, (2) were not adopted out of animus toward a religious group or religious practice, and (3) are neutral both facially and in application.[23] These laws need only satisfy rational basis review to withstand free exercise challenges.[24] The classic example is a law that bans a drug that is used in a particular religious ceremony. Assuming that the religious significance of the drug was not a factor in the enactment of the ban, the law will likely survive.[25]

On the other end are laws that either fail to apply generally, are nonneutral, or whose adoption was clearly motivated by antireligious animus: These laws are subject to strict scrutiny.[26] But there is a great deal of gray area in the middle of this spectrum. Aside from these black-and-white rules, courts have struggled to deal with cases raising different questions of religious discrimination—in particular when the discrimination comes not from the text of the law or the intent of its enacting legislature but from the manner in which it is enforced.

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22. Courts have seen no shortage of such cases in recent years. *See, e.g.*, Bey v. City of New York, 210 F. App'x 50 (2d Cir. 2006); Wat Bey v. City of New York, Nos. 1:99-cv-03873 & 1:01-cv-09406, 2013 WL 12082743 (S.D.N.Y. Sept. 4, 2013), *aff'd sub nom.* Rivera v. City of New York, 594 F. App'x 2 (2014); Sephardi v. Town of Surfside, No. 1:99-cv-01566, 2003 WL 25728156 (S.D. Fla. Jan. 6, 2003); Adler v. Kent Vill. Hous. Co., 123 F. Supp. 2d 91 (E.D.N.Y. 2000); Waldman v. N.Y.C. Dep't of Hous. Pres. & Dev., No. 102114/05, 2005 WL 3700728 (N.Y. Sup. Ct. N.Y. Cty. Dec. 30, 2005), *aff'd*, 830 N.Y.S.2d 28 (App. Div. 2007).

23. *See* Emp't Div. v. Smith, 494 U.S. 872, 879 (1990); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533-34 (1993).

24. *See, e.g.*, Cent. Rabbinical Cong. of the U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene, 763 F.3d 183, 193 (2d Cir. 2014) ("[T]he Free Exercise Clause 'does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' Such laws are subject to rational basis review." (citation omitted) (quoting *Smith*, 494 U.S. at 879)).

25. *Cf.* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424-27, 439 (2006) (explaining that even though a federal ban on ayahuasca tea placed a "substantial burden on . . . sincere religious exercise" by a religious group, it did not offend the Free Exercise Clause, though it did violate the Religious Freedom Restoration Act); *see also* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb, 2000bb-1 to -4 (2018)), *invalidated in other part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

26. *See Church of the Lukumi*, 508 U.S. at 533-34, 546 (noting that such a law "is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest").

This Note examines how selective enforcement claims operate under the Equal Protection Clause and the Free Speech Clause and attempts to build a framework for how such claims should be handled under the Free Exercise Clause. In particular, it argues that free exercise doctrine should explicitly handle "middle-of-the-spectrum" cases analogously to free speech doctrine—facially neutral laws that might otherwise receive reduced scrutiny should be given strict scrutiny when enforced disparately.[27] Defendants charged with civil rights violations (or violations of any law that burdens their religious practice) should have available, as an affirmative defense, the claim that the law is not being uniformly applied against similarly situated secular violators.[28] Ultimately, the framework this Note chooses resembles selective prosecution claims brought under the Fourteenth Amendment, with the key difference that defendants raising selective enforcement claims under the Free Exercise Clause should not be required to show discriminatory intent.

This Note proceeds as follows. Part I recounts the facts, arguments, and holdings from several recent cases in which religious actors have raised some variation of a disparity-in-enforcement claim as a defense against their alleged violations of neutral laws. Part II examines the contours of this defense under the Equal Protection Clause and concludes that the Equal Protection Clause offers insufficient protection of religious liberty. Part III describes how current free exercise doctrine is built around clear holdings for cases at the two ends of the spectrum, with much less clarity for cases falling between the two poles. It also analogizes to modern doctrine under the Free Speech Clause, which has

27. Some courts have already suggested that this is the correct framework for the Free Exercise Clause. *See, e.g.*, Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 167 (3d Cir. 2002) ("We must look beyond the text of the ordinance and examine whether the Borough *enforces* it on a religion-neutral basis . . . ." (emphasis added)); *cf.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1732 (2018) ("The Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be *applied* in a manner that is neutral toward religion." (emphasis added)).

28. Most mentions of disparate enforcement in this Note refer to situations in which a law is enforced only against a particular religious person or group (or against religious people or groups in general) while left unenforced against secular violators. Analytically, any free exercise problems inherent in this phenomenon would apply equally to cases in which a particular religious group is treated differently from another religious group. This Note focuses more on the former set of situations only because it seems to capture the contemporary cases, whereas the notion that disparate enforcement between different religious groups poses free exercise problems is more deeply established. *See, e.g.*, Fowler v. Rhode Island, 345 U.S. 67, 69 (1953); Niemotko v. Maryland, 340 U.S. 268, 271-73 (1951).

Additionally, this Note takes no position on the worthiness of grants by a proreligious government of exemptions from generally applicable laws, *see, e.g.*, Margot Sanger-Katz, *Trump Administration Strengthens "Conscience Rule" for Health Care Workers*, N.Y. TIMES: UPSHOT (May 2, 2019), https://perma.cc/7XX8-3KHJ, or on any Establishment Clause issues that might be raised by such special treatment.

dealt head-on and more clearly with cases in the middle of a parallel spectrum. Finally, Part IV suggests a substantive and procedural framework for selective enforcement claims under the Free Exercise Clause.

## I. Recent Examples of Disparate Enforcement Against the Religious

The enforcement of civil rights and other laws to target disfavored religious practices and viewpoints is a growing phenomenon. Over the past twenty years, the U.S. Supreme Court and the federal courts of appeals have addressed many high-profile cases involving laws that burdened religious freedom without being facially discriminatory. These have included facially neutral laws that exempt everyone but certain religious individuals,[29] regulations gerrymandered to burden religious professionals,[30] civil rights laws incompatible with the religious beliefs of private businesspeople,[31] and university inclusiveness policies strictly enforced only against religious student groups.[32]

Some of these cases involved a perfectly neutral law with a legitimate secular purpose that was being evenhandedly enforced in a manner that just happened to burden religious beliefs and practices.[33] Others seem to have been instances in which the entities with administrative power disparately exercised their authority to single out religious groups with disfavored beliefs.[34] The overarching problem is that free exercise doctrine is not currently equipped to tell the difference.

Before discussing the cases, it is important to outline the most basic contours of free exercise doctrine, built primarily around two U.S. Supreme Court decisions in the early 1990s. These cases set out the two ends of a spectrum of religiously discriminatory laws—one acceptable, one problematic.

First, in *Employment Division v. Smith*, the Court addressed an Oregon statute prohibiting possession of controlled substances.[35] Two members of the

29. *See, e.g.*, *Tenafly Eruv Ass'n*, 309 F.3d at 167-68; *see also infra* Part I.A.

30. *See, e.g.*, Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1076-77 (9th Cir. 2015); *see also* Stormans, Inc. v. Wiesman, 136 S. Ct. 2433, 2433-34 (2016) (Alito, J., dissenting from the denial of certiorari); *infra* Part I.B.

31. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1724-26 (2018); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2762-66 (2014); *see also infra* Part I.D.

32. *See, e.g.*, Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 669-74 (2010); Alpha Delta Chi-Delta Chapter v. Reed (*ADX*), 648 F.3d 790, 795-96, 803-04 (9th Cir. 2011); *see also infra* Part I.C.

33. *See, e.g.*, Emp't Div. v. Smith, 494 U.S. 872, 874-76 (1990).

34. *See, e.g.*, *supra* notes 1-14 and accompanying text.

35. *See* 494 U.S. at 874.

Native American Church lost their jobs after ingesting peyote during a religious ceremony.[36] They were then denied unemployment benefits on the ground that their discharge had been for "work-related 'misconduct.'"[37] The fired employees challenged this denial on free exercise grounds.[38]

In deciding the case, the Supreme Court shifted approaches from an earlier line of cases under which "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest."[39] Instead, the Court recharacterized the proper analysis under the Free Exercise Clause as looking to whether the challenged law is a "neutral law of general applicability."[40] The Court found that the Oregon statute was neutral and generally applicable, and thus the employees had no free exercise claim—regardless of the strength of the government's interest in enforcing the law.[41]

Cases at the *Smith* end of the spectrum will accordingly involve neutral, generally applicable laws whose enactments are not based in animus. These laws receive rational basis review.

*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* involved the efforts by the City of Hialeah, Florida, to prevent a Santeria church from being established within its borders.[42] Animal sacrifice is an important ritual in the Santeria faith, so the city council passed several ordinances banning the killing of animals, with exemptions for almost every conceivable reason to kill animals other than in the course of religious ceremony.[43] The Supreme Court applied strict scrutiny, distinguishing *Smith* on the ground that the law at issue was not neutral, since it was enacted specifically to discriminate against the Santeria faith.[44] Notably, the Court did not limit its analysis to the text of the statute, instead declaring that "[f]acial neutrality is not determinative" and that "[t]he Free Exercise Clause protects against governmental hostility which is masked as well as overt."[45]

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36. *Id.*

37. *Id.*

38. *See id.* at 875-76.

39. *Id.* at 882-83 (citing Sherbert v. Verner, 374 U.S. 398, 402-03 (1963)); *see also id.* at 882-90.

40. *See id.* at 878-79 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

41. *See id.* at 878-82.

42. *See* 508 U.S. 520, 525-26 (1993).

43. *See id.* at 524-25, 527-28.

44. *See id.* at 533 ("[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . . .").

45. *Id.* at 534.

Cases at the *Church of the Lukumi* end of the spectrum are the most nefarious—they serve no real purpose other than to oppress religious people and burden religious practices. Strict scrutiny applies in these instances.

The proper treatment of religious-liberty claims where the neutrality of the law is itself challenged is clear enough under this framework. But in the middle of the *Smith-Church of the Lukumi* spectrum fall claims that a neutral law has been enforced disparately against religious individuals or groups. A number of recent cases have confronted this gray area, with varying approaches and with mixed results.

### A. The Tenafly *Eruv*

The Tenafly *eruv* litigation involved the efforts of the Orthodox Jewish community in Tenafly, New Jersey, to erect an *eruv*.[46] Jewish law prohibits carrying an object outside of the home on the Sabbath.[47] But in accord with an ancient legal fiction, a ceremonial boundary (i.e., the *eruv*) can be erected around a street, neighborhood, or entire city which would permit carrying inside the bounded area.[48] The boundary can take many forms, and sometimes is no more than a mere wire strung between utility poles, in which case it brings no aesthetic disruption and is virtually indistinguishable from an ordinary utility wire.[49]

But the residents of Tenafly were unhappy about the prospect of an *eruv* in their town.[50] Objections ranged from a general "fear that an *eruv* would encourage Orthodox Jews to move to Tenafly" to the more particularized

46. *See* Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 152-54 (3d Cir. 2002). The word *eruv* (pronounced "AY-roov") means "combination" in Hebrew. For a brief analysis of the *Tenafly Eruv Ass'n* case in a context similar to this Note's discussion of disparate enforcement of facially valid laws, see Jeffrey Gautsche, Case Comment, *Neutral Discrimination—Selective Enforcement of Religiously Neutral Laws and the First Amendment*, 30 TOURO L. REV. 975 (2014).

47. *See Tenafly Eruv Ass'n*, 309 F.3d at 152; *see also* 4(A) YISROEL MEIR KAGAN, MISHNAH BERURAH §§ 345:1-:7, 346:1 (Aviel Orenstein ed., 2001). *See generally* 1 SIMCHA BUNIM COHEN, THE SHABBOS HOME: A COMPREHENSIVE HALACHIC GUIDE TO THE LAWS OF SHABBOS AS THEY APPLY THROUGHOUT THE HOME 99-155 (1995).

48. *See Tenafly Eruv Ass'n*, 309 F.3d at 152; Kaushik Patowary, *The Nearly Invisible Wires That Enclose Nearly All Major Cities of the World*, AMUSING PLANET (Mar. 23, 2016), https://perma.cc/3ZPX-3KEY; *see also* 4(A) KAGAN, *supra* note 47, § 366:1-:3.

