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ABSTRACT

The Supreme Court's "shadow docket"—the decisions issued outside its procedures for deciding cases on the merits—has drawn increasing attention and criticism from scholars, commentators, and elected representatives. Shadow docket decisions have been criticized on the grounds that they are made without the benefit of full briefing and argument, and because their abbreviated, per curiam opinions can be difficult for lower courts to interpret.

A spate of shadow docket decisions in the context of free-exercise challenges to COVID-19 public health orders culminated in Tandon v. Newsom*, a potentially groundbreaking decision that may upend longstanding doctrines governing claims brought under the Free Exercise Clause of the First Amendment.*[1] *But* Tandon *also introduces an element of uncertainty. Will lower courts treat it as they would a merits decision, or will they apply it with caution, given its status as a shadow docket case?*

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1. 141 S. Ct. 1294 (2021) (per curiam).

After reviewing the existing literature on the shadow docket and explaining the potential significance of Tandon*, this Article examines the initial decisions that have grappled with the case. Noting that some judges have treated* Tandon *as a major shift in free-exercise law, while others have minimized or essentially ignored it, I suggest that in several respects* Tandon *is similar to* Bush v. Gore*, another per curiam opinion that some courts have been reluctant to apply as precedent. The experience of* Tandon *suggests that pronouncements in the Supreme Court's shadow docket opinions do not produce the same level of consistency and legal certainty as those in merits opinions, providing further evidence for those arguing that the Court's current shadow docket practices warrant reform.*

INTRODUCTION

Religion, law, and public health are separated by an active fault line, and these disputes have increasingly led to significant Supreme Court opinions issued in non-merits cases. The tension between the Affordable Care Act's contraceptive-coverage mandate and employers who object to providing benefit plans that facilitate acts contrary to their religious teachings gave rise to nine years of divisive, contentious, and ultimately indecisive litigation.[2] The

2. *See* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2373 (2020) ("The ACA's contraceptive mandate . . . has existed for approximately nine years. Litigation surrounding that requirement has lasted nearly as long."); *see, e.g.*, Zubik v. Burwell, 578 U.S. 403 (2016); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014); Wheaton Coll. v. Burwell, 573 U.S. 958 (2014); E. Tex. Baptist Univ. v. Burwell, 793 F.3d 449 (5th Cir. 2015), *vacated*, *Zubik*, 578 U.S. 403; Geneva Coll. v. Sec'y U.S. Dep't of Health & Hum. Servs., 778 F.3d 422 (3d Cir. 2015), *vacated*, *Zubik*, 578 U.S. 403; Sharpe Holdings, Inc. v. U.S. Dep't of Health & Hum. Servs., 801 F.3d 927 (8th Cir. 2015), *cert. granted, judgment vacated sub nom.* Dep't of Health & Hum. Servs. v. CNS Int'l Ministries, 84 U.S.L.W. 3626 (May 16, 2016) (No. 15-775); Dordt Coll. v. Burwell, 801 F.3d 946 (8th Cir. 2015), *vacated*, Burwell v. Dordt Coll., 578 U.S. 968 (2016); Priests for Life v. U.S. Dep't of Health & Hum. Servs., 772 F.3d 229 (D.C. Cir. 2014), *vacated*, *Zubik*, 578 U.S. 403; Univ. of Notre Dame v. Sebelius, 743 F.3d 547 (7th Cir. 2014), *vacated*, 575 U.S. 901 (2015); Korte v. Sebelius, 735 F.3d 654 (7th Cir. 2013); Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health

Supreme Court ultimately issued a per curiam order encouraging the parties to "arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans receive 'full and equal health coverage.'"[3] In a significant development for the shadow docket, that order, though not a final ruling on the merits, was viewed by some circuit courts as weighing on the merits of the case.[4]

Another tectonic shift in the religion-and-health context was triggered by dozens of challenges to emergency COVID-19 orders limiting the size of public gatherings, including religious services, during the initial waves of the global pandemic.[5] Plaintiffs argued that these emergency

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& Hum. Servs., 724 F.3d 377 (3d Cir. 2013), *vacated*, *Burwell*, 573 U.S. 682.

3. *Zubik*, 578 U.S. at 408 (quoting Supplemental Brief for Respondents at 1, Zubik v. Burwell, 578 U.S. 403 (2016) (No. 14-1418)).

4. *See, e.g.*, *Sharpe Holdings*, 801 F.3d at 944 ("[T]he Court's orders were not final rulings on the merits . . . [but] at the very least collectively constitute a signal that less restrictive means exist by which the government may further its interests.").

5. *See, e.g.*, Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1753 (2021); S. Bay United Pentecostal Church v. Newsom, 959 F.3d 938, 939 (9th Cir.), *application for injunctive relief denied*, 140 S. Ct. 1613 (2020), *cert. granted and judgment vacated*, 141 S. Ct. 2563 (2021) (mem.); Bullock v. Carney, 463 F. Supp. 3d 519 (D. Del.), *aff'd*, 806 F. App'x 157 (3d Cir. 2020); Tolle v. Northam, 827 F. App'x 338 (4th Cir. 2020); Roberts v. Neace, 958 F.3d 409 (6th Cir. 2020); DiMartile v. Cuomo, 820 F. App'x 62 (2d Cir. 2020); Legacy Church, Inc. v. Kunkel, 455 F. Supp. 3d 1100 (D.N.M. 2020), *aff'd sub nom.* Legacy Church, Inc. v. Collins (10th Circ. 2021); Calvary Chapel of Bangor v. Mills, 459 F. Supp. 3d 273 (D. Me.), *appeal dismissed*, 984 F.3d 21 (1st Cir. 2020), *cert. denied*, 142 S. Ct. 71 (2021); Cassell v. Snyders, 458 F. Supp. 3d 981, 988 (N.D. Ill. 2020), *aff'd*, 990 F.3d 539 (2021); Antietam Battlefield KOA v. Hogan, 461 F. Supp. 3d 214, 224 (D. Md.), *appeal dismissed*, No. 20-1579, 2020 WL 6787532 (July 6, 2020); Capitol Hill Baptist Church v. Bowser, 496 F. Supp. 3d 284 (D.D.C. 2020); Denver Bible Church v. Azar, 494 F. Supp. 3d 816 (D. Colo.), *appeal dismissed sub nom.* Church v. Polis, No. 20-1377, 2020 WL 9257251 (10th Cir. Dec. 23, 2020), *injunction denied pending appeal sub nom.* Denver Bible Church v. Becerra, No. 1:20-cv-02362, 2021 WL 1220758 (D. Colo. Mar. 28, 2021), *aff'd in part and dismissed in part sub nom.* Church v. Polis, No. 20-1391, 2022 WL 200661 (10th Cir. Jan. 24, 2022); Soos v. Cuomo, 470 F. Supp. 3d 268 (N.D.N.Y. 2020), *appeal withdrawn*, No. 20-2414 (2d Cir. May 27, 2021); Dwelling Place Network v. Murphy, No. 20-CV-6281, 2020 WL 3056305

limitations on the size of worship services violated their free-exercise rights under the First Amendment.[6]

Initially, these challenges achieved little success. In the first phase of COVID-19 litigation, from the start of the pandemic through October 2020, district and appellate courts generally applied the doctrine set forth in *Employment Division, Department of Human Resources of Oregon v. Smith*, holding that Free Exercise Clause challenges against neutral laws of general applicability—ones that do not single out religion for discriminatory treatment—are reviewed under a forgiving rational-basis standard.[7] Under *Smith*, public-health regulations that imposed similar or identical limits on both secular meetings and religious gatherings (with limited exceptions for necessities like hospitals and grocery stores) did not trigger heightened scrutiny.[8] Requests for emergency injunctions against these orders were thus denied.[9]

Having failed to obtain injunctive relief in the lower courts, several plaintiffs sought emergency review by the Supreme Court, initially without success.[10] An early

(D.N.J. June 9, 2020); Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610 (6th Cir. 2020).

6. *See, e.g.*, *Elim Romanian Pentecostal Church*, 962 F.3d at 342–47.

7. 494 U.S. 872, 879 (1990); *see also* Cent. Rabbinical Cong. of U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene, 763 F.3d 183, 193 (2d Cir. 2014); Stormans, Inc. v. Selecky, 586 F.3d 1109, 1137 (9th Cir. 2009). The rational-basis test asks only if a governmental action is rationally related to a legitimate governmental interest. *See* Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1650–56 (2016).

8. *See, e.g.*, *Elim Romanian Pentecostal Church*, 962 F.3d at 342, 347; *S. Bay United Pentecostal Church*, 959 F.3d at 939; High Plains Harvest Church v. Polis, 835 F. App'x 372, 373, 374 (10th Cir. 2020). *But see Neace*, 958 F.3d at 415.

9. *See Elim Romanian Pentecostal. Church*, 962 F.3d at 347; *S. Bay United Pentecostal Church*, 959 F.3d at 939; *High Plains Harvest Church*, 835 F. App'x at 375; Andrew Wommack Ministries v. Polis, No. 20-1336, 2020 WL 5983978, at *1 (10th Cir. Oct. 5, 2020) (denying application without discussion of merits).

10. *See, e.g.*, S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief), *cert. granted and judgment vacated*, 141 S. Ct. 2563 (2021) (mem.); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2603 (2020).

concurrence by Chief Justice Roberts to a summary denial of a stay application explained the operation of the *Smith* standard in these cases.[11] Roberts also cautioned that the unelected judiciary, "which lacks the background, competence, and expertise to assess public health and is not accountable to the people," should be particularly reticent to overrule politically accountable officials where "a party seeks emergency relief in an interlocutory posture."[12]

But the balance of the Court shifted when Justice Barrett was confirmed to replace Justice Ginsburg on October 27, 2020. A new majority soon issued relief in response to several emergency applications for injunctions against COVID-19 orders.[13] These decisions culminated in *Tandon v. Newsom*,[14] a per curiam opinion that not only granted relief to religious plaintiffs but also articulated a dramatic reinterpretation of the longstanding *Smith* standard. According to the five-justice majority in *Tandon*, strict scrutiny—rather than the more lenient rational-basis review—is triggered whenever governmental regulations "treat *any* comparable secular activity more favorably than religious exercise."[15] Thus, an order that treated worship services more leniently than virtually all categories of secular mass gatherings would nonetheless be subject to the exacting strict-scrutiny standard if even a single analogous nonreligious activity were excepted. Because strict-scrutiny review is a daunting hurdle for the government to overcome—famously described as "'strict' in theory and fatal in fact"[16]—this new standard would dramatically change

11. *See S. Bay United Pentecostal Church*, 140 S. Ct. at 1613–14.

12. *Id.* at 1614.

13. *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67–69 (2020) (per curiam); S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716–17 (2021); *see also* Harvest Rock Church v. Newsom, 141 S. Ct. 889, 889 (2020); Agudath Isr. of Am. v. Cuomo, 141 S. Ct. 889, 889 (2020).

14. 141 S. Ct. 1294 (2021) (per curiam).

15. *Id.* at 1296.

16. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing*

how government may regulate around religious objections.

But a question lingers—is this shift in doctrine qualified or mitigated by *Tandon*'s status as a shadow docket case? After all, the Court has itself observed that summary affirmances, which are decided with similar procedures to those that decided *Tandon*, "have considerably less precedential value than an opinion on the merits."[17] And while on the D.C. Circuit, then-Judge Kavanaugh acknowledged the open question of whether a lower court is "*formally* bound by . . . Supreme Court stay orders."[18] Although it is perhaps too early to say with certainty, this Article explores the question of whether *Tandon* will be treated as a lessened or clouded precedent. In doing so, I hope to provide evidence that will be of use in ongoing debates over the wisdom of the Court's current shadow docket practices.

This Article first reviews the growing body of literature on the until-recently understudied shadow docket and proceeds to assess the potential significance of *Tandon* for Free Exercise Clause jurisprudence. I then examine the initial reactions to *Tandon* by courts and other actors, finding that some have treated it as a dramatic shift in the law while others have minimized its significance. I suggest that *Tandon* bears many similarities to *Bush v. Gore*,[19] another per curiam decision with uncertain precedential status. I conclude by arguing that shadow docket opinions are difficult for lower courts to apply and poorly suited for new articulations of the law or alterations of longstanding doctrine.

I do not contend that any courts have or will *ignore* the

Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972). *But 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).

17. Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 180–81 (1979).

18. Priests for Life v. U.S. Dep't of Health & Hum. Servs., 808 F.3d 1, 25 (D.C. Cir. 2015) (Kavanaugh, J., dissenting).

19. 531 U.S. 98 (2000).

decision, which at a minimum provides a barometer for how the current Supreme Court will decide future free-exercise cases. Even in civil-law systems, where stare decisis is not the rule, lower courts look to the actions of higher courts as informative, but not controlling.[20] Nothing suggests that *Tandon* is not informative in this sense. But I argue instead that, due to its shadow docket status, some courts will treat *Tandon* as something less than a fully binding merits decision yet something more than a one-off grant of extraordinary relief to a particular set of parties—a clouded precedent, much like *Bush v. Gore*.[21] Others will apply it as a definitive articulation of Free Exercise Clause jurisprudence. This, in turn, suggests that shadow-docket decisions introduce an unnecessary level of uncertainty, confusion, and complexity into the legal system.

I. "UNREASONED, INCONSISTENT, AND IMPOSSIBLE TO DEFEND": THE SHADOW DOCKET DRAWS INCREASING SCRUTINY

The Supreme Court's non-merits orders have only lately begun to attract significant attention. As recently as the 1990s, scholars believed that per curiam opinions and non-merits decisions were declining in significance and importance.[22] But this trend was reversed by the Roberts Court, and the importance of the shadow docket has instead increased at an accelerating rate.[23]

The term "shadow docket" was coined in 2015 by

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20. *See, e.g.*, Ardoin v. Hartford Accident & Indem. Co., 360 So. 2d 1331, 1334 (La. 1978).

21. *Cf.* THOMAS G. HANSFORD & JAMES F. SPRIGGS, II, THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT 23 (2008) ("Precedents vary in their legal vitality, or the extent to which they maintain legal authority."(citation omitted)).

22. *See* Stephen L. Wasby et al., *The Per Curiam Opinion: Its Nature and Functions*, 76 JUDICATURE, no. 1, June–July 1992, at 29, 29.

23. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 1–2 (2015); *see also* Barr v. E. Bay Sanctuary Covenant, 140 S. Ct. 3, 6 (2019) (Sotomayor, J., dissenting) (citing Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019)).

Professor William Baude, who argued that the Court's orders and summary decisions that "defy its normal procedural regularity" lack the transparency of its merits cases.[24] Noting problems with "consistency and transparency," Baude argued that the Court's non-merits docket deserves "attention and possibly reform."[25] Professor Payvand Ahdout has also pointed to the shadow docket as an effective and rapid barometer of the Court's behavior, given its increasing prominence.[26]

In a forthcoming article, Professor Richard Pierce, Jr. highlights some problems caused by the implications of the Court's grants and denials of stays on the shadow docket.[27] For example, when the Court issues a summary stay of a district court's grant of a preliminary injunction, we "can make an educated guess that the Supreme Court disagreed with the district court in some respect, but we have no way of knowing why."[28] Pierce warns of the consequences of the recent "enormous increase" in the use of the shadow docket, leading to decisions with "massive permanent effects" issued with only a summary opinion to explain the Court's reasoning.[29] Pierce thus questions the shadow docket's consistency with the Court's duty to engage in reasoned decision-making.[30]

Professor Stephen Vladeck has noted and raised concerns about a dramatic increase in the number of requests from the Office of the Solicitor General for

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24. *See* Baude, *supra* note 23, at 1.

25. *Id.* at 4.

26. *See* Z. Payvand Ahdout, *Direct Collateral Review*, 121 COLUM. L. REV. 159, 163 (2021).

27. *See* Richard J. Pierce, Jr., *The Supreme Court Should Eliminate Its Lawless Shadow Docket*, ADMIN. L. REV. (forthcoming) (manuscript at 1–5), https://ssrn.com/abstract=3888369.

28. *Id.* at 3.

29. *Id.* at 10.

30. *See id.* at 13.

emergency or extraordinary relief from the Court, reflecting an increasing willingness to use the shadow docket, rather than traditional procedure, to achieve the government's litigation goals.[31] Vladeck explained that this behavior has been exacerbated by the Court's receptiveness to it, warning that shadow-docket decisions can leave "a fog of uncertainty as to exactly what the standards are in different categories of cases—a muddle that is as unhelpful to lower courts as it is to the parties."[32]

An illuminating discussion of the precedential effects of shadow docket decisions was produced by Judge Trevor McFadden and Vetan Kapoor.[33] McFadden and Kapoor offer one of the first analyses of the effect that Supreme Court grants and denials of stays have on future cases.[34] They argue that lower courts should examine: (1) whether a stay was issued by a single justice or the full Court; (2) the type of underlying merits dispute; and (3) whether the Court explained its reasoning or expressed a view of the merits.[35] In cases where each of these factors are met, McFadden and Kapoor argue that lower courts should treat the Supreme Court order with deference, or at least explain why deference is unwarranted.[36]

Growing scholarly interest in the shadow docket has also been accompanied by public attention. Vladeck and others have written media articles criticizing current trends in the Court's non-merits docket.[37] Justice Barrett was questioned

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31. *See* Vladeck, *supra* note 23, at 124.

32. *Id.* at 157.

33. *See generally* Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL'Y 827 (2021).

34. *See id.* at 828.

35. *Id.* at 849.

36. *Id.*

37. *See, e.g.*, Steve Vladeck, *"Shadow Dockets" Are Normal. The Way SCOTUS Is Using Them Is the Problem.*, SLATE (Apr. 12, 2021, 6:09 PM), https://slate.com/news-and-politics/2021/04/scotus-shadow-docket-use-problem

by Senator Blumenthal about the shadow docket at her confirmation hearing.[38]

Notably, the House Judiciary Committee's Subcommittee on Courts held a hearing on the practice in February 2021, attracting media attention.[39] In an opening statement, Democratic Representative Hank Johnson stated that "transparency is a foundational element of the Supreme Court's integrity . . . in most instances, [the Court's merits procedure] gives the public months to scrutinize and understand the significant issues at bar, and their potential impact."[40] This is not so with the shadow docket, where justices "make their decisions based on shorter-than-usual briefs, without oral arguments and under a tight timeline."[41] Moreover, the "divisiveness of these decisions seems to have risen" as well; an "increasing number of emergency decisions on the shadow docket are decided by a narrow five-four margin among or along ideological lines."[42] At the hearing, concerns about the docket ran across party lines; Republican Representative Darrell Issa stated that he shared many of Representative Johnson's concerns.[43]

Notably, one of the strongest recent critiques of the

.html; Lawrence Hurley et al., *The 'Shadow Docket': How the U.S. Supreme Court Quietly Dispatches Key Rulings*, REUTERS (Mar. 23, 2021, 6:29 AM), https://www.reuters.com/article/legal-us-usa-court-shadow-video/the-shadow-docket-how-the-u-s-supreme-court-quietly-dispatches-key-rulings-idUSKBN2BF16Q; Mark Walsh, *The Supreme Court's 'Shadow Docket' Is Drawing Increasing Scrutiny*, ABA J. (Aug. 20, 2020, 9:20 AM), https://www.abajournal.com/web/article/scotus-shadow-docket-draws-increasing-scrutiny.

38. James Romoser, *Symposium: Shining a Light on the Shadow Docket*, SCOTUSBLOG (Oct. 22, 2020, 12:15 PM), https://www.scotusblog.com/2020/10/symposium-shining-a-light-on-the-shadow-docket/.

39. *See* Mark Joseph Stern, *Congress Finally Scrutinizes One of SCOTUS's Most Disturbing Practices*, SLATE (Feb. 18, 2021, 6:53 PM), https://slate.com/news-and-politics/2021/02/supreme-court-shadow-docket-house-hearing.html.

40. House Committee on the Judiciary, *The Supreme Court's Shadow Docket*, YOUTUBE (Feb. 18, 2021), https://www.youtube.com/watch?v=oC1Vo-MJ9IQ.