49. *See Tenafly Eruv Ass'n*, 309 F.3d at 152 ("Unless one knows which black plastic strips are [the *eruv* boundary] and which are utility wires, it is 'absolutely impossible' to distinguish the two." (quoting Tenafly Eruv Ass'n v. Borough of Tenafly, 155 F. Supp. 2d 142, 149 (D.N.J. 2001), *rev'd*, 309 F.3d 144)); *see also id.* at 152 n.5 (noting that *eruv*s are commonplace in major cities throughout the United States, and that both the White House and the U.S. Supreme Court are inside an *eruv*).

50. *See id.* at 152-53.

concern that Orthodox Jews "might 'stone[] cars that drive down the streets on the Sabbath.'"[51] Fortunately for the Tenafly borough council, someone unearthed a local ordinance prohibiting any "sign or advertisement, or other matter" from being placed on "any pole, tree, curbstone, sidewalk or elsewhere, in any public street or public place."[52] The borough was apparently unconcerned with the fact that the ordinance had hardly ever been enforced:

> House number signs nailed to utility poles in plain view are frequently left in place. Local churches are tacitly allowed to post permanent directional signs bearing crosses on municipal property. Lost animal signs and other private postings often remain undisturbed by Borough officials. Orange ribbons were affixed to utility poles "for a lengthy period of time" by supporters of the local high school during a protracted controversy over school regionalization, but Borough officials made no effort to remove them. Every year, officials in the small community permit the local Chamber of Commerce to affix holiday displays to the Borough's utility poles for approximately six weeks during the Christmas holiday season. Red ribbons, wreaths, and seasonal holiday lights are attached to the Borough's utility poles as part of these displays.[53]

Relying on the ordinance, the borough council ordered that the partially constructed *eruv* be torn down.[54] Orthodox Jewish plaintiffs brought suit, alleging violations of their rights under the Free Speech Clause,[55] the Free

51. *Id.* at 153 (alteration in original) (quoting *Tenafly Eruv Ass'n*, 155 F. Supp. 2d at 153-54). To be fair, the concern about rock throwing wasn't a complete innovation, as throwing stones at cars on the Sabbath is commonplace in some ultra-Orthodox neighborhoods in Israel. *See, e.g.*, Nir Hasson, *Hundreds of Jews Hurl Rocks at Cars in Jerusalem*, HAARETZ (Sept. 27, 2012, 12:46 AM), https://perma.cc/9T2S-UPWB; Dafna Linzer, *Ultra-Orthodox Jews Protest Sabbath Traffic*, AP NEWS (July 13, 1996), https://perma.cc/3VAT-Z2AV. But to my knowledge, the practice (which has no basis in Jewish law) is utterly unheard-of in the United States.

52. *See Tenafly Eruv Ass'n*, 309 F.3d at 151, 154 (quoting the local ordinance).

53. *Id.* at 151-52.

54. *Id.* at 154.

55. The plaintiffs' novel free speech argument was that erecting the *eruv* was protected expression and therefore preventing its erection constituted viewpoint discrimination. *See Tenafly Eruv Ass'n*, 155 F. Supp. 2d at 172-73. Strategically, the plaintiffs wanted to portray the *eruv* as expression *by* the religious rather than as a religious practice, perhaps trying to steer clear of any Establishment Clause problems that might arise were the Borough to allow the construction of religious instruments on public land. Noting that it was difficult to shoehorn the facts of the case into "a neat constitutional category," the district court rejected the free speech argument, *see id.* at 172, 180, and the Third Circuit agreed, *see Tenafly Eruv Ass'n*, 309 F.3d at 158-65 ("Rather than 'actually assert[ing] anything to anyone,' it seems that the *eruv* simply demarcates the space within which certain activities otherwise forbidden on the Sabbath are allowed." (alteration in original) (citation omitted) (quoting Troster v. Pa. State Dep't of Corr., 65 F.3d 1086, 1092 (3d Cir. 1995))).

Exercise Clause, and the Fair Housing Act, but the district court declined to issue an injunction in their favor.[56]

The Third Circuit reversed.[57] Even granting that the ordinance was neutral and generally applicable and thus not problematic under *Smith*, the court of appeals held that the Borough's selective enforcement of the ordinance against only the Orthodox Jews seeking to build the *eruv* meant that strict scrutiny was warranted.[58] Finding no compelling interest, the court held that construction of the *eruv* must be allowed to proceed.[59] Notably, the fact of selective enforcement was sufficient to trigger strict scrutiny; it was of no moment that the borough council was responding to many residents' "vehement objections" when it decided to bar the *eruv*, whereas presumably there were no such complaints against secular violations of the ordinance.[60]

### B. The *Stormans* Litigation

In 2007, the Washington State Pharmacy Quality Assurance Commission promulgated a rule requiring pharmacies to fill all prescriptions—so long as the drug is approved by the Food and Drug Administration—with no exemption for pharmacists with religious objections to delivering certain drugs.[61] The

56. *See Tenafly Eruv Ass'n*, 309 F.3d at 154-56. The district court did find that the borough council's consideration of the "perceived divisiveness and exclusivity that an *eruv* would generate in Tenafly" and the "perceived trouble associated with the creation of a 'community within a community'" was a "constitutionally impermissible motive" for blocking the *eruv*. *Tenafly Eruv Ass'n*, 155 F. Supp. 2d at 183. The district court therefore held that strict scrutiny was required under *Church of the Lukumi*, but believed the borough satisfied that exacting standard. *See id.* at 183, 186. In particular, the district court accepted the Borough's argument that the council had a compelling interest in "[a]voiding entanglement with religion"—i.e., that the council was merely trying to avoid violating the Establishment Clause. *See id.* at 183.

57. *See Tenafly Eruv Ass'n*, 309 F.3d at 178-79 (holding that the plaintiffs were likely to succeed on free exercise grounds and ordering the entry of an injunction in their favor).

58. *See id.* at 167-68; *see also id.* at 167 (noting that other violations of the ordinance the Borough had let go unpunished involved materials "more obtrusive" than the wires that would comprise the *eruv*).

59. *See id.* at 172-78. Unlike the district court, the Third Circuit rejected the Borough's argument that it had a compelling interest in avoiding excessive entanglement with religion (and thus implicating the Establishment Clause). *See id.* at 172-74 ("Contrary to the Borough's position, however, a government interest in imposing greater separation of church and state than the federal Establishment Clause mandates is not compelling in the First Amendment context." (citing Widmar v. Vincent, 454 U.S. 263, 276 (1981); and Davey v. Locke, 299 F.3d 748, 759 (9th Cir. 2002), *rev'd*, 540 U.S. 712 (2004))); *see also Tenafly Eruv Ass'n*, 155 F. Supp. 2d at 184 n.26.

60. *See Tenafly Eruv Ass'n*, 309 F.3d at 152-53. For more on the special case of complaint-driven enforcement, see Part IV.B below.

61. *See* Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1072-73 (9th Cir. 2015); *see also* Wash. Reg. 07-14-025 (June 25, 2007) (codified at WASH. ADMIN. CODE § 246-869-010 (2019)).

rule did, though, contain numerous other exemptions.[62] Several pharmacists brought suit, claiming the rule required them to fill prescriptions for Plan B and other contraceptives in violation of their religious beliefs, and thus violated the Free Exercise Clause (as well as the Equal Protection Clause, the Due Process Clause, and the Supremacy Clause).[63]

The district court held that the regulations violated the Free Exercise Clause and enjoined them.[64] In the district court's view, the law was not facially neutral because the complex "system of individualized exemptions" allowed the state to grant exemptions from the rule for essentially any secular purpose while enforcing it strictly against religious objectors.[65] The court also held that the rule violated the Free Exercise Clause because it had been selectively enforced against religious pharmacists.[66] It found that "pharmacies across the state have enjoyed broad discretion to decline to stock drugs and to refer patients elsewhere for a wide variety of nonreligious reasons," and it was only the religious objectors who had faced investigation and punishment.[67] Having demonstrated that "the government enforced the law against religious conduct while exempting similarly situated nonreligious conduct," the plaintiffs had shown a violation of the Free Exercise Clause.[68]

But the Ninth Circuit reversed. The court of appeals held that the fact that religious pharmacists were disproportionately burdened by the rule did not mean the rule was not neutral.[69] The court also disagreed with the plaintiffs' view that the system of individualized exemptions "destroy[ed]" the rule's general applicability.[70] And it also held that the district court erred by

62. *See* WASH. ADMIN. CODE § 246-869-010(1) to (2); *see also Stormans*, 794 F.3d at 1073. For instance, pharmacies could refuse to fill a prescription if it contained "inadequacies in the instructions," WASH. ADMIN. CODE § 246-869-010(1)(a), or if "[n]ational or state emergencies or guidelines" affected the drug's "usage," *id.* § 246-869-010(1)(b).

63. *See Stormans*, 794 F.3d at 1073-74, 1083.

64. *See* Stormans, Inc. v. Selecky, 854 F. Supp. 2d 925, 967-90, 991-93 (W.D. Wash. 2012), *rev'd sub nom. Stormans*, 794 F.3d 1064. Notably, the district court also agreed with the plaintiffs' equal protection claim, which the Ninth Circuit described as "coextensive" with the free exercise claim, *see Stormans*, 794 F.3d at 1074. As discussed in Parts II and IV below, this Note argues that courts are wrong to treat selective enforcement free exercise claims as the equivalent of equal protection claims.

65. *See Stormans*, 854 F. Supp. 2d at 975-78. In particular, the district court held that the system's allowance for gerrymandered exceptions meant that the rule was not generally applicable under *Smith*. *See id.* at 976; *see also* Emp't Div. v. Smith, 494 U.S. 872, 879-81 (1990); *supra* text accompanying notes 39-41.

66. *See Stormans*, 854 F. Supp. 2d at 978-81.

67. *Id.* at 979.

68. *See id.* at 980-81.

69. *See Stormans*, 794 F.3d at 1077-78.

70. *See id.* at 1082; *see also id.* ("[B]ecause the exemptions at issue are tied directly to limited, particularized, business-related, objective criteria, they do not create a regime of

*footnote continued on next page*

finding that the rule was selectively enforced.[71] In the Ninth Circuit's view, the fact that the enforcement process was "complaint-driven" effectively immunized the state from any selective enforcement claim.[72] Even if, in practice, the enforcement system resulted in disparate enforcement against religious pharmacies, there was no free exercise problem so long as the system was not adopted "with the specific intent to disadvantage religious objectors."[73] In essence, the Ninth Circuit found this case to be no different from *Smith*, notwithstanding the selective pattern of enforcement.

The pharmacists sought certiorari in the U.S. Supreme Court, arguing (inter alia) that the Ninth Circuit had opened up a circuit split on the question whether a law that is facially neutral and generally applicable, and thus subject only to rational basis review under *Smith*, should still be subject to strict scrutiny when it is selectively enforced against religious individuals.[74] The pharmacists pointed in particular to the Third Circuit's decision in *Tenafly Eruv Ass'n*, which the Ninth Circuit did not address in its analysis.[75]

The Supreme Court denied certiorari, although the case was apparently just one vote shy of a grant[76]: Justice Alito, joined by Chief Justice Roberts and Justice Thomas, vigorously dissented.[77] Justice Alito first questioned whether

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unfettered discretion that would permit discriminatory treatment of religion or religiously motivated conduct.").

71. *See id.* at 1083-84.

72. *See id.* ("Because no complaints have been filed against . . . other pharmacies for non-religious refusals, other pharmacies are not 'similarly situated' . . . .").

73. *See id.*

74. *See* Petition for a Writ of Certiorari at 32-35, Stormans, Inc. v. Wiesman, 136 S. Ct. 2433 (2016) (No. 15-862), 2016 WL 94218.

75. *See id.* at 32-34; *see also* Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002); *supra* Part I.A.

76. Under the unwritten "rule of four," it takes four Justices' votes to grant a petition for a writ of certiorari. *See, e.g.*, Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 527 (1957) (Frankfurter, J., dissenting).

77. *See Stormans*, 136 S. Ct. at 2433-40 (Alito, J., dissenting from the denial of certiorari). Notably, the petition in *Stormans* was filed in January 2016, one month before Justice Scalia's passing, *see* Petition for a Writ of Certiorari, *supra* note 74; Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), https://perma.cc/U2NL-FM9N, so by the time the Justices first considered the petition in May 2016, the Court was down to eight Justices, *see Docket for No. 15-862*, SUP. CT. U.S., https://perma.cc/PEN9-GPSJ (last updated June 28, 2016). So it is possible that the petition may have been granted had it been considered a bit earlier. And it is a safer bet that were the petition to have been considered a bit *later*, the Court would have granted certiorari. For instance, in a recent religious freedom case in which the Court denied certiorari, Justice Thomas, Justice Gorsuch, and Justice Kavanaugh joined Justice Alito's statement respecting the denial. *See* Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 635 (2019) (Alito, J., respecting the denial of certiorari) (noting that certiorari was inappropriate only because "important unresolved factual questions would

*footnote continued on next page*

Washington's regulations were neutral as adopted.[78] This analysis looked to the "design[]" of the regulations, asking whether their purpose was "to stamp out religious objectors."[79] And in Justice Alito's view, the regulations were "gerrymandered" in a way similar to the ordinance condemned by the Supreme Court in *Church of the Lukumi*—outlawing a category of conduct broadly, and then exempting all but the disfavored group.[80]

Justice Alito also thought it critical to look beyond the design of the rules to their "real operation."[81] The record indicated that refusals to fill prescriptions on secular grounds were common, but the State had never enforced the rules against such refusals.[82] Indeed, it seemed that the agency had "specifically targeted religious objections."[83] And it was no defense that the agency enforced its rules only in cases where a complaint had been lodged.[84] First, Justice Alito noted that a complaint-based enforcement system allows for abuse[85]: Here, the record had shown "'an active campaign' by advocacy groups" to find pharmacists who refused to fill Plan B prescriptions on religious grounds and report them to the agency.[86] But more fundamentally, Justice Alito did not view the mechanism of enforcement as being a relevant or meaningful defense to the fact of disparate enforcement.[87] In sum, Justice Alito believed that the rules "reflect[ed] antipathy toward religious beliefs that do not accord with the views of those holding the levers of government power," and thus likely violated the First Amendment.[88]

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make it very difficult if not impossible at this stage to decide the . . . question that the petition asks us to review").

78. *See Stormans*, 136 S. Ct. at 2434-35 (Alito, J., dissenting from the denial of certiorari) (describing how the board responsible for the regulations had gerrymandered them, at the behest of the Governor of Washington, to allow for exemptions other than religiously motivated ones, even though "the regulations themselves do not expressly single out religiously motivated referrals").

79. *See id.* at 2435.

80. *See id.* at 2437.

81. *See id.* (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535 (1993)).

82. *Id.* at 2438.

83. *Id.*

84. *See id.* at 2438-39.

85. *Id.* at 2438.

86. *See id.* at 2438 n.4 (quoting Stormans, Inc. v. Selecky, 854 F. Supp. 2d 925, 961 (W.D. Wash. 2012), *rev'd sub nom.* Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015)).

87. *See id.* at 2438-39 ("[T]he point remains that the Board tolerates widespread secular refusals while categorically declaring religious ones verboten. That supports the District Court's finding that the 'real operation' of the regulations is to uniquely burden religiously motivated conduct.").

88. *See id.* at 2440.

### C. The "All-Comers" Cases

University campuses are a common battleground for conflict between religious beliefs and civil rights rules. Universities have an understandable interest in ensuring their students do not face discrimination, and most have enacted comprehensive policies to that effect.[89] But the breadth of these policies creates difficulties for student groups that feel a need to restrict membership for religious reasons.

#### 1. *Christian Legal Society v. Martinez*

*Christian Legal Society v. Martinez* involved the clash between a student group's bylaws and a university's policy on student-group inclusivity.[90] While the case primarily centered on the Free Speech Clause's public forum doctrine, it bears discussion here because it involved a religious group advancing a free exercise claim and alleging that it was the victim of disparate enforcement.[91]

The dispute arose from the University of California Hastings Law School's "all-comers" policy, under which the school would recognize (and thus subsidize) student groups only if they "'allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs.'"[92] The Christian Legal Society (CLS)—a local chapter of a national organization—sought to register as a student group, but was denied.[93] Under the rules of the national CLS, local chapters may only admit members and officers who adhere to a "Statement of Faith" and a set of prescribed principles, including "the belief that sexual activity should not occur outside of marriage between a man and a woman."[94] Thus, the Hastings CLS chapter was unable to

89. *See, e.g.*, *Anti-Discrimination and Anti-Bias Policies*, WASH. U. ST. LOUIS, https://perma.cc/7R99-PUVZ (archived Apr. 19, 2020); *Non-Discrimination Policies and Resources*, STAN. DIVERSITY & ACCESS OFF., https://perma.cc/YW7X-T6C8 (archived Apr. 19, 2020).

90. *See* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 668 (2010).

91. *See id.* at 697 & n.27; *id.* at 738-39 (Alito, J., dissenting).

92. *See id.* at 669-71 (majority opinion) (alteration in original) (quoting Joint Appendix at 221, *Christian Legal Soc'y*, 561 U.S. 661 (No. 08-1371), 2010 WL 372139).

93. *Id.* at 672.

94. *Id.* The "Statement of Faith," which "[a]ll applicants/members must sign," stated as follows:

> Trusting in Jesus Christ as my Savior, I believe in:
>
> - One God, eternally existent in three persons, Father, Son and Holy Spirit.
> - God the Father Almighty, Maker of heaven and earth.
> - The Deity of our Lord, Jesus Christ, God's only Son, conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return.
> - The presence and power of the Holy Spirit in the work of regeneration.
> - The Bible as the inspired Word of God.

Joint Appendix, *supra* note 92, at 18.

accept as members students who did not subscribe to its religious views; in particular, it could not accept students in same-sex relationships.[95] The law school declared that CLS did not comply with its all-comers policy and denied it registration as an official student group.[96]

CLS sued certain officers and administrators of the law school, arguing that its refusal to register the group violated its First Amendment rights of free speech, free association, and free exercise.[97] It also made a particularly strong version of a selective enforcement argument—not only that the all-comers policy was not enforced against other groups, but also that the policy did not even really *exist* until the dispute between CLS and the law school arose.[98] In a lengthy analysis, the five-Justice majority rejected the group's free speech and free association arguments (which the Court "merge[d]" into a single argument[99]), holding that the all-comers policy was a viewpoint-neutral limitation on access to a limited public forum and therefore was acceptable.[100]

After rejecting the free speech and association challenges, the majority brushed aside CLS's free exercise claim in a footnote, invoking *Smith* and emphasizing that CLS was seeking "preferential, not equal, treatment."[101] The Court also declined to engage with CLS's argument that the all-comers policy was being trotted out only against it and was apparently inapplicable to other student groups, noting that the argument was raised only in CLS's reply brief and that it had not been liquidated in the lower courts.[102]

In dissent, Justice Alito was willing to take on the "[n]onenforcement" argument.[103] He began by noting that CLS's claim did not neatly map onto the typical case of selective enforcement, as it seemed no one had even been aware

95. *See Christian Legal Soc'y*, 561 U.S. at 672-73.

96. *Id.*

97. *Id.* at 673.

98. *See* Reply Brief for Petitioner at 23-26, *Christian Legal Soc'y*, 561 U.S. 661 (No. 08-1371), 2010 WL 1316244 ("[T]he provenance of the all-comers policy smacks of pretext.").

99. *See Christian Legal Soc'y*, 561 U.S. at 680.

100. *See id.* at 669.

101. *See id.* at 697 n.27 (citing Emp't Div. v. Smith, 494 U.S. 872, 878-82 (1990)).

102. *See id.* at 697-98. The Court suggested that the court of appeals could consider the "pretext argument" on remand, "if, and to the extent, it is preserved." *Id.* On remand, the Ninth Circuit declined to address the selective enforcement argument, holding that it had not been properly preserved. *See* Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of the Law v. Wu, 626 F.3d 483, 486, 488 (9th Cir. 2010). The court noted that "[i]f, going forward, Hastings applies its policy in a discriminatory way, CLS may be able to file a new lawsuit." *Id.* at 488. But relying on the "very specific instructions" from the Supreme Court to think carefully about whether the argument had been preserved, the court decided that it had not been. *See id.*

103. *See Christian Legal Soc'y*, 561 U.S. at 738-39 (Alito, J., dissenting).

of the all-comers policy's existence before the dispute at hand.[104] In any case, it was clear enough from the record that Hastings had made no effort to apply the policy against other student groups.[105] "If the record here is not sufficient to permit a finding of pretext," Justice Alito declared, "then the law of pretext is dead."[106]

### 2. *Alpha Delta Chi-Delta Chapter v. Reed*

Whereas the Ninth Circuit rejected the selective enforcement claim in *Stormans* and declined to address it in *Christian Legal Society*,[107] that court was more receptive (but only a little more) to the argument in *Alpha Delta Chi-Delta Chapter v. Reed* (*ADX*).[108] *ADX* involved a Christian fraternity and a Christian sorority at San Diego State University, which, similar to CLS's experience at Hastings, were denied recognition as official student groups under San Diego State's all-comers policy due to their membership criterion excluding non-Christians.[109]

The bulk of the opinion dealt with a question left open by *Christian Legal Society*—whether it made any difference for First Amendment purposes if an all-comers policy only outlawed rules that restrict membership on the basis of certain protected characteristics, as opposed to a policy that student groups

104. *See id.* at 738 ("Since it appears that no one was told about the accept-all-comers policy before July 2005, it is not surprising that the policy was not enforced.").

105. *Id.* Justice Alito pointed in particular to the existence of other student groups organized around a particular ethnicity, set of professional aspirations, or set of political beliefs. *See id.*; *see also* Brief for Petitioner at 13-14, *Christian Legal Soc'y*, 561 U.S. 661 (No. 08-1371), 2010 WL 711183 (discussing the La Raza Law Students Association). As just one example, the La Raza Law Students Association's bylaws declared that only those "who are of Raza background" could generally become "[a]ssociate member[s]." *See* Joint Appendix, *supra* note 92, at 191-92.

106. *Christian Legal Soc'y*, 561 U.S. at 738 (Alito, J., dissenting). Justice Alito also puzzled over a couple of other procedural anomalies—first, that because the Court had affirmed the entry of summary judgment by the courts below, it was unclear how CLS could ask the Ninth Circuit to consider *anything* on remand; and second, that the Supreme Court had addressed (at great length) arguments that had not been discussed by the Ninth Circuit's two-sentence opinion. *See id.* at 738-39; *see also* Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of the Law v. Kane, 319 F. App'x 645 (9th Cir. 2009), *aff'd sub nom. Christian Legal Soc'y*, 561 U.S. 661.

107. *See supra* note 102; *infra* note 115.

108. 648 F.3d 790 (9th Cir. 2011).

109. *See id.* at 795-96. In particular, the policy excluded all students who were not *devout* Christians. The sorority required all members to demonstrate "'personal acceptance of Jesus Christ as Savior and Lord,' 'active participation in Christian service,' and 'regular attendance or membership in an evangelical church'"; the fraternity required all members to "sincerely want to know Jesus Christ as their Lord and Savior." *Id.* at 795.

cannot restrict membership on *any* basis.[110] The court held that it did not matter—and that there was no meaningful facial difference between the San Diego State policy and the Hastings policy.[111] And it held, as the Supreme Court had in *Christian Legal Society*, that without more, the groups' free exercise claims were foreclosed by *Smith*.[112]

But the panel also took two steps the Supreme Court had failed to take. First, it addressed the selective enforcement issue, noting that notwithstanding *Smith*, and even though the all-comers policy "*as written*" was valid, there was a triable question of fact regarding whether the groups had been "treated differently because of their religious status."[113] And second, it recognized that if the groups could show the all-comers policy *had* been selectively enforced against them, this could raise an equal protection problem.[114] But the court did not elaborate on the relationship between the possible selective enforcement

110. *See id.* at 794-95.

111. *See id.* at 796-803.

112. *See id.* at 804 ("San Diego State's nondiscrimination policy, as written, is a rule of general application. It does not target religious belief or conduct, and does not 'impose special disabilities' on Plaintiffs or other religious groups. Any burden on religion is incidental to the general application of the policy." (quoting Emp't Div. v. Smith, 494 U.S. 872, 877 (1990))).