41. *Id.*

42. *Id.*

43. *Id.*

Court's shadow docket practices came from the Supreme Court itself. In *Whole Woman's Health v. Jackson*, the Court declined to enjoin a novel Texas law prohibiting abortions after six weeks and delegating enforcement to the general public.[44] Justice Kagan dissented, joined by Justices Breyer and Sotomayor, using the term "shadow docket" for the first time in the text of a Supreme Court opinion.[45] She charged that the

> ruling illustrates just how far the Court's "shadow-docket" decisions may depart from the usual principles of appellate process. That ruling . . . is of great consequence. Yet the majority has acted without any guidance from the Court of Appeals—which is right now considering the same issues. It has reviewed only the most cursory party submissions, and then only hastily. And it barely bothers to explain its conclusion . . . . In all these ways, the majority's decision is emblematic of too much of this Court's shadow-docket decisionmaking—which every day becomes more unreasoned, inconsistent, and impossible to defend.[46]

The Court's increasingly active shadow docket has thus come under fire and has attracted few vocal defenders. But to date, much of this criticism has turned on the fact that non-merits orders are usually accompanied by only summary opinions that shed little light on the Court's reasoning.[47] An emergency decision made with a more expansive opinion, as the Court issued in several COVID-19 cases, raises different questions. The remainder of this Article will explore what *Tandon* reveals about the operation of the shadow docket.

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44. 141 S. Ct. 2494, 2495–96 (2021).

45. *See id.* at 2500 (Kagan, J., dissenting).

46. *Id.*

47. *See, e.g.*, Pierce, *supra* note 27, at 3.

II. "SHOCKWAVES": A POTENTIAL FREE-EXERCISE REVOLUTION

The Free Exercise Clause of the First Amendment forbids governmental actions that have "as their object the suppression of religion,"[48] those demonstrating "hostility toward . . . sincere religious beliefs,"[49] and those that "impose special disabilities" based on "religious status."[50] At the same time, it "does not mean that religious institutions" or individuals receive "general immunity from secular laws."[51] Instead, courts are often faced with the difficult question of whether the Free Exercise Clause requires government to exempt people of faith or their institutions from particular civil obligations that conflict with their religious obligations. These cases can force courts to weigh interests that are difficult to balance against each other, such as public health and religious liberty. As Justice Scalia once noted in another context, when "interests on both sides are incommensurate," balancing them can be like "judging whether a particular line is longer than a particular rock is heavy."[52]

Questions about the extent to which government should or must accommodate religious obligations that are inconsistent with civil laws have arisen since the nation's founding, dating back to laws exempting the Quaker community from Revolutionary-era militia duties and oath requirements.[53] Although accommodations for the Quakers'

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48. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993).

49. Masterpiece Cakeshop, Ltd. v. Col. C.R. Comm'n, 138 S. Ct. 1719, 1729 (2018).

50. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2021 (2017).

51. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020).

52. Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

53. *See* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916–17 (1992); Ellis M.

religious objections were historically granted by legislatures as a matter of policy,[54] early court decisions rejected the idea that such claims were constitutionally mandated by free-exercise guarantees,[55] as did subsequent Supreme Court jurisprudence.[56]

Then, in two twentieth-century cases, the Supreme Court subtly opened the door to the principle that limited religious exemptions to even neutral and nondiscriminatory laws may be required by the Free Exercise Clause. In *Sherbert v. Verner*, the Court held that a state could not deny unemployment benefits from a Seventh-Day Adventist whose beliefs prohibited her from taking a job requiring working on Saturdays.[57] And in *Wisconsin v. Yoder*, it held that a state could not require Amish teenagers to attend school past the eighth grade in contravention of the

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West, *The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J. L. & RELIGION 367, 375 (1993); William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. RSRV. 357, 376–77, 376 n.95 (1989).

54. *See id.* at 376 n.95. The framers of the Second Amendment also considered—but rejected—an explicit religious exemption from compulsory militia service for religious pacifists. *See* 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834); *see also* Vincent Phillip Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J. L. & PUB. POL'Y 1083, 1109–16 (2008).

55. *See, e.g.*, Philips v. Gratz, 2 Pen. & W. 412, 416–17 (Pa. 1831); Donahoe v. Richards, 38 Me. 379, 410–12 (1854); *see also* City of Boerne v. Flores, 521 U.S. 507, 543 (1997) (Scalia, J., concurring); Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591, 629 (1990) (finding "no evidence . . . that the principle of religious freedom was ever used in the seventeenth or eighteenth centuries to justify a right, natural or constitutional, to be exempt for reasons of religion from a law whose primary purpose and effect are secular in nature"). *But see* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1411–12 (1990) (arguing that religious exemptions are consistent with the original meaning of the Free Exercise Clause).

56. *See* Reynolds v. United States, 98 U.S. 145, 166–67 (1879); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594–95 (1940), *overruled by W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

57. 374 U.S. 398, 399–402 (1963).

teachings of their faith.[58] These cases applied a demanding compelling-interest test in reviewing governmental action and evaluating whether the Free Exercise Clause had been violated;[59] however, they also made clear that the Free Exercise Clause does not bar governmental regulation of substantial threats to public safety, peace, or order, regardless of religious convictions.[60]

The Supreme Court reversed course again in 1990. In the landmark *Employment Division v. Smith*, workers who were discharged for misconduct after using peyote in a religious ceremony challenged the denial of their unemployment benefits on free-exercise grounds.[61] In an opinion penned by Justice Scalia, the Court held that "the right of free exercise 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).'"[62] Under *Smith*, Free Exercise Clause challenges against neutral laws of general applicability are thus examined under a lenient rational-basis standard of review, which requires only that the challenged law be rationally related to a legitimate

58. *See* Wisconsin v. Yoder, 406 U.S. 205, 228–29 (1972).

59. *See Sherbert*, 374 U.S. at 403; *see also* 42 U.S.C. § 2000bb(b) (establishing that the purpose of the federal Religious Freedom Restoration Act was to "restore the compelling interest test as set forth" in *Sherbert* and *Yoder*), *held unconstitutional in part by Boerne*, 521 U.S. at 543. The compelling-interest test requires the government to show that its challenged action is "necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *E.g.*, Globe Newspaper Co. v. Sup. Ct. for Norfolk Cnty., 457 U.S. 596, 607 (1982). It is thus significantly more difficult for the government to prevail under that test than under the rational basis test, see *supra* note 7 and accompanying text, although the regime imposed by *Sherbert* and *Yoder* was not insurmountable. *See* United States v. Lee, 455 U.S. 252, 261 (1982) (denying religious exemption from Social Security taxes post-*Yoder*).

60. *See Sherbert*, 374 U.S. at 402–03; *Yoder*, 406 U.S. at 230 & n.20.

61. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 874–76 (1990).

62. *Id.* at 879 (quoting *Lee*, 455 U.S. at 263 n.3).

governmental interest.[63] Only laws that single out religion for discriminatory treatment, and accordingly are not neutral or generally applicable, trigger heightened review.[64]

Smith was immediately controversial,[65] and an early test of its new standard came three years later. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, practitioners of Santeria challenged a law forbidding animal sacrifices.[66] There, the Court held that the law, supposedly targeting animal cruelty, was not generally applicable—and thus did not benefit from *Smith*'s forgiving standard of review—because it was riddled with a pattern of exceptions for secular conduct demonstrating that it impermissibly targeted a disfavored religion.[67] The Court noted that the city had purportedly acted to ban the unnecessary killing of animals, but continued to allow, among other things,

63. *See id.*; Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993); *see also* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of injunctive application), *cert. granted and judgment vacated*, 141 S. Ct. 2563 (2021) (mem.); *see also supra* note 7 and accompanying text.

64. *See Lukumi*, 508 U.S. at 531–32.

65. Congress responded to the decision by enacting the Religious Freedom Restoration Act ("RFRA"), which provides that governmental action may not substantially burden a person's religious exercise unless that action withstands a heightened compelling-interest test. 42 U.S.C. § 2000bb-1. The RFRA thus "restored" via statute the more exacting level of judicial scrutiny that had been applied in the earlier *Sherbert* and *Yoder* decisions. *See Sherbert*, 374 U.S. at 403; *Yoder*, 406 U.S. at 215. In *City of Boerne v. Flores*, the Supreme Court subsequently held that RFRA's intended application to the states exceeded Congress's enforcement authority under Section 5 of the Fourteenth Amendment, 521 U.S. 507, 530–36 (1997), but the statute continues to apply in challenges to actions taken by the federal government. *See, e.g.*, Guam v. Guerrero, 290 F.3d 1210, 1220–22 (9th Cir. 2002). Many states have also enacted their own RFRA analogues that largely track the federal statute. *See, e.g.*, Diggs v. Snyder, 775 N.E.2d 40, 44–45 (Ill. App. Ct. 2002) (deciding pursuant to Illinois RFRA, 775 ILL. COMP. STAT. 35/1–99 (2021)); Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 919 (Ariz. 2019) (deciding pursuant to Arizona Free Exercise of Religion Act, ARIZ. REV. STAT. §§ 41-1493 to 41-1493.02 (2021)); Barr v. City of Sinton, 295 S.W.3d 287, 296 (Tex. 2009) (deciding pursuant to Texas RFRA, TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001–110.012 (West 2021)).

66. 508 U.S. at 524–25.

67. *Id.* at 543–44.

hunting, fishing, the extermination of pests, the use of live animals as bait, euthanasia of unwanted animals, and the killing of animals for medical science.[68] This pattern of exceptions for analogous secular conduct showed that the law's purported concern with the lives of animals was mere pretext, masking impermissible animus toward a specific religious practice.[69]

Lukumi therefore explained that a law excepting a pattern of secular activities while banning comparable religious ones is not neutral and generally applicable, and thus does not benefit from rational-basis review under *Smith*.[70] The Free Exercise Clause guards against such "religious gerrymanders."[71] *Lukumi* did not, however, pronounce that a single secular exception from a law would automatically trigger heightened review, or that all religious activities must necessarily be treated at least as well as any single comparable secular activity.[72]

That later approach was suggested by Professors

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68. *Id.* A potential critique of the Court's reasoning is that it seems to conflate all animal species, despite vast differences between them, in terms of intelligence, capacity to experience pain, and potential nuisance and health risks to humans. Is the killing of a rat in one's home truly a valid comparison to the killing of, for example, a chicken during a religious sacrifice? Raising a similar question, James Oleske Jr. has asked whether, under the logic of the case, "the federal government [must] make an exemption for the religious sacrifice of dolphins simply because it does not ban the boiling of lobsters?" James M. Oleske, Jr., Lukumi *at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare Laws*, 19 ANIMAL L. 295, 321 (2013).