113. *Id.* (emphasis added). In doing so, the court took a similar tack to the one taken in *Truth v. Kent School District*, in which it said:

> Truth also makes a claim under the Free Exercise Clause, the Establishment Clause, and the Equal Protection Clause. . . . [W]e are remanding to the district court to determine whether Truth was denied an exemption from the District's non-discrimination policy, and whether that denial was based on religion or the content of Truth's speech. To the extent Truth can make out a colorable First Amendment violation on these grounds, it may also have a Free Exercise claim, since 'the Supreme Court noted that free exercise claims implicating other constitutional protections, such as free speech, could qualify for strict scrutiny review . . . .' Moreover, if Truth can demonstrate that it was singled out for unequal treatment on the basis of religion, it may also have a potentially valid Equal Protection or Establishment Clause argument.

542 F.3d 634, 650-51 (9th Cir. 2008) (third alteration in original) (citation omitted) (quoting Am. Family Ass'n v. City & County of San Francisco, 277 F.3d 1114, 1124 (9th Cir. 2002)), *overruled on other grounds by* Los Angeles County v. Humphries, 562 U.S. 29 (2010).

114. *See ADX*, 648 F.3d at 804. The court also noted that selective enforcement would infect San Diego State's victory on the free speech issue as well, which depended on the all-comers policy being deemed viewpoint neutral:

> [T]he evidence that some student groups have been granted an exemption from the nondiscrimination policy raises a triable issue of fact. . . . [A]s it stands now, the record does not adequately explain why some official student groups at San Diego State appear to have membership requirements that violate the school's nondiscrimination policy. We therefore reverse in part the district court's grant of summary judgment in favor of Defendants on Plaintiffs' free speech and expressive association claims. We remand for consideration of the question whether San Diego State has (1) exempted certain student groups from the nondiscrimination policy; and (2) declined to grant Plaintiffs such an exemption because of Plaintiffs' religious viewpoint.

*See id.* at 804.

claim under the Free Exercise Clause and a claim under the Equal Protection Clause. And despite the remand, the issue was never decided by the district court, as the case was ultimately dismissed on joint motion of the parties.[115]

### D. *Masterpiece Cakeshop*

*Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* involved the refusal by Jack Phillips, the owner of a Colorado bakery and a devout Christian, to sell a cake to a same-sex couple for their marriage celebration.[116] Phillips explained to the couple that he was not refusing to serve them because of their sexual orientation, and that he was glad to serve them baked goods for a purpose other than a celebration of their marriage.[117] But he operated his shop to "honor God"[118] and felt that designing and baking the cake "would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs."[119] The couple brought a complaint against Phillips under the Colorado Anti-Discrimination Act, which prohibits discrimination in public accommodations on the basis of sexual orientation.[120]

In defense, Phillips raised a claim under the Free Speech Clause (in particular, that by being forced to bake cakes for all comers he was being compelled to

115. *See* Order Dismissing Case, Alpha Delta Chi-Delta Chapter v. White, No. 3:05-cv-02186 (S.D. Cal. Mar. 20, 2013), ECF No. 144. Indeed, attention to the selective enforcement argument in all-comers cases has been elusive. In *Christian Legal Society*, the Supreme Court left the question for the court of appeals on remand, *see* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 697-98 (2010), but the Ninth Circuit deemed it waived, *see* Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of the Law v. Wu, 626 F.3d 483, 485-86, 488 (9th Cir. 2010). In *ADX*, the case was settled before the district court could address it. *See* Order Dismissing Case, *supra*. And in a similar case involving Southern Illinois University, the Seventh Circuit focused on free speech issues and declined to reach the selective enforcement arguments under the Free Exercise Clause and the Equal Protection Clause. *See* Christian Legal Soc'y, Chapter at S. Ill. Univ. Sch. of Law v. Walker, 453 F.3d 853, 860 n.1 (7th Cir. 2006).

116. *See* 138 S. Ct. 1719, 1724 (2018). "Marriage celebration"—not "wedding"—because at the time, same-sex marriages were illegal in Colorado, so the couple were to be wed in a different state. *See id.*

117. *See id.* (noting that Phillips explained to the couple that "I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings" (quoting Joint Appendix at 152, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4232758)).

118. *Id.* (quoting Joint Appendix, *supra* note 117, at 148).

119. *See id.* ("[Phillips] later explained his belief that 'to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship that they were entering into.'" (quoting Joint Appendix, *supra* note 117, at 153)).

120. *See id.* at 1724-25; *see also* Act of June 22, 1979, ch. 239, sec. 3, § 24-34-601, 1979 Colo. Sess. Laws 922, 937 (codified as amended at COLO. REV. STAT. § 24-34-601 (2019)).

"speak") and under the Free Exercise Clause (that requiring him to bake cakes for same-sex weddings required him to violate his religious beliefs).[121] His arguments failed to persuade a Colorado administrative agency and the Colorado courts, which ordered him not only to stop discriminating but also to provide his staff with reeducation and to provide quarterly reports on his compliance.[122] While the Supreme Court granted certiorari on both the free speech and free exercise questions,[123] the case was largely expected to focus on the novel free speech questions raised (especially, is baking a cake "speech"?) rather than on the free exercise claim—which seemed to be a sure loser under *Smith*.[124] Indeed, the briefing and oral argument focused much more on the former issue.[125]

But Justice Kennedy's opinion for the Court was all about free exercise. In the end, it did not matter whether Phillips, in the abstract, had a First Amendment right not to comply with the antidiscrimination law.[126] For in adjudicating the dispute, the State had failed to afford "neutral and respectful consideration" of Phillips's sincerely held religious beliefs.[127] At one hearing, a member of the Colorado Civil Rights Commission had "suggested that Phillips can believe 'what he wants to believe,' but cannot act on his religious beliefs 'if

121. *See Masterpiece Cakeshop*, 138 S. Ct. at 1726.

122. *See id.* at 1726-27.

123. *Compare* Petition for a Writ of Certiorari at i, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2016 WL 3971309, *with Masterpiece Cakeshop*, 138 S. Ct. at 1727.

124. *See, e.g.*, Amy Howe, *Argument Preview: Wedding Cakes v. Religious Beliefs?*, SCOTUSBLOG (Nov. 28, 2017, 3:14 PM), https://perma.cc/B7Z6-66L6.

125. *See generally* Transcript of Oral Argument, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 8231968; Brief for Petitioners, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 3913762; Brief for Respondent Colorado Civil Rights Commission, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4838416; Brief for Respondents Charlie Craig & David Mullins, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4838415. To the extent Phillips pressed the free exercise issue in his briefing, he suggested alternatives on the standard argument: first, that strict scrutiny was warranted because the State disparately enforced its antidiscrimination law, *see* Brief for Petitioners, *supra*, at 39-46; and second, that applying the law infringed Phillips's "hybrid" First Amendment rights—a notion suggested by the Court in *Smith* but which has failed to find much traction since, *see id.* at 46-48; *see also* Emp't Div. v. Smith, 494 U.S. 872, 881-82 (1990); Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 PENN ST. L. REV. 573, 587-605 (2003) (detailing hybrid rights claims' "lack of success in the courts" (capitalization altered)); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1122 (1990) ("[T]he *Smith* Court's notion of 'hybrid' claims was not intended to be taken seriously.").

126. *See Masterpiece Cakeshop*, 138 S. Ct. at 1723 ("Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality.").

127. *See id.* at 1729.

he decides to do business in the state.'"[128] Comments at another hearing were even more troubling:

> I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, . . . we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.[129]

These comments, wrote Justice Kennedy, "cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case."[130] Acknowledging "disagree[ment]" about the relevance in free exercise analysis of statements made by those *enacting* a law, it was clear to the majority that when antireligious remarks are made by an administrative adjudicatory body "deciding a particular case," the defendant's free exercise rights are violated.[131]

* * *

These recent cases have presented a range of putative discrimination against religious groups in the enforcement of generally applicable laws. In some, courts found the disparate enforcement to cause grievous First Amendment problems; in others, courts were less concerned. In some, courts confronted the disparate enforcement head-on; in others, they punted on the issue. In some, the fatal flaw in the application of a neutral law was the lack of any enforcement against secular comparators; in others, it was the failure of the state to give due respect to religious claims in the adjudicatory process. What has been consistent is the lack of a clear framework for what the precise constitutional violation is and how it should be remedied.

Nor is the problem going away. The clash between religious liberties and civil rights laws that are, at least in theory, generally applicable is becoming more and more important. Issues sidestepped by courts in the cases discussed above will quickly reappear.[132] With a younger generation that

128. *Id.* (quoting Meeting Transcript at 23, Craig v. Masterpiece Cakeshop, Inc., No. CR2013-0008 (Colo. Civil Rights Comm'n May 30, 2014)).

129. *Id.* (quoting Meeting Transcript at 11-12, *Masterpiece Cakeshop*, No. CR2013-0008 (Colo. Civil Rights Comm'n July 25, 2014)).

130. *Id.* at 1730.

131. *See id.* (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540-42 (1993) (plurality opinion); and *Church of the Lukumi*, 508 U.S. at 558 (Scalia, J., concurring in part and concurring in the judgment)).

132. A cert petition filed several months after the *Masterpiece Cakeshop* decision raised not only the same question presented in *Masterpiece Cakeshop*, but also expressly asked the Court to overrule *Smith*. *See* Petition for Writ of Certiorari at i, Klein v. Or. Bureau of Labor & Indus., 139 S. Ct. 2713 (2019) (No. 18-547), 2018 WL 5308156 [hereinafter *Klein* Cert Petition]; *see also* Amy Howe, Masterpiece Cakeshop *Question Returns to the Supreme Court*, SCOTUSBLOG (Oct. 22, 2018, 12:59 PM), https://perma.cc/TE83-LDHJ. A

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is less religious[133] and more inclined toward broad, inclusive civil rights policies,[134] the First Amendment right to free exercise may increasingly become a disfavored right.[135] And in the era of the coronavirus, questions about neutrality in enforcement decisionmaking will continue to bubble up: For example, are rules about what businesses are "essential" going to be applied neutrally?[136] Will there be more crackdowns against religious violators of stay-at-home orders than against secular ones?[137] Thus it is important that courts have a robust and clear framework for resolving disputes in which the religious claim they are victims of selective enforcement. The remainder of this Note seeks to provide such a framework.

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third question presented in *Klein* asked the Court to reaffirm the "hybrid rights doctrine" introduced in *Smith*. *See Klein* Cert Petition, *supra*, at ii; *see also supra* note 125. After the petition languished for much of the October 2018 Term, the Court ultimately decided to "GVR" (grant certiorari, vacate, and remand) the case in light of *Masterpiece Cakeshop*. *See Klein*, 139 S. Ct. 2713. As discussed below, the question whether to overrule *Smith* is now pending before the Court. *See infra* Part IV.E.

133. *See, e.g.*, PEW RESEARCH CTR., THE AGE GAP IN RELIGION AROUND THE WORLD 30-49 (2018), https://perma.cc/E9N2-Y2D9.

134. *See, e.g.*, Colby Itkowitz, *The Next Generation of Voters Is More Liberal, More Inclusive and Believes in Government*, WASH. POST (Jan. 17, 2019, 9:32 AM PST), https://perma.cc/R7Q6-QGMH.

135. *Cf.* Silvester v. Becerra, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from the denial of certiorari) (referring to the Second Amendment right to bear arms as a "disfavored right").

136. *See, e.g.*, On Fire Christian Ctr., Inc. v. Fischer, No. 3:20-cv-00264, 2020 WL 1820249, at *6-7 (W.D. Ky. Apr. 11, 2020); Michael W. McConnell & Max Raskin, Opinion, *If Liquor Stores Are Essential, Why Isn't Church?*, N.Y. TIMES (Apr. 21, 2020), https://perma.cc/6F22-TTUS. Of course, it does nothing to further the ideals of religious pluralism embodied in the First Amendment when a court shows favoritism to the religious, even if only in an effort to counteract what it perceives as religiously biased selective enforcement. And a court should certainly avoid adding Establishment Clause concerns into the mix by showing overt bias toward a particular mode of religious practice. *See* McCreary County v. ACLU of Ky., 545 U.S. 844, 860, 875-76 (2005).

137. For instance, New York City Mayor Bill de Blasio recently criticized (via Tweet, of all things) a group of Hasidim in Williamsburg, Brooklyn, for gathering to hold a large funeral without proper social distancing. *See* Liam Stack, *De Blasio Breaks Up Rabbi's Funeral and Lashes Out over Virus Distancing*, N.Y. TIMES (Apr. 28, 2020), https://perma.cc/7XQA-V8ND ("'My message to the Jewish community, and all communities, is this simple: the time for warnings has passed,' Mr. de Blasio said . . . ." (quoting Mayor Bill de Blasio (@NYCMayor), TWITTER (Apr. 28, 2020, 6:35 PM), https://perma.cc/8NYU-MLH5)). For allegedly focusing on the Hasidic offenders and ignoring other violators, de Blasio was immediately tarred with accusations of anti-Semitism. *See, e.g.*, Rosie Perper, *New York City Mayor de Blasio Singles Out the City's Jewish Community for Flouting Coronavirus Rules and Said Cops Will Start Arresting People Gathered in Large Groups*, BUS. INSIDER (Apr. 28, 2020, 10:35 PM), https://perma.cc/QTM3-RFJH.

## II. The Equal Protection Defense and Its Limitations

This Part examines the possibility that the Equal Protection Clause is the proper vehicle for claims that laws are being selectively enforced in a religiously discriminatory way. It first recounts basic principles of selective prosecution claims under the Fourteenth Amendment, and then argues that the Fourteenth Amendment is insufficiently protective of religious liberty in this context.

### A. Selective Prosecution Claims Under the Equal Protection Clause

Of course, the government cannot enforce every single statute, rule, or regulation against every single violator.[138] Thus it is a well-accepted principle in criminal and administrative law that the government has broad discretion over which violations it chooses to prosecute.[139] But it is equally well established that the government cannot make enforcement decisions on the basis of protected characteristics such as race or religion.[140]

Selective enforcement claims arise most often in the criminal context, where the defendant alleges "selective prosecution." The selective prosecution claim is "not a defense on the merits to the criminal charge[s]"; it is an "independent assertion that the prosecutor has brought the charge for reasons forbidden by

138. *See, e.g.*, FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 151 (1969) ("Full enforcement of the criminal law in the sense that every violator of every statute should be apprehended, charged, convicted, and sentenced to the maximum extent permitted by law has probably never been seriously considered a tenable ideal.").

139. In the criminal context, see, for example, *Wayte v. United States*, 470 U.S. 598, 607 (1985) ("In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute." (quoting United States v. Goodwin, 457 U.S. 368, 380 n.11 (1982))); *United States v. Batchelder*, 442 U.S. 114, 124 (1979) ("Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion."); and *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . ."). The principle traces back at least as far as the nineteenth-century *Confiscation Cases*. *See* 74 U.S. (7 Wall.) 454, 456-57 (1869).

In the administrative context, see, for example, *Heckler v. Chaney*, 470 U.S. 821, 830-33 (1985) (holding that an administrative agency's decisions not to take enforcement action are unreviewable under the Administrative Procedure Act because, among other reasons, an agency's enforcement decisions "often involve[] a complicated balancing of a number of factors which are peculiarly within its expertise"); and *Vaca v. Sipes*, 386 U.S. 171, 182-83 (1967) (emphasizing an agency's "unreviewable discretion" in its enforcement decisions).

140. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 364-65 (1978); Oyler v. Boles, 368 U.S. 448, 456 (1962). *See generally, e.g.*, Philip J. Cardinale & Steven Feldman, *The Federal Courts and the Right to Nondiscriminatory Administration of the Criminal Law: A Critical View*, 29 SYRACUSE L. REV. 659 (1978).

the Constitution."[141] And the required showing by the defendant is "demanding," to say the least.[142] There is a strong presumption that prosecutorial discretion is exercised in a manner consistent with the Equal Protection Clause.[143] And as is required for other equal protection claims, the defendant must show both a discriminatory effect and a discriminatory purpose behind the government's enforcement decisions.[144]

The difficulty of the required showing is cause for some unease when the activity being prosecuted is itself the exercise of a constitutional right.[145] Indeed, religious discrimination cases are not typically framed as equal protection violations.[146] But at least in theory, many cases of disparate enforcement could be so framed.[147] The showing by a religious person or group alleging disparate, discriminatory enforcement practices would parallel the showing of a criminal

141. United States v. Armstrong, 517 U.S. 456, 463 (1996).

142. *See id.* at 463-65. In *United States v. Armstrong*, the Court made it more difficult for defendants raising a selective prosecution claim to obtain discovery relating to the question of disparate enforcement. *See id.* at 468-70; *see also* Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 730-33 (1997). *See generally, e.g.*, Melissa L. Jampol, Note, *Goodbye to the Defense of Selective Prosecution*, 87 J. CRIM. L. & CRIMINOLOGY 932 (1997) (discussing *Armstrong* and its implications for the viability of selective prosecution claims).

143. *See Armstrong*, 517 U.S. at 464-65 ("A defendant [must] demonstrate that the administration of a criminal law is 'directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive' that the system of prosecution amounts to 'a practical denial' of equal protection of the law." (second alteration in original) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886))).

144. *See Wayte*, 470 U.S. at 608-09. Part of the problem is that it is unclear exactly what must be demonstrated on the discriminatory intent prong. *See* Kristin E. Kruse, Comment, *Proving Discriminatory Intent in Selective Prosecution Challenges—An Alternative Approach to* United States v. Armstrong, 58 SMU L. REV. 1523, 1525 (2005).

145. *See, e.g.*, Arcara v. Cloud Books, Inc., 478 U.S. 697, 712 (1986) (Blackmun, J., dissenting) (arguing that the availability of a selective prosecution claim, with its concomitant "heavy burden" on the defendant, is an insufficient safeguard for free speech rights).

146. *See* Susan Gellman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. PA. J. CONST. L. 665, 666 (2008) ("Challenges to discrimination based on religion are hardly ever brought under the Equal Protection Clause. Where government action interferes with or coerces religious practice, challenges are almost always analyzed under the Free Exercise and Establishment Clauses, respectively . . . ."). Gellman and Looper-Friedman suggest that the Equal Protection Clause may provide a better constitutional vehicle than the Religion Clauses in some equality cases, but their focus is on "government religious expression" cases. *See id.* at 666-68.

The Supreme Court recently had the chance to address an equal protection challenge to alleged religious discrimination, but decided the case on free exercise grounds instead. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 & n.5 (2017).

147. *See, e.g.*, Alpha Delta Chi-Delta Chapter v. Reed (*ADX*), 648 F.3d 790, 804-05 (9th Cir. 2011).

defendant alleging selective prosecution. This showing is almost impossibly demanding.

First, the religious actor against whom the law is being enforced would have to show that the law was not being enforced against "similarly situated" persons or groups.[148] Additionally, it would have to demonstrate that the entity responsible for singling it out for enforcement acted "invidious[ly] or . . . in bad faith."[149] Unsurprisingly, significant discovery might be required for the party raising a selective enforcement claim to be able to make these showings; yet, the Supreme Court has shown reluctance to allow such discovery.[150]

To see the difficulty of making this showing in practice, take the case of the Lee Avenue storeowners.[151] In order for them to succeed on a selective prosecution claim under the Equal Protection Clause, they would have to show that there were other businesses that imposed similar sex-differentiated dress codes against whom no enforcement actions were brought by the New York City Commission on Human Rights. As noted above, upscale athletic clubs and restaurants might have provided useful comparators,[152] but researching the scope of those institutions' violations would be difficult. The storeowners also would have had to show that the Commission's decision to bring an action against them was motivated by some sort of animus—either against Jews generally or against religious (or Hasidic) Jews in particular. This would be more difficult; this step proves fatal to most selective prosecution claims.[153]

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148. *See Armstrong*, 517 U.S. at 465-66; *see also, e.g.*, United States v. Venable, 666 F.3d 893, 900-01 (4th Cir. 2012) ("Defendants are similarly situated when their circumstances present no distinguishable legitimate . . . factors that might justify making different prosecutorial decisions with respect to them.").

149. *See* United States v. Tibbetts, 646 F.2d 193, 195 (5th Cir. Unit A May 1981) (per curiam).

150. *See Armstrong*, 517 U.S. at 468 ("If discovery is ordered, the Government must assemble from its own files documents which might corroborate or refute the defendant's claim. Discovery thus imposes many . . . costs . . . . The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim.").

151. *See supra* notes 1-14 and accompanying text.

152. *See supra* note 11.

153. *See, e.g.*, United States v. Gist, 382 F. App'x 181, 183-84 (3d Cir. 2010); United States v. Cyprian, 23 F.3d 1189, 1196 (7th Cir. 1994). In the case of the Lee Avenue storeowners, the Commission did make reference to the religious nature of the dress code in justifying the administrative action. *See* Mark, *supra* note 14 (reporting the Commission's argument that "[d]ress codes are OK" but that "telling someone they have to abide by certain rules of the Jewish faith crosses the line" (quoting Cliff Mulqueen, Deputy Comm'r & Gen. Counsel, N.Y.C. Comm'n on Human Rights)). Even this probably wouldn't cross the line toward showing religious *animus*; at best it shows that the defendants' religion was a motivating factor. It seems bizarre that a religious group would only have a free exercise defense against admittedly disparate administrative action if there were antireligious animus, and this is one reason why standard claims under the Equal Protection Clause offer inadequate protection for religious liberty.
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B. The Limits of the Equal Protection Clause

In addition to the typical difficulty of making the required discriminatory intent showing, there are at least four other reasons why claims under the Equal Protection Clause are an insufficient cure for the problem of disparate enforcement against the religious.[154]

First, the Equal Protection Clause by its very text protects only "person[s]."[155] While some cases of disparate enforcement might be the result of the state targeting religious people as individuals, it is more likely to see cases where it is particular religious *practices* that are being targeted. So even if the government were to concede that its enforcement decisions were motivated by disfavor of a particular religious practice, as long as it can show that those decisions were not motivated by disfavor of the *people* who engage in that practice, that may be enough to shield it from a Fourteenth Amendment claim. But clearly the Free Exercise Clause demands more.[156]

Second, the difficulty of showing discriminatory animus is especially pronounced in cases such as *Tenafly Eruv Ass'n* and *Stormans*, in which the government outsources its enforcement discretion to the public in a "complaint-driven" scheme.[157] Whatever the typical difficulty of showing animus by administrative officials, it is nothing compared to the difficulty of showing animus behind complaints—often anonymously lodged—that kick off decisions to enforce administrative regulations.[158] And that is assuming that a

What's more, this highlights the problematic fact that religious discrimination often comes in the garb of an enforcement authority purporting to *fight* religious discrimination.

154. *Cf.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 577-78 (1993) (Blackmun, J., concurring in the judgment) (criticizing *Smith* for "treat[ing] the Free Exercise Clause as no more than an antidiscrimination principle").

155. *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."). The Clause's reference to "State[s]" also raises a natural question whether the equal protection right applies against the federal government. *See* Bolling v. Sharpe, 347 U.S. 497, 498-99 (1954) ("The Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states."). The Court in *Bolling* held that the Due Process Clause of the Fifth Amendment provides some notion of equal protection, *see id.* at 499 ("[D]iscrimination may be so unjustifiable as to be violative of due process."), but examining this question further is beyond the scope of this Note.

156. *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017) ("The Free Exercise Clause 'protect[s] religious observers against unequal treatment' . . . ." (first alteration in original) (quoting *Church of the Lukumi*, 508 U.S. at 542 (majority opinion))).

157. *See infra* Part IV.B; *see also supra* Part I.A.

158. It is true that in the criminal context, too, enforcement is primarily driven by complaints. But this is different for two reasons. First, it is more likely in the criminal context that the complainant is the direct victim of the crime. And second, the state is not generally uninterested in enforcing its criminal laws absent a complaint; it is just that the state is less likely to be aware of criminal activity before a complaint. But if a

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selective enforcement claim under the Equal Protection Clause is even *available* when enforcement decisions are triggered not by government officials but by members of the public.[159]

Third, selective prosecution claims under the Equal Protection Clause are a better fit for the criminal context than the administrative context. Cases of disparate enforcement against the religious are much likelier to arise out of administrative decisionmaking; indeed, all the cases discussed above arose in this posture.[160] And as much as courts (and the Supreme Court in particular) have been hesitant to scrutinize prosecutors' charging decisions,[161] they have been even more reluctant to scrutinize the enforcement decisions of administrative agencies, for whom legitimate policy goals and the limited availability of enforcement resources make the analysis murkier.[162]

Fourth, it is not clear what good an equal protection claim would do, even if successful. In the selective prosecution setting, the equal protection claim is not an affirmative defense on the merits.[163] Rather, the claim is brought under 42 U.S.C. § 1983.[164] And while a § 1983 claim may lead to injunctive relief barring future enforcement actions against the religious actors, such claims generally cannot be brought in federal court once state administrative action has been initiated.[165] What is necessary to protect religious freedom is an

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state's attitude toward a particular crime were that it would not prosecute even those violations it became aware of unless the victim lodged a complaint, the problems of selective enforcement highlighted here could be just as salient.