69. *See Lukumi*, 508 U.S. at 545.

70. *See id.* at 546.

71. *Id.* at 534 (quoting Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

72. *See* Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1082 (9th Cir. 2015) ("The mere existence of" a single "secular exemption" does not "automatically create[] a claim for a religious exemption." (quoting Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 651 (10th Cir. 2006))); Lighthouse Inst. for Evangelism v. City of Long Branch, 510 F.3d 253, 265 (3d Cir. 2007) ("A regulation does not automatically cease being neutral and generally applicable . . . simply because it allows certain secular behaviors but not certain religious behaviors.").

Douglas Laycock and Steven Collis in a 2016 article, which argued that the "constitutional right to free exercise of religion is a right to be treated like the most favored analogous secular conduct."[73] Justice Kavanaugh later articulated this "most favored" right approach in dissent in *Calvary Chapel Dayton Valley v. Sisolak*, one of the first phase of COVID-19 cases decided against the plaintiffs before Justice Barrett reached the Court: "[T]he First Amendment requires that religious organizations be treated *equally* to the favored or exempt secular organizations, unless the State can sufficiently justify the differentiation."[74] But, in *Sisolak*, Kavanaugh was joined by no other justice.[75] Put simply, under the traditional interpretation of the *Smith* standard, rational-basis review did not necessarily hinge on whether any single secular comparator was excepted from a rule while any single religious comparator was not.[76] Heightened review was instead triggered in cases like *Lukumi*, where a pervasive pattern of exceptions demonstrated a "religious gerrymander" and thus a lack of neutrality and general applicability.[77]

That was, until *Tandon*. There, the Court ordered emergency injunctive relief on behalf of a plaintiff religious organization against California's pandemic restrictions on the size of gatherings.[78] Five Justices issued an unsigned,

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

74. 140 S. Ct. 2603, 2613 (2020) (Kavanaugh, J., dissenting). In *Roman Catholic Diocese of Brooklyn*, Justice Kavanaugh's concurrence similarly stated that, "once a State creates a favored class of businesses, . . . the State must justify why houses of worship are excluded from that favored class." Roman Cath. Diocese of Brooklyn v. Cuomo,141 S. Ct. 63, 73 (2020) (Kavanaugh, J. concurring). But again, his concurrence was joined by no other justice.

75. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2609 (2020).

76. *See Stormans, Inc.*, 794 F.3d at 1082; *Lighthouse Inst. for Evangelism*, 510 F.3d at 265.

77. *See Lukumi*, 508 U.S. at 534.

78. Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam).

per curiam opinion.[79] That opinion included one potentially revolutionary statement, closely mirroring Justice Kavanaugh's most-favored-right position in *Sisolak*: "[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[80] Chief Justice Roberts would have denied the plaintiff's application, and Justice Kagan, joined by justices Breyer and Sotomayor, dissented.[81] Perhaps obliquely criticizing the majority for issuing a sweeping articulation of the law in an unsigned opinion, Justice Kagan's dissent mentioned the opinion's status as a per curiam six times in just three paragraphs.[82] She closed by replacing her typical "I respectfully dissent"[83] with "I respectfully dissent from this latest per curiam decision."[84] Months later, she would more directly criticize the Court's shadow-docket practices in *Whole Woman's Health v. Jackson*.[85]

The potential ramifications of the per curiam's most-favored-right principle are startling. Virtually all laws and regulations include at least some exceptions.[86] COVID-19 public-health orders initially limited most voluntary public

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79. *See id.* at 1296, 1298.

80. *Id.* at 1296.

81. *Id.* at 1298 (Kagan, J., dissenting).

82. *Id.* at 1298–99 (Kagan, J., dissenting).

83. *See, e.g.*, S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 723 (2021) (Kagan, J., dissenting); Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2245 (2020) (Kagan, J., concurring in part and dissenting in part); Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 169 (2011) (Kagan, J., dissenting); Town of Greece v. Galloway, 572 U.S. 565, 638 (2014) (Kagan, J., dissenting).

84. *Tandon*, 141 S. Ct. at 1299 (Kagan, J., dissenting).

85. *See* Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting).

86. *See* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1540 (1999) ("[V]irtually all laws . . . contain many secular exemptions.").

gatherings, but they did not limit the capacity of grocery stores.[87] Public-school vaccine mandates exempt those with medical conditions that are contraindications to immunization.[88] The employment-discrimination provisions of the Civil Rights Act of 1964 do not apply to employers with fewer than fifteen employees.[89] State laws that protect the public from discrimination on the basis of protected categories include exceptions allowing businesses to refuse to serve those under the age of eighteen.[90] The nation's draft exempts women.[91] And so on, and so forth.

Do these types of routine exceptions for nonreligious groups or activities automatically entitle religious objectors to strict-scrutiny review of the government's actions? If so, *Smith*'s presumption that free-exercise cases are by default reviewed under a rational-basis standard is all but dead. Indeed, if so, it was unnecessary of the Court to outline the litany of secular exceptions to the animal-cruelty law in *Lukumi*[92] and to discuss religious gerrymanders; heightened review would have been triggered merely because the state had barred religious animal sacrifices while continuing to allow recreational hunting.[93]

The initial scholarly reaction to *Tandon* generally agrees that the decision has dramatic implications. Professor Michael Helfand described the Court's language as "somewhat slippery" but explained that, "given the frequency with which laws have exceptions, such an approach would go

87. *See S. Bay United Pentecostal Church*, 140 S. Ct. at 1613 (Roberts, C.J., concurring in denial of application for injunctive relief).

88. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 120372 (West 2021).

89. *See* 42 U.S.C. § 2000e(b).

90. *See, e.g.*, VA. CODE ANN. § 2.2-3904(D) (2021).

91. *See* Nat'l Coal. for Men v. Selective Serv. Sys., 141 S. Ct. 1815, 1816 (2021) (statement of Sotomayor, J.).

92. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543–44 (1993).

93. *See id.*

quite far in transforming the religious discrimination paradigm . . . provid[ing] a basis for deeming laws not neutral in cases where any secular conduct was granted favorable treatment."[94] Professor Josh Blackman likewise views *Tandon* as "formally adopt[ing] Justice Kavanaugh's 'most favored' right framework."[95] Professor Scott Gaylord wrote that the decision "sent shockwaves through the Court's Free Exercise jurisprudence."[96] And Professor R. George Wright described the opinion as of "disproportionately great and sustained interest" given its transformation of free-exercise doctrine.[97]

The question, then, is whether *Tandon*'s most-favored right principle will gain full-throated acceptance by lower courts. It is, of course, a decision of the Supreme Court and thus impossible to ignore. But not all precedents are created equal.[98] In the past the Court has cautioned that summary affirmances, decided with similar procedures to those in *Tandon*, "have considerably less precedential value than an opinion on the merits."[99] And in other cases, circuit judges have grappled with the question of whether the Court's non-

94. Michael Helfand, First 100 Days Symposium, *Religious Liberty and Religious Discrimination: Where is the Supreme Court Headed?*, 2021 U. ILL. L. REV. ONLINE 98, 103 https://www.illinoislawreview.org/wp-content/uploads/2021/04/Helfand.pdf.

95. Josh Blackman, *The "Essential" Free Exercise Clause*, 44 HARV. J. L. & PUB. POL'Y 637, 647 (2021).

96. Scott W. Gaylord, *Neutrality Without a Tape Measure: Accommodating Religion After* American Legion, 19 AVE MARIA L. REV. 25, 56 (2021).

97. R. George Wright, *Free Exercise and the Public Interest After* Tandon v. Newsom, 2021 U. ILL. L. REV. ONLINE, Spring, 189, at 189 https://www.illinoislawreview.org/wp-content/uploads/2021/05/Wright.pdf. Wright further notes the decision's status as "a temporary per curiam shadow docket order, by a bare voting majority, reviewing a lower court's denial of an injunction pending appeal." *Id.* at 189 n.2.

98. *See* HANSFORD & SPRIGGS, *supra* note 21, at 23; *see also supra* note 22 and accompanying text.

99. Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 180–81 (1979).

merits decisions are entitled to controlling weight.[100] The response of courts to *Tandon* will be instructive as to the true impact of the Court's shadow docket.

III. *TANDON* IN THE COURTS

The initial response to *Tandon* has been uneven and chaotic. Some have contended that the case now defines the appropriate standard for reviewing Free Exercise Clause challenges.[101] Others have minimized its significance or simply grouped it together with the other COVID-19 cases decided on the Court's shadow docket. In this section, I review early decisions interpreting *Tandon* with an eye toward evaluating whether it is being treated as the equivalent of a merits decision.

A. *Silence in* Fulton

The Supreme Court had an early opportunity to reiterate *Tandon*'s most-favored-right language in a traditional merits decision, or at least to signal to lower courts that *Tandon* is entitled to full precedential status.[102] The majority declined to do so.

Fulton v. City of Philadelphia involved a dispute between a Catholic foster-care agency and the city, which declined to renew the agency's contract unless it would agree to certify LGBTQ couples as potential foster parents.[103] The agency argued that the city had violated its free-exercise

100. *See* CASA de Md., Inc. v. Trump, 971 F.3d 220, 229–30 (4th Cir. 2020); *id.* at 281 n.16 (King, J., dissenting); Priests for Life v. U.S. Dep't of Health & Hum. Servs., 808 F.3d 1, 25 (D.C. Cir. 2015) (Kavanaugh, J., dissenting).

101. This group, naturally, includes litigants bringing free-exercise cases. Many litigants quickly filed notices of supplemental authority arguing that *Tandon* established the rule that religious entities are entitled to strict scrutiny where any comparable secular entity has received better treatment. *See, e.g.*, Little Sisters' Notice of Supplemental Authority at 2, California v. Azar, No. 17-cv-5783 (N.D. Cal. May 7, 2021), ECF No. 458.

102. *See* HANSFORD & SPRIGGS, *supra* note 21, at 16, 111.