159. *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972) ("[T]he question of whether particular discriminatory conduct is private, on the one hand, or amounts to 'state action,' on the other hand, frequently admits of no easy answer."). *But see, e.g.*, *id.* ("Our cases make clear that the impetus for the forbidden discrimination need not originate with the State if it is state action that enforces privately originated discrimination." (citing Shelley v. Kraemer, 334 U.S. 1 (1948))).

160. *See supra* Part I.

161. *See* United States v. Armstrong, 517 U.S. 456, 464 (1996) (discussing the "presumption of regularity" afforded prosecutorial decisionmaking (quoting United States v. Chem. Found., Inc., 272 U.S. 1, 14 (1926))).

162. *Cf.* Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 488-89 (1999) (noting that selective prosecution claims are "*rara*[*e*] *av*[*e*]*s*" in the typical criminal context and totally unavailable to noncitizens unlawfully in the United States who challenge their removal).

163. *See Armstrong*, 517 U.S. at 463 ("A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution."); *see also, e.g.*, United States v. Smith, 231 F.3d 800, 807-08 (11th Cir. 2000).

164. For selective prosecution claims arising in the § 1983 context, see, for example, *Daubenmire v. City of Columbus*, 507 F.3d 383, 385, 387 (6th Cir. 2007).

165. *See generally* Younger v. Harris, 401 U.S. 37 (1971). For examples of *Younger* abstention in this context, see *Spanier v. Kane*, 34 F. Supp. 3d 524, 531 (M.D. Pa. 2014); and *Thomas v. Venditto*, 925 F. Supp. 2d 352, 357-58 (E.D.N.Y. 2013).

affirmative defense that defeats a state's first effort to enforce its law disparately in a way that burdens religious practice.

One note before continuing. This Part's discussion of the shortcomings of the Equal Protection Clause in the context of religious discrimination is not meant to suggest that the Equal Protection Clause offers a useful or successful framework in the context of other forms of discrimination, particularly on the basis of race. The failure of the Fourteenth Amendment to protect against racially biased selective prosecution is serious and well documented.[166] Both because of the history of racially biased enforcement and because that bias stems from attitudes toward particular *people* rather than particular *practices*, however, that problem involves a very different set of issues and thus calls for a different set of solutions. Addressing the problem of racially disparate enforcement in more detail is beyond the scope of this Note, which addresses only religious liberty.

## III. Spectra of Disparate Enforcement Under the Free Speech Clause and the Free Exercise Clause

As noted above, there is a spectrum of discriminatory enforcement against religious practices.[167] There is also a parallel spectrum of discrimination in the free speech context. The difference between the two, at least to this point, is that there is much more doctrine covering the middle of the free speech spectrum than there is covering the middle of the free exercise spectrum. This Part explains the parallel spectra and describes how various types of claims are handled under the Free Speech Clause.

### A. The *Smith-Church of the Lukumi* Spectrum and the Doctrinal Gray Area

One way to frame the question of how to deal with the various types of discrimination in enforcement faced by religious actors is by imagining that the different contexts in which such claims arise fall on a spectrum. On one end

166. *See, e.g.*, Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497, 1511-16 (2007) (discussing the "inadequacy" of the Equal Protection Clause "as a safeguard against discriminatory enforcement"); Evan Gerstmann, *Where Is Equal Protection? Applying Strict Scrutiny to Use of Race by Law Enforcement*, 29 HARV. J. ON RACIAL & ETHNIC JUST. 1, 18 (2013) ("[I]t would be difficult to think of an area where there is greater need for a coherent, clear, and strong understanding of how the Equal Protection Clause protects minorities. Unfortunately, it is equally difficult to think of an area where equal protection doctrine is more under-theorized or less useful."); Ekow N. Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, 40 CARDOZO L. REV. 1543, 1596-97 (2019) (arguing that "relying on the Fourteenth Amendment's Equal Protection Clause has become a theoretical and practical non-starter" in addressing "racially oppressive policing").

167. *See supra* Part I.

of this spectrum lie laws that are generally applicable and neutral both facially and in application; to withstand a free exercise claim, such laws need only satisfy rational basis review.[168] On the other end are laws that are either limited in application, facially nonneutral, or whose adoption clearly evinces antireligious motives; such laws are subject to strict scrutiny.[169] But there is a lot of room between these two cases, and there has been little guidance from the Supreme Court on how to handle them. Thus, courts have found themselves trying to shoehorn these middle-of-the-spectrum cases into either the *Smith* bucket (which means the enforcement is almost certain to be upheld[170]) or the *Church of the Lukumi* bucket (which means the enforcement is almost certain to be found problematic[171]).

To be more explicit, we can imagine different categories of facts that would fall in the gray area between *Smith* and *Church of the Lukumi*. A law might be perfectly clean in its enactment, its facial applicability, and the equality of its enforcement. But a particular enforcement action might still show hints of antireligious bias—as was the case in *Masterpiece Cakeshop*.[172] Another law might raise no concern were it enforced consistently against all violators, but in fact be enforced disparately—this was the situation courts confronted in *Tenafly Eruv Ass'n*,[173] in *Stormans*,[174] and in the all-comers cases.[175] Still another law might have been acceptable under *Smith* when first enacted, but due to changes in circumstances become disparately applicable to

168. *See* Emp't Div. v. Smith, 494 U.S. 872, 874, 879, 885 (1990).

169. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).

170. *See* United States v. Alvarez, 567 U.S. 709, 731 (2012) (Breyer, J., concurring in the judgment) (noting that "near-automatic approval" is "implicit in 'rational basis' review").

171. *See id.* (noting that strict scrutiny suggests "near-automatic condemnation"); *cf.* 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) (describing strict scrutiny as "'strict' in theory and fatal in fact"). *But see, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment), *abrogated in part by Adarand Constructors*, 515 U.S. 200)); *see also, e.g.*, Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1665-66 (2015) ("'[I]t is the rare case' in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest. But those cases do arise." (citation omitted) (quoting Burson v. Freeman, 504 U.S. 191, 211 (1992) (plurality opinion))). On how laws subject to strict scrutiny tend to fare, see generally Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

172. *See supra* Part I.D.

173. *See supra* Part I.A.

174. *See supra* Part I.B.

175. *See supra* Part I.C.

religious groups and practices. And we can imagine other scenarios still, none of which map neatly onto either *Smith* or *Church of the Lukumi*.

Courts thus need a tool to deal with the growing problem of disparate enforcement of laws burdening the free exercise of religion. As discussed in Part II above, the Equal Protection Clause does not offer an adequate solution. Before we try to construct a framework that might be more suitable, we need to understand more about how selective enforcement claims operate in the context of a different provision of the First Amendment—the Free Speech Clause. This is the subject of the next Subpart.

### B. Selective Enforcement of Speech Regulations

This Subpart discusses how selective enforcement is treated in the free speech context. Before doing so, it begins with a brief outline of the contours of free speech doctrine.

#### 1. A free speech primer

Laws regulating or restricting speech also exist on something of a spectrum. On one end are what the Supreme Court has called "reasonable restrictions on the time, place, or manner of protected speech."[176] As long as these regulations are also content neutral, they receive intermediate scrutiny; we can think of these as the least pernicious.[177] On the other end are laws

176. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); *see also, e.g.*, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 814 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part).

177. *See, e.g.*, *Ward*, 491 U.S. at 798 ("[A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, *content-neutral* interests . . . ." (emphasis added)); United States v. O'Brien, 391 U.S. 367, 376-77 (1968) ("[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."); *see also* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 443 (2002) (plurality opinion).

To be sure, there are even less pernicious regulations that primarily govern conduct and whose impact on speech is incidental—these may receive rational basis review. *See, e.g.*, Sorrell v. IMS Health Inc., 564 U.S. 552, 566-67 (2011) ("[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech. That is why . . . antitrust laws can prohibit 'agreements in restraint of trade.'" (citation omitted) (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949))). But here we are focused on laws whose primary effect is to burden free speech or free religious exercise, so we treat time, place, and manner regulations as the "lax" end of the spectrum. *Cf.* Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2465 (2018) (referring to rational basis review as a "form of minimal scrutiny . . . foreign to our free-speech jurisprudence").

which facially target a particular viewpoint; the Court has referred to such "viewpoint discrimination" as an "egregious" form of regulating speech.[178] Such viewpoint discriminatory laws receive strict scrutiny.[179]

Then there are laws that fall in the middle of this spectrum—laws that discriminate based on content but not viewpoint, laws that are facially valid but that in effect burden a particular viewpoint, and laws that are enforced disparately. What distinguishes the Supreme Court's Free Speech Clause doctrine from its Free Exercise Clause doctrine is that the Court has been clearer about categorizing these "middle-of-the-spectrum" cases. Moreover, the Court has not hesitated to declare that a law falling in the middle of the spectrum should still be given strict scrutiny. For instance, while restrictions that refer to the content of speech but do not discriminate based on viewpoint are certainly less worrisome than viewpoint-discriminatory regulations, the Court has declared that such laws nonetheless receive strict scrutiny.[180] Similarly, while speech restrictions that govern speech in the provision of professional services might seem less worthy of protection, the Court has declared that they should be treated no differently from regulations of purely private speech.[181]

2. Selective enforcement in the free speech context

Of particular relevance here is how the Supreme Court has dealt with laws regulating speech that if examined only facially, would be subject to a reduced level of scrutiny, but that are in practice enforced disparately.[182] For instance,

178. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828-29 (1995); R.A.V. v. City of St. Paul, 505 U.S. 377, 391-94 (1992). Indeed, the Court has recently suggested that viewpoint-discriminatory regulations cannot withstand facial challenges for overbreadth even if their "unconstitutional applications are not 'substantial' relative to '[their] plainly legitimate sweep.'" Iancu v. Brunetti, 139 S. Ct. 2294, 2302 (2019) (quoting United States v. Stevens, 559 U.S. 460, 473 (2010)); *see id.* ("The Court's finding of viewpoint bias end[s] the matter."); *see also* Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008) ("[A] law may be overturned as impermissibly overbroad because a 'substantial number' of its applications are unconstitutional, "'judged in relation to the statute's plainly legitimate sweep.'"" (quoting New York v. Ferber, 458 U.S. 747, 769-70 (1982))).

179. *See, e.g.*, *R.A.V.*, 505 U.S. at 395-96.

180. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015); *Sorrell*, 564 U.S. at 565-66. *But see Reed*, 135 S. Ct. at 2237-38 (Kagan, J., concurring in the judgment) (arguing that strict scrutiny should not be categorically applied to content-based restrictions, but should only be applied "when there is any 'realistic possibility that official suppression of ideas is afoot'" (quoting Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 189 (2007))).

181. *See* Nat'l Inst. of Family & Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2371-72 (2018); *see also* Andra Lim, Note, *Limiting* NIFLA, 72 STAN. L. REV. 127, 131 n.17 (2020).

182. *See generally, e.g.*, Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2410 (2003) (discussing "the role of the courts in policing the distorting effects of discretion upon constitutional equality,"
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in *McCullen v. Coakley*, the Court addressed a Massachusetts statute restricting access to "buffer zones" around abortion clinics, burdening the speech of activists seeking to dissuade women entering the clinics from having abortions.[183] The Court ultimately applied only intermediate scrutiny, holding that the statute was a mere time, place, and manner regulation.[184]

But the Court also engaged with the argument that the law in question was being enforced disparately, noting that if that were the case, the law would be treated as viewpoint discriminatory and strict scrutiny would be appropriate.[185] And the Court noted that granting de facto exemptions to one side of the abortion debate would be "a clear form of viewpoint discrimination"—if there were sufficient evidence in the record demonstrating such a disparity.[186] Thus the Court recognized the principle that selective enforcement of an otherwise neutral and valid law could lead to its invalidation.

* * *

There are two important lessons to be drawn from the Supreme Court's free speech jurisprudence. One is that it is important and possible to announce rules governing laws that fall in the middle of the spectrum. The other is that there is no reason that middle-of-the-spectrum cases must always be treated differently from the most pernicious regulations. Both of these observations are critical in this Note's construction of a standard for dealing with selective enforcement claims under the Free Exercise Clause.