103. 141 S. Ct. 1868, 1875–76 (2021).

rights, and that the ordinance the city acted under was not neutral or generally applicable.[104]

Fulton—which was fully briefed and argued months before *Tandon* even reached the Court[105]—stood to potentially remake the Court's Free Exercise Clause jurisprudence, in part because the petitioners asked the Court to formally overrule *Smith*.[106] But by the time *Fulton* was decided, the significance of *Smith* had perhaps been eroded by the per curiam opinion in *Tandon*, causing some commentators to observe that *Tandon* had stolen *Fulton*'s thunder.[107] Because the *Fulton* plaintiffs argued, and the Court ultimately held, that the city's procedure for foster-care contracts was not neutral and generally applicable because it "incorporate[d] a system of individual exemptions,"[108] the Court had ample opportunity to cite *Tandon* and reiterate or clarify its most-favored-right approach.

But the majority did not. Instead, in the unanimous opinion authored by Chief Justice Roberts (who would have denied the application in *Tandon*),[109] *Tandon* was not cited a single time.[110] Nor was it cited in the concurrence of Justice Barrett, joined by Justice Kavanaugh and in part by Justice Breyer, which explained why those justices declined to overturn *Smith*.[111] *Tandon* was instead cited only in the concurrence of Justice Gorsuch, joined by Justices Alito and

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104. *See id.* at 1876.

105. *See id.* at 1868.

106. *Id.* at 1876.

107. Jim Oleske, Tandon *Steals* Fulton*'s Thunder: The Most Important Free Exercise Decision Since 1990*, SCOTUSBLOG (Apr. 15, 2020, 10:13 AM), https://www.scotusblog.com/2021/04/tandon-steals-fultons-thunder-the-most-important-free-exercise-decision-since-1990/.

108. *Fulton*, 141 S. Ct. at 1878.

109. Tandon v. Newsom, 141 S. Ct. 1254, 1298 (2021).

110. *See Fulton*, 141 S. Ct. at 1874–82.

111. *See id.* at 1882–1883 (Barrett, J., concurring).

Thomas, which criticized the majority for failing to overturn *Smith*.[112] Gorsuch cited *Tandon* to state that "[e]xceptions for one means strict scrutiny for all," reiterating the most-favored-right approach.[113] He also stated that *Tandon* "began to resolve at least some of the confusion surrounding *Smith*'s application,"[114] implying that the per curiam opinion should have precedential effect.

But what are we to make of the majority's failure to even mention *Tandon* in its discussion of exceptions?[115] In a decision where the majority devoted paragraphs to explaining the Court's Free Exercise Clause jurisprudence,[116] citing major cases like *Smith*,[117] *Lukumi*,[118] *Sherbert*,[119] *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[120] and *Bowen v. Roy*,[121] the absence of any mention of *Tandon* is noticeable[122]—if we assume that the shadow docket decision has a status equivalent to those venerable merits opinions.

On the other hand, if we assume that a per curiam

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112. *Id.* at 1929–31 (Gorsuch, J., concurring).

113. *Id.* at 1929.

114. *Id.* at 1930.

115. For a general discussion of the significance of discretionary citation of precedents, see Frank B. Cross et al., *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489, 527–28.

116. *Fulton*, 141 S. Ct. at 1876–77.

117. *Id. passim* (citing Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990)).

118. *Id.* at 1877, 1881, 1882 (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)).

119. *Id.* at 1877, 1881, 1882 (citing Sherbert v. Verner, 374 U.S. 398 (1963)).

120. *Id.* at 1877, 1882 (citing 138 S. Ct. 1719 (2018)).

121. *Id.* at 1877 (citing 476 U.S. 693 (1986)).

122. Empirically, courts tend to cite more recent precedents when possible, and "it is well established that older cases are generally less likely to be cited." Ryan C. Black & James F. Spriggs II, *The Citation and Depreciation of U.S. Supreme Court Precedent*, 10 J. EMPIRICAL LEGAL STUD. 325, 327 (2013). Thus, the Court's decision to cite older Free Exercise cases without mentioning *Tandon* during its general explication of free-exercise jurisprudence is notable.

shadow docket opinion creates something less than full, controlling precedent,[123] the majority's decision to not mention *Tandon*, even when discussing exceptions and general applicability, is less surprising.[124] But this interpretation leaves the lower courts with a difficult question: what to do with *Tandon*?

B. *The Lower Courts Respond*[125]

1. The Western District of Washington

One of the first district court decisions interpreting *Tandon* was *Chung v. Washington Interscholastic Activities Ass'n*, a free-exercise challenge by Seventh-Day Adventist student athletes who charged that the state had failed to accommodate their Sabbath observation when scheduling tournaments.[126] The plaintiffs argued that the defendant athletic association had accommodated secular concerns in its scheduling decisions but not religious ones, citing first to the Court's pre-*Tandon* COVID-19 cases and then filing a notice of supplemental authority after *Tandon* was decided.[127]

The Western District of Washington held that the Supreme Court's line of COVID-19 cases was inapplicable.[128] It read two pre-*Tandon* COVID cases—*Roman Catholic Diocese of Brooklyn v. Cuomo*[129] and a Ninth Circuit decision applying *Roman Catholic Diocese of Brooklyn*'s

123. *See, e.g.*, Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 180–81 (1979).

124. Precedents that are not incorporated into later decisions lack "power in directing the path of the law." Cross et al., *supra* note 115, at 518–19.

125. Due to the publishing schedule for this article, the following discussion covers decisions issued through October 2021 only.

126. 538 F. Supp. 3d 1170, 1175–77 (W.D. Wash. 2021).

127. *Id.* at 1184 & n.3.

128. *Id.*

129. *Id.* at 1184 (citing 141 S. Ct. 63 (2020) (per curiam)).

reasoning[130]—as simply enjoining laws that singled out religious activities for especially harsh treatment.[131] Surprisingly, the court held that *Tandon* was inapplicable "[f]or the same reasons."[132] The *Chung* court did not discuss *Tandon*'s statement that "regulations . . . trigger strict scrutiny . . . whenever they treat *any* comparable secular activity more favorably than religious exercise."[133] Instead, it determined that rational-basis review applied under *Smith*, and the court held that the defendant's application of its rules survived.[134]

Perhaps surprised by the court's failure to address *Tandon*'s most-favored-right principle, the *Chung* plaintiffs filed a motion for reconsideration, arguing among other things "manifest error in the [c]ourt's legal analysis of *Tandon v. Newsom*."[135] But on reconsideration, the court found no error in its previous opinion, emphasizing that the California public-health order enjoined by *Tandon* had subjected "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants" to operate under a more lenient standard than religious services.[136] It then noted that the *Tandon* majority criticized California's COVID-19 regulations as containing "myriad exceptions and accommodations for comparable activities."[137] Drawing from this statement, the *Chung* court held that, because the challenged Washington athletic scheduling rules did not

130. *Id.* (citing Calvary Chapel Dayton Valley v. Sisolak, 982 F.3d 1228 (9th Cir. 2020)).

131. *See id.*

132. *Id.* at 1184 n.3.

133. Tandon v. Newsom, 141 S. Ct. 1254, 1296 (2021) (emphasis in original).

134. *Chung*, 538 F. Supp. 3d at 1188–89.

135. Chung v. Wash. Interscholastic Activities Ass'n., No. 19-CV-5730, 2021 WL 3129624, at *1 (W.D. Wash. July 23, 2021).

136. *Id.* at *3.

137. *Id.* (emphasis omitted) (quoting *Tandon*, 141 S. Ct. at 1297).

contain "myriad exceptions" for secular activities, *Tandon* was inapplicable.[138]

The focus on whether there were "myriad exceptions" is difficult to reconcile with *Tandon*'s most-favored-right language. The *Chung* court essentially ignored *Tandon*'s implication that religion must be treated at least as favorably as "*any* comparable secular activity."[139] Instead, by holding that strict scrutiny is triggered by the presence of "myriad exceptions," the court applied what had been longstanding law under *Lukumi*.[140] Interestingly, the *Chung* court explicitly noted that in *Fulton*, the Court only "cited [*Tandon*] in one concurrence that disagreed with the majority's decision to avoid addressing *Smith*."[141]

Neither *Chung* opinion expressly discounted *Tandon* on the ground that the case was a shadow docket decision. But the court twice ignored *Tandon*'s language that strict scrutiny is triggered when "*any* comparable secular activity"[142] is excepted, applying instead the older precedent that patterns of non-neutral exemptions constitute impermissible "religious gerrymanders."[143] In effect, the *Chung* court appears to have not viewed *Tandon* as significantly revising free-exercise doctrine. And its reference to the Supreme Court's near silence in *Fulton* can perhaps be read as questioning whether the Court intended *Tandon*'s per curiam opinion to stand alone as controlling precedent.

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138. *Id.* at *3.

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

140. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 544 (1993).

141. *Chung*, 2021 WL 3129624, at *4.

142. *Tandon*, 141 S. Ct. at 1296 (emphasis in original).

143. *Lukumi*, 508 U.S. at 534 (quoting Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

2. The Northern District of Illinois

Other courts have also grouped *Tandon* together with the Supreme Court's other COVID-19 shadow-docket decisions, without acknowledging the fact that those cases did not articulate a change in free-exercise doctrine, while *Tandon* did. For example, considering a COVID-19 case on remand, the Northern District of Illinois considered *South Bay United Pentecostal Church*,[144] *Roman Catholic Diocese of Brooklyn*,[145] and *Tandon* together, stating that in each of these the Supreme Court was persuaded that the plaintiffs were likely to succeed "because the COVID-19 orders were not narrowly tailored and discriminated against religion."[146] The court explained that New York's COVID-19 order could be viewed as targeting the ultra-Orthodox community and thus discriminating against religion and then stated that the "same concerns also permeate the opinion in *Tandon*."[147]

The court thus viewed these three shadow docket decisions as together standing for the non-controversial proposition that government may not discriminate against religion through religious gerrymanders—a principle that was long ago enshrined by *Lukumi*.[148] It did not, however, parse these individual shadow docket opinions to identify new articulations of Free Exercise Clause doctrine. This approach suggests that the Court's disposition of cases on its shadow docket indicates whether relief should be granted to similar parties in analogous cases, but its statements in shadow docket per curiam opinions are not necessarily taken as definitive articulations of the law.

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144. Elim Romanian Pentecostal Church v. Pritzker, No. 20 C 2782, 2021 WL 3142111, at *3–4 (N.D. Ill. July 26, 2021) (citing S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021)).