## IV. Protecting Against Disparate Enforcement Through the Free Exercise Clause

To this point, this Note has tried to highlight that disparate enforcement against religious individuals and groups is a problem, and that there is no adequate and accepted way to handle this problem under current First Amendment doctrine. This Part suggests a possible route.

### A. A Framework for Selective Enforcement Claims Under the Free Exercise Clause

One way to construct a framework for handling claims of selective enforcement in the free exercise context is to borrow from both equal protection

particularly in the free speech context); Karl S. Coplan, Note, *Rethinking Selective Enforcement in the First Amendment Context*, 84 COLUM. L. REV. 144 (1984) (advocating a new framework for selective prosecution claims in the free speech context).

183. *See* 134 S. Ct. 2518, 2525-28 (2014).

184. *See id.* at 2529-30.

185. *See id.* at 2533-34.

186. *See id.* at 2534.

principles and free speech principles. This Note's proposed framework is something of a hybrid, looking to selective prosecution claims under the Equal Protection Clause in determining the proper showing of similarly situated comparators,[187] but eschewing the requirement to show discriminatory intent, which presents such a high bar for Fourteenth Amendment selective prosecution claims. And it borrows from how free speech doctrine treats laws on the middle of its "spectrum"—arguing that the Free Exercise Clause, too, should be less tolerant of laws that are in theory neutral and generally applicable but in practice are less so.[188] Finally, similar to claims under the Free Speech Clause—and contrary to claims brought under the Equal Protection Clause—a free exercise selective enforcement claim would operate as an affirmative defense, defeating continued administrative action against the religious person or group raising the claim.

#### 1. What disparities in enforcement implicate the Free Exercise Clause?

The way in which enforcement disparities are treated under the Free Speech Clause should inform their treatment under the Free Exercise Clause. Referring back to the "middle-of-the-spectrum" scenarios described above,[189] we can start to delineate which types of alleged disparities in enforcement are cognizable and which are not—that is, which types of disparities in enforcement would trigger strict scrutiny for laws that otherwise would receive rational basis review under *Smith*.

First, consider a law that is neutral and generally applicable, but which appears to be disparately enforced against religious groups because it has a disparately large *effect* on religious groups.[190] Looking to free speech doctrine, we would reject a claim of disparate enforcement and allow the enforcement action to continue. For it is clear that under the Free Speech Clause (and the Equal Protection Clause), disparate impact alone is not problematic.[191]

187. To be sure, bringing comparators into the mix always creates difficult questions. *See, e.g.*, Nieves v. Bartlett, 139 S. Ct. 1715, 1738-40 (2019) (Sotomayor, J., dissenting) (noting that comparator-based evidence "can be prohibitively difficult to come by in [the] selective-enforcement context[]").

188. *But see* United States v. Sineneng-Smith, 140 S. Ct. 1575, 1584 n.1 (2020) (Thomas, J., concurring) (noting the "discrepancy" between the Supreme Court's staunch protection of free speech and its lesser protection of free exercise).

189. *See supra* Part III.A.

190. This example assumes that the disparity in enforcement is roughly equal to the disparity in effect. Obviously, the fact that a law is *more likely* to be violated by religious objectors does not give license to its enforcers to prosecute *only* religious objectors.

191. *See, e.g.*, Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 700 (2010) (Stevens, J., concurring) ("[I]t is a basic tenet of First Amendment law that disparate impact does not, in itself, constitute viewpoint

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But what if a law's disparate effect is due (at least in part) to disparate enforcement decisionmaking? Here we should analogize to how courts would adjudicate free speech challenges to facially neutral speech regulations that are selectively enforced. That is, courts should treat them just as they treat those that are facially viewpoint discriminatory.[192]

2. A procedural framework

Suppose a municipality, a county, or a state initiates an administrative action against a religious person or group. And suppose further that the law is generally applicable and facially neutral, and that its adoption showed no signs of religious animus—and thus the religious defendant's challenge to the law itself will be unsuccessful under *Smith*. If the defendant (or respondent) can make a prima facie showing that there are other, similarly situated, nonreligious actors who are violators under the government's theory of the case but who have not faced enforcement, the burden should shift to the government to justify the apparent selective enforcement.[193] This showing could be similar to that required in equal protection cases,[194] but unlike selective prosecution claims brought under the Equal Protection Clause, the defendant need not show discriminatory motive—just discriminatory effect.[195] And this stands to reason given the nature of the Free Exercise Clause—at core it protects religious freedom, not just the right to be free of religious discrimination.[196]

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discrimination."); Pahls v. Thomas, 718 F.3d 1210, 1241 (10th Cir. 2013) ("Traditionally, it is the *exceptions* to otherwise legitimate policies that raise content- and viewpoint-neutrality problems, not the other way around.").

192. *See, e.g.*, McCullen v. Coakley, 134 S. Ct. 2518, 2533-34 (2014); Hoye v. City of Oakland, 653 F.3d 835, 849-52 (9th Cir. 2011).

193. Of course, there will always be difficult questions about the precise level of statistical proof required at the prima facie showing phase.

194. *Cf.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993) (plurality opinion) ("In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases."). Another possibility is to analogize to the showing required in free speech retaliatory arrest claims: The defendant would have to present "objective evidence" that it was prosecuted under the law "when otherwise similarly situated individuals not engaged in the same sort of protected [religious behavior] had not been." *Cf.* Nieves v. Bartlett, 139 S. Ct. 1715, 1727 (2019).

195. *Cf.* Whren v. United States, 517 U.S. 806, 813 (1996) (noting that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause," and suggesting that for claims under other provisions of the Constitution, "[s]ubjective intentions play no role").

196. *See* Emp't Div. v. Smith, 494 U.S. 872, 901-02 (1990) (O'Connor, J., concurring in the judgment) ("[T]he Free Exercise Clause protects values distinct from those protected by the Equal Protection Clause. As the language of the Clause itself makes clear, an

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Once the burden has shifted to the government, it would then have two options. Technically, it could make an argument that strict scrutiny is satisfied—but the hurdle would be to show not that the *law* satisfies strict scrutiny but that the *disparate enforcement* is motivated by a compelling government interest and narrowly tailored to serve that interest. Suffice it to say that it is hard to imagine how or why the government would have a compelling interest in only enforcing a neutral law against religious violators.[197] More realistically, the government would try to show that its enforcement was not disparate. The level of discovery available to the defendant on this issue would parallel that available in the typical selective prosecution claim under the Equal Protection Clause—which is to say, it would be limited.[198] If the court finds that the government cannot rebut the showing of a pattern of nonenforcement against secular violators, the defendant's affirmative defense would be established and the enforcement action against the religious actor must come to an end.[199]

* * *

Would courts be receptive to this more protective framework? To be sure, in other disparate enforcement areas, like selective prosecution of criminal laws, courts have been reluctant to make claims procedurally viable—perhaps because the success of such claims prevents beneficial enforcement of

individual's free exercise of religion is a preferred constitutional activity." (citation omitted)); *see also* Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 9 ("[T]he text of the First Amendment itself 'singles out' religion for special protections.").

197. As a logical exercise, we can note that if the government did have such an interest, it might be able to pass the law in a way that only applies to religious groups ex ante, and use its compelling interest to justify the law under *Church of the Lukumi*. *See supra* text accompanying notes 42-45.

198. *See* United States v. Armstrong, 517 U.S. 456, 468-69 (1996) (holding that in order to obtain discovery in a selective prosecution case, the defendant must "produce some evidence that similarly situated defendants . . . could have been prosecuted, but were not").

199. *Cf.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1732 (2018) (striking down the result of a state administrative enforcement action due to a failure to apply the law "in a manner that is neutral toward religion"). What is notable about such a dismissal is that a court would be saying nothing about whether the *law* being enforced violates the Free Exercise Clause—only the *manner* in which it is enforced. *See id.* at 1723-24 ("Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality. . . . Given all these considerations, it is proper to hold that whatever the outcome of some future controversy involving facts similar to these, the Commission's actions here violated the Free Exercise Clause; and its order must be set aside."). The circumstances under which the government could once again bring enforcement actions against religious violators are discussed in Part IV.C below.

important laws.[200] For example, if a local district attorney must stop enforcing a particular criminal law altogether because she has been failing to enforce it in a racially neutral way, the community will face the consequences.[201] This seems less a problem in the administrative context in which most religiously based selective enforcement claims arise.[202] For one, the laws being disparately enforced in the administrative context are more likely to be of the *malum prohibitum* than the *malum in se* variety, and hence the burden of reduced enforcement is less likely to burden the community or its safety.[203]

### B. The Special Case of the "Complaint-Driven" Enforcement Scheme

A far less audacious proposal involves the special case of the "complaint-driven" enforcement scheme. In such a scheme, a law is adopted that is neutral and generally applicable but that places some burden on religious practice. The government then announces its policy to enforce the law only when violations are reported by the public—that is, when a complaint is filed.

In some cases, the motivation for adopting such an enforcement scheme may be perfectly innocuous: Perhaps the relevant administrative agency simply has insufficient investigative resources to ferret out violations on its own. But sometimes such a system will predictably breed selective enforcement, as in cases where there are interest groups well positioned to point out violations by the religious, with no such groups interested in doing the same for secular violators. Indeed, this was the case with the Washington regulations challenged in the *Stormans* litigation.[204] There, pro-choice activists conducted an "active campaign to seek out pharmacies and pharmacists with religious objections to Plan B and to file complaints."[205]

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200. *See, e.g.*, *Armstrong*, 517 U.S. at 468-70 (creating a high bar for entitlement to discovery in selective prosecution suits).

201. *See* Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1516 (2009) ("[T]he high cost of remedies deters courts from vindicating rights. . . . Reversals and mistrials impose the cost of retrial on the public, the parties and witnesses, and the court system, a concern frequently cited by courts and by commentators. They may not be followed by reconviction, resulting in guilty defendants being set free. Judges may see such remedies as creating undue windfalls." (footnotes omitted)).

202. *See supra* Part I.

203. Of course, this principle will not always hold true: It is hard to argue that administratively enforced rules against, say, gender discrimination are less important than criminal sanctions for minor crimes. But for the most part the consequences of an administrative rule going entirely unenforced are less serious than the consequences of a crime going entirely unpunished.

204. *See supra* Part I.B.

205. Stormans, Inc. v. Selecky, 854 F. Supp. 2d 925, 961 (W.D. Wash. 2012), *rev'd sub nom.* Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015); *see also* Stormans, Inc. v.

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But whether the disparate impact from a complaint-driven enforcement scheme was predictable or intended should be irrelevant.[206] It cannot be that the Free Exercise Clause allows for the government to outsource its religious discrimination to the public. A case in which only religious violators face enforcement because only the *anti*religious are interested in reporting violations should be treated no differently than if the government itself announced religious animus as the guiding criterion for its enforcement discretion. For allowing disparity in enforcement under such circumstances would render the *Church of the Lukumi* principle a nullity—by political coordination with interest groups, a government could easily achieve its agenda of religious targeting while keeping its own hands clean.[207] Yet the Supreme Court has consistently warned that the state may not "tolerate" even those private prejudices that are out of the Constitution's reach.[208] Certainly the state cannot harness private biases to accomplish discriminatory ends it is unable to achieve directly.

There is precedent for considering the discriminatory intent on the part of the public when government decisions are put into its hands. Take, for instance, the Supreme Court's 2003 decision in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*.[209] There, public opposition to a low-income housing development scuttled a vote on the subject in the city council and instead put the question to a public referendum.[210] The group behind the development plans sued the City, alleging that it had budged to racial animus and thereby violated the Equal Protection Clause.[211] The Court rejected the suit, finding no equal protection violation because "statements made by private

Wiesman, 136 S. Ct. 2433, 2438 n.4 (2016) (Alito, J., dissenting from the denial of certiorari).

206. *Cf.* Club Misty, Inc. v. Laski, 208 F.3d 615, 616-17, 620-21 (7th Cir. 2000) (holding that a scheme allowing voters in a precinct to strip a business of its liquor license for any reason whatsoever violated due process).

207. The free speech analogue would be if a heavily Republican municipality with an active Democratic minority were to adopt an ordinance banning rallies that are "too disruptive" while announcing that it would only enforce the ordinance in response to complaints. Even though such a rule might facially classify as a content-neutral time, place, and manner regulation, it would be bizarre for it to receive only intermediate scrutiny, as it is totally predictable that the effect of the ordinance will be to stymie a particular viewpoint. If anything, outsourcing enforcement discretion to the public should place *more* of a burden on the government to maintain neutrality in enforcement, not less.

208. *See* Palmore v. Sidoti, 466 U.S. 429, 433 (1984); *see also, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985); Palmer v. Thompson, 403 U.S. 217, 260-61 (1971) (White, J., dissenting).

209. 538 U.S. 188 (2003).

210. *See id.* at 191-93.

211. *See id.* at 193-94.

individuals in the course of a citizen-driven petition drive, while sometimes relevant to equal protection analysis, do not, in and of themselves, constitute state action for the purposes of the Fourteenth Amendment."[212]

But the Court's qualifications were informative. First, it noted that it was limited in its ability to consider Cuyahoga Falls citizens' discriminatory statements because the referendum never actually took place.[213] The Court explicitly stated that the story might be different if the animus-motivated action had come to fruition, and that the motivation of members of the public would then be relevant in the equal protection analysis.[214] Next, the Court explained that the City was just following its charter in sending the question to referendum.[215] Moreover, by adhering to its charter's procedures on referenda, the City had "advanc[ed] significant First Amendment interests" associated with democratic lawmaking.[216] And of course, the Court was limited by the usual hurdles of the Equal Protection Clause.[217]

Contrast this with the case of outsourced enforcement. The government action is complete—its enforcement authority has already been applied to the reported party. There is no tradition of placing enforcement decisions in the hands of the public akin to that of lawmaking by public referendum. And most importantly, the First Amendment interests point in exactly the opposite direction. No free speech or association interests are served by outsourcing discretionary enforcement decisions to members of the public. To the contrary, it is the free exercise principle embedded in the First Amendment that demands careful scrutiny of the reasons for the public's decisionmaking.

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212. *Id.* at 196 (citation omitted); *see id.* ("[R]espondents put forth no evidence that the 'private motives [that] triggered' the referendum drive 'can fairly be attributed to the State.'" (second alteration in original) (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982))).

213. *See id.* at 194-97; *see also id.* at 194-95 (distinguishing several cases in which the Court had found an equal protection violation on the grounds that "respondents claim injury from the referendum petitioning *process* and not from the referendum itself—which never went into effect").

214. *See id.* at 196-97 ("[S]tatements made by decisionmakers or referendum sponsors during deliberation over a referendum may constitute relevant evidence of discriminatory intent in a challenge to an ultimately enacted initiative."); *see also* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 471 (1982) (giving weight, in considering an equal protection challenge to a publicly enacted initiative, to statements made by its proponents).

215. *See Buckeye Cmty. Hope Found.*, 538 U.S. at 195.

216. *Id.* at 196.

217. *See id.* at 195 ("Ultimately, neither of the official acts respondents challenge reflects the intent required to support equal protection liability."); *supra* Part II.

### C. Purging the Taint of Invalid Enforcement

A final question is how the government can properly purge the taint after a court has found that a particular law has been enforced disparately against religious groups. For instance, in *Masterpiece Cakeshop*, the Supreme Court reversed the Colorado courts' rulings against cake baker Jack Phillips on the grounds that the disrespect the State showed his bona fide religious views during the adjudicative process violated the Free Exercise Clause.[218] But what does that mean for future enforcement of Colorado antidiscrimination law against Phillips, or against other religious bakers (or florists[219] or photographers[220]) who prefer not to participate in same-sex weddings?

Indeed, in Phillips's case, this is hardly a hypothetical: Immediately after the Supreme Court's decision in *Masterpiece Cakeshop*, the State tried again to enforce its antidiscrimination law against him.[221] And it would seem that nothing in the Court's decision—which focused on problems with the adjudicative process during the first action—would preclude this subsequent enforcement.

An even harder case is one where an enforcement action has been deemed illegitimate because the religious defendant has shown disparate enforcement—that is, a failure by the state to enforce the same law against similarly situated secular violators. Intuitively, we would think that if the state wants to try again at enforcing the law against the same religious party, it would need to make a threshold showing that it has cured the free exercise violation by having begun to enforce the law against secular violators as well. That is, the state would have to make a decision—either start enforcing the law with full force pursuant to neutral principles of enforcement priority (in which case

218. *See supra* Part I.D; *see also* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1729-32 (2018).

219. *See, e.g.*, State v. Arlene's Flowers, Inc., 389 P.3d 543, 548-49 (Wash. 2017), *vacated*, 138 S. Ct. 2671 (2018). After being "GVRed" (granted, vacated, and remanded) the first time up, *see Arlene's Flowers*, 138 S. Ct. 2671, *Arlene's Flowers* is once again pending before the Court, *see* State v. Arlene's Flowers, Inc., 441 P.3d 1203 (Wash. 2019), *petition for cert. filed*, No. 19-333 (U.S. Sept. 11, 2019).

220. *See, e.g.*, Elane Photography, LLC v. Willock, 309 P.3d 53, 58-60 (N.M. 2013), *cert. denied*, 572 U.S. 1046 (2014).

221. *See* Kathleen Foody, *Colorado, Baker End Legal Spat over Transgender Woman's Cake*, AP NEWS (Mar. 5, 2019), https://perma.cc/6S6T-QQMP; Ashley May, *Colorado Baker Who Refused to Make Gay Couple's Cake Faces Second LGBT Bias Allegation*, USA TODAY (updated Dec. 19, 2018, 5:34 PM ET), https://perma.cc/DQZ4-HBF5. For a perhaps less objective view of the episode, see Jack Phillips, Opinion, *Can I Just Be a Cake Artist Again?*, DENV. POST (Mar. 8, 2019, 12:47 PM), https://perma.cc/H8NS-XP74. For a certainly less objective view, see Paul Strand, *"This Is Outright Christian Persecution": Baker Jack Phillips Strikes Back at Colorado's Anti-Christian Attacks*, CBN NEWS (Dec. 18, 2018), https://perma.cc/576S-YXBH.

religious groups would have no safe haven, assuming the law passes muster under *Smith*), or decline to enforce it altogether. But what exactly would this showing require? And what about subsequent enforcement against other religious actors (of varying similarity to the original defendant)? Finding an exact answer to this question is beyond the scope of this Note, but would be a critical question were courts to adopt a more consistent framework for handling selective enforcement claims under the Free Exercise Clause.[222]

### D. An Objection

I expect that the major objection to this proposal is that it makes it too easy for the religious individual or group to succeed. In other words, simply by modifying the level of abstraction, perhaps it will always be possible to find a "similarly situated" person who does not face similar enforcement. And perhaps that suggests an advantage to the high bar selective prosecution claims face under the Equal Protection Clause: Without needing to show affirmative animus on the part of the decisionmakers, too many of these claims would proceed, hamstringing law enforcement and administrative agencies. And lowering this bar in the context of religiously burdensome selective enforcement opens up the same can of worms.

This objection is well taken. But ultimately, administrative inconvenience should matter little when the alternative is a burden on a fundamental individual right. And to the extent there is a worry that a religious objector will too often be able to identify a similarly situated person who does not face enforcement of the allegedly burdensome law, this is a problem that those with enforcement discretion should be aware of and address ex ante rather than respond to ex post. A government actor enforcing a law that burdens religious practice—even if that actor has no animus and the law is valid under *Smith*—should take pains to ensure that the law is being enforced evenhandedly. If this poses a burden, good. *Smith*'s "generally applicable"[223] prong can only be consistent with the Free Exercise Clause if it also implies "generally enforced."

### E. The End of *Smith*?

This Note has taken *Smith* as a given: Facially neutral, generally applicable laws do not violate the Free Exercise Clause even if they substantially burden

222. Of course, the natural starting point would be to look at how the government can purge the taint after a successful selective prosecution claim under the Equal Protection Clause, and then, mutatis mutandis, adopt a similar standard for free exercise selective enforcement claims. The problem is that there is limited case law on the question, given the rarity of successful selective prosecution claims.

223. *See* Emp't Div. v. Smith, 494 U.S. 872, 878-79 (1990).

religious practice.[224] Many commentators have criticized *Smith* from the very beginning,[225] and there has been no shortage of petitions asking the Court to overrule the decision.[226] Justices have called for its reconsideration.[227] Even Congress tried unsuccessfully with the Religious Freedom Restoration Act (RFRA).[228] But *Smith*'s time may finally have come. In February 2020, the Court granted certiorari in *Fulton v. City of Philadelphia*, which presents the question (among two others) whether *Smith* should be "revisited."[229]

At issue in *Fulton* is a policy by a Catholic child-services organization not to work with same-sex couples as foster parents.[230] After a newspaper published a story about this, the City stopped referring children to the organization.[231] It took the position that doing so would violate municipal antidiscrimination laws.[232] In turn, the organization sued, asserting, inter alia, that the City was violating its free exercise rights.[233]

The Third Circuit rejected the argument.[234] It concluded that the law was neutral and generally applicable and thus that *Smith* applied, even in light of its own (minority) position that religiously discriminatory selective enforcement

224. *See supra* Part III.A.

225. *See, e.g.*, Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief That Was Never Filed*, 8 J.L. & RELIGION 99, 99-100, 99 n.2 (1990) (reproducing an unfiled amicus brief on behalf of free exercise scholars in favor of rehearing in *Smith*); McConnell, *supra* note 125, at 1111; Michael W. McConnell, *An Open Letter to the Religious Community*, FIRST THINGS (Mar. 1991), https://perma.cc/84DG-JXGR ("The Supreme Court's decision in *Employment Division v. Smith* . . . was a sweeping disaster for religious liberty."); *see also* Carol M. Kaplan, Note, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. REV. 1045, 1055-56, 1055 nn.42-43, 1056 n.44 (2000) (collecting sources).

226. *See, e.g.*, *Klein* Cert Petition, *supra* note 132, at i; Petition for a Writ of Certiorari at i, Ricks v. Idaho Contractors Bd., No. 19-66 (U.S. July 10, 2019), 2019 WL 3075895.

227. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 544-45 (1997) (O'Connor, J., dissenting); *id.* at 566 (Breyer, J., dissenting).

228. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb, 2000bb-1 to -4 (2018)), *invalidated in part by City of Boerne*, 521 U.S. 507; *see, e.g.*, *City of Boerne*, 521 U.S. at 512 (majority opinion) ("Congress enacted RFRA in direct response to the Court's decision in [*Smith*]."); *id.* at 529-36 (concluding that RFRA was not a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment).

229. Petition for a Writ of Certiorari at i, Fulton v. City of Philadelphia, 140 S. Ct. 1104 (2020) (No. 19-123), 2019 WL 3380520.

230. *See* Fulton v. City of Philadelphia, 922 F.3d 140, 147-48 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104.

231. *See id.* at 148-49.

232. *See id.* at 148-50.

233. *See id.* at 146-47.

234. *See id.* at 152-59.

triggers strict scrutiny.[235] The organization asked the Supreme Court to review the case, and the Court obliged. Surprisingly, the Court also agreed to consider whether to overrule *Smith*.

If the Court does decide to undo *Smith*, this Note's analysis would become simpler. Suppose this Note has argued correctly that the case of religiously discriminatory selective enforcement falls on a spectrum between the *Smith* paradigm—a neutral, generally applicable law—and the *Church of the Lukumi* paradigm—a law that is discriminatory from its genesis. There would then be little left to say once laws on *both* ends of this spectrum are subject to strict scrutiny. Obviously, at that point, religiously biased enforcement would presumptively violate the Free Exercise Clause, too, unless justified by a compelling government interest.

I am confident that much will be said in the near future on *Fulton* and the possibility of overruling or limiting *Smith*. For now, we can only wait and see what happens.

## Conclusion

In our pluralist society, it is critical that the evolution of rights in one area does not trample or stunt rights in other areas. The Free Exercise Clause has since 1791 told us how to deal with this problem. Interpretation of the Clause must evolve in light of modern attacks on religious freedom. This Note has argued that the front line of that battle is selective enforcement of civil rights and other laws against religious violators.

By seeking to find useful principles in the murky waters of the Free Exercise Clause, the Free Speech Clause, and the Equal Protection Clause, perhaps this Note has just muddied things more. But I hope that it has provided a start toward finding a workable standard for analyzing religiously based selective enforcement claims. And at the very least, I hope that it has isolated and identified a growing fault line in modern civil rights and First Amendment doctrine.

235. *See id.* at 155-56 (citing Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999); and Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002)). The *Tenafly Eruv Ass'n* case is discussed in Part I.A above.