145. *Id.* (citing Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2021)).

146. *Id.*

147. *Id.*

148. *See Lukumi*, 508 U.S. at 534.

3. The District of New Jersey

Two New Jersey churches challenged the state's expired COVID-19 gathering locations in *Solid Rock Baptist Church v. Murphy*.[149] The plaintiffs filed a notice of supplemental authority after *Tandon* was issued, arguing that the decision "mandates a strict scrutiny analysis of government restrictions involving religious matters by lower courts."[150] Although the court requested supplemental briefing on the effect of *Tandon*, it did not substantively discuss the decision in its opinion, holding instead that the plaintiffs' challenge was moot and warranted *Younger* abstention.[151]

4. The Northern District of Texas

Perhaps the most expansive early interpretation of *Tandon* by a district court came in a lawsuit by a church and a religious business seeking a free-exercise exemption from anti-discrimination policies of Title VII of the Civil Rights Act of 1964 "so that they may hire and fire in accordance with sincerely held religious beliefs and employment policies."[152] The Northern District of Texas noted the existence of several secular exemptions in Title VII, such as a specific exclusion allowing employers to fire members of communist-affiliated organizations.[153] Adopting an expansive reading of *Tandon*, and citing the per curiam decision extensively, the court held that, since the government extends "these exemptions to nonreligious decisions, they must treat requests for religious exemptions the same."[154]

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149. Civ. No. 20-6805, 2021 WL 3630289, at *1 (D.N.J. Aug. 16, 2021).

150. *Id.* at *2.

151. *See id.* at *2–6.

152. Bear Creek Bible Church v. EEOC, No. 18-CV-00824, 2021 WL 5052661, at *1 (N.D. Tex. Oct. 31, 2021), *amended by* 2021 WL 5449038 (N.D. Tex. Nov. 22, 2021).

153. *See id.* at *25.

154. *Id.*

5. The District of Maine

On the other hand, the District of Maine rejected the strongest possible interpretation of *Tandon* in a free-exercise challenge brought by healthcare providers against a vaccine mandate.[155] The plaintiffs argued that Maine's vaccine mandate impermissibly allowed medical exemptions (for those likely to suffer adverse effects from the vaccine) while not recognizing religious exemptions.[156] But the court held that a "crucial" aspect of *Tandon* is focusing only on "comparable" activities, and it rejected the argument that medical and religious exemptions are comparable.[157] The decision was affirmed by the First Circuit.[158] Its reasoning stands in sharp contrast to the Northern District of Texas's reading of *Tandon*—if medical contraindications were not "comparable" to requests for religious vaccine exemptions in Maine, it is not obvious why Title VII's exemptions for measures taken against members of communist organizations should be deemed comparable to requests for religious exemptions for nondiscrimination policies in Texas.

But the cloud of uncertainty around *Tandon* was only increased when the Maine plaintiffs sought emergency relief from the Supreme Court. Although the Court denied the application, Justice Barrett, joined by Justice Kavanaugh, wrote separately to emphasize that they were making a "discretionary judgment about whether the Court should grant review" rather than an assessment of the merits.[159] Justice Gorsuch, joined by Justices Thomas and Alito, dissented and explicitly rejected the district court's moderate

155. *See* Does 1–6 v. Mills, No. 21-CV-00242, 2021 WL 4783626, at *1, *8 (D. Me. Oct. 13), *aff'd*, 16 F.4th 20 (1st Cir.), *application for injunctive relief denied sub nom*. Does 1–3 v. Mills, 142 S. Ct. 17 (2021).

156. *See id.* at *8, *12.

157. *See id.* at *8.

158. *Does 1–6*, 16 F.4th at 37.

159. *Does 1–3*, 142 S. Ct. at 18 (Barrett, J., concurring in denial of application for injunctive relief).

interpretation of *Tandon*.[160]

6. The Sixth Circuit

Tandon was addressed by the Sixth Circuit in a challenge brought by a religious private school and two parents who contended that a mask mandate that applied to public and private schools violated their religious beliefs.[161] The court addressed *Tandon*'s most-favored-right principle without implying that its shadow docket status was relevant.[162] However, the court held that no comparator besides other schools was appropriate, and it upheld the mask requirement even under *Tandon*, as all schools in the state were treated the same.[163]

7. The Eighth Circuit

The Eighth Circuit addressed *Tandon* in a challenge to an expired COVID-19 public health order.[164] Discussing the course of COVID-19 free-exercise litigation, the court explained that, at the beginning of the pandemic,

> [w]hile it was generally understood that churches hosting religious services could not be treated less favorably than other venues that held gatherings of large groups of people in close proximity for extended periods of time, the contours of this neutrality principle were not well defined. *See S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020). What constitutes a 'comparable secular activity' that may be treated no more favorably than religious activity has divided the Supreme Court, but the Court has now ruled that the relevant comparison extends beyond movie theaters and lecture halls to hardware stores, hair salons, acupuncture facilities, and garages. *Tandon*, 141 S. Ct. at 1297; *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 66.[165]

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160. *See id.* at 18–19 (Gorsuch, J., dissenting).

161. *See* Resurrection Sch. v. Hertel, 11 F.4th 437, 441, 450–51, *rehearing en banc granted, vacated*, 16 F.4th 1215 (6th Cir. 2021) (mem.).

162. *See id.* at 457–58.

163. *See id.* at 448, 457–58, 460.

164. Hawse v. Page, 7 F.4th 685, 687 (8th Cir. 2021).

165. *Id.* at 693.

Again, the court seemed to treat the COVID-19 shadow-docket cases as a set, rather than treating *Tandon* as a watershed opinion with implications extending well beyond those of *Roman Catholic Diocese of Brooklyn* or *South Bay United Pentecostal Church*. And again, the court discussed exceptions for comparable secular activity without mentioning the most-favored-right doctrine that *Tandon* seems to assert.

8. The Ninth Circuit

Another instructive decision was *Foothill Church v. Watanabe*, a post-*Tandon* Free Exercise Clause decision that did not mention *Tandon* at all.[166] In *Foothill Church*, houses of worship contended a requirement that they offer employees group health plans that would cover elective abortions violated their Free Exercise Clause rights.[167] The plaintiffs argued that strict scrutiny was triggered in part because the relevant government officials had discretion to offer exemptions from the requirement for "good cause,"[168] and had in fact allowed at least one exemption to another entity.[169]

While *Tandon*'s most-favored-right concept, which would dramatically expand the range of situations in which exemptions trigger strict scrutiny, would seem at least relevant to these arguments, the Ninth Circuit panel did not discuss it. Instead, the panel vacated the district court's ruling and remanded for further consideration in light of *Fulton*—but not *Tandon*.[170] The exclusion of *Tandon* from the remand order, despite the fact that *Tandon* seemingly

166. *See* Foothill Church v. Watanabe, 3 F.4th 1201 (9th Cir. 2021) (vacating and remanding district court decision on plaintiffs' Free Exercise Clause claim); *see also* Foothill Church v. Watanabe, 854 F. App'x 174 (9th Cir. 2021) (dismissing plaintiffs' Establishment Clause claim).

167. 3 F.4th at 1201 (Bress, J., dissenting).

168. *See id.* at 1204.

169. *Id.* at 1206.

170. *See id.* at 1201.

altered Free Exercise Clause jurisprudence far more dramatically than *Fulton* did, is striking. Judge Bress dissented from the decision, arguing that remand was unnecessary because the case was clear under pre-*Fulton* precedent, but he did not mention *Tandon* either.[171]

9. The Tenth Circuit

A more substantial early discussion of *Tandon* came in *303 Creative LLC v. Elenis*, a case challenging a Colorado law that forbade public accommodations to discriminate on the basis of protected categories, including sexual orientation.[172] A website-design company, with owners whose religious beliefs prohibited designing websites for the weddings of same-sex couples, argued that the law violated its speech and free-exercise rights.[173] The plaintiffs argued that secular speakers had been treated better than religious speakers, triggering strict scrutiny, but the panel held that there was no evidence that any secular speakers had been permitted to discriminate against LGBTQ customers.[174] The panel cited both *Fulton* and *Tandon*, without qualifying *Tandon*'s status as a shadow-docket opinion.[175] Yet the majority opinion did not mention *Tandon*'s most-favored-right concept when articulating the standard for demonstrating that a law is not generally applicable.[176]

In contrast, the most-favored-right principle was squarely addressed in a dissent by Judge Tymkovich, who quoted from *Tandon* and argued that the Colorado statute allowed ad-hoc exceptions and thus triggered strict

171. *See id.* at 1201–07.

172. 6 F.4th 1160, 1168 (10th Cir. 2021).

173. *Id.* at 1169–70. The challenged Colorado antidiscrimination regime was the same that had been challenged in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1725 (2018).

174. *303 Creative LLC* , 6 F.4th at 1185–86.

175. *See id.*

176. *See id.*

scrutiny.[177] *303 Creative* thus demonstrates a possible split, with one judge viewing *Tandon*'s most-favored right principle as potentially deciding the case, and with the other two panel members citing the case generally but not addressing its articulation of the most-favored-right principle.

A different Tenth Circuit panel cited *Tandon* a single time in its summary of free-exercise law in a Section 1983 case brought by a Muslim inmate against a corrections officer.[178] The court cited *Tandon* along with *Lukumi* for the proposition that a law that is not neutral or generally applicable must satisfy a compelling-interest test.[179] Thus, the court appeared to recognize *Tandon* as a significant free-exercise decision worthy of citation, but it did not reference or elaborate on *Tandon*'s most-favored-right principle.

* * *

In conclusion, among the early post-*Tandon* Free Exercise Clause decisions, one panel ignored the case, focusing entirely on *Fulton*;[180] another treated it as controlling free-exercise law;[181] two other majority opinions discussed it generally without mentioning its most-favored-right concept;[182] one dissent squarely addressed the most-favored-right concept and would have found it determinative of the case before him;[183] one district court applied the strongest form of the most-favored-right concept;[184] another

177. *Id.* at 1206–09 (Tymkovich, J., dissenting).

178. *See* Ashaheed v. Currington, 7 F.4th 1236, 1240–41, 1243 (10th Cir. 2021).

179. *See id.*

180. *See* Foothill Church v. Watanabe, 3 F.4th 1201, 1201 (9th Cir. 2021).

181. *See* Resurrection Sch. v. Hertel, 11 F.4th 437, 457–58 (6th Cir. 2021).

182. *See 303 Creative LLC*, 6 F.4th at 1186; Hawse v. Page, 7 F.4th 685, 692–93 (8th Cir. 2021).

183. *303 Creative LLC*, 6 F.4th at 1206–09 (Tymkovich, J., dissenting).

184. *See* Bear Creek Bible Church v. EEOC, No. 18-CV-00824, 2021 WL 5052661, at *25–26 (N.D. Tex. Oct. 31, 2021).

did not;[185] another treated *Tandon* as interchangeable with the other shadow-docket COVID-19 cases;[186] and a final district court considered *Tandon* in two opinions but read it as applying when "myriad exceptions" are present, essentially repudiating the most-favored-right concept.[187] In short, the early application of *Tandon* has been uneven and chaotic.

While this cannot be conclusively or completely tied to its status as a shadow docket decision, a statement of the law in a traditional merits opinion would have sent a clearer signal to the lower courts, and may have resulted in more uniform interpretation. Moreover, because the Court's positive treatment of its own precedents in subsequent merits opinions tends to increase the rate at which lower courts comply with and cite those precedents,[188] the *Fulton* majority's decision to not cite *Tandon* potentially contributed to its uneven application in early lower-court opinions.

IV. A NEW *BUSH V. GORE*

There is a particular irony to *Tandon* being issued as a per curiam opinion (literally, "by the court"), because the case was a divisive opinion decided by a bare five-to-four majority. While the practice of issuing per curiam decisions was initially adopted in part to demonstrate the consensus and unanimity of the Supreme Court with respect to particular legal issues, over the course of the twentieth century, it became more common for justices to dissent from them.[189] In later years, particularly during the Burger Court,

185. *See* Does 1–6 v. Mills, No. 21-CV-00242, 2021 WL 4783626, at *8 (D. Me. Oct. 13), *aff'd*, 16 F.4th 20 (1st Cir.), *application for injunctive relief denied sub nom.* Does 1–3 v. Mills, 142 S. Ct. 17 (2021).

186. Elim Romanian Pentecostal Church v. Pritzker, No. 20 C 2782, 2021 WL 3142111, at *3–4 (N.D. Ill. July 26, 2021), *aff'd*, 22 F.4th 701 (7th Cir. 2022).

187. Chung v. Wash. Interscholastic Activities Ass'n, No. C19-5730, 2021 WL 3129624, at *3 (W.D. Wash. July 23, 2021).

188. HANSFORD & SPRIGGS, *supra* note 21, at 117.

189. *See* Laura Krugman Ray, *The Road to* Bush v. Gore*: The History of the*

the per curiam opinion was occasionally used "to resolve high-profile cases which raised difficult and controversial issues on which the Justices held widely divergent positions."[190] But *Tandon* fits neither model. Far from reflecting a unanimous Court acting together on a matter of consensus, the case was decided five to four, reaching the opposite result, due to the replacement of a Justice, as the Court reached in a virtually identical case mere months before.[191] And instead of avoiding difficult and controversial issues, the opinion appears to articulate with specificity a contested new doctrine for Free Exercise Clause cases.

But *Tandon* is not the first case of dramatic significance decided in a per curiam opinion by a bare majority—in that respect, it follows in the footsteps of *Bush v. Gore*,[192] perhaps the most significant unsigned opinion in the Court's history.[193] While not *technically* a shadow docket case—*Bush v. Gore* began as a request for an emergency stay, but the Court both granted the stay and treated it as a petition for certiorari, which it also granted, moving the case to the Court's merits docket[194]—it bore many hallmarks of modern shadow docket decisions. That case was extremely rushed, with certiorari granted on December 9, oral argument set for December 11 at 11:00 a.m., and a final decision issued shortly before midnight on December 12.[195] Briefs were filed simultaneously, depriving the parties of the ability to review

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Supreme Court's Use of the Per Curiam Opinion, 79 NEB. L. REV. 517, 524–30 (2000).

190. *Id.* at 536.

191. *Compare* Tandon v. Newsom, 141 S. Ct. 1294, 1296, 1298 (2021) (per curiam), *with* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief), *cert. granted and judgment vacated*, 141 S. Ct. 2563 (2021) (mem.).

192. 531 U.S. 98 (2000).

193. *See* Ray, *supra* note 189, at 575.

194. Bush v. Gore, 531 U.S. 1046, 1046 (2000).

195. *See id.*; Bush v. Gore, 531 U.S. 98 (2000).

and carefully respond to each other's arguments.[196] In his dissent against the Court's injunction against the election recount, Justice Stevens lamented that "[t]ime does not permit a full discussion of the merits."[197] Like the emergency COVID-19 cases, *Bush v. Gore* was decided using extraordinary procedures poorly suited to reasoned deliberation and careful articulation of the law.

And as it did in *Tandon*, the *Bush v. Gore* Court issued an unsigned, per curiam opinion over the strident objections of nearly half its members. Attempting to explain the Court's decision to issue a per curiam opinion in a case that decided a presidential election, Laura Ray wrote that:

> By suggesting that the opinion comes from the Court rather than from an identified Justice, the per curiam assumes institutional authority and attempts, with limited success, to underplay the serious division reflected by the vote and the separate opinions. The per curiam also suggests an opinion of modest intentions, useful to a Court that insists at the same time on identifying a new constitutional right and limiting its application. Most dramatically, the per curiam seems intended to support the Court's assertion that, far from engaging in judicial activism in resolving the presidential election, it is in fact only reluctantly entering the fray to fulfill its constitutional role.[198]

These considerations may have played a role in the majority's decision to issue a per curiam opinion in *Tandon* as well, with the crisis of a global pandemic replacing the crisis of a disputed presidential election.

If aspects of *Tandon* indeed mirror *Bush v. Gore*, what are the implications for *Tandon*'s acceptance by courts and other actors? Whether *Bush v. Gore* had articulated "a rule good for one case and one case only" was a hotly debated question in the decision's aftermath.[199] But the evolution of

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196. *See* Bush v. Gore, 531 U.S. at 1046.

197. *Id.* at 1047 (Stevens, J., dissenting).

198. Ray, *supra* note 189, at 575.

199. *See* Chad Flanders, *Please Don't Cite This Case! The Precedential Value of* Bush v. Gore, 116 YALE L.J. POCKET PART 141, 143 (2006), http://yalelawjournal.org/forum/please-dona8217t-cite-this-case-the-precedential-value-of-bush-v-

the law has been more complicated than many expected—some lower courts have applied *Bush v. Gore* as a fully precedential opinion; indeed, the en banc Ninth Circuit described it as "the leading case on disputed elections."[200] But this is far from a unanimous view. A later Ninth Circuit panel held that the precedential value of *Bush v. Gore* was limited,[201] and multiple district courts have stated that its precedential value is unclear.[202] In a dissent, Judge Gilman of the Sixth Circuit contended that the case was "murky" and its "precedential value" was "at best questionable."[203] Other judges have taken a middle path, asserting that *Bush v. Gore* "was a narrow holding that specifically dealt with legal challenges arising from a presidential election" and limiting it to those circumstances.[204]

Notably, the Supreme Court itself has scrupulously avoided the case. In over twenty years, the per curiam opinion appears in only one Supreme Court merits decision, cited in a footnote to a dissent by Justice Thomas.[205] Justice Rehnquist's *Bush v. Gore* concurrence has been cited twice more, both times in dissents or concurrences from shadow

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gore; *see also* Richard L. Hasen, *The Untimely Death of* Bush v. Gore, 60 STAN. L. REV. 1, 3–4 (2007) (describing *Bush v. Gore* as a dormant constitutional precedent).

200. Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 918 (9th Cir. 2003) (en banc).

201. Rodriguez v. Newsom, 974 F.3d 998, 1006 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2754 (2021).

202. *See* League of United Latin Am. Citizens v. Abbott, 369 F. Supp. 3d 768, 780 (W.D. Tex. 2019), *aff'd*, 951 F.3d 311 (5th Cir. 2020); Lyman v. Baker, 352 F. Supp. 3d 81, 87 (D. Mass. 2018), *aff'd*, 954 F.3d 351 (1st Cir. 2020).

203. Stewart v. Blackwell, 444 F.3d 843, 880, 886 (6th Cir. 2006) (Gilman, J., dissenting); *see also* Lewis v. Hughs, 475 F. Supp. 3d 597, 618 (W.D. Tex. 2020) (looking to *Bush v. Gore*'s interpretation of the Equal Protection Clause without deciding whether it "provides binding precedent").

204. *See* Jurado v. Davis, No. 08CV1400, 2018 WL 4405418, at *149 (S.D. Cal. Sept. 17, 2018), *aff'd*, 12 F.4th 1084 (9th Cir. 2021); *see also* Roybal v. Davis, 148 F. Supp. 3d 958, 1105 (S.D. Cal. 2015) (noting the "expressly limited nature of the Supreme Court's holding").

205. Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 35 n.2 (2013) (Thomas, J., dissenting).

docket decisions.[206] And because the acceptance of a precedent by lower courts is influenced in part by the Supreme Court's positive treatment of that precedent in its later opinions,[207] the Court's reticence to cite *Bush v. Gore* has likely contributed to lower-court reluctance to treat it as fully controlling. *Bush v. Gore* thus exists as a kind of clouded precedent—applied by some courts, questioned by others, and ignored if possible.

Lower courts reached different conclusions about whether and how to apply *Bush v. Gore* as precedent, as they also seem to have done, at least initially, with *Tandon*. And the Supreme Court has completely avoided citing *Bush v. Gore* in the majority opinion of a merits decision, much as the majority declined to cite *Tandon* in *Fulton*. If *Bush v. Gore* is indeed a relevant model for *Tandon*, the application of *Tandon*'s most-favored-right principle may continue to be chaotic and uneven. The most-favored-right principle will certainly be advanced in future cases, supported by citations to *Tandon* and accepted by some lower courts. But if that principle is to become a uniformly applied doctrine in free-exercise cases, the Supreme Court will likely need to articulate it outside of the shadow docket.[208]

V. TROUBLING IMPLICATIONS FOR THE SHADOW DOCKET

In *Hunter v. Bryant*, Justice Kennedy dissented from a per curiam decision simultaneously granting certiorari, vacating the decision below, and remanding for further reconsideration (a procedure known as GVR), asserting that "[t]he importance" of the questions presented "suggests that

206. *See* Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 34 n.1 (2020) (Kavanaugh, J., concurring); Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 733 (2021) (Thomas, J., dissenting).

207. HANSFORD & SPRIGGS, *supra* note 21, at 117.

208. *Cf. id.* (suggesting the Supreme Court's subsequent positive treatment of a decision directly correlates to its precedential effect).

we should not dispose of them in summary fashion."[209] "Given . . . the precedential weight that later courts will accord to all of the questions presented in the case and addressed here in express terms or by clear implication," Justice Kennedy stated that he "would set the case for full briefing and oral argument."[210]

Justice Kennedy's concern with informal procedures was later echoed by Justice Scalia in a dissent criticizing the Court's evolving GVR procedures:

> When the Constitution divides our jurisdiction into "original Jurisdiction" and "appellate Jurisdiction," I think it conveys, with respect to the latter, the traditional accoutrements of appellate power. There doubtless is room for some innovation, . . . but the innovation cannot be limitless without altering the nature of the power conferred.[211]

In an early COVID-19 case, Chief Justice Roberts cautioned that the unelected judiciary should be especially reticent to overturn the actions of politically accountable representatives where "a party seeks emergency relief in an interlocutory posture."[212] And during the editing of this article, the Court struck down the Center for Disease Control's COVID-19 eviction moratorium, over the objection of Justice Breyer that the Court ruled "without full briefing or argument."[213] These varied process-based concerns apply to the Court's increasingly vigorous assertion of its power through the shadow docket,[214] and the early experience of

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209. 502 U.S. 224, 235 (1991) (Kennedy, J., dissenting).

210. *Id.*

211. Stutson v. United States, 516 U.S. 163, 189–90 (1996) (Scalia, J., dissenting) (quoting U.S. CONST. art. III, § 2, cl. 2).

212. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613–14 (Roberts, C.J., concurring in denial of application for injunctive relief), *cert. granted and judgment vacated*, 141 S. Ct. 2563 (2021) (mem.).

213. *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2490 (2021) (Breyer, J., dissenting).

214. *See, e.g.*, Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting).

Tandon would seem to support the apprehensive skeptics.

Indeed, if stare decisis is "a sensible rule because, among other things, it protects the reliance interests of those who have structured their affairs in accordance with the Court's existing cases,"[215] then the rule necessitates that the Supreme Court articulate the law with clarity and certainty, following regular procedures, in opinions with unambiguous application. Otherwise, the ability to knowingly structure interests in accordance with the law is impaired.

Significant articulations of the law in emergency decisions like *Tandon* create unnecessary hurdles for the lower courts that must interpret and apply them. Their precedential status is uncertain, and it becomes even more so when the Court ignores them in future opinions, as it has done with *Bush v. Gore* and seemed to do with *Tandon* in *Fulton*. Their abbreviated, and usually unsigned, opinions do not explain legal principles with the exacting detail typically used by most Supreme Court merits decisions. And the rushed procedures that produce them, while perhaps unavoidable in emergency situations, are poorly suited to producing final and unreviewable expressions of legal doctrine. Small wonder that courts tasked with applying them produce inconsistent results.

Critics may challenge the legal significance of the often-criticized features of shadow docket opinions. Why should it matter if an opinion is unsigned, issued without oral argument, or rushed? It is, after all, still an opinion issued by the Supreme Court. But there are important reasons why these characteristics should matter.

There is, of course, no constitutional requirement that opinions be signed by an individual judge, and some have questioned the wisdom of the practice.[216] But the norm of the

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215. Amy Coney Barrett, *Stare Decisis and Originalism*, 92 NOTRE DAME L. REV. 1921, 1921 (2017).

216. *See* James Markham, Note, *Against Individually Signed Judicial Opinions*, 56 DUKE L.J. 923, 942–48 (2006).

Supreme Court indicating which justice authored its critical opinions makes good sense for several reasons. First, Congress plays a limited but important role in overseeing and empowering the Court.[217] The Senate is charged with providing advice and consent on nominees;[218] Congress holds responsibility for impeaching justices where necessary;[219] and the Court's power to exercise authority beyond its constitutionally conferred jurisdiction is granted by statute.[220] Unsigned opinions make it difficult for Congress to track and evaluate the work of individual justices, obscuring the Court's decision making process from the legislative branch and hindering oversight and review.

Just as importantly, in a constitutional system that grants federal judges lifetime tenure, one of the only real constraints on judicial behavior is the public reputation of judges and justices—a constraint that is weakened when they avoid taking personal responsibility for consequential and controversial opinions like *Bush v. Gore* or *Tandon*. This concern motivated Thomas Jefferson's opposition to judicial opinions that fail to identify the position of each judge, as Jefferson wrote that:

> Judges holding their offices for life are under two responsibilities only.1. Impeachment [and] 2. individual reputation. . . . [A]s to the [second] guarantee, personal reputation, it is shielded compleatly [sic] [when judges do not individually explain their decisions]. The practice is certainly convenient, for the lazy, the modest[, and] the incompetent.[221]

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217. *See* Anna Harvey & Barry Friedman, *Pulling Punches: Congressional Constraints on the Supreme Court's Constitutional Rulings, 1987–2000*, 31 LEGIS. STUD. Q. 533, 535–36, 555–56 (2006) (discussing theoretical mechanisms for Congress to constrain the Court and finding historical evidence of such constraint being exercised).

218. U.S. CONST. art. II, § 2, cl. 2.

219. U.S. CONST. art. I, §§ 2–3; U.S. CONST. art. II, § 4.

220. *See* 28 U.S.C. § 2101(f) (power to grant stays); 28 U.S.C. § 1651(a) (power to issue all writs necessary and appropriate in aid of the Court's jurisdiction).

221. Letter from Thomas Jefferson to William Johnson (Oct. 27, 1822), *in* 12 THE WORKS OF THOMAS JEFFERSON 246, 249–50 (Paul L. Ford ed., 1905).

Though Jefferson's preferred solution—that decisions be delivered seriatim, with each judge delivering their individual opinion on a given case[222]—did not catch on in the United States judicial system, his concerns remain relevant to per curiam opinions.

As for the importance of oral argument—and the consequences of key cases being decided in its absence—one has only to look to the words of the justices themselves. Though some significant justices, including Earl Warren and Oliver Wendell Holmes, did not find oral arguments especially determinative,[223] many others have publicly commented on the valuable role that argument plays. Chief Justice Rehnquist wrote that, in a "significant minority" of the cases in which he heard oral argument, especially those involving areas of the law in which he was least familiar, he left the bench feeling differently about the outcome than he felt before hearing argument.[224] Justice Potter Stewart said that he never knew more about a case than he did immediately after oral argument.[225] Justice Scalia wrote that issues "can be put in perspective during oral argument in a way that they can't in a written brief."[226] Justice Douglas wrote that oral argument can win or lose a case,[227] and Justice Jackson believed that most justices "form at least a tentative conclusion" from oral argument "in a large percentage of the cases."[228]

Moreover, an analysis of Justice Blackmun's archival

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222. *See id.* at 279–80.

223. DAVID M. O'BRIEN. STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 247 (7th ed. 2005).

224. WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 276 (1987).

225. *See id.* at 287.

226. O'BRIEN, *supra* note 223, at 247.

227. *See id.*

228. Robert H. Jackson, *Advocacy Before the United States Supreme Court*, 37 CORNELL L.Q. 1, 2 (1951).

notes, which contained his evaluations of lawyers' performances during oral argument, found that even when controlling for their ideologies, justices were significantly more likely to rule on behalf of the party whose counsel performed better at oral argument.[229] Another empirical study found "direct evidence that both attorneys and justices convey persuasive information during oral arguments."[230] The apparent importance of oral argument in the Court's regular decision-making process suggests that cases decided without it, like *Tandon*, may fail to fully explore potential issues or to convey the nuances of particular doctrines.

As for the rushed nature of shadow docket opinions, while it is commendable that the Court can rule quickly when forced to address an emergency, speed necessarily reduces the time available to refine and improve opinions. In traditional merits cases, the importance and divisiveness of an issue tends to increase the time it takes to issue an opinion.[231] The circulation of draft opinions allows justices to switch their vote if they are persuaded, while allowing an opinion's author to adjust their legal reasoning in response to criticism.[232] For example, the articulation of a right to privacy in the landmark *Griswold v. Connecticut*,[233] written by Justice Douglas, was heavily influenced by Justice Brennan's response to an early draft.[234] Time also allows justices to build consensus in cases where avoiding divisiveness is particularly important. Recognizing the need for a unanimous opinion overturning school segregation,

229. *See* Timothy R. Johnson, Paul J. Wahlbeck & James F. Spriggs, II, *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 99, 99–100, 111–12 (2006).

230. Eve M. Ringsmuth, Amanda C. Bryan & Timothy R. Johnson, *Voting Fluidity and Oral Argument on the U.S. Supreme Court*, 66 POL. RSCH. Q. 429, 435 (2013).

231. O'BRIEN, *supra* note 223, at 271.

232. *See id.* at 272–81.

233. 381 U.S. 479, 485 (1965).

234. O'BRIEN, *supra* note 223, at 276–77.

Chief Justice Warren kept *Brown v. Board of Education*[235] on the docket for more than a year, continually carrying it over at conferences until he was able to build a unanimous consensus.[236] These important tools for refining and improving opinions are lost in shadow docket emergency decisions. These concerns animated Justice Kagan's recent dissent in *Whole Woman's Health v. Jackson*, in which she criticized the Court's ruling on the basis of only "cursory party submissions."[237]

Tandon, and the pandemic cases in general, suggest that caution is in order when the Court receives applications for emergency relief. Without question, the Supreme Court may and should grant or deny requests for stays where extraordinary relief is warranted. But the disposition of such cases is not the appropriate place for new formulations of legal doctrine, and the uniformity and consistency of the lower federal courts will suffer if the Court decides otherwise. *Tandon* is a step in the wrong direction.

235. 347 U.S. 483 (1954).

236. *See* O'BRIEN, *supra* note 223, at 252–53.

237. *See* 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting).